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## International Employment and Labor Law

A Littler Mendelson Newsletter specifically for International Employment and Labor Law

### Higher Pay For Long Service Ruled Illegal By The European Court Of Justice If Employee Raises “Serious Doubts”

By Dominic J. Messiha and Ariel D. Weindling

On October 3, 2006, the European Court of Justice (the “ECJ”) issued a long-awaited decision in *B.F. Cadman v. Health & Safety Executive*, Case No. C-17/05, in which it “clarified” the circumstances under which an employer is required, under Article 141 EC<sup>1</sup>, to justify considering an employee’s length of service as a factor in determining pay. This is particularly true where use of that criterion leads to disparities in pay between men and women.

#### Factual Background

Bernadette Cadman was employed as an inspector with the United Kingdom Health & Safety Executive (the “HSE”). Since she started working for the HSE in 1990, its pay system had been altered several times. Before 1992, the system was incremental, i.e., each employee received an annual increase until she reached the top of the pay scale for her grade.

In 1992, the HSE introduced a performance-related element, which adjusted the amount of the annual increase to reflect the employee’s individual performance. Under this system, high performing employees could reach the

top of the scale more quickly than before. Following the introduction in 1995 of a Long Term Pay Agreement, annual pay increases were set in accordance with the award of points called “equity shares” linked to the employee’s performance. That change had the effect of decreasing the rate at which pay differentials narrowed between longer-serving and shorter-serving employees on the same grade.

Finally, in 2000, the system was modified again to enable employees in the lower pay bands to receive larger annual increases and, therefore, progress more quickly through the pay band.

Cadman, who had been promoted more quickly than her male coworkers, was nevertheless paid substantially less than them<sup>2</sup> because they had been employed with the HSE longer. Cadman believed that the HSE’s pay scheme discriminated against women because they were more likely than men to have less experience as a result of taking breaks for maternity leave and childcare responsibilities.

In June 2001, Cadman lodged an application

<sup>1</sup> Article 141, subsections (1) and (2) EC provide:

1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.
  2. For the purpose of this article, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.
- Equal pay without discrimination based on sex means:
- that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
  - that pay for work at time rates shall be the same for the same job.

<sup>2</sup> In the financial year 2000/2001, her annual salary was GBP 35129, while the salaries of the four males ranged from GBP 39125 to GBP 44183.

before the Employment Tribunal based on the Equal Pay Act.<sup>3</sup>

## Procedural History

The Employment Tribunal decided in favor of Cadman. The HSE appealed. The Employment Appeal Tribunal, relying on a previous decision in case 109/88 *Danfoss* (1989) ECR 3199, held: (i) where unequal pay arose because of the use of length of service as a criterion, no special justification was required; and (ii) even if such a justification were required, the Employment Tribunal had erred as a matter of law when considering the justification.

On November 4, 2003, Cadman appealed the decision of the Employment Appeal Tribunal to the Court of Appeal. The Court of Appeal (England and Wales/Civil Division) stayed its proceedings and referred questions to the ECJ for a preliminary ruling on the following: whether its holding in the *Danfoss* case was still valid in that “the employer does not have to provide special justification for recourse to the criterion of length of service.”

## The ECJ’s Decision

The ECJ ruled that, as a general rule, employers can consider “length of service” as a factor in determining pay if the employer’s objective is to reward experience that enables the worker to perform her duties better. When this is the case, the employer need not specifically justify consideration of length of service in setting compensation.

Thus, for the ECJ, a payment scheme based on service time does not necessarily contradict the principle set out by Article 141 EC.

However, the ECJ ruled, if the employee provides evidence capable of raising “serious doubts” that the use of the criterion of “length of service” as a factor in determining pay leads to disparities in pay between men and women, then the employer must justify its use.

## Impact Of The ECJ’s Decision

In theory, in many cases, employers can no longer lawfully pay certain employees much higher salaries than others solely due to long service. The ECJ’s ruling means that employers

in the UK and in Europe, if challenged, may be obliged to provide a valid reason for paying thousand of pounds (or Euros as the case may be) extra to an employee with more experience. Having said that, the practical application and consequences of the ECJ’s ruling are of limited scope. The ECJ failed (perhaps by design) to define what constitutes “evidence capable of raising serious doubts.” It is not clear whether this ruling provides the Court of Appeal with better legal ammunition to solve the issue presented to it in *Cadman v. Health & Safety Executive* once the case comes back before it.

Although no timetable has been set, the appeal is expected to be brought in a few months. To be continued...

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<sup>3</sup> Section 1 of the Equal Pay Act 1970 provides in pertinent part:

1. “If the terms of a contract under which a woman is employed at an establishment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.”