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Employment & Labour - Austria

Supreme Court issues clarification on age discrimination

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The Supreme Court recently clarified a conceptual question concerning age discrimination.⁽¹⁾

Background

Under the Equal Treatment Act, which entered into force on July 1 2004, both direct and indirect discrimination based on age is prohibited. The act also prohibits discrimination on the grounds of age during the pre-employment phase. In cases where the employment contract has not been concluded due to a violation of the act, the employer must provide compensation for the applicant's pecuniary loss and for personal damage. This compensation amounts to at least two months' salary, if the applicant would have been awarded the position in the absence of such age discrimination.

Facts

The plaintiff (born in 1960) applied for a job as a sales representative. The defendant's managing director received the application packet at 10:40am on March 14 2011 via email. Three minutes later, at 10:43am, the director replied to the plaintiff via email that the plaintiff was "too old" to be awarded the position.

The plaintiff sued for damages.

The defendant asserted that the reply mail was meant only to get rid of the plaintiff, who had been overly pushy and intrusive. According to the defendant, the plaintiff had repeatedly called the defendant's managing director and enquired about his job prospects. Furthermore, according to the defendant, the plaintiff lacked the required work experience and, due to his intrusive behaviour, was not a top contender for the job. Most importantly, the position was never filled; therefore, according to the defendant, no discrimination could have occurred.

Decision

The district court and the court of appeals awarded the damages sought by the plaintiff and the Supreme Court confirmed their ruling.

The case is unique in that the plaintiff was the only contender for the job and the vacancy was never filled. The Supreme Court had to decide whether discrimination could occur even in the absence of a person with whom the applicant's situation could be compared. The defendant had claimed that in the absence of a concrete, real-life comparator, a discrimination claim is baseless.

The court opined that there can be cases in which only one out of several job applicants fulfils the job requirement profile, or where only one person applies for a specific job. In such cases, it is correct and in line with statutory language to compare the plaintiff with a mere hypothetical comparator.

For a discrimination claim to be successful, it is thus unnecessary for there to be a person with whom the applicant's situation can be compared. It is clear that the plaintiff was treated less

favourably than a hypothetical comparator would have been and that the less favourable treatment was solely due to the plaintiff's age.

The decision demonstrates that the Supreme Court has no patience with employers who choose a formalistic defence in order to circumvent the clear statutory language out of disrespect for the act's legitimate objectives.

For further information on this topic please contact [Jakob Widner](#) at Graf & Pitkowitz Rechtsanwälte GmbH by telephone (+431 401 17 0), fax (+431 401 17 40) or email (widner@gpp.at).

Endnotes

⁽¹⁾ OGH, 9 Ob A 154/12f, January 29 2013.

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