

SUMMARY

ECJ 19 April 2012, case C-415/10 (Galina Meister - v - Speech Design Carrier Systems GmbH), Gender discrimination, Age discrimination, Nationality discrimination

Facts

Ms Meister was a Russian systems engineer. In October 2006, when she was aged 45, she read a newspaper advertisement, placed by a German company called Speech Design, for “an experienced software developer”. She applied twice. Unlike the other applicants, she was not invited for an interview. Her application was simply turned down, without providing a reason. Ms Meister did two things. She asked Speech Design to provide her with information on the successful candidate and she brought legal proceedings, alleging discrimination on the grounds of sex, age and ethnic origin. Speech Design declined to give her information on the person they had hired.

National proceedings

The courts of first and second instance turned down Ms Meister’s claim. She appealed to the highest labour court, the BAG (*Bundesarbeitsgericht*). It acknowledged that Ms Meister had suffered less favourable treatment than the other applicants, who had been invited for an interview, but she had not been able to establish that this treatment was on the grounds of sex, age or ethnic origin, as required by German law. A candidate who considers that he has been discriminated against does not meet his obligation to adduce the required evidence merely by submitting that he has applied for a job, that his application was unsuccessful and that he fits

the advertised profile. Thus, Ms Meister should have given more details of the circumstances on the basis of which it could be possible to establish, to a high degree of probability, the reasons for the discriminatory treatment. The fact that Ms Meister was not invited for an interview could be explained by many non-discriminatory factors. However, the employer's failure to provide information when rejecting the application was precisely the reason why Ms Meister was unable to fulfil the obligation under German law to produce *prima facie* evidence of discrimination. For this reason the BAG referred two questions to the ECJ:

Are Article 19(1) of Directive 2006/54 [...], Article 8(1) of Directive 2000/43 [...] and Article 10(1) of Directive 2000/78 [...] to be interpreted as meaning that, where a worker shows that he meets the requirements for a post advertised by an employer, he has the right, if he does not obtain the post, to information from the employer as to whether it has engaged another applicant and, if so, the criteria on which that appointment has been made?

If the answer to the first question is affirmative, where the employer does not disclose the requested information, does that fact give rise to a presumption that the discrimination alleged by the worker exists?

ECJ'S findings

The ECJ refers to its 2011 ruling in *Kelly* (C-104/10), which centred on Directive 97/80 on the burden of proof in sex discrimination cases. This directive was repealed in 2009 by Directive 2006/54 without its contents being altered. In *Kelly*, the ECJ held that, although Article 4(1) of Directive 97/80 does not specifically entitle job applicants to information that may help them establish "facts from which it may be presumed that there has been discrimination", it is not inconceivable that, in the context of establishing such facts, refusal by the defendant to disclose relevant information is liable to compromise the achievement of the objective pursued by Directive 97/80 and, in particular, to deprive Article 4(1) of the Directive of its effectiveness (§ 39).

It is for the referring court to ensure that Speech Design's refusal to disclose information is not liable to compromise the objectives pursued by Directives 2000/43 (race), 2000/78 (ethnic origin, etc.) and 2006/54 (gender), taking into account all the circumstances of the case and of the fact that Member States may provide that indirect discrimination can be established by any means including the use of statistical evidence. Among the factors which may be taken into account are: (i) that, unlike in *Kelly*, Speech Design seems to have refused Ms Meister any access to the information she seeks to have disclosed, (ii) that Ms Meister's level of expertise matches that referred to in the job advertisement and (iii) that she was twice refused an interview (§ 42-45).

In view of the answer given to the first question, there is no need to reply to the second question (§ 48).

Ruling

Articles 8(1) of Directive 2000/43, 10(1) of Directive 2000/78 and 19(1) of Directive 2006/54 must be interpreted as not entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected, to have access to information indicating whether the employer engaged another applicant at the end of the recruiting process. Nevertheless, a defendant's refusal to grant any access to information may be one of the factors to take into account when establishing whether there has been direct or indirect discrimination. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances.

Creator: European Court of Justice (ECJ)

Verdict at: 2012-04-19

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