EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2010/62: New challenge to German time-bar rule limiting discrimination claims (GE)

<p>German law requires discrimination claims to be notified to the employer in writing within two months of the date the employee becomes aware of the discrimination. Last year the Federal Labour Court found this requirement to be compatible with European law and did not find it necessary to refer questions to the ECJ (see EELC 2010/45). Now a lower court has decided to ask the ECJ whether the German time-bar rule is compatible with (1) primary EU law and (2) Directive 2000/78.</p>

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Facts

In November 2007 the plaintiff, at that time aged 41, applied for a job with the defendant as a call centre agent. She applied after having read a job advert that included the following statement, 'are you aged between 18 and 35, proficient in the German language and looking for a full-time job? Then you are the person we need.' The defendant had published similar adverts in 2007 and 2008, each time seeking applicants aged between 18 and either 30 (2007)

or 35 (2008). The plaintiff's application was rejected on 19 November 2007. The defendant hired two younger women instead.

Feeling discriminated against on account of her age, the plaintiff brought an action on 29 January 2008, claiming compensation for the costs of the application and the cost of the legal proceedings and lawyers' fees (*Schadenersatz*) as well as for emotional damage (*Entschädigung*) pursuant to the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, 'AGG'). She argued that she was better qualified for the job than the employees who had been hired. She also pointed out that Article 7 AGG prohibits age-specific job adverts, and that therefore there was a presumption of age discrimination.

The employer based its defence on Article 15(4) AGG. This provision requires discrimination claims in employment to be notified to the employer in writing within two months (or more or less, if so provided in a collective agreement) in order not to be time-barred. The Code of Civil Procedure also provides that, in the event the employer fails to respond or to offer adequate compensation, the employee has three months from the date of said written notification to bring legal proceedings.

The court of first instance (Arbeitsgericht Hamburg) dismissed the claim on the ground that the plaintiff's job application had been rejected on 19 November 2007 and that she had not notified the defendant of her claim until 29 January 2008, which was more than two months later, and that her claim was therefore time-barred pursuant to Article 15(4) AGG. The court rejected the plaintiff's argument that Article 15(4) AGG is incompatible with Directive 2000/78, arguing that, even if this were the case (which the court left unanswered), a directive lacks direct horizontal effect.

Judgment

National court

On appeal the appellate court (Landesarbeitsgericht Hamburg) found that the Directive does indeed lack direct horizontal effect. However, this leaves open the possibility that a provision of national law is ineffective if it is incompatible with primary EU law, for example with the principle of effective legal protection or the principle of non-regression. Since 1 December 2009 (Lisbon Treaty), the principle of effective legal protection is enshrined in Article 19 (second paragraph) TEU: 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'. The ECJ has repeatedly interpreted this principle as prohibiting national rules that make it impossible or inordinately difficult for a person whose rights, conferred on him by EU law, have been violated, to bring a claim. An

aspect of this prohibition is that it must not be more difficult to bring such a claim than it is to bring an equivalent claim (equivalency principle). The principle of non-regression holds that Member States must refrain from reducing existing levels of protection.

For this reason the court referred the following question to the ECJ1: 'Does national legislation under which a time-limit of two months from receipt of a rejection of a job application [...] apply (in the absence of provisions in a collective agreement) to the bringing in writing of a claim for damages and or compensation based on discrimination in primary recruitment infringe law of the European Community (safeguarding effective legal protection) and/or the Community law prohibition of age discrimination [.....] if three-year limitation periods apply to equivalent claims under national law, and/or the 'prohibition of regression' (reduction of protection) under Article 8 of Directive 2000/78/EC, if a previous national provision provided for a longer limitation period for discrimination on the grounds of sex?'

ECJ's decision

The ECJ held that it was up to the national court to establish whether the national law constitutes an effective remedy to sufficiently ensure effective legal protection in the fields covered by EU law. Effective legal protection does not necessarily mean that only the most advantageous regulation of the national law must be applied. Since there are no specific regulations in Germany regarding a claim for age discrimination, the national court needs to verify that the applied provision is equal to comparable time-limits in German law. In principle the implementation of a time-limit to lodge a claim is also possible in laws which transpose EU directives, so long as they do not make it impossible or inordinately difficult for a person to make use of the rights resulting from the Directive.

As regards the alleged violation of the prohibition of regression, the ECJ held that no violation occurred, since the older period did not constitute part of the general protection level in relation to discrimination for reasons of sex contained in Article 8 of the Directive.

Commentary

The most interesting aspect of this decision is its clear contrast to that of the German Federal Labour Court (Bundesarbeitsgericht, 'BAG') of 24 September 2009, reported in the August 2010 issue of EELC (2010/45). In that case, which concerned the time-bar rule referred to above, the BAG noted that Article 7(3) of Directive 2000/43 (which is identical to Article 9(3) of Directive 2000/78) allows Member States to adopt 'national rules relating to time limits for

bringing actions as regards the principle of equality of treatment'. Applying the doctrine of effective remedy, the BAG held that the two month time-bar provided in Article 15(4) AGG does not deny employees an effective remedy and that this period is not shorter than similar time-bar periods under German employment law. The BAG found this to be so evident that it saw no need to refer questions to the ECJ. At the time the judgment reported above was delivered (June 2009) the BAG had yet to deliver its judgment. Nonetheless, it is noteworthy that a lower court is asking the ECJ a question that a higher court had found unnecessary to refer to the ECJ.

In accordance with the ECJ's ruling, the BAG is competent to rule on the question of whether or not the German time-limit rule is valid. Therefore, one may wonder whether the decision of the BAG can be upheld, considering the argumentation of the Landesarbeitsgericht Hamburg.

From my perspective the two month time-bar should be considered to be in line with the Directive. Preclusion periods are not in general forbidden by Directive 2000/78. Article 9 III of the Directive, which does allow periods within which claims can be made, but on the other hand requires that it remains possible to refer to European Community law and that this is not excessively complicated to do.

Therefore in the situation at hand the question that needs to be asked is whether the two month time-bar genuinely undermines the guarantee of effective legal protection. For this purpose, section 15 paragraph 4 it is necessary to compare other regulations that restrict preclusion periods in German law.

On the one hand, one needs to look at the rulings of the BAG in 2007, which consider a two month period within which to lodge a claim in an employment contract to be too short to be valid. In the reasoning of the decision the BAG referred to various legal provisions, all of which refer to such periods and finally deduced that the three month period within which a claim must be lodged is adequate for contractual (and only contractual!) entitlements.

Today, in German Law a special provision has been enacted that applies to all claims made under the AGG. For this reason, the comparison in the older decision is no longer current and does not provide useful guidance in relation to the case at hand.

If one compares the two month period to other such periods provided in German employment law, it becomes apparent that many of the grace periods offered in employment law are significantly shorter than standard periods of limitation.

Section 4 of the Employment Protection Act (*Kündigungsschutzgesetz*, "KSchG") and s17 ss1 of

the Part-time and Limitation Act (*Teilzeit- und Befristungsgesetz*, "TzBfG") both provide a three week limitation period after which a notice of termination or the termination of employment due to the expiration of the agreed time limit can no longer be challenged.

Many collective bargaining agreements provide limitations that are shorter than the statute of limitation for making claims resulting from them – and this even goes for the remuneration regulated in the collective bargaining agreement.

Further, the older decision (BAG 2007) refers to a now-defunct national provision regarding claims for damages resulting from sex discrimination (this has now been replaced by the AGG). This rule foresaw a spectrum of limitation periods: if an applicable collective bargaining agreement or the prospective employment agreement set a grace period of two months, this period also applied to entitlements arising from any pre-contractual discrimination (i.e. where the application was turned down in violation of the anti-discrimination principles). If no such period was set, a minimum period of two months for bringing a claim applied. Therefore, it appears that a two month grace period was considered valid in principle at that point in time and a violation of the principle of non-regression can hardly be found.

Admittedly, there are a large number of other legal provisions in German law that refer to a longer period: pre-contractual breaches of duty, for example, regularly prescribe a limitation period of three years. Entitlements from s15 I, II AGG are subject to stricter rules, although the reason of the claim is comparable. If one takes a look at the intention of Section 4 of the Employment Protection Act (*Kündigungsschutzgesetz*, "KSchG") and s17 ss1 of the Part-time and Limitation Act (*Teilzeit- und Befristungsgesetz*, "TzBfG"), their intention seems to be the same as for the two month limitation period in question in this article: employment law often requires that both parties to a contract learn fast about claims that are being made or unilateral decisions, or even contractual clauses that are being considered invalid. The intention in relation to these employment law provisions is obviously the same as in the case at hand, i.e. there are good reasons for the rather short period. The main reason is that an employer needs to collect and keep all applications (not only the successful ones) to ensure he can provide adequate proof if an applicant claims to have been discriminated against. If an applicant can show some evidence that there could have been discrimination, the employer bears the burden of proof that no discrimination occurred, which regularly requires it to explain who the other applicants were. Keeping all application documents for the usual three year period would almost be impossible for larger companies. Therefore, it seems to me that the national provisions described above are a more adequate basis for a comparison.

However, from my point of view all European principles regarding the effectiveness of a

national implementing provision are based on a comparison with comparable provisions in that country. If one compares the two month rule to other regulations, one will see, that, particularly in the employment legislation, even shorter periods are common.

Comments from other jurisdictions

Austria (Martin E. Risak): The Austrian legal situation is quite similar to the German one though some differences exist. According to the provisions of the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*, s1486) employees' claims to remuneration become time-barred after three years from the date they fall due. The same period applies to claims for compensation for damages, which become time-barred three years from the date on which the claimant becomes aware of the damage and the identity of the injuring party.

The Act on Equal Treatment (*Gleichbehandlungsgesetz*) provides for shorter though not uniform preclusion periods: claims for damages resulting from discrimination during the hiring or the promotion process have to be made within six months with the Employment Court. Claims for damages resulting from (sexual) harassment have to be made within one year. The general three-year period of limitation is applicable only to claims based on wage discrimination.

The EJC decision *Bulicke* therefore is of interest for Austria too. At first glance, the provisions on shorter time-limits in the Austrian Equal Treatment Act seem to concur with European law, as they are comparable to other shorter cut-off periods in Austrian Employment Law (for instance, claims subsequent to premature withdrawal or summary dismissal must be made within six months). It also seems to me that the prohibition of non-regression does not apply, as the Equal Treatment Act introduced a new basis for employee claims that did not exist before and therefore were not covered by the general cut-off period.

United Kingdom (Richard Lister): Up until April 2009, discrimination complainants in the UK were required to send a written statement of their grievance to their employer in accordance with a statutory grievance procedure. A complaint to an employment tribunal was inadmissible unless the employee had first complied with this requirement. This legislation, introduced in 2004, was widely regarded as counterproductive and unworkable and was repealed last year.

The position now is that discrimination claims must be presented to an employment tribunal within three months of the act complained of and there is no requirement to notify the employer beforehand. A tribunal has discretion to hear a claim presented outside the three-month period if it considers it 'just and equitable' to do so. It is extremely unlikely that the current time-limit regime in the UK could be legitimately challenged as being incompatible

with EU law.

Footnote

1 OJ 10 October 2009 C 244/2.

Subject: Age discrimination

Parties: Susanne Bulicke - v - Deutsche BŸro Service GmbH

Court: Landesarbeitsgericht Hamburg

Date: 3 June 2009

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