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## Application of the Laws of the EEC and the United Kingdom to Part-Time Women Workers

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# Application of the Laws of the EEC and the United Kingdom to Part-Time Women Workers

Sabrina Allan

## **Abstract**

This Note focuses on the laws of the European Economic Community (EEC) and the United Kingdom as they affect part-time workers in the United Kingdom. Part I provides a general background to the equal pay laws of the EEC and the United Kingdom. Part II traces the legislative history of these laws and analyzes whether the administrative and legislative bodies of the EEC and the United Kingdom intended to apply equal pay laws to part-time workers. Part III chronologically reviews the case law and examines the difficulties encountered by tribunals interpreting the equal pay laws. Finally, Part IV analyzes the European Court of Justice's disregard for the legislative intent behind the equal pay laws and discusses the confusion created by this disregard for courts in the United Kingdom.

# APPLICATION OF THE LAWS OF THE EEC AND THE UNITED KINGDOM TO PART-TIME WOMEN WORKERS

## INTRODUCTION

The United Kingdom became a member of the European Economic Community (EEC or Community) in 1972.<sup>1</sup> During the past decade, over ninety percent of part-time workers in the EEC were female, and in the United Kingdom an even greater percentage were female.<sup>2</sup> Historically, part-time workers in the United Kingdom have not been paid the same hourly wages as their full-time male counterparts.<sup>3</sup> Thus, because they are primarily women, part-time workers may be subject to indirect discrimination.<sup>4</sup>

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1. The European Economic Community (EEC or Community) was formed by the Treaty establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-II) (official English translation), 298 U.N.T.S. 3 (unofficial English translation) [hereinafter cited as EEC Treaty]. The EEC Treaty was initially signed by Italy, France, Belgium, West Germany, Luxembourg, and the Netherlands. *Id.* preamble. The United Kingdom, Denmark, Ireland joined in 1972 with the signing of the Treaty of Accession of Denmark, Ireland and the United Kingdom, Jan. 22, 1972, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179-I), 11 I.L.M. 397. Greece joined in 1979. Treaty of Accession of the Hellenic Republic, May 28, 1979, 22 O.J. EUR. COMM., 18 I.L.M. 897. Portugal and Spain will become members on January 1, 1986. *See Lisbon and Madrid Agree on Entering Common Market*, N.Y. Times, Mar. 19, 1985, at 1, col. 1.

2. *Jenkins v. Kingsgate*, 1981 E. Comm. Ct. J. Rep. 911, 930, 31 Comm. Mkt. L.R. 24, 29 (Preliminary Ruling), *remanded*, 1981 Indus. Rel. L.R. 388 (Emp. App. Trib.). In the United Kingdom women comprised 90% of the part-time work force. *Id.* Most of these women work part-time because of family responsibilities. GOV'T OF U.K., DEP'T OF EMPLOYMENT, MANPOWER PAPER No. 11, WOMEN & WORK A REVIEW 49 (1973). In fact approximately 85.1% of part-time female workers in the EEC are married. Robinson, *Part-time Employment in the European Community*, 118 INT'L LAB. REV. 299, 301 (1979). Consequently, because part-time workers are not paid the same hourly wage as full-time workers, the unequal wage has fallen almost exclusively on women, and more specifically, on married women. *Id.* at 304-05.

3. Robinson, *supra* note 2, at 304; *see Docksey, Part-time Workers, Indirect Discrimination and Redundancy*, 46 MOD. L. REV. 504, 505 (1983). "Indeed, part-time workers are so very likely to be women that it is difficult in practice to regard a requirement of full-time work as gender-neutral at all." *Id.* *See generally* Barrett, *Part-Time Workers and Equal Pay*, 6 HUM. RTS. REV. 174, 175 (1981) (part-time workers do not generally receive the same wages as full-time workers.)

4. *See infra* notes 143-239 and accompanying text. Discrimination is the failure to treat all people equally based on sex, race, religion, etc. BALLENTINE'S LAW DICTIONARY 355 (3d ed. 1969). An employer may discriminate against women in a variety of ways, not just by inadequately compensating them. S. ROSS & A. BARCHER, THE RIGHTS OF WOMEN 32-33 (1983). "[I]ndirect discrimination describes the case

The European Court of Justice<sup>5</sup> and the Employment Appeals Tribunal<sup>6</sup> (EAT) interpret United Kingdom and EEC laws pertaining to part-time workers in the United Kingdom and throughout the EEC.<sup>7</sup> Both tribunals have had to resolve two major issues with respect to part-time female workers: whether indirect discrimination violates the equal pay laws<sup>8</sup> of the EEC and the United Kingdom,<sup>9</sup> and, whether part-time workers should be treated in the same manner as full-time workers.<sup>10</sup>

A suit was brought by the EEC against the United Kingdom because the United Kingdom had failed to satisfy its obli-

where two categories of people, identified by characteristics other than sex, are treated differently in a way which has a disproportionate adverse effect on women." Barrett, *supra* note 3, at 176. Therefore, if a certain policy or practice is imposed upon workers, having nothing to do with their gender, but it adversely affects many more women than it does men, it would be considered indirect discrimination. See Clarke v. Eley (IMI) Kynoch, Ltd., 1982 Indus. Rel. L.R. 482, 483 (Emp. App. Trib.); Jenkins, 1981 Indus. Rel. L.R. at 393; Steiner, *Sex Discrimination Under the UK and EEC Law: Two Plus Four Equals One*, 32 INT'L & COMP. L.Q. 399, 402 (1983); Townshend-Smith, *The Impact of European Law on Equal Pay for Women*, in THE EFFECT ON ENGLISH DOMESTIC LAW OF MEMBERSHIP OF THE EUROPEAN COMMUNITIES AND RATIFICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 69, 91 (1981).

5. The European Court of Justice is empowered to "ensure that in the interpretation and application of . . . [the EEC] Treaty the law is observed." EEC Treaty, *supra* note 1, art. 164. The Court of Justice also decides on the validity of decisions of the Council of Ministers or the Commission. A. WALSH & J. PAXTON, INTO EUROPE 52 (2d ed. 1972). A member state, the Council of Ministers, the Commission, or any person affected by a Community decision may bring an action in the Court of Justice. *Id.* It is made up of nine judges and four advocate generals. 5 H. SMIT & P. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY 5-296.6, 5-290 (1984).

6. The Employment Appeals Tribunal (EAT) receives appeals from the industrial tribunals on questions of law. R. RIDEOUT, INDUSTRIAL TRIBUNAL LAW 2 (1980). Appeals from the EAT go to the court of appeal. *Id.*

7. See *infra* notes 117-27 and accompanying text.

8. Sex Discrimination Act, 1975, ch. 65; Equal Pay Act, 1970, ch. 41 (equal pay laws of the United Kingdom); EEC Treaty, *supra* note 1, art. 119 (equal pay law of the EEC).

9. See Jenkins, 1981 Indus. Rel. L.R. 388 (holding that indirect discrimination is prohibited unless it can be shown to be "objectively necessary"); Handley v. Mono, 1978 Indus. Rel. L.R. 534 (Emp. App. Trib.) (holding that all an employer needs to do is disprove any intent to discriminate); *infra* notes 161-74, 208-15 and accompanying text.

10. See Clarke, 1982 Indus. Rel. L.R. 482 (holding that an employer cannot fire part-time workers before firing full-time workers; both must be treated equally); Jenkins, 1981 Indus. Rel. L.R. 388 (holding that unless the employer can show proveable reasons for discriminating against part-time workers they should be paid the same wages as full-time workers); *infra* notes 208-15, 228-35.

gations pursuant to EEC regulations<sup>11</sup> and had failed to amend its equal pay laws to accommodate suits brought for equal pay for work of equal value.<sup>12</sup> The United Kingdom lost the suit, and in 1983, amended its equal pay laws.<sup>13</sup> Because no part-time employment cases have been decided since this amendment it is questionable what impact, if any, the amendment will have on part-time workers.

This Note focuses on the laws of the EEC and the United Kingdom as they affect part-time workers in the United Kingdom. Part I provides a general background to the equal pay laws of the EEC and the United Kingdom. Part II traces the legislative history of these laws and analyzes whether the administrative and legislative bodies of the EEC and the United Kingdom intended to apply equal pay laws to part-time workers. Part III chronologically reviews the case law and examines the difficulties encountered by tribunals interpreting the equal pay laws. Finally, Part IV analyzes the European Court of Justice's disregard for the legislative intent behind the equal pay laws and discusses the confusion created by this disregard for courts in the United Kingdom.

## I. HISTORY OF THE STATUTES

### A. EEC Statutes

The EEC was established in 1957 by the signing and ratification of the Treaty establishing the European Economic Community<sup>14</sup> (EEC Treaty or Treaty). The purpose of the EEC is to establish among the states a harmonious coexistence of the laws that would discourage competition, encourage closer ties, promote a rise in the standard of living, and create a common market.<sup>15</sup> By enacting the EEC Treaty, the member

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11. Commission of the European Communities v. United Kingdom, 1982 E. Comm. Ct. J. Rep. 2601, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8853, at 8051.

12. *Id.* at 2604-05, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8853, at 8053.

13. See Equal Pay Act, 1970, ch. 41 amended by STAT. INST. 1983/1794.

14. EEC Treaty, *supra* note 1, preamble.

15. *Id.* art. 2. The purpose of the Treaty is to promote "a harmonious development of economic activities . . . an accelerated raising of the standard of living and closer relations between the states belonging to it." *Id.* The concept "which underlies . . . [the EEC Treaty] is that the merging of the six [now 10] economies will make for a more rapid and stable economic progress; and that in the enlarged economy,

states sought to lessen the economic and social discrepancies among themselves, thus making them more evenly competitive.<sup>16</sup> Part III, title III of the EEC Treaty concerns social policy.<sup>17</sup> Its purpose is to harmonize the social policies of the member states.<sup>18</sup> Article 119 outlines the principle of equal pay for men and women for equal work.<sup>19</sup>

The equal pay principle of article 119 is a prime example of the harmonization process called for in title III.<sup>20</sup> At the time of the Treaty's negotiation, France was more liberal<sup>21</sup> than other member states in its application of an equal pay policy.<sup>22</sup> France insisted upon the recognition of an equal pay

free and fair competition has to be ensured." M. SHANKS & J. LAMBERT, *THE COMMON MARKET TODAY AND TOMORROW* 45 (1962).

16. EEC Treaty, *supra* note 1, art. 3. This article provides in pertinent part that "the activities of the Community shall include . . . the institution of a system ensuring that competition in the common market is not distorted." *Id.* art. 3(f).

17. *Id.* part III, title III. The social policy of the EEC is found in articles 117-22 of the EEC Treaty. This policy attempts to harmonize the laws of the member states concerning labor, labor standards, and "general social welfare." 3 H. SMIT & P. HERZOG, *supra* note 5, at 3-715.

18. EEC Treaty, *supra* note 1, art. 118. This article provides in pertinent part that it shall be the aim of the Commission to promote "close cooperation between Member States in the social field." *Id.*

19. *Id.* art. 119. Article 119 provides that:

Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of the 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:

(A) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(B) that pay for work at time rates shall be the same for the same job.

*Id.*

20. *See id.* art. 117. "Member States agree upon the need to promote improved working conditions and improved standard of living for workers, so as to make possible their harmonization while the improvement is being maintained." *Id.* Since the laws of the EEC Treaty will allow for improvement, an improvement by all states at the same pace was desired. Article 119 provides that women's wages in all the member states will improve; not just in those states that have national pay laws. *Id.* art. 119; *see also* A. PARRY & S. HARDY, *EEC LAW* 358 (1981) (discussing approximation of laws in various articles of the EEC Treaty).

21. The French "liberality" was demonstrated by the fact that it had already enacted its own equal pay law. 3 H. SMIT & P. HERZOG, *supra* note 5, at 3-752.

22. E. STEIN, P. HAY & M. WAELBROECK, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE* 1089 (1976). "When the Treaty was entered into, France

principle by other member states because economic distortion<sup>23</sup> would result if employers in member states were permitted to pay female workers lower wages than their male counterparts for the same work.<sup>24</sup> Member states not adhering to an equal pay principle would have a cheaper labor force than France and, therefore, an unfair competitive advantage.<sup>25</sup> The French position was in keeping with the drafter's stated policy of preventing practices that have as their goal or outcome "the prevention, restriction or distortion of competition."<sup>26</sup> The other drafting states agreed with France that to have some member states applying the principle of equal pay without requiring the other states to apply the same principle would distort competition.<sup>27</sup>

### B. *United Kingdom Statutes*

The movement for an equal pay statute in the United Kingdom has a long history. In 1882, the Trade Union Congress<sup>28</sup> passed a resolution that demanded equal pay for women.<sup>29</sup> This resolution was never enacted because few women were involved in the union, and other union considerations took precedence.<sup>30</sup> In 1918, a committee from the government that was examining the question of equal pay recommended that women who did the same or similar work as men should be paid equally.<sup>31</sup> However, the committee's recom-

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was further ahead than the other Member States . . . in the implementation of the principle of equal pay." *Id.*

23. *Id.*

24. 3 H. SMIT & P. HERZOG, *supra* note 5, at 3-752.

25. *Id.* "France, in particular, had enacted rules which were more favorable to workers and more costly to employers than . . . in some other countries." *Id.*

26. EEC Treaty, *supra* note 1, art. 85(1).

27. A. PARRY & S. HARDY, *supra* note 20, at 358.

28. The Trade Union Congress is a major labor federation with over 100 affiliates. J. WINDMULLER & A. GLADSTONE, *EMPLOYERS ASSOCIATIONS AND INDUSTRIAL RELATIONS* 10 (1984).

29. Chiplin & Sloane, *Equal Pay in Great Britain*, in *EQUAL PAY FOR WOMEN* 9, 17 (B. Pettman ed. 1977). This was in response to a matchgirls' strike calling for equal pay. *Id.*

30. *Id.*

31. *Id.* at 18. Ironically, Beatrice Webb, an ardent feminist, in a foreshadowing of later problems, rejected the committee's proposal as too vague. The ambiguity she envisioned stemmed from the question: what was equal pay to be given for—equal product, equal time, or equal effort. *Id.* This is in fact the precise issue currently facing the courts. See *infra* notes 143-239 and accompanying text.

mentation was overlooked as unemployment became worse.<sup>32</sup>

In 1964, the Labor Party came into power promising equal pay for equal work, and in 1970, it fulfilled its promise by enacting the Equal Pay Act.<sup>33</sup> The Equal Pay Act, however, had a limited impact.<sup>34</sup> The Act provides only for equal pay<sup>35</sup> while ignoring other forms of discrimination. Employment discrimination can include discrimination in hiring, access to promotion, training, benefits, unequal social security benefits, and discrimination because of marital status.<sup>36</sup> By identifying equal pay as the only form of employment discrimination, the Equal Pay Act ignored these other forms of discrimination. Some legislators recognized that the Equal Pay Act would have a detrimental impact on female workers, because employers would no longer hire women if they could not pay them less than men.<sup>37</sup> Therefore, in 1975 the Labor Government enacted the Sex Discrimination Act,<sup>38</sup> which broadened discrimination laws to include not only equal pay requirements but also policies such as nondiscriminatory hiring and firing, and indirect discrimination.<sup>39</sup>

Both the EEC and United Kingdom statutes are ambigu-

32. Chiplin & Sloane, *supra* note 29, at 13.

33. 1970, ch. 41.

34. Seear, *Implementing Equal Pay and Equal Opportunity Legislation in Great Britain* in *EQUAL EMPLOYMENT POLICY FOR WOMEN* 261, 265 (R. Ratner ed. 1980).

35. Equal Pay Act, 1970, ch. 41, § 1(2). "An equality clause is a provision which relates to terms . . . of a contract under which a woman is employed." *Id.*

36. The Sex Discrimination Act, 1975, ch. 65, recognizes the myriad ways in which employment discrimination may manifest itself. *See infra* note 39.

37. *See Seear, supra* note 34, at 265.

38. 1975, ch. 65.

39. *Id.* § 6(1)-(2). The Act provides that:

- (1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman—
  - (a) in the arrangements he makes for the purpose of determining who should be offered that employment, or
  - (b) in the terms on which he offers her that employment, or
  - (c) by refusing or deliberately omitting to offer her that employment.
- (2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her—
  - (a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them
  - (b) by dismissing her, or subjecting her to any other detriment.

*Id.*



ous.<sup>40</sup> Thus, the courts have interpreted the laws inconsistently and sometimes incorrectly. They have failed to provide individuals with those rights the legislature intended them to have.<sup>41</sup>

## II. STATUTORY ANALYSIS

### A. EEC Law

Article 119 of the EEC Treaty provides that women should be paid wages equal to men who are doing the same work.<sup>42</sup> However, it is unclear how the equal pay principle in article 119 applies to part-time workers.<sup>43</sup> It is necessary first to examine how article 119 applies to all female workers, and then to analyze the legislative intent behind the equal pay laws of the EEC to see how they apply to part-time female workers in particular.

#### 1. General Applicability

Article 119 of the EEC Treaty outlines the principle of equal pay for men and women<sup>44</sup> in one of the few "precise" rules in the Treaty that deal with social policy.<sup>45</sup> The article specifies that men and women should receive the same pay for equal work.<sup>46</sup> If men and women do the same work at piece rates, i.e. if they are paid for how much they produce, then they will be paid according to the same unit of measurement.<sup>47</sup> For example, if a man gets paid a U.K.1 £ per shirt, then a woman doing the same work should receive the same wage. If

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40. See *infra* notes 49, 95 and accompanying text.

41. See generally Barrett, *supra* note 3, at 189-90 (there is room "for a more purposive development of Article 119 to be made by the [European Court of Justice]. Such a development would be more in keeping . . . with the aims of Article 119 and with the current policy of the Community institutions . . .").

42. EEC Treaty, *supra* note 1, art. 119; see *supra* note 19 (for the provisions of article 119).

43. See *infra* notes 209-10 and accompanying text.

44. EEC Treaty, *supra* note 1, art. 119.

45. Compare *id.* art. 118 ("the Commission shall have the task of promoting close cooperation between Member States in the social field, particularly in matters relating to: employment; labor law and working conditions; basic and advanced vocational training . . .") and *id.* art. 120 ("Member States shall endeavor to maintain the existing equivalence between paid holiday schemes") with *id.* art. 119 (stating precisely when female workers should be paid equally to male workers).

46. *Id.* art. 119.

47. See *id.* art. 119(a).

they are paid at hourly rates for the same job, then men and women should be paid according to the same time rates.<sup>48</sup> Thus, the rule seems to clearly outline the requirements for compliance. However, the meaning of "equal work" in article 119 is unclear,<sup>49</sup> and this has allowed for discrepancies in the interpretation of article 119 by the courts.<sup>50</sup>

An interpretation of the equal pay principle can be made by examining the direct statutory precursor of article 119,<sup>51</sup> the International Labor Organization Convention No. 100<sup>52</sup> (ILO Convention). The International Labor Organization (ILO) was established in 1919, in response to employment problems throughout the world.<sup>53</sup> The principle of equal pay was one of the principles included in the preamble to the constitution of the ILO.<sup>54</sup> In 1951, the ILO Convention outlined the methods to achieve equal pay, providing that the "principle of equal remuneration for men and women" would be equal pay "for work of equal value."<sup>55</sup> Every drafting member of the EEC was also a member of the ILO.<sup>56</sup> Therefore, it is reasonable to assume that when France insisted upon the adoption of an equal pay provision in the EEC Treaty, the drafters of the Treaty referred to this provision in the ILO Convention.<sup>57</sup>

Article 119 did not adopt the exact language of the ILO

48. *See id.* art. 119(b).

49. *See* Steiner, *supra* note 4, at 420.

50. *See infra* notes 216-39 and accompanying text.

51. 3 H. SMIT & P. HERZOG, *supra* note 5, at 3-758.

52. June 29, 1951, 165 U.N.T.S. 303 [hereinafter cited as ILO Convention].

53. Constitution of the International Labor Organization, June 28, 1919, 49 Stat. 2712, T.S. No. 874, 225 Parry's T.S. 373 [hereinafter cited as ILO Constitution]. The ILO was established as part of the Treaty of Versailles. *See id.*; D. MORSE, *THE ORIGIN AND EVOLUTION OF THE I.L.O. AND ITS ROLE IN THE WORLD COMMUNITY* 4-5 (1969).

54. *See* ILO Constitution, *supra* note 53, preamble. "[A]n improvement of . . . [labor] conditions is urgently required . . . including . . . the protection of . . . women . . ." *Id.*; *see* G. JOHNSTON, *THE INTERNATIONAL LABOUR ORGANIZATION* 160 (1970).

55. G. JOHNSTON, *supra* note 54, at 161; *see* ILO Convention, *supra* note 52, art. 1(a).

56. 3 H. SMIT & P. HERZOG, *supra* note 5, at 3-758. *Compare* EEC Treaty, *supra* note 1, preamble *with* ILO Convention, *supra* note 52, preamble. Great Britain ratified the ILO Convention on June 15, 1972. Gr. Brit. T.S. No. 88 (Cmd. 5039).

57. *See generally* 3 H. SMIT & P. HERZOG, *supra* note 5, at 3-758. ("[a]rticle 119 of the Treaty was modelled in part on the Convention No. 100, to which all Member States except Ireland are parties.").

Convention. It merely states that equal pay will be given for equal work, rather than stating that equal pay will be given for work of equal value.<sup>58</sup> The provision in the ILO Convention calling for equal pay for work of equal value made that document a much broader instrument than article 119, in that its scope encompasses more women.<sup>59</sup> The decision by the drafting members of the EEC not to adopt the wording of the ILO Convention may have stemmed from a belief that the language was too broad to be applied to all member states. In addition the EEC Treaty was to be binding on those ratifying it,<sup>60</sup> while the ILO Convention was not immediately legally binding on those states who were members of the ILO.<sup>61</sup> Therefore, any signatories of the EEC Treaty who did not already have a national equal pay law could have been wary of being bound by the sweeping language in the ILO Convention.<sup>62</sup>

As a result, article 119 was too narrow.<sup>63</sup> The problem with article 119 was that the term, "equal pay for equal work," applied in only three or four percent of the cases where women were discriminated against when performing the same job as their male counterparts.<sup>64</sup> The Council of Ministers<sup>65</sup> enlarged the applicability of article 119 when it drafted and put into effect a council directive,<sup>66</sup> Directive 75/117, which more closely

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58. See EEC Treaty, *supra* note 1, art. 119.

59. See 3 H. SMIT & P. HERZOG, *supra* note 5, at 3-757-58. If article 119 was read to apply only in situations where female workers did the same job as male workers, then it would only apply in three to four percent of cases. *Id.* at 3-757. Therefore, it should be read more broadly, like the ILO Convention, to apply to "equivalent" jobs. *Id.* at 3-758.

60. See EEC Treaty, *supra* note 1, art. 247.

61. See ILO Constitution, *supra* note 53, art. 405. The decisions of the Convention do not have immediate force of law. *Id.* The delegates to the ILO are obligated to submit Conventions or Recommendations, to their national governments that are adopted by two-thirds majority of the ILO delegates. *Id.*; see G. JOHNSTON, *supra* note 54, at 91.

62. See 3 H. SMIT & P. HERZOG, *supra* note 5, at 3-757.

63. *Id.* at 3-758.

64. *Id.* at 3-757.

65. The Council of Ministers is made up of representatives from each of the member states. A. WALSH & J. PAXTON, *supra* note 5, at 50. The Council's purpose as expressed in the EEC Treaty is "[t]o ensure that the objectives set out in this Treaty are attained . . . [and to] ensure co-ordination of the general economic policies of the Member State." EEC Treaty, *supra* note 1, art. 145. Some authors argue that the Council has a superior position over other institutional organs of the Community. 4 H. SMIT & P. HERZOG, *supra* note 5, at 5-94, 5-95.

66. Council Directive on the Approximation of the Laws of the Member States

aligns the equal pay provisions of the EEC with those of the ILO Convention.<sup>67</sup> Directive 75/117 expands the principle of equal pay, outlined in article 119, to include equal pay for work of equal value.<sup>68</sup> The EEC equal pay laws, like the ILO Convention, now encompass not only a woman who does the same work as a man but also a woman whose work is of the same value as a man's.

## 2. Applicability of the EEC Equal Pay Laws to Part-time Workers

The intention of the legislative and administrative bodies of the EEC was that article 119 and Directive 75/117 should apply not only to full-time female employees doing the same work as full-time male employees, but to part-time female employees doing the same work as full-time male employees.<sup>69</sup> Therefore, part-time female employees should be paid at the same wage rate as their full-time male counterparts. The Commission of the European Communities<sup>70</sup> and the Council of Ministers have stated this view on several occasions. In a 1979 Council Resolution,<sup>71</sup> the Council of Ministers noted that the Community's approach to the problem of part-time workers should be based on the principle that "part-time workers . . . have the same social rights and obligations as full-time workers."<sup>72</sup> The Economic and Social Committee<sup>73</sup> wrote that part-

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Relating to the Application of the Principle of Equal Pay for Men and Women, 26 O.J. EUR. COMM. (No. L 45) 19 (1975), [1973-1975 Transfer Binder] COMM. MKT. REP. (CCH) ¶ 9718, at 9597 [hereinafter cited as Directive 75/117]. A directive is binding on the member states and the member state may choose the method to be used to attain the purpose of the directive. EEC Treaty, *supra* note 1, art. 189; see A. WALSH & J. PAXTON, *supra* note 5, at 50.

67. Compare ILO Convention, *supra* note 52, art. 1(a) with EEC Treaty, *supra* note 1, art. 119 and Directive 75/117, *supra* note 66, art. 1.

68. Directive 75/117, *supra* note 66, art. 1.

69. See generally Barrett, *supra* note 3, *passim*.

70. The Commission is made up of fourteen members since the accession of Greece. EEC Treaty, *supra* note 1, art. 157. See *id.* art. 155 for an outline of the functions and powers of the Commission. "The Commission's powers are diverse in nature and may be of a legislative, executive, administrative, and even judicial nature." 4 H. SMIT & P. HERZOG, *supra* note 5, at 5-186.

71. Council Resolution on the Adaptation of Working Time, 23 O.J. EUR. COMM. (No. C 2) 1 (1980) [hereinafter cited as Council Resolution]. A resolution is a request made to the Commission asking the Commission to do a study or submit a proposal on a specific topic. 4 H. SMIT & P. HERZOG, *supra* note 5, at 5-144.

72. Council Resolution, *supra* note 71, at 4.

73. The Economic and Social Committee is an advisory body set up by the EEC

time workers should be paid the same hourly wage as full-time workers.<sup>74</sup> The Commission wrote that "in the presence of both male and female employees, part-time work is to be paid at the same time rate as full-time work and in strict proportion to the number of hours worked always provided the work is 'equal.'"<sup>75</sup> Thus, article 119 should be read to require that part-time workers receive the same hourly rate as full-time workers.<sup>76</sup>

On April 1, 1982, the Commission submitted the Proposal for a Council Directive on Voluntary Part-time Work<sup>77</sup> (Proposal). The report concerns part-time workers only, and while the scope of the Proposal is equal treatment for part-time workers, it does not include a provision for equal pay.<sup>78</sup> The absence of such a provision for equal pay can be attributed to the fact that equal pay was already provided for in article 119 and Directive 75/117.<sup>79</sup> The Commission believed that those laws already applied to part-time workers;<sup>80</sup> it did not consider it necessary to include a repetitive provision in the Proposal. Moreover, it is consistent with the basic aim of the Treaty that part-time workers should be paid the same hourly wage, so that those member states that do not have a large part-time

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Treaty. EEC Treaty, *supra* note 1, art. 193. Before the Commission makes a recommendation to the Council or Assembly it first accepts the opinion of the Economic and Social Committee. A. WALSH & J. PAXTON, *supra* note 5, at 37.

74. Opinion of the Economic and Social Committee, 54 O.J. EUR. COMM. (No. C 269) 57 (1978).

75. Barrett, *supra* note 3, at 183 (quoting from Written Observations of the Commission 9 (unpublished remarks)).

76. Barrett, *supra* note 3, at 189-90.

77. 93 O.J. EUR. COMM. (No. C 62) 7 (1982), 3 COMMON MKT. REP. (CCH) ¶ 10,358, at 10,773.

78. *Id.* art. 2. Article 2 outlines the equal treatment principle:

Part-time workers shall not be discriminated against as compared with full-time workers in respect of working conditions, rules governing dismissal, entitlement to participate actively or passively in bodies representing employees and access to vocational training, promotion, social facilities and medical care. This is hereinafter referred to as the 'principle of non-discrimination'.

*Id.* The principle of nondiscrimination attempts to protect part-time employees from unfair working conditions. *See id.*

79. *See supra* notes 19, 66.

80. *See supra* notes 70-71, 74-76 and accompanying text.

labor force are not competitively disadvantaged.<sup>81</sup>

### B. *United Kingdom Laws*

Tribunals have encountered two problems in their interpretation of United Kingdom statutes on equal pay rights. The first is the ambiguity of the language of the Equal Pay Act. A second problem is whether both United Kingdom statutes prohibit indirect discrimination and, if so, in what manner.

#### 1. Ambiguity of the Equal Pay Act

The purpose of the Equal Pay Act is "to prevent discrimination as regards terms and conditions of employment between men and women."<sup>82</sup> It does this by requiring an equality clause to be implied in employment contracts.<sup>83</sup> The equality clause in this situation is an implied provision in a woman's contract that causes terms in her contract to be either modified if the terms are discriminatory or implied if terms are omitted.<sup>84</sup> The equality clause is implied in two situations. First, where a woman is doing work "equivalent" to that performed by a man,<sup>85</sup> and second, where a woman performs "like work."<sup>86</sup> For instance, if there is a term benefitting a man in his employment contract and there is no corresponding beneficial term in the woman's contract, the term is implied in a woman's contract. If a term in a woman's contract is or becomes less favorable than in a man's contract, then the term is deemed modified by the equality clause.

The Equal Pay Act provides that equal pay be given for "like work."<sup>87</sup> A woman performs "like work" when she performs work which is the "same or . . . broadly similar" to work done by a man.<sup>88</sup> Equal pay must also be given to a female worker for work which is rated as "equivalent" to a man's work.<sup>89</sup> This last provision is similar to the provision in the

81. EEC Treaty, *supra* note 1, art. 85; *see Jenkins*, 1981 E. Comm. Ct. J. Rep. at 930, 31 Comm. Mkt. L.R. at 30.

82. Equal Pay Act, 1970, ch. 41, preamble.

83. *Id.* § 1; *see Steiner*, *supra* note 4, at 400-01.

84. Equal Pay Act, 1970, ch. 41, § 1(2)(a)-(b).

85. *Id.* § 1(2)(b); *see Steiner*, *supra* note 4, at 400-01.

86. Equal Pay Act, 1970, ch. 41, § 1(2)(a).

87. *Id.* § 1(2)(a).

88. *Id.* § 1(4).

89. *Id.* § 1(2)(b).

ILO Convention and Directive 75/117 that provides for equal pay for work of "equal value."<sup>90</sup>

While courts have consistently found part-time employment to fall within the ambit of "like work" as it is defined in section 1(4) of the Equal Pay Act,<sup>91</sup> a troublesome question is whether in practice the Equal Pay Act applies to part-time female workers at all. Under section 1(3) of the Equal Pay Act, an equality clause is not implied in a woman's employment contract if the "employer proves that the variation [in treatment] is genuinely due to a *material difference* (other than the difference of sex) between her case and his."<sup>92</sup> If the employer can show that the reason he paid a part-time female employee a lower hourly wage than the wage paid a full-time male employee was because of a "material difference" between them, then he has not violated the Equal Pay Act.<sup>93</sup> This exception to the application of an equality clause has become a loophole.<sup>94</sup> Once again, the vagueness of the language leads to uncertainty in its application by the courts.<sup>95</sup> There is no definition of what constitutes a "material difference" between a male and female worker, and there has been no guidance from Parliament on this issue.<sup>96</sup> When considering this exception in part-time employment cases, the courts have questioned whether a difference in the number of hours that a part-time female employee works as compared to the number of hours a full-time male employee works can constitute a "material difference" justifying a difference in pay.<sup>97</sup>

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90. See *supra* notes 52, 66.

91. Equal Pay Act, 1970, ch. 41, § 1(4). This section defines "like work" as the "same or a broadly similar nature" to a comparable man's work. *Id.*; see *infra* notes 164-65 and accompanying text.

92. Equal Pay Act, 1970, ch. 41, § 1(3) (emphasis added).

93. See *id.*

94. Townshend-Smith, *supra* note 4, at 82. It has been described as a loophole in that "[w]hat would . . . be accepted as a genuine material difference may conceal either deliberate manipulation or unverified assumptions as to the types of qualities or results . . . [from part-time workers]." *Id.*

95. See *infra* notes 223-48 and accompanying text.

96. See *infra* notes 226, 232, 239 and accompanying text.

97. See *Rainey v. Greater Glasgow Health Bd.* E. Dist. (Empl. App. Trib. Oct. 26, 1983) (available Mar. 1985, on LEXIS, Enggen library, Cases file); *Albion Shipping Agency v. Arnold*, 1982 Indus. Cas. R. 23 (Emp. App. Trib.); *Clarke*, 1982 Indus. Rel. L.R. 482; *Jenkins* 1981 E. Comm. Ct. J. Rep. 911, 31 Comm. Mkt. L.R. 24 (Preliminary Ruling), *remanded*, 1981 Indus. Rel. L.R. 388 (Emp. App. Trib.).

The United Kingdom Department of Employment<sup>98</sup> suggested "that the Act covered all full or part-time employees although the Act makes no reference to the latter group."<sup>99</sup> Because Parliament has not stated its intention as to whether the Equal Pay Act's provision for "material difference" should apply to part-time workers, the Department of Employment's interpretation, as an integral part of the implementation of the Equal Pay Act, should be given considerable weight.<sup>100</sup>

## 2. Indirect Discrimination

The Sex Discrimination Act is broader than the Equal Pay Act in that it prohibits discrimination in all areas of life, whereas the Equal Pay Act only considers discrimination in employment situations.<sup>101</sup> However, the Sex Discrimination Act was enacted not only to extend discrimination laws to nonemployment situations but also to broaden the scope of the Equal Pay Act in an employment situation.<sup>102</sup>

The Equal Pay Act only covers direct discrimination.<sup>103</sup> This means that it only prohibits obvious cases of discriminatory practices and policies of employers. The Sex Discrimination Act attacks indirect discrimination where policies and practices of the employer appear gender-neutral but, in effect, discriminate against women.<sup>104</sup> The Sex Discrimination Act,

98. The Department of Employment is one of 14 principle departments in Mrs. Thatcher's Government. T. HARTLEY & J. GRIFFITH, *GOVERNMENT AND LAW* 57 (2d ed. 1981). The Department of Employment, formerly called the Department of Employment and Productivity, is a policy-making department. It lays down policies and forms the structures of the labor department so that the policies may be carried out. F. WRIGHT, *BRITISH CONSTITUTION & GOVERNMENT* 124 (2d ed. 1973). It is responsible for "industrial relations, pay policy, employment, training, and related manpower questions . . ." *Id.* at 132.

99. Chiplin & Sloane, *supra* note 29, at 21.

100. *See generally* F. WRIGHT, *supra* note 98, at 124 (discussing the functions of the Department of Employment).

101. *Compare* Sex Discrimination Act, 1975, ch. 65 with Equal Pay Act, 1970, ch. 41, § 1. *See generally* Steiner, *supra* note 4, at 402 ("the Sex Discrimination Act 1975 supplements the Equal Pay Act by the application of the principle of non-discrimination").

102. *See* Steiner, *supra* note 4, at 402.

103. *See* Equal Pay Act, 1970, ch. 41, § 1(3); *see also* Steiner, *supra* note 4, at 400 ("the Act's scope is limited by applying only where the terms and conditions form part of the contract").

104. *See* Sex Discrimination Act, 1975, ch. 65, § 1(b); *see also* Steiner, *supra* note 4, at 400.



however, was written to complement the Equal Pay Act;<sup>105</sup> the Acts are intended to be read in conjunction with one another.<sup>106</sup> Because the two Acts are read as a "single code,"<sup>107</sup> cases of indirect discrimination have been brought successfully in worker pay disputes.<sup>108</sup>

However, courts have not yet determined whether the provision in the Sex Discrimination Act for indirect discrimination should be applied in cases of unintentional indirect discrimination.<sup>109</sup> There are two types of indirect discrimination: intentional and unintentional.<sup>110</sup> Intentional indirect discrimination occurs when an employer discriminates against part-time workers because they are women.<sup>111</sup> Usually, an employer in this type of case is unable to prove that there is a reason for paying part-time workers less money, and in fact, the real reason is that they are women.<sup>112</sup> Unintentional indirect discrimination occurs when an employer has a bona fide business reason for distinguishing between part-time workers and full-time workers but the policy or practice discriminates primarily against women.<sup>113</sup>

Whether unintentional indirect discrimination should be prohibited is a crucial question in part-time employment cases.<sup>114</sup> The courts must decide whether the employer should have to prove that his reason for discriminating is objectively correct,<sup>115</sup> and even if he proves that he has a reason to discriminate, whether he should still be allowed to pay the part-time workers less if they are women.

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105. Steiner, *supra* note 4, at 400.

106. *Id.*

107. Barrett, *supra* note 3, at 177.

108. See, e.g., Clay Cross Ltd. v. Fletcher, 1978 Indus. Cas. R. 1, 9 (Empl. App. Trib.).

109. Barrett, *supra* note 3, at 176; see *infra* notes 223-39 and accompanying text.

110. Jenkins, 1981 Indus. Rel. L.R. at 393; see Barrett, *supra* note 3, at 176; Steiner, *supra* note 4, at 402.

111. Barrett, *supra* note 3, at 176.

112. See *id.*

113. Jenkins, 1981 Indus. Rel. L.R. at 393; see Barrett, *supra* note 3, at 176.

114. See Barrett, *supra* note 3, at 179-80.

115. See *id.* at 177. Objectively correct means that the "achievement of some economic benefit can be objectively demonstrated." See *id.* An employer is "subjectively correct" when he can show that he had a bona fide motive, but he does not have to prove his motive is actually achieved. See *id.*

The Trade Union and Labor Relations Act<sup>116</sup> gave the industrial tribunals<sup>117</sup> the power to hear sex discrimination cases.<sup>118</sup> These cases are then appealed from the industrial tribunal to the EAT.<sup>119</sup> However, a decision of the industrial tribunal does not create binding precedent.<sup>120</sup> Therefore, there are disparate decisions made on similar issues in part-time employment discrimination cases.<sup>121</sup>

### 3. Interaction Between the Laws of the EEC and United Kingdom

According to the "doctrine of primacy," EEC law takes precedence over a member state's national law,<sup>122</sup> if the EEC law in question confers greater rights upon the individuals of member states.<sup>123</sup> Therefore, if article 119 confers greater equal pay rights upon female workers than the rights conferred by the Equal Pay Act or Sex Discrimination Act, article 119 takes precedence.<sup>124</sup> Moreover, the European Communities

116. Trade Union and Labor Relations Act, 1974, ch. 52.

117. Industrial tribunals were established in 1964. R. RIDEOUT, *supra* note 6, at 1. They adjudicate disputes concerning unfair dismissal, time off work, maternity rights, equal pay claims, etc. *Id.*

118. Trade Union and Labor Relations Act, 1974, ch. 52, § 16; see Seear, *supra* note 34, at 149.

119. Industrial Relations Act, 1971, ch. 72, § 114.

120. *Id.*

121. See *infra* notes 223-39 and accompanying text.

122. *Costa v. E.N.E.L.*, 1964 E. Comm. Ct. J. Rep. 585, 593, [1961-1966 Transfer Binder] COMMON MKT REP. (CCH) ¶ 8023, at 7384, 7390. "[T]he [Member] States have united their sovereign rights, albeit in limited fields, and thus created a body of law which binds both their nationals and themselves." *Id.*; see also Steiner, *supra* note 4, at 416 (discussing primacy of EEC law); Freestone, *Unenforceable Community Rights*, 41 Mod. L.R. 346, 346 (1978) (discussing the European Communities Act).

123. See *Jenkins*, 1981 Indus. Rel. L.R. at 394 ("[i]t would not contravene s.2 of the European Communities Act if the United Kingdom statutes conferred on employees greater rights than they enjoy under Article 119.").

124. *Id.* This issue arose in *Albion Shipping Agency v. Arnold*, 1982 Indus. Cas. R. 24 (Emp. App. Trib.) concerning contemporaneous versus noncontemporaneous employment. The tribunal held that the Equal Pay Act does not apply to situations of noncontemporaneous employment, where a woman compares her position to that of her male predecessor. *Id.* at 25. While the Equal Pay Act only applies where employment is contemporaneous, the tribunal held that article 119 of the EEC Treaty applies to both contemporaneous and noncontemporaneous employment. *Id.* Moreover, because the European Communities Act, 1972, ch. 68, confers a separate right on women in the United Kingdom, *Albion Shipping*, 1982 Indus. Cas. R. at 25-26, a

Act<sup>125</sup> statutorily mandates that EEC rights, remedies, and obligations are to be given effect in the United Kingdom without any further legislative action by the United Kingdom.<sup>126</sup>

### III. CASES

Two controversial issues arise in part-time employment discrimination cases. First, the courts have not resolved the question of whether indirect discrimination has to be intentional to be prohibited, or whether unintentional indirect discrimination should be prohibited as well. The second issue is whether a difference in the number of working hours constitutes a "material difference" within the meaning of section 1(3) of the Equal Pay Act.<sup>127</sup>

The courts have used four different approaches in analyzing indirect discrimination and material difference.<sup>128</sup> They are:

- A) The difference between part-time and full-time working will always be regarded as sufficient, in itself, to constitute a material difference (unless the applicant is able to show that the employer's real motive for making this distinction is to discriminate against women) . . . .
- B) The difference between part and full-time working is capable of constituting a material difference, provided that the employer has a genuine business-related motive for making the distinction other than a desire to discriminate against women . . . .
- C) The difference between part and full-time working is capable of constituting a material difference, but only if the employer proves that it is objectively necessary to achieve some business-related purpose . . . .
- D) The difference between part and full-time working can never constitute a material difference. Any economic benefit gained from such a wage differential is a factor personal to the employer and has nothing to do with "her case and his" for the purposes of section 1(3).<sup>129</sup>

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female worker could compare herself with a male worker who had worked previously.  
*Id.*

125. 1972, ch. 68.

126. *Id.* § 2.

127. See *infra* notes 161-215 and accompanying text.

128. Barrett, *supra* note 3, at 177.

129. *Id.*

In the first approach, indirect discrimination would not be prohibited. Even if an employer's policies had a disproportionate adverse effect upon women, the difference in the working hours between a full-time male employee and part-time female employee could still constitute a material difference.<sup>130</sup> Thus, an equality clause would not be applied in a woman's contract, ensuring her an equal wage, unless the employer was intentionally directly discriminating against women.<sup>131</sup> With this approach a woman must prove that the employer had an intent to discriminate.<sup>132</sup>

The second approach prohibits intentional indirect discrimination. In order to prevail, a woman must prove either that the employer was intentionally discriminating against women or that an employer's policies had an adverse effect upon women.<sup>133</sup> If the policy or practice does have an adverse effect upon women, the burden shifts to the employer who must then prove that he had a business-related motive for indirectly discriminating.<sup>134</sup>

The third approach again prohibits intentional discrimination, but in comparison to the second approach, it imposes a much greater burden of proof upon the employer. If a woman can demonstrate that her employer's practice or policy had a disproportionate effect upon women, the employer must both show that he had a business-related motive for indirectly discriminating,<sup>135</sup> and prove that his discriminatory practice or policy was "objectively necessary to achieve" his motive.<sup>136</sup> While the second approach suggests a subjective standard, the third approach suggests a more objective standard. Only if the employer meets this heavy burden of proof can a difference between a part-time worker and a full-time worker constitute a material difference.<sup>137</sup> This approach falls somewhere between a ban on intentional indirect discrimination and a ban on unintentional discrimination. However, it is not an explicit

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130. *Id.* at 176-77.

131. *See* Equal Pay Act, 1970, ch. 41, § 1(1).

132. *See* Barrett, *supra* note 3, at 176-77.

133. *Id.* at 177.

134. *Id.*

135. *Id.*

136. *Id.*

137. *See id.*

ban on unintentional discrimination. The discriminatory practice will still be allowed, if an employer has bona fide, verifiable reasons for discriminating against part-time workers, even if the policy has a disproportionate, adverse effect upon women.<sup>138</sup>

In the last approach, any form of indirect discrimination, intentional or unintentional, is prohibited and no economic benefit to the employer would constitute a material difference.<sup>139</sup> Obviously, this approach provides the greatest protection for a female worker in a discrimination suit.<sup>140</sup>

The courts in the United Kingdom and the EEC have used these types of approaches to decide part-time employment discrimination cases. While the reasoning of the third and fourth approaches were exemplified by earlier cases, the later cases fall somewhere between the second and third approach.<sup>141</sup> The next section will chronologically examine not only part-time employment cases but also those full-time employment cases which have affected the decisions in part-time employment cases. The seminal case concerning part-time employment is *Jenkins v. Kingsgate*.<sup>142</sup>

#### A. Pre-Jenkins v. Kingsgate Cases

*Clay Cross Ltd. v. Fletcher*<sup>143</sup> is a full-time employment discrimination case.<sup>144</sup> It sets a precedent for future pay discrimination cases, and especially for part-time employment cases because it renders a liberal reading of "material difference"

138. *See id.* This approach "represents a kind of half-way house, in which *de facto* discrimination is *prima facie* unlawful, but business values are allowed to prevail where the achievement of some economic benefit can be objectively demonstrated." *Id.* A second problem with this requirement is that "[t]he necessity is always that of the employer, the tribunal is not to consider the needs of the individual applicant or female workers as a whole." Townshend-Smith, *supra* note 4, at 94.

139. *See Barrett, supra* note 3, at 177.

140. *See id.* at 178.

141. *See generally id.* at 178-92 (discussing the presentation of all four approaches to the British courts).

142. 1981 E. Comm. Ct. J. Rep. 911, 31 Comm. Mkt. L.R. 24 (Preliminary Ruling), *remanded*, 1981 Indus. Rel. L.R. 388 (Empl. App. Trib.). This case was first brought in an industrial tribunal. 1981 Indus. Rel. L. R. 6 (Empl. App. Trib.) It was appealed to the EAT which brought a proceeding pursuant to article 177 to the European Court of Justice.

143. 1979 Indus. Cas. R. 1 (Empl. App. Trib.).

144. *Id.* at 3.

and indirect discrimination.<sup>145</sup>

Mrs. Fletcher worked at Clay Cross for three years when it hired a man to work for a higher salary at the same job.<sup>146</sup> There was one other woman who received the same salary as Mrs. Fletcher.<sup>147</sup> The company argued that it had to hire the man at a higher salary because there was no other qualified candidate who could be hired at Mrs. Fletcher's salary.<sup>148</sup>

In an unanimous decision, the court held that even though the employer did not intend to discriminate against Mrs. Fletcher, the lack of intention was no excuse.<sup>149</sup> The employer indirectly discriminated against women by paying its male employee a higher wage than it paid its female employees who were doing the same job.<sup>150</sup> The court reasoned that while the Equal Pay Act does not literally prohibit indirect discrimination, the Sex Discrimination Act does. Therefore, because the Equal Pay Act and the Sex Discrimination Act should be read as one body of law, indirect discrimination is prohibited under both statutes.<sup>151</sup>

Furthermore, the court decided that the employer could not forego its obligation not to discriminate by equating "extrinsic forces" with "material difference."<sup>152</sup> The court based its decision on a literal statutory reading of section 1(3) of the Equal Pay Act.<sup>153</sup> The section provides that a comparison has to be made between "her case and his" in order to constitute a material difference.<sup>154</sup> A determination of what constitutes a material difference should lie in the personal equation of the two people, i.e. personal skill, responsibility, duration of employment, etc., and not business or economic factors.<sup>155</sup> The court held that the particular "extrinsic force" in *Clay Cross* was

145. *Id.* at 5; see Barrett, *supra* note 3, at 179. See generally *supra* notes 141-45 and accompanying text (discussing the liberal interpretation under Barret's fourth approach).

146. *Clay Cross*, 1979 Indus. Cas. R. at 3.

147. *Id.*

148. *Id.*

149. *Id.* at 5; see Barrett, *supra* note 3, at 179.

150. *Clay Cross*, 1979 Indus. Cas. R. at 9.

151. *Id.* "The overall object of both Acts is to ensure that women are treated no less favourable than men." *Id.*

152. *Id.* at 5.

153. See *id.*

154. Equal Pay Act, 1970, ch. 41, § 1(3).

155. *Clay Cross*, 1979 Indus. Cas. R. at 5.

a "general bargaining factor common to any applicant."<sup>156</sup> The court also stated that it would be contrary to the intention of article 119 to allow extrinsic forces or market forces to be considered an exception to the law.<sup>157</sup>

According to the three judge panel, only a personal factor can satisfy the requirement for a material difference in pay between a female worker and a male worker.<sup>158</sup> This case provides the most liberal statutory reading of the EEC and United Kingdom equal pay acts.<sup>159</sup> It is evident the judges in later cases sought to distinguish their cases from the holding in *Clay Cross*.<sup>160</sup>

The first part-time employment discrimination case to construe *Clay Cross* was *Handley v. Mono*.<sup>161</sup> It concerned a part-time woman machinist whose hourly wages were less than that of a full-time male machinist.<sup>162</sup> Only women were allowed to work part-time at this company.<sup>163</sup>

The tribunal found that Mrs. Handley did perform work which was "in all respects similar" to what was done by the man with whom she is being compared.<sup>164</sup> However, the tribunal decided, by purporting to follow the *Clay Cross* decision concerning "material difference," that the number of hours each person worked and the economic ramifications of the different hours fit into their respective personal equations.<sup>165</sup> As

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156. *Id.* at 12.

157. *Id.* at 10-11.

158. *Id.* at 5, 9, & 12. The three judge panel decided that the variation between a woman's wages and a man's wages must be due to a personal factor by literally examining the Equal Pay Act, 1970, ch. 41 § 1(3). This section reads "variation is genuinely due to a material difference . . . between her case and his." *Id.* These last four words, "her case and his" were especially important to this court. *Clay Cross*, 1979 Indus. Cas. R. at 9. Since this clause says that the variation must be due to a difference between her case and his, the variation cannot be due to an extrinsic circumstance, like an economic factor. *See id.* It may only be "what appertains to her in her job, such as the qualifications she brought to it, the length of time she has been in it, the skill she has acquired. . . . It is on this kind of basis that her case is to be compared with that of the man's." *Id.* at 9-10.

159. Barrett, *supra* note 3, at 179.

160. *See, e.g.,* Rainey v. Greater Glasgow Health Bd. E. Dist. (Empl. App. Trib. Oct. 26, 1983) (available Mar. 1985, on LEXIS, Enggen library, Cases file); *Handley*, 1978 Indus. Rel. L.R. 534.

161. *Handley*, 1978 Indus. Rel. L.R. 534.

162. *Id.* at 535.

163. *Id.*

164. *Id.*

165. *See id.* at 537. It "is right to put in to the personal equation the fact that

a result, Mrs. Handley contributed less to overall production and to the utilization of the equipment than her male counterpart. Therefore, the company decided that she should be paid less.<sup>166</sup> The tribunal supported this argument by drawing an analogy to the length of service.<sup>167</sup> The court argued that because length of service fit into the personal equations<sup>168</sup> of employees, the number of working hours should also be among the criteria for the personal equation.<sup>169</sup> The decision in *Handley* seems to follow *Clay Cross* as it does not confer as much protection for the female worker.<sup>170</sup> First, it is questionable whether underutilization of equipment would fit into Mrs. Handley's personal equation as the opinion reasoned.<sup>171</sup> Second, it is questionable whether part-time employment causes underutilization of equipment.<sup>172</sup> Whether the latter allegation was correct or not, the court still held it was a valid business-related motive.<sup>173</sup> The tribunal thus approved a subjective standard because the business-related motive does not have to be proven; a nondiscriminatory motive is enough. The *Clay Cross* decision, however, held that all indirect discrimination was prohibited.<sup>174</sup>

### B. Jenkins v. Kingsgate

Mrs. Jenkins was a special machinist who worked approximately thirty hours a week.<sup>175</sup> Prior to 1975, there was no dif-

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Mrs. Handley was working . . . less hours a week . . . and that her machine would . . . have been out of use . . . ." *Id.*

166. *Id.*

167. *Id.* at 536.

168. *Id.*; see, e.g., *E. Coombes Ltd. v. Shields*, 1978 Indus. Rel. L.R. 263.

169. *Handley*, 1981 Indus. Rel. L.R. at 536.

170. See Barrett, *supra* note 3, at 178.

171. *Id.*

172. See Townshend-Smith, *supra* note 4, at 82.

173. See *Handley*, 1978 Indus. Rel. L.R. at 537. Thus, the tribunal followed the second approach in Barrett's system. Compare Barrett, *supra* note 3, at 177 and *supra* text accompanying notes 133-34 with *Jenkins*, 1981 Indus. Rel. L.R. at 393 ("[i]t would not be enough simply to show that the employer had an intention to achieve some other legitimate objective . . . . The employer would have to show that the pay differential actually achieved that different objective.") The employer could not just submit that he had a nondiscriminatory objective. He had to actually prove that that objective was achieved by paying the part-time worker a lower wage, illustrating court imposition of Barrett's third approach. See *supra* text accompanying notes 135-38.

174. *Clay Cross*, 1979 Indus. Cas. R. at 5; see Barrett, *supra* note 3, at 179.

175. *Jenkins*, 1981 E. Comm. Ct. J. Rep. at 914, 31 Comm. Mkt. L.R. at 27.



ference between part-time workers' and full-time workers' wages, but there was a difference in the wages of female workers and male workers.<sup>176</sup> After 1975, the year the Equal Pay Act went into effect, the reverse situation occurred.<sup>177</sup> At the time Mrs. Jenkins applied to the tribunal there were only female part-time workers.<sup>178</sup> By the time of the hearing, a male part-time worker had been employed.<sup>179</sup> He had been asked to stay on after his retirement, when he began to work sixteen hours a week.<sup>180</sup>

The British EAT asked the European Court of Justice how article 119 applied to this case.<sup>181</sup> The Advocate General<sup>182</sup> initially advised that the wording of article 119 did not create a *prima facie* case for Mrs. Jenkins.<sup>183</sup> Subparagraph (b) of the article states that pay for "time rates shall be the same for the same job."<sup>184</sup> According to the Advocate General, the terms "same job" and "equal work" are different.<sup>185</sup> Part-time workers do "equal work" and are thus entitled to the overall protections of article 119, but not to the specific provisions in subparagraph (b).<sup>186</sup>

The Advocate General's opinion specifically limits the ap-

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176. *Id.* at 929, 31 Comm. Mkt. L.R. at 29.

177. *Id.*

178. *Jenkins*, Indus. Rel. L.R. at 390.

179. *Id.* at 391.

180. *Id.*

181. *Jenkins*, 1981 E. Comm. Ct. J. Rep. at 914, 31 Comm. Mkt. L.R. at 27-28. EEC member states may petition the European Court of Justice to give a preliminary ruling on an issue. EEC Treaty, *supra* note 1, art. 177. "Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon." *Id.* This is important when a national court or tribunal is faced with an issue which necessitates an interpretation of EEC law since, if the EEC law confers greater rights, then EEC law will take precedence over a member state's national law. *See supra* note 123.

182. The EEC Treaty empowers the Advocate General to "present publicly, with complete impartiality and independence, reasoned conclusions on cases submitted to the Court of Justice." EEC Treaty, *supra* note 1, art. 166. It is the Advocate General's duty to assist the court. The Advocate General submits findings of the facts and present impartial legal arguments, both of which "form a valuable basis for the decision" of the court. P. KAPTEYN & P. VERLOREN VAN THEMAAT, INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES 88 (1973).

183. *Jenkins*, 1981 E. Comm. Ct. J. Rep. at 934, 31 Comm. Mkt. L.R. at 33.

184. EEC Treaty, *supra* note 1, art. 119(b).

185. *Jenkins*, 1981 E. Comm. Ct. J. Rep. at 934, 31 Comm. Mkt. L.R. at 33.

186. *See id.* at 933, 31 Comm. Mkt. L.R. at 33.

plication of the *Clay Cross* decisions in this case: "I can find no support in the *Clay Cross* case for wide proposition[s] . . . that any commercial benefit that an employer may obtain from differentiating between categories of workers is irrelevant."<sup>187</sup> He further states that *Clay Cross* would be applicable if the "real" reason why the employer paid the part-time workers less was because "part-time workers were generally women whose bargaining position was weaker than that of men, or that differentiation was a hangover from the days when the respondent paid all its female employees at lower rates than its male employees."<sup>188</sup> Thus, the Advocate General states that direct discrimination is prohibited.<sup>189</sup> He also states that indirect discrimination was prohibited if an employee has to work a certain number of hours per week to earn a higher wage, and the requirement has a disproportionate adverse impact upon women employees.<sup>190</sup> In such an instance, an employer would have to show some special justification for his discriminatory practice.<sup>191</sup> However, the Advocate General in *Jenkins* would not prohibit unintentional, indirect discrimination.<sup>192</sup> He seems to find some middle ground between intentional indirect discrimination and unintentional indirect discrimination.

Within the *Jenkins* opinion the court vacillates.<sup>193</sup> Upon remand to the United Kingdom, the concept stated in paragraph 14 was interpreted as the court's holding.<sup>194</sup> Paragraph 14 of the judgment states that the courts of each member state should decide whether a difference in pay between a part-time worker and a full-time worker amounts to discrimination by looking at the "facts of the case, its history and the employer's intention . . . ."<sup>195</sup> If the employer states that he did not intend to discriminate by paying his part-time workers a lower wage, it would not matter if all the part-time workers were women. Thus, the court chooses to prohibit only direct discrimination; if an employer has no intention to discriminate, then it

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187. *Id.* at 935, 31 Comm. Mkt. L.R. at 33-34.

188. *Id.*, 31 Comm. Mkt. L.R. at 34.

189. *See id.*; Barrett, *supra* note 3, at 184.

190. *See Jenkins*, 1981 E. Comm. Ct. J. Rep. at 936, 31 Comm. Mkt. L.R. at 34.

191. *Id.*

192. *See id.* at 935-36, 31 Comm. Mkt. L.R. at 33-34; Barrett, *supra* note 3, at 184.

193. *See* Barrett, *supra* note 3, at 184.

194. *Jenkins*, 1981 Indus. Rel. L.R. at 393.

195. *Jenkins*, 1981 E. Comm. Ct. J. Rep. at 926, 31 Comm. Mkt. L.R. at 40.

does not matter that he indirectly discriminates against women.<sup>196</sup>

However, in paragraph 12 of the judgment the court states that if the reasons for paying part-time workers a lower rate are economic, they must be "objectively justified."<sup>197</sup> Thus, there is an inconsistency in the court's opinion between paragraph 12 and paragraph 14.<sup>198</sup> In paragraph 12, the court prohibits not only direct discrimination, as in paragraph 14, but indirect discrimination as well.<sup>199</sup> Furthermore, it imposes an objective standard upon the employer to prove that he had a good reason for discriminating.<sup>200</sup> Thus, the court rejects the subjective approach espoused in *Handley v. Mono*.<sup>201</sup>

It is still difficult to discern how liberal the court intended its decision to be.<sup>202</sup> The court held that:

a difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by Article 119 of the Treaty, unless it is in reality merely an indirect way of reducing the level of pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women.<sup>203</sup>

It is uncertain whether this language means that all the employer must do is disprove his discriminatory intent, as the court stated in paragraph 14, or that the employer must objectively justify his discriminatory practice as stated in paragraph 12.<sup>204</sup>

The court's discussion of the *Clay Cross*<sup>205</sup> decision is clear. Paragraph 12 of the judgment states that a factor such as an economic benefit to the employer that encourages "full-time work irrespective of the sex of the worker" can justify paying a part-time worker a lower wage.<sup>206</sup> Thus this court, interpret-

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196. See Barrett, *supra* note 3, at 184-85.

197. *Jenkins*, 1981 E. Comm. Ct. J. Rep. at 925, 31 Comm. Mkt. L.R. at 40.

198. See *Jenkins*, 1981 Indus. Rel. L.R. at 393.

199. *Jenkins*, 1981 E. Comm. Ct. J. Rep. at 925-26, 31 Comm. Mkt. L.R. at 40; see *Jenkins*, 1981 Indus. Rel. L.R. at 393; Barrett, *supra* note 3, at 184-85.

200. *Jenkins*, 1981 E. Comm. Ct. J. Rep. at 925, 31 Comm. Mkt. L.R. at 40.

201. See *id.*

202. *Jenkins*, 1981 Indus. Rel. L.R. at 393; Barrett, *supra* note 3, at 185.

203. *Jenkins*, 1981 E. Comm. Ct. J. Rep. at 926, 31 Comm. Mkt. L.R. at 40-41.

204. Barrett, *supra* note 3, at 185.

205. 1979 Indus. Cas. R. 1 (Empl. App. Trib.).

206. *Jenkins*, 1981 E. Comm. Ct. J. Rep. at 925, 31 Comm. Mkt. L.R. at 40.

ing article 119, effectively dismisses the *Clay Cross* decision that held that extrinsic forces, such as economic considerations, could not justify paying a lower wage to a part-time worker.<sup>207</sup>

*Jenkins* was remanded with the answers provided by the European Court of Justice to the EAT.<sup>208</sup> These answers were ambiguous. The EAT was left "in considerable doubt as to the effect of Article 119 in relation to unintentional indirect discrimination."<sup>209</sup> The EAT believed that the formal ruling of the European Court of Justice was that only direct discrimination was prohibited. All the employer had to do was disprove any intent to discriminate.<sup>210</sup>

However, the EAT believed that the Equal Pay Act and the Sex Discrimination Act went further than the European Court of Justice's interpretation of article 119.<sup>211</sup> Therefore, it ruled that the employer had to actually prove that the nondiscriminatory objective that the employer sought by paying the part-time worker a lower hourly wage was actually achieved.<sup>212</sup>

The EAT's decision in *Jenkins* does not go as far as *Clay Cross* in its assessment of the interpretation of section 3 of the Equal Pay Act. However, the objective standard posed by the EAT in *Jenkins* would probably be difficult to meet.<sup>213</sup> Although arguments are made that part-time workers cost more for the employer, there have been few statistical analyses done on the costs of hiring part-time workers.<sup>214</sup> *Jenkins* seems to signal that fewer employers would prevail in future pay disputes because the employers would have to prove that they did achieve their economic objectives.<sup>215</sup>

207. *Id.*

208. 1981 Indus. Rel. L.R. 388.

209. *Id.* at 393.

210. *Id.*

211. *Id.* at 394.

212. *Id.*

213. See Barrett, *supra* note 3, at 177, 188-89.

214. Robinson, *supra* note 2, at 306. "Two-thirds of firms considered that the costs [for a firm to hire part-time workers] were less than 5% of their total wage bill, while for a handful of firms, the estimate was in excess of 20%." Townshend-Smith, *supra* note 4, at 82.

215. See Barrett, *supra* note 3, at 177. There is a much heavier burden of proof on the employer to actually prove that he achieves a goal by paying his part-time workers less. *Id.*

C. *Post-Jenkins Decisions*

There are three post-*Jenkins* cases that have had an impact upon part-time worker cases. Two of them are full-time employment cases. One is a part-time employment case.

In *Albion Shipping Agency Ltd. v. Arnold*,<sup>216</sup> the complainant was hired to do the same type work as her predecessor, but the volume of work was less than that of her predecessor.<sup>217</sup> Her salary was less than his had been.<sup>218</sup> The EAT held that because the woman was comparing herself to a man who no longer worked for the same company, article 119 governed the case and not the equal pay laws of the United Kingdom, which cover contemporaneous employment.<sup>219</sup>

The issue facing the EAT was whether economic circumstances are sufficient to constitute a "material difference."<sup>220</sup> The tribunal held that if the employment had been contemporaneous, then the Equal Pay Act would govern the case and, under *Clay Cross*, those economic considerations would not constitute a "material difference."<sup>221</sup> However, because the employment was not contemporaneous, *Jenkins*, not the Equal Pay Act would apply.<sup>222</sup> The EAT made a point of emphasizing the difference between the *Jenkins* and the *Clay Cross* decisions.<sup>223</sup> The court's interpretation of material difference in *Clay Cross* was attempting to produce harmony between the laws of the EEC and the United Kingdom.<sup>224</sup> As the EAT pointed out, however, the *Jenkins* decision by the European Court of Justice produced "pronounced dissonance" between the equal pay laws of the United Kingdom and the EEC.<sup>225</sup> It therefore "express[ed] the hope that Parliament" would rectify the situation.<sup>226</sup> The best way to do so, the tribunal believed, would be to amend the Equal Pay Act to conform with the *Jen-*

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216. 1982 Indus. Cas. R. 23 (Empl. App. Trib.).

217. *Id.* at 24.

218. *Id.*

219. *Id.* at 25; see *supra* note 124.

220. *Albion Shipping*, 1982 Indus. Cas. R. at 26.

221. *Id.* at 28.

222. See *id.*

223. *Id.*

224. *Id.* at 27.

225. *Id.* at 28.

226. *Id.* at 30.

*kings* decision.<sup>227</sup>

The EAT in the next case, *Clarke v. Eley*, disagreed.<sup>228</sup> In this case all the part-time workers at the firm were women.<sup>229</sup> The firm had to fire workers because of redundancy, and its policy was to fire part-time workers before firing full-time workers.<sup>230</sup> The EAT found that the firm's policy was unlawfully discriminatory.<sup>231</sup> Although the court perceived a "pronounced dissonance," this panel stated that if the issue was presented to Parliament that the panel would, unlike the tribunal in *Albion*, "express some apprehension as to the direction in which the decisions of the courts are going on this issue."<sup>232</sup> Parliament should clearly identify the priority it gave indirect discrimination.<sup>233</sup> In this tribunal's opinion, Parliament should extend the rights of women workers under the Equal Pay Act.<sup>234</sup> Once the wording of the Equal Pay Act was less ambiguous, the decisions of the industrial tribunals would be in greater harmony with one another. The discrepancy between *Clay Cross* and *Jenkins* decisions has left industrial tribunals and EAT's appealing for some sort of guidance on how to decide subsequent cases concerning indirect discrimination and material difference.<sup>235</sup>

The EAT, in the 1983 case, *Rainey v. Greater Glasgow Health Board Eastern District*<sup>236</sup> stated that because the court of appeal was a higher court, it lacked authority to overturn the decision of *Clay Cross*.<sup>237</sup> Yet, although the EAT in this case accepted

227. *See id.* at 26-27.

228. 1982 Indus. Rel. L.R. 482, 487 (Empl. App. Trib.). In this case the tribunal held that it was grossly discriminatory to fire part-time workers before firing full-time workers when part-time workers were 100% women. *Id.* at 487.

229. *Id.* at 484.

230. *Id.*

231. *Id.* at 487.

232. *Id.*

233. *Id.*

234. *See generally id.* at 485 ("[t]he purpose of the legislature in introducing the concept of indirect discrimination . . . was to seek to eliminate those practices which had a disproportionate impact on women . . . ."); *id.* at 487 ("[i]n our view, the law should lay down the degree of importance to be attached to eliminating indirect discrimination . . . so that Industrial Tribunals" will know how to decide cases).

235. *Id.* at 487; *see also Albion Shipping*, 1982 Indus. Cas. R. at 30 (expressing the hope that Parliament would amend the Equal Pay Act).

236. (Empl. App. Trib. Oct. 26, 1983) (available Mar. 1985, on LEXIS, Enggen library, Cases file).

237. *Id.*

the *Clay Cross* decision, it expressed its belief that the decision placed an undue burden upon the employer, because the employer could not use economic considerations to justify a lower hourly wage to part-time workers.<sup>238</sup> The tribunal believed that section 3 was not meant to place such a heavy burden of proof upon the employer.<sup>239</sup>

#### IV. ANALYSIS

The language of article 119 appears to end discrimination against part-time female workers by providing that part-time workers should receive hourly wages equal to full-time workers. However, the European Court of Justice has not interpreted the statute in this manner.<sup>240</sup> Thus, it has not implemented the drafter's intentions. The EEC was formed to harmonize the laws of the member states in order to form a common market.<sup>241</sup> Article 119 is not only an instrument to achieve the social policy aims of the EEC Treaty, but an instrument to further the economic aims of the EEC.<sup>242</sup> It will cause a distortion in the markets of the various member states if the United Kingdom has a cheaper source of labor than the other member states.<sup>243</sup>

The European Court of Justice's motive in being restrictive in the *Jenkins* decision was to "put the onus upon national courts and legislatures to take action."<sup>244</sup> If that was the court's objective, however, its decision in *Jenkins*, undermining *Clay Cross*, does not coincide with their stated motive. *Clay Cross* stood for the proposition that extrinsic forces such as economic considerations or business circumstances could not

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238. *Id.*

239. *Id.*

240. See *supra* notes 182-207 and accompanying text; see also Barrett, *supra* note 3, at 189-90 (discussing the aims of the current policy of the EEC).

241. EEC Treaty, *supra* note 1, art. 2; see also *supra* note 16 and accompanying text (discussing the broad purpose of the EEC).

242. See generally Barrett, *supra* note 3, at 189 (the "economic aim of article 119" would not be fulfilled if part-time workers were not paid the same hourly wage as full-time workers).

243. 3 H. SMIT & P. HERZOG, *supra* note 5, at 3-762; E. STEIN, P. HAY & M. WAELBROECK, *supra* note 22, at 1089.

244. Szyscak, *Differences in Pay for Part-time Work*, 44 MOD. L. REV. 672, 681 (1981).

constitute a material difference.<sup>245</sup> Therefore, by undermining *Clay Cross* it becomes questionable whether the European Court of Justice is committed to enforcing article 119.<sup>246</sup> The European Court of Justice is given great power to determine the interpretation and implementation of the laws of the EEC.<sup>247</sup> Unfortunately, the manner in which the court has interpreted article 119 to apply to part-time workers is not how the legislative and administrative bodies of the EEC intend it to be interpreted. Moreover, it has caused a "pronounced dissonance" in the decisions following *Jenkins*.<sup>248</sup>

However, this discrepancy in the decisions could be rectified by the Parliament of the United Kingdom.<sup>249</sup> The tribunals in the United Kingdom have requested that Parliament make some sort of decision concerning the Equal Pay Act and the Sex Discrimination Act.<sup>250</sup> Parliament did take some action in 1983. As a result of a suit brought by the Commission against the United Kingdom,<sup>251</sup> the United Kingdom amended section 1(3)—the material difference clause. The clause now provides that if a woman is doing "like work," which all the cases have held part-time workers to be doing, an employer could only defend a variation in pay if it is due to a material difference other than sex.<sup>252</sup> However, if a woman does work of equal value, then the variation may be due to a material difference.<sup>253</sup>

By making this distinction, Parliament has not clarified what constitutes a material difference. It has done nothing to

245. *Clay Cross*, 1979 Indus. Cas. R. at 5; see *supra* notes 152-60 and accompanying text.

246. Szyscak, *supra* note 244, at 681. See generally Barrett, *supra* note 3, at 189 (comparing the European Court of Justice's zealous approach to national discrimination versus its "half-hearted" approach to sex discrimination).

247. Freestone, *The European Court of Justice* in INSTITUTIONS AND POLICIES OF THE EUROPEAN COMMUNITY 43 (J. Lodge ed. 1983). The European Court of Justice is not answerable to any other executive or administrative body. *Id.* The Council, although it makes laws, cannot overturn an European Court of Justice decision by a legislative act. *Id.* Yet, the Court of Justice may overturn an act of the Council. *Id.*

248. See *supra* notes 216-39 and accompanying text.

249. *Clarke*, 1982 Indus. Rel. L.R. at 487.

250. See *supra* notes 226, 233, 239 and accompanying text.

251. *Commission v. United Kingdom*, 1982 E. Comm. Ct. J. Rep. 2601, [1981-1983 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8853, at 8051; see *supra* notes 12-14 and accompanying text.

252. Equal Pay Act 1970, ch. 41 amended by STAT. INST. 1983/1794.

253. STAT. INST. 1983/1794, reg. 2(2).



ensure a consistent application of the equal pay laws of the United Kingdom and the EEC to part-time workers. It is still necessary for Parliament to amend the equal pay laws to provide a definite method for the tribunals in the United Kingdom to use in deciding part-time equal pay cases. Because of the ambiguities the tribunals presently face, it is especially important for Parliament to clearly define what constitutes a "material difference." Unfortunately, Parliament did nothing to clarify this problem when it amended the Equal Pay Act.

### CONCLUSION

It is necessary for Parliament, the EEC, and the European Court of Justice to emphasize the intention to eliminate wage discrimination between female part-time workers and male full-time workers. Part-time work is a vital and growing part of the economy.<sup>254</sup> The legislative and judicial bodies of the EEC and the United Kingdom should not stymie the expansion of part-time work by denying part-time workers the same rights as full-time workers. The EEC and the European Court of Justice have a special responsibility. They were formed to protect free competition between the member states.<sup>255</sup> It will cause economic distortion between the member states if part-time workers are not given the same rights as full-time workers. The EEC and European Court of Justice must adhere to their mandate in the EEC Treaty and grant part-time workers equal pay rights.

*Sabrina Allan*

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254. See Opinion of the Economic and Social Committee, 54 O.J. EUR. COMM. (No. C 269) 57, 60 (1978); Robinson, *supra* note 2, at 299-301.

255. See generally EEC Treaty, *supra* note 1, art. 2 (the EEC was formed to "establish a common market"); *id.* art. 164 ("[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed").