

LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

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Equal pay: Highest or average values? What can be demanded in the event of gender-related unequal treatment?

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The question of gender neutral remuneration is always a current topic. The requirements for gender neutral remuneration are regulated at national level in the [Pay Transparency Act](#) (Entgelttransparenzgesetz, EntgTranspG). Since the adoption of the [Pay Transparency Directive](#), new provisions must be observed which must be transposed into national law by the German legislature by 7 June 2026. We have previously reported on the envisaged changes in the [Pay Transparency Directive](#) in our Legal Updates dated [20 December 2023](#) and [22 August 2024](#). Meanwhile, the number of cases before the courts in relation to gender neutral remuneration are increasing. These frequently relate to the question of the correct reference value for calculating potential back pay.

In relation to this topic, the most recent judgment of the Baden-Württemberg Regional Labour Court (Landesarbeitsgericht, LAG) dated 1 October 2024 has attracted attention (currently only the [press release dated 01 October 2024](#), case no. 2 AZR 14/24 is available). The method used by the Baden-Württemberg LAG to calculate the difference payments due to gender-related discrimination and the resulting consequences for the amount of the claim to remuneration is examined in this article. In particular, it

explores the various approaches that differ from the case law of the Federal Labour Court (Bundesarbeitsgericht, BAG) and analyses the impact this could have in practice.

The legal basis is the Pay Transparency Act and the Pay Transparency Directive

The legal basis for gender neutral remuneration can be found in the German [Pay Transparency Act](#) and the EU's [Pay Transparency Directive](#). The following principles, amongst others, apply under the [Pay Transparency Act](#):

- Ban on remuneration discrimination based on gender ([section 3 Pay Transparency Act](#))
- Remuneration systems must be designed to be free of discrimination ([section 4 Pay Transparency Act](#))
- Right to request disclosure on the criteria and practices used to determine their own remuneration as well as the (average) remuneration of a reference activity named in advance (on request from employees in establishments with more than 200 employees, [section 10 et seqq. Pay Transparency Act](#))

The Pay Transparency Directive envisages further obligations, which include protecting applicants as a new group of persons and granting employees an extended individual right of disclosure (for more details see our Legal Updates dated [20 December 2023](#) and [22 August 2024](#)).

The BAG's method of calculating the difference

According to the case law of the BAG, "the members of the discriminated group should receive the same advantages as those in the privileged group" applies to calculating back payments where discrimination has been determined ([BAG, judgment dated 21 January 2021 - 8 AZR-488/19](#)). In its decision dated [16 February 2023 \(case no. 8 AZR 450/21\)](#), the BAG awarded the claimant in this case the difference between her wages and those of the named comparative male colleague on grounds of direct pay discrimination. There were only two male colleagues to compare the claimant with. In this respect, the BAG considered it sufficient grounds for presuming a causal connection that the claimant had only named one of these two male colleagues ([BAG, judgment dated 16 February 2023 - case no. 8 AZR 450/21](#)).

The decision of the Baden-Württemberg LAG

The case before the Baden-Württemberg LAG dealt with a female claimant who was a level 3 manager. She had worked in management for around half of her thirty years working for the company. In the meantime the claimant had become a mother. She also worked part time during her parental leave. At the end of her parental leave she initially remained working part time, although she later returned to working full time. The claimant received less remuneration in

comparison with her male colleagues. In addition, the claimant received less remuneration even than her female colleagues.

A man who was the top earner in the example male comparative group was named by the claimant for calculating the difference payment she believed she was owed.

At first instance the Baden-Württemberg Labour Court (Arbeitsgericht, ArbG) held that the claimant had been discriminated against being paid less in comparison to her male colleagues and awarded her the difference to the median remuneration of the male comparative group as compensation (Baden-Württemberg ArbG, judgment dated 22 November 2023, case no. 22 Ca 7069/21 – not published). However the claimant was not satisfied with this and appealed to the Baden-Württemberg LAG.

Discrimination due to the lack of objective criteria for a difference in payment

In principle the LAG likewise accepted gender-related discrimination on the grounds of lower pay. In the opinion of the LAG, the employer was unable to rebut the presumption of discrimination arising from the lower remuneration ([section 22 of the General Equal Treatment Act \(Gleichbehandlungsgesetz, AGG\)](#)).

Deviation from the BAG's case law: the difference between the female and male average value

The LAG "only" awarded the claimant the right to be paid the difference between the female and male average remuneration.

It justified its decision by saying that the indication of gender-based discrimination should be at a certain level. In this case it was based on the fact that the remuneration of the male colleague named by the claimant was higher than the median remuneration of the male comparative group. Therefore this colleague should not have

been used as a comparator. In addition, the claimant's remuneration was less than the median remuneration of the female comparative group. In the opinion of the court there was insufficient presumption of causality that the full difference between the claimant's individual remuneration and that of the male colleague named by the claimant/the median of the male comparative group related to remuneration discrimination based on gender (cf. [press release dated 01 October 2024, case no. 2 AZR 14/24](#)).

Categorising the decision of the Baden-Württemberg LAG

The LAG deviated from the findings of the BAG and Court of Justice of the European Union (CJEU) in relation to calculating the difference payment. As stated above, the BAG held that the members of the discriminated group should be given the same advantages as the members of the privileged group ([BAG, judgment dated 21 January 2021 - 8 AZR 488/19](#)). This does not involve forming two comparative groups. In the decision in question the LAG awarded the claimant remuneration back pay that was not based on her individual wages. Instead, the LAG formed a female comparative group (including the claimant) and established the median.

Median remuneration of the female comparative group used as basis instead of the remuneration of the claimant

Determining the median from the remuneration of the female comparative group resulted in the initial salary used for calculating the difference being higher than what the claimant actually received. The difference calculation was accordingly lower.

Whether and the fact that the claimant (also) earned less than the female colleagues is irrel-

evant for the calculation of the claim to remuneration arising from discrimination in accordance with [sections 3, 7 Pay Transparency Act](#). The claim to remuneration resulted from gender-related pay discrimination, i.e. it comes down to the unequal treatment of the claimant in relation to her male colleagues who do the same work or work of equal value. Any potential difference in remuneration to colleagues of the same gender is therefore not relevant.

Difference between the right to disclosure and the right to remuneration

Furthermore the LAG referred to the median of the male comparative group and not the remuneration of a male colleague within this comparative group. It should be noted that the statistical median is the basis for the right to disclosure regulated in the [Pay Transparency Act](#) which employees can assert against their employer ([section 11 \(3\) Pay Transparency Act](#)). This right to disclosure, however, is not synonymous with the right to remuneration. The right to disclosure provides transparency. Employees should receive the opportunity through the disclosure process to assess suspected discrimination and, if applicable, to assert their rights (cf. [Bundestag document 18/11133](#), page 58).

It is questionable whether the calculation of the remuneration claim as made by the Baden-Württemberg LAG corresponds to the law, in particular European Union law. If, on the part of the claimant, the median of their own gender or both genders was always used as a basis and the remuneration of the claimant was higher than one of these median values, it would simply be impossible to discriminate against this person. Such a consideration, as taken by the Baden-Württemberg LAG, distorts the assessment of unequal remuneration. With this method of calculation the focus is no longer on the (potential) gender-related pay discrimination, but rather on a general examination of the pay in a

non gender specific group. This seems to fall short of the EU law principles. In addition, it seems doubtful that a woman can only receive payment in the amount of the difference to the median male remuneration. Is it always impossible to compare with the top male earner? Or does a right to the same remuneration not exactly arise from the individual right to remuneration in [sections 3, 7 Pay Transparency Act](#), which is to be differentiated from the right to disclosure of the median as per [section 11 \(3\) Pay Transparency Act](#) ?

Practical outlook

The Baden-Württemberg LAG allowed the appeal on a point of law to the BAG, as the issue is of great importance to both parties. It is assumed that the claimant will further strive for the BAG to award her the remuneration back pay she is seeking. It will be exciting to see how the expected continuance of the legal dispute will develop. In particular, it will be interesting to see what position the BAG takes on the calculation method used by the Baden-Württemberg LAG.

The judgment of the Baden-Württemberg LAG again made it clear the huge challenges companies will face in relation to gender neutral remuneration. It is therefore important for companies to design their pay structures to be transparent and understandable. This applies, in particular, with regard to remuneration that is higher or lower than the median. However, this does not mean that remuneration for the same work or work of equal value must not differ. As a basic principle, a difference in pay, even based on gender, is not generally forbidden. This does, however, require objectively verifiable criteria to justify such unequal treatment. It is essential for employers to deal with the provisions of the [Pay Transparency Directive](#), in particular with regard to transparent pay structures, to minimise potential claims from employees under the [Pay Transparency Act](#). In the event of litigation employers will only have a realistic chance at disproving the statutory presumption of discrimination based on gender with transparent remuneration relationships.

Note

This overview is solely provided for information purposes and should not replace professional legal advice. If you have any questions please contact your usual contact at GÖRG or the author Sarah Cordes on +49 40 500360 755 or scordes@goerg.de. Information about the author is available on our website www.goerg.de.

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