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Burden of proof in case of discrimination due to severe disability (GE)

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Summary

The German Federal Labour Court (*Bundesarbeitsgericht*, 'BAG') found, that in a compensation case, an unsuccessful job applicant regularly meets the burden of proof for the causal link between their severe disability and a discrimination by only alleging a suspected violation of the requirement for the employer to inform the works council about an application of a severely disabled person.

Legal background

The four directives on equal treatment, so-called anti-discrimination directives, adopted by the Council of the European Union (Directive 2000/43/EC of 29 June 2000, Directive 2000/78/EC of 27 November 2000, Directive 2002/73/EC of 23 September 2002 and Directive 2004/113/EC of 13 December 2004) were implemented in Germany by the General Act on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*, 'AGG') in 2006. Its purpose is to prevent or stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation (Section 1).
Part 1 of the AGG stipulates general provisions, with definitions of different kinds of discrimination (direct, indirect and (sexual) harassment). The second part of the Act deals with the protection of employees against discrimination. The prohibition of discrimination against employees is one of the essential elements of the AGG. In this context, the term 'employee' also expressly includes applicants. For this reason, there are a large number of court decisions in Germany dealing with compensation claims by rejected applicants who believe that the company treated them unequally in the application process due to one of the characteristics of the AGG (e.g. their disability). These claims for compensation are based on Section 15 of the AGG, according to which the employer is obliged to compensate for any damage caused by unlawful discrimination. Section 15 paragraph 1 AGG reads as follows:

> (1) In the event of a violation of the prohibition of discrimination, the employer shall be under the obligation to compensate the damage arising therefrom. This shall not apply where the employer is not responsible for the breach of duty.

This means that the damage must be quantifiable in concrete terms. In addition, an employee (including an applicant) may also claim monetary compensation for damage that is not a pecuniary damage. In the event that an applicant is not hired – and would not have been hired even if the selection had been free of discrimination – this compensation may not exceed three months' salary. This is regulated in Section 15 paragraph 2 AGG:

> Where the damage arising does not constitute economic loss, the employee may demand appropriate compensation in money. This compensation shall not exceed three monthly salaries in the event of non-recruitment, if the employee would not have been recruited if the selection had been made without unequal treatment."

The compensation is intended on the one hand to compensate for the immaterial damage and on the other hand to deter employers and thus serve to prevent discrimination. When claiming compensation pursuant to Section 15 AGG, the burden of proof provision of Section 22 AGG shall apply. The burden of proof is as follows: If one party is able to establish facts from which it can be presumed that there has been discrimination it is up to the other party to prove that there has been no breach of the provisions prohibiting discrimination. The law states that:

> 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."

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Severely disabled people in Germany are not only protected by the AGG, but also by the Social Security Code IX (*Sozialgesetzbuch IX*, 'SGB IX'). Among other things, the SGB IX stipulates that employers must inform the works council when a severely disabled person applies for a job. This serves the promotion and participation of disabled persons in working life. The Federal Labour Court has already consistently assumed in the past that in the case of rejection of a severely disabled applicant, a violation by the employer of protective regulations in favour of disabled persons (such as the abovementioned) constitutes a presumption of discrimination because of the disability.

Facts

The plaintiff, who has a degree in economics, applied for an advertised position as 'Scrum Master Energy (m/f/d)' in the defendant company. In his letter of application, he referred to his severely disabled status. The defendant rejected the plaintiff for the position. Shortly thereafter, the applicant asked the employer for payment of compensation on the basis of Section 15 AGG. The defendant denied the claim, arguing that the plaintiff had not been considered because he had not met the requirements of the job advertisement, i.e. he did not have a degree in (business) informatics, (business) mathematics or a comparable subject. The defendant did not answer the plaintiff's question about proof that all applicants were treated equally in the recruiting process.

The plaintiff brought an action before the Labour Court and demanded compensation in the amount of two months' gross salary advertised for the position, totaling EUR 10,000.00. He argued that he was discriminated against because of his severe disability. According to the plaintiff, the defendant had violated, amongst others, its duty to inform the works council immediately after receiving an application from a severely disabled person. He argued that this allegation was sufficient for a presumption of discrimination, which was causally based on his severe disability. The Labour Court and the Court of Appeal dismissed the action. The plaintiff then pursued his claim before the highest German labour court, the BAG.

Judgment

The BAG decided in favour of the plaintiff and ruled that he was entitled to compensation in the amount of EUR 7,500.00, i.e. one and a half months' gross salary. In the process, the BAG came to the conclusion that the plaintiff had met his burden of proof by alleging a breach of the employer's duty to inform the works council. The Court held that due to the lack of access to internal company information, the plaintiff had not been able to obtain certain knowledge about the lack of involvement of the works council. As an outsider, the plaintiff could not be required to present concrete facts that are within the sphere of the employer to support his assumption.

In this context the BAG referred explicitly to ECJ cases *Siegfried Pohl – v – ÖBB-Infrastruktur AG* (C-429/12) and *Galine Meister – v – Speech Design Carrier Systems GmbH* (C-415/10). In the former case the ECJ had ruled that the exercise of the rights that derive from European Union law – in this case Directive 2000/78/EC – must not be rendered practically impossible or excessively difficult. In the latter decision, the ECJ stated that national courts have to ensure that a refusal of disclosure by the employer in the context of establishing facts from which it may be presumed that there has been discrimination does not risk compromising the achievement of the objective of equal treatment and thus depriving the provisions concerning the burden of proof, in particular, of their effectiveness.

Therefore, in the opinion of the BAG, the defendant should have presented concrete facts to rebut the plaintiff's allegations. However, the defendant did not counter the allegation of the plaintiff that the works council had not been informed about his application. According to the ruling of the BAG, there was also no other way in which the defendant was able to dispel the assumption that the plaintiff was discriminated against in the application process because of his severe disability. The defendant's objection that the plaintiff had simply not met the requirements of the job advertised was not considered as sufficient by the Court because, according to the Court, the qualifications required by the defendant were not indispensable prerequisites for the advertised job, even if the defendant had considered them as such. The Court pointed out that there are no formal legal requirements for being employed as 'Scrum Manager'.

In the end, the Court did not grant the plaintiff the claimed compensation of EUR 10,000.00 in full. The BAG justified this by stating that the plaintiff had exclusively referred to discrimination on the grounds of his severe disability – and not, for example, additionally to discrimination on the grounds of his age. In the opinion of the BAG, the compensation in the amount of one and a half months' salary was necessary, but also sufficient to have a deterrent effect.

Commentary

The decision of the BAG is far-reaching. It has not yet been decided with such clarity that the burden of proof of the causal link between a severe disability and a discrimination can be met by the mere presumption of a violation of the employer's procedural and/or promotion obligations towards severely disabled persons. If, in the opinion of the BAG, an applicant merely has to allege violations of protective regulations without being able to provide provable facts for this, the requirements for the claim for compensation are very low.

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Nevertheless, it can be argued that it can be very difficult to counter discrimination effectively, as it is often elusive, subtle and denied. Compliance with strict legal procedural obligations is a clear requirement that is not difficult for an employer to meet, but would be very difficult for a rejected applicant to prove if the burden of proof were not eased. The BAG's more far-reaching simplification of the burden of proof can therefore be viewed critically, as every employer with a works council must fear potential lawsuits from severely disabled applicants. However, it is in line with the protective purpose of the AGG, the EU law and ECJ case law.

In doing so, the BAG on the one hand eases the requirements for the applicant within a compensation dispute. On the other hand, however, it continues to limit the amount of the compensation payment. Again the BAG does not exhaust the upper limit of three months' salary when determining the sum of the compensation, but instead sets half of it, one and a half months' salary. The seemingly sharp sword of the compensation claim in the fight against discrimination is, at second glance, put into perspective by the years of legal proceedings and the expenses and time spent, and therefore proves less attractive to a potential plaintiff than might be expected.

Comments from other jurisdictions

Finland (Janne Nurminen, Roschier, Attorneys Ltd): Finland has implemented the anti-discrimination directives in its national legislation with the Non-discrimination Act (1325/2014). The purpose of this Act is to promote equality and prevent discrimination as well as to enhance the protection provided by law to those who have been discriminated against.

The Act includes a similar provision to the German provision mentioned in the case concerning the burden of proof. According to the Non-discrimination Act, the person instituting the proceedings must present an account of facts which the claim is based on. If it can be assumed on the basis of these facts that the prohibition of discrimination has been violated, in order to revoke the assumption, the opposing party must prove that the prohibition was not violated.

However, Finnish legislation does not include a provision that obligates an employer to inform the works council or any other employee representative (or representative body) when a severely disabled person applies for a job. In the light of this, the outcome of this case might have been quite different if the case had taken place in Finland. The German Supreme Court based its ruling on the fact that the defendant did not counter the allegations of the plaintiff that the works council had not been informed about the plaintiff's application. Since this is not required by any law in Finland, the assumption of discrimination would have not emerged, if the claim was only based on the fact that the works council was not informed. If other facts were presented, the Finnish court would have assessed them and considered if the assumption of discrimination applies, as well as assessing the defendant's concrete facts to revoke the assumption, and then finally assessing whether the prohibition of discrimination had been violated or not.

Romania (Teodora Manaila, Suciu – Employment and Data Protection Lawyers): We align with the authors of the case report in asserting that the BAG's decision establishes an uncharacteristically low threshold in terms of the burden of proof. From a national legal perspective, the burden of proof is typically divided in such cases, requiring the employee to establish facts that reasonably imply direct or indirect discrimination. Subsequently, if such evidence is presented, the burden shifts to the employer to demonstrate that the alleged facts do not amount to discrimination.

We are not sure as to whether Romanian courts would adopt a similar approach, especially considering that the plaintiff's claims rest solely on the non-disclosure to the works council as evidence (the singular fact that should imply discrimination).

One aspect remains rather unclear: was the works council not informed by the employer at all? Despite the employer's failure to provide any proof of such notification, taking into consideration the active role of the judge in establishing the facts prompts the question of whether the works councils could have been consulted to verify the claim. The Court appears to have considered the absence of substantial evidence submitted by the employer (including with regard to the notification) as indirect evidence of the existence of a discriminatory treatment, as highlighted by the statement, "in the opinion of the BAG, the defendant should have presented concrete facts to rebut the plaintiff's allegations".

Additionally, considering the Court's assessment of the defendant's objection regarding the plaintiff's alleged failure to meet the job requirements, the decision seems to be grounded on circumstantial evidence and the employer's behaviour during the trial. This, by itself, represents a particularly interesting legal interpretation.

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