

SUMMARY

**ECJ 28 February 2013, case C-427/11
(Margaret Kenny and 13 others - v -
Minister for Justice, Equality and Law
Reform, Minister for Finance and
Commission of An Garda
Síochàna), Gender
discrimination**

Facts

In July 2000, when this case started, the Irish police force (Garda) included 1,114 clerical positions. Of these, based on an agreement between Garda management and Garda representative bodies, 353 were 'designated' or 'reserved' posts, which meant that they were held by police officers, mainly being men (279 men versus 74 women). The remaining 761 clerical positions were held by civil servants employed by the Department of Justice, Equality and Reform and deployed to clerical duties in the police force. These civilians were predominantly women. The police force was in the process of reducing the number of reserved posts (a process known as civilianisation), so that only those positions that really needed to be held by a trained police officer would remain reserved for police officers.

The two groups of clerical workers - the police officers and the others - were remunerated according to separate pay scales. This resulted in the police officers being paid more than their civilian colleagues.

National proceedings

The plaintiffs in this case were civilian clerical staff. They brought proceedings before the Equality Tribunal, then the Labour Court. They compared themselves to those police officers who occupied positions in which there was no need for a trained police officer. Those comparators were paid more than the plaintiffs. The latter alleged that this was discriminatory. The Labour Court, assuming (without so holding) that the plaintiffs and their chosen comparators carried out 'like' work within the meaning of Irish equal pay law, held that the plaintiffs' claims were properly classified as indirect discrimination and that the proportions of men and women in the relevant groups disclosed prima facie indirect pay discrimination.

The issue was whether this discrimination was objectively justified. The Labour Court found that this was the case, holding that deployment of police officers on clerical duties meets either the operational needs of the police or the need to implement the agreement made with the police representative bodies. In particular, paying the police officers assigned to those clerical posts at the rate applicable to police officers addresses this objective. Having regard to the small number of 'designated' posts, maintaining the arrangements agreed with the representative bodies pending completion of the process of civilianisation is proportionate to the operational needs of the police. The plaintiffs appealed to the High Court, which referred to the ECJ five questions, which the ECJ summarises as follows: (i) how to determine what the employer's justification of the prima facie case of indirect gender discrimination in pay consists of, (ii) how to determine which workers must be provided with such justification and (iii) whether the interest of good industrial relations can be taken into account when examining that justification.

ECJ's findings

1. The first part of the ECJ's findings is devoted to the fact that the referring court, with the agreement of the parties, skipped the issue of whether the plaintiffs and their comparators performed comparable work, simply presuming this to be the case for the time being, and proceeded to investigate the issue of objective justification. Even though the questions referred to the ECJ do not relate to the issue of comparability of work, the ECJ summarises its doctrine. Where seemingly identical tasks are performed by different groups of persons who do not have the same training or professional qualifications, it is necessary to ascertain whether the different groups in fact do the same work. Professional training is not merely one of the factors that may justify different pay; it is also one of the criteria for determining whether the same work is being performed (§ 18-34).
2. It is for the employer to provide objective justification for the difference in pay

between the workers who consider that they have been discriminated against and the comparators (§ 35-41).

3. If the pay of one group of workers is significantly lower than that of another group and if the former are almost exclusively women while the latter are predominantly men, there is a prima facie case of sex discrimination, at least where the two groups perform duties of equal value and the statistics describing that situation are valid. It is for the national courts to assess whether the statistics cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant. A comparison is not relevant where it involves groups formed in an arbitrary manner (§ 42-45).

4. As the ECJ held in Royal Copenhagen (C-400/93), the fact that the rates of pay have been determined by collective bargaining may be taken into account when assessing whether a pay differential is unrelated to any discrimination on the grounds of sex. It is for the national court to determine to what extent the interests of good industrial relations may be taken into consideration (§ 46-51).

Ruling

Article 141 EC and Directive 75/117 must be interpreted as follows:

- Employees perform the same work or work to which equal value can be attributed if, taking account of a number of factors such as the nature of the work, the training requirements and the working conditions, those persons can be considered to be in a comparable situation. This is a matter for the national court to ascertain.
- In relation to indirect pay discrimination, it is for the employer to establish objective justification for the difference in pay between the workers who consider that they have been discriminated against and the comparators.
- The employer's justification for the difference in pay, which is evidence of a prima facie case of gender discrimination, must relate to the comparators. Their situation will need to have been described by valid statistics covering enough individuals and appearing to be significant (thus, not, for example, providing purely fortuitous or short term phenomena) and these will have been taken into account by the referring court in establishing the difference in pay.

- The interests of good industrial relations may be taken into consideration by the national court as one factor among others in its assessment of whether the differences between the pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex and are compatible with the principle of proportionality.
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Creator: European Court of Justice (ECJ)

Verdict at: 2013-02-28

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