

## LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

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# Federal Labour Court on equal pay: Better negotiating skills do not justify unequal pay

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In the judgment dated 16 February 2023 (8 AZR 450/21) ([cf. the Federal Labour Court's press release](#)), the Eighth Senate of the Federal Labour Court (Bundesarbeitsgericht, BAG) continued to raise the profile it had started of the Pay Transparency Act (Entgelttransparenzgesetz, EntgTranspG). The decision could lead to far-reaching changes to salary negotiations and the pay structure in German companies.

### Premise and decision of the BAG dated 21 January 2021

The fact that everyone is the same before the law and the German legislature must promote the actual enforcement of the equality of men and women already results from [Art. 3 \(1\) and \(2\) German Basic Law \(Grundgesetz, GG\)](#).

The question of equal pay in accordance with this principle is clarified in [Art. 157 Treaty on the Functioning of the European Union \(TFEU\)](#), [section 3 \(1\) EntgTranspG](#) and [section 7 EntgTranspG](#). It is apparent from the wording of these provisions that only a ban on unequal payment for equal work or work of equal value based on gender was initially intended. The case law of the Court of Justice of the European Union (CJEU) and the BAG implies, however, that employees have a direct right to equal pay.

This means that employees could require their employer to pay them the same (higher) pay that an employee of another gender based on these provisions.

In the [judgment dated 21/01/2021 \(8 AZR 488/19\)](#) the BAG has already ruled that employees who claim such higher pay on the basis of [Art. 157 TFEU](#) and [section 3 \(1\), section 7 EntgTranspG](#) must show that they (1) carry out the same work or work of equal value as their comparators of the other gender to whom they relate and that (2) these comparators actually earn higher pay than the claimant. The latter can already be shown by quoting statistical mean values, as evidenced by the right to information for the median values disclosed by the EntgTranspG.

If the claimant can demonstrate these circumstances, applying the burden of proof regulation of [section 22 General Equal Treatment Act \(Allgemeines Gleichbehandlungsgesetz, AGG\)](#), it is presumed that the difference in payment relates to gender discrimination.

It is then a matter for the employer to prove that the less favourable treatment is solely based on reasons beyond gender. If the employer cannot

do so, then this is a case of gender discrimination and the claimant has the right to the same remuneration as the better paid comparators.

This case law has now been confirmed by the Eighth Senate and, in addition, has clarified that the presumption of discrimination cannot be rebutted by referring to the better negotiation skills of certain employees.

### Facts of the matter in the decision dated 16 February 2023

In the decision adopted by the BAG a female employee brought a claim where in her department two men were employed (apart from her). At least one of these men was comparable to the claimant.

This male colleague had been employed by the respondent since 1 January 2017 and from 1 January 2017 to 31 October 2017 received a basic salary of EUR 4,500 per month. His basic salary decreased to EUR 3,500 per month from 1 November 2017, in July 2018 he received a basic salary of EUR 4,000 per month and from 1 August 2018 a salary of EUR 4,120 per month based on a collective bargaining agreement. The introduction of salary based on a collective bargaining agreement included a cap which limited salary increases to a maximum of EUR 120 per year. The salary based on a collective bargaining agreement was also (initially) directly based on previously individually negotiated contracts.

The claimant continuously received a contractual basic salary in the amount of EUR 3,500 per month since starting work for the employer on 1 March 2017. With the introduction of salary based on a collective bargaining agreement, the claimant's salary increased to EUR 3,620 per month applying the cap and thus taking into consideration the previously negotiated contractual basic salary.

The claimant and her male colleagues were grouped in the same salary group in the collective bargaining agreement.

### Ruling

The BAG has recognised this lower salary paid since 2017 as discrimination against the claimant based on her gender. In applying its previous case law the BAG presumed that the claimant had been discriminated against due to her gender based on her actual lower salary. This presumption was unable to be rebutted by the employer.

The respondent did argue that the better paid male employee was initially also offered a basic salary of EUR 3,500 per month and the employee had rejected this basic salary as being too low. These "better negotiating skills" were, however, not sufficient to rebut the presumption of gender discrimination. The BAG also found the argument insufficient that the better paid male employee occupied a post that had been previously occupied by an equally better paid female employee.

The claimant was held to have been discriminated against on grounds of her gender in terms of [Art. 157 TFEU](#) and [section 3 \(1\), section 7 EntgTranspG](#) and therefore awarded all salary differences between her and her male colleague since 1 March 2017 and compensation for gender discrimination in the amount of EUR 2,000.

### Practical outlook

The decision of the BAG has made it significantly easier for employees who claim a higher salary on the basis of [Art. 157 TFEU](#) and [section 3 \(1\), section 7 EntgTranspG](#) to legally enforce their claims. In future, employers must expend considerable effort to prove that lower salaries

are solely based on non-discriminatory circumstances.

Companies therefore should be required to adhere to a fixed salary structure which is not based on negotiations or discriminatory circumstances, or, in the event of actual differences in pay between the genders, to at least document those non-discriminatory circumstances that

have lead to these differences. According to the case law of the BAG, these circumstances may, for example, be relevant professional experience. Furthermore, these circumstances may also include justifying higher salary payments to an employee after it took a particularly long time to fill their role, for example. Further case law of the BAG must be awaited in this respect, however.

#### Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author Sandra Felicia Schramm on +49 40 500360 755 or by email to [sschramm@goerg.de](mailto:sschramm@goerg.de). For further information about the author visit our website [www.goerg.com](http://www.goerg.com).

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