

FLASH REPORT

Date: 15.5.2009
Expert: Mahlmann, Matthias
Title: Age limit for service of official expert
Country: Germany

Context

Issue at stake: Appointment of official expert is limited to the age of 68 with possibility of one-time extension to the age of 71

Ground of discrimination: of Age

Source: Bavarian Higher Administrative Court, Munich, 28 January 2009, 22 BV 08.1413

Field: Employment

Legislative provisions: Art. 12.1 Grundgesetz; Sec. 3.1, 10 Allgemeines Gleichbehandlungsgesetz; Art. 2.2, 6.1 Directive 2000/78/EC; Sec. 22 Sachverständigenordnung der IHK für München und Oberbayern;

Content

Case: Born in 1936, the plaintiff was, in 1978, appointed official and sworn expert for data processing by the defendant, a public corporation with statutory power. The plaintiff's appointment was limited to the age of 68, but was extended for the (maximum) period of three more years until 2007, all according to the defendant's statute. The plaintiff demanded a further extension of his appointment for five years, which was not granted with reference to the statute.

Decision of the Court: The Court decided that the relevant statute (sec. 22 *Sachverständigenordnung der IHK für München und Oberbayern*) providing for an age limit of 68 years for the appointment of official experts with the possibility of one-time extension for another three years was neither violating German constitutional law nor European or German anti-discrimination legislation. According to the judgement, the expert may continue working as a non-official expert, whereby the provision is only limiting the practice, not the choice of profession, which facilitates the justification of such a restriction of the constitutional guarantee of occupational freedom (Art. 12.1 *Grundgesetz*). This restriction as well as the assumed direct discrimination on the ground of age (Sec.

3.1 *Allgemeines Gleichbehandlungsgesetz*, Art. 2.2 Directive 2000/78/EC), the Court held, is justified by legitimate aims, namely to reserve the special qualification which is associated with the appointment as a sworn expert to those who are physically and mentally capable to comply with the demands of such a qualification, to cope with the public trust in the quality of such experts and their opinions as well as to avert dangers for the client and the public. The Court decided that an age limit is suitable to prevent those harms since, from a general perspective, the average professional's ability to perform decreases above the age of 70. It further held that a general age limit was necessary because an alternative individual examination of the ability to perform would regularly take place later than the decrease of performance and would create further administrative burden. The possibility of shifting the financial burden of such examinations to the expert who is asking for the extension would put a "stain" on those professionals who are not willing to undertake such examination maybe because of a decrease in their performance, the Court argued. Since the statute provides for the possibility of an extension of the appointment after reaching the general age limit, the Court held it was adequate as well.

Short analysis: The decision justifies age limits on the ground of decrease of performance. An individual test is not considered to be the consequence of an application of the principle of proportionality.

Internet link source and additional information: none