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Religious employers – CJEU case law

Combatting religious discrimination at the workplace

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- II. Legitimate requirements of a religious employer
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I. Introduction

Typical current disputes regarding religion and work

- Special religion as a genuine, legitimate and justified occupational requirement
- Loyalty obligations to a religious employer
- Ban on religious signs at the workplace and how to enforce it
- Granting religious holidays only to members of the respective belief

II. Legitimate requirements of a religious employer

1. Egenberger (C-414/16)

- Temporary position as a consultant at the Evangelisches Werk für Diakonie und Entwicklung e.V. (affiliation with the German Protestant Church)
- Vacancy notice with an invitation to communicate the confession
- Non-confessional applicant was not invited for interview – the position was filled with an applicant of the Protestant confession
- Claim brought by the applicant for discrimination based on religious beliefs, according to German Anti-Discrimination Act (AGG – transforming the European Anti-Discrimination Directives (2000/43/EG; 2000/78/EG; 2002/73/EG; 2004/113/EG; 2004/113/EG) into German Law)

II. Legitimate requirements of a religious employer

1. Egenberger (C-414/16)

- Submission of the Federal Labour Court (BAG) to the ECJ
- 1. Can an employer, or the church on its behalf, authoritatively determine itself whether a particular religion of an applicant, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer or church's ethos?
- 2. If the answer to the first question is negative: Is it necessary to disapply a provision of national law which provides that a difference of treatment on the ground of religion in the context of employment with religious bodies and the organisations affiliated to them is also lawful where a particular religion, in accordance with the self-perception of the religious community, having regard to its right of self-determination, constitutes a justified occupational requirement?
- 3. If the answer to the first question is negative: What requirements are there as regards the nature of the activity or the context in which it is carried out, as genuine, legitimate and justified occupational requirements, having regard to the organisation's ethos?

II. Legitimate requirements of a religious employer

2. Chief MD (C-68/17)

- The claimant is the chief MD in a hospital, managed by a society with the purpose to carry out the tasks of Caritas as the expression of life and essence of the Roman-Catholic Church.
- After divorce, civil remarriage without annulment of the first marriage
- Dismissal because entering into a marriage that is invalid under canon law constitutes a significant breach of his loyalty obligations to his Catholic employer according to the basic rules set by the archbishop of Cologne (Grundordnung 1993)

II. Legitimate requirements of a religious employer

2. Chief MD (C-68/17)

- Submission of the BAG to the ECJ
- 1. Can the [Catholic] church decide with binding effect that an organisation is to differentiate, in connection with the requirement that employees in managerial positions act in good faith and with loyalty, between employees who belong to the same church and those who belong to another faith or to none at all?
- 2.a. If the answer to the first question is negative: must a national law under which unequal treatment of this kind, based on the employee's religious affiliation, is justified by reference to the Church's self-perception, be disapplied in these proceedings?
- 2.b. What conditions apply in respect of the requirement that employees of a church or one of the other organisations act in good faith and with loyalty to the organisation's ethos?

II. Legitimate requirements of a religious employer

3. ECJ decisions (C-414/16 and C-68/17)

- Religious employers can in principle make their own demands on a position with regard to religious affiliation or the necessary ethos. However, these requirements are subject to full judicial review. There is no other way of ensuring compliance with the requirements set out in the Directives.
- The national courts must interpret the relevant law in accordance with the relevant Directives. If it is unable to do so, it must, if necessary, disapply the national provision – including the provisions set by the religious employers.
- The requirements laid down by the employer must be checked to see whether, objectively speaking, there is a direct link between the occupational requirement laid down by the employer and the activity in question. This may result from the nature of the activity or the circumstances in which it is carried out.

II. Legitimate requirements of a religious employer

4. Decisions by BAG

- After the ECJ decision both cases went back to the BAG.
- A Catholic employer may not dismiss a Catholic employee if he or she divorces and remarries without an annulment of the first marriage by a Canonic court.
- The dismissal was not justified, because there was no sufficient connection with the ethos. The unequal treatment with workers of other denominations was therefore not justified.
- A religious employer may not require an applicant/employee to be affiliated with its own religion, if such affiliation is no prerequisite for the job at hand; e.g. every belief may require their priests to be part of their belief, but not their janitors
- European law may also restrict the freedom of the Church, the European Court of Justice has not exceeded its competences.
- Reactions of the Federal Constitutional Court are awaited.

III. Religious signs at the workplace

1. Bougnaoui (C-188/15)

- Customer requests that no more temporary workers with a veil will be sent
- Dismissal by temporary agency due to refusal to lay down the veil
- Submitted question: Is the employer's will to meet the wishes of a customer an essential and decisive professional requirement within the meaning of the Directive?
- Decision by ECJ: Essential and decisive professional requirement = objectively determined by the nature of the professional activity in question or by the conditions under which it is pursued
- Not included are subjective considerations such as the will of the employer to meet special customer requirements.

III. Religious signs at the workplace

2. Achbita (C-157/15)

- Dismissal due to a violation of an internal ban on wearing visible signs of political, philosophical or religious conviction
- Submitted question: Does the prohibition of wearing an Islamic headscarf, based on such internal rules, constitute a direct discrimination? If not, is the aim to convey a picture of neutrality a legitimate aim, justifying an indirect discrimination based on religious beliefs?
- Arguments:
 - No direct discrimination, because all employees are treated equally
 - Indirect discrimination is objectively justified by a legitimate aim and appropriate and necessary as a means of attaining that aim

III. Religious signs at the workplace

2. Achbita (C-157/15)

- Decision by ECJ: The employer's will to convey a picture of neutrality to its customers is part of the entrepreneurial freedom.
- Such an internal rule is appropriate for the proper application of a policy of neutrality. However, this must be a general and undifferentiated policy of prohibition and it needs to be limited to what is absolutely necessary, in particular only to employees who come into contact with customers.
- New submission to the ECJ (30.01.2019) whether a general arrangement in the private sector, which also prohibits the wearing of conspicuous religious signs, is always justified under discrimination law on the basis of entrepreneurial freedom
- It is as of now unclear whether a religious employer may ban the wearing of religious signs, but can use religious signs on his own and allow his employees to use them too (e.g. Catholic nun's cross chain)

IV. Religious holiday (C-193/17)

- Under Austrian Law only members of certain Christian confessions are entitled to a holiday on Good Friday
- If they are required to work on Good Friday, they are legally entitled to a holiday surcharge on their regular wage
- An employee not affiliated with any religion demanded the surcharge on his wage on Good Friday, which his employer refused
- Submitted questions
 - Does EU law conflict with the Austrian rule of Good Friday being a holiday only for members of certain Christian confessions?
 - If yes, is a private employer required to grant a surcharge to every employee working on Good Friday or do the national courts disapply the national discriminatory rule in its entirety

IV. Religious holiday (C-193/17)

Decision by ECJ

- National legislation under which, first, Good Friday is a public holiday only for employees who are members of certain Christian churches and, second, only those employees are entitled, if required to work on that public holiday, to public holiday pay, constitutes direct discrimination on grounds of religion.
- The measures provided for by that national legislation cannot be regarded either as measures necessary for the protection of the rights and freedoms of others or as specific measures intended to compensate for disadvantages linked to religion.
- Until the Member State has amended its legislation granting the right to a public holiday on Good Friday only to employees who are members of certain Christian churches, in order to restore equal treatment, a private employer who is subject to such legislation is generally obliged to also grant his other employees a public holiday on Good Friday.

V. Consequences of the court decisions

- Discrimination based on religious beliefs is still a relevant topic
- Churches in Germany still have a strong status due to guaranteed rights in the Federal Constitution
- However, it must still comply with the provisions of other laws, such as the European Anti-Discrimination Directives
- Full judicial control of decisions of religious employers based on faith is possible
- The employer may consider religion (forum internum and externum) when structuring his enterprise
- The closer a decision affects the core of the faith, the more free a religious employer is in its decisions

VI. Discussion

Discussion

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