

Today is International Women's Day, and one of the key objectives of the day is to raise awareness about discrimination, including pay discrimination, and to help forge a gender equal world.

In Germany, pay equality between men and women is statistically not a reality. According to a survey conducted by the German Federal Statistical Office, women with comparable qualifications, jobs and employment histories earned, on average, 7% less per hour than their male colleagues in 2022. Due to absences caused by parental leave and part-time work, among other things, the pay gap is growing, resulting in a pay gap between men and women in Germany as high as 18% on average.

The German Pay Transparency Act aims to enforce the principle of "equal pay for equal work/work of equal value" more effectively. It gives employees of companies with more than 200 employees a right to information on pay criteria. Companies with more than 500 employees are required to review pay structures regularly for compliance with equal pay laws, and to report regularly on the status of equal pay as far as they are subject to management reporting requirements. However, despite the legal framework established by the Act, there has not been a flood of lawsuits to date.

This could now change as a result of the most recent decision of the Federal Labour Court, in which the court determined that negotiating skills in salary discussions do not constitute a reason to pay higher remuneration and may therefore be discriminatory. At this stage we have very few details about the court's decision – only a press release has been released at this stage – but the ruling unfolded like this:

- The female plaintiff had been employed as a sales representative since March 2017. In August 2018, she requested information from her employer under Section 10 of the Pay Transparency Act, which showed the comparative remuneration of all its sales employees. The remuneration of the comparable male employees was determined as the so-called "median remuneration" under the Act. It turned out that the comparative remuneration of two male colleagues was higher than the plaintiff's remuneration in terms of both base pay and allowances, although all three employees performed the same work. The plaintiff therefore demanded payment of the difference between her pay and the higher median remuneration disclosed to her, as well as compensation for discrimination under Section 15 (2) of the General Equal Treatment Act.

- The lower courts dismissed the claim, stating that there was no gender-based discrimination. The reason for the higher pay of one of the male colleagues was that he had not agreed with the amount of the base salary offered during the application process. The employer argued that it had been necessary to increase the monthly base salary by €1,000 to secure his hire.
- The Federal Labour Court did not, however, accept this argument, although no details for its decision have been provided at this stage. Thus, negotiating skills do not constitute an objective reason for unequal treatment. Consequently, the female plaintiff is entitled to equal pay for equal work or work of equal value if the employer cannot rebut the presumption of pay discrimination based on gender. The court thus upheld the plaintiff's claim and awarded her lost pay retrospectively from the date of hiring and compensation for discrimination.

As set out above, the reasons for the court's decision have not been published yet. However, in light of its conclusions, companies should have a look at their salary structure and, irrespective of this decision, take compliance aspects into account when determining remuneration. Once we have the full decision of the court, we will be able to provide further guidance to employers on the implications of this decision.

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