

Table of Contents

- ***Judgment in Case C-414/16 Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV***

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The requirement of religious affiliation for a post within the Church must be amenable to effective judicial review

That requirement must be necessary and objectively dictated, having regard to the ethos of the church, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and must comply with the principle of proportionality

EU Court of Justice (17.04.2018) - <https://bit.ly/2H6eRYh> - Ms Vera Egenberger, of no denomination, applied in 2012 for a post offered by Evangelisches Werk für Diakonie und Entwicklung (Protestant Work for Diaconate and Development, Germany). This was a fixed-term post for a project for producing a parallel report on the United Nations International Convention on the Elimination of All Forms of Racial Discrimination. The work included the representation of the diaconate of Germany vis-à-vis the political world and the general public and the coordination of the opinion-forming process internally. According to the offer of employment, applicants had to belong to a Protestant church or a church belonging to the Working Group of Christian Churches in Germany. Ms Egenberger was not called to an interview. Since she considered that she had been discriminated against on grounds of religion, she sued Evangelisches Werk in the German courts, seeking for it to be ordered to pay her €9 788.65 compensation.

The Bundesarbeitsgericht (Federal Labour Court, Germany), which is hearing the case, asked the Court of Justice to interpret in this context the Anti-Discrimination Directive, (*) which aims to protect the fundamental right of workers not to be discriminated against on grounds, inter alia, of religion or belief. However, that directive also takes into account the right of autonomy of churches (and other public or private organisations whose ethos is based on religion or belief), as recognised by EU law, in particular the Charter of Fundamental Rights of the European Union.

Thus the directive provides that a church (or other organisation whose ethos is based on religion or belief) may impose a requirement related to religion or belief if, having regard to the nature of the activity concerned or the context in which it is carried out, 'religion or belief constitute[s] a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'. The Bundesarbeitsgericht observes in this respect that, in accordance with the case-law of the Bundesverfassungsgericht (Federal Constitutional Court, Germany) on the churches' privilege of self-determination, judicial review of compliance with those criteria should be limited, in Germany, to a review of plausibility on the basis of the church's self-perception. It therefore puts questions to the Court in particular on whether such limited judicial review is compatible with the directive.

In today's judgment, the Court starts by finding that, under the directive, the right of autonomy of churches (and other organisations whose ethos is based on religion or belief), on the one hand, and, on the other hand, the right of workers, inter alia when they are being recruited, not to be discriminated against on grounds of religion or belief

must be the subject of a balancing exercise, in order to ensure a fair balance between them.

According to the Court, in the event of a dispute, it must be possible for such a balancing exercise to be the subject of review by an independent authority, and ultimately by a national court.

Thus, 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 they 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 of effective judicial review. The court hearing the case must ensure that, in the particular case, the criteria laid down by the directive for striking a balance between the possibly competing rights are satisfied.

The Court observes in this respect that, in principle, it is not for the national courts to rule on the ethos as such on which the purported occupational requirement is founded. They must nevertheless decide, on a case-by-case basis, whether the three criteria concerning a 'genuine, legitimate and justified' requirement are satisfied from the point of view of that ethos.

Consequently, the national courts must ascertain whether the requirement put forward is necessary and objectively dictated, having regard to the ethos of the church (or organisation) concerned, by the nature of the occupational activity in question or the circumstances in which it is carried out. In addition, the requirement must comply with the principle of proportionality, that is to say, it must be appropriate and not go beyond what is necessary for attaining the objective pursued.

Finally, as regards the point that an EU directive does not, in principle, have direct effect between individuals but has to be transposed into national law, the Court recalls that it is for the national courts to interpret the national law transposing the directive, as far as possible, in conformity with that directive.

Should it prove impossible to interpret the applicable national law (in the present case, the German General Law on equal treatment) in conformity with the Anti-Discrimination Directive, as interpreted by the Court in today's judgment, the Court states that a national court hearing a dispute between two individuals will have to disapply the national law.

Since the Charter is applicable, the national court must ensure the judicial protection deriving for individuals from the prohibition of all discrimination on grounds of religion or belief (laid down in Article 21 of the Charter, that prohibition is mandatory as a general principle of EU law) and the right to effective judicial protection (laid down in Article 47 of the Charter). Both that prohibition of discrimination and the right to effective judicial protection are sufficient in themselves to confer on individuals a right which they may rely on as such in disputes between them and other individuals in a field covered by EU law.

(*) 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)