

Case Reports

2023/15

Appointment of military chaplains and religious discrimination (IR)

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Summary

An Irish Workplace Relations Commission ('WRC') adjudication has found that the complainant, who was an atheist, was discriminated against on grounds of religion. The respondent government department was ordered to review the process of appointing military chaplains to ensure compliance with the Irish Employment Equality Act 1998 ('EEA'). The scope of this adjudication relates to the ability to apply for a role and whether this constituted discrimination on grounds of religion. The complainant asserted that he was discriminated against by the Department of Defence (the respondent) in the appointment of a military chaplain at Aiken Barracks and Gormanston Army Camp on 6 November 2020 as he was an atheist. The respondent denied the claim, relying on Section 37(2) of the EEA and the occupational requirements relating to chaplaincy to the Defence Forces, in particular the role of the chaplain in conflict zones, notably Lebanon. The respondent alleged that chaplains build contacts with local religious leaders and a Christian chaplain would be more accepted by certain communities in Lebanon than a humanist chaplain would be, and thus amounted to a 'genuine occupational requirement' within the meaning of Section 37(2) of the EEA.

Legal background

The EEA prohibits discrimination on the grounds of religion. Section 37(2) allows for a difference in treatment based on a 'characteristic' related to a discriminatory ground "where, by reason of the particular occupational activities concerned or of the context in which

they are carried out (a) the characteristic constitutes a genuine and determining occupational requirement, and (b) the objective is legitimate and the requirement proportionate". This applies across the grounds, including religion.

The Framework Equality Directive 2000/78/EC (the 'Directive') which underpins the EEA sets out provisions to ensure equal treatment in employment and occupation, on four grounds, including 'religion or belief'. Recital 23 addresses the circumstances in which difference in treatment can be justified: "In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate".

As mirrored in Section 37(2) of the EEA, Article 4 of the Directive provides as follows:

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.
2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these 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. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations,

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the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

The respondent relied on a judgment of the Court of Justice of the European Union in *Bouagnaoui – v – Micropole* (C-188/15). In 2008, Ms Bouagnaoui was employed as a design engineer and, in that role, interfaced with clients. In accordance with her religious beliefs, she wore a head covering which left the face entirely clear. In 2009, she was dismissed following a customer complaint because she had breached the principle of 'necessary neutrality' in meeting clients while wearing the head covering. She took proceedings for discriminatory dismissal.

The Court of Justice emphasised that Article 4(1) refers to a 'characteristic' related to a ground, as opposed to the ground itself, that can constitute a 'genuine and determining occupational requirement'. According to paragraph 93 of the Advocate General's Opinion, the wearing of a head scarf is a manifestation of religious belief and therefore a characteristic related to religion or belief. The Court further emphasised the words 'very limited circumstances' in recital 23 of the Directive. The Court interpreted a characteristic constituting such an occupational requirement 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out' as relating to a requirement 'that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out'. The Court held that the employer in this case had relied on subjective considerations – the willingness of its client to work with Ms Bouagnaoui.

The WRC also noted the Report of the Commission on the Defence Forces, published in February 2022 which states that "the Defence Forces' chaplaincy service needs to be adjusted in line with international best practice to better reflect the religious/non-religious affiliations of younger Irish people today".

Facts

This case related to the complainant's expressed wish to apply for the role of chaplain in the Defence Forces, which he had communicated to the Defence Forces in writing on numerous occasions. There was no process for him or anyone else to submit a formal application, nor was he considered for appointment in November 2020. The respondent followed an established path of seeking a nomination from the relevant bishop, and then appointed the priest put forward by that bishop. The evidence indicated that there are about 15 Roman Catholic chaplains and one Church of Ireland chaplain. The respondent sought to allege that being ordained or an appointed minister constitutes an 'objective occupa-

tional characteristic' according to Article 4(1) of the Directive and Section 37(2) of the EEA. In stating this, the respondent sought to rely on the need to provide religious services in certain circumstances in Ireland and overseas and also the role of the chaplain in building relationships with communities. A witness who gave evidence for the respondent stated that a non-religious chaplain would not be in the same position to build up relationships with local religious leaders in Lebanon and gave examples of how they had done this. The respondent also emphasised that there was no evidence of any deficiency in the service provided by chaplains.

Decision of the WRC

The adjudication officer found that, while there may have been historical reasons for the appointment process as constituted, and no evidence of deficiency in the service, the process was, by operation, discriminatory on grounds of religion and the complainant was discriminated against on grounds of religion.

Section 37(2) does not exempt this from the ambit of discrimination because being a priest or minister of one of two religions was not a 'determining occupational characteristic' and the requirement was not proportionate. The adjudication officer noted the following:

While the ability to go on mission is part of the chaplain role, I do not find that it is a 'determining occupational requirement' as required by the section. I do not doubt the importance in respect of south Lebanon, but I find that it is not an objectively genuine and determining characteristic in respect of all the other missions and work of the Defence Forces.

The adjudication officer commented that, while the ability to go on mission was part of the chaplain role, he did not find that it was a 'determining occupational requirement'. At most, it could be a mission requirement for going to Lebanon and not an occupational requirement. While the aims set out by the respondent were legitimate, the requirement of being a priest or minister was not proportionate.

The adjudication officer concluded that there was unlawful discrimination in contravention of the EEA because there was no application process for potential applicants to apply for the role and the process that was in place was based entirely on being a clergy member of one of two churches.

An order for compensation was not warranted, as the complainant submitted that his aim in bringing the case was to ensure that this did not happen again. Pursuant to Section 82(1)(e) of the EEA, it was ordered that:

[T]he respondent [shall] review the process of appointing military chaplains to ensure compliance with the Employment Equality Act and to ensure that suitably qualified candidates can apply for military

chaplains roles in order to reflect and foster the diversity of members of the Defence Forces.

Commentary

This case is interesting in that the WRC did not accept the evidence of the respondent regarding occupational requirements relating to chaplaincy to the Defence Forces. The adjudication officer distinguished between the ability to go on mission to a conflict zone such as the Lebanon and generally acting in the role of chaplain in the Defence Forces. This demonstrates a very high hurdle for prospective employers seeking to rely on Section 37(2) of the EEA, with the adjudication officer noting that, as the respondent did not have a religious ethos, any requirement must be a ‘genuine and determining occupational requirement’ pursuing a legitimate aim and be proportionate. The decision of the WRC to order the Defence Forces to change its practices in recruitment of chaplains was also interesting in this case as it demonstrates a level of intervention on the part of the WRC which is unusual.

Comments from other jurisdictions

84 *Austria (Dr. Thomas Dullinger, University of Vienna):* This case demonstrates how subtle changes and seemingly unimportant organisational issues can have a decisive impact. In Austria, military chaplaincy is primarily a church matter and is closely linked to different forms of religious practices. It is understood as an expression of religious freedom and is guaranteed to the churches by international treaties or federal laws. Although the Republic of Austria bears the necessary costs, the military chaplains are exclusively under the authority of the church leadership in spiritual matters. Only in non-clerical matters are they subordinate to the competent military command authorities. The service is primarily aimed at members of the respective faith and there are military chaplains of various religions, including Muslim and Jewish military chaplains. In this context, I would have no concerns that selection on the basis of religious affiliation is lawful according to the ECJ case law on Article 4(2) of Directive 2000/78 (C-414/16, *Egenberger*).

Germany, Pia Wieberneit (Luther Rechtsanwaltsgesellschaft mbH): Based on the European Directives on Equal Treatment, discrimination on the basis of certain characteristics – including religion and belief – is also prohibited in Germany under the General Equal Treatment Act (*Allgemeine Gleichbehandlungsgesetz*, ‘AGG’). The AGG differentiates between the characteristics of religion and belief. The term used for ‘belief’ in Germany is ‘*Weltanschauung*’. According to German case law,

Weltanschauung, like religion, deals with a person’s beliefs about certain propositions about the world as a whole and about the origin and goal of human life. Unlike religion, however, *Weltanschauung* does not refer to transcendence, but to inner-worldly circumstances.

In the WRC decision, the complainant is an atheist. Atheists fall under the characteristic of religion in the sense of the AGG – contrary to what one might think at first. According to German case law, the characteristic of religion also protects conscious non-belief. As an atheist, the claimant would therefore be protected by the AGG in a first step.

In accordance with Directive 2000/78 the AGG contains a stipulation according to which unequal treatment is permissible if a religion constitutes a justified occupational requirement – as the respondent in this case relied on the fact that the chaplain would have to be of the Christian faith in order to perform his duties in Lebanon. A German court would have considered the overall circumstances for the decision and weighed the mutual interests against each other – similar to the WRC. In this respect, the decision of the WRC that no religious affiliation is decisive for the activity as a chaplain per se seems reasonable, as far as hiring a chaplain in principle. As far as the concrete assignment in Lebanon is concerned, for example by means of a secondment or transfer, the statements of the respondent concerning the requirements for a chaplain could have been taken into greater consideration because of the local peculiarities.

The Netherlands (Peter Vas Nunes, retired lawyer and former editor-in-chief of EELC):

1. Take the following hypothetical example. All members of the Irish army – 100% – are Catholic. A Muslim, Jewish or atheist person applies for the vacant position of chaplain. This position is there solely to cater for the religious, i.e. Catholic, needs of the military. Yet, the army may not require the candidate to be a Catholic. Such a conclusion strikes me as unreasonable. The Irish military have 16 chaplains. It would seem logical to me for the chaplains’ beliefs to reflect the ‘ethical’ needs of their ‘clients’. In other words, the percentages of chaplains that are Catholic, Protestant, Muslim, atheist, etc. should be roughly in proportion to the beliefs of the military they serve. Is there a way to avoid the conclusion that this is not possible?

Article 4 of Directive 2000/78 has two subsections. The author of this case report quotes both subsections, but deals with the first only. It is worthwhile having a look at subsection 2.

Subsection 1 allows an employer, in certain limited cases, to discriminate on all four of the non-discrimination grounds covered by the Directive: religion/belief, disability, age and sexual orientation. One of the requirements, which determined the outcome of this case, is that the characteristic in question is ‘genuine and determining’. Subsection 2 is limited to religion/belief, but the requirements for its application are slightly easier to meet, in that the characteristic in question need not be determining; it need only be ‘genuine, legitimate

and justified'. In essence, subsection 2, as applied to this case, allows Member States to maintain or adopt 'legislation' that incorporates national practices existing on 27 November 2000 (the date the Directive was adopted) that, in the case of activities within churches and other 'ethical' organisations, discriminate on the basis of religion/belief, where by reason of the nature of those activities, "a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos". I have not been able to find out how this text came about. The Commission's original proposal for the Directive was differently worded. The European Parliament had that text amended. It seems clear that subsection 2 aims at protecting certain long-established and deeply rooted 'ethical' practices.

Would it be too far-stretched to argue that the 'chaplaincy department' of the armed forces is an 'ethical organisation'? If so, the case could perhaps be made that a practice of letting religion/belief influence the appointment of army chaplains is 'legislation', and that having a religion or belief reflecting the 'ethical' needs of the armed forces is a genuine, legitimate and justified occupational requirement of that 'organisation'.

2. This case reminds us of the fact that atheism is protected under the Directive, as is not having any belief.

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