Legal Update
Labour and Employment

Employers are under no obligation to inform unsuccessful candidates as to the outcome of selection processes

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Cologne, 11.07.2013

Headnote

Unsuccessful candidates for employment have no right to information as to whether an employer has hired another candidate and what criteria were used as the basis for the new hire (*Federal Labour Court, judgment of 25 April 2013 - 8 AZR 287/08*).

Facts

The plaintiff had applied for a position as a software developer but was not invited to a job interview. She was convinced that she was ideally qualified for the position and concluded that her gender, age and Eastern European origins were the real reasons why she was not invited for an interview. Neither the job description nor the rejection letter contained any objective indication of discrimination on the basis of any of these grounds. Against this background, the plaintiff asked the employer to provide information as to whether the vacant position was filled and, if so, on the basis of what criteria.

The plaintiff anticipated that such information would provide evidence of discrimination in the recruitment process in violation of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* – AGG) and as a result entitle her to appropriate financial compensation.

Decision

The action was dismissed by the lower courts and then ultimately in the final instance by the Federal Labour Court.

According to § 15(2) of the General Equal Treatment Act, a rejected candidate is entitled to compensation only if discriminated against by an employer on the basis of race or due to his ethnic origin, gender, religion or creed, disability, age or sexual identity. If an unsuccessful candidate can provide evidence of such discrimination, for example, because the formulation of the job description is not gender-neutral or explicitly addresses "*young*" candidates, it is according to § 22 of the General Equal Treatment Act incumbent upon the employer

to prove that the successful candidate was in fact selected on the basis of objective – non-discriminatory – criteria.

Since no circumstantial evidence was immediately obvious, the plaintiff tried to obtain evidence of discrimination by demanding information from the company.

In the year 2010, the Federal Labour Court had already ruled in this matter that no such right to information can be inferred from national German law, reasoning that the legislature had indeed eased the burden of evidence and proof for unsuccessful candidates but did not make provision for a right to information that went any further.

Against that background, the Federal Labour Court submitted the question as to whether such a right to information could be inferred from Community law to the European Court of Justice. In its judgment of 19 April 2012, the European Court of Justice ruled that this was not the case, but did point out that an employer's refusal to provide any information could be cited as possible evidence of discrimination, adding that the evidentiary weight of such refusal would, however, have to be assessed on the basis of the actual circumstances involved in the specific case.
Following the decision of the European Court of Justice, the Federal Labour Court then dismissed the action of the unsuccessful candidate, concluding that she simply alleged discrimination arbitrarily without having an objective reason to do so. The court found that once it was established that no right to information exists the employer was also no longer under any obligation to provide any further explanation as regards the selection process and that refusal to provide information could not alone be of any decisive importance in the absence of any other circumstantial evidence of discrimination against the plaintiff.

Comments

Both the judgment of the Federal Labour Court and the underlying decision of the European Court of Justice are welcome and their legal argumentation convincing. In its implementation of the European Directive in the form of the General Equal Treatment Act, the legislature not only defined the substantive conditions for compensation, but also provided conclusive rules for the assignment of the burden of evidence and proof. The General Equal Treatment Act deviates from the basic rule to the effect that each party bears the burden of presenting the most favourable evidence and proof in support of its case and eases the burden of unsuccessful candidates for employment. The ostensible victim of discrimination must not provide evidence of and demonstrate the existence of discrimination as such; indication of such discrimination is sufficient. Any circumstantial evidence can usually be inferred from the recruitment process, as a rule on the basis of the use of revealing language in the formulation of job descriptions or rejection letters.

In order to preclude claims under the General Equal Treatment Act, it is still advisable to pay especially careful attention to the formulation of job descriptions and rejection letters to avoid any semblance of discriminatory selection. When recruitment processes provide no indication of any discrimination, inquiries from unsuccessful applicants for employment concerning the selection process can be ignored.
However, if the recruitment process does give the unsuccessful applicant objective reason to suspect discrimination under the General Equal Treatment Act and provide supportive *"ammunition"*, it would be advisable to respond to the inquiry. Failure to do so would expose an employer to the danger that refusal could ultimately be construed as a clear indication of discrimination.

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 himself: Dr. Frank Wilke on +49 221 33660-534 or by email to fwilke@goerg.de. For further information about the author visit our website www.goerg.com.

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