

# *Successful and unsuccessful cases on equal pay before the CJEU and lessons learnt*

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## Content

- ‘Successful and unsuccessful’? – What to expect from the CJEU?
- What has the CJEU answered and where has it been more or less helpful?
- Questions for discussion

## WHAT TO EXPECT FROM THE CJEU?

### How do cases get to the CJEU?

- Commission action
  - Transposition vs implementation
- Preliminary reference
  - In a pending case before a 'court or tribunal'
    - Typically no chance to ask for an equality body
    - Nor for administrative bodies (Labour Inspectorates)
    - But even with court litigation
      - The decision to ask is in the hands of the court, not litigants
      - And strictly speaking only last instance courts have to ask

## ‘Successful and unsuccessful’

### The limits of CJEU jurisdiction:

- Interpretation of EU law, not domestic law
- Law vs facts
- The CJEU won’t solve the individual case

## Side-note on ECtHR

- Art 14 – non-autonomous right; not in horizontal relations
- Protocol 12 – general prohibition of discrimination (independent); not in horizontal relations

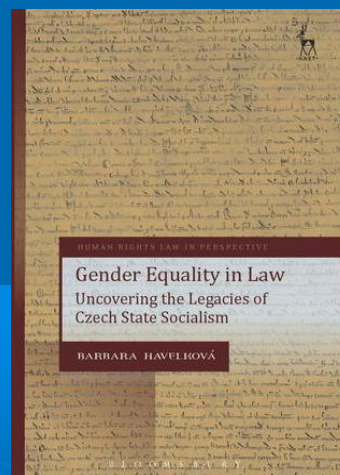
## Why are the limits important?

There is a lot of work that needs doing domestically

- Interpretation and application of domestic (transposed) legal provisions
- Using EU 'soft law' domestically (for example on transparency)
- Even going beyond what the EU requires, to adapt to domestic conditions where necessary (CZ – explicit invalidation of contractual clauses prohibiting discussion of wage)

## Conceptual Obstacles to Anti-Discrimination Law

- Germanic – freedom of contract; freedom to conduct business
- Post-socialist – lack of understanding of 'unconscious bias' (as opposed to 'evil intent')



## CJEU CASES (OTHER NOTEWORTHY LAW)



### Later sessions

- Comparator
- Respondent's defences and justifications
- Same work or work of equal value
- Burden of proof



## Horizontal direct effect

1957 Rome Treaty – Art 119 – apparently obliged only the MSs

*Defrenne II*: '[S]ince Article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.'

Importance:

- The Treaty is horizontally directly effective (the Directive is not) – poor transposition into domestic law can be 'healed' directly before a national court

## Social aim

*43/75 Defrenne II*: 'Art 119 pursues a double aim... [economic] and social'

*C-50/96 Schröder*: 'the economic aim, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to its social aim, which constitutes the expression of a fundamental human right not to be discriminated against on grounds of sex.'

Importance: Indirectly for assessment of justifications

## Objective liability

C-177/88 Dekker: *'if the employer's liability for infringement of the principle of equal treatment were made subject to proof of a fault attributable to him and also to there being no ground of exemption recognized by the applicable national law, the practical effect of those principles would be weakened considerably'*

Importance: Recognition that discrimination is often the result of unconscious bias rather than fault (will and knowledge); the effect is more important than the mental state

## Hypothetical comparator

- Comes from the 2006 Directive

Article 4(1) of the Recast Directive: 'For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated.'

Article 2(1)(a): 'direct discrimination': where one person is treated less favourably on grounds of sex than another *is, has been or would be* treated in a comparable situation; 2(1)(b): 'indirect': *would*

Importance: successor and predecessor (129/79 Maccarthy's), where woman earns more but should earn much more, when same remuneration for work of different value,...

## Definition of 'pay'

Extensive case-law and a wide definition – the form of 'consideration' does not matter (all perks, compensation, overtime, bonuses, allowances (expat), termination pay are included; even 'consideration' that does not go to the employee)

Extensive case-law on social security (especially pensions) – how statutory is the scheme

## How to compare pay?

C-381/99 Brunnhofer: 'equal pay must be ensured not only on the basis of an overall assessment of all the consideration granted to employees but also in the light of each aspect of pay taken in isolation'



## Definition of 'worker'

C-256/01 Allonby: 'A person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration . . . [T]he authors of the Treaty did not intend that the term 'worker', ...should include independent providers of services who are not in a relationship of subordination with the person who receives the services...The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker ...if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article'

Positive: substantive, EU level definition

BUT: Is it capable to cover situations of outsourcing?

## Single employer

C-320/00 *Lawrence* (Council employees): 'However, where... the differences identified in the pay conditions of workers performing equal work or work of equal value cannot be attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment. Such a situation does not come within the scope of Article 141(1) EC. The work and the pay of those workers cannot therefore be compared on the basis of that provision'

Importance: Employers can avoid the obligation of equal pay by outsourcing

## DISCUSSION IN GROUPS

### Questions

#### GROUP 1

- What are the legal issues/questions facing equal pay cases domestically?
  - Law vs facts
  - Substantive vs procedural
- Can/should they be brought to the CJEU?

#### GROUP 2

- Individual litigation tends to lead to individualized change. How can one operationalize the legal principle of equal pay to achieve structural change?
- What is the role of law (hard law vs soft law) and of other tools?