

When is an applicant an applicant?

Lessons from *Kratzer* (C-423/15)

Blog entry : <http://legalresearch.blogs.bris.ac.uk/2016/08/when-is-an-applicant-an-applicant-about-the-potential-abuse-of-non-discrimination-law-equality-law-hoppers-and-the-eu-equality-law-directives/>

Monograph: *EU Non-Discrimination Law in the Courts* (Hart Publishing 2017):
<http://www.bloomsburyprofessional.com/uk/eu-non-discrimination-law-in-the-courts-9781849467636/>



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Background

- the (so called) *AGG-Hopper*
 - ‘Professional’ claimants
 - Abuse of equality law
 - Flood of claims
- Legitimate financial interest or abuse of rights?
 - Effectiveness of Equality Law
 - CJEU on effective remedies

Burden of Proof

- Article 8 2000/43/EC; Article 10 2000/78/EC; Article 9 2004/113/EC; Article 19 2006/54/EC.
- § 22 German General Equal Treatment Act (AGG):
Where, in case of conflict, one of the parties is able to establish facts from which it may be presumed that there has been discrimination on one of the grounds referred to in Section 1, it shall be for the other party to prove that there has been no breach of the provisions prohibiting discrimination.

Effective remedies (incl. non-economic loss)

- Article 7 2000/43/EC; Article 9 Directive 2000/78/EC; Article 8 2004/113/EC; Article 17 and 18 2006/54/EC;
 - § 15 II German General Equal Treatment Act (AGG):
Where the damage arising does not constitute economic loss, the employee may demand appropriate compensation in money. This compensation shall not exceed three monthly salaries in the event of non-recruitment, if the employee would not have been recruited if the selection had been made without unequal treatment.
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Federal Labour Court (BAG) (12.11.1998) 8 AZR 365/97

- § 611a II s1 Civil Code (BGB)- old version
- Status of applicant requires:
 - Subjectively serious applicaiton &
 - Objectively qualified for the position.
- § 7 I AGG(employee); § 6 I s2 AGG (applicants)
- § 15 AGG (Compensation and Damages)

Signs for lack of seriousness (subjective test)

- Applicant is over-qualified
- Applicant has a better paid, permanent position
- Application is uncomplete, incoherent, or inappropriate
- Applicant does not accept invitation to be interviewed for a different (identical) position
- Applicant applies to many positions with discriminatory job advertisement
- Applicant is involved in a large number of claims for compensation because of discrimination

Can the approach undermine the AGG's effectiveness

- Challenge discriminatory advertisement
- Illegitimate financial interest?
- An example:

Male-to-female transsexual applies for a job as 'female secretary' (LAG Berlin 15 Sa 417/04)

Kratzer's road to the CJEU

- ArbG Wiesbaden, 20.01.2011 - 5 Ca 2491/09
- LAG Hessen, 16.01.2012 - 7 Sa 615/11
- BAG, 23.08.2012 - 8 AZN 711/12
- LAG Hessen, 18.03.2013 - 7 Sa 1257/12
- BAG, 18.06.2015 - 8 AZR 848/13 (A)
- CJEU, 28.07.2016 - C-423/15 (EU:C:2016:604)

BAG, 18.06.2015 - 8 AZR 848/13

- How to establish status as employee (incl applicant) under the AGG
 - Qualified?
 - Lack of seriousness?
- Deterrent Effect of § 15 AGG
- Preliminary Reference

CJEU judgment in *Kratzer* C-423/15

- Personal scope of Directive 2000/78/EC and Directive 2006/54/EC
- Abuse of rights (*SICES and Others* C-155/13)
 - Objective test
 - Subjective test

Appraisal of case law

- Legitimate concerns?
- Effective protection and remedies?
- Deficit image of claimants?
- General scepticism?