SUMMARY

2014/4 Dismissal of HIV-positive employee, part 2 (GE)

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Facts

The plaintiff was born in 1987 and employed as a technical chemical assistant at the defendant pharmaceutical company. The company manufactures medication that is administered

intravenously to cancer patients. The plaintiff's first day of work was 6 December 2010. During his initial medical check-up he informed the company medical doctor that he was HIV-positive. The defendant reacted by terminating the employment contract within the probationary period, giving two weeks' notice. This was in accordance with section 622 (3) of the German Civil Code (the 'BGB'). The dismissal was not in breach at the German Unfair Dismissal Protection Act, neither did it violate the special dismissal protection for disabled employees[1], as this legislation does not apply during the first six months of employment.

The plaintiff sued the defendant for disability discrimination, arguing that the German Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*) ('AGG'), which is the German transposition of Directive 2000/78/EC, applies irrespective of an employee's length of service. Section 7(1) AGG protects employees against dismissal based on disability discrimination.

The defendant argued that the plaintiff did not qualify as a disabled employee. In the alternative, it argued that the plaintiff had been dismissed because of a contagious disease, not because of a disability. It pointed out that its standard operating procedures ('SOP') provided that every possible precaution should be taken to ensure that nobody is employed in the production of medication who is suffering from a contagious disease or has open cuts or injuries, including chronic skin diseases and chronic infections of Hepatitis B or C and HIV.

The *Arbeitsgericht* held that the plaintiff was indeed not disabled, noting that his medically treated HIV infection without symptoms had no impact on either his social life or his professional career. An impact on one's social life or career is not sufficient to cause a medical condition to qualify as a disability within the meaning of the AGG if the impact is solely the result of an employer's reaction to the medical condition.

The plaintiff appealed to the *Landesarbeitsgericht* ('LAG') of Berlin-Brandenburg. The LAG did not rule on whether an HIV infection without symptoms constitutes a disability. It did not need to do this, finding that the AGG was not relevant, given that section 2(4) AGG provides: "Only the general and specific provisions governing the protection against unlawful dismissal shall apply to dismissals." For a detailed summary of this judgment, *see Schreiner/Hellenkemper* in EELC 2012/18.

The plaintiff appealed to the BAG.

Judgment

The first issue to be decided by the BAG was whether the plaintiff was disabled within the meaning of the AGG. The BAG found that this was the case. It relied on the definition the ECJ has recently given in its decision in *Ring* (ECJ, C 335/11, 4 July 2013) that a disability should be

interpreted as a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results, in particular, from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one. This would include long-term or terminal illnesses as well. The European definition would therefore always include a determination as to whether or not the impairment was suffered on a long-term basis.

The German definition is wider, as it only requires the possibility of a long-term impairment. The Court therefore determined that the plaintiff suffers a chronic disease that has a possible impact on his daily life and his acceptance in society and in his workplace because of his HIV infection. The HIV infection is untreatable and results in a progressive failure of the immune system and hence a dysfunction of the body. Stigmatization and avoidance are the results of the infection with HIV preventing full and effective participation in society. The plaintiff had been the victim of such stigmatization and avoidance resulting in the non-disclosure of the infection to the current employer.

The next question was to determine whether the plaintiff had been dismissed on the grounds of his disability.

The dismissal, as argued by the defendant, was the result of the plaintiff's inability to perform his work according to the Standard Operating Procedures to which the company had bound itself. These procedures prohibit employees with chronic infectious diseases to work in a lab. However, they allow employees with infectious diseases such as coughs and diarrhoea to be excluded from work temporarily rather than permanently. Such temporary exclusion cannot be compared to the plaintiff's permanent exclusion, which is more akin to the dismissal of a pregnant woman who cannot perform her work because of her pregnancy or the dismissal of a person in a wheelchair, given that only disabled persons are bound to a wheelchair indefinitely. The inability of such persons to perform work is based on their impairment, therefore their dismissal qualifies as discrimination. As a consequence, chronic infectious diseases such as Hepatitis B or C and chronic skin diseases also qualify as disabilities according to the BAG.

The BAG thought that the court of previous instance could not have judged on the validity of the dismissal without determining whether or not a symptomless HIV infection was in fact a disability.

The third question before the BAG was whether the plaintiff's dismissal was justified. The AGG, mirroring Article 4(1) of Directive 2000/78, allows unequal treatment where it is

justified by a genuine and determining occupational requirement, provided that the objective of the provision causing the unequal treatment is legitimate and the requirement is proportionate.

The fact that the cleanroom needs to be free from contagious diseases is an important professional requirement. An employer manufacturing medication for intravenous injections must prevent any contamination of patients using the medication and must at the same time protect the company from potential claims for damages, declining sales and harm to its reputation.

In order to achieve this legitimate aim, preventive measures need to be taken to avoid the risk of contamination.Here, the only measure the employer took into consideration was to exclude employees suffering from contagious diseases from the cleanroom. As it had not been determined whether or not other protective measures could have been taken, it was unclear if the exclusion of the employees was the only way to reach the legitimate aim.

Finally, the BAG was faced with a complication regarding the remedy for the unjustified unequal treatment. As already mentioned, the AGG provides that a dismissal in breach of the AGG can attract only those remedies that are set forth in "the general and specific provisions governing the protection against unlawful dismissal". The AGG itself is not such a general or specific provision and the statutory provisions that do govern the protection against unlawful dismissal do not apply during the first six months of employment. Strictly speaking, this would mean that the plaintiff was left empty-handed. The BAG needed to find a creative way to get round this obstacle. It did this in the following manner.

Section 134 BGB provides that a legal action (*Rechtsgeschäft*) that violates a statutory prohibition is void. Section 134 BGB is a general provision that is not specific to dismissals, or indeed to employment law. A dismissal is a legal action. Therefore, a dismissal that violates the AGG is void.

If the reluctance of the employer to take (other) preventive measures was the real reason for the dismissal, then the dismissal has to be declared void, because it would qualify as discriminatory on the grounds of disability.

The fact that the SOP of the company prevent the employer from employing the plaintiff in the cleanroom does not absolve the employer from having to examine whether protective measures can be taken to eliminate the risk of contamination of the company's products.

The case has been referred back to the LAG for further determination i.e. to clarify whether the employer could have taken preventive measures to allow the employee to work in the

cleanroom.

Commentary

Whereas up until now disabled employees could be dismissed during their six-month probationary period in the same way as other employees, the BAG has set the bar higher now so as to meet the European requirements (ECJ – *Ring* – C335-11). A dismissal should not be discriminatory regardless of the stage the employment relationship has reached. In the case at hand, it is now up to the LAG once again to determine if protective measures could have been taken to allow the plaintiff to be employed in the cleanroom without the risk of contamination. If, after further consideration, the court deems this in any way possible, the termination will be declared void.

The termination of an HIV-positive employee can hence only be lawful in limited situations. While the intention of the decision is to be applauded from a justice and socio-political point of view, the legal reasoning leaves some doubts. From the decision at hand one cannot formulate clear guidelines about what kind of alternative protection measures should reasonably be taken before one group of employees is excluded from a specific type of work. Therefore, it will be even harder for the employer to find the right mechanism to protect the customers from danger on the one hand, and employees from discrimination on the other hand.

In reality, this decision will therefore probably not serve to protect employees in the same situation as the plaintiff. The case probably only went as far as the BAG because the employer stated that he was dismissed because of his inability to work in the cleanroom. Since the Unfair Dismissal Act did not apply in this case, the validity of the dismissal was difficult for the employee to contest, as all the employer needed to do was present some form of reason for the dismissal. Had the employer said less in the case at hand, it probably would have had a stronger hand.

In terms of the bigger picture, employers should now assess even more carefully whether or not they could take alternative protective measures to protect their customers before terminating employees suffering from long-term illnesses, given that their actions might be measured against the AGG - either directly or in connection with the Unfair Dismissal Act - and possibly judged to be discriminatory.

p align="left">Footnote

[1] Section 90(1)(1) of Book IX of the Social Code.

p align="left">*Subject: disability discrimination*

Parties: unknown

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