



How to build a case: Typical justifications/defences and counter-arguments

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Structure of the presentation

- Situations of unequal pay
- Role of the Equality Body
 - Austrian Ombud for Equal Treatment
- Justifications and defences in detail
 - How to counter them
 - What is acceptable and what is not acceptable?



How cases can occur...

- There is gender segregated pay data, i.e. a salary report
- The average income of men and women within a pay system differs
- Women earn less money

- Are there (sufficient) justifications?
- Transparency?

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How cases can occur...

- A woman and a man in the same company are paid differently

- Are they in a comparable situation?
- Is it discrimination on the ground of sex/gender?

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Equality Body

- Independent assistance
- Listen to cases

- Become aware of and identify structures and patterns of discrimination
- ... and gender stereotypes

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Austrian Ombud for Equal Treatment

- Counselling and supporting
→ investigate for the victim of discrimination
- Employer has a duty to provide on request...
 - a written statement
 - information

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- Right to receive information from the social insurance institutions about the income of the comparator
- Right to receive an income report on average salaries

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Specific Obligations for Austrian employers

- information on entry-level salary in job announcements
- Companies with more than 150 employees have to compile reports on average salaries of male and female employees in different positions and pay levels every two years

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Justification and defence

- Arguments that are related to the person
 - Caution: gender stereotypes?
- Arguments that are related to the job
 - Caution: male reality? Gender bias?

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Equal pay

- ...must be ensured in respect of each element of remuneration (*Barber, C-262/88*)
- look at the elements of payment very carefully with regard to justification and defence

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Equal pay

- ...for equal work means
- the nature of the task is decisive
(*Rummler, C-237/85*)

- Does the character and type of the element of pay correspond to the nature of the task?

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Justification and defence: Some popular examples

- „she has not been working for us for that long yet“
- „she accomplishes less“
- „she has been less willing to work longer hours“
- „she has got less vocational training“
- „she has not asked for a higher salary“
- „we wanted to get him, he would not have agreed to a lower salary“
- „the company has to economize (e.g. in times of crisis) “

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„She has not been working for us that long yet“

- **length of employment** and **work experience**
 - Length of service is a legitimate justification as it entails a better performance of the required tasks (*Danfoss C-109/88*)
 - Where the employee provides evidence capable of giving rise to serious doubts that the criterion of length of service entails a better performance, it should be justified by the employer in detail (*Cadman C-17/05*)

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„She has not been working for us that long yet“

- length of service often goes hand in hand with experience and that experience can enable the worker to perform his duties better
- but as a generalization it can discriminate against part-time workers and therefor against women indirectly (*Nimz C-184/89*)

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Take a closer look...

- Seniority clause has to match the job
 - left to the national courts
- Was former work experience and education fully credited?
- Does the general pay system take this into account?

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„She accomplishes less“

- **performance**
- circumstances linked to the person of the employee which cannot be determined objectively **at the time of that person's appointment but come to light only during the actual performance** of the employee's activities,
- **cannot be relied** upon by the employer to justify the fixing, right from the start of the employment relationship, of pay different from that paid to a colleague of the other sex performing identical or comparable work (*Brunnhofer C- 381/99*)

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Take a closer look...

- Performance should not be a criterion of fixing pay at recruiting
- It should be paid in a transparent way for the quality of work that has already be done
- Is there a proof for better performance?

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„She has been less willing to work longer hours“

- **flexibility**
- acceptable, if flexibility and/or mobility is decisive for the performance of the required tasks (*Danfoss C-109/88, Bilka C-170/84, Enderby C-127/92*)
- if flexibility is not the exclusive criterion of payment, but the actual added value/advantage gained by the employer

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Take a closer look...

- Gender bias: women are often less flexible due to the unequal division of unpaid work
- In order to avoid "discrimination through the backdoor": question for appropriateness and necessity of the criterion related to the job
- Often women are generally seen as less flexible

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„She has got less vocational training“

- **vocational training**
- acceptable, if specific vocational training is a genuine requirement for the performance of the task
- Differences in professional training can justify unequal pay
- female and male employees are not in a comparable situation then (*WGKK C-309/97*)

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Take a closer look...

- Are there differences in professional trainings for the job?
- Is the training appropriate and necessary for the job?

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„She has not asked for a higher salary“

- **negotiation skills**
- No decision from the European Court yet

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The Supreme Court in Austria took a closer look... (*90bA 350/97d*)

- Female graphic designer got a job from male graphic designer – same job
- Gender specific discrimination because
 - working environment cannot be ignored
 - from a statistical aspect in Austria women are paid less than men
 - that is why women are more frequently willing to accept lower paid work than men...

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The Supreme Court in Austria took a closer look... (*90bA 350/97d*)

- Gender specific discrimination because
 - ...women's work is generally regarded as less difficult and consequently ranking lower in a job evaluation
- „Since it is up to the employer who knows the level of remuneration it also would be up to him to pay equally“

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„We wanted to get him, he would not have agreed to a lower salary“

- **Employment market – high market value**
- a lack of applications for an occupation can be seen as a justification (*Enderby, C- 127/92*)
- left to the national courts

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Take a closer look...

- Womens´ life reality often negatively affects their “market value”
- Men are often considered as „the one we needed“
- Women who are already working at the company are not seen
- Women are often told that they have to prove their value if they want to get equal pay for equal work
- Men are often considered to be able to meet the expectations in the future, they are often paid for a job they do not do yet (*Brunnhofer C- 381/99*)

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A Swiss Court took a closer look... (*St.Gallen, 18.12.2001*)

- Employment market is not transparent, has different sectors: geographical, industrial and related to professions
- So market values should be proved with data and statistics
- Economic trends are also changing frequently
- So a wage difference for a long time cannot be justified

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A Swiss Court took a closer look... (*St.Gallen vom 18.12.2001*)

- What about – female – employees who are already working in this field, they should also be affected by market values
- An employer cannot know, if the new employee will hold expectations, so you always have to be aware of the court decision "Brunnhofen"
- Unequal pay during a long period cannot be justified by business needs

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„The company has to economize“

- **financial disadvantage**
- justification based on economic grounds
- cannot be solely on the ground that avoidance of discrimination would involve increase in costs (*Hill a. Stapleton C-243/95*)

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How to build a case

- European Court: guidelines
- Closer look → left to the national courts
- The cases are also built by the investigations of national equality bodies
- Which questions should be asked?

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Thank you for your attention!