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# DAMAGES FOR BREACH OF THE EQUAL PAY PRINCIPLE IN FRENCH LABOUR LAW

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## 1. Introduction

Equality is one of the highly valued values, in turn, the principle of equality is one of the basic principles of modern legal orders. The idea of equality originated in ancient democracies, but it gained its modern content only during the French Revolution.

French law does not provide for a maximum amount of compensation for discrimination.

Under French law, compensation for discrimination against an employee may include: suffered and future financial losses; loss of pension rights; wrongs; damage resulting from the deterioration of the situation of the employee; suffered negative consequences in the labour market; damage resulting from stigmatization. It is also pointed out that compensation should include a deterrent element.

## 2. Differentiation of employees in labor law

Among the factors justifying differentiation of employees performing equal work in terms of remuneration, those having an organizational attribute have also been distinguished. Such an attribute may have a differentiation resulting from economic factors affecting the efficiency of the company. For instance, it was held that granting additional bonuses to full-time employees (who are mainly men) working in shift work, including night work (not applicable in the case of employees, mainly women, working part-time) does not breach the principle of equal pay. In arguing its position, the Court indicated that the additional bonus is justified by the fact that such additional work results in health problems (e.g. sleep) and also leads to difficulties in organising family life<sup>3</sup>.

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<sup>3</sup> The goal is to implement the constitutional right to equal pay for work of equal value. To achieve this, the Confederation is making an updated version of its standard equal pay analysis tool (Logib) available to employers as a web-based application.

In French jurisprudence, the mistaken but genuine belief that differences in pay are justified by circumstances other than gender difference has been considered as a factor justifying differential pay. It has been held that even a negligent error can exclude an employer's liability for an unauthorized pay differential between employees.

French legislation regulates several interesting institutions designed to make it easier for employees who are victims of pay differentials to assert their rights.

The basic measure is to change the conditions that violate the principle of equal treatment in remuneration to those that are no less favourable than those received by the employee with whom the comparison took place as a person performing the same work as the complainant. The court may also order compensation for periods prior to the judgment and the elimination of the unlawful differentiation.

Another institution supporting claims for elimination of discrimination in terms of pay conditions is a regulation indicating the ineffectiveness of a contractual provision aimed at preventing or limiting an employee's right to disclose information about his or her pay or to obtain information from other employees about the pay they receive. Where such a provision is included in the body of an employee's employment contract, it is deemed to be non-existent. Moreover, determining the salary information of others, disclosing this information, including one's own salary, is a protected act. Examples of protected salary disclosures include asking co-workers for information about the salary or benefits they receive, giving co-workers information about the salary they receive, or obtaining information from co-workers about the salary or benefits they receive as part of the employment relationship. An employer's adverse action in connection with an employee's disclosure of wage information may give rise to a claim for victimization. An employee is entitled to disclose his or her salary information not only to other employees, but also to third parties, such as unions. Moreover, it is argued that the disclosure can be made to any other person as long as it is directed at determining whether a gender pay gap has occurred<sup>4</sup>.

The Loi sur l'égalité– LEg 1996 also provides for the possibility of requiring employers with 250 or more employees to publish the salaries paid in that company in order to determine whether male and female employees are treated equally in this aspect. In case of violation of this requirement, a judicial coercion procedure may be initiated against the employer or a fine of up to 5,000 French francs may be imposed on him. Although this principle has been regulated in the text of the Loi sur l'égalité – Leg 1996, no decision has yet been taken on its application (the power to implement it lies with the government)<sup>5</sup>.

### **3. Protection of employees against discrimination**

One of the newer institutions designed to protect workers from pay discrimination is compulsory equal pay audits. It grants employment tribunals the power to order an audit if, in their opinion, there has been a breach of equal pay. The main task of the audit is to determine how to bring about a redress of the identified pay inequality. Labour

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<sup>4</sup> France, Ordonnance du Conseil d'État, nos 402742 et 402777, 26 août 2016.

<sup>5</sup> The Equality Act (Loi sur l'égalité – LEg) came into force on 1 July 1996. It is an important instrument for promoting effective equality between men and women.

tribunals have been given the right to appoint independent auditors to carry out the audit, and to advise the employer on how to eliminate the identified pay inequality. The reports carried out are not required to be published, but must be presented to employees and those representing them. An employer's refusal to conduct an audit exposes the employer to a fine of up to 5,000 French francs.

Until 11.09.2020, employees working in France also had the possibility to use the so-called questionnaire procedure (*procédure de questionnaire*). Under it, the employee could ask the employer a number of questions to determine whether he or she had been paid without violating the prohibition of discrimination. The employer was not obliged to answer, but if he did not do so within eight weeks, he had to reckon with the fact that the court would disadvantage him in the process of evaluating evidence<sup>6</sup>.

It seems that similar institutions are worth introducing on the grounds of European anti-discrimination legislation. Recently there have been more and more cases where employees are unable to establish and prove whether their employer has discriminated against them in terms of pay because of their refusal to provide data that would allow them to make the required comparison. In the author's opinion, it is necessary to introduce a mechanism that would enable employees to actually exercise their right to equal remuneration of persons performing the same work or work of equal value.

#### 4. Conclusion

It should be noted that French jurisprudence, in determining the amount of compensation for discrimination, pays attention not only to the actual losses suffered, but also to the damages that may only become apparent in the future. It should be advocated that all European courts should also take more account of the negative consequences that an employee may suffer as a result of an employer's breach of the principle of equal treatment.

Under French law, it is possible to award damages for unlawful termination of employment (because it is based on discriminatory grounds) and for violation of the prohibition of discrimination. However, the principle has been adopted that damages which have been compensated as a result of bringing one type of claim should not be taken into account when calculating the damages payable as a result of bringing another type of claim. This solution should also be adopted in the European labour law system.

Compensation for non-discrimination also includes compensation for non-material damage. In determining this form of compensation for an employee who has been discriminated against, the French courts accept that it should: be compensatory rather than punitive; not be too low so as not to undermine respect for anti-discrimination policy and legislation; be limited so that excessive compensation is not a route to untaxed enrichment; be similar to compensation awarded for violations of personal rights; have regard to the value of the amount awarded in a given society by relating it to the purchasing power of the wages paid; give rise to social recognition; and be linked to the degree of harm suffered by the employee.

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<sup>6</sup> CAA MARSEILLE, I komora, 10.03.2022, 20MA00335, Nieopublikowane w kolekcji Lebon.

French case law has distinguished the possibility of awarding compensation for the negative consequences that discrimination by the employer has caused in terms of the employee's position in the labour market. Two situations are possible in this respect: during the trial, the employee is still employed but the discriminatory actions have had such an impact on him that it is quite likely that he will lose his job and find it difficult to find a new one; already during the trial, the employee was unemployed and had difficulties in finding a job because of the impact on him of the discriminatory actions of the employer.

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**Summary:** The article presents the issue of the right to equal treatment and non-discrimination in widely understood employment relations has been proclaimed under European law as one of the employee's rights. The right to claim this compensation is independent of other legal remedies available to an employee in case of violation of the principle of equal treatment in employment. The general norms constituting the principle of equal treatment in employment in French law are discussed.

**Keywords:** labour law, compensation, employee, salary.