



Equal Pay !

HOW TO BUILD A CASE ON
EQUAL PAY

Equinet European network of equality bodies



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Equinet brings together 46 organisations from 34 European countries which are empowered to counteract discrimination as national equality bodies across the range of grounds including age, disability, gender, race or ethnic origin, religion or belief, and sexual orientation. Equinet works to enable national equality bodies to achieve and exercise their full potential by sustaining and developing a network and a platform at European level.

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IN BRIEF

WHO ARE THE AUTHORS?

Equinet, the European Network of Equality Bodies, consists of 45 equality bodies in 33 European countries. Legal experts working on equal pay cases in 20 of these countries have put together this handbook on How to Build a Case on Equal Pay to support both our own work and that of our colleagues.

WHY FOCUS ON EQUAL PAY?

In our work to promote gender equality and combat discrimination, equal pay is a particularly challenging topic. Progress to achieve equal pay for equal work and work of equal value has stagnated with a gender pay gap of around 16% in the EU, of which only 6% can be explained by structural factors. Gender based discrimination in remuneration is sadly prevalent, leading to increasingly unequal economic outcomes for women throughout the lifespan, undermining efforts at achieving the equal economic independence and participation of women, and preventing women in Europe from fulfilling their true potential on the labor market. All this in spite of the fact that the principle of equal pay was enshrined in the International Labour Organisation's Equal Remuneration Convention (No. 100) in 1951, in the Treaty of Rome in 1957, and has since been reiterated in numerous EU Directives (now summarized in the Gender Recast Directive 2006/54/EC) and in national law.

WHY A HANDBOOK?

Building a case on equal pay is challenging for several reasons.

Information on pay may be restricted in many countries, so complainants may not even know they are paid less than their colleagues. Ensuring

and enforcing transparency in pay systems and in access to information is therefore key. The issue is further complicated by the need to identify a comparator in cases where there might be indirect discrimination, and by having to tackle the many arguments relating to sometimes gender biased job evaluations. Shifting the burden of proof onto the respondent is a key strategic opportunity provided for by law, and we hope to help you avail yourself of this opportunity.

The Handbook aims to be a practical and useful tool for you in your work on equal pay cases, guiding you to existing resources, data, partners and arguments that have been successful in the past. It does not aim to be a piece of exhaustive research, but rather a practical manual and toolbox.

FOR WHOM?

The handbook is structured to help case-workers in equality bodies, lawyers or other legal professionals to build their case, but the resources contained therein should support and inform anyone looking to gain insight into the challenges and opportunities in litigating for equal pay. In addition, the handbook contains useful and hands-on information for anyone interested in and working on equal pay.

THE HANDBOOK INCLUDES:

- Checklists on what to ask claimants and respondents and how to gather data
- Suggestions of external partners to work with when gathering information for your case
- Information on how to shift the burden of proof
- Tools to show the importance of transparent pay schemes for your case: gender neutral job evaluation schemes and wage calculators
- Examples of cases handled by equality bodies in Europe
- Links to relevant resources, tools, statistics and literature

INTRODUCTION

WHY A CASE ON EQUAL PAY?

In our work for the promotion of equality and for combating discrimination, equal pay is a particularly challenging topic for equality bodies, as it is for all of society. In the EU, women's gross hourly earnings were on average 16% below those of men in 2013 for the economy as a whole. The gap varied by 27 %, from 3 % to 30% (Eurostat Gender Pay Gap Statistics 2013¹). Those figures are striking, considering that the principle of equal pay for men and women was already included in the Treaty of Rome in 1957 and 1975, before any equal treatment directive was adopted. Approaching gender inequalities from an organizational and policy perspective is therefore essential.

In 2013, Equinet published the report Equal Pay for Equal Work and Work of Equal Value: The Experience of Equality Bodies - the first report prepared by the newly established Working Group on Gender Equality. As a continuation, the Working Group on Gender Equality has now prepared this Handbook on How to Build a Case on Equal Pay.

The aim of the Handbook is to provide a practical and useful tool for you in your work on equal pay cases. It does not aim to be a piece of exhaustive research, but rather a practical manual and toolbox.

EU case-law in equal pay cases is substantial. However, there is hardly any case-law regarding job evaluation schemes and job classification systems. In general, it has proven difficult to conduct cases in national courts. With this report, we hope to strengthen your capability of winning cases, not least by exchanging best practices on gender neutral job evaluation schemes and by offering tips on how to access the information needed to build your case.

THE CONCEPT OF EQUAL PAY – LEGAL BASIS ²

The main legal provision on equal pay for male and female workers for equal work or work of equal value is Article 157 TFEU (former Article 119 EEC and 141 EC), which was already included in the Treaty on the Economic European Community in 1957. It has horizontal direct effect, meaning it can be directly relied upon by individuals before national courts not only against (organs of) the state, but also against individuals, such as private employers.

Similar to the definition in primary law, the equal pay principle is also drawn

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

² For a more detailed presentation of the legal framework on equal pay see the Equinet Perspective Equal Pay for Equal Work and Work of Equal Value: The Experience of Equality Bodies (2013), p.9-17.

up in Article 4 of Directive 2006/54/EC, which provides that “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”. This provision also stipulates that “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.”

Pay includes not only basic pay, but also a number of other elements in the remuneration as a whole, including occupational pension schemes. Article 2(1)(e) of the Directive³ provides an extensive definition of pay, describing it as “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.”

WORK OF EQUAL VALUE

There is no EU-level definition of work of equal value, nor any clear assessment criteria for comparing different jobs. In practice, the concept of “work of equal value” is neither well known nor well understood.

Fortunately, the Court of Justice of the European Union (CJEU)⁴ has clarified the concept of equal pay in its comprehensive and important case law. The Court has held on several occasions that determining equal value involves comparing the work of a female and a male worker by reference to the demands made on them in carrying out their tasks. The skills, effort and responsibility required, the work undertaken, and the nature of the tasks involved are relevant. The case law is summarized in the preamble of Directive 2006/54/EC. Recital 9 of the Directive provides that, in accordance with CJEU case law, to assess whether workers are performing the same work or work of equal value, it should be determined whether they may be considered to be in a comparable situation by taking into account a range of factors including the nature of the work, training, and working conditions.

One way of determining work of equal value is by using gender neutral job evaluation and classification systems. However, the Directive does not oblige Member States to put such systems in place, and their availability at national level varies significantly (see Annex 2 for available schemes by country). In practice, the use of job evaluation and classification systems is

³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:204:0023:0036:en:PDF>

⁴ This Handbook uses the name Court of Justice of the European Union (CJEU) throughout for consistency. However, the Court system only obtained this name with the entry into force of the Lisbon Treaty, and was previously known as the European Court of Justice (ECJ).

complicated by the fact that the equal pay regulation in some countries has no definition of work of equal value⁵. The EU recommends Member States to provide a definition of work of equal value in their national legislation⁶.

It is not easy for victims of pay discrimination to establish equal value of different jobs. There is a lack of clarity in the assessment criteria for comparing different jobs (see Chapter 3 for details). Victims of pay discrimination may therefore face a major obstacle in bringing claims before national courts due to the challenges related to making comparisons.

DIRECT/INDIRECT DISCRIMINATION

Unequal pay may be the result of both direct and indirect discrimination against an individual. The EU Equal Treatment Directives 2006/54/EC (Gender 'Recast' Directive) and 2004/113/EC (Gender Goods and Services Directive) define direct and indirect discrimination in the following way:

“**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;”

“**Indirect discrimination**’: where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary;”⁷

There are a number of different types of equal pay cases. The inequality may be connected to absences during pregnancy/maternity leave

⁵ “In some Member States there are rules, guidelines or other tools which provide criteria for a neutral assessment of the value of the work. In Belgium, the federal Government is making an effort to develop gender-neutral classification schemes. ...In some countries, investigations into the (indirectly) discriminatory nature of job evaluation schemes can also be performed by equality bodies or labour inspectorates. In the Netherlands, the equality body is active in developing methods for assessment of equal pay practices. In Slovenia, companies with more than 10 employees must adopt an internal document on job classification. ...it is important to scrutinise such criteria [used for evaluating “equal work”] for their potentially indirectly discriminatory effects.” http://ec.europa.eu/justice/gender-equality/files/your_rights/gender_equality_law_33_countries_how_transposed_2013_en.pdf

⁶ “In Belgium, the 2007 Act does not mention work of the same value. In Germany, the General Act on Equal Treatment contains a general prohibition of discrimination, but no entitlement to equal pay or concepts of pay and work of equal value are defined in statutory legislation. [...] No criteria are provided in Greece either and the traditional, nontransparent job classification schemes are still widely applied with a considerable risk of indirect sex discrimination. [...] By contrast, some other countries do not have such comparable provisions in their legislation (i.e. parameters for establishing the equal value of the work performed) (e.g. Latvia, Malta and Slovenia).” http://ec.europa.eu/justice/gender-equality/files/your_rights/gender_equality_law_33_countries_how_transposed_2013_en.pdf

⁷ Directive 2006/54/EC

(where you may not need a comparator, or you may use another woman as a comparator), to pension schemes, bonuses, or possibly to indirectly discriminatory job evaluation practices. You will need to find out exactly where the problem is in your case, assess whether there has been direct or indirect discrimination (or both), and build your case accordingly. It is useful to firstly allege direct discrimination. If the respondent then pleads a ground (i.e. motive) for the disadvantage suffered that is independent of the protected characteristic of gender, you can consider the existence of indirect discrimination. As regards indirect discrimination, national legislation has significant leeway in interpreting what is "objectively justified by a legitimate aim", also in the context of remuneration policies (see Chapter 4.2. for some common arguments and counter-arguments).

BURDEN OF PROOF

The fact that the claimant does the same work or work of equal value and receives different remuneration demonstrates prima facie discrimination. The law provides for "shifting the burden of proof" (see Chapter 4.1 for details) in such cases. In practice, this means that you are not a researcher, evaluating whether or not there is a gender pay gap. Your purpose is to gather sufficient evidence to suggest that prima facie discrimination has taken place. If you succeed, this will shift the burden of proof onto the respondent, making it his/her responsibility to prove that discrimination did not take place. In order to do so, you have to identify several types of facts. The claimant has to provide relevant information on his/her pay, work and pay-explanations/principles for the purposes of comparison (see Chapter 1 for more details).

Once you establish prima facie discrimination and are able to shift the burden of proof onto the respondent, the respondent will have the chance to counter your claims (Chapters 3 and 4). The respondent may successfully deny that discrimination has taken place, and seek to shift the burden of proof back onto you. If that is the case, you may use any lack of cooperation on the part of the respondent as a means to shift the burden of proof once more. An example would be to show that the respondent refused to divulge relevant information on the pay system used⁸. Lack of transparency in pay systems can be a successful way to demonstrate reasonable suspicion of discrimination. While lack of transparency is not in itself sufficient evidence, it may cause sufficient doubt to support prima facie discrimination, which in turn is sufficient to shift the burden of proof once more (see

⁸ See CJEU 17/10/1989, Danfoss C-109/77.

Chapter 4.1). Transparency is a crucial issue in cases on equal pay,⁹ and is both a challenge and an opportunity for your case¹⁰.

The current Handbook aims to assist you in supporting your claimants to overcome some of these obstacles and to shift the burden of proof onto the respondent.

INTERSECTIONS WITH OTHER GROUNDS

There are several additional factors that may play a role in a case of equal pay. Equality bodies find that ethnicity, along with gender, is a common ground of discrimination in equal pay cases. More complex intersections also take place. For example, women belonging to minority ethnic groups may face particular challenges in accessing equal pay for work of equal value. Or persons with a disability, working on subsidized contracts, may not be paid equally compared to other persons in the same workplace performing the same work. It is also of interest to note that transgender persons are victims of the gender pay gap, with men transitioning to women usually receiving lower salaries after the change, while women who transition to men usually gain higher salaries¹¹.

Such factors may lead to particular challenges in building any given case. As long as the need to be sensitive to such intersectionality is kept in mind, the steps outlined below should still generally help you in building your equal pay case.

⁹ Commission Recommendation on strengthening the principle of equal pay between men and women through transparency. C(2014) 1405
http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/c_2014_1405_en.pdf

¹⁰ Particularly for those case-workers in quasi-judicial equality bodies mandated to issue their own decisions.

¹¹ Geijtenbeek, L. and Plug, E. (2015). "Is There a Penalty for Becoming a Woman? Is There a Premium for Becoming a Man? Evidence from a Sample of Transsexual Workers." Institute for the Study of Labor (IZA). IZA DP No. 9077

1. WHAT TO ASK A CLAIMANT

As in all cases, your first contact with the claimant coming with an equal pay case is about their story. Let them tell you their version of what happened.

The following list of questions are things for you to keep in mind during your interview with the claimant, without necessarily meaning that you need to go through all of them as a check-list: the claimant may supply much of this information spontaneously and should be given the opportunity to do so.

However, the issues outlined below are all important and if you find gaps in the story you may want to prompt the claimant to fill you in. The list may be adjusted to suit the circumstances of the specific case as well as national contexts.

WHAT HAPPENED?

- What brings the claimant to you?
- Who is s/he comparing him/herself with at work?
- How did the claimant find out s/he earns less?
- How much is the claimant and the person(s) of comparison paid?
- Does the pay gap cover additional allowances, or is it only related to salary?
- Does the claimant have a possible explanation for the differences in salaries?

PERSONAL CHARACTERISTICS

- What is the claimant's age, education level, sex/gender?
- There are frequently intersections with other grounds in cases on equal pay, notably the grounds of race and ethnicity. Does the claimant feel that s/he has suffered disadvantage on multiple grounds?

CLAIMANT'S WORK STATUS

- How long has the claimant been working for the respondent (i.e. employer)?
- How many years of employment does the claimant have in total?
- How many years of relevant job experience have been taken into account?
- What is the claimant's current position?
- Did the claimant hold any previous positions at the current place of work?
- Is there any additional information in the claimant's employment contract?

FORMAL JOB DESCRIPTION

- Is there a formal job description available for the position?
- Does the job fall within a particular professional category?
- What are the skills required to perform the job? What is the level of effort required?

The above questions can be repeated to gather the same information about the chosen comparator¹².

JOB PROFILE IN PRACTICE

- What is the claimant's professional experience, qualifications and job performance?¹³
- What is the level of responsibility (both formal and informal) on the job?
- What is the nature of the work (tasks to be performed)?
- What are the working conditions at the place of work?
- What are the number of regular working

¹² For a legal assessment of how to identify the 'right comparator,' see Chapter 4.1.

¹³ The questions addressed to the claimant in this context correspond to the information needed to make a preliminary job evaluation. For more information on job evaluations, see Chapter 3.1.

hours worked?

- What are the number of overtime hours worked and compensated?

LEAVE ARRANGEMENTS

- What is the claimant's health insurance policy?
- What are his/her private life arrangements (i.e. work-life balance arrangements with protected leave or sick leave)?
- Does the claimant have paid holidays?
- Does the claimant receive pension and other fringe benefits?

REMUNERATION

- Is there a fixed, transparent, comprehensible income scheme in place (collective agreement vs. classification system at company level)?
- Which criteria are applied?
- What is the wage/salary setting process in the company?
- Does the employer give more weight to certain requirements (knowledge/skills, psycho-social skills, responsibility, physical requirements) when calculating the employees' income?
- Did the claimant receive any bonuses or suffer any disciplinary action?
- What is the claimant's basic wage?
- What is the remuneration for overtime?
- Does the claimant receive any holiday or vacation bonuses, any irregular awards or grants, or any regular awards or grants?
- Has the claimant asked for a pay rise or in any way complained to the employer?
- If so, what did the employer respond, what was his/her argument?

PERFORMANCE ASSESSMENT

- Is there a performance evaluation system at the workplace?
- How does the performance evaluation system function? (Please provide the relevant documentation)
- Does the claimant have all necessary documents for assuming the existence of discrimination (especially pay slips for previous years)?
- What are the results of any performance evaluation conducted for the claimant?

SITUATION AT COMPANY LEVEL

- Is there a work council/staff representative at company level?
- Are there any other legal provisions/obligations on the respondent (i.e. employer) to provide information related to equal pay? (i.e. pay audit, income report).
- Have these been fulfilled? Does the claimant have knowledge of this data?

Note: *If the claimant does not have (all) the necessary information, please consult Chapter 2 for further details.*

After the interview or correspondence with the claimant, you may advise the claimant what actions s/he may take before initiating proceedings. Useful advice to the claimant can include:

- Ask colleagues about their income. This possibility depends on the legal situation in the given country. In some countries, it is not prohibited to ask colleagues about their income. Nevertheless, many claimants lack this information;
- Gather as much evidence as possible to determine whether the claimant's situation is comparable to the situation of the comparator. If possible, set up a table including

amongst other things their diplomas, career path, level of effort and responsibility, and remuneration;

- Collect relevant written documentation (e.g. e-mail correspondence with superiors/ colleagues, pay slips, any record of salary increases/ bonuses/allowances/special awards/pension benefits, general information on the income scheme in the company, income report, job advert, job description including job category and job title as well as tasks to be performed, annual and sick leave records and/or records of special leave arrangements);
- Ask colleagues and/or employees' representatives to testify concerning the specific tasks performed by the claimant and her/his colleague(s) who receive higher remuneration;
- Speak to staff representatives and/or the work council in the company to help build the claimant's case. In some countries such representatives have certain rights to obtain information;
- Seek help from staff representatives and/or the work council that has access to income lists as part of monitoring the employer's fulfilment of all obligations. Note that in some countries the work council is subject to confidentiality and cannot inform the complainant on the content of the income lists. Nevertheless, the work council representative may make general comments such as: "There is a (major/minor) difference in pay. If I were you, I'd do something about that..."
- Contact trade union representatives to see if they have access to information;
- Talk to the employer. In some countries, employers must provide information about the pay level and the criteria for setting the pay of the person or persons with whom the claimant is making a comparison;
- Ask the employer for a pay rise;
- Contact the office within the enterprise that is responsible for discrimination complaints, if available; In some countries, the labour inspectorate can initiate an internal investigation in the company.

2. HOW TO GATHER DATA

There are a variety of legal and policy frameworks in European countries which regulate access to information on employees' pay and the obligation to provide such information to certain institutions, including equality bodies.

Every equality body has different powers and mandates. Some equality bodies with quasi-judicial functions take decision on the merits, others have the power to take legal cases to court, and others can only provide legal advice and rely on other organisations to take cases. In some instances, equality bodies are relied upon to seek and provide pay-specific information.¹⁴

The kind of information you will need depends on whether you are building a case of direct or indirect discrimination. Statistical data on pay differences could be more decisive for cases of indirect discrimination, though it will strengthen a case of direct discrimination as well.

Generally speaking, information on pay is more readily available from the public sector, through public sector collective agreements, income reports, other types of mandatory reporting or a general transparency focused legislation.

For the private sector, collective agreements and – where in place – pay reports (e.g. social balance sheets and reports) may also be a useful source of information. But such information may not be available to the general public, or only to certain agencies and institutions, and the use of such information may be legally restricted.

National laws on Data Protection generally safeguard sensitive individual data, including salary data, but provide certain exceptions with regard to equal pay cases. Data protection rules are often complemented or countered by Freedom of Information laws, or specific equality legislation, labour or employment laws. These often lay out provisions for pay information to be released when a gender pay gap or an equal pay case is under investigation by an equality body, a labour inspectorate, a trade union or a designated court.

Legal frameworks with specific provisions on pay transparency can make a significant difference in your ability to access this type of information and build an equal pay case¹⁵.

¹⁴ Equality bodies have varying mandates in their national jurisdictions, some primarily fulfilling tribunal type functions (quasi-judicial), some primarily fulfilling promotion type functions, and some fulfilling both types of functions. For more information, please see the Equinet perspective 'The Bigger Picture: Equality Bodies as Part of the National Institutional Architecture for Equality' (2014).

¹⁵ cf. Commission Recommendation on strengthening the principle of equal pay between men and women through transparency, C(2014) 1405 final.

Information is also available through different types of statistical offices, either related to central statistics or linked to a specific ministry (e.g. labour).

DATA SETS THAT MIGHT BE ACCESSED INCLUDE:

- Individual income data of the comparator (e.g. Finland, Austria, Ireland, France)
- Salary Tables for the private sector (e.g. Slovakia)
- Public and private collective agreements (e.g. Germany, Greece, Ireland, Portugal)
- Collective pay reports and/or other statistical information about a company or a sector (e.g. Austria)
- Company personnel records (e.g. Portugal)
- Pay audits or pay reviews (e.g. Sweden, Finland)
- Social balance reports, social balance sheets or income lists from the private sector (e.g. Belgium, France, Germany, Portugal)
- Wage calculators (e.g. Slovakia, Austria, Portugal)
- National statistics from the National Statistics Office, Ministry of Labour, etc. (e.g. Germany, Ireland, Portugal, Sweden)

Portugal: Employers are obliged to submit information on the company personnel records to the Labour Inspectorate (ACT) annually, which subsequently has to forward this information to the Statistics Department of the Ministry of Labour. The information requested refers to remunerations; working time; extra/additional work; fixed-term contracts; training; health and safety; and personnel records. The National Data Protection Commission authorises the processing and displaying of personal data on the Personnel Records.

Belgium: The models of annual accounts for Belgian enterprises¹⁶ since 2012 contain a section entitled «social balance sheet». This section must be completed by every Belgian enterprise that employs staff. The data contained in the social balance sheets of the companies has to be disaggregated according to the gender of the workers. It is then sent to the members of the Works Council or, failing that, to the union delegation, in order to be the subject of a study and consultation. The members of the Works Council or, failing that, the members of the union delegation, are bound to respect the confidentiality of the data provided. In addition, social balance reports are published at the National Bank of Belgium (<http://www.nbb.be>), where they can be consulted.

¹⁶ Can be found online at <https://www.nbb.be/en/central-balance-sheet-office/drawing/models-annual-accounts/models-enterprises>

Sweden: National facts and figures regarding wages and equal opportunities are available from the administrative agency "Statistics Sweden"¹⁷. Furthermore, unions and employers' organisations gather statistics and data which they usually publish.

WHO HAS ACCESS TO PAY DATA AND PAY REPORTS IN THE GIVEN COUNTRY?

Depending on the national legal framework, pay information, as listed above, can be requested from the employer, a public body, social insurance institutions or designated institutions and organisations that can access pay data and/or receive pay reports from the public or private sector.

Institutions and/or persons that may have access to relevant data and information are:

- Equality bodies, in accordance with their legal powers (e.g. Austria, Finland, France, Portugal, Serbia, Sweden – right to request information regarding the pay of a comparator and other relevant information to establish equal work or work of equal value).
- Trade unions/ employee representatives/ work councils (e.g. Austria, Belgium, Finland, France, Germany, Portugal)
- Designated Courts/Tribunals (e.g. former Equality Tribunal in Ireland - now merged into Workplace Relations Commission,
- Labour Inspectorates (e.g. France, Hungary, Portugal, Slovakia)
- Employee(s) taking a case and individual claimants (e.g. France, Germany)

France: The Defender of Rights (the national equality body) has significant investigative powers, which allow it to obtain information for the identification of a suitable comparator, and access to parameters for establishing equal work or work of equal value.

Austria: The Ombud for Equal Treatment has the right to request information from the Social Insurance Institution about the individual income of the comparator if a colleague has strong reasons to assume direct discrimination with regard to pay. This information (pay data) may only be communicated in an anonymized way.

¹⁷ Statistiska centralbyrån, SCB: <http://www.scb.se/en>

In Austria, the Austrian Data Protection Act stipulates that sensitive data requires special confidentiality guarantees. However, following a legal interpretation by the Constitutional Service Office ("Verfassungsdienst"), income data is not normally regarded as sensitive data. Officers working at the Austrian Ombud for Equal Treatment are civil servants and thus have an obligation to observe discretion (public secrecy), but this obligation has to be balanced out with the legal mandate to promote and support equal treatment cases.

Norway: "A worker who suspects discrimination about the setting of the pay scale, shall be entitled to demand that the employer provide written confirmation of the pay level and the criteria for the setting of the pay of the person (or persons) with whom the person in question is making a comparison." A person who receives information about pay pursuant to this provision shall be subject to a duty of confidentiality and shall sign a confidentiality declaration. This shall not apply in the case of information covered by the Freedom of Information Act.¹⁸

Finland: If an employee is suspecting pay discrimination, s/he can request and obtain information on the pay of a comparator. Furthermore, in the Act on Equality between Women and Men (the "Gender Equality Act") there are some provisions concerning access to information on pay, but not necessarily on the pay of a possible comparator. According to the Act, the employer shall provide an employee with a report to show that the prohibition of pay discrimination has been complied with.

WHO CAN HELP ACCESSING DATA FOR BUILDING THE CASE?

The equality body might not have the investigative or legal powers to bring a case or decide on a case. Other bodies and organisations will take the cases and/or obtain relevant information. In particular, trade unions have played and still play a pivotal role in taking gender pay gap cases, sometimes with the support and advice of equality bodies or on their own. Some equality bodies might be able to act as Amicus Curiae before the courts if provided for in their legal mandate.

¹⁸ Salaries of persons who hold leading positions in the public sector or leading positions in independent legal entities or board members thereof are not classed as confidential information under the Norwegian Freedom of Information Act. Outside of this exception, the salaries of individual persons are confidential.

Successful collaborations and agreements on exchanging information can be set up in different national legal frameworks by or with the following actors:

- Trade Unions (e.g. Belgium, Finland, Ireland, Norway, Portugal, Serbia, Sweden)
- Labour Inspectorates (e.g. France, Greece, Hungary, Portugal, Slovakia)
- Work councils (e.g. Germany, Austria)
- Expert witnesses (e.g. Sweden) or relevant equality body as an expert witness (e.g. Portugal)
- Associations of lawyers and attorneys (e.g. Slovakia)
- The competent ministries, i.e. labour ministries (e.g. Belgium, Portugal)

Slovakia: The National Labour Inspectorate of the Slovak Republic is responsible for the regular supervision of the situation of equal treatment in workplaces and has to review the compliance with the principle of equal pay. The Labour Inspectorate also has a right to access information about the wages of employees in the private or public sphere, but the information cannot be given to a third party.

Greece: The Ombudsman is informed of all complaints filed with the Labour Inspectorate and its branches around Greece, which are related to breaches of equal treatment legislation. The Ombudsman is invited to participate in meetings between employers and employees at the Labour Inspectorate and to exercise its competence and mandate towards a reconciliatory solution in the dispute. The Ombudsman is also entitled to carry out its own investigation on cases and draft a Findings Report, and to ask the Labour Inspectorate for the imposition of a fine on the employer, if it reaches the conclusion that there has indeed been a breach of gender equality legislation.

3. GATHERING INFORMATION FROM THE RESPONDENT

Most claimants will want to know whether there is a good chance of building a discrimination case before exposing themselves vis-à-vis their employer. The need to protect the claimant and his/her best interests is your priority. You should therefore always consider the case carefully before turning to the respondent for information. If you feel you have sufficient information to demonstrate prima facie discrimination, you may wish to take the case to the next phase. However, be sure to consult thoroughly with the claimant before doing so, to ascertain what his/her wishes and needs are.

When you do approach the respondent (usually the employer), you seek to discover how the respondent establishes pay in general, and how pay was established in the given case in particular. The general remuneration system is important insofar as it sheds light on the context of the given case, and reveals what the respondent considers comparable work. As such, it is important to be aware of the criteria necessary for evaluating the content and value of the job in question when interviewing the respondent (see section 3.1 below).

According to the CJEU, pay schemes have to be transparent and comprehensible. Specific tools have been developed to evaluate jobs and compare remuneration in Belgium, Germany¹⁹, Portugal, and Sweden. These methodologies are available in Annex 2 for consultation. Yet most European countries have no unified method of assessing equal work or work of equal value.

You only have to show reasonable suspicion that the respondent's remuneration policies are discriminatory. Demonstrating lack of transparency is important for this, and knowledge of what a transparent and non-discriminatory job eval-

uation scheme entails is useful in this respect. However, as a case worker building a case, it is not for you to conduct a full review of the respondent's remuneration policy. The job evaluation criteria and questions below are therefore meant as a guide for you when making your assessment of the case in cooperation with the respondent.

3.1. JOB EVALUATION

Have the respondent's (i.e. employer's) remuneration policy and the claimant's wages been assessed and reviewed by the different country-specific tools available?

Several EU countries have developed specific tools to both assess and review the state of gender equality (see Annex 2 for a more detailed list). There are a number of different possibilities to assess whether the claimant has been the subject of unequal treatment with regards to his/her wages. The tools on offer are **wage calculators, pay audits and reviews** and **job evaluation schemes**²⁰. The Handbook provides basic information about these tools and examples of their use. Researching whether the given country offers similar tools, and then making use of these official tools could be a valuable step in building your case. Annex 2 provides links to useful country-specific tools in the sub-section "Useful gender neutral tools for work evaluation".

¹⁹ eg-check.de

²⁰ "while in many instances direct discrimination has been significantly reduced, it is far from certain whether the job evaluation and classification schemes applied are really sex-neutral, since indirect discriminatory features are less easy to detect and deal with." http://ec.europa.eu/justice/gender-equality/files/your_rights/gender_equality_law_33_countries_how_transposed_2013_en.pdf

HAS THE CLAIMANT HAD THE POSSIBILITY TO CALCULATE THEIR WAGE ACCORDING TO THEIR PROFESSION?

Wage calculators are instruments which calculate profession-specific wages. They can be seen both as a means for companies to conduct self-assessments on the pay distribution among their employees, and a means for employees to check whether their wage is up to the necessary standard of equal treatment. Calculating the claimant's wage-specification according to their profession is one way to assess whether s/he is being treated unequally. Several countries have developed wage calculators. One example of an online wage calculator is Portugal, where the CITE has developed a Gender Pay Gap Calculator, where unequal pay distributions are analysed to review whether they are down to personal characteristics (age, gender, education, etc.) or job characteristics (working hours, skills, responsibilities, etc.).

HAS THE CLAIMANT'S EMPLOYER BEEN SUBJECTED TO A PAY AUDIT OR REVIEW TO ASSESS WHETHER THERE IS A GENERAL PROBLEM OF PAY INEQUALITY WITHIN THE COMPANY?

Pay audits and reviews are a means to test whether companies are distributing their salaries equally between the genders. Checking whether the claimant's company has already been subject to such a review might provide valuable information for your case. The ways in which these audits are conducted vary. In some cases, companies are reviewed externally, in other cases they are obliged to do it themselves and then act as soon as they detect differences in pay distribution caused by gender. In Sweden, for instance, companies receive a request to provide all necessary information for an audit to the Equality Ombudsman. In Finland, all companies with more than 30 employees are obliged to do a self-audit of wages and the development of an equality plan for the company.

HAS THE CLAIMANT'S EMPLOYER BEEN SUBJECT TO AN EVALUATION OF THEIR PAY DISTRIBUTION ACCORDING TO JOB CLASSIFICATION?

Job evaluation schemes evaluate the equal distribution of pay by assessing whether possible inequalities might be down to job classification systems. Referring to the results of such an evaluation might provide valuable information. In Sweden, the process of identifying equal work is carried out through an analysis of job titles, job codes and job grading sys-

tems, amongst other criteria. One such system is BESTA, created by the Swedish Agency for Government Employers.

3.2. WHAT TO ASK A RESPONDENT

Once you have evaluated the situation together with the claimant, supplemented by any external resources you might find useful, you may decide to turn to the respondent for further information. We offer you a list of questions you might want to pose the respondent, keeping in mind the criteria and tools for evaluating the job and any information you may already have gathered from the claimant or otherwise. During your exchange with the respondent, your goal is to gather information about your claimant as well as the comparator.

NOTE: *Many of these questions could fruitfully be posed about the chosen comparator as well.*

CLAIMANT'S WORK STATUS

- What is the working relationship between the claimant and the respondent?
- When was the working relationship established between the claimant and the respondent?
- What is the claimant's working status? (full-time or part-time employee)

FORMAL DESCRIPTION OF CLAIMANT'S WORK:

- What is the claimant's job title?
- What is the claimant's job description?
- When was the job description handed to the claimant and when was it updated?
- What qualifications/experience are necessary to perform this work?

THE JOB PROFILE IN PRACTICE:²¹

- What are the job skills required to perform this work? (NB: not personal skills)²²
- What is the level of mental/physical effort required to perform this work?

²¹ these are the criteria set up by the ECJ Rummler237/85, cf. also COMMISSION RECOMMENDATION of 7 March 2014 on strengthening the principle of equal pay between men and women through transparency (2014/124/EU)

²² The skills cited must be relevant for performing the job. Such relevance is a criterion for impacting the salary according to the case-law of the Court of Justice of the European Union (CJEU).

- What is the claimant's level of responsibility?
- What are the claimant's working conditions?
- What are the working hours of the claimant?

LEAVE ARRANGEMENTS:

- What are the leave arrangements of the claimant?
- Who performs the claimant's duties in case of absence from work?
- Has the claimant made use of protected leave? (e.g. maternity/paternity/parental leave)

PERFORMANCE ASSESSMENT:

- Is the claimant's performance assessed regularly?
- What criteria are used for the assessment? (standard forms or subjective assessment?)
- Are the claimant's scores consistent?
- Has the claimant received any performance-based awards? (monetary or non-material, e.g. "employee of the week/month" award)
- What are the criteria used to bestow such awards?
- Has the claimant been subject to any disciplinary action in conjunction with the performance of his/her duties?
- What are the criteria used to justify disciplinary action?

REMUNERATION:

- Is there a collective agreement²³ and/or a company-internal pay classification scheme applicable? If yes: in which category is the claimant classified?
- What was the claimant's starting salary?²⁴
- What mechanism was used to establish the starting salary? (fixed starting salary for all in the same job category; collective/individual wage negotiations)
- What criteria are used to set the wage level?

²³ "The problem that may arise, however, is that pay systems consist of several different parts of remuneration. Often, collective agreements lay down the minimum or a basic salary only. The remainder of the pay component is negotiated on an individual basis or is a matter which is left to an assessment by the employer, an assessment which may be rather discretionary." http://ec.europa.eu/justice/gender-equality/files/your_rights/gender_equality_law_33_countries_how_transposed_2013_en.pdf

²⁴ "Salary" must be interpreted broadly, according to the TFEU as well as CJEU case-law: " For the purpose of this Article, 'pay' means 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 employment, from his employer. Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job." (TFEU, Article 157 (2))

- Was relevant former work experience duly considered when setting the wage level?
- Did (former) part-time work or parental-leave affect the classification and or setting of the wage level in any way?

NOTE: Assess whether all the criteria used for setting the wage level are relevant to the tasks performed in practice and/or under the (formal) job description.

- What mechanisms are used to measure over-time and is it compensated?
- Was the claimant's salary raised at any point?
- What mechanism was used to establish the pay raise?
- Does the claimant have access to other benefits? (premiums, bonuses, pension benefits, access to sick pay, etc.)²⁵
- What circumstances determine access to these other benefits?

SITUATION AT COMPANY LEVEL:

- How many colleagues perform the same function or functions of the same value?
- Are there any measures put in place to monitor and ensure equal pay (e.g. pay surveys, job evaluations, etc.)?
- If applicable: did the employer fulfil his duty to conduct a pay audit, compile a pay report etc.?
- Has the company ever been found to be in breach of equal treatment legislation?

Depending on whether you are working for a promotional or quasi-judicial type equality body, as well as the particular competences of the equality body with regard to investigation and information rights, the answers to the above questions may be utilized differently. Some of the questions may have more relevance than others, depending on the case in question. (The list is in no way exhaustive.)

²⁵ Each element of pay must be free from discrimination according to CJEU, C-381/99, Brunnhofer.

4. BUILDING THE CASE

4.1. BURDEN OF PROOF/ COMPARATOR

When building a case on equal pay, shifting the burden of proof is a key tool in ensuring efficient protection against discrimination. "It is normally for the person alleging facts in support of a claim to adduce proof of such facts" states the CJEU²⁶. In fact, the CJEU took lack of transparency and particular difficulties in producing the necessary facts into account when making its rulings²⁷, before the Council Directive on shifting the burden of proof in sex discrimination cases²⁸ was introduced in 1997. Since then, the Equal Treatment Directive 2006/54/EC Article 19(1), the Employment Equality Directive 2000/78/EC Article 10(1), and the Racial Equality Directive 2000/43/EC Article 8(1) all provide for the shift in the burden of proof.

The required standard of evidence to allocate the burden of proof in court ranges from "beyond a reasonable doubt" (almost 100% certainty that discrimination has occurred), down through a high degree of probability with "clear and convincing" standards of evidence, to the lower ranges of "preponderance of the evidence" and "substantial evidence". The more stringent the court is in accepting a shift in the burden of proof, the more difficult it will be for you to bring your case forward. Nevertheless, if you can demonstrate substantiated apparent unobjective treatment (i.e. prima facie discrimination), the mechanism of shifting the burden of proof should exonerate you and the claimant from achieving a full or high degree of satisfaction that discrimination has taken place. Nevertheless,

²⁶ 27/10/1993, C-127/92 Enderby.

²⁷ See CJEU 30/6/1988 Commission v France C-318/86; CJEU 17/10/1989 Danfoss C-109/77; and CJEU 27/10/1993 Enderby C-127/92.

²⁸ Council Directive 97/80/EC of 15 December 1997.

this does not entail full reversal of the burden of proof. It is relevant to note here that some equality bodies are quasi-judicial and therefore able to issue independent legal opinions or decisions and, in some cases, these are legally binding. Established by the EU Non-Discrimination Directives, such equality bodies may in some cases be more sensitized to the practice of shifting the burden of proof than traditional courts.

There are two main reasons why shifting the burden of proof is needed:

- a) adequate protection for the weaker side, and
- b) access to information that is typically in the sphere of the respondent (i.e. employer).

Such transparency and protection are a manifestation of the principle of equality before the law and the right to a fair trial.

Applied to cases of equal pay, this means that the claimant initially has to show that, on the balance of probabilities, the comparator is doing the same work or work of equal value compared to the claimant and that there is a difference in pay. If the claimant succeeds in this, the burden of proof falls on the respondent (employer) to prove that the difference in pay is not linked to sex discrimination.

In gender pay gap cases, you are not a researcher, evaluating whether or not there is a gender pay gap. Your purpose is to:

- Shift the burden of proof onto the employer;
- Use the respondent's lack of transparency to make the argument if necessary;
- Evaluate strategically how to establish the case. In other words, you must construct a theory of the case, which builds on elements available to the claimant on the one hand and possibly the respondent's insufficient collaboration or evidence on the other hand.

As mentioned in the introduction, wage transparency is a crucial issue in ensuring equality of pay.²⁹ The claimant may not know the salaries of his/her colleagues, or the system used for determining salaries in general (see Annex 1 for examples from CJEU case law). Any lack of cooperation in accessing this information can therefore be used to support a reasonable suspicion of discrimination, as unwillingness to disclose information on differences in pay or systems used to establish pay may suggest that transparency would reveal discriminatory practices.

Identifying the right comparator(s) can prove quite difficult in practice. From the experience of equality bodies and experts on equal pay cases, good ways to find comparators in equal pay cases include:

- Find a colleague of the opposite gender, who either does the same work or work of equal value and is paid more than the claimant. In practice, most often the comparator is currently working at the same workplace as the claimant, although according to CJEU case law, this is not necessarily required from a legal point of view.
- It is important to emphasize that it is the actual nature of the task, i.e. the content, that matters, not the name of the particular position and/or the same job category under a collective agreement³⁰. As mentioned above, the nature of the work performed, the quality and the quantity of work, the work conditions, the necessary qualifications, knowledge or skills, capacity, physical or mental effort, experience, responsibility, and the labour market conditions have to be considered. Education will only be relevant if it is a relevant requirement for the particular position.
- It can be helpful if the comparator supports the case as a witness – i.e. if s/he testifies that s/he does not know why s/he earns more than the claimant, or if s/he can confirm that the claimant performed well at work. The comparator may be assured that an equal pay claim is never about adjusting the comparator's salary down, but rather about adjusting the claimant's salary up.
- If available, other colleagues of the same sex as the claimant, who also earn less than the comparator, can serve as indirect comparators in terms of supporting the gender angle of the case;
- Check whether it might be applicable to make a cross-sectoral comparison. This is mainly feasible in cases where the sectors are in the same undertaking (i.e. municipality, state public sector)³¹. In this way one can compare, for instance, the work of a midwife with the work of a clinical technician³².

²⁹ See CJEU 17/101989 Danfoss C-109/77 and CJEU 27/10/1993 Enderby C-127/92.

³⁰ CJEU C-381/99 Brunnhofer, CJEU 237/85 Rummler.

³¹ The so called « single-source » doctrine as set up by the CJEU, cf. CJEU Allonby C-256/01.

³² See CJEU C-236/98 JamO

Depending on the complexity of the case and the number of discriminatory practices identified, you may wish to find a different comparator for each practice to strengthen your case, including the supporting witnesses mentioned above.

4.2 ARGUMENTS AND COUNTER-ARGUMENTS

The following section lists arguments that, according to the experience of equality bodies, have been used in existing cases by employers to explain unequal pay. Many of them could be successfully challenged, in some instances also by national courts. In addition, the CJEU case law on equal pay offers a number of counter-arguments. However, it must be noted that some of the arguments justifying unequal pay were accepted by the CJEU and as such, are not countered in the list below.

ARGUMENT 1: PROFESSIONAL SKILLS AND VOCATIONAL TRAINING

Professional skills and/or specific vocational training often serve as an explanation of differences in pay. Employers often find a detail in the CVs of the respective employees that gives them a reason for unequal pay. However, these differences are only valid if they are of importance for the given task/position³³. Regarding formal education and training, it is necessary to add that in many industrial sectors women are now at least as well educated as men – if not better. However, (lack of) access to vocational training affects career progression, an issue (amongst others) relevant to employees who are caregivers and thus may not be prioritized for promotion.

The Danish experience shows that more attention should be given to aspects of proportionality between this particular argument and the size of the pay difference. However, as an aspect of justification it is not yet well developed in case law.

ARGUMENT 2: AVAILABILITY

Availability is used as an argument in two ways.

First, as an argument suggesting that women are more likely to have family and caregiving related career breaks and thus won't stay in any given position for very long. Therefore, employers often decide to offer them lower salaries and lower positions. It is also a problem that once an employ-

³³ E.g. CJEU Wiener Gebietskrankenkasse, C-309/97.

ee wishes to return to her job, someone has already taken her previous position.

Second, there are also cases where bonuses paid to employees regarding their attendance at work indirectly discriminates against women due to the fact that they are more commonly caregivers than men. Therefore, men usually have higher attendance bonuses than women.

See also Argument 4 'Flexibility'.

ARGUMENT 3: THE TERMS OF EMPLOYMENT³⁴

There are some countries where – compared to earlier years - the value of the length of employment gradually decreases year by year. However, it varies depending on the given position, the skills required, and a number of other factors.

In contrast to this, other countries' experience shows that the length of job tenure is a common argument when justifying a higher salary. According to the CJEU, failure to include times of absence due to childcare (apart from maternity leave) when establishing the time served in order to rise to the next salary level is not considered indirect discrimination.³⁵ Moreover, periods of part time employment may have a negative effect on seniority as well, although it needs to be shown that it has an impact on the quality of the job performance in order to justify a difference in pay.³⁶

The argument 'terms of employment' in practice is often used in connection with 'work experience' or 'seniority'.

ARGUMENT 4: FLEXIBILITY (WORKING LONGER HOURS)

Working longer hours is rarely used, at least not explicitly, as it is considered wrong in some countries to expect employees to spend extra time at work. Nevertheless, "working longer hours" is sometimes reborn as « better performance». If this criterion corresponds to an evaluation of quality that is not favorable to women, the Danfoss case shows us that it qualifies

³⁴ Moreover, there is the particular problem that work which is mainly performed by women is still in many cases intrinsically considered to be of lower value. Such problems exist, for instance, in Norway, where there is a highly segregated employment market. The pay differences there are often justified by 'market value' arguments and 'historical differences.'
http://ec.europa.eu/justice/gender-equality/files/your_rights/gender_equality_law_33_countries_how_transposed_2013_en.pdf

³⁵ Cf. CJEU, Österreichischer Gewerkschaftsbund, C-220/02

³⁶ E.g. CJEU Danfoss 109/88, Nimz C-184/89, Gerster C-1/95. In its decision Hill and Stapleton C-243/95 the CJEU held that giving job-sharers who convert to full-time employment a point on the pay scale applicable to full-time

as a disadvantageous criterion for which the employer must demonstrate particular value to the specific work of the employee.

It is a fact that women still take a larger share of caring responsibility for dependent persons within the family unit³⁷ As such, they cannot be as "flexible" as their male colleagues.³⁸

A difference in pay due to flexibility is only justified if it is of importance for the actual tasks to be performed.

ARGUMENT 5: INDIVIDUAL BARGAINING POWER

In practice, differences in pay are often explained as being the result of the employees' individual salary requirements during the recruitment process.

In Austria, the Austrian Supreme Court decided that the fact that a woman expressed a lower salary requirement at her job interview than her male comparator, cannot justify different payment. In fact, it is the employer's responsibility to pay equally, since s/he is usually the one who can assess the performance of his/her employees, having information about the respective level of remuneration. In this particular case, the employer would have had the duty to remove any inequality in payment at the moment where the two were actually performing the same tasks (in this case after the claimant's learning period of two months).

In addition, the Court reasoned that in evaluating alleged discrimination on grounds of sex, the social environment cannot be ignored. From a statistical point of view, women in Austria are paid less than men. Women are also more frequently willing to accept lower paid work than men, particularly because women's work is generally regarded as less difficult and consequently ranking lower in job evaluations.

In a similar way, in Malta, the employer's argument that wages agreed upon freely in the absence of wage scales was successfully challenged. In the Czech Republic, the argument that optional parts of the wage could be paid as the employer wishes was likewise successfully challenged.

ARGUMENT 6: PERFORMANCE

According to many equality bodies' experience, the argument about poor or good performance has proven difficult to challenge successfully.

³⁷ [www.europarl.europa.eu/RegData/etudes/STUD/2016/556933/IPOL_STU\(2016\)556933_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556933/IPOL_STU(2016)556933_EN.pdf)

³⁸ E.g. CJEU Danfoss 109/88: work in shifts can justify pay differences if it is shown, that this flexibility is important for the performance of the job.

In Germany, the argument was that the male comparators in question had performed a more difficult job for a prolonged period of time in the past than the female claimants and that the male comparators' payment was therefore higher than that of the women. Since the salary adjustment in question was not performed within a reasonable time after commencing the more difficult work, the claimants could successfully challenge this argument.

However, it needs to be noted that the evaluation of performance may be subjective in some instances, unless there are objective, transparent criteria equally applied to the employees under comparison. According to the CJEU, the personal capacity or work performance may not lead to a higher salary right from the start of the employment relationship, since it can only be assessed subsequently.³⁹

ARGUMENT 7: MARKET FORCES OR MARKET VALUES

In the experience of equality bodies, this argument is used quite frequently to explain a difference in pay. In practice, it is often used in connection with Argument 5: Individual Bargaining Power.

It may justify a higher salary at the time of recruitment⁴⁰, but according to the CJEU, Swedish and Irish case law, the principle of proportionality needs to be taken into account, as the pay gap is supposed to gradually close/decrease over time if jobs are equal or of equal value.

However, it needs to be considered that the criterion of market value and bargaining power is likely to be subject to gender bias in various ways. The mere fact of being a woman often has a negative impact on 'market value', mainly because of the persistent gendered division of unpaid care work,⁴¹ and not least because women often face discrimination in career advancement and promotion. Stereotypical attribution may lead to the effect that male applicants are considered to be the ones the company 'needs', while women already working at the company are often not recognised. The 'market value' of an employee can also reflect his/her expected future performance.⁴²

39 Cf. CJEU Brunnhofer C-381/99.

40 Cf. CJEU Enderby C-127/92.

41 [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556933/IPOL_STU\(2016\)556933_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556933/IPOL_STU(2016)556933_EN.pdf)

42 Cf. CJEU Brunnhofer C-381/99.

ARGUMENT 8: RESPONSIBILITIES AND VALUE OF THE WORK

Sometimes pay differences are explained by a difference in responsibilities or (economic) value of the jobs that are compared. It may be necessary to carry out extensive job evaluations to contest the argument. As in all cases, according to the CJEU, the actual nature of the work is decisive.⁴³

In practice, employers often relate the value of work to the job holder rather than to the actual work performed. While CJEU case law is clear that the work performed is the decisive factor in fixing remuneration, it may be advisable to also keep in mind that assessment of personal characteristics of a job holder is often a subjective process, vulnerable to influence by gender stereotypes. The notion that certain tasks or responsibilities are worth more than others is likewise likely to carry a gendered bias. In Malta, the employer's argument that the responsibilities of male managers were more onerous compared to those of women was not successful, as the Commissioner found a case of unequal treatment, since the tasks and responsibilities of the female manager were deemed to be of equal value to those of her male counterparts.

See also Chapter 3.1. on Job Evaluation.

ARGUMENT 9: SALARIES ARE PAID ACCORDING TO COLLECTIVE AGREEMENTS

The notion that salaries are paid according to collective agreements does not automatically mean that the salary cannot be discriminatory. On the contrary, having a male and a female employee classified in the same job category under the collective agreement is not in itself sufficient

43 Cf. CJEU Rummler 237/85.

to conclude that they perform the same work or work of equal value⁴⁴.

In Ireland, this argument when used by an employer was successfully challenged.

ARGUMENT 10: ABSENCE DUE TO MATERNITY LEAVE, PARENTAL LEAVE OR PERIODS OF PART-TIME WORK

Maternity leave, paternity leave, parental leave or any other form of carers' leave, as well as part-time work, can affect salaries in various ways. Examples include the setting of the wage level/classification at the beginning of an employment relationship; the rise to the next pay grade; or the granting of bonus payments for times of absence. In most cases a reference to, at least indirect, discrimination on grounds of gender, suggests itself and needs to be thoroughly examined.

To what extent such a negative effect on the salary may be legitimate very much depends on the respective national legal framework.

In principle, according to the CJEU, times of absence due to maternity leave – in contrast to times of paternity leave – may not have a negative impact on elements of remuneration dependent on time, as this would constitute a case of direct gender based discrimination⁴⁵. For instance, bonus payments compensating for work done in the past may not be reduced by times of absence due to maternity leave⁴⁶ and a pay rise must also affect women on maternity leave.⁴⁷

Regarding the negative effect of care-related times of absence, as well as part-time work on the length of employment resulting in lower payments *see also argument 3*.

⁴⁴ Cf. CJEU Brunnhofer, C-381/99.

⁴⁵ See for instance CJEU Mayer C-356/03 for occupational security schemes.

⁴⁶ CJEU Lewen C-333/97

⁴⁷ CJEU Gillespie C-342/93

5. SANCTIONS, REMEDIES AND FOLLOW-UP

SANCTIONS AND REMEDIES

Alongside other criteria like accessibility, cost-risks, and the particular wishes and needs of the claimant, the type of sanctions available may influence the claimant's choice of which institution to lodge an equal pay claim with. In particular, where the range of sanctions goes beyond those available to a court of law, a decision by a national equality body or by another competent institution, if applicable in the national context, could constitute the best option.

As previously mentioned, national equality bodies in the equality infrastructure can have the role of either promotional or tribunal type (quasi-judicial) bodies. In addition, they differ very much with regard to their mandate and specific competences. Some equality bodies can issue sanctions themselves in cases where they find a breach of equality legislation and/or a respondent is non-compliant.⁴⁸

Before bringing an equal pay claim, you may want to consider whether there are other institutions that can issue sanctions and what type of sanctions and remedies are available in the given context. Additionally, victims of discrimination have very different aims and ideas of what they may wish to achieve with their equal pay claim.

Type of sanctions and remedies⁴⁹ to consider in consultation with the claimant include:

- individual compensation (material/immaterial damages)
- obligation to stop discrimination in the future
- order to the parties to reach an agreement
- fines/administrative sanctions
- structural remedies such as obligation to implement anti-discrimination/equality plans, audits or policies
- other sanctions (such as publication of the decision, stop public funding, suspension of business activities, etc.)

NOTE: *Always check whether the sanctions meet the requirements as set out by the EU Anti-Discrimination Directives: are they "effective," "proportionate" and "dissuasive"?*

⁴⁸ Among Equinet's members 8 national equality bodies are mandated to issue sanctions (BE, BL, FI, HU, LT, LI, PT, RO).

⁴⁹ For an overview of existing sanctions and remedies in discrimination cases see the Equinet report *The Sanctions Regime in Discrimination Cases and its Effects (2015)*, table p. 19

FOLLOW-UP

Following-up on the case as well as on the compliance with the measures imposed can contribute significantly to ensuring an effective and sustainable realization of equal treatment, both in providing remedy for the single victim of discrimination and fostering equality on a structural level.

Possible questions on available mechanisms for ensuring compliance you may want to consider in this context are:

- Is a court action advisable?
 - What are the time limits applicable?
 - What are the costs involved?
 - Are there any other procedural requirements?
- Is there a non-compliance penalty or fines that may be issued?
- Are there any other options to follow up? (Sending an inquiry to the employer, an obligation to report on improvements/changes, etc.)
- Are there specific institutions that can be involved? (Such as follow-up teams of equality bodies, public authorities, NGOs for taking on court costs, etc.)
- Is the compliance monitored ex-officio or does it need to be actively pursued by the claimant, the equality body or another institution?
- Is the publication of the decision and/or of non-compliance an option?
- If not: is it possible to report the case in an anonymized way?
- Can the media be involved?
- Are discrimination cases recorded in national statistics?
 - Who provides the data (the courts, the equality bodies, other authorities)?
 - What details are registered?
 - Is the data (publicly) available?

Check the questions above with regards to the following:

- Do the mechanisms differ with regard to the type of sanction? (See above : compensation, structural recommendations/obligations, etc.)
- Does the relevance of the case influence the choice of mechanism? (e.g. How many potential victims are concerned? Is it a test case? An important new legal decision?)

ANNEX 1

EXAMPLES FROM CJEU AND NATIONAL CASE LAW

DISCLAIMER

In this Annex to the Equinet Handbook on How to Build a Case on Equal Pay, you will not only find a short summary of Court of Justice of the European Union (CJEU) case law concerning equal pay, but also some selected examples of cases and quasi-judicial decisions of 13 equality bodies related to their own experience with equal pay. The text includes a few comments on the competence of equality bodies in that context. The Handbook has the modest ambition to be a practical and useful manual on how to build a case for lawyers and other professionals dealing with equal pay cases in the field of non-discrimination law. This Annex does not contain an exhaustive list of CJEU case law, nor does it contain the full complexity of equality bodies' experiences with equal pay related cases. But the list of cases which the authors have compiled could offer interested readers a representative sample of the outlined topic.

DEVELOPMENT OF CJEU CASE LAW FOCUSED ON OR RELATED TO EQUAL PAY (THE FORMER ARTICLES 119 AND 141 EC TREATY AND CURRENT ARTICLE 157 TFEU ARE THE PROVISION IN QUESTION)

SUMMARY TABLE OF CJEU CASES ⁵⁰

CASE CODE	CASE NAME
CJEU, 8 April 1976, C-43/75	Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena
CJEU, 27 March 1980, C-129/79	Macarthy's Ltd v Wendy Smith
CJEU, 31 March 1981, C-96/80	J.P. Jenkins v Kingsgate (Clothing Production) Ltd.
CJEU, 9 February 1982, C-12/81	Eileen Garland v British Rail Engineering Limited
CJEU, 1 July 1986 C-237/85	Gisela Rummler v Dato-Druck GmbH
CJEU, 13 May 1986, C-170/84	Bilka - Kaufhaus GmbH v Karin Weber von Hartz
CJEU, 4 February 1988, C-157/86	Mary Murphy and others v An Bord Telecom Eireann
CJEU, 13 July 1989, C-171/88	Ingrid Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co. KG
CJEU, 17 October 1989, C-109/88	Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss
CJEU, 17 May 1990, C-262/88	Douglas Harvey Barber v Guardian Royal Exchange Assurance Group
CJEU, 7 February 1991, C-184/89	Helga Nimz v Freie und Hansestadt Hamburg

⁵⁰ For a more detailed overview of landmark case law of the CJEU on equal pay broken down by topic, please refer to http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/swd-2013-512-final_en.pdf

CJEU, 4 June 1992,
C-360/90

[Arbeiterwohlfahrt der Stadt Berlin e.V. v Monika Bötzel](#)

CJEU, 27 June 1990,
C-33/89

[Maria Kowalska v Freie und Hansestadt Hamburg](#)

CJEU, 9 November 1993,
C-132/92

[Birds Eye Walls Ltd. v Friedel M. Roberts](#)

CJEU, 27 October 1993,
C-127/92

[Dr. Pamela Mary Enderby v Frenchay Health Authority and Secretary of State for Health](#)

CJEU, 31 May 1995,
C-400/93

[Specialarbejderforbundet i Danmark v Dansk Industri, formerly Industriens Arbejdsgivere, acting for Royal Copenhagen A/S.](#)

CJEU, 15 December 1994,
joined cases C-399/92,
C-409/92, C-425/92,
C-34/93, C-50/93 and
C-78/93

[Stadt Lengerich v Angelika Helmig and Waltraud Schmidt v Deutsche Angestellten-Krankenkasse and Elke Herzog v Arbeiter-Samariter-Bund Landverband Hamburg eV and Dagmar Lange v Bundesknappschaft Bochum and Angelika Kussfeld v Firma Dettlef Bogdøl GmbH and Ursula Ludewig v Kreis Segeberg.](#)

CJEU, 13 February 1996,
C-342/93

[Joan Gillespie and others v Northern Health and Social Services Boards, Department of Health and Social Services, Eastern Health and Social Services Board and Southern Health and Social Services Board](#)

CJEU, 17 June 1998,
C-243/95

[Kathleen Hill and Ann Stapleton v The Revenue Commissioners and Department of Finance](#)

CJEU, 21 October 1999,
C-333/97

[Susanne Lewen v Lothar Denda.](#)

CJEU, 30 March 2000,
C-236/98

[Jämställhetsombudsmannen v Örebro läns landsting](#)

CJEU, 26 June 2001,
C-381/99

[Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG](#)

CJEU, 17 September 2002,
C-320/00

[A. G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd.](#)

CJEU, 13 January 2004,
C-256/01

[Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment.](#)

CJEU, 27 May 2004,
C-285/02

[Edeltraud Elsner-Lakeberg v Land Nordrhein-Westfalen.](#)

CJEU, 12 October 2004,
C-313/02

[Nicole Wippel v Peek & Cloppenburg GmbH & Co. KG.](#)

CJEU, 8 September 2005,
C-191/03

[North Western Health Board v Margaret McKenna](#)

CJEU, 9 December 2004,
C-19/02

[Viktor Hložek v Roche Austria Gesellschaft mbH](#)

CJEU, 3 October 2006,
C-17/05

[B. F. Cadman v Health & Safety Executive](#)

CJEU, 18 June 2009,
C-88/08

[David Hütter v Technische Universität Graz](#)

The case law of the CJEU developed from initially covering the basic provision on equal pay for men and women. As in the landmark case of Van Gend en Loos, which opened up for "direct effect" generally of Community legislation, Defrenne II (43/75) stipulated that equal pay claims could also be brought directly before national courts. In the Defrenne case of 1976, the CJEU pointed out that the scope of the European equal pay provisions is restricted to discrimination originating from legal provisions or collective agreements, or where a male and female employee receive unequal pay for work of equal value performed in the same establishment or company.⁵¹ Where the complainant has shown that s/he earns less for work of equal value, the employer will have to prove that the pay difference is justified by objective reasons.

In order to establish whether the work in question is work of equal value, the case law of the CJEU suggests that the following three steps⁵² should be considered to establish whether discrimination has occurred:

- 1) Find a comparator
- 2) Evaluate the work to establish whether it is work of equal value
- 3) In case of indirect discrimination, evaluate whether there are objective reasons justifying a difference in pay

By doing this, some challenges to identifying pay discrimination become clear. How likely is it for an individual employee to find an actual comparator, assess the value of the job performed by this comparator, and determine the exact earnings s/he receives for it? Selecting a comparator among close colleagues performing the same job seems possible. Furthermore, if the complainant is employed in a female-typed job, a suitable comparator of the opposite sex performing the same work may be lacking.

Not only can the process of finding a suitable comparator have its pitfalls, but the next steps of assessing equal value and equal pay can likewise be difficult tasks. Job evaluation is a complicated process requiring professional knowledge and experience. Moreover, when scrutinizing the employer's justification, one has to have clear insight into the common structures for job classification and remuneration and their interrelationship. It sometimes appears that even the CJEU is not familiar enough with these structures. The Brunnhofer case⁵³ represents a good example of this. This example

⁵¹ Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, C-43/75 [1976] ECR I-455.

⁵² For more details about how to proceed with these steps, please see Chapter 3 (on job evaluation and what to ask a respondent) and Chapter 41 (on finding the right comparator and shifting the burden of proof).

⁵³ Susanna Brunnhofer v Bank der österreichischen Postsparkasse AG., C-381/99 [2001] ECR I-4961.

furthermore shows that the CJEU sometimes seems to make it needlessly difficult to apply equal pay standards both for the employee and the employer.

COMMENTARY ON THE BRUNNHOFER CASE (CRITERION OF TRANSPARENCY) (CJEU, 26 JUNE 2001, C-381/99):

Ms. Brunnhofer and her male colleague worked at an Austrian bank. They performed the same job and their basic wages coincided with exactly the same level in the same salary class provided for in a collective agreement. Furthermore, both employees were entitled to exactly the same overtime allowance. There is only one difference left. When hired, the male colleague was awarded an extra monthly personal allowance, making him earn more. The employer justified this pay difference by stating that the performance of the male employee was better and that his job entailed more responsibility.

The CJEU ruled, as it had done before, that in establishing equal work one should assess whether the employees are in a comparable situation in respect of the nature of the job, the skills required and the working conditions applied. In the Brunnhofer case, one could opine that the employer's argument that the male employee performed more responsible tasks should have been accepted. The CJEU did not refer to this, but rather decided that a personal factor such as the performance of the jobholder cannot be a part of the assessment of equal value. The latter seems obvious, as performance is a person-related pay element while the concept of work of equal value concerns the nature of the work only, and should therefore be assessed irrespective of the qualifications of the jobholder.

The arguments of the CJEU were developed in quite a different way, having an unforeseen effect. The CJEU argued that because Article 119 EC Treaty (later Article 141 EC, current Article 157) attributes the right to equal pay for performing the same work, the individual performance by the jobholder cannot be taken into account at all. The CJEU, referring to the arguments of the European Commission, even stressed that where both employees perform the same job, a pay difference according to the performance of the jobholder would only be possible by assigning different tasks to the employee or changing his/her job.

The latter consideration of the Court seems to lack sufficient insight into pay systems commonly applied at the national level. Although the jobholder's performance should not be part of assessing the equal value of jobs, it can nevertheless constitute an objective factor in assessing equal pay. So were we to take this consideration of the CJEU seriously, meaning a better personal performance cannot be remunerated without a change of job, then all or most of the national remuneration systems would be contrary to Community law. Most systems rank jobs of equal value into the same salary class. However, the jobholders within the same salary class do not have to earn exactly the same amount of money precisely because of the person-related pay elements. By being awarded an extra periodical allowance or pay increase, jobholders are often compensated for seniority, performance, irregular working hours or expenses. The latter does not change the nature or value of the work performed.

Compliance with equal pay standards is not furthered when employers have to meet rather incomprehensible conditions for national pay systems. However, not only employers, but also

the national court is sometimes given a difficult task by the CJEU. Despite the fact that the work performed by Ms. Brunnhofer and her colleague were evaluated and ranked equally on the basis of a collective agreement, the CJEU nevertheless demanded the national court to start all over again and re-evaluate the jobs irrespective of the collective agreement. As said before, job evaluation requires professional knowledge and experience.

A last point in the Brunnhofer case that needs to be addressed is the assignment of the burden of proof. Consistent with its earlier case law,⁵⁴ the CJEU decided it is up to the complainant to show the work is of equal value, unless this would be impossible on the grounds that the pay system is wholly lacking transparency. According to the CJEU, the Brunnhofer case does not present such a lack of transparency, so it is up to the complainant to show the work involved are of equal value.

At this point, job-related and person-related pay elements again seem to be mixed up, putting the complainant at a disadvantage. The pay system may be transparent in respect of the evaluation and ranking of jobs (the issue of equal value). Does the same hold true in respect of the person-related pay elements, such as extra allowances (the issue of equal pay)? How is Ms. Brunnhofer to defeat the argument of the employer that her colleague is awarded an allowance because of his personal performance when relevant criteria for the award of allowances seem to be lacking? Neither the CJEU nor the employment conditions in the collective agreement refer to any, although the main questions to be answered would be:

- What are the criteria applied for awarding a personal allowance?
- Are these criteria objective and not (indirectly) discriminatory?
- And do they explain why Ms. Brunnhofer is not entitled to such an allowance?

Based on the facts included in its decision, the CJEU had no apparent reason to conclude beforehand that the specific, national pay system was transparent. Therefore, it cannot be ruled out that the employer in this case would have had to identify the objective criteria for awarding extra allowances to employees. Merely arguing that a pay difference between employees is due to a difference in performance would in that case not satisfy the Community equal pay standards.⁵⁵

An earlier well-known case, Barber⁵⁶, showed that the principle of equal pay has to be applied to all components of remuneration, including various specific benefits, protecting employees of both sexes equally. Work of equal value was also the key problem in the case of Murphy, C-157/86 [1988] ECR I-632. In a more recent case, B. F. Cadman, C-17/05, the CJEU ruled that Article 141 EC is to be interpreted as meaning that, where recourse to the criterion of length of service as a determinant of pay leads to disparities in pay in respect of equal work or work of equal value between men and women, the following is to be included in the comparison⁵⁷:

"Since, as a general rule, recourse to the criterion

⁵⁵ In this particular case, the ECJ did rule that the performance allowance was not in line with Community law because the allowance was already awarded at the moment of hiring when the employer could not yet have any knowledge about the performance level of the employee.

⁵⁶ C-262/88, Douglas Harvey Barber v Guardian Royal Exchange Assurance Group, 1990 I-01889.

⁵⁷ David Hütter v Technische Universität Graz, C-88/08, 2009 I-05325 (length of professional service in this case was related to age discrimination: exclusion of professional experience acquired before the age of 18).

⁵⁴ Handels- og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss, C-109/88 [1989] ECR I-3199.

of length of service is appropriate to attain the legitimate objective of rewarding experience acquired which enables the worker to perform his duties better, the employer does not have to establish specifically that recourse to that criterion is appropriate to attain that objective as regards a particular job, unless the worker provides evidence capable of raising serious doubts in that regard:

where a job classification system based on an evaluation of the work to be carried out is used in determining pay, there is no need to show that an individual worker has acquired experience during the relevant period which has enabled him to perform his duties better.”

The CJEU also developed a theory of so-called “single source” (i.e. single source of remuneration compared employees) and defined it in the case *Allonby*.⁵⁸ The CJEU declared that nothing in the wording of Article 141(1) EC suggests that the applicability of that provision is limited to situations in which men and women work for the same employer. Where the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source (e.g. a single employer), no one can be held accountable for the inequality and thus no one is able to restore equal treatment. However, applicability of the equal pay principle must be presumed in cases of associated employers (where one company has direct or indirect control over the other); where it is therefore legitimate to compare working places across that same employer.

⁵⁸ *Debra Allonby v Accrington & Rossendale College, Education Lecturing Services, trading as Protocol Professional and Secretary of State for Education and Employment*, C-256/01, 2004 I-00873.

INDIRECT DISCRIMINATION

CJEU case law shows that indirect discrimination may be justified by objective reasons. The starting point is that differential treatment is an expression of discrimination, unless it can be shown that such treatment is justified in objective terms. The leading case is still *Bilka*⁵⁹, where the CJEU ruled that Article 141 EC Treaty is infringed by an undertaking which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex. Such factors may lie in the fact that the undertaking seeks to employ as few part-time workers as possible, where it is shown that this objective corresponds to a real need on the part of the undertaking, and the means chosen for achieving it are appropriate and necessary.

The CJEU thus requires three conditions to be met:

- there must be a real need for the employer to apply the “suspect” criteria;
- the means chosen by the employer must be necessary to achieve this goal;
- the means must be appropriate: that is, there must be a reasonable proportion between the end and the means.

The *Bilka* test is based on the application of the principle of proportionality.

How far the CJEU had ruled equal pay in the sense of the scope of Article 157 TFEU or its predecessor Article 141 EC (Article 119 EC) could be illustrated by the three cases described below (all these rules are still applied).

⁵⁹ *Bilka-Kaufhaus GmbH v Karin Weber von Hartz*, C-170/84, 1986 I-01607.

C-342/93 GILLESPIE AND OTHERS V. NORTHERN HEALTH AND SOCIAL SERVICES BOARDS 1996 ECR I-475

In the following case, about seventeen complainants, from different Northern Irish Health Services, brought a complaint against their employers due to the amount of payment they got during their maternity leave. During the year 1988, the complainants were on maternity leave. But in November 1988, some collective negotiations in the health sector led to a pay increase backdated to 1st of April. Because of a calculation method based on the General Council Handbook, the complainants couldn't get a salary increase. The pay was based on the average weekly payment of the employees during the last two months prior to their maternity leave. Due to the fact that the employment agreement was based on a collective agreement, which stated that the employees earn the full weekly pay for the first four weeks of their maternity leave, for the next two weeks they earn 90% of their full weekly pay, and for the final twelve weeks only half of their full weekly pay. So in 1989, the complainants argued that they were discriminated against because of their sex according to Article 119 in connection with Directive 75/117 EC.

Based on legal restrictions and on collective agreements, the services an employer has to pay his employees during maternity leave represents remuneration within the meaning of Article 119 EC in connection with Directive 75/117EC. In the case of a salary increase, the employees have the right to a wage increase if they are on maternity leave at the time of the increase. Employees on pregnancy-related absence from work have the right to the same monetary increase as their colleagues in the company. Finally, it should be recalled that all pay during maternity leave is based on the employment relationship and therefore constitutes pay under Article 119 of the Treaty and Directive 75/117.

C-313/02 WIPPEL V. PEEK & CLOPPENBURG GMBH & CO. KG.

In September 1998, Ms. Wippel and Peek & Cloppenburg (P & C), concluded a service contract in the form of a «framework agreement on employment service on demand». It agreed the extent and the organization of work on a case-by-case basis between the parties. P & C only offered Ms. Wippel the prospect of working about three days per week and two Saturdays per month. But her contract of employment hadn't recorded any number of hours to be worked, and as such Ms. Wippel worked irregularly, having only the option to accept or refuse the work time offered to her. Ms. Wippel

regarded this uncertainty in the contract as unequal treatment in comparison to full-time employees. Ms. Wippel brought proceedings against P & C to compensate for the monthly difference between the pay for her actual working hours and the working hours that could have been required, had she worked the maximum amount of hours.

In this case, the court had at first to clarify the question whether the underlying contract is a regular employment contract, which falls within the scope of Directive 76/207 and the principle of equal treatment between men and women, particularly in relation to working conditions, or whether such a contract falls under Article 141 EC and Directive 75/117, which concerns the principle of equal pay for men and women.⁵⁸ The CJEU stated that the contract of employment concerned only fell under the scope of the Equal Treatment Directive 76/207/EEC. . The scope of Article 141 EC and Directive 75/117/EEC was not applied because the financial consequences were deemed to result from the type of contract (i.e. "work on demand" with the possibility to opt out of work offered), while the provisions in Article 141 EC and Directive 75/117/EEC are based on a close link between the nature of the work performed and the worker's pay.

C-191/03 NORTH WESTERN HEALTH BOARD V. MCKENNA 2005 ECR I-07631

The CJEU ruled that no discrimination based on sex had taken place, as it did not deem it to follow from Community law that a worker absent due to a pregnancy-related illness is entitled to a full salary during her absence from work, including when national legislation does not entitle a worker absent due to an illness unrelated to pregnancy to a full salary during any absence from work.

The Court held that a reduction in salary after a certain amount of absence therefore did not constitute discrimination, insofar as the reduction in wages was not so severe as to undermine the Community law objective of protecting female workers, in particular before giving birth. The Court also held that sick leave, irrespective of whether the illness is linked to pregnancy, can be offset from the total number of paid sick leave that an employee can claim within a specified period.

The Court held that the McKenna case falls within the scope of Article 141 EC and Directive 75/117/EEC on the approximation of the laws of the Member States concerning the application of the principle of equal pay for men and women.⁶⁰ However, the court ruled that pay in the sense of Arti-

60 Northwester Health Board v. Margaret McKenna, CJEU, 8 September 2005, C-191/03

cle 141 EC and Directive 75/117 does not fall within the scope of Directive 76/207/EEC, as the second recital in the preamble of the latter Directive defines pay as falling under the scope of Directive 75/117⁶¹.

PARENTHOOD has been another area of concern for the Court. Women can be given extra benefits during maternity without this being considered unequal, given their situation being different from that of men (Abdoulaye et al v Renault, 218/98). The Court has also delimited the scope of equal treatment and what benefits may legitimately be given solely to pregnant women in some cases (Krüger, 281/97 and Gruber, 249/97). Another issue has been the concept of "breadwinner", where the man typically has been seen by Member States as the head of the family. Already in Sabbatini (1971), the Court pronounced this to be an illegitimate basis for a rule. The procedural aspects of discrimination on the basis of sex are of particular importance and interest. The standard and **BURDEN OF PROOF** is essential for redressing inequality. The Court decided in Danfoss (109/88) that if there is a non-transparent pay-structure and statistical evidence shows a difference in pay for men and women, the burden of proof shifts to the employer to justify the difference on grounds other than sex. Similar subsequent cases have called for "significant statistics" suggesting discrimination (Enderby, 127/92, see above). Also, in the case of **INDIRECT DISCRIMINATION**, if criteria set to justify a level of pay give a significantly lower percentage of women higher pay, this is discrimination unless other factors serving "a legitimate aim" can account for the result. Among the procedural aspects is effective implementation. The Court has called for the guarantee of "real and effective" judicial protection with a "deterrent effect" (Von Colson, 14/83). A right to compensation has also been established (Marschall, 271/91).

LITERATURE AND OTHER SOURCES USED:

- Anna Grasmik. EU sex discrimination law and the principle of equal pay. www.grin.com/en/e-book/190764/eu-sex-discrimination-law-and-the-principle-of-equal-pay
- Jonas Grimheden. Case Law from Europe on Gender Equality. Paper for the Network Seminar on Gender and Law, Beijing, 26-27 September 2004, forming part of the EU-China Human Rights Network.
- Dagmar Schieck and Victoria Chege. European Union Non-Discrimination Law. Comparative perspectives on multidimensional equality law. Simultaneously published in the USA and Canada by Routledge-Cavendish 270

61 "Whereas, with regard to pay, the Council adopted on 10 February 1975 Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women;" Council Directive 76/207/EEC

Madison Ave, New York, NY10016, 2009.

• Dr. Albertine G. Veldman. Strengthening the effects of community equal pay legislation or why established equal pay standards have little impact on the pay gap in the EU labour market.⁶²

• Quasi-judicial decisions: examples and useful comments given by following equality bodies (different competence of each equality body and experience to be shared)

1. Austria – Ombud for Equal Treatment
2. Belgium - Institute for the Equality of Women and Men
3. Czech Republic – Office of the Public Defender of Rights, Division of Equal treatment
4. France – Defender of Rights
5. Germany – Federal Anti-Discrimination Agency (FADA)
6. Greece – Greek Ombudsman
7. Hungary – Equal Treatment Authority
8. Ireland – Irish Human Rights and Equality Commission
9. Malta – National Commission for the Promotion of Equality (NCPE)
10. Portugal – Commission for Equality in Labour and Employment (CITE)
11. Serbia – Commission for the Protection of Equality
12. Slovakia – National Centre for Human Rights
13. Sweden – Equality Ombudsman

SELECTION OF CASES HANDLED BY NATIONAL EQUALITY BODIES IN EUROPE

WORK OF EQUAL VALUE

Institute for the Equality of Women and Men, Belgium Labour Court Liège, 9.2.2011:

Two spouses were hired as caretakers in a company. The husband's contract entrusted him with additional tasks as a «handyman», while the contract of the woman included tasks as «cleaning staff». The employer broke their contracts and the spouses challenged their dismissal, formulating various requests, amongst others concerning gender equality.

In this respect, the labour court decided that the activity of caretaker of the woman was the same as that of the husband, so that the employer could not pay her less than him. But, without examining the case, the judgment

⁶² Published by the Migration Policy Group and available online at: http://www.migpolgroup.com/archive/public/docs/64.EqualPayandworkingConditions_3rdExpertsmeetingReport_EN_23-24.06.03.pdf

says that her other tasks were not of equal value to those of her husband, and that there was no discrimination at this level.

Note: this case also had implications for gender equality in access to social security schemes.

Greek Ombudsman, Greece⁶³

A female employee was hired in a hospital as ambulance crew, but also worked as a driver. She complained to the Greek Ombudsman as she was the only one hired as an ambulance driver, who did not receive the allowance provided for dangerous and unhealthy work, despite pursuing the same tasks as her male colleagues. She had submitted a question on the issue to the hospital where she worked, but did not receive an answer. Having investigated the case, the Greek Ombudsman formed the opinion that the employee performed equal work to her colleagues and was therefore entitled to equal pay. In the end, the Greek Ombudsman notified the hospital that the allowance for dangerous and unhealthy work should also be paid to the female employee. Eventually, the hospital paid the allowance, also for the previous months.

Equal Treatment Authority, Hungary EBH/1359/2009:⁶⁴

The applicant complained that for a certain time her wage had been lower than the men doing the same work as her, and that this practice was not changed when she became head of a group of three employees. The majority of the work was the same. The applicant's salary was only defined by her gender, which was confirmed by the fact that her woman colleague had the same problem.

⁶³ The Greek Ombudsman mediates between employers and employees in equal pay cases. The Greek Ombudsman's findings report has proven useful for victims of discrimination who use it before courts. But the Ombudsman cannot represent the victim in court proceedings. DIRECT DISCRIMINATION has not been found in any case.

⁶⁴ The Authority is a quasi-judicial body entitled to issue binding decisions, against which the parties can file a claim for review before the competent courts. The related Act regulates 'actio popularis', as follows:

Act CXXV. of 2003, Article 20 sec.

(1): A lawsuit under personal or labour law because of a violation of the principle of equal treatment before the court may be instigated by

a) the Public Prosecutor,

b) the Authority, or

c) NGOs and interest representation organisations, if the violation of the principle of equal treatment or a direct threat of the violation was based on such a characteristic that is an essential feature of the individual, and the violation of law or a direct threat of the violation affects a larger group of persons that cannot be determined accurately.

(2) The Authority immediately erases all those personal and special data whose handling is not ineluctably necessary for exercising its authority laid down in Paragraph 1).

The respondent stated in his defence that there was a great difference between the quality and quantity of work performed by the Applicant compared to her male colleagues. The respondent emphasized that the applicant and her colleagues do other parts of the same work process, and it is the employer's prerogative to decide which one is more important.

In the course of the procedure, the applicant proved that as the statistics show, her employer discriminated against the women employees. Following this, the burden of proof fell on the employer to demonstrate that the arrangement of the payroll was based on factual analysis and was not discriminatory. Although it is the employer's task to decide how difficult each work process is, the decision has to be based on objective criteria.

There are specific European norms to define discrimination objectively, meeting the requirements of the EUCJ. The opinion of the employer that a difference of HUF 30,000-40,000 between the salaries of the employees was negligible, is unacceptable and not in line with European practice. The argument that there had not been enough money for a raise was not credible, as the male colleagues of the applicant had been given raises.

Based on the evidence provided, it can be concluded that the respondent violated the obligation of equal treatment as the payment of the employees was independent of the nature, quality and amount of their work, their qualifications, the effort needed, and their experience. The attitude of the employer was based on a stereotype ("she will do the job for a lower salary as well"), which goes against the mainstream of Hungarian and international law.

The applicant worked for the same pay in a leading position, while her male colleague said he never considered her to be his superior: he worked for a higher salary and more independently than her. The payment system of the employer was not transparent, was not based on objective conditions, and the principle of equal pay was not observed. In light of the above, the Equal Treatment Authority concluded that the respondent violated the obligation of equal treatment in treating the applicant less favourably than her male colleagues doing the same work, and paid her less. The Authority also determined that during the course of the procedure, the respondent offered the applicant a part time job, which led to the termination of her contract. The Authority concluded that it was a retaliatory measure by the employer. (1395/2009.)

DIFFERENT BENEFITS

Institute for the Equality of Women and Men, Belgium, Labour Court Brussels, 22/09/1992 and Cass 20/06/1994:

In the judgments concerning the numerous appeals about the different benefits granted by Sabena to its female and male aircrew, the Court stated that the discrimination should be eliminated by bringing the remuneration into line with the pay of the sex who earns the most. The elimination of discrimination must not breach the rights of workers who are not discriminated.

EQUAL PAY

Office of the Public Defender of Rights (Division of equal treatment), Czech Republic

This case is about a female head physician in a hospital (private legal person). In 2013 the Public Defender of Rights was consulted in the case of Ms. M. S., a head physician in a hospital, with a complaint concerning possible discrimination in remuneration. The complaint was based on a finding that she was earning considerably less than her male colleagues, receiving approximately half of the wages of her male colleagues in comparable positions (in the same workplace).

Since a legal proceeding had been initiated, the Public Defender of Rights did not open an inquiry. However, as part of its authority to oversee respect for equal treatment legislation, the Public Defender offered its legal opinion to the attorney of Ms. M. S.

The Defender came to the conclusion that in case a female employee proves a difference in remuneration compared to her male colleagues performing work of equal value, it is up to the employer to offer evidence that the difference was not connected to the gender of the

employee. If the employer remunerates its employees according to a system which fully lacks transparency, the employer has to prove the neutrality of the system and that it does not lead to discrimination in potential legal proceedings.

Hungarian Equal Treatment Authority, Case EBH/577/2013:

The claimant turned to the Authority with the claim that her employer paid her a lower salary than her male colleagues working in the same position. She had been working for the legal predecessor of her employer since November 2001. As of January 2010, she entered into a new position and began working as a fleet operator in the franchise unit division. In this position, her actual duties included liaising with her employer's franchise partners, drafting vehicle lease contracts, reviewing freight bills and other bills of costs, and handling customer complaints.

Later in 2010, J.V. and I.V. - both men - were added to the staff of the franchise unit division. The claimant submitted that they were all charged with the same responsibilities. Of the 17 partner companies divided among them, she handled 7, while J.V. liaised with 6 and I.V. with 5. The claimant alleged that her male colleagues received a net salary that was over HUF 100,000 higher than her own, despite the fact that they were all employed in the same position and performed the same tasks. The claimant further informed them on 13 June 2013, that her employer terminated her employment contract, citing internal reorganisation.

During the proceedings, the respondent submitted that it had continually raised the claimant's salary, and that, moreover, it had awarded her with periodical bonuses and loyalty premiums. Thus the employer assessed that it had not

violated the requirement of equal treatment. Before terminating her employment, it had offered the petitioner another position, which she had rejected.

With regard to the employee IV., the employer submitted that he held certain certifications, and was therefore a more highly trained member of staff than the claimant. Moreover, he had been employed by the company for 19 years, had held managerial positions in several areas, which is why the company often relied on his managerial experience and more extensive training (as compared to the petitioner).

With respect to JV., the employer acknowledged that his base salary had been higher than that of the claimant, but as a reason it invoked that unlike the claimant, he was an employee who speaks Russian and holds a university degree, and the employer can apply his professional expertise more widely than the claimant's training and experience.

The Authority determined that the respondent failed to show that the claimant and her colleagues had discharged different functions, and was also unable to show that the value of the work performed by the male colleagues exceeded that of the claimant. The respondent also failed to discharge the burden of proof, because it had not provided documents to show that the positions held by the three employees differed from one another, since it had failed to submit their respective job descriptions. Furthermore, the evidentiary procedure conducted also substantiated the claim that they essentially had the same responsibilities. Thus the Authority determined that the respondent had violated the requirement of equal treatment by engaging in direct discrimination against the claimant in respect of her female gender, in the context of setting and providing her salary.

Irish Human Rights and Equality Commission⁶⁵

In **Kennedy -v- Thurles Golf Club⁶⁶**, the competent equality officer⁶⁷ found that the claimant and the comparator performed work of equal value in the bar of the golf club. The equality officer then considered whether there

⁶⁵ The Irish Human Rights and Equality Commission is not a quasi-judicial body, but can represent individuals in equality cases, can appear as *amicus curiae* and provide legal submissions and legal advice.

⁶⁶ Equality Authority Annual Report 2001.

⁶⁷ The equality officers were the case workers deciding cases in the former Equality Tribunal, and their functions are now performed by adjudication officers in the Irish Workplace Relations Commission: https://www.workplacerelements.ie/en/Publications_Forms/Guide-to-Procedures-in-Employment-Equality-Cases.pdf Where reference is made to equality officers in the text, the case was handled by the former Equality Tribunal.

were grounds other than gender justifying the difference in pay. Thurles Golf Club argued that the fact the comparator worked four nights per week, whereas the claimant worked only one night was a reason unrelated to gender for the difference in pay. The equality officer did not accept this argument and found that the time at which the work was carried out did not constitute a ground other than gender.

In **O'Brien v Computer Scope Limited DEC – E2006 – 030⁶⁸**, the claimant was represented by her trade union, the National Union of Journalists. The claimant, through her Union, sought advice from the Equality Authority on her complaint. The claimant claimed that she was not paid commensurate with her position as an assistant editor and was paid less than two older male colleagues for doing like work. The claimant also claims that she was victimized, as the respondent did not offer her freelance work.

The claimant had a dedicated third level qualification in journalism and her experience included work with a national newspaper. She also had the specialised technical skills of a sub editor. A male colleague of hers, on behalf of the respondent, tried to convince her not to proceed with her complaint.

The respondent submitted that the issue of like work with one of the comparators was not in question; however, the issue was superseded by market conditions and the company's financial situation. The respondent disputed the complainant's claim of like work with the other named comparator. The respondent also denied that it victimised the complainant by not offering her freelance work.

The respondent's submission that the claimant accepted her new role without a salary increase was found to be irrelevant by the competent equality officer, "as it is not possible to contract out of the requirements of the Employment Equality Acts 1998 and 2004". The equality officer also referred to the judgement of the Court of Justice of the European Union (CJEU) in the Brunnhofer case. In relation to setting starting salaries, the CJEU considered, inter alia, the issue of the effectiveness of an employee's work relative to that of a colleague in relation to the question of objective justification for the difference in pay. It stated: "...it follows..that circumstances linked to the person of the employee which cannot be determined objectively at the time of that person's appointment but come to light only during the actual performance of the employee's activities such as personal capacity or the effectiveness or quality of the work actually done by the employee, cannot be relied upon by the employer to justify the fixing,

⁶⁸ Equality Authority Annual Report 2005

right from the start of the employment relationship, of pay different from that paid to a colleague of the other sex performing identical or comparative work."

The equality officer stated that it did not appear that the claimant's ability in the job was an issue. She found that there was no objective justification for the difference in pay and she found that the respondent failed to rebut the claimant's claim of discrimination on the gender and age grounds in relation to her pay. The equality officer found that the respondent did discriminate against the claimant. She found that the claimant was treated in an adverse manner by her employer as a reaction to raising the issue of equal pay. She therefore upheld the claimant's claim of victimisation in relation to being intimidated by a colleague on behalf of the respondent to withdraw her claim. She also found that the claimant was victimised by the respondent in not offering her freelance work. The equality officer ordered that the respondent (i) pay to the claimant the same rate of remuneration as that paid to the comparator, (ii) pay the claimant the sum of €5,000 compensation for the effects of the discrimination, (iii) pay the claimant the sum of €10,000 compensation for the effects of the victimisation, (iv) pay the claimant interest at the Courts Act rate in respect of half of the amount of equal pay due to her and in respect of half of the compensation for the discrimination and, (v) draft an Equal Opportunities Policy.

In **A Worker v A Company**⁶⁹, the claimant, who is a warehouse worker, had consistently been paid less than other male warehouse workers in the company. She alleged that she was doing the same work or work of more value than the relevant comparators. She alleged further that despite raising this issue directly with her

69 Equality Authority Annual Report 2007

employer they refused to address the disparity. After advice from the Equality Authority, the matter was resolved to the claimant's satisfaction.

National Commission for the Promotion of Equality (NCPE), Malta :⁷⁰

NCPE investigated one case related to equal pay – a female manager alleged that she was receiving lower pay than male managers who had the same or similar responsibilities. In investigating the case, the Commissioner looked at the:

- different responsibilities of different managers in order to establish whether this was work of equal value;
- average pay gap between individual male managers; and
- average wage of male managers' compared to complainant's wage.

The main arguments brought forward by the employer were:

- wages of managers were not regulated by a salary-scale and individual male and female managers received different wages; and
- the responsibilities of male managers were more onerous.

The Commission upheld the complaint and concluded that the work of the complainant was comparable and was of equal value to that of her male counterparts. In this case, while each individual manager received a different pay, the gap between the male managers' pay was smaller than the one between the average male manager pay and the complainant's pay. In its conclusions, the Commissioner requested the

⁷⁰ NCPE's remit and competences are outlined in Chapter 456 of the Equality for Men and Women Act in Maltese legislation. NCPE's Commissioner can investigate cases of discrimination and issue non-binding decisions. NCPE's role is also to assist people in making a complaint and initiate ex-officio investigations where necessary. The Commission does not have the capacity to represent persons in court proceedings.

company to submit a set of criteria on the basis of which it will establish wages and consider future pay increases for all of its managers. This set of criteria will then be used as a basis to address the substantial discrepancy in pay between male and female managers.

INDIRECT DISCRIMINATION ⁷¹

The Federal Anti-Discrimination Agency (FADA), Germany ⁷²

A logistic company had different collective agreements for male and female workers. Based on these collective agreements, female workers earned less money for the same work than male workers. The works council filed a suit against the employer. However, a court decision never ensued because the Works Council formed an amicable settlement. The employer changed the collective agreements and female workers got the same wages for former and future working periods.⁷³

DIRECT DISCRIMINATION ⁷⁴

Equal Treatment Authority, Hungary (EBH/117/2010):

The applicant worked as a tool storekeeper at a company, doing the same work as her two male colleagues whose salaries were 70 percent and 100 percent higher than hers. She thought her gender was the reason for the discrimination. When the Authority initiated a procedure in the case, the respondent filed the payroll statements for the investigated time period. The payroll revealed that salaries at the company were set as a result of individual salary negotiations at the beginning of the employment relationship.

The two men had been employed at the company for 15 and 16 years, while the two women had only worked there for 2 and 4 years. One of the men had previously been a manager at the company.

The applicant informed the Authority that one of the men started to work as a storekeeper about the same time as her, while the other started later

⁷¹ Hungarian Equal Treatment Authority has no cases on indirect discrimination.

⁷² The Federal Anti-Discrimination Agency (FADA) advises complainants on equal-pay-related complaints. The counselling is not legally binding. FADA are not allowed to give concrete and binding legal advice, nor to go into detail to evaluate the concrete case. This is the task of lawyers. FADA is therefore not a quasi-judicial body. FADA has neither operated with cases nor issued an official decision or recommendation. However, FADA publishes manuals, started its project eg-check.de (a tool to discover discrimination in paying wages) and conducts surveys on topics such as sexual harassment at work. In addition, FADA compiles important court decisions concerning discrimination, also on the grounds of gender, on a regular basis. Since there are no quasi-judicial equality bodies in Germany, the cases described have all been put forward in court. There has been no decision in favour of the plaintiff concerning a case of equal pay on grounds of DIRECT DISCRIMINATION.

⁷³ File number: ArbG Hamburg Az. 17 BV 2/07

⁷⁴ The Greek Ombudsman and FADA do not have any casework on direct discrimination.

(earlier they had filled different positions), and that she had trained them both. The applicant's salary was set much lower than her male colleagues in the investigated time, and after pay rises the difference remained, leading to a growing pay gap in absolute terms.

One of the men started working in the position of storekeeper in 2003, the other one in 2007. One of them had started to work in the given position two years before the applicant, the other took up duties as a store keeper later than the applicant. The respondent did not deny paying the people doing the same job differently, and was unable to provide justification for that. The only explanation was that the men had spent a longer time at the company, even though that time had been spent in different positions.

According to the Authority's decision, even though they had done different jobs before, their past activity cannot justify salaries that are 50-110% higher than that of the applicant. The other storekeeper woman's salary was also 45-100% lower than that of the two men.

Equality Ombudsman⁷⁵, Sweden, The Swedish Labour Court (AD 2001 no 13):

Two female midwives employed by a county council were paid less than a male clinic engineer employed by the same county. The salaries had been negotiated in collective agreements. The court made an overall assessment of the requirements of their respective jobs, taking into account criteria such as knowledge and skills, responsibility and effort and, in assessing the nature of the work, took particular account of working conditions. The court found that the job as midwife and the job as engineer were of equal value. Taking into account:

1. the difference in age between the engineer and the midwives (younger);
2. the labour market situation (midwives had no alternative job market than public employer i.e. a county council);
3. that the salaries had been negotiated in collective agreements;

the Labour Court found that the differences in salaries did not tie up with the sex of the employees. The case was lost. However, it is still an important case in that the court compared a female dominated job (mid-

⁷⁵ The Equality Ombudsman is a government agency working on behalf of the parliament and the government. The Ombudsman is appointed by the government and its mission is set out in law. The Ombudsman's duty is to monitor compliance with the Discrimination Act and the prohibition to disbenefit persons on parental leave. The Ombudsman provides legal advice and issues recommendations. The Ombudsman investigates complaints regarding discrimination and can bring cases to court on behalf of the complainant.

wife) with a male dominated job (engineer) and found that they were of equal value.

PREGNANCY/MOTHERHOOD

Equality Ombudsman, Sweden, the Swedish Labor Court (AD 2009 no 56):

The Labour Court found that a confessional organization had violated the prohibition to disbenefit employees on parental leave. The society had not given the employee any pay rise in connection with the annual revision of salaries at the workplace.

In another case the Labour Court found that the employer had violated both the prohibition on sex discrimination and the prohibition to disbenefit employees on parental leave. The employee became pregnant and went on parental leave. The employer refused to honor an earlier agreement regarding pay-rise (AD 2013 no 18).

ACTING UP ALLOWANCE⁷⁶

Irish Human Rights and Equality Commission:

A government department⁷⁷ decided that they had overpaid a temporary acting up allowance when the claimant was on maternity leave. After the Equality Authority's intervention, they redrafted the circular and repaid the money.

VICTIMISATION

Irish Human Rights and Equality Commission:

Victimisation was the issue in the gender employment case of McCarthy v Dublin Corporation,⁷⁸ where the claimant alleged that she had been subject to ongoing systematic and deliberate victimisation as a direct result of the referral by her of a case under the Employment Equality Act, 1977. The equality officer found that she had been victimised and ordered the payment of £40,000 compensation, stating that the victimisation of a person for having in good faith taken a claim under the Equality legislation is very serious, as it could have the impact of undermining the effectiveness of the legislation and is completely unacceptable. It is significant that the Labour Court had awarded her £1,000 for the original discrimination (this latter case is under appeal to the Labour Court).

⁷⁶ Allowance paid to staff acting up to a higher grade (assigned to higher duties) than that contained in their regular work: <http://circulargov.ie/pdf/general-council/finance/2007/1488.pdf>

⁷⁷ Equality Authority Annual Report 2001.

⁷⁸ Equality Authority Annual Report 2001.

BURDEN OF PROOF

Irish Human Rights and Equality Commission:

In *Mitchell v Southern Health Board*⁷⁹ the claimant argued unsuccessfully that she had been discriminated against when the post she occupied was advertised in a permanent capacity. She argued that she was better qualified for the position than the successful candidate. The Labour Court applied Council Directive 97/80 on the Burden of Proof in cases of discrimination based on sex and found that the onus shifts to the respondent to rebut the presumption of discrimination only when facts, as established by the appellant, are considered by the Court to be sufficient to raise such presumption.

NEW FRENCH CASE LAW EXAMPLE HANDLED BY HALDE (CURRENTLY THE FRENCH DEFENDER OF RIGHTS): DESCRIPTION OF THE STEPS IN A LONG COURT PROCEEDING

Mrs. G. was hired in 2004 by the Chamber of Commerce and Industry of the Marseille Provence (CCIMP) to exercise the delegated functions of director of human resources within the Marseille Provence Airport for a defined learning period. From the 1st of May 2005, she was promoted and received the official title of director of human resources. She received an additional differential allowance, calculated to bridge the gap between her salary (set at the 550 coefficient level) and the salary level associated with the position (set at the 600 coefficient level).

She was on sick leave as of 22 June 2005, and then on maternity leave from 17 December 2005 until 11 August 2006. On 1 July 2006, she was confirmed in her functions and received the salary coefficient 600. As of September 2006, the date of her return from maternity leave, she suffered

acts of harassment from one of her superiors.

In 2008, she was on sick leave several times. On 24 April 2008, she was declared temporarily unfit to perform her duties by the competent doctor. On 9 April 2009, she realized she had to share part of her job with a man who was hired while she was out of office, and that this man received a higher salary and a higher coefficient than her.

Mrs. G. is notified of her dismissal for serious misconduct on 11 August 2009.

In its judgment of 23 September 2011, the Labour Tribunal Council Marseille (before which the Defender of Rights had not presented observations) dismissed all Mrs. G.'s claims. She had claimed wage discrimination because of her sex, moral harassment suffered from Mr. R., and she had contested her dismissal for serious misconduct. Mrs. G. appealed against the judgment.

The Defender of Rights, by its decision No. MLD / 2012-164 of 7 December 2012, decided to present its observations before the Court of Appeal of Aix-en-Provence. The Defender of Rights considered that Mrs. G. was the subject of wage discrimination compared to her fellow members of the Executive Committee. As of 2008, compared to her replacement Mr. B., Mrs. G. was the subject of discriminatory harassment. This took place upon her return from maternity leave in 2006 (she suffered vexation and humiliation at the hands of Mr. R.), and again when she returned from sick leave in 2009.

By its decision of 28 March 2013, the Court of Appeal of Aix-en-Provence invalidated the dismissal of Mrs. G., considering it to be a direct result of the harassment she had reported, and partly echoing observations of the Defender of Rights. The Court dismissed Mrs. G.'s other claims.

On 28 May 2013, Mrs. G. appealed in cassation against the decision of the Court of Appeal, which had not compensated her for the harassment and salary discrimination she had suffered. Her lawyer developed two grounds of appeal. The first included violation of the principle of equal work for equal pay and the principle of equal pay between women and men under articles L. 3221-2 and L. 3221-4 of the Labour Code. The second addressed claims for compensation for moral harassment.

By its Decision No MLD / 2014-46 of 26 March 2014, the Defender of Rights decided to present its observations before the Supreme Court (Cour de Cassation). The observation held that the Court of Appeal had failed to sufficiently examine the objective nature of the evidence presented by the employer in relation to wage discrimination based on sex. As a consequence, the observation held that the Court of Appeal had failed to correctly apply the relevant law on vocational classification of executive employees on the basis of article L. 1134-1 of the Labour Code relating to the principle of shifting the burden of proof in discrimination cases.

Furthermore, the observation held that the Court of Appeal had failed to request evidence from the employer regarding its decision to dismiss Mrs. G., thus failing to shift the burden of proof onto the employer in establishing whether harassment had taken place. The observation considered this to be in violation of the principle of shifting the burden of proof provided for in Article L. 1154-1 of the Labour Code and section 4 of Act No. 2008-496 of 27 May 2008 concerning the adaptation of Community law into the field of anti-discrimination.

The observation held that the Court of Appeal should have ascertained that the dismissal of the

claimant was a direct result of the discriminatory harassment she had been a victim of upon her return from sick leave.

On 22 October 2014, the Social Chamber of the Court of Cassation rendered a partial cassation judgment. The Supreme Court considered that the Court of Appeal failed to examine all the factual circumstances needed to correctly apply the provisions of Articles L. 3221-2 and L. 3221-4 of the Labour Code on wage equality and work of equal value.

⁷⁹ Equality Authority Annual Report 2001.

ANNEX 2

EXTERNAL RESOURCES

When preparing the case, it is useful to look at EU regulations concerning gender pay, prior work in this field and useful tools developed for this area. In the following, relevant information is listed with a focus on material that is applicable to the whole EU context. Some country-specific information has been included, although it is important to point out that the country-specific information given is not exhaustive. Rather, it serves as an indicator of similar material possibly available and applicable to the context in which you are preparing your case. The following information is listed by relevant institutions and organisations, useful statistics on gender equality and pay, useful gender neutral tools for work evaluation and useful websites, books and other information. All documents are available in English unless indicated otherwise.

REPORTS ON GENDER EQUALITY AND EQUAL PAY BY RELEVANT INSTITUTIONS AND ORGANISATIONS

Several institutions and organisations offer reports on gender equality that may provide useful, country-specific information for building your case. We have listed a choice of reports that could offer valuable insights by institution/organisation:

EUROPEAN COMMISSION

Report on the implementation of the directive on the equal treatment of men and women on matters of employment and occupation (Dir. 2006/54/EC) and the annexes to this report on case law and code of good practice (2013).

This Commission report to the European parliament summarises the main progress in implementing the European recast directive. Chapter 4 primarily pertains to progress made in the area of equal pay. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0861&from=EN>

Reports by the Commission's European Network of Legal Experts on Gender Equality:

The Commission's network of legal experts on gender equality publishes both a twice yearly report containing developments and evaluations in the field of gender equality law as well as thematic reports on topics within the field.

http://ec.europa.eu/justice/gender-equality/tools/legal-experts/index_en.htm

Reports on the country-specific Case Studies on Gender Pay Equality:

This page lists several examples of country-specific case studies pertaining to gender pay equality. http://ec.europa.eu/justice/gender-equality/gender-pay-gap/national-action/case-studies/index_en.htm

EC Report (2010): "The Gender Pay Gap in Europe from a legal perspective":

This report by the European Network of Legal Experts on Gender Equality is a legal analysis of the gender pay gap, including reports from 33 European countries.

http://ec.europa.eu/justice/gender-equality/files/gpg_legal_perspective_2010_en.pdf

EUROPEAN EQUALITY BODIES

Reports by European Equality Bodies on Gender Equality and Gender Pay Gaps:

Belgium, Institute for the equality of women and men(2012): "Gender and income - analysis and development of indicators"

This comprehensive report focuses on the relationship between gender and pay, analyzing the un-

derlying socio-economic complexities which lead to gender pay inequality in a Belgian context.
http://igvm-iefh.belgium.be/sites/default/files/downloads/60%20-%20Gender%20and%20income_ENG.pdf

France, Défenseur des Droits(2015): “Étude sur les écarts de remuneration entre les femmes et les hommes dans la fonction publique sous le prisme des inégalités de genre”

This French-language study explores wage inequalities for women working in the public sector in France.

www.defenseurdesdroits.fr/sites/default/files/atoms/files/150312-ecart-remuneration_hf_version_finale.pdf

Germany, Antidiskriminierungsstelle des Bundes (2013): “Gleiche Arbeit, ungleicher Lohn? Zahlen und Fakten zur Entgeltungleichheit in Deutschland und in Europa”:

This German-language report offers an overview of facts and numbers on gender pay inequality in both the European Union and Germany, also offering suggestions for possible measures to counteract this inequality.

www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/Entgelt_UN_Gleichheit/Faktensammlung_Entgeltungleichheit.pdf?jsessionid=19A399B0BC0BD9983395A8FFB0AF5EF6.2_cid322?__blob=publicationFile&v=1

United Kingdom, Equality and Human Rights Commission(2014): “Financial services inquiry - sex discrimination and gender pay gap report by the Equality and Human Rights Commission”

This report offers a comprehensive analysis of current issues of sex discrimination and gender pay inequality in the United Kingdom within the financial services arena.

www.equalityhumanrights.com/sites/default/files/documents/financial_services_inquiry_report.pdf

INTERNATIONAL LABOUR ORGANISATION (ILO)

ILO Study (2015) : “The Motherhood Pay Gap: A review of the issues, theories and international evidence”:

In this ILO study issues of gender pay in relation to motherhood were analysed. It offers both an analysis of the statistical complexity of the issue and the reasons for this pay gap with regards to economic and sociological explanations.

www.ilo.org/global/publications/working-papers/WCMS_371804/lang--en/index.htm

ILO Global Wage Report 2014/2015:

The annual ILO global wage report reviews the main trends in wages in countries from the Global North and South.

www.ilo.org/global/research/global-reports/global-wage-report/2014/lang--en/index.htm

ILO Global Wage Report 2014-2015: Experts explain the Gender Pay Gap in Europe:

In this comprehensive video, econometrician Rosalia Vazquez-Alvarez explains the differences in labour market characteristics in Europe vis-à-vis the gender pay gap.

www.ilo.org/global/research/global-reports/global-wage-report/2014/Charts/WCMS_322722/lang--en/index.htm

EUROPEAN FOUNDATION FOR THE IMPROVEMENT OF LIVING AND WORKING CONDITIONS (EUROFOUND)

EUROFOUND Report (2010): “Addressing the gender pay gap: Government and social partner actions”

This report provides an overview of national studies on the gender pay gap in Europe, analysing both the adjusted and unadjusted pay gap and reviewing efforts of national governments to counteract issues of gender pay inequality.

www.eurofound.europa.eu/publications/report/2010/working-conditions-industrial-relations/addressing-the-gender-pay-gap-government-and-social-partner-actions

EUROPEAN INSTITUTE FOR GENDER EQUALITY (EIGE)

EIGE Report (2015): “Gender Equality Index 2015 - Measuring gender equality in the European Union 2005-2012”:

This report compares the data on gender equality in the EU of the years 2005, 2010 and 2012, aiming to give an understanding of the development regarding the EU2020 targets set within this field.

<http://eige.europa.eu/rdc/eige-publications/gender-equality-index-2015-measuring-gender-equality-european-union-2005-2012-report>

EIGE Gender Equality Index (GEI):

The GEI provides comprehensive indicators of gender equality in the EU in the fields of work, money, knowledge, time, power and health.

<http://eige.europa.eu/gender-statistics/gender-equality-index>

USEFUL STATISTICS ON GENDER EQUALITY AND PAY

This section provides some essential webpages with official statistics on gender equality, both on the European level and on national levels. They are listed and divided by organisation type: Supranational organisations, national employment statistics and external statistics. Statistical evidence on gender pay inequality ought to be considered in connection with the burden of proof. A relevant difference in pay for the plaintive ought to be demonstrated using the applicable data for the national context and the field of work.

SUPRANATIONAL ORGANISATIONS

EIGE Gender Statistics:

Facts and figures on gender in the European Union.

<http://eige.europa.eu/gender-statistics>

EIGE (2012): “Segregation and quality of work”:

Both EU and country specific data on gender in relation to segregation and quality of work.

<http://eige.europa.eu/gender-statistics/gender-equality-index/2012/domain/work/2>

EIGE (2012): "Money- Financial Resources":

Both EU and country specific data on gender in relation to financial resources.

<http://eige.europa.eu/gender-statistics/gender-equality-index/2012/domain/money/1>

EIGE (2012): "Money – Economic Situation"

Both EU and country specific data on gender in relation to the risk of poverty and income distribution.

<http://eige.europa.eu/gender-statistics/gender-equality-index/2012/domain/money/2>

European Commission- European Statistics (Eurostat):

The Directorate-General Eurostat provides EU and country-specific data on a broad range of issues, including gender equality.

<http://ec.europa.eu/eurostat/>

Eurostat Statistics on Income and Living Conditions (EU-SILC)

The EU-SILC instrument is the EU reference source for comparative statistics on income distribution and social inclusion at the European level.

<http://ec.europa.eu/eurostat/web/income-and-living-conditions/overview>

Eurostat Glossary "Statistics Explained- Gender Pay Gap":

A definition and comprehensive explanation of the gender pay gap and its varieties.

http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Gender_pay_gap

Organisation for Economic Co-operation and Development (OECD) "Gender Wage Gap":

Worldwide comparative statistics on the gender pay gap.

www.oecd.org/gender/data/genderwagegap.htm

NATIONAL EMPLOYMENT STATISTICS

It is useful to check whether the country relevant for your case offers national state-sponsored statistics on employment. These could be both national employment surveys by the state's central statistics office or the country's various trade unions, which generally offer relevant statistics. Examples include:

Austria, Statistik Austria data on wage:

www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/soziales/gender-statistik/einkommen/index.html

France, INSEE, Institut national de la statistique et des études économiques, Work and Employment,:

www.insee.fr/fr/themes/theme.asp?theme=3

Germany, Destatis, Statistisches Bundesamt, labour market data,:

www.destatis.de/DE/ZahlenFakten/GesamtwirtschaftUmwelt/Arbeitsmarkt/Arbeitsmarkt.html;jsessionid=530DA9A2D4462A-F26A741B4F494E92D9.cae1

Holland, Sociaal en Cultureel Planbureau, , Emancipatiemonitor 2012:

www.scp.nl/Publicaties/Alle_publicaties/Publicaties_2012/Emancipatiemonitor_2012

Ireland, Central Statistics Office "Women and Men in Ireland":

www.cso.ie/en/releasesandpublications/ep/p-wamii/womenandmeninireland2013/employmentlist/

Spain, ISE, Instituto Nacional de Estadística, Labour Market:

www.ine.es/dyns/INEbase/es/categoria.htm?c=Estadistica_P&cid=1254735976594

Sweden, Statistiska centralbyrån (SCB) data on wage:

www.scb.se/LE0201-EN/

USEFUL GENDER NEUTRAL TOOLS FOR JOB EVALUATION

This section provides information on tools for work evaluation, listed by organisation and/or country. In general, the process of identifying equal work is carried out with the help of job titles, job codes, job grade systems and the like. There are a number of tools and instruments in the labor market, both in the private and public sector. The various tools are provided both by private actors, for instance consultancies, and public organs. The process of identifying work of equal value is normally carried out with the help of a tool for work evaluation. Four criteria are used when determining work of equal value: skills, effort, responsibility and working conditions. These instruments should comply with any given Equal Treatment Act and should be adjusted to comply with the criteria in the legal system.

GENERAL OVERVIEW:

Austria, Wage calculation tool by the Austrian ministry for women's affairs:

A German-language tool designed to indicate average salaries in particular professions based on individualized parameters.

www.gehaltsrechner.gv.at

Belgium, Statistical calculation tool by the Belgian Institute for the Equality of Women and Men:

This website provides a French and Flemish- language tool to calculate wage equality as well as a checklist on gender neutrality in job evaluation and classification.

http://igvm-iefh.belgium.be/fr/domaines_action/emploi/gelijik_loon/berekening/

Belgium, Review of gender-neutral job classifications by the Belgian Federal Public Service of Employment, Labour and Public Dialogue:

This website offers a job evaluation scheme to ensure that sectoral job classification systems are gender-neutral as established by the law.

www.emploi.belgique.be/defaultTab.aspx?id=8486#

France, Guide on non-discriminatory job evaluation of predominantly feminine professions by the French Defender of Rights:

A French language guide on gender neutral job evaluation for assessing work of equal value

www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddc_gui_20130301_discrimination_emploi_femme.pdf

Germany, Gender neutral job evaluation "EG-Check":

This German-language webpage provides a tool to check whether a company is complying with

gender equal treatment in relation to pay for the German labour market.

www.eg-check.de

Holland, Loonwijzer, Equal pay test for employers and employees:

This equal pay test tool enables employees to check whether they are being paid in line with the provisions of the Dutch Equal Treatment Act and also offers the possibility to employers to ascertain whether they abide by the act.

www.loonwijzer.nl

Slovakia, Gender income calculator:

This Slovakian-language website offers a wage calculator, which also indicates wage gaps in different professions.

www.kedvyrastiem.sk/vsetko-o-kampani

Sweden, BESTA job evaluation scheme by the Swedish Agency for Government Employers

This widely used system allows employees to evaluate whether their job is in compliance with equality guidelines.

www.arbetsgivarverket.se/globalassets/avtal-skrifter/skrifter/bestawebb.pdf

SELF-ASSESSMENT TOOLKITS FOR EMPLOYERS IN COMPANIES/INSTITUTIONS/ ORGANISATIONS:

European Commission annex to the report (2013): Annex on gender neutral tools for work evaluation to the report on Gender Equality Directive 2006/54/EC.

This annex provides useful information on what factors to take into account when setting up a gender neutral job evaluation tool for a company.

http://ec.europa.eu/justice/gender-equality/gender-pay-gap/files/131209_swd_annex_en.pdf

ILO Guide (2008): "PROMOTING EQUITY Gender-Neutral Job Evaluation for Equal Pay: a Step-by-Step guide".

This ILO guide aims to provide a foundation for any workplace to implement and reinforce gender equity in the workplace, both in pay and equal treatment.

www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_101325.pdf

Ireland, Gender Pay Audit Tool by the Irish Business and Employers' Confederation (IBEC)

This template is meant to assist organisations to carry out an equal pay audit with the main focus being on gender equality and transparency, while maintaining a perspective on other relevant equality criteria and grounds.

www.ibec.ie/IBEC/ES.nsf/vPages/Employment_law-During_employment-free-gender-pay-audit-tool-23-09-2013?OpenDocument#V004NnLOf50

Ireland, Gender and Pay Toolkit by the Irish Congress of Trade Unions:

This extensive toolkit offers an introduction to assessing gender equality in institutions, organisations and companies.

www.ictu.ie/publications/fulllist/negotiating-for-equality-gender-and-pay-toolkit/

Northern Ireland, Code of Practice on Equal Pay by the Equality Commission for Northern Ireland

This awareness-raising tool offers an accessible overview over the state of legislation on equal pay in Northern Ireland as of 2013 to employers.

www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/EqualPayCodeofPractice-June2013.pdf

Portugal, Gender Pay Gap Caculator by the Commission for Equality in Work and Employment (CITE):

This Portuguese-language online tool developed by CITE allows companies to conduct a self-assessment on equal pay between men and women, also taking into account whether possible differences are down to factors other than gender.

<http://calculadora.cite.pt/index.php/welcome/home>

Portugal, Commission for Equality in Labour and Employment CITE et al., (2008): "Self-assessment guide on gender equality in companies".

This guide for companies gives a comprehensive introduction for companies to self-assess whether they are meeting gender equality standards.

www.cite.gov.pt/pt/dsie/doc/self_assesment.pdf

Portugal, Commission for Equality in Labour and Employment CITE, International Labor Organization ILO et al., (2008): "Value of Work and Gender Equality – Guide to applying a methodology for assessing the value of work free from gender bias".

This guide to the evaluation of work free from gender bias is the product of a multi-organizational cooperation and offers an in-depth approach to the assessment of work value in line with gender equality standards.

www.cite.gov.pt/asstscite/downloads/guia_revalorizar_en.pdf

Portugal, Confederation of Portuguese Workers (CGTP), Portuguese Association of Restaurants and Similar Establishments (ARESP) & International Labour Organisation (ILO), (2008): "Training Handbook on Equal pay for Men and Women".

This English-language handbook provides useful information and tools for firms wishing to implement measures on gender pay equality.

www.cite.gov.pt/asstscite/downloads/referencial_revalorizar_en.pdf

United Kingdom, Checklists for Equal Pay in practice by the Equality and Human Rights Commission:

These checklists are intended to help an employer identify their potential vulnerability to equal pay claims.

www.equalityhumanrights.com/private-and-public-sector-guidance/employing-people/guidance-employers-about-their-rights-under-equality-act-2010/equal-pay/checklists-equal-pay-practice

United Kingdom, Equal Pay Audit Toolkit for Employers by the Equality and Human Rights Commission:

This toolkit is a guide for employers on carrying out an equal pay audit, designed for businesses with

over 50 employees.

www.equalityhumanrights.com/private-and-public-sector-guidance/employing-people/managing-workers/equal-pay/equal-pay-audit-toolkit

USEFUL WEBSITES, BOOKS AND OTHER INFORMATION

In the following general information on gender pay equality that might be of interest to your case is given. This list is not exhaustive, but rather an indication of other possible sources you can access in order to gain extra information in the preparation for your case.

European Commission, DG Justice (2014): "Tackling the gender pay gap in the European Union".

This EC report covers basic questions on the definition and extent of the gender pay gap in Europe, pertaining to the measures taken both on a European level and national levels.

http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/140319_gpg_en.pdf

Equality and Human Rights Commission (2011): "The National Equality Body contribution to closing the Gender Pay Gap".

This report looks at the best practice examples of the work of National Equality Bodies in relation to Equal Pay, concluding with suggestions to extend their involvement.

www.equalityhumanrights.com/sites/default/files/documents/legal/european-gender-pay-gap-workshop-report.pdf

European Network of Equality Bodies (Equinet)

The European Network of Equality Bodies brings together 45 organisations from 33 European countries, which counteract discrimination and promote equality. This webpage provides useful European and country-specific information on a variety of topics including Gender Equality and the work being done in this field.

www.equineteurope.org

Cooperation by European Research Centres, funded by the EU PROGRESS Program "Gender Pay Gap":

News and country-specific profiles pertaining to the European Gender Pay Gap

<http://genderpaygap.eu/>

Boll, C., Leppin, J., Rossen, A., and Wolf, A. (2016) "Magnitude and Impact Factors of the Gender Pay Gap in EU Countries"

The report assesses the causes and effects of the gender pay gap in EU member states as of 2016.

http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/2016_factors_gpg_en.pdf

Bergmann, N., Danzer, L., Sorges, C. (eds.) (2016) "Comparative Report on the Gender Pay Gap. New solutions for an old problem: Developing Transnational Strategies Together with Trade Unions and Gender Equality Units to Tackle the Gender Pay Gap."

www.genderpaygap.eu/documents/GPG_comparative%20report_add%20EGG%20final.pdf

List of Pay Related Research and Inquiry Reports by the Equality and Human Rights Commission, United Kingdom:

This comprehensive list gives reference to a number of research papers and reports in relation to equal pay.

www.equalityhumanrights.com/private-and-public-sector-guidance/employing-people/managing-workers/equal-pay/pay-related-research-and-inquiry-reports

Belgian Institute for the Equality of Women and Men

The Belgian Institute of Equality of Women and Men offers reports and statistics on gender equality in Belgium in French, Flemish and English. They also publish a yearly report on the gender pay gap.

<http://igvm-iefh.belgium.be/fr>

Plantenga, J. and C. Remery (2006): "The Gender Pay Gap in Europe: Origins and Policy Responses". External report commissioned by and presented to the EU Directorate General Employment and Social Affairs, Unit G1 'Equality between women and men'.

This report was fashioned by independent economists and evaluates the gender pay gap and policy measures taken up to counter workplace gender inequality.

<http://eige.europa.eu/gender-mainstreaming/resources/romania/gender-pay-gap-origins-and-policy-responses-comparative-review-30-european-countries>

Arulampalam, W.; A. L. Booth and M.L. Bryan (2006): "Is there a glass ceiling over Europe? Exploring the Gender Pay Gap across the Wages Distribution". Australian National University, Centre for Economic Policy Research.

This study examines data from eleven EU countries, evaluating the difference in gender pay distribution by economic sector. A salient finding is that gender pay gaps are significantly bigger both at the top and at the bottom of wage distributions.

<https://digitalcollections.anu.edu.au/bitstream/1885/43252/2/DP510.pdf>

Christofides, L.; A. Polycarpou and K. Vrachimis (2010): "The Gender Wage Gaps, 'Sticky Floors' and 'Glass Ceilings' of the European Union". Institute for the Study of Labour.

Using data from the European Union Statistics on Income and Living Conditions, this study analyses the extent and differences in wage gaps across 24 European Member States.

<http://anon-ftp.iza.org/dp5044.pdf>

Janssen, S.; S. Tuor Sartore, and U. Backes-Gellner (2014): "Discriminatory Attitudes and varying Gender Pay Gaps within Firms". University of Zurich.

This study explores the salient connection between sexist attitudes towards women and a bigger wage gap between women and men.

www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/Literatur/Themenjahr_Geschlecht/Discriminatory%20Social%20Attitudes%20and%20Varying%20Gender%20Pay%20Gaps%20within%20Firms.pdf?sessionid=D11941BA173B3D41D8D8F9F82266209E.2_cid332?__blob=publicationFile&v=1

McGinnity, Frances and Helen Russell (2008): "Gender Inequalities in Time Use, The Distribution of Caring, Housework and Employment Among Women and Men in Ireland". Equality Authority/ESRI Research, Programme on Equality and Discrimination.

This report uses time-use diaries from the nationally representative Irish National Time-Use Survey, 2005 to gather information on paid and unpaid labour from 1,089 adults in Ireland. The aim is to detect differences in time use between the genders.

www.ihrec.ie/publications/list/gender-inequalities-in-time-use-the-distribution-o/

McGuinness, Seamus, Elish Kelly, Tim Callan and Philip J. O'Connell (2009): "The Gender Pay Gap". Equality Authority/ESRI Research, Programme on Equality and Discrimination.

This study provides detailed evidence on the factors that contribute to the gender pay gap in Ireland though an analysis of the National Employment Survey, 2003.

www.ihrec.ie/publications/list/the-gender-wage-gap-in-ireland/

Reingardiene, J. (2006): "Between Paid and Unpaid Work: Family Friendly Policies and Gender Equality in Europe". Social Research Center, Vytautas Magnus University, Center for Equality Advancement.

This comparative research analyses family policies with regards to gender equality within the European Union.

<http://gap.lt/wp-content/uploads/2014/02/Between-Paid-and-Unpaid-Work.pdf>

Rubery, J.; D. Grimshaw and H. Figueiredo (2005): "How to close the gender pay gap in Europe: towards the gender mainstreaming of pay policy". Industrial Relations Journal, pp. 184-213.

Using empirical evidence from studies done across European countries, this paper demonstrates how the EU could implement a holistic Gender mainstreaming policy to promote gender equity in wages.

www.researchgate.net/profile/Damian_Grimshaw2/publication/224892357_How_to_close_the_gender_pay_gap_in_Europe_towards_the_gender_mainstreaming_of_pay_policy/links/0deec526a745cdc9d2000000.pdf

Russel, Hellen, Frances McGinnity and Gillian Kingston (2014): "Gender and the Quality of Work: from Boom to Recession". Equality Authority/ESRI Research, Programme on Equality and Discrimination.

This research report examines the impact of the economic crisis on gender equality in employment.

www.ihrec.ie/download/pdf/20141106220955.pdf

"Comparable Worth" Project by the University of Duisburg-Essen and Hans-Böckler-Foundation, Germany

This German-language research project aims at capturing statistically how work of comparable worth is being paid differently depending on the person's gender, taking into account (a) knowledge and ability; (b) psycho-social abilities; (c) responsibility; (d) physical requirements.

www.uni-due.de/biwi/klammer/comparable_worth.php

EUROPEAN AND NATIONAL ECONOMIC / SOCIAL / HUMAN RIGHTS INSTITUTES / ORGANIZATIONS WITH INFORMATION ON EQUAL TREATMENT LAW IN RELATION TO EQUAL PAY

Commissie Gelijke Behandeling: "Summary of the Survey on Equal Pay for Men and Women in General Hospitals in the Netherlands"

This survey has found that pay in Dutch hospitals in all examined areas is to the disadvantage of women:

www.google.de/url?sa-t&rct-j&q-&esrc=s&frm-1&source=web&cd-3&ved-0ahUKEw-ismT86ZfKAhWFPPhQKHbYmCIUQFggUAI&url=http%3A%2F%2Fcrvdm-zoeken.stippacceptatie.nl%2FStippWebDLL%2FResources%2FHandlers%2FDownloadBestand.ashx%3Fid%3D2650&usg-AFQjCNEkLEDqy7ZQBAU9gqZYPgMhvZqiDA&sig2-jNCx7kh6LtljPXoX_6yBC-Q

Irish Congress of Trade Unions (2004): "Summary of European Case Law pertaining to gender equality"

This report reviews European case law pertaining to gender equality up to 2004.

www.ictu.ie/publications/fulllist/european-case-law-equality-supplement/

Irish Congress of Trade Unions (2002): "Family friendly toolkit"

This toolkit is part of Congress' contribution to supporting trade unions in negotiating and developing Family Friendly and Work Life Balance initiatives at enterprise level.

www.ictu.ie/download/pdf/congress_family_friendly_toolkit_guidelines_for_trade_unions.pdf

Unite the Union, United Kingdom (2012): Unite Action Plan on Equal Pay.

The Unite the Union action plan for equal pay outlines the requirements for implementing a pay audit within a workplace to ensure wage equality between the genders.

<http://www.uniteunion.org/uploaded/documents/EqualPaypack201211-12175.pdf>

INCOME REPORTS

In some countries, companies (with a minimum number of employees) have to compile anonymized reports on average salaries (income reports)⁸⁰. If this is the case in your country, work councils or even individual employees can access this data so seek legal information.

⁸⁰ Equal Treatment Legislation. For more details, please see the Equinet report (2016) *Making Europe More Equal: A Legal Duty?*

EQUINET MEMBER EQUALITY BODIES

ALBANIA

Commissioner for the Protection from Discrimination
www.kmd.al

AUSTRIA

Austrian Disability Ombudsman
www.behindertenanwalt.gv.at

AUSTRIA

Ombud for Equal Treatment
www.gleichbehandlungsanwaltschaft.at

BELGIUM

Institute for the Equality of Women and Men
www.igvm-iefh.belgium.be

BELGIUM

Unia (Interfederal Centre for Equal Opportunities)
www.unia.be

BOSNIA AND HERZEGOVINA

Institution of Human Rights Ombudsman of Bosnia and Herzegovina
www.ombudsmen.gov.ba

BULGARIA

Commission for Protection against Discrimination
www.kzd-nondiscrimination.com

CROATIA

Office of the Ombudsman
www.ombudsman.hr

CROATIA

Ombudsperson for Gender Equality
www.prs.hr

CROATIA

Ombudswoman for Persons with Disabilities
www.posi.hr

CYPRUS

Commissioner for Administration and Human Rights (Ombudsman)
www.ombudsman.gov.cy

CZECH REPUBLIC

Public Defender of Rights
www.ochrance.cz

DENMARK

Board of Equal Treatment
www.ast.dk

DENMARK

Danish Institute for Human Rights
www.humanrights.dk

ESTONIA

Gender Equality and Equal Treatment Commissioner
www.svv.ee

FINLAND

Non-Discrimination Ombudsman
www.syrjinta.fi

FINLAND

Ombudsman for Equality
www.tasa-arvo.fi

FRANCE

Defender of Rights
www.defenseurdesdroits.fr

GERMANY

Federal Anti-Discrimination Agency
www.antidiskriminierungsstelle.de

GREECE

Greek Ombudsman
www.synigoros.gr

HUNGARY

Equal Treatment Authority
www.egyenlobanasmod.hu

HUNGARY

Office of the Commissioner for Fundamental Rights
www.ajbh.hu

IRELAND

Irish Human Rights and Equality Commission
www.ihrec.ie

ITALY

National Equality Councilor
www.lavoro.gov.it/ConsiglieraNazionale

ITALY

National Office against Racial Discrimination - UNAR
www.unar.it

LATVIA

Office of the Ombudsman
www.tiesibsargs.lv

LITHUANIA

Office of the Equal Opportunities Ombudsperson
www.lygybe.lt

LUXEMBURG

Centre for Equal Treatment
www.cet.lu

(FYRO) MACEDONIA

Commission for the Protection against Discrimination
www.kzd.mk

MALTA

National Commission for Persons with Disability
www.knpd.org

MALTA

National Commission for the Promotion of Equality
www.equality.gov.mt

MONTENEGRO

Protector of Human Rights and Freedoms (Ombudsman)
www.ombudsman.co.me

NETHERLANDS

Netherlands Institute for Human Rights
www.mensenrechten.nl

NORWAY

Equality and Anti-Discrimination Ombud
www.ldo.no

POLAND

Commissioner for Human Rights
www.rpo.gov.pl

PORTUGAL

Commission for Citizenship and Gender Equality
www.cig.gov.pt

PORTUGAL

Commission for Equality in Labour and Employment
www.cite.gov.pt

PORTUGAL

High Commission for Migration
www.acm.gov.pt

ROMANIA

National Council for Combating Discrimination
www.cncd.org.ro

SERBIA

Commissioner for Protection of Equality
www.ravnopravnost.gov.rs

SLOVAKIA

National Centre for Human Rights
www.snsnp.sk

SLOVENIA

Advocate of the Principle of Equality
www.zagovornik.net

SPAIN

Council for the Elimination of Ethnic or Racial Discrimination
www.igualdadynodiscriminacion.msssi.es

SWEDEN

Equality Ombudsman
www.do.se

UNITED KINGDOM - GREAT BRITAIN

Equality and Human Rights Commission
www.equalityhumanrights.com

UNITED KINGDOM - NORTHERN IRELAND

Equality Commission for Northern Ireland
www.equalityni.org

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