EELC EUROPEAN EMPLOYMENT LAW CASES

SUMMARY

2017/16 Non-Extension of a fixed-term contract between an overweight employee and a public service employer (GE)

Unlawful discrimination cannot be found even for morbid obesity under the German Equal Treatment Act.

Unlawful discrimination cannot be found even for morbid obesity under the German Equal Treatment Act.

The defendant in this case was an employer in the public sector which agreed an employment contract with the plaintiff, a man suffering from Grade III obesity (i.e. severe, or 'morbid' obesity).

In March 2014, the parties concluded a fixed-term contract, made conditional upon the employee passing a pre-employment medical exam. Apart from increased blood pressure, no further medical concerns were found in the exam. Despite a body mass index of 41.67 kg/m² in 2014 and 44.5 kg/m² in 2015, the plaintiff was able to do his job as an Unimog-driver without any issues.

In September 2015, the plaintiff's direct superior asked the defendant to continue the plaintiff's employment after the end of the fixed-term contract (i.e. from February 2016). During a staff appraisal in September 2015, the defendant informed the plaintiff that, taking into account all circumstances, his employment could not be extended, as his Grade III obesity would sooner or later result in poor health.

The plaintiff considered that the fixed term contract he was working under was in fact invalid

because it had been signed after he had already done half a day's work (during which time he was shown around and certain things explained to him). In addition, he felt he was being discriminated against because of his weight. He claimed that the only reason the fixed term contract was not extended was because of his obesity. He claimed that his obesity was the result of mental impairment and therefore had to be seen as a disability in the sense of section 7.1 of the German Equal Treatment Act (Allgemeines Gleichbehandlungsgesetz, the 'AGG').

The plaintiff sued the defendant, seeking continuance of his employment. Both the German Labour Court ('Arbeitsgericht') and, on appeal, the State Labour Court (Landesarbeitsgericht, the 'LAG') dismissed the claim, finding that the fixed term contract was valid and there was no entitlement to an extension.

The LAG noted that the parties had made the contract in writing, which is a necessary condition for fixed-term contracts under the Act on Part-Time Work and Fixed-Term Employment (Teilzeit- und Befristungsgesetz, the 'TzBfG'). By section 14.4 of the TzBfG, any non-written limitation to the duration of an employment relationship is invalid – which effectively means that the employment relationship is made for an indefinite period.

In addition, according to Section 14.2 of the TzBfG, a limitation for no objective reason is invalid if there had been an employment relationship between the employer and the employee before this, whether or not for a fixed term. Thus, the plaintiff could not have been employed temporarily if the LAG had found a previous indefinite term contract between the plaintiff and his employer.

In the case at hand, the plaintiff argued he was already working for the defendant before the fixed term contract was concluded, because he had spent half a day at the office before signing the contract. This might have been seen as a prior employment relationship, but the LAG concluded that the plaintiff did not begin work until he had signed the employment contract. Being shown around in the new working environment was not regarded as the beginning of work.

Further, the LAG considered that non-extension of the contract in February 2016 did not violate section 7.1 of the AGG. The plaintiff had not been discriminated against because of a disability.

In making this last finding, the LAG first established that the AGG applied. The agreement of a

fixed-term relationship is a so-called redundancy term, in the sense of section 2.1 of the AGG. A redundancy term covers not only dismissals, but all circumstances in which an employment relationship ends. If a redundancy term breaches the AGG, it is considered void.

The LAG ruled that Grade III obesity cannot be seen as a disability and therefore the employer's decision not to extend the contract was not based on a forbidden ground under sections 7.1 or 1 of the AGG. Neither the TEU nor the TFEU prohibit discrimination on grounds of obesity, as such. Even Directive 2000/78 does not list obesity as a prohibited ground of discrimination.

Nor can obesity necessarily be regarded as a disability in terms of Directive 2000/78. A disability is defined as a limitation, based on a long-term physical, mental or psychological impairment which prevents the employee from fully, equally and effectively participating in professional life. Obesity does not always create this kind of limitation. It can only be seen as a disability in the terms of the Directive if it fulfills these criteria.

In the case at hand, the plaintiff was still able to participate in professional life. His body mass index of 41.67 kg/m² in 2014 and 44.5 kg/m² in 2015 did not prevent him from working as an Unimog-driver. Therefore, the LAG concluded that the test for a disability was not met.

The decision of the LAG includes two main points. First, that section 14.4 of the TzBfG provides that any temporal limitation of an employment agreement must be made in writing. Second, that the TzBfG differentiates between two types of time limitations. Those with an objective reason, such as substitution or temporary need, and those without one. By section 14.1 of the TzBfG, an employment agreement without an objective reason can only be fixed for up to two years.

The decision also concerned certain provisions of the AGG. Section 15.6 of the AGG explicitly prevents employees from claiming a new employment relationship or promotion. In the case at hand, the plaintiff did not seek a new employment relationship. Instead, he wanted the court to rule the original fixed-term agreement invalid. Therefore, his claim was admissible.

Usually, the AGG only provides compensation. According to section 15.1 of the AGG, employees or applicants are entitled to damages to compensate them for loss. Section 7.2 AGG states that provisions in an agreement which refer to forbidden grounds are void. Therefore, if the limitation in duration was only put in place as a result of the disability of the plaintiff, it

would be considered invalid and void.

In the end, the LAG concluded that the test for disability was not met but in my view, this aspect of the case is debatable. The defendant had not continued the employment because he was of the opinion that the plaintiff's health was in danger as a result of his obesity. There is a rule in German law that an employer may breach the AGG even if it merely presumes that an employee/applicant carries one of the protected criteria – whether or not that is accurate. Therefore, from my point of view the LAG should have assessed the motivation of the defendant in more detail.

United Kingdom (Bethan Carney, Lewis Silkin LLP): In a similar 2013 decision in the UK, the Employment Appeal Tribunal found that obesity is not sufficient in itself to amount to a disability (Walker v SITA Information Networking Computing Ltd). Although the EAT did note that obesity may make it more likely that someone is disabled. This is consistent with the ECJ's decision in Fag og Arbejde, acting on behalf of Karsten Kaltoft – v – Kommunernes Landsforening, acting on behalf of the Municipality of Billund 2015 ICR 322 in which the ECJ held that EU law has not deemed obesity a protected characteristic justifying protection. However, the ECJ accepted that obesity may amount to a disability for the purposes of the Directive, provided that "it entails a limitation resulting in particular from long-term physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers". This is to be determined on a case by case basis and there is no general rule on how obese an individual must be to get protection. If an employer thinks that an obese person has a disability (even if the perception is wrong), it would be unlawful for the employer to discriminate against that person on that ground. However, if the employer just discriminated against the individual because they didn't like fat people, that would not be disability discrimination (although it might be grounds for another claim, such as unfair dismissal, depending on the circumstances).

Denmark (Christian K. Clasen, Norrbom Vinding): From a Danish perspective, this judgment seems to be perfectly in line with the ECJ's judgment in Kaltoft (C-354/13) as well as the judgment by the referring Danish court with regard to the definition of disability.

The Kaltoft case concerned an employee who, after 15 years of employment with a municipality as a childminder was dismissed due to declining birth rates. It was undisputed that the childminder was obese and had been obese during the entire employment

relationship. His trade union claimed that he was dismissed because of his obesity, that being a protected ground of discrimination under EU law, and that Mr Kaltoft's obesity constituted a disability. The trade union filed proceedings against the municipality in the Danish District Court which decided to refer questions to the ECJ.

The ECJ found that obesity is not a prohibited ground of discrimination under EU law and that obesity is not in itself a disability. However, it was left to the national court to decide whether the obesity in that case actually constituted obesity in a way governed by Directive 2000/78.

In March 2016, the Danish District Court decided in favour of the municipality. The Court found in overall terms that the obesity did not hinder the employee from working fully and effectively as a childminder on an equal basis with other childminders. Neither the inconveniences in his daily life nor the health problems described by Mr Kaltoft were of such a nature that he was covered by the definition of a disability within the meaning of the Directive.

The case has been appealed to the Danish Western High Court where it is pending.

Subject: Disability discrimination

Parties: unknown

Court: Landesarbeitsgericht Niedersachen (State Labour Court)

Date: 19 May 2016

Case number: 10 Sa 216/16

Publication:
http://www.rechtsprechung.niedersachsen.de/jportal/portal/page/bsndprod.psml?doc.id=JURE170022735&st=null&showdoccase=1

Creator: Landesarbeitsgericht Niedersachen (State Labour Court)