

**GENDER DISCRIMINATION (PARTICULARLY) IN WAGE
MATTERS: An analysis of the decision on the merits from the
European Committee of Social Rights, University Women of Europe
[UWE] v. Portugal, Complaint no. 136/2016**

***DISCRIMINACIÓN (PRINCIPALMENTE) SALARIAL POR RAZÓN
DE GÉNERO: Análisis de la decisión de fondo del Comité Europeo de
Derechos Sociales, University Women of Europe [UWE] c. Portugal,
Reclamación núm. 136/2016***

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ABSTRACT

The present article addresses the subject of gender pay gap, providing an in-depth analysis of the decision on the merits of the European Committee of Social Rights regarding complaint no. 136/2016, against Portugal. To this end, it renders an overview of the most relevant international and European provisions on this matter

and an explanation of the Portuguese legal regime. The sociological and legal reasons for gender disparity are also discussed, as well as the difficulties associated with the implementation of the principle of equal pay. Finally, it analyses the Law of equal pay, recently introduced in the Portuguese legal order.

KEYWORDS: Gender pay gap; Revised European Social Charter; Complaint no. 136/2016; principle of equal pay, Portuguese legislation.

RESUMEN

El presente artículo aborda el tema de la brecha salarial por razón de género, analizando en profundidad la decisión de fondo del Comité Europeo de Derechos Sociales en relación con la reclamación núm. 136/2016, contra Portugal. Para ello, se ofrece una visión general de las disposiciones internacionales y europeas más relevantes en esta materia y una explicación del régimen jurídico específico portugués. También se analizan las razones sociológicas y jurídicas de la desigualdad de género, así como las dificultades asociadas a la aplicación del principio de igualdad de remuneración entre mujeres y hombres (o principio de igualdad salarial). Por último, se analiza la Ley de igualdad de retribución, recientemente adoptada en el ordenamiento jurídico portugués.

PALABRAS CLAVE: Brecha salarial de género; Carta Social Europea revisada; reclamación núm. 136/2016; principio de igualdad de remuneración entre mujeres y hombres; legislación portuguesa

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I. Preliminary considerations.

1. The (Revised) European Social Charter and the European Committee of Social Rights

When dealing with issues concerning essential and imperative principles, such as equality and the prohibition of discrimination, there is an increasing call for legal orders to go beyond the frontiers of national law. In fact, the interpreter cannot ignore the several supranational legal layers – in the Portuguese case, both the international and, due to geographical reasons, the European legal sources. And, aside from the significant role played by the European Union [EU], the rules emanated from the Council of Europe, of which Portugal is also a member state, must also be considered.

In this context, and despite the timidity which still surrounds it in the Portuguese legal order¹, the (Revised) European Social Charter [RESC] is particularly pertinent concerning labour relations². Together with the European Convention on Human Rights, these documents constitute the indispensable conventions of the Council of Europe. And while the latter deals, mostly, with civil and political rights – some with a clear bearing on labour relations –, the RESC enshrines a plethora of social rights³.

¹ CATARINA SANTOS BOTELHO, “A proteção multinível dos direitos sociais: verticalidade gótica ou horizontalidade renascentista? – Do não impacto da Carta Social Europeia (Revista) na jurisprudência constitucional portuguesa”, *Lex Social – Revista Jurídica de los Derechos Sociales*, vol VII, 2017, pages 88-123. See, also, CARMELA SALAZAR, “La crisi ha... ‘sparigliato le carte’? – Note sulla tutela multilivello dei diritti sociali nello ‘spazio giuridico europeo’”, in *La Carta Sociale Europea tra universalità dei diritti ed effettività delle tutele* (dir. Claudio Panzera/Alessio Rauti/Carmela Salazar/Antonino Spadaro), Editoriale Scientifica, Napoli, 2016, pages 53-82 [58 and ff.].

² The original version of the ESC was approved in 1961. In 1996, it was extensively revised, with the approval of the RESC. Portugal has ratified both diplomas. The first was approved for ratification through the Resolution of the Assembly of the Republic 21/91, of 6 August. While the second was approved for ratification by the Resolution of the Assembly of the Republic 64-A/2001, of 17 October, and was ratified by the Decree of the President of the Republic 54-A/2001, of 17 October.

³ Among others, see REGIS BRILLAT, “La charte sociale et le système de protection des droits sociaux dans les sources européennes”, in *European Social Charter and the Challenges of the XXI Century/La Charte Sociale Européenne et les défis du XXI^e siècle* (dir. Marilisa D’Amico/Giovanni Guiglia), Edizione Scientifiche Italiane, Napoli, 2014, pages 1-21.

The RESC's enforcement is monitored through two procedures, both under the responsibility of the European Committee on Social Rights [ECSR]: (i) a reporting system, under which States Parties submit periodical reports to this body, who will examine them and adopt conclusions (also periodically), concerning the compliance (or not) of national rules and practices with the RESC; (ii) a collective complaints procedure⁴, according to which national and international entities – the European social partners, such as BusinessEurope or the European Trade Union Confederation [ETUC], some international non-governmental organizations holding participatory status with the Council of Europe, such as the UWE, and employers' organizations and trade unions of the concerned – may lodge a complaint against a State, invoking the non-compliance of its law or practice with one of the provisions of the Charter⁵. Irrespective of the (quasi-judicial?) nature of its intervention⁶, the ECSR plays a very important role concerning the interpretation of the Charter's provisions, which often have highly imprecise contents.

The applicability of the RESC, complemented by the conclusions and decisions of the ECSR, on national legal orders, still raises doubts among the specialized literature. The debate is greatly influenced by the problematic nature of that body and of its decisions – since, if one considers that it lacks a judicial character, then its decisions will not be mandatory – and also by the notion of social rights, whose justiciability is, sometimes, questioned.

Even so, a remarkable number of voices has been advocating a continuum between civil and political rights and social rights, stressing that the latter embody obligations to take measures addressed to the States – mostly, in what concerns the RESC, the States Parties – who have undertaken the compromise to respect the commitments therein. Since the judiciary is also bound by this imperative, the interpretation of national rules must, in principle, be done in accordance with the RESC. And there are even some who argue (not only vis-à-vis the RESC) that the so-called conventionality control may lead to the

⁴ Introduced by the Additional protocol providing for a system of collective complaints, approved in 1995. Its ratification was approved by the Resolution of the Assembly of the Republic 69/97, of 6 December, and the diploma was ratified by the Decree of the President of the Republic 72/97, of 6 December.

⁵ For more precise information on the control procedure, see, in Portugal, RAQUEL CARVALHO, “Os Mecanismos de Monitorização da CSEER realizados pelo Comité Europeu de Direitos Sociais: o Sistema de Relatórios e o Sistema de Reclamações Coletivas”, *Lex Social – Revista Jurídica de los Derechos Sociales*, vol VII, 2017, pages 42-61, and also CATARINA SANTOS BOTELHO, “A proteção multinível...”, *cit.*, pages 97 and ff.

⁶ JEAN-FRANÇOIS AKANDJI-KOMBE, “Réflexions sur l'efficacité de la Charte sociale européenne à propos de la décision du Comité européen des droits sociaux du 23 juin 2010”, *Revue de Droit du Travail*, no. 4, 2011, pages 233-240; PETROS STANGOS, “Les rapports entre la Charte Sociale Européenne – Le rôle singulier du Comité Européen des Droits Sociaux et de sa jurisprudence”, *Cahiers de Droit Européen*, no. 49, 2013, pages 319-393 [327]; MARIA CARMEN SALCEDO BELTRAN, “La aplicabilidad directa de la Carta Social Europea por los órganos judiciales”, *Trabajo y Derecho*, no. 13, 2016, pages 27-52, and also GIOVANNI GUIGLIA, “The importance of the European Social Charter in the Italian legal system: in pursuit of a stronger protection of social rights in a normative and internationally integrated system”, in *European Social Charter and the Challenges of the XXI Century/La Charte Sociale Européenne et les défis du XXIe siècle* (dir. Marilisa D'Amico/Giovanni Guiglia), Edizione Scientifiche Italiane, Napoli, 2014, pages 51-96.

inapplicability of internal rules that breach the Charter – something has, more than once, happened with the common courts of neighbouring European countries, namely the Spanish⁷.

2. (Pay) (In)Equality between men and women – a brief description

2.1. The legal framework: a myriad of rules

Men and women who perform the same work or work of equal value shall earn the same – this is, in its simplest form, the principle of equal remuneration for men and women.

Despite the fairness that lies therein and – dare we say – its obviousness, this principle encloses a goal that, at universal scale, is still far from being achieved, due to several reasons (such as historical, structural, or circumstantial)⁸. As remarked in the UWE complaint⁹, here under appreciation: why should something so undeniable require legal enshrinement? And, yet, this principle is still being worded and perceived as a world scale goal. For instance, it is one of the objectives present in the 2030 Agenda of the United Nations [UN]¹⁰.

This imperative is present in several legal sources. Such as the ones referring to the subject of equal pay – for instance, Convention No. 100 of the International Labour Organisation [ILO] – or to equality in labour conditions – namely Convention No. 111, of ILO, Directive 2006/54/EC, of the European Parliament and of the Council – which,

⁷ On this issue, see BRUNO MESTRE, “*Varius, multiplex, multiformes* – revisitar a questão da aplicabilidade directa da Carta Social Europeia: um pequeno contributo numa perspectiva jurisprudencial e do Direito da União Europeia”, *Lex Social – Revista Jurídica de los Derechos Sociales*, no. 7, 2016, pages 62-87 [74 and ff.], giving an account of several judgements from European courts that upheld, with that consequence, the direct applicability of the RESC, and, with much interest, on the Spanish situation, MARIA CARMEN SALCEDO BELTRAN, “La aplicabilidad directa...”, *cit.* See, also, DANIEL PÉREZ PRADO, “La problemática aplicación de la Carta Social Europea”, *Prontuário de Direito do Trabalho*, 2017-I, pages 293-317.

Regarding the Spanish legal experience, one of the most emblematic cases was decided by the *Juzgado de lo Social* no. 2 of Barcelona (process no. 426/2013). Here, an employment contract was terminated, allegedly, during its trial period. Both parties had agreed on a one-year trial period, in accordance with Article 4 of *Real Decreto-Ley* no. 3/12 (which allowed such duration with the intent of stimulating more hiring and, therefore, job creation). The court conclude that this rule encroached on Article 4, § 4, RESC (*With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake to recognise the right of all workers to a reasonable period of notice for termination of employment*), which is hierarchically superior to the aforementioned *Real Decreto-Ley*. Therefore, since the ECSR had already stated (in Complaint no. 65/2011, concerning Greece) that a trial period of such duration was not in conformity with the Charter, the Spanish Court put aside the national rule and considered the contract’s termination to be illegal.

⁸ For all, see SANDRA FREDMAN, *Discrimination Law*, Oxford University Press, Oxford, 2011, 2.nd edition, pages 38 and ff.

⁹ Available (as well all the other documents pertaining to this process) at https://www.coe.int/en/web/european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-136-2016-university-women-of-europe-uwe-v-portugal?inheritRedirect=false&redirect=https%3A%2F%2Fwww.coe.int%2Fweb%2F%2F%2Fprocessed-complaints%3Fp_p_id%3D101_INSTANCE_5GEFkJmH2bYG%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-4%26p_p_col_count%3D1.

¹⁰ *Transforming our world: the 2030 agenda for sustainable development*. The document is available at [120815_outcome-document-of-Summit-for-adoption-of-the-post-2015-development-agenda.pdf](https://www.un.org/sustainabledevelopment/wp-content/uploads/2015/09/120815_outcome-document-of-Summit-for-adoption-of-the-post-2015-development-agenda.pdf) (un.org).

despite referring to equality and non-discrimination in all the dimensions connected to employment and occupation, still expressly proclaims the principle of equal pay (Article 4) –, or the Charter of Fundamental Rights of the European Union – which, after broadly enshrining the principle of non-discrimination based on any ground (Article 21), alludes, in particular, to equality between men and women in all areas, including employment, work, and pay (Article 23)¹¹. But it also takes place amid other sources that mention this imperative in more generic terms, sometimes referring to sex as a ground of discrimination in an isolated manner – that is the case of the Convention on the Elimination of All Forms of Discrimination against Women, of the UN, which symptomatically enunciates the principle of non-discrimination in an asymmetrical fashion (*against women*) and that, aside from addressing several domains of social interaction, also reports, in particular, to employment conditions and, namely, retribution (Article 11, d)) – or as one ground among others – such as the European Convention on Human Rights [ECHR], the International Covenant on Civil and Political Rights [ICCPR], or the International Covenant on Economic, Social and Cultural Rights [ICESCR], diplomas that, nevertheless, dedicate a specific rule (Article 3, in all of them) to the issue of equality among men and women – or, finally, that merely state the principle of equality among all individuals – for example, the Universal Declaration of Human Rights.

The RESC enshrines the principle of equal pay among men and women in Article 4, § 3, while stating, in Article 20, that the States Parties undertake to recognise the “effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex”, which, naturally, also includes remuneration (although this norm has a wider range)¹².

¹¹ In truth, this is an ancient principle of EU primary law. It was already enshrined in Article 19 of the Treaty of Rome of 1957. Although, at first, its scope was merely economic, its social character was later recognized. To this effect, the Defrenne II decision (of 8 April 1976, case C-43/75) is particularly important. Moreover, the social features of the EU have been accentuating since the Treaty of Amsterdam. On this subject, see, for example, NURIA DE NIEVES NETO, “Igualdad y no discriminación em matéria salarial”, in *Condiciones de Empleo y Relaciones de Trabajo en el Derecho de la Unión Europea – un estudio de jurisprudência del Tribunal de Justicia* (dir. Joaquín García Murcia), Aranzadi, 2017, pages 479-526 [479 and ff.].

This is still a primordial concern among the European institutions, who promote several initiatives and have been launching numerous strategies towards the goal of equal pay. Without meaning to exhaust them, we can name a few, such as the European Pact for Gender Equality (2011-2020), approved on 7 March 2011; the European Parliament Resolution of 9 June 2015 on the EU Strategy for equality between women and men post 2015; the European Commission Strategic engagement for gender equality 2016-2019, and, more recently, the European Commission Gender Equality Strategy 2020-2025.

¹² CSILLA KOLLONAY-LEHOKZKY, “Article 20: The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex”, in *The European Social Charter and the Employment Relation* (dir. Niklas Bruun/Klaus Lörcher/Isabelle Schömann/Stefan Clauwaert, Hart Publishing, Oxford, 2017, pages 358-380 [367].

Gender equality has been a constant concern for the Council of Europe, as shown by the several recommendations on this subject emitted by the Council of Ministers (Recommendation R(85)2; Recommendation R(98)14; Recommendation Rec(2007)17). See *Gender Equality and Womens’ Rights – Council of Europe Standards* ([168058feef \(coe.int\)](https://www.coe.int/t/0900406680/0900406680_en.htm))

In turn, the Portuguese legal order also emphatically asserts this equality aspiration. Aside from the Portuguese Constitution [PC], namely the inescapable Articles 9, d), and e), and 13, and, specifically concerning remuneration, Article 59, no. 1, a) – which expressly (and in the form of a right)¹³ enshrines the principle of “equal pay for equal work”, only allowing differentiations based on the “quantity, nature, and quality” of the work –, the Portuguese Labour Code [PLC] also dedicates a significant and consistent number of norms to this imperative, which sometimes overlap (perhaps as a symptom of the axiological robustness of this principle and, simultaneously, of the perennial need to guarantee its effectiveness).

The PLC not only reproduces Article 59, no. 1, a), of the PC (in Article 270, located in the segment of norms devoted to the issue of remuneration), but it also contains a whole normative area dedicated to the principles of equality and non-discrimination (Articles 23 and ff.), which, reflecting supranational rules (such as Directive 2006/54), enshrines fundamental provisions of Anti-discrimination Law. From the acknowledgment of several kinds of discriminatory actions (direct and indirect discrimination, retaliation, orders to discrimination, harassment), to the recognition of legitimate differentiations, without forgetting the adjustment of the burden of proof in favour of the person that alleges discrimination.

Even though this segment encompasses sex, among the grounds of discrimination, and its material scope of prohibition covers the access to employment, training, and professional promotion, as well as employment conditions (and, therefore, remuneration), there is still a set of legal provisions specifically aimed at equality and non-discrimination between men and women (Articles 31 and ff.), in which there is a special concern with equal pay (even though their reach goes beyond this particular domain). In this context, Act no. 60/2018, 21 August, known as the Law of equal pay, is also quite pertinent. As we will see below, this diploma took into account some of the concerns voiced by the ECSR and reiterated in its decision regarding complaint no. 136/2016.

However, we believe SUSANA RODRÍGUEZ ESCANCIANO¹⁴ to be correct, when the Author states that, given the need for a fundamental overhaul of the socio-legal position of women, a mere legal intervention stating that women and men are equal in rights and duties will have a very limited effect... This issue – the little efficacy of the law and the need to implement effective measures towards its intended purpose – is, as we will see, the key idea underlying the aforementioned complaint.

¹³ JORGE LEITE, “O princípio da igualdade salarial entre homens e mulheres no direito português”, in *Compilação de Elementos para uma consulta especializada sobre igualdade de remuneração entre mulheres e homens*, Estudos CITE (no. 3), Direcção Geral Estudos, Estatística e Planeamento, Lisboa, 2004, pages 62-76 [67].

¹⁴ “Condiciones de trabajo y discriminación salarial por razón de sexo”, in *Derecho Social de la Unión Europea – Aplicación por el Tribunal de Justicia* (dir. María Emilia Casas Baamonde/ Román Gil Alburquerque), Francis Lefebvre, Madrid, 2018, pages 255-291 [257]. In the same sense, SANDRA FREDMAN, *op. cit.*, page 45.

2.2. The disadvantageous status of women – ancestral roots and an uncertain future

The complaint lodged by the UWE is quite expressive on the detrimental position of women by comparison with men, in several domains. Eloquently, it mentions Europa, the young woman whose parents wished for a boy, to whom toys were given that reflected the feminine submission, first to her father, and later to her *charming prince*, and the devotion to domestic life. It tells us how Europa was discouraged from pursuing studies in areas that would lead to a profession that would require her to make decisions or take upon responsibilities. It also tells us how Europa lost her job, after taking her parental leave (which, by chance, her country granted her), and that, despite experiencing domestic violence, her husband was never convicted...

One must allow, as stressed by the Portuguese State, in response to the complaint, that this scenario does not accurately portray the national reality. However, one also cannot ignore, when tackling the inequality of pay between men and women, that this is just one of sides of a problem (produced by strongly entrenched conceptions and decomposed in many iniquities) that has been extraordinarily difficult to fight, even if there have been serious efforts to that effect. SANDRA FREDMAN¹⁵ talks of a “painful” battle, strangely recent¹⁶, at an “excruciatingly slow pace” and still underway...

In effect, the roman model of feminine virtue¹⁷, of the modest woman, devoted to domestic life and to her children, still persists, more or less discreetly, and it is a known fact that, in most cases, women have the leading role in domestic work tasks. However, women today also pursue professional activities. Again, in the words of FREDMAN¹⁸, “women are now homeworkers and breadwinners, constantly traversing the boundary between unpaid and paid work”. Furthermore, women are the ones usually working under flexible models of working time organization, which, on the one hand, facilitates the conciliation between their professional and family lives, but, on the other hand, deepens the pay gap in relation to male employees¹⁹.

Another reason that is frequently given as a cause for this unevenness concerns the professional segregation between men and women. The latter are frequently concentrated

¹⁵ *Op. cit.*, p. 41.

¹⁶ ALFREDO MONTOYA MELGAR/YOLANDA SÁNCHEZ-URÁN AZAÑA, “La igualdad como valor, como principio y como derecho fundamental”, in *Igualdad de mujeres y hombres – comentario a la Ley Orgánica 3/2007, de 22 de marzo, para la Igualdad Efectiva de Mujeres y Hombres* (dir. Alfredo Montoya Melgar/Yolanda Sánchez-Urán Azaña), Aranzadi, Cizur Menor, 2007, pages 29-40 [31].

¹⁷ ANA ISABEL CLEMENTE FERNÁNDEZ, “La mujer ‘ideal’ en la antigua Roma – una cuestión de género”, in *La igualdad de género desde la perspectiva social, jurídica y económica* (dir. Teresa Martín López/José Manuel Velasco Retamosa), Civitas, Madrid, 2014, pages 52-73.

¹⁸ SANDRA FREDMAN, *op. cit.*, page 45.

¹⁹ *Ibidem*. See, also, ROSEMARY CROMPTON/SUZAN LEWIS/CLARE LYONETTE, “Introduction: the unravelling of the ‘male breadwinner’ model – and some of its consequences”, in *Women, men, work and family in Europe* (dir. Rosemary Crompton/Suzan Lewis/Clare Lyonette), Palgrave MacMillan, New York, 2007, pages 1-16.

in less paying professions, by comparison with men – and with a lower union density²⁰ – even though, objectively, those jobs require the same skills, degree of effort and responsibility, and social utility²¹.

According to some literature²², there is a certain profession ghettoization of women, both at horizontal – they tend to concentrate in different areas of activity from men, such as the administrative sector and the provision of services, while the latter mostly perform operational functions in the industrial sector²³ – and vertical levels – female employees are under-represented in jobs with more prestige and better salaries. This problem originates in the so-called *gender essentialism*, a sort of statistical discrimination²⁴, consisting in the biased association of some characteristics to women and of others to men: women would be more skilled in professions related to caring for others or, in general, with greater social interaction, while men would be more suited to tasks involving physical exertion, as well as decision-making responsibility. This pre-comprehension seems to impact the choices of young people when deciding their field of study and, later on, their professional field. And it also follows them on their active life, with repercussions to their self-evaluations regarding their skills. In effect, aside from the most immediate and easily identifiable discrimination – that is, women receiving lower pay, by comparison with men, when performing the same work or work of equal value – , there is also a boomerang phenomenon, more complex and harder to overcome: women’s productivity is, statistically and globally lower. And this occurs because since women realize that the financial return will not be as rewarding (as it would be for men), they decline to invest both time and financial resources in their own professional training²⁵. For this reason, regarding the pay gap between men and women, there is both an unexplained gap and an *explained gap*: the former pertains to the gender differentiation when, objectively, the work is the same or possesses equal value; while the latter concerns the differences stemming from skills disparity²⁶.

²⁰ KENNETH A. DUBIN, “¿Contradicciones traidoras? Las implicaciones de la LOIMH para las estrategias empresariales”, in *La Lei de Igualdad: consecuencias prácticas en las relaciones laborales y en la empresa* (dir. Mercader Uguina/Jesús Rafael), Lex Nova, Madrid, 2007, pages 45-69 [47].

²¹ SANDRA FREDMAN, *loc. ult. cit.*; SUSANA RODRÍGUEZ ESCANCIANO, *op. cit.*, pages 266 and ff.

²² Regarding this matter, with very interesting considerations, see KENNETH A. DUBIN, “¿Contradicciones...”, *cit.*, pages 47 and ff. See, also, RICHENDA GAMBLES/SUZAN LEWIS/RHONA RAPOPORT, “Evolutions and approaches to equitable divisions of paid work and care in three European countries: a multilevel challenge”, in *Women, men, work and family in Europe* (dir. Rosemary Crompton/Suzan Lewis/Clare Lyonette), Palgrave MacMillan, New York, 2007, pages 17-34.

²³ In *Gender-neutral job evaluation for equal pay: a step-by-step guide*, 2008 (available at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_122372.pdf), the ILO stresses the need to identify the jobs with a predominant feminine presence, since, they usually entail an area of salary discrimination. And, in order to have an element of comparison, it is also important to identify the activities mostly occupied by men (page 19).

²⁴ Concerning this issue, among Portuguese literature, see BRUNO MESTRE, *Direito Antidiscriminação – uma perspectiva europeia e comparada*, Vida Económica, Porto, 2020, pages 22 and ff.

²⁵ FRANCINE D. BLAU/MARIANNE A. FERBER/ANNE E. WINKLER, *The economics of women, men and work*, Pearson/Prentice Hall, New Jersey, 2014, 7.th edition, page 194.

²⁶ *Idem*, page 195.

All the while, women tend to withdraw from positions of higher responsibility and prestige, as they fear they would not be able to balance their professional and family responsibilities, since they still hold the main role regarding children and housework²⁷. In the words of MARIA DO ROSÁRIO RAMALHO, “one can say that even if all other grounds of discrimination were eliminated, as long as there is a structurally unbalanced allocation of family responsibilities between men and women, gender discrimination in work and employment will subsist”²⁸.

It is not surprising that the subject of work and family balance has been gradually seen as a dimension of the principle of gender equality and occupying a prominent place within EU law. This is reflected by the recent approval, following the European Pillar of Social Rights, proclaimed on 17 November 2017 (by the European Parliament, the Council, and the European Commission), of Directive 2019/1158 of the European Parliament and of the Council, of 20 June 2019, on work-life balance for parents and carers, whose preamble fully stresses the fundamental principle of equality between men and women, namely at remuneration level, and the instrumental role that an adequate balance between work and family represents vis-à-vis that goal²⁹.

2.3. Work of equal value: the problem regarding its evaluation

The several legal instruments that enshrine the principle of equal pay state, almost without variation, that equal work or work of equal value must be equally remunerated. There are significant challenges behind this, apparently simple, formulation. Firstly, one may question what is considered, to this effect, remuneration. However, this query seems to be answered by Convention No. 100 of ILO, as well as by the Treaty of Rome, which consider(ed) remuneration as the “ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the workers employment”. Similar

In the decision regarding the complaint currently under analysis (§101), the ECSR states that: “The unadjusted gender pay gap (...) covers both possible discrimination between men and women (one component of the “unexplained” pay gap) and the differences in the average characteristics of male and female employees (the “explained” pay gap). Differences in the average characteristics result from many factors, such as the concentration of one sex in certain economic activities (sectoral gender segregation) or the concentration of one sex in certain occupations (occupational gender segregation), including the fact that too few women occupy the better paid decision-making positions (vertical segregation)”.

²⁷ Also, KENNETH A. DUBIN, “¿Contradicciones...”, *loc. ult. cit.*

Concerning this last point, see, in Portugal, MARIA DO ROSÁRIO RAMALHO, “Tempo de trabalho e conciliação entre a vida profissional e a vida familiar – algumas notas”, in *Tempo de trabalho e tempos de não trabalho – o regime nacional do tempo de trabalho à luz do Direito Europeu e Internacional*, Estudos APODIT 4 (coord. Maria do Rosário Ramalho/Teresa Coelho Moreira), AAFDL, Lisboa, 2018, pages 101-116, and the references therein.

²⁸ “Tempo de trabalho...” cit., page 102. See also the references therein.

²⁹ On this issue, in the European context, see MATHIJN WILKENS/JORGE CABRITA/JEAN-MARIE JUNGBLUT/ROBERT ANDERSON (EUROFUND), *Striking a balance: Reconciling work and life in the EU*, Publications Office of the European Union, Luxemburg, 2018 (available at: www.eurofound.europa.eu/publications/report/2018/striking-a-balance-reconciling-work-and-life-in-the-eu).

formulations were used in Directive 2006/54/EC³⁰ and, in Portugal, in the recent Act no. 60/2018. According to Article 2, no. 1, b), of this last diploma, regarding the imperative of equal pay between men and women, the notion of remuneration entails “the basic remuneration and other regular and periodical payments paid, directly or indirectly, in cash or in kind, as well as the payments mentioned in Article 260, no. 1, a) to d), of the PLC”. This wording shows that, to this effect, the notion of remuneration or pay is wider than the one present in Article 258 of the PLC (coupled with Article 260 of the same diploma), used for other purposes, such as the determination of the payments to which the remuneration guarantees regime may be applied. It includes, for instance, productivity bonuses (and similar allowances), even when paid by way of donation, food allowances or other subsistence allowances, but also any payments deriving from the violation or the termination of the employment contract³¹. On the other hand, the source of these payments is irrelevant – statute, collective agreement, individual employment contract, employer practices, and so on³². The ECSR has also clarified, in the past, that Article 4, § 3, of the RESC encompasses all portions of remuneration, both in cash and in kind³³.

More complex, albeit inescapable – according to the Committee of Experts on the Application of Conventions and Recommendations³⁴, this is an aspect striking at the heart of the principle of equal pay and whose lack of understanding explains, for the most part, the gender segregation that still exists –, is definition of the notion of work of equal value³⁵. One can easily understand that payment disparity does not often concern cases where women and men perform the exact same work – equal in quantity, quality, and nature. It is, therefore, necessary to ascertain whether the work performed by the person who alleges discrimination and by the individual mobilized for this comparison are of equal value. But the value of work is not a fact naturally and automatically determined. Its assessment entails an evaluation exercise and, consequently, a margin of appreciation that can easily compromise the imperative of equal pay. There may, naturally, subsist pay differences which may affect employees of both sexes. However, these situations must rely on objective, judicially controllable, and fair grounds, in a nutshell, non-

³⁰ The jurisprudence of the CJEU on this matter is quite vast. See, for instance, the *Garland* (of 9 February 1982, case 12/81), *Kowalska* (of 28 March 1990, case C-33/89), *Seymour-Smith* (of 9 February 1999, case C-167/97), or *Renner-Kühn* (of 13 July 1989, case 171/89) Judgments. Other examples and assessments are available at PHILIPPA WATSON, *EU Social and Employment Law*, Oxford University Press, Oxford, 2014, 2.nd edition, points 24.37 and ff., NURIA DE NIEVES NIETO, *op. cit.*, page 482 and ff., or ROGER BLANPAIN, *European Labour Law*, Wolters Kluwer, Alphen aan den Rijn, 2014, 14.th edition, points 1544 and ff.

³¹ On this issue, see the considerations of JORGE LEITE, *op. cit.*, pages 68 and ff.

³² In the context of the EU, see, for example, the *Kowalska* (case C-33/89), *Krieza* (of 9 September 1999, case C-281/97), or *Nimz* (case of 7 February, case C-184/89) Judgments. See also PHILIPPA WATSON, *op. cit.*, points 24.41 and ff.

³³ Conclusions I (1969). See, for instance, ZOE ADAMS/SIMON DEAKIN, “Article 4: the right to a fair remuneration”, in *The European Social Charter and the Employment Relation* (dir. Niklas Bruun/Klaus Lörcher/Isabelle Schömann/Stefan Clauwaert), Hart Publishing, Oxford, 2017, pages 198-219 [214].

³⁴ *Giving globalization a human face, General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization*, 2012, page 281.

This document provides clues for a correct and fair evaluation of the valour of work.

³⁵ Also on this matter, see JORGE LEITE, *op. cit.*, pages 72 and ff.

discriminatory grounds – neither directly, nor indirectly – traced, according to the PC formulation (Article 59, no 1, al. a)), to the following variables: quantity (duration, intensity), quality (level of productivity, level of perfection), and nature of the work (difficulty, hardship, required skills). On the other hand, equal pay should be given to work that, despite not being equal in itself, is equal in quantity, skills, degree of effort or responsibility, and so on³⁶.

Similarly, Article 31, no. 3, of the PLC, states that pay differences are not be discriminatory if grounded on objective criteria, such as merit, productivity, attendance – although absences related to parental responsibilities are neutral (no. 4) –, or seniority, which are believed to have repercussions on the quality of the work³⁷. Even though this rule, concerning attendance, safeguards absences due to prenatal appointments, leaves of absence due to risk during pregnancy, or parental leaves – the first two exclusive to women, the latter, aside from the exclusive parental leave of the father, mostly or entirely taken by women –, it may still place women in disadvantage, since, as we previously stated, they are the ones who usually take up family responsibilities, which may lead to absences to work (for instance, to take care of a sick child)³⁸.

In addition to the abovementioned norms, Article 35, no. 5, states that the evaluation mechanisms must not be discriminatory, relying on objective and common criteria, that is, that do not vary depending on the work being performed by a woman or by a man. Concerning the companies' obligation to implement transparent payment policies, Article 4, no. 1, of Act no. 60/2018, refers to Article 31 of the PLC.

On this issue, as on many others, it is vital to consult the European jurisprudence. The CJEU has, on several occasions, commented on the equal work criterion and on the inherent problem of work performance evaluation. A textbook case on this matter is the *Rummler* Judgement³⁹. Here, in a typographical industrial unit, there was a system of professional categories which were differentiated according to the knowledge required for each task, muscle fatigue degree, and degree of responsibility. Each different category corresponded to a different pay level. Rummler, an employee of this unit and classified in category III, demanded her integration in category IV. In fact, she considered that the degree of effort entailed by her work (which included having to pack volumes with more

³⁶ Regarding the pertinent factors, see, with particular interest concerning this subject, the aforementioned OIT *Gender-neutral job evaluation for equal pay: a step-by-step guide*.

³⁷ Some literature stresses that the seniority parameter statistically favours men and can, therefore, lead to indirect discrimination. See MIQUEL ÀNGEL FALGUERA BARÓ, *Las dobles escalas salariales en función de la fecha de ingreso del trabajador y el derecho a la igualdad*, Editorial Bomarzo, Albacete, 2007, or also SUSANA RODRÍGUEZ ESCANCIANO, *op. cit.*, page 277. However, the CJEU has already stated that this criterion is admissible in light of the principle of equality and non-discrimination (*Cadman* decision, of 3 October 2006, case C-17/05).

³⁸ In this sense, see the *European Network of Legal Experts in Gender Equality and Non-Discrimination* report, on gender equality in Portugal, of 2021 (page 24), as well as the previous reports. These documents are available at <https://www.equalitylaw.eu/country/portugal>.

³⁹ Of 1 July 1986, Case 237/85.

For a brief analysis of other decisions, European and French, see, for example, MICHEL MINÉ, *Droit des discriminations dans l'emploi et le travail*, Larcier, Bruxelles, 2016, pages 157 and ff.

than 20 kgs) justified her inclusion in a higher remuneration category. The main question was, therefore, to determine whether a professional classification system was compatible with the principle of equal pay between genders, when anchored on criteria such as effort or muscle fatigue and the physically burdensome nature of the work.

The CJEU noted that the evaluation of the work's value is mostly dependent on its objective consideration. Therefore, those criteria may be legitimately used when found adequate to the tasks in question, in other words, when such tasks demand, by nature, a special physical effort or are physically burdensome. It is, therefore, "*consistent with the principle of non-discrimination to use a criterion based on the objectively measurable expenditure of effort necessary in carrying out the work or the degree to which, reviewed objectively, the work is physically heavy*".

The court also added that even though these criteria usually favour male employees, that does not necessarily mean that the evaluation system is discriminatory, since it must be seen in its entirety. Under this perspective, the evaluation model should consider – as long as this is objectively justified by the type of tasks – other criteria, to which women may show greater aptitude. The conformity of such a system with the principle of equality and non-discrimination will always require a case-by-case assessment that takes into due account the characteristics of the tasks under analysis.

Since the criterion regarding the physical effort/muscle fatigue is particularly favourable to men, the CJEU dwell on the following question: can a system, that relies on this sort of criterion, be benchmarked on the average *quantum* of effort of employees of only one of the sexes? In fact, when determining whether a certain task is particularly demanding from a physical effort standpoint, should the referential be the level of effort of which a man is capable or, conversely, should one it be the level of physical burdensomeness felt by women, when performing a certain task, in order not to disadvantage them? According to the CJEU, "*any criterion based on values appropriate only to workers of one sex carries with it a risk of discrimination (...). That is true even of a criterion based on values corresponding to the average performance of workers of the sex considered to have less natural ability for the purposes of that criterion, for the result would be another form of pay discrimination: work objectively requiring greater strength would be paid at the same rate as work requiring less strength*". And the court concludes by saying that: "*the failure to take into consideration values corresponding to the average performance of female workers in establishing a progressive pay scale based on the degree of muscle demand and muscular effort may indeed have the effect of placing women workers, who cannot take jobs which are beyond their physical strength, at a disadvantage. That difference in treatment may, however, be objectively justified by the nature of the job when such a difference is necessary in order to ensure a level of pay appropriate to the effort required by the work and thus corresponds to a real need on the part of the undertaking*".

Although this decision pays particular attention to the physical effort criterion⁴⁰, it does not ignore the most important principle one must consider when building evaluation systems, especially when they have an impact at remuneration level: when using criteria that may have an adverse effect on one of the sexes, namely on women, it is necessary, taking into account the characteristics of the tasks in question, to elect other neutral criteria that compensate or neutralize that advantage, benefiting the employees that where, comparatively, placed in a position of disadvantage⁴¹.

Another important decision regarding this issue is the *Macarthy's* Judgement⁴². Here, the CJEU established that the comparing individual does not need to be a contemporary of the employee that alleges discrimination. In this case, a female employee was receiving a lower salary by comparison with the male employee that had previously occupied that workplace. The Court stated that contemporaneity was not essential to the comparison. Portuguese law does not expressly mention the possibility of a comparison under these parameters. Nevertheless, we believe it to be admissible, since it is not prevented neither by the wording, nor by the *ratio legis*, and, in addition, such result is imposed by the principle of interpretation of national law in conformity with EU law⁴³.

Aside from the temporal aspect, the spatial universe of comparison was also considered in the *Lawrence* decision⁴⁴. On this occasion, the Court stated that the comparison can exceed the undertaking's frontiers. When the source for the determination of salaries' amounts is the same (*e.g.*, a collective agreement), then the evaluation concerning the remuneration paid to men and women should attend to several employers and companies to which such common source is applicable⁴⁵.

The ECSR has also already addressed this matter, against the backdrop of the Portuguese reality. In the 2006, 2008, and 2012 Conclusions, the Committed noted that, unlike what is demanded by the Charter, in Portugal, comparisons could only be established within the same enterprise (which, according to the Government, is due to the fact that comparisons among different entities are impossible, since the pay differentials may be due to the different work organization or to the kind of business). In the 2016 Conclusion, the ECSR noted that not only remuneration (for all professions and professional categories) is part of the contents of collective agreements (Article 492, no. 1, f), and no.

⁴⁰ Focusing this aspect, within the Portuguese Literature, see MARIA MANUELA MAIA DA SILVA, "A discriminação sexual no mercado de trabalho – uma reflexão sobre as discriminações directas e indirectas", *Questões Laborais*, year VII, no. 15, 2000, pages 84-111 [94 and ff.].

⁴¹ On this issue, see SUSANA RODRÍGUEZ ESCANCIANO, *op. cit.*, pages 276 and ff.

⁴² Of 5 May 2011, Case 129/79.

For further developments concerning this issue, see, for instance, ROGER BLANPAIN, *op. cit.*, point 1542.

⁴³ See the aforementioned *European Network of Legal Experts in Gender Equality and Non-Discrimination* report, on gender equality in Portugal, of 2021 (page 24), as well as the previous reports.

⁴⁴ Of 17 September 2002, Case C-320/00.

Alluding to this, see SUSANA RODRÍGUEZ ESCANCIANO, *op. cit.*, page 274.

⁴⁵ At EU level, see the Resolution of the European Parliament, of 24 May 2012, with recommendations to the Commission on application of the principle of equal pay for male and female workers for equal work or work of equal value (2011/2285(INI)) (available at [Textos aprovados - Igualdade de remuneração entre homens e mulheres por trabalho igual ou de valor igual - Quinta-feira, 24 de Maio de 2012 \(europa.eu\)](https://www.europa.eu)).

2, f), of the PLC), but also the subject scope of the latter may be extended (through administrative and bargaining instruments). Therefore, it is possible to compare the remuneration levels present in a universe composed by several companies, whenever their source is the same – which is enough to ensure that the Charter is being respected⁴⁶.

II. Complaint no. 136/2016

1. The complaint's contents

Under the 1995 Additional Protocol, the UWE lodged a complaint against Portugal (and other States Parties), in August 2016, on the grounds of the violation of RESC's provisions.

According to the complainant, the country was in breach of Articles 1, 4, § 3, 20, and also of Article E of the RESC, for two reasons: firstly, due the gender pay gap; and secondly, due to the under-representation of women in decision-making bodies of private companies.

The ECSR restricted its normative analysis to Articles 4, § 3 and 20. However, the reference to Articles 1 and E is not surprising. The first, since it enshrines the right to work, has a close connection to all the other norms relating to work conditions. While the second states that all the rights contained in the Charter (and, therefore, also those present in Articles 1 and 4, § 3) must be ensured without discrimination on the grounds of sex. Nevertheless, when a certain provision already connects the right it enshrines to the ideas of equality and non-discrimination, the reference of Article E ends up being mostly symbolic, rather than materially significant. So, the provisions of the RESC that, clearly, were nuclear to the present complaint were Articles 4, §3, and 20.

The first one, with the heading: “The right to a fair remuneration”, states, in § 3, that the States Parties undertake “to recognise the right of men and women workers to equal pay for work of equal value”. While Article 20, entitled “The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex”, has a material scope that goes well beyond the matter of remuneration. Nevertheless, in this context, it is a provision that develops the contents of Article 4, § 3. In fact, while the latter embodies a generic compromise towards the principle of equal pay, the latter clarifies that the States Parties must ensure the right to equality at work and employment and implement the necessary measures to ensure or promote its application

⁴⁶ ZOE ADAMS/SIMON DEAKIN, *op. cit.*, page 214.

In the aforementioned *Gender-neutral job evaluation for equal pay: a step-by-step guide*, the ILO refers particularly to the lack of masculine comparators in some companies, mostly in sectors particularly characterized by feminine work. In this sort of situation, a comparison that goes beyond the company's frontiers is crucial. The ILO recommends, precisely, resorting to masculine comparators from other companies in the same branch of activity (page 21). One way out of this impasse may be found by looking to industry-level pay equity initiatives or initiatives taken by sector-based Committees. Male-dominated jobs may thus be found in other companies in the same sector, which could be used for comparison.

in several domains, namely regarding the terms of employment and working conditions, including remuneration (c)).

The UWE substantiated the complaint against Portugal on a series of arguments that basically signify that, despite the legal and constitutional proclamation of the principle of equal pay between men and women; the existence of competent bodies to ensure this goal (namely, the Commission for Equality in Labour and Employment⁴⁷ [CITE], the Commission for Citizenship and Gender Equality⁴⁸ [CIG], and the National Labour Authority⁴⁹ [ACT]); and, finally, the launching of several initiatives aiming at this purpose, by the Government (such as the Resolution of the Council of Ministers no. 13/2013, that approved various measures towards the guaranty and promotion of equal opportunities and results among men and women in the labour market, or the *V National Plan regarding Gender Equality, Citizenship, and Non-Discrimination 2014-2017*, approved by the Resolution of the Council of Ministers no. 103/2013), the truth is that statistical data shows that the reality is still quite far from the so-proclaimed equality. Which means that the measures implemented by the Portuguese State have, so far, been ineffective in fulfilling this principle.

In fact, as ROBIN R. CHURCHILL and URFAN KHALIQ⁵⁰ underline, “where a complaint relates to legislation that is alleged to be incompatible with the Charter, this is normally sufficient by way of evidence to support an allegation of unsatisfactory application (...) On the other hand, where legislation on its face is compatible with the Charter, the ECSR obviously requires evidence that the application of the legislation in practice is contrary to the Charter in order for a complaint to be upheld”.

Furthermore, the UWE recalled complaint no. 1/1998⁵¹, also lodged against Portugal, based on the existence of cases of child work. On this occasion, the ECSR stressed that the rights enshrined on the RESC should be upheld not only in theory, but also in practice. Later on, when deciding complaint no. 33/2006⁵², against France, the Committed clarified that even though the RESC does not contain obligations of results, the States Parties should seriously endeavour to materialize the rights contained therein – applying the necessary legal, financial, and operational means to that effect; keeping clear statistical data regarding the needs, the utilized resources, and the achieved results; regularly reviewing the implemented strategies; determining reasonable timetables to attain the envisaged results; and periodically evaluating the impact of the implemented measures.

⁴⁷ In Portuguese, *Comissão para a Igualdade no Trabalho e no Emprego*.

⁴⁸ In Portuguese, *Comissão para a Cidadania e Igualdade de Género*.

⁴⁹ In Portuguese, *Autoridade para as Condições de Trabalho*.

⁵⁰ “The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?”, *European Journal of International Law*, vol. 15, no. 3, 2004, pages 417-456 [431].

⁵¹ Of 9 September 1999.

⁵² Of 5 December 2007.

The UWE also called upon statistical information that reveals the gender pay gap in Portugal. Such as the *Report on equality among women and men 2015*, from the European Commission, which uncovered an average 16% gap, in detriment of women⁵³.

The complainant also denounced several practical difficulties that women face when judicially pursuing a non-discriminatory treatment – such as fear of retaliation; uncertain results; high financial costs, among others.

Aside from the pay gap issue, the complaint was also grounded on the under-representation of women in executive positions, or similar, in private companies. According to the document *Gender balance on corporate boards 2016*⁵⁴, published by the European Commission, the rate of women in management positions was around 14%, that is to say nine percentage points below the European average⁵⁵. According to the UWE, aside from being a problem in itself, this under-representation is also impactful regarding the pay gap between men and women. How can women fight for this balance when they do not hold positions of power? In truth, as underlined by SANDRA FREDMAN⁵⁶, “when a group has been excluded from a particular setting (...), the likelihood is that the perspectives and experiences of members of the excluded group, particularly those relating to its exclusion, will be undervalued, misunderstood, or ignored by the dominant group, making it impossible for the excluded group to change its disadvantaged position”.

In its response, the Portuguese Government argued that a State should not be condemned solely based on statistics, “because we would be dealing equally with States that are making efforts and putting equality on the agenda and States that have done nothing to reduce inequality”, which would be “extremely penalizing and demoralizing” to the former, such as Portugal.

The Government also highlighted the several measures that have been implemented towards the principle of equal pay – which were not noted by the UWE –, such as Article 479 of the PLC; the aforementioned Resolutions of the Council of Ministers 13/2013 and 103/2013; Resolution 18/2014; the Project *Reevaluation of work towards the Promotion of Equality*⁵⁷, fostered by the General Confederation of Portuguese Workers jointly with many other entities, such as the CITE, the ACT, and the ILO, between 2006 and 2009, which aimed to test a work appreciation methodology free of gender bias; the compilation

⁵³ Available at https://ec.europa.eu/info/policies/justice-and-fundamental-rights/gender-equality/gender-equality-strategy_pt#relatrio-anual-sobre-a-igualdade-entre-homens-e-mulheres.

Similar data were disclosed at the European Commission publication *Reduzir as disparidades salariais entre homens e mulheres na União Europeia*, of 2014 (available at file:///C:/Users/milen/Downloads/gp_eudor_WEB_DS0214189PTC_002.pdf.pt.pdf).

⁵⁴ Available at file:///C:/Users/milen/Downloads/1607_factsheet_final_wob_data_en_5DDAD782-EFB0-61A7-346E80A0DE53922A_46280.pdf.

⁵⁵ The Committee of Experts on the Application of Conventions and Recommendations of the ILO asked Portugal to provide information regarding the evolution of the number of women occupying these positions ([https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2017-106-1A\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2017-106-1A).pdf)).

⁵⁶ *Op. cit.*, page 267.

⁵⁷ Information available at https://cite.gov.pt/projetos/-/asset_publisher/vPxQoQTABUGy/content/revalorizar-o-trabalho-para-promover-a-igualdade.

of statistical information, by the Office for Strategy and Planning⁵⁸ [GEP] of the Ministry of Labour, Solidarity, and Social Security, based on the personal records presented by companies, which contain information regarding remuneration (see Article 32 of Act no. 105/2009, of 14 September)⁵⁹; the creation, within CITE, of two tools destined to facilitate the materialization of equal pay (the DSG calculator, an electronic tool that automatically calculates the gender pay gap in companies; and the *self-evaluation questionnaire for equality among men and women within organizations*, which provides a self-diagnosis); the training and information campaigns launched by CITE, namely the *National action towards the promotion of equality among genders at work*, initiated in September 2016, or the celebration of the *National Day of Equal Pay*.

Regarding the under-representation of women in executive positions, in private companies, the Portuguese Government acknowledged that problem, but underlined its recent positive evolution and, in particular, the entry into force of Act no. 62/2017, of 1 August, on, precisely, the balanced representation between men and women in managerial positions, which stipulates a minimum of 33% of women in such positions (although it only applies to companies of the public sector and companies listed on the stock exchange).

Faced with these arguments, the UWE replied that it is necessary to actually ensure the efficacy of measures destined to promote equality among men and women. It also denounced the vague nature of the information provided by the Government, since the latter did not divulge the concrete implemented measures, nor their practical results. The complainant also pointed out the lack of national studies concerning the issue of gender discrimination, which hamper a practical analysis of this situation. The UWE also invoked new statistical data, provided by third parties, namely the Eurostat⁶⁰. And while the Portuguese Government stressed that, between 2010 and 2017, there were only 9 complaints on the grounds of gender pay gap, before the CITE, the UWE noted that these low numbers were probably due to the scarcity and inefficiency of the available tools. Finally, the complainant reminded the view of the ECSR, according to which the comparison of remuneration levels, among men and women, should be done at a wider scale (and not merely within the company).

The Portuguese Government intervened once again in the process, to provide further information. It gave concrete data regarding the competences of the ACT and on the increasing number of labour inspectors, and it also stressed the fact that the latter receive the necessary training in matters of gender equality. The Government also provided

⁵⁸ In Portuguese, Gabinete de Estratégia e Planeamento

⁵⁹ The most recent is available at <http://www.gep.mtsss.gov.pt/documents/10182/10928/qp2018pub.pdf/56bef326-3de4-4cf6-aea0-b0a7084bbb4e>.

⁶⁰ https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender_pay_gap_statistics.

In particular, see *A decomposition of the unadjusted gender pay gap using Structure of Earnings Survey data*, of 2018, available at <https://ec.europa.eu/eurostat/documents/3888793/8979317/KS-TC-18-003-EN-N.pdf/3a6c9295-5e66-4b79-b009-ea1604770676>.

information on the growing efficiency, in the most recent years, of the CITE's activity and on the self-diagnosis tools that this body provides, and it stressed the slight decrease on the ratio of gender pay gap, between 2014 and 2016. Regarding the difficulty in the access to jurisdictional tutelage, to fight for equality and non-discrimination, the Government underlined the possibility enjoying legal aid, the fact that public prosecutors represent employees at court and, also, Article 25, no. 5, of the PLC, which alleviates the burden of proof regarding those who allege discrimination. It also stressed the launching of the *National Strategy to Equality and Non-discrimination 2018-2030 – A More Equal Portugal* (Resolution of the Council of Ministers 61/2018), which contains an action plan aiming at gender equality, as well as the development of new and more refined statistical tools, namely the annual compilation of statistical information, with the intent of detecting pay differentials among sectors and between companies, by the GEP⁶¹. Finally, the Government gave notice of the presentation, before the Parliament, in November 2017, of Draft Law no. 106/XIII, containing measures to foster equal pay among men and women. Which, later on, was approved, pending this complaint, as Act no. 60/2018, known as the Law of Equal Pay.

2. The decision

2.1. General considerations

After admitting the complaint and receiving the observations made by the Portuguese Government, as well as by the European Commission, the ETUC, and the EQUINET – European Network of Equality Bodies, through the CITE, the ECSR reached a decision on the merits concerning the issues brought by the UWE, on 5 December 2019.

The Committee began by delineating the normative scope of its analysis. And, therefore, it considered that, due its previous jurisprudence concerning Articles 4, § 3, and 20, the references to Articles 1 and E were unnecessary, since the ideas of equality and non-discrimination are inherent to the former norms. Concerning Article 20, this is particularly visible in paragraph c), where it expressly enshrines the right to equal opportunities and equal treatment in terms of employment and working conditions, including remuneration. And, in addition, paragraph d), concerning the right to equal opportunities and equal treatment the career development, including promotion, is pertinent to the issue of women under-representation in decision-making positions.

2.2. The gender pay gap

Concerning the alleged gender pay gap, the ECSR started by stressing the reach of Articles 4, §3, and 20 regarding the obligation of legally enshrining the principle of equal pay among men and women.

⁶¹ [Sínteses / Publicações - Gabinete de Estratégia e Planeamento \(mtsss.gov.pt\)](https://www.mtsss.gov.pt).

On the other hand, according to the Committee, the mere constitutional allusion to this principle is insufficient, as this imperative needs to be materialized at infra-constitutional level⁶². Furthermore, the States Parties must adopt a wide concept of remuneration to this effect and, also, prohibit pay discrimination irrespective of the source of the pay scales (statute, collective agreements, individual employment contracts, and so on).

Taking into account Article 59, no. 1, a), of the PC, and Articles 31 and 270 of the PLC, the ECSR declared that the Portuguese legal regime enshrines the principle of equal pay in a sufficient manner. This conclusion is not shocking. The UWE itself had stressed that the problem was not due to the lack of the normative enshrining of this principle. However, it is a bit surprising that the Committee did not note that, unlike what is observed in several international and European instruments, the PLC does not possess any provision clarifying that the notion of remuneration, regarding matters of equality and non-discrimination, should be wide, going beyond the one definition used by Articles 258 and 260 of the PLC. Still, the truth is that PLC's regime must be interpreted in accordance with the supranational legislation on this domain, such as Directive 2006/54, which means that this omission does not raise significant obstacles. And, in any case, the recent Act no. 60/2018 filled this omission⁶³.

Afterwards, the Committee questioned whether Portugal possesses effective means of action against the violation of the principle of equal pay. In effect, this is a requirement arising from the Charter. More specifically, according to the ECSR, the States Parties must ensure appropriate and effective remedies, that do not entail unacceptable costs to their citizens; an adequate compensation to anyone who suffers discrimination; the adjustment of the burden of proof regarding discriminatory acts; the prohibition of retaliatory termination against employees who allege discrimination and, as a consequence, their mandatory reinstatement or, when that becomes impossible, the payment of an adequate compensation⁶⁴.

Taking into account the Portuguese legislation, namely Article 20 of the PC and the legal aid regime, Article 28 of the PLC, as well as Article 25, no. 5, and the legal regulation of employment contract termination, which complements Articles 25, no. 7, of the PLC, the ECSR concluded that Portugal is in conformity with Articles 4, § 3, and 20, c), of the RESC. Nevertheless, the Committee noted the scarcity of legal actions concerning equality and non-discrimination, namely based on gender discrimination – something that

⁶² CSILLA KOLLONAY-LEHOKZKY, *op. cit.*, page 375.

⁶³ Previously, the national regime had possessed a similar rule, Article 2 of Decree-Law no 392/79, which was, however, revoked by Act 99/2003, 27 August, that approved the Portuguese Labour Code of 2003. However, neither the latter, nor the current PLC reproduced that norm. Stressing the absence of this rule in the PLC, see, for instance, the 2021 *European Network of Legal Experts in Gender Equality and Non-Discrimination* report, on gender equality in Portugal (page 23), as well as its previous reports.

⁶⁴ CSILLA KOLLONAY-LEHOKZKY, *op. cit.*, pages 375 e 376.

was also stressed by the *European Network of Legal Experts in Gender Equality and Non-Discrimination*, in several of its annual reports regarding Portugal⁶⁵.

Following this assertion, the Committee focused on the third consequence of the obligation to legally enshrine the principle of equal pay: salary transparency and the possibility of drawing comparisons, which are essential to identify illegal differentiations. In effect, as noted by the ECSR, the lack of information (and not only general statistical data) on comparable jobs and their remunerations hinders the access to courts. It must, therefore, be possible to establish comparisons beyond the companies' frontiers (as stressed in several of its previous Conclusions concerning Portugal). And this wider comparison should be made possible when the source of pay scales is the same (as remarked in the Conclusions 2016, Portugal).

The Committee also underlined the importance of determining gender neutral criteria for the classification and evaluation, as a means to ensure the principle of equal pay for equal work or work of equal value. However, it recognized that the definition of work of equal value entails a certain degree of uncertainty, that the States Parties should endeavour to minimize through the creation of legal and jurisprudential parameters.

Regarding the Portuguese panorama, the Committee recalled Article 31 of the PLC, that prescribes the setting of neutral classification criteria, even though, as we previously underlined, it may lead to cases of indirect discrimination, due to the attendance parameter (despite its no. 4 safeguarding absences related child care, which mostly affect women). The Committee also stated that employers should keep annual employee records, to allow remuneration comparisons.

Despite signalling its fragilities, the ECSR did not consider Article 31, no. 4, of the PLC, to be in breach of the Charter.

The Committee then stated the obligation of creating bodies specifically devoted to guarantee the effectiveness of the principle of equal pay among men and women. Naturally, the role played by the CITE was underlined, namely its task concerning Article 479 of the PLC. Although the 2015 Conclusions of the Committee on the Elimination of Discrimination against Women, concerning Portugal, voiced concern regarding the reduction of funds allocated to bodies such as the CITE⁶⁶, the ECSR resisted to this argument invoking the *Equality bodies making a difference* report, of 2018, from the *European Network of Legal Experts in Gender Equality and Non-Discrimination*, which highlighted the increase of expenditure allocated to this effect⁶⁷.

⁶⁵ The Committee mentioned the 2017 report. However, the subsequent documents reiterate the scarcity of judicial actions.

⁶⁶ The reports from this body are available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=3&DocTypeID=27.

⁶⁷ Page 103.

This document, which stresses the extreme importance of allocation sufficient resources to these organs, under penalty of inefficiency, is available at https://ec.europa.eu/info/sites/default/files/equality_bodies_making_a_difference.pdf#page=105&zoom=100,0,0

Since, regarding these four issues, the Committee considered the Portuguese legal regime to be in conformity to Articles 4, § 3, and 20, c), of the RESC⁶⁸, it moved to another approach. It focused on Article 20, c), not now as demanding the legal enshrinement of the principle of equality (in its several dimensions), but as imposing its effective materialization. It aimed, therefore, at assessing whether Portugal adopted every necessary measure to ensure equal pay. In particular, it examined whether there is a collection of reliable data to measure the pay gap and if the promotion of gender equality is part of the State's global policy, of its strategy and perspectives (gender mainstreaming).

Here, the Committee pondered the arguments from the UWE – the statistics presented by Portugal were not sound, since they are based on the employees' remuneration, which hides, for instance, that fact that part-time jobs are mostly predominant among women, as well as the differences in overall income, even if not strictly remuneration-related (e. g., retirement pensions), between men and women; the lack of information regarding other relevant aspects to assess whether gender equality is at the centre of the States' policies: such as the choice of fields of study and of work of men and women, or the prominence of the latter regarding homework – along with the ones presented by the Government – which, in a nutshell, pointed to the slight decrease of the pay gap, between 2014 and 2016; the improvement in available statistical data; mentioned draft law no. 106/XIII, the *V National Plan regarding Gender Equality, Citizenship, and Non-Discrimination 2014-2017* and the *National Strategy to Equality and Non-discrimination 2018-2030 – A More Equal Portugal*, as denoting the central position of (gender) equality among the State's policies and, once again, the CITE's action and the reinforcement of its practical operations, namely at companies, in order to ensure fair pay plans and (in)formative actions.

The ECSR also quoted Eurostat's statistical information (which was crucial to the case's decision) which positions Portugal below the European average. In fact, even though there was a slight decrease of the pay gap – considering the hourly pay –, between men and women in recent years (from 17.8%, in 2015, to 16.3% in 2017, while it was 17.5% in 2016), in 2011 the rate was 12.9%, while in 2010 it was 12.8%. This means that, between 2010 and 2017, the gap increased in 3.5%⁶⁹.

The Committee once again reminded that the rights enshrined in the Charter must have effective application and, specifically concerning the principle of gender equal pay, the States Parties must strive to create and analyse credible statistical data, and to question the reasons behind the persistence of inequalities, since this is pivotal to the enactment of effective measures. And even though the Committee acknowledged that this is an ambitious goal, it stressed that the States Parties should set targets to achieve within

⁶⁸ Summary statement present in §§ 162-166 of the decision.

⁶⁹ Eurostat, *A decomposition of the unadjusted gender pay gap using Structure of Earnings Survey data*, 2018.

reasonable deadlines, in order to guarantee a measurable progress, coming from the maximal capitalization of the available resources.

The ECSR concluded that, despite the efforts from the Portuguese State, which had the merit of enacting several initiatives to solve the problem of gender inequality (namely by compiling and analysing clear statistical data), the fact that the pay gap increased significantly between 2010 and 2016, with merely a small decrease in 2017, proves there is still significant segregation in the Portuguese labour market. Which means that the Portuguese State still has not done enough to obtain the desirable advancement in this domain. Portugal is, therefore, in breach of Article 20, c), of the RESC⁷⁰.

However, these statistical elements, which unveiled the increase in inequality from 2010 onwards, were not the only reason for the ECSR's decision. The Committee also took other elements into account, such the *2017 Report on equality between women and men in the EU*⁷¹, from the European Commission, according to which, aside from the clear pay gap between men and women, there are other problems which increase inequality, such as vertical segregation, the fact that, usually, women undertake non-paid work, such as childcare and other familiar and household responsibilities (which leads them to greater absenteeism), and so on.

The Committee also considered the Concluding Observations from the Committee on Economic, Social and Cultural Rights, of 2014, concerning Portugal, according to which the gender pay gap is still signification in the country's panorama and, therefore, measures should be implemented to reduce vertical and horizontal segregations⁷². It also referred the Report of the Committee of Experts on the Application of Conventions and Recommendations, of 2017, regarding the Convention No. 100, where Portugal was both asked to reveal the measures that were being undertaken to fight the gender pay gap and advised to implement additional measures to oppose professional gender segregation⁷³.

2.3. The problem of feminine under-representation in decision-making positions in private companies

Regarding the second argument used in the complaint, the Committee focused its analysis on Article 20, d), according to which the States Parties are bound to promote equality among men and women regarding career development, including promotion.

Both the UWE and the Portuguese State were more concise regarding this aspect, which is reflected in the Committee's decision. To this effect, the latter noted that paragraph d)

⁷⁰ See §§ 201 e 202.

⁷¹ See [annual report ge 2017 en.pdf \(europa.eu\)](#).

Similar data can be consulted at MARIA DO ROSÁRIO PALMA RAMALHO/TERESA COELHO MOREIRA, *Equality, non.discrimination and work-life balance in Portugal*, IUSLabor 2/2016, pages 46-58 [48 and ff.].

⁷² The document is available at <https://digitallibrary.un.org/record/789386>.

In 2020, this Committee reiterated this concern (<https://www.refworld.org/country,,CESCR,,PRT,,3f6cb14f2,0.html>).

⁷³ [https://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2017-106-1A\).pdf](https://www.ilo.org/public/libdoc/ilo/P/09661/09661(2017-106-1A).pdf).

of Article 20 requires the States Parties to counter vertical segmentation in the labour market, which imposes the implementation of measures destined to ensure equality in decision-making positions.

Given the entering into force of the aforementioned Act no. 62/2017 (which, however, is fulfilled with a rate of 33.3% of women in these positions and whose field of application excludes private companies in general) and, particularly, the fact that there is statistical data revealing that, in recent years⁷⁴, the gender pay gap has been diminishing, the Committee concluded that Portugal is in conformity with Article 20, d), of the RESC⁷⁵.

2.4. Brief observations concerning the ECSR's decision

As we stressed, concerning the gender pay gap, the Committee considered that Portugal is in breach of Article 20, c), of the RESC, although the same does not happen regarding Article 4, § 3, RESC. We cannot help but discern a certain Solomonic quality to this decision... in effect, given that the contents of both provisions largely overlap⁷⁶, it is a bit peculiar that they were subjected to different decisions regarding their compliance. The ECSR itself recognizes that Article 20 of the Charter (...) embodies the same guarantee of equal pay as Article 4§3, although it “encompasses other aspects of the right to equal opportunities and equal treatment in matters of employment, such as access to employment, vocational guidance and career development”⁷⁷.

However, this decision is better understood if one considers the argumentative structure that was presented and followed by the Committee. In fact, firstly, the ECSR addressed the principle of equal pay between men and women – stating that its mere legal enshrinement is insufficient, due to the need of effective measures towards its implementation –, and, afterwards, it alluded to the execution of the necessary measures towards achievement of that goal. According to the Committee, Portugal did not comply with the latter, breaching Article 20, c), but not Article 4, § 3⁷⁸.

On the other hand, the Committee's decision reflects a compromise that it had previously professed: when deciding complaint no. 1/1998, against Portugal, it had stressed that the rights enshrined in the Charter should be seen as effective goals (their mere theoretical assertion, namely legal, being insufficient); while on complaint no. 13/2002, against France, it stated that when the practical implementation of a right enshrined in the Charter reveals itself to be complex, the State should endeavour to, gradually, implement it,

⁷⁴ See the *Data Statistics Database do European Institute for Gender Equality*, available at https://eige.europa.eu/gender-statistics/dgs/indicator/wmidm_bus_bus_wmid_comp_compbm/datatable. The document reveals that the rate of women in decision-making positions has increased from 3,5%, in 2003, to 31%, in 2021. Aside from the years between 2007 and 2012, the increase was constant.

⁷⁵ § 221.

⁷⁶ See CSILLA KOLLONAY-LEHOKZKY, *op. cit.*, pages 363 and 364.

⁷⁷ § 96.

⁷⁸ This distinction seems to be a bit artificial. CSILLA KOLLONAY-LEHOKZKY (*op. cit.*, page 374) mentions – which to us is clear – that the States' duty to emanate legislation that enshrines these rights stems from Article 20, although this provision also demands the implementation of other measures towards their materialization.

through partial targets, according to certain deadlines. Perhaps, this is the reason why the ECSR considered Portugal to be in compliance with Article 20, d). It is true that the panorama has been evolving in a positive manner, particularly in the recent past and the State demonstrated that this is one of its concerns. Also, regarding the pay gap, one might consider this decision to hold a compromise solution, reflecting the balance, on one hand, of unfavourable statistical information and, on the other, the confirmation that Portugal has been aiming at equal pay (even if with insufficient results) and (which may be the main reason for it) the persistence of different gender patterns. In turn, in its observations, the ETUC advocated for a more demanding stance from the Committee in matters related to the problem of pay gap. To the trade union, the level of pay gap should never be above 0%, although rates up until 5% would still be reasonable⁷⁹.

III. Observations regarding the reality of pay discrimination in Portugal. Act no. 60/2018, 21 August

Although only in part, the ECSR's decision was unfavourable towards Portugal and it gave special prominence to the available statistical data, which revealed that, despite the slight decrease in pay gap levels, in recent years, this phenomenon grew significantly between 2010 up until 2016.

One may question if today, in light of the most recent available data, the Committee would have still considered Portugal to be in breach of Article 20, c), of the RESC. The answer might be negative. In effect, the Eurostat's statistical information shows that the pay gap between men and women has been decreasing, in a constant manner, since 2016 (although in 2019 there was a small increase by comparison with the previous year), and is today below the European average⁸⁰.

Furthermore, the national legal framework on this domain has changed, due to the entry into force of Act no. 60/2018, the so-called Law of Equal Pay. This diploma was not exactly an outcome of the Committee's decision, since its draft had already been referenced throughout the process. But it should be noted that, in its first intervention, in October 2017, the Portuguese Government did not mention the draft, doing it only afterwards, in its second intervention, in March 2018, following the UWE's response. And, in effect, draft law no. 106/XIII was only published on 27 November 2017. One may wonder if this initiative was fostered by the UWE's complaint. Whichever is the answer, the truth is that this diploma meets the parameters in which the ECSR (as well as other entities, such as the EU) decomposes the principle of equal pay between men and women.

⁷⁹ §§ 64 e ss.

⁸⁰ [Statistics | Eurostat \(europa.eu\)](https://ec.europa.eu/eurostat/).

Firstly, it should be noted that Act 60/2018 reprises the notion of remuneration for equality and non-discrimination purposes. Article 1, paragraph b), states that, to this effect, remuneration encompasses the “the basic remuneration and other regular and periodical payments paid, directly or indirectly, in cash or in kind, as well as the payments mentioned in Article 260, no. 1, a) to d), of the PLC”.

Furthermore, this diploma imposes several duties, on the employers and on administrative bodies, namely, the GEP and the CITE, with the intent of providing further practical implementation to the principle of equal pay between men and women.

Article 3, under the heading “Statistical information”, states the obligation (of the GEP) of drafting, annually disclosing (namely online⁸¹), and sending to the ACT both the general and sectoral barometer of the gender pay gap, and the assessment of those disparities per company, profession, and skills levels. This information is based on the personal records drawn by the company and sent to the Ministry of Labour, pursuant to Article 32 of Act no. 105/2009.

This norm must be coordinated with Article 5, according to which the ACT (eventually in articulation with the CITE, following its no. 4), after receiving the assessment made by the GEP, shall notify the employer to, if so willing, present, within the next 120 days, a fair and non-discriminatory plan to the evaluation of the work and the determination of the corresponding pay levels, which will be put into practice in the following 12 months (no. 1 and no. 2). After this period, the employer shall inform on the implementation of the plan and on the achieved results. Ideally, the employer will be able to justify the existing pay differentials and will have suppressed the non-justified ones (no. 3). It also stems from this article that employers lacking an adequate pay policy (pursuant Article 4) may be required to implement one. And if they fail to do so, any pay disparity will be considered to be discriminatory (no. 5).

Article 4 enunciates one of the key principles concerning equal pay, which is the idea of transparency (which, moreover, was stressed by the ECSR in the abovementioned decision). According to its no. 1, employers shall guarantee the existence of a remuneration policy adjusted to the job positions, in accordance with objective and transparent criteria.

Even though the duty to define pay levels in accordance with objective criteria, common to men and women, was already enshrined in Article 31 of the PLC (to which Article 4 refers), we believe that the express provision of a transparency policy is a plus, by comparison to the previous normative situation. Such an imposition should strongly persuade employers to carefully and accurately define their remuneration policy. The need to refer the pay levels to measurable parameters (which can be controlled both by the employees and by external entities – such as the ACT, the CITE, and the courts),

⁸¹ [Sínteses / Publicações - Gabinete de Estratégia e Planeamento \(mtsss.gov.pt\)](https://www.mtsss.gov.pt).

Actually, only the barometer is available. Concerning the assessment, the online site states that it is made available to the companies who sent the mandatory information...

following the transparency demand, is surely a very important contribution towards an effective implementation of the principle of equal pay. On the other hand, the Legislator coordinated this imperative (regarding the adoption of a fair and transparent pay policy) with Article 25, no. 5, of the PLC, concerning the burden of proof in situations of alleged discrimination. Apparently, following Article 4, no 2, of Act no. 60/2018, when an employee alleges pay discrimination, the employer will have to rebut the presumption of discrimination, through the demonstration of a pay policy in accordance with the demands of the previous number, in order to justify the different salaries paid to the employee who alleges discrimination and the comparator employees.

The justification of the salary levels and of the used criteria are also pertinent to Article 6 of this diploma. In fact, employees who believe themselves to be subjected to discrimination, as well as trade unions, can file a complaint (which shall be duly justified and indicate the other employees in regard to which this particular employee is being discriminated against) with the CITE. This entity will give an opinion (no. 1 and no. 2) and notify the employer to, in the next 10 days, provide a response and information regarding its remuneration policy – mentioned in Article 4 –, as well as the criteria used to define the pay levels of the employees in question (no. 3). If the employer fails to provide this information, the pay differences will be considered to be unjustified (no. 4). By the end of those 10 days, the CITE will, within 60 days, draft the proposal of an opinion concerning the existence of a salary discrimination, which will be conveyed to the complainant and to the employer. In the eventuality of the CITE considering that there are indications of discrimination – which will happen when the employer does not provide the necessary information or when such information reflects a discriminatory salary policy – the employer will be asked to justify this apparently discriminatory differentiation or the present corrective measures, within the next 180 days (no. 5 and no. 6). After this period, the CITE will provide a final opinion (no. 7). The law qualifies this opinion as binding, but the use of this expression is not clear. In fact, we believe that the employer will be able to contest it...

As we saw, the employer has two different occasions to justify the salary differences behind the allegation of discrimination – when notified of the complaint, or when the CITE conveys its proposal of opinion. In order to provide this justification, the employer must hand out information concerning the salary policy applied in the company and explain the criteria used to determine the salaries of the employees named in the process. In the absence of an intervention – which may only occur in the second occasion – the salary disparities invoked by the complainant will be considered to be discriminatory (no. 7). We can, therefore, conclude that in this context there is a mechanism quite similar to the one enshrined in Article 25, no. 5, of the PLC, in coordination with Article 4 of Act 60/2018⁸².

⁸² Even if the employer decides not to comment on the situation, the complaint may be rejected, when lacking reasonable grounds.

The CITE's tasks are not exhausted in this moment. According to Article 8, it will guarantee the implementation of this diploma and, in particular, it will emit an "orientation that defines the general conditions of the evaluation of the tasks' components, based on objected criteria, common to men and women", which is essential to ensure the principle of equal pay to equal work (or work of equal value). It will also have to periodically evaluate the implementation of this diploma, pursuant to Article 10.^o

This "orientation" document, mentioned in Article 8 consists in the Opinion no. 671/CITE/2018⁸³. In, perhaps, a succinct manner, this document underlines that the evaluation of the work value should take into account the tasks that were effectively carried out and elements such as the required qualifications or experience, the physical and psychological effort, and the conditions in which the work is performed.

Act no. 60/2018 also provides for the protection of the employee that reacts against a discriminatory behaviour. Even though this was already contained in Article 331 of the PLC, Article 7 of Act 60/2018 presumes that the termination of the employment contract or the application of any sanction against the employee, in the year following the filing of a complaint with the CITE, are abusive. It also reiterates Article 25, no. 7, of the PLC: any retaliatory action against an employee that refuses salary discrimination is null and void.

Article 9 states that the courts shall communicate to the CITE all the definitive convictions concerning the issue of gender equality.

This diploma also contains (Article 12) the sanctions framework applicable when the employer breaches the duties contained therein (the devising of the plan mentioned in Article 5). Furthermore, the opinion of the CITE, pursuant Article 6, is notified to the ACT, for the purpose of Article 25, no. 8, of the PLC (since, it seems that if this opinion considers that there are discriminatory practices, the ACT shall apply an administrative offense).

Finally, it should be noted that this diploma's scope of application excludes several companies. In accordance with Article 18, it will not apply to undertakings with less than 50 employees, that is to say, small and medium enterprises.

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⁸³ https://cite.gov.pt/documents/14333/17950/PLei60_18.pdf/7005e8d1-b1c2-4b98-aaae-a7e8eac05fda.

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