

SUMMARY

2017/3 Meeting the qualification requirements for a job is not a prerequisite for an applicant to be entitled to damages on grounds of discrimination (GE)

<p>A claim for compensation for discrimination was not excluded simply because the applicant did not have the ‘objective qualifications’ necessary for the job. According to the German General Equal Treatment Act (the ‘Allgemeines Gleichbehandlungsgesetz’, or ‘AGG’), what is necessary for a compensation claim is a ‘comparable situation’. According to the latest decision of the German Federal Labour Court (the ‘Bundesarbeitsgericht’, or ‘BAG’) this can occur even if the applicant does not fulfill the general requirements to do the job.</p>

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Facts

The plaintiff was born in 1953 and passed his first and second German State Exams in 1979

and 1983 with a satisfactory result (seven points). Later, he obtained a doctorate and practiced law for several years. He specialised in employment law and medical malpractice. The defendant was a law firm specialising in public commercial law. All the lawyers working for the defendant had exceptional legal qualifications and had passed both German State Exams with a score of at least nine points.

In November 2012, the defendant advertised a job vacancy in a legal journal for a lawyer with work experience of 0 to 2 years in public commercial law “to complete its young and dynamic team”. The advertisement, among other things, stated that the applicant should be a team player with first-class legal qualifications. The plaintiff applied for the position. By a letter of 19 November 2012, the defendant informed the plaintiff that his application was not being considered.

In the end, no applicant was employed for the position, since the project that had been envisaged was not started.

The plaintiff was of the view that his rejection constituted discrimination on grounds of age and therefore breached the AGG. According to section 7, in conjunction with section 1 AGG, applicants must be treated equally irrespective of race, ethnic origin, gender, religion, world view, disability, age or sexual identity. As the advertisement was specifically worded to address only young lawyers (e.g. professional work experience of 0 to 2 years), the plaintiff filed a claim for compensation for discrimination on grounds of age.

Both the Labour Court (‘Arbeitsgericht’) and the Regional Labour Court (‘Landesarbeitsgericht’, or ‘LAG’) rejected the claim. The LAG based its decision mainly on the fact that for a claim for compensation for discrimination to be successful requires different treatment of potential job applicants where the applicants are in a comparable situation. A comparable situation would only exist if the applicant had the “objective qualifications” for the job. However, the plaintiff’s exam results did not match up to that requirement.

Judgment

The BAG overturned the ruling of the LAG. According to the BAG, the LAG should not have dismissed the claim for the reason that the claimant did not have the “objective qualifications”.

Contrary to its previous decisions, the BAG found that objective qualifications should not be regarded as a prerequisite for entitlement to compensation for discrimination. What was required was that the applicant needed to be genuinely interested in the job. Normally, this would not be the case if the applicant was not qualified for the job or it could be seen from the

circumstances that the applicant probably would not get the job. This was especially likely if the applicant did not fulfill the requirements with regard to education and training. But in this decision, the BAG determined comparability between applicants can apply even if the applicant does not meet the requirements for the job, as EU law – on which the AGG is based – would not restrict the scope of possible discrimination claims in that way.

In its reasoning, the BAG clarified that the ‘objective qualification’ of an applicant is not specified in law as a prerequisite for entitlement for compensation. Indeed, if the German courts found objective qualifications to be a prerequisite, this would be in conflict with EU law (Directive 2000/78), because it would limit the scope of rights under that Directive.

The BAG made clear that the advertisement used by the defendant – for a lawyer with 0 to 2 years of professional work experience to complete a young and dynamic team – could be considered as discrimination on grounds of age. Hence, the case is now back with the LAG to determine whether age discrimination is made out.

If so, the LAG will have to examine if the application was in line with the obligation to act in good faith. If the plaintiff only applied for the job so as to be able to claim compensation, then the claim could be denied. The ECJ also acknowledged this restriction as a common principle in *CASTA* and others (C-50/14) and *ASL TO4* and others.

In fact, the applicant had separately filed a number of actions claiming to have been discriminated against – but this in itself is not enough to prove breach of the obligation to act in good faith. The court would need to look at the surrounding circumstances before it dismissed the claim on that basis. The burden of proof on this point rests with the employer.

Commentary

This decision is a landmark that will have a significant impact on German law, as the BAG has deviated considerably from its previous stance on the conditions for a discrimination claim. This will likely result in an increase in claims for damages on grounds of discrimination under the AGG. If conditions are met, claims will only be restricted by the principle of good faith and the prohibition against the abusive exercise of rights.

However, it will be harder for employers to defend themselves against claims – and they will be well advised to scrutinise their advertisements even more closely to exclude any hint of discrimination.

Comments from other jurisdictions

United Kingdom (Bethan Carney, Lewis Silkin): This is a really interesting case. Under UK law

also, an individual claiming that a recruitment process was discriminatory must have a genuine interest in the job (Keane – v – Investigo and ors EAT 0389/09). If he was just applying in order to try and bring a discrimination claim, he would not succeed and would probably be penalized in costs too. A requirement that a job applicant have no more than 2 years' experience would also be viewed by UK courts as potential indirect age discrimination, as it would be likely to disproportionately exclude older candidates. As 'indirect' discrimination, the requirement might be able to be justified as a proportionate means of achieving a legitimate aim but it is not clear what the aim would be on these facts and whether it would be proportionate. Wanting to recruit a young person because the rest of the team is young would not be a legitimate aim. An employer might have concerns that an overqualified candidate would not be sufficiently motivated or would find it hard to take instructions from someone with less experience but these sorts of concerns are unlikely to be sufficient for a complete bar on experienced candidates, rather than attempting to address issues if they arise. In the UK, however, the fact that the candidate did not have the necessary qualification might be a stumbling block to a successful claim. There might be an argument that the candidate could not succeed in an indirect discrimination claim because he would have to show that the requirement to have 0 to 2 years' experience had 'put him at a disadvantage'. The employer could argue that it did not put this individual at a disadvantage because he could not have got the job anyway, due to his qualifications. If he did succeed in showing discrimination, damages would be limited to compensation for injury for feelings because he would have no loss of earnings to claim if it was established that he would not have been offered the job even without discrimination. It is interesting to see the direction in which the German jurisprudence is going and it is certainly possible that a UK court might make a similar decision in the future.

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Parties: unknown

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