

RÉPUBLIQUE FRANÇAISE

**LE DÉFENSEUR
DES DROITS**



Equal pay for work of equal value.

**A guide to the
non-discriminatory evaluation of predominantly
female jobs**

Outline

Introduction: Presentation of the Défenseur des droits

- 1) The undervaluation of predominantly female jobs: an explanatory factor in the gender pay gap**
- 2) The legal framework upholding the principle of equal pay for work of equal value.**
- 3) Job evaluation methodologies**

Wage inequalities between women and men: explanatory factors

Several factors explain the pay gaps:

- Occupational segregation
 - Concentration of women in a few careers
 - The glass ceiling
- Inequalities due to part-time work
- Secondary earnings, bonuses
- Fear of maternity leave

An overlooked factor

The undervaluation of predominantly female jobs

- Classifications reproduce gender stereotypes
- The undervaluation of women's work (assumptions about what should be a job for a woman or a man)
- Failure to recognise the qualifications of women leads to the undervaluation of the jobs they do

An undervaluation that can be explained in historical terms

- A stereotyped concept of jobs historically found in the job-classification systems of collective agreements
- Classifications have always been the result of negotiation and hence of a compromise that itself reflects unequal social relations. Classifications are not gender-neutral.

A key moment: the publication of the ILO Guide (1986)

In 1986 the ILO published a first guide on job evaluation:

It requires adopting a new way of looking at job characteristics, modifying the perception of women's work compared to men's work, re-examining the pay systems in force in organizations and raising the pay for female-dominated jobs.

Code of Practice (1996)

European Commission recommendations

“pay systems based on classification and skills/competency-based systems to determine the hierarchy or hierarchies of jobs [...] may have been in place for many years without any review and many incorporate features which contribute to the undervaluing of work undertaken by women”

“Factors which are more likely to be present in female jobs may not be identified at all by a scheme and therefore not valued at all”

National Interprofessional Agreement (ANI) on professional equality of 1 March 2004

“if we consider what are often invoked as the innate aptitudes of women (conscientiousness, dexterity, gentleness, listening skills and compromise) we can see that they are often used as a pretext for denying women access to jobs with a more positive image in terms of social representation, in order not to acknowledge certain of their skills in particular in professions where the employment of women is predominant.”

European Parliament report of 10 May 2012

The European Parliament presented a report to the European Commission calling on Member States to encourage the social partners, including employers, to use occupational evaluation programmes which are not influenced by gender and to introduce job classification systems.

The principle of equal pay for women and men for work of equal value

- The application of the **principle of equal pay** for women and men for the same work or work of equal value assumes a non-discriminatory evaluation of jobs.
- Makes possible equal pay for workers of different sexes when they are doing different jobs.

The international framework

- **Convention No. 100** on equal remuneration for women and men (1953)
- **CEDAW** (1979)

Establishes the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work

The European framework

Article 119 of the Treaty of Rome (1957)

No reference to equal pay for work of equal value

Introduction of the principle of equal pay for **equal work** to avoid distortion of competition between workers in different Member States

This principle only applies to jobs held at the same time and on the same basis by women and men

The European framework

Defrenne II CJEC 8 April 1976

- A legal challenge regarding unequal pay for employees doing the same jobs brought on the basis of Article 119
- Direct applicability of Article 119
- The Court clarified that the principle of equal pay should be understood *“from the point of view of extending the narrow criterion of ‘equal work’ , in accordance in particular with the provisions of Convention No 100 concluded by the International Labour Organization in 1951 on equal pay, article 2 of which establishes the principle of equal pay for work ‘of equal value’ “*

The European framework

Directive 75/117/EEC relating to the application of the principle of equal pay for men and women (1975)

Establishes the right to equal pay for women and men only for the same work or work to which equal value is attributed.

Article 141 of the Amsterdam Treaty (1997)

Establishes the principle of equal pay for male and female workers for equal work or work of equal value

The European framework

Directive 2006/54/EC

Article 4, paragraph 1:

“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.”

Recital 9:

“In accordance with settled case-law of the Court of Justice, in order to assess whether workers are performing the same work or work of equal value, it should be determined whether, having regard to a range of factors including the nature of the work and training and working conditions, those workers may be considered to be in a comparable situation.”

Pamela Enderby CJEC 27 October 1993

The comparison of different jobs

Situation

The case of speech therapists, pharmacists and physiotherapists in the UK National Health Service. Existence of a **presumption of discrimination** based on sex:

- Work of equal value
- Statistics show the predominance of women in speech therapy jobs and men in the other two jobs

Justifications

Professions with separate collective bargaining arrangements, considered separately, no discriminatory impact.

Result

The difference in treatment can be established where these two professions are employed by the same employer

What is the context within which to make the comparison?

- In principle, it is **the undertaking**, as a separate legal person, that serves as the context within which respect for the equal pay principle is assessed.
- However, comparisons may be made in situations where unequal pay can be ascribed to legislative provisions or collective labour agreements
- It must be possible to attribute the differences to a **single source**: there must be a body which is responsible for the inequality and which could restore equal treatment

The national framework

- *“Every employer shall ensure equal pay for women and men for the same work or work of equal value”* (Article L. 3221-2 of the Labour Code).
- *“jobs are considered to be of equal value if they require of employees a comparable set of professional skills established by a title, qualification or professional practice, capabilities acquired through experience, responsibilities and physical or mental workload.”* (Article L.3221-4 of the Labour Code).

CASS. SOC 6 November 1990 BOCAMA No. 89-86.526

Taking account of physical and mental fatigue

Situation

13 female workers on a press belonging to category 2 and classified at coefficient 145 believed they were victims of a difference in pay compared with their male colleagues.

Justifications

The employer justified the pay difference by the more onerous nature of the work carried out and the versatility of the positions occupied by men, which demanded longer training.

Result

The mental fatigue suffered by the female workers was equivalent to the physical strain on the men, and no evidence was available to prove that the training of the latter was longer than that of the former.

Cass. Soc 6 November 1997

USAI CHAMPIGNONS No. 95-41.694

Taking account of arduous work and physical strength

Situation

Warehouse workers classified at the same coefficient in the same category. But the women are paid less than the men.

Justifications

The women “limit themselves” to tasks requiring no use of strength.

Result

The difference in treatment is not justified by any objective element regarding the value of the work and the onerous nature of the tasks carried out by either sex.

Cass. Soc 6 July 2010 TMS contact vs Mrs B, No. 09-40.021

Taking account of organisational responsibility

Situation

A head of HR compared herself with a financial director (same coefficient in the same category, same status as member of the management committee)

Justification

A difference in the job titles justified the pay difference, they did not have the same responsibilities

Result

The principle of equal pay for work of equal value requires employers to compare different jobs in terms of the criteria set by law.

Cass. Soc 6 July 2010 TMS contact vs Mrs B,
No. 09-40.021

Taking account of organisational responsibility

The Supreme Court upheld the Court of Appeal, noting:

“between the functions exercised by Mrs B and by her male colleagues, members like her of the management committee, with whom she compared herself, an identical level of hierarchy, classification, responsibilities, comparable importance in the operations of the enterprise, each furthermore demanding comparable capabilities and representing a mental workload of the same order; that given these findings characterising the execution by employees of work of equal value, it correctly deduced that Mrs B, who with greater seniority and a similar educational level received lower pay than her male colleagues, had been the victim of unequal treatment.”

Occupational classifications must be free of any gender bias

Community principle

- Article 4 of the 2006 Directive, paragraph 2:

“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.”

- An occupational classification system must be *formal, analytical, based on exact and non-discriminatory criteria.*

CJEC 1 July 1986 RUMMLER

The criterion of physical strength/onerousness

- Values corresponding to the average performance of only one sex in order to measure the effort and value of physical work constitutes a form of gender-based discrimination
- In order for a classification system to be non-discriminatory, it must take into account, insofar as the nature of the work carried out in the enterprise allows, of criteria for which workers of either sex can present particular aptitudes.

CJEC 26 June 2001 BRUNNHOFER

Belonging to the same occupational category does not mean that jobs are of equal value

- The fact that men and women workers belong to the same occupational category is not sufficient for concluding that they perform work of equal value
- As a matter of evidence, the general indications provided in the collective agreement must in any event be corroborated by precise and concrete factors based on the activities actually performed by the workers concerned.
- It is there necessary to ascertain whether, when a number of factors are taken into account, such as the nature of the activities actually entrusted to the employees, the training requirements for carrying them out and the working conditions in which the activities are actually carried out, those persons are in fact performing the same work or comparable work.

Occupational classifications free of any gender bias?

- **A principle not explicitly affirmed in national law**

“The different elements making up remuneration are established in accordance with identical rules for women and men.

The occupational categories and criteria for classification and promotion and all the other bases of wage calculation, including job evaluation methodologies, must be the same for employees of both sexes.”

L.3221-6 of the Labour Code

BOCAMA Cass. Crim 31 May 1998, No. 89-86.526

A discriminatory classification may be set aside by the judge

The job of an employee working in management, classified in category 2 at coefficient 145, may be considered to be *“of the same nature as that of an warehouse assistant performed by some male employees in category 3”* insofar as it *“demands a comparable set of capabilities, responsibilities and professional knowledge”*

Cass. Soc. 19 December 2000, Société Pyrénées Labo
photo, No. 98-43.3331
Analysing the activities actually performed

Situation

Female workers in a photographic laboratory have a lower classification coefficient (160) than their male colleagues (175)

Justification

The men develop the films, but no women are engaged in this process. The men work at night, the women only on a rotation basis

Result

Where the women work mainly at night like the men, have at least equal seniority to the men and their actual activities are of equal value to those of the men, their jobs are of comparable value.

Cass. Soc. 6 June 2012, AGIRC/MSA

An indirectly discriminatory collective agreement clause (I)

Situation

Refusal by AGIRC of membership of a supplementary pension scheme for managers to social assistants and social finance counsellors at the Mutuelle Sociale Agricole (MSA), jobs mainly performed by women.

But the mostly male MSA inspectors, covered by the same collective agreement, were given membership.

Cass. Soc. 6 June 2012, AGIRC/MSA

An indirectly discriminatory collective agreement clause (II)

Justifications

AGIRC justified its refusal on the grounds that a clause in its collective agreement stipulates that, to determine whether jobs qualify as management jobs, it should be ascertained whether similar jobs in other occupational sectors have qualified for membership.

The fact that social assistants in other sectors had not been given membership justified the refusal to admit those at MSA.

This measure served the legitimate objective of maintaining the stability, consistency and long-term survival of the scheme.

Cass. Soc. 6 June 2012, AGIRC/MSA

An indirectly discriminatory collective agreement clause (III)

Result

The Court took into consideration the fact that this measure affected a much higher proportion of persons of one sex.

It did not challenge the legitimate objective. However, it considered that AGIRC had not justified the necessary and proportionate nature of this adverse measure.

The comparison between social assistants at MSA and similar posts in other occupational sectors was not relevant.

National Interprofessional Agreement on gender diversity and professional equality (ANI) (2004)

“Five-yearly review of classifications, the evaluation criteria applied to different jobs in order to identify and correct those likely to lead to discrimination between men and women and to take account of all the skills used.” (Article 13)

→ National and European framework, case law/ individual approach and classification, 2004 ANI. And the Law of 9 May 2001 requires the introduction of equality in all negotiations.

→ **A guide to non-discriminatory evaluation of predominantly female jobs.**

What is an occupational classification?

- For collective agreements, the **occupational classification** covers the hierarchical scale (or grid) of jobs on the basis of a sector of professional activities. This classification is generally established on the basis of the levels of responsibility and levels of education required for a given job.
- Classification thus designates a process used to recognise, assess and classify jobs in order to impose a hierarchical structure on pay.
- Occupational classification tables are used as the basis for pay scales, showing the levels of basic pay for each job or benchmark job.
- To establish this system of classifying and ranking qualifications, **evaluation methods** are required.

What are the evaluation methods?

- The ILO (1984) defines the evaluation of jobs as a technique that makes it possible to systematically determine the relative position of a job with reference to others in a pay hierarchy, on the basis of the importance of the tasks involved in this job.
- Job evaluation thus designates the **systematic process** used to establish the relative value of jobs within an organisation.
- To assess the value to the employer of the work carried out and the ranking of the jobs which the employer provides, it is necessary to conduct an exhaustive analysis of the tasks, responsibilities, knowledge and skills required for each job.
- Many approaches or methods are available to organisations for the purposes of job evaluation.

Evaluation methods

Global methods

- **Hierarchical ranking of jobs** (simplest method): A comparison between jobs allows them to be classified in order of importance from highest to lowest.

Example of comparison of jobs by pairs

	Executive secretary	Payroll manager	Sales assistant	Receptionist	Maintenance manager	Laboratory technician	TOTAL
Executive secretary is above				1			1
Sales assistant is above	1			1			2
Receptionist is above							0
Maintenance manager is above	1	1	1	1		1	5
Laboratory technician is above	1		1	1			3
Payroll manager is above	1		1	1		1	4

Evaluation methods

Global methods

- **Classification of jobs:** Related jobs are grouped into classes of jobs or by sector, in accordance with predetermined specifications for each class.

Example of comparison of jobs by sector

Sectors, levels and coefficients	Manufacturing	Accounting	Secretarial	Maintenance	Sales	IT
Benchmark job	Operator	Accounts assistant	Secretary	Operator	Shop assistant	Operator
Benchmark job	Setter					
Benchmark job		Accountant	Executive secretary	Workshop technician		Programmer
Benchmark job	Foreman			Foreman	Sales representative	Systems analyst
Benchmark job	Head of unit	Chief accountant				Project leader
Benchmark job				Maintenance engineer	Sales director	

Evaluation methods

Global methods: limits

- These methods are limited to establishing general tables of jobs corresponding to pay levels. These systems are intended to set pay on the basis of the task assigned.
- In the absence of explicit criteria, these methods reproduce implicit and internalised traditional hierarchies such as the technicality of the job, leadership or physical strength.

Evaluation methods

Analytical methods: evaluation by points and factors

- These introduce an analysis phase between the description of jobs and their classification.
- Job descriptions are assessed on the basis of predefined criteria to which predetermined values are allocated, varying with the frequency and importance of each criterion (weighting).
- These criteria (or factors) are grouped into general criteria: qualifications (degree/experience), effort, responsibilities and working conditions.
- Points are allocated for the various criteria. Totalling these points gives a score for the job, i.e. its ranking on the basis of the number obtained.
- This total determines the corresponding salary level.

Evaluation methods

Analytical methods

•Stages:

- 1) identify, analyse and describe the jobs
- 2) assess them on the basis of criteria
- 3) establish a classification
- 4) set a monetary value (pay scale)

The example of the HAY method: the criteria

Criteria	Sub-criteria	Levels
Jurisdiction	1. Technical know-how	Primary / elementary vocational / vocational / advanced vocational / basic technical specialised / seasoned technical or specialised / expertise or higher administration / mastery
	2. Managerial know-how	Insignificant / minimal / homogenous / diverse / broad
	3. Human relationships skills	Basic / important / critical
Problem-solving	4. Thinking environment	Strict routine / routine / semi-routine / standardised / clearly defined / broadly defined / very generally defined / abstractly defined
	5. Analytical challenge	Repetitive / patterned / interpretive / adaptive / uncharted
Accountability	6. Freedom to act	Prescribed / controlled / standardised / generally regulated / directed / generally directed / guided / strategically guided / virtually unguided
	7. Impact	Not quantified or very small / small / medium / large / very large
	8. Magnitude	Indirect / contributory / shared / primary /

Apparently neutral classification methods that may be discriminatory

Deconstructing methods of evaluating and classifying jobs

Risks of indirect discrimination in the evaluation:

“The situation in which an apparently neutral clause, criterion or practice would disadvantage persons of one sex more than persons of the other, unless this clause, criterion or practice can be objectively justified by a legitimate objective and the means to achieve this objective are appropriate and necessary” (Law of 27 May 2008)



Apparently neutral classification methods that may be discriminatory

Based on the literature, existing analyses and three case studies (2 national collective agreements and the Hay method) conducted by the group



Deconstruction of the most commonly used methods and criteria for evaluating and ranking jobs



Exposure of bias or problems of indirect discrimination that undervalue predominantly female jobs

Examples of the risks of discrimination in the evaluation of predominantly female jobs

- **In the choice and application of evaluation criteria**
 - Restrictive approach of some criteria (problem-solving, responsibilities, purpose, etc.);
 - Vague definitions in other criteria (training, experience, relationships, etc.)
- **In the omission of some criteria, including those relating to physical and mental workload**
- Or by **restricting the evaluation to “dominant tasks”** and totally omitting the great variety of tasks specific to very feminised occupations.

Recommendations for non-discriminatory job evaluation, promoting the reevaluation of predominantly female jobs

- Mobilisation of all the players
- Shared diagnosis
- Evaluation committee
- Definition of jobs and remuneration: definition of predominantly female jobs, analysis of jobs, aspects of remuneration

Recommendations for non-discriminatory job evaluation, promoting the revaluation of predominantly female jobs

- Selection of criteria supplementing those usually applied in order to give equal value to predominantly female and male jobs
 - **Required qualification**
 - Training (clarification, method of acquisition, parity of value of different approaches, etc.)
 - Experience (objective assessment of equivalent experience)
 - **Complexity**
 - Different forms of technical expertise
 - Expansion of problem-solving criteria
 - Multi-dimensional nature of jobs

Recommendations for non-discriminatory job evaluation, promoting the revaluation of predominantly female jobs

– Responsibilities

- Functional responsibilities
- Responsibility for supervision and coordination

– Organisational requirements

- Physical requirements
- Emotional requirements
- Time requirements

- Weighting choices
- Follow-up and remedies

Conclusion

- **The non-discriminatory evaluation and the revaluation of predominantly female jobs** is an approach that supplements the usual policies for tackling pay inequalities (gender diversity, practical work, etc.)
- **The stress here is on jobs mainly performed by women** and hence on women's work and the risks of discrimination in their evaluation.
- **Today this approach must be used by all the players engaged in negotiation and specialists in pay inequalities.** A significant effort is required to raise awareness and to train these players if this approach is to play a part in the fight for equal pay for women and men.

Conclusion

Thank you for your attention