SUMMARY

2010/61: Employer may exclude older employees from voluntary exit arrangement (GE)

<p>The exemption of older employees from a general offer to conclude attractive severance agreements is compatible with the German General Anti-Discrimination Act (Allgemeines Gleichbehandlungsgesetz, “AGG”).</p>

Summary

The exemption of older employees from a general offer to conclude attractive severance agreements is compatible with the German General Anti-Discrimination Act (*Allgemeines Gleichbehandlungsgesetz*, "AGG").

Facts

A company introduced a voluntary redundancy scheme under which employees born in or after 1952 could resign – with the company's consent – on favourable financial terms. As at 1 July 2007, a total of 5,937 employees had made use of the scheme. Of these 5,937 employees 24 were born before 1952. Whether or not the 24 agreements concluded with these older employees were on the same terms as those offered to the younger employees was in dispute.

An employee born in 1949 applied for resignation on the terms of the redundancy scheme. When his request was turned down, he took his employer to court, claiming that the redundancy scheme and the refusal to let him make use of it were discriminatory on the ground of age.

The plaintiff's claim was turned down by the local labour court, by the appellate court and, finally, by the Federal Labour Court (*Bundesarbeitsgericht*, 'BAG').

Judgment

The BAG began by stating that age is a linear attribute, in the sense that every employee has a certain age that is subject to constant change. This is in contrast to the other strands of discrimination, which prohibit distinguishing between people on the basis of attributes that are, as a rule, immutable. Therefore, a distinction based on age can only constitute discrimination if it negatively affects an entire age group. This was not the case in the redundancy scheme at issue, given that Directive 2000/78 and the German non-discrimination law implementing it (the AGG) aim to protect employees *against* termination of their employment, not to give them a right to benefit from an incentive to resign. The BAG referred to the following recital clauses in the Directive: s6 ('[...] the economic integration of elderly [...] people'), s8 ('[...] to pay particular attention to supporting older workers, in order to increase their participation in the labour force') and s25 ('[...] It is therefore essential to distinguish between differences in treatment which are justified, in particular by legitimate employment policy, labour market and vocational training objectives, and discrimination, which must be prohibited'). In summary, the BAG found that the scheme did not constitute discrimination.

Alternatively, the BAG held that the redundancy scheme was objectively justified by a legitimate aim and that excluding older employees from the scheme was a proportionate means to achieve that aim.

Commentary

The BAG based its decision on the need to protect elderly workers, which is a plausible argument against discrimination such as what occurred in this case.

As regards the potential justification according to s10 AGG in case of discrimination, the decision is rather short and not very convincing, since the criteria for a justification are not assessed carefully. Nevertheless, the BAG gives some interesting statements regarding the prohibition of age discrimination:

Firstly, it clarifies that there can be no age discrimination unless a certain age group is treated less favourably than another. This is part of the definition and not only part of a potential justification. In other words, treating an individual differently on the basis of age does not in itself constitute age discrimination. This of course is in line with the underlying directive.

Secondly, the BAG wasted no time in illustrating why there was no age discrimination, although older employees did not even have the choice to apply for an attractive termination package. One could very well have argued that the denial of the mere choice itself is

discriminatory. From my perspective the BAG did not illustrate this question further since there was no obligation for either side to conclude termination agreements. Therefore, the scheme itself merely constituted a formal guideline for the severance payments. Besides, older employees were also offered the conclusion of termination agreements or partial retirement. In the end, it seems the BAG probably had the impression that an acceptable solution had been found for every employee who wanted to leave the company. In this respect the situation was comparable to a 'normal' redundancy scheme, given that social plans may also operate differentiation amongst employees with regard to their age as long as there is sufficient reason for it. For example it is not considered discriminatory if older employees are offered lower redundancy payments if they will be retiring in the foreseeable future.

The total redundancy package in the situation at hand – redundancy payments for termination of younger employees, lower redundancy payments for termination of older employees and partial retirement – seems, when taken as a whole, not to be discriminatory, even if it meant that the older employees could not resign under the same conditions as the younger employees.

Comments from other jurisdictions

Austria (Martin E. Risak): The commentary raises the question of the possible justification for differentiation in social plans based on age. It assumes that offering older employees lower redundancy payments than their younger counterparts because they will be retiring in the near future would not be considered discriminatory. I am not too sure that this is the case, as it seems to differ from the reasoning in the ECJ's decision in the *Hlozek* case (C-19/02). The court stated that EU law on the equal treatment of men and women did not preclude the application of a social plan providing for a difference in the treatment of male and female workers in terms of the age at which they are entitled to a bridging allowance, since, under the national statutory scheme governing early retirement pensions, they are in different situation with regard to the factors relevant to the grant of that allowance. More important for the question at hand is that the ECJ also accepted the fact that workers approaching statutory retirement age constitute a category different from that of other workers as regards the likelihood of their (not) finding other employment. The ECJ also argued that that assessment explained why the social plan provided for a difference in treatment, for the purposes of the grant of the bridging allowance, based directly on the age of the workers at the time of their dismissal. Considering this decision, I am not too sure whether lower redundancy payments for older employees who have not yet reached the statutory retirement age would not be considered to be age-discrimination.

France (Claire Toumieux and Aude Pellegrin): It is undisputed in France that older employees may not be excluded from a voluntary redundancy scheme solely on account of their age. Indeed, a social plan may reserve the benefit of some measures to certain categories only if all the employees of the company are placed in an identical situation concerning the said benefit (French Supreme Court, 12 July 2010, n¡09-15.182). In that case, the French Supreme Court held that the social plan could not exclude employees from the benefit of a voluntary scheme solely because they belonged to another establishment of the French company, as such a measure violated the equality of treatment principle. The company may only reserve the benefit of voluntary exit arrangements to certain categories of employees if the difference of treatment rests upon objective and relevant criteria, the relevance of which are evaluated on a case by case basis for the benefit at stake. At a time where the protection of senior employment is in hot debate, an age criterion may not be viewed as a valid one by which to exclude older employees from a voluntary redundancy scheme.

Spain (Ana Campos): In Spain also, discrimination based on age is forbidden. In consequence, it is not possible to establish a compulsory retirement age in collective bargaining agreements unless other requirements, such as employment policies, including a commitment to replace retired employees, are met.

This case is noteworthy because, as the BAG states, all legislation and policies prohibiting discrimination based on age aim to protect older employees from being excluded from the job market, and in this case, the employee finds his age does not permit him to terminate employment under privileged conditions. Nevertheless, considering that the employee could have terminated the employment under different conditions, including partial retirement, it is probable a Spanish court would rule in the same way as the German court, because the redundancy scheme taken as a whole, was not discriminatory.

United Kingdom (Richard Lister): There have been several cases in which employers' contractual redundancy pay schemes have been challenged under the UK's age discrimination legislation (now contained in the Equality Act 2010). There is a specific exemption for severance schemes that are similar to the UK statutory redundancy payment scheme. However, many employers' schemes fall outside this exemption and are unlawful unless they can be objectively justified as a proportionate means of achieving a legitimate aim.

The courts have identified various potential legitimate aims in this context, including: encouraging and rewarding loyalty; cushioning older workers against labour-market

disadvantage; maintaining good employee relations and a contented workforce; and encouraging voluntary redundancies and career progression for more junior staff. Importantly, another legitimate aim can be to prevent employees receiving a 'windfall'. On this basis, employers have successfully justified provisions in contractual schemes under which redundancy payments were either capped or 'tapered' downwards for older employees approaching retirement age (*Loxley v BAE Systems Land Systems (Munitions & Ordnance) Ltd* [2008] IRLR 853; *Kraft Foods UK Ltd v Hastie*, EAT0024/10, unreported).

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Parties: unknown

Counsel: unknown

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