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## Closing the Gender Pay Gap in the European Union: The Equal Pay Guarantee Across the Member-States

Jarrold Tudor

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# CLOSING THE GENDER PAY GAP IN THE EUROPEAN UNION: THE EQUAL PAY GUARANTEE ACROSS THE MEMBER-STATES

JARROD TUDOR\*

## ABSTRACT

The decision by the people of the United Kingdom (“U.K.”) to leave the European Union (“Brexit”) has created a renewed interest by global employers in the twenty-eight-member common market. The European Union has been constitutionally committed to the concept of equal pay based on gender since its inception in 1957, where the guarantee was first enshrined in the Treaty of Rome (1957). However, Article 157 (ex 141, 119) of the Treaty on the Functioning of the European Union (“TFEU”) is brief on the specifics as to what constitutes pay for the purposes of equal treatment. The European Court of Justice and other national courts have been called upon to address various issues including retirement contributions, part-time workers, life partnerships, gender reassignment, retirement ages, in-kind benefits, sick leave benefits, maternity leave, military leave, indirect discrimination, longevity pay, professional qualifications, and general criteria for compensation. Despite the European Court of Justice’s broad definition of what constitutes pay for the purposes of gender equality, employers and member-state governments do enjoy some exceptions and discretion regarding the application of the equal pay guarantee.

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## I. INTRODUCTION

First, this Article provides the international business and human resources practitioner with a broad knowledge as to how the equal pay doctrine is applied in Europe. Second, this Article analyzes the dominant themes found in a survey of the European Court of Justice's jurisprudence, while also identifying the threats facing the equal pay doctrine in the European Union. Lastly, this Article provides suggestions as to how to remediate the identified threats to the equal pay doctrine.

### A. EQUAL PAY AS A RIGHT AND THE EUROPEAN UNION

The European Union ("EU") has been committed to equality since the 1957 Treaty of Rome.<sup>1</sup> Generally, sex discrimination has always been prohibited in the TFEU.<sup>2</sup> Specifically, Article 157 (ex 143, 119) of the TFEU prohibits disparate treatment between men and women in regard to equal pay on an economic basis.<sup>3</sup> However, in contrast to many provisions of the TFEU, Article 157 (ex 141, 119) does not maintain an interstate equality requirement and is, thus, independent of the provisions of the TFEU that concern the free movement of workers.<sup>4</sup> Regardless, the principle of pay equality is broadly interpreted in EU law.<sup>5</sup> The scope of EU law on the subject of pay and sex equality has altered the legal landscape of Europe, which includes both the EU and the European Free Trade Area ("EFTA").<sup>6</sup> Together, the EU and the EFTA comprise the European Economic Area ("EEA").<sup>7</sup> Gender equality is a fundamental right within the EEA.<sup>8</sup> Even Switzerland, which is not a member-state of the EEA, has adopted an equal pay policy in regard to gender equality.<sup>9</sup> This is an important reality because the entire EEA must follow the precedents of the European Court of Justice ("ECJ").<sup>10</sup>

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1. Jill Rubery, *Pay, Gender and the Social Dimension to Europe*, 30 BRIT. J. INDUS. REL. 605, 605 (1992).

2. MARGOT HORSPOOL & MATTHEW HUMPHREYS, EUROPEAN UNION LAW 513 (Nicola Padfield, ed., 7th ed. 2012).

3. *Id.*

4. JAMES D. DINNAGE & JEAN-LUC LAFFINEUR, THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION 1016 (3d ed. 2012).

5. Ingeborg Heide, *Sex Equality and Social Security: Selected Rulings of the European Court of Justice*, 143 INT'L LAB. REV. 299, 339 (2004).

6. *Id.* at 299.

7. *Id.*

8. *Id.* at 338.

9. Roland Erne & Natalie Imboden, *Equal Pay by Gender and by Nationality: A Comparative Analysis of Switzerland's Unequal Equal Pay Policy Regimes Across Time*, 39 CAMBRIDGE J. ECON. 655, 655 (2015).

10. Heide, *supra* note 5, at 299.

Experienced by men and women, differential pay has negatively affected women in the labor market and, in turn, has also affected the general power and status of women.<sup>11</sup> Lower pay for women on a comparable work level has also increased the economic dependence of women.<sup>12</sup> By the mid-1970s, one of the most obvious employment trends in Europe was the integration of women into the workforce, especially during the second half of the Twentieth Century.<sup>13</sup> A number of EU member-states were experiencing an increase in activism by women which eventually led to the adoption of progressive legislation on the subject of equal pay for women.<sup>14</sup> It, thus, became clear to EU officials that equal pay legislation was a must, but there existed some debate as to the best process and form for doing so.<sup>15</sup> When crafting the legislation, EU officials engaged in purposeful discussions with leading women's organizations.<sup>16</sup>

The concept of equal pay has been called a human right.<sup>17</sup> The definition of a gender pay gap is the difference between men's and women's average gross earnings, divided by the average of men's gross earnings.<sup>18</sup> Equal pay, as a doctrine, is a legal requirement in most countries with liberal market economies.<sup>19</sup> There is little doubt that the anti-discrimination legislation has pushed to narrow the gender pay gap over the last forty years.<sup>20</sup> However, public policies to narrow the gaps in labor realities between men and women have a controversial past.<sup>21</sup> The social systems of the EU member-states were developed over many years with different cultures, traditions, and history, yet only recently did these social systems begin to divorce themselves from the traditional models of male and female roles.<sup>22</sup> Regardless of this shift, however, women still engage in more domestic work than their male counterparts.<sup>23</sup> The 1975

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11. Virginija Grybaite, *Analysis of Theoretical Approaches to Gender Pay Gap*, 7 J. BUS. ECON. MGMT. 85, 85 (2006).

12. *Id.*

13. TIM BALE, *EUROPEAN POLITICS: A COMPARATIVE INTRODUCTION* 31 (3d ed. 2013).

14. FRANCESCO DUINA, *THE SOCIAL CONSTRUCTION OF FREE TRADE* 110 (2006).

15. *Id.* at 113.

16. *Id.* at 114.

17. Mark Smith, *Social Regulation of the Gender Pay Gap in the EU*, 18 EUR. J. INDUS. REL. 365, 376 (2012).

18. *Id.* at 366.

19. Erne & Imboden, *supra* note 9, at 658.

20. Marie Drolet & Karen Mumford, *The Gender Pay Gap for Private-Sector Employees in Canada and Britain*, 50 BRIT. J. INDUS. REL. 529, 529 (2012).

21. David Neumark & Wendy A. Stock, *The Labor Market Effects of Sex and Race Discrimination Laws*, 44 ECON. INQUIRY 385, 385 (2006).

22. Heide, *supra* note 5, at 299-300.

23. BALE, *supra* note 13, at 33.

Equal Pay Directive (“Directive 75/117”) was the result of the changing social systems and the activism felt in Europe, which requires equal pay for work of equal value and allows for comparisons of pay rates across sex-segregated populations.<sup>24</sup> Since the EU adopted the Equal Pay Directive, jurisprudence from the ECJ has modified and broadened the scope of the general equal pay doctrine.<sup>25</sup>

The integration of Europe, through EU law, has further pushed the debate on social progress across the continent.<sup>26</sup> The EU has been a force in promoting gender equality.<sup>27</sup> This is difficult to do given that reward systems can be cultural and vary across member-states in regard to the “width of pay differentials, ranking of jobs by pay, and the various principles of pay determination.”<sup>28</sup> Although the EU has shown a strong constitutional commitment to gender equality, the political debate on the subject still exists.<sup>29</sup> Despite the continued integration of Europe and the promotion of gender equality, there is comment that perhaps a one-size-fits all approach to gender equality may not work in the EU.<sup>30</sup> As additional member-states have joined the EU, the desire for strengthened legislation to combat pay inequality has diminished.<sup>31</sup> Additionally, several decades of equal pay legislation and caselaw have not completely erased the gender pay gap across the member-states.<sup>32</sup> One study found that, although the gender gap has been stable in the EU, the gap varies from a high of almost thirty percent in Estonia to 4.4% in Slovenia.<sup>33</sup> Across the EU, women make an average of 17.4% less than their male counterparts.<sup>34</sup> However, the financial crisis in Europe has, ironically, been credited with somewhat closing the gender-based equality gap.<sup>35</sup>

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24. Smith, *supra* note 17, at 367.

25. Jacqueline O’Reilly et al., *Equal Pay as a Moving Target: International Perspectives on Forty-Years of Addressing the Gender Pay Gap*, 39 CAMBRIDGE J. ECON. 299, 300 (2015).

26. Rubery, *supra* note 1, at 605.

27. Smith, *supra* note 17, at 367.

28. Rubery, *supra* note 1, at 606.

29. Christopher D. Totten, *Constitutional Precommitments to Gender Affirmative Action in the European Union, Germany, Canada and the United States: A Comparative Approach*, 21 BERKELEY J. INT’L L. 27, 60 (2003).

30. Smith, *supra* note 17, at 368.

31. *Id.* at 365.

32. *Id.*

33. *Id.* at 366.

34. Joanne Deschenaux, *Pay Gaps Persist Throughout Europe*, 54 HUM. RES. MAG. 97, 97 (2009).

35. Smith, *supra* note 17 at 366.

## B. EQUAL PAY AND THE IMPACT OF DISCRIMINATION

In the world of employment, women workers face several hurdles and disadvantages that can affect salary. One problem women face in regard to pay inequality is occupational segregation which not only affects women in Europe, but around the world.<sup>36</sup> Such a reality has been called “crowding” whereby women are limited to only a few occupations and, thus, the labor supply is higher than normal which pushes down the salaries of workers in those occupations.<sup>37</sup> Some crowding seems to exist in careers that are focused on caring, nurturing, and service, whereas men dominate manual and technical occupations.<sup>38</sup> There is evidence that women are more affected by a poor economy than men if layoffs, outsourcing, and stagnant wages are taken into consideration.<sup>39</sup> There also exists evidence that women are disadvantaged by claims of being over-educated, over-skilled, and/or assigned to a less demanding or unstable position.<sup>40</sup> In contrast, women are more likely to interrupt their careers and, subject to the prevailing social model, may accumulate less training, education, and experience; therefore, limiting their advancement.<sup>41</sup> In turn, employers may be less attracted to female workers, not because of their gender, but because of the reality that the employer may be required to invest more in the female worker through advanced training and education.<sup>42</sup> Moreover, there is a lack of international opportunities for women.<sup>43</sup> However, there is comment that the closure of the education gap has also helped close the gender pay gap.<sup>44</sup> Women are more likely to be in positions whereby they can opt out of work and experience the double burden of motherhood and work.<sup>45</sup> Relatedly, the gender pay gap may be the result of the undervaluing of work traditionally performed by women.<sup>46</sup> These differences in how work is valued affect women even in retirement, because

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36. Grybaite, *supra* note 11, at 89.

37. *Id.* at 87.

38. *Id.* at 89.

39. Elizabeth D. MacGillivray et al., *Legal Developments: Gender Issues Now, and Increasingly in the U.S. and EU Spotlight*, 28 GLOBAL BUS. & ORG. EXCELLENCE 79, 83 (2009).

40. Hugo Figueiredo et al., *Gender Pay Gaps and the Restructuring of Graduate Labour Markets in Southern Europe*, 39 CAMBRIDGE J. ECON. 565, 567 (2015).

41. Grybaite, *supra* note 11, at 86.

42. *Id.*

43. Margaret Linehan, *Senior Female International Managers: Empirical Evidence from Western Europe*, 13 INT'L J. HUM. RES. MGMT 802, 813 (2002).

44. O'Reilly et al., *supra* note 25, at 302.

45. MacGillivray et al., *supra* note 39, at 81.

46. O'Reilly et al., *supra* note 25, at 301.

retirement benefits are calculated largely based on wages earned while working.<sup>47</sup>

Despite the fact that women make up a large share of the workforce, pay inequality persists and wage discrimination continues.<sup>48</sup> There exists comment that human capital attributes play a role in the development of gender pay gaps.<sup>49</sup> Where these pay gaps exist between men and women, but are not explained by human capital, it is likely that the pay gap is due to discrimination.<sup>50</sup> Economic pay discrimination exists where two people are paid different amounts, yet possess the same qualifications.<sup>51</sup> According to Eyraud, a social science researcher, there are three “stages” in regard to the scope and application of equal pay legislation used to attack economic pay discrimination, including equal pay for the same job, equal pay for jobs of comparable worth, and apply equal pay legislation to combat indirect discrimination whereby unequal value is placed on structural differences associated with the nature of a female worker’s employment.<sup>52</sup> Comparable worth examines equality across different jobs, even if the jobs have very different tasks.<sup>53</sup> One problem associated with equal pay legislation is quantifying and calculating the value of equal pay in regard to different occupations.<sup>54</sup> The equal pay for equal work standard could be applied to work with an equal market value.<sup>55</sup> If, however, a reviewing court or member-state (through the use of legislation) wishes to use comparable worth as a standard, such an argument is only valid if one believes the pay inequity in question is a result unrelated to human capital requirements.<sup>56</sup> Job evaluation studies can assist reviewing courts in determining value differences and similarities between different jobs with comparable worth.<sup>57</sup>

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47. Grybaite, *supra* note 11, at 85.

48. *Id.*

49. Figueiredo et al., *supra* note 40, at 566.

50. Grybaite, *supra* note 11, at 86.

51. *Id.*

52. Francois Eyraud, *Equal Pay and the Value of Work in Industrialized Countries*, 132 *INDUS. LABOUR REV.* 33, 34 (1993).

53. Paula England, *The Case for Comparable Worth*, 39 *Q. REV. ECON. & FIN.* 743, 743-44 (1999) (in her work, the author noted that the countries studied including Sweden, Denmark, and Finland are members of the EU and EEA, and that Norway and Iceland are members of EFTA and the EEA).

54. Eyraud, *supra* note 52, at 33-34.

55. *Id.* at 41.

56. England, *supra* note 53, at 748.

57. *Id.* at 744.



### C. ENFORCEMENT OF THE EQUAL PAY DOCTRINE IN THE EUROPEAN UNION

It is not simply the governments of the member-states, the EU itself, or the ECJ and national courts that are responsible for engaging in activities to promote equal pay for equal work, although pay regulation has been credited with narrowing the pay gap between men and women in some member-states.<sup>58</sup> The use of trade groups and social partners may be chief allies in efforts to reduce the pay gap between men and women in the EU.<sup>59</sup> The presence of trade unions has narrowed the pay gap between men and women through collective bargaining agreements which adhere to the concept of equal pay.<sup>60</sup> Trade unions in the U.K. have scored especially significant victories for workers in regard to equal pay.<sup>61</sup> Problematically, gains made by women through collective bargaining agreements have not been converted into victories for women in non-unionized sectors.<sup>62</sup>

Moreover, although firms themselves have been associated with causing gender pay gaps, there are efforts to find ways to lure new parents back to work in an attempt to prevent the loss of valuable talent.<sup>63</sup> There exists an incentive for firms to take such an affirmative approach, because failing to address pay inequality can lead to expensive litigation, even in the EU.<sup>64</sup> Gains associated with the retention of female employees have been supported by firms providing child care, flexible hours, and maternity leave.<sup>65</sup> Female workers are having fewer children and those with advanced degrees are becoming less likely to have any children.<sup>66</sup> When firms get women involved in more senior levels of work, employers protect themselves against potential talent shortages occurring in the upcoming years.<sup>67</sup> More importantly, as women progress in their careers, their financial positions improve and they become more motivated as the projects they work on become more interesting.<sup>68</sup>

In regard to the EU specifically, there is argument that, regionally, the Scandinavian members of the EEA have done the best at integrating and

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58. Rubery, *supra* note 1, at 613.

59. Smith, *supra* note 17, at 376.

60. *Id.* at 370.

61. Hazel Conley, *Trade Unions, Equal Pay, and the Law in the UK*, 35 *ECON. & INDUS. DEMOCRACY* 309, 309 (2014).

62. *Id.* at 311.

63. MacGillivray et al., *supra* note 39, at 79; Drolet & Mumford, *supra* note 20, at 529-30.

64. O'Reilly et al., *supra* note 25, at 302.

65. See MacGillivray et al., *supra* note 39, at 82-83.

66. *Id.* at 80.

67. *Id.* at 82.

68. *Id.* at 81.

protecting women in the employment world.<sup>69</sup> Regardless of whether firms, governments, trade unions, or individuals attempt to close the gender pay gap, the gap will not close until the EU and the member-states have matching priorities on the subject matter.<sup>70</sup> One estimate is that full pay equality will not be achieved until 2058.<sup>71</sup>

Problematically, gender pay differences have been studied primarily on a country-by-country basis.<sup>72</sup> Despite the fact that twenty-eight member-states that make up the EU are tied together by a common body of law, international comparisons on the gender pay gap are complicated and require not only an examination of law but also an inquiry into employment structures and reward systems in each country.<sup>73</sup>

Comparatively, the EU has attacked indirect discrimination with its constitutional provisions, whereas the United States has a legal corpus that only applies to purposeful discrimination.<sup>74</sup> The treaties that have formed the constitutional basis of the EU have always maintained an article (Article 157, ex 143, 119) concerning gender equality.<sup>75</sup> The United States Constitution does not reference gender equality.<sup>76</sup> Thus, in the United States, a lack of constitutional commitment to gender equality has made it difficult for the United States Supreme Court to promote gender equality and support affirmative action.<sup>77</sup> However, decisions by the Supreme Court have gone a long way in eliminating the debate on gender equality through the Court's use of a high level of judicial scrutiny applied to government policies that create inequality of the sexes.<sup>78</sup> This is not to say that the constitutional commitment the EU has made to pay equality is not without criticism. There is comment that the "soft law" approach that the EU has taken has allowed for too much flexibility for each member-state as they are free to craft their own implementing legislation which meets their specific conditions and needs.<sup>79</sup> One argument is that the EU's use of Directives as a legislative tool represents a piecemeal approach and is not effective at narrowing the pay separation between men and women in the EU.<sup>80</sup>

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69. BALE, *supra* note 13, at 31-32.

70. Smith, *supra* note 17, at 368.

71. O'Reilly et al., *supra* note 25, at 302.

72. Rubery, *supra* note 1, at 606.

73. *Id.*

74. Totten, *supra* note 29, at 27.

75. *Id.*

76. *Id.* at 52.

77. *Id.* at 28.

78. *Id.* at 52, 61.

79. Smith, *supra* note 17, at 368.

80. Rubery, *supra* note 1, at 618.

## II. THE PURPOSE OF THIS ARTICLE

The principle purpose of this Article is to discover the various forms of compensation and remuneration that qualifies under the term “pay,” pursuant to Article 157 (ex 141, 119) according to the caselaw of the ECJ. Second, this Article seeks to determine what discretion a member-state has when structuring its pension systems. Third, this Article seeks to acquaint the reader, including international employers and employees, with the various rules concerning the right to equal pay in the EU, which includes Article 157 (ex 141, 119) and various EU Directives. Fourth, and lastly, this Article wishes to provide suggestions to the EU regarding how to further strengthen the right to equal pay for equal work across the various member-states that constitute the EU.

## III. THE DECISIONS OF THE ECJ REGARDING THE RIGHT TO EQUAL PAY

The decisions by the ECJ on the topic of equal pay includes a wide variety of topics including covering the scope of employment within the EU based on both intentional and unintentional discrimination by both member-states and employers. The ECJ has made decisions concerning the definition of pay, pay equality, retirement benefits, maternity leave, redundancy pay, pension rights, service credits, government social policy, public servant status, and collective bargaining agreements.

### A. APPLICATION OF ARTICLE 157 AND EQUAL PAY FOR EQUAL WORK STANDARD

Article 157 (ex 141, 119) requires that employers operating within EU member-states pay their employees equally, based on gender, for equal work or work of equal value.<sup>81</sup> The quintessential case that evaluates

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81. Article 173 (ex 157 TEC) states:

1. The Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union's industry exist. For that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at: - speeding up the adjustment of industry to structural changes, - encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings, - encouraging an environment favourable to cooperation between undertakings, - fostering better exploitation of the industrial potential of policies of innovation, research and technological development.
2. The Member States shall consult each other in liaison with the Commission and, where necessary, shall coordinate their action. The Commission may take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.
3. The Union

Article 157 is *Defrenne v. SABENA*.<sup>82</sup> The most important aspect of the *Defrenne* case was that the ECJ found the guarantees under Article 157 to be directly effective against the member-states and employers that operate within the member-states, thus requiring the several national courts to recognize its protections even if the legislatures of the member-states and/or the legislative branches of the EU had not acted accordingly.<sup>83</sup> More problematically, especially for plaintiffs unlike Ms. Defrenne, as the facts of the case at bar reflect, the direct effect condition does not apply to plaintiffs that might file actions against their employers for retroactive violations unless they had already filed at the time of the *Defrenne* decision (obviously, plaintiffs could file freely for violations occurring after the *Defrenne* decision of 1976).<sup>84</sup>

The *Defrenne* plaintiff was an airline stewardess who, between 1961 and 1968, was paid noticeably less than her male counterparts.<sup>85</sup> In 1968, however, pursuant to a provision in the collective bargaining agreement that covered her employment (SABENA), she left her position because she reached the age of forty.<sup>86</sup> Shortly after her mandatory retirement, she filed a claim in a Belgian court for back pay, pursuant to Article 157, due to her lower and disparate pay in relation to her male co-workers.<sup>87</sup>

The ECJ spent most of its opinion discussing the scope and merits of Article 157 (ex 141, 119).<sup>88</sup> Specifically, one of the chief responsibilities of national courts, and the ECJ itself, is to enforce Article 157 (ex 141, 119) to ensure that firms and member-state governments that have adhered to its requirements do not suffer a comparative disadvantage against firms and

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shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of the Treaties. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, may decide on specific measures in support of action taken in the Member States to achieve the objectives set out in paragraph 1, excluding any harmonisation of the laws and regulations of the Member States. This Title shall not provide a basis for the introduction by the Union of any measure which could lead to a distortion of competition or contains tax provisions or provisions relating to the rights and interests of employed persons.

Consolidated Version of the Treaty on the Functioning of the European Union art. 173, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

82. Case 43/75, *Defrenne v. SABENA*, 1976 E.C.R. 0455.

83. *Id.* ¶ 2 (“Ruling”).

84. *Id.* ¶ 4.

85. *Id.* ¶ 2 (“Grounds”).

86. *Id.* ¶ 26. The Court, however, did not deliver an opinion on Ms. Defrenne’s mandatory retirement.

87. *Id.* ¶ 7.

88. *Defrenne*, E.C.R. 0455, ¶ 1 (“Ruling”).

member-state governments that have not followed its mandates.<sup>89</sup> Secondly, the requirement of equal pay is important to the social progress and improved standard of living missions behind the EU.<sup>90</sup> Regardless, the ECJ stated that national courts in the EU must guarantee that during the process of harmonizing EU law, Article 157 (ex 141, 119) is recognized.<sup>91</sup> Additionally, the ECJ commented that national courts in the EU must confirm that the protections of Article 157 (ex 141, 119) are afforded even when collective bargaining agreements dictate otherwise.<sup>92</sup>

In the end, although the ECJ did not specifically state as such, Ms. Defrenne and plaintiffs that had already filed claims at the time of the decision, could recover for back pay if they were successful in their claims because the provisions of Article 157 (ex 141, 119) were to be fully recognized by January 1, 1962.<sup>93</sup>

In *Fletcher v. Clay Cross Limited*, the British Court of Appeals attempted to mesh the United Kingdom's Equal Pay Act of 1970 with Article 157 (ex 141, 119).<sup>94</sup> The Plaintiff, Ms. Fletcher, was working as a sales clerk with two others in the same position, a man and another woman, for less pay than her male counterpart, but was paid the same amount as her female counterpart.<sup>95</sup> Initially, she was paid eight pounds less per week than her newly hired male counterpart because the latter would not accept less than forty-three pounds per week, which was what he was making with his old employer.<sup>96</sup> Shortly after the male's hiring, the employer raised all wages by six pounds per week, which still left the disparity in place at eight pounds per week.<sup>97</sup> The defendant firm then raised the wages of the two women, but not the male employee, by almost two and one half pounds per week, pursuant to a study of the value of work at the workplace.<sup>98</sup> It was at this point that Ms. Fletcher brought a claim of pay discrimination against her employer under the British Equal Pay Act.<sup>99</sup>

All three Judges wrote opinions that were unanimous in finding that Ms. Fletcher's employer had violated the Equal Pay Act of 1970.<sup>100</sup> Lord

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89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *See id.* ¶ 2.

94. *Fletcher v. Clay Cross Ltd.*, 1978 C.M.L.R. 1.

95. *Id.* at 2.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 2.

100. *Fletcher*, C.M.L.R. 1, at 6, 10, 13.

Denning found that there were no material differences between Ms. Fletcher and her male counterpart that would justify the disparity in salary.<sup>101</sup> Such arguments made by the employer to justify the disparity in pay, such as the lack of a suitable labor pool and/or the higher amount of salary was required because it was equal to what the male worker was making at his old place of employment were immediately discounted as unsuitable excuses.<sup>102</sup> Additionally, Lord Denning borrowed from American jurisprudence on the American Equal Pay Act of 1963 in holding that a British employer could be held responsible for a violation, even if it was not the employer's goal to discriminate.<sup>103</sup>

Lord Lawton, after extensive recitation of both British and American jurisprudence on the issue of equal pay based on gender, found that even if the employer were able to use, as a justification, the lack of a labor pool for the sales clerk position, a labor shortage did not exist in this particular case when three applicants applied for the job but only one was interviewed and hired (the male applicant).<sup>104</sup> Perhaps most importantly, Lord Lawton noted that although British and American jurisprudence allows for grounds to pay men and women disparately if unrelated to gender, the United Kingdom Equal Pay Act disallows such grounds.<sup>105</sup> Relatedly, both Lord Denning and Lord Lawton stressed the need to keep domestic law and TFEU law harmonious.<sup>106</sup>

Lord Browne similarly held that although it was not the intent of the employer to discriminate on the basis of gender when paying Ms. Fletcher and the male counterpart, the very effect of disparate pay leads to a violation of the British law.<sup>107</sup>

## B. INDIRECT DISCRIMINATION

In one of its more prescriptive cases, *Regina v. Seymour-Smith and Perez*, four prominent questions were raised and answered by the ECJ regarding the doctrine of equal pay for equal work.<sup>108</sup> As one might imagine, the use of statistics is an extremely effective way to show that a member-state's policy has a disparate impact on men or women. In *Seymour-Smith & Perez*, while answering the first question, the ECJ stated

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101. *Id.* at 5

102. *Id.* at 4-5.

103. *Id.* at 5.

104. *Id.* at 8.

105. *Fletcher*, C.M.L.R. 1, at 8.

106. *Id.* at 5, 9.

107. *Id.* at 12.

108. Case C-167/97, *Regina v. Seymour-Smith*, 1999 E.C.R I-00623.

that to show a member-state's policy reflects indirect discrimination and thus a violation of Article 157 (ex 141, 119), a national court must verify that the statistics reflect that a considerably smaller percentage of women than men are able to fulfill the requirements of that member-state's policy.<sup>109</sup> However, even if indirect discrimination is shown through a statistically considerable difference, if a member-state can show that the policy is justifiable by other objective factors, none of which are related to gender, then indirect discrimination does not exist.<sup>110</sup>

According to the ECJ, the first step in determining whether indirect discrimination exists in violation of Article 157 (ex 141, 119) is to discover whether the policy in question creates a more unfavorable impact on women than men.<sup>111</sup> Second, when using statistics, a reviewing court must determine that there are proper proportions of men and women to compare in regard to the policy in question; however, it is not sufficient to look at the number of people affected because that might depend on the number and percentage of people working in the member-state.<sup>112</sup> Third, the national court must establish that the statistics reveal a relatively constant disparity between men and women over a long period of time to find a case of sex-based discrimination.<sup>113</sup> Specific to the facts in *Seymour-Smith & Perez*, the ECJ found that when a member-state policy affects 77.4% of men, but only 68.9% of women, such figures do not show that a considerably smaller percentage of women are more unfavorably disadvantaged, which reflects indirect discrimination in violation of Article 157 (ex 141, 119).<sup>114</sup>

The plaintiffs in *Seymour-Smith & Perez* believed that they were unfairly dismissed and submitted a claim to a U.K. administrative court assigned with determining whether an employee had been unfairly dismissed, and if such a finding resulted, was charged with issuing one of two remedies, including reinstatement or compensation.<sup>115</sup> According to U.K. law at the time, an employee who believed he or she has been terminated unjustly could petition the administrative court, so long as the employee had maintained employment for a total of two years.<sup>116</sup> Both plaintiffs had worked for their employers for roughly one and one-half years, but had not worked the full two years as required by U.K. law, which

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109. *Id.* ¶ 65 (“Grounds”).

110. *Id.*

111. *Id.* ¶ 58.

112. *Id.* ¶ 59.

113. *Id.* ¶¶ 61-62.

114. *Regina*, E.C.R I-00623 ¶¶ 63-65.

115. *Id.* ¶¶ 2-5 (“Ruling”).

116. *Id.* ¶ 4.

would enable them to petition the administrative court.<sup>117</sup> The plaintiffs argued that Article 157 (ex 141, 119) was violated by the U.K.'s two-year policy in that it adversely affected more women than men.<sup>118</sup>

The second significant question asked in *Seymour-Smith & Perez* was whether a judicial award of compensation in an unfair dismissal case was within the scope of pay pursuant to Article 157 (ex 141, 119).<sup>119</sup> Although the plaintiffs contended that this question should be answered in the affirmative, the U.K. government suggested that such compensation was outside the scope of pay and was merely a remedy for an employer's breach of a working condition.<sup>120</sup> The ECJ held, however, that Article 157's definition of pay included various forms of consideration, even indirect consideration, as the result of employment.<sup>121</sup> While examining its own jurisprudence, the ECJ remarked that it had previously held that compensation may be received when an employee is terminated.<sup>122</sup> To answer the second question, the ECJ held that compensation from an administrative court, in the form of both an actual award and a compensatory award, is designed to give the employee what he or she would have received had the employer not unfairly terminated his or her employment, and was within the scope of the term "pay" for purposes of Article 157 (ex 141, 119).<sup>123</sup> On this point, the ECJ further strengthened its holding by stating that compensation received through a statutory right, such as the case here in the form of a judicial award, would be treated the same as if the compensation was directly received by an employee pursuant to an employment contract.<sup>124</sup>

The third question posed to the ECJ concerned technical grounds of law and the separation of Article 157 (ex 141, 119) and Directive 76/207.<sup>125</sup> According to the ECJ, when an applicant is seeking reinstatement from an administrative court for unfair dismissal, Directive 76/207, which pertains more so to working conditions including the possibility of dismissal and the right to take up employment, applies.<sup>126</sup> However, when an employee who believes he or she has been unfairly dismissed and is seeking financial

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117. *Id.* ¶¶ 11, 12.

118. *Id.* ¶ 54 ("Grounds").

119. *Id.* ¶ 20.

120. *Regina*, E.C.R I-00623, ¶¶ 21-22.

121. *Id.* ¶ 23.

122. *Id.* ¶ 25.

123. *Id.* ¶¶ 26-28.

124. *Id.* ¶ 29.

125. *Id.* ¶¶ 31, 35-36.

126. *Regina*, E.C.R I-00623, ¶ 37.



compensation for lost remuneration, Article 157 (ex 141, 119) applies.<sup>127</sup> In the case at bar, because the plaintiffs were seeking financial compensation, the case should be governed by Article 157 (ex 141, 119) 7.<sup>128</sup>

The fourth question in *Seymour-Smith & Perez* centered on what would substantiate an objective justification by a member-state for the purpose of indirect discrimination.<sup>129</sup> The ECJ stated that if a member-state is able to show that its social policy, espoused in legislation, is suitable and necessary for achieving that aim, then even if the legislation far more negatively affects women than men, the legislation in question does not violate Article 157 (ex 141, 119).<sup>130</sup> In regard to the facts of the case at bar, the ECJ found that the social policy in question, creating a two-year time period before an employee can bring a claim for unfair dismissal to encourage the recruitment of employees who wish to stay with the employer for a long period, was a legitimate aim for a member-state's social policy.<sup>131</sup> Regardless of the legitimate aim, a member-state must take into account other means by which to achieve that social policy.<sup>132</sup> Although the ECJ specified that member-states should have broad discretion when determining the best legislative methods by which to achieve its social and employment policies, this discretion cannot be exercised in a way that frustrates the spirit of EU law.<sup>133</sup> In such cases, the member-state has the burden of proof to show that its use of discretion when developing its social policy through legislation is not related to discrimination based on gender and must also justify the means chosen to achieve its legislative aims.<sup>134</sup> Here, the ECJ believed that a mere concern in regard to the recruitment of employees was not enough to justify the two-year rule in British law and immunize this legislative aim by a blanket finding that it is unrelated to gender discrimination.<sup>135</sup>

### C. RETIREMENT PLANS AND CONTRIBUTIONS

In another early case, *Worringham v. Lloyd's Bank*, the ECJ not only addressed the issue of retirement contributions as a form of "pay" in regard

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127. *Id.* ¶ 41.

128. *Id.* ¶ 36.

129. *Id.* ¶ 66.

130. *Id.* ¶ 69.

131. *Regina*, E.C.R I-00623, ¶¶ 70-71.

132. *Id.* ¶ 72.

133. *Id.* ¶¶ 74-75.

134. *Id.* ¶ 77.

135. *Id.* ¶ 76.

to Article 157 (ex 141, 119), but also the temporal effect of an ECJ decision, finding an employer's breach of Article 157 (ex 141, 119).<sup>136</sup> The plaintiffs in *Worringham* believed that their employer violated the tenets of Article 157 (ex 141, 119) and Directives 75/117 and 76/207 because the employer required male employees to contribute 5% toward their pension plans, paid the male employees an extra 5%, yet immediately deducted that same additional 5% of salary.<sup>137</sup> Additionally, the plaintiffs claimed that the employer moved that money directly into the pension fund while female employees were not required to pay 5% toward their pension account but were not paid the additional 5% as the male employees were nor was 5% deducted from the female workers' pay.<sup>138</sup> Although this dual retirement contribution system did not yield a direct difference in regard to the pension system, the additional 5% paid to the male employees affected other benefits associated with employment including redundancy payments, unemployment benefits, family allowances, contributions equivalent premiums, and mortgage and credit facilities.<sup>139</sup>

The ECJ made it clear that pension contributions are considered within the scope of the term "pay" for the purposes of Article 157 (ex 141, 119), which includes ordinary wages and salaries, cash, and in-kind contributions that an employee receives either directly or indirectly from an employer.<sup>140</sup> Furthermore, also within the scope of the term "pay" would be the benefits that accrue from having a larger salary, even if that additional salary is deducted from a worker's take-home pay because that additional salary increases other salary-related benefits and/or social benefits.<sup>141</sup> Additionally, the ECJ found the employer to have violated Directive 75/117 in implementing the dual retirement contribution system as that Directive applies to the same work in which the male and female employees were engaged in *Worringham*.<sup>142</sup>

Given that *Worringham* was an early case, the ECJ was charged with determining whether Article 157 (ex 141, 119) had direct effect, meaning that member-states had to adhere to the principle of equal pay for equal work, without implementing legislation when applied to retirement plans.<sup>143</sup>

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136. Case 69/80, *Worringham v. Lloyd's Bank Ltd.*, 1981 E.C.R. 0767, ¶¶ 17, 33 ("Grounds").

137. *Id.* ¶¶ 5, 11.

138. *Id.*

139. *Id.* ¶¶ 6, 7.

140. *Id.* ¶ 14.

141. *Id.* ¶¶ 15, 17.

142. *Id.* ¶ 21.

143. *Worringham*, E.C.R. 0767, ¶ 22.

According to the ECJ, the unequal gross pay, despite the immediate deduction that male workers face for which that amount is contributed to their pension accounts, is an intolerable source of discrimination that Article 157 (ex 141, 119) was envisioned to extinguish.<sup>144</sup> The ECJ held that Article 157 (ex 141, 119) was directly effective and thus member-state governments are charged with making sure the equal pay for equal work doctrine is adhered to within their political boundaries.<sup>145</sup> As well, national courts may rely on Article 157 (ex 141, 119) without implementing legislation to provide relief to plaintiffs when there exists disparity in relation to retirement plans.<sup>146</sup>

Lastly, the ECJ was required to decide whether their holding, that the employer in the case at bar had violated Article 157 (ex 141, 119) and Directive 75/117, would be limited in scope of time so that additional plaintiffs could not come forth alleging gender discrimination in regard to the equal pay for equal work doctrine.<sup>147</sup> The ECJ stated there were two reasons, both required, as to why a judgment should not apply retroactively including that, first, the employers in a similar situation and the member-states were led to believe over a long period of time that their prior discriminatory actions were not violating the tenets of Article 157 (ex 141, 119).<sup>148</sup> Second, there existed policy reasons as to why retroactive effect would not be desirable due to the existence of important questions of legal certainty that could affect many other parties other than the litigants.<sup>149</sup> Regardless, the ECJ found that neither of these conditions existed and refused to place a temporal restriction on their judgment in *Worringham*.<sup>150</sup>

#### D. RETIREMENT PLANS AND AGE DIFFERENCES

The focus of *Barber v. Guardian Royal Exchange* was the difference between the pension ages of men and women and the relationship between a member-state's statutory pension system and a privately managed pension system.<sup>151</sup> In *Barber*, the plaintiffs included an estate and the widow of a deceased employee who was made redundant by his employer at an age whereby he was only eligible for a deferred pension, a statutory redundancy

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144. *Id.* ¶¶ 24-25.

145. *Id.* ¶ 28.

146. *Id.*

147. *Id.* ¶¶ 29-33.

148. *Id.* ¶ 31.

149. *Id.*

150. *Id.* ¶ 33.

151. Case C-262/88, *Barber v. Guardian Royal Exch. Assurance Grp.*, 1990 E.C.R. I-01889.

payment, and an ex gratia payment from his employer.<sup>152</sup> The worker in question, Mr. Barber, was employed by Guardian which maintained a wholly funded pension system with no employee contributions but, according to the provisions of the pension, male workers were not eligible for a pension until age sixty-two, whereas female workers were eligible at age fifty-seven.<sup>153</sup> The statutory pension system, as crafted by the U.K. government, allowed men to retire with a pension at sixty-five and women at sixty.<sup>154</sup> Workers at Guardian, pursuant to the pension system, were eligible for a deferred pension if they had reached at least age forty and had worked for the firm for at least ten years.<sup>155</sup> However, workers facing redundancy could gain an immediate pension at age fifty-five, if male, and fifty, if female, at the time of the redundancy declaration.<sup>156</sup> As for the facts in the case at bar, Mr. Barber was declared redundant at age fifty-two making him eligible only for a deferred pension, yet his female counterpart would have been eligible for an immediate pension under the same circumstances.<sup>157</sup>

The ECJ in *Barber* put forth several rules concerning the interplay between different ages for different work-related benefits and pension systems either crafted by an employer or a member-state. First, the ECJ held that pay associated with a declaration of redundancy is within the scope of the term “pay” pursuant to Article 157 (ex 141, 119).<sup>158</sup> According to the ECJ, compensation related to a finding of redundancy, be it from a contract provision, a statutory provision, or via an ex gratia payment, is still pay for the purposes of Article 119, which requires compensation equality between men and women.<sup>159</sup> In regard to ex gratia payments which an employer makes without an obligation to do so, Article 157 (ex 141, 119) still requires equality.<sup>160</sup> Second, the ECJ stated that pension benefits are included within the scope of Article 157’s term “pay” even if the employer contracts with a private entity to manage the pension scheme.<sup>161</sup> Relatedly, the pension benefits in question are still within the guise of Article 157 (ex 141, 119) despite the fact that the pension corpus is

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152. *Id.* ¶¶ 1-2, 6 (“Grounds”).

153. *Id.* ¶¶ 3, 4.

154. *Id.* ¶ 4.

155. *Id.*

156. *Barber*, E.C.R. I-01889, ¶ 5.

157. *Id.* ¶¶ 2, 6.

158. *Id.* ¶ 20.

159. *Id.* ¶¶ 16, 17.

160. *Id.* ¶ 19.

161. *See id.* ¶ 31.

managed in the form of a trust and administered by trustees which are independent of the employer.<sup>162</sup> The ECJ contended that because the privately-contracted pension system fulfills the same function as a statutory pension system, and also because the contributions paid by employees to the private pension fund in lieu of being paid to the government-sponsored pension system, Article 157 (ex 141, 119) would encompass the former.<sup>163</sup>

The fourth point made by the ECJ in *Barber* may have been the most significant. The ECJ held that in cases whereby an employee is declared redundant, Article 157 is violated if there are different ages assigned to men and women for eligibility for an immediate pension.<sup>164</sup> On the issue of pensions associated with redundancy declarations before the age of pension eligibility, the ECJ was chiefly concerned with transparency in that member-states and that their associated national courts have a responsibility to eliminate all discrimination on grounds of gender, including making sure judicial review was possible and effective.<sup>165</sup> Relatedly, the ECJ charged national courts with assessing and comparing all possible forms of compensation, pursuant to Article 157 (ex 141, 119).<sup>166</sup> The ECJ also found Article 157 (ex 141, 119) directly effective, requiring equality in regard to pension systems; thus, national courts can use Article 157 (ex 141, 119) without implementing legislation from a member-state to hold various forms of compensation systems intolerable when one gender is adversely affected.<sup>167</sup> Furthermore, the ECJ found the privately-contracted pension scheme to violate Article 157 (ex 141, 119) due to the different pension eligibility ages between men and women even if there was an age-eligibility difference associated with the government-sponsored pension system.<sup>168</sup>

#### E. IN-KIND BENEFITS

In a fairly short-winded case, the ECJ held that an employer violates Article 157 (ex 143, 119) if it grants in-kind benefits to male employees upon retirement, but fails to grant the same to female employees.<sup>169</sup> In *Garland v. British Rail*, the ECJ found that Article 157 (ex 141, 119) covered in-kind benefits upon retirement in the form of free travel facilities

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162. *Barber*, 1990 E.C.R. I-01889, ¶ 30.

163. *Id.* ¶¶ 28, 29.

164. *Id.* ¶ 35.

165. *Id.* ¶¶ 33-34.

166. *Id.* ¶ 34.

167. *Id.* ¶¶ 38, 39.

168. *Barber*, 1990 E.C.R. I-01889, ¶ 32.

169. Case 12/81, *Garland v. British Rail Eng'g Ltd.*, 1982 E.C.R. 0359, ¶ 1 (“Ruling”).

on railroads to the spouse and children of former railroad workers.<sup>170</sup> The ECJ found a violation of Article 157 (ex 141, 119) although, pursuant to a contract, the employer was not obligated to provide such benefits to retired workers.<sup>171</sup> The ECJ also commented that the nature of the benefits would be analyzed because there was a clear form of discrimination when male workers were afforded the free travel facilities, considered within the scope of pay for the purposes of Article 157 (ex 141, 119), yet female workers were.<sup>172</sup> Interestingly enough, once the policy was deemed to have violated Article 157 (ex 141, 119), the ECJ did not find it necessary to determine if the employer's policy violated either Directive 75/117 or 76/207.<sup>173</sup>

Directive 2000/78 generally requires equal treatment in matters of employment and occupation, but does not apply to benefits that are the result of a member-state's social security or social protection scheme or a payment from a member-state by which the design is to provide access to employment or the purposes of Article 157 (ex 141, 119).<sup>174</sup> Directive 2000/78 specifically prohibits discrimination on the basis of religion, disability, age, or sexual orientation and requires equal treatment on matters of employment and occupation either by direct or indirect means.<sup>175</sup> This Directive specifically addresses employment conditions, dismissals, pay, and working conditions whereby employers must treat employees equally based on the suspect classifications previously identified, but does not apply to payments made by the governments of member-states which, again, include social security or pension schemes.<sup>176</sup> In *Germany v. Dittrich*, the ECJ was asked to determine if statutorily-mandated assistance provided to public servants by the German government was within the scope of the equal treatment requirements of Directive 2000/78.<sup>177</sup>

The German law in question provided various benefits, such as health care benefits (including benefits for maternity and illness-related conditions) for partners and other family members and to same-sex partners who were government employees.<sup>178</sup> German law, however, was amended to exclude civil partners from the health care benefits provisions.<sup>179</sup>

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170. *Id.* ¶¶ 7, 9 (“Grounds”).

171. *Id.* ¶ 11.

172. *Id.* ¶¶ 4, 5.

173. *Id.* ¶ 12.

174. Cases C-124/11, C 125/11, and C 143/11, *Germany v. Dittrich*, 2012 E.C.R. 00000, ¶¶ 1, 3.

175. *Id.* ¶¶ 4-5.

176. *Id.* ¶ 6.

177. *Id.* ¶ 29.

178. *Id.* ¶¶ 7-11.

179. *Id.* ¶ 12.

According to the ECJ, Directive 2000/78 applies to all employees whether employed in the public or private sectors in regard to pay.<sup>180</sup> As well, the ECJ held that health care benefits afforded to spouses and their family members are generally included within the term “pay” for the purposes of Article 157 (ex 141, 119).<sup>181</sup> However, the ECJ stated that to determine if a benefit acquires the full protection from Article 157, the benefit must be afforded to the worker because of his or her employment and must be paid by the employer, specifically.<sup>182</sup> In *Dittrich*, the ECJ held that because the health care benefits were part of Germany’s statutory regime, and not directly afforded to an employee from an employer, nor did the benefits supplement an existing social benefit, the health care benefits in this case, specifically, were not within the scope of “pay.”<sup>183</sup> Regardless, the ECJ left the national courts to determine if the health care benefits in question, in a case like *Dittrich*, are funded by legislative mandate or by a public employer.<sup>184</sup>

#### F. PART-TIME WORKERS AND PENSIONS

In *Jenkins v. Kingsgate*, the ECJ entertained a referred question from a British administrative court as to whether an employer violated Article 157 (ex 143, 119) by paying part-time workers a lower hourly rate than full-time workers when virtually all part-time workers were female.<sup>185</sup> At one time, Kingsgate, the employer, paid both full-time (those working forty hours per week) and part-time workers the same hourly rate, yet, in 1975, it decided to pay a higher hourly wage to full-time workers.<sup>186</sup> According to British law at the time, specifically the Equal Pay Act of 1970, employers were required to pay men and women equally when “a woman is employed in like work with a man in the same employment.”<sup>187</sup> However, the British administrative court found that such equality was not required between male and female employees when an employer can prove a material difference between the contracts of the male and female workers and that material difference is unrelated to gender.<sup>188</sup> The plaintiff, who was a part-

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180. *Dittrich*, E.C.R. 00000, ¶ 30.

181. *Id.* ¶ 36.

182. *Id.* ¶¶ 37, 40.

183. *Id.* ¶ 41.

184. *Id.* ¶ 43.

185. Case 96/80, *Jenkins v. Kingsgate (Clothing Prods.) Ltd.*, 1981 E.C.R. 0911, ¶¶ 2, 3, 9 (“Grounds”).

186. *Id.* ¶ 6.

187. *Id.* ¶ 3.

188. *Id.* ¶ 4.

time worker, rested much of her case on the fact that all but one part-time employee was male and that male employee had just recently retired and was allowed to return performing brief stints of work.<sup>189</sup>

The ECJ held that a mere difference in hourly pay rates between part-time and full-time workers is not a per se violation of Article 157 (ex 141, 119), assuming that the part-time and full-time pay rates are applied equally to male and female workers in those categories.<sup>190</sup> However, the ECJ hinted that an employer would be required to show that the hourly pay rates were unrelated to sex discrimination and that the same pay rates were objectively justified on grounds such as encouraging full-time employment over part-time employment.<sup>191</sup> The ECJ did, however, state that if an employer cannot show that, where a considerably smaller percentage of women are full-time employees due to the difficulties associated with arranging work schedules, there are reasons for the pay differentials unrelated to gender, Article 157 (ex 141, 119) would be infringed.<sup>192</sup> The ECJ did allow the national courts to decide if the case facts and employer's intention was to treat male and female workers differently through its remuneration policies.<sup>193</sup>

In *Bilka v. Weber von Hartz*, the ECJ put forth several crucial statements about pensions, the differences between part-time and full-time employees, and employees' rights to equal pay for equal work under Article 157 (ex 141, 119).<sup>194</sup> First, the ECJ held pension schemes that are not mandated by a member-state's statutory provision, but instead, as the result of negotiations between a firm and its employees, are within the scope of Article 157's "pay" term.<sup>195</sup> Second, if the private sector firm excludes part-time workers from its pension system, and the pension system affects a far greater number of women than men, the pension system violates the requirements of Article 157 (ex 141, 119), unless the employer can show that the pension scheme is the result of objectively justified factors that are unrelated to gender discrimination.<sup>196</sup> According to the ECJ, this is especially true if, in contrast to men, a much lower percentage of women

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189. *Id.* ¶ 7.

190. *Id.* ¶ 10.

191. *Jenkins*, E.C.R. 0911, ¶¶ 12, 13.

192. *Id.* ¶ 13.

193. *Id.* ¶ 15.

194. Case 170/84, *Bilka v. Weber von Hartz*, 1986 E.C.R. 1607.

195. *Id.* ¶¶ 22-23 ("Grounds").

196. *Id.* ¶ 10.



work full-time, and thus, make up a larger percentage of part-time workers when considering that women have greater difficulties in the work world.<sup>197</sup>

Third, however, if an employer can show that the reason for excluding part-time workers from its pension system was to discourage part-time work and make full-time work more attractive, such a reason would constitute an objective reasonable factor under Article 157, and thus, not constitute a breach of the Article.<sup>198</sup> The ECJ, in the case at bar, agreed with the employer that such a policy, in regard to its pension scheme with the design of promoting full-time work, was a policy irrespective of gender, and thus, appropriate to meet the firm's objective.<sup>199</sup> Interestingly, the respondent firm suggested that part-time employees are less likely to agree to work in the late afternoons and on Saturdays, and in order to ensure an adequate workforce, full-time employment was more likely to allow for coverage of those periods of time.<sup>200</sup> As well, the ECJ stated that the European Commission has suggested that, in regard to the equal pay for equal work doctrine, member-states need not require employers within that member-state to account for the family responsibilities of their workers.<sup>201</sup> The stance by the ECJ and the Commission were in stark contrast to the arguments made by the plaintiff, Ms. Weber, who articulated that women suffer disadvantages in the workplace because of the exclusion of women from full-time work, and that when women take time to care for family members while working part-time, that period of part-time employment should be considered full-time employment for the purposes of an employer's pension scheme.<sup>202</sup> Regardless, the ECJ, agreeing with the European Commission, held that employers are under no obligation to craft a pension scheme that takes into consideration difficulties maintained by those with family obligations.<sup>203</sup>

The ECJ did not dwell much on the facts of its *Bilka* decision. Ms. Weber worked at Bilka, a department store chain, for fifteen years, but only worked full-time for the first eleven years, making her ineligible for a pension.<sup>204</sup> The pension system negotiated between the workers at Bilka and the firm required fifteen years of full-time employment within a

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197. *Id.* ¶ 29.

198. *Id.* ¶¶ 33, 37.

199. *Bilka*, E.C.R. 1607, ¶ 37.

200. *Id.* ¶ 33.

201. *Id.* ¶ 41.

202. *Id.* ¶ 39.

203. *Id.* ¶ 43.

204. *Id.* ¶ 5.

twenty-year period.<sup>205</sup> Although proffered by Bilka, yet without much notice by the ECJ, the firm stated that no discrimination occurred since the great majority (81.3%) of all pensions granted within its group were paid to women and only 72% of all employees at Bilka were women.<sup>206</sup>

Perhaps the best articulation of the scope of direct discrimination in regard to Article 157 (ex 141, 119) is in *Nikoloudi v. OTE*.<sup>207</sup> Pursuant to a collective bargaining agreement in Greece, only females could be part-time cleaners within the framework of a fixed-term contract, though, it was also possible to become a fixed-term contract worker if a cleaner were taking on the dependent of a deceased worker due to family problems resulting from the death.<sup>208</sup> The plaintiff, Ms. Nikoloudi, a female cleaner, was hired as a part-time cleaner from 1978 until 1996, when her contract was converted to full-time, thus, making her eligible for a pension in 1998.<sup>209</sup> She later brought an action in a Greek court alleging violation of Article 157 (ex 141, 119), claiming that since she was limited to only part-time employment for eighteen years, she was disadvantaged, as evidenced by a lower pension payment.<sup>210</sup>

The ECJ first contended that it did not make a difference that no male worker was engaged in the same work as the plaintiff and that she may still bring her claim for a violation of EU law, and, in regard to finding comparisons, the plaintiff need not to find workers engaged in exactly the same form of work to enforce the principle of equality.<sup>211</sup> The defendant, OTE, a labor organization, argued that the part-time cleaner position was justified due to the small physical area needed for cleaning and that the position should be limited only to women to meet their specific needs.<sup>212</sup> Although the ECJ conceded that categories of workers can be reserved specifically for a particular gender and such a designation does not itself create a form of direct discrimination, the disadvantageous treatment of those in that gender-specific work category due to general unfavorable treatment as a worker or in regard to equal pay, does constitute direct discrimination.<sup>213</sup> Problematically for the plaintiff, it was possible for a female worker to seek full-time employment, just as Ms. Nikoloudi had

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205. *Bilka*, E.C.R. 1607, ¶ 4.

206. *Id.* ¶ 7.

207. Case C-196/02, *Nikoloudi v. O.T.E.*, 2005 E.C.R. I-01789.

208. *Id.* ¶ 9 (“Grounds”).

209. *Id.* ¶ 14.

210. *Id.* ¶¶ 16-18.

211. *Id.* ¶¶ 27-28.

212. *Id.* ¶ 33.

213. *Nikoloudi*, E.C.R. I-01789, ¶ 34.

done for the last two years, and, in conjunction with the fact that the same rate of pay existed for both part-time and full-time workers, ECJ found no direct discrimination.<sup>214</sup> Relatedly, the ECJ also found that even if part-time workers were paid a lower rate than full-time workers, but women were still eligible for full-time employment, no direct discrimination would exist so long as the employer could objectively justify the difference in pay between full-time and part-time workers, and that the difference was unrelated to gender.<sup>215</sup> Additionally, despite the fact that part-time workers were paid less than their full-time counterparts, no direct discrimination existed, again, so long as full-time employment was open to women.<sup>216</sup>

Despite its holding on the subject of direct discrimination, the ECJ held that if there is evidence that the gender-specific category of employment, here the reservation of part-time cleaning positions for women, has a disadvantageous effect on a particular gender, a claim of indirect discrimination can be substantiated.<sup>217</sup> However, if an employer (or labor organization) can show that the disadvantageous impact on part-time workers is due to a reality not related to gender, then indirect discrimination does not exist.<sup>218</sup> In regard to indirect discrimination, the ECJ stated that although member-states have flexibility making choices in regard to their social policies and social protection, these social systems cannot bring about discrimination based on gender.<sup>219</sup>

For the ECJ, the length of service question, in regard to qualifying for a state pension, was much more challenging. Here, the ECJ ruled that if the total exclusion of part-time employment for the purpose of calculating the length of service in regard to pension rights affects a much larger percentage of female workers than male workers, such a reality violates Directive 76/207 as a form of indirect discrimination, so long as the employer (or labor organization) cannot objectively justify its practices that create the disparity.<sup>220</sup> Regardless of whether the cause of action is direct or indirect discrimination, however, the ECJ held that an employer (or labor organization) has the burden of proving that when a plaintiff claims that the principle of equal treatment has been infringed any adverse disparity is not due to gender.<sup>221</sup>

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214. *Id.* ¶¶ 36-40.

215. *Id.* ¶ 38.

216. *Id.* ¶ 39.

217. *Id.* ¶ 57.

218. *Id.*

219. *Nikoloudi*, E.C.R. I-01789, ¶ 53.

220. *Id.* ¶ 66.

221. *Id.* ¶ 75.

In *Moreno v. I.N.S.S.*, the ECJ found the Spanish pension system not to be covered by Article 157 (ex 143, 119).<sup>222</sup> According to the ECJ, pension systems that appear to be determined more so by considerations of social policy rather than the relationship between an employer and an employee are not covered by Article 157 (ex 141, 119).<sup>223</sup> More specifically, because the pension system at issue in *Moreno* concerned social policy, member-state organization, and budgetary concerns, and did not apply to one specific category of worker, Article 157 (ex 141, 119) was inapplicable.<sup>224</sup> The Spanish pension law in question created a pension for life when a person reaches 65 years of age, based on contributions for fifteen years.<sup>225</sup> The pension system did provide for part-time workers, so long as the part-time worker contributed sufficiently based on hours worked, which included traditional employment and overtime hours.<sup>226</sup> The plaintiff, Ms. Moreno, applied for a pension upon her retirement at age sixty-six, but was refused eligibility by the Spanish government because she had not fully contributed for fifteen years because she had only worked part-time, four hours per week, for eighteen years.<sup>227</sup> Ms. Moreno, while filing a complaint with the Spanish administrative court, contended that the contribution system punished part-time workers in that they had to contribute for many more years to meet the fifteen-year equivalent rule, and thus, resulted in a form of indirect discrimination because 80% of part-time workers in Spain were female.<sup>228</sup>

As previously stated, the ECJ began its opinion by stating that Article 157 does not apply to a pension scheme which (1) is the creation of statutory authority of the member-state, (2) its creation is based on social policy, and (3) no bargaining exists between the employer and employee(s).<sup>229</sup> However, the ECJ did find the Spanish pension system to violate Directive 79/7 because the system required a proportionally greater contribution by part-time employees in comparison to full-time employees given that the great majority of part-time employees are women.<sup>230</sup> Directive 79/7 requires equal treatment of men and women in matters of social security and provides specific protection in regard to age, which is

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222. Case C-385/11, *Moreno v. Instituto Nacional de la Seguridad Soc.*, 2012 E.C.R. 00000, ¶ 25.

223. *Id.* ¶ 22.

224. *Id.* ¶¶ 23-25.

225. *Id.* ¶ 8.

226. *Id.*

227. *Id.* ¶¶ 9-10.

228. *Moreno*, E.C.R. 00000, ¶ 12.

229. *Id.* ¶ 20.

230. *Id.* ¶ 38.

considered a “risk” by the Directive.<sup>231</sup> More narrowly, Directive 79/7 prohibits both direct and indirect discrimination on account of gender, marital status, family status in regard to pension schemes, contributions, calculations, related family benefits, and the retention and duration of benefits.<sup>232</sup> The ECJ was clear that Directive 79/7 is violated when a member-state’s provision of law, although facially neutral, works to disadvantage far more women than men and, in this case, the ECJ found it to be indisputable that 80% of part-time workers are female.<sup>233</sup> The ECJ did not accept the Spanish government’s argument that the contribution requirements and calculation systems were necessary to protect the social security system, even if it meant excluding many part-time workers, such as Ms. Moreno, from earning a lifetime pension.<sup>234</sup>

#### G. SUBCONTRACTORS AND OUTSOURCING OF EMPLOYMENT

Perhaps the best case that explores the right to equal pay in cases involving part-time workers pursuant to Article 157 (ex 141, 119), is *Allonby v. Accrington & Rosendale College*, largely because it is both recent and on point.<sup>235</sup> In *Allonby*, a female, part-time lecturer filed a claim against the college where she taught and her direct employer (ELS) for violating Article 157 (ex 141, 119), when she learned that a male counterpart who held the same position was paid a higher salary by the college.<sup>236</sup> At one time, Ms. Allonby had been working directly for the college, until budget cuts forced it to not renew her contract.<sup>237</sup> However, she went to work for her new employer, ELS, which hired several of the part-time lecturers that were laid off by the college and Ms. Allonby ended up teaching the same classes at the college, but she was directly employed by ELS.<sup>238</sup> Regardless, Ms. Allonby was paid less by ELS, essentially as a subcontractor, than her male counterpart who was paid by the college.<sup>239</sup> In addition to filing a claim Article 157 (ex 141, 119), Ms. Allonby argued that the college and ELS violated the British Sex Discrimination Act of 1975.<sup>240</sup>

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231. *Id.* ¶¶ 3-4.

232. *Id.* ¶ 5.

233. *Id.* ¶¶ 29, 31.

234. *Moreno*, E.C.R. 00000, ¶¶ 33-36.

235. Case C-256/01, *Allonby v. Accrington*, 2004 E.C.R. I-00873.

236. *Id.* ¶ 16.

237. *Id.* ¶ 18.

238. *Id.* ¶ 19.

239. *Id.* ¶¶ 19-20.

240. *Id.* ¶ 23.

Although the ECJ found that Ms. Allonby was a “worker” within the definition of Article 157 (ex 141, 119), she could not assert a claim under that Article for sex discrimination because she and her male counterpart had different employers, despite the fact that, physically, the two lecturers taught at the same educational institution.<sup>241</sup> According to the ECJ, this is true even if the rate by which Ms. Allonby is paid is at least indirectly determined by what the college pays ELS to contract its services.<sup>242</sup> To support its decision, the ECJ stated that because there is no one body that could rectify the disparity in salary with two different employers, a claim for equal pay could not be sustained.<sup>243</sup>

An additional point should be made regarding the ECJ’s opinion in *Allonby* that certainly reflects the current condition for part-time workers. The ECJ stated that part-time professors are still “workers” within the confines of EU law, even if they are not forced to undertake an offered assignment.<sup>244</sup>

Although provided with the opportunity to significantly broaden the scope of the equal pay for equal work principle to apply across employers, the ECJ refused to do so in *Lawrence v. Regent Office Care Ltd.*<sup>245</sup> The facts of *Lawrence* certainly provide insight for those involved, either as employers, government agencies, and/or associated workers, with the process of outsourcing. In *Lawrence*, the plaintiffs were workers that, at one time, were directly employed by a U.K. government agency as cleaners and caterers in various schools, but later became employees of a private sector agency charged with the same responsibilities, but the latter employer acquired those duties through outsourcing.<sup>246</sup> However, while still employed as cleaners and caterers for the local government agency, the plaintiffs had successfully shown evidence of sex discrimination in regard to remuneration as the local government agency accepted the results of a job evaluation study showing the work of cleaners and caterers to be of equal value in comparison to those working in gardening, refuse collection, and sewage treatment, most of whom were men, but also worked for the same local government agency.<sup>247</sup> As the result of the proof of sex discrimination pursuant to the equal pay for equal work principle, the wages of the cleaners and caterers were raised to that of the workers engaged in

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241. *Allonby*, E.C.R. I-00873, ¶ 33.

242. *Id.* ¶ 82.

243. *Id.* ¶ 1 (“Ruling”).

244. *Id.* ¶ 3.

245. Case C-320/00, *Lawrence v. Regent Office Care Ltd.*, 2002 E.C.R. I-07325, ¶¶ 18-19.

246. *Id.* ¶¶ 3, 6, 7.

247. *Id.* ¶ 4.

gardening, refuse collection, and sewage treatment.<sup>248</sup> Following the outsourcing of cleaning and catering services to a private firm, the local government agency employees were hired by the private firm at lower wage rates.<sup>249</sup> Those working for the private firm filed an action for sex discrimination in regard to the equal pay for equal work principle with a British administrative court.<sup>250</sup> The employees claimed that Article 157 (ex 141, 119) applies to the condition whereby a private sector employer hires workers whose labor has been earlier determined to be of equal value to another set of workers directly employed by the same local government agency that awards the contract to the private sector employer.<sup>251</sup>

The ECJ stated that the equal pay for equal work principle is directly effective to member-states and also applies to both government employers and private sector employers so that employees can rely on these protections regardless of their employer.<sup>252</sup> However, there were three realities cited by the ECJ that made this case different. These include that the employees being compared for equal work for equal pay purposes had different employers, that the work performed by the cleaning and catering employees was the same under the private sector employer as it was for the local government agency, and that there was a continuation of the belief that the work performed by the cleaners, caterers, gardeners, refuse collectors, and sewage treatment workers was of equal value.<sup>253</sup> Regardless, the ECJ held that the scope of Article 157 (ex 141, 119) only applied to employees working for the same employer, and thus, the plaintiffs could not rely on Article 157 (ex 141, 119) for relief because the remuneration did not come from a single source; thus, no one organization could remedy the disparity in pay despite the recognition that the parties are performing work of equal value.<sup>254</sup>

#### H. CRITERIA FOR COMPENSATION

One of the leading cases on the subject of equal pay for equal work and involving Directive 75/117 and Article 157 (ex 141, 119) is *UCCE v. Danfoss*.<sup>255</sup> In *Danfoss*, a labor organization brought a claim against an

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248. *Id.* ¶ 5.

249. *Id.* ¶ 6.

250. *Id.* ¶¶ 8, 10.

251. *Lawrence*, E.C.R. I-07325, ¶¶ 8, 10.

252. *Id.* ¶ 13.

253. *Id.* ¶ 15.

254. *Id.* ¶¶ 17, 18.

255. Case C-109/88, *Union of Commercial and Clerical Workers v. Danish Emp'rs' Ass'n ex rel Danfoss*, 1989 E.C.R. 3119.

employers' organization arguing the practice of using mobility, training, and seniority as criteria for pay supplements that led men to be paid on average more than women violated Directive 75/117.<sup>256</sup> According to the labor organization, because of the criteria for pay supplements, men on average made 6.85% more than women and this reality was evidence of sex discrimination.<sup>257</sup>

One of the key issues arising in the dispute between the parties in *Danfoss* was transparency in that, according to the ECJ, Directive 75/117 requires that when a remuneration practice is not transparent to the workers, the employer has the burden of proof to show that the practice is not the cause of the disparity in pay between men and women.<sup>258</sup> More specific to the case at bar, the ECJ acknowledged that much of what supported the employees' action against the employers was the fact that a woman could not know how the system of supplemental pay criteria is used to increase a worker's overall salary.<sup>259</sup> Instead, women would only know the total amount of supplemented pay and the workers in each wage group are unable to compare the way in which the criteria were applied, but instead can only compare the total amounts of remuneration.<sup>260</sup> Thus, given this lack of transparency, female workers are without a mechanism for which to enforce the equal pay for equal work doctrine.<sup>261</sup> The ECJ contended that Directive 75/117 requires member-states to provide a legal forum for litigants who believe their rights have been violated under the equal pay for equal work doctrine.<sup>262</sup> Additionally, as part of that legal process, the employer must proffer evidence as to how and why the remuneration practice, here the criteria used for pay supplements, does not violate the equal pay for equal work standard, and thus also making the remuneration system transparent.<sup>263</sup>

Determining whether the individual criteria violate the equal pay for equal doctrine was the second issue addressed by the ECJ in *Danfoss*. The ECJ stated that each criterion constituting the supplemental pay system would have to be considered separately.<sup>264</sup> On the use of "mobility" as a supplemental pay criterion, the employer can only use such a criterion if the

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256. *Id.* ¶¶ 1-4.

257. *Id.* ¶¶ 2-4.

258. *Id.* ¶ 11.

259. *Id.* ¶ 10.

260. *Id.*

261. *Union of Commercial and Clerical Workers*, E.C.R. 3199, ¶ 13.

262. *Id.* ¶¶ 14, 16.

263. *Id.* ¶¶ 15, 16.

264. *Id.* ¶ 18.



reward is for the ability to work variable hours, at various locations, and the ability to adapt to different situations.<sup>265</sup> In contrast, an employer cannot use the mobility criterion if it is used to judge the quality of work.<sup>266</sup> The ECJ espoused some concern that employers may judge work by women as simply inferior because the work was done by a woman.<sup>267</sup> Training can be used as a supplemental pay criterion, so long as the training is an important part of improving the performance of the employee.<sup>268</sup> According to the ECJ, training, or a lack thereof, may be a greater problem for women due to the inability to take advantage of training opportunities.<sup>269</sup> Lastly, the employer can reward employees based on length of service to the employer.<sup>270</sup> The ECJ also held that, when challenged with evidence that male workers are paid more than female workers in positions of equal value, an employer must justify the use of mobility and training as supplemental pay criteria, but need not justify the use of supplemental pay for length of service.<sup>271</sup> The employer need not justify the use of length of service as a supplemental pay criterion even if there is evidence that women do not have longevity levels equal to men due to frequent interruptions in their careers.<sup>272</sup>

In *Cadman v. United Kingdom*, the ECJ set forth several pronouncements about the use of length of service criterion an employer may use to determine pay for its employees.<sup>273</sup> First, while citing precedent, the ECJ stated that the principle of equal pay requires the elimination of all sex discrimination regarding all forms of remuneration whereby the equal value has attached to similar work.<sup>274</sup> Second, Article 157 (ex 141, 119) should be interpreted to require the employer to prove that its remuneration practices are justified by objective factors unrelated to sex discrimination when evidence of discrimination exists.<sup>275</sup> Third, any means used by the employer to achieve its legitimate objectives must be appropriate and necessary.<sup>276</sup> Equally important are two provisions of EU law. Directive 97/80 states that the principle of equal pay for equal work

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265. *Id.* ¶ 25.

266. *Id.*

267. *Union of Commercial and Clerical Workers*, E.C.R. 3199, ¶ 20.

268. *Id.* ¶ 23.

269. *Id.*

270. *Id.* ¶ 24.

271. *Id.* ¶¶ 23, 24.

272. *Id.* ¶ 24.

273. Case C-17/05, *Cadman v. Health & Safety Exec.*, 2006 E.C.R. I-09583, ¶¶ 29-38.

274. *Id.* ¶ 29.

275. *Id.* ¶ 31.

276. *Id.* ¶ 32.

also applies to cases of indirect discrimination by an employer, and thus, even apparently neutral employer policies on remuneration could illegally favor one gender over another.<sup>277</sup> As well, the same Directive places the burden of proof on the employer in cases involving sex discrimination.<sup>278</sup> The Directive also mandates that member-states allow those believing they have been disadvantaged by an employer's remuneration practices, as the result of gender discrimination, to seek judicial review.<sup>279</sup>

More specific to the use of longevity as a means to compensate workers, the ECJ stated that the use of rewarding experience on the job, allows the worker in question to perform his or her duties at a high level and also because the benefit of experience is the result of longevity, an employer is free to use such a means to financially reward workers.<sup>280</sup> Furthermore, according to the ECJ, when the use of longevity as a remuneration criterion is only designed to reward workers for obtaining experience, the employer need not justify the use of longevity.<sup>281</sup> This is true even if a worker, feeling disadvantaged by the system, provides evidence of disparities in pay between men and women in regard to the principle of equal work for equal pay when an employee could show that he or she has obtained the experience necessary to reach the work level of a person with many years of experience.<sup>282</sup>

The facts of *Cadman* are compelling. Ms. Cadman worked for the same employer for many years under a traditional incremental system that included a provision for longevity in order to pay workers after several years of service.<sup>283</sup> In 1992, the employer moved to a performance system which adjusted the annual increment to reflect an employee's individual performance and all high performing employees to reach the top of the pay scale more quickly.<sup>284</sup> Ms. Cadman filed a complaint with the British government after she was able to show that four men earned more than she did for the same level of work, but who had been employed by the same employer for longer periods of time.<sup>285</sup> The British Court of Appeal, which received the case after an administrative court had entertained it, reasoned that a systematic prejudice existed in using longevity as a remuneration

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277. *Id.* ¶ 6.

278. *Id.* ¶ 5.

279. *Cadman*, E.C.R. I-09583, ¶ 7.

280. *Id.* ¶¶ 35-36.

281. *Id.* ¶ 39.

282. *Id.* ¶ 40.

283. *Id.* ¶ 13.

284. *Id.*

285. *Cadman*, E.C.R. I-09583, ¶¶ 14-16.

criterion because, in the U.K. and throughout the EU, the average length of service to an employer for women is shorter than for men.<sup>286</sup> The ECJ contended that an employer need only justify the use of longevity as a remuneration criterion when the employee provides evidence of a disparate impact between men and women due to the use of the remuneration system and there are serious doubts as to whether the objective of rewarding experience is an appropriate objective.<sup>287</sup>

### I. SICK LEAVE BENEFITS

Member-state legislation that provides for sick leave pay yet has the effect of adversely impacting women, violates Article 157 (ex 141, 119).<sup>288</sup> In *Rinner-Kuhn v. FWW*, the ECJ found fault with a German law that required employers to pay wages for up to six weeks while a worker was involuntarily on sick leave, however, employment contract required the employee to work more than ten hours per week or more than forty-five hours per month, and those that normally worked fewer hours were excluded from the sick leave wage benefit.<sup>289</sup> The plaintiff, a female who worked roughly ten hours per week, was denied benefits by her employer pursuant to the German legislation.<sup>290</sup> According to the ECJ, the continuation of pay while an employee is on sick leave is included within the definition of pay as it pertains to Article 157's guarantee that men and women must be paid equally for equal work.<sup>291</sup> Although facially neutral in regard to gender, the ECJ found that once the German law made a distinction between two categories of workers, those working more than ten hours per week and those working less than ten hours per week, under Article 157 (ex 141, 119), the German law would have to face scrutiny because the sick leave benefit was considered a form of pay.<sup>292</sup>

Although the German law did not expressly separate men from women in regard to the sick leave compensation benefit, the ECJ held so long as the percentage of women that fall into the category of workers not receiving the benefit is greater than the percentage of men who would benefit, the spirit of Article 157 (ex 141, 119) is violated.<sup>293</sup> The ECJ was firm in holding

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286. *Id.* ¶ 22.

287. *Id.* ¶ 38.

288. Case C-171/88, *Rinner-Kuhn v. FWW Spezial-Gebaudereinigung GmbH & Co.*, 1989 E.C.R. 2743, ¶ 16.

289. *Id.* ¶ 5.

290. *Id.*

291. *Id.* ¶¶ 7, 9.

292. *Id.* ¶ 10.

293. *Id.* ¶¶ 12-13.

that only when such a member-state law is justified by objective factors not related to sex discrimination could it be upheld in the face of Article 157 (ex 141, 119).<sup>294</sup> For the legislation to be upheld, the member-state would have to show that the means chosen meet a necessary aim of its social policy and that the suitable and requisite for attaining that aim; and in this case, if the member-state could substantiate that, then the mere difference in impact between female and male workers would not be disastrous.<sup>295</sup> However, it is for the national courts to decide whether a member-state's law impacts men and women workers differently, and whether that difference is objectively tolerable or amounts to sex discrimination.<sup>296</sup>

#### J. GENDER REASSIGNMENT

In *Richards v. Secretary of State for Work & Pensions*, the ECJ held that Directive 79/7/EEC prohibits a member-state from denying a person who has undergone gender reassignment surgery the benefits that would otherwise apply to that person associated with his or her new gender identity.<sup>297</sup> More specifically, the ECJ found a U.K. decision to deny a potential pensioner, Ms. Richards, a government pension because she had not reached the retirement age associated with her birth gender (male) to be interpreted as precluding legislation.<sup>298</sup> In 2002, Ms. Richards, born as a male in 1942, petitioned the U.K. government for a pension after engaging in gender reassignment surgery in 2001.<sup>299</sup> However, the U.K. government refused to approve the application for a pension contending that Ms. Richards had to wait until she turned sixty-five.<sup>300</sup> Somewhat confusingly, the U.K. Gender Recognition Act allowed for a citizen to receive a gender recognition certificate identifying the new gender when a citizen had suffered from gender dysphoria and had acquired the new gender (via surgical procedure) two years from the date of application for the certificate.<sup>301</sup>

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294. *Rinner-Kuhn*, E.C.R. 2743, ¶ 14.

295. *Id.* ¶ 14.

296. *Id.* ¶ 15.

297. Case C-423/04, *Richards v. Sec'y of State for Work & Pensions*, 2006 E.C.R. I-3602, ¶ 30 ("Grounds").

298. *Id.* ¶¶ 7, 38 ("According to paragraph 1 of Part 1 of Schedule 4 to the Pensions Act 1995, a man attains pensionable age at 65 and a woman born before 6 April 1950 attains pensionable age at 60.").

299. *Id.* ¶¶ 14-16.

300. *Id.* ¶¶ 17-18.

301. *Id.* ¶¶ 10-11.

The ECJ began its opinion by stating that it is the province of each member-state to determine when a person has changed his or her gender.<sup>302</sup> However, the ECJ also stated that the scope of Directive 79/7 is not only confined to matters of discrimination based on male or female gender, but also applies to the rights of equal treatment in regard to gender reassignment.<sup>303</sup> Moreover, the ECJ contended that the Directive seeks to protect the full embodiment of social security rights and that the right not to be discriminated against on grounds of sex is a fundamental human right under EU law, and it is the ECJ's role to ensure those rights.<sup>304</sup> The ECJ rejected the U.K.'s argument, at least in regard to relativity to the facts of the case, that there was a need to have different pension eligibility ages for men and women.<sup>305</sup> The ECJ stated that EU law and its own case law require, when applicable, that member-states comply with EU statutory and case law despite the fact that both allow member-states to develop their social security systems.<sup>306</sup> According to the ECJ, although member-states could have different pension eligibility ages within their social security systems, member-states are not allowed to derogate from the protections afforded those who wish to undergo a gender reassignment, and once that occurs, a member-state cannot discriminate on the basis of gender reassignment.<sup>307</sup>

#### K. LIFE PARTNERSHIPS

Showing progression toward the equality of marriage and a life partnership between two people of the same gender, in *Maruko v. Germany*, the ECJ held that once a member-state enacts legislation equating the two forms of union, it must equally award survivor's benefits.<sup>308</sup> The case arose when Mr. Maruko's life partner died and he was denied a survivor's pension from the pension fund associated with his life partner's employment.<sup>309</sup> At the time, German law recognized same-sex life partnerships and set guidelines for obtaining such a recognition, which included a requirement that the life partners agree to support and care for each other and commit to a lifetime union, contribute to common needs of the partnership through employment and property, and also required mutual

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302. *Id.* ¶ 21.

303. *Richards*, E.C.R. I-03585, ¶ 24.

304. *Id.* ¶¶ 22-24.

305. *Id.* ¶ 25.

306. *Id.* ¶ 33.

307. *Id.* ¶¶ 34-35, 38.

308. Case C-267/06, *Maruko v. German Theatre Pension Inst.*, 2008 E.C.R. I-1757, ¶ 73.

309. *Id.* ¶¶ 19-23.

family recognition.<sup>310</sup> German law also provided for equality of pension rights for survivors of marriages and life partnerships, specifically identified equality between a spouse and a life partner, and recognized, on equality grounds, the ending of a life partnership and a divorce.<sup>311</sup>

The employment of Mr. Maruko's life partner, as a theatre worker, mandated he be part of a collective bargaining agreement that afforded pension benefits and associated survivor rights for married people, but failed to recognize such pension and survivor rights for life partners.<sup>312</sup> The pension fund argued that it was not entitled to provide a survivor's benefit to Mr. Maruko because such a benefit should not be regarded as "pay" within the confines of Directive 2000/78, which mirrors the language of Article 157 (ex 141, 119), requiring equality in pay.<sup>313</sup> The pension fund also stated that because it is regulated by public law, and thus, is outside the scope of Directive 2000/78 and Article 157 (ex 141, 119), as both laws exclude state pension schemes that are created by statute, and the pension system in question is not linked directly to specific employment but instead was created based on social policy grounds.<sup>314</sup>

According to the ECJ, the survivor's benefit at issue was within the scope of "pay" for purposes of Article 157 (ex 141, 119), which includes not only wages, salaries, and other forms of consideration, but also includes benefits that are paid at the conclusion of an employment relationship.<sup>315</sup> Furthermore, the ECJ also stated that the method by which a survivor's pension is calculated falls within the anti-discrimination provisions of Article 157 (ex 141, 119).<sup>316</sup> Most importantly, the ECJ found the theatre's pension fund to be outside of the exclusions of Article 157 (ex 141, 119) and Directive 2000/78 because the workers were subject to a collective bargaining agreement that was exclusive to only theatre workers, which qualified as a specific category of workers and such workers must be part of the collective bargaining profession to gain the benefits.<sup>317</sup>

On the more specific question of equality, the ECJ found that it was Germany's clear intent to treat same-sex life partnerships on the same level as traditional marriages.<sup>318</sup> Once that equality is legislated, Article 157 (ex

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310. *Id.* ¶¶ 8-11.

311. *Id.* ¶¶ 12-14.

312. *Id.* ¶ 17.

313. *Id.* ¶¶ 4-6, 35-36.

314. *Maruko*, E.C.R. I-01757, ¶ 36.

315. *Id.* ¶¶ 42-44.

316. *Id.* ¶ 46.

317. *Id.* ¶¶ 49-53.

318. *Id.* ¶¶ 66, 67, 71-73.

141, 119) and Directive 2000/78 prohibit this form of direct discrimination occurring when two groups of people, in comparable circumstances, are treated in a way whereby one of the groups is handled less favorably than the other.<sup>319</sup>

#### L. MATERNITY LEAVE

According to the ECJ in *Abdoulaye v. Renault*, the provisions for financial remuneration during maternity leave, as a lump sum and the continuation of paid salary, constitute pay pursuant to Article 157 (ex 143, 119) and Directive 75/117.<sup>320</sup> Here, the plaintiffs were male employees contending that the labor agreement between the workers and the employer (Renault) provided for a lump sum to be paid to a female worker who would also receive her traditional salary and social security contributions.<sup>321</sup> However, if a male or female worker were to adopt a child, that worker would only receive a lump sum.<sup>322</sup> Interestingly enough, the male plaintiffs limited their complaint, contending that Article 157 (ex 141, 119) and Directive 75/117 were violated, to only the financial compensation components of the lump sum and the continued salary and social security components, and did not take issue with the labor agreement's provision that only women can take maternity leave.<sup>323</sup>

The ECJ reminded readers that Article 157 (ex 141, 119) applied to all consideration that workers would receive, directly or indirectly, from their employers.<sup>324</sup> The ECJ added that the TFEU applied to cases even when labor agreements and/or statutory provisions require payment to workers (such as in the case of paid maternity leave) when workers are not performing their duties.<sup>325</sup> The ECJ next stated that for a claim of equal pay for equal work to be successful, the male and female workers must be in comparable positions.<sup>326</sup> The employer, Renault, posited several reasons as to why men and women workers are not comparable in regard to maternity leave, including that women on maternity leave are not eligible for promotion, the maternity leave period does not count toward longevity, female workers are not eligible for performance-related salary increases, and the returning female worker is not up to speed regarding technological

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319. *Id.*

320. Case C-218/98, *Abdoulaye v. Renault*, 1999 ECR I-05723, ¶¶ 4, 5.

321. *Id.* ¶¶ 3-5, 10.

322. *Id.* ¶ 6.

323. *Id.* ¶ 7.

324. *Id.* ¶ 12.

325. *Id.* ¶ 13.

326. *Abdoulaye*, E.C.R. I-5723, ¶¶ 16, 17.

advances in the workplace.<sup>327</sup> In the end, the ECJ did not find that the payment of salary and social security contributions, as well as a lump sum, to only female workers while on maternity leave infringed upon Article 157 (ex 141, 119) because these payments are designed to compensate for the occupational disadvantages associated with maternity leave.<sup>328</sup>

The difference between military leave, on the one hand, and parental and maternity leave, on the other hand, and whether the participants in those forms of leave are to be considered comparable pursuant to Article 157 (ex 141, 119) and Directive 75/117 in regard to the equal pay for equal work principle were the subject matter in *Osterreichischer Gewerkschaftsbund v. Wirtschaftskammer Osterreich*.<sup>329</sup> Here, the ECJ held that military service, although almost exclusively the province of men, and parental and maternity leave, which is almost exclusively engaged in by women, are not comparable activities for the purposes of Article 157 (ex 141, 119) and Directive 75/117.<sup>330</sup>

As is typical in Europe, the litigants were an employees' labor organization (the Gewerkschaftsbund) and an employers' organization (the Wirtschaftskammer Osterreich).<sup>331</sup> The former argued that for purposes of calculating the length of service period for an employer, the longer of which makes a termination payment larger, should include the period by which an employee takes parental leave, as is the case when a person in military (or civilian) service, when absent, is entitled to have that time period included within the length of service period for the purposes of calculating a termination payment.<sup>332</sup> The employees' labor organization believed that the discrepancy in treatment between the two forms of leave violated Article 157 (ex 141, 119) because 98.253% of those on parental leave are women, whereas only 1.747% are men, while virtually all military personnel are men, and thus, the Austrian system resulted in a form of indirect discrimination.<sup>333</sup> In contrast to the position taken by the employees' labor organization, the employers' organization contended that those in military service and those taking parental leave are not comparable for the purposes of the equal pay for equal work doctrine, because parents take parental leave voluntarily which is unrelated to the employer's

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327. *Id.* ¶¶ 18-19.

328. *Id.* ¶¶ 20, 22.

329. Case C-220/02, *Osterreichischer Gewerkschaftsbund v. Wirtschaftskammer Osterreich*, 2004 E.C.R. I-5907.

330. *Id.* ¶ 65 ("Grounds").

331. *Id.* ¶ 22.

332. *Id.*

333. *Id.* ¶¶ 23-26.



conduct, and thus, length of service in cases of parental leave should not be counted in regard to a termination payment.<sup>334</sup> Furthermore, the employers' organization argued there was no discrimination against women because Austrian law creates a very favorable condition for those who wish to take parental leave in that the employee cannot be dismissed from his or her position.<sup>335</sup>

Austrian law, at the time of the case at bar, required a termination payment under certain conditions and such payment was, in part, based on the length of service to the employer.<sup>336</sup> However, pregnant women were not permitted to work during the last eight weeks of a pregnancy, during the eight weeks after a traditional birth, if, at any time, the continuation of work would endanger the life of the mother or child, or for twelve weeks after a premature or caesarean birth.<sup>337</sup> Furthermore, an employee can electively take up to two years off from work to care for a child until the child reaches two years of age.<sup>338</sup> At no time can the period for which the employee was removed from work be counted toward the length of service criterion for a termination payment, regardless of when or why the employee was on parental leave.<sup>339</sup> Austrian law also set the requirements for military service which included both compulsory service for men, and elective service for women, which can be voluntarily extended by the military personnel, but in all cases, the time spent in the military would count for length of service for a termination payment.<sup>340</sup>

First, the ECJ stated that a termination payment was within the scope of the term "pay" in Article 157 (ex 141, 119) and any unequal treatment in regard to termination payments would be analyzed pursuant to that Article.<sup>341</sup> On the subject of comparability between workers on military leave and those on parental leave, the ECJ found that these two sets of workers were not comparable in regard to Article 157 (ex 141, 119), because the purposes of the two forms of leave were different.<sup>342</sup> Specifically, parental leave is voluntary and to care for a newborn, while

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334. *Id.* ¶¶ 27, 28.

335. *Id.* ¶ 30.

336. *Osterreichischer Gewerkschaftsbund Gewerkschaft*, 2004 E.C.R. I-5907, ¶ 6.

337. *Id.* ¶¶ 7-8.

338. *Id.* ¶ 10.

339. *Id.* ¶ 11. The relevant provisions of the Austrian law stated: "[u]nless otherwise agreed, the period of [parental] leave shall not be taken into account for the purposes of entitlements of a female employee based on length of service." *Id.*

340. *Id.* ¶¶ 12-20.

341. *Osterreichischer Gewerkschaftsbund Gewerkschaft*, 2004 E.C.R. I-5907, ¶¶ 37-38.

342. *Id.* ¶¶ 60-61.

military leave is involuntary and part of a larger civic obligation.<sup>343</sup> The ECJ also commented that its jurisprudence allowed member-states to limit compulsory military service to men.<sup>344</sup> The ECJ made clear that the suspension of employment for the greater interest of the member-state's defense could allow for different treatment in contrast to the suspension of employment to take care of family interests.<sup>345</sup>

In a split decision on the scope and limitations of maternity leave, the ECJ held that Article 157 (ex 143, 119) and Directive 75/117 do not require that women on maternity leave receive the same salary they received while engaged in full-time work, but that women on maternity leave should receive any pay increases granted to other workers while they are on maternity leave.<sup>346</sup> In *Gillespie v. Northern Ireland Health and Social Services Boards*, the ECJ also stated that, although women on maternity leave are not guaranteed the same salary as when they were working, they should not be paid so low as to undermine maternity leave's purpose, and any reviewing court assigned to determine the appropriate value of maternity leave must take into account the length of the maternity leave and other forms of social protection afforded by a member-state's national law.<sup>347</sup> In this case, the ECJ heard a complaint by the plaintiffs who were paid less than the amount they would have been paid while engaged in full-time work, and held that such treatment violated Article 157 (ex 141, 119), Directive 75/117, and Directive 76/207.<sup>348</sup> The ECJ found that the amount plaintiffs were paid on maternity leave, a full salary for the first four weeks, nine-tenths of the salary for the two weeks thereafter, and one-half of the salary for the final twelve weeks, was not below the level that would undermine the purpose of maternity leave.<sup>349</sup> Interestingly enough, the amount paid to the plaintiffs was pursuant to a collective bargaining agreement which set the maternity leave pay higher than the statutory pay rate of nine-tenths for the first six weeks and a flat-rate allowance for the remainder of the maternity leave period.<sup>350</sup>

After restating the premise that Article 157 (ex 141, 119) and Directive 75/117 require the elimination of all discrimination that would interfere

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343. *Id.*

344. *Id.* ¶ 62.

345. *Id.* ¶ 64.

346. Case C-342/93, *Gillespie v. N. Health & Soc. Servs. Boards*, 1996 E.C.R. I-492, ¶¶ 20-21.

347. *Id.* ¶¶ 20, 25.

348. *Id.* ¶ 9.

349. *Id.* ¶¶ 3, 20.

350. *Id.* ¶¶ 3, 4.

with the equal pay for equal work doctrine espoused in both laws, the ECJ stated that income guaranteed in a collective bargaining agreement between employees and an employer, which includes provisions for maternity leave, is within the scope of the term “pay.”<sup>351</sup>

In *Griesmar v. France*, a predecessor to *Leone v. France*, the ECJ held that a French law provided service credits associated with the national pension system for female civil service workers for (1) each natural child with established paternity, (2) each adopted child, and (3) each child falling into a third category, so long as the child has been raised by the mother for at least nine years prior to the child’s twenty-first birthday, including (a) children from an earlier marriage, (b) children delegated of parental authority in the name of the female civil servant or her husband, (c) children placed in the guardianship of the female civil servant or her husband, and (d) foster children placed with the female civil servant or her husband, to be in violation of the Agreement on Social Policy which, according to the ECJ, reproduces the rules set forth in Article 157 (ex 141, 119).<sup>352</sup> The Agreement on Social Policy went into effect on the day the Treaty of Amsterdam went into force of which the latter reproduced and modified Article 119 (now Article 157).<sup>353</sup>

In *Griesmar*, the plaintiff, a male civil servant and father of three children was awarded a pension by the French government, yet the pension granted did not take into consideration the service credits which would have been awarded to a female civil servant in similar circumstances regarding parenthood.<sup>354</sup> The father argued that his status as a father is derived from the reality that he has children, just as a woman’s status as a mother is derived, and that the French pension law in question provides female civil service workers with service credits on the sole basis of motherhood without any proof that she raised the children, either naturally born or adopted.<sup>355</sup> Furthermore, attested the father, the service credits are not designed to offset any occupational disadvantages the female civil service worker would encounter because the grant of service credits is not attached to any requirement of maternity leave and she earns these service credits even if she had lost the status of civil servant or was not a civil servant at the time of the birth or adoption.<sup>356</sup> The French government stated that the

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351. *Id.* ¶¶ 10, 12.

352. Case C-366/99, *Griesmar v. Ministre de l’Economie, des Finances et de l’Industrie*, 2001 E.C.R. I-09383, ¶¶ 5, 12, 13, 67.

353. *Id.* ¶ 21.

354. *Id.* ¶¶ 16-17.

355. *Id.* ¶ 49.

356. *Id.* ¶ 50.

service credits are awarded to address any occupational or career challenges female civil service workers who have had children would face due to the reality that they are the predominant caretakers of children, regardless of whether they have taken off time from their careers to do so.<sup>357</sup> The ECJ, however, noted that the French pension law did not allow male civil service workers to earn the service credits, although they may have proof to establish that they have been chiefly responsible for raising their birthed or adopted children; thus, the French pension law created a difference on gender grounds.<sup>358</sup>

The ECJ believed that the Agreement on Social Policy allowed member-state governments to employ measures that would remove or mitigate the actual instances of inequality facing women.<sup>359</sup> Specifically, on the question as to whether this difference in treatment grounds was tolerable under Article 157 and the Agreement on Social Policy, the ECJ found that the service credits provision benefitting only female civil service workers would not offset the obstacles they faced.<sup>360</sup>

The ECJ did not find a link between the service credits awarded by the French pension system, generally, and the application of those credits to female civil service workers due to any career challenges they face because the service credits were not linked to maternity leave or adoption leave and thus female workers who did not take maternity leave did not face occupational challenges.<sup>361</sup> Although the ECJ found that the sole reason for awarding the service credits was due to the belief that female civil service workers raised the children they birthed or adopted, the legislative history of the French pension law on that point indicated that the purpose of the service credits was actually to make it easier for female civil service workers to leave work and remain at home to raise their children.<sup>362</sup>

One of the most significant points in *Griesmar* was the ECJ's comment on the reach of Article 157 (ex 141, 119). The ECJ first stated the traditional parameters of Article 157 (ex 141, 119), that member-states which develop pension systems based on social policy, or concerns of governmental organization, ethics, and/or budgetary issues, and do not address a specific category of workers, are free to craft those pensions systems without fear of infringing Article 157 (ex 141, 119).<sup>363</sup> However,

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357. *Id.* ¶ 51.

358. *Griesmar*, E.C.R. I-09383, ¶¶ 57-58.

359. *Id.* ¶¶ 64, 65.

360. *Id.*

361. *Id.* ¶¶ 52-53.

362. *Id.* ¶ 55.

363. *Id.* ¶ 30.

pursuant to the facts of the *Griesmar* case, the ECJ found that because civil servants would constitute a specific category of workers, member-states that create pension schemes to benefit those workers must follow the equal pay requirement of Article 157.<sup>364</sup>

In *Leone v. Gardes des Sceaux*, the ECJ was asked to comment on whether a French law that provided for early retirement and an immediate pension for a civil servant with (1) either three children or a (2) child older than one year old, with a disability of 80% or greater, so long as the civil servant/parent was able to show that he or she took a career break of at least two continuous months in the form of (1) maternity leave, (2) adoption leave, (3) paternity leave, (4) parental care leave, or (5) parental leave violated Article 157 (ex 141, 119).<sup>365</sup> In addition to the aforementioned conditions, French law required the civil servant to have taken the career breaks just before the birth or adoption and the have ended the leave just after the birth or adoption.<sup>366</sup> Furthermore, the child must have been raised by the civil servant for at least nine years with these breaks taking place before the child's sixteenth birthday or before the age at which they ceased to be dependent.<sup>367</sup> In addition to the right to an early retirement with an immediate pension, the French law provided to the civil servant/parent a four-trimester service credit.<sup>368</sup> In *Leone*, the plaintiff was a male civil servant/parent with three children who did not take career breaks during the periods surrounding the birth of his children and was, thus, denied an early retirement with an immediate pension by the French government.<sup>369</sup>

The ECJ acknowledged that the provisions of French law were neutral in relation to the gender of the civil servant, yet, also acknowledged that the impact of the French legislation would benefit a much higher proportion of women than men.<sup>370</sup> The French government, however, defended its policy as a means to compensate for the career-related disadvantages of birthing and/or adopting a new child.<sup>371</sup> According to the ECJ, for the French law to sustain a challenge in the face of Article 157 (ex 141, 119), the French government would be required to show that it maintained a legitimate policy aim through objective factors unrelated to gender and that the social policy supporting the aim genuinely reflects the concern to attain that

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364. *Griesmar*, E.C.R. I-09383, ¶¶ 31, 35.

365. Case C-173/13, *Leone v. Garde des Sceaux*, 2014 E.C.R. 00000, ¶¶ 80-82 (“Grounds”),

366. *Id.* ¶¶ 82-84.

367. *Id.*

368. *Id.* ¶ 42.

369. *Id.* ¶¶ 10-13.

370. *Id.* ¶¶ 86-88.

371. *Leone*, E.C.R. 00000, ¶¶ 86-88.

aim.<sup>372</sup> The French government would also be required to show that the social policy is pursued in a consistent and systematic manner in regard to the legitimate policy aim.<sup>373</sup>

Interestingly, the ECJ cast doubt on whether the social policy, allowing early retirement with an immediate pension for a civil servant maintaining the aforementioned responsibilities connected to child rearing, would actually compensate for career-related disadvantages arising from a career break.<sup>374</sup> The ECJ also mentioned that the French government had not established how this social policy would meet its objectives.<sup>375</sup> Specifically, the ECJ found three problems with the French government's social policy that would purportedly meet its aim. First, the ECJ seemed unsure as to why the early retirement with an immediate pension should be associated with having both a career break of two months and the fact that the children must be raised by the civil servant for at least nine years.<sup>376</sup> Second, it was unclear why there would be a difference in eligibility based on whether the civil servant had a child with a disability of 80%.<sup>377</sup> Third, the ECJ believed there is no difference in the disadvantages associated with a career break based on whether the civil servant had one or several children.<sup>378</sup>

In an interesting twist, however, the ECJ stated that Article 157 (ex 141, 119) did not prohibit a member-state from creating a social policy that creates specific advantages to make it easier for the underrepresented gender to participate in a vocational activity or to prevent or compensate for disadvantages that the underrepresented gender may face in his or her professional career.<sup>379</sup> The ECJ saw the French law in question, which created a right to early retirement with an immediate pension and service credit granted for the career breaks that a civil servant/parent takes, as a means to craft full equality between men and women in the workplace.<sup>380</sup>

#### M. PROFESSIONAL QUALIFICATIONS

The ECJ addressed the problem of whether the equal pay for equal work doctrine, pursuant to Article 157 (ex 143, 119), is violated when

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372. *Id.* ¶¶ 87, 89.

373. *Id.*

374. *Id.* ¶ 90.

375. *Id.*

376. *Id.* ¶ 92.

377. *Leone*, E.C.R. 00000, ¶ 93.

378. *Id.* ¶ 94.

379. *Id.* ¶ 100.

380. *Id.* ¶¶ 101-02.

professionals of different academic backgrounds and different qualifications perform the same work-related duties, yet one group is paid a higher salary than another and the lower paid group is comprised of a higher number of women.<sup>381</sup> In the *Staff Committee v. Health Fund* case, the foundation of the argument put forth by the Staff Committee largely rested on statistics showing that Health Fund employed, within its clinic, twelve psychotherapists including six doctors and six psychologists, and within those two subsets, five doctors were men and five psychologists were women.<sup>382</sup> Health Fund also employed thirty-four psychotherapists within its social insurance institutions, twenty-four of which were psychologists and ten of which were doctors.<sup>383</sup> Yet, only eighteen of those psychologists were women and only two women were doctors.<sup>384</sup> However, regardless of whether the employee was a doctor or a psychologist, both sets of professionals performed duties as psychotherapists, but the doctors were paid more than the psychologists in accordance with a collective bargaining agreement between the employees and the employer.<sup>385</sup> The Staff Committee argued that psychologists should be placed within the same salary band as doctors, and without Health Fund doing so, Article 157 (ex 141, 119) and Directive 75/117 are violated.<sup>386</sup>

According to the ECJ, the equal pay for equal work doctrine requires that employees be paid equally in regard to piece rates when the same unit of measurement is used and that, as a rule, equal pay for work at time rates applies when employees are performing the same job.<sup>387</sup> The Staff Committee contended that the ECJ should hold that doctors and psychologists who perform the same work as psychotherapists should be compensated at the same rate because, in a prior case, the ECJ held that categories of employees with different professions and qualifications can perform work of *equal value*; therefore, that rule should apply across the board to cases whereby employees are performing the *same work*.<sup>388</sup> In contrast, Health Fund suggested that two groups of employees with different professional qualifications, involving different obligations and skills, are not engaged in the same work for the purposes of the equal work

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381. Case C-309/97, *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v. Wiener Gebietskrankenkasse*, 1999 E.C.R. I-02865, ¶ 9.

382. *Id.* ¶ 8.

383. *Id.*

384. *Id.*

385. *Id.* ¶¶ 1-3, 5.

386. *Id.* ¶¶ 1, 5.

387. *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*, E.C.R. I-02865, ¶ 10.

388. *Id.* ¶¶ 11-12.

for equal pay doctrine.<sup>389</sup> Although the ECJ restated its belief that Article 157 (ex 141, 119) applied to situations whereby employees are in comparable situations yet exposed to different rules, the ECJ reminded the Staff Committee that its earlier jurisprudence only addressed the question of work of equal value.<sup>390</sup> It also agreed with Health Fund that doctors and psychologists, even when performing the function of psychotherapist, are not actually engaged in the same work.<sup>391</sup> The ECJ believed that the differences between doctors and psychotherapists was too great in regard to the knowledge and skills they draw upon and also because doctors can engage in many more activities, including psychotherapy, whereby psychologists can *only* engage in psychotherapy.<sup>392</sup> It was also important to the ECJ that doctors and psychologists were recruited by Health Fund for their different backgrounds.<sup>393</sup> Additionally, the ECJ stated that it was irrelevant that the fee charged to clients for psychotherapy services, regardless of whether those services were performed by a doctor or a psychologist, was the same.<sup>394</sup> Nevertheless, the ECJ stated that reviewing courts in similar cases should evaluate the two subsets of workers based on several factors, such as the nature of the work, any associated training requirements, and working conditions, to determine if the equal pay for equal work doctrine should apply.<sup>395</sup>

#### IV. THEMES DISCOVERED FROM AN EXAMINATION OF ECJ CASELAW ON EQUAL PAY

The compilation of caselaw in this Article reflects several themes. First, any entity considering employing people in the EU should be concerned with the terms included in the definition of pay for the purposes of Article 157 (ex 141, 119). Despite the lack of an express definition in Article 157 (ex 141, 119), the ECJ has espoused a wide definition of pay to remove the vestiges of pay discrimination that existed in the EU's past employment world. According to the ECJ, retirement contributions and pension plans are within the confines of pay pursuant to Article 157 (ex 141, 119).<sup>396</sup> In *Worringham*, the ECJ was deliberate to include within the

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389. *Id.* ¶ 13.

390. *Id.* ¶¶ 12, 16, 20.

391. *Id.*

392. *Id.* ¶ 20.

393. *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse*, E.C.R. I-02865, ¶ 21.

394. *Id.* ¶ 22.

395. *Id.* ¶ 17.

396. *Case 69/80, Worringham v. Lloyd's Bank Ltd.*, 1981 E.C.R. 0767, ¶ 17. *Case 170/84, Bilka v. Weber von Hartz*, 1986 E.C.R. 1607, ¶¶ 22-23.



scope of Article 157 any form of remuneration that affected equality.<sup>397</sup> In *Bilka*, pension plans, even voluntarily created by employment agreements between employers and workers, are examined through the lens of Article 157 (ex 141, 119); however, the ECJ held that part-time workers could be excluded from the pension scheme if objectively justified.<sup>398</sup> The definition of pay under Article 157 (ex 141, 119) also includes non-working related activities such as lump-sum payments for maternity leave and termination payments for maternity and military leave.<sup>399</sup> More broadly, service credits associated with maternity leave also constitute a form of pay.<sup>400</sup> Additionally, employers must acknowledge the equal pay requirements of Article 157 (ex 141, 119) when providing redundancy pay in both the public and private sectors.<sup>401</sup> In-kind benefits issued to employees, even when the employer provides them out of choice and not due to an obligation, are covered by Article 157 (ex 141, 119).<sup>402</sup> Likewise, benefits associated with an employee's sick leave must adhere to the equal pay doctrine.<sup>403</sup>

Despite the previously-mentioned jurisprudence on the terms included within the definition of pay for the purposes of Article 157 (ex 141, 119), there are three cases that, perhaps, best show the breadth of the equal pay doctrine. In *Danfoss*, the ECJ held that the criteria used to determine pay supplements, and each criterion separately within the pay supplement scheme, will be scrutinized under Article 157 (ex 141, 119).<sup>404</sup> However, the one criterion within a supplemental pay scheme used by an employer that will not be scrutinized is supplemental pay based on length of service.<sup>405</sup> The ECJ's decision in *Seymour-Smith* also expands the breadth of the equal pay doctrine as the ECJ held that a judgment, and the related award tied to an equal pay discrimination case, must be evaluated based on

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397. *Worringham*, E.C.R. 0767, ¶¶ 25, 28.

398. *Bilka*, 1986 E.C.R. 1607, ¶¶ 22-23, 31.

399. Case C-218/98, *Abdoulaye v. Renault*, 1999 ECR I-05723, ¶¶ 4-5, 12; Case C-342/93, *Gillespie v. N. Health & Soc. Servs. Boards*, 1996 E.C.R. I-492, ¶ 21; Case C-220/02, *Case C-220/02, Osterreichischer Gewerkschaftsbund Gewerkschaft v. Wirtschaftskammer Osterreich*, 2004 E.C.R. I-5907, ¶ 65.

400. Case C-366/99, *Griesmar v. Ministre de l'Economie, des Finances et de l'Industrie*, 2001 E.C.R. I-09383, ¶¶ 64-65.

401. Case C-262/88, *Barber v. Guardian Royal Exch. Assurance Grp.*, 1990 E.C.R. I-01889, ¶¶ 16-17, 19-20.

402. Case 12/81, *Garland v. British Rail Eng'g Ltd.*, 1982 E.C.R. 0359, ¶¶ 5, 9 ("Grounds").

403. Case C-171/88, *Rinner-Kuhn v. FWW Spezial-Gebaeudereinigung GmbH & Co.*, 1989 E.C.R. 2743, ¶ 16.

404. Case C-109/88, *Union of Commercial and Clerical Workers v. Danish Emp'rs' Ass'n ex rel Danfoss*, 1989 E.C.R. 3119, ¶ 18.

405. *Id.* ¶ 24.

Article 157 (ex 141, 119).<sup>406</sup> The *Maruko* decision will likely be most noteworthy for its fact pattern involving a member-state's recognition of same-sex marriage, but for the purposes of Article 157 (ex 141, 119), the decision will be noted for the extension of the equal pay doctrine to survivor's benefits.<sup>407</sup>

Second, although the ECJ has maintained a broad conceptual definition of pay for the purposes of Article 157 (ex 141, 119), there does exist some discretion for member-states and employers.<sup>408</sup> This discretion exists despite the ECJ's declaration in *Barber* that every national court must work to remove all discrimination that contradicts the tenets of the equal pay doctrine and despite the ECJ's holding in *Seymour-Smith*, whereby employers may be asked to objectively justify their decisions in creating remuneration systems and rhetorically asked whether there is a better method to create these systems without the effect of disadvantaging female workers.<sup>409</sup> Member-states have the discretion to craft a retirement system based on its own social and employment policies and are free to do so long as the social policy is not tied to discrimination.<sup>410</sup> In fact, a pension system can be developed around a member-state's social policy, if the social policy is not based solely on the employer-employee relationship.<sup>411</sup> For example, the ECJ held in *Moreno* that a retirement system can be based on age and years of service, in accordance with Article 157 (ex 141, 119), so long as the system is based on that member-state's social policy, the member-state's organization, the member-state's budgetary concerns, and does not single out one category of worker.<sup>412</sup> Relatedly, and somewhat remarkably, member-states are still allowed to maintain different retirement ages for each gender.<sup>413</sup> Perhaps the best example of an allowable member-state social policy that passed Article 157 (ex 141, 119) muster is the ECJ's decision in *Leone* whereby the ECJ held that a member-state can implement an early retirement system to assist an underrepresented group (such as female workers) so long as it is clear that the member-state is attempting to

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406. Case C-167/97, *Regina v. Seymour-Smith*, 1999 E.C.R. I-00623, ¶¶ 28-29, 36.

407. Case C-267/06, *Maruko v. German Theatre Pension Inst.*, 2008 E.C.R. I-1757, ¶¶ 42-44, 73.

408. Case C-262/88, *Barber v. Guardian Royal Exch. Assurance Grp.*, 1990 E.C.R. I-01889, ¶¶ 38-39; *Regina*, E.C.R. I-00623, ¶¶ 68, 70-72.

409. Case C-262/88, *Barber v. Guardian Royal Exch. Assurance Grp.*, 1990 E.C.R. I-01889, ¶¶ 38-39; *Regina*, E.C.R. I-00623, ¶¶ 68, 70-72.

410. *Regina*, 1999 E.C.R. I-00623, ¶¶ 72, 74-75.

411. Case C-385/11, *Moreno v. Instituto Nacional de la Seguridad Soc.*, 2012 E.C.R. 00000, ¶¶ 22-25.

412. *Id.* ¶¶ 23-25.

413. Case C-423/04, *Richards v. Sec'y of State for Work & Pensions*, 2006 E.C.R. I-3602, ¶¶ 34-35, 38 ("Grounds").

close the gender gap or presumably, any gap, between an overrepresented and underrepresented group.<sup>414</sup>

As previously stated, the *Maruko* case will have a profound effect in the future based on its fact pattern involving same-sex relationships, but it also reflects a member-state's discretion in determining which relationships it equates to a traditional marriage. However, once that determination is made and a non-traditional relationship is equated to a traditional relationship, the discretion is removed and a member-state must apply the tenets of the equal pay doctrine.<sup>415</sup> Relatedly, the discretion associated with equality of relationships, once made, cannot be trumped by a collective bargaining agreement and such an agreement must acknowledge the member-state's extension of equality.<sup>416</sup> In the ECJ's *Richards* decision, a case with similar progressive issues involved, a member-state was granted the discretion to determine when a person's gender has changed, legally.<sup>417</sup> In *Rinner-Kuhn*, a case that is likely reflective of the broadest swath of member-state discretion, the ECJ stated that in equal pay cases the member-state's national courts can determine whether genders are treated differently based on the facts of a case and also, after having determined if inequality has occurred, whether that difference in treatment is tolerable.<sup>418</sup> A member-state also has the ability to create differences in salary and benefits for public servants.<sup>419</sup>

There are limits on the discretion of both member-states as well as employers. Employers cannot use professional qualifications as the sole reason for differences in salaries if two groups of workers are performing the same work or work of equal value, even if one group has greater professional qualifications than the other.<sup>420</sup> The most significant limitation on a member-state's discretion pursuant to Article 157 (ex 141, 119) is a general, but broad stroke, prohibition against categorically treating workers differently.<sup>421</sup>

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414. Case C-173/13, *Leone v. Garde des Sceaux*, 2014 E.C.R. 00000, ¶ 100 ("Grounds").

415. Case C-267/06, *Maruko v. German Theatre Pension Inst.*, 2008 E.C.R. I-1757, ¶¶ 66-67, 71-73.

416. *Id.* ¶¶ 49-53.

417. *Richards*, E.C.R. I-3602, ¶ 21.

418. Case C-171/88, *Rinner-Kuhn v. FWW Spezial-Gebaudereinigung GmbH & Co.*, 1989 E.C.R. 2743, ¶ 15.

419. Cases C-124/11, C 125/11, and C 143/11, *Germany v. Ditrlich*, 2012 E.C.R. 00000, ¶ 41.

420. Case C-309/97, *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v. Wiener Gebietskrankenkasse*, 1999 E.C.R. I-02865, ¶¶ 12, 16, 20.

421. Case C-366/99, *Griesmar v. Ministre de l'Economie, des Finances et de l'Industrie*, 2001 E.C.R. I-09383, ¶¶ 30-31, 35.

The third major theme espoused in the caselaw is that, although the great majority of forms of remuneration and compensation during employment and after employment are within the scope of Article 157 (ex 141, 119), there is a noticeable disconnect between what is covered by Article 157 (ex 141, 119) and what member-states and employers are obligated to do under Article 157 (ex 141, 119). Perhaps the best example of this reality is the ECJ's decision in *Barber*, whereby the ECJ held that firms, as employers, are not permitted to have different retirement ages for men and women even if the member-state government in which they operate maintains different ages for retirement.<sup>422</sup> Regardless of any disconnect, member-states or employers attempting to treat male and female employees differently will likely have the burden to show that Article 157 (ex 141, 119) is not violated.<sup>423</sup> Relatedly, employers should know that regardless of whether they operate in the public or private sector, Article 157's equal pay requirement applies.<sup>424</sup>

There are two rules that provide the greatest disconnect between what is and what is not scrutinized by Article 157 (ex 141, 119). First, the ECJ's jurisprudence in both *Danfoss* and *Cadman*, stating that length of service criterion for any form of remuneration is immune from Article 157's scrutiny even if there is evidence of a discriminatory impact, seems to be a puzzling separation.<sup>425</sup> The decision in *Cadman* helps close the separation a bit between what is and what is not scrutinized by Article 157 (ex 141, 119) in that the ECJ stated that an employer does not have to defend its use of a length of service provision in a remuneration scheme, so long as the length of service provision is only for the purposes of acquiring and rewarding experience.<sup>426</sup> Taken together, however, the *Danfoss* and *Cadman* decisions do not help close the noticeable gap in experience maintained by the men and women mentioned in several cases and included in this Article. The *Cadman* decision also widens the gap between what is and what is not permitted by Article 157 (ex 141, 119) in that it allows employers to change the criteria used to determine remuneration even when an employee has already begun employment.<sup>427</sup>

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422. Case C-262/88, *Barber v. Guardian Royal Exch. Assurance Grp.*, 1990 E.C.R. I-01889, ¶ 32.

423. Case 96/80, *Jenkins v. Kingsgate (Clothing Prods.) Ltd.*, 1981 E.C.R. 0911, ¶¶ 12-13, 15 ("Grounds").

424. *Barber*, E.C.R. I-1944, ¶¶ 28, 29.

425. Case C-109/88, *Union of Commercial and Clerical Workers v. Danish Emp'rs' Ass'n ex rel Danfoss*, 1989 E.C.R. 3119, ¶ 24; Case C-17/05, *Cadman v. Health & Safety Exec.*, 2006 E.C.R. I-09583, ¶ 39.

426. *Id.* ¶ 38.

427. *Id.* ¶ 13.

Within this same realm of confusion is the *Bilka* decision, whereby the ECJ stated that, pursuant to Article 157 (ex 141, 119), employers are permitted to exclude part-time workers from pension schemes, so long as the goal is to promote full-time work over part-time work, even if there is a negative impact on women (most likely in that they make up a larger proportion of part-time workers).<sup>428</sup> Similarly, in the *Nikoloudi* decision, the ECJ stated that employers can pay full-time workers a higher wage than part-time workers, although indirect discrimination may result if there is evidence that a greater percentage of female workers are adversely affected.<sup>429</sup> Therefore, it appears that by taking the *Bilka* and *Nikoloudi* decisions together, an employer may exclude part-time workers from its pension system and pay them less without infringing Article 157 (ex 141, 119), so long as, in regard to pay, the percentage of women in the part-time ranks is not too great. In such a case whereby a reviewing court found evidence of indirect discrimination, an employer need only raise the wages of the part-time workers, but need not move the part-time workers into the pension system.

Although Article 157 (ex 141, 119) does not identify men or women as a group more so in need of equal pay recognition, one would believe that it would protect both genders, equally. In *Abdoulaye*, the ECJ stated that employers could, without violating Article 157 (ex 141, 119), allow women to receive salary, social security contributions, and a lump sum while on maternity leave, without providing their male counterparts with the same benefits.<sup>430</sup> This decision seems to contradict the holding in *Gillespie*, whereby the ECJ stated that women must receive salary increases while on maternity leave and that maternity leave cannot be compensated at such a low rate as to undermine the purpose of maternity leave.<sup>431</sup> Relatedly, in *OGGP*, the ECJ held that, although admittedly different forms of benefits, a member-state can treat military service and maternity differently, even if the former is almost exclusively the province of men and the latter is almost exclusively the province of women, at least in regard to termination payments.<sup>432</sup>

Two cases, *Allonby* and *Lawrence*, illustrate the most significant disconnect between the mission of Article 157 (ex 141, 119) and what is not considered equal pay discrimination. Taken together, these cases stand for

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428. Case 170/84, *Bilka v. Weber von Hartz*, 1986 E.C.R. 1607, ¶¶ 33, 37, 43.

429. Case C-196/02, *Nikoloudi v. O.T.E.*, 2005 E.C.R. I-01789, ¶¶ 38, 53.

430. Case C-218/98, *Abdoulaye v. Renault*, 1999 ECR I-05723, ¶¶ 20, 22.

431. Case C-342/93, *Gillespie v. N. Health & Soc. Servs. Boards*, 1996 E.C.R. I-492, ¶ 21.

432. Case C-220/02, *Osterreichischer Gewerkschaftsbund Gewerkschaft v. Wirtschaftskammer Osterreich*, 2004 E.C.R. I-5907, ¶¶ 60-61, 65.

the idea that an employer can outsource employment to a subcontractor and indirectly pay those working for the subcontractor, who are performing the same work as the employer's previous employees performed, a lower amount even if there is a disparate difference between the employees still working for the employer and those working for the subcontractor in regard to gender.<sup>433</sup> According to *Lawrence*, the employees working first for the employer, and then for the subcontractor, who engaged in the same work on the same physical grounds, can be paid less by the subcontractor.<sup>434</sup>

Lastly, a note should be made concerning part-time workers and Article 157's equal pay requirement. Frankly speaking, part-time workers are not well protected by Article 157 (ex 141, 119). As previously stated, part-time workers can be excluded from pension plans to promote the attraction of full-time employment.<sup>435</sup> It is also acceptable, according to Article 157 (ex 141, 119), to pay part-time workers less than full-time workers.<sup>436</sup> Perhaps the only source of equality for part-time workers lies within Directive 79/7 which requires employers not to prejudice part-time workers in regard to pension contributions assuming the employer allows the part-time workers to be part of the pension system.<sup>437</sup>

## V. THREATS TO EQUAL PAY IN THE FUTURE IN THE EU

As mentioned in Section I, the addition of new member-states to the EU has reduced the push for equal pay within the twenty-eight-member-state bloc.<sup>438</sup> If this continues, one of the chief threats to the equal pay for equal work doctrine is the expansion of the EU. As the EU exists today, different cultures, social systems, and histories have created several variations of equality across the member-states despite the fact that Article 157 (ex 141, 119) is directly effective in each member-state and no implementing legislation is needed to bind member-states to the equal pay for equal work doctrine. Two questions that should be addressed in regard to equal pay is whether the EU will become more complacent with the differences across the member-states and whether the movement toward completely erasing the pay gap between male and female workers will be sidelined. Member-state national courts were given the discretion in

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433. Case C-320/00, *Lawrence v. Regent Office Care Ltd.*, 2002 E.C.R. I-07325, ¶¶ 17-19. Case C-256/01, *Allonby v. Accrington.*, 2004 E.C.R. I-00873, ¶ 79.

434. *Lawrence*, E.C.R. I-07325, ¶¶ 17, 18.

435. Case 170/84, *Bilka v. Weber von Hartz*, 1986 E.C.R. 1607, ¶¶ 33, 37.

436. Case 170/84, *Bilka v. Weber von Hartz*, 1986 E.C.R. 1607, ¶¶ 33, 37.

437. Case C-385/11, *Moreno v. Instituto Nacional de la Seguridad Soc.*, 2012 E.C.R. 00000, ¶¶ 33-36.

438. *See supra* Section I.

*Rinner-Kuhn* to determine whether a particular gender was being treated in a discriminatory fashion and whether this discrimination reached a level of intolerability.<sup>439</sup> Much akin to the moral hazard associated with the ECJ's decisions in *Allonby* and *Lawrence*, providing the member-state national courts with so much leeway in determining whether tolerable discrimination exists, creates too much risk that the cultures, social values, and histories of the various member-states will trump the intent of Article 157 (ex 141, 119), to the point in which female (and male) workers are more easily discriminated against in regard to remuneration. Such a checkerboard approach to equal pay could create the lack of harmony that Article 157 (ex 141, 119) specifically, and the TFEU generally, sought to avoid. Given EU citizen workers' right to free movement under Article 45 (ex 39, 48), it is foreseeable that workers would move to member-states that maintain a greater level of equality.<sup>440</sup> Likewise, pursuant to a firm's right to establishment under Article 49 (ex 43, 52), employers would move to member-states that permit greater discretion in treating workers unequally.<sup>441</sup> The holding in *Rinner-Kuhn* also seems to contradict the decision in *Barber* whereby the ECJ stated that national courts must work

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439. Case C-171/88, *Rinner-Kuhn v. FWW Spezial-Gebaudereinigung GmbH & Co.*, 1989 E.C.R. 2743, ¶ 15.

440. Article 45 (ex 39, 48) states:

1. Freedom of movement for workers shall be secured within the Union. 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States for this purpose; (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action; (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission. 4. The provisions of this Article shall not apply to employment in the public service.

TFEU art. 45.

441. Article 49 (ex 43, 52) states:

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

TFEU art. 49.

to remove all discrimination based on equality of pay.<sup>442</sup> Questioning this rhetorically, is it possible to both command national courts to remove all discrimination based on equal pay, yet provide them with the discretion to determine whether a particular group is being treated disadvantageously and to what extent that disadvantage is tolerable.

The ECJ's decision in *Allonby* and *Lawrence* serves as a real threat to the expansive scope of Article 157's equal pay requirement. Both cases allow an employer to dismiss certain employees and replace them with a subcontractor's workers who are engaged in the same form of work, yet the employer is able to reduce its labor costs by paying less to the subcontractor's workers.<sup>443</sup> In such a scenario, the funds to pay the subcontractor's workers originate with the employer and pass through the subcontractor. With these decisions in place, an employer has a method to reduce costs and a significant incentive to do so even if it is shown that the work being performed happens to maintain a comparatively high percentage of women. As previously stated, women workers are more likely to suffer from layoffs. One can only imagine the threat to various professions whereby women dominate the employment landscape and then an employer decides to subcontract. The decision in *Allonby*, which specifically commented that Article 157 does not apply because no one employer can remediate the problem, could be easily reversed to prevent the moral hazard associated with the incentive to subcontract employees.<sup>444</sup>

The *Cadman* decision is troublesome in light of the mission of Article 157 (ex 141, 119) and likewise poses a threat to pay equality. In several cases in this Article, the ECJ showed concern for female workers that might be disadvantaged because they are more likely to take on the responsibilities of home life and sacrifice time in the workplace. However, the ECJ's holdings in both *Cadman* and *Danfoss* allow an employer to craft a remuneration policy that benefits the employee's length of service which can be maintained even if there is evidence of a discriminatory impact, so long as the employer is using the length of service criterion for the purpose of acquiring and rewarding experience.<sup>445</sup> Thus, the ECJ has opened a pathway for unequal pay in that women, who are recognized as being more

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442. Case C-262/88, *Barber v. Guardian Royal Exch. Assurance Grp.*, 1990 E.C.R. I-01889, ¶¶ 33-34.

443. Case C-256/01, *Allonby v. Accrington.*, 2004 E.C.R. I-00873, ¶ 74; Case C-320/00, *Lawrence v. Regent Office Care Ltd.*, 2002 E.C.R. I-07325, ¶¶ 18-19.

444. See *Allonby*, E.C.R. I-00873, ¶ 74.

445. Case C-109/88, *Union of Commercial and Clerical Workers v. Danish Emp'rs' Ass'n ex rel Danfoss*, 1989 E.C.R. 3119, ¶ 24. Case C-17/05, *Cadman v. Health & Safety Exec.*, 2006 E.C.R. I-09583, ¶¶ 39, 40.



likely to remove themselves from the workplace to care for family responsibilities and thus would have fewer years of service to an employer, would be disadvantaged in regard additional remuneration. To be fair, the ECJ warned employers that a length of service criterion could not be used if there exists evidence that rewarding experience is not an appropriate objective.<sup>446</sup> Despite this qualification, it is difficult to think of an instance whereby rewarding experience would not be an appropriate objective, or at least, whereby rewarding experience would be defensible. It is unclear as to whether the ECJ's holding in *Gillespie*, that salary increases extended to workers must also be extended to those on maternity leave, could perhaps make up for the lost time in regard to remuneration based on length of service.<sup>447</sup>

The next threat to the equal pay doctrine consists of the inability of the ECJ to develop independently, or in conjunction with other EU institutions, a formula to determine comparable worth in regard to the three stages of equal pay. A strong argument could be made that the EU legislative bodies should enact a Regulation, or at least a Directive, that puts into place a standard, based on a formula for determining comparable worth, and give the ECJ the responsibility for enforcing that standard. This reality would remove some of the bias that might potentially exist pursuant to the ECJ's decision in *Rinner-Kuhn*. Related to this suggestion is the possibility that the EU legislative institutions and/or the ECJ develop a statistical standard to determine when a group has been disadvantaged enough to the point that Article 157 (ex 141, 119) would require a remedy. In *Seymour-Smith*, the ECJ articulated a three-part test to determine whether a member-state's policy has an unfavorable impact on women.<sup>448</sup> First, an unfavorable impact must be recognized.<sup>449</sup> Second, there must exist proper proportions of men and women in the general population in comparison to those men and women affected by the member-state's policy.<sup>450</sup> Third, the ECJ must determine whether that disparity has existed consistently over time.<sup>451</sup> In this particular case, the ECJ found that a near 9% differential was not evidence of disadvantage at a level to violate Article 157 (ex 141, 119).<sup>452</sup>

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446. *Id.* ¶ 38.

447. Case C-342/93, *Gillespie v. N. Health & Soc. Servs. Boards*, 1996 E.C.R. I-492, ¶¶ 21, 64.

448. Case C-167/97, *Regina v. Seymour-Smith*, 1999 E.C.R I-00623, ¶¶ 58, 59, 61-62.

449. *Id.*

450. *Id.*

451. *Id.*

452. *Id.* ¶¶ 63-65.

To create complete equality across genders, two cases that the ECJ could reexamine include *Richards* and *Abdoulaye*. These cases upheld a member-state's ability to maintain different retirement ages for different genders and a maternity leave system that favored women over men.<sup>453</sup> Again, although the culture, history, and social system of each member-state plays a role and the ECJ attempts to provide discretion where possible, requiring the same retirement age for men and women and making maternity leave more appealing to men would assist in cementing the concept of equal pay based on gender. The author of this Article, however, is cognizant of the fact that such a reversal and in-turn mandate for equality could place the progress of harmonization of equal pay based on gender at risk.

Lastly, and perhaps the most challenging effort the EU as a whole can take to improving the condition of the equal pay doctrine across the continent, is to broaden the scope of Article 157 (ex 141, 119) to require an inter-member-state requirement that employers must treat their workers equally based on gender. In other words, an employer operating in two or more EU member-states must adhere to the equal pay doctrine in each of those member-states. By example, an employer operating in Sweden and Germany must compensate equally the female workers in Sweden and the male workers in Germany if those workers are engaged in work of comparable value. Such a broadening of Article 157 (ex 141, 119) would also mitigate the possibility that an employer would relocate its operations to a member-state that takes a more relaxed view of the equal pay doctrine legally, historically, and/or culturally. As well, gains for women associated with the equal pay doctrine across the EU, as identified in Section I, could be better realized.

## VI. CONCLUSION

As previously stated, one estimate is that full pay equality will not exist in the EU until 2058 which represents at least one full generation from the time of this Article. In *Richards v. United Kingdom*, the ECJ held that it is a fundamental human right not to be discriminated based on gender and that such a right is embedded in EU law.<sup>454</sup> However, despite all of the progress made by the ECJ in ensuring member-states and employers within the twenty-eight-country EU adhere to the equal pay doctrine, the ECJ's decisions in *Cadman*, *Allonby*, *Lawrence*, and *Rinner-Kuhn* threaten to

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453. Case C-423/04, *Richards v. Sec'y of State for Work & Pensions*, 2006 E.C.R. I-3602, ¶¶ 34-35, 38; Case C-218/98, *Abdoulaye v. Renault*, 1999 ECR I-05723, ¶¶ 20, 22.

454. *Richards*, E.C.R. I-3602, ¶¶ 22-24.

dismantle some of the progress by potentially creating twenty-eight different standards for equal pay. The real progress of the ECJ has been in developing and broadening the scope of the term “pay” within the framework of Article 157 (ex 141, 119) given that the Article is deplete of a definition of pay. The term has been expanded to include virtually all forms of remuneration including retirement contributions, in-kind benefits, redundancy pay, civil judgments, pay supplements, sick leave benefits, pay during maternity leave, pay during military leave, termination payments, and service credits.

The ECJ could provide greater protection against potential unequal pay by tightening the discretion espoused in *Cadman* and *Rinner-Kuhn* and reversing its decisions in *Allonby* and *Lawrence* by closing the door left open by those decisions which allow an employer to gain the same work at a lower wage rate, and possibly from the same workers, through an outsourcing and subcontractor arrangement.