

## Genuine Occupational Requirements

Academy of European Law, Trier, 27-28 April 2009

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### *Context*

Let us introduce our examination of genuine occupational requirements with a reminder of the context in which they were developed and in which they operate, as this will have an important bearing on their interpretation and operation. While there can be a defence of justification where an employer imposes a provision, criterion or practice which results in indirect discrimination against one of the protected groups, there is no defence to direct discrimination<sup>1</sup>. Thus, the only circumstances in which an employer is able directly to discriminate on one of the protected grounds is *either* if there is an applicable genuine occupational requirement *or* the situation falls within the limited circumstances where positive action is permitted<sup>2</sup>.

While our focus today is on Directives 2000/43 and 2000/78, it is also worth remembering that the genuine occupational requirement concept was originally introduced in relation to sex discrimination and the jurisprudence of the ECJ in relation to this concept so far comprises only cases on sex discrimination. This is a point to which I will wish to return; I will propose that it is easier to imagine situations where sex may be a determining requirement for employment than for the other protected characteristics.

The concept of the genuine occupational requirement is also an evolving concept, and this is reflected to some extent in the language of the directives dealing with it. Thus, the original provision, Art 2(2) of Directive 76/207 stated:

This directive shall be without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, 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.

By the time we reach Directives 2000/43 we have this guidance in the Preamble, recital 18:

In very limited circumstances, a difference of treatment may be justified where a characteristic related to racial or ethnic origin constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is

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<sup>1</sup> Except in relation to age discrimination: Directive 2000/78, Art 6.

<sup>2</sup> See Treaty of Rome Art 141(4); Directive 76/207 Art 2(8); Directive 2002/54 Art 3; Directive 2000/43 Art 5; Directive 2000/78 Art 7. Further consideration of positive action is beyond the scope of this paper.

proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.<sup>3</sup>

This wording leads us to expect that such situations should be very exceptional. The provision in 2000/78 permitting the genuine occupational requirement derogation is in these terms:

*Article 4: Occupational requirements*

- (1) Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 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.<sup>4</sup>

By the time we reach Directive 2006/54, the Recast Directive on the implementation of the principle of equal opportunities and equal treatment for men and women (in force from 15 August 2009), the relevant recital (Recital 19) now states:

Ensuring equal access to employment and the vocational training leading thereto is fundamental to the application of the principle of equal treatment of men and women in matters of employment and occupation. Any exception to this principle should therefore be limited to those occupational activities which necessitate the employment of a person of a particular sex by reason of their nature or the context in which they are carried out, provided that the objective sought is legitimate and complies with the principle of proportionality.

and the exception for genuine occupational requirements now appears as a qualification to the basic principle of equal treatment, rather than as a freestanding exemption.<sup>5</sup>

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<sup>3</sup> Directive 2002/78, recital 23 is in exactly parallel terms:

In very limited circumstances, a difference of treatment may be justified where a characteristic related to 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. Such circumstances should be included in the information provided by the Member States to the Commission.

<sup>4</sup> 2000/43 Art 4 is in exactly parallel terms:

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin 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.

2000/78 Art 4(2) contains a further exception, to be considered later.

<sup>5</sup> 2006/54 Art 14: *Prohibition of discrimination*

- (1) There shall be no direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to:

This examination of the legislative history of the genuine occupational requirement concept, informed, as we will see, by the jurisprudence of the ECJ, shows that there is increasing emphasis on the idea that it is to be seen as a highly unusual phenomenon, rarely to be relied upon. The legislation has also recognised that the genuine occupational requirement concept is inherently an evolving concept, which is liable to change as social and cultural attitudes change in society. For example, in 1983, in *Commission v United Kingdom*<sup>6</sup> the ECJ accepted that it was legitimate to restrict the role of midwife to women only, because of the sensitivity of the relationship between the midwife and the woman giving birth. However, in 2000 the Commission reported that the profession of midwife was now fully open to men in all the Member States.<sup>7</sup>

### ***Scope of the general genuine occupational requirement***

As noted already, there is one specific genuine occupational requirement in 2000/78 Art 4(2) relating to religious organisations. This will be considered later. In this section, the general genuine occupational requirement is considered in more detail.

The first point to note is that the genuine occupational requirement provisions are permissive, not mandatory. There is no need for Member States to use this facility at all, as the ECJ stressed in *Commission v Germany*<sup>8</sup>. Secondly, the Directives do not say that race, sexual orientation, religion or belief, etc must themselves constitute the genuine occupational requirement: rather, the genuine occupational

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- (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
  - (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
  - (c) employment and working conditions, including dismissals, as well as pay as provided for in Article 141 of the Treaty;
  - (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

- (2) 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.

<sup>6</sup> Case 165/82 [1983] ECR 3431.

<sup>7</sup> COM (2000) 334 final p.8.

<sup>8</sup> Case 248/83 [1986] 2 CMLR 588

requirement need only be a *characteristic related to* any of the protected grounds, which is a wider formulation.

Thirdly, there are two alternative ways in which a requirement may be held to be genuine and determining: first, because of the *nature* of the particular occupational activities, or secondly, because of the *context* in which they are carried out. The difference between these is illustrated by *Johnston v Chief Constable of the RUC*<sup>9</sup>, where the issue was whether women could be excluded from the position of full-time reserve police constable in Northern Ireland because police in that province were armed and the Chief Constable had decided that women police officers should not be armed. The reasons given for this were that women might be targeted for assassination and their firearms could fall into the hands of their attackers; that it would conflict too much with the ideal of an unarmed police force and that armed policewomen would be less effective in carrying out welfare work with families and children. The ECJ considered that the nature of the work as a police officer did not constitute a genuine occupational requirement – this was evidenced by the fact that the law expressly stated that the principle of equal treatment extended to the police service. However, the Court was prepared to accept that the *context* of policing activities could constitute a determining factor: the context in this case being the particular issues around public safety in Northern Ireland.

It is worth remarking that at this time (under Directive 76/207 Art 2(2)) it was open to Member States to exempt whole areas of occupational activity by using the genuine occupational requirement exception. However, in *Commission v France*<sup>10</sup> and *Kreil v Germany*<sup>11</sup> the ECJ held that the requirement under Art 9(2) of Directive 76/207 to keep exempted activities under review to assess whether the derogation was still justified meant that in fact only *specific* activities could be excluded. This is embodied in the wording of 2000/43 Art 4 and 2000/78 Art 4(1), which limit genuine occupational requirements to “particular occupational activities”. Posts alleged to fall within the genuine occupational requirement exception must be examined on a case-by-case basis.

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<sup>9</sup> Case 222/84 [1986] ECR 165.

<sup>10</sup> Case 318/86 [1988] ECR 3559

<sup>11</sup> Case C-285/98 [2000] ECR I-69

The fourth, and very important point, is that the principle of proportionality must be applied in considering the genuine occupational requirement exception. Again, this point was established in case law on Directive 76/207 Art 2(2): see *Johnston, Kreil* and *Sirdar v Army Board and Secretary of State for Defence*<sup>12</sup>, for example. In *Johnston*, the Court explained the principle in these terms:

“That principle requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view and requires the principle of equal treatment to be reconciled as far as possible with the requirements of public safety which constitute the decisive factor as regards the context of the activity in question.” (para 38).

Both *Kreil v Germany* and *Sirdar v Army Board* involved restrictions on women serving in the armed forces. In *Kreil*, women were barred under German law from serving in any military positions involving the use of weapons. The ECJ found this to be disproportionate because of the blanket nature of the ban. By contrast, in *Sirdar*, women were banned from being members of a particular regiment in the British Army, the Royal Marines. *Sirdar* was a chef and complained that she had therefore been banned from taking up a post as a chef in the Royal Marines. In this case, the ECJ held that the ban on women could be regarded as proportionate, because the unit in question was a small force, intended to be the first line of attack in combat situations and all members of the unit were meant to be able to act as fighting members of the unit, if necessary, in addition to any other role.

While these cases give some flavour of how the principle of proportionality has been applied in practice, it may be felt that the particular application in *Sirdar* is at least ripe for review in the light of modern conditions. In particular, it seems strange that the Court appeared to have accepted that women could not perform the required role in the Royal Marines without investigation of whether this was in fact the case. Similarly, in *Johnston*, some commentators have criticised the Court's willingness to accept that there could be an argument based on public safety restricting the arming of women police officers without factual evidence of any such increased danger. In both cases there is an element of gender stereotyping in the underlying attitudes about the capabilities of women compared with men.<sup>13</sup>

Having now looked closely at the wording of the genuine occupational requirement exception in the two Directives, we should additionally consider other

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<sup>12</sup> Case C-273/97 [1999] ECR I-7403

<sup>13</sup> Similar points could be made about *Commission v France* Case 318/86 [1988] ECR 3559.

points of interpretation arising from the case law on Directive 76/207 Art 2(2), which will almost certainly be followed when the Court considers exemptions under Directives 2000/43 and 2000/78.

First and foremost, all the cases have emphasised the need for the exception to be construed strictly, since it constitutes a derogation from a most important individual right to equal treatment. Secondly, the circumstances in which a genuine occupational requirement can be claimed as stated in the Directive have been treated by the Court as exhaustive: that is to say, there are no circumstances in which Member States can argue for other special occupational exemptions. This was decided in *Johnston*, where the argument that the Chief Constable's actions were justified by considerations of national security, protection of public safety and public order were rejected by the Court:

"... the principle of equal treatment is not subject to any general reservation as regards measures taken on the grounds of the protection of public safety ..." (para 27)

Similar findings were made by the ECJ in *Sirdar* and *Kreil*.

On the other hand, the Court has accepted that Member States have some margin of discretion when adopting measures which they consider to be necessary in the interests of public security<sup>14</sup>. It is noticeable that the cases which have arisen on the applicability of the genuine occupational requirement exception have mainly arisen in relation to the police, the armed forces and similar occupations. At this point, it is important to take account of a difference between Directive 2000/43 and Directive 2000/78. Directive 2000/78 includes in its Preamble recital 18, stating that the armed forces, police, prison service and emergency services do not have to recruit or maintain in employment people who do not have the required capacity to carry out the range of functions they may be called upon to perform, in accordance with the legitimate objective of preserving the operational capacity of those services. In consequence, Art 3(4) permits Member States not to apply the Directive to the armed forces in relation to discrimination on grounds of disability and age. Two questions arise here. First, what level of evidence will a Member State need to produce to show that individuals do not have the required capacity? If, for example, Member States were to be allowed to exempt particular occupations under this principle, rather than to produce proof this on a case-by-case basis for each particular post and each particular individual, there is a danger of

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<sup>14</sup> *Sirdar op cit*, para 27

stereotyped assumptions about the capabilities of people with disabilities, or older people, being used in a negative fashion to limit opportunities<sup>15</sup>. The interplay with the duty of reasonable accommodation is also important, especially in relation to disability. Where members of the armed forces, for example, are injured on active service, it may be felt that the armed forces should have a particular duty to attempt to accommodate them (and make use of their valuable training and experience) in suitable non-combat roles rather than to dismiss them as no longer having the required capacity to perform the range of functions a soldier *may* be called upon to perform.

Secondly, does Art 3(4) have any application to grounds other than disability or age? Kenner<sup>16</sup> questions whether this provision may lead to a re-run of the arguments about whether gay and lesbian people should be allowed to serve in the armed forces. The United Kingdom sought to justify such a ban for "operational reasons" before the European Court of Human Rights in *Smith and Grady v United Kingdom*<sup>17</sup>, but failed on the grounds that the investigation of officers' sexual orientation infringed their right to privacy under Art 8 of the European Convention on Human Rights. The decision fell short, however, of prohibiting a ban on homosexuals in the armed forces.

The last principle to be derived from the current jurisprudence on genuine occupational requirements is the requirement that any derogation must be transparent, so that it is capable of effective supervision by the Commission. This was established in *Commission v France*<sup>18</sup> where separate systems of recruitment for men and women operated for five different corps within the police force so that different percentages of men and women could be recruited in order to achieve what the Government considered to be an appropriate balance of male and female officers. This was held by the Court to lack transparency in two ways: first, there were no objective criteria for fixing the relevant percentages; secondly, the secrecy surrounding the fixing of percentages meant that it was impossible for the Commission to monitor the process and impossible for any aggrieved person to

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<sup>15</sup> Comparable to the kinds of arguments accepted in *Johnston, Sirdar* and *Commission v France*, discussed above.

<sup>16</sup> J Kenner, *EU Employment Law*, Hart Publishing, 2003, p 414.

<sup>17</sup> Apps 33985/96 and 33986/96 [1999] IRLR 734.

<sup>18</sup> Case 318/86 [1986] ECR 1651 paras24-28.

verify whether or not the percentages set corresponded to specific activities for which a genuine occupational requirement could be claimed.<sup>19</sup>

### ***The general genuine occupational requirement and specific grounds***

How will the general genuine occupational requirement actually be used in relation to the grounds protected by Directives 2000/43 and 2000/78? Inevitably, any discussion will be highly speculative, but with that caveat in mind, it is perhaps worth spending a little time considering what possible genuine occupational requirements there could be in relation to the newer protectorate – although it is likely that this will raise questions rather than provide answers.

One obvious example would be authenticity in relation to acting, modelling and other occupations where appearance is important. In *Commission v Germany* the ECJ noted that the laws and practices of Member States were similar with regard to exemptions relating to singing, acting, dancing and artistic or fashion modelling.<sup>20</sup> But this is an example where, although it is easy to imagine sex being an obvious genuine occupational requirement, it is not by any means so clear that such occupational activities should come within the exception for other grounds. Authenticity of appearance this could constitute a genuine occupational requirement on grounds of race: the Commission referred expressly to this in its proposal for Directive 2000/43<sup>21</sup>, although in acting this has not always been the case.<sup>22</sup> Authenticity could also apply in relation to (apparent) age, but probably not in relation to the other protected grounds. Being heterosexual did not disqualify Sean Penn from playing Harvey Milk, the first openly gay man to be elected to public office in California, in the recent film, *Milk*. Indeed, it is possible that the knowledge that he was heterosexual was seen as making his success in the role the more praiseworthy and may even have contributed to his being nominated for an Oscar. However, this may not work in reverse: it is entirely probable that an openly gay actor may find his or her opportunities diminished because they are perceived as not credible in, say, a romantic leading role. This raises a further question: could credibility in an occupational role amount to a genuine occupational requirement,

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<sup>19</sup> Cf also *Commission v Germany* Case 248/83 [1986] 2 CMLR 588

<sup>20</sup> *Commission v Germany* Case 248/83, para 34.

<sup>21</sup> COM (99) 566 at p.8.

<sup>22</sup> See G.Pitt, "Madam Butterfly and Miss Saigon: race and sex as GOQs", in eds J Dine and B Watts, *Discrimination Law: Concepts, Limits and Justifications*, Longmans, 1996, pp 198-206.

either because of the nature of the occupational activities or context in which they are carried out?

I have raised the question in relation to sexual orientation and acting. The same question could arise in relation to employment in organisations promoting the welfare or providing services to people in the protected groups. Could it be a genuine occupational requirement that the chief executive of an organisation promoting the rights of disabled people or gay people should themselves be disabled or gay, in order to be credible in the role? Or might it be argued that this is not a determining characteristic and it is more important that such a person should be well-informed, an effective communicator and well-networked? Arguably, it could be said that the nature of the role does not involve a genuine occupational requirement, but the context could, in, some circumstances, bearing in mind that the context may change over time.

A related, but different issue arises where services are provided to people within one of the protected groups – are those services most effectively provided by people who share the relevant characteristics? In such a case, what would be the characteristics which are genuine and determining? Is empathy enough to constitute a genuine occupational requirement?

This raises another question in my mind: in the examples given above, it may be felt that sharing a characteristic of the particular protected group might be a relevant factor, but not the only factor to be taken into account. In those circumstances, could the genuine occupational requirement defence be used? At first sight, it would seem not, in that the exception requires that the characteristic should be “determining” – but this begs the question whether any single characteristic can ever be said to be determining on its own.

The possible conflict between privacy rights and genuine occupational requirements based on sexual orientation was briefly alluded to earlier in relation to gays and the military. However, Oliver points out that there is a fundamental conflict between privacy and the genuine occupational requirement based on sexual orientation.<sup>23</sup> Since the Directive prohibits discrimination on grounds “related to” sexual orientation, it follows that a claim may be pursued where an individual has been discriminated against because an employer thinks that he or she is gay,

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<sup>23</sup> H. Oliver, “Sexual orientation discrimination: perceptions, definitions and genuine occupational requirements”, 33 *Industrial Law Journal* 1 (2004).

regardless of whether or not this is in fact the case. Indeed, there is no need for claimants to disclose at any point what their sexual orientation is – thus they can maintain their privacy. But if sexual orientation is said to be a genuine occupational requirement, it follows that anyone applying for such a post must also disclose their sexual orientation – which infringes their rights to privacy. The same sort of conflict also arises in relation to a genuine occupational requirement based on religion or belief and (perhaps) age and disability.

This raises a final question for consideration, which is, should all the protected grounds be treated in the same way? The trend in EU legislation is towards convergence, but it may be questioned whether this is always appropriate. There is a major difference now between genuine occupational requirements based on sex and those based on the other protected grounds, which is that in relation to sex, a genuine occupational requirement can only be relied upon in relation to *access* to employment, or training for it, while under Directives 2000/43 and 2000/78 any difference in treatment may be a genuine occupational requirement. Is there any warrant for this? One example given in guidance for the British legislation suggests this scenario: a local government authority wishes to engage in outreach work with a minority Bangladeshi community in its area and wishes to employ a Bangladeshi worker for this project, as such a person would be more effective in making links with the community. Three years later, the project has been successful and the local authority would like to replicate it with a different ethnic minority, the local Somali community. As it can only afford to fund one such project, it might be a genuine occupational requirement justifying the dismissal of the Bangladeshi worker in order to appoint a Somali worker.

### ***Organisations with a religious ethos***

We turn now to the special exception contained in Directive 2000/78 art 4(2) for organisations with a religious ethos. The conditions for the application of this exception are as follows:

- (1) It applies to “churches and other public or private organisations the ethos of which is based on religion or belief”.

One of the critical questions in relation to this exception will be how widely this concept will be construed. In its proposal for the Directive, the Commission said:

“It is evident that in organisations which promote certain religious values, certain jobs or occupations need to be performed by employees who share the relevant religious opinion. Article 4(2) allows these organisations to require occupational qualifications which are necessary for the fulfilment of the duties attached to the relevant post.”<sup>24</sup>

This suggests that the kinds of organisations covered by the exception should be construed fairly narrowly in that the promotion of the religious values should be in some sense a purpose of such an organisation. Yet a number of commentators have argued that it is apt to cover organisations of like-minded people who wish to work with co-religionists: a Christian firm of lawyers, a Muslim doctors’ practice, and so on.

It was always envisaged that schools professing allegiance to a particular religious faith would be one of the organisations to which this exception would apply. In this context, it may be instructive to note an early case on the UK legislation on this point, concerning an atheist teacher rejected for the post of principal teacher of pastoral care in a Roman Catholic school<sup>25</sup>. Because the school was publicly funded, his actual employer was Glasgow City Council – which, the Employment Appeal Tribunal held, could not be regarded as an employer with a religious ethos.

(2) The exception applies to “occupational activities” in such an organisation where the nature or context of the activities are such that a person’s religion or belief can be regarded as a “genuine, legitimate and justified occupational requirement” having regard to the organisation’s ethos.

The obvious point to note here is that the requirement has to be legitimate and justified – but *not*, apparently, determining. Can a requirement be justified if it is not also determining? Is a different test of proportionality implied by this wording? This is another question which can only be resolved definitively by the ECJ. On the one hand, it may be argued that only certain kinds of posts would come within this stipulation. Thus, to take the faith school example, it might be a genuine occupational requirement for “front-line staff” to adhere to the relevant religion – but not “ancillary staff”. On the other hand, it might be argued that the school is a community based on faith and everyone who works for it should share the same beliefs. Even if the former distinction were chosen, who would count as front-line

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<sup>24</sup> COM (99) 565 p.10

<sup>25</sup> Glasgow City Council v McNab [2007] IRLR 476.

staff? Would it be the head teacher, or teachers of religious education, or perhaps all teachers? Should ancillary staff who come into contact with pupils or parents be treated as front-line or not?

- (3) Thirdly, Art 4(2) stipulates that any difference of treatment must also take account of (a) Member States' constitutional provisions and principles, (b) general principles of Community law, and (c) should not justify discrimination on another ground.

The status of the final proviso here is what has exercised most commentators. The fact that many religions condemn homosexuality suggests an inevitable conflict between this exception and the prohibition of discrimination on grounds of sexual orientation. The UK-implementing legislation, the Employment Equality (Sexual Orientation) Regulations 2003, reg 7(3), provide that where employment is for the purposes of organised religion, the employer may discriminate on grounds of sexual orientation where this is necessary either to comply with the doctrines of the religion or to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers. The compatibility of this with Art 4(2) was challenged in *R(Amicus) v Secretary of State for Trade and Industry*<sup>26</sup> where it was held that there was no conflict with the Directive. The judge, Richards J, considered that this exception would apply only to a very small number of posts – ministers of religion and the equivalent. He thought it would not apply to posts such as teachers in faith schools or a nurse in a care home run by a religious foundation, although these would be organisations with a religious ethos, who could therefore claim to discriminate in favour of co-religionists in accordance with Art 4(2).

- (4) The proviso to Art 4(2) also permits organisations with a religious ethos "to require individuals working for them to act in good faith and with loyalty to the organisation's ethos."

This may also permit quite wide-ranging powers for religious ethos organisations. It may be remembered that in a case under the European Convention of Human Rights, *Rommelfanger v Germany*<sup>27</sup> the European Commission on Human Rights

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<sup>26</sup> [2004] IRLR 430 High Court, Queen's Bench.

<sup>27</sup> (1989) 62 DR 151.

rejected the claim of a doctor who had been dismissed from his post in a Roman Catholic hospital for publicly criticising the church's teaching on abortion. His claim was mainly under Article 10 (freedom of speech) rather than Article 9 (freedom of thought, conscience and religion) but failed because he had accepted the duty to be loyal to the ethos of the organisation when he had entered his contract of employment.

### ***Conclusions***

The genuine occupational requirement exceptions permitted under Directives 2000/43 and 2000/78 are intended to be limited in scope and will be interpreted strictly. However, it is clear that there are a number of areas where it is not clear how far the exceptions will operate and it is not always possible to extrapolate principles from existing case law on sex equality in relation to the other protected grounds. The religious ethos exception, in particular, raises sensitive issues which will be difficult to navigate. The inconsistency between protection under Directives 2000/43 and 2000/78 and Directive 76/207 (and 2006/54), with the latter being restricted to access to employment while the others are at large, is at best puzzling, at worst a worrying anomaly. What is clearly of great importance is that the genuine occupational requirements should be kept under review and that we should constantly ask the question, are they really necessary?