

Case Reports

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A gender-related pay disadvantage cannot be justified by better negotiating skills (GE)

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Summary

The German Federal Labour Court (*Bundesarbeitsgericht*, the ‘BAG’) had to decide on the claim of a female employee who demanded payment of additional remuneration for past employment and compensation for damages as she received a lower salary than a male colleague with comparable work duties. The BAG upheld the claim and found that the employer’s argument that the favoured male employee had negotiated better could not justify unequal treatment.

Legal background

In Germany, the General Equal Treatment Act (‘AGG’) and the Pay Transparency Act (*EntgTranspG*) provide discrimination protection. Enacted in August 2006 to comply with various EU anti-discrimination directives, the AGG prohibits unfair direct or indirect discrimination based on race, ethnic origin, gender, religion, disability, age, or sexual identity (Section 7). Discriminated employees can seek compensation (Section 15). In legal disputes, presenting evidence suggesting discrimination is sufficient, shifting the burden to the other party to prove there was no discrimination (Section 22).

The Pay Transparency Act mandates equal pay for men and women. Section 3(1) forbids direct or indirect gender-based pay discrimination. According to Section 3(2), salary differences can be justified by factors

such as labour market conditions or performance, as long as proportionality is maintained.

Facts

The female plaintiff started working as a sales representative in March 2017, earning a monthly gross salary of EUR 3,500. She later sought a higher salary and compensation for gender discrimination, citing a male colleague who performed similar tasks. This colleague, employed since January 2017, was also initially offered EUR 3,500 but requested and received EUR 4,500 gross per month.

Judgment

The two prior courts hearing the case had dismissed the claim. The reason given was that the employer’s interest in recruiting the plaintiff’s colleague as an employee justified the unequal remuneration compared to the plaintiff. In the opinion of the courts, the plaintiff had not been discriminated against on the basis of gender as the payment of the higher remuneration was justified by the objective interest in recruiting an employee.

The BAG overturned the decision of the previous courts and largely upheld the claim. It found that the plaintiff was entitled to the difference in remuneration she had not received compared to her male colleague both under Section 3(1) of the Pay Transparency Act and directly under Article 157 TFEU.

The BAG began by stating that the plaintiff had successfully demonstrated that she received a lower remuneration (in this case a lower basic salary) than her male colleague. The BAG clarified that the principle of equal pay applies to each individual component of the remuneration paid and that no overall assessment of the remuneration granted is to be made. Accordingly, the basic salary of the plaintiff and the colleague were to be compared. Any other salary components, such as commissions or bonus payments were not to be included in the comparison.

By demonstrating the lower remuneration than her male colleague, the plaintiff had provided evidence that suggested discrimination based on gender. Therefore, the employer was obliged to demonstrate and prove that the unequal treatment was not based on gender due to the reversal of the burden of proof regulated by Section 22

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AGG. In the opinion of the BAG, the employer had not succeeded in doing so.

The BAG indicated that difficulties in recruitment and a challenging job market could, in principle, serve as a valid reason for offering a higher salary to a candidate, thereby justifying unequal pay compared to employees of the opposite sex. Nevertheless, during the trial, the employer failed to demonstrate and substantiate that such circumstances existed to warrant paying a higher salary to the plaintiff's colleague. Specifically, the employer did not provide evidence that there were no other equally qualified candidates willing to accept the remuneration offered by the defendant.

The plaintiff's colleague having better negotiating skills did not justify the disparity in base salary. The fact that both were initially offered the same salary but only the colleague had negotiated a higher one underscored this unfair treatment. The BAG emphasized that the negotiation of a higher salary itself created the unequal treatment and could not simultaneously justify it. Gender could have influenced the employer's decision to agree to the higher salary demand. Accepting superior negotiation skills as grounds to rebut gender-based pay discrimination would allow employers to sidestep the principle of equal pay for men and women, undermining the efficacy of laws intended to enforce this principle.

Finally, the BAG also awarded the plaintiff compensation in accordance with Section 15(2) AGG, as she had been discriminated against on the grounds of her gender through the payment of lower remuneration than the male colleague. However, the BAG awarded less than that claimed by the plaintiff, who had demanded an amount of EUR 6,000. The BAG considered an amount of EUR 2,000 to be appropriate as compensation for the non-material damage suffered as a result of the unlawful pay discrimination. This amount guaranteed a deterrent effect against the employer, but at the same time complied with the principle of proportionality.

Commentary

The BAG's ruling has drawn widespread attention in Germany. Some fear it may end salary negotiations, while others praise it as a major step toward true equal pay.

A sudden end to salary negotiations should not be feared. In its ruling, the BAG expressly left the door open to justifying unequal pay on the basis of the labour market situation or the employee's qualifications. For example, specialised training or relevant professional experience can justify higher pay. This is also in line with the case law of the ECJ (judgment of 28 February 2013 – C-427/11 *Kenny and others*). Employers will therefore continue to have the option of remunerating their employees differently and negotiating salaries with them.

Following the BAG judgment, the scope for negotiation in employment contracts is limited. Employers should

avoid simply agreeing to higher salary demands, as this could prompt other employees, particularly of different genders, to request increases. If higher pay is necessary, it should be justified by labour market criteria or performance as outlined in Section 3(2) of the Pay Transparency Act. For new hires with higher salaries, employers should document the selection process to show that equally qualified candidates with lower salary expectations were unavailable. The safest approach is to avoid offering different pay for the same job level.

Overall, the BAG's decision is a positive move towards reducing gender pay disparities and ensuring equal pay for both men and women. Allowing employers to justify unequal pay based on an employee's negotiating ability would undermine statutory regulations. As the BAG correctly identified, gender-based pay discrimination often emerges during salary discussions. Moving forward, employers must ensure that any pay differences are supported by objective reasons, which should benefit all employees regardless of gender and contribute to fairer salary structures.

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Parties: Unknown

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