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NEWS REPORT

Country:	Poland
Title:	Court finds discrimination on the ground of sexual orientation by association
Date:	28 July 2017
Expert:	Lukasz Bojarski
<u>Context</u>	
Issue at stake:	May personal beliefs contrary to the catholic doctrine constitute a genuine and determining occupational requirement resulting in breach of the contract for leading a concert of lay songs organized by a religious entity?
Ground of discrimination:	Sexual orientation by association, indirect discrimination on the ground of beliefs
Source:	National court decision
Field:	Employment, (civil contract)
Applicable law:	Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment ¹ (ETA), Civil Code

Content

YZ (journalist, known media personality) supported on social media (Facebook) the petition for legalizing civil partnerships (of both different and same sex partners). Shortly after signing the petition, he lost the job of running a Radio B. concert (YZ argued that there had been an oral agreement). The catholic priest who organized the concert, told him that this was due to the fact that he supports gays (using insulting words).

YZ sued the Roman Catholic Diocese of H. for compensation for infringement of the rule of equal treatment on the ground of sexual orientation by association (direct discrimination and harassment) referring to ETA, EU directives and CJEU jurisprudence. He claimed 3750 PLN (approx. 900 EURO) as compensation for damages for himself and 1250 PLN (approx. 300 EURO) for Polish Society for Anti-Discrimination Law [PTPA], which represented him).

Decision of the Court:

First instance: Sąd Rejonowy in X; 16 December 2016; YZ, PTPA² on behalf of YZ v. Catholic Diocese of H.; reference number: I C 1326/15.

The court of 1st instance dismissed the lawsuit, stating that there was no binding contract between parties. Regarding discrimination, the court did not accept the shift of the burden of proof arguing that the claimant should have provided more evidence himself.

¹ Poland, Act on the Implementation of Certain Provisions of the European Union in the Field of Equal Treatment (*Ustawa z dnia 3 grudnia 2010r. o wdrożeniu niektórych przepisów Unii Europejskiej w zakresie równego traktowania*) (hereafter as 'ETA').

² Polish Society for Anti-Discrimination Law, representing the complainant.

The court also argued that the organizer of the concert being part of the Catholic Church structure has a right to refuse collaboration with persons who support ideas the Catholic Church does not agree with. So even if one would come to the conclusion that there had been a breach of a contract and that the reason for the breach was the claimant's support for civil partnerships between same-sex partners, it would not constitute discrimination.

The court also relied on Art. 5.7 of ETA (and similar provisions of the Labour Code) stating that ETA shall not apply to "7) limitation by churches and other religious associations, and also organisations, whose ethical rules are based on religion, denomination or belief, of the access to professional activity or performance thereof due to religion, denomination or belief, provided that the type or conditions of performance of such professional activity make religion, denomination or belief a genuine and determining occupational requirement set for a given natural person, proportionate to the accomplishment of legitimate aim of the differentiation of situation of this person; this applies also to the requirement for employed natural persons, that specifies the obligation to act in good faith and be loyal to the ethics of church, other religious association or organisation, whose ethical rules are based on religion, denomination or belief".

YZ appealed the ruling.

Second instance: Sąd Okręgowy in S; 22 March 2017; reference number: 75/17

The court of 2nd instance changed the verdict finding discrimination and awarding 1000 PLN (approx. 250 EURO) to YZ and 1000 PLN to PTPA. The verdict is final.

The court agreed that there was an oral civil contract (providing services of leading the concert) that was binding the parties (proven also by their past collaboration based also on oral contracts, preparation of the parties already undertaken, and the fact that the name of the claimant was included in the leaflet informing about the concert). If the civil contract was proved the provisions of ETA applied. According to the Court, the claimant provided enough evidence on probability of indirect discrimination because of beliefs and the burden of proof was shifted to the respondent. The respondent did not prove that he did not discriminate the claimant and break the contract for other than discriminatory reasons (economical).

The court also stated that Art. 5.7 of ETA does not apply. In the case of leading a concert with lay songs, the beliefs of the claimant (and whether they were in line with the catholic church doctrine) did not constitute genuine and determining occupational requirements proportionate to the accomplishment of a legitimate aim.

Based on ETA (Article 13), the court awarded the claimant compensation for discrimination at 1000 PLN (the remuneration that he would receive for leading two concerts planned). Based on the Civil Code (Article 24 – protection of personal rights like dignity and Article 448 which specifies that an appropriate sum may be paid to a designated social cause, in connection with ETA), the court awarded PTPA 1000 PLN.

Key points of analysis: The claimant argued that the discrimination took place on the ground of sexual orientation by association (direct discrimination and harassment). While the court of the first instance rejected the claim, the court of the second instance found discrimination, however defined it as an indirect discrimination based on somebody's beliefs.

The case however is also important from the point of view of the discussion on the shift of the burden of proof. The court of the first instance put too much burden on the claimant in fact stating that the claimant should prove his claims. The court of 2nd

instance adequately changed this approach and pointed out that the claimant made his claim probable and that the burden should be shifted.

Internet link source: case not published.