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Introduction

Historically international labour law created a distinction between equal treatment as regards pay and equal treatment as regards access to employment (including promotion), vocational training and working conditions. In 1951 the International Labour Conference adopted Convention No.100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value. Equal opportunities for both sexes are promoted by the more comprehensive Discrimination (Employment and Occupation) Convention, 1958 (No.111). These fundamental Conventions are treaties, binding as to the application in law and practice upon those countries that ratify it[1]. Unlike the World Trade Organization the International Labour Organization does not count the European Community amongst its Members. Equality of treatment is one of those rare social policy areas in which the EC member States have developed a firm consensus. The relevant legislation has in turn given rise to burgeoning case-law[2], both in domestic courts and by the Court of Justice.

Equal pay for work of equal value

Difference in pay between men and women workers is declining, yet persist-

[1] C. 100 has been ratified by all member States of the European Union, currently 15, and Japan. C. 111 has been ratified by all member States of the European Union, except Ireland and Luxembourg, not by Japan.

[2] For a succinct yet complete overview of European legislation and the case-law of the Court of Justice on the subject *see* ECSC-EC-EAEC, HANDBOOK ON EQUAL TREATMENT FOR MEN AND WOMEN IN THE EUROPEAN COMMUNITY, Office for Official Publications of the European Communities, Luxemboury, 1995, 243 p..

ent in the European Union. Statistics for 1993[3] reveal the following conclusions. First, for non-manual workers in the manufacturing industry, women's average earnings are, at European level, between 30 and 40% lower than men's. For manual workers in the same industry, the pay differential is 15 to 35% and exceeds 30% only in Luxembourg and the United Kingdom.[4] Secondly, between 1988 and 1993, the pay differential between female and male manual workers in manufacturing industry decreased by more than 2% in Spain, Luxembourg, the UK and Ireland. The pay differential for non-manual workers was reduced by over 2% in Luxembourg, the Netherlands and the UK.

The Treaty of Rome founding the European Community in 1958 enshrines the principle of equal pay for equal work in Art. 119. The principle thus acquired constitutional status in what is today called the European Union right from the outset. In one of the three landmark *Defrenne v. Sabena*[5] cases the Court of Justice articulated the twofold rationale. First, the principle ensures that undertakings in countries that do have implemented the principle do not suffer a competitive disadvantage as compared to those States that do not. Secondly, the Community is not only an economic union, but is at the same time intended to ensure social progress. Since Art. 119 is mandatory and fundamental in nature, the Court continued, Art. 119 may give rise to individual rights which the courts must protect and "extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals" (the so-called horizontal direct effect). Initially the Court limited the scope of Art. 119 to instances of "**direct and overt** discrimination", a concept which can be delineated as referring to any pay structure that differentiates between men and women plainly on the ground of sex. One year earlier though, in 1975, the Council of Ministers had already adopted the Equal Pay Directive[6] expounding the more accurate notion of "work to which equal value is attributed". The notion of "equal pay for work of equal value" gradually underwent wider

[3] ECSC-EC-EAEC, WOMEN AND MEN IN THE EUROPEAN UNION-A STATISTICAL PORTRAIT, Office for Official Publications of the European Communities, Luxembourg, 1995, 156.

[4] By way of a comparison, according to ILO figures for 1993/1994, the average wage for women in manufacturing industries was the equivalent of 57% of men's wages in Singapore, 52% in South-Korea, 90% in Sri Lanka, 72% in Hong Kong and 62% in Japan.

[5] Case 43/75, *Defrenne v. Sabena* (*Defrenne II*), [1976] 1 ECR 455.

[6] Council Directive 75/117 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L45/19 of 10 February 1975.

interpretation as to finally include **indirect** forms of discrimination - pay structures which do not differentiate between men and women, but between groups of workers in which one gender is predominant in practice or based on criteria which *de facto* typically one gender is in a position to comply with.

Part-time workers is such a category in which typically women workers prevail.[7] Within any given context they are consequently entitled to a proportionally equal pay treatment as their full-time colleagues performing work of equal value, lest it can be argued that women are indirectly discriminated. A recent judgement of the Court proves that not every case of *prima facie* discrimination in reality constitutes indirect discrimination. The question was whether part-time workers, most of whom were women workers, were entitled to overtime supplements for hours worked in addition to their individual working hours at the same rate as that applicable for overtime worked by full-time employees in addition to normal working hours. The Court rejected the existence of indirect discrimination if collective agreements restrict the payment of overtime supplements to cases where the normal working hours fixed by them for full-time employees are exceeded.[8]

Is there a margin for counterarguing in practice that part-time workers are less favourably treated, not because most of them are female but because they are part-time workers ? From the point of view of European equality law the answer is yes, under condition that less favourable treatment can be tracked down to justifications irrespective of gender. In *Jenkins v. Kingsgate,* a case concerning part-time workers receiving a lower hourly rate than full-time workers, the Court already indicated that the desire to discourage absenteeism, to ensure greater productivity and to ensure maximum operating time for expensive machinery may justify such discrimination. In *Bilka-Kaufhaus*, a case

[7] Although women constitute only 41% of the European workforce, about 29% of the female population in Europe is involved in part-time work, compared to only 4% of the male population (*See* STATISTICAL PORTRAIT, supra note 3,150). Whereas in France, Germany and the United Kingdom well over 80% of all part-time workers are female, in Japan and the United States only 67% are female, in fact one of the lowest percentages in the OECD (*See* OECD IN FIGURES-STATISTICS ON THE MEMBER COUNTRIES, Paris, 1996, 10-11). Part-time work is of considerable pecuniary importance to small and medium-size enterprises. The regulation of part-time work as such, in the broader context of atypical work, has at this stage not been harmonized at the European level yet mainly because of obstruction from the United Kingdom. However, the European Court of Justice has established some interesting case-law on indirect discrimination of women workers under Art. 119 and the Equal Pay Directive.

[8] Case C-78/93, *Stadt Lengerich v. Angelike Helmig*, [1994] ECR I -5727.

which extended the concept of equal pay to entitlements under an employer's private pension plan, the Court specified that the employer bore the burden of proving "objectively justified economic grounds" to warrant the poorer treatment of part-time employees, in fact affecting more women than men. Bilka-Kaufhaus, a German department store chain, invoked as justification its intention to discourage part-time work because of lower ancillary costs and since in general part-time workers refuse to work in the late afternoon and on Saturdays. The burden of proof implies that the *prima facie* discriminatory measure corresponds to a real need on the part of the undertaking, is appropriate with a view to achieving the objectives pursued and is necessary to that end. Paying certain jobs more to attract candidates when the market indicates that such workers are in short supply has for instance been accepted as an objective justification. The principle that staff council members are not paid to ensure their independence has also been indentified as an objective justification. On the other hand the general belief that part-time workers are not integrated in, or as dependent upon the undertaking employing them as are full-time workers have not been found to constitute objectively justified grounds. Importantly the Court has found that the difference in pay can in no way be solely justified by the fact that the rates of pay were arrived at by collective bargaining.

A related question of a more comprehensive nature, not only affecting part-time workers, is whether certain criteria for awarding pay increases can be justified. *Danfoss*[9] paid, pursuant to a collective labour agreement, salary supplements to base pay, calculated on factors such as mobility, special training and length of service (seniority). In 1982-1986, the average wage paid to men was 6.85% higher than that paid to women. On this basis the union claimed sex discrimination. The Court abided by its reasoning in *Bilka-Kaufhaus*. The employer may justify special remuneration of adaptability to variable hours and varying places of work or of special training by showing that it is of importance for the performance of specific tasks entrusted to the employees concerned. In *Danfoss* the Court found that special remuneration for seniority was automatically justified since length of service goes hand in hand with experience and since experience generally enables the employee to perform his duties better. In later

[9] Case 109/88, *Handels-og Kontorfunktionarernes Forbund i Denmark v. Dansk Arbejdsgiveforening*, [1989] ECR 3199.

case-law, however, the Court took a step back by considering that the correlation between the performance during a particular period and the performance gained is a matter for the national court to be determined, implying that the opposite can be proven.[10]

How is equal value attributed to particular work ? Directive 75/117 suggests that a job classification system permitting objective comparisons by the nature of work may be used, although such a system is not mandatory. When classifying different aptitudes of both genders must be equally considered so that there is no practical effect of discriminating generally against workers of one sex. Where such classification system has not been drawn up, the assessment of "equal value" may be effected even in the context of adversary proceedings after obtaining information as required. In many member States labour inspectorates are competent to supervise the implementation of the principle and consequently are the first in line to assist and resolve disputes.

What is the meaning of "pay" ? The Directive only prescribes the elimination of discrimination with regard to all aspects and conditions of remuneration (Article 1). The Court has defined "pay" as "consideration, whether in cash or in kind, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment from his employer. In recent times the Court has held that "occupational pension schemes", redundancy benefits and bridging pensions preceding retirement (as opposed to state social security benefits) were an "integral part of the contracts of employment". This has resulted in a flurry of litigation because payment under most of the schemes were linked to the pensionable age set by the state social security system and a separete Directive[11] has allowed member States to set a different age for men and women workers.

Equality of opportunity

Gender discrimination surfacing in employment conditions different from

[10] Case C-184/89, *Nimz v. Freie und Hansestadt Hamburg*, [1991] ECR I -297.

[11] Council Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ L6/24 of 10 January 1979) is the third pillar of European equality law. The Directive is not elaborated upon here, but abundant litigation proves that this Directive has equally struck a responsive chord in society.

pay (for instance dismissal) is not explicitly prohibited by the Treaty of Rome. The European Community, however, considered that the equal treatment for male and female workers deserved community-wide protection and, therefore, assumed the power to adopt Directive 76/207[12]. According to this Directive member States must guarantee equal treatment as regards access to employment, vocational training and promotion, and working conditions. This implies that direct as well as indirect discrimination (for instance on the basis of family or marital status) must be eradicated, affecting contracted workers in large as well as small businesses. To this end member States are under an obligation to make available to women remedies "to pursue their claims by judicial process after possible recourse to other competent authorities". A victim cannot rely on the Directive in a lawsuit against a private employer before a domestic court, if the Directive has not been properly transposed into national law. In such case, however, the victim can claim compensation from the negligent member State. The Court of Justice has specified that State sanctions are required to "guarantee real and effective judicial protection" of the right to equal treatment. The circumstance that discrimination ensues from the collective bargaining process cannot justify discrimination.

The Directive allows Member States to establish or maintain a few instances of discrimination. As exceptions to the general rule, however, the scope of these derogations is limited, they must not be more burdensome on the discriminated individual than strictly necessary to serve the objective pursued by the discrimination.

The first derogation recognizes that there are certain occupations where the sex of the worker constitutes a *determining factor* in view of the training leading thereto or by reason of the context in which it is carried out. Examples are the post of midwife (because of "personal sensitivities") or the reservation of posts for men in male prisons and for women in female prisons. In a more controversial judgement the Court accepted that certain policing activities in Northern Ireland involving the handling of firearms could be reserved to police*men*, basically because "carrying of fire-arms by policewomen might create additional risks of their being assassinated and might therefore be contrary to the require-

[12] Council Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L39/40, 14 February 1976.

ments of public safety". The Court cautioned, however, that the United Kingdom had to consider whether any lay-off could not be avoided by allocating to women police officers duties which can be performed without fire-arms.

The second derogation validates national provisions concerning the protection of women, particularly as regards *pregnancy and maternity*. The Court of Justice has specified that this derogation was intended to protect a woman's biological condition and the special relationship which exists between a woman and her child. Consequently, it was ruled, a father could not rely on this provision to enforce in his favour German legislation granting a daily allowance to mothers during a period of four months following the statutory maternity leave, even when the parents decide that the father will take care of the children. However, a few years later the Court considered that French legislation providing *inter alia* leave days for female employees when a child is ill or at the beginning or the school year and allowances to mothers to pay for nurseries or child attendants were not covered by the derogation - this means in practice that the legislation constitutes unlawful discrimination of male workers). The derogation intends to protect childcare by the mother until a "reasonable" period following childbirth. Beyond this period raising children is the responsibility of both parents and consequently, this does not justify discrimination. Both judgements are not entirely inconsistent. The German legislation did not grant rights to women in the general and timewise unspecified context of childcare, but honoured the maternal condition albeit beyond maternity leave. Such protection is covered by the derogation, while Community law contains no obligation to grant the same rights to the father. This reasoning would also explain why the Court in an earlier case upheld Italian legislation granting a women, but not her husband the entitlement to the equivalent of maternity leave when they adopted a child under six years old. The question of childcare and parental leave are the subject of a Council Recommendation and a draft Directive, adoption of which is vetoed by the United Kingdom.

Another issue dealt with under this derogation is the *prohibition of night work*. The Court has repeatedly held that, the exception of pregnancy and its aftermath left aside, a general exclusion of women from nightwork cannot be justified, since the risks relating to nightwork are common to men and women. Concerns of the greater risks of assault on women going to and from work at

night and the greater burden placed on women to meet family obligations were dismissed. In order to comply with the Directive member States had to denounce ILO Convention No.89 (Night work (women) Convention).

Finally, the third derogation validates national measures that, although discriminatory in appearance, "promote equal opportunity for men and women, in particular by removing existing inequalities which women's opportunities in the areas of employment, vocational training and working conditions."[13] The Court of justice has pointed out that the derogation clears *positive action* and, depending on the circumstances, positive discrimination in specific instances, but certainly not positive discrimination as a general measure. *Positive action* includes encouraging women to participate in vocational and continuous training, adapting working conditions and adjusting working time, as suggested by a Council Recommendation on the subject. One may also think of a new approach to questions of seniority, such assimilation of time to rear children to working time for the purpose of calculating seniority or a retirement pension. However, the Court of Justice recently ruled that at this stage the principle of equal treatment between men and women does not oblige national social security legislation to grant advantages in respect of old-age pension schemes to persons who have brought up children or to provide benefit entitlements where employment has been interrupted in order to bring up children. Equally there is no obligation to assimilate receipt of a retirement pension to pursuit of a main occupation affording social security when that pension is reduced by loss of earnings as a result of time spent bringing up a child. *Positive discrimination,* on the other hand, refers to a generalized preservation of special rights to women or to a situation where applicants are preferred on the ground of sex, possibly to achieve recruitment targets. The Court ruled that the abovementioned French legislation, specifically allowing collective bargaining agreements and individual contracts to contain exclusive benefits for women, such as shorter work hours for women over 59 and daily breaks for women telephone operators or typists was not justifiable under the positive action exception because the measures were of too general a nature. A landmark judgement revealed some guidelines with regard to policies to promote "equal opportunities for women" in public and

[13] For an overview of the practical situation, *see* Rubery and Fagan, *Occupational Segregation of Women and Men in the European Community,* Commission of the European Communities, V/5409/93-EN.

private sector. In *Kalancke*[14] the question was raised whether local legislation imposing quota rules in favour of women in professional categories where they are underrepresented is covered by this exception, or in other words whether such policy is compatible with the principle of non-discrimination on grounds of sex. Does the Directive allow domestic regulation proclaiming that women who have the same qualifications as men applying for the same post are to be given priority in sectors where they are underrepresented ? Positive action policies were earlier on recommended by the Council "to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures". Advocate-General Tesauro distinguished three types of positive action policies of which the one ruled upon was the most radical in being the only result-oriented one (the other two mainly aiming at vocational training and fostering a balance between career and family responsibilities). On the way, he noted that in the United States the Supreme Court has reluctantly accepted the criterion of goals, but has attached strict conditions to it (mainly a transitional nature and objectively verifiable factual preconditions). He concluded that the measure in question manifestly and unquestionable conflicted with the principle of equal treatment, because it discriminated men. In his view the measure did, on the other hand, not come within the purview of the derogation since, far from fostering equal *opportunities* for women, it aimed to confer the *results* on them directly. These results should normally only be brought about by better opportunities. The Court plainly followed this reasoning.

Closing remark

The law of the European Union bears witness to a distinction that has historically developed under international labour law. EU law has drawn upon but occasionally also departed from international law, as is borne out by the controversy on night work by women workers. Judging from the sheer amount of disputes and ensuing legal questions that have been thrown up before the courts, the law has responded to a pressing social need while proving its effectiveness. As such the study of the law of the European Union may provide some interesting clues to other ILO member States.