



The Concept of Genuine Occupational Requirement

ERA conference “The EU Anti-Discrimination Directives 2000/43 and 2000/78 in Practice: An in-depth analysis”

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[Genuine Occupational Requirement (GOR) – Context]

In EC law: Prohibition of discrimination based directly on a suspect criterion
Art. 2 (2, a) Dir. 2000/78 and 2000/43,
Art. 2 (1) Dir. 2006/54

Essentially no possible justification
except a genuine occupational requirement

Genuine Occupational Requirement – Exceptions to the prohibition of direct discrimination

- I. **General exception to all grounds for discrimination** (Art. 4 Dir. 2000/43, Art. 4 (1) Dir. 2000/78, Art. 14 (2) Dir. 2006/54)
 - A. Sex
 - B. Other grounds

- II. **Specific exception: religion or beliefs → churches or organisations with religious ethos** (Art. 4 (2) Dir. 2000/78)
 - A. Beneficiaries
 - B. Contours

Genuine Occupational Requirement – Sex

Dir. 76/207, Art. 2 (2)

*“This directive shall be without prejudice to the **right** of MS to exclude from its field of application those occupational activities and [...] the training leading thereto, for which, by reason of their **nature or the context in which they are carried out**, the sex of the worker constitutes a **determining factor**.”*

Art. 9 (2)

*“MS shall **periodically assess** the occupational activities referred to in Article 2 (2) in order to decide, in the light of **social developments**, whether there is justification for maintaining the exclusions concerned. They shall notify the Commission of the results of this assessment.”*

Genuine Occupational Requirement – Sex – Lessons from PR ECJ

- ECJ, *Johnston*, 15 May 1986, Case 222/84

Facts: Refusal to renew Mrs Johnston's contract with the Royal Ulster Constabulary based on an argument relating to state security

[ECJ, *Johnston*, Case 222/84] (cont'd)

- No general reservation can be applied to the principle of equal treatment for men and women on the grounds of protecting public security (§§ 26-27)
- Q: Is the work of an armed police officer an activity for which sex = determining factor by reason of its nature or the context in which it is carried out?

ECJ, *Johnston*, Case 222/84 (cont'd)

§ 36 “[Art. 2(2)], being a derogation from an individual right laid down in the Directive, must be interpreted strictly [...]”

§ 40 “In deciding whether, by reason of the context in which the activities of a police officer are carried out, the sex of the officer constitutes a determining factor for that occupational activity, a Member State may take into consideration requirements of public safety in order to restrict general policing duties, in an internal situation characterised by frequent assassinations, to men equipped with fire-arms.”

- NB: Observe the **proportionality principle**

ECJ, *Johnston*, Case 222/84 (cont'd)

- Hence derogation because of concern to protect women? **NO**

§ 44 *“It is clear from the express mention of pregnancy and maternity that the Directive is intended to protect a woman’s biological condition and the special relationship which exists between a woman and her child. [This provision] does not therefore allow women to be excluded from a certain type of employment on the ground that public opinion demands that women be given greater protection than men against risks which affect men and women in the same way and which are distinct from women’s specific needs of protection.”*

[Genuine Occupational Requirement – Sex (cont'd)]

→ ECJ, C-285/98, *Kreil* (Judgment of 11 January 2000)

Facts: Refusal by the Bundeswehr of Ms Kreil's application to work in arms maintenance (weapons electronics) on the ground that women may only be deployed in the armed forces to provide health care or train military musicians

[ECJ, C-285/98, *Kreil* (cont'd)]

- The armed forces are not excluded from the scope of application of Directive 76/207 (§§ 15-19)
- Excluding women from almost all military posts was held to be **disproportionate**, even taking into account the **margin for national discretion** (§§ 27-29)

Genuine Occupational Requirement – Sex (cont'd)

Compare:

→ ECJ, C-273/97, *Sirdar*, Judgment of 26 October 1999

Refusal to employ Mrs Sirdar as a chef in the *Royal Marines*

→ no violation of the proportionality principle as “the specific conditions for deployment of the assault units of which the Royal Marines are composed, and in particular the rule of interoperability to which they are subject, justified their composition remaining exclusively male” (§ 31).

Genuine Occupational Requirement – Sex (cont'd)

Article 14 (2) Dir. 2006/54:

“Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.”

Genuine Occupational Requirement – Other criteria

Art. 4 (1) Dir. 2000/78 and Art. 4 Dir. 2000/43

“...MS *may provide that a difference of treatment which is based on a characteristic related to any of the grounds [for prohibited discrimination] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.*”

Conditions for application –

Art. 4 (1) Dir. 2000/78 and Art. 4 Dir. 2000/43

!!! NB !!! Member States MAY (not MUST) establish exceptions

- 1) Fundamental requirement
- 2) Proportionality requirement
- 3) Formal requirement?

Fundamental requirement – Article 4 (1)

- **Genuine and determining** character of the requirement with regard to the **nature** of the occupational activity or the **context** in which it is carried out
- **For example:**
 - Teacher of Islam in a school?
 - “Oriental” appearance to serve in a Chinese restaurant?
 - Homosexual to work for an association defending gay and lesbian rights?

Proportionality requirement – Article 4 (1)

Exception to the principle of equal treatment: only for specific activities → strict interpretation

Cf. ECJ case law on gender equality
(*above*)

Formal requirement? – Article 4 (1)

23rd recital in Preamble to Dir. 2000/78 and 18th recital in Preamble to Dir. 2000/43

“In very limited circumstances, a difference of treatment may be justified where a characteristic related to [one of the suspect grounds] constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.”

→ Hence **obligation** on MS to draw up a **limitative list** or is it acceptable to leave case-by-case assessment to the judge provided there is compliance with the duty of transparency?

Formal requirement – Transparency

ECJ, Case 318/86, *Commission v. France*

“It follows [from articles 2 (2) and 9 (2)] that the exceptions provided for in Article 2 (2) may relate only to **specific activities**, that they must be sufficiently **transparent** so as to permit effective supervision by the Commission and that in principle they must be **capable of being adapted to social developments**. [...]” (§ 25).

[Formal requirement – Transparency]

Cf. Art. 8 (4) of the **Belgian Anti-Discrimination Act of 10 May 2007** (M.B., 30 May 2007)

§ 3. *It is for the **judge** to appraise, **case by case**, whether a given characteristic constitutes a genuine and determining occupational requirement.*

§ 4. *The King may, by means of a **decree that has been debated in the Council of Ministers** and after consultation with the bodies described in Article 10 (4), establish an **illustrative list of situations** in which a specific characteristic constitutes a genuine and determining occupational requirement pursuant to Article 2.*

Specific Exception – Churches and “Organisations with Ethos”

Art. 4 (2) Dir. 2000/78

“MS may maintain national legislation [...] or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person’s religion or belief shall not constitute discrimination where, by nature of these activities or of the context in which they are carried out, a person’s religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos. [...]”

Specific Exception – Churches and “Organisations with Ethos” (cont’d)

“... This difference of treatment shall be implemented taking account of Member States’ constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground. Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation’s ethos.”

Churches and Organisations with Ethos – Conditions for Application

- Member States **MAY** (not **MUST**)
- Hence **standstill** requirement to enable rules to be maintained or existing practices to be codified?
- **Difficulty of interpreting** the various clauses in Article 4 (2) coherently →
 - A. Beneficiaries of the exception
 - B. Contours of the exception

Churches and Organisations with Ethos – Beneficiaries

“Churches and other public or private organisations, the ethos of which is based on religion or belief”

- Directive 2000/78 (employment): no definition of the terms “religion” and “belief”

// International conventions protecting freedom of religion

- MS implementing legislation: silent → divergence in case law across Europe (e.g. Church of Scientology) → autonomous interpretation to be defined at European level (ECJ, *Chacon Navas*, 11 July 2006, Case 13/06)

Churches and Organisations with Ethos – Beneficiaries (cont'd)

Broader approach than in original Commission proposal: **concept embracing organisations** whose immediate purpose is not to promote a faith but **which are founded on a religious or philosophical ethos?**

→ Hence licence to recruit on the basis of **company culture?** To dismiss for damaging the **company image?**

Churches and Organisations with Ethos – Beneficiaries (cont'd)

- Dismissal on grounds of misconduct of an employee (sales assistant) by the well-known popular book store Club because she refused to remove her veil at work in breach of house rules obliging staff to wear a uniform and conduct themselves in a manner concomitant with the company's pluralist image ([Labour Court in Brussels](#) (4th chamber), 15 January 2008, Club)

Organisations with Ethos – Labour Court, Brussels 2008 (cont'd)

“Freedom of religion is not at issue here: the company [Club] did not reproach [the employee] for belonging to the Moslem faith, but simply for turning up to work displaying an obvious religious symbol, in defiance of recommendations — applied to all members of staff — whereby workers who come into contact with clients must not only wear clothing that expresses their adherence to the company’s commercial brand, but in addition refrain from exhibiting symbols or clothing which have the effect of damaging the company’s ‘open, helpful, serious, neutral family image’.”

- A practice of this kind which applies to the entire work force or an entire body of workers is not discriminatory.

Contours of the exception – Organisations with Ethos

Art. 4 (1) – General exception	Art. 4 (2) – Specific exception – churches and organisations with a religious or philosophical ethos
Any grounds	Only religion or belief
Nature or context in which the occupational activities are carried out	Nature or context in which the occupational activities are carried out
Genuine and determining OR + legitimate purpose and proportionality	Genuine, legitimate OR which is justified in terms of the organisation's ethos + prohibition of discrimination based on any other grounds

Nature and context of activities – Lessons from ECHR case law

Cf. Eur. Comm. Human Rights, *Rommelfanger v. Germany*, 6 September 1989

Catholic hospital dismissed a physician for expressing his pro-abortion views in public

→ Hence **contrary to freedom of expression?**
NO because duty of loyalty to employer has been freely accepted when signing contract with employer

Lessons from ECHR case law – *Rommelfanger* (cont'd)

Limited review function applied by the European Commission of Human Rights as test lacked stringency: existence of a reasonable relationship between the measures affecting freedom of expression and the employment context + importance of the issue to the Church

Question: Would this matter be settled in the same manner using the criteria defined in Article 4 (2) of the Directive?

NB: Article 16 Dir. 2000/78 (contractual clauses contrary to the principle of equal treatment are null and void)

Labour Court of Hamburg – 4 December 2007 (20 Ca 105/07)

Rejection of an application to work as a social assistant for a sub-organisation of the German Protestant Church

Job involved integration of immigrants under the EU's EQUAL Programme

Turkish plaintiff was non-practising Moslem → application turned down due to refusal to change religion

Labour Court of Hamburg – 2007 (cont'd)

Decision by the Labour Court in Hamburg →
discrimination founded on religion

Interpretation of Art. 9 Equal Treatment Act according
to requirements of Dir. 2000/78 → protection of
church autonomy does not authorise a difference of
treatment founded on religion irrespective of the
work to be performed

In this case, no link between post to be filled and need
for candidate to be Christian

→ Compensation of € 3,900 awarded to the plaintiff

New departure in case law compared with traditional
approach (i.e. “Rommelfanger”) BUT controversial

Lessons from ECHR case law – *Dahlab v. Switzerland, 2001*

No leave to appeal for primary school teacher claiming that her religious freedom was violated by her duty to remove her headscarf when teaching in a state school

- The Court in Strasbourg endorsed the reasoning of the Swiss Constitutional Court: in the context of her teaching activities, **risk of offending the religious feelings of her pupils**, of other pupils at the school and of their parents + violation of the **school's principle of religious neutrality**
- Account taken of the **nature of the profession of state school teacher** as guardian of the school's authority and representative of the State

Nature and context of activities – National law

- Can a cleaner be dismissed by a Christian humanitarian organisation (Christian Cross Army) for not being a member of the National Lutheran Church?
- Cf. Court of Copenhagen, 1 September 2005: employer accepted the transaction and €8,000 was paid in compensation (EADLR, no. 3, April 2006, p. 59)

Nature and context of activities – National law (cont'd)

A Moslem woman was refused a job as an Arabic teacher in a Moslem school for refusing to wear the headscarf

→ Cf. **Decision by Equal Treatment Commission** (Netherlands), 15 November 2005, Case 2005-222: direct discrimination founded on religion; no justification as requirement to wear the headscarf was not essential to implementing the founding principles of the school (EADLR, no. 3, April 2006, pp. 78-79)

[Legitimacy – Respect for human rights]

Obligation to respect other fundamental rights and freedoms that might pose a conflict

→ Cf. ECHR, 27 September 1999, *Smith & Grady* (no. 97): prohibition of taking prejudice among members of the armed forces as a basis for justifying discrimination founded on sexual orientation

Legitimacy – Respect for human rights (cont'd)

→ Can a traditionalist Christian association dismiss a sexton after inadvertently discovering that he is gay and HIV positive?

Cf. Cass. Fr. (social), **17 April 1991**, *Painsecq v. Association Fraternité Saint Pie X*: illegal dismissal

→ Can a Catholic school dismiss a teacher because she has remarried after her divorce?

Cf. Cass. Fr. (plenary) 19 May **1978**: yes, but conflict with Directive because it concerns her private life

Legitimacy – Respect for human rights (cont'd)

United Kingdom Regulation 7 (3) of Employment Equality (Sexual Orientation) Regulations 2003

This paragraph applies where -

- *(a) the employment is for purposes of an organised religion; [and]*
- *(b) the employer applies a requirement related to sexual orientation - so as to comply with the doctrines of the religion, or because of the nature of the employment and the context in which it is carried out, so as to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers; [...]*

Legitimacy –

Respect for human rights (cont'd)

- *R (Amicus-MSF and others) v. Secretary of State for Trade and Industry and Christian Action Research Education and others* [2004] IRLR 430
- ➔ Restrictive interpretation of the exception in the *Employment Equality (Sexual Orientation) Regulations 2003* in order to make it compatible with the limitations imposed by Article 4 (1) of Directive 2000/78/EC.

Employment “for the purpose of an organised religion is limited to the appointment of religious leaders and teachers such as priests and imams. It does not cover workers employed by religious organisations such as teachers or nurses in religious foundations.”

Legitimacy – Respect for human rights (cont'd)

- Churches and organisations with a religious or philosophical ethos may require their employees to adopt an **attitude of good faith and loyalty towards their ethical principles** BUT they may not discriminate on the basis of gender or sexual orientation (Art. 4 (2))
- In this event, we **resort to the very strict conditions for a genuine and determining occupational requirement** (Art. 4 (1))