



Legal Seminar 26 November 2012
Equality Law for Everyone: Challenges Ahead

SUMMARY - WORKSHOP 5
Religious Discrimination in Employment

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Extract from the thematic report “Religion and Belief Discrimination in Employment – the EU law” written by Lucy Vickers, published by the European Network of Legal Experts in the Non-Discrimination Field, in November 2006.

The Employment Equality Directive¹ introduced in 2000 requires all Member States to protect against discrimination on grounds of religion and belief in employment, occupation and vocational training. This report provides an overview of the provisions on religion and belief and examines the approach taken to implementation by Member States. The report also identifies some of the problematic legal issues which are likely to arise, and considers what should be the proper scope of protection against discrimination on grounds of religion and belief. The complexity of this question comes from the fact that while Europe is committed to upholding religious freedom, it is equally committed to equality and other fundamental freedoms. At times these rights are complementary, with protection against religious discrimination enabling full enjoyment of religious freedom; in other respects, the rights are in tension, with religious groups failing to recognise equality rights or the rights of those outside the religious group.

The Directive protects against direct and indirect discrimination, harassment and victimisation on grounds of religion or belief. The provisions are in similar terms for those existing in EC law concerning other grounds of discrimination such as sexual orientation and sex discrimination. Direct discrimination occurs where a person is treated less favourably on grounds of religion and belief. It cannot be justified, but there is a defence where a genuine occupational requirement can be identified, and it is proportionate to impose that requirement. Indirect discrimination arises where an apparently neutral requirement would put persons of a particular religion or belief at a particular disadvantage compared with other persons. It can be justified if there is a legitimate aim for the requirement and the means of achieving the aim are appropriate and necessary. It is not yet clear what types of factor courts will accept as justifying either indirect religious discrimination or the imposition of genuine occupational requirements based on religion or belief. It is suggested that a tension could develop between providing adequate protection for the religious freedom of

¹ 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000] O.J. L303/16 (the Directive).

employers and employees, and achieving consistency in treatment as between different grounds of discrimination within European Law, particularly as between sex discrimination and discrimination on grounds of religion and belief.

It is arguable that provisions on indirect discrimination impose a duty on employers which is similar to a duty to make reasonable accommodation for the needs of religious staff. The extent of any such duty will be determined by the scope of the justification defence available in indirect discrimination cases. In interpreting 'justification' under the Directive in such cases, courts will need to decide whether to require similar levels of protection against indirect religious discrimination as they do for sex discrimination. To do so will be to impose on employers a fairly onerous duty of accommodation of religious practice. This may give rise to additional problems in terms of creating equality between employees of different religions, as well as achieving a fair balance between the interests of those who are religious and those who are not.

One preliminary question which arises under the Directive is how to define religion or belief. In common with most international documents dealing with rights based on religion and belief, the terms are not defined within the Directive itself. Although not defined, it is likely that courts will draw on the experience of the European Court of Human Rights which has some jurisprudence on the issue, as well as the experience of several member states which have defined religion and belief for other purposes within their domestic law. An advantage of the lack of a formal definition is that the concept can adapt to reflect modern developments in our understanding of religion and belief. However, a corresponding disadvantage is that the lack of definition can give rise to inconsistencies in treatment. For example, Scientology is recognised in some Member States but not in others. In terms of the definition of 'belief', again the term is undefined, but it is likely that to be protected beliefs will need to have a certain level of cogency, seriousness, cohesion and importance.² There is also some inconsistency between Member States, with political beliefs protected in the some, but not in all. Other difficulties may arise out of the complexities in the relationship between religion, race and ethnicity. Within the Directives a clear distinction is drawn between religion, and race and ethnic origin, with the Racial Equality Directive being more extensive in scope than the Employment Equality Directive under which religion is protected. Yet the boundary between race and ethnicity on the one hand, and religion on the other is not always clear: ethnicity is sometimes defined to include religious identity; religious groups may be predominantly from one particular racial group; and some religions may encompass cultural practices or rituals, that might otherwise be understood as linked to ethnic identity. Given that the boundaries between ethnicity and religion can sometimes be blurred, the hierarchy in protection between the two grounds of discrimination may give rise to difficulties if the aim of the

² In accordance with the ECHR case law *X,Y and Z v. UK* (1982) 31 D&R 50, and *Campbell and Cosans v. UK* (1982) 4 EHRR 293.

Employment Equality Directive is to put an end to discrimination between those of different religions.

Further difficulties can arise in the relationship between the protection of religious interests and the principle of non-discrimination on grounds of gender. These interests can conflict where religious groups are not committed to gender equality. In the context of the employment relationship, issues can arise in relation to the employment of women within religious bodies, and the imposition of dress codes requirements, such as those relating to the Islamic headscarf, which predominantly affect women. Legal problems may arise with respect to the need to maintain autonomy for religious organisations; issues regarding the wearing of religious symbols or religious clothing at work; and conflicts between religious freedom and other human rights such as privacy and equality on grounds of gender and sexual orientation. That tensions exist between fundamental rights is well known: within human rights law these conflicts and tensions are dealt with by providing exceptions to the rights where necessary and proportionate to meet a legitimate aim, such as protecting the rights of others. Implicit within the non-absolute nature of many human rights is the notion of balancing competing rights, and holding them in some form of equilibrium.

The mechanism within the Directive for achieving an equilibrium between conflicting rights is via the exceptions for genuine occupational requirements, and the requirement for indirectly discriminatory rules to be justified. These mechanisms allow exceptions to the non-discrimination principle to be subject to review by courts to ensure that they are objective and reasonable. Courts need to find a balance between protecting freedom of religion and respecting the rights of others. To do this they will need to assess the proportionality of exceptions to the non-discrimination principle in the light of the need to uphold equality, to protect freedom of religion, and to protect other human rights such as privacy and freedom of speech. The assessment of proportionality should also take into account the equality interests of service users, the freedom of religion of all members of staff, the right to freedom from religion for customers and colleagues, and an interest in political or religious neutrality for the employer. Where the balance lies may depend in part on the status of the employer (for example, whether it has a religious ethos and whether it is part of the public or private sector) and whether it has a monopoly on providing particular types of employment.

In effect, the Employment Equality Directive requires resolution in the work context of many highly contested and sensitive conflicts that can arise in relation to competing rights to religious equality and to equality on grounds including gender and sexual orientation. The resolution suggested by the Directive is to provide a proper procedural basis for the consideration of competing arguments. As the German Constitutional Court has recognised, the aim in balancing such complex competing

rights is to achieve 'practical concordancy'.³ This involves a recognition that the rights are not reconcilable, and yet that a *modus vivendi* must be found. If this is to be achieved, it will require an approach by the courts which is fact and culture dependent. One disadvantage of such a fact sensitive approach is that predicting the outcome in any particular case becomes difficult as so many interests are being weighed in the balance. However, the advantage of such an approach is that it can provide consistency in terms of clear procedural safeguards, to ensure that restrictions on religious freedom, and exceptions to the non-discrimination principle are only imposed after proper consideration of the varied interests at stake, in the cultural and political context of the particular member state. It may be that the role of the Directive and those who interpret it, is not so much to determine exactly where the equilibrium between the rights of workers to equality and the rights of religious groups to religious freedom and autonomy is to be found. Instead its role is to establish clear procedural safeguards so as to ensure that the correct issues are considered in the proportionality equation.

³ German Classroom Crucifix case, BVerfGE 93, 1, 1 BvR 1087/91.