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Gender equality in German workplaces – equal pay

Mayer Brown | Employment & Immigration - Germany



DR. SVENJA
FRIES

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Introduction

Employers are legally prohibited from discriminating on the basis of gender (as well as on the basis of other forbidden criteria) when it comes to remuneration. The General Act on Equal Treatment (AGG) prohibits discrimination on the grounds of:

- race or ethnic origin;
- gender;
- religion or belief;
- disability;
- age; or
- sexual orientation.

"Discrimination" comprises unequal treatment in relation to employment conditions and working conditions, including pay, that cannot be justified by reasonable grounds.

The AGG not only prohibits direct discrimination (ie, where an employee is treated less favourably than another in a comparable situation on the ground of one of the aforementioned criteria), it also prohibits indirect discrimination. This occurs where "an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared with other persons" on any of these criteria. A case of indirect discrimination might occur, for instance, if part-time employees are treated worse than full-time employees, since the majority of part-time employees in Germany are women.

This prohibition of unequal treatment of part-time employees is also enshrined in the Part-time and Fixed-term Employment Act, which explicitly states that "a part-time employee shall not be treated less favourably than a comparable full-time employee because of the part-time work, unless objective reasons justify a difference in treatment". It further confirms the requirement of equal pay, stating that "a part-time employee shall be paid remuneration or another divisible benefit of monetary value at least to the extent of the proportion of his or her working time to the working time of a comparable full-time worker".

Irrespective of these prohibitions, women continue to earn about 18% less than men in reality. The most prevalent explanations for this gender pay gap include:

- the traditional division of roles (with women being responsible for raising children while men are the typical breadwinners);
- fewer career options for employees working part time (such employees being predominantly female); and
- the tendency of women and men to take up "gender-typical" occupations in different sectors of the economy.

Various efforts have been made to overcome this difference, both by the German legislature and the German employment courts. Two of the more recent examples include:

- the Act to Promote Transparency of Pay Structures; and
- its interpretation and application by the German Federal Employment Court.

Act to Promote Transparency of Pay Structures

The Act to Promote Transparency of Pay Structures came into force in 2017. This Act aims to promote wage fairness for women and men performing the same or equivalent work.

The Act provides for amendments regarding claims for payment of a higher remuneration in cases of discrimination. To this end, the Act tries to provide clarification on a factual level by defining "equal and equivalent work" in compliance with previous case law. Accordingly, "equal work" is defined as work that is "identical or of the same kind". Equivalence is to be measured by an overall assessment of several factors, including:

- the type of work;
- the qualification requirements; and
- the working conditions.

As equivalence does not extend to the result of the work, there is no qualitative evaluation of the employee's performance at this level. However, differences in performance can still be considered elsewhere – for example, as a justification for unequal treatment.

The Act further introduced an individual claim to information. In sites that regularly employ more than 200 employees, employees are entitled, by means of an enquiry with the works counsel or the employer, to request information about the average monthly gross remuneration (statistic median) of the respective other gender of a comparison group, and – per enquiry – about up to two individual remuneration components. The term "remuneration" in this context also includes other cash compensation or compensation in kind, such as the provision of a company car. Furthermore, the employer must inform the employee about the criteria and procedures of remuneration determination. Such enquiries enable the employee to receive targeted information about remuneration components where the employee suspects unequal treatment.

Private employers that regularly employ more than 500 employees are further asked to conduct a review process about their compliance with the equal pay obligation. Such a process consists of a review of the current situation, an analysis and a results report. However, the Act provides no obligation to conduct such a review, nor any legal consequences in the event of non-performance.

Recent case law of Federal Employment Court

In February 2023, the Federal Employment Court ruled that negotiation skills alone cannot justify unequal pay.⁽¹⁾

In the underlying case, a female employee and a male employee had been hired at a similar time for a similar position. During the hiring process, the male employee successfully demanded a higher salary than the employer had originally offered; in contrast, the female employee accepted the offered salary. The female employee later filed a payment claim based on alleged discrimination.

The Federal Employment Court ruled that the salary gap was discriminatory, and that the employer had to pay the difference, as well as additional compensation, to the female employee. In particular, it did not accept the employer's argument that the difference in the two employees' remuneration had not been based on their gender but merely on the male employee's negotiation skills.

As the decision has not yet been released in full (the above summary is based on a press release), there is still some uncertainty as to its consequences. Many questions remain unanswered, including with regard to:

- whether women are generally perceived to be weaker in negotiations;
- whether there can be individually negotiated increases within a homogenous group;
- whether employers must now raise the salaries of existing employees after every successful salary negotiation with a new hire; or
- what effect the hiring date of the employees in question can have on the justification of unequal pay (in the underlying case, the male and the female employee had been hired only a few weeks apart).

For now, the main takeaway is that employers must properly document the reasoning for their salary decisions in order to prove, if it comes to a dispute, that they were non-discriminatory. In addition, they should be increasingly mindful about pay differences between similar positions. Employers might wish to consider, if they have not yet done so, introducing a remuneration system based on objective criteria, such as:

- seniority;
- education and degrees; and
- foreign language and other skills.

Comment

It is expected that there will be a rise in equal payment litigation in the wake of the aforementioned Federal Employment Court decision. It remains to be seen whether this will be the case, and whether this alone will be sufficient to close the gender pay gap. More critical commentators have already voiced their doubts, since a system that requires enforceable claims and litigation to combat payment inequality relies on (female) employees' willingness to challenge their employer. In their view, it is the employers' mindset that must change – in particular with a view to equal opportunities and appreciation despite "inconveniences" such as part-time work, maternity and parental leave, and childcare.

For further information on this topic please contact [Svenja Fries](mailto:sfries@mayerbrown.com) at Mayer Brown by telephone (+49 69 7941 0) or email (sfries@mayerbrown.com). The Mayer Brown website can be accessed at www.mayerbrown.com.

Endnotes

(1) Federal Employment Court, judgment of 16 February 2023, docket No. 8 AZR 450/21.