

LEGAL UPDATE LABOUR AND EMPLOYMENT LAW

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Equal pay: pairwise comparison possible with individual highest earners

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In advance of the implementation of the EU Pay Transparency Directive by the German legislature, the Federal Labour Court (Bundesarbeitsgericht, BAG) has strengthened its previous case law and clarified that the presumption of gender-related discrimination on the grounds of differences in pay also arises in comparison with individual employees. It held that employees who file a claim against their employer are not restricted to the median or mean average pay of the comparative group of the other gender. Using the simplification provided by presumption of conformity in [section 22 of the General Equal Treatment Act \(Allgemeines Gleichbehandlungsgesetz, AGG\)](#) employees may file a claim for the maximum amount of remuneration. This has (once again) increased pressure on employers to implement a system of remuneration where any pay differences can be explained on non-discriminatory grounds. A well documented and maintained personnel file is therefore extremely relevant to remuneration.

Facts of the matter

The claimant had been employed by the respondent/their legal successor since 2008 at senior management level (Head of department level) below the Board of Directors. Her

remuneration was made up of a fixed base salary, a 'company bonus', share-based remuneration and a capital contribution to the occupational pension scheme. In 2022, these components comprised a total remuneration package of approx. EUR 105,000.00 gross (while working as 0.5 FTE).

Even taking into consideration the different level of employment the claimant's remuneration was lower than (1) the median remuneration of comparable female employees of the respondent as well as (2) the (higher) median remuneration of comparable male employees of the respondent and (3) the (even higher) remuneration of one individual (specific) male employee whose work was comparable to that of the claimant whose remuneration was known to the claimant.

The claimant viewed her lesser remuneration as discrimination due to her gender and filed a claim for payment of the outstanding pay since 2018.

She primarily sought payment of remuneration in the amount of the one male employee whose remuneration was known to her, or alternatively in the amount of the (lesser) median remuneration of comparable male employees of the respondent.

The decision of the Baden-Württemberg Regional Labour Court (Landesarbeitsgericht, LAG)

The Baden-Württemberg LAG only partially ruled on behalf of the claimant (see our [Legal Update dated 11 November 2024](#)). It upheld the basic presumption that the claimant had been discriminated against due to her gender in accordance with [section 22 AGG](#). However, this presumption of conformity restricted the Baden-Württemberg LAG to the difference between the median remuneration of the comparable female and male employees. It could only be presumed in accordance with [section 22 AGG](#) regarding this amount that the claimant had been discriminated against due to her gender and her corresponding right to remuneration was only based on this amount. With regard to the further amount of remuneration, in particular the difference between the even higher remuneration of the named individual male employee, the court held that the claimant would have to separately demonstrate and prove that she had been discriminated against due to her gender.

In doing so the Baden-Württemberg LAG rejected the previous case law of the BAG on a very wide presumption of conformity which also dealt with a pairwise comparison of the total difference in remuneration between one individual female employee and one individual male employee.

Decision of the BAG dated 23 October 2025

The BAG has now overturned this argument of the Baden-Württemberg LAG and clarified that the presumption of conformity in accordance with [section 22 AGG](#) also applies to a pairwise comparison between female and male employees. In this regard it does not matter how many other male employees the claimant is

comparable to and what the ratio between the requested remuneration of the individual female employee is in relation to the (median) remuneration of these other male employees.

As the claimant had referenced the higher remuneration of a comparable male employee, it is presumed in accordance with [section 22 AGG](#) that the claimant was discriminated against due to her gender with regard to the total difference in remuneration. Accordingly, in relation to the total difference in remuneration the employer would have had to rebut the presumption that this difference in remuneration was due to gender. The BAG held that the employer would not be able to rely on the fact that the median remuneration of the female comparative group was higher than the remuneration of the claimant or that the median remuneration of the male comparative group was lower than the remuneration of the individual named male employee.

In summary: during litigation employees may demand the remuneration of the highest earning comparable employee of the other gender. The employer is then obligated to prove that the difference in remuneration is not due to gender. This requires (documented) reasons that are not discriminatory.

If the employer cannot do so the claimant employee will be awarded the same remuneration as the named employee, even if this remuneration is significantly higher than the median or mean average remuneration of the remainder of the comparative group.

Consequences

The case law of the BAG has followed the existing case law of the Court of Justice of the European Union (CJEU). At the same time it has (again) increased the pressure on German employers to promptly implement the provisions of the EU Pay Transparency Directive and the case law of the BAG as well as a remuneration system which conforms to these provisions. With regard to the case law of the BAG, it is always important to ensure that such remuneration systems and remuneration paid on this

basis can also stand up to a potential pairwise comparison of the highest earning employee of the other gender and any differences in remuneration can be (completely) explained using reasons that are not discriminatory. This also requires complete documentation of what the remuneration is comprised of and the remuneration history.

If you require any further information on this topic please contact us and we will be happy to help.

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. For further information about the author visit our website www.goerg.com.

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