



## NEWSLETTER

From: EMPLOYMENT LAW DEPARTMENT

Subject: JOB HUNTING WHEN YOU NO LONGER QUALIFY AS A JUNIOR :

On (age-) discrimination and obstacles of the recruitment process in Belgium

Date: June 2016

### **1. THE CHALLENGES OF AN AGEING LABOUR MARKET**

Age-discrimination is a recurring social issue frequently encountered in employment relations.

Recent studies show that the next 40 years the number of people over the age of 45 in Belgium will increase with 20%. In 2015, for Belgians surpassing the age of 55, only 44% were professionally active. One out of three employees shares the opinion that age discrimination is justified and believes that people over the age of 45 have a higher risk of being discriminated due to their age.

With the rise of the ageing population as well as the rise of the legal pension age, low employment rate for people over 55 due to age prejudice, and growing chances of age-discrimination for older professionally active people, challenges and issues arise for tomorrow's labour market.

Stereotypes labeling employees over the age of 55 as less flexible, not up to speed with modern technology, exposed to health risks, less productive, not keen to learn, set in their ways, difficult to coach,... should be dealt with.

Highlighting the importance of prevention of age discrimination during recruitment is essential, if we don't want to endanger the future of our Belgian labour market. Age discrimination issues may often seem to disappear under the radar, which doesn't mean that social problems of this nature don't exist in daily life. A broader public awareness on age-issues in employment relations both for employers and employees is important.

### **2. AGE DISCRIMINATION: A RECENT CASE**

A recent judgment from the Labour Tribunal of Ghent (Section Roeselare) revived the media's interest for this topic.

A well-known Belgian kitchen manufacturer and supplier recently became the center of public attention, not so much due to the convivial TV-ads of its company president, but for the brief and rather unfortunate encounter the company had with a 59 year old applicant, seeking employment within the company.

The applicant reacted to a job vacancy for independent sales personnel, selling the company's made to measure kitchens. A motivation letter was sent by the applicant, yet several days later he received a rather unpleasant response from an independent representative of the kitchen manufacturer. The applicant was informed that he did have the perfect profile for the job, with exception to his...age (59). The concerned email was closed with the clarification that this was the reason for not being invited for a job interview. Safe to say, this wasn't necessarily the cleaver, or right thing to write.

The concerned applicant contacted UNIA, the Inter-federal Center for Equal Opportunities. UNIA can, at its initiative, introduce judicial procedures in her capacity of plaintiff, provided she has received consent of the affected person.

UNIA claimed the immediate cession of the discrimination, by pain of penalty as well as publication of the judgment. The applicant himself intervened voluntarily and claimed damages.

Legal grounds for their respective claims were quickly found in the Statute of 10 May 2007 on combating discrimination (anti-discrimination statute).

The anti-discrimination statute prohibits direct discrimination on the basis of age, which is one of the protected criteria. The anti-discrimination statute is applicable on the conditions relating to entry to employment. This includes the selection criteria and selection channels used during the recruitment process and the appointing criteria used when engaging employees at the end of the recruitment process (in reference to the present case, the anti-discrimination statute equally qualifies services rendered as an independent as professional relations).

Proof should be presented of a breach of aforementioned anti-discrimination statute. Providing factual proof can be difficult, and is a burden normally imposed on the plaintiff. The burden of proof often constitutes a reason not to proceed with further judicial steps. Article 28 of the anti-discrimination statute nevertheless eases this burden, by providing a mechanism that reverses the burden of proof to the defendant. When the plaintiff presents facts that assume the existence of discrimination on one of the statutory protected grounds, the defendant will have to proof the non-existence of discrimination.

Without focusing too much on the content, the plaintiff in the present case provided the Labour Tribunal with the unfortunate email referred to above. As a consequence the assumption of the existence of

discrimination applied in his favour. The Tribunal judged that the employer-defendant was in the impossibility to present counter-proof or any objectified reasons justifying the differentiation in treatment on the basis of the applicant's age.

The defendant was ultimately condemned to pay (among others) an indemnity of 25.000,00 EUR (interest excl.) to the refused applicant and to display the Tribunal's judgment in visible places for customers and future employees to see.

### **3. AGEISM AND RECRUITMENT**

This judgment in mind, it is reassuring to know that the Belgian legislator has tried to prevent poor social practices by imposing duties on both Employers and employees during the recruitment process.

The Collective Labour Agreement N°38 of the National Labour Council on the recruitment and selection of employees imposes enforceable duties on the employer (e.x. equal treatment of applicants, obligation to borne the costs of recruitment procedures, prohibition to demand the deposit of official and sealed documents...) and non-enforceable rules of conduct on the Employer (providing sufficient info on the nature and conditions of the function, reasonable delay to inform applicants of non-acceptance, questions on private life only allowed insofar it's relevant to the job...) and the employee (cooperate to the recruitment process in good faith, preservation of confidential information received during recruitment...).

Non-discrimination is one of the basic principles of Belgian Employment law. This basic principle has equally found its way to the early recruitment stages of the employment relationship. This is only normal, since discrimination during recruitment can have a profound impact on job opportunities for certain people or a group of people that may find themselves in unfavourable situations.

### **4. AVOID AGE DISCRIMINATION ISSUES**

Although it has been appealed (outcome to be continued) to by the defendant, this judgment of the Labour Tribunal of Ghent (section Roeselare) has given a strong and important signal that the employment-discrimination of senior employees is an ongoing social issue that has to be dealt with. Older employees should be screened on their productivity and qualification, rather than their seniority and age.

Mediatized cases of this nature should urge employers to act with caution when recruiting, if they wish to avoid discrimination claims.

Employers are therefore advised to be careful, and provide themselves with good legal assistance before recruiting. Employees, in turn, should be very aware of the fact that discrimination during recruitment is not acceptable. When confronted with any form of unjustified

discrimination, applicants should know that legal action is possible.  
Good counsel is therefore essential.

Wish to contact our legal experts?

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