Is it permissible to ask for a severe disability without cause during the application procedure?

The General Equal Treatment Act (AGG), which came into force on 18 August 2006, caused some uncertainty among employers at the time. It was feared that this law would result in an almost uncontrollable flood of lawsuits against employers. In retrospect, this concern was unfounded. In the meantime, both the Federal Labour Court (BAG) and the European Court of Justice (CJEU) had the opportunity to largely defuse the concerns originally expressed against the law in this context (see in connection with the so-called AGG-Hopping the judgment of the CJEU of 28 July 2016, file number C-423/15 and, building on this, the judgment of the BAG of 26 January 2017, file number 8 AZR 848/13). However, not all issues related to the AGG have been resolved by the highest courts so far. Among the questions still to be clarified by the Federal Labour Court is the question whether the employer is still entitled to ask the applicant in an interview without a reason whether he is disabled. This question was answered by the Federal Labour Court in favour of employers prior to the effective date of section 81 (2) SGB IX (in an old version) on 1 July 2001 and of the AGG on 18 August 2006 (see, for example, the judgment of the Federal Labour Court of 5 October 1995, file number 2 AZR 923/94) and deliberately left open in a judgment of 7 July 2011 (file number 2 AZR 396/10). In a ruling of 30.11.2017 (file number 7 Sa 90/17), the Hamburg Higher Labour Court dealt with a related question and deviated from the earlier rulings of the Federal Labour Court in favour of the employees.

What had happened?

The severely disabled plaintiff applied to the defendant for a job as caretaker. After an application interview, the plaintiff worked for 3 days on trial with the defendant.

After further diologues, the defendant submitted to the plaintiff an employment contract which she had already signed and which contained, inter alia, the following clause referred to as § 9:

> The employee assures that he is able to work, does not suffer from an infectious disease and that there are no other circumstances which make the work to be performed under the contract considerably more difficult or impossible now or in the near future. The employee further declares that he is not subject to the provisions of the Disabled Persons Act at the time the contract is concluded. If, for example, the conditions for this occur at a later date, the company will inform the customer immediately.

After receiving the signed contract, the plaintiff made a number of requests for amendments to the defendant. In this connection, he revealed to the defendant that he was severely handicapped. The parties to this lawsuit disputed whether employees of the defendant stated that they did not want severely disabled persons in the company. It is undisputed that the defendant did not comply with the plaintiff's requests for changes and "withdrew" her offer to hire the plaintiff in the following. The Hamburg Labour Court has awarded the plaintiff only part of the compensation he sought. The Hamburg Higher Labour Court has fully conceded the plaintiff's action for the following reasons.

If an employment contract requires confirmation that the employee is not subject to the provisions of the Severely Disabled Persons Act, this usually constitutes a disadvantage for the applicant / employee!

In the guiding principle to this decision the Hamburg Higher Labour Court clarifies that the wordings in an employment contract like "The employee explains that he is not subject to the regulations of the Severely Disabled Persons Act at the time of the conclusion of the contract." constitutes a discrimination within the meaning of Section 3 (1) sentence 1 AGG if the severe disability cannot have any effect on the activity to be carried out by the employee. Since the defendant had not succeeded in demonstrating in the legal dispute that the rejection of the plaintiff's application was not due to his severe disability and that a severe disability could lead to problems in the performance of the contractually owed work, the Hamburg Higher Labour Court assumed in favour of the plaintiff a violation of the AGG. The fact that the plaintiff worked for several days for trial and the defendant subsequently sent him an employment contract she had already signed played a role that should not be underestimated. So the defendant rejected the plaintiff's application after she learned of the plaintiff's disability. In combination with the aforementioned clause, these facts constituted the relevant reasons for deciding to the detriment of the defendant. In this respect, the Hamburg Higher Labour Court could, in its view, leave open whether employees of the defendant made statements in the context of the application procedure which allow the conclusion that disabled employees are undesired in the defendant's company.

Summary

I have to admit that the decision of the Hamburg Higher Labour Court is not directly related to the problem whether the employer is generally allowed to ask about the existence of a disability in the context of the application procedure. However, this decision has a direct relationship to this problem. Even if the employer does not ask about the disability in the context of the application procedure, but he wishes a

clarification in the draft employment contract submitted by him, the employee is always faced with the same situation which is unfortunate for him. As the Hamburg Higher Labour Court rightly emphasises, he must decide whether to disclose his disability and thus risk not being taken into account or not disclosing his disability and risking consequences under labour law as soon as the employer learns of his disability. Therefore, this decision is a further indication that the Federal Labour Court will consider the question of disability in an application procedure to be inadmissible if certain types of disability do not prevent the fulfilment of the contractual obligations. With the entry into force of the AGG the original basis of argumentation of the Federal Labor Court was withdrawn. The Federal Labour Court considered this question admissible so that the employer could meet its increased welfare obligations. In cases of employment relationships in which disabilities do not affect the activities to be carried out, it should be sufficient for the employer to know about the disability after the disabled employee has been hired. The situation can only be assessed differently if certain impediments stand in the way of the owed activity or make it more difficult to perform the owed activity properly. In such a case, the question of disability should only be admissible if the employer makes the applicant aware of the types of physical restrictions which, in his view, could prevent employment. Because then the employee can understand for which reasons the employer asks this question and he can try to counteract the concerns existing with the employer. Only in this way will the employer be able to provide credible proof that the requirements set out in Section 8 (1) AGG have been met.

We will have to wait to find out whether the Federal Labour Court will follow the line set by various labour courts, including the Hamburg Higher Labour Court. In my view, however, there are no discernible reasons that the Federal Labour Court could still put forward to justify the inadvertant question of the existence of a disability during an application procedure. In my view there are no reasons left that the Federal Labour Court could still put forward to justify questions of the existence of a disability without a reason during an application procedure.

Notwithstanding the above, this decision of the Hamburg Higher Labour Court shows which clauses an employer should avoid in an employment contract he has made available, if he wants to avoid the appearance of a willingness to discriminate the applicant. If, from the employer's point of view, it should be necessary to state that a severe disability precludes the conclusion of the employment contract on non-discriminatory grounds, the relevant reasons shall be set out in the relevant clause. Otherwise, the courts will correctly assume the employer's intention to discriminate the applicant.

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