SUMMARY

2012/19: Inviting for job interview by email not discriminatory (CZ)

<p>A job applicant was invited for an interview by email, sent less than 24 hours before the planned time of the interview. Because the applicant did not own a computer she read the invitation too late, missed the interview and did not get the job. Did the method of inviting applicants for an interview discriminate on the grounds of “property”? The Supreme Court found that this was not the case, as the employer had no intention to disadvantage applicants without a computer of their own.</p>

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Facts

The Czech Ministry of Culture announced on its website a vacancy for the position of Managing Director of the National Heritage Institute. A number of candidates filed an application for this position. One of them was the plaintiff. Although she did not own a computer of her own, she did apply by email, perhaps using a friend's computer or a computer in an Internet café.

On 13 December 2005 the Ministry invited all of the applicants, by email and/or by telephone, for job interviews the next day. In other words, the applicants were given less than 24 hours'

notice. Because the plaintiff did not own a computer and did not have all-day access to her email account, she did not read the invitation that was sent to her email address on time. Therefore, she did not attend a job interview.

The Ministry decided to prolong the selection procedure and it placed a second advertisement for the vacancy. The plaintiff was not informed about this despite the Ministry knowing that she had applied in the first round. Nevertheless, she could have applied again, seeing that the advertisement was published both in a newspaper and on the Ministry's website. Be this as it may, the plaintiff did not apply a second time.

The result of the foregoing was that someone else got the job. When the plaintiff protested, she was told that she would not have been selected for the job anyway, as she was clearly a person with "inadequate organisational abilities". The plaintiff experienced this remark as being hurtful of her dignity and self-respect. Moreover, she felt that she had been discriminated on the grounds of "property", as provided in the Act on Employment, arguing that the Ministry's method of selecting applicants disfavoured people like her who are too poor to afford a computer of their own or to have all-day access to the Internet or a personal email account. This alleged discrimination caused the plaintiff to experience loss of dignity for which she demanded monetary compensation.

The plaintiff brought proceedings against the State. The court of first instance dismissed her claim. It reasoned that there had been no discrimination, given that all of the applicants for the vacancy had been treated in the same manner. They had all received less than 24 hours' notice of the job interview. The court of second instance upheld this judgment, adding that the plaintiff had only herself to blame, as she had failed to provide the Ministry with such contact details, e.g. a mobile telephone number, as would enable her to be contacted at short notice. As for the plaintiff's complaint that she had not been invited for the second round of interviews, there was no discrimination either, given that the invitation to apply for this second round had also been published in a newspaper. Thus, the plaintiff could have applied and, in any case, she had not been treated differently than others in this regard.

The plaintiff brought the case to the Supreme Court.

Judgment

The Supreme Court upheld the lower courts' judgments. Although it agreed with the plaintiff that the Ministry had behaved inappropriately by inviting applicants for an interview at less than 24 hours' notice, it held that the Ministry had treated all (potential) applicants in the same manner and that, therefore, it had not discriminated. There would have been discrimination, the Court added, if the Ministry had intentionally disfavoured individuals who

do not own a computer or have all-day access to an email account. However, there was no such intent, given that the plaintiff had applied by email without informing the Ministry that she had no computer.

Commentary

Until 31 December 2011 the Czech Republic had (i) a special provision in the Act on Employment that prohibited discrimination on many grounds including "property" and (ii) since 1 September 2009, the Anti-Discrimination Act, which applies to discrimination in general, but prohibits discrimination on more limited grounds, not including "property". As of 1 January 2012 the rules on non-discrimination were removed from the Act on Employment.

As the alleged discrimination in this case occurred before 2012, the plaintiff could invoke both the anti-discrimination rules in the Act on Employment (including the prohibition to discriminate on grounds of property) and the Anti-Discrimination Act.

The Supreme Court does not make a clear distinction between direct and indirect discrimination, but it does so implicitly, where it holds that there would have been discrimination (on grounds of property) if the Ministry had intentionally made application difficult for individuals without a computer.

Although the claim in the case reported above may seem frivolous, the case does illustrates that discrimination claims are on the rise in the Czech Republic. This may be due to the coverage given to discrimination claims (not only in the area of employment) by the media and the heightened awareness of the general public of their rights.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): The TFEU and a number of Directives prohibit discrimination in employment on the grounds of nationality (Article 18 TFEU), gender (Article 157 TFEU and Directive 2006/54), race (Directive 2000/43), religion/belief, disability, age and sexual orientation (Directive 2000/78) and certain categories of employment status, namely posted work (Directive 96/71), part-time work (Directive 97/81), fixed-term work (Directive 99/70) and temporary agency work (Directive 2008/104). I will refer to these grounds as the "express" grounds or strands of discrimination law.

Neither the TFEU nor any Directive prohibits discrimination in employment on what I will refer to as "other" grounds, such as property, size, weight or beauty/ugliness ("lookism"). However, there is softer law, both international (e.g. Article 26 of the BUPO Convention) and European (e.g. Article 14 of the ECHR and Article 21 of the Charter of Fundamental Rights of

the European Union), that does outlaw discrimination on other grounds, but the recent ruling in the *Agafitei* case (reported in EELC 2011-3) indicates that the ECJ has no desire to apply that law to non-express forms of discrimination. Therefore, unless the ECJ expands the scope of its *Mangold* doctrine by qualifying other grounds as "general principles of EU law", employees who wish to challenge discriminatory practices that are not expressly prohibited will need to rely on their domestic law.

The national (case) law on discrimination on "other" grounds seems to be different in the various EU Member States. Judging by the rulings of the French Supreme Court reported in EELC 2009/50, 2010/10 and 2010/51, the French doctrine of equality, for example, extends well beyond the express strands of discrimination, *inter alia* requiring managers (*cadre*) and workers (*non-cadre*) to be remunerated equally in the absence of objective justification.

The Czech judgment reported above is an example of national law that prohibits discrimination on at least one "other" ground, namely property. My reading of the judgment is that if the plaintiff had established *prima facie* evidence of differential treatment on the ground of owning/not owning a computer, her claim might have been upheld.

The Dutch Supreme Court seems to be concerned that accepting a "general" equality doctrine, i.e. one not limited to the express strands, would open the gates to a flood of litigation. In a 1994 ruling in the *Agfa - v - Schooldermans* case the Supreme Court referred to "*the generally accepted principle that employees are entitled to fair remuneration, which entails, inter alia, that similar work under similar conditions must be rewarded similarly in the absence of objective justification*". Ten years later, however, in its 2004 ruling in the Parallel Entry case, the Supreme Court was more reluctant. The case concerned airline pilots employed by KLM. Briefly and incompletely stated, pilots who had been employed by KLM for their entire career were paid more than their colleagues who had spent the first part of their career as employees of a subsidiary company of KLM called KLC. A group of former KLC pilots demanded a pay rise, basing their claim on the *Agfa - v - Schooldermans* doctrine. The Supreme Court upheld the lower courts' decisions to turn down the claim. It reasoned that, although the principle of equal payment as formulated in the *Agfa - v - Schooldermans* case is a fundamentally important principle rooted in international law, it is no more than one of several aspects assessed to determine whether an employer has acted in accordance with the Dutch doctrine of "good employership". It follows, according to the Supreme Court, that an employee can only claim compensation for loss resulting from discrimination on "other" grounds in the event of a gross violation of the said principle (literally: in the event the inequality is "unacceptable" from the point of view of reasonableness and equity). The *Parallel Entry* ruling has dashed the hope of those who advocate a wider scope for anti-discrimination legislation.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Subject: Other forms of discrimination

Parties: H.P. - v - Czech Republic (Ministry of Culture)

Court: Nejvyšší soud Ceské republiky (Supreme Court)

Date: 27 March 2012

Case number: 21 Cdo 4586/210

Internet publication: www.nsoud.cz > Rozhonutí (etc.) > Spisová (etc.)

Creator: Nejvyšší soud (Czech Supreme Court)
Verdict at: 2012-03-27
Case number: 21 Cdo 4586/210