EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2013/4 Not inviting to a job interview someone who applies to a discriminatory advertisement is unlawful, even if in the end nobody was hired (GE)

<p>An applicant who is not given the opportunity to attend a job interview may be entitled to immaterial damages under the Equal Treatment Act (<i>Allgemeines Gleichbehandlungsgesetz</i>, ‘AGG’), even if the employer does not hire anyone for the advertised position. The applicant is not entitled to immaterial damages if the employer can provide evidence that the applicant was either objectively unqualified for the position or abused the law.</p>

Summary

An applicant who is not given the opportunity to attend a job interview may be entitled to immaterial damages under the Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, 'AGG'), even if the employer does not hire anyone for the advertised position. The applicant is not entitled to immaterial damages if the employer can provide evidence that the applicant was either objectively unqualified for the position or abused the law.

Facts

The case arose from a dispute between a (potential) employer and an applicant concerning the employer's decision not to invite the applicant to a job interview.

In 2009, the employer advertised a job internally and used the following wording:

"X Company has been developing, customised database solutions based on the MS SQL Server (2000/2000) mainly for industrial process applications since 1995 [...].

We are looking for two independent contractors aged 25 to 35 to support our pending projects. [...] Net Developer, SQL Developer.[...]"

The plaintiff, aged 53 at the time, applied for the advertised position of SQL developer. He had only seven months' work experience on the required MS SQL Server software and he asked for € 8,800 as his monthly salary. The respondent did not invite him to a job interview. They invited only one applicant. At the end of the application process the company did not hire anyone at all.

On 27 October 2009, the plaintiff filed a claim with the Local Labour Court, seeking immaterial damages under the Equal Treatment Act in the amount of 3 x € 8,800 = € 26,400. The court ruled in the respondent's favour.

TheplaintiffappealedtotheRegionalLabourCourt(*Landesarbeitsgericht*, the 'LAG' of Berlin-Brandenburg), where his appeal was rejected. In its reasoning the LAG explained that a discrimination claim can only be made where the vacancy was actually filled during the application procedure. Since this was not the case here, there was no need to decide whether or not the applicant was objectively qualified for the job, or whether the application had perhaps been made for the purpose of establishing a claim for discrimination. In neither of these cases would damages be granted by German courts.

Eventually the applicant filed a petition with the Federal Labour Court (Bundesarbeitsgericht, the 'BAG').

Judgment

The BAG set aside the LAG's judgment and referred the case back to that court. The BAG held that not inviting an applicant to a job interview for discriminatory reasons constitutes a breach of the AGG.

The judges stated that the respondent's failure to invite the plaintiff for an interview indicated discrimination, given that the plaintiff did not fit within the age bracket the respondent asked for in the job offer. Therefore, there were significant indications of unequal treatment of applicants based on a criterion prohibited in the AGG. Therefore, Section 15.2 of the AGG could, in principle, be applied, and on that basis, immaterial damages could be awarded where an applicant was not employed for discriminatory reasons.

In opposition to the appellate court's view, the BAG reasoned that a breach of Section 15.2 AGG does not require that the respondent actually employed someone at the end of the application process. Instead, it is sufficient that the applicant has been denied the opportunity to get a job. Section 15.2 merely requires that someone is disadvantaged in comparison with someone else. Such disadvantage or discrimination, has already occurred if an applicant has been turned down before the selection process (i.e. job interviews) started.

In addition, the BAG stated that if this were not the case, employers would be able to decide for themselves whether they violated the AGG. In other words, the employer could, after realising that it was discriminating against an applicant, simply terminate the application process without hiring anyone - and get away with it scot-free.

Since the appellate court had mistakenly not applied Section 15.2 AGG, the BAG referred the case back to the LAG.

Finally, the BAG said that the breach of the AGG in question does not necessarily trigger a right to damages. Therefore the appellate court would need to look deeper into the respondent's allegations. On the one hand, the employer could provide evidence that the applicant was objectively unqualified for the job, but it might also be able to prove an abuse of law by the plaintiff, since he did not have much experience in the field of MS SGL Server and had asked for a utopian amount of monthly salary.

Commentary

This judgment is a consistent continuation of previous BAG case law. Under the AGG, an applicant is not merely entitled to a non- discriminatory decision when it comes to the employment itself, but to a non-discriminatory application process as a whole. The outcome of such a process is not relevant to entitlement to damages for discrimination.

Therefore employers need to be aware that merely depriving an applicant of an opportunity can lead to a claim.

Academic comments (Prof. Gregor Thüsing)

The judgment of the BAG deserves approval. A non-discrimination claim by an applicant can be successful, even if the employer does not hire someone else. If an applicant is rejected on discriminatory grounds based on a prohibited criterion, he or she is generally entitled to claim damages. The usual outcome of the application procedure itself is not relevant in this regard. The BAG rightly argued that if this were not the case, an employer would be able to determine by itself whether it violated the AGG and simply stop the application procedure. The employer

could escape the consequences, notwithstanding it had in fact acted in a discriminatory way.

Generally, the burden of proofing the existence of discrimination based on a prohibited criterion lies with the applicant. A discriminatory employment advertisement can be sufficient evidence that unlawful discrimination has occurred. In the case at hand, the wording of the employment advertisement specified the age band of those applicants that might be looked on favourably. The rejected applicant did not fit into this age band and therefore age discrimination appears possible. In this situation, it is up to the employer to disprove the assertion.

An applicant rejected on discriminatory grounds is generally entitled to claim damages under the AGG. According to §15 (2) AGG, the claimant can apply for immaterial damages of up to three times the monthly salary to which he would have been entitled had he been hired. However, not every breach of the AGG necessarily triggers a right to damages. As the Federal Labour Court rightly found, the employer can successfully escape a damages claim if it proves that the applicant was either objectively unqualified for the job or had abused process by claiming damages. The BAG suggests that it was possible that the applicant lacked the necessary qualifications for the job. The BAG also considered the question of abuse of process, since the applicant had claimed a very high monthly salary (€ 8,800). The BAG referred the case back to the LAG to decide on these questions.

Both questions depend greatly on the facts. Employers can generally expect applicants to have a degree of experience and they may be justified in making an objective job requirement. In this case, the advertisement did not specify any requirement with regard to experience, despite such specifications being commonplace. In fact, the applicant had at least seven months' experience and therefore it seems doubtful that he lacked the objective qualifications for the job. In addition, at least at first sight, the assumption of an abuse of law appears to be ungrounded. As the applicant had worked as a net developer for seven months, the fact that he asked for a very high salary is, in my view, not sufficient in itself for an assumption of an abuse of law.

Subject: Age discrimination

Parties: Not known

Court: Bundesarbeitsgericht (Federal Labour Court)

Date: 23 August 2012

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