



Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 29 November 2012¹

Case C-427/11

**Margaret Kenny
Patricia Quinn
Nuala Condon
Eileen Norton
Ursula Ennis
Loretta Barrett
Joan Healy
Kathleen Coyne
Sharon Fitzpatrick
Breda Fitzpatrick
Sandra Hennelly
Marian Troy
Antoinette Fitzpatrick
Helena Gatley**

v

**Minister for Justice, Equality and Law Reform
Minister for Finance
Commissioner of An Garda Síochána**

(Reference for a preliminary ruling from the High Court (Ireland))

(Equal pay — Discrimination on grounds of sex — Directive 75/117/EEC — Indirect discrimination — Objective justification — Collective bargaining)

1. The High Court of the Republic of Ireland is referring a series of questions relating to an employer's obligation to provide justification 'in circumstances where there is *prima facie* indirect gender discrimination in pay'. The High Court further asks whether, and to what extent, the interests of good industrial relations can legitimately constitute one of the criteria for justification.

2. In this context, the reference for a preliminary ruling offers a further opportunity to revisit some very specific aspects of the case-law of the Court of Justice in the area of indirect discrimination on grounds of sex.² The first aspect is the problem of defining the terms of reference to be used in assessing equality (the *tertium comparationis* or comparator); the second aspect relates to weighing up the competing rights and interests that exist in the very specific situation of administrative reorganisations involving the reallocation of duties in types of employment where one sex or the other still has a dominant presence.

¹ — Original language: Spanish.

² — An up-to-date list of the rulings in this field can be found in Case C-17/05 *Cadman* [2006] ECR I-9583.

I – Legislative framework

A – *European Union law*

3. Article 1 of Directive 75/117³ provides as follows:

‘The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called “principle of equal pay”, means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.’

4. Pursuant to Article 3 of Directive 75/117:

‘Member States shall abolish all discrimination between men and women arising from laws, regulations or administrative provisions which is contrary to the principle of equal pay.’

5. By virtue of Article 4 of that directive:

‘Member States shall take the necessary measures to ensure that provisions appearing in collective agreements, wage scales, wage agreements or individual contracts of employment which are contrary to the principle of equal pay shall be, or may be declared, null and void or may be amended.’

6. Article 6 of the directive provides as follows:

‘Member States shall, in accordance with their national circumstances and legal systems, take the measures necessary to ensure that the principle of equal pay is applied. They shall see that effective means are available to take care that this principle is observed.’

7. With effect from 15 August 2009, Directive 75/117 was repealed by Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation,⁴ which provides that all references in other legislation should be construed as references to the new directive (Article 34).

8. By virtue of Article 2(1)(b) of Directive 2006/54, indirect discrimination is defined for the purposes of the directive as ‘where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary’.⁵

3 — Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19).

4 — OJ 2006 L 204, p. 23.

5 — According to the case-law of the Court of Justice, this definition also matches the definitions set out in Article 2(2) of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ 1998 L 14, p. 6) and in Article 2(2) of Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (OJ 2002 L 269, p. 15).

B – *Irish law*

9. The Employment Equality Acts 1998-2004 prohibit discrimination in employment on the grounds of gender.⁶ Part III of the 1998 Act concerns equality between men and women. Section 18(1)(a), as amended, provides as follows:

‘Subject to paragraph (b), for the purpose of this Part, “A” and “B” represent 2 persons of opposite sex so that, where A is a woman, B is a man, and vice versa.’

10. Section 19, as amended, provides as follows:

‘1. It shall be a term of the contract under which A is employed that, subject to this Act, A shall at any time be entitled to the same rate of remuneration for the work which A is employed to do as B who, at that or any other relevant time, is employed to do like work by the same or an associated employer.

...

4.

- (a) Indirect discrimination occurs where an apparently neutral provision puts persons of a particular gender (being As or Bs) at a particular disadvantage in respect of remuneration compared with other employees of their employer.
- (b) Where paragraph (a) applies, the persons referred to in that paragraph shall each be treated for the purposes of subsection (1) as complying or, as the case may be, not complying with the provision concerned, whichever results in the higher remuneration, unless the provision is objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary.
- (c) In any proceedings statistics are admissible for the purposes of determining whether this subsection applies in relation to A or B.

5. Subject to subsection (4), nothing in this Part shall prevent an employer from paying, on grounds other than the gender ground, different rates of remuneration to different employees.’

II – Facts

11. The appellants in the main proceedings are established civil servants in the Department of Justice, Equality and Law Reform who are deployed to clerical duties in An Garda Síochána (the Irish national police service, ‘Garda’). Clerical duties are also carried out by Garda officers (‘comparators’). There are specific clerical posts reserved for these Garda officers, referred to as ‘designated’ or ‘reserved’ posts. Remuneration is determined for both groups on the basis of the category of civil servant to which they belong.

12. The appellants’ trade union referred several claims to the Equality Tribunal under the Employment Equality Acts 1998-2004 and, in a decision dated 22 November 2005, the Tribunal found in favour of 7 of the 14 appellants.

6 — The Employment Equality Act 1998 repealed and replaced earlier legislation transposing into Irish law, inter alia, Directive 75/117. The Equality Act 2004 amended the 1998 Act in order to transpose into Irish law certain directives in the area of equality.

13. The decision of the Equality Tribunal was appealed to the Labour Court by both parties. The respondents submitted, in essence, (A) that the claims indicated direct discrimination, (B) that the appellants were paid the rate appropriate to the grade of clerical officer, whereas the comparators were paid the rate applicable to their rank as Garda members, and (C) that the different rates of remuneration were paid on grounds other than gender, relying on Section 19(5) of the 1998 Act. They further contended, in the alternative, that, in the event of a finding of indirect discrimination, the difference in remuneration was objectively justified, relying on Section 19(4) of the 1998 Act. The appellants argued, in essence, that the issue concerned indirect discrimination in respect of which there was no objective justification.

14. The Labour Court decided that the claims of the 14 appellants were properly classified as indirect discrimination and that the proportions of men and women in the relevant groups disclosed *prima facie* indirect pay discrimination. With the agreement of the parties, the Labour Court decided to treat the question of objective justification as a preliminary matter. For that purpose the court assumed, without so holding, that the appellants and their chosen comparators were engaged in 'like work' within the meaning of Section 7(1) of the 1998 Act. This assumption was confined to the appellants and their chosen comparators.

15. Having so decided, the Labour Court required the respondents to adduce evidence to show objective justification. The respondents argued that the deployment of Garda members in the reserved clerical posts was objectively justified in meeting the operational needs of the Garda and that it was appropriate and necessary for the attainment of that operational need to pay the police officers assigned to that work the rate applicable to their rank.

16. The evidence of the respondents also indicated that the number of designated posts had been determined by an industrial relations agreement between Garda management and Garda representative bodies and that the third-named respondent was reducing the number of designated clerical posts occupied by police officers in cooperation with Garda representative bodies. This process of reduction is known as civilianisation. It was accepted by the respondents that there were a small number of posts filled by police officers in respect of which there was no real operational need for a trained police officer but the respondents asserted that these posts were not representative of the generality of posts in which Garda members were deployed, in which knowledge and experience of policing is a requirement.

17. Regarding the facts of the case, the Labour Court found that there were 353 designated posts occupied by police officers when the initial claims were filed in July 2000, 279 of which were held by men and 74 by women. There were 761 clerical officers, predominantly women, deployed in clerical posts within the Garda. The Labour Court also found that, at the time of the Labour Court hearing in May 2007, the number of designated posts was 298 and that the respondents' policy was to reduce this number to 219 core designated posts.

18. In its decision of 27 July 2007, the Labour Court upheld the appeal brought by the Minister for Justice, Equality and Law Reform. The court held that deployment of police officers to clerical duties meets either the operational needs of the police or the need to implement the process of civilianisation in a manner and at a pace which ensures the backing of police representative bodies. In particular, paying the police officers assigned to those clerical posts at the rate applicable to police officers addresses this objective. The decision further states that, having regard to the small number of 'designated' posts, maintaining the arrangements agreed with the representative bodies pending completion of the process of civilianisation is proportionate to the operational needs of the police.

19. The appellants brought an appeal on a point of law against the decision of the Labour Court before the High Court. The appellants submitted that, on the evidence adduced, it was incorrect to accept that the indirect discrimination was objectively justified, when the operational needs cited in this respect did not apply to all designated posts and, in particular, did not apply to the posts held by the

chosen comparators. In the view of the appellants, the necessary objective justification does not consist of demonstrating that the comparators must receive higher pay. What has to be justified is that the appellants should be paid less and that paying them less was the only means of achieving the objectives sought by the respondents. In any event, the interests of good industrial relations cannot justify a breach of the principle of equality.

III – The question referred

20. Against this background, the High Court is referring the following questions to the Court of Justice:

‘Question 1:

In circumstances where there is *prima facie* indirect gender discrimination in pay, in breach of Article 141 EC (now Article 157 TFEU) and Council Directive 75/117/EEC, in order to establish objective justification, does the employer have to provide:

- (a) justification in respect of the deployment of the comparators in the posts occupied by them;
- (b) justification of the payment of a higher rate of pay to the comparators; or
- (c) justification of the payment of a lower rate of pay to the complainants?

Question 2:

In circumstances where there is *prima facie* indirect gender discrimination in pay, in order to establish objective justification, does the employer have to provide justification in respect of:

- (a) the specific comparators cited by the complainants and/or
- (b) the generality of comparator posts?

Question 3:

If the answer to Question 2(b) is in the affirmative, is objective justification established notwithstanding that such justification does not apply to the chosen comparators?

Question 4:

Did the Labour Court, as a matter of Community Law, err in accepting that the “interests of good industrial relations” could be taken into account in the determination of whether the employer could objectively justify the difference in pay?

Question 5:

In circumstances where there is *prima facie* indirect gender discrimination in pay, can objective justification be established by reliance on the industrial relations concerns of the respondent? Should such concerns have any relevance to an analysis of objective justification?’

21. The High Court asserts that the main proceedings raise important questions of Community law on which the Court of Justice has not given any specific ruling, notwithstanding the case-law established since the *Bilka*⁷ case.

IV – Procedure before the Court of Justice

22. The reference for a preliminary ruling was received by the Court Registry on 16 August 2011.

23. Written observations have been submitted by the appellants in the main proceedings, the Spanish and Irish Governments and the Commission.

24. At the hearing held on 12 July 2012, oral observations were presented by the appellants in the main proceedings, the Irish Government and the Commission.

V – Arguments

25. The appellants in the main proceedings contend that, notwithstanding the fact that they do the same work as police officers assigned to ‘designated’ or ‘reserved’ posts, the latter, as police officers, are paid at a higher rate. In their view, the respondents have not proved any of the grounds relied on to justify the existence of these ‘designated’ posts, for example that the holders of such posts are required to prepare policing plans or that such posts are necessary to ensure continuity of service or for the purpose of communications with international organisations which deal exclusively with police officers. Furthermore, it has been established that some police officers are assigned to duties which do not involve the use of police powers and that in some cases their duties are interchangeable with those of civilian clerical officers.

26. With regard to question 1, the appellants argue that the employer must justify paying them at a lower rate and, where relevant, show that ensuring the operational efficiency of the police cannot be achieved by any other means. In relation to questions 2 and 3, the appellants argue that the justification must relate to the specific comparators cited by them, who, like themselves, are not assigned to any of the clerical roles in the police which require police powers. Finally, in relation to questions 4 and 5, the appellants maintain that industrial relations concerns cannot justify the difference in pay.

27. The Irish Government starts by pointing out that the Ministry does not accept that the appellants and the comparators were engaged in like work, arguing that the difference in pay is justified on grounds other than gender. In any event, the equivalence of the work is simply an assumption made by the Labour Court in the interests of economy.

28. In relation to question 1, the Irish Government argues that what has to be justified is the apparently neutral provision, criterion or practice which discriminates against women, rather than any particular rate of pay or the deployment of the particular comparators. In this case, the disputed practice is the assigning of police officers to clerical posts for operational reasons and paying them at the rate applicable to their rank. In relation to question 2, the Irish Government considers that the justification must be in respect of the generality of comparator posts and that, once the practice adopted has been shown to be justified, the fact that it affects a greater number of women than men would not be sufficient to show that it constitutes an infringement of Article 157 TFEU. As far as question 3 is concerned, the Irish Government maintains that the Labour Court concluded that the justification should relate to the generality of clerical posts, stating that certain posts involved duties requiring knowledge and experience of police matters, that there was a need to ensure continuity of

⁷ — Case 170/84 [1986] ECR 1607.

service or that, for operational reasons, the number of ‘designated’ posts could not fall below 219. Lastly, the Irish Government’s view is that there is no reason why industrial relations considerations cannot be taken into account in this context, although the Labour Court only did so in relation to the small number of ‘designated’ posts that are not strictly necessary. This was therefore a criterion that was not relevant across the board.

29. The Spanish Government’s stance, in relation to the first three questions, is that the justification must relate to the difference in rates of pay between the appellants and the comparators, leaving aside other persons assigned to ‘designated’ posts. Finally, the Spanish Government does not consider that the interests of good industrial relations constitute sufficient justification for derogating from the right to equal pay.

30. The Commission maintains, in relation to the first three questions, that any difference in pay must be objectively justified, which involves, as far as the present case is concerned, explaining how the comparators were deployed in their posts. The Commission is of the opinion that where it can be demonstrated that the duties performed are the same, as in the case of police officers who have remained in a clerical post for many years without having performed policing duties, it would be difficult to justify the difference in pay. In any event, the Commission considers that the justification should relate to the difference in rates of pay for like work rather than to the fact that one or other group is paid at a higher or lower rate. In this respect, the justification should be restricted to the group of persons doing similar work to that of the appellants. With regard to questions 4 and 5, the Commission submits that the pursuit of social dialogue does not absolve the employer from the requirement to provide objective justification for differences in rates of pay where there is *prima facie* discrimination on grounds of sex.

VI – Assessment

A – Preliminary remark

31. In order to define the subject-matter of these proceedings we must bear in mind that the referring court is not expecting a response from the Court of Justice on the issue of whether the discrimination on grounds of sex which is claimed by the appellants in the main proceedings exists or does not exist. Whether or not they have been discriminated against in this way is, in any event, a matter to be settled by the Irish courts.

32. When referring the questions, the High Court expressly states that it is doing so ‘in circumstances where there is *prima facie* indirect gender discrimination in pay’. Thus, discrimination is merely assumed for the purposes of defining the context in which the questions being referred should be viewed. The present task is therefore not to make an assessment of equality but to answer some very precise questions relating to the definition of the terms upon which an assessment of that nature can be made.

33. It seems to me that the five questions raised by the High Court can be grouped together under three headings.

34. Under the first would be question 1, that is, whether, in the circumstances of the case, the employer must justify (A) the deployment of the persons chosen by the appellants as comparators in particular posts; (B) the fact that those persons are paid at a higher rate; or, (C) the fact that the appellants are paid at a lower rate. These alternatives all relate to the difference in treatment which is potentially discriminatory. In essence, the question being asked is: *what has to be justified*, the deployment of particular individuals in particular posts or the differing rates of pay applying to different individuals?

35. The second heading would cover questions 2 and 3, which ask whether the required justification must relate to (A) the specific comparators cited or (B) the generality of comparator posts and to what extent. By posing these questions, the High Court is asking, essentially, *who the relevant comparator should be* for the purposes of the assessment of equality which must be made in order to reach a decision regarding the discrimination alleged by the appellants.

36. Lastly, questions 4 and 5 make up a third heading, relating to the merits of industrial relations considerations as a justification. In this regard, the High Court asks whether such considerations can constitute an acceptable objective justification for the difference in question. The doubt entertained by the referring court on this point therefore relates only to a very specific aspect of one of the constitutive parts of the assessment of equality: the justification for the difference in treatment claimed to be discriminatory. It is not seeking an answer as to whether the difference in question is capable of justification or in relation to the precise merits of the considerations specifically mentioned as a justification; it only seeks to ascertain whether, and to what extent, maintaining good industrial relations can be included as one of the criteria to be used to assess whether the difference in rates of pay is objectively justified.

37. Against this background, I see these proceedings as focusing on three elements in the structure of the assessment of equality: (A) the difference in treatment requiring justification, (B) the comparator by reference to whom the difference in treatment arises and, (C) the merits of any criteria used as a basis of justification for the allegedly discriminatory difference in treatment.⁸

B – *The difference in treatment*

38. The order for reference indicates that the police officers deployed in the posts known as ‘designated posts’ or ‘reserved posts’ are paid at a higher rate than the appellants in the main proceedings due to the fact that they are Garda members. The higher pay is not, therefore, linked to the ‘designated or reserved post’, which is actually a clerical post equivalent to the posts held by the appellants, irrespective of whether in certain cases there may be posts which can only be held by police officers because they involve exercising police powers as such. Even these what we might call ‘clerical posts with policing aspects’ do not in themselves carry a higher rate of pay since, in these cases too, the higher pay derives from the fact that the persons occupying them are police officers.

39. I do not think, therefore, that it would make a great deal of sense to provide justification for deployment to posts which in themselves do not entail any difference in pay.

40. What does need to be justified is the fact that, setting aside the case of what I have called ‘clerical posts with policing aspects’, there exist within the Garda a number of clerical posts which, working on the assumption that they involve work which is basically indistinguishable, attract a different rate of pay by reason of the category of civil servant to which the person holding the post is assigned, and all the more so where that reason translates, in practice, into a difference which predominantly disadvantages women, thereby indirectly giving rise to discrimination on grounds of sex.

41. I am therefore of the opinion that the justification must relate exclusively to the difference in pay. It seems to me that it is immaterial whether this is viewed from the perspective of the higher pay or that of the lower. The important factor is the difference per se. Only once it has been established that a difference exists and, if so, that it is discriminatory, as shown by the relevant assessment of equality, does the time come to consider redress and therefore to decide whether the difference should be corrected by adjusting pay upwards or downwards, that is, by increasing the pay of those who were

8 — On the typical structure of the assessment of equality see, inter alia, Alexy, R., ‘Das allgemeine Gleichheitsrecht’, in *Theorie der Grundrechte*, 5th ed., Suhrkamp, Frankfurt. 2006, pp. 357 to 393, and Sachs, M., ‘Zur dogmatischen Struktur der Gleichheitsrechte als Abwehrrechte’, in *DÖV*, 1984, pp. 411 to 419.

paid at a lower rate, by reducing the pay of the officers who were paid at a higher rate or by levelling out the pay of both at a point somewhere between the two. That would also be the time to address other aspects of restoring equality, such as, in particular, the timescale for implementation. In any event, that stage has not been reached in the main proceedings and certainly does not constitute the subject-matter of the present proceedings before the Court of Justice.

42. My first conclusion is therefore to propose that the Court of Justice reply to question 1 to the effect that, in circumstances where there is *prima facie* indirect gender discrimination in pay, the employer must justify the existence of different rates of pay for the two groups, which have each been shown to have different gender distributions, it being unnecessary to determine whether the anomaly lies with the higher pay or with the lower. For the present purposes, the determining factor is that there is a disparity between the two.

C – Identifying the comparator

43. Questions 2 and 3 concern the comparator to which the referring court must look in order to determine whether the appellants in the main proceedings are the victims of discrimination.

44. I hardly need to state that equality is, by definition, a relative or relational concept. The right to equality is nothing more than a right to be treated on the same terms as someone in an equivalent legal situation. Thus, it is a right which is always predicated on a comparison between at least two subjects, objects, circumstances or situations.

45. A claim of unequal treatment always involves a comparison with a third party who, although in a position equivalent to that of the person making the claim, is treated differently. To be able to refer to a comparator in a way which demonstrates the difference complained of is therefore the key element in actually proving that difference. If the difference is born of the comparison, then its existence depends on the correct identification of the elements compared.

46. Here we are in territory very close to that of the burden of proof in the field of equality. Providing the right comparator for establishing that a difference exists is not, strictly speaking, evidence of discrimination. Rather, it is the assumption upon which such evidence is based, since if discrimination is any difference in treatment for which there is no reasonable justification, the comparator is the element of comparison by virtue of which the difference requiring justification is revealed.

47. The burden of proving that a difference in treatment exists must rest on the person asserting that the difference in question is unjustified or discriminatory. In this respect, then, the guidelines observed by the Court of Justice in relation to the burden of proof in the field of inequality are applicable. It should be recalled that, in the words of the Court's judgment in *Brunnhöfer*,⁹ 'it is normally for the person alleging facts in support of a claim to adduce proof of such facts. Thus, in principle, the burden of proving the existence of sex discrimination in the matter of pay lies with the worker who, believing himself to be the victim of such discrimination, brings legal proceedings against his employer with a view to having the discrimination removed (see Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 13).'

48. It is therefore for the appellants in the main proceedings to show, in the first instance, that there is a difference in treatment by providing a valid comparator demonstrating the existence of a group of persons who, in an equivalent situation to their own, receive different treatment in terms of their rates of pay.

⁹ — Case C-381/99 [2001] ECR I-4961, paragraph 52.

49. Once it has been shown that a difference exists, it will then be time to establish whether or not the difference is discriminatory, in other words, whether or not it is justified. As far the determination of the comparator is concerned, however, the assessment of equality occurs at the time the difference is identified.

50. In the circumstances of the case under consideration in the main proceedings, I do not think that the question is so much whether the relevant comparator should be the specific comparators cited by the appellants or the generality of comparator posts (and, in the latter case, what the consequences would be where the potential justification for the difference in relation to such posts does not cover the comparators indicated by the appellants). In my view, the deciding factor is, rather, whether the appellants have been able to show that there is a representative number of workers who, although they do work that is equivalent to the work done by the appellants, are nevertheless paid at a higher rate.

51. The Court of Justice took this view in *Brunnhöfer*, stating that it is for the employer to prove that his practice in the matter of wages is not discriminatory ‘if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men (Case 109/88 *Danfoss* [1989] ECR 3199, paragraph 16)’.¹⁰

52. In short, the important thing is whether the appellants have been able to provide an appropriate comparator for the purposes of establishing the existence of ‘a relatively large number of employees’ who do the same work as the appellants but are paid at a higher rate.

53. Thenceforward the problem is one of evaluating the evidence adduced in the proceedings and, as such, it is a question which falls to the national courts to resolve. In this regard, the case-law of the Court of Justice concerning the evidential value of statistics adduced in proceedings to demonstrate the existence of indirect discrimination is applicable. As the Court held in *Enderby*,¹¹ ‘[i]t is for the national court to assess whether it may take into account those statistics, that is to say, whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant’.

54. In a situation, such as this, of indirect discrimination on grounds of sex, it is for the appellants to provide sufficient evidence of the existence of a difference which, they allege, in practice disadvantages women. As I have indicated, they must establish that a ‘relatively large’ number of men, or ‘enough’ of them, are engaged in equivalent work and are paid at a higher rate than the appellants and, more generally, at a higher rate than a group of individuals predominantly made up of women. They must do so in a way which suggests something that is systemic or indicative of a pay structure that is intrinsically discriminatory, rather than a ‘fortuitous’ or ‘short-term’ phenomenon.

55. Of course, whether the decision on the difference complained of is reached on the basis of a comparison between the situation of the appellants and that of the specific comparators mentioned by them or between the situation of the appellants and that of the persons holding the generality of the ‘designated’ or ‘reserved’ posts is a matter for the national court. The important thing, in my opinion, is that, using the information provided by the appellants, the national court should be in a position to reach the firm view, in accordance with the applicable rules of evidence under national procedural law, that the claimed difference actually exists, since an unequivocally representative number of men who perform the same work as the appellants are nevertheless paid at a higher rate.

¹⁰ — *Brunnhöfer*, paragraph 54.

¹¹ — Case C-127/92 [1993] ECR I-5535, paragraph 17.

56. My second conclusion must therefore be to propose that the Court of Justice reply to questions 2 and 3 to the effect that in circumstances where there is *prima facie* indirect gender discrimination in pay, the employer has to provide justification in respect of a significant number of men who perform the same work as the appellants.

D – Some remarks on the justification of differences created by reorganisations of working conditions

57. In questions 4 and 5 the High Court is asking whether the maintenance of good industrial relations is acceptable as objective justification for the difference in pay under consideration. As I have already mentioned, the referring court is not seeking an answer in relation to the precise merits of the considerations specifically mentioned as a justification. It is merely asking whether, and to what extent, maintaining good industrial relations can be included as one of the relevant criteria for assessing whether the difference in rates of pay is objectively justified.

58. Before going on to analyse this issue, I should mention that I find the difference in wording of the two questions somewhat confusing. In the first the court is asking whether the Labour Court, ‘as a matter of Community Law, [erred] in accepting that the “interests of good industrial relations” could be taken into account in the determination of whether the employer could objectively justify the difference in pay’. In the second it asks whether, in the circumstances of the case, ‘objective justification [can] be established by reliance on the industrial relations concerns of the respondent’ and, additionally, whether such concerns have ‘any relevance to an analysis of objective justification’.

59. I confess that I have some difficulty in grasping the subtle difference in meaning between the two questions. I wonder if, in reality, a single question is being asked about the value of industrial relations considerations as a justification, with each of the two questions referring to the degree of strength that these considerations might have as a justification. Thus, when it asks whether such interests ‘could be taken into account’ in determining whether the difference in pay is objectively justified, the High Court is asking whether that criterion can be assessed at all. By contrast, the question as to whether the objective justification can be established ‘by reliance on the industrial relations concerns of the respondent’ is asking whether those concerns, instead of being taken into account as one element, amongst others, of the justification, can go further and constitute the basis of the justification itself (that on which it ‘relies’).

60. I can state at this point that I believe the second of these possibilities to be untenable.

61. In explaining my reasons for reaching this decision I must start by mentioning the context in which maintaining good industrial relations has become a relevant consideration.

62. In effect, the difference in pay complained of by the appellants in the main proceedings appears to have come about as a result of a reorganisation within the Garda under which certain clerical posts that had traditionally been held by police officers are now to be held by civilians. The difference in pay derives from the fact that, whereas the latter are paid as civilians, the former have continued to be paid as police officers, so that the difference does not relate to the post but to the category of civil servant who fills it.

63. As objective justification for this difference, the police authority relies on the fact that it was necessary to retain the pay structure for police officers so that those carrying out clerical duties should not perceive themselves to be disadvantaged in comparison with the majority of police officers. Indeed, the agreement reached to that effect with the representative bodies of the police officers seems to have been fundamental to the success of the Garda reorganisation process.

64. As argued in my Opinion in *Prigge*,¹² ‘autonomy in collective bargaining deserves proper protection at the EU level’. Evidently, part of ensuring the proper levels of protection is respect for the principle of equality. In addition to being upheld under Title III of the Charter of Fundamental Rights of the European Union, in the form of the right not to be discriminated against on grounds of sex in the area of pay, that principle is set out in Article 157 TFEU as one that ‘forms part of the foundations of the Community’.¹³

65. In *Prigge* I pointed out that ‘extensive case-law has held that collective agreements are not excluded from the scope of the provisions relating to the freedoms protected under the Treaty’ and, in particular, ‘that the principle of non-discrimination between male and female workers in terms of pay, as set out in the Treaties (Article 119 EC and then Article 141 EC, now Article 157 TFEU) and in secondary legislation, applies to collective agreements because it is mandatory’.¹⁴

66. In my view, the foregoing means that matters agreed in the context of negotiations with police representatives cannot constitute adequate grounds for the objective justification of a difference such as that under consideration in the main proceedings.

67. Admittedly, the referring court does not specifically ask whether the agreement reached with police representatives can do so. It is clear, however, from the way the question is framed, that respecting the terms agreed is a prerequisite for maintaining good relations and this concern is the potential justification for the difference in question.

68. There is no doubt in my mind that this concern, which is perfectly legitimate in principle, cannot, of itself, constitute a sufficient basis on which to justify differentiating pay on grounds of sex.¹⁵

69. That does not mean that, together with other factors, this consideration cannot combine to form sufficient grounds for justification. It is for the national court to determine whether in the present case such a combination of grounds for justification is present. It is also for the national court to assess the relative weight to be given to this particular consideration.

70. The Court of Justice should not, however, fail to point out that, in the circumstances of the case, such relative weight must depend on the length of time taken by the administrative reorganisation during which the disputed difference in pay arose and continued.

71. By that I mean that the maintenance of good industrial relations cannot be given the same weight in cases where the reorganisation which is might be detrimental to such considerations constitutes a more serious attack on the rights or expectations of the persons concerned, due to its sudden imposition or its severity, as where the reorganisation is spread over some time so that its impact is mitigated through a gradual, planned and foreseeable implementation.

72. It is therefore for the Irish courts to assess the importance of such considerations in the context of a reorganisation that started in the last decade of the twentieth century and whose outcome today is apparent from the information provided by the parties in the course of these proceedings.

12 — Delivered on 19 May 2011 (C-447/09, ECR I-8003), point 46.

13 — *Cadman*, paragraph 28. Article 157 TFEU itself has been defined as ‘the key employment law provision on equal treatment’ (Krebbler, S., ‘Art. 157, Rn. 1’ in Callies, C. and Ruffert, M., *EUV.AEUV Kommentar*, 4th ed., C.H. Beck, Munich, 2011).

14 — Point 45. The following cases were cited: Case 43/75 *Defrenne* [1976] ECR 455, paragraph 39; Case 165/82 *Commission v United Kingdom* [1983] ECR 3431, paragraph 11; Case C-33/89 *Kowalska* [1990] ECR I-2591, paragraph 12; Case C-184/89 *Nimz* [1991] ECR I-297, paragraph 11; Case C-333/97 *Lewen* [1999] ECR I-7243, paragraph 26; Case C-284/02 *Sass* [2004] ECR I-11143, paragraph 25; and Case C-19/02 *Hlozek* [2004] ECR I-11491, paragraph 43.

15 — On justifications for this difference, in general, see Hervey, T.K., ‘EC Law on Justifications for Sex Discrimination in Working Life’, in *Collective Bargaining, Discrimination, Social Security and European Integration, Bulletin of Comparative Labour Relations*, No 48, 2003, p. 103 to 152.

73. My third and final conclusion will therefore be to propose that the Court of Justice reply to questions 4 and 5 to the effect that, in circumstances where there is *prima facie* indirect gender discrimination in pay, objective justification cannot be established by reliance on the respondent's industrial relations concerns alone. Such concerns may, however, be relevant to an analysis of objective justification, depending on the context in which such concerns are raised.

VII – Conclusion

74. In the light of the foregoing, I propose that the Court reply to the question referred by the High Court as follows:

1. In circumstances where there is *prima facie* indirect gender discrimination in pay, in breach of Article 141 EC (now Article 157 TFEU) and Council Directive 75/117/EEC, in order to establish objective justification, the employer has to provide justification for the difference in pay as such.
2. In circumstances where there is *prima facie* indirect gender discrimination in pay, the employer has to provide justification in respect of a significant number of men who perform the same work as the appellants.
3. In circumstances where there is *prima facie* indirect gender discrimination in pay, objective justification cannot be established by reliance on the respondent's industrial relations concerns alone. Such concerns may be relevant to an analysis of objective justification, depending on the context in which such concerns are raised.