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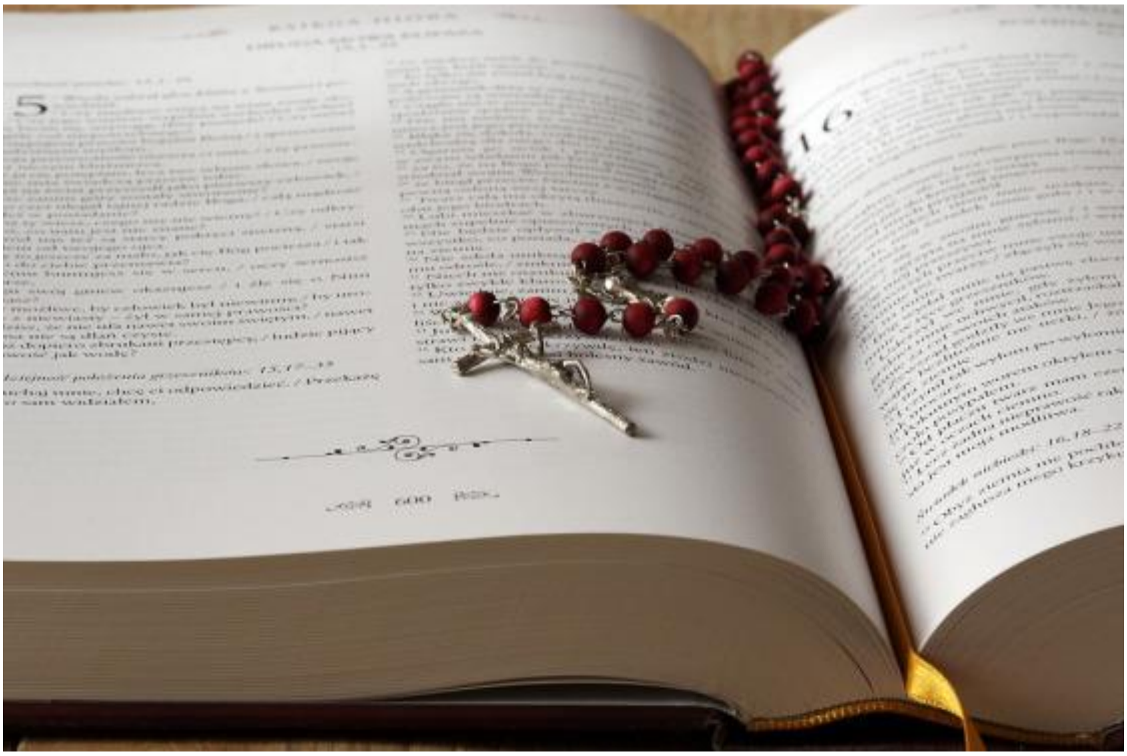
Discrimination and privacy in religious workspaces: a welcome ruling on "ethos organisations" – Katy Sheridan

by UK Labour Law Blog

Last week, the Grand Chamber of the CJEU handed down its fourth case on religious discrimination under the Equal Treatment Directive in employment and occupation: IR v JQ. It is a welcome exposition of limitations on the ability of ethos organisations - those founded on a particular religion or belief - to discriminate against workers. The CJEU appears to take a more stringent approach to restrictions on ethos organisations than that expounded by the split judgment of the European Court of Human Rights (ECtHR) Grand Chamber in Fernández Martínez. The legal issue in both cases related to an ethos organisation dismissing an employee for reasons involving its religious stance.



While the EU's ambition to accede to the European Convention on Human Rights (ECHR) remains in deadlock, it may be that the protection offered against such dismissals by EU law under the Equal Treatment Directive goes further than that offered under article 8 ECHR (the right to respect for private and family life), despite the similar factual matrixes of the two cases. The CJEU approach is to be preferred. The requirement for a protected characteristic to be a "genuine, legitimate, and justified occupational requirement", as found in article 4 (2) of the Equal Treatment Directive, has come close to being infused with a temporal notion of employee privacy. First described as such by Mantouvalou, a temporal notion of employee privacy seeks to emphasise that it is the distinction between activities in and out of working time, rather than acts in public or private spaces, that should inform our analysis of what we should consider 'private' for the purposes of unfair dismissal. By focusing on the relevance of workplace activities, the CJEU takes a welcome step toward recognising this.

The facts in IR v JQ

IR, the employer, is a private company established under German law. Its mission is to realise the work of Caritas (the international confederation of Catholic charitable organisations), which it does through the provision of numerous public services, including healthcare. JQ, a Catholic employee, was the Head of Internal Medicine at a hospital run by IR. He was dismissed following his second marriage, on the grounds that by entering into a marriage that was invalid under canon law, he had infringed his contractual obligation of loyalty to the Church.

Unusually to UK readers, German law permits gradations in the duty of loyalty owed to church-run organisations depending on the religion of the *employee*. For example, by law, Catholic employees "are expected to recognise and observe the principles of Catholic doctrinal and moral teaching", other Christian employees are "expected to respect the truths and values of the gospel", and all employees "shall refrain from acting in a manner that is contrary to the Church. They must not*, in their personal life and their conduct at work*, undermine the credibility of the church" (emphasis added). JQ contended that his dismissal was discriminatory on the grounds of his religion. If a Protestant employee had engaged in the same conduct, it would not have been grounds for dismissal - this was agreed by both parties.

The ruling

The German Federal Labour Court considered that the legality of the dismissal, and by implication the validity of the law on which the dismissal was based (the gradations in loyalty regulations), depended on its compliance with article 4 (2) of the Equal Treatment Directive. Article 4 (2) of the Directive has two aspects. First, it provides that for ethos organisations a difference in treatment based on religion or belief may not constitute discrimination when, by reason of the nature of occupational activities or the context in which those activities are carried out, having such a religion or belief is a genuine, legitimate and justified occupational requirement. Second, 4 (2) provides that, if the other provisions in the Directive are complied with, ethos organisations are permitted to impose a duty of loyalty to the organisation's ethos on employees.

The Court ruled that the lawfulness of a loyalty requirement was subject to both EU law and far-reaching, rather than deferential, judicial review. This confirmed its approach in Egenberger, where the CJEU held that the determination of what constitutes a "genuine, legitimate and justified occupational requirement" was for the court, not the ethos organisation, to determine. In that case, the applicant had not been invited to interview for a post on the basis of having no belief. Thus, in IR, the provisions for loyalty gradations were held only to be lawful to the extent that the religion or belief fulfilled the conditions of being a genuine, legitimate, and justified occupational requirement that was consistent with the principle of proportionality. The Court held the difference in treatment between Catholics and other employees did not comply with article 4 (2). It was not "genuine" as it was clear that similar positions were entrusted to non-Catholic employees and that, moreover, the ability to provide medical care was unrelated to the employee's religion. Neither was the employee's religion a justified requirement. Only if the requirement safeguards against a "probable and substantial risk" of either the organisation's right to autonomy or ethos can it be justified. There was no evidence of such risk in this case.

Analysis

Three aspects of the case are particularly worthy of note.

- *Objectivity and religion*

Both Egenberger and IR make important strides in ensuring the decision of what constitutes a "genuine, legitimate and justified" occupational requirement is appropriately safeguarded by intensive judicial review. In Egenberger, the challenged German law (which was held to be non-compliant with article 4 (2) of the Directive) only subjected the Church's determination of an occupational requirement to a "plausibility" review. IR bolsters the approach in Egenberger by emphasising that there must be an "*objectively verifiable*existence of a direct link between the occupational requirement imposed by the employer and the *activity* concerned" (emphasis added).

Although the court took a robust approach in general, their conclusions in IR perhaps do not go far enough. Another legitimate reason for dismissal, under the challenged German law, would have been if JQ had left the Catholic Church. This creates the situation where an employee converting to the same religion as their colleagues would be a ground for dismissal. The Court should have been clearer that in such a situation where the same job can be effectively done by two people of different faiths or no faith, a difference in treatment leading to dismissal will only not amount to discrimination in the most exceptional circumstances. Such an approach would show more of an appreciation for religion's almost unique status as a protected ground in discrimination law. It is more likely to change than most other protected characteristics.

Indeed, requiring an employee to obey the tenets of their faith shows the employer, by threat of dismissal, attempting to exercise an extreme level of power over the personal or moral choices of its employees. Such an approach, which may be appropriate for a relationship between a church and its congregation, has no place in the employment relationship where the Church has entered into the field of provision of public services. As the Catholic Church remains one of the largest non-governmental providers of healthcare in the world, this point is not merely theoretical. The CJEU hinted at a temporal approach to worker protection which focuses on activities within working time. For example, the CJEU's analysis of JQ's suitability focused on his workplace activities: the provision of care in a hospital setting. It did not focus on the fact that his second marriage was public and therefore 'fair-game' to the religious employer. By noting that an occupational requirement may relate to ensuring that "the church or organisation is presented in a credible fashion to the outside world" the Court appropriately respected the autonomy of ethos institutions, but within a robust system of judicial protection.

Such an approach differs, both in relation to the intensity of review and the focus on workplace activities, from the approach taken by the ECtHR in Fernández Martínez.

- *ECHR: article 8 and* Fernández Martínez

The facts in Fernández Martínez were different from IR in a few important respects. Martinez was a Catholic priest ordered in 1961. He was involved in the movement for optional celibacy in the clergy and in 1985 he married. Six years after his marriage, he applicant was employed as a teacher of Catholicism and ethics in a state-run school. Five years after that, his employer refused to renew his contract on the grounds that by speaking publicly about his views on clerical celibacy (outside the classroom) he had broken his duty of loyalty to the Church. Martinez brought a claim in the ECtHR on the ground that the non-renewal was contrary to the right to respect for private life under article 8 of the ECHR. As is always the case in the ECtHR, the case was against the state rather than a private employer.

The Grand Chamber was sharply divided, but the majority held there was no violation on the grounds that, in the circumstances, the decision had been proportionate. It held that, if a religious community is seeking to assert that its autonomy is threatened, it must show that "the risk alleged is probable and substantial." This matches the language used in IR. But the court then went on to find that the highly deferential approach of the domestic courts was Convention compliant. The dissent's approach emphasised that "the courts should not…confine themselves… to merely verifying the existence of a decision taken by the competent religious authority and then attach civil consequences to that decision." Given that, under domestic law, it was impossible for the courts to conclude that the Ministry (by giving effect to the decision of the church) had violated Martinez's article 8 right, there seems to be a gulf in the intensity of review required of religious employers between EU and ECHR law. Although the applicant's adherence to doctrine, as a priest and teacher, *may*be more convincingly argued to be a genuine occupational requirement in EU law terms, the majority elide the standard of review and the substantive proportionality question. This is most apparent at paragraph 149: the Grand Chamber justifies the domestic Constitutional Court's finding that it was precluded from examining the reason for the dismissal - "scandal"- by reference to the individual circumstances of the applicant. The substantive analysis of the proportionality of the dismissal pays scant attention to the fact that the applicant had been successfully teaching whilst married and had married prior to his appointment. The Court's legitimatisation of the Church's "do as I say, not do as I do" approach affords inadequate protection to workers. Particularly, as the dissenting judgment notes, it is highly questionable whether such a sanction was foreseeable for the applicant.

- *Domestic relevance*

As well as illuminating the Directive, the CJEU in IR held that the prohibition on all forms of religious discrimination was a general principle of EU law. This meant that the Court's ruling on the interpretation of the Directive applied irrespective of the fact that the Directive had not, at the time of the dismissal, been transposed into domestic law. The general principle sidestepped the Directive and applied directly between two private parties. This is significant for domestic application. Pursuant to section 6 of the European Union (Withdrawal) Act 2018, general principles proclaimed prior to exit day remain part of the corpus of retained EU law. Though general principles will no longer generate a cause of action through which to disapply domestic law, they will remain strong interpretive guides.

This is important for Schedule 9, paragraph 3 of the Equality Act, which is the domestic equivalent of article 4 (2) of the Equal Treatment Directive. Schedule 9, paragraph 3 provides that, in the context of an ethos organisation, a requirement to have a particular religion or belief will not be discriminatory if, having regard to the ethos and to the nature or context of the work, it is an occupational requirement which is a proportionate means of achieving a legitimate aim. With no mention of the need for the occupational requirement to be "genuine, legitimate and justified", at first glance its protection falls short of the Directive. The reading of the Directive's requirements into a general principle means that the reasoning in IR could endure through interpretation. This is all the most important given that the European Union (Withdrawal) Act 2018 does not retain Directives in and of themselves, but only their transposing legislation or directly effective rights that have been recognised prior to exit day.

Conclusion

Though a pluralistic democracy demands that courts do not rule on the meaning of religious doctrine, it also requires adequate protection of those who work for ethos organisations. Fernández Martínez is, like Lautsi, another contribution by the ECtHR showing its unwillingness to employ robust judicial scrutiny in sticky religious matters. When these religious matters concern employment, however, the CJEU has taken the lead in ensuring that the status of the employer as an ethos institution does not lead to an unacceptable deference in determining what constitutes a 'genuine occupational requirement.' Whether the ECtHR catches up remains to be seen.

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