SUMMARY

2011/7: Discriminatory termination in probationary period can lead to claims for damages (GE)

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Summary

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Facts

This case concerns a German plaintiff who spoke with a Russian accent. She completed a six-week internship with the defendant, a logistics company. Upon completion of her internship she was issued with a positive reference. On 20 January 2009, directly following her internship, she was hired by the same company as an administrative clerk. Her contract included a clause stipulating that the initial six months of her employment would be a probationary period (six months being the maximum possible length under German law). On 11 March 2009, the company's managing director told the plaintiff that the company could not afford to employ staff who speak with an accent, because customers might think, "what an awful shop, they hire only foreigners". Following this conversation, the plaintiff got no more work, was denied the use of the telephone and on 7 April 2009, her employment was terminated with two weeks' notice. Shortly afterwards, the defendant advertised a vacancy, starting on 1 May 2009. On 15 April 2009, the plaintiff made a request to the defendant to pay

her € 5,400 (the equivalent of three months' salary) in damages, pursuant to the German Anti-Discrimination Act ("Allgemeines Gleichbehandlungsgesetz", the "AGG"). The defendant rejected this demand, whereupon, on 19 May 2009, the plaintiff brought an action before the local court in Bremerhaven, claiming € 5,400. The court awarded the claim despite the defendant's assertion that it had terminated the employment contract for operational reasons during a probationary period, which is perfectly legitimate under German law. The defendant lodged an appeal with the appellate court in Bremen.

Judgment

The defendant's first argument was based on Article 15(4) of the AGG, which provides that a person who feels discriminated against and wishes to bring a claim, must give notice of his or her intention to do so within two months of the date on which he or she became aware of the discrimination. The court held that this date was 7 April 2009, the date on which the plaintiff was given notice of termination and that, therefore, she had given notice of her intention to bring a claim in time. The defendant argued that the notice given by the plaintiff only related to material harm, pursuant to Article 15(1) of the AGG, not to compensation for immaterial harm, pursuant to Article 15(2) of the AGG. The court held that in principle both claims are in relation to harm, either material or immaterial. Secondly, and more importantly, the defendant relied on Article 2(4) of the AGG. This provision, the meaning of which is much debated, reads, "Für Kündigungen gelten ausschliesslich die Bestimmungen zum allgemeinen und besonderen Kündigungsschutz". This translates as, "In respect of terminations, the general and specific rules relating to dismissal protection apply exclusively". The defendant, in line with certain scholars and judicial precedent, read this as meaning that a claim in respect of the termination of an employment agreement can be based exclusively on the "Kündigungsschutzgesetz", which is the Law on Dismissal Protection. Since the "Kündigungsschutzgesetz" does not contain a provision granting damages for a discriminatory notice of termination, the defendant argued that the plaintiff had no such claim. The Court of Appeal rejected this argument, reasoning as follows. First, Article 2(4) of the AGG deals with the validity of the termination and it prevents a discriminatory termination from being valid. It does not, however, bar a claim for monetary compensation based on the violation of a person's "Persönlichkeitsrecht". This is a concept, codified in Article 823(1)(0) of the Civil Code, which covers, inter alia, an individual's right to privacy and non-discrimination. Secondly, the defendant's reading of Article 2(4) of the AGG would lead to the illogical result of rendering Article 2(1)(2) of the AGG meaningless. This provision holds that any unequal treatment ("Benachteiligung") in respect of conditions of termination ("Entlassungs-bedingungen") is unlawful. The defendant's interpretation of the law would lead to inconsistency between two provisions of the same statute. Thirdly, there was the fact that prior to 2006, when the AGG

did not yet exist, the highest German labour court dealing with employment matters ("Bundesarbeitsgericht", the "BAG") had repeatedly awarded claims for immaterial harm based on the violation of the principle of "Persönlichkeitsrecht" in cases of discrimination. Given that Article 15(2) of the AGG allows victims of discrimination to bring a claim for immaterial harm, the same should still hold true for violation of the AGG. Having established that the plaintiff's claim was valid, the Court of Appeal went on to examine whether the defendant had in fact discriminated against her. The court began by noting that Article 22 of the AGG shifts the burden of proof to the defendant, if the plaintiff makes a prima facie case of discrimination. In light of this, the statement made by the defendant's director (which had been evidenced by witnesses) that the defendant could not afford to employ staff who speak with an accent, clearly referred to the plaintiff's Russian origin and therefore constituted direct ethnic discrimination. The fact that the defendant had issued the plaintiff with a positively worded reference upon completion of her internship made it clear that the director's remark about her accent did not reflect on her ability to make herself clear to customers, but rather to her ethnic origin. Therefore, although the reason given for the dismissal was not the plaintiff's accent, but "operational reasons", the termination, coming less than one month after the discriminatory remark, was presumptively discriminatory. The defendant was not able to refute this presumption. Although it is true that German law permits a probationary dismissal for any reason, the fact that the defendant had advertised a vacancy for the plaintiff's position as of 1 May 2009, proved that the reason the defendant gave in court, namely "operational reasons", was false. Finally, the court addressed the extent of the compensation. It found the defendant's behaviour to be very serious, and accordingly, awarded the plaintiff compensation for immaterial harm in the amount of three months' salary (the maximum compensation allowed under Article 15(2)(2) of the AGG). Admittedly, this provision deals with a different situation (namely, where a job applicant is turned down for a discriminatory reason, but would not have got the job irrespective of the discrimination), but the plaintiff had only demanded this specific sum, which hindered the court from awarding her a larger amount.

Commentary

This case is presently under review by the BAG, which has agreed to review it because the issue of whether Article 2(4) of the AGG bars claims for compensation, particularly in a case of discriminatory termination, has yet to be settled. I am confident that the BAG will uphold the judgment reported above. A BAG judgment in another case regarding Article 15(2) of the AGG, delivered on 22 October 2009, supports my view. In my opinion, the judgment reported above is dogmatically correct and in line with Directive 2000/78, which the AGG transposed into German law. Although the court in this case limited the compensation it awarded to three months' salary, it did not rule that this was the highest possible award in a case like this. I do

not rule out the possibility of higher awards being made in the future. Because of the burden of proof rule under the AGG, I doubt whether the defendant would have done any better if its managing director had not lied about the reason for terminating the plaintiff's employment. It was clearly evidenced that the director had made the statement relating to ethnic origin. If an employee can prove such allegations, an employer needs to react to this by showing the reasons for the termination, otherwise a court cannot ignore the facts put forward by the employee.

Comments from other jurisdictions

Finland (Karoliina Koistila): As a general rule, probationary periods in Finland do not exceed four months. While it is possible for an employer to terminate an employment relationship with immediate effect during the probationary period, this termination must not breach the prohibition of discrimination (e.g. based on nationality or ethnic origin) and the employer's duty to treat employees fairly. Likewise, the termination should not take place on account of other inappropriate reasons. In the case in question, it is possible that the plaintiff might have successfully brought a claim against the defendant for both discrimination and unlawful termination. On the other hand, it is generally difficult for an employee to challenge a termination that occurs during the probationary period, because the criteria for permitting termination in the probationary period are less strict than for termination during regular (post-probationary) employment. It is worth noting that, under Finnish law, if the work performed by the employee as a trainee and a clerk was similar and had an equivalent level of responsibility, a Finnish court may have held that the employer was not permitted to use a probationary period at all when rehiring him or her. Under Finnish law, the purpose of the probationary period is purely for the employer to evaluate whether the employee in question is suitable to do the work. Therefore, when rehiring a former employee, a decision would be taken based on how much time has passed since the former employment relationship ended, whether the nature of the tasks is different, or whether the employee's professional skills may have deteriorated. If the court considers that the internship gave the employer a sufficient chance to determine whether the employee was suitable to do the work, it may find that the probationary period was unjustified.

United Kingdom (Lorna Scamman): The finding in this case broadly matches the position in the UK, where employees who have at least one year's continuous service have the right not to be unfairly dismissed. For a dismissal to be fair, the employer must show that it had valid grounds for the dismissal and that it acted reasonably in dismissing the employee. Given that probationary periods tend to be significantly shorter than 12 months, employees dismissed during or at the end of their probationary period will typically have no right to argue that the dismissal was unfair. Employees also have the right not to be discriminated against because of

a protected characteristic, but there is no qualifying period of service for this right and it applies even before employment begins. Therefore, where a dismissal is found to be tainted by discrimination, the employee can lodge a complaint in the employment tribunal regardless of their length of service. The UK Government is currently proposing to increase the qualifying period of service for unfair dismissal to two years. If this proposal goes ahead, we are likely to see an increase in the number of discrimination claims that are brought during the first two years of employment.

Subject: Gender discrimination, unfair dismissal
Parties: Unknown plaintiff – v – unknown defendant Court: Landesarbeitsgericht (Labour Court of Appeal) Bremen
Date: 29 June 2010
Case number: 1 Sa 29/10
Hardcopy publication: NZA-RR 2010, 510-514
Internet publication: www.landesarbeitsgericht.bremen.de | Entscheidungen

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Creator: Landesarbeitsgericht Bremen (Labour Court of Appeal)
Verdict at: 2011-06-29
Case number: 1 Sa 29/10