SUMMARY

2012/46 Incorrect information by employer may indicate discrimination (GE)

<p>The employer decided not to extend a Turkish employee’s fixed-term (temporary) contract. When the employee ask it to disclose the reason for the non-renewal, the employer offered a variety of explanations, including low quality of work, a company merger, a drop in volume of work and lack of vacancies. The employee sued successfully for damages, claiming that the real reason for the non-renewal of her contract was her ethnic origin. The court explored the difference between nationality and ethnic origin.</p>

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Facts

The plaintiff was a 32-year old employee of a governmental organisation charged with administering the German mandatory accident insurance scheme. The organisation operates through eleven regional Accident Insurance Boards (Bezirksverwaltungen). The plaintiff was

hired by one of the regional boards (the "Employer"), initially for an 11 month fixed term. This initial contract was extended for a second term, from January 2009 to January 2010. The plaintiff was a Turkish national.

In March 2009, i.e. just after the start of the plaintiff's second fixed term, the Employer hired two German nationals, Ms B and Ms F, in similar positions as the plaintiff. They were also given fixed term contracts.

In September 2009, the plaintiff was informed that her contract would not be renewed and that she would therefore lose her job on 31 January 2010. The reasons she was given were that the Employer was merging with another regional board and that the workload was declining. Then in the same month, all employees with permanent contracts who were employed to do the same job as the plaintiff were informed that they could apply for a certain vacancy. As the plaintiff was not on a permanent contract she was not invited to apply. Ms B and Ms F were invited. It appeared that their contracts had been converted from fixed term to permanent in order to make them eligible to apply for the vacancy.

In November 2009, the plaintiff sought legal advice. Her lawyer wrote to the Employer pointing out that the plaintiff was the only non-German who had been hired by the Employer during her entire period of employment. Given that the ten other regional boards each had employees of many nationalities, this was a statistically relevant indication that the plaintiff's religion or nationality had played a role in the decision not to renew her contract. The Employer replied that it was not under an obligation to give a reason for its decision, but that the decision had nothing to do with the plaintiff's ethnicity.

On 31 January 2010, the last day of her employment, the plaintiff was given a testimonial which stated that she had performed her work "independently, reliably, within the required timeframes and to our full satisfaction".

The plaintiff did not find another job until 16 May 2010, which meant that she was unemployed for a period of 3½ months. A few days later, she brought legal proceedings. She claimed (i) the balance of her last salary and her unemployment benefits for 3½ months plus (ii) compensation for discrimination in the amount of € 5,000.

In its defence, the Employer alleged that the reason for the non- extension of the plaintiff's contract was underperformance.

The court of first instance dismissed the plaintiff's claim, but on appeal the appellate court (LAG) ruled partially in her favour, awarding her compensation in the amount of € 2,500. The plaintiff appealed to the Bundesarbeitsgericht (BAG).

Judgment

The BAG held that the plaintiff's appeal was well-founded and referred the case back to the Regional Labour Court for further clarification of the facts. It ruled that the incorrect information regarding the reason for the non-extension of the plaintiff's contract given by the Employer may constitute prima facie evidence of discrimination within the meaning of section 22 of the General Act on Equal Treatment (the 'AGG'), the German transposition of Directives 2000/43 (race) and 2000/78 (other strands).[1] It determined that the plaintiff had been treated differently from other employees in the same situation.[2]

According to the definition in Section 3 AGG, direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on any of the grounds referred to under Section 1 AGG, which provides that the purpose of the AGG is to prevent or to stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation. Note that nationality is not listed as a prohibited ground for less favourable treatment.

The employee had been treated differently because her contract was not renewed, whereas the contracts of two of her colleagues had been converted into permanent contracts in order to offer them the opportunity to apply for the advertised position. The issue was whether this difference in treatment was based on the plaintiff's ethnic origin.

The court found that this unequal treatment was based on the ethnic origin of the employee although, in its opinion, the fact that the plaintiff was the only foreign national in the district administration did not necessarily indicate that the non-renewal of the contract was discriminatory.

The fact that the plaintiff was a Turkish national was not enough in itself to show that the plaintiff had been subject to discrimination based on her ethnic origin. The plaintiff made the argument that other district administrations had several foreign employees, whereas she was the only one in this particular district administration. The BAG clarified that there is nothing to stop statistics being used to show that discrimination has occurred. However, in doing so, the plaintiff needed to demonstrate that the number of employees of her ethnic origin within the employing organisation was disproportionate to the number of employees within the same region and branch of industry. In the case at hand, the plaintiff had failed to demonstrate this.

The plaintiff had further argued that the Employer did not satisfy her right to information concerning the non-renewal of the contract, and that this was also evidence that discrimination had occurred. The supposed low quality of her work had not been proved by the Employer and seemed to contrast sharply with the testimonial she received on her last day.

The BAG held that if the Employer had simply not renewed her contract without comment, there would have been no evidence of discrimination, but the incorrect information given by the Employer in its reasoning might indicate discrimination. Therefore, the Court made a presumption that the employee had been subject to discrimination on grounds of ethnic origin. The discrimination was not based on her nationality, but on ethnic origin. According to Directive 2000/43/EC a person's nationality is not indicative of 'ethnic origin', Article 3(2) providing that the Directive "does not cover difference of treatment based on nationality".

Nonetheless, the BAG explained that discrimination that appeared to be related to her Turkish origin (nationality) could be considered as discrimination on the grounds of ethnic origin, given that the source of the discrimination was not affiliation to a nation but rather to a cultural community. The court held that a foreign people or people with a foreign culture are included in the meaning of 'ethnic origin', even if the members of the relevant group do not have uniform characteristics.

From the BAG´s point of view the employee had advanced sufficient indication of discrimination for it to be presumed in this case. By Section 22 of the AGG, the burden of proof lay with the Employer. As the Employer had claimed that the real reason for the non-extension of her contract was a fall in the volume of work and the merger with another company, the LAG will be required to examine whether any of these reasons can be proved by the Employer.

Commentary

This decision is not surprising given the recent ECJ- judgments Meister and Kelly. The ECJ ruled that in general a rejected applicant has no right to inspect the applications of others, but that refusal to disclose any information about the process could indicate discrimination on the grounds of ethnic origin. The ECJ held that a court can take into account all the circumstances in order to decide whether there is sufficient evidence for a finding that discrimination can be presumed (ECJ 19 April 2012, case C-415/10, Galina Meister). As part of this, it may take into account that the employer did not disclose any information.

In addition, the BAG now also held that the content of the information must be closely scrutinised, because incorrect facts might also lead to a presumption of discrimination. German employers are therefore well advised to treat complaints regarding discrimination ever more carefully.

Footnotes

1 AGG Section 22 Burden of Proof

Where, in 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, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination.

2 AGG Section 7 Prohibition of Discrimination

(1)Employees shall not be permitted to suffer discrimination on any of the grounds referred to under Section 1; this shall also apply where the person committing the act of discrimination only assumes the existence of any of the grounds referred to under Section 1.

(2)Any provisions of an agreement which violate the prohibition of discrimination under Subsection (1) shall be ineffective.

(3)Any discrimination within the meaning of Subsection (1) by an employer or employee shall be deemed a violation of their contractual obligations.

Subject: Race/nationality discrimination, general discrimination

Parties: Unknown

Court: Federal Labour Court (BAG)

Date: 21 June 2012

Case number: 8 AZR 364/11

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