

EQUAL PAY AND THE GENDER PAY-GAP

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**CURRENT REFLECTIONS ON EU GENDER
EQUALITY LAW**

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INTRODUCTION – WHY SO SLOW?

Pay gap: 16,2% in 2012

Equal pay provision – huge case law – developing, progressive

Difference between

- provisions and case law of the “equal-pay” principle – issues of legal interpretation
- pay-gap: complex, economic, social, cultural as well as legal issue

Recent case law - focus

- 1. The concept of pay and the “work of equal value”
- 2. The burden of proof
- 3. Comparator – scope of comparison – the “single source” test
- 4. Pregnancy and Maternity losses

Concept of “pay” – new development:

- **Public employees occupational pension scheme is “pay”**
- Case law development: the “*Defrenne 2* exception” excludes only pensions that are paid by the state as such. (*Beune, Griesmar*)
- Case C-351/00: *Pirkko Niemi* – mandatory State Pension Law falls within TFEU 357, if satisfies the three criteria:
 - *If it concerns only a particular category of workers, I*
 - *if it is directly related to the period of service completed and*
 - *if its amount is calculated by reference to the public servant's last salary, a pension paid under that system*

“Work of equal value”

- Lack of clarity dominates – while there are apparently reliable criteria.
- Court laid down promising principles and guidelines (in and leaves the question unanswered (*Rummier, Royal Amsterdam*))
- Questionable statements on the required “comparable situation” – gender differences, gender stereotypes may play a role:
 - mental effort, physical effort, skill needed, responsibility, supervisory
 - responsibility, working conditions and other such factors (for instance, know-how, problem solving abilities, accountability, etc.)

Hidden gender inequalities in classification criteria – length of service

- Length of service – strongly questionable
Cadman (C-17/05): “..since, as a general rule, recourse to the criterion of length of service is appropriate to attain the legitimate objective of rewarding experience acquired which enables the worker to perform his duties better, the employer does not have to establish specifically that recourse to that criterion is appropriate”

Burden of Proof

- While expressly reversed – in practice frequently means insurmountable burden for the applicant.
 - No information available on the wages of others
 - Prima facie indirect discrimination requires statistical data
 - Huge uncertainty on what has to be proved by the applicant
 - difference in wages?
 - individual difference or statistical difference?
- - “Prima facie” indirect discrimination – appellant has to prove
(*Kenny*)
 - job criteria are arbitrary or unjust? (*Commission v. UK 61/81*,
Federal Labour Court, judgment of 10 December 1997, 4 AZR 264/96)
- CJEU and also national courts repeatedly reject claims, on the basis, the applicant could not establish facts leading to the conclusion that the job classification criteria for the two groups of employees were arbitrary

Needed Changes in Burden of Proof

- Less effort (more assistance) provided to applicants
- The “Danfoss principle” should be tightened: not only when there is a “total lack” of transparency, instead, whenever there is a lack of transparency that cannot be explained.
- The presumption of discrimination in case of lack of objectivity and transparency of the wage differences could help to find justice to other victims of arbitrary and discriminatory pay-settings

Kenny and others v. Minister for Justice, Equality and Law Reform, Minister for Finance and Commissioner of An Garda Síochána.

- it is not a question of justifying the rate of remuneration paid to the different groups of comparators or the deployment of workers to one group or the other, but rather of justifying the difference in pay in itself.

“Good industrial Relations” (“customer preference”)?

- Cadman: So far as concerns,.... the question whether the interests of good industrial relations may be taken into account to justify objectively a prima facie case of indirect gender discrimination in pay, it must be noted that possible objective justifications must correspond to a real need of the employer

(Swedish court does not find discrimination, when comparable work is differently paid, with regard to the significantly higher market demand for the male hospital technicians. Labour Court, 2001.No.13.)

The issue of the comparator

- Same work? – has to be comparable – with regard to requirements!
- Location unity?
- Temporal unity?

Single source principle

- **Recital (10) of the Recast Directive:**
- **The Court of Justice has established that, in certain circumstances, the principle of equal pay is not limited to situations in which men and women work for the same employer.**
- **Goal: to make possible the comparison of the wages of men and women in segregated jobs**

Lawrence and Others v Regent Office Care Ltd and Others C-320/00

- *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**.*
- *Where, however, the differences identified in the pay conditions of workers of different sex performing the same 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. Such a situation does not come within the scope of Article 141(1) EC. The work and the pay of those workers cannot therefore be compared on the basis of that provision.*

The Impact of Lawrence

- ***Robertson & Ors v DEFRA* [2005] IRLR 363**: the UK Court of Appeal ruled that civil servants working in the Department for Environment Food and Rural Affairs (DEFRA) were not entitled to compare themselves with those working for the Department of the Environment Transport and the Regions for the purposes of an equal pay claim.
- Both were employed by the Crown, but, since the terms and conditions of employment had been negotiated at departmental level. The Court of Appeal ruled that the pay of claimants and their comparators could not be attributed to a single source even though they had the same employer

Pregancy, Maternity, Parental leave

- Increasing application to courts and equality bodies due to lost wages, holiday benefits, or career opportunities
- *C-333/97 Susanne Lewen v. Lothar Denda,*
- *C-471/08 Parviainen v. Finnair Oyj*
- *C-194/08 S. Gassmayr v. Bundesminister für Wissenschaft*
- *C-104/09 Pedro Manuel Roca Álvarez v Sesa Start España ETT SA,*

Emerging questions needing Court response

- Treating pregnant women equally with sick men
- Differential treatment of mothers in comparison to sick persons
- Positive action, differential treatment or equal treatment with due respect of differences
- Disadvantages exercising pressure to give up fundamental rights
- Standards of the European Social Charter

- Little progress – or even regression – in the more equal distribution of family duties
- Public-private labour market – disadvantages
- segregation of the labour market;
- Schemas, stereotypes that influence the evaluation and
- classification of jobs and the educational choices men and women make