

SUMMARY

2015/43 No protection for rejected job applicant (CR)

The Labour Code does not protect job applicants. Anti-discrimination legislation does protect job applicants, provided they specify their discrimination claim and seek the correct remedy.

Facts

The defendant in this case was a company called KD Autotrolej d.o.o. ('Autotrolej'). It had a vacancy for a trainee. The Employment Bureau posted the vacancy on its website on 14 May 2010. The requirements for the position were a university degree in economics and computer proficiency. No work experience was required.

The plaintiff was Ms Maja Babic. She met the requirements for the position and sent Autotrolej an application. She received no response until two months later, when Autotrolej informed her in writing that they had selected another person for the position and that her application was therefore unsuccessful.

The plaintiff did some investigations. She discovered that Autotrolej's internal regulations stated that the position of trainee required an economics degree issued by the Faculty of Economics. She also found out that the successful applicant was a man with an economics degree issued by the Faculty of Tourism Management. Moreover, it appeared that Autotrolej had informed the Employment Bureau, at the time they submitted the vacancy, that the vacancy had already been filled. In other words, the successful male candidate had already been selected before the selection procedure had begun.

The plaintiff brought legal proceedings against Autotrolej. She asked the court (i) to annul Autotrolej's decision to select the successful male candidate; (ii) to dismiss; and (iii) to initiate

new selection proceedings. She based this claim on the Labour Code, arguing that Autotrolej had prejudiced her rights by following a non-transparent and discriminatory selection procedure without clearly set criteria.

The court of first instance turned down the claim. It noted that the Labour Code does not contain any provision on which someone who is not already an employee can base a claim. The Labour Code only protects employees. As for the allegation of discrimination, the court noted that the plaintiff had failed to specify any grounds for discrimination and that in any case, she had not produced enough of an indication that she was actually discriminated against to justify shifting the burden of proof.

The Court of Appeal upheld the decision of the first instance court. It concurred with the lower court's finding that the Labour Code cannot provide a basis for a claim by a job applicant against a prospective employer. As for the discrimination issue, the court pointed out that Croatian Anti-Discrimination Law allows a person who considers that his or her right not to be discriminated against has been violated, to bring a claim, either in regular proceedings, where the court will rule on the violation of that right as the main issue, or in special proceedings where it will rule on it as a side issue. In both cases, the only remedies that the courts can apply are (i) a declaration that the defendant has discriminated against the plaintiff; (ii) an order to stop discriminating; (iii) an award of damages; or (iv) publication of the judgment in the media. The remedy sought by the plaintiff fitted into none of these categories.

The plaintiff did not appeal the Court of Appeal's judgment to the Supreme Court. Instead, she filed an application with the Constitutional Court for violation of her constitutional rights to a fair trial and to her right to work.

Judgment

The Constitutional Court rejected the claim. It found that the civil courts had interpreted and applied Croatian law in a constitutionally acceptable manner and that their reasoning was also constitutionally acceptable.

Commentary

This case was determined on the basis of purely domestic Croatian law. Croatia did not join the EU until 1 July 2013. Although the Constitutional Court's judgment was delivered one year later, the case started in 2010 and was adjudicated on the basis of the Labour Code of 2009, well before Croatia became a Member State. Having said this, it may be noted that Croatia had started to align its domestic employment law, including the provisions on non-discrimination,

before 2013, in anticipation of its membership.

The crucial issue in this case is the non-existence of an employment relationship between the plaintiff and the defendant. The Labour Code regulates employment relationships in the Republic of Croatia that are primarily based on the principle of autonomy of will and consent of the parties. The mere participation in a selection procedure is not deemed to establish an employment relationship. This means that a candidate applying for a job does not fall within the scope of the Labour Code with regard to the protection of employees whose rights have been violated.

It is to be noted, however, that prior to the Labour Code, employment relationships were regulated by the Act on Basic Employment Rights (applicable until 1994) which also protected candidates who considered that a procedure for recruiting for a job had been incorrectly carried out in a certain way, including where the selected candidate did not meet the criteria for selection. This approach was not carried forward by the Labour Code of 1994, but it did remain in place as regards certain categories of employees subject to special laws (e.g. civil servants, based on the Law on Civil Servants).

As regards the allegation of discrimination, the plaintiff did not make her claim under the Croatian Anti-Discrimination Law and follow the proper procedure under that law, according to which: "any person who considers that his or her right has been violated on account of discrimination may request protection of that right in proceedings by designating that right as the main issue". Since the plaintiff's main claim was for the annulment of the defendant's recruitment selection and related to termination of the employment agreement concluded with the selected candidate, instead of a claim about discrimination, both the lower instance courts and the Constitutional Court correctly rejected the claim. We think the plaintiff might have done better if the claim had been framed as a discrimination claim from the start.

Subject: gender discrimination, vacancies

Parties: Maja Babić – v – KD Autotrolej d.o.o.

Court: Ustavni sud Republike Hrvatske (Constitutional Court of the Republic of Croatia)

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