

Discrimination based on religion

Case study on the exclusion based on religion

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Introduction

In the context of the equal treatment legislation of the European Community the (non-discrimination) grounds of religion and belief appear in two different situations:

- A. In case you want to combat discrimination on these grounds.
- B. In case you want to justify a difference in treatment that is based on any of the other non-discrimination ground, mentioned in Article 13 EC with the argument of (freedom of) religion or belief.

In this background paper I will give a brief overview of the most important provisions in both situations.

In the last part of this paper (C) I will briefly describe a fictional case that we will discuss in our workshop.

A. Combating discrimination on the ground of religion or belief

Implementation / direct effect

Discrimination on the ground of religion or belief is prohibited under the General Framework Directive on Equal Treatment in Employment (Directive 2000/78/EC). The implementation date of this Directive has expired at 2 December 2003. This means that each Member State of the EU must now have national legislation in place, prohibiting this kind of discrimination. If this legislation is not in conformity with the Directive it is possible that the norms of the Directive will have direct (vertical) effect in the Member States. This depends on the interpretation that the European Court of Justice (ECJ) will give to these norms. With respect to the existing Sex Equality Directives the ECJ has established on several occasions that the equal treatment norms in these Directives can indeed have direct effect. This means that it is predictable that the ECJ will decide that most of the provisions of the Framework Directive on Equal Treatment in Employment will also be able to have direct effect. The criteria for direct effect are that a provision must be clear, precise and unconditional enough to be considered justiciable. (C-63/99: Głoszczuk.)

The definition of religion and belief

The Directive itself does not define what should be considered to be a religion or a belief. There is nothing about the meaning of these terms to be found in the Preamble of the Directive as well. This means that it is open for legal debate what should count as a religion or a belief.

According to the European Court of Human Rights (ECHR) the concept of a religion in article 9 of the European Convention on Human Rights should be interpreted in a broad sense. This article also protects the right not to have a religion! (see EHRM 18 February 1999, *Buscarini and others vs San Marino*, nr. 24645/94).

But is the personal conviction of somebody that every Thursday is a holy day in which 'spirits' send messages to the earth a 'belief' that should be respected?

In the Netherlands we have some experience with the prohibition of discrimination on the ground of religion or belief. From this we can derive some 'guidelines'.

According to the Dutch Equal Treatment Commission something is only a belief in the sense of the Dutch Equal Treatment Act when it involves a coherent set of ideas, concerning shared and fundamental opinions about human existence. In addition the Dutch legislator and the Commission have declared that the protection against discrimination on this ground not only covers the fact that somebody (internally) has a certain religious conviction, but also covers the (external) visible behaviour that is inspired by / based on this conviction. The question then arises what kind of behaviour is being seen as essential for a person's religious beliefs. Is it necessary that everybody in a certain religious community does subscribe to these practices? For example: some Islamic women say that wearing a headscarf is an essential part of the Islamic faith, other women say it is not.

We will have to wait and see how the ECJ is going to interpret the concepts of a religion and a belief.

The norms

Directive 2000/78/EC prohibits *direct* and *indirect* discrimination and *harassment* on the ground of religion or belief and *instructions* to this kind of discrimination.

Direct discrimination

Direct discrimination is the case when a difference in treatment of one person compared to another is directly based on the fact that this person has a certain religion or belief. (Article 2, par. 2 (a) of the Directive.) An example: an employer refuses to hire somebody because this person has declared that he is a Christian and the employer (a Jewish butchery) only wants to employ Jewish people.

The definition of direct discrimination means that there needs to be (a) a less favourable treatment and (b) a comparable situation. This is not always easy to establish. It remains to be seen whether the ECJ will accept the hypothetical comparison.

In case of direct discrimination it is only possible to bring forward justifications that are mentioned in the Directive (see below).

Indirect discrimination

Indirect discrimination is the case when an otherwise neutral provision, criterion or practice puts persons with a particular religion or belief at a particular disadvantage, unless this ... etc. (Article 2, par. 2 (b) of the Directive.)

This involves a two-fold test:

1. Is there a (a) *disparate impact* of (b) certain *provisions, criterion or practices*?
2. Is there an objective justification for this to be given?

Ad 1 (a): how to assess whether this is the case(*)? How to prove this? What is 'particular' (how big has the difference have to be?) Statistical evidence? Or common knowledge?

(*) In EC law you can find different criteria for this. The Framework Directive and the Racial Equality Directive require that a practice, etc puts persons of a certain religion or belief, race etc.. at a particular disadvantage. The Burden of Proof Directive requires that this practice disadvantages a substantially higher proportion of one group compared to another and the ECJ stated in the O'Flynn case with respect to indirect nationality discrimination: is liable to affect one group more than another. It remains to be seen what kind of proof the ECJ will demand.

Ad 1 (b) provision, criterion, and practices: this is very broad. There must be shown some 'cause' of the difference in outcome for the respective groups, and this cause must somehow be linked to the dealings (or non-dealings!) of the accused.

Ad 2. If there is a prima facie case of indirect discrimination it still has to be ascertained that there is no objective justification for this provision, criterion or practice. (See below.)

An example: A school has issued a dress code for all its pupils. They all have to wear the same blue and grey uniform. The dress code also states that all pupils are prohibited to wear caps, scarves or anything else on the head. Any pupil that is not dressed according to this code will be removed from the school. This dress code can

be indirectly discriminatory to pupils who have to wear headscarves on the ground of their religious beliefs when it is proved that this dress code will have a disproportionate negative impact on the rights of these pupils. In case there is such a case of indirect discrimination the board of the school can bring forward arguments that justify the indirect discrimination (see below).

Harassment

Harassment is the case when unwanted conduct related to religion or belief takes place with the purpose or the effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. (Article 2, par. 3 of the Directive.) An example: a Sikh worker, wearing a turban, is constantly being the victim of practical jokes by his fellow employees and the employer refuses to take action against this. One should be aware that the Directive does not give any opportunities to justify an established case of harassment.

Instruction to discriminate

An instruction to discriminate is the case when an employer gives people who work under his supervision, or with whom he contracts the instruction to discriminate directly or indirectly on the ground of religion. For instance: an employer can give an instruction to a Manpower Station not to send him any temporary personnel that has a certain religion. It is unclear in how far instructions to discriminate can be justified. Some commentators assume that in this case the system of justifications in case of direct and indirect discrimination and harassment is applied accordingly.

Possible justifications for discrimination on the ground of religion

General exception clause

With respect to all the different non-discrimination grounds that are covered by Directive 2000/78/EC a general exception-clause is in place. Article 2 par. 5 states that this Directive shall be without prejudice to measures, laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

To give an example: a certain 'church' has the habit of sacrificing living animals to their 'god' by way of burning them in a wood in the middle of the night. The government may prohibit these practices in a period of dryness and great danger for wood fires, provided that they construct a legal basis for this action. Or the government may state that burning living animals is contrary to the national criminal laws prohibiting cruel treatment of animals.

Direct discrimination

In case of direct discrimination on the ground of religion and belief the defendant can also bring forward a certain (limited) number of possible justifications.

These are, according to Directive 2000/78/EC:

- Occupational requirements that are related to having a specific religion or belief (article 4, par. 1.)
- Occupational activities within churches and other public and private organisations that are based on a religious ethos (article 4, par. 2)
- Positive action programs (article 7, par. 1.)
- Specific positive action programmes in Northern Ireland (police and teaching staff) (article 15.)

Occupational requirements

As to the occupational requirements the Preamble of the Directive clearly states that they should be used very restrictively as a justification for unequal treatment (Preamble, par. 23.) There are two proviso's: the aim that is served by this requirement should be legitimate (i.e.: non-discriminatory in itself!) and the requirement should be proportionate. The case of the Jewish butchery (see above) could perhaps serve as an example of a justifiable occupational requirement that justifies the recruitment of a butcher with the Jewish faith. (A butchery does not fall under par. 2 as far as I can see!)

Churches and other religious institutions

As to the justification for churches and other religious organisations: this is a justification clause in the Directive that is much debated. We can expect that it will mostly be used in case of (presumed) discrimination on one of the other non-discrimination grounds. (This will be discussed below, in part B. of this paper.)

But also in the case of discrimination on the ground of religion one can foresee that this provision may play a role. For example: a catholic school wants to recruit a new gym teacher and states in the job advertisement that only catholic candidates can apply for the job. There is a lot of debate going on among commentators of European non-discrimination law about what exactly does / does not fall under this provision. In the workshop during the Conference we will try to establish the borders of this justification defence more clearly.

Positive action

Positive action plans, in order to ensure full equality in practice to persons of a certain religious group in order to compensate for disadvantages that this group has, are sometimes necessary. (Think of the example of Northern Ireland.) This means that members of this religion will get a certain ‘preferential treatment’ in order to overcome the effects of past or present discrimination against them. Of course this is only admissible as long as such groups really are in a disadvantaged position. One can expect that the ECJ will interpret this clause very restrictively.

In *Commission vs France* (a sex equality case decided in 1988) the ECJ held that this exception is specifically and exclusively designed to allow measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequalities which may exist in the reality of social life.

This is because any positive action in favour of a certain religious group will automatically mean that members of other religions or people who are not religious at all will not have the same rights under the programme and thus will (in theory) be discriminated. The Court has given some general guidelines as to the question under what conditions positive action programmes are allowed in its sex equality cases. (e.g. *Kalanke*, C-450/93 and *Abrahamson*, C-407/98.)

Kalanke: national rules which guarantee women absolute and unconditional priority for appointment or promotion overstep the limits of the exception of article 2(4) of the Sex Equality Directive. The aim could not be to achieve equal results, only equal opportunities.

In *Abrahamson*, the Court sticks to this restrictive approach. The criteria used and an appointment procedure must be transparent and amenable to judicial review in order to obviate any arbitrary assessment of the qualification of the candidates. The Court also mentions the principle of proportionality: giving absolute preference to one sex is in any case disproportional to any given aim. (Par. 55).

Northern Ireland

The Directive makes a specific exception for Northern Ireland. In that case the Directive sets the express condition that the programmes should have a basis in national law.

Indirect discrimination

In case of indirect discrimination it is possible to bring forward ‘objective justifications’.

According to article 2, par. 2 (b) sub i, this means that there needs to be a legitimate aim and that the means of achieving that aim are appropriate and necessary.

In its case law in the field of sex discrimination the ECJ has given quite concrete directions about the question as to what can count as a legitimate aim and how to assess whether means are appropriate and necessary. (See e.g. *Bilka*, C.- 170/84 and *Nimz*, C.- 184/89.)

The ECJ narrowly describes the test whether such justifications are indeed “an excuse” for the fact that *de facto* people of a certain religion or belief are disadvantaged by a formally neutral provision, criterion or practice. It involves the following steps.

1. The defendant should bring forward the aim of this provision, criterion or practice, and has to prove:
 - a) that this aim corresponds to a real need of the undertaking or meets a necessary aim of the social policy of a Member State (See e.g. *Bilka*, C.- 170/84 and *Nimz*, C.- 184/89);
 - b) that this aim in itself has nothing to do with discrimination on grounds of religion or belief.
2. The defendant should prove that the means (*) of achieving this aim are appropriate and necessary. This means:

- a) that the aim could not be reached with other (less damaging) means
(necessary)
- b) that the means are proportional to this aim and are effective to reach this aim
(appropriate)

(*) the means are the contested provision, criterion or practice

So, for instance, in the case where a school has so-called neutral dress code for pupils in place, it should first be established whether, as a result of that requirement, pupils of a certain religion are excluded from the school. (See above.) Next it should be established whether there is an objective justification that could legitimate the alleged discrimination. The burden of proof for this rests on the defendant. This means that the aim of setting this requirement must be free of discrimination. In case the board of the school admits that the dress code is intended to keep Muslim pupils out of the school this is not legitimate! The aim could be to prevent competition between pupils or to prevent indecent or dangerous clothing. These aims are legitimate as such. It then needs to be established that the requirement to wear a school uniform is appropriate and necessary to achieve that particular aim.

(I will not deal with more technical matters, like the need for statistical evidence of indirect discrimination and the burden of proof. I presume that these issues will be dealt with in other parts of this conference.)

B. Justifying different forms of discrimination with the freedom of religion or the autonomy of churches

In case we have a case of direct or indirect discrimination on the ground of race/ethnicity, disablement, age, or sexual orientation it is possible to bring forward a justification that refers to religion and belief.

It is to be expected that Article 4, par. 2 of Directive 2000/78/EC will serve this goal in the future.

Although, strictly speaking, this provision can be brought forward only to justify a difference of treatment *on the ground* of religion or belief, it can have the effect of justifying a difference of treatment on one of the other grounds mentioned in article 1 of the Directive. The European legislator has tried to prevent this from happening by expressly stating in article 4, par. 2 that this provision may not be justified to discriminate on another ground.

However, many commentators have expressed the fear that especially with respect to sex and sexual orientation churches or religious organisations may use this provision to justify discrimination.

This means that an organisation can state that it will not hire a homosexual or a woman because this is against the ethos of the organisation.

With this clause in the Directive we have entered the difficult area of the intersection between on the one hand the right not to be discriminated against and on the other hand the constitutional right to religious freedom of individuals and organisations.

Example: a Protestant school that is very strict in maintaining its 'religious ethos' accidentally finds out that one of the teachers, who has been working there for 15 years, is a homosexual because one of the pupils has seen this woman during a vacation on a Spanish beach with her partner. They were embracing and hugging each other. The pupil has spread this news after the school holidays. This means that in no way this teacher has ever expressed her homosexuality in the school. The board of the school fires the woman. It states that being a homosexual is contrary to the Christian belief and that the woman sets a bad example for the children! Would this be allowed under the Directive???

C. Fictional case about discrimination on the ground of religion / belief

Ms Ulla Senton lives in a Member State of the EU. Ms Senton is 25 years old. She has a university degree in psychology and has also been trained as a counsellor. A couple of years ago Ms Senton (born Catholic) has converted to the Sikh religion. She is a very strict believer. This means that she is a vegetarian and wears only white clothing and a white turban. She has even officially changed her name into Sad Atmar Gahn. After she has obtained her counsellor diploma Ms Gahn does not get a grant from her parents any longer and she desperately needs to get paid work.

She looks into the newspapers and finds four different job advertisements that she finds suitable. Now: Let us have a look at these ads and see whether Ms Gahn has a chance of getting a job!

1. The local government seeks for a psychologist / counsellor in the local health care centre annex hospital. The main task of this person will be to give psychological aid to the relatives of children with deadly diseases. Not in the add, but well known to Ms Gahn: The local government has a dress code policy in all of their public (service) institutions. It says that employees are not allowed at all to show any sign of their religious beliefs or convictions.
2. A Catholic grammar school (for secondary education) applies for a counsellor for pupils who need psychological aid. Not all of the pupils of this school are Catholics or even Christians. The school even encourages parents of different religious beliefs to send their children to this school (instead of to the local 'neutral' public school, with whom they are in fierce competition!). Nevertheless, according to the add, the school requires that the person who applies for the job has been baptised as a Roman Catholic and is practising this belief.
3. The local women's shelter (for battered women) seeks a social worker / counsellor. The women's centre puts in the add that they want to appoint a woman of the Islamic faith because they have a lot of Islamic women coming

to the centre for aid and they do not have anybody in their staff with special knowledge of this religion c.q. culture.

4. A big psychiatric hospital in a nearby town advertises for a psychotherapist / counsellor. The institution is not based on a particular belief. The regional government finances it. This regional government has a policy to subsidise only those mental healthcare institutions whose list of personnel shows that there is a proportional representation of all of the different cultural / religious groups that live in the particular region. Statistics show that of this population 68% is Christian, 17% does not have a religion, 9% is Muslim, and the rest is spread over a number of other religions. The institution meets most of these criteria, but has nobody in the category 'various beliefs'. On this ground the mental health institution puts in the advertisement that they especially invite Hindus, Sikhs, Buddhists, et cetera to apply for this job. It is stated that the job will automatically be given to a person from this category, provided that he/she fulfils the necessary requirements (diploma's, experiences, etc) for the job.

Questions that need to be answered with respect to each of these adds (*):

1. Is this a case of direct or indirect discrimination? How to draw the line?
2. Why is it important to decide whether this is direct / indirect discrimination?
3. In case you decide that this is a possible case of direct discrimination: is it possible for the employers in these particular cases to bring forward one of the justification defences that are allowed according to the Directive (78/2000/EC)? Which article is suitable in which case? Why?
4. In case you decide that one of the cases may constitute indirect discrimination:
(a) What would Ms Gahn have to bring forward to win her case? (b) What would the employer have to bring forward? Do you think that the employer would have a chance to win the case?

5. Let us presume that a Protestant or Islamic person also applies for the job in the 4th add. He states that this positive action programme of the regional government is illegal. What arguments could he bring forward to build his case on? Does he have a chance to win the case?

(* I leave aside some preliminary questions, like: does Ms Gahn fall under the personal scope of the Directive, is the situation covered by the material scope, what if the Member State did not fully implement the Directive? Et cetera.