Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

19 April 2012*

(Directives 2000/43/EC, 2000/78/EC and 2006/54/EC — Equal treatment in employment and occupation — Worker showing that he meets the requirements listed in a job advertisement — Right of that worker to have access to information indicating whether the employer has recruited another applicant)

In Case C-415/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Bundesarbeitsgericht (Germany), made by decision of 20 May 2010, received at the Court on 20 August 2010, in the proceedings

Galina Meister

v

Speech Design Carrier Systems GmbH,

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Lõhmus, A. Rosas (Rapporteur), A. Arabadjiev and C.G. Fernlund, Judges,

Advocate General: P. Mengozzi,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 30 November 2011,

after considering the observations submitted on behalf of:

— Galina Meister, by R. Wißbar, Rechtsanwalt,

— Speech Design Carrier Systems GmbH, by U. Kappelhoff, Rechtsanwältin,

— the German Government, by T. Henze and J. Möller, acting as Agents,

— the European Commission, by V. Kreuschitz, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 12 January 2012,

gives the following

* Language of the case: German.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of 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 (OJ 2000 L 180, p. 22), Article 10(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16) 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 (OJ 2006 L 204, p. 23).

2 The reference has been made in proceedings between Ms Meister and Speech Design Carrier Systems GMbH ('Speech Design') concerning the discrimination on the grounds of sex, age and ethnic origin that she claims to have suffered during a recruitment procedure.

Legal context

European Union legislation

Directive 2000/43

3 Recital 15 in the preamble to Directive 2000/43 states that '[t]he appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence'.

4 Under Recital 21 of that directive, '[t]he rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought.'

5 Under Article 1 of the directive:

'The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.'

6 Article 3(1) of the same directive provides:

'Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

…'

7 Article 7(1) of Directive 2000/43 provides:

'Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of the obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.'

8 Article 8 of that directive, entitled ‘Burden of proof’, is worded as follows:

‘1. 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.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 7(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or other competent authority to investigate the facts of the case.’

Directive 2000/78

9 Recital 15 in the preamble to Directive 2000/78 states that ‘[t]he appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide in particular for indirect discrimination to be established by any means including on the basis of statistical evidence’.

10 Recital 31 of that directive states that ‘[t]he rules on the burden of proof must be adapted when there is a prima facie case of discrimination and, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought. However, it is not for the respondent to prove that the plaintiff adheres to a particular religion or belief, has a particular disability, is of a particular age or has a particular sexual orientation’.

11 Under Article 1 of the directive:

‘The purpose of this Directive 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’.

12 Article 3(1) of the same directive provides:

‘Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

…’

13 Article 9(1) of Directive 2000/78 provides:

‘Member States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of the obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.’

14 Article 10 of the directive, entitled ‘Burden of proof’, states:

‘1. 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.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence, which are more favourable to plaintiffs.

3. Paragraph 1 shall not apply to criminal procedures.

4. Paragraphs 1, 2 and 3 shall also apply to any proceedings brought in accordance with Article 9(2).

5. Member States need not apply paragraph 1 to proceedings in which it is for the court or other competent authority to investigate the facts of the case.’

Directive 2006/54

15 Recital 30 in the preamble to Directive 2006/54 is worded as follows:

‘The adoption of rules on the burden of proof plays a significant role in ensuring that the principle of equal treatment can be effectively enforced. As the Court of Justice has held, provision should therefore be made to ensure that the burden of proof shifts to the respondent when there is a prima facie case of discrimination, except in relation to proceedings in which it is for the court or other competent national body to investigate the facts. It is however necessary to clarify that the appreciation of the facts from which it may be presumed that there has been direct or indirect discrimination remains a matter for the relevant national body in accordance with national law or practice. Further, it is for the Member States to introduce, at any appropriate stage of the proceedings, rules of evidence which are more favourable to plaintiffs.’

16 Under Article 1 of that directive:

‘The purpose of this Directive is to ensure the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

To that end, it contains provisions to implement the principle of equal treatment in relation to:

(a) access to employment, including promotion, and to vocational training;

…’

17 Article 14(1) of the same directive states:

‘There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

…’

18 Article 17(1) of Directive 2006/54 provides:

‘Member States shall ensure that, after possible recourse to other competent authorities including where they deem it appropriate conciliation procedures, judicial procedures for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.’

19 Article 19 of that directive, entitled ‘Burden of proof’, is worded as follows:

‘1. 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.

2. Paragraph 1 shall not prevent Member States from introducing rules of evidence which are more favourable to plaintiffs.

3. Member States need not apply paragraph 1 to proceedings in which it is for the court or competent body to investigate the facts of the case.

4. Paragraphs 1, 2 and 3 shall also apply to:

(a) the situations covered by Article 141 of the [EC] Treaty and, insofar as discrimination based on sex is concerned, by Directives 92/85/EEC and 96/34/EC;

(b) any civil or administrative procedure concerning the public or private sector which provides for means of redress under national law pursuant to the measures referred to in (a) with the exception of out-of-court procedures of a voluntary nature or provided for in national law.

5. This article shall not apply to criminal procedures, unless otherwise provided by the Member States.’

National legislation

20 Paragraph 1 of the General Law on equal treatment (Allgemeines Gleichbehandlungsgesetz), of 14 August 2006 (BGBl. 2006 I, p. 1897), in the version applicable at the material time (‘the AGG’), is worded as follows:

‘The purpose of this Law is to prevent or to eliminate discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age or sexual orientation.’

21 Under Paragraph 3(1) of the AGG:

‘Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Paragraph 1. Direct discrimination on the ground of sex shall also be taken to occur within the meaning of Paragraph 2(1) Nos 1 to 4 where a woman is treated less favourably on account of pregnancy or maternity.’

22 Paragraph 6(1) of the AGG states:

‘For the purposes of this Law, “worker” means:

1. persons in salaried employment;

2. persons employed for the purposes of their vocational training;

3. persons of similar status to salaried persons on account of their dependent economic status, including those who work from home and those comparable to persons who work from home.

"Worker" shall also refer to job applicants and persons whose employment relationship has ended.'

23 Under Paragraph 7(1) of AGG workers must not suffer discrimination on any of the grounds referred to in Paragraph 1. That prohibition also applies where the person responsible for the discrimination merely assumes, when exercising the discrimination, that one of the grounds given in Paragraph 1 exists.

24 Under Paragraph 15(2) of the AGG:

'The worker may claim appropriate financial compensation for non-pecuniary damage. In the event of non-recruitment, the compensation shall not exceed three months' salary if the worker would not have been recruited even if the selection had been free from discrimination.'

25 Paragraph 22 of the AGG provides:

'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 Paragraph 1, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination.'

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

26 Ms Meister, a Russian national, was born on 7 September 1961. She holds a Russian degree in systems engineering, the equivalence of which to a German degree awarded by a Fachhochschule (university of applied science) has been recognised in Germany.

27 Speech Design published a newspaper advertisement for the purposes of recruiting an 'experienced software developer', to which Ms Meister responded by applying for the post on 5 October 2006. By a letter of 11 October 2006, Speech Design rejected her application without inviting her to a job interview. Not long afterwards, a second advertisement, with the same content as the first, was published by that company on the internet. On 19 October 2006 Ms Meister reapplied, but Speech Design once again rejected her application, without inviting her to an interview and without telling her on what ground her application was unsuccessful.

28 There is nothing in the file before the Court to suggest that Speech Design claimed that Ms Meister's level of expertise did not correspond to that sought in that recruitment process.

29 Being of the view that she met the requirements of the post in question, Ms Meister considered that she suffered less favourable treatment than another person in a comparable situation, on the grounds of her sex, age and ethnic origin. She therefore brought an action against Speech Design before the Arbeitsgericht (Labour Court), seeking, first, compensation from that company for employment discrimination and, secondly, the production of the file for the person who was engaged, which would enable her to prove that she is more qualified than that person.

30 As Ms Meister's action was dismissed at first instance, she brought an appeal against that judgment before the Landesarbeitsgericht (Higher Labour Court) which also dismissed her appeal. She brought an appeal on a point of law before the Bundesarbeitsgericht (Federal Labour Court). That court questions whether Ms Meister can claim a right to information on the basis of Directives 2000/43, 2000/78 and 2006/54 and, if so, what are the consequences of a refusal of disclosure by Speech Design.

31 In those circumstances, the Bundesarbeitsgericht decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘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:

Where the employer does not disclose the requested information, does that fact give rise to a presumption that the discrimination alleged by the worker exists?’

Consideration of the questions referred

The first question

32 By its first question, the referring court asks, in essence, whether Article 8(1) of Directive 2000/43, Article 10(1) of Directive 2000/78 and Article 19(1) of Directive 2006/54 must be interpreted as entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process and, if so, on the basis of which criteria.

33 At the outset, it should be recalled that it follows from Article 3(1)(a) of Directive 2000/43, Article 3(1)(a) of Directive 2000/78 and indent (a) of the second subparagraph of Article 1 and Article 14(1)(a) of Directive 2006/54 that those directives apply to a person seeking employment, and also in regard to the selection criteria and recruitment conditions of that employment.

34 Those same directives provide, in essence, in Article 8(1) of Directive 2000/43, Article 10(1) of Directive 2000/78 and Article 19(1) of Directive 2006/54, that the Member States are to 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 is for the respondent to prove that there has been no breach of that principle.

35 It should be noted that the wording of those provisions is almost identical to that of Article 4(1) of 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), a provision which the Court has interpreted, in particular in Case C-104/10 *Kelly* [2011] ECR I-6813. Article 4(1), which was repealed by Directive 2006/54 with effect from 15 August 2009, along with Directive 97/80 in its entirety, made cases of discrimination on the grounds of sex subject to the same legal rules on the burden of proof as the directives in question in the main proceedings.

36 Interpreting Article 4(1) of Directive 97/80 in *Kelly*, the Court held in paragraph 30 of the judgment that it is the person who considers himself to have been wronged because the principle of equal treatment has not been applied to him who must initially establish the facts from which it may be presumed that there has been direct or indirect discrimination. It is only where that person has established such facts that it is then for the defendant to prove that there has been no breach of the principle of non-discrimination.

37 The Court also held that the assessment of the facts from which it may be presumed that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with national law or practice (*Kelly*, paragraph 31), as stated in Recital 15 of Directives 2000/43 and 2000/78 and Recital 30 of Directive 2006/54.

38 Moreover, the Court stated that Directive 97/80, pursuant to Article 1 thereof, seeks to ensure that the measures taken by the Member States to implement the principle of equal treatment are made more effective, in order to enable all persons who consider themselves wronged because the principle of equal treatment has not been applied to them to have their rights asserted by judicial process after possible recourse to other competent bodies (*Kelly*, paragraph 33). In that regard, it should be noted that Article 7(1) of Directive 2000/43, Article 9(1) of Directive 2000/78 and Article 17(1) of Directive 2006/54 refer to the same principle.

39 In those circumstances the Court concluded, at paragraph 34 of *Kelly,* that although Article 4(1) of that Directive 97/80 does not specifically entitle persons who consider themselves wronged because the principle of equal treatment has not been correctly applied to them to information in order that they may establish 'facts from which it may be presumed that there has been direct or indirect discrimination' in accordance with that provision, it is not however inconceivable that a refusal of disclosure by the defendant, in the context of establishing such facts, is liable to compromise the achievement of the objective pursued by that directive and, in particular to deprive that provision of its effectiveness.

40 As was noted at paragraph 35 of the present judgment, Directive 97/80 was repealed and replaced by Directive 2006/54. However, having regard to the wording and scheme of the articles concerned by the present reference for a preliminary ruling, there is nothing to suggest that, in adopting Directives 2000/43, 2000/78 and 2006/54, the European Union legislator intended to amend the rules on the burden of proof established by Article 4(1) of Directive 97/80. Consequently, in the context of establishing the facts from which it may be presumed that there has been direct or indirect discrimination, it must be ensured that a refusal of disclosure by the defendant is not liable to compromise the achievement of the objectives pursued by Directives 2000/43, 2000/78 and 2006/54.

41 According to the wording of the second and third subparagraphs respectively of Article 4(3) TEU, the Member States inter alia 'shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union' and 'shall … refrain from any measure which could jeopardise the attainment of the Union's objectives', including those pursued by directives (see Case C-61/11 PPU *El Dridi* [2011] ECR I-3015, paragraph 56, and *Kelly*, paragraph 36).

42 Therefore, it is for the referring court to ensure that the refusal of disclosure by Speech Design, in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination against Ms Meister, is not liable to compromise the achievement of the objectives pursued by Directives 2000/43, 2000/78 and 2006/54. It must, in particular, take account of all the circumstances of the main proceedings, in order to determine whether there is sufficient evidence for a finding that the facts from which it may be presumed that there has been such discrimination have been established.

43 In that regard, it should be recalled that, as is clear from Recital 15 of Directives 2000/43 and 2000/78 and Recital 30 of Directive 2006/54, national law or the national practices of the Member States may provide, in particular, that indirect discrimination may be established by any means including on the basis of statistical evidence.

44 Among the factors which may be taken into account is, in particular, the fact that, unlike in *Kelly,* the employer in question in the main proceedings seems to have refused Ms Meister any access to the information that she seeks to have disclosed.

45 Moreover, as the Advocate General noted in paragraphs 35 to 37 of his Opinion, account can also be taken of, in particular, the fact that Speech Design does not dispute that Ms Meister's level of expertise matches that referred to in the job advertisement, as well as the facts that, notwithstanding this, the employer did not invite her to a job interview and she was not invited to interview under the new procedure to select applicants for the post in question.

46 In the light of the foregoing, the answer to the first question is that Article 8(1) of Directive 2000/43, Article 10(1) of Directive 2000/78 and Article 19(1) of Directive 2006/54 must be interpreted as not entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process.

47 Nevertheless, it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it.

The second question

48 In view of the answer given to the first question, there is no need to reply to the second question referred by the national court.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

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 must be interpreted as not entitling a worker who claims plausibly that he meets the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process.

Nevertheless, it cannot be ruled out that a defendant's refusal to grant any access to information may be one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination. It is for the referring court to determine whether that is the case in the main proceedings, taking into account all the circumstances of the case before it.

[Signatures]