

Case Reports

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Breach of procedure leads to legal presumption of discrimination against a severely disabled applicant (GE)

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Summary

The German Federal Labour Court has held that where a job-filling procedure disregards mandatory procedural and/or promotional obligations in favour of severely disabled persons, this results in the presumption that an unsuccessful severely disabled applicant had not been considered in the procedure and hence had been disadvantaged on account of their severe disability. In the case at hand the severely disabled job applicant was entitled to compensation for non-pecuniary damage.

Legal background

Legislation relevant to this case is closely associated with/directly implements Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. In particular, the provisions set out below apply to this case.

Section 165 of the Social Code IX (*Sozialgesetzbuch IX*, ‘SGB IX’), which deals with the rehabilitation and participation of people with disabilities provides that:

Early after an unsuccessful examination as to whether internal recruitment is possible, the public employers’ services shall notify the [local] employment agencies of vacancies as well as new jobs to be filled. [...] If severely disabled persons have applied for such a job [...], they shall be invited to an interview. An

invitation is not necessary where professional suitability is obviously lacking.

The local employment agencies are primarily responsible for employment promotion tasks including providing services for the participation of severely disabled persons. “Early” means that the vacancy or job is to be reported to the local employment agency once it can be safely assumed that it is indeed to be filled.

Section 15 of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, ‘AGG’) provides that:

1. In the event of a breach of the prohibition of discrimination, the employer shall be obliged to compensate the damage caused thereby. This shall not apply if the employer is not responsible for the breach of duty.
2. The employee may demand appropriate monetary compensation for damage that is not pecuniary damage. In the event of non-employment, the compensation shall not exceed three months’ salary if the employee would not have been employed even if he or she had been selected without discrimination.

Section 22 AGG provides that:

If, in a dispute, one party proves circumstantial evidence suggesting a disadvantage on a ground [of race or ethnic origin, gender, religion or belief, disability, age or sexual identity], the other party shall bear the burden of proving that there has been no breach of the provisions protecting against disadvantage.

Generally, the AGG’s aim is to prevent or eliminate disadvantage based on racial or ethnic origin, gender, religion or belief, disability, age or sexual identity. Disadvantage within the meaning of the AGG occurs if a person receives less favourable treatment than another person in a comparable situation receives, has received or would receive.

Under Section 22 AGG, the party alleging discrimination need only prove circumstantial evidence suggesting a disadvantage on the grounds of racial or ethnic origin, gender, religion or belief, disability, age or sexual identity. The other party bears the full burden of proving that a violation of the relevant protective provisions did not occur. Essentially, this rule means that if there are reliable indications of a violation of the AGG or other relevant protective provisions there is a presumption of the alleged discrimination to the detriment of the alleged discriminator.

In the event of unlawful discrimination in a recruitment setting, Section 15 AGG obliges the discriminating

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employer to (1) pay damages and/or (2) compensation for non-pecuniary damage to the applicant concerned. For the assertion of both (1) and (2), the applicant benefits from the above-mentioned evidence facilitation rule under Section 22 AGG, i.e. only circumstantial evidence needs to be provided for the occurrence of discrimination-related disadvantage. The employer, on the other hand, shall prove that no violation of the relevant protective provisions occurred.

Apart from that, the two claims under Section 15(1) and (2) AGG are different in their prerequisites and legal consequences as follows:

- Section 15(1): The damage claim requires an employer's culpable conduct, and, by way of a reversal of the burden of proof, puts the employer under an obligation to prove that it is not at fault. The applicant, however, shall prove causality leading to the occurrence of damage and the damage itself. In a recruitment setting, this includes the challenge for the applicant to prove that s/he would have been successful in obtaining the position as the most suitable applicant in a case where the selection had been carried out in a non-discriminatory manner.
- Section 15(2): The compensation claim for non-pecuniary damage does not require an employer's culpable conduct. It is generally uncapped and shall restore the condition that would have existed if the unlawful discrimination had not occurred, however, this generally excludes a claim to employment. The determination of the amount of compensation is at the discretion of the court. Only if the applicant would not have been employed anyway, irrespective of the employer's discriminatory conduct, the legislator has expressly limited the claim for compensation for non-material damage to three months' salary. Otherwise, the compensation shall be suitable to ensure actual and effective legal protection and shall have a deterrent effect vis-à-vis the employer.

Facts

In search of its new Head of Legal and Municipal Office the defendant district published a job vacancy via the publicly accessible job exchange run by the Federal Employment Agency. According to the job description, the candidate should hold a master's degree or equivalent in the field of law or be a second state law examination graduate, was to manage approximately 20 employees and, among other criteria, should have several years of relevant professional and management experience, preferably in the municipal sector. The defendant failed to notify the local employment agency in charge of actively promoting the hiring of severely disabled persons of the vacancy. The severely disabled claimant, a law graduate with second state exam and master's degree in the field of law with various work experience, including in the field of municipal law and management,

applied for the advertised position stating his severe disability. Following his application the plaintiff was not invited for an interview but was later informed that the defendant had decided in favour of another applicant.

The claimant objected to not having been considered as a severely disabled applicant and claimed that the defendant had discriminated against him on account of his severe disability by not inviting him for an interview and claimed compensation for non-pecuniary damage. According to the claimant, the invitation for an interview was not dispensable as the claimant was not obviously lacking professional suitability. In fact, however, the claimant's profile was not an ideal fit for the position and the question of his professional suitability remained in dispute between the parties throughout the process.

The Labour Court dismissed the action. It held that the claimant was obviously lacking professional suitability and did not fulfil the requirements for the advertised position as stated in defendant's job profile because of his lack of relevant professional experience.

The claimant's appeal against the ruling of the Labour Court was also unsuccessful. The Court of Appeal also found that the claimant was obviously lacking professional suitability for the position and hence the defendant was not obliged to invite the claimant to a job interview. It ruled that no infringement of provisions protecting against discrimination on account of disability had occurred and therefore the claimant could not resort to the legal presumption of discrimination on the grounds of disability. The claimant's claim for compensation was therefore rejected. The case went before the Federal Labour Court (BAG).

Judgment

The BAG ruled in favour of the claimant and awarded him compensation for non-pecuniary damage in accordance with Section 15(2) AGG. It based its decision primarily on the non-fulfilment of formal requirements for the protection of severely disabled persons. According to the Court, the defendant had neglected its mandatory notification obligation under Section 165 SGB IX towards the local employment agency. Its publication of the job vacancy on the publicly accessible job exchange of the Federal Employment Agency, however, was found not to meet the requirements established by Section 165 SGB IX. Applying Section 22 AGG, the BAG held that the defendant's breach gave rise to the presumption that the claimant was not considered in the job-filling procedure and was hence disadvantaged on account of his severe disability. In the opinion of the Court, other possible violations of procedural and/or promotional obligations in favour of severely disabled persons were not to be investigated and therefore did not form the basis of the Court's verdict. The issue of the claimant's suitability for the position with the defendant, which was taken up by the courts at first and

second instance, was not of key relevance for the BAG's decision.

Commentary

In the BAG's decision, unlike in the previous court decisions and perhaps to the surprise of the outsider, the professional suitability of the severely disabled applicant becomes at best an accompanying issue. What was crucial, however, was the sanctioning of a violation of rules protecting severely disabled persons from illegitimate disadvantage. The award took into account the legislator's intention to provide effective legal protection against unjustified discrimination and, at the same time, to deter and sensitize potential employers with considerably little effort in terms of proof on the part of the severely disabled applicant.

The BAG, as in earlier case law, resorted to the presumption of discrimination on the grounds of severe disability. According to the Court, breaches of mandatory procedural and/or promotional obligations in favour of severely disabled persons are in principle likely to create the impression that the relevant employer is not interested in employing severely disabled persons. As a rule, against a presumption of discrimination in favour of a severely disabled claimant, the alleged discriminator bears the burden of proof that the principle of equal treatment has not been violated. More specifically, the employer must present and if necessary prove facts which show that exclusively reasons other than discriminatory reasons led to a less favourable treatment of the severely disabled applicant. This places high demands on employers defending such claims.

Infringements of procedural and/or promotional obligations enhancing equal treatment in employment and occupation – both for public as well as private employers – will broadly entail the evidence facilitation rule in favour of the discriminated party.

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