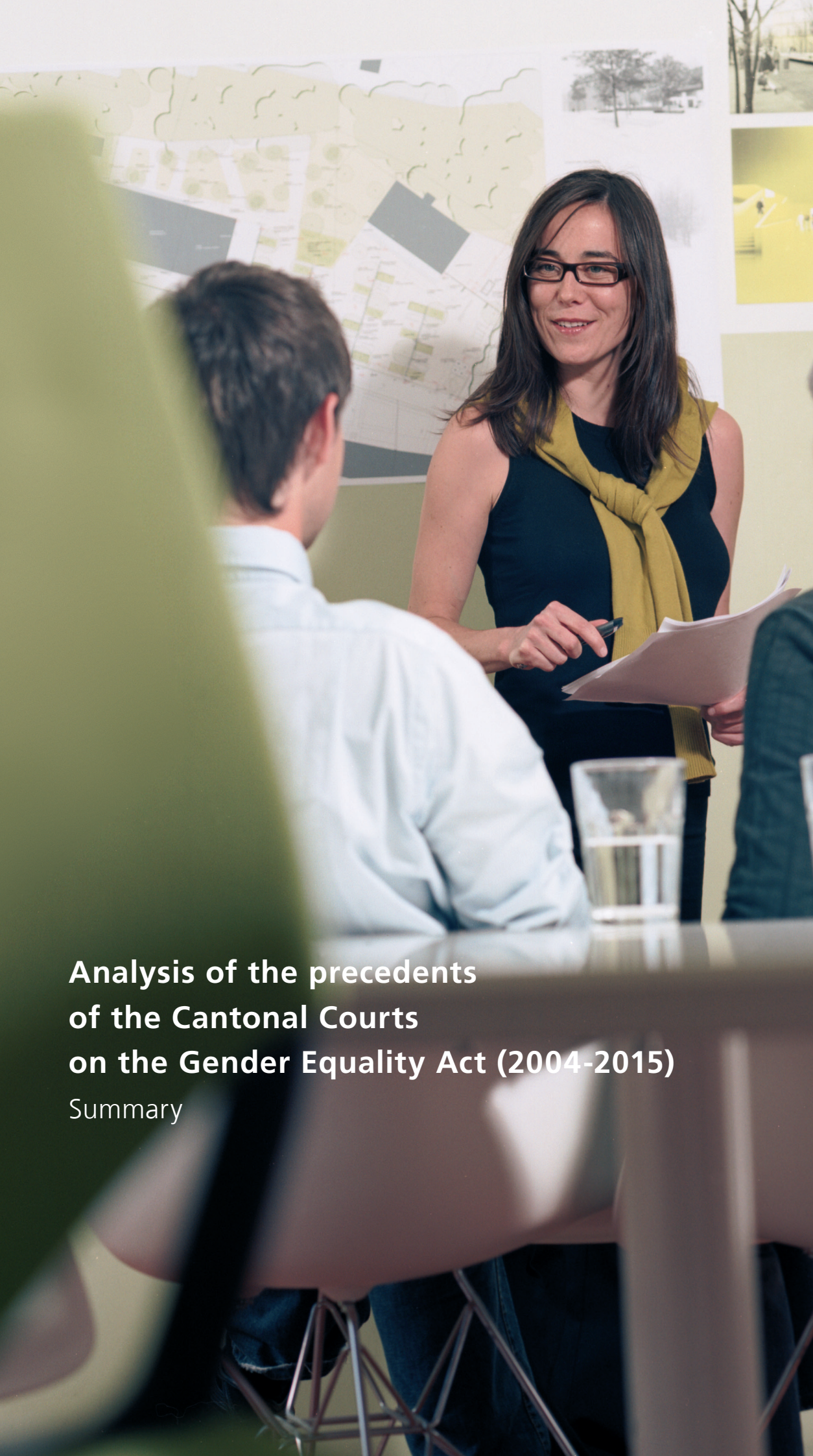




Analysis of the precedents of the Cantonal Courts on the Gender Equality Act (2004-2015)

Summary

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Analysis of the precedents of the Cantonal Courts on the Gender Equality Act (2004-2015)

Research report

commissioned by the Federal Office for Gender Equality (FOGE)

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Geneva, 16 June 2017

Main results

This is an in-depth study of 190 records of cantonal conciliation hearings and judgments under the Federal Gender Equality Act (GEA) over a period of just over one decade (2004-2015).

1. Proceedings under the GEA are nearly always brought by private individuals (mainly women) and very rarely by organisations (GEA Article 7). This study has only found eight cases (out of 190) in which organisations availed themselves of their right to bring legal action. In three cases (out of the eight), the organization sued parallel to private lawsuits of the individuals concerned (cf. 4.12-4.13).
2. In the vast majority of cases (84%), employment has ceased before judgment is delivered (cf. 4.7).
3. Individuals referring a case of gender discrimination to the courts most commonly complain of pay discrimination (67 cases) or discriminatory dismissal (67 cases - cf. 4.20). Such cases are especially common in the healthcare professions (cf. 4.11).
4. Most decisions concern *direct* discrimination. There is only a claim or finding of *indirect* discrimination in 30.5% of cases, and most of these are complaints of pay discrimination (cf. 4.18).
5. Almost one-third of all cases of discrimination in the terms of GEA Article 3 relate to pregnancy or maternity (41 cases). Discrimination often occurs on return to work after maternity leave. Most often, the mother is dismissed (cf. 4.16-4.17).
6. Our analysis of the precedents reveals that several cases of discriminatory dismissal (in the terms of GEA Article 5.2) were appraised solely from the angle of the Code of Obligations (CO Article 336). Sometimes, as a result, there was no relaxation of the onus of proof under the Gender Equality Act (GEA Article 6 - cf. 4.24 and 4.28).
7. When relief of the onus of proof is granted (GEA Article 6), the judgment rarely makes a clear distinction between the two stages of reasoning (1 - plausibility; and 2 - objective evidence). In the majority of cases (53.4%), plausibility is not accepted and the petition is dismissed (cf. 4.24).
8. Of all the judgments analysed, 62.5% are mostly or entirely against the employee lodging the discrimination claim. In particular, nearly all (91.6%) complaints of constructive unfair dismissal (GEA Article 10) are dismissed. The incidence of decisions against the employee is also very high (82.8 %) when the alleged form of discrimination is sexual harassment (GEA Article 4 - cf. 4.21-4.22 and 4.35).
9. A clear majority of claims for a compensation payment for sexual harassment (GEA Article 5.3) are dismissed (76.6% - cf. 4.20). Courts rarely consider the question of whether the employer had the requisite safeguards in place (cf. 4.13).
10. The Gender Equality Act also allows compensation for sexual harassment (GEA Article 5.3) not exceeding six months' "average Swiss salary." In practice, however, the courts base their calculations on "median Swiss salary," which is lower than average salary (cf. 4.29).
11. In pay discrimination proceedings, a sizeable majority of actions for back-payment of wages (GEA Article 5.1.d) fail (76.3% - cf. 4.26).
12. Although the proceedings are, in theory, free of charge (CPC Article 114a), GEA-based actions do entail a certain financial risk. This study found 23 decisions which awarded costs (CPC Article 95.3) against the employee. The amount payable by the employed party generally ranges from CHF 1,200 to CHF 19,392 (cf. 4.33).

Conclusion

This study set out to examine whether the problems identified in the 2005 evaluation of the GEA persist to this day, or whether there have been noticeable improvements. It also sought to highlight any new difficulties in the enforcement of this Act.

The main change to report is in the **types of discrimination most frequently claimed in court**. In 2005, Switzerland-wide, proceedings for pay discrimination were the most frequent, followed by sexual harassment, then discriminatory dismissal. In 2016, discriminatory dismissal and pay discrimination come top of the list (cf. 4.20).

This study has found 41 rulings in cases of **discrimination based on pregnancy or maternity**, of which 33 (80.4%) led to **dismissal**. Maternity-based discrimination is most common shortly after **returning from maternity leave** (after the period of protection against dismissal provided by CO Article 336.c. -cf. 4.16-4.17).

Discriminatory (GEA Article 5.2) or constructive (GEA Article 10) dismissal are often appraised solely from the angle of the Code of Obligations (CO Article 336 a or d). Non-implementation of the Gender Equality Act sometimes results in failure to relax the conditions of proof (GEA Article 6) and claims are framed exclusively in monetary terms (whereas reversal of dismissal is claimable under GEA Article 10 - cf. 4.28 and 4.36). Thus **the courts' tendency to prefer sole reliance on the general provisions of employment law**, which was noted 10 years ago,⁸⁴ seems to continue.⁸⁵

The **protection against constructive dismissal** under GEA Article 10 proves **fairly ineffective** in practice.⁸⁶ The rare actions brought on the strength of this provision have all failed, with one exception (cf. 4.21). In 2005, the evaluation of the Gender Equality Act showed that, in half to two-thirds of cases, employment had been terminated by the time of the judgment.⁸⁷ According to our study, at the time of judgment, employment had been terminated in 84% of cases. Nowadays, **bringing an action under the Gender Equality Act still very often entails losing one's job** (cf. 4.7). Proceedings brought at cantonal level under the Act may last several years (cf. 4.6).

It is still very rare for organisations, rather than the individuals concerned, to use the option granted to them by GEA Article 7 to bring actions for recognition of discrimination. Of the 190 decisions we analysed, we found only eight brought by organisations, and in three of these, the organisation was exercising its right in parallel to the affected individuals (cf. 4.12). **Under the current provision of GEA Article 7, the right of action by organizations does not dispense individuals from having to bring their own cases before the courts.**⁸⁸

Similarly to a decade ago, **most people bringing proceedings for gender-based discrimination do not win their cases**. Our analysis shows that 62.5% of rulings enforcing the GEA find mostly or entirely against the claiming employee (cf. 4.35). Similarly, **it is not unusual for the employee in the action to be ordered to pay costs which may amount to several thousand francs** (cf. 4.33).

The failure rate is particularly high (**82.8%**) when the alleged form of discrimination is sexual harassment (4.35). In this field, the courts often do not seem to have understood that the intention of "procuring sexual favours" is not necessary to a finding of a hostile working environment (and therefore of sexual harassment in the terms of GEA Article 4). Moreover, it is rare for judgments to assess how far the employer had met its obligation to prevent harassment beforehand and bring a specific case of it to an end (cf. 4.22). The special compensation allowed under GEA Article 5.3 is rarely awarded (cf. 4.29). On this point, also, we have found no improvement since the 2005 evaluation. As the Federal Council has refused to extend the relief of the onus of proof (GEA Article 6) to **sexual harassment cases**,⁸⁹ this form of discrimination remains very hard to prove (cf. 4.22).

Even when the onus of proof is relaxed, in over half of cases the party alleging discrimination fails to get past the first stage of plausibility (cf. 4.24). Evidence of pay discrimination is difficult to compile, given the lack of transparency in this field.⁹⁰

To this day, **most judgments make no clear distinction between the two stages of reasoning relating to easing the onus of proof**: these are "plausibility" (evidence to be adduced by the employee) and "objective grounds" (full proof to be supplied by the employer). Finally, in about 10 judgments in matters of discrimination eligible for the relaxation enshrined in GEA Article 6, the courts omitted to apply this provision (cf. 4.24).

In a clear majority of cases, complaints are of discrimination *directly* based on gender. Our analysis found **only a few cases of indirect discrimination**, most of which were pay-related (cf. 4.18). This result may be linked to that of a recent SCHR study, which found that parties in litigation are too unfamiliar with the notion of indirect discrimination.⁹¹

In recent years, the published works of Swiss legal authors have started to show an interest in multiple discrimination⁹² (e.g. based on gender and disability). However, our study found **not a single case in which multiple discrimination was claimed or formally upheld by a court of law** (cf. 4.15). This result is attributable to the fact that the phenomenon is still little known in legal circles. Furthermore, the GEA contains no requirement that courts should consider multiple counts of discrimination, say in relation to penalties.

Our study found **no case of discrimination based on gender identity or sexual orientation** (4.16). The lack of awareness of these issues in legal circles, and uncertainty on the applicability of the GEA to them⁹³ no doubt go some way to explaining why no such proceedings were instituted.

Recommendations

Based on the conclusions presented in the last section, we make recommendations designed to improve access to justice for people discriminated against on grounds of gender in working life.

A. Legislative authorities

- 1. Improve pay transparency:** in the context of the revision of the Gender Equality Act, now under way, oblige employers of at least 50 people to undertake regular analyses of their pay practices and have proper compliance with these checked by an external auditor, as proposed by the Federal Council.⁹⁴
- 2. Conduct systematic checks of GEA implementation:** make similar arrangements to those required by the Employment Act in the field of occupational health and safety (EmpA Article 40 *et seqq.*). Nominate cantonal authorities to monitor due compliance with the law, under the ultimate supervision at federal level.
- 3. Strengthen organisations' right of action:** as part of the work designed to improve the collective exercise of rights in Switzerland,⁹⁵ examine ways of making organisations' rights of action more effective when proceedings are based on the Gender Equality Act (GEA Article 7).
- 4. Exempt the losing party from the obligation of paying costs:** consider whether to waive payment of costs in all cantonal civil proceedings based on employment law, as allowed by the Canton of Geneva.⁹⁶
- 5. Relax the onus of proof in cases of sexual harassment and discrimination in recruitment:** reconsider whether to extend the easing of the onus of proof (GEA Article 6) to all cases of gender-based discrimination, as allowed in European Union law.⁹⁷

B. The Judiciary

- 6. Improve the continuous training of judges, members of the conciliation authority and barristers:** add GEA courses to continuous training programmes to deal especially with the following aspects:
 - the notions of indirect and multiple discrimination;
 - the arrangements for easing the onus of proof;
 - proof of pay discrimination;
 - the relation between the compensation allowed under the Code of Obligations and GEA;
 - the possibility of cumulative award of certain types of compensation;
 - action for reversal of constructive dismissal, as allowed by GEA Article 10;
 - and the definition of sexual harassment and the two aspects of exonerating evidence to be furnished by the employer in sexual harassment proceedings.
- 7. Undertake systematic data collection:** pursue and strengthen the co-operation between court registries and equality offices in order to improve access to judgments under the Gender Equality Act.

C. Equality offices

- 8. Undertake systematic data collection:** pursue and strengthen the co-operation between court registries and equality offices in order to improve access to judgments under the Gender Equality Act. Maintain support for the projects www.gleichstellungsgesetz.ch and www.leg.ch in the context of the financial aid granted by the Federal Office for Equality under GEA Article 14.
- 9. Improve knowledge of maternity-based discrimination:** conduct a study of the frequency and forms of pregnancy or maternity-based discrimination to improve understanding of this reality in Switzerland

and its impact on women's working lives.

10. Raise awareness of rights under the GEA: continue to inform all involved circles (individuals, businesses, government departments, social partners, the judiciary etc.) about gender-based discrimination at work, the rights conferred by the GEA and the avenues of legal redress.

D. Universities

11. Add GEA tuition to basic education: ensure that the GEA forms part of the material dealt with in bachelor's degree courses in law, and is not covered only by optional courses for a restricted audience.

84. Federal Council report, evaluation GEA, 3077. See also RAMSEYER/MUELLER, p. 1338-1339; FREIVOGEL, p. 1350

85. In this context, see AUBRY GIRARDIN, p. 100

86. HAUSAMANN/DE PIETRO, sub-study 2, p. 42

87. Federal Council report, evaluation GEA, 3070

88. In this context, see FC report, collective implementation, pp. 25-28

89. Federal Council report, evaluation GEA, 3094, 8.2.6; see also Federal Council report, discrimination, 4.2.3

90. In this context, see HAUSAMANN/DE PIETRO, sub-study 2, p. 43

91. HAUSAMANN/DE PIETRO, sub-study 2, p. 42

92. See, notably, thesis from Kleber

93. Grohsmann, sub-study 3, p. 47-49

94. See press release published by Federal Council on 26 October 2016

95. FC report, collective implementation; motion 14.4008 LAC-S

96. LaCC Article 22 (2)

97. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (reworking), OJ No. L 204, 26 July 2006, p. 23 (Article 19)

