SUMMARY

2016/19 Reference in a termination letter to 'retirement' can cost the employer dearly (GE)

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Facts

The plaintiff, born in 1950, had been employed by the defendant as a physician's assistant in a private urology practice since 1991. She was dismissed in 2013 at the age of 63. At that time, the

practice had four other employees in addition to the plaintiff, some of whom had different qualifications than hers. Her tasks included appointment management, front desk management, patient management and administrative work. She drew blood and administered injections. By the time she was dismissed, she was predominantly employed in the laboratory. In 2013 the law changed. The new law, which was to take effect on 1 January 2014, restricted laboratory services to specialized laboratories. This development caused the defendant to terminate the employment relationship in May 2013, giving notice effective 31 December 2013. In the termination letter, the defendant referenced not only the need to restructure the practice, but also the plaintiff's pension entitlement, writing:

"[...] we have been working together closely for over 20 years now. [...] In the meantime, you have become eligible for retirement and we are starting a new phase in the life of the practice too. We will see considerable changes in the laboratory area next year. This requires a restructuring of our practice."

The plaintiff brought a claim seeking compensation. The claim was based on the argument that the defendant had discriminated against the plaintiff on the grounds of age. The defendant denied having discriminated against her. It argued that the plaintiff had been dismissed because it anticipated a decline of 70 to 80 percent in the number of chargeable laboratory services, that it therefore needed fewer staff and that it had selected the plaintiff as the person to be made redundant because she was less qualified than the other employees. As for the reference to 'retirement', the defendant explained that it had merely wanted to formulate the letter of termination in a friendly and legally correct manner.

Despite the defendant's statement regarding an anticipated turnover reduction, it employed a new nurse, who started working in January 2014.

The Labour Court in Leipzig and the Provincial Labour Court of Saxony both dismissed the claim. The plaintiff then appealed to the Federal Labour Court (BAG).

Judgment

In order to understand this case, it is necessary to give some legal background. As a rule, employees in Germany are protected by the Unfair Dismissal Act. However, this Act only applies where the establishment in which the employee works has more than ten regularly employed employees. In that case, a dismissal must be 'socially justified', which essentially means that the youngest employees in terms of age and seniority are to be dismissed before others. In smaller establishments, on the other hand, a dismissal for economic reasons does

not have to fulfill the requirement of social selection. In small establishments there is therefore no protection against unfair dismissal.

An employee in a small establishment does not lack protection against discrimination however, including against age discrimination. Although employers must observe the German Equal Treatment Act ('AGG'), which transposes Directive 2000/78/EC, but it is settled law that in restructuring situations, older employees who are close to retirement age may be paid lower severance compensation than their younger colleagues. The courts are in agreement that such unequal treatment is admissible under Section 10 AGG if it is objectively and reasonably justified by a legitimate aim.

The BAG reasoned as follows. Although the defendant claimed that the dismissal was based solely on the employee's qualifications, the fact was that the termination letter made reference to the plaintiff's pension entitlement, thereby suggesting that the dismissal was also based on her reaching retirement age. This was enough to create a presumption of age discrimination (Section 22 AGG). It fell upon the defendant to rebut this presumption by presenting evidence that the dismissal was not in fact based on the plaintiff's age. The defendant failed to establish this. Thus, it was established that the defendant had discriminated against her directly on the grounds of age. The next step was to examine whether the discrimination was objectively and reasonably justified, as provided in Section 10 AGG, which is an exact translation of Article 6 of Directive 2000/78/EC.

The lower courts had reasoned that the defendant had pursued a legitimate aim by protecting its younger employees, who were not yet entitled to a pension, against dismissal. In contrast, the BAG found that the defendant had not presented a legitimate aim for the unequal treatment. Legitimate aims within the meaning of Article 6 of the directive, and hence also within the meaning of Section 10 AGG, are social and labour market aims of "a public interest nature".

See the ECJ's 2009 judgment in Age Concern (C-388/07), where it held (at § 46) that: "It is apparent from Article 6(1) of Directive 2000/78 that the aims which may be considered 'legitimate' within the meaning of that provision, and, consequently, appropriate for the purposes of justifying derogation from the principle prohibiting discrimination on grounds of age, are social policy objectives, such as those related to employment policy, the labour market or vocational training. By their public interest nature, those legitimate aims are distinguishable from purely individual reasons particular to the employer's situation, such as cost reduction or improving competitiveness, although it cannot be ruled out that a national rule may recognise, in the pursuit of those legitimate aims, a certain degree of flexibility for employers".

Section 134 of the German Civil Code ('BGB') provides that a legal act that violates a statutory prohibition is void. This means that, as the plaintiff's dismissal was in violation of Section 7 AGG, it was void and ineffective. The AGG itself only contains a regulation providing that contractual provisions violating the AGG are invalid and void, but section 134 BGB extends that effect also to unilateral measures such as a notice of termination. Therefore, the reason for the invalidity was technically to be found in the BGB.

The plaintiff claimed damages for the discrimination she suffered. Section 15 AGG provides for compensation for discriminatory behaviour. This section is not limited to dismissals on discriminatory grounds but covers discriminatory behaviour in general and states that, in the event of discriminatory conduct, the employer shall be obliged to compensate for damage arising from it. Since the BGB held that the dismissal was invalid by reason of the discrimination, hence establishing discriminatory behaviour, it was in a position to grant damages for discrimination. However, the BAG could not determine the amount the plaintiff was entitled to and therefore referred the matter back to the Provincial Labour Court.

Commentary

This decision does not come as a surprise. The groundwork had already been laid in 2014 in the BAG decision reported in EELC 2014/4 (edition EELC 2014-1, page 12). In that case, an HIV-positive employee had been dismissed in breach of the prohibition against discrimination on the grounds of (real or perceived) disability. The BAG had no difficulty in finding that the dismissal was unlawful. The challenge the court faced for the first time in that case had to do with the remedy. Section 2(4) AGG provides that discriminatory dismissal can attract only those remedies that are set forth in the"general and specific provisions governing protection against unfair dismissal". This would mean literally that, as there is no protection against unfair dismissal in establishments employing ten employees or less, there is no remedy against discrimination in such establishments.

In the earlier case, the difficulty was that there was no unfair dismissal protection where the employee had been employed for under six months.

This case, as so many other discrimination cases, is an example of an employer using age in an attempt to explain a dismissal decision in a friendly way and suffering for it in court. The employer's intentions in dismissing an employee who would soon be retired anyway (rather, say, a 40-year-old single mother of two) may have been good. German law does not require an employer to give reasons for a dismissal. Had the employer in this case not made reference to pension eligibility, the dismissal would have been valid and would not have risked a claim for damages. Less can be more.

Comments from other jurisdictions

Slovenia (Nives Slemenjak, Schoenherr): When the Slovenian Employment Relationship Act was introduced in 1990, it provided that retirement was a lawful reason to terminate an employment relationship. However, the Constitutional Court since found this to be unconstitutional and the relevant provision was abolished. The Constitutional Court reasoned that termination on account of retirement means that the employment relationship ceases differently for individuals according to their sex and age, since the right to retirement depends on these two (personal) circumstances. As pointed out by the Court, freedom to work, free choice of employment and access to every working post under the same conditions means that termination of the employment agreement should also be equally regulated under the same conditions for all. Ergo, personal circumstances (including age) should not be a basis for differentiation when it comes to termination of the employment relationship.

The Netherlands (Peter Vas Nunes, BarentsKrans):

- Had this urology practice been situated in The Netherlands, where employers cannot simply dismiss employees (not even in small businesses), the employer would have applied to the court to terminate the plaintiff's employment. Had the court found the employer's reason for applying for dismissal to be discriminatory, it would have turned down the application, the employee would have kept her job, and the employer would have had to dismiss one of her younger, better qualified colleagues.

- Would a Dutch court have found discriminatory intent? I expect that the remark in the termination letter ("you have become eligible for retirement") would have been sufficient for the court to accept a prima facie presumption of direct age discrimination. In an attempt to rebut this presumption, the employer would have argued, as in this German case: "The reason this employee has to leave is that we must restructure for economic reasons, and she is the least qualified of the staff. I did not want to hurt her by telling her this reason. That is why I explained my decision to select her for redundancy by reference to her age, which is a more neutral reason than being the least qualified of the staff". I cannot say whether the court would have accepted this as a sufficient rebuttal. I recall having seen cases where such an argument was not accepted.

- Not so long ago, age would have been seen as a "neutral" reason for dismissal. Nowadays, employers are more careful. Most are sufficiently aware of the discrimination rules not to use age as a pretext for dismissal where the real reason is performance. In fact, the opposite is more common: the employee uses underperformance as a pretext where the real reason is

discriminatory, such as a recent Appeals Court case where the employer did not renew the fixed-term contract of an employee with a heart condition for fear of the financial consequences of that condition, which it supposed to be a disability, and claimed (untruthfully, according to the employee) that the reason for the non-renewal was underperformance.

- An interesting aspect of this German case is that the Bundesarbeitsgericht applied (an interpretation of) Article 6 of Directive 2000/78, rightly so in my opinion. Given that the unequal treatment at issue was direct ("you have become eligible for retirement"), the court could not apply the general objective justification exception of Article 2 (2)(b), which only helps as a defence against a claim of indirect unequal treatment. As explained in the footnote to the author's case report, Article 6, as interpreted by the ECJ in Age Concern, requires the legitimate aim underlying an unequal treatment to be one of social policy, i.e. an aim of a public interest nature (see also the UK case report published in this issue of EELC as No. 22). An individual employer's aim of retaining the most qualified employees in a redundancy situation does not meet this requirement.

Subject: age discrimination

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