

SUMMARY

2011/56: Severance payment in a social plan based on age as well as on period of employment (GER)

***<p>Severance payments in a social plan can be calculated according to both the age of the employee and to length of service. However, a provision in a social plan that considers the employee’s prospects on the labour market (which are dependent on age) in a way which puts the emphasis on age, must be specifically justified by a legitimate aim in accordance with section 10 of the German General Equal Treatment Act (the ‘AGG’).*</p>**

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Facts

The plaintiff, born in 1969, was employed by the defendant from January 1997 to March 2008. In October 2007 a social plan was agreed between the defendant and its works council. The amount of the severance payment agreed in the social plan was calculated on the basis of the period of employment and the gross monthly salary. However, the calculation differentiated between ages, by awarding 80% of the full value of the calculation up to the age of 29; 90% for 30 to 39 and 100% from the age of 40 years and older. The employment relationship of the

plaintiff was terminated on 31 March 2008 by the defendant. The defendant paid a severance payment to the plaintiff based on the age differential, which amounted to 90% of the full amount, as regulated in the social plan. The plaintiff claimed the full 100%. She argued that the reduction for younger employees violated the prohibition against age discrimination.

The court of first instance and on appeal the Landesarbeitsgericht (the 'LAG') dismissed the claim. Both courts decided in favour of the defendant and argued that to calculate the severance payment provided for in the social plan in a way that took account, not only of the employee's period of employment, but also of her age was compatible with section 10(6) AGG, which provides as follows: *"Notwithstanding Section 8, a difference of treatment on grounds of age shall likewise not constitute discrimination if it is objectively and reasonably justified by a legitimate aim. The means of achieving that aim must be appropriate and necessary. Such differences of treatment may include, amongst others: differentiating between social benefits within the meaning of the Works Constitution Act (Betriebsverfassungsgesetz), the creation by the parties of a regulation governing compensation based on age or length of service whereby the employee's prospects on the labour market (which are decisively dependent on his or her age) have been taken into consideration by means of emphasizing age relatively strongly, or the exclusion of employees who are economically secure from social benefits because they may be eligible to draw an old-age pension after drawing unemployment benefit."*

This provision itself does not violate EU law because it is justified by a legitimate aim of the national government in accordance with Article 6(1) of Directive 2000/78. Although Section 10(6) AGG itself only permits differences in treatment relating to age **or** period of employment, consideration of both is not expressly excluded. The plaintiff appealed to the highest German court for labour affairs, the Bundesarbeitsgericht (the 'BAG').

The defendant based its position on Section 10(6) AGG, arguing that that provision permits the chosen form of differentiation, i.e. reduced job prospects as a function of age.

Judgment

The BAG held that both the sliding scale of age and length of service are compatible with Section 10(6) AGG in calculating severance payments based on a social plan. Although the social plan violated the prohibition of age discrimination contained in section 3(1) and (2) AGG¹, the reduction of the severance payment by 10% by reason of age, was justified by a legitimate aim that was appropriate and necessary in accordance with Section 10(6) AGG.

The BAG also ruled that Section 10(6) AGG itself does not violate EU law because it was justified by a legitimate aim of the national government (Article 6(1) Regulation 2000/78 and see also BAG 26 May 2009 D 1 AZR 198/08). The BAG considered that section 10(6) AGG

takes into account the fact that older employees typically have more difficulty finding a job than younger employees. The judgment is supported by statistics of the Federal Employment Centre, which show that job prospects decrease with age.

Commentary

This judgment is in line with previous ones (notably the BAG's decision of 26 May 2009 D 1 AZR 198/08) in that it is compatible with the AGG to calculate severance payment based on the period of employment.

In the case at hand the BAG had to decide whether a severance payment in a social plan based on age **as well as** length of service was lawful. Such rules are not unusual in social plans, yet the wording of the law only permits the calculation of severance payments based on age **or** period of employment.

From our point of view, Section 10(6) AGG should be read as 'and/or'. German law allows parties plenty of scope in terms of what is provided in a social plan, provided this does not amount to unlawful age discrimination. Although the calculation of the severance payment in the social plan at hand does amount to age discrimination, it is justified by the legitimate aim of taking into account the fact that job prospects increase with age.

Footnote

¹ Section 3 (1) and (2) AGG read as follows: '(1) Direct discrimination shall be taken to occur 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 under Section 1.

(2) Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons at a particular disadvantage compared with other persons on any of the grounds referred to under Section 1, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.'

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