SUMMARY

2013/39 Advertising vacancies for ‘young professionals’: presumptive age discrimination (GE)

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Facts

The defendant in this case was an employer in the public sector (a hospital) that had placed an advertisement in newspapers inviting applications for its trainee programme to "*college graduates/young professionals*" (*Hochschulabsolventen/Young Professionells*). The advertisement mentioned that, as it was directed at "job starters" (*Berufsanfänger*), work experience was not required, adding that applicants would be selected on the basis of suitability, qualifications and professional performance. The plaintiff was one out of 310

applicants. He was 36 years old and had several years of experience in the legal department of an insurance company and as a solicitor.

The plaintiff was not one of the 29 applicants who were invited to an assessment centre. In the end, the defendant hired two applicants, a man and a woman. The plaintiff sued the defendant, seeking compensation for emotional damage resulting from age discrimination. Both the *Arbeitsgericht* and, on appeal, the *Landesarbeitsgericht* dismissed the claim, finding that there had been no age discrimination. The plaintiff appealed to the *Bundesarbeitsgericht (BAG)*.

Judgment

The BAG analysed the expression "*college graduates/young professionals*" in the defendant's job advertisement, focusing on the words 'young' and 'professional' separately, without considering their context. In combination with the reference to "college graduates" and "job starters", it was obvious that the defendant's search was not simply aimed at anyone who had recently graduated from college or was looking for an entry-level position, as someone who had spent an unusually long time in college would also satisfy those criteria. It was clear that the defendant in this case was not seeking applications from any person who satisfied these criteria but exclusively from candidates who were not older than about 30, at most 35. Thus, the job advertisement contained an age-discriminatoryelement and gave rise to the presumption that the plaintiff's application had been denied for a discriminatory reason. Hence, in the BAG's view, the defendant should bear the burden of proof that the plaintiff's application had been rejected for non-discriminatoryreasons.

The German Constitution requires public employers to adhere to the 'best candidates' principle. In the event the defendant had complied with this principle by selecting the two best candidates, it would be able to rebut said presumption. As the BAG did not have at its disposal all the facts needed to determine whether this was the case, it referred the case back to the *Landesarbeitsgericht*.

Although not necessary for the adjudication of this case, the BAG addressed another issue, namely whether an age discriminatory hiring procedure may be objectively justified by the fact that the hiring is for a management trainee programme. The BAG held that in the case at hand, the employer had offered insufficient evidence to justify that its aim was legitimate. An applicant aged 36, such as the plaintiff in this case, would still be able to work for the hiring company for 31 years, assuming a retirement age of 67, in which event the employer would recoup the benefit of the applicant's work for a sufficiently long period after completion of the trainee programme for it to have been worth the employer's while. Neither did the objective of

raising the employer's 'next generation' (*Nachwuchs*) constitute a legitimate aim, as there is no general rule that older employees learn less or more slowly than young employees, or that older employees would not fit into an existing organisation. Therefore, in the absence of a detailed statement by the employer as to what motivated it to select on the basis of age, the BAG found that no justification had been provided. Therefore, it limited itself to clarifying that, in principle, a trainee programme could possibly justify discrimination, without detailing the kind of arguments that could constitute a legitimate aim.

Commentary

The decision raises two interesting issues. Firstly, the BAG found that the best candidate principle can rebut the presumption of discrimination. If the employer can prove the existence of this principle, a refused applicant would not be entitled to compensation. Even though the case at hand was focused on a public employer, the outcome is important for private employers as well, since the BAG considered the best candidates principle to be valid under section 22 of the German Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, the 'AGG'), which also applies to private sector employers. Section 22 states that:

"Where, in the case of conflict, one of the parties is able to establish facts from which it may be presumed that there has been discrimination on one of the grounds referred to in Section 1 [e.g. age], it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination."

Having said that, as private employers are not bound by the Constitution to adhere to the best candidate principle, they should include in job offers a statement to the effect that only the best candidates will be invited for an interview and make sure to be able to provide evidence that the principle has been applied. So far, no judgement has been rendered on the issue of whether a private employer can rebut the presumption of discrimination by arguing that it has applied the principle. However, if an employer can show that the best candidate had been hired after all, this will limit any immaterial damages to three months' salary by section 15.2 of the AGG.

Secondly, the BAG answered the question of whether a trainee programme might justify age discrimination. In our view the BAG's decision on this issue is problematic, because we think an employer should be allowed to make a decision to hire only job starters with no professional experience when it comes to a trainee programme. A decision to do that – as the employer mentioned in the case at hand - pursues the employer's goal of moulding its own future leading or key employees. This could include an employer wanting to hire people with no professional experience, so as to avoid any prior unwanted professional bias. This might

not be in the best interests of the organisation, but should be respected as a decision of the organisation.

Further, from our understanding it is common knowledge that almost every (larger) corporation offers management trainee programmes to train up the next generation of leading employees. The words 'trainee programme' are self-explanatory and are, we think, naturally addressed to younger candidates.

Comments from other jurisdictions

Austria (Daniela Krömer): No issues relating to young professional programmes have yet come before the courts. However, in 2008 the Austrian Supreme Court (*Oberster Gerichtshof*) was faced with a somewhat comparable case (OGH 9.7.2008, 9 ObA 177/07f). An employer advertised for a logistics manager and the requirements for the post were a completed vocational training and two to three years of professional experience. The requirement of "*two to three years of professional experience*" does not target young employees as explicitly as a "young professionals" programme, but it might tend to imply that the company is looking for a young employee.

The claimant was a lady in her fifties with extensive professional experience. In her job interview she was asked, amongst other things, whether she could cope with a younger superior, which she confirmed she could. Eventually, she received a letter in which she was told that she did not meet the requirements listed in the advertisement. The position was given to a young male and she claimed damages based on age and sex discrimination.

All the courts, including the Supreme Court, denied her claims, as she could not establish facts from which it could be presumed that there had been direct or indirect discrimination. The Supreme Court stated that the claimant had not argued that the employer had applied discriminatory requirements for appointing the logistics manager, but that she argued she was discriminated against on the basis of the choice made by the person conducting the job interview. In such a situation, neither the wording of the job advertisement – "*two to three years of professional experience*", nor the question regarding working under a younger superior was enough to establish a presumption of age discrimination. As no presumption was established, there was no need for the court to go on to consider justification.

Denmark (Mariann Norrbom): This case is interesting from a Danish point of view because the Danish Anti-Discrimination Act explicitly prohibits discriminatory job advertisements. Any breach of this rule may result in the employer being fined, and rejected candidates may be awarded compensation of approximately € 3,350.

If a job advertisement indirectly targets candidates of a specific age, this will in itself create a presumption of discrimination and, thus, the burden of proving that there was no discrimination rests with the employer.

As in Germany, the principle of "the best candidate" applies in Denmark. In Denmark, it is mandatory for public employers to observe this principle when hiring new employees, and private employers may choose to adhere to it as well.

This means that if an employer is able to prove that a candidate was hired because he or she was in fact the best candidate, then the presumption of discrimination may be rebutted.

However, the case law from the Danish Board of Equal Treatment on this issue is inconsistent, and the requirements that employers have to meet are yet to be determined by the Danish High Court or Supreme Court.

As mentioned above, the compensation awarded to a candidate who was rejected for discriminatory reasons is normally fixed at approximately € 3,350. No harm or loss needs to be proved in order for the candidate to be awarded the compensation.

As regards the second part of the BAG's judgment, the Danish Anti- Discrimination Act is different from the Anti-Discrimination Directive (Directive 2000/78), in that there generally are no exceptions to the prohibition against direct discrimination on grounds of age. This means that an employer cannot lawfully reject a candidate specifically because of age. There are, however, a few exceptions to this rule. An employer may, for example, be granted an exemption from the prohibition of age discrimination from the relevant government department.

The Netherlands (Peter Vas Nunes): Article 6(1)(c) of Directive 2000/78 provides that differences of treatment on the grounds of age may include the fixing of a maximum age for recruitment which is based on:

(i)"the training requirements of the post in question"; or

(ii)"the need for a reasonable period of employment before retirement"

Argument (ii) is clear. In the case reported above it could, for example, exist where hiring a 36 year old for a four-year trainee programme would cost the employer four years during which the trainee performs little useful work but costs a large amount of salary and that the period between ages 40 and 67 (retirement) would be too short to recoup their investment. Clearly, this is not a good example, seeing that 27 years to make good an investment of 4 years would seem long enough, but better examples can be given.

I find it hard to think of an example of argument (i). The defendant in this case seems to have argued that the training requirements of the "post in question", i.e. the post of management trainee, required the trainee to have had no previous work experience, perhaps because that would make it harder to train him in a certain manner.

The BAG has referred the case back to the appellate court in order for the defendant to be given the opportunity to rebut the presumption of age discrimination. It will be interesting to see how the defendant goes about this. Must it demonstrate that the two successful candidates were the best out of 310? That would seem impossible, if only because the defendant< will, I assume, have destroyed the records of the 308 unsuccessful applicants. Or will it be sufficient for the defendant to demonstrate that the two successful candidates were (or appeared objectively to be) better qualified for the trainee position than the plaintiff? Or - even simpler - will it be sufficient for the defendant to demonstrate that the selection criteria it used were age-neutral?

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Parties: Not identified

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