

SUMMARY

## **ECtHR 23 September 2010 (Obst &ndash; v &ndash; Germany)&nbsp;&nbsp;&nbsp;Application no. 425/03, Fundamental rights**

***&lt;p&gt;The European Court of Human Rights (ECtHR) recently considered these two cases about the dismissal of an employee from a religious organisation. The issue was whether these dismissals were compatible with Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (&ldquo;European Convention on Human Rights&rdquo; or ECHR), which guarantees the right to respect for private and family life. Although both cases involved Church bodies, the rulings have wider implications for all ideological employments, including the scope of Article 4 of Directive 2000/78/EC. This provision allows Member States to maintain or adopt legislation &ldquo;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&rsquo;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&rsquo;s religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation&rsquo;s ethos&rdquo;.&lt;/p&gt;***

## **Introduction**

The European Court of Human Rights (ECtHR) recently considered these two cases about the dismissal of an employee from a religious organisation. The issue was whether these dismissals were compatible with Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights” or ECHR), which guarantees the right to respect for private and family life. Although both cases involved Church bodies, the rulings have wider implications for all ideological employments, including the scope of Article 4 of Directive 2000/78/EC. This provision allows Member States to maintain or adopt legislation “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”.

## **Facts**

In *Obst*, a member of the Church of Jesus Christ of Latter Day Saints (the Mormon Church), who was employed by that church in Germany in a senior position as Director of European Relations, was dismissed summarily (without notice) for cause. He was dismissed after confessing that his marriage had deteriorated and that he had had an affair with another woman. He brought proceedings before the local labour court, which declared the dismissal to be void. The Court of Appeal initially upheld the judgment, but following a further appeal to the Federal Labour Court and remittal of the case, the Court of Appeal found in favour of the Church.

In *Schüth*, an organist and choirmaster employed by a Catholic parish in Germany was dismissed without notice for having an extra-marital affair. As in *Obst*, he initiated legal proceedings against his dismissal but in the end the Church prevailed.

Relying on Article 8 ECHR, both *Obst* and *Schüth* complained of the refusal of the courts to overturn their dismissal.

## **ECtHR’s judgment**

In both cases, the ECtHR had to examine whether the balance struck by the German labour courts, between the applicants' right to respect for their private life under Article 8 ECHR on the one hand and the rights of the Catholic and the Mormon Church on the other, had afforded the applicants sufficient protection. The ECtHR reiterated that the autonomy of religious communities was protected against undue interference by the State under Article 9 ECHR (freedom of religion) read in the light of Article 11 ECHR (freedom of assembly and association).

By putting in place a system of labour courts and a constitutional court having jurisdiction to review the former courts' decisions, Germany had in principle complied with its positive obligations towards litigants in the area of employment law. The applicants had been able to bring their cases before a labour court with jurisdiction to determine whether the dismissal had been lawful under State labour law while having regard to ecclesiastical labour law. In both cases, the Federal Labour Court had found that the requirements of the Mormon Church and the Catholic Church, respectively, regarding marital fidelity did not conflict with the fundamental principles of the legal order.

As regards *Obst*, the ECtHR observed that the German labour courts had taken account of all the relevant factors and had undertaken a careful and thorough balancing exercise regarding the interests involved. According to those courts' findings, his dismissal amounted to a necessary measure aimed at preserving the Church's credibility, having regard in particular to the nature of his post. The courts had explained why the Church had not been obliged to inflict a less severe penalty, such as a warning, and they had underlined that the injury suffered by *Obst* as a result of his dismissal was limited, having regard among other things to his relatively young age.

The fact that, after a thorough balancing exercise, the German courts had given more weight to the interests of the Church than to those of *Obst*, did not itself raise an issue under the ECHR. The conclusion that *Obst* had not been subject to unacceptable obligations was reasonable, given that, having grown up in the Mormon Church, he had been or should have been aware when signing the employment contract of the importance of marital fidelity for his

employer .

As regards *Schüth*, in contrast, the ECtHR observed that the labour court of appeal had confined itself to stating that, whilst his functions as organist and choirmaster did not fall within the group of employees who in case of serious misconduct had to be dismissed, his functions were nonetheless so closely connected to the Catholic Church's mission that the parish could not continue employing him without losing all credibility. The court of appeal had not examined this argument any further but appeared to have simply reproduced the opinion of the Church on this point.

The labour courts had moreover made no mention of *Schüth's* de facto family life or of the legal protection afforded to it. The interests of the Church had thus not been balanced against *Schüth's* right to respect for his private and family life, but only against his interest in keeping his post. A more detailed examination would have been required when weighing the competing rights and interests at stake.

While the ECtHR accepted that in signing his employment contract, *Schüth* had entered into a duty of loyalty towards the Catholic Church which limited his rights to respect for his private life to a certain degree, his signature on the contract could not be interpreted as an unequivocal undertaking to live a life of abstinence in the event of separation or divorce. On balance, the ECtHR found that the German labour courts had failed to weigh *Schüth's* rights against those of the Church employer in a manner compatible with the ECHR.

In summary, the ECtHR unanimously concluded that there had been no violation of Article 8 in *Obst's* case and that there had been a violation of Article 8 in *Schüth's* case.

### **Commentary**

These decisions raise a number of concerns, specifically in relation to religious organisations, but additionally to all ideological employments protected by Article 4 of Directive 2000/78/EC. Such employments include religious organisations, political organisations, environmental groups, charities and employments related to a specific task (for example, the licensing of

embryo research (which others may object to)).

Firstly, there is concern over the jurisdiction of the ECtHR and, by inference, the ECJ. In *Schüth*, a defining factor in the decision by the ECtHR was the meaning given to Directive 2000/78/EC. Germany had implemented this Directive by means of its General Law on Equal Treatment (*Allgemeines Gleichbehandlungsgesetz*). Germany had been subject to a Commission Enforcement Notice dated 31 January 2008 because the Commission was of the opinion that Germany had failed to transpose Article 4 of Directive 2000/78/EC properly.

In relation to religious organisations, this very possibility of a secular court reviewing the religious needs of an autonomous religious organisation is likely to have a chilling effect on its operation, and to hamper its religious mission. For this reason, the US courts seek to maintain religious liberty under the First Amendment by seeking to avoid all religious entanglement. This has been done by providing for a doctrine known as ‘ministerial exemption’ (see *Rweyemamu – v – Cote*, 520 F.3d 198, 206 (2d Cir. 2008)). This is an exemption to the law that prevents the US courts from even embarking on an enquiry of any form at all (subject to the preliminary issue of whether the doctrine applies). In contrast, Directive 2000/78/EC requires such an enquiry. For example, in the UK case of *Reaney – v – Bishop of Hereford* (2007), a bishop in the Church of England did not want to employ a homosexual youth worker who said he would be celibate for the duration of the employment. The bishop was found to have breached the national implementing measure for Directive 2000/78/EC. The Employment Tribunal could not separate function (the applicant would preach Christianity and not practice homosexuality) from the ideological nature of the employment (you need to believe that homosexuality is a sin). Does a secular court know the requirements of the Church of England better than a bishop?

Secondly, other ideological non-religious employers may require a commitment to the ethical values of the employer and seek to impose a code of conduct on all employees. Can someone who believes in nuclear power and oil exploration in the North Sea and Alaska be a suitable person for employment in the environmental group *Friends of the Earth*? Does it matter that his advocacy for the intrusion into the Alaska wilderness by US corporate interests takes place after work and forms part of his private life within Article 8 ECHR? Can an atheist scholar teach Islamic ethics to students of the *Qur’an*? Can a Conservative value-orientated person

seek employment in a socialist advocacy group?

And fundamentally, is it so wrong to have a Jewish firm of lawyers, a Christian medical practice and a Muslim firm of accountants? The State can promote a version of the 'good', but private citizens must be free not to follow the State's version of the 'good'.

However, to summarise the position following the ECtHR's judgments in *Obst* and *Schüth*, national courts must consider, *inter alia*, i) the requirement for the voluntary assumption of an ideological code as a condition of employment, ii) the importance and reasonableness of the code, iii) the proportionality of any sanction, iv) the interests of the employee, v) the ability of the employee to secure alternative employment, and vi) the importance of autonomy for the ethical body.

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**Creator:** European Court of Human Rights (ECtHR)

**Verdict at:** 2010-09-23

**Case number:** no. 425/03