

Legal Seminar 25 November 2008 on the implementation of EU law on equal opportunities and anti-discrimination

DISCUSSION PAPER EXCEPTIONS TO THE PRINCIPLE OF DISCRIMINATION: WHAT JUSTIFICATION?

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Genuine occupational requirements

The Preamble of both the Racial Equality Directive and the Employment Framework Directive (Recitals 18 and 23 respectively), as well as Article 14 (2) of Directive 2006/54/EC (Recast Directive) state that in very limited circumstances, a difference in treatment may be justified where a characteristic related to racial or ethnic origin, religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate.

This introduces the concept of occupational requirements under Article 4 of the Equality Directives and Article 14 (2) of the Recast Directive, an exception to the general principle prohibiting both direct and indirect discrimination.

The genuine occupational requirement:

- applies only to situations relating to employment, not to the other fields covered by the Racial Equality Directive
- it is not mandatory, therefore the Member States are not obliged to adopt such provisions

According to the Directives, the treatment will not be discriminatory if, either by reason of the nature of the particular occupational activities or of the context in which they are carried out, the following conditions are fulfilled:

- a) the employer has a honest and good faith belief that the occupational requirement is necessary for the fulfilment of the legitimate work-related purpose;
- b) the characteristic is a determining occupational requirement. The employer should prove that possession of the characteristic or failure to possess it cannot be accommodated otherwise;
- c) the belief of the employer that the characteristic is a prerequisite for engaging in the occupation, must be in pursuit of a legitimate aim
- d) the requirement of the characteristic in order to offer the particular job is proportionate to the aim pursued.

Therefore, if there is another way by which the aim could be achieved, the difference in treatment will not be justified by the alleged occupational requirement.



A genuine occupational requirement exists when the essential nature of the job, or the particular duties attached to it, may require the existence or absence of a particular characteristic. In order to successfully argue this derogation from the general principle of non-discrimination, it is important that the task required to be undertaken is an essential requirement of the job and not just the usual practise in this working environment.¹

The occupational requirements should be attached to a particular job, and not to the organisation as a whole.

Each job must be considered individually. As a result, if an employer decides not to employ someone because of a disability, for instance, s/he needs to be clear about the selection criteria, the duties involved, why this person is unable to do them, and whether reasonable adjustments can be made to enable a person to do the job. If the employer has conducted a thorough selection process, the exemption should be able to be successfully argued. Under Article 4, the burden lies on the employer to justify why an exemption from the normal provisions relating to discrimination is appropriate in the particular circumstances and the judge will determine each case on an individual basis. The ECJ has interpreted the exception on the principle of direct discrimination in cases where sex is a determining factor in different cases.²

Genuine occupational requirements especially on the grounds of religion or belief

Paragraph 2 of Article 4 of the Employment Framework Directive introduces an exception from the anti-discrimination principle for employment in churches and other public or private bodies, such as schools and hospitals, whose ethos is based on religion or belief. Therefore, these bodies can specify a religion as a job requirement, even if it is not a “determining” occupational requirement *per se*; this is a significant consideration, as it obscures the borders between the private beliefs and life of an individual against his/her public role and occupation.

This genuine occupational requirement stipulates that it is not outlawed for an employer to discriminate on the grounds of religion or belief if the employer has an ethos based on religion or belief and, with regard to the nature of the employment or the context in which it is carried out, the religion or belief requirement is genuine, proportionate and justified for the particular job.

The following paragraph, also referring to churches and other public or private bodies the ethos of which is based on religion or belief, grants them the discretion to require individuals working for them to act in good faith and with loyalty to the organisation’s ethos; it is particularly ambiguous and paves the way to discriminatory treatment which could not be justifiable on factual grounds.

¹ See, for instance, Case C-273/97 *Sirdar v Army Board and the Secretary of State for Defence*, Case C-285/98 *Kreil v the Bundesrepublik Deutschland* and Case C-186/01 *Dory v Federal Republic of Germany*, on the interpretation of Art. 2 of Directive 76/207/EEC

² As above.

Occupational requirements on the grounds of age

Article 6 of the Employment Framework Directive allows the different treatment on the ground of age in relation to employment policy, labour market and vocational training objectives, if, possessing a characteristic related to age is objectively and reasonably justified by a legitimate aim and the discriminatory treatment contributes to a proportionate aim, the discriminatory effect is outweighed by the importance of the legitimate aim, and the employer has no other reasonable alternative to this discriminatory action. A legitimate aim may include, for instance, economic factors or the health and safety of the employee.

Permission for Armed Forces Exemption

Another exception from the equality principle is foreseen in Recital 18 of the Employment Framework Directive, providing that the armed forces, the police and emergency services are not required to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services. The use of the term “required capacity” means the capacity to perform the essential functions of the job, including the right to reasonable accommodation for people with disabilities.

In addition, Article 3(4) of the Directive provides the Member States the discretion not to apply the Employment Framework Directive on the grounds of disability and age to their armed forces. Recital 19 of the Directives justifies this derogation under the need of the Member States to safeguard the effectiveness of their armed forces. However, by requiring from the Member States which make that choice to define the scope of the derogation, indirectly implies that derogations beyond necessary will probably not be accepted.

Limits to Genuine Occupational Requirements

If an employer already employs a sufficient number of people who are capable of carrying out the particular duties to which the genuine occupational requirements would otherwise apply, then the genuine occupational requirements will not be valid.

Questions:

- *Is there a genuine occupational requirement exception in your national legislation?*
- *Could Paragraphs 2 and 3 of Article 4 of the Employment Framework Directive be used to justify discrimination on the grounds of sexual orientation or other ground not explicitly foreseen by the law?*
- *Could you provide any examples of the types of employment duties that might qualify for genuine occupational requirements?*