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NEWS REPORT

Country:	Germany
Title:	Judicial definition of pay discrimination
Date:	7 August 2017
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<u>Context</u>	
Issue at stake:	Court decision on equal pay
Ground of discrimination:	Sex/gender
Source:	National court decision
Field:	Equal pay
Applicable law:	Article 157 TFEU, General Equal Treatment Act

Content

Case: The claimant was a female freelancer working in the position of a senior editor fulltime with defined duties for a public service broadcaster receiving a fixed monthly remuneration. She discovered that her male colleagues doing the same or equivalent work were paid significantly better than herself. Therefore, she sued her employer. The defendant employer confirmed that male colleagues doing equivalent work were paid a higher salary than the claimant but denied discrimination. The pay difference was explained by different collective agreements for freelancers and permanent employees on the one hand, and differences in seniority (employment period for the same employer) between the claimant and other (male) freelancers on the other.

Decision of the Court: The Labour Court of Berlin decided that the claimant was not discriminated against on the grounds of sex. Article 157 TFEU would not require equal pay for equal work but prohibit sex discrimination. The court could not identify any discrimination on the grounds of sex but justified differentiations due to seniority and the different contract arrangements for freelancers and permanent employees. Unequal pay for the same or equivalent work could not in itself indicate discrimination. As there was no discrimination, the court rejected the claimant's request for information about the pay structure and salaries of further male colleagues performing equivalent work.

During the public hearing, the judge explained that higher remuneration would mainly depend upon negotiating skills, supposedly more pronounced in men. Furthermore, it was argued that contractual freedom and maternity and childcare periods would often lead to shorter periods of employment of women. Due to this women build less seniority and thus receive lower wages. This does not however constitute discrimination according to the judge.

The procedure is now pending before the State Labour Court of Berlin-Brandenburg.

Key points of analysis: The court emphasized the idea that there is no legal rule providing for the same pay for the same or equivalent work, neither in German law in general nor under Article 157 TFEU, while at the same time ignoring (or contributing to)

discriminatory structures. The claimant was performing defined task and receiving a fixed monthly salary which challenges the idea that she was a freelancer working under totally different circumstances compared to her male colleagues with permanent contracts. Collective agreements are not beyond judicial review but must comply with constitutional and EU law. Moreover, the court put special emphasis on the lack of seniority while the judge stated that maternity and childcare periods severely diminish the chances of women to achieve positions of seniority.

Several organisations, among them the German Women Lawyers' Association, heavily criticised the decision and the judicial remarks. They pointed out that the court should have focused on the equivalence of the actual work performed and the working conditions as well as the comparability of qualifications, not on seniority and disputable collective agreements.

Internet link source:

Press release of the Labour Court of Berlin:

<http://www.berlin.de/gerichte/arbeitsgericht/presse/pressemitteilungen/2017/pressemitteilung.556652.php>

Newspaper report on the oral hearing and the public announcement of the decision:

<http://www.berliner-zeitung.de/kultur/fall-birte-meier-darum-darf-das-zdf-eine-frau-schlechter-bezahlen-als-maenner-25660522>

Press release of the German Women Lawyers' Association:

<https://www.djb.de/Kom-u-AS/K1/pm17-07/>