SUMMARY

2011/24 How much compensation for lost income following discrimination? (GE)

<p>How much can an employee, whose fixed-term contract was not extended for a reason that was age-discriminatory, claim?</p>

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Facts

The plaintiff was the Managing Director of a hospital in Cologne. As is common in Germany for managing directors, he was employed on the basis of a five year contract. In his case it ran from October 2004 to September 2009. In the normal course of events, the plaintiff's contract would have been extended for a second five-year period, i.e. to September 2014. However, as the hospital's shareholder had a policy of not employing senior staff beyond the age of 65, and as the plaintiff was 62 when his first contract ran out, his contract was not extended. Various press statements issued by the hospital at the time indicated a clear connection between his departure and his age.

The plaintiff took the hospital to court, alleging age discrimination and claiming compensation both for five years of lost income and for immaterial damages. In its defence, the hospital argued that despite the press statements, in truth the only reason for the non-extension of the plaintiff's contract was his inadequate performance.

The court of first instance dismissed the claim. It reasoned that the German anti-discrimination law, the AGG, does not apply fully to self-employed persons and to "organs" of

a company such as managing directors, but applies merely by analogy (mutatis mutandis), and that therefore such individuals lack the full protection of the AGG.

Judgment

On appeal, the Oberlandesgericht (OLG) reasoned differently. It began by recalling that the non-extension of an employment contract against the wishes of the employee is the equivalent of turning down a job application. It also found that the AGG applies to such rejections in relation to managing directors just as much as it does to other employees.

The court then applied s22 of the AGG which, in accordance with European law, provides that where an individual demonstrates prima facie discrimination, the measure in question is presumptively discriminatory and the burden of proof to the contrary shifts to the employer. In the present case, the statement to the press issued by the hospital, which suggested a clear connection between the non-extension of the plaintiff's contract and his age, constituted sufficient prima facie evidence of age discrimination. Even if the plaintiff's performance had been poor Ð an allegation he disputed Ð age would have been at least one of the factors influencing the decision not to extend his contract and, under German law, it is sufficient for a measure to be considered in breach of the anti-discrimination law if no more than one of several reasons for a measure is discriminatory. In conclusion, given that the hospital had failed to rebut the presumption of age discrimination, the court established that the non-extension of the plaintiff's contract was discriminatory.

The next question was whether the discrimination was justified. The court found that it was not. It saw no reason why the employment contract of the Managing Director of a hospital should terminate at the age of 65. Moreover, even if such a reason had existed, it should not have prevented the shareholder from offering to extend the plaintiff's contract for three more years, i.e. until age 65.

Given the unjustified discrimination, the plaintiff was entitled to compensation. The issue was how much. As regards loss of income, the court did not arrive at a conclusion, since the plaintiff had not specified his claim, merely applying for a declaratory judgment that the hospital had an obligation to pay him damages. As regards immaterial damages, the court awarded two months' salary, being | 36,600, in consideration of the harm done to the plaintiff's reputation by the statements to the press.

Commentary

The OLG left unanswered the most interesting question in this case, namely how much to award the plaintiff for loss of income. This question is hotly debated in German legal

literature.

Personally, I wonder whether an employee whose fixed-term contract is not extended for a discriminatory reason Ð a situation which is deemed equivalent to the rejection of a job application Ð should be entitled to any compensation for lost earnings at all. Barring certain specific exceptions in the law (e.g. young works council members), there is no rule in German law requiring an employer to enter into an employment contract with any particular person. If there is no such obligation, then surely not (re-)hiring a person cannot constitute a breach of any duty, and if there is no breach, how can there be an obligation to compensate? I am aware that this line of thought runs counter to the generally accepted doctrine held by German scholars.

Some of those scholars hold that in a situation such as that reported above, the plaintiff should be compensated for lost earnings up until his statutory retirement age, which in this case would have been an amount equal to about three years' salary (from 62 to 65). In this particular case, I do not see why the damages should be limited to the period up until the statutory retirement age, given that German law does not provide for an obligation to retire at any particular age and the plaintiff was apparently willing to work beyond that age. At the other end of the spectrum there are scholars who argue that compensation for lost earnings should be limited to the salary the plaintiff would have earned up until the first possible termination date. In this case, the plaintiff's contract included a clause allowing either party to terminate the contract prematurely by giving nine months' notice. Thus, in the view of these scholars, his claim should be limited to nine months' salary. I do not subscribe to this view, for the following reason. Under German law a dismissal is valid only if it is lawful. An unlawful dismissal, e.g. one based on discrimination, is void, in which case the employment continues. Surely a dismissal following directly after a discriminatory non-renewal of contract is just as unlawful as the non-renewal itself. Therefore, limiting the compensation for lost earnings to, in the case of the plaintiff, nine months, would be in breach of the law.

In brief, this judgment has opened the way for a debate on the issue of compensation for lost earnings. It will be interesting to see what the Federal Labour Court does.

Comments from other jurisdictions

Austria (Martin Risak): In the Austrian context I would expect a court to qualify the non-renewal of a fixed-term contract, which is not regulated explicitly, as a case of non-hiring. The damages issue would then be solved as follows: The Austrian Act on Equal Treatment (Gleichbehandlungsgesetz) provides that if the employment relationship was not finalised for a discriminatory reason, the employee may claim damages of a minimum of two months' pay

if he or she would have been employed had the hiring procedure been non-discriminatory. The prevailing literature states that the maximum would be the wages until the end of the next possible notice period or, in the case of a fixed term contract, until the contract's expiry date. In this case, alternative income the employee would be likely to have earned during that period should be taken into account given that Ð as a matter of general legal principle Ð a party who has suffered loss must take all reasonable measures to mitigate that loss.

The Netherlands (Peter Vas Nunes): the German court in this case equates involuntary non-renewal of a fixed-term contract to non-hiring. This is in line with the ECJ's case law, e.g. in the Melgar case (ECJ 4 October 2001, case C-438/99). I have always found this doctrine a bit artificial. In this case, the Managing Director had been employed for five years at the time of the non-renewal. The hospital, i.e. the shareholder, had had ample opportunity to get to know him. Surely not renewing a contract in such a situation should not be deemed comparable with a decision not to hire an unknown job applicant?

As for the damages issue, I expect a Dutch court would have estimated the period during which the plaintiff's contract would have continued beyond September 2009 in the event the contract had been renewed, and would have awarded as compensation for lost earnings (i) the amount of salary for that period, adjusted to present day value, minus (ii) alternative income the plaintiff would be likely to have earned during that period.

United Kingdom (James Davies): UK employment law expressly equates the non-renewal of a fixed term contract with a dismissal, so in this case there would have been a discriminatory dismissal. As under German law, on the facts described the burden of proof would probably have transferred to the employer to prove it had not discriminated. The claimant would win if he could show that a discriminatory reason was one of the reasons for the "dismissal".

The compensatory element of the award would be calculated on the employee's actual likely loss of earnings taking into account mitigation (i.e. income he could obtain from other sources during the relevant period) and the chance he would have left anyway (either by being dismissed, resigning or retiring). So, the court would decide how long it believed the claimant would have continued working for the employer if it had not been for the discriminatory "dismissal". It would then award him his lost earnings (salary and benefits) for that period, less any amount he either obtained Ð or ought reasonably to have obtained Ð through mitigating his loss by working elsewhere.

Subject: Age discrimination , unfair dismissal

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