



Public Defender of Rights
OMBUDSMAN

How to Build a Case on Equal Pay

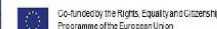
Equinet training



Equinet Training Session
31 August - 1 September 2017
Public Defender of Rights, Brno, Czech Republic



HOW TO BUILD A CASE ON
EQUAL PAY



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Workshop 3

Identifying the Comparator



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2007-2017

BASIC QUESTION

WHO IS THE COMPARATOR?

STEP BY STEP APPROACH

- SOMEONE OF THE OPPOSITE SEX
- SOMEONE DOING THE SAME WORK OR WORK OF EQUAL VALUE
- SOMEONE WHO IS TREATED MORE FAVOURABLY THAN CLAIMANT (DIFFERENCE IN PAY)



SOMEONE OF THE OPPOSITE SEX

- Gender Recast Directive 2006/54/EC
direct discrimination: where **one person is** treated less favourably on grounds of sex **than another is, has been or would be** treated in a **comparable** situation

SOMEONE OF THE OPPOSITE SEX

Employee of the Respondent

- Is there any time limit?
- See **Macarthys case (C-129/79)**

Single Source Theory

- See **Allonby case (C-256/01)**



SOMEONE OF THE OPPOSITE SEX

- How many comparators do we need to build the case? - at least 1...
- **Examples** from CJEU case law

Brunnhofer (C-381/99): one male colleague (bank), Enderby (C-127/92): 2 male colleagues, Cadman (C-17/05): 4 male inspectors

SOMEONE OF THE OPPOSITE SEX

- **Hypothetical comparator**

In **Macarthy's case** CJEU was not prepared to permit hypothetical comparisons.

However in 2017: Art. 157 TFEU seems to embrace hypothetical comparators.

see case **Barber** (C-262/88)

SAME/LIKE/IDENTICAL/EQUAL WORK

- **Defrenne v. Sabena (C- 43/75)** work of an air hostess is identical to that of a cabin steward
- **Macarthys (C-129/79)** – manager of the stockroom of warehouse
- **Brunnhofer (C-381/99)** – employer of foreign and legal department of bank, advisor to clients



SAME/LIKE/IDENTICAL/EQUAL WORK

- Hungarian EB – fleet operator
- Czech EB – head physician in a hospital
- Greek EB – ambulance driver
- Irish EB – assistant editor in a newspaper
- Maltese EB - manager



WORK OF EQUAL VALUE

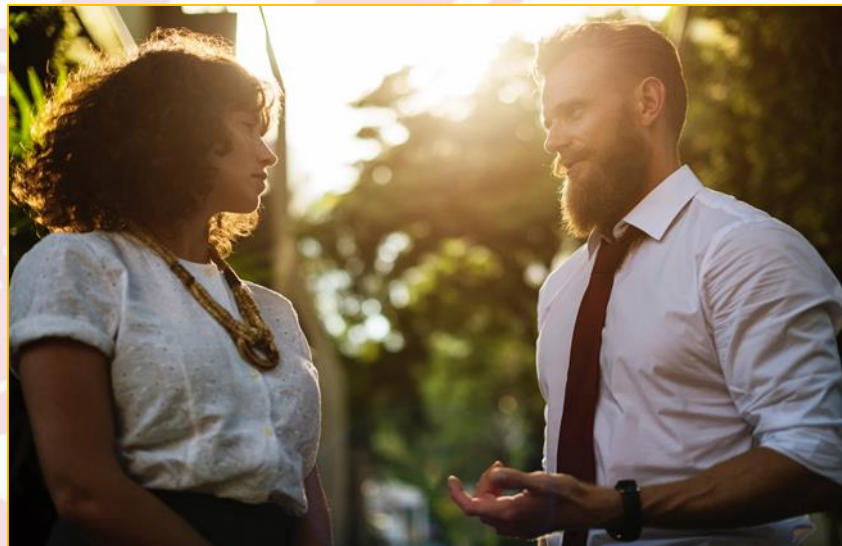
- Is cross-sectoral comparison feasible?
- **Murphy and Others (C-157/86)**

29 women working in factory – specified male worker employed as a stores labourer

- **Jämo (C-236/98)**
midwives – clinical technician

WORK OF EQUAL VALUE

- **Enderby (C-127/92)**
principal speech therapist
– principal pharmacist,
clinical psychologist
- **Irish EB** – employers in
the bar of the golf club



WORK OF EQUAL VALUE

- Can we also deal also with the **case of work of unequal value?**
- What if...
lower-paid category of workers is engaged in work of higher value?
- Yes, we can. See **Murphy case (C-157/86)**

What if...?

- the claimant is unable to identify the comparator but have access to data
- See **Danfoss case** (C-109/88)
- Claimant brought **detailed statistics** relating to the wages - the average wage paid to men is **6.85%** higher than that paid to women.

Using statistics

- **Enderby (C-127/92), para. 17**

It is for the **national court** to assess whether it may take into account **those statistics**, that is to say, whether they cover **enough individuals**, whether they **illustrate purely fortuitous or short-term phenomena**, and whether, in general, **they appear to be significant**.

DIFFERENCE IN PAY

- Comparator earns more than claimant
- See **Barber case** (C-262/88)
- Confidentiality clauses – social climate
- How significant the difference in pay should be?
- How would you assess compliance with the principle of proportionality?

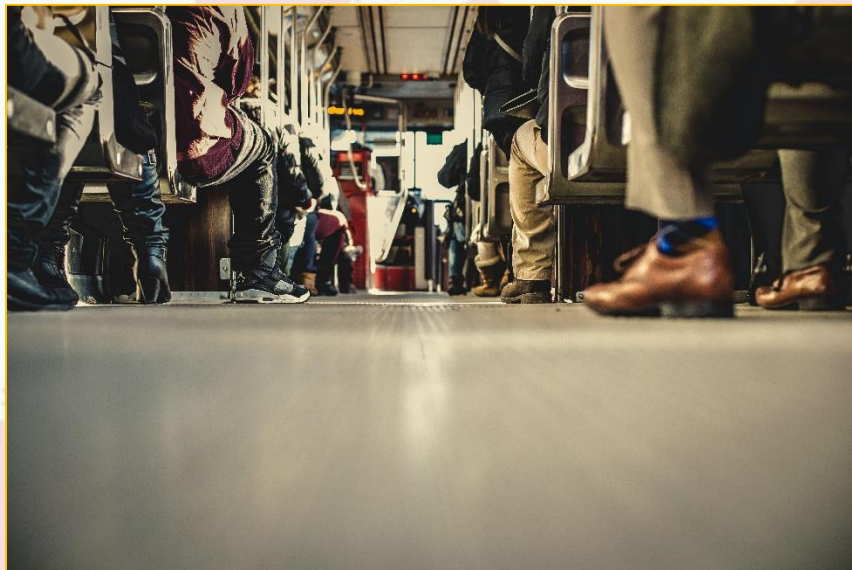
FOR DISCUSSION

HOW CAN WE USE THE COMPARATOR?

Advise

- Learn to love comparator!
- Ideal case – comparator is supportive, called as a witness
- Comparator can testify in favour of claimant
- Make sure - adjusting the claimant's salary up
- Protection against victimisation

INDIRECT DISCRIMINATION



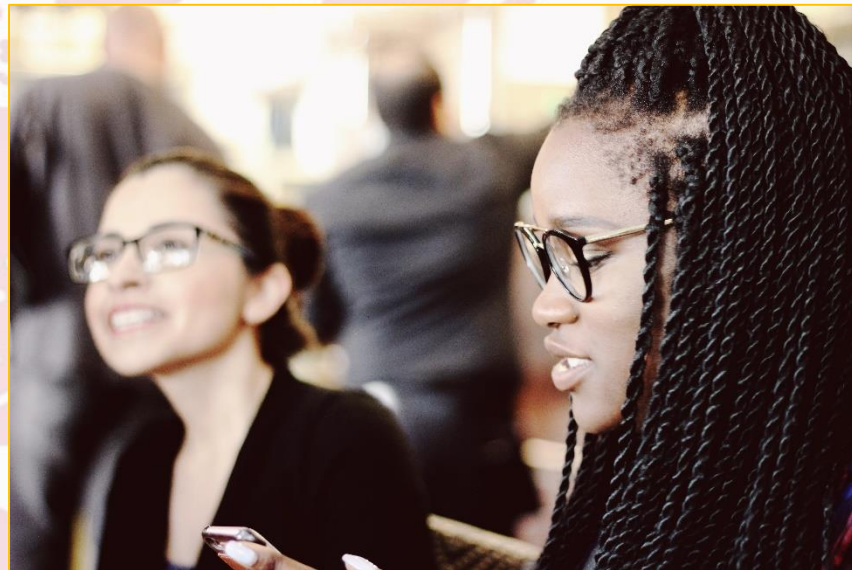
Usually two groups compared:

- Full-time vs. part-time workers (C-170/84)
- Workers whose contract is in suspense (C-333/97)



INDIRECT DISCRIMINATION

- Criterion based on the degree of muscular effort objectively required by a specific job (C-237/85)



CHALLENGES

- Claimant employed in a female-typed job – comparator lacking
- Complex job evaluation – equal work/work of equal value (nature of the work, quality and quantity, the work conditions, skills, experience, education, etc.)

Let's Discuss Cases in Groups.



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