Legal Update Labour and Employment

Typical traps – A search for "Recent Graduates/Young Professionals" may constitute age discrimination

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Headnote

Mention of "Recent Graduates/Young Professionals" in an employment advertisement run to recruit candidates for a trainee program may be construed as indicative of age discrimination. In such cases, an employer will regularly have to prove that no such discrimination took place.

Facts

The Federal Labour Court was called upon to decide whether an employment advertisement directed at "Recent Graduates/Young Professionals" represented prohibited discrimination against older candidates.

The defendant – the operator of a public hospital – had set up a special program for "Recent Graduates/Young Professionals" and started to recruit junior managerial personnel for the program in April of 2009. The employment advertisements included the passage: "C will require junior management personnel in the years to come. We now have a special program for "Recent Graduates/Young Professionals" to meet that need.

The then 36-year-old lawyer and subsequent plaintiff applied for such a position. His candidacy was unsuccessful and he brought an action for relief in the form of damages and a cease-and-desist order under the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* – AGG). The plaintiff was of the opinion that the employment advertisement constituted prohibited discrimination on the basis of age.

Decision

Both the lower Labour Court and the Higher Labour Court dismissed the action. The plaintiff's appeal to the Federal Labour Court as regards entitlement to damages

was successful. Finding that evidence of improper discrimination on the basis of the plaintiff's age did exist in the present case, the superior court remanded the case to the Higher Labour Court for reconsideration.

The text of the job advertisement was what provided the grounds for assuming the existence of age discrimination since the qualifications contained therein included the terms "college graduates" and "young professionals". According to the court, the choice of vocabulary showed that the defendant was using age as a specific criterion for qualification and was seeking "young" applicants of about 30 years of age, which meant that the search was in violation of § 7 of the General Equal Treatment Act according to § 11 of the Act.

Since – in the opinion of the Federal Labour Court – concrete evidence of a discriminatory hiring practice did exist, the employer was responsible, as required by § 22 of the General Equal Treatment Act, for showing that the plaintiff was not a victim of illegal discrimination. According to § 10 of the General Equal Treatment Act, distinctions may be made on the basis of age, for example, to achieve a balanced age structure. Nonetheless, the Federal Labour Court was of the opinion that the argument advanced by the employer in the case at hand was without merit. The same applied as regards the argument to the effect that college graduates were recruited because they could be more easily "moulded". The defendant had, however, also submitted that it had selected the best candidates as required by Article 33(2) of the Basic Law. Since the plaintiff's academic performance was not as good as those of the other candidates interviewed, there was reason to think that considerations other than age had indeed led to the less favourable outcome. Since the candidate contested the employer's selection practice, the matter was remanded to the Higher Labour Court for further action and reconsideration.

Comments

The Federal Labour Court's decision addresses the issue of non-discriminatory recruitment of new employees, which is an important concern for many companies, and underscores once again the fact that the formulation of employment advertisements calls for extreme care in order to avoid exposure to claims under the General Equal Treatment Act. It is particularly important to avoid any reference to age, including in the form of Anglicisms ("young professionals"). The Federal Labour Court evidently does not proceed from the understanding of English terms commonly found in English-speaking countries, where the allusion is not to age, but rather to professional experience. In fact, the Federal Labour Court relies exclusively on the literal construction.

The judgment also clearly shows that the Federal Labour Court's view of what constitutes permissible discretion as regards the use of age as a hiring criterion (§ 10 of the General Equal Treatment Act) is restrictive and imposes high standards for compliance. Employers must demonstrate that their interests are founded on concrete and plausible considerations. An employer's interest in being able to "mould" its managerial personnel does not, in any case, suffice to justify a discriminatory practice.

The Federal Labour Court's reasoning as regards the possibility of abuse on the part of the plaintiff also merits critical attention. An application for employment that is not meant seriously, but is only feigned for the purposes of claiming damages under the General Equal Treatment Act, constitutes an abusive practice. Despite the fact that the plaintiff applied for a position with the administration of a hospital and mentioned in his appli-

cation that his father was a victim of medical malpractice as well as the fact that the plaintiff had already brought comparable actions against several large law firms for alleged discrimination, the Federal Labour Court did not question the seriousness of the plaintiff's application.

Note

This overview is solely intended for general information purposes and may not replace legal advice on individual cases. Please contact the respective person in charge with GÖRG or respectively the author herself: Dr. Jessica Blattner on +49 221 33660-503 or by email to jblattner@goerg.de. For further information about the author visit our website www.goerg.com.

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