SUMMARY

2010/84: Does a rejected job applicant have the right to know who got the job and why? (GE)

<p>A German court has referred to the ECJ the following question for a preliminary ruling: must national courts interpret EU law as meaning that an applicant who demonstrates that he or she complies with the requirements of a job advertisement but was not invited for a job interview, has the right to know whether someone else was engaged and, if so, on which criteria that engagement was based? If the answer is yes, does the fact that the employer does not give such information lead to a presumption of discrimination?</p>

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Facts

In 1961 a Russian-born woman – the plaintiff – applied for a job as a software-developer with the respondent. She had completed her studies in Russia, where she had received a Russian certificate attesting to the fact that she was a qualified systems engineer. The certificate had been accepted in Germany as being equivalent to a German informatics degree. Nevertheless, her application was rejected. She was not informed whether the respondent had engaged

another person and, if so, on which criteria such engagement was based. A short time afterwards, the respondent again published the same job advertisement and the plaintiff again applied for the job. However, her application was again turned down without any further comment.

The plaintiff argued that she fit perfectly into the published job profile and was able to fulfil all the duties associated with the position advertised. In her opinion, she was obviously the person who was best qualified for the job, therefore the only explanation for not being invited to a job interview was discrimination on the basis of gender, age and/or nationality. She sued the respondent for breach of the *Allgemeine Gleichbehandlungsgesetz* (AGG), which is the German transposition of Directive 2000/78/EC. She claimed compensation pursuant to section 15(2) AGG (a form of immaterial damages) as well as information about the person engaged.

The respondent argued that the plaintiff had failed to show adequate facts to substantiate her discrimination claim. However, German law provides that a claimant merely needs to demonstrate facts from which it may be presumed that there has been discrimination, in which case it is for the respondent to prove the contrary. Furthermore, the respondent took the position that a claim for information does not exist under the AGG.

The plaintiff's claim was dismissed in the lower courts. She took the case to the German Federal Court for employment matters, the BAG.

Judgment

The BAG held that the plaintiff was not entitled to compensation in accordance with section 15(2) AGG since she had failed to provide sufficient evidence to justify presumptive discrimination. The BAG clarified that the fact that she had not been invited to a job interview could, in principle, in itself constitute a violation of the AGG, but that in this case it did not. It is for the plaintiff to provide evidence that a rejection was discriminatory. Such evidence cannot be found solely in the fact that the plaintiff belonged to a number of protected categories (gender, age. nationality). In addition, the mere fact that there are statistically fewer women employed in IT industries than men, does not specifically relate to the employer in this case – the respondent – and therefore does not constitute sufficient evidence.

On this basis, the plaintiff was not able to substantiate her claim for compensation. Therefore, the question arose as to whether or not she was also entitled to more information about the application procedure and the successful applicant, in essence, to substantiate her claim.

The BAG held that the AGG does not allow for such a claim. Indeed, German law in general

does not provide for such a claim, since as a general rule the plaintiff bears the burden of proof that he is entitled to a certain benefit and the defendant is under no obligation to help him to substantiate his claim. An exemption is made insofar as there is a right to information in the event a claim has been awarded, but the quantum thereof is in dispute. On the basis of these general rules there would be no right to information and, as a consequence, the plaintiff would probably not be able to show further evidence of discrimination.

However, as the BAG was uncertain whether this was compatible with EU law, it referred to the ECJ an application for a preliminary ruling on the question of whether community law requires such a right to information.

Commentary

From my perspective the conclusions of the BAG regarding the national law are accurate and there is no right to information under German law in cases such as this. Therefore, such a right to information could only be founded on European law. Given that the respective directives do not contain explicit provisions, a right to information could only be drawn from general principles.

Such a right could possibly be extracted from the principle of effectiveness, if one assumes that an applicant such as the plaintiff in this case is prevented from enjoying rights guaranteed under EU law. This, however, seems not to be the case. Both German law and the relevant directives provide for a shift in the burden of proof, with the result that a plaintiff need only to bring evidence indicating discrimination. With this rule the lawmaker acknowledged that the plaintiff typically cannot provide evidence to prove the discriminatory intent behind a given measure since he has no knowledge about the intent itself, but only of the facts through which the intention is manifested.

From my perspective the legal position provided by this rule is sufficient to give individuals a simple and effective remedy against discrimination, and I see no need to ease plaintiffs' position even further. In addition, the practical consequences of a right to information regarding other candidates seem problematic. Such a right could not only be used in trials, but also in pre-court situations. An employer that rejects an applicant might face many information requests by different applicants, even where there is no evidence that the application procedure was discriminatory in any way.

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Subject: Other forms of discrimination

Parties: Galina Meister – v – Speech Design Carrier Systems

Court: *Bundesarbeitsgericht*, Achter Senat (German Federal Employment Court, Eighth Chamber)

Date: 20 May 2010

Case number: 8 AZR 287/08

Hardcopy publication: –

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Creator: Bundesarbeitsgericht (Federal Labour Court)
Verdict at: 2010-05-20
Case number: 8 AZR 287/08