

EC law on Justifications for Sex Discrimination in Working Life

Tamara K. Hervey, University of Nottingham, UK
Tamara.Hervey@nottingham.ac.uk

Index

EC law on Justifications for Sex Discrimination in Working Life

A	Introduction	103
B	Direct sex discrimination	106
	Standard of justification	106
	Substantive grounds	107
C	Indirect sex discrimination	121
	Standard of justification	121
	Substantive grounds	123
D	Unjustifiable sex discrimination	136
E	Conclusions	137
Notes	137

EC law on Justifications for Sex Discrimination in Working Life

Tamara K. Hervey

A Introduction

The justification of sex discrimination becomes increasingly important as the 'general principle' of non-discrimination on grounds of sex (among other grounds) becomes the accepted norm in Western societies, including the European Community. In certain circumstances, decisions, practices or policies that are discriminatory on grounds of sex, either directly or in effect, are nevertheless regarded as acceptable, for a variety of reasons. In those circumstances, deviation from the principle of non-discrimination is legally justified.

It is common ground that general principles are subject to exceptions. If the value of the general principle is to be respected, however, any such exceptions should be applied so as to avoid undermining the core principle, and must therefore be given as limited an interpretation as is consistent with their objectives. Thus, an assessment of justifications for sex discrimination in EC law must proceed from an understanding of the core principle, and must assess justifications with respect to the extent to which they successfully balance other interests with the core principle of non-discrimination on grounds of sex.

Thus far, the analysis is not controversial. However, the problem is that there is no common agreement or understanding of the core principle of non-discrimination on grounds of sex. Rather sex discrimination has been subject to a number of definitions or approaches, in particular with respect to its key purpose or function, both in theoretical writing and in EC law.¹ Naturally, the adoption of a particular approach to the function of the principle of non-discrimination on grounds of sex will have direct implications for the evaluation of purported justifications.

It is not the purpose of this study to provide a definitive theory or definition of sex discrimination, or even an exhaustive exposition of such theories or definitions.² However, for the purposes of evaluating lawful justifications for sex discrimination in EC law, a clear exposition of the purpose or function of the non-discrimination principle is necessary. The analysis of justifications for sex discrimination below proceeds from the position that the function of sex discrimination law, certainly in the context of working life, is to provide 'equality of opportunity' for women and men in that sphere.

Adopting the phrase 'equality of opportunity' of course raises more questions than it answers. However, as a starting point for analysis, it is meant to denote a notion of non-discrimination on grounds of sex beyond that of formal equality. Formal equality (or treating like as like) is a useful starting point in a liberal

democracy, as it resonates with liberal notions of justice. However, as a mechanism for redressing the factual inequalities between women and men in working life, it is limited. Moving beyond formal equality, 'equality of opportunity' recognises the historical and structural disadvantages faced by women in the employment sphere, and seeks to move towards 'equal starting points' for men and women in employment. It counters the assumption that the 'normal employee' is male, and that traditional male patterns of work (full-time, for life) are the norm. While rejecting socially constructed differences between men and women, if they operate to remove women's choice, it recognises and seeks to compensate for those real differences that do exist between men and women, in particular those related to child-bearing. The legal prohibition of discrimination on grounds of sex is thus viewed as one factor in redressing the relative positions of men and women in the workplace, and in its broader societal contexts.³

It is not entirely clear whether the promotion of 'equality of opportunity' is the underlying function of EC law.⁴ The original inclusion of Article 119 EEC (now Article 141 EC) in the Treaty of Rome was largely to serve an economic purpose. France was concerned that its equal pay laws would put French undertakings at a competitive disadvantage in the EEC. Therefore, the equal pay provision was added to the Treaty to prevent social dumping.⁵ However, since then, the legislative institutions and the European Court of Justice (the Court) have recognised the principle of equal treatment on the grounds of sex as a fundamental right serving a social function, in addition to its economic function.⁶ For instance, in *P v S*,⁷ in the context of the application of the Equal Treatment Directive to discrimination against a transsexual on the basis of her gender reassignment, the Court held that 'the Directive is simply the expression, in the relevant field, of the principle of equality, which is one of the fundamental principles of Community law'.⁸ The Court went on to find that 'to tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard'.⁹ More recently, in *Schröder*,¹⁰ the Court has reasserted¹¹ that the right not to be discriminated against on grounds of sex is a fundamental human right, and stressed that,

'in view of that case law, it must be concluded that the economic aim pursued by Article 119 of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is *secondary* to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.'¹²

The construction of sex equality as a fundamental right in EC law has implications for its justification.¹³ Of course, fundamental rights are not absolute, and considerations of public policy may justify their *prima facie* infringement. However, fundamental rights are not to be lightly justified. Rather one would expect them to be subject to what other legal systems term a 'strict scrutiny' test, which probably translates into a strong version of the proportionality principle in EC law.

It is significant therefore, that the 'fundamental rights' construction of sex equality in EC law is far from established. The Court's construction of equal treatment has been the object of consistent criticisms on the basis that it has not lived up to its statements in *Defrenne*, and has tended towards formal equality

approaches, especially where market forces are at stake.¹⁴ This is illustrated, for instance, by the ruling in *Grant v South-West Trains*,¹⁵ concerning the refusal of an employer to grant travel concessions to the female partner of a lesbian worker, where such concessions would have been granted to a male partner of a heterosexual woman worker. The Advocate General, following the Court's statements in *P v S*, urged the Court to apply Article 119 EC. The Court refused and retreated to a formal equality approach, stating that in the case of Ms Grant, the appropriate comparator was a gay man, who would have been treated the same way, and thus there was no discrimination.

One possible explanation for the difference in approach between the *Grant* and *P* cases is that they arose in the context of different provisions of EC law. EC law on sex equality in working life is comprised of a number of separate measures, each covering equal treatment on the ground of sex in a different context.¹⁶ Article 141 EC covers equal pay for equal work and work of equal value.¹⁷ Equal treatment in the context of employment is covered by Directive 76/207/EEC (the 'Equal Treatment Directive' (ETD)).¹⁸ This Directive is currently under revision, and the proposed amendment was at the time of writing before a conciliation committee.¹⁹ Equal treatment for professionals and the self-employed is covered by Directive 86/613/EC.²⁰ A number of other relevant measures of Community employment law also interact with the equal treatment measures in particular fields, including measures on pregnancy and maternity,²¹ atypical workers,²² parental leave.²³ Finally, the implications for Community sex equality law of the 'Article 13 Directives', on race equality,²⁴ and equality in employment on the other grounds listed in Article 13 EC²⁵ have yet to be elaborated.

For our purposes, what is most interesting about the 'construct' of EC sex equality law is that it appears that different standards of justification apply in different circumstances.²⁶ If non-discrimination were simply treated as a 'fundamental right' in EC law, then one might expect standards of justification to remain constant, irrespective of the ground of justification. It appears from the Court's case law that this is not the case, and that standards of justification differ depending on the context of their application. This point will be elaborated below. It appears that there are a number of different 'standards of justification' in EC law, varying from stronger to weaker versions of the proportionality test.

A final introductory point with respect to the term 'justification' must be made. In EC law, 'indirect discrimination',²⁷ may be justified by legitimate and proportionate policy reasons advanced by the employer; or, in the case of national legislation, by the government of the relevant Member State. This is an 'open class' of possible justifications. On the other hand, the orthodox view in EC law is that 'direct discrimination'²⁸ can be 'justified' only by an express legislative derogation: a closed class.²⁹ Some take the view that such express derogations, rather than *justifying* the discrimination, take the activity outside of the category 'discrimination' altogether. In my view, assessment of 'justifications for sex discrimination in working life' should include assessment of all exceptions to the principle of non-discrimination in that context.³⁰ This allows comparison of standards of justification across the board. In theory, it does not much matter which approach is taken: the unequal treatment is lawful whether the exception is constructed as rendering the act non-discriminatory or justifying the discrimination.³¹

B Direct sex discrimination

Standard of justification

The standard for justification of direct sex discrimination is derived from the Court's application of the exclusion provision in Directive 76/207/EEC (ETD), Article 2 (2). It should be noted that this derogation and the others in Articles 2 (3) and (4) apply only within the scope of the ETD, that is to equality of treatment in access to employment, training and working conditions. They do not apply to equal pay (covered by Article 141 EC) nor it is argued do they apply to sexual harassment.

Article 2 (2) ETD provides that

'This Directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor'.

The exception is narrow, and subject to a relatively strong version of the principle of proportionality.³² A Member State wishing to use it must show that, for the occupation concerned, sex is a 'determining factor'; that is, a non-discriminatory policy in the occupation concerned would make it very difficult or impossible to carry out the activities necessitated by that occupation. However, sex may be a determining factor not only by reason of the *nature* of the work, but also the *context* in which it is carried out, allowing more leeway in the interpretation and application of the exception.

The application of Article 2 (2) ETD is illustrated by the Court's approach to discrimination against women employed in national police and armed forces.³³ First, it is important to note that the Court found no *general exclusion* for the police or armed forces from the scope of EC equal treatment law. In interpreting Article 2 (2) ETD, the Court stressed that, as an exception, it must be construed narrowly and limited to *specific* exceptional circumstances.

Article 2(2) ETD must be read alongside Article 9 (2) ETD which imposes a transparency requirement on Member States invoking the exception in Article 2 (2). Member States must notify the Commission of whether, 'in the light of social developments, there is justification for maintaining the exclusions concerned'. The Court has adopted a strict interpretation of this transparency requirement, holding that a general statement on the part of a Member State to the effect that a derogation would be desirable was insufficient to satisfy its terms.³⁴

The proposed new ETD will modify Article 2 (2) to provide that,

'Member States may provide, as regards access to employment ..., that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'³⁵

The final clause of this provision was added to the Commission's proposal³⁶ by the European Parliament.³⁷ It appears that the European Parliament is concerned to stress and bolster the fundamental character of the principle of equality

between women and men. The new wording suggests a stronger version of proportionality, which would be consistent with this aim.³⁸

Substantive grounds

Having considered the standard of justification for direct sex discrimination required by EC law, we turn now to specific substantive grounds of justification.

1. *Artistic authenticity and cultural necessity*

It seems clear that Article 2(2) ETD would cover certain employment activities in the arts, for instance in dramatic performances, or modelling for painters or sculptors, where the role to be fulfilled is one which could not be carried out authentically if undertaken by a person of the other sex. The very nature of the occupational activity concerned justifies the discrimination, if the intrinsic qualities of works of art are to be valued and preserved. This ground of justification appears uncontroversial: who would wish to endorse a female Othello³⁹ or a male Eve in a sculpture or painting?

Cultural necessity may also justify employment of a person of a particular sex, in particular the employment of a man to work in a country in which it would be difficult, for religious and/or cultural reasons, for a woman to carry out the work, because women are excluded from the public sphere, or from business activity in that community. Again, this would seem to fall clearly within Article 2(2) ETD, by reference to the context in which the work is to be carried out.

2. *Decency and privacy*

Interests and claims of individuals other than the employee who has been discriminated against may provide justification for direct sex discrimination in EC law. For example, it is justifiable that individuals carrying out the job of customs officer or prison officer, where the duties of the job include the conducting of strip searches of the public or inmates, are the same sex are those with whom they come into close physical contact. It seems that the privacy issue may have come into play in the Court's ruling in *Sirdar*, discussed below, with respect to the nature of the job carried out by the British Royal Marines, a small front-line force, which operates in difficult and unsanitary conditions.

The Court rejected a general statutory exclusion from the principle of non-discrimination on the grounds of privacy in *Commission v UK*.⁴⁰ There the Court found that, while certain kinds of employment in private homes may justifiably be restricted to members of one sex, this was not so with respect to all kinds of employment excluded from the application of the UK Sex Discrimination Act 1975. In effect, the Court found that the exclusion was disproportionate.

The Court's application of the principle of proportionality to the decency and privacy justification has not always been robust. The Court accepted the ground of privacy as justification for sex segregation in various posts in the French prison service.⁴¹ One such post was that of head warder of a single sex prison. In reaching its decision that the direct discrimination was justified, the Court examined the post of warder, from which individuals are promoted to head warder. The Court held that the specific nature and context of the post of warder justifies reserving posts in male prisons for men and those in female prisons for women, on the grounds of protection of the interests of decency and privacy of the inmates with whom the warder is required to work. Although the activities of *head*

warders were not necessarily of such a nature for sex to be a determining factor in their appointment, the reasons for appointing head warders from the pool of warders, in particular that head warders should have had experience of the job of warder, justified the policy.

At first sight this decision might seem sound. It is certainly acceptable to stipulate that head warders must have the experience of being warders, and the specific nature of the post of warder and the duties carried out in that post justify the restriction of warders to those of the same sex as the inmates. However, the Court did not take into account the situation where a female warder, having gained experience in a female prison, wishes to apply for *promotion* to a post for which being of a particular sex is not a determining factor, that is the post of head warder, in a male prison. In this situation, the exclusion of women should not be justified.

3. *Safety or security*

a. safety of the public

A public security justification was successfully raised in *Johnson v RUC*.⁴² The Court was required to decide whether the policy of the (then) Royal Ulster Constabulary that women members of the RUC were not armed, was consistent with the ETD. The effect of this policy was that Ms Johnson lost her job, where a man in her situation would not have done so. The Court held that,

‘the possibility cannot be excluded in a situation characterised by serious internal disturbances that the carrying of firearms by policewomen might create additional risks of their being assassinated and might therefore be contrary to the requirements of public safety. In such circumstances, the context of certain policing activities may be such that the sex of police offenders constitutes a determining factor for carrying them out. If that is so, a Member State may therefore restrict such tasks ... to men.’⁴³

The ruling in *Johnson* may be regarded as problematic. The Court accepted, without explanation, the assertion that women RUC officers were more likely to be assassinated. But there is no biological reason preventing women from using arms as effectively as men use them. Given appropriate training, there seems to be no reason why women should be more vulnerable than men when faced with a situation of internal disturbance. Would public perceptions of women as ‘the weaker sex’ constitute a *significantly* greater risk to women, so as to meet the strong version of the proportionality test required for justifying direct discrimination in employment?

The more recent rulings of *Sirdar* and *Kreil* are consistent with the *Johnson* ruling. In the case of *Kreil*, the Court considered the German army’s policy that women could not be engaged in any post involving the use of arms. Ms Kreil, trained in electronics, applied for voluntary service in the army, requesting duties in weapon electronics maintenance. She was refused, and challenged this refusal as contrary to EC law. The Court held that such a general rule could not be justified either by the specific nature of the posts in question, or by the particular context in which the activities in question are carried out. Moreover, where women were appointed to the German army, they were given basic training in the use of arms. Therefore the exclusion of women from all posts involving the use of arms was disproportionate. By contrast, in the case of *Sirdar*, the Court found that the proportionality principle might be met. The British Royal Marines exclude women from service on the basis that every Marine, irrespective of his specialisation, must

be capable of fighting in a commando unit: the requirement of ‘interoperability’. Mrs Sirdar, an army chef facing redundancy, received an offer of a transfer to the Royal Marines. However, the offer had been made on the mistaken assumption that Mrs Sirdar was a man, and was subsequently withdrawn. Mrs Sirdar challenged this as contrary to EC law. The Court held that, in the light of the function of front-line commandos, the exclusion of women could be justified. The Court explained its decision thus:

‘the organisation of the Royal Marines differs fundamentally from that of other units in the British armed forces, of which they are the “point of the arrowhead”. They are a small force and intended to be the first line of attack. It has been established that, within this corps, chefs are indeed also required to serve as front-line commandos, that all members of the corps are engaged and trained for that purpose, and that there are no exceptions to this rule at the time of recruitment’.

One interpretation of this case law is that service in the Royal Marines may be a ‘special case’, compared to service in the army in general, just as service in the RUC was a special case, compared to service in the police force in general. If this is correct, the objections raised above with respect to the *Johnson* case apply equal to *Sirdar*.⁴⁴ However, there may however be something about the *context* in which the work of the Royal Marines is carried out (the conditions of front-line attacking – a small force, operating in difficult and unsanitary conditions) which does justify the exception from the point of view not of public safety, but of personal privacy. In this case, *Sirdar* is an appropriate application of the exception in Article 2(2) ETD.

By contrast, in *Commission v France (Sex Discrimination in the Civil Service)*, the Court was not satisfied that the principle of proportionality had been met in the case of a quota system for the recruitment of men and women to the French police force. The Court held that the quotas for the various grades of officers were not sufficiently related to the specific activities of the jobs concerned, as required by the wording of Article 2(2) ETD. A justification relating to ‘public security’ in general cannot apply to all posts in the police force of a Member State.⁴⁵

b. safety of women

In the past, in a number of Member States, the ground of safety of women has been used to justify direct discrimination against women, in particular in the exclusion of women from jobs regarded as too perilous, or otherwise unsuitable for women, for example underground coal mining or night work. These measures are reflected in a number of international labour law obligations.⁴⁶ Some such measures remain in force today. However, the general trend in the EU seems to be to progressively remove such protective legislation, leaving only such measures necessary to protect women with respect to their child-bearing abilities.⁴⁷ In dealing with the consistency of such measures with national obligations in EC law, the Court has had to engage with the relationship between EC law, international law, and fundamental rights.⁴⁸

4. *Pregnancy and Parenthood*

Article 2 (3) ETD provides that ‘this Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity’. As with Article 2 (2) ETD, the Court has regarded this provision

as a narrow ground for different treatment of women, finding, for instance, that it is only intended to exempt measures concerned with the protection of women's biological condition, and may not be used to advantage men, even where carrying out 'female' childcare roles.⁴⁹ The details of the application of this provision, an application of the general principle of subsidiarity,⁵⁰ and, more recently, its relationship with provisions of the pregnancy and maternity directive (PMD),⁵¹ raise difficult problems for EC law.

The PMD provides a number of special protections for pregnant women employees⁵² and those who have recently given birth, and thus, technically speaking, elaborates a number of justifiable employment policies which discriminate against men. The PMD requires employers to assess the risk to pregnant or breastfeeding workers of exposure to hazardous agents, processes or working conditions, and if necessary to make appropriate accommodations, including moving the woman to another job.⁵³ Employment rights must be ensured for women in those circumstances.⁵⁴ Women workers are entitled to at least 14 weeks maternity leave before and/or after confinement.⁵⁵ During that time, they are entitled to protection of their employment rights, and to entitlement to a payment and/or 'adequate allowance', not less than statutory sick pay.⁵⁶ They may not be dismissed at any time during the period from the beginning of their pregnancy until the end of their maternity leave.⁵⁷ Thus it is clear from Article 2(3) ETD and the PMD that pregnancy and maternity are accepted grounds for justification of discriminatory measures *favouring* women. However, measures *detrimental* to women may not be justified on the grounds of pregnancy *per se*.⁵⁸ This is a direct consequence of the Court's firm view that, in EC law, discrimination on the ground of pregnancy is *direct* sex discrimination.⁵⁹

a. protection of employee or foetus

As noted above, the PMD requires different treatment of pregnant and breastfeeding women in circumstances where the workplace constitutes a specific hazard to the woman, the newborn child or the foetus. Such 'discrimination' is therefore 'justified' (or in fact mandated⁶⁰) in EC law. However, only *beneficial* different treatment of a pregnant woman may be justified in these circumstances. The Court held in *Mahlburg*⁶¹ that refusal to employ a pregnant woman on a permanent contract where the job entailed exposure to harmful substances was contrary to Article 2 (1) ETD.

b. ability to perform job

A pregnant woman who is physically unable to perform her job, due to her altered physique during pregnancy (say, an air hostess who can no longer operate in the confined conditions of an aircraft cabin) is protected from dismissal⁶² and detrimental treatment by the terms of the PMD.

Ability to perform the job in the sense not of physical ability but of availability for work poses more difficult problems. Is it justifiable for an employer to argue that the fact that the pregnant employee will not be available for work during her maternity leave justifies her dismissal? The Court firmly rejected this justification with respect to a permanent employee in *Webb*,⁶³ holding that 'dismissal of a pregnant woman recruited for an indefinite period cannot be justified on grounds relating to her inability to fulfil a fundamental condition of her employment contract'.

However, it appeared from the ruling in *Webb*, by implication, that the dismissal of a woman employed on a *fixed-term* contract may be justified if on the ground of pregnancy she is unable to be present for the necessary period of time.⁶⁴ This was the argument of the employer in *Tele-Danmark*,⁶⁵ in which a woman was recruited for a six-month contract, did not inform her employer at the time of the interview of her pregnancy, and was dismissed shortly after she did so, on the basis that she would not be able to work for a significant portion of her period of employment. It was argued by the employer that Article 10 PMD did not apply in these circumstances. The Court robustly rejected this argument, stating that the principles developed in earlier cases with respect to dismissal of employees on grounds of pregnancy apply equally to fixed term contracts.⁶⁶ In *Melgar*,⁶⁷ the Court reached the same result by a different approach, in the context of a fixed-term contract⁶⁸ that had come to an end, and was not renewed, allegedly on the ground of the employee's pregnancy. The Court pointed out that non-renewal of the contract was not dismissal, but that, as refusal to employ a woman on a permanent contract on the grounds of pregnancy constitutes unjustifiable direct discrimination,⁶⁹ non-renewal of a fixed term contract may, where it is motivated by the worker's state of pregnancy, constitute direct sex discrimination.⁷⁰ What has not yet been considered by the Court, and was not discussed in the *Mahlburg* decision,⁷¹ is whether a refusal to appoint a pregnant woman on a fixed term contract, where the contract cannot be carried out by a pregnant woman, as the workplace constitutes a specific hazard to the woman and/or her foetus, is justified. One view is that it can be assumed from the Court's silence on this issue that the Court has introduced a possible justification for direct discrimination on the grounds of health and safety.⁷² However, the contract at issue in *Mahlburg* was a permanent contract, and thus the Court was not required to rule on the question of refusal to appoint a pregnant woman to a fixed term contract in those circumstances.

Further problems arise where the purported justification is the inability to work arising from pregnancy-related illnesses. The Court has dealt with this issue on a number of occasions, struggling to find a balance between the financial burden on employers (and thus the labour market) arising from pregnancy-related long-term incapacity of employees, and the principle of equal treatment. In *Hertz*,⁷³ the Court confirmed that dismissal of a female worker constitutes direct discrimination on grounds of sex. However the Court failed to follow the logic of *Dekker*,⁷⁴ rather finding that dismissal of a woman employee because of repeated absence due to illness which appears after the period of maternity leave provided under national law, even if this illness is attributable to the pregnancy, is not discrimination.⁷⁵ After the end of maternity leave, dismissal due to absence because of pregnancy-related illness is not distinguished from dismissal due to absence arising from other illnesses, and thus the absence, not the pregnancy or the pregnancy-related illness, justifies the dismissal. Moreover, the Court held in *Larsson*⁷⁶ that nothing in the applicable EC law prevented the employer from taking into account Ms Larsson's absences from the beginning of her pregnancy, to the start of her maternity leave, for the purposes of calculating absences providing grounds for her dismissal. This ruling was widely criticised, and the Court reviewed its position in *Brown v Rentokil*.⁷⁷

In *Brown v Rentokil*, the Court held,

'contrary to the Court's ruling in Case C-400/95 *Larsson*, where a woman is absent owing to illness resulting from pregnancy or childbirth, and that illness arose during pregnancy and persisted during and after maternity leave, her absence not only during maternity leave but also during the period extending from the start of her pregnancy to the start of her maternity leave *cannot be taken into account for computation of the period justifying her dismissal under national law*'.⁷⁸

Ms Brown's illness was clearly pregnancy-related. During the protected period, therefore, her situation could not be compared to that of a co-worker absent from work for non-pregnancy related reasons.⁷⁹ It follows that absence from work during the 'protected period' established by the PMD, (which runs from the start of the pregnancy to the end of maternity leave) cannot justify dismissal, or presumably any other detrimental treatment of an employee in terms of her status or entitlements. Outside that period however, EC sex equality law does not prevent such a justification, and national employment law on unfair dismissal in cases of illness will apply.

The rulings in *Larsson* and *Brown v Rentokil* may be criticised in terms of the promotion of 'equal opportunity', on the grounds that only women can suffer pregnancy-related illnesses, whether or not that illness arises within the protected period. The establishment of such a protected period gives protection to women with 'normal' pregnancies, but denies employment protection to women whose pregnancies are problematic, arguably those women who need protection the most. It is not clear why, if the *cause* of the illness is pregnancy, an illness should be treated differently depending upon whether it arises within or outside the period of maternity leave. Indeed, in the context of an equal pay claim in *Høj Pedersen*,⁸⁰ the Court held that, where, under national law, in principle all workers were entitled to continue to be paid in full in the event of incapacity for work, depriving a woman of full pay in the event of incapacity for work arising before maternity leave, where the incapacity is 'the result of a pathological condition connected with the pregnancy, must be regarded as treatment based essentially on the pregnancy and thus as discriminatory'.⁸¹

However, from the point of view of employers, the combination of *Brown*, *Larsson* and the PMD makes it very clear where, in accordance with the provision in Article 2 (3) ETD, an employer may rely on national employment regulation and justify dismissal of an employee with prolonged periods of absence arising from pregnancy-related illness. The ruling in *Brown* shows the Court applying the principle of justification for sex discrimination in such a way as not to infringe on the provision made by the legislature in the PMD.

The Court's decision in *Grüber*⁸² was even less disturbing of the status quo with respect to women's relationship to the labour market and family responsibilities. Ms Grüber had to terminate her contract of employment, as she could not find adequate child-care. Employees who had worked for three years were entitled to a termination payment if they ended the contract for 'important reasons'. These did not explicitly include child-care, but those who had worked for five years were entitled to half of the termination payment if they left work on the birth of a child. Rather than compare those who resigned for child-care with those who resigned for 'important reasons', the Court held the appropriate comparator groups were those who resigned for child-care and those who

resigned without an 'important reason'. Thus the Court found no indirect discrimination, and there was no need to consider the justification issue.⁸³

c. cost to employer

The Court held, in extremely general terms, in *Dekker*, that

'a refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. Such discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer ...'.⁸⁴

This principle was confirmed in *Webb*, where the Court held that the protection afforded by EC law to a woman during pregnancy and maternity leave cannot be dependent on whether her presence at work during the maternity leave period is essential to the proper functioning of the employer's undertaking.⁸⁵ Most recently, in *Mahlburg*,⁸⁶ the Court has applied the principle in the case where the pregnant employee cannot carry out the job concerned for the duration of the pregnancy. Financial loss to an employer in such circumstances cannot justify a refusal to appoint, at least to a permanent post.⁸⁷

However, once we move beyond refusal of employment into the terms and conditions of employment of pregnant workers and workers on maternity leave, the matter is less clear-cut. The PMD implies that the financial burden of pregnancy need not be borne entirely by employers, but also by the state, in the maintenance of an adequate allowance during maternity leave, and, where, as in many cases, that allowance is lower than her pay, by the woman herself. This justification for the difference in reimbursement between employees on maternity leave and other employees has been confirmed by the Court in a number of cases involving the interactions between Article 141 EC, the ETD and the PMD.

In the rather unusual case of *Thibault*, the Court considered the refusal to grant a woman a performance assessment, on the grounds that she had been absent from work for more than six months of the relevant year, where the absence was largely due to maternity leave. The performance assessment normally led to a 'promotion', in terms of a pay increment, but the Court dealt with the case under the ETD, rather than Article 141 EC. The Court held that to deny Ms Thibault her performance assessment was directly discriminatory, because if she had not been on maternity leave, she could have qualified for the increment. The reasoning appears to imply that a woman on maternity leave must be compared with her colleagues who remain at work. However, the Court did not expressly acknowledge this, nor did it distinguish this case from others, in which the Court has consistently held that a woman on maternity leave is in a special situation, not comparable with any others.⁸⁸

In *Lewen*, the Court held that refusal to pay a Christmas bonus, on the ground of absence on maternity leave during the year for which the bonus was paid, was unlawful. This was on the basis that the bonus was 'pay' in the sense of Article 141 EC, not the 'payment' of Article 11 PMD, as it was not intended to ensure a minimum level of income during the leave period. Thus it seems that, with respect to pay linked to the contract of employment, discrimination on grounds of pregnancy is not justifiable.⁸⁹

In general though, as the Court has held in *Gillespie*⁹⁰ and *Boyle*⁹¹, different levels of remuneration for women on maternity leave as compared to those at

work, and those on sick leave, are justifiable in EC law. The Court reached this conclusion by stating that a woman on maternity leave is not comparable with man or a woman actually at work, or on other sorts of leave, such as sick leave. Thus the Court does not approach this as a matter of justification, but as a matter of lack of discrimination, as there is no appropriate comparator. However, it seems likely that underlying this reasoning is the view that, in the settlement provided in EC law for the sharing of the costs of maternity leave, the provision of Article 11 PMD draws a line in the sand, preventing use of the non-discrimination principle to undermine that settlement.⁹²

However, Article 11 PMD applies only to payments made *during maternity leave*. In *Høj Pedersen*,⁹³ the defendants argued that Article 11 PMD allows national law to set a ceiling for allowances which women may claim in the event of *pregnancy*. It was further argued that any discrimination which might exist in such national law would be justified by the fact that it reflects a sharing of the risks and economic costs connected with pregnancy between the pregnant worker, the employer and society as a whole.⁹⁴ The Court rejected this argument, finding that the ceiling only applies to pay or benefits received during maternity leave.⁹⁵ In any event, the Court continued

‘The discrimination ... [the depriving of a woman of her full pay on the grounds of a pregnancy-related incapacity for work, where other incapacities were not so treated] cannot be justified by the aim of sharing the risks and economic costs connected with pregnancy between the pregnant worker, the employer and society as a whole. That goal cannot be regarded as an objective factor unrelated to any discrimination based on sex within the meaning of the case law of the Court.’⁹⁶

Thus in interpreting the justification of the cost to the employer in terms of discriminatory treatment arising from pregnancy and maternity, the Court has respected the views of the legislature, and has drawn a distinction between pregnancy and maternity.⁹⁷

d. morality/freedom of religion

In certain circumstances, the pregnancy of an employee raises moral or religious problems for an employer. This is the case, for instance, where an unmarried teacher in a religious school becomes pregnant. It is not the pregnancy *per se* that is regarded as morally reprehensible or inconsistent with the religious beliefs of the employer, but rather the pregnancy as outward sign of extra-marital sexual activity. Would the dismissal of such an employee be lawful in EC law? The Court has not yet had to consider such a question. Applying the logic of *Dekker*, it would seem that, as pregnancy, a visible sign of sexual activity, can only happen to a woman, dismissal of a woman in such circumstances would be direct sex discrimination. It would be difficult for an employer to show satisfactorily that it would have treated a man in an extra-marital sexual relationship the same way.

However, were the Court to be faced with such a case, it might refer, in addition to the sex equality legislation, to the ‘Article 13’ Directive 2000/78/EC.⁹⁸ This provides for non-discrimination on the grounds of religion or belief, disability, age, and sexual orientation in the employment sphere. Article 4 provides an exemption on the basis of ‘genuine and determining occupational requirements’. Article 4(2) elaborates this in the context of discrimination on grounds of religion. In employment within ‘churches and other public or private organisations the

ethos of which is based on religion or belief', a difference of treatment based on a person's religion is lawful, where the nature of the work or the context in which it is carried out justifies it. In assessing whether this is a genuine occupational requirement, regard is to be had to the institution's ethos. The use of the word 'ethos' here is significant, and appears to imply something beyond the pure tenets of faith entailed in the religion, in the sense of inward belief, perhaps extending to outward manifestations of consistency with faith. Religious ethos may therefore require an employee's consistency with respect to matters of life-style, in particular sexual morality. Article 4 does state that the provision 'should not justify discrimination on another ground', which would presumably include the ground of sex. However, it goes on to say that 'the Directive shall not prejudice the right of churches ... to require individuals working for them to act in good faith and with loyalty to the institution's ethos'. Might the Court then construe extra-marital pregnancy as inconsistent with an employer's ethos, find that there is direct sex discrimination, but find it justified by the employer's religious ethos? It is widely held that direct sex discrimination can only be justified on the grounds set out in the ETD, which do not include morality, ethos or freedom of religion. However, the Court has never explicitly held this to be the case, and indeed at least one Advocate General has invited the Court to find direct sex discrimination justified in a context not falling within the explicit derogations of the ETD.⁹⁹ The existence of another measure of EC legislation, the Article 13 Directive, might be sufficient to persuade the Court that such discrimination would be justified.

e. family responsibilities

The Court has consistently held that beneficial different pay and treatment of mothers on maternity leave is justifiable, and that fathers cannot rely on the non-discrimination provisions of EC law to claim equal treatment. This is so even where the father is carrying out the (traditionally female) childcaring role. In *Hofmann*,¹⁰⁰ the Court considered a claim by a father who wished to take paternity leave on the same basis as the mother would have been entitled to take maternity leave under national law. The Court held that the national law fell within the scope of Article 2 (3) ETD, as its purpose was the protection of women, and their 'special relationship' with their children, in connection with the effects of pregnancy and motherhood.¹⁰¹ However, in *Commission v France*,¹⁰² the Court rejected the argument that various special privileges for mothers, such as extra holidays, time off work on Mother's Day and special allowances to pay for childminders, were lawful within Articles 2 (3) or 2 (4) ETD. However, this case stands alone as representing this line of reasoning. In later cases, such as *Abdoulaye*,¹⁰³ the Court has followed the *Hofmann* approach. There the Court held that, where a lump sum was payable only to women employees when taking maternity leave, there could be no discrimination, as a woman worker on maternity leave was not in a comparable situation to others.¹⁰⁴ In *Lommers*,¹⁰⁵ the Court found that restriction of workplace nursery places to children of women employees¹⁰⁶ was consistent with EC law.

Assessing these cases in terms of equality of opportunity poses special problems. As McGlynn and others¹⁰⁷ have convincingly shown, the Court's approach is based on a discredited notion of mother-infant 'bonding'. However, at the same time, elements of the Court's approach do reflect social reality with respect to the role of women in the family. For most children in the EU, it is

mothers who are primary carers. Thus the Court's approach could be considered consistent with 'equality of opportunity', as it recognises actual difference between women and men with respect to childcare.

However, on the other hand and especially in the long term, a 'special protection for mothers' approach, when applied to parenting as opposed to childbearing, is fundamentally harmful to women. Only women bear children: thus it is justifiable in the name of equality of opportunity to treat women differently on the basis of their pregnancy. But both men and women become parents; with respect to parenting, therefore, at least with a long-term perspective, EC law should move towards the same treatment for mothers and fathers. This would imply that provisions relating to childcare, outside the 'special period' of pregnancy,¹⁰⁸ should be drawn up on an 'equal parenting' basis. Favourable treatment of women, on account of their parenting duties, will not, in the long term, promote equality of opportunity.

At present, however, neither the rulings of the Court nor the legislative framework of EC law operate on this basis. The problem with the Court's approach is that it considers 'pregnancy' and 'motherhood' as equivalent, or at least shading into one another, whereas it is only pregnancy itself that is unique to women – parenthood is shared with men. The Parental Leave Directive (PLD),¹⁰⁹ significantly by failing to grant an entitlement to paid parental leave, falls short of the protection offered by the PMD. Thus the legislature failed to grant all parents the special protection needed to achieve true 'reconciliation of work and family life', in the name of equality of opportunity.

The Court has perpetuated its ideology of motherhood in interpretation of the PLD. In *Lewen*,¹¹⁰ the Court considered a claim for payment of a Christmas bonus by a woman on parental leave. The Court held that a Christmas bonus does not fall within the scope of the 'rights acquired or in the process of being acquired by the worker on the date on which parental leave starts', which must be maintained as they stand until the end of parental leave.¹¹¹ This seems surprising, but is presumably explained by the employer's argument to the effect that the bonus was a motivation for the forthcoming year, not a reward for work already done. But the Court, by reference to the social reality that 'female workers are likely ... to be on parenting leave when the bonus is awarded far more often than male workers',¹¹² found indirect sex discrimination. On the one hand, this could be seen as recognising the status quo and protecting women within it, thus promoting equality of opportunity. On the other hand, this reinforces the assumptions that childcare is the primary responsibility of women, and only women need special employment protection in this respect. Further, should more men take leave to care for children, the indirect discrimination argument would cease to be available, as the statistical disparity between women and men would reduce.¹¹³ It is therefore particularly disappointing that the Court adopted this approach in the context of the PLD. What is needed is special treatment for *parents*, and recognition that any indirect discrimination on the grounds of sex that might arise¹¹⁴ is justifiable.

The proposed amendments to the ETD may clarify matters, but will ultimately not achieve what would be necessary to promote equality of opportunity in the long term. It is proposed to add to Article 2 (3) ETD a specific entitlement for a woman to return to her own job, or an equivalent post, on terms no less favourable to her, after her maternity leave.¹¹⁵ This will mirror a similar provision

in the PLD.¹¹⁶ The ETD will explicitly be made without prejudice to the provisions of the PLD and the PMD, which grant different employment rights to mothers on maternity leave from those granted to parents on parental leave. The different treatment of mothers from fathers in this respect, already guaranteed by the Court, will thus be further entrenched in the ETD.

More promisingly for equal opportunities, the proposed new ETD is also to be without prejudice to the right of Member States to recognise a distinct right of *paternity* leave. Member States which recognise such a right are to make provision to protect fathers from dismissal due to exercising that right, and to grant them an entitlement to return to their jobs or equivalent posts on terms no less favourable to them. On the one hand, this provision may be seen as recognising the need to grant special entitlements in employment law to working fathers, in order to promote the reconciliation of work and family life. The specific derogations in the amended ETD will ensure that the application of the principle of non-discrimination may not be used to require that such special rights be extended beyond their intended scope, for instance by opening up an argument that women should also be entitled to whatever paternity leave entitlements are granted by national law. Such an application would run the risk of losing the support of employers, who might justifiably argue that they were being required, in the name of equality, to provide greater entitlements than the EC legislature regards necessary to promote the reconciliation of work and family life.

On the other hand, by perpetuating a distinction between maternity leave and paternity leave, the proposal may be seen as failing to move towards an 'equal parenting' approach. This fundamental change is what is necessary to bring the entire framework of EC law on reconciliation of work and family life into line with an equal opportunities approach, and to reassert the fundamental nature of the right to equality of opportunity, in terms of its relationship with other employment rights.

5. *Affirmative action*

Article 2 (4) ETD exempts from the scope of the Directive 'measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunity in employment'. Article 141 (4) EC provides similarly that

'with a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers'.

Thus EC law permits some types of affirmative action. Affirmative action measures operate to ensure substantive, as opposed to formal, equality, by taking into account historical, social and structural differences between men and women's experience of and opportunities in the labour market, in view of women's (and men's) social roles.¹¹⁷

The Court has held that in principle the application of an affirmative action provision constitutes direct discrimination on grounds of sex.¹¹⁸ Adopting a formal equality approach, the Court does not regard affirmative action as promoting substantive equality.¹¹⁹ Rather, affirmative action is discrimination

which may in some circumstances be justified in order to promote equality of opportunity. This construct has consequences for the approach of the Court to affirmative action measures. As affirmative action measures constitute an exception to the non-discrimination rule, the Court adopts a narrow approach to what is permissible affirmative action.

In the first case in which the Court had an opportunity to consider Article 2 (4) ETD, *Kalanke*,¹²⁰ the Court held that Article 2(4) ETD permits measures relating to the organisation of work, especially for workers with children, and the reconciliation of work and family life, but not rigid quota rules requiring the appointment or promotion of women to jobs in preference to (equally qualified) men. Such rules overstep the limits of the exception in Article 2 (4) ETD.¹²¹ This was confirmed in *Abrahamsson*.¹²² in which the Court held that a national rule which gave automatic priority to a person of the under-represented sex who had adequate qualifications but which were inferior in minor aspects to those of the person who would otherwise have been appointed, failed to satisfy the requirements of Article 2 (4) ETD and Article 141 (4) EC.¹²³

The judgment in *Kalanke* caused considerable concern and cast doubt on the legality of a variety of different forms of affirmative action.¹²⁴ However, the Court, perhaps in response to the Treaty changes agreed at Amsterdam,¹²⁵ adjusted its position in *Hellmut Marschall*.¹²⁶ Mr Marschall was refused promotion to a teaching post in a secondary school, and an equally qualified woman was promoted instead, on the grounds that women were under-represented in higher-grade teaching posts. This was consistent with the applicable State law, which allowed an equally qualified woman to be preferred for promotion, 'unless reasons specific to an individual [male] candidate tilt the balance in his favour' (the 'saving clause'). Distinguishing *Kalanke*, and rejecting the Opinion of its Advocate General, the Court held that a quota rule with a 'saving clause' would be consistent with Article 2 (4) ETD if it operated to counteract the prejudice experienced by women candidates due to employers' discriminatory tendencies. This would be the case,

'if, in each individual case, [the saving clause] provides for [equally qualified] male candidates ... a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate. In this respect, however, it should be remembered that those criteria must not be such as to discriminate against female candidates.'¹²⁷

The ruling in *Hellmut Marschall* therefore confines *Kalanke* to the (unusual) situation of an unqualified quota rule. A quota rule with a saving clause, provided that it is objectively applied, will fall within Article 2 (4) ETD, as an exception to the equal treatment principle. Moreover, the Court has limited the criteria which may be applied to tilt the balance (back) in favour of the man, which in effect restricts the operation of such saving clauses. The criteria applied must be based on the individuals concerned and must be non-discriminatory in a general sense.¹²⁸ They may not be based on generalisations about men.¹²⁹ Thus it would seem that *Hellmut Marschall* opens the door to all but the most ostensibly inflexible or misapplied quota systems, allowing national legislatures to permit (flexible) measures of affirmative action, including quota systems. This was confirmed in *Baedeck*,¹³⁰ in which the Court held that Articles 2 (1) and

(4) ETD did not preclude state rules that encouraged 'fair' participation in the workplace by allocating at least half the places for training in public administration to women, subject to certain safeguards.¹³¹ The Court also considered the legality of the so-called 'flexible result quota'¹³² in the state of Hesse. This is a rule applying in sectors of the public service in which women are under-represented. It gives priority to female candidates where male and female candidates for selection have equal qualifications, if this is necessary for complying with binding targets in the women's advancement plan, provided that there are no reasons of 'greater legal weight'.¹³³ The Court said that the priority rule introduced by the Hesse law was not 'absolute and unconditional' in the *Kalanke* sense. It was lawful so long as it guaranteed that candidatures were the subject of an objective assessment which took account of the specific personal situations of all candidates.¹³⁴ The Court recognised that capabilities and experience acquired by carrying out work in the home were to be taken into account in so far as they were of importance for the suitability, performance and capability of candidates. By contrast, seniority, age, and the date of last promotion were to be taken into account only in so far as they were of importance to the job. Family status or income of a partner was immaterial. Further, part-time work, leave, and delays in completing training as a result of looking after children or other dependants could not have a negative effect on the selection process.¹³⁵ The Court continued,

'Such criteria, although formulated in terms which are neutral as regards sex and thus capable of benefiting men too, in general favour women. They are manifestly intended to lead to an equality which is substantive rather than formal, by reducing the inequalities which may occur in practice in social life.'¹³⁶

Thus, the Court seems¹³⁷ to allow some (indirect) discrimination against men in the application of the selection criteria. Of course, only if a female candidate and a male candidate could not be distinguished on the basis of their qualifications could the woman be chosen according to the flexible quota.¹³⁸

One element of the Hesse rules prescribed binding targets for women for temporary posts in the academic service and for academic assistants where women applicants were equally qualified to male applicants. These targets required that the minimum percentage of women be at least equal to the percentage of women among graduates, holders of higher degrees and students in each discipline. This came very close to an 'equality of results' approach, that had been rejected by the Court in *Kalanke* as falling outside the provision in Article 2 (4) ETD. The Court in *Baedeck* found the rule compatible with EC law, pointing out that the system did not fix an absolute ceiling, but one relative to the number of persons who had received the appropriate training.¹³⁹ Use of an actual fact as a quantitative criterion for giving preference to women was justifiable.

One argument justifying the affirmative action in cases such as *Marschall* and *Abrahamsson* was the need to appoint women to senior posts in the education sector, so as to provide role models to young women and girls. For instance, the Court was criticised for failing to take account of the level of under-representation of women among Swedish professors in *Abrahamsson*.¹⁴⁰ Although the woman in *Marschall* was successful in her appointment to a post as a senior teacher, this was not regarded as an acceptable justification in *Abrahamsson*. It would seem that the appointing of role models is not a key element in the justification of affirmative action in EC law.

What is crucial about the *Marschall* and *Baedeck* rulings is the Court's recognition that 'the mere fact that a male candidate and a female candidate are equally qualified does not mean that they have the same chances'.¹⁴¹ This is in stark contrast to the view of the Advocate General in *Kalanke* that since the applicants had equivalent qualifications, they must have equal opportunities: they were 'on an equal footing at the starting block'.¹⁴² The Court in *Marschall* recognised that employers tend to favour male candidates for promotion over equally qualified female candidates 'because of stereotyped views of women',¹⁴³ and so equally qualified men and women do not necessarily have the same chances of promotion.¹⁴⁴ As Kenner points out,

'policies that seek to correct imbalances in the workforce by quotas and targets and whose aim is one of equality of outcome may be granted legitimacy. It follows that a national rule may fall within the scope of Article 2 (4) if it operates to counteract such attitudes and behaviour and thus "reduce the actual instances of equality which may exist in the real world" (para 31 emphasis added). In other words societal discrimination outside the workplace provides a justification for an element of positive action in the employment sphere.'¹⁴⁵

In addition to appointment and promotion, Article 2 (4) ETD may also apply with respect to working conditions.¹⁴⁶ In *Lommers*, the Court considered a rule providing that workplace nursery places were available, save in emergencies,¹⁴⁷ only to female members of staff of the Netherlands Ministry for Agriculture. Here the Court was able to confirm elements of its approach in *Kalanke*, as well as in *Marschall* and *Baedeck*, to the effect that Article 2(4) ETD justifies measures 'in fact intended to eliminate or reduce actual instances of inequality which may exist in the reality of social life',¹⁴⁸ such as measures relating to the organisation of work, and the reconciliation of work and family life. These are 'intended to improve the ability of women to ... pursue a career on an equal footing with men'.¹⁴⁹ In this respect, the Court referred to Recommendation 84/635 on the promotion of positive action for women¹⁵⁰ and Recommendation 92/241 on child care,¹⁵¹ finding that a lack of suitable nursery places is more likely to induce women to give up their jobs.¹⁵²

The Court explicitly referred to the argument, discussed above, that measures such as these, although beneficial to women in the sense of recognising the current *status quo* with respect to childcare responsibilities, may have a *long-term* detrimental effect in that they help perpetuate a traditional division of roles between men and women. Dismissing this as (mere) 'academic legal opinion',¹⁵³ the Court went on to say that the measures do not guarantee all women working at the Ministry of Agriculture a nursery place for their children. Moreover, in the view of the Court, male employees are not denied a place any more than female employees who have not been able to obtain a place. With respect, this cannot be the case, as male employees wishing to gain a nursery place for their child must pass the *additional* requirement of showing that their case falls into the category of 'emergency', whereas female employees need not do so. The Court seemed to find significance in the fact that the Netherlands rule did not totally exclude men; perhaps an echoing of the rules in *Marschall* and *Baedeck* with respect to flexibility. In the final analysis, however, as noted above, until EC law moves towards an 'equal parenting' approach with respect to measures concerning reconciliation of work and family life, it cannot be said to be promoting equality

of opportunity in the long-term. The justification for the discriminatory rule here was, in my view, misplaced.

C Indirect sex discrimination

Standard of justification

Indirect discrimination arises where a provision, criterion or practice, although not discriminating on a forbidden ground (here sex), has the effect of so doing.¹⁵⁴ In EC law the plaintiff bears the initial burden of showing such disparate impact. This is normally done by showing a statistical disparity between the position of women and men,¹⁵⁵ although there are indications in the Court's jurisprudence to the effect that an inherent risk of a disparate impact, based on a national court's understanding of the social reality, could also suffice.¹⁵⁶ The burden is then transferred to the employer (or the Member State, in the case of indirectly discriminatory legislation) to justify the application of the provision, criterion or practice. The question of justification is thus central to the very concept of indirect discrimination. Any disparate impact in fact on women may trigger an indirect sex discrimination enquiry; if there are justifiable reasons for the disparate impact, the application of the provision, criterion or practice is not unlawful.

The Court originally established the standard by which justification must be established in *Bilka-Kaufhaus*.¹⁵⁷ The Court held that in establishing justification, it must be decided whether the grounds put forward by an employer to explain an indirectly discriminatory practice, can be 'objectively justified'. If the national court finds that the measure at issue meets a genuine need of the enterprise, is suitable for attaining the objective pursued by the enterprise, and necessary for that purpose, it will not be unlawful. Two elements of this test deserve further consideration.

First, it is clear that the justification must be *objective*. It is not enough simply to assert a justification, but the factual basis of the alleged benefit of the indirectly discriminatory criterion, policy or practice must be shown. The Court has consistently held that mere generalisations about certain categories of workers cannot constitute objective justifications. For instance, in *Rinner Kühn*,¹⁵⁸ the Court held that a belief that part timers were not as integrated in or committed to the employer's undertaking was not an objective justification. In *Hill*,¹⁵⁹ an assertion by the employer that a reward system that disadvantaged job-sharers maintained staff motivation, commitment and morale, was also not accepted as objective.

Secondly, as the 'suitable' and 'necessary' elements of the *Bilka* test imply, the proportionality test plays an important role in establishing the standard of justification for indirect sex discrimination in EC law.¹⁶⁰ The early cases, concerning indirectly discriminatory acts carried out by employers, suggested a very strict version of the proportionality test was applicable. So in *Bilka* itself, the Court assessed the purported justification for giving superior pension conditions to full-time workers as compared to part-time workers, that this would enable the store to maintain its staffing levels on Saturdays, allegedly an unpopular day for part-timers to work. The Court stated that the policy of the employer would not necessarily (rather than could not possibly) have the desired effect, and in particular noted that there had been no attempt by the employer to offer the

superior pension rights to part-timers who did work on Saturdays. Thus the Court concluded that the proportionality requirement had not been met. This version of the proportionality test requires a strict scrutiny by the Court, that the measure must be no more than is necessary to meet its objective.

However, a much less strict version of proportionality was applied in the later cases of *Megner*¹⁶¹ and *Nolte*¹⁶² in the context of EC legislation on sex discrimination in social security.¹⁶³ In *Megner* and *Nolte*, the parties (women in 'minor employment'¹⁶⁴) were seeking recognition that they were subject to compulsory insurance under the statutory and old age insurance scheme and that they were obliged to pay contributions to the statutory unemployment insurance scheme. Their exclusion from the schemes was indirectly discriminatory. There the Court found that the social policy reasons advanced by the German government – the need for structural coherence of the German social security scheme, the social demand for minor employment and the risk of a rise in 'black market employment', should the exclusion of minor employment from compulsory social insurance be withdrawn – justified the indirect sex discrimination. The Court explicitly stated that Member States enjoy a 'broad margin of discretion'¹⁶⁵ with respect to social policy, and added that 'the national legislature was reasonably entitled to consider that the legislation in question was necessary in order to achieve its aims'.¹⁶⁶ This standard appears to imply a much less strict scrutiny than that of *Bilka*. It is enough that the legislature was reasonable in its belief that the aim was necessary. This approach was confirmed in *Posthuma-van Damme*¹⁶⁷ and *Laperre*.¹⁶⁸ Thus, under the *Megner/Nolte* test, even showing that a less discriminatory means would have been available to meet the same aim will not render the justification unlawful. Therefore it appears that EC law gives more judicial deference to legislative choices in the field of social security, even where those undermine the principle of equal treatment on the ground of sex.

If *Bilka* and *Megner/Nolte* occupy two ends of the spectrum in terms of standard of scrutiny, employment legislation appears to occupy a middle ground. This was implicit in cases such as *Bötel*,¹⁶⁹ in which in effect the Court rejected a justification as the national legislation could have been interpreted or applied in a less discriminatory manner. The Court was explicitly asked what legal conditions for establishing objective justification applied to a measure adopted by a Member State in pursuance of its social policy, in the context of employment legislation, in *Seymour-Smith*.¹⁷⁰ The Court's answer is equivocal, and appears to fall somewhere between the *Bilka* and *Megner/Nolte* tests. The Court began its analysis by reiterating that the question of justification is a matter for the national court, but one on which the Court may provide guidance. It then referred to the *Megner* ruling.¹⁷¹ However, the Court rejected the UK government's contention that all a Member State would have to show was that it was 'reasonably entitled to consider that the measure would advance a social policy aim',¹⁷² on the basis that although social policy is a matter for Member States, 'the fact remains that the broad margin of discretion available to Member States in that connection cannot have the effect of frustrating the implementation of a fundamental principle of Community law such as that of equal pay for men and women'.¹⁷³

It therefore appears that the standard of justification varies depending on whether it is an employer's provision, criterion or practice at issue, or national legislation. Further, the margin of discretion available to Member States with respect to indirectly discriminatory *social security* legislation appears to be greater

than that available where *employment* legislation is concerned. The relationship between the standard of justification and the Court's construction of sex equality as a 'fundamental right' in EC law is as yet under-determined. It seems from *Seymour-Smith* that, where the Court is articulating a 'fundamental rights' conception of equal treatment, this may have the effect of increasing the standard of justification, but not necessarily to the strictest version of proportionality. Moreover, there seems to be no good reason why equality should be a 'fundamental right' in the context of employment, but not in the context of social security. Given the strong linkages between employment conditions and social security, the very distinction may be problematic. However, it is submitted that the distinction drawn by the Court is explicable by reference to the boundaries of Community competence. The further the application of the EC law principle of equal treatment impinges on elements of national social policy for which the Community has no competence to adopt other harmonisation legislation, the wider a margin of discretion the Court is prepared to give in the justification of indirect sex discrimination.¹⁷⁴

Substantive grounds

Having considered the standards of justification for indirect sex discrimination required by EC law, we turn now to specific substantive grounds of justification. These may be divided into three categories: justifications related to the job itself; to the needs of the employer's enterprise; and broader public interests.

1. *Job-related*

Job-related justifications are relatively unproblematic under a system committed to equality of opportunity. To avoid sex stereotyping in employment roles, it is important that those requirements and conditions advanced by employers purportedly related to the duties of the job are in fact necessary for the job to be carried out. Necessary here implies a strict standard of scrutiny; mere convenience to the employer will not justify a discriminatory impact. EC law applies such a strict standard with respect to job-related justifications.

a. physical abilities

As men, in general, have greater muscular strength than women, employment conditions which require, or reward, muscular strength may be indirectly discriminatory. The appointment of stronger staff to particular jobs or the higher payment of staff who carry out heavy physical work may be justified in EC law only if the duties of the job require the use of muscular strength.

In *Rumler v Dato Druck*,¹⁷⁵ the Court considered a job classification system that relied on criteria such as 'demand on the muscles', 'muscular effort' and 'heavy work'. In general, it would be more difficult for women to carry out jobs requiring such muscular activity. The Court held that,

'Where a job classification system is used in determining remuneration, that system must be based on criteria which do not differ according to whether the work is carried out by a man or a woman, and must not be organised, as a whole, in such a manner that it has the practical effect of discriminating generally against workers of one sex'.¹⁷⁶

The use of a criterion such as muscular demand to determine pay may be justified, if the pay difference relates to a genuine need of the employer, in that it

ensures a level of pay appropriate to the effort required by the work,¹⁷⁷ with the proviso that the job classification system as a whole must not be discriminatory.¹⁷⁸

b. qualifications and training

Where the job requires certain qualifications or training, it is lawful to discriminate against applicants for a job, or in terms of pay, on the basis of such qualifications or training, even where more men than women are able to meet the requirement. The employer must demonstrate an objective relationship between the qualifications or training requirements and the job concerned.

*Danfoss*¹⁷⁹ concerned a challenge to a collective agreement, with respect to the payment of supplements based on a number of factors, including mobility, training and seniority. The Court held that the employer may justify higher remuneration of those with special training by showing that it is of importance for the performance of specific tasks entrusted to the employee.¹⁸⁰

Professional training is not only one of the factors that may be an objective justification for giving different pay for doing the same work; it is also one of the possible criteria for determining whether or not the same work is being performed. Where professionals perform seemingly identical activities, but draw on knowledge and skills acquired in very different disciplines, they must be regarded as performing different tasks or duties, and thus cannot be in a comparable situation.¹⁸¹

c. seniority and experience

The Court accepted in *Danfoss* that, although rewarding seniority may be indirectly discriminatory against women, who tend to suffer interruptions to their careers more frequently than men, it is nevertheless justified 'since length of service goes hand in hand with experience and since experience generally enables the employee to perform his duties better'.¹⁸² In *Danfoss*, the Court said that employers were not required to show that seniority is important for the performance of the specific duties of the job concerned, but this was modified in the later ruling of *Nimz*.¹⁸³ This concerned a collective labour agreement which provided for different conditions for full and part-timers. Full timers would automatically be entitled to a pay increase after working for 6 years, but those working half-time to three-quarter-time would not be entitled to the increase until 12 years had elapsed. It was argued that the greater experience of the full timers justified the indirect sex discrimination. The Court did not agree, finding that the ideas that full-timers acquire competencies and capabilities pertaining to their work faster than part-timers or that greater experience *per se* justifies greater pay are 'no more than generalisations about certain categories of workers'.¹⁸⁴ Thus the objectivity of the justification with respect to seniority and experience must be assessed by reference to the relationship between the nature of the work and the experience gained from the performance of that work upon completion of a certain number of working hours.¹⁸⁵

The *Nimz* ruling must be considered as the better approach, as it is not necessarily the case that a more senior employee will perform every job better than a younger or newer employee. The benefits of fresh ideas, energy and a different vision must be weighed against the benefits of enhanced performance through familiarisation, which seniority implies. Thus seniority and experience are accepta-

ble *objective* justifications, if the employer can show a real link between the requirement for experience and the performance of the job concerned.¹⁸⁶

d. employee 'flexibility'

Employee 'flexibility' includes the ability to work full-time and the adaptability to variable work schedules and places of work. If the employer can show that the activities of a job carry with them a genuine need for 'flexibility', then this may justify indirect sex discrimination. This was accepted in *Danfoss*,¹⁸⁷ even though such a requirement would disadvantage women, who were less likely to be able to organise their working time in a flexible way because of their family responsibilities. The Court stressed that the requirement for flexibility must be related to the specific activities of the job; a general requirement for a flexible workforce would not constitute lawful justification.

e. different working hours

Certain jobs require the employee to work 'unsocial' hours, such as night-times, shift-work and weekends. For instance, midwives need to be available at all times of day and night. It is justifiable in EC law to pay such unsocial hours at a higher rate than normal working hours. This was confirmed by the Court in *JämO*.¹⁸⁸ Two midwives brought an equal value claim, in respect of the differential between their pay and that of a clinical technician. The basic hours salary was lower for the midwives than the clinical technician, but he had no opportunity to earn the 'inconvenient-hours supplement' that the midwives received on a regular basis. The national court had not actually made a finding that the jobs were of equal value, but referred a number of questions to the Court.

The Court held that, because the amount of supplement earned varies from month to month, the basic salaries were the appropriate point of comparison, in order to ensure transparency and guarantee compliance with the EPD.¹⁸⁹ Without ruling on the matter of equal value (a question for the national court), the Court could only conclude that, were the jobs of equal value, the midwives were paid less.¹⁹⁰ If a considerably higher percentage of women than men work as midwives, this would be indirect discrimination, unless justified. The employer would have to show an objective non-discriminatory factor justifying the difference in pay. The Court concluded that 'the inconvenient hours supplement is not to be taken into account in calculating the salary which serves as a basis for a pay comparison for the purposes of Article [141 EC]'.¹⁹¹ Were a male clinical technician to bring a subsequent claim, after the basic rates of pay of midwives and clinical technicians had been equalised, claiming indirect pay discrimination, the Court could not accept his argument and maintain consistency with its ruling in *JämO*. It follows therefore that payment of such an inconvenient-hours supplement would be justified in EC law. This was confirmed later in the judgment, where the Court explicitly stated that 'differences that might exist in the hours worked by the two groups whose pay is being compared may constitute objective reasons unrelated to any discrimination on grounds of sex such as to justify a difference in pay'.¹⁹²

f. work performance

The Court held in *Royal Copenhagen*¹⁹³ that, in the case of work paid at piece rates, the principle of equal pay does not prohibit workers from receiving different pay if that is due to different individual output.¹⁹⁴ However, where work is paid at

time rates, an employee's work performance or personal capacities in the job may be assessed only *ex post facto*. Thus, while differences with respect to performance could clearly justify different pay of different employees in terms of a *retrospective* performance-related bonus, it cannot justify a difference in pay awarded at the time of engagement. The employer cannot, at the time when the employees concerned are appointed, pay a female employee less than a male employee carrying out the same work or work of equal value, and later justify the difference on the basis that the man's work is superior.¹⁹⁵ To do so would not preclude the possibility that the difference in pay is based on sex.¹⁹⁶

2. *Enterprise-related*

Enterprise-related justifications relate to the broad economic needs of an employer, within the context of its whole enterprise, rather than the narrow duties of a particular job. Problems arise with respect to enterprise-related justifications because the decision whether to allow such justifications inevitably involves an element of balancing between the competing claims and interests of the parties involved (the employer and the employee). Broader societal interests in the continued success of enterprises, with implications for the economy as a whole, may also come into play. In this respect, this category of justifications merges with the third category of public interest-related justifications.

The organisation of the employment environment, in its wider societal context, operates on the assumption of the 'normal' male worker, who works full-time, for a lifetime, with no significant outside commitments. The promotion of equality of opportunity through the principle of equal treatment in EC law implies a challenge and change to this *status quo* in which women are systemically disadvantaged. Therefore a commitment to equal opportunities will imply some transfer of burden from women, who are currently disadvantaged, to employers, who benefit from the current organisation of working life. Further, if equal treatment on the grounds of sex is a fundamental right in EC law, mere considerations of economics should not gainsay the enjoyment of such a right. Enterprise-related justifications should therefore be subject to strict scrutiny.

a. economic or financial efficiency

In *Bilka*, the employer claimed that the exclusion of part-time workers from the employer's occupational pension scheme was justified by the need to discourage part-time employment. It was alleged that this was necessary, as Bilka was obliged to employ some full-time workers to cover the evening and Saturday opening times, which were unpopular among part-timers, and so had to make full-time work more attractive than part-time work. The Court found that the assessment of this justification was for the national court, but implied that economic grounds could constitute a lawful justification in EC law.¹⁹⁷

This was confirmed in *Enderby*¹⁹⁸ in the context of a claim for equal pay for work of equal value. *Enderby* involved a claim by a speech therapist (a job almost exclusively carried out by women) for equal pay with comparable professions (clinical psychologist and pharmacist) in which there are more men than women. The Court found in that 'the state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract candidates, may constitute an objectively justified economic ground'¹⁹⁹ within the meaning of its previous case law. The market forces in question were the shortage of candidates

for the more highly paid jobs, and the consequent need to offer higher pay in that job in order to attract candidates.

In my view,²⁰⁰ the *Enderby* ruling on market forces is not consistent with the Court's earlier jurisprudence with respect to objectivity of justifications, or with the principle of equality of opportunity. 'Market forces' is not an objective criterion, but rather is based on generalisations about the 'market value' of particular workers. We have already noted that the Court does not accept mere generalisations about certain categories of workers as objective justifications.²⁰¹ Further, the 'market forces' justification lacks transparency. The Court had previously held in *Danfoss* that where a discriminatory impact flows from a policy which would be expected to be entirely gender neutral in impact, such as the use of the criterion 'quality of work' to determine pay increments, this raises the presumption that the criterion in question is being used to cloak discrimination. It may be that the factors actually taken into account under the criterion are operating in a directly or indirectly discriminatory fashion, but where the criterion is not transparent, this cannot be checked. Thus, where the use of a particular criterion creates systematic disadvantage to women and the criterion is not transparent, the burden shifts to the employer to show it is non-discriminatory.²⁰² Similarly, in *Enderby*, given that the jobs concerned were assumed by the Court to be of equal value, the disadvantage to women in the pay structure could have been considered to raise a presumption of concealed discrimination. The employer was not able to explain those differences by reference to a neutral explanation, but only by reference to 'market forces', which does not explain *why* market forces in this instance operated to the systematic detriment of women. In this respect²⁰³ the ruling in *Enderby* is insensitive to structural disadvantage to women in the employment sphere, and thus does not support equality of opportunity.

The Court reverted to a more robust approach to an alleged economic efficiency justification put forward in *Hill*.²⁰⁴ Ms Hill had worked in the Irish civil service in a job-sharing capacity, and then reverted to full-time work. She was placed on a lower point of the full-time pay scale than that of the job-sharing pay scale which she previously occupied. This practice was established by government Circular, which provided that each year's job-sharing experience was to be reckoned as only six month's full-time service, in terms of calculating annual pay increments. The Court found that this was indirectly discriminatory.²⁰⁵ With respect to the argument that the discrimination was justified on economic grounds, the Court stated bluntly,

'it should be noted that an employer cannot justify discrimination arising from a job-sharing scheme solely on the ground that avoidance of such discrimination would involve increased costs'.²⁰⁶

The Court referred specifically to the fact that a job-sharing scheme allows workers to reconcile work and family life. Community policy in this area is to adapt working conditions to family responsibilities where possible. The Court noted that measures on reconciliation of work and family life are 'widely regarded in the legal systems of the Member States as being the natural corollary of the equality between men and women'.²⁰⁷

b. company restructuring

Where companies restructure, in response to the economic climate, this often

involves redundancies. Employer policies for selection of workers to be made redundant are obviously a matter of extreme sensitivity. They may also be indirectly discriminatory on grounds of sex. For instance, given women's patterns of employment, a 'last in, first out' redundancy policy is likely to be indirectly discriminatory.²⁰⁸ The Court considered a potentially discriminatory redundancy policy in *Kachelmann*.²⁰⁹

The relevant national legislation provided that selection for redundancy could be carried out by taking into account 'social criteria', where operational or economic requirements of the employer did not preclude such selection. Ms Kachelmann worked part-time for Bankhaus, in its recovery department. Following a reduction in its international activities, Bankhaus decided to merge its recovery department with the rest of its documentary transactions section; this entailed some reallocation of duties and redundancies. Ms Kachelmann was made redundant. She complained that the employer had failed to make a selection on the basis of social criteria among all workers performing the same duties, as it had not compared her with full-time workers. Ms Kachelmann had given notice before her dismissal that she would have been willing to work full-time. The national court found that she had no contractual entitlement to be transferred to a full-time post, and concluded that therefore her position and that of full-time workers were not comparable.

The Court found that part-time workers are far more likely to be women than men,²¹⁰ and that there are far more full-time jobs available than part-time jobs.²¹¹ It followed that where jobs are being cut, part-timers are in general at a disadvantage, as they have less of a chance of finding another comparable job than full-timers.²¹² Thus the lack of comparability between part-timers and full-timers in the selection for redundancy could be indirectly discriminatory on grounds of sex.²¹³ Could the relevant national legislation be justified?

According to the Court, the purpose of the national legislation is to protect workers facing redundancy whilst at the same time taking account of the undertakings' operational and economic needs. Job comparability determines whether the worker who is to be made redundant could, with regard to his or her qualifications and experience within the undertaking to date, carry out different but equivalent work so far carried out by others within the enterprise. Where jobs of part-timers and full-timers cannot be compared in a selection for redundancy, that may well result in a disadvantage for part-timers, as noted above. But the Court was convinced by the argument of the German government that if such job comparability were introduced on the basis of social criteria, that would have the opposite effect, in that *full-time* workers would be disadvantaged. In the event of their jobs being abolished, part-timers would have to be offered a full-time post, even if their employment contract did not entitle them to one.²¹⁴

The Court then concluded, by reference to its earlier statements about national discretion in social policy,²¹⁵ that 'the question whether part-time workers should enjoy such an advantage is a matter for the national legislature, which alone must find a fair balance in employment law between the various interests concerned'.²¹⁶ Here, the Court said, that assessment had been made without reference to considerations based on the sex of workers. The indirectly discriminatory national legislature was therefore justified.

The Court's argument reveals a lack of sensitivity to the reality of working life for those who have to reconcile work and family responsibilities, that is, in

general, women. It could be argued that, if job comparability were introduced, full-timers and part-timers in a pool of workers being selected for redundancy would *each* have to be offered the other type of job, even if their employment contract did not entitle them to one. The Court's reasoning assumes that a full-time post is more valuable to a worker than a part-time one, and thus that part-timers who are offered a full-time post in a redundancy round are better off than they should be by reference to their contractual entitlements. But this need not be the case with respect to all workers. Some (in particular those who have to combine paid work with family responsibilities) may regard the offer of a full-time job as significantly less advantageous than, say, a redundancy settlement. The Court's approach to justification here thus does not support equality of opportunity. Rather, it would be more appropriate to require a *job-related* comparability test in selection for redundancy, so that the employer would have to show that the tasks at issue could not be carried out on the part-time basis, or at least could not be so carried out without serious jeopardy to the enterprise as a whole.

3. *Public interest-related*

Public interest-related justifications were first accepted as a possibility by the Court in *Rinner-Kühn*.²¹⁷ The Court held, adding to the *Bilka* test of justification of economic grounds, that an indirectly discriminatory legislative provision could be justified, if it met 'a necessary aim of [the Member State's] social policy'.²¹⁸ The Court has not distinguished its reasoning in *Bilka*, with respect to employer justifications for job-related or enterprise-related reasons, from justifications on broader grounds of public interest. It is implicit from subsequent case law²¹⁹ that such justifications are also available to employers. As with enterprise-related justifications, problems may arise in terms of balancing competing claims of the collective interest in the discriminatory policy or practice and the individual interest in equal treatment. As noted above, the Court has relaxed its standard of justification where the discriminatory policy arises through national legislation in the social security context, and to some extent in the employment context. This may be seen as reflecting the Court's view on the appropriate forum for balancing such competing interests.

a. encouraging employment

In 1985 the UK Conservative Government raised from 1 year to 2 years the qualifying period which employees must meet in order to bring an unfair dismissal claim. Ms Seymour-Smith was employed for less than 2 years, and was dismissed. Having had her claim for unfair dismissal rejected, on the grounds that she did not meet the qualifying period, Seymour-Smith then challenged the national law on the qualifying period, on the grounds that it breached the ETD. In *Seymour-Smith*,²²⁰ the Court held that compensation for breach of the right not to be unfairly dismissed constitutes 'pay' within Article 141 EC. Rights to re-instatement or re-engagement after an unfair dismissal however fall within the ETD. In assessing whether national rules on access to remedies for unfair dismissal are indirectly discriminatory, it is for the national court to decide the point in time at which such national rules are to be assessed, and whether statistics show at that point in time a disparate impact of the national rules on women. If such indirect discrimination is shown, the Member State may justify the rule on legitimate social policy grounds, which must be non-discriminatory and proportionate.

With respect to the issue of objective justification, the Court referred to its earlier rulings in *Megner*²²¹ and *Nolte*²²² to the effect that a legitimate national social policy aim may justify indirect sex discrimination. The UK Government argued that the 2 year qualifying period had the aim of encouraging employment, by removing burdens on employers, as employers are likely to be deterred from recruitment if they are at risk of unfair dismissal claims being brought by employers only recently engaged. The Court held that a Member State could not rely on 'mere generalisations' on the ability of a national rule to increase employment levels. A Member State would have to show *evidence* on the basis of which it could reasonably be considered that the means chosen (the 2-year qualifying period) were suitable for the social policy aim (promoting employment). This standard requires a Member State at least to show some evidence that its policy is reasonable – however, if a Member State meets that minimum requirement, it is probably sufficient to show justification. Counter-evidence, for instance to the effect that the economic studies on which the Member State relies are methodologically flawed, or refuted by other studies, is probably not enough to render unreasonable the Member State's assumption that its measure is an appropriate means of protecting a legitimate social policy. Presumably though, at some point, discredited evidence must cease to be a reasonable basis for policy.

b. encouraging small businesses

In *Kirshammer-Hack*,²²³ the Court considered the compatibility with EC law of a provision of national law protecting employees from unfair dismissal, which excluded from its scope small businesses, that is those employing no more than five employees. In determining the number of employees, those in 'minor employment' were excluded. One question was whether this provision was indirectly discriminatory on grounds of sex. The Court noted that such discrimination would only be present if it were shown that small businesses employ a considerably greater number of women than men,²²⁴ and there was no evidence before the Court to support this conclusion. However, the Court went on to say that such a measure could be justified 'where legislation like that in question forms part of a group of measures intended to alleviate the constraints on small businesses, which play an essential role in economic development and job creation'.²²⁵

c. the 'social demand' for atypical work

As noted above, the Court considered the detrimental treatment of workers in 'minor employment' as indirectly discriminatory on grounds of sex in *Megner*²²⁶ and *Nolte*.²²⁷ Part of the justification advanced by the German government in that context was the social demand for 'minor employment', and that the government wished to foster this type of work. However, *Megner* and *Nolte* were decided in the context of Directive 79/7, and moreover, the justification was advanced by the state, rather than by an employer. Was such a justification available to an employer treating workers in 'minor employment' unfavourably, with respect to pay or working conditions?

This question was considered by the Court in *Krüger*.²²⁸ Ms Krüger was employed by a district hospital as a nurse from 1990-1995. From 1995-1998 she took maternity and childcare leave, and was in receipt of a child-care allowance. During that time, she worked in 'minor employment' for the hospital.²²⁹ Ms Krüger asked for the Christmas bonus for 1995 to be paid to her.²³⁰ The

employer took the view that the collective agreement governing Christmas bonuses did not cover persons in 'minor employment'. Ms Krüger brought her claim before the German employment tribunal.

The national court took the view that the exclusion of persons in 'minor employment' – effected through the general collective agreement for public sector employees – was indirectly discriminatory against women. Over 90% of people who receive child-care allowance are women. The national court asked the Court whether a national law which provides that employees not subject to compulsory social insurance who work during childcare leave, by contrast to employees liable to compulsory social insurance, do not receive an annual special allowance (the Christmas bonus) is compatible with EC law. Essentially the question was whether exclusion from receipt of the Christmas bonus for workers exempt from compulsory social insurance is indirect sex discrimination.

The Court noted that the exclusion of persons in minor employment from social insurance is intended to meet a social demand for minor employment which the German government wished to support, referring to *Megner* and *Nolte*.²³¹ However, the Court continued that such an exclusion could not alter the fundamental principle of EC law that men and women should receive equal pay for equal work.²³² The Court then explicitly stated that if the national court found indirect sex discrimination, it would have to conclude that the collective agreement breached Article 141 EC.²³³ *Krüger* concerns a different situation from those in *Megner* and *Nolte*. It was not a measure of national legislation at issue, nor was the exclusion of workers in minor employment from receipt of the Christmas bonus necessary for the structural coherence of the German social security system.²³⁴

It follows from *Krüger* that employers (as parties to collective agreements, and, presumably, as individuals) do not have open to them the same broad sweep of public interest-related justifications as are open to governments of Member States. Where the effect of a collective agreement is to produce indirect discrimination, reference to reasons that would justify a measure adopted by a national legislature in pursuit of its social policy will not suffice. It would seem that the justification with respect to the structural coherence of the social security scheme was crucial in the *Megner* and *Nolte* cases. The other two justifications advanced by the German government in *Megner* and *Nolte* (the social demand for minor employment and the risk of 'black market employment') operate on the assumption that employers gain a benefit from the exclusion of workers in minor employment from the statutory scheme. The *Krüger* ruling circumscribes this benefit: it may only be enjoyed with respect to the obligation to make compulsory statutory insurance payments. Workers in 'minor employment' – mostly women – must be treated the same in respect to all other benefits granted to them, *if* those benefits can be considered to constitute 'pay' in the sense of Article 141 EC. Presumably this principle extends also to equal *treatment* in the employment context.

d. lack of employer responsibility for atypical workers
*Rinner-Kühn*²³⁵ concerned a provision of national law requiring employers to pay sick pay for up to six weeks, but excluding from its scope 'minor employees'.²³⁶ Ms Rinner-Kühn fell into this category and was refused sick pay. The exclusion was clearly indirectly discriminatory on grounds of sex.

The German government sought to justify the discrimination by the contention that,

'the workers covered by the legislation in question were not as integrated in, or as dependent on, the undertaking employing them as other workers and that consequently the conditions for obliging their employer to furnish them with assistance, including the continuation of their salary, were not met'.²³⁷

According to the Commission, this argument was ill-founded. It could not be regarded as economically defensible or socially necessary to allow full-timers to receive six weeks sick pay and refuse this to part-timers who are socially less favoured. Such a rule, noted the Commission, removes protection precisely in the situation where it is most needed.²³⁸ The Court held that national legislation such as that at issue was unlawful, unless an objective justification could be shown,²³⁹ and justifications could include necessary aims of social policy.²⁴⁰ However, the Court stated that such a justification could not be shown by reference to 'generalisations about certain categories of workers',²⁴¹ such as in this case the statements that part-timers are not integrated in and connected with the employer's undertaking in a way comparable to that of full-timers.

The Court's approach here is supportive of equality of opportunity. Indirect sex discrimination in the provision of sick pay could be regarded as concealing gender stereotyping in its application. According to this stereotype, only full-time employees (men) are carrying out 'real work', as main breadwinners, and they (and indirectly their families) should be provided for by state social security laws, including those imposing obligations on employers to pay sick pay, if they cannot earn due to illness. Part-time work (women's work) is an extra, for 'pin money', and is not 'real work', therefore there is no need to provide for social security in the case of sickness for part-time workers. The implication is that there is a 'real bread winner' who can support a part-time worker who is ill. The reasoning ignores the fact that, for many families, the income of a woman working part-time makes a significant difference to the family's *subsistence* income. Therefore the Court is correct to reject this purported justification.

Unfortunately, the Court was less robust in its approach in *Kowalska*.²⁴² in which a similar argument was raised. *Kowalska* concerned the justifiability of the exclusion of part-timers from entitlement to a severance payment on retirement. The defendant employer considered that this indirectly discriminatory rule was justified by the fact that part-timers do not place their full working capacity at the disposal of the employer²⁴³ and that part-time workers do not provide for their needs and those of their families exclusively out of the income from their employment.²⁴⁴

The Advocate General identified these justifications as 'mere generalisations affecting certain categories of workers'.²⁴⁵ It is simply not the case that the income of all part-timers is always an 'added extra' to the family income. On the contrary, the income of a part-timer, especially in the case of single parents, can be crucial to the family's well-being. The Advocate General pointed to a 'marked similarity' between the justification advanced in *Kowalska* and that rejected by the Court in *Rinner-Kühn*. However, the Court omits this stage of analysis in its judgment, merely reasserting that it is the responsibility of the national court to decide whether objective reasons justify the indirect sex discrimination in this case.

e. respect for collective agreements

In *Kowalska*, the different entitlement of part-time and full-time employees to a severance grant was enshrined in a collective agreement. The national court asked whether, if the provision were to be found to be indirectly discriminatory, EC law required that part-timers be treated the same way as full-timers, given the application of the principle of freedom of contract of the parties to a collective agreement. In essence, the question was whether enshrining the different, indirectly discriminatory, treatment in a collective agreement could constitute a justification for the discrimination. This matter had already been considered by the Advocate General in *Danfoss*, who considered that the existence of two separate collective agreements, one for men and one for women would not preclude the application of Article [141]. Although it would not be unlawful *per se* to have separate collective agreements, the *manner* in which the agreements operated would be crucial.

In *Kowalska*, the Court held that simply enshrining discriminatory measures in a collective agreement could not justify indirect discrimination. The direct effect of Article [141] EC required that part-timers were entitled to come within the same scheme as full-timers, proportionately to the number of hours worked. Although the question in *Kowalska* related primarily to the remedy available, the decision with respect to the status of collective agreements as justification for indirect sex discrimination was confirmed in *Enderby*. There the English Court of Appeal specifically asked whether the employer could rely on the fact that the different rates of pay of the jobs in question were decided by collective bargaining processes, as justification for the discrimination. The Court held unequivocally that it could not, pointing out that, were such a justification available, employers could easily circumvent the principle of equal pay.²⁴⁶

The rejection of separate collective bargaining processes as justification for indirect sex discrimination supports equality of opportunity, since merely to ask whether arriving at two different levels of pay was due to the operation of two different processes is insufficient. It is necessary to look *behind* those processes and ask *why* one collective agreement was able to arrive at a more favourable result than the other.²⁴⁷ This might be because unions have traditionally been more effectual in obtaining better pay for men than for women,²⁴⁸ and this may itself be due to the fact that men's work has traditionally been valued more highly by the market than women's. Thus to use different agreements as a justification in themselves may be to cloak the discriminatory forces that lie behind them. Freedom of contract, in the hands of male-oriented unions, can mean freedom to perpetuate sex-based assumptions and practices concerning the status and value of jobs, in particular the assumption that 'male' jobs, carried out by breadwinners, must have a sufficiently high pay rate to support a wife and family. As we have seen, in fact an increasingly high proportion of families are supported by women, or reliant on a woman's income.²⁴⁹

f. maintaining worker participation

The Court has been in dialogue with the German courts with respect to the different treatment of part-time workers who participate in works councils and other mechanisms for worker representation in the employer's enterprise. The Court first considered the issue in *Bötel*,²⁵⁰ concerning the application to part-timers of provisions of German legislation providing for compensation for employees who require time off work to attend training courses to enable

participation in staff committees. The legislation allowed compensation only for time employees would have worked, had they not attended the courses. The effect was that part-timers received less compensation for attending the same training courses as full-timers.

Controversially, the Court found that the 'compensation' for attending the training courses was 'pay' in the sense of Article 141 EC.²⁵¹ In *Helmig*,²⁵² the Court had established that when comparing the pay of full and part-timers for the purposes of a claim under Article 141 EC, the relevant comparison was between pay for the same hours worked. Therefore, when part-timers attend training courses to enable them to take part in staff representation, but are not paid the 'compensation' given to full-timers for so doing, on the grounds that the courses take place outside the part-timers' normal working hours (in their 'free time', by implication), this is indirect sex discrimination. The whole system seems to be constructed around a gendered notion of 'normal' working hours, and did not take into account the fact that the relevant time is not likely to be 'free' at all for many part-timers, who may for instance have to arrange (and pay for) child-care during that time.

The German government's justification focused on its assertion that the difference in treatment was due entirely to the difference in working hours, and since the legislation provided for compensation for hours not worked, there was no discrimination. The Court held that this argument did not alter the fact of the adverse impact on part-timers, although both categories of workers gave up their time for the training, 'for the purpose of effectively safeguarding the interests of employees in the interest of good labour relations'.²⁵³ The Court did reserve to the national court the possibility of finding the discrimination justified for another reason.²⁵⁴

Despite the Court's ruling in *Bötel*, the Court was asked to consider the issue again in *Lewark*²⁵⁵ and *Freers and Speckmann*.²⁵⁶ The reason for the references is the special status of works and staff councils in the organisation of German national employment policy and labour relations. The independence of staff councils is guaranteed, *inter alia*, by the principle that members of staff councils carry out their duties without loss of earnings, and without any financial incentives to take on such responsibilities.²⁵⁷ The Court repeated that the discriminatory effects of the legislation might be justifiable by considerations of national social policy. However, the Court went on to indicate that the German legislation was likely to 'deter [part-timers] ... from performing staff council functions or from acquiring the knowledge necessary for performing them, thus making it more difficult for that category of worker to be represented by qualified staff council members'.²⁵⁸ The under-representation of women in collective bargaining structures is well-documented.²⁵⁹ This statement might be seen as a suggestion from the Court that the requisite non-discriminatory justification was not present here;²⁶⁰ however, the Court did not definitively preclude a finding to the contrary by the national court.

g. sound management of social security systems

In the only case in which the Court has so far interpreted Directive 86/613 on equal treatment for professionals and the self-employed, *Jørgensen*,²⁶¹ the Court considered the reorganisation of remuneration of specialised medical practitioners under the Danish national health system. In order to prevent such practitioners in 'part-time practice' from neglecting their other duties in public hospitals, a

uniform ceiling was fixed for turnover of such part-time practices. Moreover, practices were reclassified, by reference to their turnover in the year preceding the reorganisation, as either part-time or full-time. In the event of sale, however, practices were to be automatically classified as 'part time'.

Ms Jørgensen's practice had previously been regarded as a 'full-time practice', and in fact remained so after the reorganisation. However, Ms Jørgensen argued that if she were to sell it, the annual amount of fees which the purchaser could receive would be fixed by the ceiling. As a medical practice is an investment for a future pension, this therefore affected Ms Jørgensen's projected pension income.²⁶² Ms Jørgensen pointed out that she had always worked in full-time practice, and did not in fact carry out any other duties in public hospitals. The reason for her low turnover in the relevant year was that she had had to devote time to her family commitments while her children were young. She argued that the reorganisation scheme was indirectly discriminatory, since it affected a higher proportion of female than male specialised medical practitioners, since women attend to the rearing of their children more frequently than their male counterparts and for that reason achieve a lower turnover. There was some dispute over whether the statistics showed such indirect sex discrimination.²⁶³ However, the Court was sufficiently satisfied that there might be such discrimination, so also considered the issue of objective justification.

It was argued by the Danish government that the functions of the reorganisation were to limit public expenditure on health care provided by specialised medical practitioners, and to improve the financial and geographical planning of the number of such specialists.²⁶⁴ The national court asked whether considerations relating to budgetary stringency, savings or medical practice planning could constitute objective justifications. The Court reiterated its previous ruling in *De Weerd*²⁶⁵ to the effect that, although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of its social protection measures, they do not *in themselves* constitute an aim pursued by that policy and therefore cannot provide a justification for sex discrimination.²⁶⁶ The Court also referred explicitly to the fact that equal treatment on grounds of sex is a fundamental principle of EC law.²⁶⁷ However, the sound management of public expenditure on specialised medical care and guaranteeing access to such care may constitute legitimate objective justifications.²⁶⁸

h. defence?

A number of Member States, including Germany, require compulsory military service²⁶⁹ from all young men. Women are excluded from such compulsion. The Court will consider a challenge to the direct sex discrimination this entails in *Dory*.²⁷⁰ However, the Court has already considered an *indirect* sex discrimination claim arising from the matter.²⁷¹ The law on civil servants in the German Land Hesse provided that, if insufficient places were available for the practical stage of legal training, and some qualified candidates thus had to defer their entry, those who had completed compulsory military service (by definition men) were among those who had priority for places. Ms Schnorbus was rejected for a legal training place, and argued that the rules discriminated against women, as only men could complete compulsory military service. It was argued that the rule, designed to counterbalance the disadvantage suffered by those who had to complete military service, was objectively justified.

The Court found that there was indirect sex discrimination.²⁷² On the question of justification, the Court was asked a number of specific questions. Was the fact that the rule *automatically* resulted in the preferential admission of men sufficient to exclude justification under Article 2 (4) ETD?²⁷³ If not, was such a rule justifiable under Article 2 (4) ETD, even though it was a measure serving to promote equal opportunities *in favour of men*?²⁷⁴ Is the mere fact that only men are required to do military service itself to be regarded as an existing inequality within the meaning of Article 2 (4) ETD which prejudices men's opportunities, or do the disadvantages to women also have to be taken into account? Can the rule be justified solely on the basis that it counterbalances disadvantages not faced by women? The Court dealt with all these questions together, in a distinctly cursory manner. In spite of having found that the discrimination was *indirect*, and therefore logically that justifications need not be limited to those express derogations in the ETD, the Court considered Article 2 (4) ETD as the basis for justification. The Court simply stated that

' it is clear that the provision at issue, which takes account of the delay experienced in the progress of their education by applicants who have been required to do military or civilian service, is objective in nature and prompted solely by the desire to counterbalance to some extent the effects of that delay'²⁷⁵

and therefore the provision could not be regarded as contrary to the principle of equal treatment.²⁷⁶ Further, the Court found that the provision was not disproportionate, as the delay was only for a maximum of 12 months, and military or civilian service is at least that period.²⁷⁷

Underlying this technical legalistic approach lies a fundamental question about the justifiability of the historical restriction of compulsory military service to men. This question pits the 'fundamental right' to equality in EC law against a constitutional provision of a Member State, with reference to military defence, a matter clearly beyond the scope of Community competence and of extreme national sensitivity. The litigants and the Court seemed anxious to avoid this issue in *Schnorbus*: the Court will not be able to avoid it in *Dory*.

D Unjustifiable sex discrimination

As we have noted, direct discrimination cannot be justified save by reference to specific legislative derogations. There are no such derogations with respect to equal pay,²⁷⁸ only equal treatment. The proposed new ETD will include sexual harassment within the definition of sex discrimination. It is submitted that such a form of discrimination should also not be justifiable. This is because of the nature of the discrimination, defined in the proposal as 'unwanted conduct relating to sex ... with the purposes or effect of affecting the dignity of a person ...'. The reference to dignity underlines the idea that discrimination by means of sexual harassment is closely related to the fundamental right not to be discriminated on grounds of sex. There can be no justification for failing to respect that fundamental right in this context.

E Conclusions

The Court appears to adopt different standards for justification of sex discrimination in working life, depending upon the context in which the discrimination arises. Direct sex discrimination in pay is not justifiable. A relatively strong version of the proportionality test is applied to direct sex discrimination in access to employment and employment conditions. The Court retains a relatively strong version of proportionality when assessing job-related justifications and enterprise-related justifications for indirect sex discrimination, at least when those are advanced by an employer. Broader public interest-related justifications, especially when advanced by a Member State as a plank of its broader social policy, are subject only to a weaker, reasonableness-based proportionality test.

The differences in standards for justification are probably best explained by the 'boundaries' of EC law, and the need to respect national discretion with respect to social security policies and other social policies outside the employment field, a matter largely outside Community competence.²⁷⁹ This also explains why the Court's sex equality jurisprudence has been (in general) accepted by the national courts, without provoking constitutional clashes that might be expected with respect to a 'constitutional' principle such as equality.²⁸⁰ However, it does not match the Court's wide statements about the importance of sex equality as a fundamental human right in the EC's legal order.

Notes

- 1 See Barnard, *EC Employment Law* (Oxford: OUP, 2000); Hoskyns, *Integrating Gender* (London: Verso, 1996); Ellis, 'The Definition of Discrimination in European Community Sex Equality Law' 19 *ELRev* (1994) 563; Fredman, 'European Community Discrimination Law: A Critique' 21 *ILJ* (1992) 119; More, ' "Equal Treatment" of the Sexes in Community Law: What does "Equal" mean?' 1 *Feminist Legal Studies* (1993) 45; More, 'Equality of Treatment in European Community Law: The Limits of Market Equality' in Bottomley, ed, *Feminist Perspectives on the Foundational Subjects of Law* (London: Cavendish, 1996).
- 2 For a useful introduction from an American perspective, see Bartlett and Kennedy, eds, *Feminist Legal Theory: Readings in Law and Gender* (Boulder: Westview, 1991); from a British perspective, see Fredman, *Discrimination Law* (Oxford: Clarendon Press, 2002) and Fredman, *Women and the Law* (Oxford: Clarendon Press, 1997), especially chapter 1.
- 3 Clearly, discrimination law alone cannot address all the deep-rooted causes of inequalities. However, legal rights do have a role to play in terms of providing redress for individual complaints, and shaping social behaviour.
- 4 A number of authors consider that it is, see Barnard, supra n 1, p 206–208; Fredman (2002), supra n 2, esp 136–143; cf Von Prondzynski and Richards, 'Equal Opportunities in the Labour Market: Tackling Indirect Sex Discrimination' 1 *EPL* (1995) 117–138.
- 5 See further Barnard, supra n 1, p 198; Barnard, 'EC Sex Equality Law: A Balance Sheet' in Alston, ed, *The EU and Human Rights* (Oxford: OUP, 1999); Barnard, 'The Economic Objectives of Article 119 EC' in Hervey and O'Keeffe, eds, *Sex equality Law in the European Union* (Chichester: Wiley, 1996); More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right' in Craig and de Búrca, eds, *The Evolution of EU Law* (Oxford: OUP, 1999); Hoskyns, *Integrating Gender* (London: Verso, 1996, chapter 4.
- 6 See Case 43/75 *Defrenne No 2* [1975] ECR 455: 'Article 119 pursues a double aim ... at once economic and social ...'; Case 149/77 *Defrenne No 3* [1978] ECR 1365:

- 'respect for fundamental person human rights is one of the general principles of Community law ... there can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights'. See further, Docksey, 'The Principle of Equality Between Women and Men as a Fundamental Right under Community Law' 20 ILJ (1991) 258-280; Kilpatrick, 'Gender Equality: A Fundamental Dialogue' in Sciarra, ed, *Labour Law in the Courts: National Judges and the European Court of Justice* (Oxford: Hart, 2000) Flynn, 'Equality Between Men and Women in the Court of Justice' 18 YEL (1998) 259; Loenen, 'Rethinking Sex Equality as a Human Right' (1994) *Netherlands Quarterly of Human Rights* 253.
- 7 Case C-13/94 [1996] ECR I-2143. See further Barnard, 'P v S: Kite Flying or a New Constitutional Approach?' in Dashwood and O'Leary, eds, *The Principle of Equal Treatment in EC Law* (London: Sweet and Maxwell, 1997); Flynn, 'The Body Politic(s) of EC Law' in Hervey and O'Keefe, eds, *Sex Equality Law in the European Union* (Chichester: Wiley, 1996); Flynn, 34 CMLRev (1997) 367; Stychin, 2 *International Journal of Discrimination and the Law* (1997) 217; Wintemute, 'Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes' 60 MLR (1997) 334; Skidmore, 'Can Transsexuals Suffer Sex Discrimination?' 19 JSWFL (1997) 105
- 8 Para 19. See also the AG's opinion at para 22: 'The Directive is nothing if not an expression of a general principle and a fundamental right ... Respect for fundamental rights is one of the general principles of Community law, the observance of which the Court has a duty to ensure'. The Court adopted a similar approach in Case C-132/92 *Birds Eye Walls v Roberts* [1993] ECR I-5579 when it said that the principle of equal pay for women and men was 'like the general principle of non-discrimination which it embodies in a specific form'.
- 9 Para 22.
- 10 Case C-50/96 [2000] ECR I-743.
- 11 Citing Case 149/77 *Defrenne No 3*; Cases 75/82 and 117/82 *Razzouk and Beydoun v Commission* [1984] ECR 1509 and Case C-13/94 *P v S*.
- 12 Para 57.
- 13 See also Ellis, 'Proportionality in EC Sex Discrimination Law' in Ellis, ed, *The Principle of Proportionality in the laws of Europe* (Oxford: Hart, 1999), p 166; Prechal, 'Combating Indirect Discrimination in Community Law Context' (1993) LIEI 81-97, at 87.
- 14 See, for example, Fredman, 'European Community Discrimination Law: A Critique' 21 ILJ (1992) 119; More, ' "Equal Treatment" of the Sexes in Community Law: What does "Equal" mean?' 1 *Feminist Legal Studies* (1993) 45; Fenwick and Hervey, 'Sex Equality in the Single Market: New Directions for the European Court of Justice' 32 CMLRev (1995) 443; De Búrca, 'The Role of Equality in Community Law' in Dashwood and O'Leary, eds, *The Principle of Equal Treatment in EC Law* (London: Sweet and Maxwell, 1997)
- 15 Case C-249/96 [1998] ECR I-621. See further, Bamforth, 'Sexual Orientation Discrimination after *Grant v South West Trains*' 63 MLR (2000) 694; Wintemute, supra n 7; Bell, 'Shifting Conception of Sexual Discrimination at the Court of Justice: from *P v S* to *Grant v SWT*' 5 ELJ (1999) 63; Armstrong, 'Tales of the Community: sexual orientation discrimination and EC law' 20 JSWFL (1998) 455; Kenner, *Employment Law in the European Union: From Rome to Amsterdam* (Oxford: Hart, 2002 forthcoming), chapter 10.
- 16 Related to the employment legislation, equal treatment in social security is covered by Directives 79/7/EEC and 86/378/EC; equal treatment in occupational pensions is covered by Article 141 EC. Discussion of the justification of sex discrimination in the context of social security is outside the scope of this paper. For further information, see, Hervey and Shaw, 'Women, Work and Care: Women's Dual Role and Double Burden in EC Sex Equality Law' 8 JESP (1998) 43-63; Hervey, 'Sex Equality in

- Social Protection: New Institutional Perspectives on Allocation of Competence' 4 ELJ (1998) 196–219; Sohrab, *Sexing the Benefit: Women, Social Security and Financial Independence in EC Sex Equality Law* (Aldershot: Dartmouth, 1996); Whiteford, *Adapting to* Change: Occupational Pension Schemes, Women and Migrant Workers (Deventer: Kluwer, 1997).
- 17 It is supplemented by Directive 75/117/EEC OJ 1975 L 45/19.
18 OJ 1976 L 39/40.
19 COM(2000) 334; European Parliament Report A5/2001/173; COM(2001) 321 final; Council Common Position 32/2001 OJ 2001 C 307/5; COM(2001) 689 final.
20 OJ 1986 L 359/56.
21 Directive 92/85/EC OJ 1992 L 348/1.
22 Directive 97/81/EC OJ 1998 L 14/9; Directive 99/70/EC OJ 1999 L 175/143.
23 Directive 96/34/EC OJ 1996 L 145/4; amended by Directive 97/75/EC OJ 1998 L 10/24.
24 Directive 2000/43/EC OJ 2000 L 180/22.
25 Directive 2000/78/EC OJ 2000 L 303/16.
26 See also Kilpatrick, 'Community or Communities of Courts in European Integration? Sex Equality Dialogues Between UK Courts and the ECJ' 4 ELJ (1998) 121–147, at 144; Barnard, *supra* n 1, p 218; Ellis, 'The Recent Jurisprudence of the Court of Justice in the Field of Sex Equality' 37 CMLRev (2000) 1403–26, at 1407–11; Nielsen, 'The Concept of Sex Discrimination: Recent Developments and Future Perspectives in EU Law', in Kallioma-Puha, eds, *Perspectives of Equality* (Copenhagen: Nordic Council of Ministers, 2000).
27 Where the application of a criterion or practice, itself neutral on the ground of sex, has the effect of discriminating against women (or men), as it disadvantages in fact a far higher proportion of women than of men. See e.g. Case 170/84 *Bilka Kaufhaus* [1986] ECR 1607 where exclusion of part-time workers from an occupational pension scheme had the effect of disadvantaging far more women than men. Intention of the employer is not relevant in finding indirect sex discrimination. Problems arise in respect to identifying the appropriate pool of comparators, determining what is a 'substantially higher proportion' of women (or men), and deciding at what point in time the discriminatory effect should be judged, see Case C-167/97 *Seymour-Smith* [1999] ECR I -623.
28 Where one sex is treated less favourably than another on the basis of their sex; see e.g. Case 129/79 *Macarthys v Smith* [1980] ECR 1275 where a woman was paid less than a man doing the same job.
29 See, the opinion of the AG in *Grant*, para 38; and, arguing to the contrary, the opinion of the AG in Case C-312/92 *Roberts* [1993] ECR I-5579.
30 See also Ellis, *supra* n 13, who discusses the application of proportionality with respect to both direct and indirect sex discrimination in EC law.
31 In practice, it might have relevance in terms of burden of proof. Directive 97/80/EC, Article 4, provides that 'when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish ... facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.' It might also be relevant in terms of the emotional response of the employee discriminated against – it is one thing to be told that, under the law you have been discriminated against, but it is justified for an over-riding reason, and quite another thing to be told that the law does not regard the activity as discrimination at all.
32 See Case 222/84 *Johnson v Chief Constable of the RUC* [1986] ECR 1651, para 38; Case 318/86 *Commission v France (Sex Discrimination in the Civil Service)* [1988] ECR 3559.
33 Case 222/84 *Johnson v Chief Constable of the RUC* [1986] ECR 1651; Case C-273/97 *Sirdar v The Army Board* [1999] ECR I-7403; Case C-285/98 *Kreil v Germany*

- [2000] ECR I-69.
- 34 Case 248/83 *Commission v Germany (Sex Discrimination Laws)* [1985] ECR 1459.
- 35 Text from Council Common Position 32/2001/EC OJ 2001 C 307/5.
- 36 COM(2000) 334 final.
- 37 The original proposal and the Parliament's proposed amendments included an explicit statement to the effect that derogation from the principle of equality shall remain within the limits of what is appropriate and necessary to achieve the objective in view. The European Parliament sought to have the words 'or of the context in which they are carried out' deleted, on the basis that it often leads to abuses; see Hautala Report of European Parliament, A5/2001/173, p 20. According to the Parliament, this would be consistent with the Court's jurisprudence. However, given that contextual elements of the workplace may be relevant in terms of protection of important countervailing rights, such as personal privacy, it would seem that the inclusion of this provision is appropriate.
- 38 The Commission (COM(2001) 321 final) and Parliament also favoured adding a sentence at the start of Article 2 (2) ETD to the effect that general exclusions of one sex from access to any kind of professional activity constitute discrimination within the meaning of the Directive. This was rejected by Council on the basis that this sentence would have contradicted the remainder of the provision, which provided that certain characteristics related to sex may justify difference of treatment. Moreover, it was felt it should be omitted for consistency of wording with the 'Article 13 Directives' 2000/43/EC and 2000/78/EC.
- 39 Although of course both Fiona Shaw and Sarah Bernhardt have played Hamlet; thanks to Philip Rostant for pointing this out to me.
- 40 Case 165/82 [1983] ECR 3431.
- 41 Case 318/86 *Commission v France (Sex Discrimination in the Civil Service)* [1988] ECR 3559.
- 42 Case 222/84 [1986] ECR 1651.
- 43 Paras 36–37.
- 44 See Ellis, 'Recent Jurisprudence of the Court of Justice in the Field of Sex Equality' 37 CMLRev (2000) 1403–26, at 1414–5: 'The degree of gender stereotyping in contained within this formulation is little short of staggering. Why, it may be asked, is it beyond question that a woman can be chef but not a commando?'
- 45 The Court also considered the restricting of compulsory military service to men only in Case C-79/99 *Schnorbus* [2000] ECR I-997, discussed below. The Court will consider whether the *Sirdar* and *Kreil* rulings may be relied on by a man challenging the fact that military service in Germany is obligatory for men and not for women in Case C-186/01 *Dory*. The Court rejected an application from Mr Dory for interim relief in C-186/01-R [2001] ECR I-7823, on the grounds of lack of jurisdiction.
- 46 See, e.g. ILO Convention No 89 of 9 July 1948.
- 47 Case C-421/92 *Habermann-Beltermann* [1994] ECR I-1657.
- 48 Case C-345/89 *Stoeckel* [1991] ECR I-4047; Case C-158/91 *Levy* [1993] ECR I-4287. See also Case C-13/93 *Minne* [1994] ECR I-371; Case C-197/96 *Commission v France (Nightwork for Women)* [1997] ECR I-1489.
- 49 See Case 222/84 *Johnston v RUC* [1986] ECR 1651, paras 44–46; Case 318/86 *Commission v France (Sex Discrimination in the Civil Service)* [1988] ECR 3559; Case 184/83 *Hofmann v Barmer Ersatzkasse* [1984] ECR 3047; Case 312/86 *Commission v France (Protection of Women)* [1988] ECR 6315.
- 50 Wynn, 'Pregnancy Discrimination: Equality, Protection or Reconciliation?' 62 MLRev (1999) 435, at 439.
- 51 Directive 92/85/EC OJ 1992 L 348/1.
- 52 The PMD applies equally to women on fixed-term contracts and indefinite contracts, see Case C-109/00 *Tele Danmark* [2001] ECR I-6993 para 33; Case C-438/99 *Melgar* [2001] ECR I-6915, para 44.

- 53 Article 4 (1) and Article 6 PMD.
- 54 Article 11 PMD.
- 55 Article 8 PMD.
- 56 Article 11(2) PMD.
- 57 Article 10 PMD, 'save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice', for example conduct permitting dismissal, such as dishonesty.
- 58 Case 177/88 *Dekker* [1990] ECR I-3941; Case C-179/88 *Hertz* [1990] ECR I-3979; Case C-136/95 *Thibault* [1998] ECR I-2011, para 26.
- 59 Case 177/88 *Dekker*; Case C-179/88 *Hertz*; see also the Canadian Supreme Court in *Brookes v Canada Safeway Ltd* (1989) 1 SCR 1219; and the US Supreme Court in *California Federal Savings and Loan Association v Guerra* (1987) 479 US 272, 107 S Ct 683. This approach has been criticised by some authors, see in particular, Wintemute, 'When is Pregnancy Discrimination Indirect Discrimination?' 27 ILJ (1998) 23, but see, in response, Honeyball, 'Pregnancy^{and Sex Discrimination}' 29 ILJ (2000) 43.
- 60 Case C-66/96 Høy Pedersen [1998] ECR I-7327.
- 61 Case 207/98 [2000] ECR I-549.
- 62 Article 10 PMD
- 63 Case C-32/93 [1994] ECR I-3567.
- 64 Barnard, supra n 1, p 272; Szyszczak, 'Community Law on Pregnancy and Maternity' in Hervey and O'Keefe, eds, *Sex Equality Law in the European Union* (Chichester: Wiley, 1996).
- 65 Case C-109/00 *Tele Danmark* [2001] ECR I-6993.
- 66 Para 30. The Court went on to note, in para 33, that had the legislature wished to exclude fixed term employment contracts from the scope of the ETD and PMD, it would have done so expressly.
- 67 Case C-438/99 *Melgar* [2001] ECR I-6915.
- 68 Actually, one of a long line of fixed-term contracts with the same employer.
- 69 Case 177/88 *Dekker*.
- 70 Case C-438/99 *Melgar*, paras 46–47.
- 71 Case C-207/98 [2000] ECR I-549.
- 72 Caracciolo di Torella and Masselot, 'Pregnancy, maternity and the organisation of family life' 26 ELRev (2001) 239, at 247.
- 73 Case C-179/88 [1990] ECR I-3979.
- 74 If dismissal on account of pregnancy constitutes (unjustifiable) direct sex discrimination (because only women can become pregnant), dismissal on account of pregnancy-related illness must logically also constitute (unjustifiable) direct sex discrimination. See Barnard, supra n 1, p 270; Wynn, 'Pregnancy Discrimination: Equality, Protection or Reconciliation?' 62 MLRev (1999) 435, at 439.
- 75 Paras 14–16.
- 76 Case C-400/95 [1997] ECR 2757.
- 77 Case C-394/96 [1998] ECR I-4185.
- 78 Para 27, italics added.
- 79 Para 31.
- 80 Case C-66/96 [1998] ECR I-7327.
- 81 Para 34. The Court held that this so unless benefits received under the relevant national legislation were equal to the women's pay. It is noteworthy that the Court does not describe the discrimination at issue as 'direct' discrimination, nor does it cite *Dekker*.
- 82 Case C-249/97 [1999] ECR I-5295.
- 83 See further, Ellis, supra n 44, at 1410–12.
- 84 Para 12.
- 85 Para 26.
- 86 Case C-207/98 *Malburg* [2000] ECR I-549.

- 87 Para 29.
- 88 The lack of clear reasoning has been criticised by a number of authors, see ed Ellis, supra n 44; Caracciolo di Torella and Masselot, supra n 72.
- 89 See also *Gillespie*, with respect to payment of salary increases while on maternity leave.
- 90 Case C-342/93 [1996] ECR I-475.
- 91 Case C-411/96 [1998] ECR I-6401.
- 92 See Hervey and Shaw, supra n 16, at 52.
- 93 Case C-66/96 [1998] ECR I-7327.
- 94 Para 38.
- 95 Para 39.
- 96 Para 40. It is interesting that the Court cites Case C-457/93 *Lewark* [1996] ECR I-243, para 31 in this respect, as *Lewark* is concerned with *indirect* sex discrimination.
- 97 See further in this respect Caracciolo di Torella and Masselot, supra n 72.
- 98 OJ 2000 L 303/16.
- 99 Case C-312/92 *Roberts* [1993] ECR I-5579.
- 100 Case 184/82 [1984] ECR 3047. See also Case 163/82 *Commission v Italy* [1983] ECR 3273.
- 101 Para 25.
- 102 Case 312/86 [1988] ECR 6315.
- 103 Case C-218/98 *Abdoulaye v Renault* [1999] ECR I-5723.
- 104 See, also, for instance, Case C-411/96 *Boyle*, para 40.
- 105 Case C-476/99 [2002] ECR I- (19 March 2002).
- 106 Save in emergencies, to be determined by the employer.
- 107 McGlynn, 'Ideologies of Motherhood in European Community Sex Equality Law' 6 *ELJ* (2000) 29; McGlynn, 'Pregnancy, Parenthood and the Court of Justice in *Abdoulaye*' 25 *ELRev* (2000) 654; McGlynn, 'Reclaiming a Feminist Vision: The Reconciliation of Paid Work and Family Life in European Union Law and Policy' 7 *Columbia Journal of European Law* (2001) 241. See also Caracciolo di Torella and Masselot, supra n 72; Caracciolo di Torella, 'Childcare, Employment and Equality in the EC: First (False) Steps of the Court' 25 *ELRev* (2000) 310; Hervey and Shaw, supra n 16; Moebius and Szyszczak, 'Of Raising Pigs and Children' 18 *YEL* (1998) 125.
- 108 And perhaps short post-birth maternity leave.
- 109 Directive 96/34/EC OJ 1996 L 145/4.
- 110 Case C-333/97 [1999] ECR I-7243.
- 111 Directive 96/34/EC, Annex, Clause 2 (6).
- 112 Para 40
- 113 As McGlynn notes, this 'preposterous' and 'counter-intuitive' result means that one key to promoting equal opportunities, that men become more involved in childcare, will lead to a reduction in women's rights. McGlynn (2001) supra n 107, at 268–269.
- 114 Against men, who would be less likely than women to benefit from such special treatment for parents.
- 115 An entitlement already enjoyed in many Member States.
- 116 Annex, Clause 2 (5).
- 117 See further, Fredman, 'Affirmative Action and the European Court of Justice: A Critical Analysis' in Shaw, ed, *Social Law and Policy in an Evolving European Union* (Oxford: Hart, 2000); Fredman, *Discrimination Law* (Oxford: Clarendon Press, 2002), p 136–43; Peters, 'The Many Meanings of Equality and Positive Action in Favour of Women under European Community Law – A Conceptual Analysis' 2 *ELJ* (1996) 177; Barnard and Hervey, 'Softening the approach to quotas: positive action after *Marschall*' 20 *JSWFL* (1998) 333–52; Barnard, 'The Principle of Equality in the Community context: *P. Grant, Kalanke and Marschall*: Four Uneasy Bedfellows' 57 *CLJ* (1998) 352; Schiek, 'Positive Action before the European Court of Justice – New

- Conceptions of Equality in Community Law?’ 16 *IJCLL&IR* (2000) 251.
- 118 Case C-450/93 *Kalanke* [1995] ECR I-3051, para 16; Case C-158/97 *Baedeck* [2000] ECR I-1875, para 17; Case C-476/99 *Lommers* [2002] ECR I- (19 March 2002), para 30.
- 119 See Barnard and Hervey, ‘European Union Employment and Social Policy Survey 1996 and 1997’ 17 *YEL* (1997) 436-490 and Barnard and Hervey, ‘European Union Employment and Social Policy Survey 1999–2000’ 20 *YEL* (2001), on which this section is based.
- 120 Case C-450/93 [1995] ECR I-3051.
- 121 Para 22.
- 122 Case C-407/98 [2000] ECR I-5539.
- 123 This outcome was not affected by the limited number of posts to which the rule applied nor the level of the appointment.
- 124 Germany has had various quota systems for the ‘advancement of women’ in public employment from the mid 1980s at both federal and regional level. For further information, see Shaw, ‘Positive Action for Women in Germany: The Use of Legally Binding Quota Systems’ in Hepple and Szyszczak, eds, *Discrimination: The Limits of Law* (London: Mansell, 1992); Szyszczak, ‘Positive Action after *Kalanke*’ 59 *MLRev* (1996) 876; Prechal, 33 *CMLRev* (1996) 1245; Moore, ‘Nothing Positive from the Court of Justice’ 21 *ELRev* (1996) 156; Fenwick, ‘Perpetuating Inequality in the Name of Equal Treatment’ 18 *JSWFL* (1996) 263; Barnard and Hervey, ‘Softening the approach to quotas: positive action after *Marschall*’ 20 *JSWFL* (1998) 333; Schiek, ‘Positive Action in Community Law’ 25 *ILJ* (1996) 239; Schiek, ‘Sex Equality Law after *Kalanke* and *Marschall*’ 4 *ELJ* (1998) 148.
- 125 New Article 141 (4) EC, and the ‘mainstreaming’ of gender equality (as opposed to bare ‘equal treatment’) in Article 3 (2) EC had been agreed and signed, but were not ratified and in force at the time of the judgment. See Shaw, ‘European Union Governance and the Question of Gender: a critical comment’ <http://www.jeanmonnetprogram.org/papers/01/011901.html>.
- 126 Case C-409/95 *Marschall* [1997] ECR I-6363.
- 127 Para 33.
- 128 ‘[N]ot such as to discriminate against female *candidates* (plural)’ para 33, emphasis added.
- 129 Such as, for instance, their need to bring home a ‘household wage’ (an indirectly discriminatory requirement which may still be implicit in some aspects of national social security systems), or the fact that the man is the sole breadwinner (also an indirectly discriminatory assumption). It was suggested by the national court that this might be precisely one such criterion applied in the assessment.
- 130 C-158/97 [2000] ECR I-1875.
- 131 Paras 45–55.
- 132 *Flexible Ergebnisquote*.
- 133 These reasons of ‘greater legal weight’ concern five rules of law, described as ‘social aspects’, which make no reference to sex. Preferential treatment is given, first, to former employees in the public service who have left the service because of family commitments; secondly, to individuals who worked on a part-time basis for family reasons and who now wish to resume full-time employment; thirdly, to former temporary soldiers; fourthly, to seriously disabled people; and fifthly, to the long-term unemployed; see para 35. See generally, Barnard, *supra* n 1, p 241–8.
- 134 Paras 23; 36–38.
- 135 Para 31.
- 136 Para 32.
- 137 The legitimacy of these criteria was not actually challenged in the main proceedings; see para 32.
- 138 Para 33.

- 139 Paras 42–43; Opinion of the AG, para 39.
- 140 Numhauser-Henning, ‘Swedish Sex Equality Law before the European Court of Justice’ 30 ILJ (2001) 121.
- 141 *Marschall*, Para 30.
- 142 Para 13.
- 143 Para 29.
- 144 Para 30.
- 145 Kenner, *supra* n 15.
- 146 The Court has also considered Article 141 (4) EC (or rather its precursor, Article 6 (3) in the Agreement on Social Policy) in the context of social security provision in Case C-366/99 *Griesmar* [2001] ECR I- (29 November 2001).
- 147 It appears that ‘emergencies’ in this context means single fathers.
- 148 Para 32.
- 149 Paras 33; 38.
- 150 OJ 1984 L 331/34.
- 151 OJ 1992 L 123/16.
- 152 Paras 35 and 37.
- 153 Para 42.
- 154 Burden of Proof Directive 97/80/EC, Article 2 (2), OJ 1998 L 14/6.
- 155 Case C-167/97 *Seymour-Smith* [1999] ECR I-623.
- 156 Case 170/84 *Bilka-Kaufhaus* [1986] ECR 1607. For instance, the Court has regularly noted that it is common ground that part-time workers are far more likely to be women than men, see, e.g. Case C-33/89 *Kowalska* [1990] ECR I-2591, para 13; Case C-322/98 *Kachelmann* [2000] ECR I-7505, para 24. See further, Barnard and Hepple, ‘Indirect Discrimination: Interpreting *Seymour-Smith*’ 58 CLJ (1999) 399.
- 157 Case 170/84 [1986] ECR 1607, para 36.
- 158 Case 171/88 [1989] ECR 2743.
- 159 Case C-243/95 [1998] ECR I-3739.
- 160 See Ellis ‘Gender Discrimination Law in the European Community’ in J Dine and B Watt eds, *Discrimination Law: Concepts, Limitations and Justifications* (London: Longman, 1996).
- 161 Case C-444/93 [1995] ECR I-4741.
- 162 Case C-317/93 [1995] ECR I-4625.
- 163 Directive 79/7/EEC OJ 1979 L 6/24.
- 164 Defines as working less than 15 hours per week and whose income did not exceed one-seventh of the monthly ‘reference wage’, that is the average salary of persons insured under the statutory old-age insurance scheme during the previous calendar year.
- 165 *Nolte*, para 33; *Megner*, para 29.
- 166 *Nolte*, para 36; *Megner*, para 30.
- 167 Case C-280/94 [1996] ECR I-179, paras 26–27.
- 168 Case C-8/94 [1996] ECR I-273, paras 18–19.
- 169 Case C-360/90 [1992] ECR I-3589.
- 170 Case C-167/97 [1999] ECR I-623.
- 171 Para 69.
- 172 Referring to *Nolte*, para 36.
- 173 Para 75.
- 174 See Hervey, *supra* n 16.
- 175 Case 237/85 [1986] ECR 2101.
- 176 Para 13.
- 177 Para 24.
- 178 A detailed discussion of the difficult issues surrounding the evaluation of work is outside the scope of this paper. See further, McColgan, *Just Wages for Women*

- (Oxford: OUP, 1997).
- 179 Case 109/88 [1989] ECR I-3199.
- 180 Para 23.
- 181 See Case C-309/97 *Wiener Gebetskrankenkasse* [1999] ECR I-2865.
- 182 Para 24.
- 183 Case C-184/89 [1991] ECR I-297.
- 184 Para 14.
- 185 Para 14.
- 186 The *Nimz* approach has been confirmed in Case C-1/95 *Gerster* [1997] ECR I-5253, Case C-100/95 *Kording* [1997] ECR I-5289; and Case C-243/95 *Hill and Stapleton* [1998] ECR I-3739, para 43.
- 187 *Danfoss*, para 22.
- 188 Case C-236/98 [2000] ECR I-2189.
- 189 Paras 43–45.
- 190 Paras 48–49.
- 191 Para 54.
- 192 Para 61.
- 193 Case C-400/93 [1995] ECR I-1275.
- 194 Para 21. See further, Bourn, 'The Devil is in the Detail' 20 *ELRev* (1995) 612–8.
- 195 Case C-381/99 *Brunnhöfer* [2001] ECR I-4961.
- 196 Para 79.
- 197 *Bilka*, para 36: 'It falls to the national court ... to decide whether ... the grounds put forward by the employer ... can be considered to be objectively justified for economic reasons' (emphasis added). See also Case 96/80 *Jenkins v Kingsgate* [1981] ECR 911, para 12: 'such may be the case ... when ... the employer is endeavouring, on economic grounds which may be justified, to encourage full time work ...' (emphasis added).
- 198 Case C-127/92 [1993] ECR I-5535.
- 199 Para 26.
- 200 For further elaboration, see Fenwick and Hervey, *supra* n 14, on which this section is based.
- 201 See *Rinner Kühn and Hill*.
- 202 See also Case C-400/93 *Royal Copenhagen* [1995] ECR I-1275.
- 203 Though not in others, see Fenwick and Hervey, *supra* n 14.
- 204 Case C-243/95 [1998] ECR I-3739. See McGlynn and Farrelly, 'Equal Pay and the "Protection of Women within Family Life"' 24 *ELRev* (1999) 202–207.
- 205 Para 25. The Court found that 99.2% of clerical assistants (the job of Ms Hill and Ms Stapleton) who job-share are women and 98% of all civil servants employed under job-sharing contracts.
- 206 Para 40.
- 207 Para 42.
- 208 See, in the UK context, *Brook and others v Mayor and Burgesses of the London Borough of Haringey* [1992] IRLR 478. For another example, see the rule that 'double earners' are to be made redundant first in the German *Kündigungsschutzgesetz* (Termination Protection Act).
- 209 Case C-322/98 [2000] ECR I-7505.
- 210 Para 24.
- 211 In Germany, and probably throughout the Community, para 27.
- 212 Para 27.
- 213 Para 28.
- 214 Para 33.
- 215 See *Megner and Scheffel; Nolte*; Case C-226/98 *Jørgensen* [2000] ECR I-2447, para 41.
- 216 Para 34.

- 217 Case 171/88 [1989] ECR 2743.
- 218 Para 14.
- 219 See e.g. *Krüger*.
- 220 Case C-167/97 *R v Secretary of State for Employment, ex parte Seymour-Smith and Perez* [1999] ECR I-623.
- 221 Case C-444/93 [1995] ECR I-4741.
- 222 Case C-317/93 [1995] ECR I-4625.
- 223 Case C-189/91 [1993] ECR I-6185. See Horspool, 'Annotation of *Kirshammer-Hack*' 31 CMLRev (1994) 1115–24.
- 224 Para 30.
- 225 Para 33; see also para 35.
- 226 Case C-444/93 [1995] ECR I-4741.
- 227 Case C-317/93 [1995] ECR I-4625.
- 228 Case C-281/97 [1999] ECR I-5127.
- 229 Such 'minor employment' constitutes employment of less than 15 hours per week, with normal pay not exceeding a fraction of the monthly baseline. It is exempt from the obligation to pay social security contributions.
- 230 In Case C-333/97 *Lewen v Denda* [1999] ECR I-7243, the Court held that a Christmas bonus constitutes 'pay' in the sense of Article 119 EC, even if it is paid on a voluntary basis, and essentially as an incentive for work in the next year or loyalty to the employer (para 21).
- 231 Para 23.
- 232 Para 25.
- 233 Para 26.
- 234 Para 29.
- 235 Case 171/88 [1999] ECR 2743.
- 236 In this instance, those who had worked not more than 10 hours a week or 45 hours a month.
- 237 Report for the Hearing, [1999] ECR 2743, at 2747. See also para 13 of the judgment.
- 238 Report for the Hearing, [1999] ECR 2743, at 2747.
- 239 Para 16.
- 240 Para 14.
- 241 Para 14.
- 242 Case C-33/89 [1990] ECR I-2591.
- 243 Report for the Hearing [1990] ECR I-2591, at 2593.
- 244 Para 14.
- 245 Opinion of the AG, para 14.
- 246 Para 20–23.
- 247 For comment, see, Lester and Rose, 'Equal value claims and sex bias in collective bargaining' 20 ILJ (1991) 163–175; Gay, 'Collective bargaining as a material factor defence in equal value claims' 18 ILJ (1989) 63–66.
- 248 See Soldon, *Women in British Trade Unions* (1978), p 186–7; Boston, *Women Workers and the Trade Union Movement* (1980), p 9–11; 278–305.
- 249 See Fenwick and Hervey, *supra* n 14, on which this section is based.
- 250 Case C-360/90 [1992] ECR I-3589.
- 251 See further, Shaw, 'Works Councils in German Enterprises and Article 119 EC' 22 ELRev (1997) 256–62.
- 252 Cases C-399/92 C-409/92, C-425/92, C-34/93 [1994] ECR I-5727.
- 253 Para 24.
- 254 Para 26.
- 255 Case C-457/93 [1996] ECR I-243.
- 256 Case C-278/93 [1996] ECR I-1165.
- 257 As Kilpatrick points out, essentially the repeated references arose because the

- German national courts did not agree with the Court's original ruling; Kilpatrick, 'Gender Equality: A Fundamental Dialogue' in Sciarra ed, *Labour Law in the Courts: National Judges and the ECJ* (Oxford: Hart, 2001).
- 258 Lewark, para 37; Freers, para 30.
- 259 Cockburn, *Strategies for Democracy: Women and the European Social Dialogue*, Social Europe, Supp 4/95.
- 260 Shaw, supra n 251, p 260.
- 261 Case C-226/98 [2000] ECR I-2447.
- 262 The Court did not accept the argument that the sale price of a medical practice could be treated as a retirement pension, see paras 43–46 of the judgment.
- 263 Two expert reports on the subject reached opposite conclusions, as they disagreed on what the relevant original data should be. Those in the particular category of specialised medical practitioners to which Ms Jørgensen belonged were 22, of whom 14 were women, out of a total of 1680, of whom 302 were women. The Court doubted whether such data could be regarded as significant, see para ³⁴.
- 264 Para 13.
- 265 Case C-343/92 [1994] ECR I-571, para 35.
- 266 Para 35.
- 267 *Jørgensen*, paras 39 and 42; citing *De Weerd*, para 36.
- 268 Paras 40 and 42.
- 269 Or equivalent civilian service.
- 270 C-186/01; see discussion above, at n 45.
- 271 Case C-79/99 *Schnorbus* [2000] ECR I-997.
- 272 Paras 38–39.
- 273 Following the *Kalanke* reasoning.
- 274 New Article 141 (4) EC now refers to 'the under-represented sex', suggesting both men and women could be favoured by positive action measures in EC law.
- 275 Para 44.
- 276 Para 45.
- 277 Para 46.
- 278 Case C-132/92 *Roberts v Birds Eye Walls* [1993] ECR I-5579.
- 279 See further, Hervey, 'Sex Equality in Social Protection: New Institutional Perspectives on Division of Competence' 4 *ELJ* (1998) 196–219.
- 280 See Kilpatrick, 'Gender Equality: A Fundamental Dialogue' in Sciarra, ed, *Labour Law in the Courts: National Judges and the ECJ* (Oxford: Hart, 2001), pp 36–40; Shaw, 'Gender and the Court of Justice' in De Búrca and Weiler, eds, *The European Court of Justice* (Oxford: OUP, 2001), at 123. It is not clear whether the Court will be able to continue to chart its careful course through this particular site for 'constitutional clashes'; see the discussion above re C-186/01 *Dory*.