Legal Update
Labour and Employment

Discrimination documented by handwritten comments on a résumé

Felix R. W. Pott

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Headnote

If an employer notes the age of the child (7 years old) next to the information “married, one child” on a résumé submitted with an application for employment and underlines this information, this can be taken as evidence of indirect discrimination against the candidate (Hamm Higher Labor Court, judgment of 6 June 2013, 11 Sa 335/13).

Facts

The employer, the operator of a local radio station, ran an employment ad in a newspaper to recruit a “bookkeeper m/f” with a completed clerical apprenticeship. The plaintiff applied for the position and submitted a résumé, which included among other things the information “Married, one child”. The employer then added by hand: “7 years old!”. The entire resulting sequence of words “one child, 7 years old!” was underlined. The employer informed the plaintiff that another candidate had been chosen and returned the plaintiff’s résumé, including the handwritten notes. The plaintiff brought an action for compensation in the amount of € 3,000.00 for gender-based discrimination.

Decision

The Labor Court had dismissed the plaintiff’s claim for compensation on the grounds that there had been no discrimination, either directly or indirectly, on the basis of gender. The Hamm Higher Labor Court reversed the decision of the lower court and awarded the employee € 3,000.00. by way of compensation for discriminatory treatment in violation of § 7 of the General Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz – AGG). According to the court, the discrimination lay in the rejection of the application without inviting the candidate to a personal interview and it could also be assumed that the discrimination was based on gender. The Hamm Higher Labour Court found the handwritten remark “7 years old!” and the fact that the entire resultant sequence of words “one child, 7 years old!” was underlined were indicative of discrimination within the meaning of § 22 of the General Equal Treatment Act. The court did to be sure find that there was no direct discrimination involved since parenthood is not in itself a gender-specific characteristic. Nevertheless, the Hamm Higher Labour Court did find evidence of indirect discrimination on the basis of gender within the meaning of § 3(2) of the General Equal Treatment Act since the issues subsumed under “compatibility of family (with minor children) and employment” did in the context of social reality in the Federal Republic very predominantly affect women. Especially since the percentage of employed fathers is significantly higher than that of employed mothers, the court assumed that a man in a comparable situation (father of a seven-year-old child) would have been afforded better treatment than the plaintiff. The court found that the use of “one child, 7 years old!” as a decision-making criterion could not be legally justified and constituted evidence of indirect discrimination pursuant to § 22 of the General Equal Treatment Act. The employer was also not able to refute this evidence by arguing that the successful candidate actually was better qualified. Instead, it would have been necessary to prove that the hiring decision was free of bias by providing positive proof of the fact that the use of improper criteria had been excluded. Accordingly, the Hamm Higher Labour Court ruled that the handwritten remark and the underlining sufficed to prove the existence of indirect discrimination on the basis of gender. The court also considered the compensation in the amount of € 3,000.00 to be appropriate.

Comments

The decision of the Hamm Higher Labour Court is yet another clear example of the pitfalls and obstacles that employers must navigate in practice to ensure that hiring processes are free from discrimination. The court's assessment of the case was based solely on the triggering circumstance – and ultimately the determinative criterion – i.e., the handwritten remark on the résumé and the underlining. The plaintiff did not submit further evidence detrimental to the defendant. By returning the candidate's résumé, the defendant created the actual basis for a negative outcome. There exists a certain potential for conflict in this case between the (legitimate) need of employers to document the hiring process and the specifics of each candidate to a sufficient extent on the one hand and their objective interest in revealing few practical aspects of the decision-making process involved in the recruitment process to the world outside on the other hand. Although it is still advisable to keep internal records to document hiring decisions, handwritten notes on résumés are to be avoided, especially if they are returned to applicants. In less "obvious" cases, there would otherwise also be the danger that such notes might be viewed as evidence of a discriminatory selection procedure since résumés do contain considerable data and information that fall under one of the "forms of discrimination" contained in § 1 of the General Equal Treatment Act.

Note

Our offices

GÖRG Partnerschaft von Rechtsanwälten mbB

BERLIN
Klingelhöferstraße 5, 10785 Berlin
Phone +49 30 884503-0, Fax +49 30 882715-0

COLOGNE
Kennedyplatz 2, 50679 Köln
Phone +49 221 33660-0, Fax +49 221 33660-80

ESSEN
Alfredstraße 220, 45131 Essen
Phone +49 201 38444-0, Fax +49 201 38444-20

FRANKFURT AM MAIN
Neue Mainzer Straße 69 – 75, 60311 Frankfurt am Main
Phone +49 69 170000-17, Fax +49 69 170000-27

HAMBURG
Dammtorstraße 12, 20354 Hamburg
Phone +49 40 500360-0, Fax +49 40 500360-99

MUNICH
Prinzregentenstraße 22, 80538 München
Phone +49 89 3090667-0, Fax +49 89 3090667-90