

SUMMARY

2012/18: Dismissal for being HIV-positive justified (GE)

<p>The termination of an HIV-positive employee cannot lead to a successful claim for damages based on disability discrimination if the safety standards adopted by the employer aim to prevent the infection of patients with that disease.</p>

Summary

The termination of an HIV-positive employee cannot lead to a successful claim for damages based on disability discrimination if the safety standards adopted by the employer aim to prevent the infection of patients with that disease.

Facts

The plaintiff was born in 1987 and was employed as a technical chemical assistant at a pharmaceutical company in December 2010. The defendant manufactures medication that is administered intravenously to cancer patients. The parties agreed to a probationary period of six months in the plaintiffs' employment contract. During that period, the contract was terminated with two weeks' notice in accordance with section 622 (3) of the German Civil Code (the "BGB"). The German Unfair Dismissal Protection Act and the special dismissal protection for disabled employees under German law do not apply during the first six months of employment.

According to his job description the plaintiff was to be employed in the production and quality control of pharmaceuticals. His workplace was in the so-called "cleanroom" section of the company. The company's Standard Operating Procedures are based on the European "Good Manufacturing Practice" guidelines, which are in turn based on Directive 2003/94/EC. The guidelines provide that every possible precaution must be taken to ensure that no one suffering from a contagious disease or with open cuts or injuries is employed in the

production of medication. Chronic skin diseases and chronic infections such as hepatitis B or C and HIV are listed in the Standard Operating Procedures to the effect that people with those conditions must not be employed.

The plaintiff started working on 6 December 2010. During the initial medical check-up two days later, the plaintiff informed the company medical doctor that he was HIV positive. The doctor then filled out a form expressing concern regarding the employment of the technical chemical assistant in the cleanroom. Since there was no other possible employment for the plaintiff, the defendant terminated the contract with two weeks' notice.

The plaintiff sued the company for disability discrimination. The German Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, the "AGG"), which is the German transposition of Directive 2000/78/ EC) applies irrespective of an employee's length of service. The plaintiff also said the company medical doctor did not raise concerns about his employment during the check-up and that because of the specific path of infection of HIV, transmission to a cancer patient would be practically impossible.

The defendant argued that the plaintiff did not qualify as a disabled employee.

The Labour Court in Berlin held in the first instance that the plaintiff was indeed not disabled. It noted that someone is considered disabled when the condition in question has an impact, which lasts longer than 6 months, on his or her ability to carry out normal day to day activities and has an adverse impact on his or her ability to participate in society (Section 2 SGB IX). A medically treated HIV infection without symptoms had no impact on either the plaintiff's social life or his professional career. He could not be considered disabled under the AGG, as his condition had not (yet) had any impact on his ability to participate in society. The first time it had any impact at all was when his employer prohibited him from working in the cleanroom.

The plaintiff appealed to the Regional Labour Court (the "LAG") of Berlin-Brandenburg to have his termination declared void. He claimed in damages what he would have been paid for three months of the probation period.

Judgment

The LAG held that the employment contract had been lawfully terminated by the company during the six-month trial period in accordance with section 622 of the BGB. The court considered the employer's obligations under the guidelines and its own Standard Operating Procedures and found that it was under a duty to ensure there was no contamination in the cleanroom. If it needed to remove an infected employee from the cleanroom in order to fulfill

that duty, it was then obliged to take steps to redeploy the employee elsewhere. However, if that failed, the employer was entitled to dismiss the employee, as happened in this case.

It ruled that the termination did not violate section 7(1) of the AGG (which provides that employees may not be discriminated against on any of the protected grounds listed in section 1, including disability), as this section was not relevant to the termination. The court did not rule on whether an HIV infection without symptoms constitutes a disability as defined by section 1 of the AGG. However, the court did consider section 3 of the AGG, which says that direct discrimination occurs when one person is treated less favourably than another in a comparable situation (this mirrors Article 2 (2)(a) of Directive 2000/78). The court found that it was not clear that the employer would have acted differently towards another HIV-positive person (or indeed any other employee suffering from a contagious, yet not necessarily permanent disease) who had been employed for a longer period of time. There were no indications that HIV-positive employees would be more likely to be terminated or excluded from the cleanroom based on indirect discrimination resulting from their disease than other employees who were not HIV positive. The court therefore held that the plaintiff had not been subject to unequal treatment.

In any event, the court found that by section 8 of the AGG, unequal treatment would have been permitted in this case. Section 8 of the AGG stipulates that exceptions to the principle of equal treatment can be made if the treatment is justified by a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate (this mirrors Article 4(1) of Directive 2000/78). In this case, the fact that the cleanroom needed to be free from contagious diseases was 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.

The employee has since lodged an appeal with the Federal Labour Court.

Commentary

The Berlin-Brandenburg LAG left unanswered the interesting question of whether or not HIV qualifies as a disability under section 1 of the AGG. Nor have the German courts yet determined whether AIDS constitutes a disability, but this would largely depend on the nature of the illnesses suffered as a result of the AIDS virus.

Nevertheless, under German law, being HIV positive is not usually sufficient reason for termination of employment. There are no set causes for termination under German law. The termination of an HIVpositive employee is therefore only lawful in limited situations.

This decision has been quite controversial, as some authors have argued that HIV positive employees should not be excluded from the workplace under any circumstances. However, the court ruled that the employer's interests held sway where the safety and well-being of patients was in question. Only in such circumstances - and with the proviso that the employer also cannot find other suitable work for the employee (here, outside the cleanroom) - should the employer have the right to terminate the contract. It remains to be seen whether or not the Federal Court will uphold this judgment.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): In the Netherlands this question would be approached in the following way:

Step 1: does the plaintiff's HIV qualify as a disability (real or perceived) within the meaning of the AGG and, hence, Directive 2000/78? If not, the claim is to be rejected.

Step 2: if there is a disability, has the plaintiff been discriminated against? The answer depends on whom one takes as a comparator.

Step 3: if the plaintiff has been discriminated against on grounds of disability, is that discrimination direct or indirect?

Step 4: if there is direct discrimination, do any of the statutory exceptions apply?

Step 5: if indirect, is the discrimination objectively justified?

In terms of step 1: I agree with the authors that it is a pity that the court did not address the question of whether HIV qualifies as a disability. A disability within the meaning of Directive 2000/78, as defined by the ECJ in *Navas (C-13/05)*, is "a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life", provided that it is "probable that the limitation will last for a long time". In other words, there are two elements: (i) long-lasting impairment and (ii) hindrance of participation in professional life (or perception of each of these elements). To my knowledge the ECJ has not yet refined its definition and has not addressed the question of whether a hindrance is absolute or whether it can depend on the person's profession. For example: if an airline pilot's eyesight deteriorates so that he needs to wear glasses (or contact lenses) and he refuses laser treatment, making him unfit to fly, is he "disabled"? Being short-sighted does not hinder his participation in most professions and so the pilot could become a bookkeeper or almost anything else - but it certainly would hinder his professional life as a pilot.

Recently the Dutch Equal Treatment Commission has held that being HIV-positive is a disability within the meaning of the Dutch law transposing Directive 2000/78.

In terms of step 2: The correct comparator, as I see it, is someone identical to the plaintiff with one exception, namely that he is not HIVpositive. Clearly, such a comparator would not have been dismissed and so I find the German judgment surprising. Bearing in mind that the court did not settle the question of whether the plaintiff was disabled – in other words, it did not rule that he was not disabled - how could one say with certainty that this employee, who was dismissed for no other reason than disability, was not treated unfavourably? The court seems to take as a comparator an HIV-positive person who has been employed for more than six months. I find this a strange comparison.

Subject: disability discrimination

Parties: unknown

Court: Berlin-Brandenburg Regional Labour Court

Date: 13 January 2012

Case number: 6 Sa 2159/11

Hardcopy publication: NZA-RR 2012,183

Internet-publication: <http://www.iww.de/index.cfm?pid=1307&opv=120497>

Creator: Berlin-Brandenburg Regional Labour Court

Verdict at: 2012-01-13

Case number: 6 Sa 2159/11