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Press and Information

Advocate General's Opinion in Case C-68/17
IR v JQ

According to Advocate General Wathelet, the prohibition of discrimination on grounds of religion precludes a Catholic doctor who is Head of Department at a Catholic hospital from being dismissed because of his divorce and remarriage

The requirement for a Catholic doctor who is a Head of Department to respect the sacred and indissoluble nature of marriage as understood by the Catholic Church does not constitute a real occupational requirement, much less one that is genuine and justified

From 2000 to 2009, JQ, of the Roman Catholic faith, was Head of the Internal Medicine Department of a Catholic hospital located in Düsseldorf, Germany. That hospital is managed by IR, a limited liability company established under German law and subject to the supervision of the Catholic Archbishop of Cologne. When IR learned that JQ had remarried in a civil ceremony, after a divorce from his first wife was granted in accordance with German civil law, but without his first marriage, which had been concluded according to the Romanic Catholic rite, having been annulled, it terminated his contract of employment.

According to IR, by entering into a marriage that is invalid under canon law, JQ clearly infringed his obligations under his employment relationship. Canon law provides that a Catholic bound by the bond of a prior marriage cannot validly enter into another marriage. In addition, in accordance with the rules laid down by the Catholic Church in Germany, the personal conduct of church managerial employees such as doctors who are Heads of Department must comply with the principles of Catholic doctrinal and moral teaching. Consequently, entering into a marriage that is invalid according to the Church's interpretation of its faith and its legal system is considered a serious infringement of the obligations of loyalty, which would thereby justify JQ's dismissal in the present case.

JQ, for his part, considers that his dismissal is an infringement of the principle of equal treatment because, in accordance with the church rules in question, in the case of heads of department of the Protestant faith or of no faith, divorce and remarriage would not have had any consequences for their employment relationships with IR.

The Bundesarbeitsgericht (Federal Labour Court, Germany), hearing the case, asks whether the German concept of the right to religious self-determination, which allows the Catholic Church to require different gradations of loyalty from its employees depending on their professed religion even where they hold similar positions, complies with EU law and, more specifically, with the prohibition of any discrimination on grounds of religion laid down, in particular, by the directive on equal treatment at work ('the directive').[1] It asks, in that context, the Court of Justice to interpret the directive.

In today's Opinion, Advocate General Melchior Wathelet observes, first of all, that JQ's dismissal would be manifestly unlawful, representing direct discrimination based on religion, if churches and organisations the ethos of which is based on religion did not benefit from a **special legal system both under German constitutional law and under the directive.**

[1] 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).

In that connection, the Bundesarbeitsgericht will, first, need to determine whether IR is indeed a private organisation the ethos of which is based on religion. The mere fact that IR is subject to supervision by the Catholic Archbishop of Cologne and that its company object is the implementation of the missions of Caritas is not sufficient in that regard. On the contrary, it is necessary to determine whether the practice of the hospitals managed by IR falls within the doctrine of the Catholic Church in that the healthcare services are provided in a way that distinguishes them clearly from public hospitals. If, in particular, in accordance with the catechism of the Catholic Church, the hospitals managed by IR do not perform abortions and do not administer the 'morning-after' pill, unlike public hospitals, IR could be classified as a private organisation the ethos of which is based on religion.

Next, the Advocate General notes that, according to the directive, a difference of treatment based on a person's religion or belief does not constitute discrimination where, by reason of the nature of the activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.

According to the Advocate General, the comparability of the situations affecting, on the one hand, Catholic employees and, on the other hand, employees from another faith or no faith at all, in relation to the ground for dismissal in question, must be examined in objective terms on the basis of the occupational activities of the religious employer, in this case the provision of healthcare services.

The Advocate General states that **in the present case, the requirement in question is** not membership of a particular religion,[2] but rather **the professing of a particular belief of the Catholic Church**, namely the concept of marriage defined by the doctrine and canon law of the Catholic Church, **which includes respect for** the religious form of marriage and **the sacred and indissoluble nature of the bonds of matrimony.**

The Advocate General considers that it is clear that such a profession of belief does not constitute, in this case, an occupational requirement, much less one that is genuine and justified.

First of all, that requirement is **in no way linked to** the occupational activities of IR and JQ, namely **the provision of healthcare services and patient care**. The proof of this is that membership of the Catholic Church is not a required condition for the role of Head of the Internal Medicine Department and that IR recruits non-Catholics for roles with medical responsibility and entrusts managerial duties to them. Furthermore, since it is directed at JQ's private and family life, the requirement in question has no possible link with the administrative tasks for which he is responsible as the Head of Department in the department concerned. **Therefore, this is not a real occupational requirement**.

Moreover, respect for the concept of marriage according to the doctrine and canon law of the Catholic Church is **not** a **genuine** occupational requirement since it does not appear necessary because of the importance of IR's occupational activity, namely the provision of healthcare services, for the manifestation of IR's ethos or the exercise by IR of its right of autonomy. In that regard, it should be noted that there is no expectation on the part of patients and colleagues that the Head of the Internal Medicine Department be Catholic and still less that he not have contracted a marriage that is invalid on the basis of the doctrine and canon law of the Catholic Church. On the contrary, what is important for those patients and colleagues are the qualifications and medical skills of the Head of Department and his abilities as a good administrator.

For the same reasons, the requirement in question is **far from being justified**. JQ's divorce and remarriage in a civil ceremony pose no risk, whether probable or substantial, of causing harm to IR's ethos or to its right of autonomy. Moreover, it should be noted that IR did not even consider relieving JQ of his duties as Head of the Internal Medicine Department but rather directly dismissed

[2] Case: C-414/16 Egenberger, see Press Release No 46/18.

him, whereas as a doctor without any managerial role, he would not have been bound by the requirement in question.

Where it is not possible for the Bundesarbeitsgericht to interpret German law in conformity with the directive, the Advocate General observes further that **the principle of non-discrimination on grounds of religion** or belief, given the historical context in which the EU was founded, **constitutes a fundamental constitutional value of the EU legal order,**[3] which the Court has recognised as **a general principle of EU law.**

According to the Advocate General, that principle grants private persons an individual right that may be invoked as such in disputes between private persons.

Consequently, if it is not possible for the Bundesarbeitsgericht to interpret the applicable national law in conformity with the directive, that court would be obliged to ensure within its jurisdiction the judicial protection deriving for individuals from the general principle of non-discrimination on grounds of religion and to **guarantee the full effectiveness** of that principle **by disapplying, if need be, any contrary provision of national law**.

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 beginning 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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[3] Article 21 of the Charter of Fundamental Rights of the European Union now expressly prohibits any discrimination based on religion or belief. However, the present case arose before the Charter entered into force, so that it is not applicable to it.