

News on the equal pay front

More uncertainties regarding the standard of comparison for equality of pay claims

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It is imperative that any pay discrimination based on gender is promptly and effectively addressed and rectified. Henceforth, companies are obliged to implement a remuneration structure that ensures equal pay for work of equal or equivalent value.



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On 1 October 2024, the Regional Labor Court (hereinafter LAG) of Baden-Wuerttemberg handed down a landmark ruling (2 Sa 14/24) in a case concerning pay transparency and the equal treatment of men and women in remuneration. The court had to rule on the claim of a female employee who sought equal remuneration with a specific male colleague employed in a comparable position.

Since the complete judgment of the LAG is not yet available, the press release published by the court leaves room

for questions and interpretations. As a result, the following article can only consider to a limited extent whether the previous case law of the Federal Labor Court (hereinafter BAG) and the case law of the European Court of Justice (hereinafter ECJ) has been sufficiently taken into account. One issue that stands out is whether the female plaintiff was permitted to make a direct comparison with a specific male colleague and claim the resulting compensation difference, or whether she was only entitled to the difference between the female and male median compensation, as the LAG had determined. Moreover, it is neces-

sary to determine whether the General Equal Treatment Act can or even must be entirely disregarded when it comes to unequal pay claims. Going forward, the implementation of Directive 2023/970 (EU) on the reinforcement of the application of the principle of equal pay for men and women for work of equal value will again change the playing field for equal pay claims in the German court system. The implementation of Directive 2023/970 (EU) into German law will force companies to establish transparent pay structures and will lead to new enforcement mechanisms.

The LAG ruling

In the case ruled on by the LAG, the salary of the plaintiff was below both the median salary of the female and the median salary of the male peer groups at management level. The plaintiff's primary objective was to be awarded the discrepancy between her remuneration and that of a specific male colleague, whom she identified as the highest-paid individual at the third management level worldwide. As a minimum, the plaintiff expected the difference between her remuneration and the median salary of the male peer group. Her claim was based on § 3 (1) of the German Pay Transparency Act (Entgelttransparenzgesetz – EntgTranspG), which prohibits direct or indirect discrimination for equal work or work of equal value. This regulation is based on art. 157 (1) of the Treaty on the Functioning of the European Union (Vertrag über die Arbeitsweise der Europäischen Union – AEUV).

According to the LAG, the plaintiff was only entitled to the difference between the male and female median salary, which is less than what the plaintiff had demanded. According to the court, it is not possible to claim the highest conceivable remuneration amount based on art. 157 (1) AEUV and §§ 3 (1) and 7 EntgTranspG only because there is an indication of gender-based pay discrimination within the meaning of § 22 of the German General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG). In order to successfully claim the highest conceivable remuneration amount of the other peer group, there would also have to be an indication of gender-based discrimination with regard to the specific level and amount of remuneration. The exact extent cannot be determined from the press release. In the view of the LAG, compared to the specific remuneration of the plaintiff, neither the salary of the named male colleague nor the median of the male peer group was based on gender-based discrimination. The AGG could not justify a claim to the maximum difference either, as it only refers to the average value within a comparison group. Due to its fundamental importance, the LAG allowed both sides to appeal to the BAG. It is very likely that at least one of the parties to the LAG case will appeal the ruling, in which case the BAG will have to rule. However, the outcome of this is unclear and cannot be predicted.

Comparison of case law

The ruling of the LAG is highly relevant because it significantly deviates from previous rulings of the judgment of

the BAG of 21 January 2021 (8 AZ 488/19), and the ECJ of 3 June 2021 (C – 624/19) on this topic.

BAG (21 January 2021 – 8 AZ 488/19)

The BAG defines pay discrimination as the unequal compensation of employees of different genders for work of a similar or equivalent nature, on the basis of their gender. It is the responsibility of the employer to provide a reasoned justification for differential treatment based on criteria other than gender.

In contrast to the LAG, the BAG provided for an easing of the burden of proof, a lowering of the standard of proof, and a reversal of the burden of proof in accordance with § 22 AGG. This means that if one party presents evidence indicating discriminatory conduct based on a criterion enumerated in § 1 AGG – such as gender in the present case – the opposing party is then obliged to demonstrate that no violation of the anti-discrimination requirement has occurred. According to the BAG, since there is no more specific provision on the burden of presentation and proof in the Remuneration Transparency Act, § 22 AGG and § 2 (2) clause 1 EntgTranspG are decisive.

The prohibition of unequal pay is derived from art. 157 (1) AEUV and both § 3 (1) and § 7 of the EntgTranspG. In the BAG's ruling of 21 January 2021, both the selected male comparator and the median male employee earned more than the plaintiff. That was sufficient for the BAG to determine that a violation had occurred, and consequently, the plaintiff was entitled to equal pay. Furthermore, the unequal pay could not be justified on the basis of other objec-

tive criteria. In its analysis, the BAG made reference to both a comparable male employee and a comparable median salary.

This leads to the question of which of the two values should be selected as an indicator for comparative purposes. On the one hand, § 3 (2) EntgTranspG allows for the use of another employee of the opposite gender as a comparison, but this would result in the use of the highest-paid individual within the comparison group for all cases. Consequently, it is preferable to use the median value. In contrast to the BAG, the LAG only awards the difference between the medians of the male and female peer groups. Since the plaintiff in the LAG case had earned less than the female median, the difference awarded by the LAG could not fully close the gap to the male median. That means that the plaintiff in the LAG case still earns less than the male median, despite the absence of any objective criteria to justify this discrepancy.

ECJ (of 3 June 2021 – C-624/19)

In its ruling, the ECJ also states that, in accordance with art. 157 (1) AEUV, male and female employees must be compensated equally for the same work or work that is deemed equivalent within the same sector. This is a directly applicable law that represents the general principle of equality. In contrast to the BAG, however, the ECJ does not utilize the median as its point of departure; rather, it considers the circumstances of individual employees.

Lack of consideration of the AGG

Although the LAG applied the AGG, its ruling did not fully achieve the AGG's goal of non-discriminatory treatment. The simple existence of a discrepancy between the male and female medians is sufficient indicative evidence under § 22 of the AGG to conclude that gender-based discrimination has occurred. At the same time, it is conceivable that the discrepancy in remuneration in comparison with the individually identified highest-paid employee does not automatically constitute evidence of gender-based discrimination. However, this does not permit the conclusion that the female plaintiff should not generally earn as much as the male median earner. Otherwise, the remaining pay gap would still be indicative evidence for gender-based discrimination. In such a case, the defendant would have had to refute this on the basis of the reversal of the burden of proof due to the circumstantial effect under § 22 AGG. However, this was not done.

Future amendment with Directive 2023/970

The recently enacted EU Pay Transparency Directive (2023/970) became effective on 6 June 2023, with the objective of eliminating the gender pay gap. The directive introduces new regulations that extend beyond the requirements set forth in the EntgTranspG, which came into force in 2017. The EU Member States have to implement these provisions into national law by 7 June 2026.

It is imperative that any pay discrimination based on gender is promptly and effectively addressed and rectified.

Henceforth, companies are obliged to implement a remuneration structure that ensures equal pay for work of equal or equivalent value. In order to ascertain whether employees are in comparable situations based on the value of their work, objective, gender-neutral criteria must be employed for the assessment process. Such criteria must not be directly or indirectly related to gender. Art. 4 (4) of the Directive enumerates four criteria: Skills, workload, responsibility, and working conditions. These criteria may be augmented by additional factors that are pertinent to the role and position in question.

In contrast to the EntgTranspG, which only applies to employees from the commencement of their employment, art. 5 (1) of the Directive stipulates that the applicant must be furnished with sufficient information regarding the starting salary or salary range in a timely manner, thereby enabling them to engage in informed and transparent salary negotiations. This will also have an impact on the recruitment process.

In the case of existing employment, art. 7 (1) of the Directive provides for a right to information for all employees regarding their own individual pay level and the average pay level of other employee groups, broken down by gender and by individual employee groups who perform the same or equivalent work within the meaning of art. 4 (1) of the Directive. In contrast to the current § 11 (3) clause 2 of the EntgTranspG, which is based on the statistical median, the Directive addresses the average value of comparable employees. In accordance with art. 7 (3) of the Directive, it is necessary for the employer to inform employees of their right to information. Concurrently,

art. 7 (5) of the Directive stipulates that employees must not be impeded from disclosing information, thereby rendering any confidentiality clauses in employment contracts regarding this matter null and void.

Moreover, art. 9 of the Directive introduces amendments to the reporting requirements pertaining to the gender pay gap. While § 21 of the EntgTranspG only requires measures to promote and achieve equal pay and information on the average total number of employees and the average number of full-time and part-time employees, the Directive requires reporting on the gender pay gap, including the variable remuneration component. Additionally, the reporting threshold for companies has been reduced from 500 employees to 100 employees, with a phased implementation period extending until 2031. Art. 10 of the Directive introduces a novel provision that allows for – and, under certain circumstances, requires – a joint assessment of remuneration by the company and employee representatives in specific instances, as delineated in art. 9 of the Directive. It will be of interest to observe whether this will have an impact on works constitution law regarding the co-determination rights of the works council.

In accordance with art. 16 (1) of the Directive, member states are obliged to guarantee that employees who have suffered losses as a result of a contravention of the principle of equal pay are fully compensated. In contrast with the preceding regulation of the AGG, the compensation for damages according to art. 16 (4) is not subject to a fixed upper limit. Nevertheless, the burden of proof regulation, as previously established in the AGG, will be main-

tained. In accordance with art. 18 (1) of the Directive, it is sufficient for employees to demonstrate that there has been direct or indirect pay discrimination. This establishes a presumption of liability on the part of the employer, who must then prove that no discrimination has occurred.

Ultimately, the Directive calls for the establishment of effective, proportionate, and dissuasive sanctions, as outlined in art. 23 (1). It is possible that fines may be imposed, with the amount to be set in accordance with the relevant criteria, irrespective of the size of the organization in question, in order to ensure that the deterrent factor is effective. The EntgTranspG does not include any sanctions of this nature.

General outlook

Although the Directive will not be fully implemented for some time, there is a significant need for adjustment, particularly in comparison with the existing EntgTranspG. It would be advisable for companies to undertake comprehensive analyses of remuneration disparities at the present time and to implement a well-structured documentation system in advance. It would be advantageous for courts to take the requirements of the Directive into account as soon as possible, which in some cases has already been done. The particular case under discussion continues to be a source of interest. It will be interesting to see whether the BAG adheres to its previous case law, follows the LAG, or sets a new standard, taking the Directive into account. ←

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