EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2012/3: Age was not a factor (DK)

<p>A 55-year-old temp applied for a vacant permanent position in her department. When the employer decided not to consider her for the position, the temp was convinced it was because of her age. The employer explained that the decision was based on a lack of personal qualities. The Supreme Court agreed with the employer and, accordingly, did not find that the principle of equal treatment had been breached.</p>

Summary

A 55-year-old temp applied for a vacant permanent position in her department. When the employer decided not to consider her for the position, the temp was convinced it was because of her age. The employer explained that the decision was based on a lack of personal qualities. The Supreme Court agreed with the employer and, accordingly, did not find that the principle of equal treatment had been breached.

Facts

The Danish Anti-Discrimination Act prohibits employers from, among other things, discriminating against applicants for a vacancy on grounds of age. Under the Act, there is a shared burden of proof in such matters, as per Article 10 of Directive 2000/78. This means that the employee or applicant must establish facts from which it may be presumed that there has been discrimination. If successful, the burden of proof shifts and it will be for the employer to prove that the principle of equal treatment has not been breached.

The plaintiff in this case was a 55-year-old temp with a position in a Danish municipality. When there was an opening for a permanent position, she decided to apply. It was of great importance to the municipality that the new employee should be customer-service oriented, because the work involved contact with the general public. However, the municipality did not find that the temp's personal qualities were as good as those of the other applicants. She was

therefore told that she would not be taken into consideration for the position.

When the temp asked for a written explanation of her non-appointment, the municipality wrote that the decision not to offer her the position was based on an assessment of her personal and professional qualities. However, it added that it was necessary to take into account the "coming generational change" in the department. The temp interpreted this as meaning that her age was the real reason for her non-appointment. She brought proceedings.

The court of first instance and the appellate court accepted that there was sufficient prima facie evidence to shift the burden of proof to the municipality, which then needed to provide evidence that it had not discriminated. In the course of the proceedings five witnesses were heard, namely the temp, her manager, her former manager, an HR advisor and a co-worker. Based on their testimony, the court of first instance and the appellate court both found in favour of the municipality.

The temp was granted leave to appeal to the Supreme Court.

Judgment

In assessing whether the employer had discharged the burden of proof, the Supreme Court attached great importance to the statements of the witnesses. They provided explanations of the temp's personal qualities to enable the employer to prove that her lack of personal qualifications was the reason for the non-appointment. The witnesses also confirmed that the temp and her manager had already discussed the decision not to take the plaintiff into consideration for the position before the written explanation had been drafted. Both the temp and the manager explained that the manager had in fact stated that age had nothing to do with the non-appointment. The remaining part of the written explanation Ð focusing on the temp's personal qualities Ð also indicated that the temp's age was not a factor. Furthermore, other representatives of the employer had explained that personal qualities were an important factor when finding the right candidate for the vacancy.

On these grounds, the Supreme Court found that the municipality had discharged the burden of proof, because it had proved that the decision not to appoint the 55-year-old temp was based on the fact that she did not have the personal qualities required for the position. Accordingly, the Supreme Court found in favour of the municipality.

Commentary

Danish case law on the principle of equal treatment shows that it can be very difficult for an employer to satisfy the burden of proof once it has shifted. In this case, the employer was

furthermore faced with the challenge that the only evidence consisted of the statements given by the persons involved.

The fact that the Supreme Court agreed with the employer illustrates that it is possible for an employer to prove that no discrimination has taken place even though there is written documentation suggesting that the employee's age was a factor in the rejection. So even though a heavy burden of proof often rests on the employer in discrimination cases, it is possible Ð by means of thorough and reliable witness statements Ð to prove that no discrimination has taken place.

Comments from other jurisdictions

Germany (Paul Schreiner): In general, I share the view of Peter Vas Nunes printed below, but would like to add some specifics of the German case law. From the German point of view it does not really matter whether the discriminatory motive was the only one or whether it was one of many motives. If the employer had at least one discriminatory motive to turn down the application, he is liable for damages to the applicant. The question is how these damages are to be calculated and on which basis they are granted. German law distinguishes between claims for material damages or losses resulting from discrimination and immaterial damages resulting from infringement of the applicant's personal rights. In the case at hand therefore a court would have had to evaluate whether or not the applicant would have got a job in the absence of the discrimination. Only in this case material damages could be awarded. Since the employer apparently proved that there were different other, legitimate motives for the rejection, it is to be assumed that the applicant would not have been employed even without the discriminatory motive. As for immaterial damages, however, a claim is definitely possible. The rejection of the application showed that it was based, , on age. Therefore, the employer under German law would need to show that the use of the criterion age was justified. In the case at hand the defendant had argued that age was not a relevant criterion, therefore there was hardly a justification for using this criterion.

The Netherlands (Peter Vas Nunes): Suppose an employer turns down a job applicant for two reasons: you lack the required qualities and you are pregnant. I doubt whether such an employer would get away with his action in any European jurisdiction, even if it manages to prove beyond all doubt that it would still have rejected the application if the candidate had not been pregnant. I see no reason why this should be different where a job applicant is rejected for 99 non-discriminatory reasons and one discriminatory reason. In other words, even if a decision not to hire (or to dismiss, not promote, etc.) is tainted even slightly by discrimination, it is still discriminatory. The fact that the penalty may differ depending on the likelihood that the application would have been turned down in the absence of the discrimination, is another

matter. The principle is the same.

In the Danish case reported above, as I understood it, the municipality managed to prove (1) that the applicant lacked essential qualities and (2) that this was the reason for the non-appointment. The municipality did not prove that the applicant's age played no role whatsoever in the process that led to its decision. It was merely proven that the applicant's manager had stated that age had played no role.

I expect that the Dutch Equal Treatment Commission, and perhaps the courts as well, would have been less lenient on the municipality.

United Kingdom (Bethan Carney): In the UK, the burden of proof would shift to the employer to show that it had not discriminated if there are facts from which the tribunal could decide that there had been discrimination in the absence of any other explanation. In other words the claimant must show a *prima facie* case of discrimination in order for the burden of proof to change to the employer. It seems likely that a tribunal would shift the burden of proof to the employer in these circumstances, given the express mention of an age-related factor in the written explanation for the non-appointment. Once the burden of proof has shifted, the employer must prove that there was no discrimination by providing an "adequate explanation" for the facts shown in the employee's *prima facie* case. "Adequate explanation" means that the employer's reasons for acting in the way that it did were not discriminatory. In other words, in this case the employer would have had to provide a non-discriminatory explanation for why it had said an age-related factor played a part in its decision making.

An employer might have multiple reasons for acting in the way it did. A discriminatory factor does not have to be the sole or even the principle reason for the conduct for an employer to be guilty of discrimination provided the discriminatory factor "had a significant influence on the outcome" (*Owen and Briggs – v – James* [1982] ICR 618 CA, *Nagarajan - v - London Regional Transport* [1999] IRLR 572 HL and *Bahl – v - Law Society* [2004] IRLR 799 CA) .

The employer's written explanation seems to suggest that it had multiple reasons for the non-appointment: personal and professional qualities and generational change in the department. Once the burden of proof has shifted, the employer would have to prove that the "generational change"' factor was not discriminatory. It could do this by proving that the factor was "justified"' or possibly that the written explanation had been misleading and "generational change"' had not in fact had a significant influence on its decision to reject the claimant. On this account, it is difficult to see that the employer actually proved either of these things. The employer may well have lost this case if it had been heard in the UK.

Subject: Age discrimination

Parties: HK/Denmark on behalf of A - v - B municipality

Court: Danish Supreme Court (Højesteret)

Date: 7 December 2011

Case number: 102/2010

Hard Copy publication: not yet available

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