

## Equal Pay For Work Of Equal Value

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### **Introduction**

1. This paper explains and analyses some of the key concepts in the EU law of equal pay.

### **Sources Of Law**

2. The legislative sources are the TEU, the TFEU, Directive 2006/54 (which consolidated and replaced four previous directives on equal pay and treatment), and the Charter of Fundamental Rights of the European Union. The wording of these instruments is simple, although the concepts and their application in practice is not.
3. Article 3(3) TEU provides that the EU “*shall promote ... equality between men and women*”.
4. Art 157 TFEU provides as follows:

*1. 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.*

*2. For the purpose of this Article, '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.*

*Equal pay without discrimination based on sex means:*

*(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;*

*(b) that pay for work at time rates shall be the same for the same job.*

*3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.*

*4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State*

*from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.*

5. The preamble to Directive 2006/54, which uses terminology and Treaty numbering in existence prior to the Lisbon Treaty of 1/12/09, and which is often referred to in English as the Re-Cast Directive, since it re-casts previous provisions, provides in the Preamble paragraph (2) that *“Equality between men and women is a fundamental principle of Community law under Article 2 and Article 3(2) of the Treaty and the case-law of the Court of Justice. Those Treaty provisions proclaim equality between men and women as a 'task' and an 'aim' of the Community and impose a positive obligation to promote it in all its activities.”*
6. It provides in art. 4, under the headings “Equal Pay”, and “Prohibition on Discrimination”, that *“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. In particular, where a job classification system is used for determining pay, it shall be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.”*
7. Art. 14(1) provides that *“There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to ... (c) employment and working conditions, including dismissals, as well as pay as provided for in Art. 141 of the Treaty.”*
8. “Direct discrimination” is defined by art. 2(1)(a) as meaning *“where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation”*.
9. The Re-Cast Directive defines pay in the same way as art. 157 TFEU.
10. The Charter of Fundamental Rights of the European Union (2010), originally adopted in 2001, and as amended by the Treaty of Lisbon with effect from 1/12/09, provides at art. 23 that *“Equality between women and men must be ensured in*

*all areas, including employment, work and pay.*” The effect of the Charter is as described by art. 30.

11. In this paper, I use the convention of referring to the claimant for equal pay as a female (“F”), and the comparator as a man (“M”), though the comparison can equally be the other way around.
12. As the provisions above show, the essence of the equal pay comparison is between the pay of a woman and a man, or a group of women and a man or a group of men, where their work is equal.

### **Meaning of “Pay”**

13. For the purposes of art. 157 TFEU, “pay” has a wide meaning. The following have all been held to be “pay”:

special travel facilities for former male employees to enjoy after retirement *Garland v British Rail Engineering* 12/81;

redundancy pay, even though this is in the nature of a payment reflecting social policy *Barber v Guardian Royal Exchange* C-262/88;

equating two years' jobsharing service with one year's full-time service for the purposes of progression on an incremental pay scale *Hill and Stapleton v Revenue Commissioners* C-243/95;

Christmas bonus and parental leave *Lewen v Denda* C-333/97;

national legislation which permits employers to exclude employees whose normal working hours do not exceed 10 hours a week or 45 hours a month from the continued payment of wages in the event of illness, and hence sick pay itself, *Rinner-Kuehn v FWW Spezial-Gebauerdereinigung GmbH* 171/88;

collective agreements *Kowalska v Freie und Hansestadt Hamburg* C-33/89;

overtime *Stadt Lengerich v Helmig* C-399/92 and other joined cases;

pregnancy, where a woman has a pregnancy-related illness, is off sick, and subject to the employer's general sick-leave scheme, with an effect on pay *McKenna v North Western Health Board* C-191/03;

maternity pay, though full pay was not required during maternity leave absence, and pay rises awarded during maternity leave absence *Gillespie v Northern Health and Social Services Boards* C-342/93;

time off for training courses *Arbeiterwohlfahrt der Stadt Berlin eV v Boetel* C-36/90;

pension schemes *Barber*, see above, and *Coloroll Pension Trustees Ltd v Russell* C-200/91;

and unfair dismissal compensation *R v Secretary of State for employment ex parte Seymour-Smith* C-167/97.

14. Importantly, the comparison required by art. 157 is in respect of each aspect of pay, and not the overall remuneration package, *Brunnhöfer v Bank der Oesterreichischen Postsparkasse AG* C-381/99. The identification of what constitutes a separate aspect of pay may not be straightforward.
15. If the claimant succeeds, she recovers what she ought to have received if not discriminated against. For example, if her comparator received a fixed bonus of £100, she recovers that bonus. If her comparator had access to enhanced rates of overtime that she did not, she is entitled to be paid the difference between what she did receive for the overtime that she worked, and what she ought to have received.

### Meaning of “Equal Work”

16. In a typical equal pay case involving an employer, whether the employer is a public or a private employer, the national court needs to consider whether the work of the claimant and her comparator are equal.
17. The ECJ has consistently held in *Brunnhofer* and in other cases that in order to determine whether employees perform the same work or work to which equal value can be attributed, it is necessary to ascertain whether, taking account of a number of factors such as the nature of the activities actually entrusted to each of the employees, the training requirements for carrying them out and the working conditions, those persons are in fact performing the same or comparable work, see especially paragraphs 41-50.
18. Thus, there are different categories of “equal work”. One is where F and M occupy the same post, or very similar posts.
19. Another is where F and M occupy different posts, but the demands made of F in her post, under headings such as skill, effort and decision, are equal to or greater than those of the post occupied by M. In a situation where F and M occupy different posts, but the demands on them of their posts are equal, the posts can be described as being of equal value.
20. In the UK there exist job evaluation schemes (“JESs”) which are used to evaluate the demands of different posts within an organisation, such as all posts within a local authority, or within the National Health Service.
21. Where F’s complaint is about national legislation, such as the qualifying conditions for a redundancy payment, or for bringing a claim for unfair dismissal, or is about a collective agreement, there is no need for the national court to analyse the work carried out by an individual F and an individual M.
22. Instead, the focus is on whether or not there is an unjustifiable disparate impact on Fs as oppose to Ms of the legislation or collective agreement in question. As the ECJ put it in *Allonby v Accrington & Rossendale College C-256/01*, “there is nothing

*in the wording of Article 141(1) EC to suggest that the applicability of that provision is limited to situations in which men and women work for the same employer. The principle established by that article may be invoked before national courts, in particular 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”,* paragraph 45.

### **Meaning of “worker”**

23. “Worker” in art. 157 has an autonomous EU meaning. The ECJ in *Allonby* held that it is not to be interpreted restrictively, and that “*there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration (see, in relation to free movement of workers, in particular case 66/85 Lawrie-Blum [1986] ECR 2121, paragraph 17, and Martínez Sala, paragraph 32),*” paragraph 67.

### **Which Comparator?**

24. Since at the heart of an equal pay complaint is the comparison between F and M, with which M may F compare herself?
25. Art. 157 talks of the pay which the worker receives in respect of her employment from her employer. Naturally, this allows F to make a comparison between the pay that she receives from her employer (“E1”) and M who is also employed by E1.
26. However, art. 157 is not limited to situations where F and M work for the same employer. It applies also where F and M work for different employers, and where the difference in pay can be attributed to a single source that is capable of correcting that inequality: *Lawrence v Regent Office Care C-320/00*, as applied in *Allonby*.
27. At what time must F and M be working in order for a comparison to be made?
28. F can compare her post to that of a comparator’s M where F and M both work for E1 at the same time.

29. F can compare her post to that of a comparator's where M was a predecessor of hers, *Macarthys Ltd v Smith* 129/79.
30. As for comparison with a successor, the ECJ decided in *Defrenne v Sabena* 149/77, where the court had to consider when and whether what is now art. 157 had direct effect, that it was of direct effect only in relation to "direct and overt discrimination".
31. In *Macarthys* the ECJ was asked to consider whether it was permissible for F to make a hypothetical comparison, ie that she would have been paid more if a man. The ECJ concluded that that type of comparison "*is to be classed as indirect and disguised discrimination, the identification of which, as the court explained in Defrenne v Sabena, implies comparative studies of entire branches of industry and therefore requires, as a prerequisite, the elaboration by the Community and national legislative bodies of criteria of assessment. From that it follows that, in cases of actual discrimination falling within the scope of the direct application of Article 119, comparisons are confined to parallels which may be drawn on the basis of concrete appraisals of the work actually performed by employees of different sex within the same establishment or service,*" paragraph 15.
32. In *Worringham v Lloyds Bank* 69/80, the ECJ explained what it mean by overt and direct discrimination (which does not mean direct discrimination as compared to indirect discrimination): "*As the court has stated in previous decisions (judgment of 8.4.76 in Case 43/75, Defrenne (1976) ECR 455 and judgment of 27.3.80 in Case 129/79, Macarthys Ltd, Article 119 of the Treaty applies directly to all forms of discrimination which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the Article in question, without national or Community measures being required to define them with greater precision in order to permit of their application. Among the forms of discrimination which may be thus judicially identified, the court mentioned in particular cases where men and women receive unequal pay for equal work carried out in the same establishment or service, public or private. In such a situation the court is in a position to establish all the facts enabling it to decide whether a woman receives less pay than a man engaged in the same work or work of equal value,*" paragraph 23.

33. In *Coloroll* the ECJ did not depart from *Macarthys*, and it expressed itself in terms that did not support comparison with a successor, “*It follows that a worker cannot rely on Article 119 in order to claim pay to which he could be entitled if he belonged to the other sex in the absence, now or in the past, in the undertaking concerned of workers of the other sex who perform or performed comparable work. In such a case, the essential criterion for ascertaining that equal treatment exists in the matter of pay, namely, the performance of the same work and receipt of the same pay, cannot be applied,*” paragraph 103.
34. The ECJ in *Allonby* summarised the effect of *Coloroll* as follows: “*Thus in the case of company pension schemes which are limited to the undertaking in question, the court has held that a worker cannot rely on Article 119 of the EC Treaty ... in order to claim pay to which he could be entitled if he belonged to the other sex in the absence, now or in the past, in the undertaking concerned of workers of the other sex who perform or performed comparable work,*” paragraph 74. This formulation does not include comparison with a successor.
35. The current state of EU law is therefore that art. 157 does not permit comparisons with a successor, or a hypothetical comparator.
36. There is something to be said for this as a matter of practicality, since no breach of the principle of equal pay would occur until a date after F has been paid, perhaps many years after, and E is not in a position to remedy the inequality at the date that it occurs, and may not even know until after F’s employment has ended. It also presents practical problems – what if M is offered employment on more favourable terms but does not accept? What if he does accept, but then leaves employment, and M2 is offered employment on terms that are the same as F’s?
37. However, it is hard to see as a matter of policy why hypothetical comparisons are permissible when it comes to equal treatment (eg sex discrimination), but not when it comes to equal pay. Also, in a case of a hypothetical pay complaint (“If I had been a man you would have paid me more”), the references in *Defrenne* and *Macarthys* to the need for comparison of “entire branches of industry” is unconvincing.

38. As the extracts above from the legislation show, the Re-Cast Directive is concerned with discrimination in equal treatment and in equal pay. The definition of direct discrimination for both refers to a hypothetical comparison (F is less favourably treated than M “has been or would be treated”). This raises the question whether a hypothetical comparison is envisaged under art. 157. The wording of the predecessor equal pay Directive did not permit this. A Directive cannot alter the meaning of a Treaty provision, such as art. 157, see for example paragraph 29 of *Brunnhofer*, but perhaps the time is ripe for a change of approach by the ECJ.

### **The meaning of discrimination**

39. Direct discrimination in pay is prohibited.

40. Indirect discrimination in pay is permissible if justifiable. So in what circumstances will there be prima facie indirect discrimination?

41. One is where there is a requirement or condition that prevents F from receiving that element of pay or having access to it. The classic case is *Bilka-Kaufhaus GmbH v Weber von Hartz* C-170/84, where part-time workers were denied access to an occupational pension scheme.

42. Another is where although there is no requirement or condition, statistics appear to show that a group of predominantly women is being disadvantaged in relation to pay compared to a group of predominantly men, *Enderby v Frenchay Health Authority* C-127/92. It is for the national court to assess whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant.

43. A third situation of prima facie indirect discrimination in pay, requiring justification, is where the pay structure lacks transparency: *Handels- og Kontorfunktionærernes Forbund I Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss* 109/88. The case is usually called *Danfoss*.

### Justification

44. The justification for any indirectly discriminatory inequality in pay must satisfy the usual requirements for justification, namely there must be a legitimate aim, and the means adopted must be appropriate and necessary.
45. The UK courts have been grappling recently in discrimination cases with when cost may amount to a justification if at all. Leaving to one side age and disability discrimination – where different approaches apply - they have concluded that cost alone may never be a justification in cases of indirect discrimination, but that it may be a justification when combined with another factor.
46. The ECJ has unsurprisingly held, in cases that were not directly concerned with equal pay, that it is legitimate for member states to take into account budgetary considerations when formulating national legislation, and those considerations can affect the policy choices made and underpin the aim, provided that the principle of equal treatment is respected eg *M. A. De Weerd, née Roks, and others v Bestuur van de Bedrijfsvereniging voor de Gezondheid, Geestelijke en Maatschappelijke Belangen and others C-343/92*.
47. It is perhaps unlikely that the ECJ would permit a private employer, or a public body or the state acting as a private employer, to rely on cost alone as a justification for inequality in treatment.
48. A collective agreement will not necessarily amount to a defence to an equal pay claim. Nevertheless, the ECJ has held that the fact that the rates of pay have been determined by collective bargaining or by negotiation at local level may be taken into account by the national court as a factor 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, see *Royal Copenhagen C-400/93*, paragraph 46.
49. Good industrial relations alone will not amount to a justification, but are capable of doing so when combined with another reason, *Margaret Kenny and Others v Minister for Justice, Equality and Law Reform, Minister for Finance and Commissioner of*

*An Garda Síochána C-427/11, paragraph 50: “It follows that the interests of good industrial relations may be taken into consideration by the national court as one factor among others in its assessment of whether differences between the pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex and are compatible with the principle of proportionality.”*

50. As for pay protection, *Smith v Advel Systems C-408/92* allows transitional arrangements (ie if objectively justified), but not pay protection that continues past direct discrimination in pay.
51. Length of service was permitted in *Danfoss* as a justification without the need for the employer to provide specific justification in each case. However in *Cadman v Health & Safety Executive C-17/05*, although the court reiterated that in general “length of service goes hand in hand with experience, and experience enables the worker to perform his duties better,” paragraph 35, it also said that if the claimant produces “evidence capable of giving rise to serious doubts as to whether recourse to the criterion of length of service is, in the circumstances, appropriate to attain the abovementioned objective”, the burden shifts to the employer to justify, paragraph 38.

### **Effectiveness and Equivalence**

52. The EU principles of effectiveness and equivalence apply just as much to claims for equal pay as other claims based on rights derived from EU law.
53. An example of the principle of effectiveness in the equal pay field is *Preston v Wolverhampton Healthcare NHS Trust C-78/98*.

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