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Limitation period for compensation claim on grounds of discrimination (GE)

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Summary

An acquired mother tongue is – at least indirectly – connected to a person's origin and therefore also linked to ethnic origin. Claims based on the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, the 'AGG') must be brought in writing within two months after knowledge of a possible discrimination. Time only starts to run for claims after the employer has provided an unsuccessful job applicant with a clear and definite statement that he or she has been rejected. The limitation period under the AGG will not be triggered by lapse of time only.

Facts

The plaintiff was a male job applicant who was born in Ukraine. Even though his mother tongue was Russian, he spoke German fluently and studied economics and psychology at a German university. The defendant, a book publisher, used a placement service to search for temporary employees for office work in the period from 18 March to 17 May 2013. The employment service put out a job advertisement requiring "German as mother tongue".

The plaintiff applied for a job, but he was not considered by the employer. However, he heard nothing back. It was not until he requested information in September 2013 that the defendant told him that his application had not been taken forward. After receiving a formal rejection, the plaintiff made a written request for statutory compensation for discrimination. He claimed that he had only been rejected because he was not a native German speaker – but that that was effectively discrimination on grounds of ethnic origin.

In February 2014, he sued the defendant, seeking compensation of EUR 4,800 (based on an estimated three months' salary). The defendant requested the action to be dismissed, arguing that the requirement for "German as mother tongue" was to do with language skills only. The defendant considered the requirement justified, as the job holder needed to be able to help write a book in German. The defendant also said that the statutory limitation of two months for the claim was up.

In the first instance, the German Labour Court *('Arbeitsgericht')* dismissed the case, ruling that the plaintiff had not filed his claim within the limitation period. However, the State Labour Court (*Landesarbeitsgericht*, the 'LAG') granted the plaintiff's appeal and ordered the defendant to pay compensation of EUR 3,200. The Federal Labour Court (*Bundesarbeitsgericht*, the 'BAG') upheld this ruling.

Judgment

The BAG affirmed the scope of the AGG. The AGG implements the provisions of Directive 2000/78/EC on equal treatment in employment and occupation. In general, entitlement to compensation occurs when there has been unlawful discrimination, including indirect discrimination.

The BAG held that the plaintiff had been discriminated against because of his ethnic origin, which, it said, must be interpreted broadly. The concept of 'origin' includes having a common religion, language, culture, traditions and living environment. The BAG ruled that an acquired mother tongue is – at least indirectly – connected to a person's origin and therefore also linked to ethnic origin.

In the job advertisement, the defendant had made it clear that it was only interested in employees who grew up in a German-speaking area. The fact that the advert was actually circulated by a third party was found to be irrelevant. The third party was acting on the defendant's instructions and was therefore ultimately responsible for it.

The BAG was not persuaded that it had been necessary and appropriate for the defendant to hire only native German speakers. The court felt that the job of assisting

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an editor writing a book in German could easily be fulfilled by someone with "*perfect*" or "*very good*" language skills.
Regarding the expiry period for the claim, the BAG held that the plaintiff had met all time-limits and formal requirements, as for job applications and promotions, time (in this case two months) only starts to run once a person has been formally rejected. This requires an express or implied notice referring to the *individual* employee. Therefore, the individual employee shall be addressed directly. Thus, the rejection needs to be sufficient for the applicant to understand that his or her application will not be successful. While no particular form is required, the BAG does require that the notice should actually have been received by the applicant (it refers to the 'normal' civil law requirements in this respect), so that he or she is aware of its content.
Further, the BAG ruled that neither silence nor inaction on the part of the employer are enough. Even the fact that the job was temporary and would only last until 17 May 2013 did not make any difference. Hence, the BAG found that it was not until 11 September 2013 that the plaintiff was informed that his application had been rejected and the two month limitation period for asserting a claim started at that moment. By making his claim on 6 November 2013, the plaintiff had kept within the two month time limit.
In addition, the BAG stated that even if the advertisement had said that if applicants had not heard back from them by a certain date they could consider themselves rejected, would not constitute notice. This kind of refusal in advance could not be seen as a clear and definite rejection within the meaning of the AGG.

Commentary

The decision of the BAG emphasizes two points. First, the BAG has determined that the requirement of "German as mother tongue" in a job advertisement constitutes discrimination on grounds of ethnic origin. While indirect discrimination of this kind could be justified depending on the facts, the defendant had failed to do so on this occasion.
Secondly, the BAG stated that if an applicant is to be rejected in a way that triggers the limitation period for claims against the employer, this requires a clear and definite statement by the employer. Neither refusal in advance nor inaction or silence on the part of the employer suffices, as time will only start to run following the applicant's *receipt* of notice addressed to him or her individually [explicit or implied rejection. The starting point for the time limit is consistent with the EU principle of effectiveness, as ruled by the ECJ in the case of *Bulicke* (C-246/09). If national law can be interpreted in different ways, the principle of effectiveness prefers the interpretation that enforces European law the most effectively.
Finally, the case at hand clarifies the importance of monitoring and supervising job advertisements before publishing them. The employer cannot rely on having assigned the task to a placement service. It remains responsible for conduct of third parties acting under its instructions and it continues to bear the risk of any claims. To minimize these risks, employers are well advised to ensure that all rejected applicants receive a timely, individual, explicit notice explaining that their application has been rejected.

Comments from other jurisdictions

Romania (Andreea Suciu and Catalin Roman, Noerr): In Romania the Directive no. 2000/78/EC was implemented through the Government Ordinance no. 137/2000 on the prevention and sanctioning of all discriminatory forms (hereinafter referred to as "***Antidiscrimination Ordinance***").
The Romanian legal provisions also sanction any forms of discrimination regarding the conditions of employment, criteria and conditions for recruitment, selection and promotion, access to all forms and levels of guidance, vocational training and professional enhancement.
Moreover, it is considered a contravention imposing conditions in the publication of a job ad that pertain to the candidate's race, nationality, ethnicity, religion, social category or in a disadvantaged category, age, gender or sexual orientation, or beliefs.
The difference of treatment based on a characteristic related to the above criteria is not considered discrimination where, by virtue of the nature of the occupational activities or the context in which they take place, such a characteristic is a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate with such treatment.
The person who considers herself/himself to be discriminated may refer the matter either to the Antidiscrimination Council, within one year from the date when the act was committed or from the date on which she/he could have become aware of the discriminatory measure, either directly to the competent Court of Laws, within three years from the date when the act was committed or from the date on which she/he could have become aware of the discriminatory measure.
Thus, as in Germany, the statute of limitations may be considered to have started from the moment the employer made aware to the candidate the discriminatory condition set for hiring, meaning that the announcement solely may not be sufficient to be considered discriminatory.
If the candidate considers appropriate to file a claim for damages and for applying the *restitution in integrum* principle, directly to the Courts of Law, the Antidiscri-

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mination Council is considered part of the litigation *ex officio*.
The plaintiff is to disclose facts on the basis of which direct or indirect discrimination may be presumed and the person against whom the referral has been brought has the burden of proving that there has been no breach of the principle of equal treatment. Any evidence may be invoked before the court, respecting the constitutional status of fundamental rights, including audio and video recordings, or statistical data.
Also, upon request (of the discriminated person), the court may order the withdrawal or suspension by the issuing authorities of the operating authorization of the legal entity that, through discriminatory actions, caused material damages or which, while causing minor prejudice, repeatedly infringes the provisions of Antidiscrimination Ordinance.
On the merits, we consider the decision issued by the BAG to be appropriate and in accordance with the spirit of Directive no. 2000/78/EC, as it could have been demonstrated that Non-German candidates can have the same language qualifications as the native language candidates. Thus, such criteria is to be considered discrimination on the merits of ethnic origin.

Austria (Dr. Erika Kovács, Vienna University of Economics and Business): The Austrian legal situation is similar to the German one, but the deadline for filing a claim is significantly longer. Violates the employer the principle of equal treatment through the job advertisement or in the recruitment process, the job applicant has the right to compensation. The amount of the compensation depends on the fact, whether the applicant would have been employed without the discrimination. If the applicant would not have been selected anyway, the compensation is capped in 500,-€. If the applicant would have been selected without the discrimination, he is entitled to compensation in the amount of at least 2 months' salary.
In Austria, the requirement "German as mother tongue" in a job advertisement would usually constitute a discrimination on the grounds of ethnic origin. However, if the activities of the profession require, the job advertisement can require German language proficiency or a stylistically confident German.
The term "ethnic origin" is extensively interpreted in the Austrian legal literature including also adverse treatment based on nationality, skin colour, origin, culture and language skills (Hopf/Mayr/Eichinger, GlBG (2009) § 17, para. 15-16.). The Austrian Supreme Court delivered a judgment in 2013 in which it concluded that the degrading comments of a superior towards an employee with Polish origin constituted discrimination based on the ethnic origin (OGH 9 ObA 40/13t, 24.07.2013).
In Austria, the job applicant have more time to file a claim than in Germany. The deadline for any claim in case of an alleged discrimination in case of a refused job application is 6 months. The deadline starts with the refusal of the application.

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