CURRENT DEVELOPMENTS

EUROPEAN UNION LAW

Edited by Joe McMahon

I. Social policy
II. External relations

I. SOCIAL POLICY

The wide range of developments in social policy has necessitated dividing this commentary into two parts. The first part will examine discrimination law developments; the second part, published in the next issue, will look at general employment law developments.

A. New legislation

After almost five years of heated deliberation, on 13 December 2004 the Council formally adopted Council Directive 2004/113/EC implementing the principle of equal treatment between women and men in the access to and supply of goods and services.[1] The Directive is based on Article 13 of the EC Treaty.[2] The Directive therefore follows the template of the earlier Article 13 EC directives. There are four chapters. Chapter I addresses general provisions; Chapter II outlines remedies and enforcement; Chapter III sets out bodies for the promotion of equal treatment; and Chapter IV tidies up the final provisions. Direct and indirect discrimination is covered, along with sexual harassment and the possibility of using positive action.

The Directive contains an exception in Article 4(5) where a good or service was intended exclusively or primarily for members of one sex or where skills required for its delivery are different for each sex. The Commission examples for this provision are single-sex swimming sessions and single-sex private members' clubs. Examples of specific sex skills include hairdressing. The interaction with religious beliefs will make this clause very important.

[1] OJ 2004 L 373/37. The Directive must be implemented by 21 Dec 2009. The watered-down version of the Directive does not address the media and advertising, education, and taxation. The even more far-reaching suggestions put forward by the European Women's Lobby on family and societal violence and the participation of women in decision-making were lost at an early stage. See E Caracciolo di Torella and A Masselot 'The Future of Gender Equality' in T Tridimas and P Nebbia (eds) *EU Law for the 21st Century: Rethinking the New Legal Order. Vol II* (Hart Publishing Oxford 2004); A Masselot 'Reflection on Council Directive Implementing the Principle of Equal Treatment Between Men and Women in the Access to Supply of Goods and Services' in S Millns and M Diaz (eds) *Gender Equality and the Future of the European Union* (Palgrave Basingstoke 2005).

[2] An alternative legal base would be Art 95 EC. See EC Commission COM(2004) 279 final and the *Options Paper,* July 2003, available at <http://europa.eu.int/comm/employment_social/news/2003/jul/consultation_en.html>.

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The Directive does address the elimination of gender discrimination in the insurance sector, particularly private pension schemes. Article 5 requires that insurance companies treat men and women the same in the calculation of annuities and pensions.[3] The Directive leaves Member States room to continue to use gender where it is a determining factor in assessing insurance risks, but this must be based on relevant and accurate data, which must be regularly updated and made public. As a result of the Directive, individuals will in the future have much clearer information on how their insurance premiums and benefits are calculated. All Member States must ensure that insurance costs related to pregnancy and maternity are attributed equally to both men and women. The Commission argues that this will lead to a much fairer distribution within society of the costs of pregnancy and parenthood. The Commission has also undertaken to carry out a review of the Directive as it relates to insurance in six years' time. This review will be carried out with the full participation of representatives of the insurance industry, consumers and equality bodies.

During 2004 there has been much reflection on the future of equality law and policy but the proposal to recast the existing equality Directives into one consolidated text continues to work its way through the institutional consultation procedure.[4]

B. New policy

A new Commissioner for Employment, Social Affairs and Equal Opportunities was appointed in November 2004, the Czech, Vladimir Spidla. On 9 February the Commission adopted the new Social Policy Agenda for 2005–2010.[5] The Agenda has two key priorities: employment and fighting poverty, combined with promoting equal opportunities. Special attention will be paid to a policy for ethnic minorities, especially the Roma. A new development will be the creation of a European Institute for Gender Inequality to support the work of the institutions. Consultations have also started on a proposal for a Regulation to establish a Fundamental Rights Agency of the EU[6] and the Commission began a consultation process in a Green Paper, *Equality and Non-Discrimination in an Enlarged European Union*, adopted in May 2004.[7] A Communication from the Commission on the latter is expected in 2005.

[3] For background to this controversial issue see EC Commission, COM(2003) 657 final and SEC (2003) 1213; European Parliament, PE 337.825 (final A5-0155/2004).

[4] Proposal for a Directive of the European Parliament and of the Council on the implementation of the principle of equal opportunity and equal treatment of men and women in matters of employment and occupation, COM(2004) 279 final.

[5] Communication from the Commission on the Social Agenda, COM(2005) 33 final.

[6] Communication from the Commission, *The Fundamental Rights Agency*, Public Consultation Document, Brussels, 25 Oct 2004. In 2003 the Commission adopted proposals to recast Regulation 1035/97 (COM(2003) 483); in Dec 2003 the European Council called for the extension of the mandate European Monitoring Centre on Racism and Xenophobia to become a Human Rights Agency.

[7] See Lisa Waddington 'Taking Stock and Looking Forward. The Commission Green Paper on Equality and Non-Discrimination in an Enlarged European Union' (2004) 33 ILJ 358.

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C. Case law

1. Infringement Actions

In 2005 there have been three successful infringement actions brought against Finland, Luxembourg and Germany for failing to implement Directive 2000/43.[8] On 20 December 2004 the Commission announced that infringement actions were being commenced against Austria, Germany, Finland, Greece, and Luxembourg for failure to implement Directive 2000/78 (the transitional period ended on 2 December 2003). It is likely that further infringement actions will be taken in the coming years.[9] The Commission policy is to bring 'packages' of proceedings against a number of Member States at the same time.

Under Article 17 of Directive 2000/43 and Article 19 of Directive 2000/78 the Member States must communicate by 19 July 2005 and 2 December 2005 respectively, and every five years thereafter, all information necessary for the Commission to prepare a report to the European Parliament and the Council on the application of the Directives. Directive 2002/73/EC[10] must be implemented by 5 October 2005. In order to raise awareness of the directives the Commission launched a multi-annual EU-wide campaign to combat discrimination under the heading 'For diversity—Against Discrimination' funded under the Community Programme to Combat Discrimination 2001–2006.[11]

An infringement action brought against Austria raised issues concerning the compatibility of protective legislation with Community law. The Austrian Government relied upon differences between men and women's physiological structure in order to justify the legislation. The Court found such justifications too wide, and Austria could not satisfy the principle of proportionality. As a further defence Austria argued that, on accession to the EU, it was bound by ILO Convention No 45. The Commission argued that the ILO Convention contained a denunciation clause and Austria should have taken advantage of this on accession. The Court accepted that Article 307(3) EC can insulate agreements made *before* accession to the EU, but Article 307(2) EC requires Member States to take all appropriate steps to eliminate any incompatibility between national law and Community law. Denunciation of the ILO Convention fell within this duty. But the Commission overlooked a technicality. The ILO Convention could only be denounced every ten years. Austria had the opportunity to do this during the year following 30 May 1997 and thereafter from 30 May 2007. Thus Austria had not failed to fulfil its obligations under Community law.

In a short judgment[12] the Court found Luxembourg in breach of the parental leave

[8] Case C-327/04 *Commission v Finland*, judgment of 24 Feb 2005; Case C-320/04 *Commission v Luxembourg*, judgment of 24 Feb 2004; Case C-329/04 *Commission v Germany* judgment of 28 Apr 2005.

[9] See *European Anti-Discrimination Law Review*, Issue 1, Apr 2005, 32. Summary Reports of the implementation of the directives in the old and accession States can be found at <http://www.europa.eu.int/comm/employment_social/fundamental_rights/public/pubst_en.htm>.

[10] OJ 2002 L 269/15.

[11] Communication From the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Scoreboard on Implementing the Social Policy Agenda, COM(2004) 137 final, 16.

[12] Case C-519/03 *Commission v Grand Duchy of Luxembourg* judgment of 14 Apr 2005.

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Directive 96/34 and Framework Agreement.[13] Under a 1999 law the right to maternity leave arising during a parental leave replaces the latter. The parental leave comes to an end and it is not possible for a woman to defer the portion of parental leave which was not taken up. The Court stressed the individual nature of the employment rights and the fact that Community law grants rights to leave for different purposes.[14] The Court also found that the eligibility rules for the parental leave (a child must be born, or adoption proceedings initiated before 31 December 1998) made it impossible for some parents to exercise their rights under the Directive and Framework Agreement.

2. Confirming existing jurisprudence

A number of cases have raised questions already addressed by the Court and it has not departed from settled case law. In *Robert Bourgard v INASTI* the Court confirmed that the derogations under Article 7(1)(a) of Directive 79/7/EEC must be interpreted strictly.[15] Any differences in treatment between men and women must be confined to forms of discrimination that are necessarily and objectively linked to the differences in retirement ages. Bourgard's complaint was that, as a self-employed worker applying for a pension five years before the normal retirement age, his pension was reduced by 5 per cent to take into account that it was awarded early. The normal retirement age in Belgium was set at the age of 65 years of age for men and 60 years of age for women. The Court accepted that Member States were allowed to temporarily retain advantages afforded to women in relation to retirement pensions in order for pension schemes to be modified progressively to create equality of treatment without upsetting the complex financial equilibrium. The Court examined the measures taken by Belgium to assess if they were necessarily and objectively linked to the national provisions setting different retirement ages. The Court found a relationship of interdependence between the fact that men can choose to retire early and the concomitant reduction in their pension. Member States have a wide discretion as to how to address the problems of maintaining the financial equilibrium of the pension schemes. It was not possible from the evidence produced to determine whether the 5 per cent reduction in the men's pension was set at a reasonable rate.

In *Schönheit v Stadt Franfurt an Maim* and *Becker v Land Hessen* the Court found that by applying established case law a pension paid by a public employer fell within Article 141 EC.[16] There was an allegation of indirect sex discrimination where a pension awarded to a part-time worker was reduced. Statistical evidence was used to show that in 1993 92.05 per cent of part-time staff were women; in 1996 87.9 per cent of part-time staff were women. The case turned on the objective justification that could be used to defend a claim of indirect discrimination. The Court ruled that the aim of restricting public expenditure could not be relied upon; otherwise the scope of a fundamental right to equality would vary in time and place according to the state of public finances. The German Government put forward a new justification, not raised initially, for the measures: the pension abatement was a corrective mechanism to prevent civil servants employed on a part-time basis from being placed at an advantage over full-

[13] OJ 1996 L 145/4.
[14] See Case C-342/01 *Merino Gómez*, discussed below.
[15] Case C-172/02, judgment of 30 Apr 2004.
[16] Case C-4/02 and 5/02 [2003] ECR I-12575.

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time civil servants. The objective justification for the reduction in the pension of part-time workers was that such workers performed a lesser amount of work. The Court held that the reduction in the pension payment must be in proportion to the work undertaken.

Equal pay issues continue to be prominent in the case law. The Court gave judgment in *Allonby v Accrington College*.[17] In 1996 a college decided that the legislative changes making it necessary to give part-time workers equality with full-time workers, especially in relation to retirement pensions, imposed too many financial burdens. Part-time workers were dismissed by the non-renewal of their contracts. A policy decision was made to employ only hourly paid workers through ELS, which offered the lecturers the possibility of being registered as self-employed. 110 men and 231 women were made redundant by the college. A test case was brought by the EOC and the trade union against the college, alleging discrimination against a contract worker, and for a redundancy payment, and for redress against unfair dismissal combined with a complaint of indirect discrimination by reason of dismissal. A second complaint was made against ELS for equal pay. A third complaint was made against the Secretary of State for denying access for a self-employed worker to the statutory pension scheme. A central issue in the claim was whether the applicant could make a comparison for equal pay and sex discrimination purposes with a male worker employed by the college. The Court found that the male worker was paid by the college under conditions determined by the college, whereas the applicant's pay was determined by ELS. The Court stated that the pay conditions of the two comparators could not be attributed to a *single source* and that there was no body responsible for the pay inequality that could restore equal treatment. The ELS and the College were not associated employers.[18] There was, therefore, no basis for a comparison under Article 141 EC and ELS could not be held liable for the lack of access to the pension scheme.

As against State liability, the ruling is more nuanced. A comparison can be made of all teachers who are workers and who fulfil the conditions of membership of the pension scheme with workers who do not fulfil the condition because they are not employed under a contract of employment. If discrimination is found, then the UK law should be disapplied. Applying its earlier ruling in *Lawrence*,[19] the Court held that the legislature is the sole source of the difference in treatment between male and female workers. The Court affirmed that the term 'worker' in Article 141 EC must have a Community law meaning. Looking at the case law on the free movement of persons, a set of criteria has emerged: the person must work for a certain period of time, perform services for, and under the direction of, another in return for which she receives remuneration. The Court ruled that the nature of the legal relationship is of no consequence and the formal classification of a self-employed person under national law does not exclude the possibility that a person can be classified as a worker within the meaning of Article 141 EC. The correct test to ask is whether teachers employed via an intermediary have any limitation on their freedom to choose their timetable, place and the content of their work. The fact that they can refuse an assignment is of no consequence.

Part-time work and indirect discrimination continue to occupy the Court's caseload. In *Edeltrand Elsner-Lakeberg v Land Nordrhein-Westfalen* a part-time teacher was not

[17] Case C-256/01, judgment of 13 Jan 2004. The Opinion of the Advocate General is discussed at (2003) 52 ICLQ 1013.

[18] ibid para 46.

[19] Case C-320/00 *AG Lawrence and ors v Regent Office Care Ltd, Commercial Catering Group, Mitie Secure Services Ltd* [2002] ECR I-7325.

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paid for extra work as the hours worked fell below the threshold which triggered extra remuneration.[20] The Court found such rules contrary to the equal pay provisions where considerably more women than men are affected by the measure and there is no objective justification, unrelated to sex discrimination, for the measure. It is for the national court to determine if differential treatment affects considerably more women than men and whether such differential treatment is justified and proportionate.

In a dispute between a trade union representing employees in the private sector and an Austrian economic chamber, the union sought a declaration that parental leave should be taken into account in the same way that military service and civilian service was taken into account for a period of up to eight months in calculating the length of service for termination payments.[21] Military service is compulsory for men. The trade union argued that 98.253 per cent of workers on parental leave are women, yet only a few collective agreements take parental leave into account when calculating length of service. The Court held that the issue fell within Article 141 EC. In making comparisons the Court distinguishes parental leave from maternity leave and also from compulsory military service, including the situation where military service is extended through voluntary choice. The two situations were not the same and Community law permitted a difference in treatment. The Court ruled that termination payments fall within the scope of Article 141 EC. The Court held that the period of employment that is relevant for determining a termination payment may be increased as a result of a statutory provision that takes into account military or civilian service which is performed in the public interest and which is not connected with the employment. The Court drew a distinction between parental leave, which it was argued was taken on a voluntary basis, and national service, which was a civic obligation. Community law did not preclude the obligation to undertake military service falling upon men only.[22]

3. Equality as a fundamental right

The Court has long held that equal treatment between the sexes is a fundamental right protected in Community law. Equality is also one of the general principles of Community law. In *Wippel* the Court affirms that:[23]

> the prohibition on discrimination is merely a particular expression of a fundamental principle of Community law, namely the general principle of equality under which comparable situations may not be treated differently unless the difference is objectively justified. That principle can therefore apply only to persons in comparable situations.

The Court has used this idea to extend protection under Community law, even when there is no legislative basis for such a principle. The EU Charter of Fundamental Rights recognises equality as a fundamental right taking the existing paradigm away from the existing focus on negative rights, the right not to be treated differently, without objective justification, towards ideas of a positive right to equality. The new EU Constitution incorporates the ECCFR into Part II, which contains a number of provisions relating to equality as well as recognizing the principle of diversity. Equality is seen as a *value* and

[20] Case C-285/02, judgment of 27 May 2004.

[21] Case C-220/02 *Osterreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten* v *Wirtschaftskammer Osterreich*, judgment of 8 June 2004.

[22] See Case C-186/01 *Alexander Dory v Federal Republic of Germany* [2003] ECR I-2479.

[23] Case C-313/02, judgment of 12 Oct 2004, para 56 (references omitted).

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as an *objective* in the new EU Constitution.[24] Article III-124 provides a general legislative competence to combat discrimination, which is subject to unanimity voting in the Council and the consent of the European Parliament. Article III-214 grants specific powers to combat sex discrimination in employment. There are also positive duties to promote equality between men and women in Article III-116 and a duty to combat discrimination in all activities in Article III-118.

On 17 December 2004 the ten ratifications required for the entry in to force of Protocol 12 to the ECHR were reached. The Protocol entered into force on 1 April 2005. This will enhance human rights protection in the EU since the Protocol provides in Article 1 that no one shall be discriminated against by any public authority on any ground such as those listed in Article 2. Article 2 contains a general prohibition of discrimination on a wide range of grounds which is open-ended: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status. This provides a broader basis for anti-discrimination claims than the current Article 13 EC or the provisions in the new EU Constitution.[25]

In *Rinke* the Court held that the principle of non-discrimination enjoys the status of a fundamental right in Community law and may take precedence over other Community law provisions that infringe this right.[26] In this case a challenge was made to the non-recognition of part-time training for fulfilling the requirements for the mutual recognition of general medical practitioner qualifications. In looking at the compatibility of Council Directives 86/457 and 93/16 with the Equal Treatment Directive (Directive 76/207), the Court balanced the equality of opportunity objective against the Community objective of ensuring a high level of public health protection in the free movement of medical practitioners. In this instance the public interest overrode the fundamental principle of equality.

In a reference from the Court of Appeal, England and Wales, involving rights to a survivor's pension benefit for a couple where one partner is a transsexual, the Court ruled that the fact that certain benefits are restricted to married couples cannot be regarded as per se discrimination on grounds of sex.[27] The Court held that there is inequality of treatment when, in breach of human rights, a person is prevented from satisfying a condition upon which the award of a benefit protected by Community law depends. As a preliminary point, the Court stated that a survivor's pension paid under an occupational pension scheme falls within the scope of the Treaty provisions prohibiting all discrimination on grounds of sex in relation to pay. The Court ruled that the decision to restrict certain benefits to married couples, while excluding all persons who live together without being married, cannot, of itself, be regarded as prohibited by Community law as discriminatory on grounds of sex. For the purpose of awarding the

[24] See M Bell 'Equality and the European Union Constitution' (2004) 33 ILJ 242; E Caracciolo di Torella and A Masselot 'The Value of Gender Equality' in S Millns and M Aziz (eds) *Values in the Constitution of Europe* (Dartmouth Aldershot 2005).

[25] For a further account of wider models of discrimination which could apply to the EU see R Holtmaat 'Towards Different Law and Public Policy. The Significance of Article 5a CEDAW for the Elimination of Structural Gender Discrimination' May 2004 available at: <http://home.szw.nl/navigatie/dossier/dspdossier.cfm?set id=1691&doctype id=7>.

[26] Case C-5/02 judgment of 9 Sept 2003.

[27] Case C-117/01 *KB v NHS,* judgment of 7 Jan 2004. The Advocate General's Opinion is discussed at (2003) 52 ICLQ 1013.

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survivor's pension, it is irrelevant whether the claimant is a man or a woman. The Court found that there is inequality of treatment which, although it does not directly undermine enjoyment of a right protected by Community law, affects one of the conditions for the *grant* of that right. In the situation in question, the inequality of treatment relates to the capacity to marry, where marriage is a necessary precondition for the award of a widower's pension. By comparison with a heterosexual couple, where neither partner's identity is the result of gender reassignment surgery, and the couple are therefore able to marry, a couple such as KB and R are unable to satisfy the marriage requirement. The fact that it is impossible for them to marry arises from the United Kingdom rules on marriage and birth certificates. The Court, recalling that the European Court of Human Rights has already held that the fact that it is impossible for transsexuals to marry in their acquired gender constitutes an infringement of their right to marry under Article 12 of the ECHR, rules that the legislation concerned must be regarded as being, in principle, incompatible with Community law. Since it is for the Member States to determine the conditions under which legal recognition is given to change of gender, the Court states that it is for the national court to determine whether a person in KB's situation can rely on Community law in order to nominate his or her partner as the beneficiary of a survivor's pension.

The Opinion of Advocate General Kokott in *Wippel*[28] refers to the forgotten Community Charter of the Fundamental Social Rights of Workers 1989. Paragraph 5 of the 1989 Charter refers to fair remuneration, the improvement of the living and working conditions of workers and the right to adequate social protection. The Advocate General argued that the Charter does not have the legally binding status of a primary Act of the Community: 'It is simply a declaration of general socio-political aims the purpose of which is to provide the Union with impetus for its development in the field of social policy' (para 37). But the Charter can be used as an aid to interpretation where Community law provisions reveal a close connection with it. The Advocate General pays particular attention to the role the Charter can play in realising the goals of Article 2 EC and the provisions in the Preamble to the EC Treaty referring to the Charter. These arguments were not taken up by the Court.

4. Equal treatment

The interaction of the equal pay and equal treatment provisions was explored in *Erika Steinicke*.[29] The German Government had introduced labour market measures to encourage full-time workers to accept reduced hours. Steinicke had worked part-time (50 per cent of full-time hours) after the birth of her baby. In 1998 she asked to increase her hours on a permanent basis because of an increased workload. The request was denied due to budgetary constraints. She then asked to take advantage of part-time work on grounds of age but this was denied because she did not satisfy the qualifying conditions of having worked full-time for three of the five years immediately preceding the period of part-time work. In response to a claim of indirect discrimination the German Government raised the costs and planning burdens of allocating part-time posts as an objective justification for the qualifying rules. Applying *Kutz-Bauer*,[30] the

[28] Case C-313/02. judgment of 12 Oct 2004. Opinion delivered 18 May 2004.
[29] Case C-77/02 judgment of 11 Sept 2003.
[30] Case C-187/00 [2003] ECR I-2741, para 44.

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Court held that the German measures fell within Article 5(1) of the Equal Treatment Directive and not Article 141 EC. The measures affected the exercise of an occupation and adjusting hours of work. Ninety per cent of part-time workers in the German public sector were women and thus there was a prima facie case of indirect discrimination. Accepting that the Member States enjoy a broad margin of discretion in matters of social policy, the Court held that in exercising that discretion the Member States may not frustrate the implementation of a fundamental principle of Community law such as the principle of equal treatment. 'Mere' generalisations were not sufficient objective justifications and neither were budgetary considerations.

The interaction of indirect discrimination under the Equal Treatment Directive and the Burden of Proof Directive (Directive 97/80)[31] is seen in *Vasiliki Nikoloudi v Organismos Tilepikinonion Ellados AE*.[32] This was a dispute involving a female part-time worker who worked as a cleaner for the Hellenic Telecommunications Organisation (OTE). The legal status of OTE and the question of whether provisions of the equal treatment directives can be applied to OTE are not discussed until the end of the judgment, in relation to the burden of proof Directive, Directive 97/80. While not directly addressing the legal status of OTE, the Court repeated its formula that where the provisions of a directive are unconditional and sufficiently precise they may be relied upon by individuals against:[33]

> organisations or bodies, whatever their legal form, which are subject to the authority or control of the State or have special powers beyond those which result from the normal rules applicable to relations between individuals.

The Court then put an end to any speculation that its ruling in *Pfeiffer* on 4 December 2004 suggests that certain provisions of directives may create horizontal direct effect. It stated that: 'a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such as against an individual.'[34] The Court reaffirmed the duty of national courts to interpret national law 'so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive'.[35] In order for there to be no doubt, the Court then explained the result sought by the Burden of Proof Directive: to ensure that the principle of equal treatment is applied more effectively in as much as, if there is a prima facie case of discrimination, it is for the employer to prove that the principle has not been infringed.

Under OTE's General Staff Regulations a part-time worker could not become established as a member of staff. The Regulations implemented collective agreements of 1987 and 1991. Only female staff could be taken on as cleaners on employment contracts of indefinite duration for part-time or intermittent employment. The issue concerned the failure to take into account part-time service on the termination of the employment contract. First, the Court was asked if there was *direct* discrimination in the hiring policy of OTE. The Commission and the Greek government had argued that it was not possible to make an equal pay for work of equal value claim since there was no male comparator carrying out the same work as the applicant. The Court, relying upon *JämO*[36] and *Lawrence*,[37] rejected this contention, ruling that the work which may serve as a comparison need not be the same as that carried out by the applicant who

[31] OJ 1998 L14/6.
[32] Case C-196/02, judgment of 10 Mar 2005.
[33] ibid, para 70. References omitted
[34] ibid, para 71. References omitted.
[35] ibid, para 73.
[36] Case C-236/98 [2000] ECR I-2189.
[37] Case C-320/00 [2002] ECR I-7325.

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invokes the equality principle. The same reasoning applied to cases decided under the Equal Treatment Directive. It was for the national court to assess the facts, the nature of the work and the conditions under which it is carried out to determine if work of equal value existed in OTE without necessarily taking account of the working schedule on the basis of the work performed.[38] If there are comparable work situations then any difference in treatment must be considered in order to determine whether it is directly based on sex:[39]

> In order for there to be no direct discrimination on grounds of sex the factor characterising the category to which the excluded worker belongs must be such as to place that worker in a situation that is objectively different, with regard to appointment as an established member of staff, from the situation of those who are eligible to become established.

OTE argued that the post of part-time cleaner was justified by the existence of premises having a small area for cleaning and a part-time post assisted women to meet their specific needs. The Court accepted that certain posts could be restricted to one sex by virtue of Article 2(2) and (4) of the Equal Treatment Directive. But the subsequent introduction of unfavourable treatment by reference to that category, whether relating to equal pay or equal treatment, could amount to discrimination.[40] It was for the national court to determine whether a much higher percentage of women than men have been denied the possibility of becoming established workers with OTE. The use of the phrase 'a much higher percentage of women than men' is a difficult evidentiary hurdle. It is also for the national court to determine if any explanation for the difference in treatment is related to the sex of the worker. As is often the case, the Court then moved on to say that it may provide guidance for the national court. In this case no justification for the choice of the difference in treatment is evident. OTE had argued that the difference in treatment was based upon objective reasons of general public and social interest in that a national public utility should not bear excessive burdens. The Court did not comment upon whether this was a legitimate aim but pointed out that it was too general and did not show how the aim of the measure was unrelated to any discrimination on grounds of sex. Furthermore budgetary considerations cannot, in themselves, be an aim of a Member State's choice of measures to justify sex discrimination.

Accepting that part-time work may be remunerated at a lower hourly rate than full-time work for objective reasons unconnected to sex discrimination, the Court felt that it did not have enough evidence to determine if sex discrimination was present. There was no evidence to show if the hourly rate differed between part-time and full-time workers. It was also pointed out that women were *not prevented* from working full-time for OTE. The Court's language and reasoning is confused, both in the test it uses to establish if direct discrimination is present and also in the use of objective justifications for the difference in treatment. The latter suggests that direct discrimination may be justified in the same way as indirect discrimination.[41] Examining the length of service criterion which was applied to workers seeking the status of established members of

[38] Above n 32, para 29.
[39] ibid para 40.
[40] See Case C-313/02 *Wippel,* discussed below.
[41] For a discussion as to why direct discrimination should not be justifiable, and only clear *exemptions* from the principle of equal treatment should be permissible see E Szyszczak, 'Pregnancy Discrimination' (1996) 59 Modern Law Review 589.

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staff, the Court ruled that this was a working condition within the meaning of Article 5 of the Equal Treatment Directive. In looking at the objective justification for the use of a length of service criterion the Court repeated previous rulings that while this may be objective factor, the criterion must be looked at in the context of the individual case. It was left to the national court to determine if a two-year full-time service criterion for the ability to apply to be an established member of staff with OTE should be applied in a proportionate manner to part-time workers. But the Court did rule that the total exclusion of part-time employment when calculating length of service affects a much higher percentage of female workers than male workers and constitutes indirect discrimination unless it is justified by objective reasons unrelated to sex. OTE argued that the length of service criterion was a management need, to assess workers' professional experience and did not preclude assessing workers who work part-time. It was left to the national court to determine whether there was an objective reason, unrelated to sex discrimination.

5. Pregnancy and Maternity Issues

A reference from the Court of Appeal, *Alabaster v Woolwich plc*, also raised the question of whether the equal treatment or the equal pay provisions of the pregnancy and maternity directive, Directive 92/85/EC apply to maternity benefits.[42] The point was left open in *Gillespie*.[43] The Court held that Article 141 EC applies to pay paid by virtue of legislative provisions and under a contract of employment where the purpose is to ensure that workers receive an income, even if they are not performing any work provided for in the contract of employment.

The Court brought together a number of pieces of protective employment legislation in order to ensure that a woman on maternity leave enjoys maximum protection under Community law.[44] In *Maria Paz Merino Gómez v Continental Industrias del Caucho* a woman was on maternity leave which coincided with one of the periods of annual leave that had been fixed in a collective agreement.[45] Her application to take annual leave following the end of her maternity leave was refused. The Court observed that paid annual leave, of at least four weeks, provided by the Directive on the organization of working time, is a particularly important principle of Community social law; its aim is to ensure that workers take a proper break. The purpose of maternity leave is different. Such leave is intended to protect a woman's physical condition and to protect the special relationship between a woman and her child after childbirth. The rights connected to the employment contract must be ensured in a case of maternity leave, including the right to paid annual leave. But the determination of *when* paid annual leave is to be taken falls within the Equal Treatment Directive, which allows provisions to be adopted that are intended to protect women during pregnancy and following childbirth. Such provisions may not result in unfavourable treatment in relation to working conditions.

[42] Case C-147/02, judgment of 30 Mar 2004.

[43] Case 342/93 [1996] ECR 475.

[44] The organization of working time Directive (Council Directive 93/104/EC, OJ 1993 L 307/18); the protection of pregnant workers Directive (Council Directive 92/85/EEC, OJ 1992 L 348/1); the equal treatment for men and women Directive (Council Directive 76/207/EEC, OJ 1976 L 39/40).

[45] Case C-342/01 judgment of 18 Mar 2004.

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The *Wippel* decision raised the question of whether a framework 'work on demand' contract is in breach of the Community law provisions relating to discrimination and part-time work.[46] The reference questioned whether it was permissible to conclude work on demand contracts that did not set out an agreement as to hours of work and the organisation of working time. The applicant argued that such a contract was *contra bonos mores*. The Opinion of Advocate General Kokott addressed the question of the concept of a 'worker' under Article 141 EC, Directives 75/117 and 76/207 and the 1989 Charter of the Fundamental Social Rights of Workers 1989. The Advocate General stated that the concept should be a *Community* concept and afforded a wide interpretation.[47] The Advocate General argued that the definition of a 'worker' under Article 39 EC 'can be taken as guidance for this purpose'. As with *Alabaster,* discussed above, this reveals an element of 'creeping competence' of Community law concepts into areas previously thought to be within the domain of national law definitions. The Advocate General discussed the conditions necessary to establish indirect discrimination and she argued that such discrimination may be shown where national rules, worded in neutral terms, work to the disadvantage of a *much higher percentage of persons of one sex*.[48] This implies a high statistical hurdle for an indirect discrimination claim to be made. The Court ruled that a work on demand contract fell within the Equal Treatment Directive. Such contracts also fell within Council Directive 97/81 and the Framework Agreement on Part-time Work provided that the Member State has not excluded such contracts or employment relationships, either wholly or partly. The Austrian law on Working Time did not infringe either EC law provision and it was permissible to conclude work on demand contracts.

Equality issues were raised in relation to the compatibility of the German rules on insolvency and Council Directive 80/987.[49] Mau was on child-raising leave, a period when under German law her employment was maintained even though the obligations towards work and pay were suspended. Her employer became insolvent and Mau applied to the Leipzig Labour Office for an insolvency payment. The equality issue was whether Mau was in an employment relationship during a period of child-raising leave. The Court held that the concept of an 'employment relationship' 'is a Community law expression that calls for uniform interpretation in all Member States'.[50] But the Court held that the Insolvency Directive does not cover a period of leave during which the employment relationship is suspended as a result of child-raising leave which confers no right to remuneration.

6. *Positive Action*

The Court found a reference from Austria concerning positive action measures inadmissible.[51] In *Serge Briheche Ministre del'Intérieur, Ministre de l'Éducation nationale and Ministre de la Justice*[52] a challenge was made to a French positive action measure which restricted entry to a competitive examination to applicants under the age of 45

[46] Case C-313/02 judgment of 12 Oct 2004.
[47] Para 49. Opinion delivered 18 May 2004.
[48] ibid para 91.
[49] Case C-160/01 [2003] ECR I-4791.
[50] Para 39.
[51] Case C-380/01 *Schneider v Bundesminister für Justiz*, judgment of 5 Feb 2004.
[52] Case C-319/03 judgment of 30 Sept 2004.

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years but which made an exception for widows who have not remarried and who are obliged to work after the death of a husband. The Court accepted the Commission's argument that the French rules gave automatic priority to widows and was thus contrary to Article 2(4) of the Equal Treatment Directive and the provision could not therefore be justified under Article 141(4) EC.

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II. EXTERNAL RELATIONS

A. The Treaty establishing a Constitution for Europe

Each time this writer has prepared a three-yearly update on the external relations of the Union, the Treaty framework has changed and the sense that Europe's leaders are being distracted from vital problems grows. The Constitution for Europe now on offer, the result of a mandate from the European Council at Laeken to effect a simplification of the treaties with a view to making them better understood without changing their meaning, would introduce new legal uncertainties into the framework for the conduct of external relations. Its entry into force, however, now appears unlikely.

The fusion of the European Union and the European Community would make the Union a single organization with explicit international legal personality (Article I-7), and successor to the European Community (Article IV-438). There is provision for the contractual and non-contractual liability of the Union (Article III-431). The abolition of the Second Pillar under which the Common Foreign and Security Policy (CFSP) is currently constructed under rules not of European Community law but of public international law, leaves however uncertainty as to how the intergovernmental character of the Union's foreign policy would be safeguarded. The institutional and procedural rules are not fundamentally changed (in particular the near total exclusion of the European Court of Justice). Primacy as established by the European Court in Community law would however extend to all law adopted by the institutions of the Union (Article I-6). The Union's competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy, is not further defined, leaving it uncertain to what extent the adoption of common foreign policies in specific areas would circumscribe the independence of Member States in the conduct of their national foreign policies (Article I-12 and I-16).

While these provisions appear to call into question the satisfaction by the Member States of the independence in the conduct of foreign policy which is a key criterion of separate sovereign status, the Constitution offers a guarantee (Article I-11) that the limits of Union competence are governed by the principle of conferral and that competences not conferred on the Union remain with the Member States. The UK Government stated that the CFSP will remain intergovernmental and backed this assertion in the terms of the European Union Bill (which fell with the dissolution of Parliament). The Bill contained new powers to give effect to CFSP obligations, but

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