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Discrimination against severely disabled persons by the calculation of social plan compensation (GE)

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Summary

The Federal Labour Court of Germany (*Bundesarbeitsgericht*, 'BAG') has decided that a social plan that distinguished between employees who were born in 1960 or later and employees who were born before 1960 for the calculation of severance payment did not constitute unjustified age discrimination. However, a regulation in a social plan which referred to the "earliest possible" entitlement to a statutory pension when calculating the severance payment constituted unjustified indirect discrimination against disabled persons.

Legal background

Section 75 of the Works Constitution Act (*Betriebsverfassungsgesetz,* 'BetrVG') prohibits agreements that discriminate against employees on certain grounds such as age and disability. Since these prohibitions of discrimination correspond to those of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, 'AGG') and Framework Directive 2000/78/EC, the justification of discrimination is only possible under the conditions of those regulations.

In the event of an unjustified discrimination, members of the discriminated group are entitled to the same benefits as non-discriminated employees.

Facts

In this case, the claimant was a disabled employee who was born in 1956. Because of a planned closure of his company, the employer and the responsible trade union concluded a social collective bargaining agreement. Additionally, the employer and the works council concluded a social plan. That social plan referred to the collective bargaining agreement and extended some of its provisions to the employees affected by the closure.

In accordance with both agreements and to avoid dismissals due to operational reasons, the employer had to offer each employee a termination agreement which entitled the employee to a severance payment.

The calculation method for the severance payment differed according to the age of the employees. For employees born before 1960, the employer had to provide these employees with an offer to leave the company at the end of the year and to work in a transfer company for a limited period of 12 months. In this case, the severance payment was calculated in such a way that, taking into account unemployment benefits, it covered 80% net of the former income from the age of 60 until the earliest possible change to the statutory pension. Regarding the severance payment, the same calculation method applied to employees born in 1960 and 1961, if they were disabled to a degree of at least 50% (the degree of disability indicates the extent to which a person is affected by the disability).

Employees born in 1960 or later also received an offer to leave the company at the end of the year. Unlike the older employees, they received a severance payment that was calculated by reference to age, length of service and gross monthly income.

The parties in this case concluded a termination agreement including a compensation clause. The (disabled) claimant was paid a severance payment according to the standards of the social plan for employees born before 1960. The severance payment was calculated taking into account an early retirement pension for severely disabled people (usually 2-3 years earlier). This resulted in a lower severance payment compared to non-disabled employees due to a lower retirement age (i.e. shorter compensation period).

The claimant argued that the defendant had to pay a higher severance payment. In his opinion, the provisions in the social collective bargaining agreement and the social plan resulted in unjustified discrimination on grounds of age and disability.

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Judgment

The BAG ruled that the calculation of the severance payment based on the earliest possible change to the statutory pension is an indirect discrimination against disabled persons, because the payment amount differs between disabled and non-disabled persons. According to Section 236a(1) second sentence of the Sixth Book of the Social Code (*Sozialgesetzbuch VI*, 'SGB VI') the earliest possible retirement age for disabled persons is 60 years, whereas for non-disabled persons it is only possible at the age of 63. Therefore, on the basis of the social plan and the social bargaining agreement, disabled persons were entitled to a lower severance payment than non-disabled persons of the same age.

In the opinion of the BAG, this discrimination against disabled persons was not justified. The BAG held that the calculation pursues a legitimate objective (compensation for the loss of earnings until the earliest possible retirement) but goes beyond what is necessary. Contrary to the requirements of the ECJ, the unequal treatment caused by the indiscriminate focus on the earliest possible transfer to the statutory pension was not justified by objective factors. Moreover, this constituent element discriminated against the legitimate interests of severely disabled employees. The amount of the severance payment is limited by a social security advantage, which takes account of the difficulties and particular risks faced by severely disabled employees. Disabled employees may claim an 'upward adjustment' resulting in the same severance payment as non-disabled employees of the same age.

Contrary to the claimant's view, however, the discrimination does not entitle the claimant to a severance payment on the basis of a different calculation method (such as for younger employees in this case). Instead, the disputed regulations are to be applied as if the claimant had not been severely disabled.

Furthermore, the BAG held that the distinction in the social plan (regarding the calculation method) did not constitute age discrimination. Even though employees born before and after 1960 are treated differently, this differentiation is justified. A different treatment is justified under Section 10 first and second sentence AGG if a legitimate objective is pursued and the differentiation according to the year of birth is also objectively suitable and necessary for achieving this objective. The BAG held that the disadvantage resulting from unequal treatment in this case is justified under the above criteria. The BAG regarded severance payments not as additional remuneration for services provided in the past, but instead as compensation or at least economic mitigation for redundancy. Moreover, it referred to Article 6(1) of Directive 2000/78/EC and the case law of the ECJ (C-152/11, *Odar*). The ECJ has held that, in view of the limited resources of a social plan, it is not unreasonable to treat employees less favourably if they are economically more secure than others (e.g. younger employees). Therefore, the calculation method for severance pay may regard actual economic disadvantages resulting from the imminent loss of the job and unemployment. It may additionally introduce different calculation methods preventing employees of a higher age from benefitting disproportionately and receiving compensation in excess of the disadvantage to be compensated.

As stated above, in the opinion of the BAG, the claimant was entitled to a higher severance payment, since the regulations are to be applied as if the claimant was not severely disabled. Therefore the Court referred the case back to the Regional Labour Court (*Landesarbeitsgericht*, 'LAG') Hamm to determine the claimant's correct severance pay.

Commentary

This ruling was another link in a long chain of rulings by German courts regarding the legality of social plans within the context of discrimination. According to settled case law, social plans are subject to review with regard to possible discrimination. Since the assessment of this question is based on the AGG, respectively Directive 2000/78/EC, the question is strongly influenced by European law. The courts are therefore strongly oriented towards the case law of the ECJ.

With regard to age discrimination, such discrimination may already be justified under Section 10, third sentence, sub 6 AGG if the social plan contains a staggered severance payment regulation. Such regulation may consider opportunities on the job market, which depend to a large extent on age and consequently place a relatively strong emphasis on age. Such regulation may additionally exclude employees from the benefits of the social plan who are economically secure because of entitlement to a pension (possibly after receiving unemployment benefit).

Even if, as in the present case, this justification does not apply, a justification of age discrimination is still possible. The BAG refers to Article 6(1) of Directive 2000/78/EC and the judgment of the ECJ (C-447/09, *Prigge*) and generalizes the named examples which justify discrimination as social policy objectives. By doing so, the BAG extends the possibilities to create discriminatory rules. This is consistent as the Directive itself provides for the possibility of age discrimination being justified on specific grounds. The ECJ decided that it must be regarded as legitimate to avoid making severance payments to employees who are not seeking a new job but a replacement income in the form of an old-age pension (C-152/11, *Odar* – see Albertine Veldman, EELC 2020/17, for its impact on Dutch law).

With regard to discrimination against disabled persons in social plans, the BAG has already had to decide this issue. Prior to this judgment the BAG ruled that there was direct, unjustified discrimination against disabled persons if the social plan excluded severely disabled persons from the regular calculation method and instead awarded a lump-sum severance payment. This decision

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is new insofar as the BAG has not previously had to decide on merely indirect discrimination in social plans. However, the ECJ has had to rule on a comparable case which the BAG referred to in the present case (C-152/11, *Odar*). In this judgment the ECJ ruled that a calculation method like the one in the present case constituted an unjustified indirect discrimination against disabled persons. It is not justified by objective factors unrelated to the disability and, furthermore, contradicts the statutory aim of easing difficulties and particular risks faced by severely disabled employees. In this respect, the BAG merely repeated this reasoning in the present case.

Against this background, it is advisable to no longer use such clauses in social plans. The risk for employers of being sued for higher severance payments at a later date seems apparently too high – even if the provided plan budget has already been spent. When negotiating a social plan, it should therefore be ensured that the calculation disregards disability when referring to the earliest possible entitlement to a statutory pension.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): The facts, simplified and perhaps not entirely accurate, but sufficient for the purpose of this commentary: a German company closes down. It offers the redundant staff severance compensation based on a social plan negotiated with a union. The compensation differentiates directly on the ground of age and indirectly on the ground of disability. Employees born in or after 1960 are offered a lump sum calculated on the basis of age and years of service. Older employees are offered a more generous package, including payment of 80% of salary until the date on which they can claim statutory retirement benefits. Employees who are not disabled can claim such benefits from age 63. Disabled employees are eligible from age 60. Hence, disabled employees get less severance compensation. Clearly this difference in treatment between disabled employees and their non-disabled colleagues (whom the BAG, in line with the ECJ, did not consider to be incomparable) distinguishes on the ground of disability. As in the *Odar* case (C-152/11), the distinction was indirect. This allowed the employer to raise an objective justification defence. The Court found that the (indirectly) differential treatment of disabled and other employees pursued a legitimate aim, being that it limited the right to payment of 80% of salary to employees without retirement benefits, i.e. to those who, for lack of those benefits, needed the payment most. Apparently, the Court found that the means to achieve this aim was not proportionate. The case report does not reveal why this is so. I would imagine that the Court weighed the disadvantage of a shorter entitlement to payment of 80% of salary against the advantage of earlier access to statutory retirement benefits, and found the disadvantage to outweigh the advantage.

Subject: Disability Discrimination, Age Discrimination

Parties: Unknown

Court: *Bundesarbeitsgericht* (German Federal Labour Court)

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