

Analysis of the case law of the Federal Supreme Court on the Gender Equality Act (2004-2019)

Summary

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**UNIVERSITÉ
DE GENÈVE**

FACULTÉ DE DROIT
Département de droit civil



Analysis of the case law of the Federal Supreme Court on the Gender Equality Act (2004-2019)

Research report

Commissioned by the Federal Office for Gender Equality FOGE

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Main results

This analysis covers 81 decisions of the Federal Supreme Court in connection with the Swiss Federal Act on Gender Equality (GEA) over a 16-year period (2004-2019). **All these decisions are** accessible via the website www.bger.ch. The leading decisions are also published in the Decisions of the Federal Supreme Court. The main outcomes are as follows:

1. The proportion of decisions on GEA subjects published in the Decisions of the Federal Supreme Court is 15%. This is high compared to the percentage of decisions published in all fields (3% – see 4.2).
2. Most GEA-related cases brought before the Federal Supreme Court originate from the cantons of Zurich and Geneva, which have large conurbations (see 4.5).
3. At the time of appeal to the Federal Supreme Court, the employment still exists in only about one-third of cases. All these cases relate to pay discrimination, and nearly all are from the public sector. In 93% of private-law cases, the employment has been terminated (see 4.8).
4. GEA-based appeals to the Federal Supreme Court most commonly concern a complaint of pay discrimination in the public law sector (see 4.3 and 4.15).
5. The average total duration of GEA-based litigation is less than four years. Proceedings before the Federal Supreme Court average less than one year, with differences according to which division is competent (see 4.11).
6. Organisations within the meaning of Article 7 GEA make little use of their right to bring legal action. The nine recorded cases only concern pay discrimination proceedings in German-speaking Switzerland (see 4.12).
7. Though, in general, far fewer women than men bring cases before the Federal Supreme Court, most people who lodge a GEA-based appeal before the Federal Supreme Court are female employees, often aged over 50 (see 4.13).
8. Over half the disputes referred to the Federal Supreme Court in GEA matters concern the healthcare or education professions (see 4.16).
9. Maternity-related discrimination cases are common at cantonal level, but are rarely brought before the Federal Supreme Court (see 4.20). The proportion of unfair dismissal cases where discrimination is alleged is much lower at Federal Supreme Court level than before the cantonal courts (see 4.23). The Federal Supreme Court very often rules against the aggrieved employee in appeals concerning discrimination of this kind (see 4.37).
10. In just over half the cases based on a complaint of sexual harassment, the facts established before a cantonal court were not found to constitute “harassing” or “other behaviour related to the person's sex” in the meaning of Article 4 GEA (see 4.25).
11. The Federal Supreme Court is no stricter than the cantonal courts in its application of Article 6 GEA. In most cases, it does not accept the prima facie evidence and finds the discrimination unproven (see 4.26).
12. The Federal Supreme Court has limited power of review (see 4.27). Only 27% of employees who are parties in discrimination cases are granted leave to appeal. Even if they are, it does not mean that they win their cases, since the Federal Supreme Court often refers the matter back to the lower court for a new decision (see 4.39).

13. In just over half of cases, the Federal Supreme Court invites the Federal Office for Gender Equality to give its opinion (Art. 102 FSCA). This only happens in cases concerning civil service personnel. In one case out of two, the Federal Supreme Court does not follow the opinion of this specialised federal office (see 4.28).

Conclusion

The primary purpose of this study is to supplement the research results of the 2017 analysis of cantonal case law on GEA subjects.

That first analysis entailed a major effort to **gather data** and create a compendium of the judgments delivered by the courts of the Swiss cantons. This new study has encountered no such difficulties. All the case law of the Federal Supreme Court was available online. This free availability of the decisions of the Federal Supreme Court on the Internet is welcome, because it facilitates access to information on aggrieved parties and their access to justice¹.

Over a 16-year period, the Federal Supreme Court has issued 81 GEA-related decisions. This makes an average of **five decisions per year** for the private and public sectors combined. This figure is very low compared with the number of cases dealt with annually by the Federal Supreme Court in private and public employment law (about 200: see 4.1).

The **type of discrimination** which most often engages the Federal Supreme Court is **pay-related** (55 out of 81 cases). Although the 2017 analysis recorded an equally large number of complaints of unfair dismissal alleging discrimination, the proportion of such cases reaching the Federal Supreme Court is much lower (15), similar to sexual harassment proceedings (14). Proceedings are rarer for the other types of discrimination prohibited under the GEA (see 4.23).

The type of discrimination claimed varies according to **language region**. The cases originating from German-speaking Switzerland are essentially claims of pay discrimination, whereas the proceedings relating to other types of discrimination, especially sexual harassment, originate largely from French-speaking Switzerland (see 4.23). However, the statistics on the frequency of this phenomenon reveal no major regional differences². Should these results therefore be interpreted as reflecting different mentalities either side of Switzerland's language divide? It is not possible to answer this question on the basis of this study.

Of the 81 decisions analysed, 30 concern employment under private law (37%) while 51 relate to **employment under public law** (63%) (see 4.3 and 4.15). In our opinion, there are two factors which make it easier for public employees to appeal to the Federal Supreme Court. This is why the majority of cases have a civil service background.

- Factor one: government employees bear less **financial risk** in GEA-based proceedings; and if they lose, they do not have to pay legal expenses to the public body which employs them (Art. 68 para. 3 FSCA). Public employees are only liable for court costs at the reduced rate applicable to GEA-based litigation. In principle the amount ranges from CHF 200 to CHF 1,000 (Art. 65 para. 4.b) FSCA), provided that the claims are based solely on that Act (see 4.35 and 4.36).

¹ On this subject, see KIENER, pp. 72-73.

² See KRINGS/SCHÄR MOSER/MOUTON, p. 4 (percentages of women claiming to have faced harassment at least once in their working lives: 56.6% in German-speaking Switzerland, 52.4% in Ticino and 48.6% in the French-speaking part).

- Factor two: the **risk of employees losing their jobs** seems more limited when the employment is governed by public law, although personnel legislation often refers to private law. By the time of appeal to the Federal Supreme Court, the employment still existed in only 21 cases (31.3%), 2 of which were subject to private and 19 to public law (see 4.8).

The length of the court proceedings often frustrates hopes of job retention³. GEA-based **proceedings average** less than four years (from referral to the conciliation authority or cantonal court of first instance until decision by the Federal Supreme Court). Proceedings before the Federal Supreme Court average less than one year, with differences according to which division is involved. Proceedings before the first civil law division last only 6.4 months, whereas those before the first social law division extend over 11.4 months, on average. This difference may well be due to the different caseloads and matters dealt with by these divisions (see 4.11).

The **first civil law division never requests an opinion from the Federal Office for Gender Equality** (Art. 102 FSCA). By contrast, the first social law division regularly takes the time to consult the FOGE, though it only follows its opinion in one case out of two, generally when it decides to dismiss the appeal (see 4.28).

The only cases where the employment has continued despite proceedings reaching the Federal Supreme Court have related to pay discrimination. In the public sector, these proceedings are often brought by several individuals, sometimes parallel to actions by organisations which safeguard the interests of employees (Art. 7 GEA), in order to challenge the grading of an occupation in terms of pay. These circumstances probably tend to depersonalise the dispute and hence encourage job retention (see 4.8).

Nevertheless, **organisations within the meaning of Article 7 GEA make little use of their right to bring an action** for recognition of the claim. This study found no case from outside the German-speaking cantons. Furthermore, the nine decisions given in the context of proceedings brought, at least in part, by an association concern pay discrimination, and none of the other types of discrimination prohibited by the GEA (see 4.12).

Though far fewer women than men bring cases before the Federal Supreme Court⁴, most people who bring a GEA-based appeal before it are **female employees, often aged 50+** (see 4.13). This study has not been able to establish with certainty why these women seem more willing to pursue their cases to the Federal Supreme Court. Furthermore, it notes many cases where the aggrieved employee had more than ten years' seniority. Besides, more full-time than part-time women employees bring their cases to court (see 4.14).

Neither of the two decisions analysed in 4.22 takes explicit account of any **multiple discrimination** based on several of the criteria prohibited under Art. 8 para. 2 of the Swiss Federal Constitution (e.g. gender and age). Although the GEA does not mention the notion, an interpretation of this text in line with the international treaties ratified by Switzerland, especially the CEDAW (see 4.20), would require the courts to consider multiple and intersectional forms of discrimination⁵.

³ On the link between duration of proceedings and job retention, see the studies cited by COLÀS-NEILA/YÉLAMOS-BAYARRI, p. 45.

⁴ An SCHR study on access to justice corroborates this. It covered 4,383 decisions of the Federal Supreme Court (in all fields) over an 18-month period. The gender gap is especially wide in the field of contract law, which includes private law on employment. See WYTTENBACH/BRAUN, pp. 7-11.

⁵ C/CEDEF-KLEBER, N 30 on Art. 1 CEDAW; C/CEDEF-COTTIER, N 46-47 on Art. 5 CEDAW; C/CEDEF-LEMPEN, N 34-40, 56 on Art. 11 CEDAW.

At the time of the 2017 analysis at cantonal level, just over one-third of decisions related to discrimination on grounds of **pregnancy, maternity or family situation**. The present study reveals that such cases seldom reach the Federal Supreme Court. Only 6.9% of its decisions relate to a complaint of discrimination on grounds of pregnancy or maternity, generally linked to a dismissal (see 4.20).

At cantonal level, it is proceedings for **unfair dismissal involving discrimination** (Art. 3 and Art. 5 para. 2 GEA) which most commonly lead to an award of compensation to the employee⁶. By contrast, in 93%⁷ of proceedings referred to it on the same subject, the Federal Supreme Court finds against the dismissed person (see 4.37). Moreover, four out of six recorded decisions associated with a complaint for **dismissal in retaliation** for proceedings having been brought, in the meaning of Article 10 GEA, reach the conclusion that the conditions prescribed by that provision have not been met (see 4.24).

In 71% of decisions on **sexual harassment**, the outcome of the proceedings is wholly or mostly against the employee (see 4.37). Such outcomes occur especially because the behaviour recorded in the summary of the facts in the cantonal judgment is not considered “harassment” in the terms of Article 4 GEA. The way in which the courts construe that Article often leads them to deny the existence of an instance of sexual harassment. Besides, proceedings on this subject face difficulties of proof, since the reduced burden of proof under Article 6 GEA does not apply (see 4.25).

When the burden of proof is eased in accordance with Article 6 GEA, in the **majority of cases** (54.5%) **prima facie evidence is not admitted** and the claims of the party claiming discrimination are therefore dismissed. However, the Federal Supreme Court is no stricter than the cantonal courts in this regard. Besides, the federal decisions follow the two stages of legal reasoning, necessitated by Article 6 GEA, with greater clarity than most of the cantonal decisions studied by the 2017 analysis and the 2005 evaluation of the effectiveness of the GEA (see 4.26). At federal level, there has thus been some progress in the knowledge of the specifics of the GEA.

In general, leave to **appeal to the Federal Supreme Court based on the GEA is granted in about a quarter of cases**. When the appeal is brought by an aggrieved employee, the success rate stands at 27% (see 4.39). This very low percentage reflects our Supreme Court’s limited power of cognisance. In particular to avoid overload, the legislature wanted the Federal Supreme Court to be primarily a law review body, and only to review the summary of the facts drawn up at cantonal level if it was obviously incorrect or contrary to the law (Art. 105 FSCA). In this regard, the Federal Supreme Court often finds that the **appeal lacks sufficient grounds** (Art. 42 para. 2 and Art. 97 FSCA), because the appellant does no more than repeat the pleadings made before the cantonal courts, without explaining exactly why the cantonal appeal court was arbitrary in its dismissal of them (see 4.27).

Appeals to the Federal Supreme Court based on the GEA come from a **limited number of specialist lawyers**, most of whom practise in the cantons with large conurbations like Zurich and Geneva. The development of the case law on the subject of the GEA seems to owe much to the commitment of these few individuals, whose names feature at regular intervals at the beginning of the decisions analysed. Note, also, that the cantons where no GEA-related proceedings have been recorded often have no gender equality office (see 4.5).

⁶ 2017 analysis, p. 27.

⁷ This high percentage, due in particular to the Federal Supreme Court’s limited power of cognisance, must be viewed in the light of a Supreme Court decision, 4A_59/2019 given on 12 May 2020, shortly after the end of the period under review. In this case, summarised at www.leg.ch/jurisprudence FSC (GE) 12.5.2020, the employee won the three months’ remuneration claimed in compensation for discriminatory dismissal on grounds of maternity.

Recommendations

Based on the findings presented in the last paragraph, we make some recommendations designed to improve the administration of justice and access to it in the event of gender discrimination in working life. Some recommendations were already made at the time of the 2017 analysis⁸.

A. Legislative authorities

1. Reinforce the right of organisations to bring legal action: in the context of the work of improving the collective exercise of rights in Switzerland⁹, examine ways of making organisations' right to bring legal action more effective in proceedings based on the Swiss Federal Gender Equality Act (Art. 7 GEA).

2. Reduce the burden of proof in cases of sexual harassment and discrimination by refusal of employment: review whether to extend the reduced burden of proof (Art. 6 GEA) to all cases of gender discrimination, as provided for in European Union law¹⁰.

B. Legal professions

3. Improve the training of judges, members of the conciliation authorities and of the bar: Add GEA and CEDAW course modules to basic and continuous training programmes. Systematically raise awareness¹¹ in legal circles of sexist stereotypes, gender-based violence¹² (especially sexual harassment) and intersectional forms of discrimination¹³.

C. Equality offices

4. Raise awareness of rights under the GEA: continue to inform all concerned (individuals, companies, authorities, social partners, legal circles, etc.) about gender-based discrimination at work, the rights prescribed by the GEA and possibilities of legal action.

D. Federal Office for Gender Equality (FOGE)

5. Commission further research on the outcomes of litigation based on the GEA: improve knowledge of the outcome of proceedings when the Federal Supreme Court has referred the matter back to a cantonal court for a new judgment. Organise a survey of lawyers of both sexes who have brought cases before the Federal Supreme Court (their names appear at the top of the judgment) to answer the following questions: what was the fate of the claims based on the GEA? Did the parties finally settle out of court?

⁸ 2017 analysis, pp. 31-32.

⁹ Federal Council Dispatch CPC 2020, p. 2630 (Collective implementation of rights: excision and separate treatment); explanatory report of the Federal Council CPC 2018; motion 13.3931 BIRRER-HEIMO "collective exercise of rights: promotion and development of the instruments."

¹⁰ Directive 2006/54 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 (recast), OJ L 204 of 26.7. 2006, p. 23 (Art. 19).

¹¹ On the need for government to adopt a systematic approach and not rely solely on pre-existing skills of certain individuals within the judicial authorities, see KIENER, p 70.

¹² See the Council of Europe Convention on preventing and combating violence against women and domestic violence of 11 May 2011, SR 0.311.35, Art. 15 (Training of Professionals).

¹³ In accordance with CEDAW committee recommendation 33 on women's access to justice (CEDAW/C/GC/33), N 18e and 26 et seqq.

6. Gain a better understanding of the practice and expectations of the Federal Supreme Court when it requests an opinion from an authority (Art. 102 FSCA). For this purpose, raise the matter especially with the presiding judges of the first social law division and the first civil law division.

E. Associations safeguarding employee interests

7. Assume the right of action allowed by Article 7 GEA: equip themselves to use this right by in-depth study of the conditions on which it can be exercised in order to win not only public sector pay discrimination cases, but also cases of other types of discrimination (e.g. refusal of employment or promotion), including in contexts where the employment is governed by private law.

F. Scope of research

8. Pursue research into access to justice: conduct a qualitative study to clarify the profiles of the women who take their complaints of discrimination to the Federal Supreme Court and highlight the factors which influence their choice (e.g. family situation, age, disability, financial resources, economic recession, language region, etc.)

9. Study the employment termination agreements entered into after pregnancy: conduct a survey of cantonal bar members, GEA conciliation authorities and women who have lost their jobs after pregnancy, to find out more about the frequency and content of maternity-based termination agreements. Gather a number of agreements (in anonymous form) and analyse how far they entail mutual concessions.

