SUMMARY

2013/54 BAG accepts levelling-down in age discrimination case (GE)

<p>Provisions in a collective agreement that grant employees of different ages different terms of service are discriminatory and violate section 7 of the German Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz (AGG), the German transposition of Directive 2000/78/EC) and are therefore invalid and void. In consequence, younger employees are not entitled to equal beneficial entitlements and the provision is disapplied in respect of the initial beneficiaries.</p>

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Facts

The plaintiff was born in 1969. He had been employed since 1995 as a flight attendant with the defendant airline company. Since 1995, he formed part of the 'IK' group. The IK group comprised the personnel serving only on long-distance, intercontinental flights, which are apparently preferred by flight attendants. Due to a change in the organisation, the IK group was dissolved in 2009. From that time on, all flight attendants were required to serve both on long-distance and on short-distance flights. Accompanying this change, the defendant and the works council concluded a social plan that included the following provision (the 'Contested

Provision'):

"Older employees with considerable seniority are entitled to an 'additional request continental'[1]. They will be allowed to limit their service on shortdistance flights to five days per period of three months. This provision applies to all employees who have reached the age of 43 on 31 December 2009 and have been in the service of the company for over 15 years."

The plaintiff satisfied the 15-year service requirement but not the age requirement, being aged 40 on 31 December 2009. He argued that the Contested Provision discriminated against younger employees. He demanded to be accorded the same beneficial treatment as his older colleagues with 15 years of service who benefited from the Contested Provision (the 'privileged group'). The airline company argued that it would not be possible to organise its flight schedules if the Contested Provision was applied to all employees. It admitted the unequal treatment, but claimed that the Contested Provision was justified by section 10 AGG[2]. This section provides that a difference in treatment on grounds of age shall not constitute discrimination if it is objectively and reasonably justified by a legitimate aim and the means to achieve that aim are appropriate and necessary. The airline company based its justification defence on the argument that older flight attendants who are not accustomed to frequent short-distance flights have more difficulty than others in adjusting to an increased frequency of take-offs and landings.

The Labour Court and, on appeal, the Regional Labour Court ('LAG') in Frankfurt both rejected the plaintiff's claim. The plaintiff then appealed to the Federal Labour Court ('BAG').

Judgment

The BAG held that the provision in the social plan was void, because it violated the AGG, and that the provision could therefore not be applied. In its opinion, the Contested Provision did not only discriminate indirectly between the employees of different age groups, but actually constituted direct discrimination within the meaning of section 3(1) AGG[3]. This section provides that direct discrimination occurs where one person is treated less favourably than another is, has been or would be treated in a comparable situation on any of the grounds referred to in section 1 AGG (here: age). Since the AGG also applies to provisions in a collective agreement such as a social plan, the unequal treatment of employees on the basis of age needs to be justified in order to be valid.

The court held that the Contested Provision was likely to help older employees in the IK group to adjust to the disadvantages of an increased number of take-offs and landings. This, however, was not a sufficient justification for the unequal treatment, for two reasons. The first was that the Contested Provision did not differentiate between employees who had always

served in the IK group and other employees who had only recently transferred to this group and would therefore not need a long time to readjust to short-distance flights. For example, a 42-year old flight attendant who had been in the IK-group during his entire career of 15 or more years, and who would therefore need a long time to adjust to frequent take-offs and landings, was treated less favourably than a 43-year old colleague, also with 15 years of service, who had spent 14 of those years on short-distance flights and had only recently transferred to the IK group, and who would therefore need less time to adjust to more frequent take-offs and landings. In the second place, the defendant had not argued that older flight attendants who were not accustomed to frequent short-distance flights were *unable* to adjust; it had merely argued that older employees needed a longer adjustment period. Thus, the beneficial treatment would have been required only temporarily to help with the adjustment. There is no evidence that older employees would not be able to adjust to the new schedule permanently. Hence, the BAG held that the provision's aim was legitimate, but it found that the measure adopted was not necessarily suitable to achieving that aim.

According to the BAG, the unequal treatment could be equalized, if the older employees did simply not receive any beneficial treatment.

Contrary to its previous decisions where favourable holiday entitlements or pay for older employees could not be equalized for the past, the BAG opted for a levelling-down, reasoning that levelling-up would make flight scheduling impossible for the defendant. The fact that this outcome did nothing to undo the benefit that the advantaged group had wrongly enjoyed in the preceding years, was insufficient to lead to a different result, given that this benefit was not of a monetary nature.

Thus, the plaintiff was right that he had been discriminated against, but his demand to fly no more than five short-distance flights per quarter was turned down and he lost the case in three instances.

Commentary

Whereas in previous decisions concerning payment and holiday entitlements (see *Schreiner/Hellenkemper*: Extra paid leave for older employees discriminatory; levelling-up, EELC 2012-3 Nr. 37) the BAG had decided in favour of a levelling-up solution, the above decision makes it clear that levelling-up is not the only legal solution when addressing the consequences of discrimination in Germany.

Unfortunately, the BAG was not entirely clear when levelling-up is appropriate and when levelling-down is the correct solution. In the decision reported above, the BAG seems to allow

this to depend on whether or not in the past the privileged group received material benefits that could or could not be claimed back. In such cases, levelling-up is the only possible solution to treat both groups equally. In situations in which there is no material disadvantage, it is not possible to correct the disadvantage retroactively, therefore there is no need for a levelling-up solution.

However, the BAG seems to have some doubts as to whether it really is so simple. Without any apparent reason, it discussed in its reasoning the possibility for the defendant to maintain its flight schedule. From our perspective the question of whether or not the flight schedule was operable was not relevant. This seems to address the feasibility of the levelling-up - which can only be relevant if levelling-up is necessary to reverse the effect of the unequal treatment. Maybe the BAG wanted to indicate that levelling-up has limitations if its consequences seem inappropriate.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): What was the Contested Provision's aim? Clearly, it was to protect a category of flight attendants against the detrimental impact of a sudden change from relatively relaxed longdistance work to more strenuous short-distance work. Apparently it takes time to adjust to such a change, but the case does not make clear to me what makes adjustment hard: is it age (the older one becomes the longer it takes to adjust) or is it the duration of the pre-change situation (the longer one has worked mainly on intercontinental flights the harder it becomes to adjust to short-haul work)? Or perhaps a mix?

The issue of levelling-up versus levelling-down is complex. In The Netherlands this has come up in (at least) two types of cases (see EELC 2010/66): extra paid leave for older employees (direct age discrimination) or on the basis of length of service (indirect age discrimination) and, in particular, social plans that offer older employees different benefits than younger employees (for older employees, e.g. topping-up of employment benefits until retirement and for younger ones lump-sum severance compensation). For a comparable Polish case, see EELC 2009/29.

In principle, one would think that the solution is black or white: either the privileged group loses their undeserved advantage or the disadvantaged group gains a windfall. The former solution hurts, the latter solution can be expensive. However, in *Hennigs* (C-297/10), the ECJ allowed a gradual levelling-down, which softened the impact of levelling-down.

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Parties: Unknown

Court: Bundesarbeitsgericht (Federal Labour Court)

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