



Funded under the 'Rights, Equality and Citizenship  
Programme 2014-2020' of the European Commission

# Religious discrimination at the workplace

Applying EU Anti-Discrimination Law  
Academy of European Law  
Webinar for members of the judiciary,  
28-29 September 2020

Anna Śledzińska-Simon  
Professor of Constitutional Law  
University of Wrocław

## Contents

1. LEGAL FRAMEWORK
2. UNEQUAL TREATMENT WITH REGARD TO RELIGIOUS HOLIDAYS (FESTIVALS)
3. GENUINE AND DETERMINING QUALIFICATIONS
4. CHURCH AUTONOMY / RELIGIOUS EMPLOYERS
5. RELIGIOUS SYMBOLS
6. RELIGIOUS ACCOMMODATION?

# 1. LEGAL FRAMEWORK

## Freedom of thought, conscience and religion

Article 9 of the European Convention of Human Rights

- 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

## Freedom of thought, conscience and religion

Article 9 of the European Convention of Human Rights

- had there been an interference provided for by law?
- was it justified?

„was it necessary in a democratic society”

„was the relationship between the means and the ends proportional”

„did national authorities strike a fair balance between the protection of public interests/rights of others and the rights of the applicant”?

## Freedom of thought, conscience and religion

Article 10 of the Charter of Fundamental Rights

- 1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
- 2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

subject to limitations pursuant to Article 52(1) of the Charter

- Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

## Religion

- „freedom of religion is one of the fundamental rights and freedoms recognised by EU law and that the term ‘religion’ must be understood, in that regard, as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public” (Cresco, para. 58).

## Prohibition of discrimination on grounds of religion or belief

- Article 21 of the Charter
- Framework Equality Directive (Directive 2000/78/EC)
  - Direct discrimination Article 2(2)(a) – may be justified in exceptional cases, to be interpreted strictly:
    - Article 2(5) national measures for protection of public interests
    - Article 4(1) genuine and determining occupational qualifications
    - Article 4(2) church autonomy
    - Article 7(1) positive action
  - Indirect discrimination Article 2(2)(b) – may be justified by an legitimate/objective aim, and the means of achieving that aim are appropriate and necessary (the means-ends relationship is proportional)
  - applicable only in the context of employment (Article 3(1)).

## 2. UNEQUAL TREATMENT WITH REGARD TO RELIGIOUS HOLIDAYS (FESTIVALS)

### Religious holidays (Kosteski v. FYRM)

- Kosteski v. the Former Yugoslav Republic of Macedonia (2006) - disciplinary dismissal due to unauthorized absence to participate in a religious festival
  - no violation of Article 9 of the Convention;
  - no violation of Article 14 of the Convention in conjunction with Article 9.

## Religious holidays (Kosteski v. FYRM)

- 39. Insofar as the applicant has complained that there was an interference with the inner sphere of belief in that he was required to prove his faith, the Court recalls that the courts' decisions on the applicant's appeal against the disciplinary punishment imposed on him made findings effectively that the applicant had not substantiated the genuineness of his claim to be a Muslim and that his conduct on the contrary cast doubt on that claim in that there were no outward signs of his practising the Muslim faith or joining collective Muslim worship.
- While the notion of the State sitting in judgment on the state of a citizen's inner and personal beliefs is abhorrent and may smack unhappily of past infamous persecutions, the Court observes that this is a case where the applicant sought to enjoy a special right bestowed by Macedonian law which provided that Muslims could take holiday on particular days, including the Bayram festival in issue in the present case (see paragraph 29 above).
- In the context of employment, with contracts setting out specific obligations and rights between employer and employee, the Court does not find it unreasonable that an employer may regard absence without permission or apparent justification as a disciplinary matter.
- Where the employee then seeks to rely on a particular exemption, it is not oppressive or in fundamental conflict with freedom of conscience to require some level of substantiation when that claim concerns a privilege or entitlement not commonly available and, if that substantiation is not forthcoming, to reach a negative conclusion (see, *mutatis mutandis*, cases concerning conscientious objection where the authorities may legitimately require strong evidence of genuine religious objections to justify exemption from the civil duty of military service – e.g. *N. v. Sweden*, no. 10410/83, Commission decision of 11 October 1984, D.R. 40 p. 203, *Raninen v. Finland*, no. 20972/92, Commission decision of 7 March 1996). **The applicant however was not prepared to produce any evidence that could substantiate his claims. To the extent therefore that the proceedings disclosed an interference with the applicant's freedom of religion, this was not disproportionate and may, in the circumstances of this case, be regarded as justified in terms of the second paragraph, namely, as prescribed by law and necessary in a democratic society for the protection of the rights of others.**
- 40. The Court concludes that there has been no violation of Article 9 in the present case.

## Religious holidays (Sessa v. Italy)

- Francesco Sessa v. Italy (2012) - refusal by the judicial authority to postpone the hearing set down for the date of a religious festival preventing the applicant from participating in his capacity as the representative of one of the complainants
- no violation of Article 9 of the Convention.

## Religious holidays (Sessa v. Italy)

- 37. In the circumstances of this case, the Court is not convinced that the scheduling of the impugned hearing on a date corresponding to a Jewish holiday and the refusal to postpone it to another date can be construed as a restriction on the petitioner's right to freely exercise his or her religion. Indeed, it is not disputed that the person concerned was able to discharge his religious duties. Moreover, the applicant had to expect that his request for postponement would be rejected in accordance with the provisions of the law in force and could have been replaced at the disputed hearing in order to meet his professional obligations.
- Finally, the Court noted that the applicant had not shown that he had been subjected to pressure to change his religious beliefs or to prevent him from manifesting his religion or belief (Knudsen v. Norway, no. 11045/84, Commission decision of 8 March 1985, DR 42, p. 258; Kottinen, *supra*).
- 38. In any event, **even supposing there had been interference with the applicant's right under Article 9 § 1, the Court considers that such interference was provided for by law, that it is justified by the protection of the rights and freedoms of others - in particular the right of individuals to benefit from the proper functioning of the administration of justice and to have the principle of reasonable time in proceedings respected (paragraph 12 above)** - and that it bears a reasonable relationship of proportionality between the means employed and the aim pursued (see, *mutatis mutandis*, Casimiro and Ferreira v. Luxembourg (dec.), No. 44888/98, 27 April 1999).
- 39. Accordingly, there was no violation of Article 9 of the Convention.

## Religious holidays (C-193/17 Cresco Investigation GmbH)

- 1. Articles 1 and 2(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that **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 a payment in addition to their regular salary for work done on that day, 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, within the meaning of Article 2(5) of that directive, or as specific measures intended to compensate for disadvantages linked to religion, within the meaning of Article 7(1) of the directive**.
- 2. Article 21 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that, until the Member State concerned 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 obliged also to grant his other employees a public holiday on Good Friday, provided that the latter have sought prior permission from that employer to be absent from work on that day, and, consequently, to recognise that those employees are entitled to a payment in addition to their regular salary for work done on that day where the employer has refused to approve such a request.

### 3. GENUINE AND DETERMINING OCCUPATIONAL QUALIFICATIONS

#### GDOQ

Article 4(1) of the Framework Equality Directive

- 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.

## GDOQ

- „37. (...) it is clear from Article 4(1) of Directive 2000/78 that it is not the ground on which the difference of treatment is based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement (see judgments of 12 January 2010, *Wolf*, C-229/08, EU:C:2010:3, paragraph 35; of 13 September 2011, *Prigge and Others*, C-447/09, EU:C:2011:573, paragraph 66; of 13 November 2014, *Vital Pérez*, C-416/13, EU:C:2014:2371, paragraph 36; and of 15 November 2016, *Salaberria Sorondo*, C-258/15, EU:C:2016:873, paragraph 33).“
- „38. (...) it is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement.“
- „39. (...) such a characteristic may constitute such a requirement only ‘by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out’.“
- „40. the concept of a ‘genuine and determining occupational requirement’, within the meaning of that provision, refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer.” (Bougnaoui, para. 37-40)

## 4. CHURCH AUTONOMY / RELIGIOUS EMPLOYERS

See:

- Declaration No 11 on the status of churches and non-confessional organisations annexed to the Final Act of the Treaty of Amsterdam
- Article 17 TFEU

## Religious employers

- Article 4(2) of the Framework Equality Directive
- Member States may maintain national legislation in force at the date of adoption of this Directive 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 reason of the nature of these activities or of the context in which they are carried out, **a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos**. 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.

## Employment by religious organizations

- Schüth v. Germany (2010) – violation of Article 8 in case of dismissal from the position of organist and choirmaster at the Catholic parish church for a breach of the duty of loyalty (adultery and bigamy).
- Obst v. Germany (2010) – no violation of Article 8 in case of dismissal from the position of a director for public relations in the Mormon Church for the breach of the duty of loyalty (extramarital cohabitation).
- Siebenhaar v. Germany (2011) – no violation of Article 9 in case of termination without notice of a teacher in a kindergarten run by an evangelical parish due to her active membership in another religious community.
- Sidicatul „Pastorul cel Bun” v. Romania (2012) – no violation of Article 11 in case of refusal to register a union set by members of the clergy and lay members of the Orthodox Church as a trade union.
- Fernández Martínez v. Spain (2014) – no violation of Article 8 in case of non-renewal of an employment contract with an ex-priest who publicly advocated the abolition of celibacy.

## Religious employers (C-414/16 Egenberger)

- Article 4(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, read in conjunction with Articles 9 and 10 of the directive and Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that, where a church or other organisation whose ethos is based on religion or belief asserts, in support of an act or decision such as the rejection of an application for employment with it, that by reason of the nature of the activities concerned or the context in which the activities are to be carried out, religion constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation, it must be possible for such an assertion to be the subject, if need be, of **effective judicial review** by which it can be ensured that the criteria set out in Article 4(2) of that directive are satisfied in the particular case.
- (2) Article 4(2) of Directive 2000/78 must be interpreted as meaning that the genuine, legitimate and justified occupational requirement it refers to is a requirement that is necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and **cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation. That requirement must comply with the principle of proportionality.**
- (3) A national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 4(2) of Directive 2000/78, to ensure within its jurisdiction the judicial protection deriving for individuals from Articles 21 and 47 of the Charter of Fundamental Rights of the European Union and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.
- 

## Religious employers (C-68/17 IR)

- The second subparagraph of Article 4(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning:
  - first, that a church or other organisation the ethos of which is based on religion or belief and which manages a hospital in the form of a private limited company cannot decide to subject its employees performing managerial duties to a requirement to act in good faith and with loyalty to that ethos that differs according to the faith or lack of faith of such employees, without that decision being subject, where appropriate, to **effective judicial review** to ensure that it fulfils the criteria laid down in Article 4(2) of that directive; and
  - second, that **a difference of treatment, as regards a requirement to act in good faith and with loyalty to that ethos, between employees in managerial positions** according to the faith or lack of faith of those employees is consistent with that directive **only if**, bearing in mind the nature of the occupational activities concerned or the context in which they are carried out, **the religion or belief constitutes an occupational requirement that is genuine, legitimate and justified in the light of the ethos of the church or organisation concerned and is consistent with the principle of proportionality, which is a matter to be determined by the national courts.**
- 2. A national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in a manner that is consistent with Article 4(2) of Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from the general principles of EU law, such as the principle prohibiting discrimination on grounds of religion or belief, now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union, and to guarantee the full effectiveness of the rights that flow from those principles, by disapplying, if need be, any contrary provision of national law.

## 5. RELIGIOUS SYMBOLS

### Religious symbols

- Conflict between the neutrality of the state and the freedom to manifest or even practice religion
- Conflict between freedom to conduct business (Article 16 of the Charter) and the freedom to manifest or even practice religion

## Religious symbols / religious objections to carry out specific works (ECHR)

- Dahlab v. Switzerland (2001) – no violation of Article 9 in case of a school teacher who was dismissed for wearing a Muslim headscarf.
- Eweida v. UK (2013) – violation of Article 9 in case of a member of the check-in staff working for a private airline who was in breach of its uniform policy prohibiting religious symbols
- Chaplin v. UK (2013) – no violation of Article 9 in case of a nurse working in a state hospital, on a geriatric ward, who was in breach of its uniform policy prohibiting any kind of jewellery
- Ladele v. UK (2013) – no violation of Article 14 in conjunction with Article 9 in case of a registrar refusing to conduct same-sex civil partnerships
- McFarlane v. UK (2013) – no violation of Article 9 or Article 14 in case of an employee in private foundation refusing to consult same-sex couples.
- Ebrahimian v. France (2015) – no violation of Article 9 for a refusal to renew the employment contract with an employee of a public hospital who insisted on wearing a Muslim veil against the principle of state neutrality
- Grimmark v. Sweden (2020); Steen v. Sweden (2020) – inadmissibility (as manifestly ill-founded) of an application filed by midwives who objected assisting abortions.

## Religious symbols (C-157/15 Achbita)

- Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that **the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief within the meaning of that directive.**
- By contrast, such an internal rule of a private undertaking **may constitute indirect discrimination** within the meaning of Article 2(2)(b) of Directive 2000/78 if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary, which it is for the referring court to ascertain.

## Religious symbols (C-188/15 Asma Bougnaoui)

- Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that **the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.**

## Religious symbols (C-341/19 MH Müller Handels GmbH)

- Can established **indirect unequal treatment on grounds of religion** within the meaning of Article 2(2)(b) of Directive 2000/78/EC, resulting from an internal rule of a private undertaking, be justifiable only if, according to that rule, it is prohibited to wear any visible sign of religious, political or other philosophical beliefs, and not only such signs as are prominent and large-scale?
- If Question 1 is answered in the negative:
  - (a) Is Article 2(2)(b) of Directive 2000/78/EC to be interpreted as meaning that the **rights derived from Article 10 of the Charter of Fundamental Rights of the European Union and from Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms may be taken into account in the examination of whether established indirect unequal treatment on grounds of religion is justifiable** on the basis of an internal rule of a private undertaking which prohibits the wearing of prominent, large-scale signs of religious, political or other philosophical beliefs?
  - (b) Is Article 2(2)(b) of Directive 2000/78/EC to be interpreted as meaning that **national rules of constitutional status which protect freedom of religion may be taken into account as more favourable provisions within the meaning of Article 8(1) of Directive 2000/78/EC** in the examination of whether established indirect unequal treatment on grounds of religion is justifiable on the basis of an internal rule of a private undertaking which prohibits the wearing of prominent, large-scale signs of religious, political or other philosophical beliefs?
- If Questions 2(a) and 2(b) are answered in the negative:
  - In the examination of an instruction based on an internal rule of a private undertaking which prohibits the wearing of prominent, large-scale signs of religious, political or other philosophical beliefs, **must national rules of constitutional status which protect freedom of religion be set aside because of primary EU law, even if primary EU law, such as, for example, Article 16 of the Charter of Fundamental Rights, recognises national laws and practices?**

## 6. RELIGIOUS ACCOMMODATION?

Thank you for your attention!

[anna.sledzinska-simon@uwr.edu.pl](mailto:anna.sledzinska-simon@uwr.edu.pl)