



According to Advocate General Tanchev, occupational requirements set by religious organisations are subject to judicial review with respect to alleged unlawful discrimination on the basis of belief

The national courts are obliged to a balance the right of the organisation to autonomy and self-determination against the right of the employee or prospective employee not to be discriminated against on the basis of belief

Vera Egenberger applied for a job advertised by the Evangelisches Werk für Diakonie und Entwicklung, an auxiliary organisation of the Protestant Church in Germany that is governed by private law, and which exclusively pursues charitable, benevolent and religious purposes. The job, which was for a fixed term of 18 months, entailed preparing a report on Germany's compliance with the United Nations International Convention on the Elimination of All Forms of Racial Discrimination. This included public and professional representation of the Evangelisches Werk für Diakonie und Entwicklung and coordination of the process of forming opinions within that organisation. The advertisement required membership of a Protestant church or of a church which is a member of the Cooperative of Christian Churches in Germany.

Ms Egenberger was not appointed to the post. She contends that this was so because she does not belong to any religious community. She therefore lodged a claim with the German Labour Courts for payment of damages of around €10 000, arguing that she had been discriminated against on the basis of belief.

In order to determine whether, as a matter of EU law, Ms Egenberger has suffered unlawful discrimination or rather been subjected to justified unequal treatment, the Bundesarbeitsgericht (Federal Employment Court, Germany) submitted a series of questions to the Court of Justice. In particular, it asks the Court to clarify the extent to which occupational requirements of religious organisations invoking the ecclesiastical privilege of self-determination may be judicially reviewed.¹ The Bundesarbeitsgericht says that, under German law, such judicial review is limited to plausibility review, on the basis of a religion's self-conception defined by belief. It also seeks guidance as to how the competing interests at stake are to be balanced, namely freedom of belief and the right not to be discriminated against on the basis of religion or belief, on the one hand, and the right to self-determination and autonomy of religious organisations on the other hand.

In today's opinion, Advocate General Evgeni Tanchev points out that the EU directive that is central to the resolution of the dispute² ('the Directive') contains a special rule that was developed to deal with the specific situation of the circumstances in which religious organisations can lawfully engage in unequal treatment on the basis of belief.³ This rule sets the parameters for the standard of judicial review to apply when a religious organisation is challenged for having taken the position that unequal treatment on the basis of belief does not amount to unlawful discrimination. That is, by reason of the nature of the activities in question and the context in which they are carried out, does

¹ The Advocate General points out that church related institutions are reported to be the second largest employer in Germany, employing around 1.3 million people, and as occupying a quasi-monopolistic position in some regions and fields of work. (4,126).

² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16). (2)

³ Ibid Article 4 (2).

a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos?

First, Advocate General Tanchev considers that an employer, such as the Evangelisches Werk für Diakonie und Entwicklung, or the church on its behalf, may not itself authoritatively determine whether adherence by an applicant to a specified religion, by reason of the nature of the activities in question or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer/church's ethos.

While judicial review of the ethos of the church is to be limited,⁴ this does not mean that a Member State court is to be excused from assessing *the activities in question* against the ethos of a religion, to determine whether a person's religion or belief constitute a genuine, legitimate and justified occupational requirement.

Second, the Advocate General is of the opinion that the Bundesarbeitsgericht, in assessing whether adherence to a particular religion for given activities is a genuine, legitimate and justified occupational requirement, having regard to the nature of the activities or of the context in which they are carried out, along with the organisation's ethos, is obliged to take account of the following:

- the right of religious organisations to autonomy and self-determination is a fundamental right that is recognised and protected under EU law. The Directive, and in particular its reference to the 'ethos' of religious organisations,⁵ is to be interpreted in conformity with this fundamental right;
- Member States have a wide but not unlimited margin of appreciation with respect to occupational activities for which religion or belief amounts to genuine, legitimate and justified occupational requirements, by reason of the nature of the activities and the context in which they are carried out;
- the Directive is to be implemented in such a way that the model selected by individual Member States for the conduct of relations between churches and religious associations or communities and the State, is to be respected and not prejudiced;
- the word 'justified' in the Directive requires analysis of whether occupational requirements entailing direct discrimination on the grounds of religion or belief are appropriately adapted to protection of the right of the Evangelisches Werk für Diakonie und Entwicklung to autonomy and self-determination, in the sense that they are suitable for the purpose of attaining this objective;
- the words 'genuine, legitimate' in the Directive require **analysis of the proximity of the activities in question to the proclamatory mission of the Evangelisches Werk für Diakonie und Entwicklung;**
- **the impact, in terms of proportionality, on the legitimate aim of securing the *effet utile* of the prohibition on discrimination on the basis of religion or belief, is to be weighed against the right of the Evangelisches Werk für Diakonie und Entwicklung to its autonomy and self-determination, with due account taken of the fact that the Directive makes no distinction between recruitment and dismissal.**

Third, the Advocate General observes that the present case concerns a dispute between two private parties, which means that national courts are bound to do everything within their powers to interpret the relevant national law in conformity with the Directive. However, if it is impossible for

⁴ For example, under the case-law of the European Court of Human Rights, a State must not interfere in the internal organisation of churches. Further, determining the religious affiliation of a religious community is a task for its highest spiritual authorities alone and not for the State.

⁵ Above note 2, Article 4(2).

the national court to do so because of a clear conflict between the Directive and the relevant provisions of national law, this obligation ceases to apply.

Therefore, if the Bundesarbeitsgericht were to come to the conclusion that the German law at issue cannot be interpreted in conformity with the prohibition contained in the Directive on discrimination on the basis of belief, the remedy available to the Ms Egenberger under EU law would be an action in State liability for damages against Germany. This is so because the prohibition on discrimination based on religion or belief as reflected in the Charter of Fundamental Rights of the European Union, is not, in the opinion of Advocate General, a subjective right that has horizontal application between private parties, in a situation in which it is in competition with the right of religious organisations to autonomy and self-determination.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now commencing their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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