Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 12 January 2012 [1]

Case C-415/10

Galina Meister
v
Speech Design Carrier Systems GmbH

(Reference for a preliminary ruling from the Bundesarbeitsgericht (Germany))

(Social policy — Equal treatment in employment and occupation — Burden of proof — Right of a person whose application for a job in a private company was unsuccessful to receive full information concerning the selection procedure in order to be able to prove discrimination — Fact giving rise to a presumption that discrimination exists — Legal consequences linked to the employer's failure to provide information)

1. Discrimination has the reputation of being particularly hard to substantiate. This is even truer in respect of discrimination in employment. Aware of this problem, the European Union legislature has adopted measures to assist applicants claiming to be victims of discrimination on the grounds of, in particular, sex, age or origin. The European Union legislature has thus provided for a shift in the burden of proof, without, however, going so far as to uphold its complete reversal since the long-standing freedom of employers to recruit the people of their choice must not be completely disregarded.

2. This reference for a preliminary ruling, from Germany, presents the Court with a thorny question: how can a job applicant enforce observance of the principle of equal treatment when his application for a job was rejected by the employer who failed to provide any information whatsoever as to why the application was unsuccessful or in respect of the recruitment procedure and its outcome.

I – Legal context

A – *European Union ('EU') Law*

3. The purpose of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2] is to combat discrimination on the grounds of racial or ethnic origin.

1 — Original language: French.
2 — OJ 2000 L 180, p. 22.

4. Article 8 of Directive 2000/43 governs the burden of proof. Article 8(1) provides that 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment'.

5. The purpose of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation,[3] is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect, in the Member States, the principle of equal treatment.

6. Article 10 of Directive 2000/78 governs the burden of proof. Paragraph 1 of Article 10 reproduces verbatim the content of Article 8(1) of Directive 2000/43.

7. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation,[4] provides, in Article 19(1), governing the burden of proof, that 'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment'.

B – *German law*

8. The General Law on equal treatment (Allgemeines Gleichbehandlungsgesetz) ('the AGG') has the objective, as set out in Article 1, of preventing any worker from suffering discrimination on the grounds of race, ethnic origin, sex, religion or belief, disability, age or sexual orientation. Within the meaning of that law, an applicant for an employment relationship is considered to be a worker.[5] In addition, Article 22 of the AGG provides, with regard to the burden of proof, that 'where, in the event of conflict, one of the parties is able to establish factual evidence from which it may be presumed that there has been discrimination on one of the grounds referred to in Article 1, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination'.

II – The dispute in the main proceedings and the questions referred for a preliminary ruling

9. Ms Meister, a Russian national, was born in 1961. She holds a Russian degree in systems engineering, the equivalence of which to a German degree awarded by a technical college has been recognised by the Land of Schleswig-Holstein.

10. Speech Design Carrier Systems GmbH ('Speech Design') published a newspaper advertisement in 2006 for the purposes of recruiting 'an experienced software developer'. Ms Meister applied to the advertisement on 5 October 2006 but her application was rejected by letter dated 11 October 2006 from Speech Design. Not long afterwards, Speech Design published an advertisement on the internet with the same content. Ms Meister re-applied for the job on 19 October 2006 but Speech Design again rejected her application without inviting her for an interview or providing her with information on what ground her application was unsuccessful.

3 — OJ 2000 L 303, p. 16.

4 — OJ 2006 L 204, p. 23.

5 — Article 6 of the AGG.

11. Believing that she had been the victim of discrimination on the grounds of her sex, origin and age, Ms Meister brought proceedings and sought, under Article 15 of the AGG, financial compensation. She also requested that Speech Design produce, in order to clarify the facts, the file for the person who was engaged in response to the advertisement.

12. Having held that Ms Meister had not submitted sufficient evidence, in accordance with Article 22 of the AGG, to support a presumption of discrimination, both the court at first instance and the court of appeal dismissed Ms Meister's claim for compensation brought before them. Ms Meister therefore brought an action for review before the Bundesarbeitsgericht (Federal Labour Court) (Germany). Speech Design contends that the action should be dismissed for not being adequately substantiated, as the applicant has not submitted sufficient evidence to support a presumption of discrimination.

13. The referring court acknowledges that the applicant in the main proceedings has clearly suffered, in accordance with national law, less favourable treatment than other persons in a comparable situation since she was not called for a job interview by the employer, unlike other persons who also submitted an application to Speech Design. However, the referring court also notes that Ms Meister has not been able to establish that it was on the grounds of her sex, age or ethnic origin that she suffered less favourable treatment. The referring court adds that German law requires the applicant who alleges discrimination to establish the facts and to produce evidence, and not just mere allegations, to support a presumption of discrimination. That is particularly the case if, on an objective view, the facts submitted support the inference that it is highly likely that there was discrimination on one of the abovementioned grounds.

14. Pursuant to the relevant provisions of the AGG, and in particular Article 22 the objective of which is to transpose Article 8 of Directive 2000/43 and Article 10 of Directive 2000/78 into German law, the referring court states that a candidate who considers that he has been discriminated against on the grounds of his sex, age and/or ethnic origin does not meet his obligation to adduce evidence merely by submitting that he had applied for the job, that his application had been unsuccessful and that he fits the required profile set out in the advertisement, doing no more than mentioning his sex, age and origin. Ms Meister should thus give more details of the circumstances on the basis of which it could be possible to establish, to a high degree of probability, the reasons for the discriminatory treatment, as the fact that she was not called for a job interview may be explained by many other factors. She is also required, pursuant to Article 22 of the AGG, to adduce evidence. However, the failure of the employer to provide information when rejecting the application is precisely the reason why she is unable to fulfil that obligation. The referring court therefore asks whether Directives 2000/43, 2000/78 and 2006/54 provide for a right to information enabling an unsuccessful job applicant to force the employer to tell him whom he has engaged and for what reasons.

15. Finding that it was faced with a difficulty in interpreting European Union law, the Bundesarbeitsgericht decided to stay the proceedings and, by a decision received by the Court on 20 August 2010, decided to refer the two following questions to the Court for a preliminary ruling on the basis of Article 267 TFEU:

'(1)Are Article 19(1) of Directive 2006/54 …, Article 8(1) of … Directive 2000/43 and Article 10(1) of … Directive 2000/78 … to be interpreted as meaning that, where a worker shows that he meets the requirements for a post advertised by an employer, he has a right vis-à-vis that employer, if he does not obtain the post, to information as to whether the employer has engaged another applicant and, if so, as to the criteria on the basis of which that appointment has been made?

(2)If the answer to the first question is affirmative[, w]here the employer does not disclose the requested information, does that fact give rise to a presumption that the discrimination alleged by the worker exists?'

III – Procedure before the Court of Justice

16. The applicant in the main proceedings, Speech Design, the German Government and the European Commission lodged written observations with the Court.

17. The defendant in the main proceedings, the German Government and the Commission presented oral submissions at the hearing on 30 November 2011.

IV – Legal analysis

A – *The first question referred*

18. By its first question, the referring court asks whether a job applicant who shows that he fits the required profile set out in the advertisement published by the employer has a right vis-à-vis that employer, if his application was unsuccessful and he was not called for a job interview, to information as to which applicant was successful and, in particular, as to the criteria on the basis of which that appointment has been made.

19. In so far as the applicant in the main proceedings claims to have suffered discrimination on the grounds of her sex, age or origin, the first question refers to the relevant provisions of Directives 2000/43, 2000/78 and 2006/45 [6] the scope of which includes conditions of access to employment. [7] Article 8(1) of Directive 2000/43, Article 10(1) of Directive 2000/78 and Article 19(1) of Directive 2006/54 are worded in virtually identical terms and subject cases of discrimination to the same legal rules in respect of the burden of proof.

20. It must also be noted that those articles are worded in terms almost, [8] or indeed, identical [9] to Article 4(1) of Directive 97/80. However, the Court has already been called on to rule on the interpretation of Article 4(1) of Directive 97/80 in *Kelly*. [10] In that case, Mr Kelly submitted an application seeking admission to a Master's degree in Social Science offered by an Irish university. His application was unsuccessful. Mr Kelly claimed to have suffered discrimination on the grounds of sex, prohibited by Article 4(1) of Directive 97/80, and requested copies of the retained applications, copies of the documents appended to or included with those applications, and copies of the scoring sheets of the candidates whose application forms had been retained. The Court ruled that that article 'must be interpreted as meaning that it does not entitle an applicant for vocational training, who believes that his application was not accepted because of an infringement of the principle of equal treatment, to information held by the course provider on the qualifications of the other applicants for the course in question, in order that he may establish "facts from which it may be presumed that there has been direct or indirect discrimination" in accordance with that provision'. [11]

21. It must be stated that there is nothing in the wording or spirit of Article 8(1) of Directive 2000/43, Article 10(1) of Directive 2000/78 and Article 19(1) of Directive 2006/54 to rebut that decision. Indeed, their wording does not once expressly refer to a right to information held by the person 'suspected' of discrimination. For the most part, the interested parties who have lodged written observations noted

6 — Pursuant to Directive 2006/45, it is true that the events in the main proceedings occurred under Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex (OJ 1998 L 14, p. 6). Directive 2006/54 replaced Directive 97/80 during the main proceedings. That being so, Directive 2006/54 did not introduce any changes of substance with regard to the burden of proof.

7 — See Article 3(1)(a) of Directive 2000/43, Article 13(1)(a) of Directive 2000/78 and Articles 1(2)(a) and 14(1)(a) of Directive 2006/54.

8 — The wording of Article 8(1) of Directive 2000/43 and Article 10(1) of Directive 2000/78 only differs to that of Article 4 of Directive 97/80 in relation to the position of the phrase 'in accordance with their national judicial systems'.

9 — Article 19(1) of Directive 2006/54.

10 — Case C-104/10 *Kelly* [2011] ECR I-6813.

11 — *Kelly*, paragraph 38.

that, while the Commission tabled a proposal intended to establish a right to information for victims of discrimination, [12] such a proposal has never been adopted in the final texts. In those circumstances, the absence of an express reference to a right to information in the aforementioned provisions must be interpreted, not as an oversight on the part of the legislature but, on the contrary, as the manifestation of its intention not to affirm such a right.

22. It is also apparent from the overall scheme of those provisions that the choice made by the legislature was clearly that of maintaining a balance between the victim of discrimination and the employer, when the latter is the source of the discrimination. Indeed, with regard to the burden of proof, those three directives opted for a mechanism making it possible to lighten, though not remove, that burden on the victim. In other words, as the Court has already held in its judgment in Kelly, [13] the mechanism consists of two stages. First of all, the victim must sufficiently establish the facts from which it may be presumed that there has been discrimination. In other words, the victim must establish a *prima facie* case of discrimination. Next, if that presumption is established, the burden of proof thereafter lies on the defendant. Central to the provisions referred to in the first question referred for a preliminary ruling is therefore the *burden* of proof that, although somewhat reduced, nevertheless falls on the victim. A measure of balance is therefore maintained, enabling the victim to claim his right to equal treatment but preventing proceedings from being brought against the defendant solely on the basis of the victim's assertions.

23. Upsetting that balance between the person who claims to have suffered discrimination and the defendant would not be the only risk involved were a right to information for victims to be recognised. [14] Indeed, such a case also raises the question of rights of any third parties referred to in the documents or information submitted. [15]

24. In the light of the foregoing, I propose that the answer to the first question should be that Article 8(1) of Directive 2000/43, Article 10(1) of Directive 2000/78, and Article 19(1) of Directive 2006/54 are not to be interpreted as meaning that a job applicant must, if his application was unsuccessful, be able to force the employer to tell him whether, and on the basis of what criteria, he has engaged another applicant, even if it transpires that the unsuccessful applicant shows that he fits the required profile set out in the advertisement published by the employer.

B – *The second question referred*

1. Preliminary observations

25. It is apparent from the reference for a preliminary ruling that the questions are worded in such a way that the Court need answer the second question only in the case of the first question's being answered in the affirmative. However, as stated above, I propose that the Court should reply in the negative to the first question.

12 — See Article 4(b) of the Proposal for a Council Directive on the burden of proof in the area of equal pay and equal treatment for women and men (COM(88) 269 final) submitted by the Commission on 27 May 1988 (OJ 1988 C 176, p. 5). That proposal was withdrawn by the Commission in 1998 (OJ 1998 C 40, p. 7).

13 — *Kelly*, paragraph 30.

14 — It should be noted that the legislature has acknowledged that that balance is upset, but in favour of the applicant only, since those three directives do not prevent Member States from introducing rules of evidence more favourable to plaintiffs (see Article 8(2) of Directive 2000/43, Article 10(2) of Directive 2000/78 and Article 19(2) of Directive 2006/54). Nevertheless, upsetting that balance is a matter of the Member States' own volition alone. It is apparent from the file that the Federal Republic of Germany did not introduce rules of evidence more favourable to plaintiffs when transposing the three directives at issue in this reference for a preliminary ruling.

15 — The Court has also recognised that, where an applicant for vocational training can rely on Directive 97/80 in order to obtain access to information held by the course provider on the qualifications of the other applicants for the course in question, that entitlement to access can be affected by rules of European Union law relating to confidentiality (*Kelly*, paragraph 56).

26. However, if the Court were to adhere to the wording of the questions, the consequences which would result therefrom would be the following, that is to say, that Ms Meister could not claim any right to information on the basis of the three directives at the heart of this reference for a preliminary ruling. Without the information that only the employer holds, Ms Meister would be unable to provide the referring court with the facts from which it may be presumed that there has been discrimination and would, moreover, never be able to, as she would not have a right to information. If the Court did not pursue the analysis further, it would be the effectiveness of the directives combating discrimination in employment that could well be nullified.

27. It could, however, be objected that it is for the referring court alone to establish whether a fact alleged by a victim is sufficient to infer that there has been discrimination [16]. Nevertheless, I note that the Court has, in the past, already made such a classification [17] and that, in addition, the Court has, in the present case, been explicitly asked by the referring court to determine whether the employer's silence constitutes a fact from which it may be presumed that there has been discrimination, as alleged by the employee. It is clear, moreover, from the spirit underlying the preliminary reference procedure that the Court must provide the referring court with all information of use in order to give judgment in the case in the main proceedings and the Court 'may provide guidance based on the documents relating to the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment in the particular case before it'. [18]

28. That spirit of cooperation that the Court must show towards the referring court is also the reason why I suggest reformulating the second question as seeking to determine whether the employer's failure to disclose the information requested by the job applicant must, in all cases, be considered irrelevant with regard to a presumption of discrimination under Article 8(1) of Directive 2000/43, Article 10(1) of Directive 2000/78 and Article 19(1) of Directive 2006/54.

29. I therefore propose that the Court should reflect further on the legal consequences of the employer's silence in a case such as that in the main proceedings.

2. Appraisal

30. The second question therefore seeks to ask the Court about the method to be followed by the referring court when assessing, in the light of the three directives central to this reference for a preliminary ruling, the attitude of an employer who does not respond to the request for information by a job applicant. In that regard, the Court, in *Kelly*, after refusing to endorse the existence of a right to information, nevertheless held that 'it cannot be ruled out that a refusal of disclosure by the [employer], in the context of establishing [facts from which it may be presumed that there has been discrimination], could risk compromising the achievement of the objective pursued' [19] by the directives on equal treatment and thus depriving the provisions concerning the burden of proof, in particular, of their effectiveness.

31. In so holding, the Court unequivocally stated that it is necessary, from a methodological point of view, to assess the attitude of the employer by considering not only his failure to respond but also by taking account of the wider factual context in which that occurred. In this reference for a preliminary ruling, the Court was specifically asked to assist the referring court in deciding what facts may be taken into account in order to carry out the assessment necessary in the present case.

16 — See recital 15 in the preamble to Directive 2000/43, recital 15 in the preamble to Directive 2000/78 and recital 30 in the preamble to Directive 2006/54. See, also, Case C-381/99 *Brunnhofer* [2001] ECR I-4961, paragraph 49).

17 — See, in particular, concerning the question whether public statements by which an employer lets it be known that it will not recruit any employees of a certain ethnic or racial origin constitute a fact within the meaning of Article 8(1) of Directive 2000/43 (see Case C-54/07 *Feryn* [2008] ECR I-5187, paragraphs 30 and 34).

18 — Case C-464/10 *Henfling and Others* [2011] ECR I-6219, paragraph 41 and the case-law cited.

19 — *Kelly*, paragraph 39.

32. In that regard, the referring court must not overlook the fact that, given that the employer refused to disclose information, it is not unlikely that that employer can, in that way, make his decisions virtually unchallengeable. In other words, the employer continues to keep in his sole possession the evidence upon which ultimately depend the substance of an action brought by the unsuccessful job applicant and, therefore, its prospects of success. In the context of a recruitment procedure, it should also be borne in mind that the position of the applicant — inevitably external to the undertaking in question — makes obtaining evidence or facts from which it may be presumed that there has been discrimination even more difficult than if the applicant sought to prove that the employer applies discriminatory measures in respect of conditions of employees' pay, for example.[20] The job applicant is therefore entirely dependent on the good will of the employer with regard to obtaining information capable of constituting facts from which it may be presumed that there has been discrimination and may experience genuine difficulty in obtaining such information which is, nevertheless, essential in order to trigger the lightening of the burden of proof. In that regard, I would point out that the solutions mooted by the German Government at the hearing to the effect that the job applicant should, on her own initiative, obtain information, appeared unconvincing. Indeed, a requirement that a candidate must contact the company's workers' council directly or even go, at the moment of taking up the post, to the work place in order to record, by 'category', the employees present would be particularly hypothetical and, ultimately, unreasonable in so far as, first, not all employers have a workers' council and, second, not all characteristics which may form the basis of one of the grounds of discrimination are necessarily identifiable by observation alone.

33. Where a job applicant appears to be entirely dependent on the good will of the employer with regard to obtaining information capable of constituting facts from which it may be presumed that there has been discrimination, the balance between the freedom of employers to recruit the people of their choice and the rights of job applicants, to which the EU legislature has attached special significance, would therefore seem to have been upset.

34. Faced with such circumstances, in order to restore that balance national courts must, in general, adopt a lower level of requirement than, for example, that which would be required when determining a high degree of likelihood such as that mentioned in the grounds of the order for reference, in relation to the characterisation of those facts that make possible a presumption of discrimination, for the purpose of the three directives referred to in this reference for a preliminary ruling, in particular so that the rights conferred on individuals by EU law may be efficaciously guaranteed and given effective judicial protection. An employer's refusal to disclose information may well, in the particular context of the case, jeopardise the attainment of the objective pursued by those directives,[21] which is to be found in the effective implementation of the principle of equal treatment.

35. For the purpose of the assessment to be carried out in order to follow the method suggested in *Kelly*, the referring court must not overlook important evidence such as that in the present case deriving from, first, the fact that, as is apparent from the documents before the Court, the applicant's qualifications match the post to be filled is not disputed by the employer even though the latter did not wish to call Ms Meister for a job interview, despite the fact that he called other applicants to such an interview, and, second, the fact that Ms Meister responded to the publication of a job vacancy and did not submit a spontaneous application. For the sake of clarity, the refusal of disclosure by the employer must be assessed differently, in the light of Article 8(1) of Directive 2000/43, Article 10(1) of Directive 2000/78 and Article 19(1) of Directive 2006/54, where the applicant clearly does not fit the required profile, has been called for an interview or submitted a spontaneous application.

20 — Even in those circumstances, discrimination may be difficult to prove. However, in accordance with settled case-law, where an undertaking applies a system of pay which is wholly lacking in transparency, and which therefore makes the applicant's task more difficult, it is for the employer to prove that his practice in the matter of wages is not discriminatory if a female worker who claims to be the victim of discrimination establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men (see, in an extensive body of case-law, *Brunnhofer*, paragraph 54 and the case-law cited).

21 — See, by analogy, *Kelly*, paragraph 34.

36. A third factor might also be considered. The reference for a preliminary ruling indicates that, first, the defendant in the main proceedings rejected the applicant's application by letter dated 11 October 2006 and, second, after the defendant had published a new advertisement on the internet with the same content, the applicant re-applied for the job on 19 October 2006 but her application was once again rejected without her being invited for an interview. When asked at the hearing about the reasons for publishing that second advertisement, the representative of the defendant in the main proceedings was unable to explain clearly the chronology of the recruitment process. It is for the referring court to establish whether publication of the second advertisement was due to the fact that the employer was dissatisfied with the applicants called for interview following the first advertisement and whether, notwithstanding this, the employer continued to reject Ms Meister's application, without calling her for interview, even though not disputing that her qualifications match the post to be filled.

37. In direct line with the method suggested by the Court in *Kelly*, I propose that the answer to the second question should be that, under Article 8(1) of Directive 2000/43, Article 10(1) of Directive 2000/78 and Article 19(1) of Directive 2006/54, the referring court must assess the attitude of an employer, consisting in a refusal to disclose the information requested by the unsuccessful job applicant as to the outcome of the recruitment process and as to the criteria on the basis of which one of the applicants has been engaged, not only by considering the failure of the employer to respond but, on the contrary, also by taking account of the wider factual context in which that occurred. In that regard, the referring court may also take into account such evidence as the fact that the applicant's qualifications clearly match the post to be filled, the failure to call her for a job interview and the fact that the employer persisted in refusing to call her for an interview when he ought to have conducted a second selection process for that same job vacancy.

V – Conclusion

38. In the light of all the foregoing considerations, I propose that the Court's answer to the two questions referred for a preliminary ruling by the Bundesarbeitsgericht should be as follows:

(1) Article 8(1) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, Article 10(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, and Article 19(1) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation are not to be interpreted as meaning that a job applicant must, if his application was unsuccessful, be able to force the employer to tell him whether, and on the basis of what criteria, that employer has engaged another applicant, and, if so, for what reasons, even if it transpires that the unsuccessful applicant shows that he fits the required profile set out in the advertisement published by the employer.

(2) Under Article 8(1) of Directive 2000/43, Article 10(1) of Directive 2000/78 and Article 19(1) of Directive 2006/54, the referring court must assess the attitude of an employer, consisting in a refusal to disclose the information requested by the unsuccessful job applicant as to the outcome of the recruitment process and as to the criteria on the basis of which one of the applicants has been engaged, not only by considering the failure of the employer to respond but, on the contrary, also by taking account of the wider factual context in which that occurred. In that regard, the referring court may also take into account such evidence as the fact that the applicant's qualifications clearly match the post to be filled, the failure to call her for a job interview and the fact that the employer persisted in refusing to call her for an interview where he ought to have conducted a second selection process for that same job vacancy.