Commentary

The Berlin-Brandenburg LAG left unanswered the interesting question of whether or not HIV qualifies as a disability under section 1 of the AGG. Nor have the German courts yet determined whether AIDS constitutes a disability, but this would largely depend on the nature of the illnesses suffered as a result of the AIDS virus.

Nevertheless, under German law, being HIV positive is not usually sufficient reason for termination of employment. There are no set causes for termination under German law. The termination of an HIV-positive employee is therefore only lawful in limited situations.

This decision has been quite controversial, as some authors have argued that HIV positive employees should not be excluded from the workplace under any circumstances. However, the court ruled that the employer's interests held sway where the safety and well-being of patients was in question. Only in such circumstances - and with the proviso that the employer also cannot find other suitable work for the employee (here, outside the cleanroom) - should the employer have the right to terminate the contract. It remains to be seen whether or not the Federal Court will uphold this judgment.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): In the Netherlands this question would be approached in the following way:
Step 1: does the plaintiff's HIV qualify as a disability (real or perceived) within the meaning of the AGG and, hence, Directive 2000/78? If not, the claim is to be rejected.
Step 2: if there is a disability, has the plaintiff been discriminated against? The answer depends on whom one takes as a comparator.
Step 3: if the plaintiff has been discriminated against on grounds of disability, is that discrimination direct or indirect?
Step 4: if there is direct discrimination, do any of the statutory exceptions apply?
Step 5: if indirect, is the discrimination objectively justified?
In terms of step 1: I agree with the authors that it is a pity that the court did not address the question of whether HIV qualifies as a disability. A disability within the meaning of Directive 2000/78, as defined by the ECJ in *Navas* (C-13/05), is *"a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"*, provided that it is *"probable that the limitation will last for a long time"*. In other words, there are two elements: (i) long-lasting impairment and (ii) hindrance of participation in professional life (or perception of each of these elements). To my knowledge the ECJ has not yet refined its definition and has not addressed the question of whether a hindrance is absolute or whether it can depend on the person's profession. For example: if an airline pilot's eyesight deteriorates so that he needs to wear glasses (or contact lenses) and he refuses laser treatment, making him unfit to fly, is he "disabled"? Being short-sighted does not hinder his participation in most professions and so the pilot could become a bookkeeper or almost anything else - but it certainly would hinder his professional life as a pilot.
Recently the Dutch Equal Treatment Commission has held that being HIV-positive is a disability within the meaning of the Dutch law transposing Directive 2000/78.
In terms of step 2: The correct comparator, as I see it, is someone identical to the plaintiff with one exception, namely that he is not HIV-positive. Clearly, such a comparator would not have been dismissed and so I find the German judgment surprising. Bearing in mind that the court did not settle the question of whether the plaintiff was disabled – in other words, it did not rule that he was not disabled - how could one say with certainty that this employee, who was dismissed for no other reason than disability, was not treated unfavourably? The court seems to take as a comparator an HIV-positive person who has been employed for more than six months. I find this a strange comparison.

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2012/19

Inviting for job interview by email not discriminatory (CZ)

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Summary

A job applicant was invited for an interview by email, sent less than 24 hours before the planned time of the interview. Because the applicant did not own a computer she read the invitation too late, missed the interview and did not get the job. Did the method of inviting applicants for an interview discriminate on the grounds of "property"? The Supreme Court found that this was not the case, as the employer had no intention to disadvantage applicants without a computer of their own.

Facts

The Czech Ministry of Culture announced on its website a vacancy for the position of Managing Director of the National Heritage Institute. A number of candidates filed an application for this position. One of them was the plaintiff. Although she did not own a computer of her own, she did apply by email, perhaps using a friend's computer or a computer in an Internet café.

On 13 December 2005 the Ministry invited all of the applicants, by email and/or by telephone, for job interviews the next day. In other words, the applicants were given less than 24 hours' notice. Because the plaintiff did not own a computer and did not have all-day access to her email account, she did not read the invitation that was sent to her email address on time. Therefore, she did not attend a job interview.

The Ministry decided to prolong the selection procedure and it placed a second advertisement for the vacancy. The plaintiff was not informed about this despite the Ministry knowing that she had applied in the first round. Nevertheless, she could have applied again, seeing that the advertisement was published both in a newspaper and on the Ministry's website. Be this as it may, the plaintiff did not apply a second time.

The result of the foregoing was that someone else got the job. When the plaintiff protested, she was told that she would not have been selected for the job anyway, as she was clearly a person with "inadequate organisational abilities". The plaintiff experienced this remark as being hurtful of her dignity and self-respect. Moreover, she felt that she had been discriminated on the grounds of "property", as provided in the Act on Employment, arguing that the Ministry's method of selecting applicants disfavoured people like her who are too poor to afford a computer of their own or to have all-day access to the Internet or a personal email account. This alleged discrimination caused the plaintiff to experience loss of dignity for which she demanded monetary compensation.

The plaintiff brought proceedings against the State. The court of first instance dismissed her claim. It reasoned that there had been no discrimination, given that all of the applicants for the vacancy had been treated in the same manner. They had all received less than 24 hours' notice of the job interview. The court of second instance upheld this judgment, adding that the plaintiff had only herself to blame, as she had failed to provide the Ministry with such contact details, e.g. a mobile telephone number, as would enable her to be contacted at short notice. As for the plaintiff's complaint that she had not been invited for the second round of interviews, there was no discrimination either, given that the invitation to apply for this second round had also been published in a newspaper. Thus, the plaintiff could have applied and, in any case, she had not been treated differently than others in this regard.

The plaintiff brought the case to the Supreme Court.

Judgment

The Supreme Court upheld the lower courts' judgments. Although it agreed with the plaintiff that the Ministry had behaved inappropriately by inviting applicants for an interview at less than 24 hours' notice, it held that the Ministry had treated all (potential) applicants in the same manner and that, therefore, it had not discriminated. There would have been discrimination, the Court added, if the Ministry had intentionally disfavoured individuals who do not own a computer or have all-day access to an email account. However, there was no such intent, given that the plaintiff had applied by email without informing the Ministry that she had no computer.

Commentary

Until 31 December 2011 the Czech Republic had (i) a special provision in the Act on Employment that prohibited discrimination on many grounds including "property" and (ii) since 1 September 2009, the Anti-Discrimination Act, which applies to discrimination in general, but prohibits discrimination on more limited grounds, not including "property". As of 1 January 2012 the rules on non-discrimination were removed from the Act on Employment.

As the alleged discrimination in this case occurred before 2012, the plaintiff could invoke both the anti-discrimination rules in the Act on Employment (including the prohibition to discriminate on grounds of property) and the Anti-Discrimination Act.

The Supreme Court does not make a clear distinction between direct and indirect discrimination, but it does so implicitly, where it holds that there would have been discrimination (on grounds of property) if the Ministry had intentionally made application difficult for individuals without a computer.

Although the claim in the case reported above may seem frivolous, the case does illustrates that discrimination claims are on the rise in the Czech Republic. This may be due to the coverage given to discrimination claims (not only in the area of employment) by the media and the heightened awareness of the general public of their rights.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): The TFEU and a number of Directives prohibit discrimination in employment on the grounds of nationality (Article 18 TFEU), gender (Article 157 TFEU and Directive 2006/54), race (Directive 2000/43), religion/belief, disability, age and sexual orientation (Directive 2000/78) and certain categories of employment status, namely posted work (Directive 96/71), part-time work (Directive 97/81), fixed-term work (Directive 99/70) and temporary agency work (Directive 2008/104). I will refer to these grounds as the "express" grounds or strands of discrimination law.

Neither the TFEU nor any Directive prohibits discrimination in employment on what I will refer to as "other" grounds, such as property, size, weight or beauty/ugliness ("lookism"). However, there is softer law, both international (e.g. Article 26 of the BUPO Convention) and European (e.g. Article 14 of the ECHR and Article 21 of the Charter of Fundamental Rights of the European Union), that does outlaw discrimination on other grounds, but the recent ruling in the *Agafitei* case (reported in EELC 2011-3) indicates that the ECJ has no desire to apply that law to non-express forms of discrimination. Therefore, unless the ECJ expands the scope of its *Mangold* doctrine by qualifying other grounds as "general principles of EU law", employees who wish to challenge discriminatory practices that are not expressly prohibited will need to rely on their domestic law.

The national (case) law on discrimination on "other" grounds seems to be different in the various EU Member States. Judging by the rulings of the French Supreme Court reported in EELC 2009/50, 2010/10 and 2010/51, the French doctrine of equality, for example, extends well beyond the express strands of discrimination, *inter alia* requiring managers (*cadre*) and workers (*non-cadre*) to be remunerated equally in the absence of objective justification.

The Czech judgment reported above is an example of national law that prohibits discrimination on at least one "other" ground, namely property. My reading of the judgment is that if the plaintiff had established *prima facie* evidence of differential treatment on the ground of owning/not owning a computer, her claim might have been upheld.

The Dutch Supreme Court seems to be concerned that accepting a "general" equality doctrine, i.e. one not limited to the express strands, would open the gates to a flood of litigation. In a 1994 ruling in the *Agfa - v - Schooldermans* case the Supreme Court referred to *"the generally accepted principle that employees are entitled to fair remuneration, which entails, inter alia, that similar work under similar conditions must be rewarded similarly in the absence of objective justification"*. Ten years later, however, in its 2004 ruling in the *Parallel Entry* case, the Supreme Court was more reluctant. The case concerned airline pilots employed by KLM. Briefly and incompletely stated, pilots who had been employed by KLM for their entire career were paid more than their colleagues who had spent the first part of their career as employees of a subsidiary company of KLM called KLC. A group of former KLC pilots demanded a pay rise, basing their claim on the *Agfa - v - Schooldermans* doctrine. The Supreme Court upheld the lower courts' decisions to turn down the claim. It reasoned that, although the principle of equal payment

as formulated in the *Agfa - v - Schooldermans* case is a fundamentally important principle rooted in international law, it is no more than one of several aspects assessed to determine whether an employer has acted in accordance with the Dutch doctrine of "good employership". It follows, according to the Supreme Court, that an employee can only claim compensation for loss resulting from discrimination on "other" grounds in the event of a gross violation of the said principle (literally: in the event the inequality is "unacceptable" from the point of view of reasonableness and equity). The *Parallel Entry* ruling has dashed the hope of those who advocate a wider scope for anti-discrimination legislation.

Subject: discrimination on grounds of property
Parties: H.P. - v - Czech Republic (Ministry of Culture)
Court: *Nejvyšší soud Ceské republiky* (Supreme Court)
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2012/20

When does fertility treatment begin? (DK)

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Summary

In a recent landmark judgment, the Supreme Court found that an employee who was undergoing initial check-ups before starting fertility treatment was not protected by the prohibition against dismissal on grounds of pregnancy, because she had not begun the fertility treatment.

Facts

Section 9 of the Danish Act on Equal Treatment of Men and Women (the "Act") prohibits employers from dismissing employees for reasons relating to pregnancy, childbirth or adoption or for exercising their parental rights to leave. Under normal circumstances, the protection under the Act commences on the date the employee becomes pregnant, irrespective of whether she or the employer knows about the pregnancy.

In 2003 the Supreme Court established that section 9 of the Act also protects employees from being dismissed for trying to become pregnant through artificial insemination. In the present case, however, the question was whether or not the employee was covered by the protection under this section, since the fertility treatment had not yet begun. The employee was dismissed while undergoing initial check-ups. She had told the employer about her wish to undergo fertility treatment and she claimed that this was the reason for her dismissal.

The employee argued that fertility treatment should be viewed as a whole, to the effect that an employee is protected against dismissal, in the same way as a pregnant employee, i.e. from the moment she knows that she will be going into fertility treatment. The employee admitted that this interpretation of the rules would give women undergoing fertility treatment better protection than women who get pregnant without fertility treatment, since the former would be protected from an earlier stage. Since the purpose of the rules is to prohibit employers from using their knowledge about an employee's wish to become pregnant in a dismissal situation, the employee argued that this difference in protection was well-founded.

The employer argued that it had to dismiss six employees on grounds of shortage of work and that, in making this decision, it had attached great importance to sickness absence. In addition to absence due to the initial check-ups, the employee had had a large number of sick days.

Because of its fundamental nature, the district court referred the case to the High Court. The High Court stated that, at the time of dismissal, the employee's own doctor was doing initial check-ups in order to clarify what kind of fertility treatment the employee should begin. Thus, the actual fertility treatment had not begun at the time of the dismissal. The High Court found in favour of the employer, ruling that situations like these are not covered by the special dismissal protection under the Act, since there is no "actualised possibility" of becoming pregnant. The employee appealed to the Supreme Court.

Judgment

On the same grounds as the High Court, the Supreme Court ruled that although section 9 of the Act protects employees from being dismissed for trying to become pregnant through fertility treatment, the employee in this case was not covered by the dismissal protection under the Act. This is because when she was given notice, she was only undergoing initial check-ups and had not begun fertility treatment. The Supreme Court also emphasised that there was no "actualised possibility" of becoming pregnant.

Like the High Court, the Supreme Court believed that there was no basis for establishing that, in deciding to dismiss the employee, the employer had fallen foul of the prohibition against gender discrimination set out in section 4 of the Act. Therefore, the Supreme Court was satisfied that the dismissal was justified by operational reasons. The appeal was dismissed.

Commentary

In 2008, the European Court of Justice ruled in the *Sabine Mayr* case (C-506/06) that an Austrian employee was not protected against dismissal at a time when her eggs had been fertilised *in vitro*. The ruling was based on the fact that the eggs had not yet been implanted in her uterus.

In the Danish case, the employee argued that the EU directives are minimal directives and that the Danish legislature has introduced stronger protection than that provided in the *Sabine Mayr* case. Unfortunately, the Supreme Court did not address the issue of whether the protection against dismissal is triggered at an earlier stage in Denmark than in Austria. The answer depends on how the expression "actualised possibility" is to be interpreted. It is not clear whether it will be deemed an actualised possibility if the employee has *in vitro* fertilised eggs that are still not implanted in her uterus – as was the case for *Sabine Mayr*. It seems most likely that the Danish implementation of the EU Directive in question is a minimal implementation.