

SUMMARY

## **2011/25 Statistics alone insufficient to establish presumption of “glass ceiling” (GE)**

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### **Summary**

An employee who is not promoted to a higher position and who alleges that this is because there is a “glass ceiling”, must establish facts from which it may be presumed that there has been gender discrimination. Providing statistics to the effect that women are underrepresented in senior positions is insufficient for this purpose.

### **Facts**

The plaintiff was a female HR Manager, reporting to the male HR Director. When the latter left the company, the company did not publish a vacancy, nor was the plaintiff informed that she could apply for the position. Instead, an external male person was appointed. The plaintiff felt sidelined. She alleged that she was not invited to apply for the HR Director position because of her gender. She brought legal action against her employer, seeking compensation equal to the balance between her salary as an HR Manager and the salary she would have earned had she been promoted to HR Director, as well as compensation for hurt feelings.

The plaintiff based her gender discrimination claim on statistics. Whereas 69% of the workforce consisted of women, only one third of the senior staff<sup>1</sup> were female. Furthermore,

not one woman had been promoted to the level of Director in the company for 30 years. Finally, statistics indicated that the percentages of women in the various positions were lower in the defendant company than they were within the relevant branch of industry.

The court of first instance dismissed the claim. On appeal, the Landesarbeitsgericht (LAG) reversed the decision and awarded the plaintiff's claim. This decision was based on Article 22 of the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, abbreviated ÖAGG'). This provision is the German transposition of Article 19 of the "Recast Directive"<sup>2</sup> which requires Member States to ensure that "when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish [É] facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment". The LAG found that the statistics submitted by the plaintiff were sufficient to establish a presumption of gender discrimination and that the defendant had not proved its absence.

The defendant appealed to the highest German court for labour affairs, the Bundesarbeitsgericht (BAG).

### **Judgment**

The BAG held that statistics can constitute a relevant indication that discrimination may be involved. However, in this case, the statistics presented by the plaintiff were not, in themselves, sufficient to warrant reversing the burden of proof. The disparity in the ratio of women as a percentage of the entire workforce and women in senior positions does not establish a presumption of gender discrimination, because there can be many non-discriminatory reasons for such a disparity. In particular, the statistics presented by the plaintiff did not relate specifically to female employees in positions directly below and directly above the alleged "glass ceiling". The fact that no woman had been promoted to the Director level in 30 years was also insufficient to establish presumptive discrimination, given that it was not clear if and to what extent women had previously applied for Director positions. In addition, the turnover rate at the managerial level in this company had always been very low, most senior staff remaining with the company for lengthy periods, in many cases over 30 years. This low turnover rate led to historical disparities that had existed 30 years ago subsisting for a long while. Finally, statistics relating to other companies are not relevant.

With this reasoning, the BAG sent the case back to the (same) LAG, which was instructed to establish whether there were indicators of possible gender discrimination other than the statistics. The case is now pending again before the LAG. In general the BAG said that

statistics must refer specifically to the employer concerned and must relate to the relevant behaviour.]

### **Commentary**

By the present decision, the BAG decided one of the central practical questions regarding Article 22 AGG  $\text{\textcircled{D}}$  and, in my view, convincingly. Clearly, the mere fact that employees belonging to a certain category (gender, nationality, race, age, disability, religion, etc.) are over or underrepresented within a certain hierarchical level in an organisation as compared to such employees as a percentage of the total workforce, is insufficient to allow even a prima facie conclusion of discrimination. As a general rule it can be said that a company that grows “organically”, i.e. not through mergers, etc., is dependent for the composition of its workforce on many factors beyond its control, such as the type of industry, the regional job market and its working hours. Take, for example, a textile company that offers ironing services. Such a company will, as a rule, employ people to carry out the ironing who are almost always women, and better paid sales staff comprising both men and women. In such a case, statistics comparing ironing and the sales department would almost surely lead to the result that men are overrepresented in the sales department in comparison to the total workforce. However, this situation cannot lead to the conclusion that women are discriminated against, given that even only one male employee in the sales department could yield statistical evidence that men are overrepresented in the higher paid jobs. If one were to judge on the basis of statistics alone, discrimination would have to be presumed. In reality, however, the reason for the allocation of men and women in this case may be found in the fact that the ironing services require an experienced workforce, which leads to overrepresentation of employees above a certain age. At the time these employees were hired, ironing was not considered to be a suitable job for a man.

The BAG has yet to award a discrimination claim based on statistical evidence. This case may be the first step. The BAG for the first time provides guidance on the use of statistics for establishing (a presumption of) discrimination. In the case at hand, the statistics submitted by the plaintiff were insufficient. However, the BAG leaves open the possibility that in certain cases, statistical evidence alone may be sufficient to warrant shifting the burden of proof to the employer. Unfortunately, the BAG fails to make clear what is needed for this to happen. It looks as if the BAG wishes to decide this on a case by case basis. In this case, if the plaintiff had presented statistics to the effect that female employees were underrepresented significantly more strongly at the level directly above that of Manager than at the Manager level, would that have been sufficient? It is hard to tell.

A point to note is that the LAG based its judgment entirely on statistical evidence. It did not

examine whether the procedure that led to the appointment of an external male HR Director complied with the principle of transparency as set out by the ECJ in, inter alia, its rulings in the Danfoss and Royal Copenhagen cases<sup>3</sup>.

### **Comments from other jurisdictions**

*United Kingdom (Ailsa Murdoch)*: As in Germany, the UK requires claimants to prove that there is a prima facie case of discrimination. If the claimant provides facts from which a tribunal could decide (in the absence of any other explanation) that an employer has discriminated, the burden of proof shifts to the employer and they will be required to demonstrate that there is an alternative explanation for the alleged discrimination.

Cases in the UK have gone both ways in assessing the weight that may be applied to statistics. There have been cases (which remain good law) where statistical evidence has been sufficient to support a prima facie finding of discrimination (*Rihal v Ealing London Borough Council* [2004] EWCA Civ 623). There are also cases where the statistics alone have not been considered strong enough to switch the burden of proof to the employer (*Abiola v North Yorkshire County Council* [2010] UKEAT 0369/08). It is clear that the sufficiency of the statistical evidence must be considered on a case-by-case basis and is fact-sensitive. Tribunals are entitled to decide on the merits of the particular statistical evidence with which they are supplied and to draw their own conclusions as to whether it is sufficient.

#### **Footnotes**

<sup>1</sup> Senior staff in this case being employees not covered by the relevant collective agreements because their salary exceeded the maximum under those agreements, so-called "non-tariff" employees.

<sup>2</sup> Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

<sup>3</sup> ECJ 17 October 1989 case 109/88 (*Danfoss*) and ECJ 31 May 1995 case 400/93 (*Royal Copenhagen*).

**Subject:** Gender discrimination

**Parties:** not published

**Court:** Bundesarbeitsgericht (Federal Labour Court)

**Date:** 22 July 2010

**Case number:** 8 AZR 1012/08

**Hardcopy publication:** NJW-Spezial 2011, 18

**Internet-publication:**

[www.bundesarbeitsgericht | Entscheidungen | case number](http://www.bundesarbeitsgericht.de/Entscheidungen/case-number)

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**Creator:** Bundesarbeitsgericht (Federal Labour Court)

**Verdict at:** 2010-07-22

**Case number:** 8 AZR 1012/08