

SUMMARY

ECJ 17 April 2018, C-414/16 (Egenberger), Religious discrimination

It is ultimately for the courts to verify whether religious organisations can legitimately invoke occupational requirements as a reason for unequal treatment.

Vera Egenberger – v – Evangelisches Werk für Diakonie und Entwicklung eV, German case

Legal background

Directive 2000/78/EC (Framework Directive) aims to prevent unequal treatment in labour relations, based, *inter alia*, on religion or belief. However, Article 4(1) enables Member States to provide that differences in treatment may be allowed based on otherwise forbidden characteristics. Because of the nature of particular occupational activities or their context, determining characteristics can then constitute a genuine and determining occupational requirement. However, the aim of the unequal treatment must be legitimate and the requirement proportionate.

Article 4(2) stipulates that, 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 will not constitute discrimination if, because of the nature of the activities or their context, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. The difference in treatment must take account of Member States' constitutional provisions and principles, as well as the general principles of EU law, and it should not justify discrimination on another ground. In this way, the Framework Directive does not prevent churches and other religious organisations from requiring individuals working for them to act in good faith and with loyalty to the organisation's ethos.

However, Germany has implemented these provisions in a way that appears to give religious institutions more room for unequal treatment than the corresponding provisions in the Framework Directive. In fact, established German case law holds that religious institutions can themselves determine whether occupational activities require a difference in treatment. The courts' review of such decisions is limited to a review of plausibility.

Facts

Evangelisches Werk für Diakonie und Entwicklung eV ('EKD') published an offer of fixed-term employment for a project to produce a report on the United Nations International Convention on the Elimination of All Forms of Racial Discrimination. It required membership of a (relevant) church. Ms Egenberger applied for the position, although she was not a member of a church. EDK did not invite her for an interview and hired someone else, who was a member of a relevant church. Ms Egenberger took the matter to court, stating that she had been discriminated against based on belief. She claimed the statutory compensation that is available for discriminatory 'non-hiring'. She was only awarded part of the compensation and so appealed up to the *Bundesarbeitsgericht*. That court noted the potential incompatibilities between EU and German law and asked preliminary questions.

Questions

Must Article 4(2) of Directive 2000/78 be interpreted as meaning that a church or other organisation whose ethos is based on religion or belief intending to recruit an employee may itself determine authoritatively the occupational activities for which religion, by reason of the nature of the activity concerned or the context in which it is carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the ethos of the church or organisation?

What should the criteria be for ascertaining in the particular case whether, having regard to the ethos of the church or organisation in question, religion or belief constitutes, in view of the nature of the activity concerned or the context in which it is carried out, a genuine, legitimate and justified occupational requirement within the meaning of Article 4(2) of Directive 2000/78?

Is a national court required, in a dispute between individuals, to disapply a provision of national law which it is not possible to interpret in conformity with Article 4(2) of Directive 2000/78?

Judgment

As regards the first question, Article 4(2) of the Framework Directive would be deprived of

effect if no independent authority could review whether the criteria were complied with. In addition, the Framework Directive is a specific expression of the general prohibition of discrimination (Article 21 Charter). Article 9 of the Framework Directive requires Member States to provide (judicial) procedures for enforcement. Article 47 of the Charter also requires effective legal protection. By means of Article 4(2), the Framework Directive also takes into account the right of autonomy of churches and religious (or religion-based) institutions and ensures a fair balance between the fundamental rights at stake. However, it must be possible to review whether the balance is being struck, and Member States cannot withdraw their role in this task.

Article 17 TFEU (on the recognition of the neutrality of churches and religious associations) does invalidate this conclusion. It follows from recital 24 of the Framework Directive, that this Article must have been taken into account, along with the corresponding Declaration No 11 on the same subject. Further, whilst the EU recognizes its neutrality towards religious (and religious-based) institutions, they are not exempt from EU law.

As to the second question, Member States and their judicial authorities should refrain from assessing the legitimacy of the employer's ethos itself. They should instead ensure that the occupational requirement in question, by reason of the nature of the activities concerned or the context in which they are carried out, is genuine, legitimate and justified, having regard to that ethos. Thus, there must be a direct, objectively verifiable link between the occupational requirement and the activity. This may follow from the nature of the activity or the circumstances in which it is carried out (e.g. ensuring credible presentation to the outside world).

The requirement must be genuine, legitimate and justified, having regard to the organisation's ethos. 'Genuine' means necessary because of the importance of the occupational activity to the manifestation of that ethos. 'Legitimate' means the requirement must not be used to pursue an aim that has no connection with the ethos. 'Justified' means that the supposed risk of harm to the organisation's ethos or its right of autonomy is probable and substantial, thus making the requirement necessary. Moreover, the requirement must comply with the principle of proportionality. Although this is not mentioned in Article 4(2), it is a general principle of EU law.

As regards the last question, the national courts must try to ensure national provisions conform to EU law to the extent possible, without recourse to a *contra legem* decision. This may involve changing established case law. If it is impossible to apply a national provision in such a way that it conforms with the Framework Directive, the national provision must be disapplied. If not, this would be in contravention of Article 21(1) of the Charter. Article 47 of

the Charter confirms this, in that it provides for judicial protection. The courts should seek to balance the various interests involved.

Ruling

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.

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.

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.

Creator: European Court of Justice (ECJ)

Verdict at: 2018-04-17

Case number: C-414/16 (Egenberger)