

EQUAL PAY FOR WORK OF
EQUAL VALUE:

EU LEGAL FRAMEWORK
AND ECJ CASE-LAW

Historical background

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Article 119 Treaty of Rome (1957)

Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

- Raison d'être: level playing field for companies
- Scope: equal work but not yet 'work of equal value'

Defrenne cases

Defrenne cases mid 1970s

- Direct effect from 1976 onwards
- Broad definition of pay – ordinary basic pay plus any consideration, in cash or in kind, which worker receives in respect of his employment
- Broad scope - applies in cases of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which work is carried out in the same establishment or service, whether private or public

Secondary legislation

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Directive 1975/117

job-to-job comparison

- The principle of equal paymeans, for the same work or for work to which equal value is attributed...elimination of all discrimination on grounds of sex.
- Non-discrimination principle applies to job classification schemes.

Directive 1976/207

no discriminatory (pay)conditions

- Equal treatment in employment: no sex discrimination in relation to employment conditions including pay.

Two types of legal standards

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1) Right to equal pay in case of work of equal value

Result-oriented. Like cases should be treated alike

Cf. Defrenne *'in cases in which work is carried out in the same establishment or service'*

2) The pay rules/conditions applied may not rely on criteria which (in)directly discriminate on sex

Process oriented. No discriminatory rules/provisions may apply

Cf. Defrenne *'discrimination arising directly from legislative provisions or collective labour agreements'*

Current provisions I

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Article 157 TFEU:

- Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
- Wide definition of pay
- Legal base for further legislation (section 3)
- Positive action measures permissible (section 4)

Current EU pay provisions II

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Directive 2006/54 (recast)

- Repealed 75/117 and 76/207 and Burden of proof-Directive 97/80

- Article 4

For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.

- Article 14

forbids (in)direct sex discrimination in relation to employment conditions including pay

Case law

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Inventory

- Pay concept
- How to establish a prima-facie case of pay discrimination?
- Objective justifications
- Remedies

Pay concept

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- Art. 157(2) TFEU: pay means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
- Thus: very broad concept. In addition to basic salary, e.g.:
 - ✓ Supplements/ additional pay rates for overtime, irregular hours, inconvenient work, performance
 - ✓ Travel benefits for workers or family members
 - ✓ Maternity benefits
 - ✓ Christmas bonus
 - ✓ Termination payment
 - ✓ Occupational social security (chapter 2 arts 5-13 Dir 2006/54)
- *'Equal pay must be ensured not only on the basis of an overall assessment of all the consideration granted to employees, but also in the light of each aspect of pay taken in isolation'* Case C-381/99 Brunnhofer

How to establish a prima facie case of pay discrimination?

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Two methods to be distinguished:

Difference in pay in comparable cases (I)

job-to-job comparison

- *Between individual jobs of equal value*
- *Between job groups of equal value*

Indirect discriminatory pay regulations (II)

Specific pay provision puts one sex at a particular disadvantage

- *statistical/hypothetical comparison of male and female workers who fall within the scope of the pay regulations concerned*

I Individual job-to-job comparison

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Case C-381/99 Brunnhofer

it is for employees (..) to prove that they are receiving lower pay than that paid by the employer to a colleague of the other sex and that they are in fact performing the same work or work of equal value,

the employer may then not only dispute the fact that the conditions for the application of the principle of equal pay for men and women are met in the case, but also put forward objective grounds, unrelated to any discrimination based on sex, to justify the difference in pay

prima facie case:

- pay difference between (female) worker and (male) comparator
- performing same work / work of equal value

I Job comparison among groups

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127/92 Enderby; case 400/93 Royal Copenhagen

where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, so that there is prima facie case of sex discrimination, Article 119 of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex

prima facie case:

- Statistical significant difference between the (average) pay of the female dominated job group and the male dominated job group
- Job groups represent work of equal value

I Work of equal value

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- number of factors to be taken into account, such as the nature of the activities actually entrusted to employees, (..) training requirements (..) and working conditions (Brunnhofer)
- job classification systems (art 4 Directive 2006/54)
- classification of employees in the same job category under a collective agreement not in itself sufficient (Brunnhofer)

I Choice of comparator

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- the activity need not be performed at the same time
- comparison may be made with an activity of lower value
- Same employer?

Defrenne II (1976): equal pay principle applies [...] in cases in which work is carried out in the same establishment or service

*Single source requirement; Lawrence (2002), Allonby (2004):
[...] where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment.*

How to establish a prima-facie case of pay discrimination (II)

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Cf. article 14 Dir 2006/54

When it can be shown that a specific pay condition or rule in itself, has an indirect discriminatory effect, there is no requirement of work of equal value

- ❖ presumes the suspect pay condition/rule is already identified
- ❖ it must be shown that the pay condition puts one sex at a particular disadvantage
- ❖ the scope of the pay rule determines the category of persons who may be included in the statistical comparison (Allonby point 73)

II Examples from case law

ARTICLE 119 OF THE EEC TREATY IS INFRINGED BY A DEPARTMENT STORE COMPANY WHICH EXCLUDES PART-TIME EMPLOYEES FROM ITS OCCUPATIONAL PENSION SCHEME, WHERE THAT EXCLUSION AFFECTS A FAR GREATER NUMBER OF WOMEN THAN MEN, UNLESS THE UNDERTAKING SHOWS THAT THE EXCLUSION IS BASED ON OBJECTIVELY JUSTIFIED FACTORS UNRELATED TO ANY DISCRIMINATION ON GROUNDS OF SEX (*Case 170/84 Bilka*)

[..] it must be held that a woman may rely on statistics to show that a clause in State legislation is contrary to Article 141(1) EC [..] In such cases, it is the legislature that is the sole source of the difference in treatment [..] thus [..] where State legislation is at issue, the applicability of that provision vis-à-vis an undertaking is not subject to the condition that the worker concerned can be compared with a worker of the other sex (*Case 256/01 Allonby*)

II Proving indirect pay discrimination without statistics?

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(Art 2 Dir 2006/54) ..where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage ...

➤ Overtime supplements (Case 285/02 Elsner)

Although that pay may appear to be equal [..], three additional hours is in fact a greater burden for part-time teachers [..] Since the number of additional teaching hours giving entitlement to pay is not reduced for part-time teachers in a manner proportionate to their working hours, they receive different treatment

Objective justification grounds

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Legitimate aim / means appropriate and necessary

- Real need of the employer, including business/economic grounds (however, not just need to save costs)
- No mere generalizations but relate to the specific tasks in hand and work carried out
- Two exceptions: better training / more years of service do not need justification (Danfoss C 109/88; Cadman C 17/05)

Objective ground: collective bargaining?

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- Pay difference is arrived at as a result of collective bargaining with different groups of staff: no objective justification (C127/92 Enderby)
- Contrary C400/93 Royal Copenhagen?

The answer to the fourth question, paragraph (b), should accordingly be that the principle of equal pay for men and women also applies where the elements of the pay are determined by collective bargaining or by negotiation at local level, but that the national court may take that fact into account in its assessment of whether differences between the average pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex

Remedies

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Depending on:

a) discriminating pay provision (method 2)

b) unequal pay for work of equal value (method 1)

ad a - Discriminating pay provisions shall be set aside (C-184/89 *Nimz*); provisions of individual or collective agreements are null and void (art 23 Dir 2006/54)

ad b - Equal pay shall be provided by means of an upward alignment (C 43/75 *Defrenne II*; C 71/85 *FNV*; C-33/89 *Kowalska*) until the moment the pay practice is formally adjusted