

EQUAL PAY AND THE GENDER PAY GAP

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Seminar on

CURRENT REFLECTIONS ON EU GENDER EQUALITY LAW

2-3 June, 2014
ERA, Trier, Germany

Outline

1. Equal Pay versus the Gender Pay Gap

Two different subject matters, showing different trends

- a. Equal pay: a matter of legal regulation and interpretation
- b. Gender pay gap: predominantly a matter of economic and social relations, in minor part a legal issue
- c. A bad news and a good news:
 - i. little progress in closing the gender pay gap,
 - ii. progressive and sophisticated case law in guaranteeing equal pay.

2. EU regulation of equal pay

2.1 Direct applicability and development of the Treaty (TEEC 119, TEC 141, TFEU 157) and the relevant directives (Equal Pay Dir.: 75/117/EEC, Recast Directive: 2006/54/EC)

Defrenne cases (*Defrenne 2 – C-43/75*)

Temporal effect of the decision

2.2 Definition of “pay” : article 1.2 (e) of the Recast Directive:

“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/her employment from his/her employer;”

3. CJEU interpretation

3.1 Concept of “pay”

- “*basic or minimum wage or salary*”

109/88 *Handels-og kontorfunktionaerenes Forbund i Danmark v Dansk Arbejdsgiverforening (Danfoss A/S)*

- wage increase
 - C-184/89 *H. Nimz v Freie und Hansestadt Hamburg*
 - C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S.*
- severance pay, redundancy payment
 - C-173/91 *Commission of the European Communities v Kingdom of Belgium,*
- judicial decision on unfair dismissal
 - C-167/97 *Regina v Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*
- **“any other consideration.....”**
 - occupational social security schemes (pension, sick pay)
 - C-170/84, *Bilka-Kaufhaus v Weber*
 - C-132/92 *Bird Eye Walls Ltd v Friedel M. Roberts*
 - C-19/02 *Viktor Hlozek v Austria Gesellschaft mbH*
 - C-171/88 *Ingrid Rinner-Kühn v FWW Spezialgebäudereinigung GmbH & Co. KG*
 - travel allowance
 - C-12/81 *Eileen Garland v British Rail Engineering Ltd*
 - C-249/96 *Lisa Jacqueline Grant v South West Trains Ltd*
 - “head of household” allowances
 - C- 20/71 *Luisa Sabbatini v. European Parliament*
 - C-58/81 *Commission of the European Communities v Grand Duchy of Luxembourg*
 - other benefits – Christmas bonus
 - C-281/97 *Andrea Krüger v Kreiskrankenhaus Ebersberg*
- **“directly or indirectly” ... from the employer**
 - C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*
- regulated either by law or by collective agreement
 - C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S.*
 - C-33/89 *Maria Kowalska v Freie und Hansestadt Hamburg*
- granted on a voluntary basis (“*ex gratia*”)
 - C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*
 - C-333/97 *Susanne Lewen v Lothar Denda*

3.2 Equality of pay – pay systems

- transparency of wage systems - lack of transparency amounts to *prima facie* discrimination and reverses the burden of proof
 - C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group*
C-109/88 *Handels-og kontorfunktionaerenes Forbund i Danmark v Dansk Arbejdsgiverforening (Danfoss A/S)*
C-127/92 *Dr Pamela Enderby v Frenchay Health Authority and Secretary of State for Health*
C-17/05 *B. F. Cadman v Health & Safety Executive*
 - objective - gender neutral – criteria
C-427/11 *Margaret Kenny and others v Ministry of Justice and others*
- Skills, effort and responsibility, nature of the tasks
C-471/08 *Parviainen*, C-194/08 *Gassmayr*

3.3 Comparator

- work of equal value (even if not the same work)
C-143/83 *Commission v. Denmark*
C- 69/80 *Susan Jane Worringham and Margaret Humphreys v Lloyds Bank Ltd*
- the same employer
C-129/79 *McCarthy's Ltd v Wendy Smith*
Reversed by Recital (10) of the Recast Directive
- principle of the “single source”
C-320/00 *A.G. Lawrence and Others v Regent Office Care Ltd*,

4. Persistence of the pay gap (over 16% in 2012)¹

4.1 Reasons of the persistence of the pay gap

- Labour market segmentation and other distortions, affecting predominantly female labour
 - low wages in public services (health, education, social services)
 - role of informal market

¹ epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tsdsc340

- Freedom of contract and collective bargaining versus responsibility of the state – the “single source” escape
- Pay secrecy – preventing efficient enforcement
- Persisting lack of transparency in wage system – in part due to objective difficulties in measurement of performance, in part due to lack of willingness – corroborated by the global competition pressure towards “flexible” wage systems
- Slow change of the traditional gender roles – lack of action.
- Insufficiency of measures by the EU: gathering and spreading information, analysing data, searching causes, calling attention, setting goals – necessary but insufficient

4.2 Possible measures to close the gap.

Commission's Strategy for equality between women and men 2010-2015

ways to implement the principle of equal pay more effectively in practice and actions to reduce the persistent gender pay gap.

Some ideas for discussion on possible State action to promote closing the gender pay gap:

administrative or policy action for the reconciliation between

- the EU goal of combatting gender segregation in the labour market set by the „Gender Pact 2011-2020”
- the concept of „responsible body” and the responsibility of the Member State for accomplishing these goals and thereby decreasing the separation between of male and female workers along the „single source” divide while they are performing work of equal value
- for the elimination of the gender biased occupational wage differentials between predominantly female and predominantly male occupations,

policy action and also legislation

- on more equal distribution of family obligations
- for the reasonable and proportionate removal of pay secrecy in private employment