SUMMARY

ECJ 11 September 2018, C-68/17 (IR – v – JQ), Unfair dismissal, Religious discrimination

<p>IR – v – JQ, German case</p>

Summary

If a religious organisation relies on an exception to the principle of equal treatment to draft rules that differ according to the religion of the employees, this must be subject to judicial review and will be acceptable only if the religion or belief constitutes a genuine and legitimate occupational requirement, justified by the ethos of the organisation concerned and the application of the exception is proportionate. If there are contrary provisions in national law, these must be disapplied.

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.

Germany has incorporated freedom of religion or belief into its Constitution. It has also implemented the Directive. Various churches and religious institutions apply their own rules, using the exceptions in the German implementation of Article 4 of the Directive. The Basic Regulations on Employment Relationships in the Service of the Church (*Grundordnung*) treats *"entering into a marriage that is invalid according to the Church's teachings and its legal system"* as a serious breach of duty which is generally considered to be a possible ground for dismissal. For employees in managerial positions, this rules out any possibility of continued employment, except in very exceptional cases. However, the rules do not apply to non-Catholic Christian employees or employees without any religion or belief. Consequently, there is a difference in treatment between various groups within the organisation, as described below.

Facts

IR is a limited liability company established under German law, with the purpose of carrying out the work of the Roman Catholic Church. One way in which it did this was by running hospitals. IR is a mainly not-for-profit organisation under the supervision of the Archbisop of Cologne. JQ was Roman Catholic and he worked as Head of the Internal Medicine Department in an IR hospital, his employment contract being subject to the *Grundordnung*. After he divorced his first wife, he married again, albeit invalidly according to the Church. When IR found out, it dismissed JQ.

JQ brought an action, claiming that the dismissal infringed the principle of equal treatment. He asserted – and this was agreed between parties over the course of the proceedings – that he would not have been dismissed had he not been Catholic. JQ won all proceedings up to the Federal Labour Court (*Bundesarbeitsgericht*), but when IR appealed, the Federal Constitutional Court set aside the initial judgment – it is not clear why – and referred back the case to the *Bundesarbeitsgericht*.

In the subsequent proceedings, the *Bundesarbeitsgericht* was unsure about the interpretation of Article 4(2) of the Directive, as IR treated employees differently according to their beliefs. It wanted to know what criteria must be used to determine whether the requirement to act in good faith and with loyalty is consistent with Article 4(2) of Directive 2000/78. It also wanted

to know whether the contested provision (i.e. the German implementation of Article 4(2)) should be disapplied, if it was impossible to interpret it in accordance with the Directive.

Questions

Must the second subparagraph of Article 4(2) of Directive 2000/78 be interpreted as meaning 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 can definitively decide to subject its employees performing managerial duties to a requirement to act in good faith and with loyalty that differs according to the faith or lack of faith of such employees and, if that is not the case, what criteria are to be used to determine whether, in each individual case, such a requirement is consistent with that provision?
Is, under EU law, a national court required, in a dispute between individuals, to disapply a provision of national law that cannot be interpreted in a manner that is consistent with the second subparagraph of Article 4(2) of Directive 2000/78?

Consideration

First question

Private organisations such as IR, can also use the exception in Article 4(2) of the Directive, provided that their ethos is based on religion or belief. The provision covers the occupational activities of the individuals working for the organisation. However, the decision or act creating the difference in treatment must be subject to effective judicial review and the Member States must ensure this is available (*Egenberger*, C-414/16). Article 17 TFEU does not invalidate that conclusion. It was also mentioned explicitly in recital 24 to the Directive and must therefore be taken into account when Member States adopt the Directive. Further, while Article 17 TFEU expresses neutrality towards how churches, religious associations and communities are organised in Member States, this does not exempt them from compliance with Article 4(2) of the Directive.

The ECJ explained that the difference in treatment must meet the conditions of Article 4(2). The lawfulness of the difference of treatment depends on the objectively verifiable existence of a direct link between the occupational requirement imposed by the employer and the activity concerned. Such a link may be the result of the nature of the activity (e.g. to contribute to the evangelising mission of the organisation) or the circumstances in which the activity is to be carried out (e.g. ensuring it presents itself credibly to the outside world). The occupational requirement must be genuine, legitimate and justified.

'Genuine' here means that professing the religion or belief on which the ethos of the church or organisation is based must be necessary because of the importance of activity in question for the promotion of that ethos or the exercise by the organisation of its right of autonomy (as recognised by Article 17 TFEU and Article 10 of the Charter).

'Legitimate' means that there must be a connection between the religion or belief on which the ethos is founded and the aims of the organisation.

The term 'justified' implies that the risk of undermining the ethos is probable and substantial, and this makes it necessary to impose a requirement. But the requirement must meet the principle of proportionality, i.e. it must be appropriate and not go beyond what is necessary.

It follows that employers can only treat people differently in connection with the requirement to act in good faith and with loyalty to the ethos, if the religion or belief is a genuine, legitimate and justified occupational requirement in the light of the ethos of the organisation. While this is for the national court to decide, as guidance the ECJ explained that the requirement in this case, concerned a particular aspect of the Catholic Church's ethos, namely the sacred and indissoluble nature of religious marriage and that adherence to that notion did not appear to the ECJ to be necessary for the promotion of IR's ethos, bearing in mind the occupational activities of JQ. It therefore appeared to the Court not to be a genuine requirement – albeit that this was for the national court to verify. This conclusion was supported by the by the fact that non-Catholic IR employees performed the same jobs but were not subject to the same requirement.

Second question

The ECJ explained that national courts must take into account the whole body of national rules to decide whether a contested provision should be interpreted in line with the Directive, without having recourse to an interpretation *contra legem*. The ECJ was of the view that if necessary, the national court must change its established case law.

If this was impossible, the ECJ noted that the Directive does not, in itself, establish the principle of equal treatment. This originates in various international instruments and constitutional traditions common to the Member States. The Directive aims to lay down a general framework. A national court that cannot interpret the contested provision in line with the Directive, is obliged to provide the legal protection of EU law and must ensure the full effectiveness of that law, disapplying, if need be, any contrary provision.

In this case, the dismissal happened earlier than the Charter came into force (in 2009). However, the prohibition against discrimination on grounds of religion or belief, now enshrined in Article 21 of the Charter, was derived from common constitutional traditions of the Member States and is therefore a mandatory general principle of EU law and in itself sufficient to confer a right on individuals that they can rely on against other individuals. The national court must therefore disapply any contrary provisions.

Ruling

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.

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.

Creator: European Court of Justice (ECJ)
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