

# **EQUAL PAY AND WORKING CONDITIONS**

**TOWARDS THE UNIFORM AND DYNAMIC IMPLEMENTATION OF EU ANTI-DISCRIMINATION LAW:  
THE ROLE OF SPECIALISED BODIES.  
REPORT OF THE THIRD EXPERTS' MEETING, HOSTED BY THE DUTCH EQUAL TREATMENT COMMISSION  
23-24 JUNE 2003**

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# INTRODUCTION

EDITH BRONS, VICE PRESIDENT, EQUAL TREATMENT COMMISSION

This publication documents the third experts' meeting in a series of seven organised under the project called 'Towards the Uniform and dynamic Implementation of EU Anti-discrimination Legislation: the Role of Specialised Bodies'. Both the Racial Equality Directive (Council Directive 2000/43/EC of 29 June 2000) and the amending Sex Equality Directive (Directive 2002/73/EC, amending Council Directive 76/207/EEC) require EU Member States to designate bodies for the promotion of equal treatment. The above-mentioned project has to be seen against the background of the fact that all specialised bodies are obliged to adhere to European anti-discrimination law. The project was initiated by several national equality bodies, among which the Dutch 'Commissie gelijke behandeling', hereinafter the Equal Treatment Commission ('the Commission'). The latter was asked to lead the project, which is supported by the European Community Action Plan to Combat Discrimination.

This third experts' meeting was hosted by the Commission in Utrecht, the medieval seat of the bishop of Utrecht, on 23 and 24 June 2003. The Commission chose the theme 'Equal pay and working conditions' because of its considerable experience with this subject. As we all know, equal pay is one of the oldest subjects in the history of fighting discrimination. Already in 1951 the ILO Treaty no. 100 embodied the idea of equal pay for work of equal value for men and women, as did the European Social Charter in section 4, subsection 3, and the UN Convention on the Elimination of all forms of Discrimination against Women in section 11, subsection 1d). In this sense, the right to equal pay for work of equal value can be seen as a human right. In the European context, this right was also recognised rather a long time ago in the Treaty of Rome of 1957, in Section 119 (now 141) of the EC Treaty, as well as in the first directive on equal pay between men and women 75/117/EEC of 10 February 1975, and in others subsequently. In the Netherlands the starting point was the implementation of that directive through the Equal Treatment Act (ETA) 1975.

In the Netherlands there is a long-standing tradition of job description schemes, a basic tool to compare jobs and ascertain whether there are discriminatory factors in the determination of salaries. This circumstance has played an important role in the gathering of experience by the Dutch Commission. A comparable tradition is not to be found in many other countries.

Exceptional speakers, expertly chaired by Ina Sjerps, former director of the Equal Treatment Commission for Men and Women, delivered highly informative presentations setting out the main issues related to equal pay. Today Ina Sjerps is secretary-general of the College for Employment Affairs of the Dutch Association for Urban Councils (VNG). She plays an important role in the collective agreements between the public local authorities and their civil servants. Irene Asscher-Vonk, professor at the University of Nijmegen, gave an excellent opening speech. Siebrand Bisschop, job evaluation expert of the Commission, and Albertine Veldman, lecturer at the University of Utrecht, explained the technical and the legal aspects respectively of questions of how to determine equal value of jobs and what is the role of job evaluation schemes. Beverly Jones, solicitor in Belfast, and Evert-Jan Henrichs, solicitor in Amsterdam, explained the practical value and suitability of the legal criteria for work of equal value. Susanne Burri, lecturer at the University of Utrecht, department of Gender and Law, and Muriel Dalglish, equal pay-expert of the FNV, a Dutch trade union, discussed the concept of indirect discrimination in equal pay questions. Dick Houtzager, lawyer with the *Landelijke bureau voor racismebestrijding* (LBR), a Dutch NGO against racism, and Lilla Farkas, a Hungarian lawyer, discussed the question whether the concepts that have been developed for gender discrimination can be transposed to race discrimination in equal pay questions. To conclude, Yvonne Telenga, judge and substitute member of the Commission, and I made a comparison of some cases that have been judged by both the Commission in its quasi-judicial role and the courts. We also tried to explain the source of the differences in the results of their judgements.

We were pleased to welcome all of the speakers and participants from across Europe to Utrecht, and thank them for their contributions to this event and to this publication.

# **EQUAL PAY: EXPERIENCES OF THE EQUAL TREATMENT COMMISSION**

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VICE PRESIDENT, EQUAL TREATMENT COMMISSION & SIEBRAND BISSCHOP, EXPERT ON JOB  
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## 1. INTRODUCTION

During the 1990s in the Netherlands there was a shift in political focus away from sex equality in the labour market towards policies to achieve a balance between work and family life. The 1998-2002 government turned some of its attention back to policies that challenge unequal pay in 2000.<sup>1</sup> This renewed attention was welcomed by the Equal Treatment Commission.

On average the pay gap between men and women has fluctuated between 23 and 25% during the last 25 years.<sup>2</sup> Recent *Eurostat* figures show that the gap between men and women was 21% in 1999, which indicates that the gap has been slightly reduced.<sup>3</sup> As in other countries, there is some discussion as to the extent to which unequal treatment and unequal pay contribute to the pay gap, in order to determine the possibilities of remedies through equality legislation and policies. As in most European countries, the development of legislation dealing with equal pay has been strongly influenced by European Community Law, including the rulings of the European Court of Justice in Luxembourg (EJC).

In the section 2 of this paper an overview of the Dutch national legislation concerning equal treatment in working conditions and equal pay will be presented. Section 3 looks at the equal pay practice of the Commission and comments on the Commission's objective of enhancing collective improvement in the field of unequal pay, and section 4 sets out the relationship between the Commission and the courts.

<sup>1</sup> *Plan for combating unequal pay (Plan van Aanpak gelijke beloning)*, TK 27099 (Parliament, Second Chamber).

<sup>2</sup> European Commission, *Employment in Europe 1999*, Luxembourg, Office for Official Publications of the European Communities 1999.

<sup>3</sup> See [www.europa.eu.int](http://www.europa.eu.int)

## 2. EQUAL TREATMENT LEGISLATION IN THE NETHERLANDS

### 2.1 Equal Treatment Act (ETA) <sup>4</sup>

In 1983 the principle of equal treatment was introduced into the Dutch Constitution. According to Article 1 of the Constitution, all persons in the Netherlands should be treated equally in equal circumstances and distinctions on grounds of religion, belief, political opinion, race, sex, or any other grounds are prohibited. The principles of equal treatment and non-discrimination apply, like human rights law, to the relationship between the government and the individual. Article 1 is not directly applicable in actions between civilians. Unlike in Germany, there is no Constitutional Court in the Netherlands, but the Constitution places an obligation on the judiciary to interpret national law in accordance with binding international law.

The Equal Treatment Act of 1994 provides for the establishment of an Equal Treatment Commission, vested with powers to investigate, mediate and judge. The Commission is an independent body of nine members and several deputy members. The Commission plays its own part in the national structure. The government's responsibility for equal treatment is also expressed through the establishment of the Commission. By doing so, the government has set a standard that enables potential plaintiffs to initiate proceedings, without for instance denying the responsibility of social partners for collective bargaining or the competence of the judiciary.

### 2.2 Equal Treatment of Men and Women in the Workplace Act (ETMW)

Prior to the establishment of the ETA, equal treatment legislation existed to protect women employees against differential treatment. In addition to the ETA, the 1989 Equal Treatment of Men and Women in the Workplace Act is still in force. The provisions concerning differential treatment on the ground of sex have been partially incorporated into the Labour Law section of the Civil Code. It functions as a *lex specialis* to the ETA. Thus it takes priority over the ETA. The 1989 ETMW gives, for example, more detailed provisions about the establishment of an equal pay case. These provisions followed the adoption of Council Directives 75/117 and 76/207.<sup>5</sup>

### 2.3 Differential Treatment on the ground of Working Hours Act (WHA)

Since 1 November 1996 the law has also prohibited discrimination based on working hours, unless the distinction is objectively justified.<sup>6</sup> Before the 1996 Act, cases concerning infringements of the rights of part-time workers had to be construed as indirect discrimination against women, following the case law of the *Bilka/Weber* doctrine developed by the ECJ.<sup>7</sup> The infringement had to be supported by statistical evidence showing disproportional effects on female employees. The principal rule now is that the aggrieved party has to prove that he or she has suffered disadvantage or damage in comparison with someone working a different amount of hours (per week or month or annually). The basic rule is that the part-time worker is entitled to a proportion of the working conditions, unless this is impossible. An example is the part-time worker who works five hours every day and gets his travel expenses reimbursed pro rata. This would not be fair, since he would have exactly the same expenses as a full-timer. Another example is the part time worker who does not benefit comparably by being granted half the benefits of a lease car. Other options have to be taken into consideration in such cases. If disadvantage on the ground of working hours can be established, the infringement may be lawful, provided the other party presents an objective justification. The law follows the objective justification test set out by the ECJ in its case law.

<sup>4</sup> The full text of the Equal Treatment Act can be downloaded from the English page of our internet site [www.eqb.nl](http://www.eqb.nl)

<sup>5</sup> 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 of 19 February 1975, p. 19 and 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 of 14 February 1976, p. 40.

<sup>6</sup> Differential Treatment on the ground of Working Hours Act (*Wet onderscheid op grond van arbeidsduur WOA*) Stb. 391.

<sup>7</sup> Case 170/84 *Bilka-Kaufhaus v. Weber von Hartz* [1986] ECR, 1607 and ECJ 15 July 1989; Case 171/88, *Rinner-Kühn v. FWW Spezial Gebäudereinigung* [1989] ECR 1989, 2743; Case C-184/89, *Nimz v. Freie und Hansestadt Hamburg* [1991] ECR I-313.

## 2.4 Other Legislation

A law on the right to adaptation of working hours entered into force in the Netherlands on 1 July 2000.<sup>8</sup> Although not directly linked to equal treatment, it is likely to be mostly women who will make a request for adaptation of their working hours in order to combine their tasks at home with their jobs. Further legislation to prohibit distinctions on the grounds of the character or type of labour contract came into force on 22 November 2002.<sup>9</sup> This legislation forbids differential treatment of people with flexible or temporary contracts compared to permanent staff. Unlike distinctions on the grounds of age, distinction on the ground of disability has also recently been incorporated into Dutch anti-discrimination law, namely in the Equal Treatment Act on the ground of Disability and Chronic Illness.<sup>10</sup>

## 3. SELECTED ISSUES FROM THE COMMISSION'S EQUAL PAY PRACTICE

Much of the gender pay gap arises as a result of the high concentration of women among the low paid. This problem cannot be challenged under current equal treatment legislation. The law applies whenever the level of pay is influenced by indirect discrimination, differential treatment on the grounds of working hours, unequal application of labour conditions or unequal pay for work of equal value. This does not detract from the fact that, on average, wage levels in the sections of the labour market dominated by men are higher than in the sections dominated by women. Other policies are needed to improve this situation. It is quite striking that up until today no research has been done to investigate the equal value of male and female dominated jobs and to analyse more closely the nature and range of different benefits. The Dutch Ministry of Social Affairs and Employment is however currently conducting an investigation into the nature and range of unequal pay in the private sector.

### 3.1 Standard equal pay investigation

The main provisions concerning equal pay between the sexes are laid down in Articles 7-9 ETMW and are applied by the Commission in investigations of unequal pay. In a standard procedure of investigation the Commission will:

- determine the period to be taken into consideration and
- assess the equal value of the jobs that have to be taken into consideration;
- assess the standards of conditions the employer usually applies to determine salaries and
- investigate if and how these standards have been applied in the specific case (with respect to the applicant and the colleagues s/he compares her/himself with)

Article 8 ETMW provides that the equal value should preferably be assessed by using a reliable job evaluation scheme, where possible using the scheme the company itself applies. If such a scheme is not available - because the employer does not apply one and/or the collective agreement does not prescribe one or the scheme does not appear to be reliable - the Commission usually chooses a job evaluation scheme that corresponds to the type of labour at hand.

<sup>8</sup> Law on the Adaptation of working hours (*Wet aanpassing arbeidsduur, WAA*) Stb. 114.

<sup>9</sup> Law of 7 November 2002 to transpose Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed term work concluded by ETUC, UNICE and CEEP (*Wet van 7 november 2002 tot uitvoering van de richtlijn 1999/70/EG van de Raad van de Europese Unie van 28 juni 1999 betreffende de door het EVV, de UNICE en het CEEP gesloten raamovereenkomst inzake arbeidsovereenkomsten voor bepaalde tijd*), Stb. 2002, 560, referred to by the Commission as WOBOT.

<sup>10</sup> *Wet van 3 april 2003 tot vaststelling van de Wet gelijke behandeling op grond van handicap of chronische ziekte*, Stb. 206. There are also legal provisions that cover equal job opportunities for disabled employees (Article 3, *Wet reïntegratie arbeidsgehandicapten*), and medical examinations in job applications, (*Wet Medische Keuringen*). See also A. Hendriks, *Gelijke toegang tot de arbeid voor gehandicapten*, Kluwer Deventer, 2000, Summary, p. 301.

<sup>11</sup> See e.g. *Commission 18 May 1998*, 1998-55.

The Commission has developed a test of several criteria to determine whether a job evaluation scheme is reliable.<sup>11</sup>

These criteria concern:

- consistency of the method
- protocols concerning the job descriptions
- evaluation and classification of job characteristics
- existence of reference materials and job lists to compare evaluation or classification of job levels
- transparency of the scheme
- possibility of evaluating main factors such as knowledge, responsibilities, abilities and specific labour conditions (such as emotional or physical burden during job performance)
- regular maintenance of methods and job descriptions

The Commission's interpretation of the EJC *Rummler* ruling<sup>12</sup> is also that a job evaluation scheme should be based on an analytical method of evaluation. This means the scheme must be able to evaluate jobs on the basis of each relevant characteristic that is part of the totality of demands needed to perform the job. A method based on the comparison of job descriptions as a whole, and not comparing jobs on the basis of their specific characteristics, will not be accepted as reliable by the Commission.

### **3.2 Differences in the research methods used in race and gender unequal pay cases**

The Equal Treatment of Men and Women in the Workplace Act (ETMW) describes exactly how cases dealing with gender and unequal pay must be investigated. According to Articles 7, 8 and 9 of this Act, the income of the complainant has to be compared with that of a person of the opposite sex in order to find out whether the Act has been violated. The salaries can only be compared if the jobs are of equal value. The value of the job has to be determined by a sound job evaluation scheme. The salary is considered to be the same if the same standards have been used to determine how much will be earned.

The Equal Treatment Act (ETA) is less explicit than the Equal Treatment of Men and Women in the Workplace Act about how equal pay cases should be reviewed. Article 5 of the Equal Treatment Act states that it is forbidden to discriminate in employment conditions, but does not say how this is to be determined.

In several cases the Commission has concluded that there is no reason to use a different method of investigation for cases relating to unequal pay on grounds of gender from that used for cases dealing with race or nationality or any ground whatsoever. This might give the impression that there is no difference in the way the Commission investigates the different kinds of cases. In practice, however, there is a slight difference. According to the Equal Treatment of Men and Women in the Workplace Act, it is enough to make a comparison of income with only one other colleague. But the question is whether one can assume that the employer is discriminating simply on the basis that there is a difference in the salaries of a white Dutch person and a person with a different race or nationality. Because this question cannot be answered just like that, in race and nationality cases the Commission also investigates any structural differences in pay between different categories of employees. A diagram is then drawn up, with a different pay curve for each category of employees (e.g. different curves for employees of Moroccan origin and employees of Dutch origin). In this diagram a curve of the average salary of all employees is also included. These pay curves show the relationship between the level of the job and the salary level per category of employees (sometimes with a 'correction' because of the specific situation of the employees).

<sup>12</sup> Case 237/85 *Rummler v. Dato Druck GmbH*, [1986] ECR 2101.

In principle the corrected pay curves should not differ. By making a separate pay curve for the complainant and the employee(s) he or she is comparing his or her salary with, one can determine whether there are individual or structural differences in pay between certain categories of employees. This method helps the Commission to determine whether or not there is unequal pay on the basis of race or nationality.

### 3.3 General outcomes of unequal pay cases

The opinions of the Commission concerning unequal pay are becoming an interesting source of information in terms of the nature and origins of unequal pay. Many of the headings of the Commission's opinions are now collected in the 'Checklist Equal Pay' that the Dutch Foundation of employers' and employees' organisations distribute to their members.

Many cases brought before the Commission reflect the disadvantages of women when trying to negotiate their working conditions.<sup>13</sup> These disadvantages at the outset may on many occasions not be repaired or compensated later on. Attention to negotiation skills during education, for example, would be an investment that would immediately pay off when entering the labour market. The pay gap at the outset may even grow wider during the employment period if periodical salary rises are granted as a percentage of the achieved salary level (as opposed to a fixed rise following a salary table). The case law also shows that a female employee is more likely to encounter an employer with 'higher expectations' of male employees than of female employees. The Commission will uphold that actual performance is an objective standard to justify differences, whereas future expectations are not.

A standard unequal pay case concerns an employer who tends not to apply all pay conditions in a comparable way in relation to all employees. For the most part, employees discover such differences by accident. Usually the employer will propose some kind of explanation for his/her behaviour. One common explanation will be the alleged poor performance of the female complainant. The Commission will in that case demand solid proof of such an allegation. Where education or physical strength is given as an explanation, the Commission assesses the way these actually affect performance.

Justification of fringe benefits is sometimes based on the labour market. Employers sometimes argue that e.g. a male employee is worth more because of the situation on the labour market. The Commission requires some objective information as to the labour market figures that justify market-determined salaries. If shortages are temporary, the employer may have difficulties upholding his unequal salaries.<sup>14</sup> In our case law we also observe that men appear to be more successful in maintaining profitable salary conditions after demotion to a post of lesser value. Women tend not to receive as many fringe benefits (such as education, a car or a mobile phone) as men do.

A typical source of unequal pay is of course the different classification of jobs that turn out to be of equal value. The case law of the Commission shows a high level of creativity in job descriptions that seek to distinguish one job from the other or distinguish the level or seniority of the jobs in question. The equal value is - as pointed out in section 3.1 - usually assessed by using a job evaluation scheme. Usually the cases challenge jobs with comparable characteristics, although the Commission has on some occasions evaluated the job descriptions of a secretary compared to a bulldozer-driver and an electrician. These proved to be of equal value, but this is not always the case. Some of the unequal pay claims will prove to be unfounded.

<sup>13</sup> E.g. Commission 2000-62

<sup>14</sup> E.g. Commission 2000-22 and 45, 1999-27, 1998-140 and 146, 1997-05 and 09, 1996-31, 46 and 71.

The legislation does, in accordance with recent EC Directives, provide for a shift of the burden of proof to the defendant in cases of discrimination on the ground of sex. Shifting the burden of proof was common practice for the Dutch Equal Treatment Commission in cases of discrimination on all grounds even before the 1997 Burden of Proof and 2000 Article 13 Directives. The Commission relied on EJC case law that had already established a doctrine on shifting the burden of proof.<sup>15</sup> If, for example, the plaintiff holds that her gender was the reason for the refusal of promotion, and she can prove her credentials were sufficient to meet the requirements, the defendant has to deliver evidence proving there were other relevant reasons that justified the decision. The Commission generally rules that the risk of not having - for instance - a salary scheme based on clear principles, regulations and criteria lies with the employer. If the employer cannot clarify his decisions in an adequate manner, a violation of the law will be presumed.

### 3.4 Prevention and collective remedies

The wide array of sources of unequal pay shows an emphasis on the individual circumstances of the case. Usually in the individual case a combination of different sources of unequal pay can be traced. This on many occasions makes it difficult to remedy collective interests through individual cases. In practice we see that the employer will compensate damages in the individual case, but will not tend to focus on changing practices to prevent future repetition. This partly explains the slow pace of the narrowing of the pay gap and the relatively poor influence of experience gained from individual cases. The need for action could be stressed by simply calculating the amount of money the average national pay gap represents. A 23% gap on average represents an enormous amount of money. Merely reducing the gap by a couple of percentages will take millions of Euros. If the goal is to reduce the average pay gap, some budget should be reserved or granted to this end. This is not usually the case. This is why the achievement of each collective result needs to be intensified and the parties concerned have to be persuaded to take action.

A positive development however has come out of the establishment of the above-mentioned Working Hours Act. This Act has led to over 50 complaints. While this is not such a large amount, a considerable number of cases have led to the adaptation of collective agreements or the amendment of working conditions for entire companies. We have also observed that the opinions are easily accepted in comparative cases by other parties. Thus, giving new opinions in similar cases has often proved not to be necessary because of direct implementation of previous Commission opinions by other employers. Although this is not the subject of research, we sense that the judiciary is less reluctant to give effect to the principle of equal treatment in such cases. We presume this effect is enhanced by the neutrality of the principle of equal treatment on the basis of working hours. Although in effect the principle is designed to protect women who are working part-time, men can also claim protection, a right which they use in practice.

In order to increase the tempo during investigations, the Commission also seeks to initiate new research tools to assess the situation in a company. For instance, the Commission introduced the possibility of comparing the wage level of individual employees with the average wage level of co-workers in comparative jobs. This proved to be a useful instrument to gain a quick insight into unequal pay cases on the grounds of race and nationality. This method may also be used as a research tool in equal pay cases on the ground of gender, as long as this does not interfere with the EJC ruling (*Macarthy's*<sup>16</sup>) that comparison to a hypothetical colleague is not possible.<sup>17</sup>

<sup>15</sup> See *i.a.* Case C-109/88 *Danfoss* [1989] ECR 3199.

<sup>16</sup> Case C-129/79 *Macarthy's Ltd v. Smith*, [1980] ECR I-1275.

<sup>17</sup> Although this may be revised in light of the Directives 2000/43/EC, 2000/78/EC and 2002/73/EC which allow for hypothetical comparators.

The Commission is currently also, in co-operation with the Ministry of Social Affairs and employment, investigating the possibilities of using information technology to accelerate 'Quickscan' research on the basis of computer data extracted from an individual company's personnel and salary information. If successful, this might become a tool which employers themselves may be able to use to perform audits within their own company. The 'Quickscan' is now ready for use, but the Commission still has to decide how to interpret the outcomes of the scan.

### 3.5 Seeking a collective remedy for the pay gap in education

The Dutch approach has proven to be sensitive to alternatives to litigation and opts for self-regulation. One of the recent examples in the Netherlands is the 'Checklist Equal Pay'<sup>18</sup> created by the Foundation for employers' and employees' organisations and presented at a recent Conference in Berlin on Equal Pay models and initiatives.<sup>19</sup> The checklist was established with the support of the government. It is too soon to tell what its effects may be, but it may well serve to create awareness and understanding of equality principles. It may also change attitudes towards these principles. The checklist sets out the major origins and effects of unequal pay in the Netherlands. The factors that largely determine the context of the cases brought under Dutch anti-discrimination law are more or less similar to those in other European countries. The Dutch approach is characterised by a strong focus upon the government and its responsibility to develop policies and carry out plans in order to improve equal treatment. Strong equality organisations and other pressure groups working in the major fields of anti-discrimination law are indispensable. Fortunately in the Netherlands such organisations still exist.

The Commission also tries to favour remedies of collective interest. In doing so, the Commission favours the angle of preventing future damage over seeking redress for (individual) past infringements. The strategy that is often used - in line with the consensus-orientated structure of Dutch society - is initiating 'follow-up conferences'. Sometimes one or two meetings will be sufficient to determine the kind of measures that should be taken. It may equally prove to be a lengthy process, especially when the remedy represents a considerable amount of money.

An example of such a slow-moving project is that attempting to combat unequal pay in the field of secondary education in the Netherlands, which affects the salaries of some 30,000 secondary teachers. Perhaps typical for the Dutch situation in general is the disproportionate number of claims concerning the effect on pay and seniority that women encounter because of a career break. Career breaks can prove to be seriously damaging to remuneration, as the education case has shown. Due to salary scales based on a period of 23 years (from minimum to maximum level) and the neglect of previous relevant unpaid labour, female teachers re-entering school after a career break remain at a disadvantage throughout their career. The Commission also found that as a result of a pay structure introduced in 1985, the pay gap between female and male teachers could reach 500-1200 Euros per month. Women tend to receive pay according to so-called 'scale 10', whereas men tend to receive a higher salaries based on 'scale 12' remuneration.

The Commission conducted an investigation into the value of the work and found equal value and thus that the different salary scales were not justified. The source of the inequality was the 1985 structure. Factual evidence showed that male teachers benefit significantly more from the transitional remuneration levels set according to the pre-1985 salary scheme. Before 1985 secondary education was a male-dominated sector. Nowadays women account for 32% of secondary teachers. The Commission decided in 2000 that this structure does in effect indirectly

<sup>18</sup> Presented by L. van Hoogstraten, A. Embden Andres and K. Kuiper at the Berlin Conference

<sup>19</sup> International Conference on Equal Pay, models and initiatives, 17-19 June 2002, organised by the German Federal Ministry of Family Affairs, Senior Citizens, Women and Youth.

<sup>20</sup> Commission 2000-98, 99,100 and Commission 2001-125 and 126.

discriminate against women. A crossover period to facilitate the transfer to a new salary scheme is clearly not contrary to the law, but in this case the Commission ruled that because of the disproportionate lifetime effects on women, this inequality could not be upheld.<sup>20</sup>

At first the Ministry of Education and the social partners remained reluctant to alter the salary provisions in favour of women teachers. The results of this investigation generated massive media attention and initiated a public debate. Teachers turned to their unions by the hundreds to complain about this 'old sore spot'. The media attention, alongside shortages in the education labour market, caused the Minister of Education and the collective agreement partners to move towards establishing remedies. The result was the reduction of the number of years it takes to reach the end of the salary scale, enabling women to reduce the pay gap. Also, a special provision in the collective agreement was arranged to reduce the salary gap between experienced teachers with and those without a career break. The remedies do not cover the entire pay gap, but do reduce it. All in all, reaching this collective result took more than five years. As it is, new requests from this sector continue to be submitted to the Commission, as not all individual school boards comply with the new rules. The last word seems not to have been heard on the education pay gap in the Netherlands. This case illustrates the difficulties that have to be overcome in order to reach (expensive) collective results.

More successful was the follow-up to a series of cases concerning unequal pay originating from a collective agreement in the public welfare sector. There was a different salary scheme with lower salaries for employees who worked for groups of immigrants. It was mostly women and/or immigrants who worked for these groups of immigrants. This resulted in a disadvantage in salary for women as well as immigrants who worked in public welfare. After the Commission held that this was not in accordance with the law, the Unions initiated new negotiations on the subject. The unions for employers and employees have appointed a third party to develop a new job and salary scheme in order to prevent further discrimination. Furthermore, the employees who filed the complaints have received compensation for their lower salary.

### 3.6 Group actions concerning equal pay

The effectiveness of the law depends not only the norm, but also on procedural measures such as the burden of proof, group actions, summary procedures, and other supportive actions brought, for instance, by employers' and employees' organisations and other institutions. The 1995 Blom/Fitzpatrick et al. Report on the utilisation of sex equality litigation procedures accurately pointed out the shortcomings of the 'individual justice model' laid down as the main principle in legislation across the Member States.<sup>21</sup> In an individual justice model the breach of rights is perceived as giving rise to an individual action (the individual employee against the employer). The collective nature of the dispute is masked by the individual nature of the applicant and his/her search for remedies. An indirect impact upon collective outcomes, such as deterioration from repetition behaviour, is presupposed but not automatically the case. The 1995 report suggests the possibility of *locus standi* for agencies, unions and interest groups as a remedy, as well as a focus upon questions of structural discrimination. In the Netherlands group actions are permitted under equal treatment legislation and Dutch civil law. The title of organisations to sue in certain fields was incorporated into Dutch legislation in July 1994 (Article 12, section 2(e) ETA). The Act gives *locus standi* to legal persons representing the interests of individuals. Class actions are important because generally victims of discrimination are reluctant to take action for fear of a deterioration in their (working) conditions, even although the law provides that the termination of employment on the ground

<sup>21</sup> Blom/Fitzpatrick, 1995, Chapter 4.

<sup>22</sup> See Leenders 2000, p. 83.

that the employee has invoked his right to equal treatment is invalid (Article 8, section 1 ETA). The national provisions do not allow the plaintiff association/foundation to seek monetary damages.<sup>22</sup> If an individual person who is a victim of unequal treatment does not wish his case to be used to file a complaint, the Commission is not allowed to investigate (Article 12, section 3 ETA). Furthermore, an individual can disagree with an opinion consisting of an order or prohibition. He or she is not bound by this opinion.

Although individual claimants initiate the majority of cases, class actions have proved to be important in attempts to achieve systematic equal pay and to focus on structural causes of discrimination. Whether or not the Commission will succeed in focusing on the important and systematic examples of differential treatment strongly depends on the kind of claims pending. Quite a few of the important cases have been brought before the Commission by unions (as individual or class actions supported by union lawyers).

Another example was the request of a healthcare union in relation to the job evaluation scheme in this sector, which covers around 150 000 people. The Commission conducted research, including setting up a method of assessing the gender neutrality of job evaluation schemes. For the first time a reliable method was developed to assess the gender neutrality of a job classification scheme. The Commission selected 88 job descriptions that could be divided into male and female-dominated jobs. A statistical analysis was carried out on 8888 outcomes of the job evaluation scheme. The difference between the chances of male-dominated and female-dominated jobs scoring certain levels of value was assessed, and followed by a comparative qualitative analysis on the basis of the disclosed statistical data.

The Commission found that this scheme was not gender-neutral.<sup>23</sup> The Commission used the *Rummeler* ruling to approach the gender substructure in the job evaluation scheme. A number of mechanisms systematically disadvantaged the evaluation of women's jobs. Observations were that some of the male-dominated jobs, such as management and technical staff, were described in more detail compared to the nursing staff. This enhanced the likelihood of scoring during the evaluation process. Also, the scheme provided for opportunities for double scores in favour of male-dominated jobs. Paradoxically, other mechanisms to reduce scoring possibilities also turned out to be disadvantageous to women. The same conclusion was drawn for the scheme's mechanism to link several characteristics in such a way that a score can only be obtained for one characteristic provided a score is obtained on the other (linked) job characteristic. Also the attention accorded to managerial skills was disproportionate to the attention accorded to the actual delivery of health care. A striking example was the undervaluation of contact with patients of the nursing staff compared to the positive valuation of this aspect in the case of the technical staff. The Commission held that emphasis on male-dominated existing job characteristics are not contrary to the law as long as this is accompanied by comparable attention to existing job characteristics of female-dominated jobs. This comparable attention to both male and female job characteristics proved not to be implemented by the scheme.

The Commission's opinion was used during the process of redesigning the job evaluation scheme in question. After the Commission ruling on this specific job evaluation scheme, the Ministry of Social Affairs also took the initiative to further develop the method. The result was the drafting of a code of conduct that is to be followed while performing audits on job evaluation schemes.<sup>24</sup> Social partners have engaged themselves in promoting the application of this code to the available schemes. The results, as monitored by the Ministry, should be published shortly. Such an initiative may well be expanded to other grounds, such as race and nationality.

<sup>23</sup> Commission 1998-55.

<sup>24</sup> A. Veldman, *De weegschaal gewogen, Ministry of Social Affairs and Employment, the Hague, 2000.*

## 4. THE COMMISSION AND THE JUDGE

By giving non-binding opinions the Commission interprets the laws outlined above. The rulings of the Commission may also include, and often do include, recommendations on how to comply with the law. These recommendations can contribute to the transformation of legal provisions into actual concrete situations, and to ensuring that anti-discrimination law becomes part of a wider policy. Parties also often ask the Commission to provide such recommendations to prevent further discrimination. Both individuals and organisations can bring cases to the Commission. Persons or organisations may also want to know whether their own conduct is in accordance with the law. For example, an employer may ask whether a specific regulation on part-time work is permitted, or a car rental company that wants to ask non-residents for additional guarantees may ask the Commission whether that would be lawful. Work councils or representative bodies of civil servants may bring a case to the Commission. Class actions are also allowed. Furthermore, it is a criminal offence under Dutch legislation not to co-operate with the investigations of the Commission (Article 19 ETA).

Article 15 ETA empowers the Commission to take an opinion to court in order to obtain a court ruling about certain discriminatory treatment. The Commission can request that the conduct be declared unlawful and prohibited or rectified. The Commission has not yet used this competence. Advantages of doing so could be the establishment of precedent and the enhancement of the status of the Commission opinions. A negative aspect could be any confusion arising from combining the role of judge and prosecutor, as well as the time and resource-consuming element of this competence.

### Impact of rulings

There is no obligation to go to the Commission before bringing a case before the courts, nor do proceedings before the Commission prevent court action. However, a minority of the cases judged by the Commission are taken to court afterwards. Sometimes it is necessary to go to court e.g. to obtain damages, but generally the Commission's rulings function as an alternative to the judiciary. This is sometimes also seen as a disadvantage because the judiciary does not handle enough cases of discrimination to acquire experience and expertise in this field. The rulings of the Commission have no legally binding character. During the parliamentary debate on the Equal Treatment Act it was suggested the rulings of the Commission be given some binding force, by giving them the status of an expert opinion which the courts cannot overrule without giving well-founded reasons. The government rejected this suggestion. Instead, the Commission was given the power to bring a case to court to obtain an injunction prohibiting conduct that is contrary to the relevant anti-discrimination laws or to obtain an order that the consequences of such conduct be remedied.

The Supreme Court ruled in 1987 in relation to the predecessor of the Commission, the Equal Treatment Commission for Men and Women, that courts may make a ruling that is contrary to the Commission's rulings, but only on well-founded grounds.<sup>25</sup> However, there are also examples of lower court rulings setting aside the ruling of the Commission without due reasoning.<sup>26</sup> There was also a Supreme Court judgement of 24 April 1992 that did not pay attention to the fact that the lower courts had set the Commission's rulings aside without giving a good reason. The Commission is once again seeking support for the idea of giving the rulings the statutory status of an expert opinion that cannot be overruled without proper reasoning.

<sup>25</sup> *Supreme Court (HR) 13 November 1987, NJ 1989, 698.*

<sup>26</sup> *See I.P. Asscher-Vond and C. A. Groenendijk, Gelijke behandeling: regels en realiteit, SDU Publishers, The Hague, 1999, p. 273.*

The law provides for only two remedies and the ETA is often criticised for that. The Equal Treatment Act protects the employee against discriminatory terms in his contract by stipulating that those terms are void (Article 9), and termination of an employment contract in defiance of the act can be annulled (Article 8). The intention of the law is therefore more to enable a party whose rights have been violated to initiate tort proceedings and claim damages and compensation. The Commission has no means of enforcing its opinions. Therefore the Commission has an active follow-up policy, which consists of following the results of the ruling and if necessary arranging conferences between important actors in the branch or umbrella organisations. The results are on balance positive. Most rulings are seriously taken into account and several have caused changes in discriminatory practices and regulations.

It is worth mentioning that the Commission has expert status in court. Article 12, section 2c) ETA gives a judge, who has to answer an equal treatment question, the possibility to request the Commission's expert opinion. This possibility has never been used.

## 5. CONCLUDING REMARKS

Not much is known about the pay gap between native Dutch and foreign employees. We do know that the unemployment rate for foreigners is much higher than for natives, that their educational level is lower, and their command of the Dutch language often insufficient. The pay gap could in their case be even wider than the gap between men and women. Perhaps the fact that foreign women are doing very well in education at the moment will turn out to be a hopeful development.

In this paper it has been explained that a lot of legislation has been developed in the Netherlands over the last 25 years. In spite of all the legislation on equal treatment, and the efforts of the Commission and many others, the pay gap between men and women still remains rather wide. Even if we start from the most favourable figures of Eurostat it is still about 21%.<sup>27</sup> Of course we cannot know how wide it would have been without all these efforts. It is therefore too easy to say that none of it mattered. Instead, we had better look at the things we have achieved.

The usefulness of class or group actions has been reaffirmed in equal pay cases, not only because of the fact that an individual action masks the collective nature of the dispute, but also to protect the position of the individual complainant.

By means of investigations based on job evaluation schemes it has proved to be possible to determine whether there is discrimination based on gender or race in individual cases. It is important to note that when investigating a possible discrimination case, only the facts count. Whether or not there is an intention to discriminate is not relevant. This is something most courts find hard to grasp.

Based on the case law of the ECJ and the use of so-called pay curves, it has been possible to deal with indirect discrimination based on race as well. Diagrams with pay curves usually give a clear indication as to which group or individual is being discriminated against.

<sup>27</sup> See: [www.europa.eu.int](http://www.europa.eu.int)

Job evaluation schemes are therefore a very useful tool in our efforts to reduce the pay gap. Through these, we are able to obtain information that can be used to form a general equal pay policy. In line with the information obtained in the Netherlands, a checklist for equal pay has been developed, which is another tool to fight the pay gap. The results of this are not yet known, but it gives unions and employers something to go on when investigating equal pay.

The predominant position of job evaluation schemes in equal pay investigations also means that it is particularly important that these schemes are not inherently discriminatory. The Commission set up an investigation to check the health care job evaluation scheme and concluded that, applying the criteria of the ECJ, it was not free from discriminatory aspects based on gender.

In the future the Commission will have the competence to investigate equal pay in a company or small groups of companies on its own initiative. At present, its investigative powers are limited. Of its own accord, the Commission can only investigate a whole branch or an individual case, but not a company or small groups. The Commission is currently developing 'Quicksan' equal pay, a software programme designed to indicate differences in pay in one company or a small group of companies. The Commission will then, with this information, investigate whether or not it is a case of discrimination. 'Quicksan' will be very important for this kind of investigation, since it takes an enormous amount of time and effort to check large companies.

Last but not least we have seen that the knowledge of judges must be improved. Not only does their judgement not always fit the system that the ECJ jurisprudence prescribes, but they also fail to use the instruments that the ETA presents. The existence of the Commission and the equal treatment legislation has to be better acknowledged by the judiciary. Furthermore the judiciary has to be stimulated to request the opinion of the Commission when equal treatment questions arise. The judiciary must be stimulated to not judge contrary to the Commission's opinions without a well-founded justification, which is a general principle of justice after all.

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# **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**

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# 1. INTRODUCTION

Community equal pay standards for men and women have been in force for over two decades. The persisting gender pay gap in the EU labour market today is nevertheless still the focus of Community and national public policy. Gender pay differentials were for instance again put on the agenda by the Swedish EU Presidency of 2001 and were also referred to in the recent EU employment guidelines, which state that both the Member States and the social partners must promote equal pay for equal work or work of equal value and must take steps to minimize gender-related pay disparity.

Does this imply that the European legal framework on equal pay and its development since the *Defrenne cases* of the late 1970s is ineffective or not being complied with on the national level? Or do other factors also have to be taken into account? In this paper some clarifying factors will be examined in respect of the existing 'gap' between rules and reality in the field of pay equality. It will be argued that the main reasons for gender pay disparity fall outside the scope of the legal instruments put in place, while at the same time those reasons that can be tackled by the Community legal standards are not always effectively dealt with. The latter depends for the most part on practical difficulties flowing from the legal methods used to establish pay discrimination. From this point of view it will also be considered whether the recently introduced Equality Directives 2000/43/EC<sup>28</sup> and 2000/78/EC<sup>29</sup> and the subsequent amendment of Sex Equality Directive 76/207/EEC<sup>30</sup> have indeed brought any improvement. Can the flaws in the legal instruments at hand be sufficiently remedied or is pay equality better dealt with outside the law through social dialogue?

The next paragraph sets out the Community legal framework on equal pay and the methods for identifying pay discrimination that flow from it (Para. 2). The main factors that might explain the EU gender pay gap will then be considered in order to establish whether or not they could be tackled by Community law (Para. 3). Those reasons behind pay differences that could and should be addressed by the European equal pay standards will be singled out to investigate how, and with what effect, they tend to be scrutinized by the European Court of Justice (Para. 4). Finally, some conclusions will be drawn and suggestions will be made for strengthening legal as well as non-legal instruments to combat pay disparity (Para. 5).

# 2. THE EUROPEAN LEGAL FRAMEWORK ON EQUAL PAY

The subject of equal pay of men and women is addressed by Article 141 EC, the EC Directives on Equal Pay (no. 75/117/EEC)<sup>31</sup> and Equal Treatment (no. 76/207/EEC, revised) and more recently also in relation to other discrimination grounds in the two new EC Directives based on Article 13 EC.<sup>32</sup> There is an important distinction to be made in EC equal pay law. On the one hand we have Article 141 EC. It flows from the case law of the European Court of Justice (ECJ) that Article 141 EC and the provisions of the Equal Pay Directive should be read together. As the court puts it, this Directive does not alter the scope of Article 141 EC but clarifies it. Taken together, the specific equal pay provisions provide a right to equal pay for work of equal value regardless of sex. On the other hand, the Sex Equality Directive 76/207/EEC (revised) and also the 'Article 13 Directives' have a

<sup>28</sup> Council Directive of 29 June 2000, OJ L 180 of 19 July 2000, p. 22.

<sup>29</sup> Council Directive of 27 November, OJ L 303 of 2 December 2000, p. 16.

<sup>30</sup> Council Directive of 9 February 1976, OJ L 39 of 14 February 1976, p. 40 as revised by Council Directive 2002/73/EC of 23 September 2002, OJ L 269 of 5 October 2002, p. 15.

<sup>31</sup> Council Directive of 10 February 1975, OJ L 45 of 19 February 1975, p. 19.

<sup>32</sup> Racial Equality Directive no. 2000/43/EC (supra) and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2 December 2000, p. 16 (hereinafter the 'Article 13 Directives').

broader scope. They forbid direct and indirect discrimination on several discriminatory grounds *inter alia* in the conditions of access to employment, promotion or training and in employment conditions, which includes pay and dismissal. As wages are included in the employment conditions, the subject is to be treated according to the general Community law methods developed for establishing (in)direct discrimination. The following will attempt to further clarify these two systems or methods and stress their differences in relation to equal pay.

### **2.1 Combating (in)direct discrimination in employment conditions**

The method for scrutinizing equal pay underlying the Equal Treatment Directives focuses on the employment conditions, meaning the general pay conditions of the individual or collective agreement that are often elaborated in employers' pay policies. Where the applied pay conditions or pay criteria are neutral, no direct discrimination arises. However, where it is shown that these conditions or criteria in effect especially disadvantage women or persons of a certain ethnic origin, religion, age and so on, then it is up to the employer to explain this difference by providing objective reasons or justification for the disproportional impact of the pay conditions applied. In respect of equal pay it can be said that this method implies that one starts at the beginning of the process of remuneration and 'looks forward'. If the pay conditions or criteria are applied in the same way and do not differentiate on the basis of sex or race, and if they do not have an unjustified, disproportional impact on groups of employees according to sex or race, then the actual wages that result from these non-discriminatory conditions are deemed to be equal.

Complicating things further, this method, which stems from the Sex Equality Directive 76/207/EEC (revised), has also been referred to by the ECJ in applying Article 141 EC, even though the text of Article 141 does not provide for this. An example of this case law is for instance the *Bilka* case where employment conditions relating to supplementary pension benefits were found to have an unjustified negative impact on women.<sup>33</sup> Article 141 seems therefore to allow for the appliance of both methods.

### **2.2 The right to equal pay for work of equal value**

The second method, based on Article 141 EC and much more in line with its wording, is of a different nature. It starts at the end of the process of remuneration and 'looks back'. This method entails looking at the final pay results, i.e. the actual wages earned by an individual employee, which should be the same as that of a colleague of the opposite sex if they are both in a comparable situation and performing work of equal value. When it is shown that for instance a female employee performs equal work compared to a male comparator but earns less, it is up to the employer to prove that the established pay difference is explained and justified by objective reasons, for instance relevant differences in human capital (such as differences in work experience, education or performance level). If the employer fails to do so and therefore no objective explanation for unequal pay is given, then the pay difference is attributed to the fact that the employees are of different sex. Discrimination will therefore have been established.

The important differences between these two legal methods are made clearer when we relate them to the general factors that explain the gender pay gap in the labour market. It may then also become clear that both methods, despite their different approaches, only address a small number of the factors that may account for this pay gap.

<sup>33</sup> ECJ Case 170/84, [1986] ECR I-1607.

### 3. THE INTERRELATIONSHIP BETWEEN COMMUNITY EQUAL PAY RULES AND THE WAY PAY DIFFERENCES ARISE IN THE LABOUR MARKET

The first step in every policy process requires identifying the actual scope, characteristics and reasons for the problem at hand. This is no easy task in the case of unequal pay. It necessitates accurate statistics covering the EU labour market. EU statistics on individual wages according to the ethnic origin of employees do not exist. Statistics according to sex are however available. Nevertheless, even if restricted to average gross wages leaving out bonuses, allowances or other secondary employment benefits, the EU statistics on the gender pay gap may differ according to, *inter alia*, differences in hourly, monthly or yearly wages, full-time or part-time employment, whether women's wages are construed as a percentage of men's wages or vice versa, and of course on the accuracy of the data delivered by the national agencies and the way they are compiled at the central level. For instance, Eurostat reports for 1999 a gender pay gap of 16% at the EU level when the average gross hourly earnings of females are taken as a percentage of the average gross hourly earnings of males.<sup>34</sup> In this report the widest gap is to be found in the UK and Ireland (24%). Portugal is the best performer with 5%. However, the majority of statistical research from other sources, but also from other reports of Eurostat itself, report a much wider pay gap of approximately 25% in the EU. In 1995 Eurostat put Sweden at the top of the list with a pay gap of 12%. Portugal was at the bottom with 33%.<sup>35</sup> In the statistics on employees who are employed full-time in services and industry, Eurostat finds for Portugal a pay gap of 32% for 1999 and of 28% for the Netherlands.<sup>36</sup> The Dutch official statistics themselves identify for 1998 as well as 2000 a pay gap of 23%.<sup>37</sup>

Although the figures on wages earned apparently may differ, it is uncontested that they do not change significantly over the years despite national and international policies and regulations. Harmonised statistics make clear that between 1990 and 1999 there was either a decline or a rise of only one or two percentage points per year.<sup>38</sup> According to the Dutch official statistics, in the Netherlands there was a pay gap of 23.9% in 1985, of 22.5% in 1990 and again 23% in 2000.

#### 3.1 Factors that account for the EU pay gap between men and women

Leaving aside possible inaccuracies in statistics, several explanatory factors for the gender pay gap can be identified. I will distinguish three categories. First of all, differences in gross hourly wages could be explained by differences in individual human capital between men and women. On average women still have a lower level of education in the EU and less work experience. Nevertheless, these differences have declined sharply over recent years and therefore cannot fully account for the persisting EU pay gap. Secondly, pay disparity is due to differences between men and women in job positions. Women tend to work lower in the company hierarchy, to make fewer career moves or have more career interruptions due to family responsibilities. Also, part-time employment has a negative impact on the job positions of women.

Finally, the pay gap may be explained by differences in the *labour market positions* of men and women. The EU labour market is characterized by persistent and significant labour market segregation according to sex.<sup>39</sup> Female employees are predominantly employed in services, whilst men are considerably overrepresented in industry. This segregation is moreover unbalanced, in that female workers work in a relatively small number of job types in a relatively small number of sectors or branches such as services, education and health care. Male workers are

<sup>34</sup> Eurostat, *General Statistics, updated version (2) of 12 September 2003*.

<sup>35</sup> Eurostat, *Statistics on Structure of Earnings (SSE) 1995*.

<sup>36</sup> Eurostat, *Statistics in focus: Population and Social conditions, theme 3, 5/2001*.

<sup>37</sup> Dutch Ministry of Social Affairs and Employment (Labour Inspection Agency), *The Hague 1999 and 2000*.

<sup>38</sup> Swedish Presidency 2001, *Highlighting pay differentials between women and men, Swedish Government Offices 2000; Eurostat, Statistics in focus: Population and Social conditions, theme 3, 5/2001*.

<sup>39</sup> *Gender segregation in the labour market/services and industry. Source: Employment in Europe 2000; Swedish Presidency 2001, Highlighting pay differentials between women and men, Swedish Government Offices 2000*.

more dispersed over services and industries and also over job types. Sex segregation has a significant impact on wages because the female-typed labour market sectors, but also the female-dominated job types, provide a lower general salary level and fewer career opportunities, resulting in lower average pay for women.

### 3.2 Interrelationship between the identified factors and the scope of Community equal pay regulations

The majority of factors that may account for pay disparity are not subject to Community law regulations on equal pay. Having less work experience, working at a lower job level or in a generally lower paid sector or branch of the labour market, making fewer career moves because of part-time work or having more career interruptions due to family responsibilities, all fall outside the scope of the European equal pay legislation. According to a recent study in the Netherlands, the average pay gap between men and women of 23% can for more than 80% be accounted for by differences relating to labour market positions, which are not affected by legislation.<sup>40</sup>

The fact that within the EU Member States differences between men and women, resulting in particular from labour market segregation and the unequal distribution of family responsibilities, has not significantly altered over the last few decades might explain in part why the average pay gap of 25% in the EU, although fluctuating by a few percentages points per year, has not significantly narrowed in spite of decades of equal pay legislation. Still, the remaining 20% of the gender pay gap is caused by factors that potentially can be analysed by applying the Community legal methods discussed above.

## 4. APPLYING THE COMMUNITY LAW METHODS FOR IDENTIFYING PAY DISCRIMINATION

### 4.1 Combating (in)direct discrimination in employment conditions

An examination of the case law of the ECJ shows the method of scrutinizing pay conditions and pay policies discussed in paragraph 2.1 ('forward-looking strategy') to be especially appropriate where the case concerns suspected discriminatory elements that are not so much job-related but person-related. By the latter I mean pay elements that do not directly depend on the type or level of the job but on the personal conduct, merits or other personal circumstances of the jobholder. According to the European case law, these person-related pay conditions comprise for instance allowances for overtime, irregular hours or performance or personal increases in pay for completing relevant training courses or for gaining work experience. Furthermore, the method has been successfully applied to combat mostly indirect sex discrimination in personal benefits such as Christmas bonuses, benefits for travel or child-care expenses or supplementary pension benefits.<sup>41</sup>

All of these pay elements have in common that they generally apply to all employees or to large groups of employees irrespective of performing work of equal value. Exactly because there is no need to perform the difficult task of establishing work of equal value, the legal approach of focussing on possible discriminatory elements in applied pay conditions seems to have been quite effective in individual cases. A precondition for using this method is, however, that the pay conditions applied already suggest that they might have a disproportionate impact on, *inter alia*, women or groups of persons of a specific ethnic origin. The first is for instance where pay

<sup>40</sup> Ministry of Social Affairs and Employment (Labour Inspection Agency), *The labour market positions of employees in 2000*, The Hague 2002.

<sup>41</sup> E.g. *Defrenne*, Case 43/75 [1976] ECR I-455; *Jenkins*, Case 96/80 [1981] ECR I-911; *Nimz*, Case 184/89 [1991] ECR I-297; *Barber*, Case 262/88 [1990] ECR I-4135; *Bötel*, Case 360/90 [1992] ECR I-3589; *Kording*, Case 100/95 [1997] ECR I-5289; *Boyle*, Case 411/96 [1998] ECR I-6401; *Hill*, Case 243/95 [1998] ECR I-3739.

conditions differ according to working time or disadvantage employees who have to interrupt their work because of pregnancy or children. It comes as no surprise that the majority of successful sex discrimination cases before the ECJ over the last twenty years have related to employment conditions that disadvantage either part-time workers or pregnant women. In the case of racial discrimination, there is no European case law as yet, but an example from the Dutch case law is that employment conditions can suggest indirect racial discrimination when for instance the employee is required to speak Dutch fluently even though the job does not require this *per se*.

Where there is no apparent indication of indirect sex or racial discrimination in the pay conditions applied or where the pay conditions are extremely vague or non-existent, the legal approach discussed here cannot benefit the individual employee. It is too much to ask an individual employee to undertake statistical research into the effect of every formal and informal pay condition applied without having any clue beforehand of its potentially discriminatory effect.

Where the pay conditions or pay policies applied do not suggest any discrimination beforehand, an individual employee may nevertheless suspect discrimination if he or she earns less than a close colleague who is of a different race or sex, although they appear to be in a comparable situation. This takes us to the second method for identifying pay discrimination: the individual right to equal pay for work of equal value. Strictly speaking, this method has until now been restricted to sex discrimination as the right to equal pay for work of equal value is guaranteed in Article 141 EC. The Article 13 Directives merely provide for a prohibition of discriminatory employment conditions, including pay. There is of course no case law yet clarifying the interpretation of these new provisions. As stated above, the ECJ has in the past applied the method of analysing employment conditions for direct or indirect discrimination laid down in the Sex Equality Directive 76/207/EEC (revised) to Article 141 EC. The ECJ might again want to expand the scope of the newly introduced non-discrimination provisions in the future. This could entail transferring the right to equal pay for equal work, and the case law thereon, to the Article 13 Directives in cases of discriminatory pay on grounds other than sex.

#### 4.2 The right to equal pay for work of equal value

In the *Defrenne* case of 1976 the ECJ 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*.<sup>42</sup> Where the plaintiff has shown that she or he earns less for work of equal value, the employer will have to prove that the pay difference is justified by objective reasons. The latter entails the method of equal pay for equal work that can be divided into three steps.

Firstly, the individual plaintiff has to show that the work performed is of equal value. Because of the inherent difficulties of job evaluation, most of the pay discrimination cases on the Community as well as the national level refer to the situation that the employee and his comparator of a different sex perform exactly the same job rather than different jobs of equal value. In assessing an equal value case the ECJ has set out the following criteria. First of all a comparator performing work of equal value should be identified. This comparator has to be an actual employee working in the same establishment or company, although this could also be someone who has already left the company.<sup>43</sup> Although this all refers to a comparison between two individual employees, which is the typical situation, the ECJ in the *Enderby* case also allowed a *prima facie* case to be established when two different

<sup>42</sup> Case 43/75 [1976] ECR I-455.

<sup>43</sup> *Macarthy*, Case 129/79 [1980] ECR I-1275; *Murphy*, Case 157/86 [1988] ECR I-632.

job classes were of equal value and the jobholders in the one class were predominantly women and in the other predominantly men.<sup>44</sup>

When a comparator is found, the second step consists of the actual comparison and evaluation of the jobs performed by the plaintiff and the comparator. The ECJ made clear in the case of *Commission v. UK* that regardless of whether the employer makes use of a job evaluation system (JE-system) or not, a worker is entitled to claim before an appropriate authority that his work has the same value and, if the employer disputes this, to have this examined by the court.<sup>45</sup> In doing so, the court should establish whether the employees are in a comparable situation in respect of the nature of the job, the skills required and the working conditions applied.<sup>46</sup> It is important to emphasise that this entails that the jobs themselves should be of equal value regardless of the qualifications and work experience of the specific jobholder. Where the employer does use a JE-system the ECJ requires the system to be without direct or indirect sex discrimination, meaning the system should cover all necessary characteristics of all the work performed in the company, be transparent and based on objective criteria that are not to the disadvantage of one sex.<sup>47</sup>

The last step to be taken is an assessment of equal pay. When the specific jobs are found to be of equal value but the plaintiff is earning less than her comparator, the burden of proof shifts to the employer.<sup>48</sup> The arguments of employers for a difference in pay can generally be divided into two categories. Either the equal value of the jobs is disputed, for instance because the tasks performed by the male comparator allegedly differ and entail more responsibility, or the personal qualifications of the job-holders are disputed, for instance because the male comparator allegedly has more work experience, better education or personal performance.

Some drawbacks of this method of identifying pay discrimination are however 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. However, if the plaintiff is employed in a female-typed job, a suitable comparator of the opposite sex performing the same job may be lacking. Furthermore, comparing jobs from female-dominated branches of industry with jobs of equal value from male-dominated branches is often ruled out because both employees must be employed in the same establishment or company. Not only can the process of finding a suitable comparator have its pitfalls, but also the next steps of assessing equal value and equal pay can be a difficult task. Job evaluation is a complicated process requiring professional knowledge and experience. Moreover, when scrutinizing the employer's justification one has to have a clear insight into the common structures for job classification and remuneration and their interrelationship. It sometimes appears that even the ECJ is not familiar enough with these structures. The recent *Brunnhofer* case represents a good example of this.<sup>49</sup> I will elaborate on this example somewhat further showing that the ECJ sometimes seems to make it needlessly difficult to apply equal pay standards, both for the employee and the employer.

### 4.3 An example: the Brunnhofer case

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.

<sup>44</sup> Case 127/92 [1993] ECR I-5535.

<sup>45</sup> Case 61/81 [1982] ECR I-2601.

<sup>46</sup> ECJ *Macarthy*, Case 129/79 [1980] ECR I-1275; ECJ *Royal Copenhagen*, Case 400/93 [1995] ECR I-1275.

<sup>47</sup> *Rummier*, Case 237/85 [1986] ECR I-2110.

<sup>48</sup> *Lawrence*, Case 320/00 [2002] ECR I-7325.

<sup>49</sup> Case 381/99 [2001] ECR I-4961.

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 ECJ 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. Here I would say the employer's argument that the male employee performed more responsible tasks should have been accepted. The ECJ did not refer to this, though did decide 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 jobs of equal value concerns the nature of the job only and should therefore be assessed irrespective of the qualifications of the jobholder. However, the arguments of the ECJ were developed in a quite different way having an unforeseen effect. The ECJ argued that because Article 119 EC Treaty (now Article 141 EC) attributes the right to equal pay to performing the same work, the individual performance by the jobholder cannot be taken into account at all. The ECJ, referring to the arguments of the EC 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 this employee or changing his job.<sup>50</sup>

The latter consideration of the court apparently lacks sufficient insight into pay systems commonly applied at the national level. Although the performance by the jobholder should not indeed 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 ECJ 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 job 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 ECJ. Despite the fact the jobs performed by Ms. Brunnhofer and her colleague were evaluated and ranked equally on the basis of a collective agreement, the ECJ 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. Would it not be more efficient if the national court were to rely on the collective employment conditions, which rank the jobs in the same salary scale? Of course there could be differences between the actual jobs and the ones evaluated in the collective agreement but would that, in this case, not be a risk the employer has to bear, for it was the employer him/herself who ranked different jobs into the same salary class?

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,<sup>51</sup> the ECJ decided it is up to the plaintiff 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 ECJ, the *Brunnhofer* case does not present such a lack of transparency, so it is up to the plaintiff to show

<sup>50</sup> Case 381/99 [2001] ECR I-4961, para. 77.

<sup>51</sup> *Danfoss*, Case 109/88 [1989] ECR I-3199.

the jobs involved are of equal value. At this point, job-related and person-related pay elements again seem to be mixed up, putting the plaintiff at a disadvantage. The pay system may be transparent in respect of the evaluation and ranking of jobs (the issue of equal value), however 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 ECJ 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 ECJ 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.<sup>52</sup>

## 5. CONCLUSIONS

To summarize our findings, one could say that pay discrimination resulting from especially person-related pay elements such as allowances or individual pay increases for seniority or performance or secondary employment benefits, are best tackled with the legal tool for analysing direct and indirect discrimination in employment conditions. This method flows from the Equal Treatment Directives on sex, race, ethnic origin, religion, belief, age, disability and sexual orientation. The main advantage of this method is that no job evaluation is required because person-related pay elements generally apply to all employees, irrespective of the job performed. However, when there is no apparent indication of indirect discrimination in the pay conditions applied, this legal approach can hardly benefit the individual employee because it would necessitate statistical research by the employee into the impact of every pay condition applied.

When the pay conditions themselves seem neutral, the method of looking back from the actual pay results received, and trying to explain any difference, may provide an alternative. This right to equal pay for work of equal value laid down in Article 141 EC is so far limited to the ground of sex. Nevertheless, there may be a possibility that the ECJ will apply this system in the future to the discrimination grounds of the Article 13 Directives. Although such an expansion of the methods for establishing pay discrimination cases is to be welcomed, the method does have some important drawbacks. A suitable comparator is not always to be found, the value of jobs is not easily determined, and the exact wages earned by a comparator are not always accessible by the individual. Also for the national courts the assessment of equal value and equal pay can be a complicated process the court is not familiar with. Inadequate knowledge of job evaluation and remuneration systems easily leads to poor judgements.

Can these flaws in the Community equal pay standards be remedied? The new Article 13 Directives and the subsequent revision of Directive 76/207/EEC provide for several promising instruments to strengthen the implementation and application of the equal pay standards. When implementing these directives I would say that it is of the utmost importance to realize that current legal equal pay standards can hardly be enforced by an

<sup>52</sup> 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 clue on the performance level of the employee.

individual employee alone. The Racial Equality Directive has lowered the requirements for making a *prima facie* case of indirect discrimination but more special arrangements are needed. The national legal systems should introduce for instance the class action allowing associations, organisations or trade unions to start legal proceedings not only on behalf of the individual but also on their own account.<sup>53</sup> NGOs or trade unions have by far more access to resources, knowledge and information about companies than individuals, and are therefore in a better position to investigate equal pay. Secondly, specialized bodies such as equal treatment commissions on race and gender can also play an important role. They can provide independent assistance to victims of discrimination and may conduct independent surveys. The Dutch experience is that the majority of successful equal pay claims depend solely on the fact that the Dutch Equal Treatment Commission conducts its own equal pay research at the company level after an individual claim is made. The employer is forced by law to cooperate.

Last but not least, strengthening the possibilities for taking equal pay cases to court should be accompanied by a strengthening of the expertise of the court, either by introducing specialized courts or specialized authorities with the power to make binding decisions or by requiring the involvement of experts in the field of job evaluation and pay systems. Otherwise a pitfall may easily be established.<sup>54</sup> From the experience of the fifteen Member States so far it is clear that litigation concerning equal pay suffers from a kind of self-fulfilling prophecy. The legal difficulty of equal value claims and the infrequency of successful cases make individuals reluctant to take their case to court. As a result, the courts rarely encounter equal value claims and therefore are not developing expertise in this field. This sometimes leads to a precarious attitude among the courts resulting in the swift rejection of claims made. At this point we will have come full circle because in the end this will result in even fewer individuals willing to bear the risks and costs of litigation.

Implementing the additional arrangements provided for in the recent Article 13 Directives and the revised Sex Equality Directive may remedy some of the difficulties discussed. Still, I do not expect this to lead to pay equality in the EU labour market because only a small part of pay disparity can be effectively dealt with through legal instruments, as I have tried to demonstrate in this paper. Combating the pay gap seriously requires more pro-active measures that, preferably, should be established through social dialogue because such measures demand full commitment of the trade unions and employers' organisations. These kinds of measures may comprise for instance the promotion of the use of job evaluation systems by employers in general, as research concludes that companies applying such systems have less of a pay difference between men and women. Furthermore, management tools can be developed, as has been done in the Netherlands, to scrutinize job evaluation systems on sex or race bias before they are applied. A last suggestion may be the development of research methods in equal pay that are not restricted to the comparison of only two employees, such as the method of 'wage lines'.<sup>55</sup> All Equal Treatment Directives mentioned above encourage both sides of industry to conclude agreements on anti-discrimination by collective bargaining. If this would entail agreements on pro-active tools such as an obligation to conduct comprehensive company research into equal pay according to sex and race, say every five years, perhaps a start can be made with actually narrowing the pay gap.

<sup>53</sup> In that case a provision could be included for involved individuals to be excluded from the proceedings if they wish.

<sup>54</sup> See also J. Blom et al., *The Utilisation of Sex Equality litigation in the Member States of the EU*, EC Commission 1995, V/782/96-EN; Expert Network, *Legal Impact Assessment of the Equality Directives*, EC Commission 2003 (forthcoming).

<sup>55</sup> See for further explanation the paper delivered by Siebrand Bisschop.

**INDIRECT SEX  
DISCRIMINATION  
IN PAY AND  
WORKING  
CONDITIONS:  
THE APPLICATION  
OF A POTENTIALLY  
DYNAMIC CONCEPT**

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## 1. INTRODUCTION

This paper analyses some recent developments regarding the concept of indirect discrimination in the field of pay and working conditions in EC Sex Equality Law and in Dutch employment law. As the case law of both the European Court of Justice (ECJ) and the Dutch courts has until now primarily been concerned with the application of EC Sex Equality Law and similar national provisions, this area may be a useful source of analysis for other grounds of discrimination such as race, religion, disability, age or sexual orientation. First, attention will be paid to the concept of indirect sex discrimination as developed in the case law of the ECJ and the definitions of indirect discrimination in different EC directives. Then some specific Dutch equal treatment provisions will be analysed, such as the prohibition of any differentiation based on working time or between fixed-term and permanent employment contracts. Such discrimination was first tackled with the concept of indirect sex discrimination and it is modelled on this concept. According to Dutch law, workers are also entitled to more specific rights, such as the right to adjust working time and working hours and other such rights that may facilitate the reconciliation of work and family life. In this area, the Dutch Equal Treatment Commission had applied the concept of indirect sex discrimination to working conditions before specific provisions became available.<sup>56</sup> Which possibilities have been offered to date by the concept of indirect discrimination in order to combat sex discrimination in pay and in working conditions? How has it contributed to the development of an expanded body of law and more specific rights for workers, which can potentially contribute to improving the position of women in employment? Which difficulties emerge from the application of this concept by the Dutch courts in the field of pay and working conditions and how can these problems be tackled? These are some of the questions which will be addressed in this paper.

## 2. THE CONCEPT OF INDIRECT SEX DISCRIMINATION IN EC LAW

In the case law of the ECJ on the application of the principle of equal pay for male and female workers for equal work or work of equal value, two different approaches can be distinguished. The first approach requires a comparison of the work which two (groups of) workers fulfil, after a difference in pay has been established. The question then is whether the work of the male and the female worker(s) is of equal value and this requires a direct comparison between the two.<sup>57</sup> The second approach is when the application of an apparently sex-neutral criterion, such as for instance part-time work, has an adverse effect on many more women than men, for example in the field of pay. This may amount to indirect sex discrimination if there is no objective justification.

The concept of indirect sex discrimination has mainly been developed by the ECJ, in particular in relation to part-time work. In most cases Article 119 EEC (now Article 141 EC) was at stake, which lays down the principle of equal pay for male and female workers for equal work or work of equal value.<sup>58</sup> The Court has also applied the concept of indirect sex discrimination to working conditions, interpreting the second Equal Treatment Directive (76/207/EEC; 'The second Equal Treatment Directive')<sup>59</sup> and directives granting specific rights, such as the Parental Leave Directive (96/34/EC).<sup>60</sup> The second Equal Treatment Directive explicitly outlaws indirect discrimination in Article 2(1).

<sup>56</sup> Information on the Dutch Equal Treatment Commission and its opinions can be found on the Commission's website: [www.egb.nl](http://www.egb.nl).

<sup>57</sup> An example of such a comparison is ECJ 4 February 1988, Case 157/88, *Murphy v. An Bord Telecom Eireann* [1988] ECR 673 and more recently ECJ 26 June 2000, Case C-381/99, *Brunnhöfer v. Bank der Österreichischen Postsparkasse* [2001] ECR I-4961.

<sup>58</sup> The first directive on equal pay for men and women is also relevant: Council directive 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 (75/117/EEC), OJ 1975, L 45/19.

<sup>59</sup> Council directive 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 (76/207/EEC), OJ 1976, L 39/40. This directive was amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, OJ 2002, L 269/15.

<sup>60</sup> Council directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ 1996, L 145/4.

Landmark cases are *Bilka*, on the exclusion of a group of part-time workers from an occupational pension scheme and *Rinner-Kühn*, on the exclusion of part-time workers from a national scheme for continuing payment in the case of illness.<sup>61</sup> The test, which has to be applied in order to establish whether the application of a criterion or a practice amounts to indirect discrimination, is roughly the same whether pay or working conditions are at stake. In the field of statutory social security schemes the test seems to be more lenient and allows Member States more discretionary power.<sup>62</sup>

## 2.1 Definitions of Indirect Discrimination

The concept of indirect discrimination as developed by the ECJ has now been codified in different directives. The first definition of indirect sex discrimination was given in the burden of proof directive in cases of discrimination based on sex (97/80/EC).<sup>63</sup> Article 2(2) reads: 'For purposes of the principle of equal treatment... indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex.'

More recently, new definitions have been incorporated in the Racial Equality Directive (2000/43/EC),<sup>64</sup> the Framework Directive (2000/78/EC)<sup>65</sup> and in the directive amending the second Equal Treatment Directive (2002/73/EC).<sup>66</sup> The definitions in these three directives are similar. Article 2(2) of the second equal treatment directive has been amended with the inclusion of a definition of indirect sex discrimination in access to employment, vocational training and promotion and working conditions. This definition reads: '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.' These new definitions of indirect discrimination have to be implemented. The definition of indirect sex discrimination in Directive 2002/73/EC is not exactly the same as the definition in the burden of proof directive. It is not clear if the burden of proof directive will be amended. As long as this is not the case, two slightly different definitions of indirect sex discrimination remain in EC law depending on the field in which they are applied.

## 2.2 Burden of Proof

According to Article 4(1) of the burden of proof directive persons who consider themselves to have been wronged because the principle of equal treatment has not been applied to them have to establish facts from which it may be presumed that there has been direct or indirect discrimination. The burden of proof then lies on the respondent to demonstrate that there has been no breach of the principle of equal treatment. Directive 2002/43/EC and Directive 2000/78/EC contain the same provision on the burden of proof.<sup>67</sup> According to these two directives this burden of proof does not apply to criminal proceedings and Member States are not obliged to apply it to proceedings in which the court or a competent body has to investigate the facts of the case.

The shift in the burden of proof, which is now codified in directives, is in conformity with the case law of the ECJ.<sup>68</sup> Furthermore, when interpreting the principle of equal pay for men and women for work of equal value, the Court stressed the importance of the principle of transparency. The *Danfoss* case clarified that where an undertaking applies a system of pay which is completely lacking in transparency, it is for the employer to prove that this practice is not discriminatory, if a female worker establishes, in relation to a relatively large number of

<sup>61</sup> ECJ 13 May 1986, Case 170/84, *Bilka-Kaufhaus GmbH v. Weber von Harz* [1986] ECR, 1607 and ECJ 13 July 1989, Case 171/88, *Rinner-Kühn v. FWW Spezial Gebäudereinigung* [1989] ECR 1989, 2743.

<sup>62</sup> Council directive of 19 December 1978 on the progressive implementation of equal treatment for men and women in matters of social security (79/7/EEC), OJ 1079, L 6/24. See for instance ECJ 14 December 1995, Case C-317/93, *Nolte v. Landesversicherungsanstalt Hannover* [1995] ECR I-4625.

<sup>63</sup> Council directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ 1998, L 14/6.

<sup>64</sup> Council directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000, L 180/22. This directive had to be implemented by 19 July 2003.

<sup>65</sup> Council directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000, 303/16. This directive had to be implemented by 2 December 2003; an additional period is allowed to implement the provisions on age and disability discrimination.

<sup>66</sup> Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council directive 76/207/EEC 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 2002, L 269/15. This directive should be implemented by 5 October 2005.

<sup>67</sup> In Article 8(1) of Directive 2000/43/EC, Article 10(1) of Directive 2000/78/EC.

<sup>68</sup> See for instance ECJ 13 May 1986, Case 170/84, *Bilka-Kaufhaus v. Weber von Harz* [1986] ECR 1607, paragraph 31.

employees, that the average pay for women is less than that for men.<sup>69</sup> In *Barber* the Court made clear that the principle of transparency requires that the application of the principle of equal pay is ensured in respect of each element of remuneration and not only on the basis of a comprehensive assessment of the worker's pay.<sup>70</sup> In *Enderby* the Court stated 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 and the other predominantly by men, Article 119 EEC requires the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex.<sup>71</sup> In order to consider whether a measure has a more unfavourable impact on women than on men a comparison of statistics has to be undertaken between the proportion of men in the reference group who are able to fulfil a requirement and those who are not able to do so compared to the proportion of women (*Seymour*).<sup>72</sup> The national court has to assess whether the statistics are valid and significant. *Prima facie* indirect discrimination can also be established when statistical evidence reveals a lesser but persistently constant disparity over a long period between men and women.

The most recent definition of indirect discrimination in the Racial Equality Directive (2000/43/EC) and in the Framework Directive (2000/78/EC), makes it easier to establish a *prima facie* case of indirect discrimination, because an alleged victim of discrimination no longer has to prove that 'a substantially higher proportion of members of one group' are disadvantaged. It is sufficient that persons of, for example, a racial or ethnic origin are put at a particular disadvantage compared with other persons. The European Commission stressed that this would alleviate the burden of proof for plaintiffs. When directive 2002/73/EC is implemented, the same test shall apply to indirect sex discrimination. The definition in the burden of proof directive clarifies that the adverse impact must be on the members of a group.<sup>73</sup>

All definitions suggest that a comparison has to be drawn between persons of one group and persons of another group. The definitions in the Racial Equality Directive (2000/43/EC) and the Framework Directive (2000/78/EC) make a comparison with other persons possible. It may therefore depend on the context and with which group the comparison can be drawn. In the case of indirect sex discrimination it is clear that the comparison has to be made between persons of one and persons of the other sex.

The definition in the three most recent directives explicitly states that indirect discrimination may be established not only when a neutral provision or criterion disadvantages persons, but also when a practice does so. The discriminatory result is decisive, not the source of the discrimination. This approach is in accordance with the case law of the ECJ. In all these definitions the norm is formulated in a neutral and symmetric way. Therefore the prohibition of discrimination based on sex, for example, not only protects women, but also men.

### 2.3 Objective Justification

The objective justification test as described in the burden of proof directive is roughly the same as in the case law of the ECJ. In the new definitions, the legislator has made it explicitly clear that the aim has to be legitimate and it therefore has to be tested separately. According to the proposal of the Commission, the aim has to deserve protection and has to be important enough to prevail over the principle of equal treatment.<sup>74</sup>

More specific guidance is given in the case law of the ECJ. When employment conditions, including pay, are at stake and the defendant is an employer, the aim must meet a 'real need' of the undertakings.<sup>75</sup> If the defendant

<sup>69</sup> ECJ 17 October 1989, Case 109/88, *Union of Commercial and Clerical Employees v. Danish Employers' Association, acting on behalf of Danfoss* [1989] ECR 3199, paragraphs 12-16.

<sup>70</sup> ECJ 17 May 1990, Case C-266/88, *Barber v. Guardian Royal Exchange Assurance Group* [1990] ECR I-1944, paragraph 34-35.

<sup>71</sup> ECJ 27 October 1993, Case C-127/92, *Enderby v. Renchay Health Authority* [1993] ECR I-5566, paragraphs 14-19.

<sup>72</sup> ECJ 9 February 1999, Case C-167/97, *Regina v. Secretary of State for Employment ex parte Seymour-Smith* [1999], ECR I-623, paragraphs 51-65.

<sup>73</sup> C. Barnard and B. Hepple, 'Substantive Equality', *Cambridge Law Journal* 59(3), November 2000, p. 568.

<sup>74</sup> COM 1999, 565, p. 9.

<sup>75</sup> ECJ 13 May 1986, Case 170/84, *Bilka-Kaufhaus GmbH v. Weber von Harz* [1986] ECR 1986, 1607 paragraph 37.

is a Member State and State policy is at stake, then the aim has to be a ‘necessary aim of social policy’.<sup>76</sup> In the *Seymour case*, the ECJ stressed that although social policy is essentially a matter for the Member States, the broad margin of discretion available to the Member States cannot have the effect of frustrating the implementation of a fundamental principle of Community law such as that of equal pay for men and women. In this case, mere generalisations concerning the capacity of a specific measure to encourage recruitment were not enough to show that the aim of the disputed rule was unrelated to any discrimination based on sex nor to prove that the means chosen were suitable for achieving that aim.<sup>77</sup> The Court also clarified that the economic aim of article 141 EC is secondary to the social aim, which constitutes the expression of a fundamental human right.<sup>78</sup>

The definitions in the different directives make absolutely clear that the means to achieve a legitimate aim have to be appropriate and necessary. This last criterion is not met when the legitimate aim can also be realised by other less or non-discriminatory means. The opinions of the Dutch Equal Treatment Commission show that this last criterion is an important hurdle to meeting the objective justification test.

It is for the national court to establish whether there is a breach of EU law, but in some cases the ECJ provides further guidance concerning arguments which do not provide an objective justification when a prima facie case of indirect sex discrimination in the field of pay or working conditions has been established and concerning which treatment has to be applied in the case of a breach of the principle of equal pay or equal treatment. According to *Kowalska* the group of persons suffering indirect sex discrimination must be treated in the same way and subject to the same scheme as other workers.<sup>79</sup> Mere generalizations are not an objective justification. In *Nimz*, for example, the ECJ emphasized that the objectivity of applying the criterion of length of service in order to qualify for the next salary scale, depends on all the circumstances in a specific case, in particular on the relationship between the nature of the work performed and the experience gained from that work after a certain number of working hours.<sup>80</sup> The *Enderby* case clarified that the fact that rates of pay are the result of a collective bargaining process by the same parties, but conducted separately for two professional groups and taken separately, have in themselves no discriminatory effect, is not an objective justification for differences in pay between those two jobs.<sup>81</sup> Recently the ECJ confirmed in *Kutz-Bauer* that although budgetary considerations may underlie a Member State’s choice of social policy and may influence the nature or scope of the social protection measures which it wishes to adopt, they do not in themselves constitute an aim pursued by that policy and cannot therefore justify discrimination against one of the sexes.<sup>82</sup> Interpreting Article 2(1) and Article 5(1) of the second equal treatment directive, the ECJ held that to concede that budgetary considerations may justify a difference in treatment between men and women which would otherwise constitute indirect discrimination on grounds of sex would mean that the application and scope of a rule of Community law as fundamental as that of equal treatment between men and women might vary in time and place according to the state of the public finances in Member States. Such guidance by the ECJ may be especially useful in equal pay cases when the state is acting as the employer.<sup>83</sup> The Court also made clear in *Kutz-Bauer* that in the case of a breach of Directive 76/207/EEC by legislative provisions or by provisions of collective agreements introducing discrimination contrary to that directive, the national courts are required to set aside that discrimination, using all the means at their disposal, and in particular by applying those provisions for the benefit of the class placed at a disadvantage, and are not required to request or await the setting aside of the provisions by the legislature, by collective negotiation or otherwise.

<sup>76</sup> ECJ 13 July 1989, Case 171/88, *Rimmer-Kühn v. FWW Spezial Gebäudereinigung* [1989] ECR 1989, 2743, paragraph 14.

<sup>77</sup> ECJ 9 February 1999, Case C-167/97, *Regina v. Secretary of State for Employment, ex parte Seymour Smith* [1999] ECR I-623.

<sup>78</sup> ECJ 10 February 2000, Case C-50/96, *Deutsche Telekom v. Schröder* [2000] ECR I-743.

<sup>79</sup> ECJ 27 June 1990, Case C-33/89, *Kowalska v. Freie und Hansestadt Hamburg* [1990] ECR I-2591.

<sup>80</sup> ECJ 7 February 1991, Case C-184/89, *Nimz v. Freie und Hansestadt Hamburg* [1991] ECR I-313.

<sup>81</sup> ECJ 27 October 1993, Case C-127/92, *Enderby v. Renshaw Health Authority* [1993] ECR I-5566, paragraphs 20-23.

<sup>82</sup> ECJ 20 March 2003, Case C-187/00, *Kutz-Bauer v. Freie Hansestadt Hamburg* [2003] ECRI-2741.

<sup>83</sup> See for instance the different opinions of the Dutch Equal Treatment Commission regarding pay in education: Opinions 2000-98, 2000-99 and 2000-100.

## 2.4 Definitions in Dutch Equal Treatment Law

Until now a slightly different definition of (direct and) indirect discrimination has been given in Dutch equal treatment law. The Dutch law prohibits a distinction based on for example, race or sex. How will the definitions of indirect discrimination in the most recent directives be implemented in the Netherlands?<sup>84</sup> The specific Dutch terminology shall remain unchanged in the near future, thus prohibiting distinction, not discrimination. It is clear that 'distinction' includes 'discrimination'. The Dutch Equal Treatment Commission did not advise replacing 'distinction' by 'discrimination', because people often have an incorrect impression that the use of the word 'distinction' means that making a distinction is intended. Up to now the use of the word distinction has not given rise to specific problems. But, on the other hand, implementing the terminology of the directives ensures that no other interpretation is intended. Furthermore, the Dutch definition of indirect discrimination is not evident. Article 1(c) of the Equal Treatment Act defines indirect discrimination as discrimination on the grounds of characteristics or behaviour other than those listed in (b). According to paragraph b, direct discrimination is discrimination between persons on the grounds of religion, belief, political opinion, nationality, race, sex, heterosexual or homosexual orientation and civil status. The Dutch proposal on the implementation of the new directives adds the objective justification test as defined in these directives in the Equal Treatment Act and therefore clarifies the test that has to be applied, and this is a positive point.

Some other developments in EC employment law are worth mentioning, because in some situations it is no longer necessary to apply the concept of indirect discrimination.

## 3. PROHIBITION OF SPECIFIC FORMS OF DISCRIMINATION

Some specific forms of discrimination are prohibited in more recent directives, which had to be implemented, such as the prohibition of discrimination between part-time and full-time workers (Directive 97/81/EC) and between workers with fixed-term contracts and permanent workers (Directive 99/70/EC).<sup>85</sup> In these cases, no link with sex discrimination or race discrimination or other grounds has to be established. This alleviates the burden of proof for the plaintiff.

### 3.1 Prohibition of Distinction Based on Working Time

In the Netherlands an Act prohibiting distinction based on working time was adopted in 1996.<sup>86</sup> Furthermore, the part-time work directive had to be implemented before 20 January 2000. The wording of the Dutch prohibition of distinction based on working time is strongly influenced by the case law of the ECJ on indirect sex discrimination in relation to part-time work. The Dutch Equal Treatment Commission is competent to give (non-binding) opinions on the application of this discrimination ground as well and has published an evaluation of all the opinions given in 2002.<sup>87</sup> The competence of the Equal Treatment Commission in the application of both grounds of discrimination means that a more coherent development of the norm is possible concerning on the one hand the concept of indirect discrimination based on sex in relation to part-time work and, on the other, concerning the application of the non-discrimination principle in relation to working time.

<sup>84</sup> A proposal which implements some general notions of directives 2000/43/EC and 2000/78/EC is pending in the First Chamber of Parliament: Kamerstukken I 2003-2004, 28770, A.

<sup>85</sup> Council directive 97/81/EC of 15 December 1997 concerning the framework agreement on part-time work concluded by UNICE, CEEP and the ETUC, OJ 1998, L 14/9 and Council directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ 1999, L 175/43.

<sup>86</sup> Wet verbod van onderscheid naar arbeidsduur, Stb. 1996, 391.

<sup>87</sup> Commissie gelijke behandeling, Advies Commissie gelijke behandeling inzake evaluatie van de Wet verbod tot het maken van onderscheid naar arbeidsduur, 1 August 2002, CGB-advies/2002/04.

The prohibition of differentiation based on working time applies to the private and the public sectors (Article 7:648 of the Civil Code and Article 125g of the Public Servants Act). The employer (or the public service) may not differentiate between employees based on a difference in working time concerning the conditions under which an employment contract is concluded, continued or terminated, unless the differentiation is objectively justified. No distinction is made between direct and indirect discrimination. The Act applies to both forms of distinction. The test to decide whether a distinction is objectively justified is the same as in the case of indirect discrimination based on sex.<sup>88</sup>

The points of departure in this regulation are distinction with regard to working time, which means that the full-timer will not always be the point of reference, and high quality part-time work. The Dutch legislator has provided guidance as to which treatment has to be applied to various conditions in order to comply with the law. The starting point is that differentiated treatment is required. The nature of the treatment depends on the working condition at stake. The principle of *pro rata temporis* will mostly not amount to a breach of this law, but sometimes the same treatment or different treatment is required. Compensation for travel costs should, for example, be identical for workers with different working times; the real costs have to be paid. There is now more clarity concerning the principle of equal pay and equal treatment in relation to part-time work in the field of working conditions. But a difference of interpretation concerning the nature of a pay element at stake will provide a different outcome as to which treatment should be applied.<sup>89</sup>

Furthermore, the Act did not improve the conditions of part-time workers regarding the payment of supplements in the case of overtime. Before the *Helmig* case<sup>90</sup> was decided by the ECJ, the Dutch Equal Treatment Commission for Men and Women had already provided opinions on this issue.<sup>91</sup> The Commission, applying the concept of indirect sex discrimination, concluded that a provision providing that a worker is entitled to overtime payments when the usual working hours of an undertaking (for example 40 hours a week) are exceeded, disadvantages part-time workers. Therefore a presumption of indirect sex discrimination was established. The Commission did not accept the argument of the employer that the overtime supplements were meant to compensate full-time workers for the inconveniences of having to work overtime. The Commission stressed that the inconvenience of overtime cannot be established in general. Overtime above the individual working time of part-timers may also be inconvenient for part-time workers. This depends, for instance, on the health of the worker, care activities or family responsibilities. As is well known, the ECJ decided in the much criticized *Helmig* case that such a provision in a collective agreement did not disadvantage part-time workers compared to full-time workers. Dutch law has to be applied in accordance with *Helmig* and this case therefore resulted in a more disadvantageous situation for part-time workers.

### 3.2 Prohibition of Distinction Between Workers with Fixed-term Contracts and Permanent Workers

Another example of a specific anti-discrimination provision is the application of the non-discrimination principle to fixed-term workers compared to permanent workers. Member States had to implement directive 99/70/EC before 10 July 1999.<sup>92</sup> In the European Union, the majority of workers with fixed-term contracts are women. In the Netherlands, immigrants are more often subject to fixed-term contracts than native workers. Furthermore, in the Netherlands part-time workers are more often subject to fixed-term contracts than full-time workers. Thus discrimination against workers with fixed-term contracts may amount to multiple discrimination.

<sup>88</sup> The relevant Acts refer to the criteria developed by the ECJ in *Bilka*: ECJ 13 May 1986, Case 170/84, *Bilka-Kaufhaus GmbH v. Weber von Harz* [1986] ECR I607.

<sup>89</sup> See, for instance, opinion 1997-140 by the Equal Treatment Commission and CR v B 25 November 1999, *Administratiefrechtelijke beslissingen 2000*, 53. ECJ 15 December 1994, Case C-399/92, *Stadt Lengerich and others v. Helmig and others* [1994] ECR I-5727.

<sup>90</sup> The first was an opinion of the Equal Treatment Commission of men and women: opinion 1-90-10, 5 March 1990. This Commission was competent to give opinions on the application of the Equal Treatment Act of men and women at work until 1 September 1994, when the Equal Treatment Act entered into force and the Equal Treatment Commission was established.

<sup>92</sup> Council directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ 1999, L 175/43.

The Dutch Act on fixed-term contracts applies to the private sector, and not yet to the public sector, but a proposal to this effect is pending.<sup>93</sup> Temporary workers are excluded from the scope of the Act. A proposal for an EC directive on temporary work is still pending.

Article 7:649 Civil Code stipulates that the employer may not differentiate between workers in respect of working conditions based on the temporary or non-temporary character of the employment contract, unless the distinction is objectively justified. Just as with distinctions based on working time, the test is the same as in the case of indirect sex discrimination. Where appropriate, the principle of *pro rata temporis* shall apply. During the parliamentary proceedings, attention was paid to how to apply this non-discrimination principle in practice. But the legislator gave less guidance compared to differentiations based on working time. Probably the fact that there is less ECJ case law on this subject than relating to indirect sex discrimination and part-time work played a role here. The Dutch Equal Treatment Commission and the Dutch courts will have to provide guidance in the application of this principle in practice.

Interesting is the fact that the concept of indirect discrimination based on sex has played a role in the recognition of discrimination in relation to part-time work and fixed-term contracts. The concept has proved to be a vehicle for placing these forms of discrimination, closely related to sex discrimination, on the agenda of the European Union, and through the obligation to implement the directive, on the national agenda. The fact that the Dutch Equal Treatment Commission is competent to give opinions on all these discrimination grounds enhances a uniform application of the norm of equal treatment of men and women with regard to pay and working conditions, equal treatment of part-timers and full-timers and equal treatment of workers with fixed-term contracts and permanent workers.

The application of the same definitions of indirect discrimination is probably easier when different discrimination grounds are at stake in a given situation, for example indirect sex discrimination and discrimination based on working time or the temporary character of an employment contract. On the other hand, in the Netherlands it is the subject of discussion whether the same strict test should apply to all grounds of discrimination. Discrimination based on race or sex is not the same kind of discrimination as differentiation based on the nature of an employment contract, for example. Race or sex discrimination are structural forms of discrimination and are closely linked to the qualities of a person and human dignity, while the character of discrimination based on the nature of an employment contract is mostly temporary and dependant on varying circumstances. So the question is raised whether the legislator should use the same terminology and the same strict tests for all kinds of discrimination.

## 4. FROM ANTI-DISCRIMINATION PROVISIONS TO SPECIFIC OBLIGATIONS

In the recently adopted directives and in Dutch employment law some specific obligations for employers have been formulated. These norms may be considered as a further step towards a more substantive approach to equal treatment. In some areas, such as work-family policies, strong legal norms have been realized. A clear example is the right to adapt working time in Dutch legislation. Problems in this field were first tackled or could be addressed with the concept of indirect (sex) discrimination.

<sup>93</sup> *Kamerstukken II 2002-2003, 28992, nos. 1-3.*

#### 4.1 Reasonable Accommodation for Disabled Persons

In the Framework Directive (2000/78/EC) we can find a good example of a clear obligation for employers to combat discrimination. Article 5 stipulates that reasonable accommodation shall be provided in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities. Employers have to take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, to participate in, or to advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. Contrary to the concept of indirect discrimination, where a group of persons suffers a disadvantage, this obligation is formulated as an individual right.

It has been suggested that the obligation to provide reasonable accommodation does not really fit within the dual approach of direct and indirect discrimination.<sup>94</sup> It is not yet clear whether a direct or indirect discrimination case could be made if reasonable accommodation is not provided. But it is clear that the obligation for the employer is firmly rooted in anti-discrimination law and that an employer who does not meet this requirement will be in breach of this provision. In Dutch employment law, we also find some examples of enhanced workers rights and specific obligations for employers.

#### 4.2 Adjustment of Working Time and Working Hours

For persons balancing work and a family life (still mostly women), the possibility to adjust working time - mostly amounting to a reduction of working time - and to adjust working hours to accommodate responsibilities outside their work is paramount, especially in a context of insufficient child care facilities. The Dutch Equal Treatment Commission has developed an interesting application of the concept of indirect sex discrimination in this area, which has resulted in a limited right to work part-time. The Equal Treatment Commission took the following approach. When an employer did not grant a request to reduce working time, the Commission judged that a presumption of indirect discrimination on the ground of sex had been established. As it is mostly women who want to work part-time in order to balance work and a family life, imposing a minimum number of working hours amounts to indirect sex discrimination. According to the Dutch Equal Treatment Commission, the employer has to justify why a certain number of minimum hours is required for a certain job. The opinions of the Commission show that this requirement is not easily met. The Dutch Equal Treatment Commission took the same approach in the distribution of working hours. A presumption of indirect discrimination was established in the same way as in the case of a request to reduce working time.

In the Netherlands, such an approach is no longer necessary in most cases, because two legal obligations have entered into force in this area. The first is the Act on the Adaptation of Working Time.<sup>95</sup> This Act stipulates that an employer has to grant a request by an employee or a civil servant to adjust his/her working time (reduction or increase), unless serious business reasons compel a refusal. Dutch case law to date shows that a reduction or extension of working time is easily granted. This is not the case with the distribution of hours during the week. On this point, it seems that the courts try to reach a compromise and mostly the interests of the employer will prevail.

Since 1 June 2003 the Dutch Act on Working Time contains a provision on working time patterns, which enhances the rights of workers.<sup>96</sup> When establishing individual working time patterns, the employer has to take the personal circumstances of workers into consideration as far as this can reasonably be required.

<sup>94</sup> L. Waddington & A. Hendriks, 'The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation', *International Journal of Comparative Labour Law and Industrial Relations*, 2002, p. 423-426.

<sup>95</sup> *Wet aanpassing arbeidsduur*, *Stb.* 2000, 114, which entered in force on 1 July 2000. See S. Burri, A. Veldman & H. Opitz, 'Work-family Policies on Working Time put into Practice. A Comparison of Dutch and German Case Law on Working Time Adjustment', *International Journal of Labour Law and Industrial Relations* 2003, p. 321-346.

<sup>96</sup> *Article 4a Arbeidstijdenwet*, *Stb.* 2003, 141.

### 4.3 Conciliation of Work and Family Life

Some rights of workers with family responsibilities have been codified in the parental leave directive (96/34/EC).<sup>97</sup> This directive has placed an obligation on Member States to implement a right to parental leave and a right to time off on the ground of *force majeure*. This is not paid parental leave or paid time off. In the Netherlands, parental leave is not paid either, but in some sectors it is partially paid when collective agreements stipulate this. Time off on the ground of *force majeure* to be able to care for a child, husband or wife or parents is paid at up to 70% of the salary. The maximum amount of days which a worker is entitled to take off in this respect is twice the weekly working time each year. Such a provision may be considered as an example of taking family responsibilities into account at the workplace and the expanded rights of workers with family responsibilities.

## 5. SOME PROBLEMS CONCERNING THE APPLICATION OF THE CONCEPT OF INDIRECT SEX DISCRIMINATION IN THE NETHERLANDS

### 5.1 Problems Regarding the Burden of Proof

An analysis of the opinions of the Dutch Equal Treatment Commission shows that in the field of occupational pensions in particular, plaintiffs often do not succeed in establishing a *prima facie* case of indirect sex discrimination. In the Netherlands the exclusion of married women and part-time workers from occupational pension schemes has been widespread and some groups of workers are still excluded.

In 1994 a statutory equal treatment provision for part-time workers in occupational pension schemes entered into force.<sup>98</sup> The exclusion of part-timers from pension schemes without any objective justification is prohibited. As we have seen, since 1996 differentiation based on working time has been prohibited, unless there is an objective justification. In situations that do not fall under the scope of these provisions, the link with sex discrimination has to be established. But in many cases relating to the past, statistics are no longer available. Another problem arises when the difference between how many women and how many men have been excluded is not significant, for instance in strongly segregated sectors. When no statistics concerning the occupational pension fund are available, the Dutch Equal Treatment Commission is not always willing to apply national statistics. This is for instance the case if the statistics relating to the occupational pension fund do not reflect developments in national statistics during a period of time in which statistics are available concerning the occupational pension fund.

It is often difficult to obtain statistics regarding pay and working conditions as they are often in the hands of the employer. The Dutch Equal Treatment Commission has the competence to demand any information and documents that are reasonably necessary for the fulfilment of its tasks and everybody has an obligation to provide the required information.<sup>99</sup>

Another problem is that sometimes a case of indirect discrimination is at stake, but the courts do not apply the concept of indirect discrimination. This was recently the case in a judgment by the Supreme Court of the Netherlands in the *Souverein* case.<sup>100</sup>

<sup>97</sup> Council directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ 1996, L 145/4. This directive had to be implemented by 3 June 1998.

<sup>98</sup> Article 2a Pensioen- en spaarfondsenwet.

<sup>99</sup> Article 19 Equal Treatment Act. The article provides for a few specific exceptions.

<sup>100</sup> HR 12 April 2002, Jurisprudentie Arbeidsrecht 2002/101.

## 5.2 Non-application of the Concept of Indirect Discrimination

In the *Souverijn* case the exclusion of workers with an administrative function – all female workers – from an occupational pension scheme was at stake. Only workers with technical functions – all male workers – had the right to join the pension scheme. In 1996, the Dutch Equal Treatment Commission had provided an opinion on this case and had determined that the exclusion amounted to indirect sex discrimination.<sup>101</sup> In taking the case to Court, *Souverijn* claimed the right to join the pension scheme, invoking Article 119 EEC and referring to the case law of the ECJ, in particular to *Bilka* and *Vroege*, which were decisions on the exclusion of (some groups) of part-time workers from occupational pension schemes and the right to join such a scheme.<sup>102</sup> The Court reached a different conclusion from the opinion of the Dutch Equal Treatment Commission. According to the Court, the *Bilka* and *Vroege* cases would only apply if part-time and full-time workers undertake work of equal value. Article 119 EEC requires equal pay for equal work or work of equal value. Therefore the Court first decided that pay was at stake, and then addressed the question whether the administrative functions and the technical functions were of equal value. *Souverijn* did not address this question and the employer had stated that both jobs were not of equal value, therefore the Dutch Court answered this question in the negative and concluded that Article 119 EEC was not at stake, because the jobs were not of equal value.

The case was taken to the Supreme Court of the Netherlands which stated that Article 119 EEC is applicable in the case of equal work or work of equal value, referring to *Brunnhöfer*.<sup>103</sup> The Supreme Court concluded that this requirement also applies in the case of indirect discrimination, referring to the *JämO* case.<sup>104</sup> Referring to *Brunnhöfer* the Supreme Court stated that the plaintiff has to prove that he or she is paid less than a comparator and that both are in fact performing the same work or work of equal value. According to the Supreme Court, in this case there was no reason to place the burden of proving that both jobs were not of equal value on the employer.

The judgment of the Dutch Supreme Court has been strongly criticized.<sup>105</sup> The first point of criticism is that the grounds for the judgment are weak. Secondly, commentators stress that the requirement of equal work or work of equal value is only relevant in the case of a comparison between two employees of different sexes, when one worker is paid less than the other, when the claimant is performing work of equal value or when a comparison can be made between two groups of workers. It is then for the claimant to prove that the work is of equal value. That was the issue at stake in both *Brunnhöfer* and *JämO*. But the situation in *Souverijn* was different. All groups of employees who did not perform technical functions were excluded from the occupational pension schemes. This is therefore a case of indirect discrimination. The negative effect of a criterion or practice on one group is decisive and in that case there is no need to establish that the work done by both groups is equal or of equal value. The application of an additional requirement in all equal pay cases that the work has to be of equal value places a barrier to the realization of equal pay between men and women. In *Souverijn* the Dutch Supreme Court did not consider the approach of the ECJ in the landmark case of *Bilka*. In *Bilka*, a case concerning the exclusion of part-time workers from an occupational pension scheme, the question whether work of equal value was at stake was not considered at all by the ECJ. According to the ECJ such exclusion amounted to indirect discrimination, which could in some instances be objectively justified. This approach was confirmed in *Vroege*. Another point of criticism is that the Dutch Supreme Court did not request a preliminary ruling from the ECJ on this question.

## 5.3 Lack of Prejudicial Questions

The highest Dutch Courts sometimes seem to be reluctant to request a preliminary ruling, even when it is clear

<sup>101</sup> Opinion 1996-86.

<sup>102</sup> ECJ 13 May 1986, Case 170/84, *Bilka-Kaufhaus GmbH v. Weber von Harz* [1986] ECR, 1607 and ECJ 28 September 1994, Case C-57/93, *Vroege v. NCIV* [1994] ECR, I-4541.

<sup>103</sup> ECJ 26 June 2000, Case C-381/99, *Brunnhöfer v. Bank der Österreichischen Postsparkasse* [2001] ECR I-4961.

<sup>104</sup> ECJ 30 March 2000, Case C-236/98, *Jämställdhetombudsmannen v. Örebro länds landsting* [2000] ECR I-2189.

<sup>105</sup> See for instance HR 12 April 2002, *Rechtspraak Nemesis 2003, 1535*, annotation by A. Veldman and *Nederlandse Jurisprudentie 2002/411*, annotation by T. Koopmans.

that EC Community law is at stake, as in the *Souvereinijn* case. According to Article 234 EC the highest courts have to request a preliminary ruling from the ECJ on the interpretation of the EC Treaty. There are two main exceptions to this obligation. The first is when the ECJ has already ruled on the matter and it thus concerns an 'acte éclairé'. Secondly, the national court may feel that the case is so clear that no ruling by the ECJ is warranted, in other words there is a so-called 'acte clair'. But the ECJ has stressed that in such a case the national court must be convinced that the matter is equally obvious to the courts of other Member States and to the Court of Justice.<sup>106</sup> Furthermore the Court has stressed the specific characteristics of EC law and the difficulties concerning its interpretation, such as the use of different languages, the EC terminology and the context of the provisions.

## 6. OPPORTUNITIES TO TACKLE INDIRECT SEX DISCRIMINATION IN THE FIELD OF PAY AND IN WORKING CONDITIONS

### 6.1 Establishing a *Prima Facie* Case of Indirect Discrimination

It is often not easy to establish a case of indirect sex discrimination in the field of pay, because the necessary information is often not available to the plaintiff. In such cases, a presumption of indirect discrimination can sometimes be established by using national or sectorial statistics. It is then up to the employer to prove that these statistics do not reflect the situation in the undertaking or the relevant frame of reference. It seems that the Dutch Equal Treatment Commission is more prepared than the Dutch courts to accept such general statistics. With the new definitions of indirect discrimination in the Racial Equality Directive (2000/43/EC), the Framework Directive (2000/78/EC) and the directive amending the second equal treatment directive (2002/73/EC), it will become easier to prove that a person is suffering a particular disadvantage with reference to national or general statistics in indirect discrimination cases.

### 6.2 Objective Justification Test

In the Netherlands, the definition of the objective justification test contained in the new directives shall be implemented in the Equal Treatment Act. Such a provision may contribute to more clarity as to which test should be applied. Nevertheless, the application of this test is often difficult in practice. A more frequent use, for instance by social partners or employers, of the possibility to request an opinion from the Equal Treatment Commission before adopting new policies or provisions, could contribute to clarifying the norm in practice and would eventually prevent discrimination. Specific information could be provided to employers, social partners and NGOs, for instance, concerning the application of the objective justification test in practice in relation to the different prohibited grounds of discrimination. Such campaigns could be (partly) subsidized by the State.

### 6.3 Towards more effectiveness

According to the case law of the ECJ, as long as no new measures are taken, the national courts have to set aside discriminatory provisions (*Kutz-Bauer*).<sup>107</sup> The Dutch Equal Treatment Commission sometimes adds a recommendation in its opinions and thus contributes to clarifying the norm in a specific situation. The Commission could make even more use of recommendations. In follow-up investigations, the Commission tries to gather information as to whether the opinion has been followed and the consequences thereof. Such information gives

<sup>106</sup> ECJ 6 October 1982, Case 283/81, *CILFIT v. Ministry of Health* [1982] ECR 3415.

<sup>107</sup> ECJ 20 March 2003, Case 187/00, *Kutz-Bauer v. Freie Hansestadt Hamburg* [2003] ECRI-2741.

some indication as to the effectiveness of the equal treatment legislation in practice and is therefore very useful. Burrows - among others - has stressed that transparency in the pay and reward mechanism, which is operated by the employer, should be ensured.<sup>108</sup> She suggested the creation of a legal requirement of an equal pay audit for all employers. Such an audit could be conducted in conjunction with the specialised bodies. This requirement would go a step further than the competence of the Dutch Equal Treatment Commission to require all information and documents, which are reasonably necessary to fulfil its tasks. In the United Kingdom, workers have the right to address a questionnaire to the employer with questions related to differences in pay between workers. The employer does not have an obligation to answer the questions, but not answering or answering evasively will probably be taken into account by the courts. In the Netherlands, a checklist for equal pay has been developed by the Labour Foundation. The implementation of such a list and its application in practice could contribute to more proactive policies, with more emphasis on the detection of unequal pay policies. Instruments to detect or - even better - to prevent unequal treatment are a welcome addition to the existing equal treatment policies, which are an impressive body but which depend on the filing of complaints by individuals or NGOs.

The Dutch Equal Treatment Commission furthermore has the competence to conduct investigations on its own initiative to determine whether discrimination is systematically taking place in the public service or in one or more sectors in society. Until now, the Commission has only carried out a few such investigations. In the future, the Commission will probably be given the competence to investigate a specific undertaking or service if there is a presumption of systematic discrimination. Such investigations and the publication of its results may contribute to a more collective and systematic approach to problems of discrimination in pay and in working conditions. More emphasis on combating discrimination in collective agreements and regulations of undertakings will, in the long term, probably yield better results than enforcement policies principally based on the instigation of individual complaints.

#### **6.4 The (potential) Role of the Dutch Legislator**

The opinions of the Dutch Equal Treatment Commission are not binding. But the courts should provide sufficient grounds as to why they disregard an opinion by the Dutch Equal Treatment Commission when handling the same case. As the government has stressed, such an obligation follows from Article 121 of the Dutch Constitution, which states that the courts have to provide sufficient grounds for their judgements.<sup>109</sup> But providing such grounds when courts diverge from an opinion by the Equal Treatment Commission is not legally required and practice shows that not all judgements contain the necessary grounds for such a decision. Such a legal requirement would strengthen the role of specialized bodies. The Dutch Equal Treatment Commission and NGOs in general give advisory opinions on the legislative proposals of the government. Even if many comments do not attain their objective, they do make a comprehensive contribution to the discussion.

In the Netherlands, the legislator often does not adopt measures offering more protection than the European minimum requirements. The burden of proof directive, for instance, does not apply to social security. An exception seems to be the Dutch policy on the adjustment of working time and working hours that enhanced the rights of workers. But in other areas, only the required minimum has been implemented. Sometimes, even this is not the case. An exception concerning pension schemes in Dutch Equality Law which was contrary to EC law has only recently been abolished. Furthermore, levelling down has often been the result of a judgement of the ECJ, in particular in the field of social security. In such areas Member States have a specific responsibility.

<sup>108</sup> *At the European Commission Conference "Gender Equality and Europe's Future" in Brussels in March 2003.*

<sup>109</sup> *Kamersstukken II 2002-2003, 28770, nr. 5, p. 17.*

## 7. SOME CONCLUSIONS

In the Netherlands European Sex Equality Law has had quite a major impact in the field of pay and working conditions. Especially the concept of indirect discrimination has been a vehicle to address more hidden forms of discrimination. The creative use of this concept by the Dutch Equal Treatment Commission is worth noting. In some areas there is a shift from the application of the concept of indirect discrimination to the prohibition of specific forms of discrimination and even to specific obligations. This is particularly true in the Netherlands as regards policies towards a greater differentiation of working time, working hours and work-family policies.

The application of the concept of indirect discrimination by the courts is not unproblematic, especially in the field of pay. The approach of the Supreme Court of the Netherlands makes it more difficult to address sex discrimination in the field of pay. It has been suggested that the compliance of this approach with EC law may be doubted, and the lack of prejudicial questions by the highest courts has been criticised. While the Dutch Equal Treatment Commission in general closely follows the case law of the ECJ, the same is not always true for the Dutch courts. This hampers a uniform application of EU anti-discrimination law. A creative and innovative application - not only by specialized bodies - of the concept of indirect discrimination is necessary in order to combat more hidden forms of discrimination. The Dutch legislator can contribute to such a development by creating a legal obligation on the courts to provide sufficient grounds for their decision to set aside the opinions of the Equal Treatment Commission.

# **EQUAL PAY FOR WORK OF EQUAL VALUE: THE ROLE OF JOB EVALUATION SCHEMES**

**SIEBRAND BISSCHOP, SENIOR ADVISER ON JOB EVALUATION, EQUAL TREATMENT COMMISSION**

## 1. INTRODUCTION

This paper addresses the role of job evaluation in the determination of equal pay issues by the Equal Treatment Commission (Commission). In order to explain the role of job assessment, I will first explain the procedures followed by the Equal Treatment Commission when it investigates equal value of work. Subsequently I will explain *why* the Commission uses these procedures, using the common practice of job evaluation in the Netherlands as a starting point. The following will deal with:

- Job evaluation as a tool regarding equal pay
- Kinds of job evaluation and possibilities of application
- The most important job evaluation schemes in the Netherlands

Last but not least, I will outline the present situation regarding equal treatment legislation in the Netherlands and address the terms 'equal value', 'reliable' and 'common use', the difference between race and gender research methodologies, and the pitfalls surrounding equal pay issues as a consequence of job evaluation.

## 2. THE WORKING METHODS OF THE COMMISSION WHEN DEALING WITH EQUAL PAY INQUIRIES

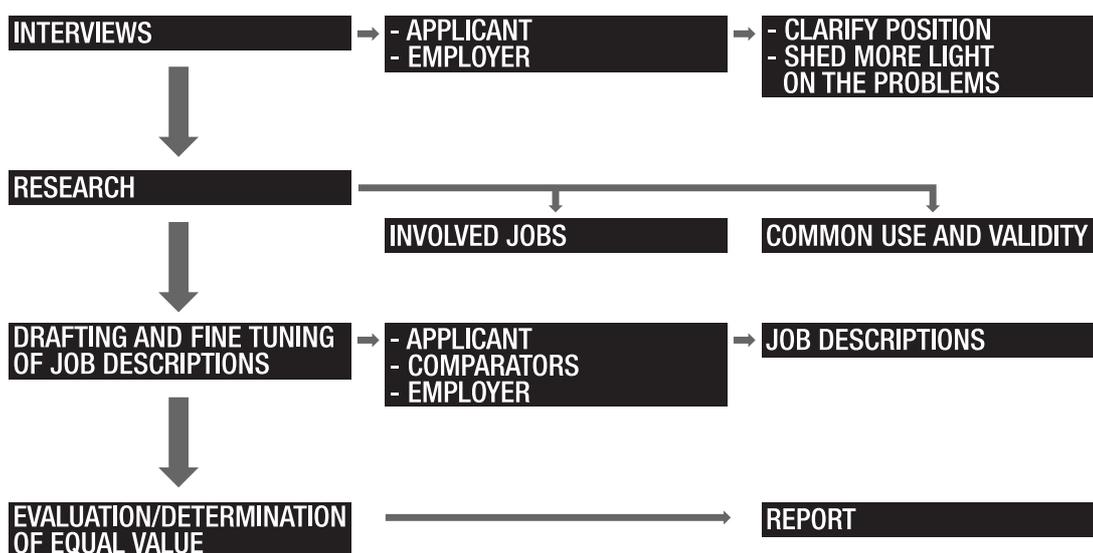
Almost every equal pay case is different, but a number of features can be found in every case, such as:

- Who are the right comparators?
- Which period should be investigated?
- What standards of remuneration should an organisation apply?
- Are the standards of remuneration free from discrimination?
- How are the standards of remuneration applied to the applicant and the comparator?

A complete pay inquiry demands effort with regard to job evaluation as well as with regard to the investigating standards of remuneration. In the context of equal value, the following questions are of interest:

- What jobs do the applicant(s) and comparator(s) undertake?
- With which job evaluation scheme should the Commission weigh up the jobs?
- Is this scheme reliable?
- Are the jobs of (almost) equal value?

The working method of the Commission in relation to job evaluation is as follows:



First a discussion takes place with the applicant and employer in the place of work of the applicant. The first goal of these talks is to clarify the position of the Commission with respect to the working method. The second goal is to shed more light on the problems that have arisen. During these discussions the true reasons for filing a complaint with the Commission are often revealed. These reasons can be quite different from the dissatisfaction about the difference in remuneration, for instance a personal grudge between the applicant and a manager, but the inquiry's primary focus is still the question of whether or not there is a difference in pay.

In evaluating jobs, the first task is to determine which job(s) of the applicant(s) and which job(s) of the comparator(s) should be investigated by the Commission. This is the subject of much misunderstanding. Sometimes it is the current job that should be examined, sometimes it is a job that was undertaken in the past, and sometimes it is both. The second task is to consider the common use and validity of the evaluation scheme to be used by the Commission.

Once it is clear which system should be used and the jobs to be investigated have been established, talks take place with the applicant, the comparators and the employer about the contents of a job. The place of work of those involved – each jobholder separately and the employer – is also investigated to get a picture of their working conditions. Thereafter, the job evaluation specialist drafts rough job descriptions, which s/he discusses with all parties concerned. The specialist continues discussing and fine-tuning the job description until everyone agrees

with its content. This can be a strenuous process, because both parties can have different views about what the job really entails. An employee sometimes credits himself with having more responsibilities than the job really has. An employer, on the other hand, often denies that someone has certain responsibilities when the opposite is true. These views can be the result of plain ignorance, but can also be the result of one of the parties trying to gain some advantage by steering the procedure in his or her own direction. We should not forget there has almost always been a conflict between the parties before the Commission is asked for a judgement. If the specialist cannot get both parties to agree with one another, s/he makes two job descriptions, one according to the applicant and one description according to the defendant. The specialist reports to the Commission on both versions, supplemented by the evaluation and the conclusions regarding job equality. The Commission decides independently which version (of the job description) should be involved in the final judgement.

Finally, the specialist evaluates the jobs subject to the job evaluation scheme. S/he then reports to the Commission whether s/he thinks the jobs involved in the inquiry can be considered equal.

When determining the value of the job, the focus of the specialist is primarily on equal treatment legislation, but s/he also focuses on the guidelines and norms of the job evaluation scheme that is used. In the following I will elaborate on the impact of this working method, on job evaluation in the Netherlands and the equal treatment legislation.

### **3. JOB EVALUATION AS A TOOL REGARDING EQUAL PAY QUESTIONS**

A number of definitions of job evaluation can be found and rather than adding a new one here, I shall abide by the general consensus, which is that

‘Job evaluation clarifies the rank order of jobs with the purpose of coming to an acceptable and just remuneration policy.’

I would immediately like to add that when it comes to equal treatment, we are talking about the order of jobs within one organization. I know there are many experts who claim that it is possible to use job evaluation schemes to establish the order of jobs in more than one organisation, but this is only a limited possibility. In fact, it might not even be feasible at all. It is important to keep in mind when discussing equal pay problems that we are always talking about jobs within one organisation.

But within one organization different jobs can be compared objectively and systematically, in spite of the jobholders’ personal traits and that is why job evaluation is a good tool for equal pay questions.

But is this really possible? There are so many critical voices about job evaluation. However, despite all the negative views on job evaluation, we must not forget that it is this tool which takes us closer to equal pay for employees despite their personal traits. It is my opinion that we can take advantage of this instrument to promote equal pay. However, there are a number of pitfalls to be circumvented when dealing with job evaluation schemes and equal pay issues.

## 4. KINDS OF JOB EVALUATION SCHEMES AND POSSIBILITIES OF APPLICATION

At the moment in the Netherlands about 50 different job evaluation schemes are being applied to grade and scale jobs. These systems differ greatly. Because of these differences it is not easy to make any general statements about job evaluation schemes in the Netherlands. A closer examination of the different schemes shows that they can be separated into a limited number of groups. I will divide them according to two starting points, each with 3 possibilities.

### 1. Evaluation of Job Characteristics

- a) Multiple characteristics or factors (each separately)
- b) A defining characteristic
- c) The job in its totality

### 2. The Method of Evaluation

- a) Ranking, using a series of already described and evaluated jobs
- b) Classification (in a limited number of classes)
- c) Evaluation, using a scale

In this way all job evaluation schemes can be characterized (for example 1a/2c) and reduced into nine different categories. Later I will show that the Commission, when dealing with equal pay cases, must first decide whether a certain job evaluation scheme can be applied to a specific case. I will now show which methods are best known and most commonly applied, and indicate which of these methods are acceptable to the Commission.

#### Point Method = 1a/2c

The point method has a scale at its disposal, with which a point score can be attained for each factor or characteristic. Definitions for different evaluation levels are known and key jobs can be a useful instrument for the evaluation. Every characteristic can have its own grading factor. After multiplying the score by the grading factor and adding the characteristic scores, the level of the job in points is known.

In the Netherlands we consider the point method the most pure form of job evaluation. The Commission almost always applies point methods. Job evaluation schemes using this method are considered to be analytical schemes. Dutch legislation considers the requirement that job evaluation schemes are analytical to be important. The point method meets this demand because different factors are analysed and clear definitions guarantee the proper allocation of points. By using key or reference jobs it is possible to consistently compare all kinds of different jobs.

#### Factor Comparison = 1a/2a

Each factor of a number of key jobs has been described and a certain amount of points per factor has been allocated. By using these scores as a starting point and by comparing the job with key jobs, a score per factor will be given. By adding the points given to each factor, the job's final score is determined.

This method has been applied only sporadically in the Netherlands. It is an analytical system, because the evaluation takes place per job factor. This method could, in theory, be used by the Commission. However, because the ranking is often too subjective, clear descriptions of factors are missing, and the ranking takes place in terms of reference, the Commission will not readily use this method.

Ranking = 1c/2a

Classification = 1c/2b

Ranking and classification both start with the job in its totality. Therefore, in principle these methods cannot be considered to be analytical. Nevertheless, these methods are widely in use in the Netherlands. One can find these methods in a number of collective agreements. These schemes only describe a few key jobs and a global job level. This leaves it up to the employer to rank the remaining jobs in job and salary groups. Although this formally can be called job evaluation and it leads to acceptable results cheaply and quickly, the Commission cannot adopt this method in equal pay cases.

## 5. IMPORTANT DUTCH JOB EVALUATION SCHEMES

Besides categorising job evaluation schemes, as previously stated, it is also possible to discern other categories. For example, job evaluation schemes can be divided according to system ownership or area of application.

Every job evaluation scheme has its own system manager, which means that a legal owner is responsible for the development of its contents. The system manager is responsible for maintenance of the system and also safeguards the consequent and consistent application of the system. System managers can be divided into consultancy agencies that are part of employers' or branch organisations, and commercial consultancy agencies (see following table).

JOB EVALUATION SCHEME	SYSTEM MANAGER
	<b>Employers' organisations:</b>
ISF/SAO	Metal and electronics sector employers' organisation (FME/CWM)
FUWASYS	Government, schools, provinces and municipalities
FWG	Healthcare employers' organisations
BASYS	Bankers' Job evaluation scheme foundation
ORBA	General employers' society of the Netherlands (AWVN)

JOB EVALUATION SCHEME	SYSTEM MANAGER
	<b>Commercial organisations:</b>
USB	Berenschot
HAY	Hay Consultants
BAKKENIST	Human Capital Group/ Deloitte & Touche
IMF	ATOS KPMG Consulting
IFA	Price Waterhouse Coopers
CATS	De Leeuw Consults
ZWFS	STOAS ZUIDEMA Belonings Management
V-BALANS	Human Capital Group/ Deloitte & Touche
ODRP	Cap Gemini / Ernst & Young

When the application area is used as a starting point, it becomes apparent that some systems can only be of use in one corporate sector or branch (for instance the systems of the first four employers' organisations), while other systems can be found in a number of business sectors, where every system manager has his or her own field (for example industry, service or health care).

With regard to the area of application it is quite noticeable that almost every system is able to evaluate any job from lower to higher levels and is also able to evaluate different kinds of jobs. As noted above, in a number of situations the Commission must choose which system to use. Despite the fact that a lot of systems are universally applicable and can evaluate different kinds of jobs, this choice is not an easy one to make. This has to do with how a reference file has been built.

Finally I would like to comment on the influence computerization has had on job evaluation schemes. Nowadays every self-respecting system manager has an electronic version of his job evaluation system at his disposal. In a number of cases it is a tool to find information (for example reference material) and to quickly find the right comparison job. The evaluation process is still the domain of the analyst. In some cases we can ascertain that some of the evaluation techniques have been added to computerized job evaluation schemes. This leads to a more efficient and consistent process for employers and it is also more cost-effective. A disadvantage is that the analyst puts in information on the level of job factors, whilst technology defines the end result. This way, the clarity and transparency of the system is reduced. When dealing with equal pay issues transparency is exactly what the Commission strives for. That is why in my view computer-determined results must be carefully checked by equal pay experts and if necessary adjusted.

In conclusion, with regards to job evaluation systems it can be said that:  
In the Netherlands many different evaluation systems can be found. These systems can be categorized into nine different groups.

The Commission cannot apply a number of systems because they cannot be characterized as analytical or because they arrange jobs too subjectively.

Despite the fact that systems are often integral regarding the type of job and job level, choosing the right system is not easy for the Commission.

A close eye needs to be kept on future computerization developments.

## 6. DUTCH EQUAL TREATMENT LEGISLATION

In the Netherlands the Equal Treatment Act 1994 (ETA) and the Equal Treatment of Men and Women Act 1980 (ETMW) dictates how the Commission should conduct its equal pay investigations. The ETMW sets out very stringent guidelines, while the ETA is far less explicit. Because of this distinction between the two laws, in principle the Commission applies the methodology as laid down in the ETMW for all discrimination grounds. It is worth noting however that in practice there is a difference between investigations into race or nationality discrimination and investigations into gender discrimination. I will explain this further below.

Article 2 of the ETMW concerns equal reward for jobs of equal value. For the Commission, Articles 7 and 8 are the most interesting. These highlight equal value (Article 7) and the way in which equal value must be ascertained (Article 8). I will outline a number of important elements of these articles and explain their relationship to job evaluation.

Article 7 provides that “the remuneration of the applicant must be compared to the remuneration an employee of the other sex would receive for labour of equal or almost equal value.” The main point of this article is that it refers to “jobs of equal value” or “almost equal value”. “Equal value” is equal value in terms of job evaluation. In other words, the necessary knowledge, skills, job responsibilities and circumstances under which the jobs are performed, determine whether or not jobs are of equal value. It is not determined by the economic value a job has for an enterprise. The economic value can play a part later on, when wage comparison is involved, but only if it forms part of the already applied standards of remuneration.

By ascertaining the value of jobs in this way it is also possible to compare jobs that are in their nature (quite) different.

Example:

AREA OF EVALUATION *	MANUAL LABOUR WORKER	COMMERCIAL EMPLOYEE
Knowledge	20	26
Responsibilities	19	23
Skills	22	21
Job conditions	17	11
<b>Total</b>	<b>78</b>	<b>81</b>

\*Each job evaluation scheme has its own areas of evaluation, but these four areas (sometimes named differently) are part of all schemes.

This table shows that the commercial employee has greater job responsibility than the manual labour worker. The necessary skills required to do this job are also greater than the manual labour worker needs. The manual labour job has worse job conditions than the commercial job has; therefore it gets a higher rating. However, both jobs have about the same total value. This shows that different kinds of jobs can be compared with one another.

Fortunately applicants in the Netherlands are starting to realize more and more that not only similar jobs, but also dissimilar jobs can be compared, provided they have the same job level. Among others, the Commission has compared a data entry typist with a trucklift driver, a manager of a laundry with an administrative employee, a bookkeeper with a shopkeeper, an orthodontist with a psychologist and a secretary with an electrician.

It is also important that jobs are of equal value or almost equal value. This seems like a nuance, but a whole world of ideas and technical job evaluation arguments lie behind this difference. For example, the job examples above had scores of 78 and 81. These scores are close enough to think that these two jobs are of almost equal value, but actually, to determine this is quite complex. Usually the remuneration level is not set for each job individually, but clusters are formed of almost equal jobs. These jobs are all paid the same salary (job and/or salary groups are created). For example, a corporation may use of the following categories:

JOB GROUP	JOB EVALUATION SCORE
A	>40
B	40 – 60
C	60 – 80
D	80 – 100
E	100 – 125
F	125 – 150
etc.	etc.

In this case the manual labour worker would, with 78 points, fall into category C, while the commercial employee, with 81 points, would fall into category D. Are these jobs still of almost equal value? Because this group classification belongs to the standards of compensation of a corporation and in principle the Commission uses these standards (if these standards are not discriminatory), the conclusion must be that these jobs are not of equal value.

Article eight of the ETMW demands that evaluation schemes are reliable and applied to all. Article 8 provides that ‘the value of labour must be ascertained using a reliable job evaluation scheme’

The Dutch legislator states that the value of a job must be ascertained using a reliable job evaluation scheme, but it does not say what is meant with the term ‘reliable’. In the Explanatory note for this law the Dutch legislator states: ‘A reliable scheme should weigh up specific criteria that are characteristic for the job and which encompass all the skills and demands required by the job description’.

Thus there are two criteria a sound job evaluation scheme must adhere to. These are:

1. The scheme must be analytical (evaluation by means of specific factors)
2. The scheme must be able to assess all job factors (evaluation of the whole set of skills and demands of the job)

Based on its experience and jurisprudence, the Equal Treatment Commission has added a number of complementary criteria to the already existing criteria. These are:

3. Consistency of the method
4. Protocols concerning the job descriptions and proceedings
5. Existence of reference materials and job lists
6. Transparency of the scheme (and complete documentation)
7. Regular and systematic application of methods and job descriptions
8. The scheme itself must be non-discriminatory (gender neutral)

A second element of article 8 refers to the common use of a scheme, providing that:

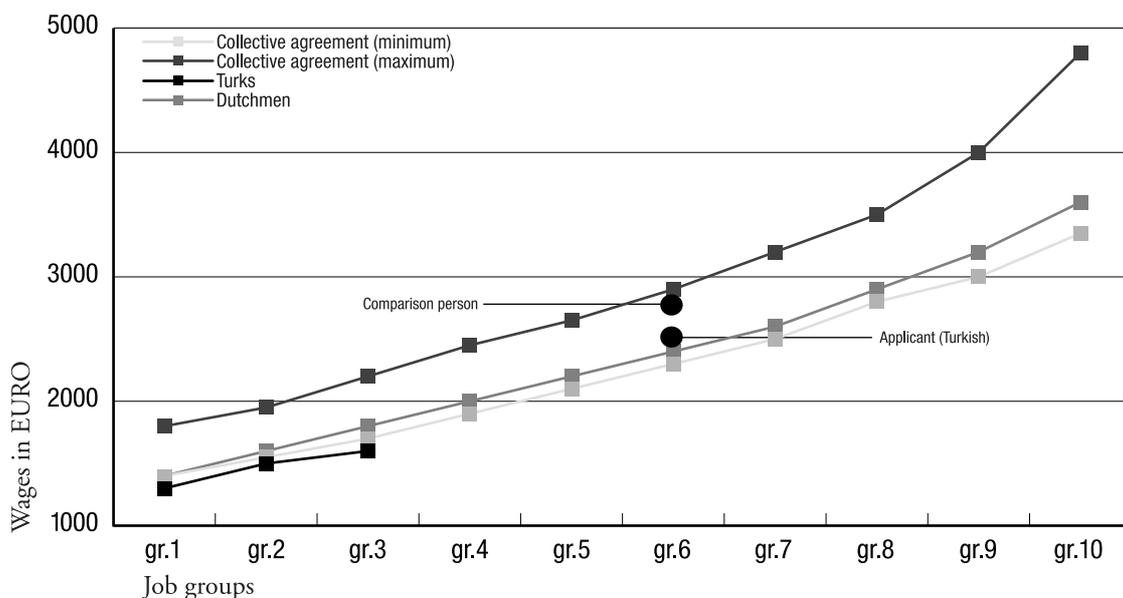
‘The applied job evaluation scheme must correspond as much as possible to the job evaluation scheme the company commonly uses’.

At first glance it does not appear too difficult to determine the commonly used system of an organisation. You simply ask the management which system they use, and assume that is the commonly used system. But is it really that easy? Regrettably, in a lot of cases it is not. For instance an organisation sometimes does not even use a job evaluation system, or only uses it for some of its staff. Also, it sometimes occurs that an organisation uses a job evaluation scheme from a completely different collective agreement. The question of which system is commonly used thus cannot always be answered simply and sometimes quite a large investigation is necessary to determine the commonly used system.

## **7. THE DIFFERENCE BETWEEN RACE AND GENDER RESEARCH METHODOLOGY**

According to the ETMW, the Commission can, when dealing with a gender case, make a finding on the basis of a single comparison between one applicant and one comparator. Can this also be done if the case has to do with nationality? If a difference in remuneration between one Dutch and one Turkish employee can be found does that imply a distinction based on nationality and that the employer has discriminated on the grounds of nationality? I am of the opinion that this cannot be formulated quite so categorically. In a situation such as this it is desirable to investigate further whether the difference in remuneration between Dutch and Turkish employees or between native and foreign employees is structural. For this purpose real wage lines can be constructed for all categories of staff/personnel and also the wage line of wages mentioned in the collective agreement. These wage lines show the relationship between job level and pay level per category, sometimes corrected on the basis of a number of personal traits (see diagram).

Wage lines Collective Agreement and investigation Categories (corrected)



This diagram shows the minimum and maximum wage lines according to the collective agreement and the (corrected) wage lines for Dutch and Turkish employees. A correction takes place in order to take into account as much background information relevant to the individual as possible, such as the collective agreement rules with respect to age, years of employment and so on. In principle corrected wage lines should not differ from one another.

In this situation it is clear that Turkish employees in lower job groups receive a much lower salary than Dutch employees. This salary is even lower than the collective agreement wages guarantees. There are no Turkish employees in the higher job groups.

Also marked are the wages of applicant and comparators. The applicant's corrected salary coincides exactly with the level of the "Dutch" salary line, but in reality he receives considerably less than his Dutch comparator.

Thus when investigating cases of alleged race or nationality discrimination, the Commission has far more data to base its judgement on than in cases of alleged discrimination based on gender. As the example shows, making this analysis is not easy. Is the applicant discriminated against when compared with native employees and when compared with the comparator? The available information is not yet sufficient upon which to base a sound judgement. The ways in which standards of remuneration have been applied are critical. At least with the help of job evaluation it is possible to set up wage lines and as a result more information is available.

## 8. PITFALLS SURROUNDING EQUAL PAY AS A RESULT OF JOB EVALUATION

As set out, the ETWM Act dictates that job evaluation schemes must measure the value of a job. This exercise is meant to determine whether jobs should or should not be compared based on their value. The role of job evaluation does not stop there however. When applying standards of remuneration, it is often the case that the wrong application of a job evaluation scheme leads to discrimination in pay. This can be caused by implicit mistakes in the job evaluation scheme itself or by knowingly or unknowingly misusing a job evaluation scheme. These are the kind of mistakes that are rarely visible, but nonetheless they are there. The following outlines four such pitfalls.

### Pitfall 1: unbalanced categories when determining job level groups and salary tables.

Many companies apply salary tables which serve as a standard for remuneration. The basis of these tables is classification into job groups, which can be put together using a job evaluation system. Most Dutch job evaluation systems set job groups at regular intervals (for example 20 points per job group). In almost every case the employers' organizations and the unions dictate together where the borders of the 20 points begin and end, for instance from 20-40, 40-60, 60-80 or 30-50, 50-70, 70-90. The results of job evaluation then define to which job group a job belongs (see the example below).

JOB GROUPS	ORIGINAL SITUATION		NEW SITUATION	
	Categories	Number	Categories	Number
A	20 – 40	240	20 – 40	240
B	40 – 60	140	40 – 65	222
C	60 – 80	146	65 – 80	64
D	80 – 100	54	80 – 100	54
E	100 – 120	45	100 – 120	45
F	120 – 140	31	120 – 140	31

An organization sometimes describes and evaluates a job before determining the boundaries between the job groups. Using the knowledge of these evaluation results, a lot of money can be saved by changing the boundary of a job group in such a way that a certain number of employees can be put in a lower salary group.

The example shows that in the original situation 140 people were in group B and 146 in group C. By changing the group borders suddenly 82 people can be moved to group B. This does not necessarily lead to unequal remuneration, but when this group of employees just happens to consist of only women or foreigners then it is clear that unequal remuneration may have crept into the salary system. In this way the Employers' Organisations

and Unions and/or individual employers can, by choosing the category boundaries, sometimes knowingly or unknowingly build in a distinction in the remuneration scheme. This only happens because the job evaluation results play a large role in the determination of these borders.

#### **Pitfall 2: when an employer determines job levels**

Sometimes an employer places a certain job in another job group than the evaluation results of the Commission would have placed it according to the evaluation results. This may occur for a number of reasons (I will leave aside human error on the part of the Commission or employer):

Some collective agreements work with very short job descriptions or sometimes only a job title. These short descriptions and titles are linked to job groups which the employer often adopts without question. It is frequently the case that when the Commission does a full investigation, the real job contents deviate considerably from the short job description. As a result, it is justified to put the job in another job group. In this way the application of short job descriptions leads to wrong evaluation results. This can partly be ascribed to the system in the collective agreements (and this is a form of job evaluation) and partly to the employers.

Relatively often it occurs that an employer starts with a sound job group classification, but that a couple of years later this classification has become out of date as a result of a number of developments. Technological developments for example can often greatly influence the contents of a job. Employers only deal with this change much later.

It occurs strikingly often that employees get more and more responsibilities as the years go by, but that this is not reflected in a re-evaluation of the job. This occurs more often to female employees than male employees. Sometimes an employer genuinely does not know that an employee's job has gained responsibility, but often it is simply denied that certain responsibilities are part of the official job description. The organisation gratefully uses the services of the employee, but is not willing to pay the financial consequences. This happens more to women than to men. In this case the refusal of the employer to use the instrument of job evaluation has negative consequences for women.

#### **Pitfall 3: The determination of a job level by an employer using a different scheme than the Commission has applied**

#### **Pitfall 4: The application of a salary system that has no relation to the level of the job by the employer**

The following conclusions can be drawn with regard to equal treatment legislation on job evaluation:

The ETMW is directive when developing equal pay investigations.

The ETA is less strict with regards to working methods to determine unequal pay.

The Commission applies the same working method to all grounds of discrimination.

When dealing with race and nationality cases, the Commission's investigation is more comprehensive.

There are a number of pitfalls surrounding job evaluation which can hinder progress in equal pay cases.

The method of work in equal pay investigations takes place completely according to legal guidelines, with job evaluation forming only a part of the total investigation.



**ARE THE  
ECJ'S LEGAL  
CRITERIA ON  
EQUAL VALUE  
SUITABLE TO  
WORK WITH  
IN PRACTICE?**

**EVERT JAN HENRICHS, LAWYER, DE BRAUW BLACKSTONE WESTBROEK**

My task is to discuss whether the case law of the ECJ provides us with a workable set of tools when it comes to matters of equal pay. As my colleague Albertine Veldman has more than adequately dealt with a practical approach to handling the ECJ case law, I will step outside the gender-equal-pay territory and mainly focus on equal pay and equal conditions on other grounds.

But before I go any further, I have two confessions to make. First, I mainly work for larger corporations – the employer – in The Netherlands. Thus, I mainly defend such large employers against claims that they have discriminated in one fashion or another. And I must admit that it has become more or less second nature to be critical – or even sceptical – of many of the equal pay claims I see today. My scepticism is not reduced when I here calls for tackling the ‘pay gap’ through equal pay claims. I do not deny that there is a pay gap and that it must be a reflection of a number of social or sociological mechanisms – the so-called glass ceiling – but the thought that a claim based on equal pay for work of equal value is the appropriate remedy is in my view unsustainable. Secondly, I am not really a fan of the Dutch Equal Treatment Commission. This has, of course, nothing to do with either the persons that serve on the commission, or with a general dislike on my side of any judicial or quasi-judicial body that enforces equal treatment in all of its aspects. Based upon what I have seen, it is my strong conviction that by now a proper enforcement of equal treatment issues belongs to the ordinary judiciary.

The above implies that some of my observations may be found to be of a provocative nature. Let there be no misunderstanding however: in my view the European Court of Justice (ECJ) has done a very good job over the last decades in establishing a vast body of jurisprudence on equal pay. And as far as I am concerned, one of the truly interesting things about equal treatment and equal pay is the considerable number of cases tried before the ECJ. Usually they provide us with clear rules and guidelines, and the fact that the ECJ is the most authoritative source of jurisprudence makes practising equal pay matters interesting, because it is not only a matter of national law and thus provides you with a much broader horizon.

## WHAT IS GOING ON IN THE FIELD OF EQUAL PAY IN THE NETHERLANDS?

I am inclined to say that there are at least two developments that are relevant if you look at ‘real life’ equal pay issues, or phrased differently, two developments that complicate life. First of all, the equal pay issues are tending to entail more and more detailed questions, and often these are questions of fact rather than questions of law. This is only logical: equal pay has been well on the agenda of the ECJ now for almost three decades and in the Netherlands most of the basic issues have been dealt with. The obvious or flagrant cases of wage discrimination have already been successfully fought. We are now more at the stage where we are gradually refining the system. Or as I sometimes explain to clients, we are moving from the main arteries of equal treatment into the capillary system, the finest blood vessels.

By way of an example, one can look at the complex factual situations that gave rise to the *Lawrence* and the *Brunnhöfer* decisions. These judgements are good examples of this tendency. If you compare these decisions with the clear-cut case law on pensions, it becomes clear that establishing the relevant *facts* and *circumstances* to apply the norm that is set by the ECJ is much more complicated in equal pay cases.

Secondly, there is the growing catalogue of grounds on which equal pay can be claimed. It all started of course with such classical grounds as sex discrimination and race discrimination, but now we also deal with part-timers and workers on a fixed term contract. To this will be added age discrimination and other grounds in the near future.

I am not complaining about these developments, I simply note that they make life more complex. If equal pay cases become more detailed and deal with more intricate situations, it will become more difficult to come up with sound judgements. In particular, it will be more difficult to establish the facts. Blessed were the days when you only had to decide whether or not it was a form of sex discrimination if part-time workers were excluded from a pension scheme. By just looking at the pension scheme you had established the relevant facts. Anybody can readily apply *Bilka* and *Barber*, comparing, for instance, individual remuneration elements rather than the total value of the remuneration package. Compare this with the test that is to be found in the *Brunnhöfer* judgement and it is evident that we are now not only dealing with more intricate questions of law, but also with very important questions of fact.

The facts of these intricate situations do not only have to be *established*, they also have to be weighed, balanced and valued. Increasingly, there are no 'black and white' answers. One element of the facts may plead in favour of awarding the equal-pay claim; the other may plead against it. You have to carefully place these findings on a scale, attribute a certain 'weight' to them and see to which side the scale will tip.

A more fundamental question can be raised in relation to the very strict rules the ECJ has set, for instance for the so-called *objective justification*. These rules have been developed in view of the classical equal pay grounds, and in particular sex discrimination. These strict rules can be justified by the fundamental nature of this anti-discrimination ground. Albertine Veldman has been one of the first in the Netherlands to note this shift from classical, fundamental grounds to grounds which are of a different nature. And not only did she notice this change, she also added an important question to that observation: are we to apply all the strict rules of the ECJ in respect of sex discrimination in precisely the same manner on these newer grounds? The classical grounds are based on personal qualities that cannot be altered. The newer grounds are to a large extent the product of 'labour market policies'. 'Age discrimination' is a very good example: everybody is young at one point in time, and old or older at some other point in time. And moreover, the use of age as a decisive factor for a number of decisions can be justified. So one can indeed ask the question: is it fair, and is it necessary, to apply the strict rules on *objective justification* to this new type of grounds as rigorously as you do to sex discrimination?

Finally, the more we leave the main arteries of equal pay and are dealing with more intricate rules on equal pay, the more important other sources of law may become: there will come a point where principles of equal pay will have to be balanced against one of the other important constitutional rights, for instance, the freedom of collective bargaining for trade unions. The chair of the Commission very recently stated that equal treatment principles will have to interact with certain fundamental principles.<sup>110</sup> In other words, at some point, equal pay and equal treatment will have to be put into perspective. We all know that many of the classical constitutional civil rights may be in conflict with each other (such as freedom of speech and the protection of personal life and privacy). Balancing these fundamental rights does not surprise anybody. The same may be true of equal pay, in particular if we are talking of the more recent equal treatment grounds.

<sup>110</sup> *Nederlands Juristenblad*, afl. 25 2003, by Prof. mr J.E. Goldschmidt "Equal treatment in the year 2003"

Based on these observations, I would like to put forward a couple of propositions, ‘*stellingen*’, and give some further background on these propositions and thus hopefully invoke some discussion. My first proposition is that equal pay issues may conflict with other fundamental rights, such as the freedom of collective bargaining (and/or the freedom of contract between individual employers and employees). This is particularly so in situations where we are entering ‘grey areas’ and no ‘black-or-white’ answers are possible. More generally, in some respect equal pay will at some point have to be put into perspective. My second proposition is that equal pay issues belong to the ordinary judiciary.

## PROPOSITION 1

A good example is age discrimination, as it will be a new issue on the agenda soon (if it is not already so). It is also a good example because the European Council has made it clear in its Directive (2000/78/EC) that age as a non-discrimination ground is different from other grounds: the directive allows *direct* age discrimination on rather broad grounds such as policies in the field of employment, labour market and occupational or professional training. Such policies can be an objective justification for direct age discrimination.

But there is more: the directive also aims to stimulate the ‘*social dialogue*’. Article 13 of the directive is aimed at involving the social partners when it comes to implementing the directive in specific enterprises or in certain branches of industry. It encourages the social partners (employers’ and employee organisations) to enter into agreements in respect of the anti-discrimination rules laid down in the directive. Now this is interesting: let’s assume that a *bona fide* trade union enters into a collective labour agreement that sets a certain pension age. It agrees after careful and diligent negotiations with the employer that this pension age – which is of course direct discrimination on the basis of age – can be seen as an objective justification under the directive (and the future national implementation laws). Let’s also assume that this particular trade union represents a considerable part of the relevant employees.

Whichever age is used as the pension age, there will always be one or more individuals who have opposing views: they may question the legitimacy of the policies behind the pension date; they may question proportionality; as a cynic I would even say they will question anything that may help them.

The question now becomes to what extent should the judiciary – or the Equal Treatment Commission – revisit the complex *balancing act* that is involved in agreeing on these types of rules. We have all been brought up with the ground rule that the fact that something has been agreed in a collective labour agreement is of no help, if equal pay aspects of that “something” are questioned in court. And as far as the not so recent past is concerned this was of course a sound position: if you take equal treatment of pensions, collective labour agreements have been a prime source of discriminating practices. But things have changed, even to the extent that trade unions are explicitly asked to agree on the implementation of equal treatment. Within that context, *policies* – can one think of something more *subjective* than a policy? – may serve as a justification for discrimination. I really think there is not a shade of doubt: if the parties to a collective agreement meet certain criteria,

the outcome of their negotiations should be respected (which means accepted by the judiciary). The criteria that should be met are simple:

- The trade unions must be representative of the employees in one form or another;
- Parties must be able to show that they included the relevant equal pay aspects in their negotiations and agreements;
- There must be one or more important *subjective elements* involved (what I call 'grey areas');
- The outcome must be within the margin of appreciation that is granted to the parties. In the Netherlands we tend to call this the 'marginal testing' of the outcome, which means that the outcome is not accepted by the judiciary only if no reasonable party would have accepted the outcome of the negotiations.

Age discrimination is – I think – a clear example that equal pay norms do not always have to be of an absolute nature. A certain rule may be viewed as discriminating on the basis of age if you look at it in one way; the same rule may be viewed as aiming at equal payment if you look at it in another way. In some industry sectors pension ages are set relatively low in order to clear the way for younger personnel. What if this rule is in place for a long period of time, and the ones that are forced to retire effectively benefited from this rule when they were young? Are they allowed to step out of this solidarity mechanism the moment they have to pay back what they benefited from in the past? Equality can mean different things with this sort of new non-discrimination ground. Do you compare the treatment of the employee at one particular age? Then you will have to say you discriminate on the basis of age. Or do you compare the life cycle of the employee? Then it would be unequal treatment if you allow the older employee to step out of the solidarity system: you deny the then the younger employee the benefit of the relatively early departure of the older ones, whilst the older benefited in his younger days from the mechanism.

You may share my view as long as I limit my observation to age discrimination. But can we also apply the above to gender equal pay issues? I do not exclude the possibility of a conflict with the collective bargaining freedom. Let us assume that on the basis of diligent wage investigation, the Equal Treatment Commission will hold that position A is of equal value to position B. The salary of A-employees is adjusted upwards. However, the trade union for B-employees does not agree with this finding. It demands higher pay and is about to start industrial action. Are we now going to deny this trade union the right to call a strike? Are we going to deny the employer the 'right' to give in and grant the B-employees a salary rise?

You may say that this is all rather academic, and you may be right. But on the other hand the question is: do we really think that you can *objectively* assess the exact value of different types of jobs? If that were the case, then we should forget about the fundamental freedom of collective bargaining also. If we cannot agree on the value of the job, we will go to an arbitrator and he will settle the dispute by assessing what a reasonable increase of the wage will have to amount to. In contract law we call that the *iustum praetium* when we are talking about a contract of sale, but that idea has long been abandoned.

## PROPOSITION 2

Is it still necessary to create 'single purpose' institutions that deal specifically with equal pay issues? When I ask this question, I am concentrating on the quasi-judicial task of the Commission and I will leave out such tasks

as education and mediation. Quite frankly, I do not answer the question in the affirmative. In general, the two main justifications that are put forward for such bodies are:

- There should be a procedure available with a “low threshold” that will give a decision with more speed than the ordinary judiciary.
- There should be specialised body for equal pay claims.

I will start with the second justification, because I find that easy to deal with: equal treatment may not be the easiest field of law, but I do not think it is the most complex or difficult either. We do not have specialised judges for other constitutional rights, nor do we have them for notoriously complex fields of law such as pension law, patent law or competition law. Of course specialised experts are required to compare wage systems and value jobs, but that is not different from any other field of law. The court will simply have to appoint an independent expert.

The first justification was valid at the time the Equal Treatment Commission was established. Of course, swift and easy proceedings are to be preferred. The question, however, is whether the type of case I have been talking about is fit for such a swift – and therefore simplified – procedure. You will have guessed by now that I do not think this is the case. And it is going to be very difficult to create an appropriate test for cases that are and cases that are not suitable for being submitted to a simplified procedure. I am not sure a solution can be found on this point.

For me, the most difficult part of handling equal pay cases is the existence of this type of special judicial body in the Netherlands. If the type of client I represent decides to fight an equal pay claim, it is bound to be a case with a lot of grey areas, and in particular one where an *individual* is questioning the ‘fairness’ of a rather complex *collective* issue. One of the more difficult cases (and I have no grudge against the Commission because it basically found in favour of my client) was on where an employer, a conglomerate of operating companies, decided it wished to harmonise the employment conditions of these operating companies, in particular the number of hours worked per week (one group was working 40 hours per week, the other 38 hours, yet another group was working 36 hours per week). This is a nice dilemma: if you want to harmonise the number of hours worked per week, by definition, you will have to discriminate on the basis of hours worked; if you do not, nothing will change. But that is part-timer discrimination; it may even be *direct* part-timer discrimination. If you are practical, you know that you can only deal with such a problem if you agree with the trade union on a solution that in a reasonable manner takes all interests into consideration. Those whose number of working hours is reduced should not suffer a reduction of their actual salary earned. Yet, in some fashion they will have to make up for the fact that they earn the same amount of money for a reduced number of working hours. But as I said before, there is always going to be an individual that will claim that the outcome is unreasonable, in this case, that there is no objective justification.

In this type of case I do not think a specialised body has much to offer. Neither party will consider the advice of the Equal Treatment Commission as authoritative, nor is it binding on them. The parties will read the judgement and the one that is not satisfied with the decision will go before the competent court. Quite frankly, many of the larger corporations feel that the Equal Treatment Commission is biased against the respondent (i.e. the employer). And I must admit, there may be some basis for that feeling. If you have one objective – i.e. to safeguard the individual against discrimination – you may become somewhat one-sided. As the Americans say, if you are a hammer, you are inclined to only see nails. A good example of this phenomenon could be the famous – or infamous –

case of the male postman that wanted to wear shorts while at work; shorts, however, were not part of the uniform for postmen. He then claimed equal treatment on the basis that his female colleagues were allowed to leave their legs uncovered while wearing a skirt (which *was* part of the uniform). The fact that the Commission held in favour of the plaintiff while both courts (first instance and appeal) denied his claim may be illustrative of what I would call the pre-occupation of a 'single issue' body with its single issue. This ties in nicely of course with the observation that the time may have come for equal pay to no longer be seen in all respects as an absolute principle. Other constitutional or fundamental rights may have to be weighed up.

Apart from these observations on the possible 'single-mindedness' of any single purpose body – my colleagues that practice privacy law will say the same of the “registration chamber” that has a similar position in privacy matters – there are significant procedural aspects. There can be no doubt that in complex and voluminous cases there is considerable tension between (a) the objective to provide the plaintiff with a swift decision in a procedure without a threshold and (b) rules of proper procedure. The rules of proper procedure – whether they govern the hearing of witnesses, or the moment at which documents may be submitted – are there to safeguard the position of the parties.

## CONCLUSION

I hope that I have given some food for thought, in particular in respect of the newer discrimination grounds that are the subject of the 2000/78 Directive. It is not the same picture as others have been painting. I do hope it will contribute to the discussion that is slowly starting to take place in the Netherlands, because this discussion is really necessary.



# **UNEQUAL PAY IN SEX AND RACE CASES: SAME PROBLEMS, SAME REMEDIES?**

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# 1. INTRODUCTION

The general standard of equal pay for work of equal value is in most EU Member States and accession countries not always adhered to. Despite legislation and efforts of governments, trade unions and NGOs, differences in pay between men and women and between different ethnic groups exist. In some countries research provides evidence of a pay gap, in others court cases or complaints procedures before specialized bodies bring it out in the open.

In the field of sex discrimination, a considerable history of measures against unequal pay practices has developed. From the introduction of Article 119 (now 141) of the EC Treaty in 1957 via the Equal Pay Directive of 1975 to the draft Constitution in 2003, the European Union has been a platform from which wage discrimination has been confronted. The European Court of Justice (ECJ), with its often ground-breaking case law, has played and will continue to play an important role in this development.

With the introduction of Article 13 EC, protection against discrimination on other grounds than sex has taken a foothold in Europe. The general principle of equal treatment, including equal pay for work of equal value, has become the legal standard. The adoption in 2000 of two equal treatment Directives, 2000/43/EC or the Racial Equality Directive and 2000/78/EC or the Framework Directive, are practical bases for measures in the Member States. Elaboration on the Framework Directive lies outside of the scope of this article.

Now that the Racial Equality Directive calls for measures against discrimination, more legal possibilities to expose and combat wage discrimination will be created. The question arises whether the case law of the ECJ in the field of unequal pay in the field of sex discrimination can and will be used in the field of race and ethnic origin. This contribution explores the similarities and differences between sex and race discrimination and the applicability of the ECJ case law in racial equality cases. It also looks into the case law of the Dutch Equal Treatment Commission, which has taken up cases of wage discrimination in both fields since 1994.

## 2. EC REGULATIONS AND CASE LAW

In the following, a comparison is made between EU provisions and case law on equal treatment and discrimination on the grounds of sex and race or ethnic origin. The draft Constitution for Europe will also be discussed.

### 2.1 EC Treaty

#### 2.1.1 Sex

The EC Treaty, in Title XI on social politics, has laid down that the Member States 'shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion' (Article 136 EC Treaty). The Union commits itself to this cause by supporting and complementing measures against, amongst others, equality between men and women with regard to labour market opportunities

and treatment at work and the combating of social exclusion. This principle is further elaborated in Article 141, which requires Member States to ensure equal pay between men and women for equal work or work of equal value.

The European Court of Justice, in the *Defrenne II* ruling, has declared this article to have direct effect.<sup>111</sup> Women who do not receive the same wages for work as men who do the same work or work of equal value, can invoke this article before a court of law.

### 2.1.2 Race or ethnic origin

For equal treatment on the basis of race or ethnic origin, the Treaty does not give a similar provision. The provision that, in broader terms, refers to race or ethnic origin is Article 13. With the introduction of this Article in the Treaty of Amsterdam in 1997, the Union was required to develop measures against discrimination on a number of grounds. The wording, however, is different from Article 141, which in itself creates various rights. Article 13 does not forbid unequal treatment as such, it rather gives the Council the power to take measures against discrimination. It can therefore not be interpreted and used in the same way as Article 141. Contrary to this latter provision, it would be difficult to award direct effect to Article 13. The effect of Article 13 therefore has to be derived from specific Council Directives.

## 2.2 Directives

### 2.2.1 Sex

In the field of equal pay, in 1975 the Union (then still the European Economic Community) adopted the Equal Pay Directive 75/117/EEC. The Directive required the elimination of sex discrimination in pay, where equal work or work of equal value is concerned. Similarly, job classification schemes should not lead to wage discrimination. It contains detailed provisions, which were meant to make the principle of equal pay more efficient in concrete work situations. Member States needed to develop adequate methods for (female) workers to check whether their work was comparable with work done by other (male) workers. The Directive was not meant to prejudice the direct effect of Article 141.

A further elaboration of the principle of equal treatment between men and women was Directive 76/207/EEC. This contained a wider scope than just the principle of equal pay. It also aimed at creating equal opportunities in other spheres of employment.

In the *Danfoss* ruling,<sup>112</sup> the ECJ stated that the effectiveness of the equal pay principle could mean that the employer needed to prove that the non-transparency of a wage policy did not discriminate against women. The ruling was followed in 1997 by the burden of proof Directive,<sup>113</sup> which provides for a shift of the burden of proof in cases where an employee can establish facts from which it may be presumed that discrimination between men and women exists. The Directive not only covers pay discrimination, but unequal treatment between men and women in general.

### 2.2.2 Race or ethnic origin

In the wake of the Treaty of Amsterdam and the adoption of Article 13 in the Treaty, the Council decided to adopt a Directive to give shape to the measures referred to in this Article. Directive 2000/43/EC,<sup>114</sup> the Racial Equality Directive, laid down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect the principle of equal treatment in the Member States. The scope of the

<sup>111</sup> Case 43/75 *Defrenne v. Sabena* (1976) ECR 455 (*Defrenne II*): "24. In such situation, at least, Article 119 is directly applicable and may thus give rise to individual rights which the courts must protect."

<sup>112</sup> Case C 109/88 *Danfoss* (1989) ECR 3199, paragraph 16.

<sup>113</sup> Council Directive 97/80 (1997) OJ L 14/6.

<sup>114</sup> Council Directive 2000/43 (2000) OJ L 180/22.

Directive includes equal pay.<sup>115</sup> The Racial Equality Directive requires Member States to provide for a shift of the burden of proof in cases where there is *prima facie* discrimination. The relevant provision, Article 8, uses the same wording as the Directive on burden of proof in sex discrimination.

### 2.3 Constitution for Europe

In the draft Constitution for Europe, as composed by the Convention on the future of Europe, the principles of equal treatment and of combating discrimination can be found in a number of provisions. To a certain extent, the draft Constitution is an adaptation of the existing EC and EU Treaties.<sup>116</sup> In the opening articles, regarding the values and the objectives of the Union, equality and non-discrimination are described as belonging to the key principles of the Union.<sup>117</sup>

In Part II, which contains the full text of the Charter of Fundamental Rights as adopted by the European Council of Nice in 2000, Title III is devoted to equality. Article II-21 is the general non-discrimination article, stating that discrimination on a wide number of grounds is prohibited.<sup>118</sup>

The policy areas of the future Union are set out in Part III. This part of the Constitution aims at mainstreaming equality and non-discrimination, and to this end, a number of articles have been drafted. Specifically concerned with equality on racial and ethnic background are Article III-3 and III-8. The former states that in defining and implementing policies and activities, the principle of combating discrimination is a core assumption. The latter is a reworded version of the existing Article 13 of the EC Treaty, aimed at establishing measures to combat discrimination on several grounds.<sup>119</sup> The existing Article 141 on equal pay for men and women is reworded and included in Article III-108. A similar Article, prescribing equal pay on grounds of race or ethnic origin, has not been included.

### 2.4 Legal sources relating to racial discrimination

As article 141 only refers to sex discrimination, the terms and conditions regarding this Article cannot be applied to racial discrimination. There are no provisions in the Treaty which directly apply to racial discrimination. Article 13 is directed at the Council and the Member States, and the text does not create rights for individuals.

The case law of the ECJ, where it interprets Article 141, would not be directly applicable to other grounds of discrimination. This was confirmed by the Court in its judgement of *Grant v South West Trains*.<sup>120</sup> In this case, a gay woman invoked protection against discrimination and based herself on the provisions relating to sex discrimination. The ECJ ruled that the protection against sex discrimination in both Article 141 and in Council Directive 75/117/EEC covers discrimination against transsexuals, but it excludes the ground of sexual orientation.

The role of the Racial Equality Directive is therefore important as the main legal source against wage discrimination at the Union level. As was mentioned before, Article 3(1)(c) of the Directive brings pay under the scope of the protection against discrimination. Member States are required to take legal action against this type of discrimination. However, as opposed to the Equal Pay Directive of 1975, this provision in the Racial Equality Directive does not seem to create directly applicable rights. Where the Equal Pay Directive is strongly worded,<sup>121</sup> the Racial Equality Directive mentions in broad terms that “there shall be no direct or indirect discrimination based on racial or ethnic origin.”<sup>122</sup> Through Article 3(1)(c), wage discrimination is included, but no express mention is made of the principle of equal pay for work of equal value.

<sup>115</sup> Directive 2000/43, Article 3, para 1 c.

<sup>116</sup> The final text of the Constitution may differ from the draft that is referred to here.

<sup>117</sup> Article I-2 and I-3 of the Draft Constitution.

<sup>118</sup> Article II-21, para 1: Any discrimination based on sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

<sup>119</sup> The list of grounds is shorter than that of the Charter of Fundamental Rights as listed in Article II-21.

<sup>120</sup> Case C-249/96 *Grant v. South West Trains* (1998) ECR I-621

<sup>121</sup> E.g. Article 3: “Member States shall abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay.”

<sup>122</sup> Article 2 para 1, Racial Equality Directive

Whether the case law of the ECJ with regards to sex discrimination will be applied in the same manner in cases relating to race or ethnic origin remains to be seen. For national courts and specialized bodies, which will start to deal with racial discrimination on the basis of the Racial Equality Directive, barriers may exist in applying the existing case law on sex discrimination in race cases. Sex discrimination in general is less incriminating and less stigmatizing than race discrimination and courts may be less willing to draw inferences in racial equality cases. Added to this is the matter of classification. In sex discrimination in most cases a difference between men and women can be pointed out. In racial equality cases, the identification of a person as belonging to a 'race' or ethnic group may be problematic. This is especially so in those Member States where ethnic registration is not accepted or even illegal.

However, when dealing with cases of wage discrimination in racial equality cases, national courts and specialised bodies will have to find a reference point to determine whether discrimination is at stake. As is shown below, in the Netherlands, the Equal Treatment Commission (Commission) applies the same rules and regulations in cases of sex and racial discrimination.

### 3. WAGE DISCRIMINATION IN THE NETHERLANDS

In order to understand wage discrimination based on racial or ethnic origin in the Netherlands, it is useful to sketch the labour market situation of ethnic minorities.

#### 3.1 Employment situation

The employment opportunities for members of ethnic minorities in the Netherlands have been worse than those for native Dutch workers.

Data available for 2002 show that labour participation rates and unemployment figures differ widely among various ethnic groups.

Table 1. Labour participation rate and unemployment, 2002

ETHNIC GROUP	NET LABOUR PARTICIPATION %	UNEMPLOYMENT %
Native Dutch	68	3
Non-western ethnic minorities <sup>123</sup>	50	10

Source: Statistics Netherlands, 2003

For some groups, such as people with a refugee status, the figures are even lower. Some groups, on the contrary, have reached a better position, such as women of Surinamese origin. It must be noted that in recent years the overall situation for most ethnic minority groups has improved, especially where labour participation is concerned.

<sup>123</sup> People born in, or of whom at least one parent was born in, Africa, Asia (excluding Japan and former Dutch East Indies and Indonesia), South America and Turkey. The largest groups are Moroccans, Turks, and people from Surinam and the Netherlands Antilles/Aruba.

The causes of the disadvantaged position of ethnic minorities which are commonly cited include a lack of language skills and a generally lower level of education on the part of minorities. Other causes are a mismatch on the labour market, expressed by different search and find channels by employers and ethnic minority job seekers. Apart from this, discrimination plays a role. To what extent this phenomenon hampers minorities' opportunities has not been extensively researched.<sup>124</sup>

Ethnic minorities are not only confronted with discrimination with regard to access to the labour market. They also face discrimination at their workplace. As Table 2 shows, the largest number of labour-related complaints, filed with the local Anti-Discrimination Agencies (ADAs), concern the work floor.

Table 2. Labour related complaints submitted with ADAs, 2002<sup>125</sup>

RECRUITMENT AND SELECTION	WORK FLOOR	PROMOTION	EMPLOYMENT MEDIATION	LABOUR CONDITIONS, INCL. PAY	TERMINATION	OTHER	TOTAL
114	235	19	15	41	45	20	489

Source: Kerncijfers discriminatie 2002. Amsterdam: National federation of Anti-Discrimination Agencies, 2003

Relatively few complaints (41) relating to labour conditions, which includes wages, were received. Other sources, however, point towards a substantial wage difference between native Dutch workers and ethnic minority groups.

### 3.2 Wage discrimination

In 2000, the Labour Inspectorate conducted a survey on wage differences in the private sector. The uncorrected difference between native Dutch and ethnic minority wages was 21%. If corrected for job and personal characteristics, such as education, distribution over economic sectors et cetera, a difference of 4% remains. This difference cannot be explained by other factors and this is defined as wage discrimination.<sup>126</sup>

Other macro data more or less confirm this outcome. The Wage Indicator Survey 2002, which utilizes data submitted by visitors of a website, indicate that the gross hourly wages of a native Dutch man was € 15,74; that of a native Dutch woman was € 13,42. Men of Surinamese and Antillean origin earned €14,55 and men of Turkish and Moroccan origin earned € 12,66. Women of Surinamese or Antillean origin received €14,10 whereas women of Turkish and Moroccan origin earned € 12,42.<sup>127</sup>

To what extent discrimination is at stake at the personal level is difficult to prove. Not only the information from the ADAs, but also the case law of the Equal Treatment Commission indicate that few people actually file complaints about wage discrimination. The majority of those who do request a Commission ruling fail to get a positive ruling. It may be noted that there is no case law of judicial courts on wage discrimination with regards to race or ethnic origin. The only reference point is therefore the case law of the Commission.

<sup>124</sup> See D.C. Houtzager, *Discrimination in employment (2001)*, Dutch Monitoring Centre against Racism and Xenophobia, Amsterdam: DUMC, 2002 ([www.dumc.nl](http://www.dumc.nl))

<sup>125</sup> Data include various discrimination grounds, such as sex, race, sexual orientation, age and handicap. A breakdown of the different grounds is not available. Race, however, concerns the largest category of complaints.

<sup>126</sup> *Parliamentary Documents II, 2001/2002, 27 099, no. 6.*

<sup>127</sup> K. Tijdens et.al., *Loonwijzers 2001/2002 Amsterdam: Amsterdam Institute for advanced labour studies, 2002*

From 1998 to 2003, the number of Commission rulings on wage discrimination with regards to race or ethnic origin was 29. Of these, 13 cases were decided in favour of the complainant. In the remaining 16 cases, wage discrimination could not be established. Of the 13 positive rulings, eight were very similar and concerned the application of the collective labour agreement for Cultural Minorities and Interpreters.<sup>128</sup> Before 1996, not a single wage discrimination case based on race was brought before the Commission; in the succeeding years, the number increased somewhat. In 2003, the Commission handled only one case.<sup>129</sup>

Although wage discrimination exists in the Netherlands, it seems that very few people actually submit a complaint to a relevant body, as the data from the ADAs and the Commission suggest. The reasons for not lodging complaints have not been researched. It may be assumed that a lack of information of a comparator's salary and other aspects of proof of discrimination are deterring factors.

### 3.3 Application of the law in racial equality cases

In 1989, the Dutch Act on Equal Treatment of men and women in the Workplace (ETMW) came into force. The ETMW specifies that equal pay should be given for work of equal value or work of nearly equal value.<sup>130</sup> The Act specifies what criteria should be used when determining wage differences. A similar specification is lacking in the Equal Treatment Act, which was introduced five years later. The Equal Treatment Commission utilizes the ETMW as the legal basis for wage discrimination in both sex and race cases.

In the case of a complaint by a Turkish employee and an Antillean employee of a printing company, the Commission established that co-workers, performing similar work, earned more than employees of ethnic minority background. The Commission considered that the law did not prescribe an assessment procedure to compare wages of ethnic minorities with those of other workers. In the absence of such specific regulations, the Commission applied the assessment criteria which are laid down in the ETMW. Referring to the *Enderby case*,<sup>131</sup> the Commission concluded that the market value of certain types of work may under specific circumstances lead to differences in payment, but that that difference must be proportional. In this case, the Commission found that market value differences were only allowed in times of scarcity on the labour market, which was not the case.<sup>132</sup>

In other cases, it proved to be impossible to find an existing comparator. In sex discrimination, the ECJ has put a limit on the use of hypothetical comparators. The question remains whether the Court will uphold this restriction in racial equality cases. Given the more problematic nature of defining 'race' or ethnic background, a wider range of comparisons may be accepted.

The Commission in the Netherlands has experience in using average wage levels of other workers in comparable jobs,<sup>134</sup> which has led to satisfying results. Where a suitable comparator has not been available within the company of the complainant, the Commission has looked into other companies in order to find a comparator. In this specific case, the Commission rejected the comparator on pragmatic grounds, namely because similar companies did not exist.<sup>135</sup>

<sup>128</sup> Commission 2002-73, 2002-74, 2002-75, 2002-76, 2002-77, 2002-78, 2002-80 and 2002-81.

<sup>129</sup> Commission 2003-151

<sup>130</sup> Article 7 to 12, ETMW.

<sup>131</sup> Case C-127/92 *Enderby v. Frenchay Health Authority* (1993) ECR I-4328.

<sup>132</sup> Commission 2001-52.

<sup>133</sup> Case 129/79 *Macarthy's Ltd. v. Smith* (1980) ECR I-1275

<sup>134</sup> e.g. Commission 1999-70

<sup>135</sup> See Commission 2002-178, 2002-179 and 2002-180.

## 4. CONCLUSION

Despite many years of drafting legislation and developing policy, wage discrimination is still prevalent in EU Member States. Both women and members of ethnic minority communities are confronted with lower wages for work of equal value.

Legal action against unequal pay for women has been based on Article 141 EC Treaty, a succession of EC Directives and the interpretation of these by the European Court of Justice. With the introduction of Article 13 in the Treaty and the Racial Equality Directive, European legislation also covers race and ethnic origin. However, the rules relating to race or ethnic origin are not as elaborate as those relating to sex. The question arises whether the same remedies apply to both grounds.

In the absence of more specific legislation on wage discrimination based on race or ethnic origin, courts will have few other references than legislation and case law regarding sex discrimination. In the Netherlands, few cases concerning unequal pay in race cases have been submitted. However, in the cases brought before the Equal Treatment Commission, the Commission has applied sex discrimination laws and ECJ case law.

Although sex and race or ethnic origin are different grounds altogether, it makes sense to apply the legislation and case law on both grounds. It would be inconceivable to have a hierarchy of rights in the Union; the principle of equal treatment would otherwise become meaningless.

**WILL WOMEN BE  
THE EASIER CASE?  
A COMPARISON  
OF RACE AND SEX  
DISCRIMINATION  
LITIGATION IN  
HUNGARY**

LILLA FARKAS, STAFF ATTORNEY, HUNGARIAN HELSINKI COMMITTEE

The present paper searches for synergies between sex and race discrimination. While a more theoretical comparison of community law covering both fields will be provided, this short intervention will also give an overview of law and practice in a new democracy soon to accede to the EU.

## 1. SOCIAL CONDITIONS

The State in question is Hungary, where transition to a society governed by the rule of law commenced in 1989, and is still underway. At the time accession negotiations started, the non-discrimination component of Community law was far more limited, notably it did not cover race. For the last decade Hungary – due mainly to geopolitical reasons – has developed a broad system of ethnic minority protection. Basic procedural guarantees thus far lacking, such as a statutory definition of direct discrimination or the reversal of the burden of proof and the protection against indirect discrimination outside the field of employment are also provided for under the Equal Treatment Act (ETA), which came into effect on 27 January 2004.<sup>136</sup> Protection against sex discrimination has been shaped by the gradual transposition of relevant Community law into domestic labour law.

In 1998, 7% of the potentially active female population was unemployed, compared to 8.6% of men. Behind these figures, however, one might suspect a muddling with definitions to facelift statistics. In 2000, wage differentials for men and women in comparable jobs were around 12.7% in the private and 8.5% in the public sector.<sup>137</sup>

The Iron Curtain left Hungary with only a small group of migrants. And now, in a predominantly white society with strict immigration regulations, immigrants are scarce. On the other hand, Hungary has a sizeable indigenous ethnic minority – the Romani community, accounting for approximately 4.2% of its population,<sup>138</sup> which “constitute the largest ‘visible minority’ and are the most frequent target of discrimination in both the public and the private sector.”<sup>139</sup>

In 1971, 85.2% of Romani men were employed, though mainly as unskilled labourers.<sup>140</sup> This figure had fallen to 26.2% by 1994.<sup>141</sup> Conspicuously, average official figures for unemployment have remained at around 10% since 1990.<sup>142</sup> Discrimination against Roma in employment is compounded by discrimination in education, housing and social protection,<sup>143</sup> all of which are issues the Racial Equality Directive (RED) addresses.

To a certain extent, though rather ambiguously, Hungary has been implementing positive action programmes for Roma in education on the basis of ethnic quotas, and in housing in the form of the Romani component of the national housing programme 2001.

## 2. LEGAL BACKGROUND

The Hungarian enforcement model is fundamentally individualistic. Remedies are sector specific. Article 76 of the Civil Code can be perceived as the legal provision that operationalises and ensures the vertical effect of the constitutional anti-discrimination clause. It includes all grounds that Community law covers.

<sup>136</sup> Act No. 125 of 2003 on equal treatment and the fostering of equal opportunity.

<sup>137</sup> See, *Women 2000: An Investigation into the Status of Women's Rights in Central and South-Eastern Europe and the Newly Independent States*, International Helsinki Federation for Human Rights, Vienna, 2000, p. 193.

<sup>138</sup> G. Kertesi and G. Kézdi, „A cigány népesség Magyarországon, Dokumentáció és Adattár”, Budapest: Socio-typo, 1998.

<sup>139</sup> Kádár, A., Farkas L., and Pardavi, M. (Hungarian Helsinki Committee), *Legal Analysis of National and EU Anti-Discrimination Legislation: A Comparison of the EU Racial Equality Directive and Protocol No 12 with Anti-Discrimination Legislation in Hungary*, September 2001, available at [www.migpolgroup.com](http://www.migpolgroup.com).

<sup>140</sup> Kemény, I. and Havas, G., *Beszámoló a Magyar Tudományos Akadémia Szociológiai Intézete által 1971-ben végzett reprezentatív cigánykutatóról*, Budapest, MTA Szociológiai Kutató Intézete, 1976.

<sup>141</sup> Kertesi G. *Cigány foglalkoztatás és munkanélküliség a rendszerváltás el-ít és után (tények és terápia)*, Esély, Volume 4, 1995.

<sup>142</sup> For figures see Hungarian Central Statistical Office, at: [www.ksh.hu](http://www.ksh.hu).

<sup>143</sup> For details, see Kádár, A., Farkas, L., and Pardavi, M., Chapter on Hungary in *Monitoring the EU Accession Process: Minority Protection*, 2001, at [www.eumap.org](http://www.eumap.org).

Civil law remedies range from the finding of a violation *in integrum restitutio* to a public acknowledgement of, and compensation for, a violation, as well as a court-imposed public fine. Hungarian law does not allow for class actions, but test and sample cases can be brought. Since 1 January 1999, labour courts have had the competence to rule on discrimination in recruitment, but the only remedy under the Labour Code is compensation.

Just as Hungary lacks forward-looking sanctions (such as contract compliance, non-discrimination monitoring and training), it also falls short of having a unified regulatory agency entrusted with the range of powers envisaged under Article 13 of the Race Directive. The primary body dealing with complaints of racial discrimination is the Parliamentary Commissioner for National and Ethnic Minorities (Minorities Commissioner) with the power to investigate and recommend general or specific measures to remedy discrimination. Statutory regulation limits his power to investigating complaints raised against public authorities.<sup>144</sup>

Transposition of the Racial Equality, Employment Equality and Revised Equal Treatment Directives<sup>145</sup> in Hungary commenced in November 2002, when the Concept of the Equal Treatment Bill was published for consultation. The Bill (No. T/5585) was sent out for further consultation in September 2003 and approved by Parliament in December. It foresees identical protection against race and sex discrimination, covering all fields listed in the RED. It shifts the burden of proof in all types of proceedings except those of a criminal nature. Regrettably, it leaves the system of sanctions intact and is rather clumsy in its definition of discrimination. Most importantly, however, it establishes an enforcement body in a rather peculiar manner. Articles 13-17 give us clues about the tasks and status of this body, i.e. an administrative authority with national competence. However, these provisions do not enter into force until 1 January 2005.<sup>146</sup> Details of the authority's operation and personnel will probably be regulated in a government decree, which is not only a rudimentary solution but will leave Hungary in non-compliance with Article 13 RED as of 1 May 2004. It is clearly the sign of a battle lost during consultation within the State administration, where seemingly concerns raised about the clash of competence with already existing bodies – primarily the Minorities Commissioner – could not thus far be resolved.

Community law relating to sex discrimination has already been transposed (including equal pay) but implementation is seriously flawed – as the everyday practice of discriminatory job advertisements suggests. As opposed to race, litigation in this field has been extremely scarce or well hidden. No equal pay claims have been reported so far. The only case of sex discrimination known to the general public has been a civil action brought because of a discriminatory job advertisement.<sup>147</sup> Three factors seem to contribute to the low profile of sex discrimination: the lack of (i) a permanent specialised body to deal with complaints<sup>148</sup> and stimulate public debate, compounded by the reluctance of the Parliamentary Commissioner for human and civil rights to take these cases on board; (ii) civil society and trade union initiative; (iii) commitment from donors to support litigation in this field on a par with race discrimination.

### 3. ISSUES OF PROOF

Litigation has so far focused on race discrimination. Much of what is known about discriminatory practices in this field stems from the case-by-case investigation and systemic reports of the Minorities Commissioner.<sup>149</sup> These have thus far made court action possible in two cases involving the largest groups of Roma.

<sup>144</sup> Cf. *Will the groom adopt the bride's unwanted child: the EU Race Directive, Hungary and its Roma*, Lilla Farkas, *Roma Rights 2003/1-2*, European Roma Rights Centre, Budapest, pp. 42-45, available at [www.errc.org](http://www.errc.org)

<sup>145</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Council Directive 2000/78/EC of November 2000 establishing a general framework for equal treatment in employment and occupation and Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC 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.

<sup>146</sup> See, Article 65 sub. 2 ETA.

<sup>147</sup> *Zs. K. v. P. Supermarket*, see details in report at [www.migpolgroup.com](http://www.migpolgroup.com)

<sup>148</sup> Indeed, the case invoked was brought by a short-lived government agency, the Equal Opportunities Secretariat.

<sup>149</sup> His reports are available in English at [www.obh.hu](http://www.obh.hu).

In *Tiszaijváros* a challenge could be mounted with the Constitutional Court against a local government decree that adversely affected Roma who far outnumbered non-Roma among those whose livelihood depended on the collection of litter. Here, a claim of indirect discrimination could be clearly established.<sup>150</sup>

In *Karcag* such a claim could not be advanced, partially due to the procedural rule, which did not allow for the reversal of the burden of proof in civil cases. Still, civil compensation for work performed “in exchange of” social provisions could be won for 135 plaintiffs, all of whom were Roma.<sup>151</sup> Article 19 ETA will provide a solution for similar problems.

The use of situation testing in court proceedings has given rise to various concerns. NGOs, such as the Legal Defence Bureau for National and Ethnic Minorities (NEKI), have regularly had recourse to testing in cases concerning discrimination in access to services. In certain instances they have successfully requested public authorities, such as consumers’ inspections, to employ testers in the course of their investigation.<sup>152</sup> The attitude of judges to testing varies to a great degree and they seem to attach great importance to testers’ personal credentials.

This is all the more peculiar, because testing is a commonly used method in investigating the quality and quantity of goods and services in the general inspections of authorities concerned with public health and consumer protection.

Regrettably, despite NGO proposals in this regard, the ETA remains silent on this issue. Government representatives have made it abundantly clear that amendments to civil procedure will not be made to accommodate testing as a means of evidence. Nonetheless, one can expect testing to flourish and make its way into sex discrimination litigation. And testing would not be the first issue to find its way into statutory law through court guidelines.

The key problem one can at this stage foresee is linked to the limitations imposed on the use of ethnic data/statistics. That domestic law at present only allows for the handling of data on racial and ethnic origin with the consent of the person concerned<sup>153</sup> severely impedes the process of establishing discrimination, simply in finding comparators but more particularly in proving indirect discrimination or institutional racism.

Indeed, at present often the majority vindicates the right to say who is a Roma. Despite the lack of official data, commanders of prisons give estimates about the number of Roma inmates. In court proceedings non-Roma employees testify to be Roma so as to rebut claims of ethnic discrimination. More recently, in a notorious case relating to educational segregation, non-Roma inhabitants of Jászladány joined together in claiming they were Roma so as to ridicule claims of ethnic discrimination.

As Goldston argues,<sup>154</sup> public interest lawyers are handicapped without ethnic data, as the “very notion of indirect discrimination implies a need for data”. As Recital 15 RED suggests, data do not have to come in the form of statistics though. This is important, because even if on the national level the existence of such statistics is denied, ethnic data are collected by many institutions – e.g. schools that apply for ethnic quota and any other institutions that implement positive action programmes.

However, the issue of ethnic data collection is far from being domestic. With the notable exceptions of the UK and the Netherlands, in half of Council of Europe member states – specifically those with large Roma populations - national constitutions prohibit the collection of ethnic data.<sup>155</sup> In Hungary the prohibition depicts a struggle

<sup>150</sup> See, NEKI (Legal Defence Bureau for National and Ethnic Minorities) White Booklet 2000, p. 39, available at [www.neki.hu](http://www.neki.hu)

<sup>151</sup> See, NEKI, White Booklet 1998, p. 40.

<sup>152</sup> See e.g. the case of Szikszó, NEKI, White Booklet 1999, p. 11.

<sup>153</sup> Articles 2(2) and 3(2) of Act No. 63 of 1992 on the protection of personal data and the publicity of public data.

<sup>154</sup> James A. Goldston, *Race and Ethnic Data: A Missing Resource in the Fight against Discrimination*, in *Ethnic Monitoring and Data Protection: The European Context*, CPS Books, Central European University Press – INDOK, Andrea Krizsán (ed.), 2001, pp. 19-41.

with a racist past, where ethnic data were abused and misused to formulate anti-Roma policies. It is against this backdrop that minority organisations oppose the compulsory gathering of ethnic data.

So, shall lawyers wait patiently for minority attitudes to change or push for data collection regardless, knowing that the lack of unified data goes beyond individual cases, giving rise to far more serious problems at community level, i.e. the planning and funding of action plans under the RED?

Accession states will have to reconsider existing domestic regulations in the light of the Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data, under which the processing of personal data would still be permissible where it “relates to data which are ... necessary for the establishment, exercise or defence of legal claims”.<sup>156</sup> Certainly, an argument for the need of ethnic data at the national level and state liability for the failure of its provision could be advanced on the basis of this provision taken in conjunction with Recital 15 and Article 2(b) RED.

At this point use could be made of the case law of the European Court of Justice (ECJ) relating to indirect discrimination based on sex. Given that data based on one’s sex can easily be collected and is available at the national level, domestic litigation aimed at (indirect) discrimination against women could amplify the fallacy surrounding ethnic data gathering. At the same time it could prove an easier path to walk when establishing domestic case law.

## 4. COMMUNITY LAW – COMPARE SEX AND RACE DISCRIMINATION

I would like to outline a few considerations that in my view may be relevant to domestic litigation, as well as actions before the ECJ.

The scope of protection in race discrimination legislation is far more robust than in sex discrimination. However, in the latter a directly effective Treaty provision deals with equal pay. Whether the prominence equal pay has received in the field of sex discrimination will be given in race discrimination, remains to be seen.

It may certainly be argued that for ethnic minorities – such as Hungary’s Roma – access to employment is the major issue, never mind the level of protection regarding equal pay. Nonetheless, this difference goes to the heart of Community policies. Article 141 TEC is symbolic of the equal worth (and dignity) of the sexes and relevant to all working women.

Article 3(c) RED provides for equal pay regardless of race and ethnicity. Under Article 249 TEC, “a directive shall be binding as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and method.” Directives are addressed to Member States of the EU only and have vertical direct effect when they are unconditional and sufficiently precise and when Member States have failed to implement them within the time limit.<sup>157</sup>

In other situations directives have “indirect effect”. Member States and particularly domestic courts are obliged to do everything possible to achieve the result contained in directives.<sup>158</sup> Member States in an action for damages in the domestic courts must make good loss and damage caused to individuals through breach of Community

<sup>155</sup> *Roma and Statistics: Strasbourg, 22-23 May 2000, (2000), Council of Europe, Paragraph 41.*

<sup>156</sup> *Article 2 of Council Directive 95/46/EC.*

<sup>157</sup> *Case 152/84, Marshall v Southampton and SW Hampshire Area Health Authority, [1986] 2 ECR 723.*

<sup>158</sup> *Case C-106/89, Marleasing SA v La Comercial Internacional de Alimentacion SA, [1990] ECR I-4135.*

law, particularly in instances where a non-directly effective part of a directive is concerned.<sup>159</sup> Three conditions must be met in order to trigger state liability for damages. The result, as required by the directive, must include the conferring of rights on individuals. The breach must be sufficiently serious and there must be a causal link between the State's breach of obligation and the damage suffered by the individual.

Thus, in theory equal pay clauses in the fields of sex and race discrimination provide identical protection. However, if transposition fails or is insufficient, domestic practice may result in significant differences when litigators try and ensure this protection. It appears that in acceding States' domestic courts are as yet unwilling to take into account arguments based on international treaties – proclaimed in domestic law – let alone the jurisprudence developed by the enforcement bodies established under these treaties. The most common reason given is that such treaty provisions are far too vague for domestic application. Moreover, international case law is considered to be lacking binding effect. As to guidance that can be taken from it, one only needs to look at the long-standing debate about the applicability of constitutional jurisprudence in ordinary courts. In Hungary for instance, practitioners can hardly find a judgment that refers to Constitutional Court decisions.

By analogy, invoking Article 141 TEC may prove a far easier exercise than bringing a case under Article 3(c) RED – particularly against private sector employers. For the latter, far too many ECJ cases will have to be cited and notions alien to domestic law introduced for any domestic judge not to feel like throwing such a case out.

Article 2 RED contains definitions of both direct and indirect discrimination that allow for hypothetical comparisons to be made. The same applies to the Revised Equal Treatment Directive, where definitions contained in Article 2 are reinforced by Recital 6, which emphasises the need to have definitions of sex discrimination that are in line with those of race discrimination. However, in sex discrimination cases the ECJ<sup>160</sup> has so far disallowed hypothetical comparators and, similarly, the definition of indirect discrimination given in Article 2(1) of the Burden of Proof Directive<sup>161</sup> cannot be construed to allow hypothetical comparators. It remains to be seen whether problems will arise from discrepancies between the definitions given by the Community legislature and the judiciary and if so, how they will be resolved.

In both areas specific attention is paid to means through which indirect discrimination can be established. Commentators emphasise that these means are far from being reduced to using statistics and as it is argued above, viewing statistics as the main proof of indirect discrimination would indeed be counter-productive in race discrimination.

It is to be noted that Article 8b(4) of the Revised Equal Treatment Directive calls on Member States to encourage the provision of information on equal treatment for men and women and that this information may include employer-level statistics. Regrettably, a similar solution has not found its way into the RED. However, domestic lawyers should not shy away from drawing analogies between sex and race discrimination legislation in this regard.

Though Community legislation now extends to discrimination based on race and ethnicity, religion, belief, age, disability and sexual orientation, it is only in the areas of sex and race/ethnicity that agencies for the promotion of equal treatment must be established. In Hungary, transposition rectifies this situation by opting for a single agency model. The role agencies can play in uncovering discriminatory practices and supporting litigation must be emphasised and utilised by practitioners.

<sup>159</sup> *The joined cases C-6/90 and C-9/90, Francovich and Bonifaci v Italian Republic*, [1991] ECR I-5357.

<sup>160</sup> *See Macarthy Ltd. v Wendy Smith*, Case No. C-129/79 ECJ [1980] ECR I-1275.

<sup>161</sup> *Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.*

	SEX DISCRIMINATION	RACE DISCRIMINATION
Relevant provisions	Art 141 TEC, Dir 2002/73/EC amending 76/207/EEC	Dir 2000/43/EC – multiple discrimination recital (14)
Effect	Direct effect – vertical direct effect In public and private sectors	Vertical direct effect (Francovich claim, domestic judicial interpretation in line) In public and private sectors
Comparator	<i>Macarthys</i> : no hypothetical comparator allowed – recital (6) definitions of discrimination must be in line with Race and Employment directives, where hypothetical comparator allowed – Art 2 – definition of indirect discrimination in burden of proof directive (disadvantages)	Article 2 – direct discrimination is defined to allow hypothetical comparison (would be treated); indirect likewise (would put persons)
Scope	Pay, employment – Art 3(c) pay In public and private sectors including public bodies	+ social protection (healthcare), education, access to services (inc. housing) – no specific equal pay clause but Art 3(c) public and private sectors
Burden of proof	Dir 97/80/EC	Recitals (21), (22), Art 8
Statistical evidence	Recital (10), Art 8b information to employees on equal treatment, which may include statistics on proportion of men and women at different levels of organisation	Recital (15)
Body for the promotion of equal treatment	Art 8a	Art 13 – assist victims, survey, report, recommendations
Sanctions	Art 6(2) compensation or reparation, Art 8d	Individual justice model: mainly compensation – effective, proportionate, dissuasive
Deadline for transposition	5 October 2005	19 July 2003



# **COMMENTS AND DISCUSSION**

Despite 30 years of equal pay legislation, inequalities in pay between women and men are still prevalent across Europe, though today the gap is far less flagrant than it was 30 years ago. The pay gap between the sexes is today largely attributable to segregation in the labour market rather than women not receiving equal pay for equal work. In the Netherlands the pay gap between the sexes is 30%. However, once factors such as education and career breaks are removed, the gap is 5%. The equal treatment goals can also be said to have shifted: 30 years ago women sought equality in the same jobs as men; today women seek equal status in society. This distinction requires different tools than traditional equal treatment law. Methods to address current labour market patterns must be found.

Macro factors such as the reasons behind female or male-dominated sectors cannot be effectively tackled with the equal pay tools developed by the European Court of Justice to address micro factors such as the actual salary in an individual case. Equal pay provisions, in particular in the first Equal Treatment Directive, allow women to ensure they receive the same pay, but they are ill equipped to deal with labour market segregation. Equal treatment and positive action provisions, on the contrary, can be used to help get more women into better jobs. Certainly the latter presents the greater challenge. Employers are likely to settle in clear cases of unequal pay, making this kind of case far easier to tackle.

One reason for the absence of equal pay for equal work lies in the often weaker negotiating skills of women when it comes to negotiating wages, which is an obstacle of a psychological nature rather than legal. Trade unions have a role to play in helping women become more assertive in asking for equal pay. The University of Amsterdam operates a programme providing indicators on pay on the Internet so women can see what is the average salary in their sector. This is a valuable tool for women to improve their negotiation skills (see <http://www.loonwijzer.nl/>).

Part of the problem is also that new principles on equal treatment are being applied to old structures; work places are run and organised by predominantly indigenous males in a way that is not accommodating the increase in female and ethnic minority employees.

Tools to combat traditional pay inequalities include checklists on equal pay and job evaluation schemes. In the Netherlands a checklist on equal pay has been developed by the Equal Treatment Commission, based on the case law of the European Court of Justice. In Northern Ireland, where there is a 37% pay gap between women and men, the Equality Commission for Northern Ireland has introduced an Equal Pay Review Kit to help employers and trade unions review their pay policies and practices and remove any discrimination in pay. It is based on a toolkit piloted by the Equal Opportunities Commission in Great Britain, but tailored to the legal, administrative and business context of Northern Ireland.

In the Netherlands there is a growing culture of using job evaluation schemes to determine equal pay. The Equal Treatment Commission has an expert staff member who acts as an interface between the Commission and the job evaluation industry. In the UK job evaluation schemes are being used in the health service and the civil service, and local government is developing its own system. In Finland and Sweden systems are also being developed, though in Sweden it is usually the trade unions that gather information to evaluate pay equality. Cooperation between specialised bodies and other interested parties, such as trade unions, is practical given the considerable

resources required to operate successful job evaluation systems due to their sometimes very technical nature. In Austria one trade union has developed a job evaluation scheme, but otherwise there is little experience of job evaluation schemes; indeed female employees tend to be suspicious of job evaluation. Much depends on how the job evaluation is performed and by whom. One Austrian university undertook a job evaluation pilot which led to a change in the wage system to the advantage of women. However, the evaluated employer was in the public sector and has been unable to find the finances to pay the women what they are owed. Lack of funds to pay women in the case of a finding of unequal pay has similarly been a problem in the UK. One solution is to introduce 'Equality Funds' whereby employers set aside funds to pay back victims of equal pay discrimination; funds can also be set aside through trade unions, e.g. a 1% wage fund in a collective agreement could be agreed to bridge a proven pay gap.

Another issue is the competency of courts and tribunals to effectively deal with job evaluation in equal pay cases (e.g. failure to keep separate the evaluation of personal performance and the evaluation of actual work). In Ireland job evaluation has been left to the courts. There is currently no formal job evaluation in Northern Ireland, but ECNI is considering bringing equal pay cases to industrial tribunals and there is concern that the members of the tribunal will not have the expertise to deal with cases involving job evaluation.

A significant difficulty is caused by the fact that pay is a closely guarded secret in many countries. If women have been out of the labour market for some time, it is especially difficult to ensure they are being paid the correct wage. It is therefore not surprising that cases brought by women more often concern recruitment and promotion than pay, as the discrepancies are more evident.

Employers should be interested in developing tools to establish where they are on the pay scale and in terms of equality. It is in employer's interests to eliminate legal insecurity, which is bad for business. By discussing these matters with specialised bodies, employers can become aware of their duties. In the Netherlands employers' organisations asked the Equal Treatment Commission for an opinion on how the working time directives should be applied in order to implement change collectively.

Class actions can be a useful tool in equal pay cases if permitted in a given jurisdiction. NGOs and other organisations are often in a better position to bring a case than an individual employee, *inter alia* because they may have more information on the company and they may have more resources. Class actions by employees are allowed in the Netherlands, though in such cases no compensation may be awarded, only other remedies. Class actions are not permitted in the UK, but there are cases in which a large number of victims bring complaints and a few are selected by the courts to be heard. Once the judgement is made, the employer may be convinced to offer the same remedy to all of those affected.

Where a specialised body has the power to investigate companies or other suspected discriminators, this can be a very important tool, e.g. the Dutch Commission conducts research into companies on behalf of complainants, which has led to many successful cases. The Swedish Ombudsmen can investigate a case and if it finds discrimination it may bring the case to court if it thinks it is good for legal development.

The Equality Commission for Northern Ireland can represent victims in individual cases or instruct solicitors to do so. Employment cases are considered by employment tribunals before going to appeal. Such specialist judiciary at the low level performs an important function, as it means expertise filters up to the higher courts.

The quasi-judicial role of an equality body was discussed in view of the powers of the Dutch Equal Treatment Commission to hear cases and hand down non-binding opinions. To enforce such opinions, parties must go to court. Some commentators are of the view that this competency of the Commission should end and discrimination cases should only be heard by the Dutch courts. Others point to the immense experience and knowledge that the Equal Treatment Commission has built up that the courts (and lawyers) lack, and the advantages of the Commission procedures over traditional court procedures, which can be very lengthy. The Equal Treatment Commission provides cheaper, faster justice, which serves the goal of having an effective system to protect victims against discrimination. On the other hand, there is concern that the Commission may find that it has become so specialised that the ordinary courts do not understand its opinions, in which case the system could be reconsidered. If cases were to be taken to courts it would be advisable for the Equal Treatment Commission to help bring cases so as to ensure good legal arguments are brought and courts are forced to take these into account. The courts could even be formally obliged to take the Commission's opinions into account and give reasons for any deviation from these. The comment was also made that by giving a specialised body a judicial role, their resources are diverted from the role of promoting equality and using its expertise and resources to strategically promote equality instead.

The question was raised as to whether a specialised body with quasi-judicial powers in reaching their decisions should be balancing the right to non-discrimination against other fundamental rights. As single issue bodies defending the right to equality, such bodies are not usually required to balance competing rights in the way courts are. This could mean widening the strict permitted exceptions to discrimination where other rights are found to be more persuasive. The necessity of the Commission being *seen* to be independent by both parties was again asserted.

# PROGRAMME

MONDAY, 23 JUNE 03 - TUESDAY, 24 JUNE 03

## MONDAY, 23 JUNE 03

09.00 – 09.30 Registration and coffee

09.30 – 09.45 Word of welcome by Jenny Goldschmidt, Chair of the Equal Treatment Commission (CGB), and short introduction by the chair of the meeting Ina Sjerps, Dutch member of the network of independent gender equality experts of the European Commission and secretary-general of the College for Employment Affairs of the Dutch Association for Urban Councils (VNG)

09.45 – 10.45 Introductory speech by Irene Asscher-Vonk, professor in Labour law, Catholic University of Nijmegen, and member of the Social Economic Council

10.45 – 11.15 Coffee break

11.15 – 12.45 Workshops in parallel sessions

Group I: “Equal pay for work of equal value. How should equal value be determined and what is the role of job evaluation schemes?”

Albertine Veldman, assistant professor, Utrecht University;  
Siebrand Bisschop, senior adviser on job evaluation, CGB;  
Chair: Ingrid Nikolay-Leitner, Ombud for Equal Employment Opportunities;  
Rapporteur: Janet Cormack, MPG

Group II: “Indirect discrimination”

Susanne Burri, lecturer Gender and Law, Utrecht University;  
Muriel Dalglish, policy maker at the women’s and ethnic minorities department of the Dutch Trade Union Confederation, FNV;  
Chair: David Zilkha, CRE;  
Rapporteur: Eilis Barry, Equality Authority

13.00 – 14.30 Lunch

14.30 – 16.00 Same workshops as in the morning in parallel sessions

Group I: “Indirect discrimination”

Group II: “Equal pay for work of equal value. How should equal value be determined and what is the role of job evaluation schemes?”

16.00 – 16.30 Tea break

16.30 – 17.30 Reports in plenary on the main findings of each working group, followed by plenary discussion

17.30 Closing of the first day by Ina Sjerps

- 18.00 Reception hosted by the Lord Mayor of Utrecht at the City Hall
- 19.30 Dinner in “Huize Molenaar”
- 22.30 End of dinner

## **TUESDAY, 24 JUNE 03**

- 08.00 – 09.00 Partners meeting
- 09.00 – 09.30 Arrival and coffee
- 09.30 – 09.45 Opening by Ina Sjerps, preview of the day
- 09.45 – 11.15 2 workshops out of 3 parallel sessions
- Group I: “Are the legal criteria of the ECJ concerning equal value suitable to work with in practice?”  
Evert Jan Henrichs, lawyer, De Brauw Blackstone Westbroek, specialised in the field of employment law (including equal treatment, co-determination and pension law) and Beverley Jones, solicitor and partner, Jones and Cassidy Solicitors
- Group II: “What is the attitude of the judiciary?”  
Edith Brons, vice president of the CGB and Yvonne Telenga, vice president of Zwolle District Court and deputy member of the CGB  
Chair: Isabelle Chopin, MPG  
Rapporteur: Barbara Bos, legal officer, CGB
- Group III: “Same problem, same remedies?”  
Dick Houtzager, legal officer, National Bureau against Racial Discrimination (LBR) and Lilla Farkas, staff attorney, Hungarian Helsinki Committee  
Chair: Marcel Zwamborn, alternate member of the CGB  
Rapporteur: Marjolijn Nicolai, member of the CGB
- 12.30 – 14.30 Boat tour and lunch at the office of the Dutch Equal Treatment Commission
- 14.30 – 16.00 Same workshops as in the morning; other groups
- 16.00 – 17.00 Reports in plenary on the main findings of each working group, followed by plenary discussion
- 17.00 Closing of the experts’ meeting and farewell drink

## **PARTICIPANTS:**

### **Austria:**

Eva Fehringer, Ministry of Economic Affairs and Labour  
Ingrid Nikolay-Leitner, Ombud for Equal Employment Opportunities

### **Belgium:**

Bruno Blanpain, DLA Caestecker  
Koen Cooreman, Centre for Equal Opportunities and Opposition to Racism  
Isabelle Demeester, Centre for Equal Opportunities and Opposition to Racism

### **Denmark:**

Mandana Zarrehparvar, Danish Centre for Human Rights

### **Hungary:**

Lilla Farkas, Hungarian Helsinki Committee

### **Ireland:**

Jason McCabe, Equality Authority

### **Italy:**

Luisa Corazza, Office of the Minister of Equal Opportunities  
Mario Serio, Office of the Minister of Equal Opportunities

### **The Netherlands:**

Irene P. Asscher-Vonk, Faculty of Law, Catholic University of Nijmegen  
Siebrand Bisschop, Equal Treatment Commission  
Barbara Bos, Equal Treatment Commission  
Edith Brons, Equal Treatment Commission  
Susanne D. Burri, Gender and Law, University of Utrecht  
Muriel A. Dalgliesh, FNV Women's Department, Afdeling Doelgroepen  
Jenny E. Goldschmidt, Equal Treatment Commission  
Evert Jan Henrichs, De Brauw Blackstone Westbroek  
Dick Houtzager, Landelijk Bureau ter bestrijding van Rassendiscriminatie (LBR)  
Lydia J.H.M. Lousberg, Ministry of Social Affairs and Employment  
Marjolijn G. Nicolai, Equal Treatment Commission  
H.G.W. Ruygrok, E-Quality  
Ina C.M. Sjerps, Secretaris College voor Arbeidszaken/VNG  
Yvonne Telenga, Equal Treatment Commission  
Inge Y. Piso, Ministry of Social Affairs and Employment  
Mieke van der Burg, Equal Treatment Commission  
Albertine Veldman, Faculty of Law, University of Utrecht  
Marcel Zwamborn, Equal Treatment Commission

**Norway:**

Ann Helen Aarø, Centre for Combating Ethnic Discrimination  
Ella Ghosh, Centre for Combating Ethnic Discrimination

**Slovak Republic:**

Viera Kusendova, Department of Equal Opportunities and Anti-discrimination, Ministry of Social Affairs and Labour

**Spain:**

Luisa Cava de Llano, 1st Deputy Ombudsman  
Carmen Comas-Mata, Chief Cabinet of 1st Deputy Ombudsman

**Sweden:**

Anna Theodóra Gunnarssdóttir, Ombudsman against Ethnic Discrimination  
Linus Kyrklund, Ombudsman against Ethnic Discrimination

**United Kingdom:**

Beverley Jones, Jones & Cassidy Solicitors  
Julie McGrath, Equality Commission for Northern Ireland  
Antoinette McKeown, Equality Commission for Northern Ireland  
David Zilkha, Commission for Racial Equality

**Migration Policy Group:**

Isabelle Chopin  
Janet Cormack



## TOWARDS THE UNIFORM AND DYNAMIC IMPLEMENTATION OF EU ANTI-DISCRIMINATION LEGISLATION: THE ROLE OF SPECIALISED BODIES

*Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive) and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (Framework Directive, prohibiting discrimination on the ground of religion or belief, disability, age and sexual orientation) enhance the potential to combat discrimination in the European Union. These compliment the existing legislative programme on gender discrimination, which was most recently added to by Directive 2002/73/EC amending Council Directive 76/207/EEC 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. All EU Member States require legislative change to ensure compliance with these Directives.*

Under Article 13 of the Racial Equality Directive, a specialised body (or bodies) must be designated for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies that have a wider brief than racial and ethnic discrimination. Article 8a of Directive 76/207/EEC as amended by Directive 2002/73/EC requires the same in relation to discrimination on the grounds of sex. The bodies' tasks are to provide independent assistance to victims of discrimination, conduct independent surveys on discrimination, and publish independent reports and make recommendations on any issue relating to such discrimination. Many States are thus faced with the challenge either of establishing a completely new body for this purpose, or revising the mandate of an existing specialised body.

The project *Towards the uniform and dynamic implementation of EU anti-discrimination legislation: the role of specialised bodies* is funded by the European Community Action Programme to Combat Discrimination (2001-2006). It creates a network of specialised bodies with the objective of promoting the uniform interpretation and application of the EC anti-discrimination directives, and of stimulating the dynamic development of equal treatment in EU Member States. It promotes the introduction or maintenance of provisions that are more favourable to the protection of the principle of equal treatment than those laid down in the Directives, as allowed under Article 6(1) of the Racial Equality Directive and Article 8(1) of the Framework Directive. The partners of the project are the Ombud for Equal Employment Opportunities (Austria), the Centre for Equal Opportunities and Opposition to Racism (Belgium), the Equality Authority (Ireland), the Equal Treatment Commission (Netherlands, leading the project), the Ombudsman against Ethnic Discrimination (Sweden), the Commission for Racial Equality (Great Britain), the Equality Commission for Northern Ireland, and the Migration Policy Group (Brussels).

The project provides a platform for promoting the exchange of information, experience and best practice. Specialised bodies from other EU Member and accession states are also participating in the activities of the project.

This is the report of the third in a series of 7 experts' meetings conducted under the project, which was hosted by the Dutch Equal Treatment on 23-24 June 2003 in Utrecht. The theme of the meeting was 'Equal Pay and Working Conditions'. The first and second publications in this series are 'Proving Discrimination' and 'Protection against Discrimination and Gender Equality: how to meet both requirements'.

