

Equal Pay – Let's Hear It for the Freedom of Contract

INTRODUCTION

The grounds of the decision of the Federal Labor Court (BAG) that has already been broadly discussed (judgment of February 16, 2023, 8 AZR 450/21) concerning different pay for men and women have finally arrived. The basis of the decision was the complaint of a female employee for pay comparable to that of her male colleagues who were performing the same or similar types of work. As already announced, the BAG agreed with the female employee. There was much discussion of the statement that greater skill in negotiating is not an argument for differences in pay that will stand up in court. The speculation surrounding this is now at an end; what have we actually learned from the decision?

CORE STATEMENTS OF THE BAG

The BAG first establishes that the plaintiff can support her claim on both Art. 157 TFEU and on Sec. 3 (1) and Sec. 7 Transparency in Wage Structures Act. Employees would thus not be limited to the period since the enactment of the Transparency of Wages Structures Act. The court does not appear to make a differentiation between these two bases of claim. According to the decision, the following applies:

- In principle, men and women must be **paid the same** for the **same** or **comparable** work.
- Equal pay must be evaluated **separately for each component of compensation**. It is thus immaterial that the compensation is the same in total; rather, each component taken separately must be the same.
- The **rule in Sec. 22 General Non-discrimination Act governing the burden of proof** applies to the benefit of the subject of discrimination when reviewing discriminatory treatment. This means that the alleged subjects of discrimination must only substantiate that they earn less than the colleagues with whom they are comparing themselves. In the case at hand, it was already sufficient that there was a better-paid male colleague because there were only a total two other employees who could be compared with the plaintiff.

It then **rests with the employer to refute the disadvantage** in pay. This was evidently not possible in the case at hand. In particular, the blanket assertion that the male colleague demanded higher pay as a stipulation for accepting the offer of employment was insuffi-

cient for the BAG. The principle of the freedom of contract cannot justify unequal treatment.

Although difficulties in filling a vacant position may be a reason in the individual case, the BAG expects specific substantiation in such cases such as that there were no other similarly qualified applicants who would have accepted lower pay. However, the BAG emphasizes that a higher qualification can justify differences in pay in the individual case. In the case at hand, the employer did not raise this argument until the proceedings before the BAG, which, however, was too late in the proceedings.

Finally, the BAG granted the female employee additional restitution in the amount of EUR 2,000 for the discriminatory treatment.

CONSEQUENCES FOR BUSINESSES

The BAG did not usher in the end of the freedom of contract with this decision, but it did make it plain that better negotiating skills do not alone justify the differences in salary between men and women. Employers are therefore well advised to only agree to different salaries if there are further, material justifications, and to take pains to carefully document these grounds. Care must be taken particularly in those cases of differing qualifications or of special difficulties during the process of refilling vacancies to establish immaculate documentation which is capable of clearly substantiating the underlying situation in the event of litigation.

Please do not hesitate to contact us if you have questions concerning this topic. If you would like to be included on our mailing list of the subscribers to our free newsletter, please send us a brief **E-Mail**, with your request.

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