

SUMMARY

ECJ 22 January 2019, C-193/17 (Cresco Investigation), Discrimination, Religion

Cresco Investigation GmbH – v – Markus Achatzi, Austrian case

Summary

Granting an allowance for working on Good Friday which is subject to the membership of specific churches constitutes direct discrimination under Framework Directive 2000/78/EC. Following Article 21 of the Charter, the allowance must be paid to every employee who works on Good Friday.

Legal background

Framework Directive 2000/78 aims to combat discrimination in employment and occupation, such as religious discrimination. Article 2(2)(a) forbids direct discrimination. Article 2(5) stipulates that the Directive shall be without prejudice to measures of 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 freedom of others. Article 7 of the Directive enables positive action, meaning that specific measures to prevent or compensate for disadvantages linked to any of the discrimination grounds are allowed.

The Austrian Law on Rest Periods and Public Holidays (*Arbeitsruhegesetz*, the 'ARG') applies to all employees. Paragraph 7(2) lists the public holidays, at which all employees are entitled to rest. Additionally, Paragraph 7(3) declares Good Friday a public holiday (only) for a fixed set of four Roman Catholic Churches. Paragraph 9 of the ARG grants both regular wage and an additional allowance for employees who work on a public holiday.

It should be noted that Directive 2000/78 was transposed into Austrian law by other legislation, most notably by the Law on Equal Treatment (*Gleichbehandlungsgesetz*).

Facts

Mr Achatzi was employed by Cresca, and not a member of any of the churches covered by the ARG. He claimed that he suffered discrimination by being denied public holiday pay for the work he did on Good Friday in 2015.

At first instance, his claim was rejected, but the appeal court allowed his appeal. The case then came before the Supreme Court (*Oberster Gerichtshof*). It wondered whether Article 7(3) of the ARG was compatible with the Framework Directive as it seemed directly discriminatory, but also wondered whether one of the exceptions could apply. It therefore asked preliminary questions.

Questions

Must Articles 1 and 2(2) of Directive 2000/78 be interpreted as meaning that national legislation under which, first, Good Friday is a public holiday only for employees who are members of certain Christian churches and, second, only those employees are entitled, if required to work on that public holiday, to public holiday pay, constitutes direct discrimination on grounds of religion?

If the answer is in the affirmative: can the measures provided for by the national legislation be regarded as measures that are necessary for the protection of the rights and freedoms of others, within the meaning of Article 2(5) of that directive, or as specific measures intended to compensate for disadvantages linked to religion, within the meaning of Article 7(1) of that directive?

Must EU law be interpreted as meaning that, until the Member State concerned has amended its legislation granting the right to a public holiday on Good Friday only to employees who are members of certain Christian churches, in order to restore equal treatment, a private employer who is subject to such legislation is obliged also to grant his other employees a public holiday on Good Friday and, consequently, if the latter are required to work on that day, to recognise that they are entitled to public holiday pay?

Consideration

First question

It is apparent that there is a difference in treatment based on religion. The key determinant is whether the employee is a member of one of the churches in question, not whether he must actively participate in any religious duties. Consequently, the situation of such employee is no different from that of other employees who want to have a rest day on Good Friday, but are not entitled to an allowance. Therefore, there is direct discrimination on grounds of religion within the meaning of Article 2(2)(a).

It then should be established whether one of the exceptions applies. As regards the exception of Article 2(5), its intention is to prevent and adjudicate on a conflict between (i) the principle of equal treatment and (ii) the need to ensure public order, safety and health, the prevention of criminal offences and the protection of individual rights and freedoms. Such considerations may set aside the prohibition on direct discrimination, however, only if such measures are necessary. They must be interpreted strictly (*Prigge and Others*, C-447/09). In this case, the provisions at issue are laid down by national law (which is one of the criteria of Article 2(5)). Their objective is to take account of the particular importance of religious celebrations associated with Good Friday of members of those churches. Freedom of religion is one of the fundamental rights and freedoms referred to by Article 2(5). However, employees belonging to another church or religion cannot claim a public holiday when such day is not covered by the ARG. Given the lack of consistency, Article 7(3) of the ARG apparently is no necessary measure.

The provision at issue also cannot be deemed a positive action as meant in Article 7(1). It does not meet the principle of proportionality and, as far as possible, the principle of equal treatment: supporters of other religions are not treated comparably favourable.

Second question

It is settled case law that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual (such as *Cresco*). Courts must interpret the whole body of national laws conform the Directive, without having recourse to an interpretation *contra legem*.

If this is also not possible, it should be noted that Directive 2000/78 does not itself establish the principle of equal treatment in the field of employment and occupation. The principle originates in various international instruments and the constitutional traditions common to the Member States. The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law. Article 21 has direct effect, even between individuals (*Egenberger*, C-414/16).

As long as measures reinstating equal treatment have not been adopted, it is only possible to treat persons equally when the disadvantaged category enjoys the same advantages as the favoured category. They must therefore be placed in the same position (*Milkova*, C-406/15). Until reinstating equal treatment have been adopted by the national legislature, it is for employers to ensure that employees who are not members of one of those churches enjoy the

same treatment as that enjoyed only by employees who are members of one of those churches under the provisions at issue in the main proceedings – which in this situation means that all employees are entitled to a public holiday on Good Friday, if they have informed their employer that they do not wish to work on that day.

Ruling

Articles 1 and 2(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 that national legislation under which, first, Good Friday is a public holiday only for employees who are members of certain Christian churches and, second, only those employees are entitled, if required to work on that public holiday, to a payment in addition to their regular salary for work done on that day, constitutes direct discrimination on grounds of religion.

The measures provided for by that national legislation cannot be regarded either as measures necessary for the protection of the rights and freedoms of others, within the meaning of Article 2(5) of that directive, or as specific measures intended to compensate for disadvantages linked to religion, within the meaning of Article 7(1) of the directive.

Article 21 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that, until the Member State concerned has amended its legislation granting the right to a public holiday on Good Friday only to employees who are members of certain Christian churches, in order to restore equal treatment, a private employer who is subject to such legislation is obliged also to grant his other employees a public holiday on Good Friday, provided that the latter have sought prior permission from that employer to be absent from work on that day, and, consequently, to recognise that those employees are entitled to a payment in addition to their regular salary for work done on that day where the employer has refused to approve such a request.

Creator: European Court of Justice (ECJ)

Verdict at: 2019-01-22

Case number: C-193/17