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Analysis of The Dilemma of Equal Pay for Equal Work Under Labor Rights Protection

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***Abstract*—**Equal pay for equal work is a system provided in the labor law, but the purpose of this system is not clear, in reality many workers rely on this protection of rights and interests, but the judicial practice is not satisfactory, and does not play a real role in protecting workers. The reason for this is that although equal pay for equal work is stipulated in labor laws, it was originally introduced as an anti-discrimination law in employment, and its role is more to protect labor from discriminatory treatment than to guarantee workers' access to pay. Based on theoretical and practical dilemmas, equal pay for equal work should be included in the law against discrimination in employment, and the matter of protecting workers' rights to remuneration should be subsumed into labor laws, so that the regulated matters between different laws can be coordinated and the role of the equal pay system can be effectively played.

Keywords*—Equal Pay For Equal Work; Anti-Employment Discrimination; Labor Contracts; Worker Protection;*

I. THE MEANING OF EQUAL PAY FOR EQUAL WORK

In 1951, the International Labor Organization adopted the Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (hereinafter referred to as "the Convention"), formally declaring that "work of equal value shall receive equal remuneration (referred to as equal pay for equal value).[1] Article 19 of the "Provisional Measures of the All-China Federation of Trade Unions on Labor-Management Relations", which was issued on November 22, 1949, stipulates that "male and female workers who are equally skilled, perform equal work, and are equally effective shall receive equal pay", which is the earliest legislative provision on equal pay for equal work in China. National People's Congress formally adopted the National Labor Organization's Convention on Equal Remuneration for Men and Women Workers for Work of Equal Value, and the 1994 Labor Law of the People's Republic of China clearly states in Article 46 that "the distribution of wages shall follow the principle of distribution according to labor and the implementation of equal pay for equal work."

There is no internationally accepted concept of what is meant by equal pay for equal work. Article 1 of the ILO Convention states that the term "equal remuneration for men and women workers for work of equal value" refers to a standard of remuneration that is not based on gender discrimination. The definition of "equal pay for equal work" is not defined, but the meaning of "equal pay for equal work" is mentioned in the "Explanation of the Ministry of Labor on Certain Provisions of the Labor Law of the People's Republic of China" issued in 1994, which means that the employer shall pay equal pay for equal work to workers who perform the same work with equal amount of labor and achieve the same performance. The meaning of "equal pay for equal work" is mentioned in this document. In this document, it is clear that the meaning of "work" should include three aspects: first, the same work, second, the same amount of labor, and third, the same labor performance. This clarification of the Ministry of Labor became the basic guideline for the research and application of equal pay for equal work in the Chinese jurisprudence and judicial circles since then. As Tu Yongqian believes, three conditions must be met for equal pay for equal work: first, the workers have the same work content in their jobs; second, they have paid the same amount of labor workload as others in the same jobs; and third, they have achieved the same work performance for the same amount of work.[2]

Among the scholars who study equal pay for equal work, they basically agree that in order to realize equal pay for equal work, the prerequisite is to clarify the connotation and extension of "equal work" and "equal pay". The "work" in equal pay for equal work can be interpreted as work status, work position and work performance. Among them, the work performance is composed and reflected by the quantity and quality of work.[3] Scholar Wang Quanxing believes that in order to enhance the operability and standardization of the definition of "same work", the rules of job classification should be combined to set the criteria for defining the same, similar and similar jobs, taking into account the content and nature of work, and also the quality of work. Not only horizontal comparison, but also vertical comparison should be made.[4] The term "remuneration" in the term "equal pay for equal work" is also known as pay, and in Chinese labor law, remuneration is basically the same concept as wages. According to the definition of the International Labor Organization in the Convention, it includes the regular, basic or minimum wages or salary paid by the employer directly or indirectly in cash or in kind to the worker as a result of his employment, as well as any additional remuneration. "Wages" refers to the remuneration paid directly to the workers by the employer in the form of money in accordance with the relevant state regulations or the agreement of the labor contract, and generally includes hourly wages, piece-rate wages, bonuses, allowances and subsidies, remuneration for extended working hours and wages paid under special circumstances. In addition to the items that should be clearly included in the remuneration, some scholars also point out that the "remuneration" in equal pay for equal work specifically includes the remuneration standard and the amount of remuneration. The former is the standard and basis for measuring and determining the amount of compensation, and the specific amount of compensation can be determined only when it is combined with specific work performance.[5]

II. THE THEORETICAL DILEMMA OF EQUAL PAY FOR EQUAL WORK

Although the meaning of equal pay for equal work has been explained in detail in various legal documents and by many scholars, these explanations have been criticized by many for their lack of operability. In theory, it is possible to make a static distinction between equal work, equal labor, and equal labor performance, but in practice the three are dynamic. The static distinction is tantamount to implying that the same work will necessarily result in the same amount of work, and the same work and the same amount of work will necessarily result

in the same labor performance, which is a logical reasoning that obviously defies common sense.

From the logical relationship between "equal work" and "equal pay", the relationship between the two should be causal rather than parallel, that is, "equal pay because of equal work". Compensation comes from "work", and "work" includes work content (also called job), workload (including the quantity and quality of work) and labor performance, so is compensation given to all three parts together or only to one or two parts? Is the compensation given for all three components or only for one or two of them? If compensation is given for all three components, is it distributed equally among the three components or is it focused? Among the three components of "work", performance is undoubtedly the most important one. In order to balance the relationship between work process and work result, most of the labor compensation is paid to the three components. Moreover, among the three components, more weight is assigned to labor performance, except for those jobs where labor performance cannot be measured exactly.

It is also important to note that the same work content and the same workload do not necessarily lead to the same labor performance. The simple linear inference that the same work content and the same workload will bring the same labor performance undoubtedly ignores the most important factors affecting labor performance, i.e., workers' own skills, experience and potential motivation. According to Paul Dong, it is impossible for two workers engaged in the same job to work in the same amount and achieve the same labor performance due to different skills, education and qualifications.[6]

Comprehensive consideration, although the law provides that "equal pay for equal work", there are many difficulties in practice. First, how to identify the same work content of two jobs there are certain difficulties, in addition to the assembly line operation of the same type of operating tools have a certain comparability, technical or general category of jobs more difficult to define the same work content. Second, even the same job is not necessarily the same workload, for example, the same driver position, few companies can achieve two driver positions in a certain period of time exactly the same mileage, different mileage is necessarily a different workload. Third, the same workload does not necessarily bring the same work performance. The realization of work performance is not only related to the workload, but also with the completion of the work of people's labor skills, work experience, and even with the work of psychological motivation is also closely related.

Another theoretical disagreement is whether equal pay for equal work exists as a legal principle or a legal rule. Scholar Zhang Wenxian establishes rules, principles and concepts as the three elements of law. He believes that "rules are the guidelines that specify rights and obligations and specific legal consequences, or the various instructions and regulations that give a definite and specific consequence to a factual state. Rules have a rigorous logical structure, including assumptions (assumptions about the state of facts such as the time and space in which the act occurs, various conditions, etc.), behavior patterns (rights and obligations) and 'legal consequences' (including negative consequences and positive consequences). ..... Legal Principles are comprehensive, stable principles and guidelines that can serve as the basis or origin of rules ..... The characteristic feature of a principle is that it does not presuppose any definite, specific state of facts, does not prescribe specific rights and obligations, much less definite legal consequences." Rules are those that define specific rights and obligations, principles are those that articulate value orientation; rules are more specific and easy to operate, principles are general and difficult to implement. According to this classification standard, equal pay for equal work has "assumption", i.e. "equal work", and "behavior mode", i.e. "equal pay "At present, Chinese labor laws and regulations are basically the same, which provide for equal pay for equal work but do not provide for penalties for violating this rule. Therefore, some scholars believe that whether equal pay for equal work has the attribute of legal rules cannot be generalized, but needs to be judged in conjunction with the content of legislation. As far as the current legislation is concerned, although equal pay for equal work has the property of a certain rule, it is not a typical legal rule, at least not in the complete sense. On the contrary, its value declaration function is more obvious, and plays the role of guiding the direction of behavior. Perhaps that is why "equal pay principle" is widely used in legislation and doctrine, but "equal pay rule" is rarely mentioned or used.[7]

There is also the issue of conflict between equal pay for equal work and freedom of contract, and whether equal pay for equal work can be used as a basis to counter the principle of freedom of contract. An employment contract is a contract between an employer and a worker on the basis of autonomy of meaning, reflecting the will of both parties. The principle of meaningful autonomy is the basic principle of traditional civil law, and even reflects the characteristics of traditional civil law excluding state intervention. Although labor law has been separated from traditional civil law and is no longer a branch of civil law, labor law has not been subsumed under public law, becoming a third category of law independent of private law and public law, and therefore inevitably embodies many features of private law. Article 11 of the Labor Contract Law introduced in China stipulates that if the employer does not conclude a written labor contract at the same time of employment, and the labor compensation agreed with the workers is unclear, the labor compensation of newly recruited workers shall be implemented in accordance with the standard stipulated in the collective contract; if there is no collective contract or the collective contract does not stipulate, equal pay for equal work shall be implemented. This article stipulates the basis for determining labor compensation, firstly, the labor contract agreement between the hired worker and the employer, secondly, in the absence of such agreement, the provisions of the collective contract shall apply, and finally, in the absence of both the former two, equal pay for equal work shall apply.

III. ANALYSIS OF THE CAUSES OF THE EQUAL PAY DILEMMA

Equal pay for equal work, one of the four core labor standards recognized by the International Labor Organization, is theorized to have emerged after the mid-18th century with the advent of laws to protect workers, and is the result of the struggles of the feminist and workers' movements following the Industrial Revolution. The first legal recognition of equal pay for equal work was in the Universal Declaration of Human Rights in 1948, which stated, "Everyone has the right to equal pay for equal work without discrimination of any kind." In 1951, the International Labor Organization adopted the Convention on Equal Remuneration for Men and Women for Work of Equal Value, which established equal pay for work of equal value as a specific legislation for the first time, and after the 1970s most countries generally established equal pay for work of equal value in their laws. after the 21st century, Germany, the United Kingdom and other countries adopted comprehensive anti-discrimination legislation, which developed anti-discrimination from simply opposing inequality between men and women in employment to a broader field of anti These comprehensive anti-discrimination legislations basically cover a wide range of issues. These comprehensive anti-discrimination legislations basically cover most types of

occupational discrimination, mainly including race, gender, religion, social birth, political opinion, etc., and apply to all fields of employment.[8] The history of equal pay for equal work shows that equal pay for equal work was proposed to fight against discrimination in labor employment.

The provision of equal pay for equal work in Chinese law is in the Labor Law, and the legislative purpose of the Labor Law clearly states four items in Article 1: to protect the legitimate rights and interests of workers, to regulate labor relations, to establish and maintain a labor system that adapts to the socialist market economy, and to promote economic development and social progress. Obviously, the Labor Law does not include anti-employment discrimination in the purpose of the law, and the law targeting anti-employment discrimination is the Law of the People's Republic of China on Employment Promotion, which was adopted on August 30, 2007. The combined provisions of the two laws show a division of labor between the two laws in protecting the interests of workers, with the Labor Law protecting the specific labor rights of workers and the Employment Promotion Law being adopted to establish an equal employment environment. Equal pay for equal work is historically developed to be more suitable to oppose employment discrimination and therefore more suitable to be elaborated in the Employment Promotion Law rather than placing it in the Labor Law, precisely because placing equal pay for equal work in the Labor Law, which protects workers' specific rights, causes the result that workers' lawsuits based on this provision cannot really play a role in protecting their rights, and also causes differences in jurisprudential theory.

IV. ESTABLISHING EQUAL PAY FOR EQUAL WORK BASED ON ANTI-DISCRIMINATION IN EMPLOYMENT

As a historical achievement of the protection of workers' rights, the role of equal pay for equal work is more reflected in the broad protection of workers from employment discrimination and the establishment of a legal environment of equal employment, rather than the specific protection of workers' interests. Scholar Gong Lixia suggests that "at the present stage, we cannot mechanically understand this principle and make it absolute and complete; equal pay for equal work should not be used as a ruler, but more as a framework."[9]

Equal pay for equal work, as a principle against employment discrimination, should be unified with other anti-discrimination measures. The Law of the People's Republic of China on Employment Promotion, in Chapter 3 "Fair Employment", lists the types of employment discrimination, including gender discrimination, ethnic discrimination, discrimination against persons with disabilities, discrimination against carriers of infectious diseases, and discrimination against rural workers. When workers are not paid equally for the same work for the above reasons, they can file a labor arbitration or lawsuit to oppose unfair treatment at work. If the pay is different based on different job positions, different workloads and different labor performance, labor arbitration or litigation cannot be filed on the basis of different pay for the same work. In determining labor compensation, the negotiation between workers and employers should be fully respected, and the freedom of intention of both parties should be the basic principle, as well as the system or measures of employers to motivate workers by means of compensation. Anti-discrimination is the cornerstone and goal of the application of equal pay for equal work, and should be the core factor in judging equal pay for equal work cases. Therefore, as long as the discrimination factor can be excluded, the agreement on remuneration formed between the worker and the employer cannot be denied simply by the fact that the pay is different for the same work, and this logic should run through the whole legal framework of equal pay for equal work.

However, the determination of discrimination is not an easy task. Therefore, when workers file labor arbitration or litigation based on different pay for the same work, how to determine the existence of employment discrimination can be judged from the following aspects.

One situation is where there is explicit employment discrimination. In the employer's rules and regulations or recruitment documents, or even in any public or non-public documents issued by the employer, there are clear statements indicating that in the case of the same position, the worker will be paid differently than other workers in the same position based on factors such as gender, ethnicity, physical disability, carriage of infectious diseases, rural residence, etc., which constitutes explicit employment discrimination. In this case, the burden of proof is only on the worker to prove the existence of the provision and that the worker himself or herself falls within the scope of the discriminated person, and no other matters need to be proven. What the employer needs to prove is that the worker is not discriminated against even though he or she falls within the scope of the document, or that the difference in treatment is not based on belonging to a different category of personnel, but rather on the content of the work, workload or performance. This approach reduces the burden of proof on workers, increases the success rate of workers in asserting their rights, and is in line with common international practice. Internationally, it is more common to place a lighter burden of proof on the person claiming unequal treatment, and it is sufficient to establish a prima facie case that discrimination may have occurred. This likelihood is not sufficient to "cause a fair and reasonable person to prefer one side of the issue to the other" as required by the preponderance of the evidence standard.[10]

Another situation is the existence of implicit employment discrimination. It is not explicitly stated in the various rules and documents of the employer that workers will be paid differently because of their gender, ethnicity, physical disability status, carriage of infectious disease pathogens, rural residence, etc., but in actual operation there are cases of different pay due to the existence of the above factors. Implicit employment discrimination places a greater burden of proof on workers to prove both that the work is the same between workers and that the pay is different between workers and that this difference in pay is based on different non-labor performance. Even if the worker makes a showing, the employer may be able to deny the worker's claim by proving that the worker's work content, workload, or labor performance is different, or even that the fact that the worker is paid by others is inherently difficult to achieve in an employer that employs a secret pay system.

CONCLUSION

Equal pay for equal work as a system to protect workers is more reflected in the fight against employment discrimination, which is conducive to creating a fair employment environment and protecting the rights and interests of workers in a macro sense. If equal pay for equal work is taken as a specific rule to protect workers' rights, or specifically as a means to protect workers' access to remuneration, it is in fact difficult to play its intended role, no matter the conflict with other systems or principles of labor law in theory, or the difficulties brought to workers in the proof link in practice. Instead of forming it into an empty and unrealizable theory, it is more operative and feasible in reality to stipulate equal pay for equal work in the legal norms against employment discrimination and to protect the specific interests of workers through labor contracts or related labor legal systems.

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