

Case Reports

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eBay Classifieds used as a recruiting and job application platform not a safe haven for gender discrimination of applicants (GE)

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Summary

The Schleswig-Holstein Regional Labour Court (*Landesarbeitsgericht*, ‘LAG’) has found that a person who expressed interest in a job through the Internet portal ‘eBay Classifieds’ was an ‘applicant’ within the meaning of the German General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, ‘AGG’) and, provided the other legal requirements are met, eligible for compensation for immaterial damage. The Court further ruled that the hurdles are high for the compensation claim to be countered by the defence of abuse of rights.

Legal background

The AGG implemented the EU directives on equal treatment into national German law. The Act not only protects employees but also job applicants during the application process for employment (Section 6(1) para. 3 AGG) from unequal treatment on account of their race or ethnic origin, gender, religion or belief, disability, age or sexual orientation (Section 1 AGG). Direct discrimination under the AGG is defined to occur where one person is treated less favourably than another on any of the grounds referred to under Section 1 AGG (Section 3(1) AGG).

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The AGG provides for a no-fault compensation claim in a case where immaterial damage has been suffered through unequal treatment within the scope of the Act. Accordingly, Section 15 AGG states:

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.
2. Where the damage arising does not constitute economic loss, the employee may demand appropriate compensation in money. [...].

The decision at hand furthermore deals with the *objection of abuse of rights* which is known both to EU and German law, and is – under German law – derived from Section 242 of the Civil Code (*Bürgerliches Gesetzbuch*, ‘BGB’) that states: “An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration”.

Facts

In the case at hand the parties disputed a compensation payment due to a gender-discriminatory job advertisement. The plaintiff had trained as an industrial clerk and was completing a correspondence course in business law. The defendant was a family-run small business.

The defendant had placed an advertisement on the internet portal eBay Classifieds as follows: “Secretary wanted as of now! Full time/part time. It would be great if you had experience”. In the advertisement, the German term for ‘secretary’ used was the female form only (*‘Sekretärin’*).

Through the chat function in the app, the plaintiff informed the defendant that he was interested in the position, that he had completed a commercial apprenticeship as an industrial clerk, had professional experience in the office, knew how to write delivery bills and invoices, was fit to do the typical work of a secretary and that he would be available immediately. In view of the wording used in the advertisement, he also enquired whether the defendant was in fact only looking for a woman to fill the vacancy. The defendant replied that they were looking for a lady secretary only.

After several presumably pre-formulated references by the plaintiff, that restricting the position to female applicants alone would constitute discrimination on the ground of gender, the plaintiff finally sued the defendant at the Elmshorn Labour Court for financial

compensation for not having been considered in the application process.

The defendant invoked an abuse of rights by the plaintiff because, in its view, the plaintiff had not applied in order to obtain a vacant position, but exclusively in order to assert a claim for compensation. Among other arguments, it claimed that the plaintiff was recognizably overqualified, that his repeated enquiries for clarification on the gender of the wanted candidate were aimed at provoking statements that would enable recourse and it referred to the plaintiff's pre-formulated correspondence – including a ready for signature settlement agreement for compensation – in order to illustrate that the plaintiff presumably had some practice in pursuing compensation payments instead of employment.

The Labour Court dismissed the action on the ground that the personal scope of application of the AGG was not opened in this case, because the plaintiff could not be considered an 'applicant' within the meaning of the law. The Court found that beyond an inquiry as to whether the defendant was looking for a woman only, and an expression of interest, the plaintiff had not made a specific application request to the defendant.

Following this decision the plaintiff appealed to the LAG.

Judgment

22 In its judgment, the LAG held that the plaintiff was entitled to payment of compensation for immaterial damage due to gender discrimination under Section 15(2) AGG.

The LAG ruled that the plaintiff was an 'applicant' and hence protected under the AGG because he provided at least the required minimum level of information for an application by sharing his name, presenting his qualifications as an industrial clerk, expressing his interest in the position and expressly stating that he would apply for the job. The LAG further held that by advertising the vacancy on eBay Classifieds, the defendant was to expect that applications would be made via the reply button on eBay Classifieds.

The defendant, by repeatedly stating to the plaintiff that it only wanted to hire a lady secretary, in the view of the LAG, committed an act of discrimination in accordance with the AGG ultimately denying the plaintiff the chance to be hired because of his gender. The plaintiff was found to have thereby suffered a – causal – direct disadvantage, because he experienced a less favourable treatment than another person in a comparable situation – here: at least the lady who was finally hired – on account of his gender.

The LAG further held that the plaintiff's compensation claim was not precluded by the objection of abuse of rights, as referred to by the defendant. In the view of the LAG, it could not be established that the plaintiff did not want to obtain the relevant position with his application but only the formal position of an 'applicant'

with the sole aim of claiming compensation under Section 15(2) AGG.

With reference to ECJ case law, especially the *Kratzer* case (ECJ 28 July 2016, Case C-423/15, para. 35), the LAG clarified that the prohibition of an abuse of rights is a recognized principle – generally and in the specific situation at hand – under Union law, too. In the *Kratzer* case, the ECJ, upon submission by the German Federal Labour Court, had ruled that where a person by applying for a job does not wish to obtain the job in question but only the formal status of an 'applicant' with the sole aim of claiming compensation, this may be assessed as an abuse of rights.

However, considering the burden of proof, which, in accordance with ECJ case law was to follow national law (ECJ 17 December 2015, Case C-419/14 *WebMindLicences*, para. 65), the LAG held that the circumstances presented by the defendant were insufficient. Contrary to the view of the defendant, no sufficient objective circumstances could be inferred from the overall behaviour of the plaintiff which would allow the conclusion that the plaintiff acted in an abusive way or even pursued compensation claims systematically in the sense of a 'business model'. The Court held that the plaintiff, being an industrial clerk, was generally qualified for the advertised position, that the possibility remained that the plaintiff had a serious interest in obtaining the position and that he therefore permissibly exercised his rights under the AGG by bringing the action for compensation.

The LAG considered an aggregate of three monthly wages (as customary in the relevant region for the full-time job) an appropriate compensation for the immaterial damage caused to the plaintiff in order to encourage the defendant to properly fulfill its obligations under the AGG and to deter third parties from committing similar violations.

Commentary

The case at hand at first glance is a typical case of discrimination on the ground of gender and the LAG's decision in this regard is unsurprisingly clear. What is, however, striking about the decision is that the LAG took digital chat messages on the app eBay Classifieds as a valid application within the meaning of the AGG.

Also, the required minimum level of information for an application established by the LAG (identifiable by name, statement of unproven qualifications, expression of interest in the position and language that suggests an application for the job) is noteworthy. Against the impending risks for employers that materialize in the case at hand, when choosing to recruit via an internet portal like eBay Classifieds, it appears imperative to not only avoid discriminatory language but also to specify what minimum requirements an application must meet in order to be considered at all (e.g. CV, certificate(s), proof of certain qualifications, etc.).

As far as the objection of an abuse of rights is concerned, the Bundesarbeitsgericht follows a very strict line, and the LAG does not deviate from this in the case at hand. If employers want to resort to their counterparties' abuse of rights, they must well establish and prove their arguments.

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General

Parties: Unknown

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