

EQUALITY AND MARKET CONSIDERATIONS: WHICH SHOULD PREVAIL?

PATRICK LLOYD

I. INTRODUCTION AND DEFINITIONS

This article discusses the relationship between the concept of gender equality and the functioning of the market system. It highlights the inherent conflict between the two hypotheses and provides a rationalisation for the necessity of the freedom of the labour market in the modern economy. Finally, it concludes that the European Court of Justice's decision in *Enderby v Frenchay Health Authority and the Secretary of State for Health*¹ strikes the appropriate balance between the competing ideals.

The provisions on gender equal pay generally deal with direct and indirect discrimination. s.6 of the Employment Equality Act 1998-2004 defines direct discrimination as "less favourable treatment than another person in a comparable situation on the ground of gender." s.19 (5) allows the employer to pay differently, for like work, if the employer has grounds other than gender for doing so. Market considerations were held to be a valid ground other than gender in *Rainey v Greater Glasgow Health Board*.²

s.19 (4) provides that indirect discrimination occurs where an apparently neutral provision, puts a person of a particular gender, at a particular disadvantage, in respect of remuneration, compared with other employees. The European case of *Bilka-Kaufhaus v Weber van Hertz*³ established that indirect discrimination can be objectively justified where the employer shows that there is a genuine business objective for the requirement/provision and that the means adopted were both appropriate and necessary for achieving that objective. The European Court of

¹ C-127/92 [1993] I.R.L.R. 591.

² [1987] A.C. 224 (discussed further *infra*).

Justice's decision in *Enderby v Frenchay Health Authority and the Secretary of State for Health*⁴ applied market forces as an objective justification for indirect discrimination.

Market considerations as a concept are difficult to define. A broad definition might include collective bargaining and tendering processes as market forces which prevent successful equality claims. This article, however, deals with these issues separately and uses the term market forces in a narrower, solely economic context. Market forces are basically the economic factors, which affect pay and conditions in the labour market.

The labour market, like any other market, is dependant on the forces of demand and supply. Thus, market forces may constitute inequality in pay for those doing work equal in value because the demand for one job may be higher than the demand for the other job or, conversely, the supply of workers for one job may be lower than the supply of workers for the other job.

II. MARKET CONSIDERATIONS V EQUALITY

Market forces have always existed in and naturally regulated labour markets. It is difficult to disturb market considerations adequately, if at all, to promote equality because employment equality, on the other hand, must be pursued through government policies and legislature, a pursuit which consumes much time and resources.

Government resources are largely spent on issues such as health, education and the economy.⁵ In a democratic system, the people dictate the government's

³ C-170/84 [1986] E.C.R. 1607.

⁴ C-127/92 [1993] I.R.L.R. 591.

⁵ It is clear that society as represented by the government believe market considerations ought to prevail over equality. The judiciary another organ of the state have also found that economic concerns will take priority over equality. This was the case in *Re: Art 26 and Employment Equality Bill* [1997] 2 I.R. 321. The Bill transferred the cost of equality provisions onto the employer. The Supreme Court

policies through elections. Thus, citizens do not view equality as a huge concern and it seems voters would rather have a strong economy. The advent of the “Celtic Tiger” has placed even more emphasis on economic concerns in modern society. Evidence of this is exhibited in the UK, where market forces have been imposed on the public sector in the form of competitive tendering.

Gender employment equality can lead to a lack of competition, in industries by disrupting tendering processes, as was the case in *Ratcliffe v North Yorkshire County Council*.⁶ The County Council had set up a Compulsory Competitive Tendering process for the provision of school meals. In order to compete with private sector tenders, DSO⁷ reduced the wages of predominantly female canteen workers in line with private sector rates. The wage rate for work done mostly by men remained unchanged.

The Court of Appeal held that the indirect discrimination was objectively justified based on market forces. Commenting on the outcome, Collins⁸ posited that “the whole legal approach destructs itself once the employer is permitted to rely upon external labour market rates to justify departures from pay levels set by job evaluation.”

On appeal in the House of Lords, all five Lords overturned the decision and ruled in favour of the canteen workers. Lord Slynn opined that “I am satisfied that to reduce the women’s wage below that of their male comparators was the very kind of discrimination which the Act sought to remove.”

found that the Bill placed an onerous burden on employers, and is evidence that the courts will not allow equality to prevail over economic considerations.

⁶ [1985] I.R.L.R. 441.

⁷ DSO was the County Council’s own company established to compete for the tender.

⁸ Collins, “CCT, Equal Pay and Market Forces” (1994) 23 *Industrial Law Journal* 341.

Prima facie, the House of Lords decision in *Ratcliffe* appears to be the correct one. However, studying the overall implications of the judgment on the market and competition reveals a different picture. The Lords' rejection of the objective justification of market considerations will effectively mean that DSO cannot compete with the private sector bid. Consequently, DSO will be forced to close down and the women, who have succeeded in winning their equal pay claim, will not be able to reap the benefits of the decision. Further, the judgement eliminates competition in the market and gives the private sector company a monopoly.

Situations, such as that illustrated in *Ratcliffe*, prove that circumstances occur where equality is damaging for competition and explains precisely why market considerations should prevail over equality.

Brian Napier⁹ sets out another reason why the market forces defence should be utilised in his discussion of the *Rainey* case. In *Rainey*, the House of Lords accepted that s.1 (3) of the Equal Pay Act could provide a defence to the employer, who paid more to a man than a women for like work due to market forces when the extra pay was necessary in order to recruit staff to do the work at a particular time. Without the application of the market forces defence, the prosthetics unit would not have been established and consumers would have been left without an essential health care service.

III. THE EEC

The stimulus for employment equality legislation in Ireland was joining the European Economic Community in 1973. Article 119¹⁰ the EC Treaty provided that "men and women receive equal pay for equal work." The landmark case, *Defrenne v*

⁹ Napier, "Julia Hayward and the Continuing Saga of Equal Value" (1988) 138 *New Law Journal* 341.

¹⁰ Treaty of Amsterdam was renumbered Article 119 and it is now Article 141.

*Sebena*¹¹ established that Article 119 had direct effect against both public and private employers.

The primary purpose of the European Economic Community was, as the name suggests, purely economic. Fenwick & Hervey¹² acknowledge this, stating “[T]he community legal system is based upon the economic goal of the creation and expansion of a single, internal market, by means of market forces. Although community law is intended to create social benefits as well as economic benefits, the social benefits are a by-product of economic integration.”

Bolger & Kimber,¹³ *inter alia*,¹⁴ argue that the EU is premised on Adam Smith’s free market and there is a danger that market forces will be easily permitted to justify unequal pay.

However, despite these reservations, there are strong reasons why the European institutions and courts cannot hinder the operation of market forces. After World War II, the United States of America emerged as the world’s political and economic superpower. Europe needed to unite in a community based on Smith’s free market in order to compete economically with the USA.

Bolger & Kimber¹⁵ explain that proponents of a perfect free market view statutory clauses in contracts of employment as a distortion and thereby a threat to the open market and perfect competition. The competitive market is regarded as providing optimum conditions for men and women. This free market self-regulating view does not lie comfortably with the elements of intervention and redistribution

¹¹ C-149/77 [1978] E.C.R. 1365.

¹² Fenwick & Hervey, “Sex Equality in the Single Market” (1995) 32 *Common Market Law Review* 443.

¹³ Bolger & Kimber, *Sex Discrimination Law* (Dublin, 2000).

¹⁴ Sandra Fredman concurs with these sentiments and fears that using the market forces defence runs the risk of neglecting the social forces which operate effectively to perpetuate women’s disadvantages in the workplace.

¹⁵ Fenwick & Hervey, “Sex Equality in the Single Market” (1995) 32 *Common Market Law Review* 443 at 446.

that would be involved in a policy of non-discrimination between the sexes, founded upon positive obligations. Thus, from the outset, the community principle of sex equality and the right to equal pay for equal work was constrained by the underlying free market philosophy of the European common market.

Economic necessity underpinned the adoption of the provisions on equality in the EC Treaty. The inspiration for Article 119 has been attributed to the fears of French industrialists at the time of the signing of the Treaty of Rome. Ellis and Curtin¹⁶ both highlight the fact that France had legislation which mandated equal pay for men and women, as well as other rules which favoured workers and were consequently expensive for employers. France feared these indirect costs would make French goods uncompetitive in the Common Market.

Therefore, the motivation of Article 119 was firmly couched in the belief of the community partners in free trade and the common market. As a result, academic commentators who believe fundamentally in equality cannot reasonably argue that equality should operate to disrupt and distort market forces. Article 119 was established to ensure markets operated effectively.

IV. CAPITALISM AND GLOBALISATION

There are significant ideological reasons as to why market forces will prevail over equality. Policies of equality are heavily linked with social democracy and the ideology of socialism. Conversely, free markets and market forces are unregulated and dominant in the capitalist system.

The western world in particular, believes that a system of capitalism, which incorporates laissez-faire economics and the deregulation of markets, is the only economic and political system which is able to encourage technical, scientific,

economic and social progress for humanity. Fenwick & Hervery¹⁷ seem to accede to this reality: “The impact of sex-equality legislation has always been severely limited in a capitalist society, where the organising principle for contractual relationship is the free play of market forces.”

The dominance of the market system over the principle of equality shows no signs of reversing. Crane & Matten¹⁸ trace the advent of globalisation to the rise in ultra capitalist, laissez-faire economics and deregulation of markets under Prime Minister Margaret Thatcher in the UK and President Ronald Reagan in the USA during the 1980s and 1990s. This policy has been continued today by President George W. Bush.

Korten¹⁹ advances the theory that corporations are now increasingly making the decisions which affect social life. Globalisation and the rise of multinational corporations have allowed large corporate entities to engage states in a “race to the bottom” as regards labour and equality laws in order to attract these corporations to their states. The net effect of the phenomenon caused by these trends is that the market dominates economic life and, thus, government regulation is weaker.

These multinational corporations have individualised working contracts, rendering equality in the labour market even more difficult to regulate. Flexibility and individualisation of payment contracts, in concert with a move toward performance related pay would ensure that people will be paid fairly for their work and efficiency in the economy will be increased.

¹⁶ See generally Curtin, *Irish Employment Equality Law* (Dublin, 1989); Ellis, “Enderby v Frenchay Health Authority and the Secretary of State for Health” (1994) 31 *Common Market Law Review* 387.

¹⁷ Fenwick & Hervery, “Sex Equality in the Single Market” (1995) 32 *Common Market Law Review* 443 at 463.

¹⁸ See generally Crane & Matten, *Business Ethics* (Oxford, 2004).

¹⁹ See generally Korten, *When Corporations Rule the World* (London, 1995).

Ewelukwa²⁰ raises the question: “Do the world’s women advance any feasible alternative to market liberalisation associated with globalisation?” Thomas Friedman²¹ posits that it is doubtful that the world will see a new coherent universal ideological reaction to globalisation in the absence of an ideology, policy or programme that can remove all the brutality and destructiveness of capitalism and still produce steadily rising standards of living.

V. COLLECTIVE BARGAINING

While many people include collective bargaining under the broad heading of market forces, the concepts are essentially different because collective bargaining agreements are not influenced by the market mechanism. The ECJ’s decision on collective bargaining in *Enderby* is, therefore, a correct one. In *Enderby*, the employers claimed the pay disparity between predominantly female speech therapists and mainly male psychologists was justified by different pay agreements.

The ECJ held that the fact that the pay rates are determined by separate collective agreements, which are not in themselves discriminatory, is not a sufficient objective justification for a difference in pay. Advocate General Lenz pointed out those historical causes cannot be used to justify inequality in results, for this would merely perpetuate existing sex roles.

Evelyn Ellis’s observation on this matter is especially prescient.²² “If the employer could rely on the absence of discrimination within each of the collective bargaining processes as sufficient justification for a pay differential, the employer could easily circumvent the principle of equal pay by using separate bargaining

²⁰ Ewelukwa, “Women and International Economic Law: An Annotated Bibliography,” 8 *Law & Business Review of the Americas* 603, 616 (2002).

²¹ See generally Friedman, *Understanding Globalisation: The Lexus and the Olive* (New York, 2000).

²² Ellis, “*Enderby v Frenchay Health Authority and the Secretary of State for Health*” (1994) 31 *Common Market Law Review* 387 at 391.

processes.” This can be distinguished from an approach which allows the market forces of demand and supply prevail over equality.

VI. ENDERBY CASE STRIKES A BALANCE

There is an obvious need for balance in the interaction between employment equality and market considerations. Complete domination of market forces would marginalise women and workers generally, while total supremacy of equality would prevent the EU from competing economically with the USA.

An adequate balance has been struck by the ECJ in *Enderby v Frenchay Health Authority*. The decision was described by Ellis²³ as “a victory for the forces of common sense and realism on the much embattled field of equal pay law.” The judgment broadens the scope of equality in various ways, yet simultaneously ensures that a genuine market forces defence will prevail over equality.

The Employment Appeals Tribunal in England had previously held that if the factor causing the difference in pay is untainted by gender, there can be no question of discrimination based on sex because the language of s.1 (3) of the Equal Pay Act 1970 is of “cause,” not “result.” Kentridge²⁴ contends that the EAT ruling goes against the whole concept of indirect discrimination, stating “it is only if the cause of the difference in treatment is not tainted by gender that the issue of justification (of indirect discrimination) arises at all.”

Bolger & Kimber,²⁵ discussing the outcome of the case, noted “once statistics showed the pay practice had a disparate impact on women the ECJ was not concerned with direct or indirect discrimination.”²⁶ Wynn²⁷ opines that this application of

²³ *Ibid.*

²⁴ Kentridge, “Direct and Indirect Discrimination after *Enderby*” (1994) *Public Law* 198.

²⁵ Fenwick & Hervey, “Sex Equality in the Single Market” (1995) 32 *Common Market Law Review* 443 at 458.

²⁶ A provision for the use of statistics was introduced in s.19 (5) of the Employment Equality Act 1998-2004 as a consequence of the decision.

Article 119 allows a more fundamental view to be taken of discrimination which focuses on results rather than the process.

Advocate General Lenz, who provided the opinion in the *Enderby* case, didn't allow the national tribunal to employ definitions of direct and indirect discrimination to impede claims for equality. He explained that the purpose of so classifying discrimination is to comprehend ways in which women are disadvantaged, not to create formalistic obstacles. A pragmatic, result orientated approach is, he asserted, the correct one. Ellis²⁸ highlights that the strength of the A.G.'s decision is that he perceives all forms of discrimination to be essentially manifestations of a single problem and that this perception enables him to formulate clear general rules to govern all cases.

The judgment further aided those pursuing equal pay claims by transferring the burden of proof onto employers. The ECJ held "[O]nce valid statistics showed an appreciable difference in pay between two jobs of equal value, where one job was performed predominantly by women, and the other largely carried out by men, a prima facie case of discrimination is established. The burden of proof then shifts to the employer to show that the practice is not discriminatory."

The approach taken by the most superior court in the EU has developed the concept of equality and promoted the undertaking of equal pay claims. These equality-oriented conclusions can be considered as economic concessions by employers insofar as they allow more equality claims to be pursued and increase their legal costs.

²⁷ Wynn, "Equal Pay and Gender Segregation" (1994) 110 *Law Quarterly Review* 556.

²⁸ Ellis, "Enderby v Frenchay Health Authority and the Secretary of State for Health" (1994) 31 *Common Market Law Review* 387 at 392.

Although many commentators, like Sandra Fredman,²⁹ argued that allowing the market forces defence completely undermined equal pay legislation, it must be remembered that the justification of market forces was limited by the principle of proportionality.³⁰ The ECJ found that a shortage of candidates for a job was an objective economic justification for indirectly discriminatory pay, but that the national courts should quantify the increase in pay attributable to labour market considerations and ensure the pay differential is proportionate. The doctrine of proportionality will allow a valid market forces defence and also prevent economic concerns from overshadowing equality.

Fredman³¹ challenges the proportionality aspect of the ECJ decision, expressing the opinion that it would be impossible to calculate the proportionate disparity resulting from market forces. However, the court provides for this situation in paragraph 28 of its judgement. “If the national court has been unable to *determine precisely* what proportion of the increase in pay is attributable to market forces, it is for the national court to assess whether the role of market forces in determining the rate of pay was *sufficiently significant* to provide the objective justification for part or all of the difference.”

The *Enderby* ruling has allowed market forces to prevail over equality. However, reasonable application of the principles outlined has not hindered equality. Ellis³² warns that it remains vital for courts to scrutinise cases very carefully to make sure, what looks like an objectively justified factor does not, in reality, have its roots in sex discrimination.

²⁹ Fredman, “Equal Pay and Justification” (1994) 23 *Industrial Law Journal* 37.

³⁰ See generally Ellis, *EC Sex Equality Law* (Oxford, 1988). Ellis even admits that the proportionality test established originally in the *Bilka-Kaufhaus* case provides a formidable hurdle for an employer seeking to justify indirectly discriminatory conduct.

³¹ Fredman, “Equal Pay and Justification” (1994) 23 *Industrial Law Journal* 37 at 41.

The *Enderby* decision has not developed a broad market forces defence, to the detriment of equality, as can be witnessed in some recent cases. Hilary Slater³³ discusses the *Seivwright v Universal Sodexo Remote Sites* case, where the tribunal noted that market forces could provide a defence, but that the evidence provided was not convincing. In *Knight v West Ferry Printers*, the Stratford Employment Tribunal ruled that holding an employee's salary down because she was paid above the market rate did not form a defence when the comparator's salary had not been fixed in the same way.

VII. CONCLUSION

Enderby has struck an effective balance has been struck between employee and employer interests. The market forces defence does prevail, but one must acknowledge that the *Enderby* decision has transferred much of the costs of equality onto employers. Market forces must constitute a valid defence because abandonment of the underlying economic fundamentals of demand and supply in the labour market would not be feasible. It may lead to a shortage of essential public services in situations similar to the facts of the *Rainey* case

Interfering with markets would be seriously damaging for any economy, even to promote the noble concept of equality. Economic history shows that minimal interference with the market produces the greatest economic growth and gross domestic product for developed countries.³⁴ The rise in capitalism and globalisation

³² See generally Ellis, "Enderby v Frenchay Health Authority and the Secretary of State for Health" (1994) 31 *Common Market Law Review* 387.

³³ Slater, "Market forces defence fails to stand up to scrutiny" (2003) 123 *Equal Opportunities Review* 27.

³⁴ See generally Mankiw, *Macroeconomics* (Harvard, 2003).

has rendered the dominance of the market a necessity in order for Europe to compete economically with the USA.³⁵

³⁵ American equal pay legislation includes four affirmative defences. This contrast is important not only to highlight the different approaches of the jurisdictions, but also because the relative strength of equal pay defences impacts economic competition between the USA and the EU. Under Title 7 of the United States Equal Pay Act 1963, the only way for a plaintiff to invalidate compensation practices which are fair in form, but which are having a disparate impact on women, may be to prove that the employer intended to discriminate. See Treu, "A New Phase of European Social Policy: the EMU and Beyond" (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 461. The preceding two paragraphs indicate that Europe is promoting equality more than other countries, despite genuine fears of sacrificing economic competitiveness with the USA.