

Social Policy: Case 43/75 Defrenne v Societe Anonyme Belge de Navigation Aerienne (SABENA). pages: 151 – 155

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Chapter in:

Conversion Course Companion for Law: Core Legal Principles and Cases for CPE/GDL

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Pearson Education, 2008

ISBN: 9781405873154

SOCIAL POLICY

Case 43/75 Defrenne v Société Anonyme Belge de Navigation Aérienne (SABENA) [1976] ECR 455, [1976] 2 CMLR 98 a.k.a. Defrenne II

The principle of equality between the sexes is now recognised as a cornerstone of EC Law and there are numerous legislative instruments and a plethora of case law to support its application. However, despite the reference to ‘equal pay for equal work’ in Article 119 (now 144) of the Treaty of Rome, the impact of European law on the furtherance of social as well as economic objectives was not widely acknowledged in the early days of European integration.

In the early 1970s a Belgian air hostess commenced proceedings against her employers which resulted in three early references for preliminary rulings under the Article 177 EC (now Article 234) procedure. Gabrielle Defrenne’s litigation was based on the various forms of discrimination she had been subjected to on the grounds of her sex and the most celebrated of the cases, referred to widely as Defrenne II, concerns her equal pay claim.

The European Court of Justice’s ruling in this case is interesting in three important respects: it added to the developing jurisprudence on the direct effect of Treaty provisions; it dealt with the difficult policy issue of retroactivity in claims for damages; and, perhaps most importantly, it laid the foundations for the future development of EC sex equality law and formed the basis of the European Court of Justice’s relationship with what has become known as ‘the social dimension’.

The facts were as follows. Gabrielle Defrenne, an air hostess, brought an action for compensation against the airline that employed her on the grounds of discrimination in pay. From February 1963 until February 1966, she had been paid less than men who were doing the same job. Her employers did not dispute that the work performed by male air stewards and female air hostesses was the same or that there was discrimination in the rates of pay applicable to men and women. As there was no

remedy available under Belgian law for gender-based pay discrimination, Ms Defrenne sought to rely on Article 119 (now 141). Article 119 set out the principle that men and women 'should receive equal pay for equal work'. The Belgian appeal court, the Cour du Travail, referred the case to the European Court of Justice for a preliminary ruling under Article 234 (ex 177) on two counts. First, whether Article 119 of the Treaty of Rome was directly effective, in other words, whether its inclusion in the Treaty introduced the principle of equal pay for equal work directly into the national law of each Member State, thereby entitling workers to institute proceedings before national courts to ensure its observance and, if so, from which date. Second, the Cour du Travail asked if Article 119 was directly applicable in Member States or whether its application depended on it being adopted by national law.

The application of Article 119 to the Defrenne case was in relation to obligations which fall on individuals (i.e. employer and employee). This is known as horizontal direct effect. Vertical direct effect arises where a Treaty obligation falls on a Member State itself and reflects the relationship between the individual and the State (Van Duyn). Ms Defrenne's reliance on Article 119 arose due to the Belgian legislature's reluctance to implement the principle of equal pay into national law. Belgium was not alone in failing to fulfil its obligation in this way. Article 119 was intended to be implemented by Member States by the end of the transitional period (December 1961). Although this deadline was moved to the end of 1964, it had still not been met at that date by several Member States. The Commission had threatened to bring infringement proceedings against Member States not complying by July 1973, but this threat was never carried out. In February 1975 the Council issued the Equal Pay Directive (75/117/EC) for implementation by July 1976.

The Aim of Article 119

In considering the objectives set out in the Treaty of Rome, the Court identified the underlying rationale for the inclusion of Article 119 (now 141) thus:

Article 119 [now 141] pursues a double aim. First, in the light of the different states of the development of social legislation in the various Member States, the aim of Article 119 is to avoid a situation in which undertakings established

in States which have actually implemented the principle of equal pay suffer a competitive disadvantage in intra-Community competition as compared with undertakings established in States which have not yet eliminated discrimination against women workers as regards pay.

Secondly, this provision forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant development of the living and working conditions of their peoples... This double aim which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the community.

In its clear recognition of the existence of the social as well as economic objectives of Community law, the Court can be said to have refocused the scope of the founding Treaty and, thus, assured the future development of European Community sex discrimination law. This aspect was highly controversial at the time of the ruling. The newly established European Economic Community was viewed primarily as a vehicle for the avoidance of future armed conflict in Europe which, it was envisaged would best be achieved through the attainment of economic prosperity and market integration. The remainder of the social provisions within the Treaty are drafted in a manner which appears aspirational rather than likely to give rise to specific legal rights. The Court's interpretation of Article 119 as being capable of giving individually enforceable rights has been central to its subsequent jurisprudence on sex equality and has also served as an important foundation for the establishment of a European social dimension to the law-making capacity of the EC institutions.

Equal Pay as a 'Principle'

In its ruling, the European Court stated that the fact that Article 119 referred to equal pay as a 'principle' gave it a specific status within the European legal order which made it 'impossible to put forward an argument against its direct effect' (Para 28). The subjective nature of Article 119's wording meant that the scope of 'equal pay' and 'equal work' would have to be determined by the Court. On the issue of the horizontal application of Article 119, the Court found that the Article was directly effective and not limited to public authorities but also covered the relationship

between individuals as ‘the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the duties thus laid down’. (Para 31). This means that the rights bestowed by Article 119 apply directly to individuals and do not require implementation by Member States. The Article can, thus, be utilised against employers in both the public and private sectors without the need for equivalent rights under domestic legislation. In such cases, applicants must rely on the precise wording of the Article which becomes part of domestic law. It follows that in cases of conflict between the provisions of domestic law and Article 119, the latter must prevail.

On the issue of legal certainty, although Article 119 was found to be ‘sufficiently precise’ to be capable of having direct effect, the Court drew a distinction between ‘direct and overt discrimination’ and ‘indirect and disguised discrimination’ in the pay of men and women. The former, the Court held, is prohibited by Article 119 which is directly effective in this respect as it can be identified by national courts ‘solely with the aid of the criteria based on equal work and equal pay referred to by the article’. However, the prohibition of the latter by Article 119 lacked sufficient precision to be directly effective as it could be identified only by ‘reference to more explicit implementing provisions of a Community or national character.’ (p. 143). This distinction has been set aside over the intervening years so that Article 141 has been held to have direct effect in certain circumstances in which a finding of indirect rather than direct sex discrimination has been made – most notably in relation to inequalities of pay between part-time and full-time workers – see *Bilka-Kaufhaus*.

The Temporal Limitation

Retroactive application of the ruling was not allowed and a temporal limitation was imposed so that the judgment was only effective for the future. This meant that, with the exception of claims already submitted at the date of the ruling, back pay could not be claimed in respect of inequalities of pay relating to periods of service prior to that time. The Court was clear that limitations of the temporal effect of a ruling is an exceptional measure which should only be imposed on the grounds of legal certainty if the effects of the ruling would have a seriously disruptive effect – in this case the

large numbers of backdated claims that would otherwise have been submitted would have had serious financial consequences for many organisations. Nevertheless, the imposition of such a limitation has been criticised as a blatant example of judicial law-making by which the furtherance of social objectives are subordinated to the economic imperative. For a subsequent use of the imposition of a temporal limitation see Barber and, more recently, Preston on the application of Article 141 to occupational pension schemes.

Developments since Defrenne II

In giving its ruling, the Court isolated the stated principle of Article 119 - equal pay for equal work – and sidestepped consideration of the more complex, and wide-reaching, question of equal value. This is reflective of the conditions of the time in which blatant sex-based inequalities in pay of the kind identified in the Defrenne litigation were commonplace. Equal value, as a concept on which claims could be based, was very much in its infancy. In the intervening years, equal value has emerged as the most progressive provision on which to base claims and is now widely utilised. As the Court's jurisprudence since Defrenne II has demonstrated, the ruling certainly has application in claims relating to work of equal value as well as work which is the same or broadly similar to that performed by a suitable comparator as it is the core principle of Article 119 which was considered to be sufficiently precise rather than the effect of its application in what might be considered less precise circumstances. Furthermore, subsequent legislative developments have seen the principle expanded, in part to take account of jurisprudential factors.

Although Article 141 (ex 119) provided the only specific reference to equal treatment contained in the Treaty of Rome, it has served as a basis on which the principle of non-discrimination has been expanded beyond the originally narrow confines of equal pay. The Treaty of Amsterdam made some important amendments in this respect, most notably by pronouncing 'equality between men and women' as one of the goals outlined in Article 2. Article 141 has itself been expanded to provide explicitly for the application of equal pay for 'work of equal value' in addition to the original reference to 'equal work' and also refers to the principle of equal treatment in respect of action to promote equality.

In making its ruling in Defrenne II, the Court's primary concerns were that Member States should not be able to escape obligations imposed by European law simply by refusing to transpose key principles into national law and that tardiness on the part of Community institutions should not be able to hamper the development of the Community's aims. This was particularly important in the social context as the institutions of the time lacked the political will to prise open the window of opportunity presented by the Treaty's inclusion of Article 119. Instead this was left to the European Court of Justice which, in its recognition of the EEC as a social as well as economic Community, laid the foundations for future development. In this respect, Defrenne II should be acknowledged as a pivotal case which helped to create an appropriate environment for the Court's involvement in the birth of social action.

Further Reading:

Primary sources

Case 41/74 Van Duyn v Home Office [1974] ECR 1337

Case 96/80 Jenkins v Kingsgate (Clothing Productions) Ltd [1981] 2 CMLR 241

Case 170/84 Bilka-Kaufhaus GmbH v Weber con Hartz [1986] ECR 1607.

Case 109/88 Danfoss [1989] ECR 3100

Case 262/88 Barber v Guardian Royal Exchange [1990] ECR 1944

Case C-78/98 Preston and Fletcher v Wolverhampton NHS Healthcare Trust [2000] ECR I-3201

Secondary sources

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