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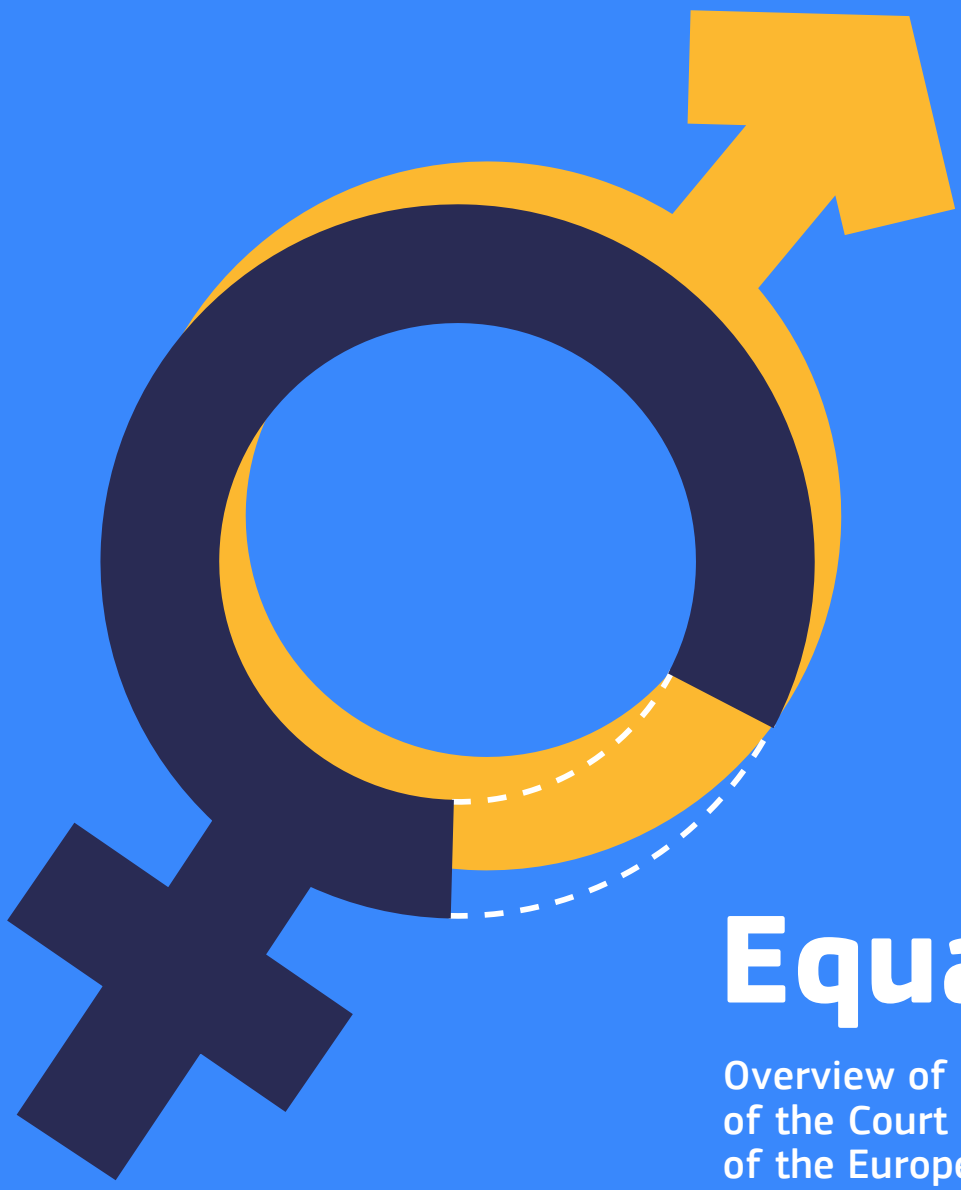

Equal Pay

Overview of landmark case-law of the Court of Justice of the European Union

Justice and Consumers

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EQUAL PAY

OVERVIEW OF LANDMARK CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

1. Introduction

Equal pay for equal work for women and men is one of the EU's founding principles, embedded in the Treaties since 1957.

Article 119 of the Treaty establishing the European Economic Community ('TEEC') laid down the principle of equal pay for equal work for women and men. In 1997, with the Amsterdam Treaty, Article 119 became Article 141 of the Treaty on the European Community ('TEC'). Today, after the Lisbon Treaty, the principle of equal pay is enshrined in Article 157 of the Treaty on the Functioning of the European Union ('TFEU'), but its content has remained basically unchanged. The provision stipulates that 'each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'.

The principle of equal pay was further amplified and specified by secondary Union legislation and the case-law of the Court of Justice of the European Union ('CJEU'). Directive 75/117/EEC[1], which was meanwhile replaced by Directive 2006/54/EC[2], reiterated the Treaty concept of equal pay for equal work and for work of equal value and provided more details, including on the requirements to ensure access to justice and protection against victimisation.

Article 4 of Directive 2006/54/EC 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'.*

Furthermore, in line with the TFEU and the jurisprudence of the CJEU, Article 2(1)(e) of the Directive 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'.*

The case-law of the CJEU has helped to clarify and further develop the interpretation and scope of the principle of equal pay. In particular, in its landmark judgment in case C-43/75 — *Defrenne II*[3], the CJEU declared that the principle of equal pay is one of the fundamental principles of the then Community and has direct effect, and can therefore be invoked by any

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1 Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 45, 19.2.1975, p. 19.

2 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204, 26.7.2006, p. 23

3 C-43/75, *Defrenne v SABENA*, ECLI:EU:C:1976:56, p. 455.

citizen before national jurisdictions. Later the CJEU has passed judgments on equal pay provisions on several occasions, resulting in a large body of case-law.

However, the legal provisions on equal pay and the jurisprudence address questions of considerable complexity, in particular with regard to the principle of equal pay for work of equal value which implies the intricate task of assessing the value of different types of work. It is crucial to enable individuals to understand the scope of rights provided under these provisions so that they can rely on this principle before the national courts. More generally, the correct interpretation of the different elements forming the equal pay principle is also important for the effective application of equal pay provisions by employers and social partners in the context of pay systems and collective agreements.

This overview of the case law is an update version of the document published by the Commission as Annex II[4] to the 2013 Report on the application of Directive 2006/54/EC.[5] It provides a synopsis of the CJEU's interpretation on the principle of equal pay and its different elements. The overview aims at facilitating and promoting the effective application of this principle in practice at national level. It is offered for information and consideration to all relevant stakeholders, including employers, social partners, employees, Member State governments and national judiciaries.

The overview of the case law draws, *inter alia*, on the Commission's 1994 Memorandum on Equal Pay for Work of Equal Value.[6] It provides a comprehensive overview of the CJEU's landmark cases on equal pay, covering the definition of pay, the meaning of the concept of work of equal value, as well as discrimination related to job classification and evaluation.

2. Definition of pay

The definition of pay is enshrined in Article 157(2) of the TFEU and is also provided in Article 2(1)(e) of Directive 2006/54. The CJEU has repeatedly held that the concept of pay within the meaning of Article 157 TFEU encompasses all benefits in cash or in kind, present or future, provided they are paid, directly or indirectly by the employer to the worker in connection with his employment. Over the years, the CJEU has had various occasions to comment on the concept of 'pay' and to clarify its scope. [7]

2.1. Basic and additional pay

The CJEU has held that a gradual increase in the salary of a worker who remains in the same position for a certain period of time, provided for by a collective agreement (C-184/89 — *Nimz*[8]) and piece-work pay schemes (C-400/95 — *Royal Copenhagen*[9]), constitutes 'pay'.

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4 Commission Staff Working Document Accompanying the Report on the application of Directive 2006/54/EC, SWD(2013)512 final, Brussels, 6/12/2013.

5 Report from the Commission to the Council and the European Parliament on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), COM(2013) 861 final, Brussels, 6/12/2013.

6 COM(94) 6 final, 23.6.1994.

7 See for instance Case C-262/88, *Barber v Guardian Royal Exchange Assurance Group*, ECLI:EU:C:1990:209.

8 C-184/89, *Nimz v Freie und Hansestadt Hamburg,* ECLI:EU:C:1991:50, paragraph 15.

9 C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri,* ECLI:EU:C:1995:155, paragraph 12.

The fact that payments to employees are not governed by an employment contract does not remove them from the scope of 'pay' under the former Article 119 TEEC (now Article 157 TFEU). Gratuities paid at the discretion of an employer are encompassed (C-12/81 — *Garland*[10]). Therefore pay, whether paid pursuant to a contract, statutory or collective provisions or on a voluntary basis is covered.

Moreover, the CJEU has found that several payments additional to basic and minimum pay fall within the scope of the former Article 119 TEEC, such as individual pay supplements (calculated on the basis of such criteria as mobility, training or the length of service of the employee) to basic pay (C-109/88 — *Danfoss*[11]) and increments based on seniority (C-184/89 — *Nimz*[12]), as well as 'heads of household' allowances granted to civil servants (C-58/81 — *Commission v Luxembourg*[13]). It would appear that any direct payments supplementing a basic wage are covered. This seems to include overtime and all forms of merit and performance pay.

In addition, time off with pay for part-time employees undertaking works council training, pay for overtime in respect of employees' participation in training courses or compensation received by members of trade unions from their employer in the form of paid holidays have been also considered to constitute pay and to fall within the scope of application of the former Article 119 TEEC (C-360/90 — *Bötel*[14], C-457/93 — *Lewark*[15], C-278/93 — *Freers*[16]).

The same applies to monthly salary supplements agreed on in individual employment contracts (C-381/99 — *Brunnhofer*[17]) and wages for additional hours (C-285/02 — *Elsner*[18]).

2.2. Benefits

Benefits calculated in monetary terms, such as sick pay allowances, constitute pay (C-171/88 — *Rinner*[19]). The same applies to benefits paid by an employer under legislation or collective agreements or under an employment contract to a woman on maternity leave (C-342/93 — *Gillespie*[20], C-411/96 — *Boyle*[21], C-335/15 — *Ornano*[22]), as well as to an allowance for female workers taking maternity leave which is designed to compensate for the professional disadvantages resulting from these employees' absence from work (C-218/98 — *Abdoulaye*[23]).

The following also count as pay: occupational social security pensions, travel facilities obtainable on retirement, severance schemes (C-12/81 — *Garland*[24], C-249/96 — *Grant*[25],

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10 C-12/81, *Garland v British Rail*, ECLI:EU:C:1982:44.

11 C-109/88, *Handels-og Kontorfunktionaerenes Forbund i Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, ECLI:EU:C:1989:383.

12 C-184/89, *Nimz v Freie und Hansestadt Hamburg*, ECLI:EU:C:1991:50.

13 C-58/81, *Commission v Luxembourg*, ECLI:EU:C:1982:215.

14 C-360/90, *Arbeiterwohlfahrt der Stadt Berlin v Bötel*, ECLI:EU:C:1992:246, paragraphs 13, 14.

15 C-457/93, *Kuratorium für Dialyse und Nierentransplatation v Lewark*, ECLI:EU:C:1996:33, paragraph 23.

16 C-278/93, *Freers and Speckmann*, ECLI:EU:C:1996:83, paragraphs 19, 20.

17 C-381/99, *Brunnhofer*, ECLI:EU:C:2001:358, paragraph 34.

18 C-285/02, *Elsner-Lakeberg*, ECLI:EU:C:2004:320, paragraph 19.

19 C-171/88, *Rinner-Kühn v FWW Spezial-Gebäudereinigung*, ECLI:EU:C:1989:328, paragraph 7.

20 C-342/93, *Gillespie and Others*, ECLI:EU:C:1996:46, paragraph 14.

21 C-411/96, *Boyle and Others*, ECLI:EU:C:1998:506, paragraph 38.

22 C-335/15, *Ornano*, ECLI:EU:C:2016:564, paragraph 38.

23 C-218/98, *Abdoulaye and Others*, ECLI:EU:C:1999:424, paragraph 14.

24 C-12/81, *Garland v British Rail*, ECLI:EU:C:1982:44, paragraph 9.

25 C-249/96, *Grant v South West Trains*, ECLI:EU:C:1998:63, paragraphs 14, 15.

C-262/88 — *Barber*[26], C-354/15 — *Kleinsteuber*[27]), end-of-year bonuses that an employer pays to an employee under a law or collective agreement as a gratuity (C-281/97 — *Krüger*[28]), "even if paid voluntarily and even if paid mainly or exclusively as an incentive for future work or loyalty to the undertaking" (C-333/97 — *Lewen*[29]).

The same applies to benefits paid by an employer to an employee upon a compulsory redundancy, whether under a law or voluntarily (C-262/88 — *Barber*[30]), and to severance grants paid to workers, including those working part-time, upon the termination of their employment relationship, in particular on account of retirement (C-33/89 — *Kowalska*[31]), as well as to additional redundancy payments (C-173/91 — *Commission v Belgium*[32]).

This also covers a bridging pension that an employer may pay to employees who have taken early retirement on grounds of ill health (C-132/92 — *Birds Eye Walls*[33]) and to wages for a bridging allowance provided for by a work agreement (C-19/02 — *Hlozek*[34]).

Compensation granted to a worker for unfair dismissal 'falls within the definition of pay for the purpose of [the former] Article 119 TEEC', since it 'is designed in particular to give the employee what he would have earned if the employer had not unlawfully terminated the employment relationship' (C-167/97 — *Seymour-Smith*[35]).

Moreover, the CJEU has found that pay can include benefits received by persons performing military or compulsory civilian service (C-220/02 – *Österreichischer Gewerkschaftsbund*[36]). For example, if they receive a termination payment, they may subsequently be able to claim that this is part of their pay within the meaning of the former Article 141 TEC (now Article 157 TFEU).

However, a supplementary tax on retirement pension income, without any link to the contract of employment, does not constitute 'pay' (C-122/15 — *C* [37]).

2.3. Social security benefits

The question of whether benefits under social security schemes have to be considered as pay within the meaning of the former Article 119 TEEC was addressed by the CJEU in the C-80/70 — *Defrenne I* judgment.[38] In this judgment, the CJEU excluded statutory social security schemes from the concept of 'any other consideration' of the said Article. The CJEU ruled that the concept of consideration paid directly or indirectly, in cash or in kind, could not encompass statutory social security scheme benefits that apply to workers in general and are not provided for in an agreement within a specific company or industry. The CJEU noted that to fund such schemes, workers, employers and public authorities contribute in line with social policy, rather than in compliance with an agreement covering the employer-employee

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26 C-262/88, *Barber v Guardian Royal Exchange Assurance Group*, ECLI:EU:C:1990:209.
27 C-354/16, *Kleinsteuber*, ECLI:EU:C:2017:539, paragraph 23.
28 C-281/97, *Krüger*, ECLI:EU:C:1999:396, paragraph 17.
29 C-333/97, *Lewen*, ECLI:EU:C:1999:512, paragraph 21.
30 C-262/88, *Barber v Guardian Royal Exchange Assurance Group*, ECLI:EU:C:1990:209, paragraph 20.
31 C-33/89, *Kowalska v Freie und Hansestadt Hamburg*, ECLI:EU:C:1990:265, paragraph 11.
32 C-173/91, *Commission v Belgium*, ECLI:EU:C:1993:64, paragraph 15.
33 C-132/92, *Birds Eye Walls v Roberts*, ECLI:EU:C:1993:868, paragraph 12.
34 C-19/02, *Hlozek*, ECLI:EU:C:2004:779, paragraph 40.
35 C-167/97, *Seymour-Smith andPerez*, ECLI:EU:C:1999:60, paragraph 26.
36 C-220/02, *Österreichischer Gewerkschaftsbund*, ECLI:EU:C:2004:334, paragraph 39.
37 C-122/15, *C*, ECLI:EU:C:2016:391, paragraph 24.
38 C-80/70, *Defrenne v Belgian State*, ECLI:EU:C:1971:55.

relationship. It thus concluded that statutory social security schemes could not be included in the concept of 'any other consideration'. This was particularly true of retirement pensions, determined by statute rather than by agreements in the workplace or industrial sector.[39]

However, company occupational pension schemes, for instance, are included, as they are not enforced by law. They involve reaching an agreement within a company or industrial sector, and are not compulsory for workers in general, only for those covered within a specific organisation. They are financed by employers or workers who contribute directly, depending on the schemes' funding requirements, not according to social policy considerations.

In the later judgment, the CJEU confirmed that only benefits deriving from a statutory social security scheme were outside the scope of the former Article 119 TEEC (C-70/84 — *Bilka-Kaufhaus*[40]). Accordingly, the CJEU ruled that an occupational pension scheme funded by the employer constituted pay for the purposes of that Article.

2.4. Occupational social security schemes

The CJEU has also clarified in numerous rulings the scope of 'pay' in relation to occupational social security schemes.

In the *Barber* judgment[41] and in subsequent jurisprudence, the CJEU confirmed its earlier case-law from *Bilka*[42], where it ruled that benefits and employee contributions under the terms of an occupational pension scheme fall within the concept of pay.

Therefore, benefits under occupation social security schemes constitute pay under Article 157 TFEU. Only pensions paid by the state acting as such are excluded from the scope of this provision. More specifically, social security schemes or benefits do not constitute 'pay' if they are directly governed by statute to the exclusion of any element of negotiation within the undertaking or occupational sector concerned, and if they are obligatorily applicable to general categories of employees (C-399/99 — *Griesmar*[43]).

In the *Barber* judgment, the CJEU upheld what was implicitly stated in *Defrenne I*, i.e. that benefits granted under a pension scheme, which essentially relates to a person's employment, form part of that person's pay and come within the scope of concept of pay within the meaning of the former Article 119 TEEC.

The CJEU has included in the concept of pay benefits awarded under an occupational scheme that take the place of the benefits that would have been paid by a statutory social security scheme (C-7/93 — *Beune*[44]), as well as compulsory additional pre-retirement payments (C-166/99 — *Defreyn*[45]).

Furthermore, the CJEU has ruled that the following also qualify as pay: 'a contribution to a retirement benefits scheme which is paid by an employer in the name of employees by means of an addition to the gross salary and which therefore helps to determine the amount of that salary' (C-69/80 — *Worringham*[46]; C-23/83 — *Liefting*[47]) and the reduction in net pay

39 *Idem*, paragraphs 7 and 8.

40 C-170/84, *Bilkav Weber von Hartz*, ECLI:EU:C:1986:204.

41 C-262/88, *Barber v Guardian Royal Exchange Assurance Group*, ECLI:EU:C:1990:209.

42 C-170/84, *Bilkav Weber von Hartz*, ECLI:EU:C:1986:204, paragraph 22.

43 C-366/99, *Griesmar*, ECLI:EU:C:2001:648, paragraph 27.

44 C-7/93, *Bestuur van het Algemeen burgerlijk pensioenfonds v Beune*, ECLI:EU:C:1994:350, paragraph 37.

45 C-166/99, *Defreyn*, ECLI:EU:C:2000:411, paragraphs 26, 30.

46 C-69/80, *Worringham and Humphreys v Lloyds Bamk*, ECLI:EU:C:1981:63, paragraphs 15, 17.

because of a contribution paid to a social security scheme without affecting the gross pay (C-92/85 — *Newstead*[48]), as well as the right to join an occupational pension scheme (C-57/93 — *Vroege*[49]).

However, the use of actuarial factors differing according to sex in funded defined-benefit occupational pension schemes does not fall within the scope of Article 157 TFEU (C-152/91 — *Neath*[50]).

Benefits paid under a 'contracted-out' private occupational scheme that partly replaced a general statutory scheme constitute 'pay', even if paid after the termination of an employment relationship (C-262/88 — *Barber*[51]), as well as schemes supplementary to the statutory occupational pension scheme (C-110/91 — *Moroni*[52]).

Article 157 TFEU also applies to a survivor's pension provided by an occupational pension scheme based on a collective bargaining agreement (C-109/91 — *Ten Oever*[53]) and to benefits granted under a pension scheme, including survivors' benefits (C-147/95 — *Evrenopoulos*[54]). The CJEU has later found that pensions provided under a retirement scheme for civil servants are 'pay', since 'civil servants must be regarded as constituting a particular category of workers' (C-366/99 — *Griesmar*[55], C-173/13 — *Leone*[56]). In a case related to discrimination based on sexual orientation, the Court made clear that benefits from a survivor's pension scheme can constitute 'pay' even if the pension scheme has been transferred to a national authority and the benefits are funded by the State (C-433/15 — *Parris*[57]).

Occupational social security schemes are also covered by Title II, Chapter 2 of Directive 2006/54/EC, where Article 5 lays down that '*without prejudice the principle of equal pay, there shall be no direct or indirect discrimination on grounds of sex in occupational social security schemes'*.[58] However, in a certain sense the practical importance of this provision has been 'largely undermined by the Court's rulings that Article 157 also applies to [occupational social security] schemes'.[59]

Moreover, under Union law, a worker may only claim equality of treatment concerning occupational social security schemes in respect of periods of employment subsequent to 17 May 1990, the date of the *Barber* judgement, except if the worker has initiated legal proceedings before that date (C-109/91 — *Ten Oever*[60]).

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47 C-23/83, *Lieftingv Academisch Ziekenhuis bij de Universiteit van Amsterdam*, ECLI:EU:C:1984:282, paragraphs 12, 13.

48 C-192/85, *Newstead v Department of Transport*, ECLI:EU:C:1987:522, paragraph 18.

49 C-57/93, *Vroege v NCIV*, ECLI:EU:C:1994:352, paragraph 18.

50 C-152/91, *Neath v Steeper*, ECLI:EU:C:1993:949, paragraph 32.

51 C-262/88, *Barber v Guardian Royal Exchange Assurance Group*, ECLI:EU:C:1990:209, paragraph 30.

52 C-110/91, *Moroni v Collo*, ECLI:EU:C:1993:926, paragraph 15.

53 C-109/91, *Ten Oever v Stichting Bedrufspensioenfonds voor het Glazenwassers-en Schoonmaakbedrijf*, ECLI:EU:C:1993:833, paragraphs 12-14.

54 C-147/95, *Dimossia Epicheirissi Ilektrismou v Evrenopoulos*, ECLI:EU:C:1997:201, paragraph 24.

55 C-366/99, *Griesmar*, ECLI:EU:C:2001:648, paragraph 31.

56 C-173/13, *Leone*, ECLI:EU:C:2014:2090, paragraph 39.

57 C-443/15, *Parris*, ECLI:EU:C:2016:897, paragraph 41.

58 Concerning the definition of 'occupational social security schemes' for the purpose of Directive 2006/54/EC, see Article 2(1)(f); concerning the material scope of Title II, Chapter 2 of Directive 2006/54/EC, see Articles 7 and 8 of the Directive.

59 *Ellis, Evelyn and Watson, Philippa*, EU Anti-Discrimination Law, Second Edition, Oxford 2012, p. 210.

60 C-109/91, *Ten Oever v Stichting Bedrufspensioenfonds voor het Glazenwassers-en Schoonmaakbedrijf*, ECLI:EU:C:1993:833, paragraph 19; see also Article 12 of Directive 2006/54/EC.

3. Work of equal value

Victims of pay discrimination may face a major obstacle in bringing claims before national courts due to the problems of making comparisons. There is a lack of clarity in the assessment criteria for comparing different jobs.

In its jurisprudence the CJEU has clarified the scope of the Treaty provisions and the secondary EU legislation on the principle of equal pay. There is no EU-level legislative definition of work of equal value, even if the concept of 'work of equal value' has been extensively interpreted by the CJEU in its case law.

The CJEU has held on several occasions that determining equal value of work 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 skill, effort and responsibility required, or the work undertaken and the nature of the tasks involved in the work to be performed[61] are all relevant. This case law was also reflected in the Recital 9 of Directive 2006/54/EC, which states that:

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

The CJEU has declared early on that the former Article 119 TEEC pursued an economic and social aim, thus showing that the principle that men and women are entitled to equal pay 'forms part of the foundations of the Community' and is thus a provision with direct effect (C-43/75 — *Defrenne II*[62]). This Treaty provision may be invoked before national courts, in particular in cases of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which work is carried out in the same establishment or service, whether private or public (C-43/75 — *Defrenne II*[63], C-129/79 — *McCarthys*[64], C-96/80 — *Jenkins*[65]).

The CJEU has also specified that the former Article 141(1) TEC lays down the principle that equal work or work of equal value must be remunerated in the same way, regardless of whether it is performed by a man or a woman (C-320/00 — *Lawrence*[66], C-17/05 — *Cadman*[67]). To be applicable, the principle presupposes that male and female workers are in comparable situations (C-320/00 — *Lawrence*[68]).

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61 See for instance Cases C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri*, ECLI:EU:C:1995:155; C-237/85, *Rummler v Dato-Druck GmbH*, ECLI:EU:C:1986:277; C-262/88, Barber v Guardian Royal Exchange Assurance Group, ECLI:EU:C:1990:209; C-381/99, *Brunnhofer*, ECLI:EU:C:2001:358, paragraph 35.

62 C-43/75, *Defrenne v SABENA*, ECLI:EU:C:1976:56, paragraph 12.

63 *Idem*, paragraph 40.

64 C-129/79, *McCarthys v Smith*, ECLI:EU:C:1980:103, paragraph 10.

65 C-96/80, *Jenkins v Kingsgate*, ECLI:EU:C:1981:80, paragraph 17.

66 C-320/00, *Lawrence and Others*, ECLI:EU:C:2002:498, paragraph 11.

67 C-17/05, *Cadman*, ECLI:EU:C:2006:633, paragraph 27.

68 C-320/00, *Lawrence and Others*, ECLI:EU:C:2002:498, paragraph 12.

The principle of equal pay laid down in the former Article 119 TEEC does not preclude the making of a lump-sum payment exclusively to female workers who take maternity leave, where that payment is designed to counterbalance the occupational disadvantages which arise for those workers as a result of their being away from work (C-218/98 — *Abdoulaye*[69]) because their particular situation due to maternity cannot be compared with that of male workers.

The CJEU has held that Member States are responsible for guaranteeing the right to receive equal pay for work of equal value, even in the absence of a job classification system. If there is a disagreement as to the application of the concept of 'work to which equal value is attributed', the worker must be entitled to claim before an appropriate authority that his/her work has the same value as other work and, if that is found to be the case, to have his/her rights under the Treaty and the Directive acknowledged by a binding decision (C-61/81 — *Commission v UK*[70]).

If the worker presents evidence to show that the 'criteria for establishing the existence of a difference in pay between a woman and a man and for identifying comparable work are satisfied, a *prima facie* case of discrimination would exist' (C-427/11 — *Kenny*[71]*).*

In *Barber* and in the subsequent case law, the CJEU has considered the concept of transparency to be of fundamental importance in relation to pay under the former Article 119 TEEC. The CJEU stated that 'with regard to the means of verifying compliance with the principle of equal pay, […] if the national courts were under an obligation to make an assessment and a comparison of all the various types of consideration granted, according to the circumstances, to men and women, judicial review would be difficult and the effectiveness of [ex-] Article 119 TEEC would be diminished as a result. It follows that genuine transparency, permitting an effective review, is assured only if the principle of equal pay applies to each of the elements of remuneration granted to men or women. The application of the principle of equal pay must be ensured in respect of each element of remuneration and not only on the basis of a comprehensive assessment of the consideration paid to workers (C-262/88 — *Barber*[72], C-381/99 — *Brunnhofer*[73]).

Over the years, the CJEU has established the following criteria to determine whether different types of work are of equal value.

3.1. Nature of work

In a case concerning the question whether a classification scheme might be discriminatory on grounds of gender, the CJEU ruled that the nature of tasks involved in the work to be performed 'should be capable of measurement by a scheme'. Therefore, in differentiating rates of pay, it was consistent with the principle of non-discrimination to use a criterion based on the objectively measurable expenditure of effort necessary in carrying out the work or the degree to which, reviewed objectively, the work was physically heavy (C-237/85 — *Rummler*[74]). This also applies to part-time work (C-96/80 — *Jenkins*[75]).

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69 C-218/98, *Abdoulaye and Others*, ECLI:EU:C:1999:424..

70 C-61/81, *Commission v United Kingdom*, ECLI:EU:C:1982:258, paragraph 9.

71 C-427/11, *Kenny and Others*, ECLI:EU:C:2013:122, paragraph 20.

72 C-262/88, Barber v Guardian Royal Exchange Assurance Group, ECLI:EU:C:1990:209, paragraphs 34, 35.

73 C-381/99, *Brunnhofer*, ECLI:EU:C:2001:358, paragraph 35.

74 C-237/85, *Rummler v Dato-Druck GmbH*, ECLI:EU:C:1986:277.

3.2. Scope of comparison of work of equal value

The CJEU has developed criteria of comparability with regard to the principle of equal pay for men and women.

The CJEU has held that the Treaty and the Directive apply to piece-work pay schemes, in which pay depends entirely or in a large measure on the individual output of each worker (C-400/93 — *Royal Copenhagen*[76]).

Moreover, for the purposes of the comparison between the average pay paid to two groups of workers to whom a piece-work pay scheme is applied, the national court must satisfy itself that the two groups both encompass all the workers who, taking account of a set of factors such as the nature of the work, the training requirements and the working conditions, can be considered to be in a comparable situation and that they cover a relatively large number of workers ensuring that the differences are not due to purely fortuitous or short-term factors or to differences in the individual output of the workers concerned (C-400/93 — *Royal Copenhagen*[77]).

The CJEU has further held that the principle of equal pay for work of equal value covers a situation in which a worker is engaged in work of a higher value than that of the person with whom a comparison is to be made (C-157/86 — *Murphy*[78]).

The work which may serve as a comparison does not necessarily need to be the same as that carried out by the person who invokes the principle of equality to their benefit (C-236/98 — *JämO*[79], C-192/02 — *Nikoloudi*[80]).

Concerning benefits that fall under the concept of 'pay', a violation of the principle of equal pay can only be identified if the men and women to whom the benefit applies are in identical situations. For this reason, the Court did not see a violation of the principle of equal pay in the case of a so-called bridging pension. The rules governing the bridging pension resulted, in average, in smaller sums paid to women between 60 and 65 than to men between 60 and 65, because the retirement age was at 60 for women and at 65 for men (C-132/92 — *Birds Eye Walls*[81]).

3.2.1. Source of pay conditions

Early on, the CJEU found that both public and private sector employees can pursue equal pay claims. In *Defrenne II*, followed by subsequent judgments, the CJEU ruled that the former Article 119 TEEC applied in cases 'in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public'.

These findings were confirmed when the CJEU stated that 'in cases of actual discrimination falling within the scope of the direct application of [ex-] Article 119 TEEC, comparisons are confined to parallels which could be drawn on the basis of concrete appraisals of the work

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75 C-96/80, *Jenkins v Kingsgate*, ECLI:EU:C:1981:80, paragraph 10.

76 C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri*, ECLI:EU:C:1995:155, paragraph 38.

77 C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri*, ECLI:EU:C:1995:155, paragraphs 32 to 34.

78 C-157/86, *Murphy v An Bord Telecom Eireann*, ECLI:EU:C:1988:62, paragraph 6.

79 C-236/98, *JämO*, ECLI:EU:C:2000:173, paragraphs 48-50.

80 C-196/02, *Nikoloudi*, ECLI:EU:C:2005:141, paragraph 28.

81 C-132/92, *Birds Eye Walls v Roberts*, ECLI:EU:C:1993:868, paragraph 23.

actually performed by employees of different sex within the same establishment or service' (C-129/79 — *McCarthys*[82]).

However, it was later specified that there was 'nothing in the wording of the former Article 141(1) TEC to suggest that it only applies to situations in which men and women work for the same employer' (C-320/00 — *Lawrence*[83]).

On the other hand, in a case 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, there is no body which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of the former Article 141(1) TEC. The work and the pay of those workers cannot therefore be compared on the basis of that provision' (C-256/01 — *Allonby*[84]).

In the above case law, the CJEU introduced a new element broader than the same establishment or the same service for the comparison of work of equal value, that of single source. According to that case law, when the differences identified in the pay conditions of workers of different sex performing equal work or work of equal value cannot be attributed to a single source, they do not fall within the scope of Article 157 TFEU.

3.2.2. Period of time when work of men and women was performed

The principle that men and women should receive equal pay for equal work applies whether or not that work is performed at the same time and for the same employer. It also applies if it is established that a woman received less pay than a man who was employed for a period before her, doing equal work for the employer. The CJEU stressed, however, that it could 'not be ruled out that a difference in pay between two workers occupying the same post but at different periods in time may be explained by the operation of factors which were unconnected with any discrimination on grounds of sex' (C-129/79 — *McCarthys*[85]).

3.2.3. Collective agreements

A number of cases before the CJEU have concerned national collective agreements. In a segregated labour market men and women are often covered by separate agreements because of their different occupations, which precludes comparison between groups of workers, even in the same organisation, covered by different collective agreements.

The CJEU has found that the fact that the pay rates were agreed by collective bargaining is not sufficient to objectively justify a difference in pay (C-127/92 — *Enderby*[86]). The principle of equal pay for men and women also applies where the elements of pay are determined by collective bargaining or negotiated at local level (C-400/93 — *Royal Copenhagen*[87]).

3.2.4. Shifting of the burden of proof

The CJEU has held that where an undertaking applies a pay system which is lacking in transparency, the burden of proof is on the employer to show that his pay practice is not discriminatory, where a female worker establishes, by comparison with a relatively large

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82 C-129/79, *McCarthys v Smith*, ECLI:EU:C:1980:103, paragraph 15.

83 C-320/00, *Lawrence and Others*, ECLI:EU:C:2002:498, paragraph 17.

84 C-256/01, *Allonby*, ECLI:EU:C:2004:18, paragraph 46.

85 C-129/79, *McCarthys v Smith*, ECLI:EU:C:1980:103, paragraph 12.

86 C-127/92, *Enderby v Frenchay Health Authority and Secretary of State for Health*, ECLI:EU:C:1993:859, paragraph 22.

87 C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri,* ECLI:EU:C:1995:155, paragraph 47.

number of employees, that the average payment of female workers is lower than that of male workers (C-109/88 — *Danfoss*[88]*).* The CJEU has noted that female employees 'would be deprived of any effective means of enforcing the principle of equal pay before the national courts if the effect of adducing such evidence was not to impose upon the employer the burden of proving that his practice in the matter of wages is not in fact discriminatory'.

The concern on transparency expressed in *Danfoss* is applicable to every element of the determination of a pay system, including to any form of classification.

The CJEU has also held that where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women, the former Article 119 TEEC required the employer to show that the difference is based on objectively justified factors unrelated to any discrimination on grounds of sex (C-127/92 — *Enderby*[89]), or where the percentage of women is much higher than of men, this provision 'requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex' (C-236/98 — *JämO*[90]; C-17/05 — *Cadman*[91]*;* C-427/11 — *Kenny*[92]).

This shows that a *prima facie* case of discrimination should in principle be evidenced by significant statistics, but sometimes statistical data might not be available. In a case concerning the job application of a woman who claimed she was discriminated against on grounds of her sex, age and ethnic origin, the CJEU made clear that indirect discrimination could be established by any means, including on the basis of statistical evidence (C-415/10 — *Meister*[93]). In this regard the national court, which has to apply the rule on the shifting of the burden of proof, may take into account that an employer has refused the worker any access to the information that she or he has sought to have disclosed.[94]

The CJEU expressed the same basic concern more recently in *Schuch-Ghannadan*[95], concerning the determination of whether a national legislation affects a considerably higher number of women than men, where a common problem encountered by complainants is that relevant statistics on the impact of a specific law may be hardly accessible or not available at all. The complainant alleged that the Austrian legislation which allowed universities to set different maximum duration of successive fixed-term work relations for full-time workers and part-time workers entailed indirect discrimination against women. She presented statistical data on the Austrian employment market in general, showing that a considerably higher proportion of women than men were working part-time. However, she was unable to provide specific data on workers employed by Austrian universities subject to the legislation in discussion, because she had no access to such data. The CJEU held that where workers alleging indirect discrimination have no access or hardly access to statistics or facts targeting

88 C-109/88, *Handels-og Kontorfunktionaerenes Forbund i Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss*, ECLI:EU:C:1989:383, paragraph 11.

89 C-127/92, *Enderby v Frenchay Health Authority and Secretary of State for Health*, ECLI:EU:C:1993:859, paragraph 19.

90 C-236/98, *JämO*, ECLI:EU:C:2000:173, paragraph 54.

91 C-17/05, *Cadman*, ECLI:EU:C:2006:633, paragraph 39.

92 C-427/11, *Kenny and Others*, ECLI:EU:C:2013:122, paragraph 17.

93 C-415/10, *Meister*, ECLI:EU:C:2012:217, paragraph 43.

94 *Idem*, paragraph 44.

95 C-274/18, *Schuch-Ghannadan*, ECLI:EU:C:2019:828.

specifically workers concerned by the national legislation at stake, they should be allowed to present general statistical data on the employment market of the member state concerned.[96]

Even though these two latter judgments did not concern pay, they show that the CJEU constantly applies the concern on transparency to cases regarding the sharing of the burden of proof.

In the case of indirect pay discrimination 'it is for the employer to provide objective justification for the difference in pay between the workers who consider that they have been discriminated against and the comparators' (C-427/11 — *Kenny*[97]).

In *Royal Copenhagen*, concerning proof of pay discrimination in piece-work pay schemes, the CJEU noted that the principle of equal pay between men and women means 'that the mere finding that in a piece-work pay scheme the average pay of a group of workers consisting predominantly of women, carrying out one type of work is appreciably lower than the average pay of a group of workers consisting predominantly of men, carrying out another type of work to which equal value is attributed, does not suffice to establish that there is discrimination with regard to pay. However, in a piece-work pay scheme in which individual pay consists of a variable element depending on each worker's output and a fixed element differing according to the group of workers concerned, where it is not possible to identify the factors which determined the rates or units of measurement used to calculate the variable element in the pay, the employer may have to bear the burden of proving that the differences found are not due to sex discrimination[98].' Therefore, also in piece-work schemes the burden of proof may be shifted to the employer, when this is necessary in order to avoid depriving workers of effective means of enforcing the equal pay principle.

3.3. Objective justification of a difference in treatment

The CJEU has held that a measure which puts considerably more workers of one sex at a disadvantage when compared to the other sex is only compatible with the principle of equal pay if the difference in treatment is 'justified by objective factors unrelated to any discrimination linked to the difference in sex' (C-173/13 — *Leone*[99], C-427/11 — *Kenny*[100]). A service credit scheme designed to compensate for the disadvantages suffered in the course of a career break taken to bring up children can constitute a violation of the principle of equal pay, if it benefits a significantly higher number of female civil servants than men. It is for the Member State having introduced this system to show that the difference in treatment is justified because the service credit system pursues a legitimate aim unrelated to any discrimination based on sex (C-173/13 — *Leone*[101]). Possible objective justifications must correspond to a real need of the employer (C-427/11 — *Kenny*[102]). The fact that pay rates have been agreed in collective bargaining does not constitute sufficient objective justification for the difference in pay (C-127/92 — *Enderby*[103], C-427/11 — *Kenny*[104]).

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96 C-274/18, *Schuch-Ghannadan*, ECLI:EU:C:2019:828, paragraphs 55-57.

97 *Idem*, paragraph 41.

98 C-400/93 *Specialarbejderforbundet i Danmark v Dansk Industri*, ECLI:EU:C:1995:155, paragraph 28.

99 C-173/13, *Leone*, ECLI:EU:C:2014:2090, paragraph 41.

100 C-427/11, *Kenny and Others*, ECLI:EU:C:2013:122, paragraph 39.

101 C-173/13, *Leone*, ECLI:EU:C:2014:2090, paragraph 62.

102 C-427/11, *Kenny and Others*, ECLI:EU:C:2013:122, paragraph 46.

103 C-127/92, *Enderby v Frenchay Health Authority and Secretary of State for Health*, ECLI:EU:C:1993:859, paragraph 22.

104 C-427/11, *Kenny and Others*, ECLI:EU:C:2013:122, paragraph 48.

4. Job evaluation and classification

Job classification or job evaluation can be used to determine the hierarchy or hierarchies of jobs in an organisation or in a group of organisations as the basis for explaining the pay system. Since direct simple pay discrimination for the exact same work has become rare, the discrimination-related roots of the pay gap have to be located in the methods used to differentiate between male and female-dominated jobs. Such discrimination is much less conspicuous and is often concealed in the technicalities of determining the value of work and pay through classification systems. Gender-neutral job classification systems support establishing 'work of equal value' and may keep away indirect pay discrimination.

Job classification systems aim to measure the relative value not of job holders, but of jobs. In theory, the performance of the individual should not enter into the evaluation or classification of the job itself. However, if a job classification system is established in practice, it may be difficult to dissociate individuals from their jobs.

Job evaluation or job classification systems aim to provide an acceptable rationale for determining pay levels in existing hierarchies of jobs. Job classification systems are a management tool to achieve an acceptable rank order of jobs, implemented unilaterally or with varying degrees of participation on the part of the workforce. Acceptability, consensus and the maintenance of traditional hierarchical structures are essential parts of job evaluation or job classification systems.

Article 4, second indent of the Directive 2006/54/EC provides 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'.

Member States are not obliged to introduce job classification systems. Nevertheless, if such systems are used by a private or a public employer as a basis for determining pay rates, they have to be gender neutral.

A number of judgments of the CJEU provide guidance on the role and nature of job evaluation and classification systems.

Early on, the CJEU noted that comparative studies of entire branches of industry are needed to detect indirect and disguised discrimination. Therefore, the CJEU 'requires, as a prerequisite, the elaboration by the Community and national legislative bodies of criteria of assessment' (C-129/79 — *McCarthys*[105]*).* This would appear to encompass evaluation and classification techniques as well as statistical analyses of pay and gender differences.

In *Danfoss*[106], the CJEU held that the employer had to justify recourse to the criteria of mobility and training, but not to the criterion of length of service. This merely confirms that before any system of classification can be considered as a justification for the different grading of jobs, the court seized of a dispute, must itself, with relevant information, determine the nature and demands of jobs compared for the purposes of equal pay. Job classification and evaluation may be reasons justifying differences in pay but their neutrality and

105 C-129/79, *McCarthys v Smith*, ECLI:EU:C:1980:103, paragraph 15.

106 C-109/88, *Handels-og Kontorfunktionaerenes Forbund i Danmark v Dansk Arbejdsgiverforening, acting on behalf of Danfoss,* ECLI:EU:C:1989:383.

appropriateness for particular jobs must be assessed against a review by the courts of the nature of disputed jobs to comply with the the principle of equal pay.

Under Directive 76/207/EEC[107] (now Directive 2006/54/EC), a job classification system is only one of several tools for determining pay for work to which equal value is attributed (C-61/81 — *Commission v UK*[108]). The CJEU held that 'where a job classification system is used in determining remuneration, that system must be based on criteria which do not differ according to whether the work is carried out by a man or by a woman and must not be organised, as a whole, in such a manner that it has the practical effect of discriminating generally against workers of one sex'.[109]

On the other hand, the CJEU provided that a classification system can use the criterion of the muscular effort required for the work, as long as the system as a whole precludes any discrimination on grounds of sex by taking into account other criteria for which workers may show particular aptitude on account of being male or female (C-237/85 — *Rummler*[110]).

The CJEU laid down three guiding principles following from paragraph 2 of Article 1 of Directive 75/117/EEC (now Article 4, 2nd indent of Directive 2006/54/EC) on the question of job classification (C-237/85 — *Rummler*):

> 'a) the criteria governing pay-rate classification must ensure that work which is objectively the same attracts the same rate of pay whether it is performed by a man or a woman;
>
> b) the use of values reflecting the average performance of workers of the one sex as a basis for determining the extent to which work makes demands or requires effort or whether it is heavy constitutes a form of discrimination on grounds of sex contrary to the Directive;
>
> c) in order for a job classification system not to be discriminatory as a whole it must, insofar as the nature of the tasks carried out in the undertaking permits, take into account criteria for which workers of each sex may show a particular aptitude.'[111]

These guiding principles demonstrate that in the context of a dispute, according to the case law of the CJEU, a job classification system must be formal, analytical, factor based and non-discriminatory.

In subsequent judgment, the CJEU provided the following clarifications of its case law on job classification and on work of equal value (C-381/99 — *Brunnhofer*[112]):

- the fact that a female employee who claims to be the victim of discrimination on grounds of sex and the male comparator are classified in the same job category under the collective agreement regulating their employment is not in itself sufficient for concluding that those employees perform the same work or work of equal value, since this fact is only one indication amongst others that this criterion is met;

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107 Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39, 14.2.1976, p. 40

108 C-61/81, *Commission v United Kingdom*, ECLI:EU:C:1982:258, paragraph 4.

109 *Idem*, paragraph 8.

110 C-237/85, *Rummler v Dato-Druck GmbH*, ECLI:EU:C:1986:277, paragraph 17.

111 *Idem*, paragraph 25.

112 C-381/99, *Brunnhofer*, ECLI:EU:C:2001:358, paragraphs 44, 63 and 68.

– a difference in pay may be justified by circumstances not taken into consideration under the collective agreement applicable to the employees concerned, provided that they constitute objective reasons unrelated to any discrimination based on sex and are in conformity with the principle of proportionality;

– in the case of work paid at time rates, a difference in pay awarded, at the time of their appointment, to two employees of the different sexes for the same work or for work of equal value cannot be justified by factors which become known only after the employees concerned start work and which can be assessed only once the employment contract is being performed, such as a difference in the individual work capacity of the persons concerned or in the effectiveness of the work of a specific employee compared with that of the colleague.

Confirming its previous case-law in *Danfoss*, the CJEU ruled that since, as a general rule, recourse to the criterion 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 this regard (C-17/05 — *Cadman*[113]).

5. Conclusions

A considerable body of CJEU case law addresses various elements of the principle of equal pay. It provides valuable clarification about concepts of pay and work of equal value as well as guidance on discrimination in job evaluation and classification.

This case law could serve as guidance to all relevant stakeholders to facilitate the application of the principle of equal pay in practice. It may also be a source of inspiration for the authorities of Member States as well as national judiciaries to tackle the complex challenges related to equal pay.

113 C-17/05, *Cadman*, ECLI:EU:C:2006:633, paragraph 39.

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