EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

ECtHR 3 February 2011 (Siebenharr – v – Germany), Application no. 18136/02, Fundamental rights

***<p>The European Court of Human Rights (ECtHR) has recently considered, or will be considering these cases, which have both a direct and indirect impact on employment law.

In Siebenhaar – v – Germany, the European Court considers the position of the Church as an employer. What is unusual is that this case is now the third such case against Germany in less than six months (Both Obst – v – Germany (Application No 425/03) and Schuth – v – Germany (Application No 1620/03) were decided on 23 September 2010, see EELC 2010-5).

On 12 April 2011, the European Court accepted two cases from the United Kingdom on the place of religious rights in the employment context. In both McFarlane and Ladele, an employee who is a practising Christian refused to preside over a civil partnership service for homosexuals on the premise that they would be facilitating their lifestyle.

It is because of the increasing sensitivity of this issue that the subject should be addressed. Further, it is prudent to note the upcoming cases***

***from the United Kingdom because of their likely widespread impact on employment practice throughout Europe.
***
***
***
The issue of an employee’s religious rights in the workplace is becoming contentious across Europe and it further appears that the Christian faith is particularly problematic. This is likely to be because of twin factors, which appear contradictory. The first is the increasing secularism within the EU and the consequent displacement of Judeo-Christian values; the second is the increasing importance of religion in a multi-faith Europe.</p>

Introduction

The European Court of Human Rights (ECtHR) has recently considered, or will be considering these cases, which have both a direct and indirect impact on employment law.

In Siebenhaar – v – Germany, the European Court considers the position of the Church as an employer. What is unusual is that this case is now the third such case against Germany in less than six months (Both Obst – v – Germany (Application No 425/03) and Schuth – v – Germany (Application No 1620/03) were decided on 23 September 2010, see EELC 2010-5).

On 12 April 2011, the European Court accepted two cases from the United Kingdom on the place of religious rights in the employment context. In both McFarlane and Ladele, an employee who is a practising Christian refused to preside over a civil partnership service for homosexuals on the premise that they would be facilitating their lifestyle.

It is because of the increasing sensitivity of this issue that the subject should be addressed. Further, it is prudent to note the upcoming cases from the United Kingdom because of their likely widespread impact on employment practice throughout Europe.

The issue of an employee’s religious rights in the workplace is becoming contentious across Europe and it further appears that the Christian faith is particularly problematic. This is likely to be because of twin factors, which appear contradictory. The first is the increasing secularism within the EU and the consequent displacement of Judeo-Christian values; the

second is the increasing importance of religion in a multi-faith Europe.

Facts

In Siebenhaar, a Church worker employed in the day care centre (Kindergarten) of the Protestant Parish of Pforzheim was dismissed because of her membership of the Universal Church of Humanity. The primary issue was her religious belief, which was held incompatible with that of her employer. Ms Siebenhaar was not only a member of another Church (religious organisation), but was responsible for an introductory course to that Church. After losing in the Labour Court, she appealed to the Labour Court of Appeal, to the Federal Labour Court and finally submitted a complaint to the Constitutional Court. She was unsuccessful at every level (except for the Labour Court of Appeal) and her claim was dismissed. Thereafter, she made an application to the ECtHR under Article 9 for breach of her of her freedom to manifest her religion.

In McFarlane, a marriage counsellor was concerned that providing directive sex therapy to a same sex couple would violate his religious conscience and in Ladele, a marriage Registrar declined to preside over a civil partnership as this was contrary to her religious conscience. Both Mr McFarlane and Ms Ladele were model employees, who simply sought exemption from an employer's order because of their religious beliefs. The employer in both cases could have allocated the work to another employee. Both Mr McFarlane and Ms Ladele failed before the Employment Tribunal, Employment Appeal Tribunal and the Court of Appeal. Both applicants made an application to the ECtHR under Article 9 for breaches of freedom to manifest religious belief.

ECtHR' s judgment in Siebenharr

In Siebenharr, the ECtHR had to examine whether the balance struck by the German labour courts was satisfactory. The issue was between the applicants' freedom of religion under Article 9 ECHR on the one hand and the rights of the employer to protect its identity and reputation on the other. The main question addressed by the ECtHR was whether the national courts in Germany had correctly balanced the conflicting interests of the employer and employee.

The ECtHR held that the German courts had correctly balanced the interests of the employer and employee. However, the Judgment of the Court under Article 9 was confusing and contradictory to its decision in Schuth.

Further, the ECtHR gave the German courts a broad margin of appreciation because of the

lack of consensus within the Council of Europe as to the importance of religious rights and how best to protect them. It has to be noted that this approach is regrettable as it will no doubt facilitate conflicting and contradictory judgements by the Member States of the Council of Europe in relation to an increasingly important right of the Convention.

The ECtHR held that a Church employer was entitled to require that employees refrain from activities that were incompatible with the objectives of the employer. In particular, it was recognised that the Protestant Church needed to maintain its credibility both in the eyes of the public and with parents of children at the Kindergarten (who would be concerned about any undue influence of a teacher on their children). The ECtHR also considered the young age of the applicant, her length of employment and the fact she was aware (or should have been aware) that her membership of the Universal Church of Humanity conflicted with the interests of her employer.

Whilst, this decision is consistent with Obst, it is difficult to reconcile with Schuth where the Court found a violation of Article 8 whereby Mr Schuth was dismissed in consequence of an affair and new family. In Schuth, the failure to consider other means of preserving the reputation of the Church should have been considered. However, in Siebenhaar, there was no evidence that her service provision to the children was anything other than professional.

Whilst it is clear that Church autonomy is important to freedom of religion, which includes the right that employees should hold the same religious views as their employer (Article 4(2) of Directive 2000/78 specifically provides for this), one might think that the activities of Mr Schuth would be more damaging to the reputation of the Church than those of Ms Siebenhaar.

The cases of McFarlane and Ladele will give the ECtHR an opportunity to consider the place of religious rights in the workplace. Clearly there is a clash between the values of Christian morality and modern sexual mores. However, it is to be noted that in both cases the wishes of Mr McFarlane and Ms Ladele could have been accommodated by a simple screening process.

It is because of these inconsistent decisions, and the importance of the religious rights of employees, that these cases from the United Kingdom give the ECtHR an opportunity to resolve this issue on a principled basis.

Commentary

Clearly, a balance needs to found between an employer's interests and the religious rights of

employees. The problem is further heightened by the (natural) desire of employers to restrict their employee's activities or rights to free speech where they feel these are damaging to their enterprise.

In Vogt – v – Germany (Application No 17851/91), the applicant was dismissed from her position as a teacher on account of her membership of the Communist Party: such membership was deemed incompatible with the Ôduty of political loyalty' placed on all civil servants by the then Federal Republic of Germany. The Court found a violation of Article 10 and that individuals could not lose their Article 10 rights by virtue of employment (as a civil servant). The Court held the dismissal disproportionate as the Communist Party was a lawful organisation and there was no evidence that Ms Vogt did anything other than act as a professional teacher.

On the other hand, in Rommelfanger – v – Germany (Application No 12242/86), the ECommHR upheld the dismissal of a doctor by a Catholic hospital for his expression of opinion in support of abortion (which was contrary to the position of the Catholic Church). There was a specific contractual clause of loyalty. The doctor had publically expressed his opinion in a letter to the magazine 'Stern'. The Commission examined the issue and upheld the position of the German Courts (that the dismissal was justified), in particular, because of the fact that his expression was public and the Catholic Church was 'an organisation based on certain convictions and value judgments'.

The field of religious rights is becoming increasingly important in employment law and requiring added sensitivity by employers. Where the employer owes special duties to the public (police, civil service or judiciary), or the employer is an 'ideological organisation' (such as the church, gay rights groups or political parties) it appears that a 'proportionate' 'duty of loyalty' can be imposed and an employee can be dismissed for public or private activities incompatible with the objective or reputation of the employer.

Where the employer is a commercial undertaking, the principle is likely to be 'reasonable accommodation' of the religious rights of an employee. However, this is subject to other neutral norms of feasibility, cultural norms, relations between the sexes, and relations between other groups. This area is clearly going to be an increasing area of controversy and is likely to be further clarified by the decisions in McFarlane and Ladele – v – United Kingdom.

Creator: European Court of Human Rights (ECtHR)
Verdict at: 2011-02-03

Case number: 18136/02