
Gender pay gap Evidence and the Shift in the burden of proof

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Theory of the Case

- The facts to establish
 - Hypothetical causes to build a strategy
 - Available sources of information
 - Legal method
-

Gender pay gap: what do we know

- Gender hourly base wage
- Men and women do not occupy the same jobs
- Men and women do not have the same careers
- There are biases in the parameters used to attribute value to jobs and employees

Equal Pay for Work of Equal Value

Hypothesis:

- Direct discrimination
- Impact of maternity and family
- Stereotypes and traditions
- Career evolution discrepancy
- Vertical positioning of female jobs

Directive 2006/54 of 5 July 2006 (Recast) 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.

Criteria of Evaluation Used

Article 4

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.

The Shift in the Burden of Proof

- CJCE, **Danfoss**, 17 October 1989, aff. C-109/88 (par. 11)
- « where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men . »

ECJ Enderby 27 October 1993, Aff. C-127/92 Par. 19

« where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, Article 119 of the Treaty requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex. »

Directive 2006/54 of 5 July 2006 (Recast)

Recital 30:

- As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts.

Article 19 par.1 The Burden of Proof

- (...) when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

EVIDENCE

- Another relation to Evidence in civil law countries
- Procedural difficulty of access to evidence
- Training of lawyers
- Role of Equality Bodies:
 - Providing access to evidence
 - Developing expertise in access to evidence
 - Developing inferences of presumptions
 - Promote justification by employers

EU Law Approach to evidence

Indications of an appearance of discrimination

- Facts leading to a presumption of discrimination
- Transfer of the burden of proof
- Legitimacy and proportionality of the measure

Facts leading to a presumption

- Evidence accessible to Plaintiff
- Evidence in possession of Defendant
- Evidence in possession of third parties Labour inspectors – Doctors – etc..
- External expertise
 - History? Data analysis? Evaluation of employment experts ?

Elements contributing to the presentation of the Case

- ✓ Comparative analysis
- ✓ Expertise / Statistics
- ✓ Witnesses
- ✓ Employers declarations (Feryn case, (aff. C 54/07) 10/07/2008, par 25)
- ✓ Refusal of the employer to provide explanations Meister, 19 avril 2012, (aff. C-415-10)

Feed the Comparison

Article 2 par 1.

Definition of direct discrimination

where one person is treated less favourably on grounds of sexe than another is, has been or would be treated in a comparable situation;

Application

French Examples

"Equal pay for work of comparable worth Definition"

Article L. 3221 – 4 L.C.

- Are deemed of equal value, works that require a comparable set of professional knowledge, skills resulting from experience, responsibilities and types of physical or nervous loads ". (1972)

Aims to overcome the problems of occupational segregation.

Human Resources Manager vs Financial Director

Ms B. Cass. Soc.6 July 2010

Equivalent value of typically female jobs
Beyond title, market and stereotypes:

Job content analysis

Ms B.

Beyond “market value” or “title”

Level in the hierarchy (all director level)
Classification
Responsibilities (part of direction committee)
Importance (combines a number of strategic functions)
Capacity
Educational level
Experience
Seniority Contribution to working unit, and
Stress

Pyrénées Photo Lab

Cass. Soc. 19 Dec. 2000

- Difference in remuneration between men and women
- Job content analysis to establish comparability of employment
- Women work during the day and men at night
- Training analysis
- Equivalent technical Content
- Evaluation in function of work effectively performed

Two employees with different job titles Mrs R. , Cass. Soc. 16 November 2010

- Mrs R hired as Industrial Officer and her male colleague, as Project manager two years later.
- Powers of investigation
- Request to employer on :
 - Respective resumés,
 - job description,
 - evaluations,
 - work loads,
 - Projects followed over the last four years
 - Pay
 - Justification of the difference in pay

Mrs R.

- Different diplomas but comparable education
- Job content analysis reveals similar work load, responsibilities and projects.
- Employer argues that at time of employment market without specific evidence
- Does not justify maintaining a different pay over time

Mrs N. vs X. Bank

Cass. Soc. 22 September 2011

- High performance employee
- Return from maternity leave at exact same pay then ten years earlier
- Return part time
- No raise for three years
- Very low job and salary progression over 6 years
- Resigns

Mrs N. vs X Bank

- Individual and collective investigation

Mrs N. vs X Bank

- Individual Investigation
- Explanations for:
 - Her career evolution year by year
 - From High level to mother.....
- Her salary evolution year by year
- The conditions of her reintegration
- Her evaluations

Mrs N. vs X Bank

- Collective investigation
- All employees
- Arrived the same year with:
 - Same education
 - Same level of entry
 - Comparable education
- Arrived 5 and 10 years later
- With the same level she had upon her return

Mrs N. vs X Bank

- All employees had a better evolution in all hypothesis
- All women had a significantly lower evolution
- Women with children who had taken leave all had a plateau
- Employer justification
 - Reasonable impact of the leave
 - Some women did well
 - Part time justified slower career
 - Requested a hearing

Contributions to the Shift in the Burden of Proof

- All elements can contribute
- Combination of details and systemic analysis
- Expertise and narrative
- Investigation allows to find :
 - Comments on the fact that she still had a brain.....
 - In House memos on maternity
 - Discrepancy between a praised candidate and a slow or lack of career

Durable impact on the way we look at the value of work – Cultural revolution

- The market and
 - Are some degrees are worth more ?
 - Respective value of responsibilities?
 - What is a technical skill ?
 - Value of seniority?
 - Impact of individual negotiations on existing employees?