Workplace

> Religare introduction: *This research area covers access to the labour market, labour relations, and the accommodation afforded to practices and duties based on religions or beliefs. On the one hand, this research deals with the relation between labour law and collective religious organisations, in order to assess the level of autonomy – e.g. exemptions and derogations - provided to particular organisations with regard to state regulations. On the other hand, religious practices and beliefs of individual employees are taken into account, including conscientious objections, alternative dispute resolution and reasonable accommodations.*

Our comments follow your division of this theme into two, in effect, (corporate) employers and (individual) employees.

So far as concerns employers, we start from the position that in employment, occupation and training discrimination on the basis of religion or belief should no more be acceptable than discrimination based on race, sex or any other protected characteristic. This is of course already EU law in the form of the framework directive on equal treatment in employment and occupation 2000/78/EC, which uses a wide definition of discrimination, including harassment based on religion or belief and victimisation based on complaints of discrimination.

The Directive allows for exceptions in relation to all protected characteristics if these constitute a "genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate", a provision that allows the churches to require their priests to be men and of the required denomination and (say) the armed services to specify the religion or belief of chaplains.

It allows for further exceptions in organisations with an ethos based on religion or belief where "a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos". The directive specifies, however, that this exception "should not justify discrimination on another ground". This allows, for example, Christian charities to restrict key posts to Christians.

However, there is evidence that this exception is being abused. Some EU member states have incorrectly transposed the directive into national law (e.g., United Kingdom regulations purport to permit religious organisations to discriminate on grounds of sexuality despite the plain stipulation in the directive against "discrimination on another ground" - a breach on which the UK government has yet to respond to the EU Commission's reasoned opinion of November 2009[19]).

More widely, religious requirements for jobs are often imposed where they are far from justified as genuine, legitimate, justified and occupational - each of which words carries

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[19] See http://ec.europa.eu/unitedkingdom/press/press_releases/2009/pr09146_en.htm, accessed 9 January 2011 but no longer available on 6 April 2013.

significant legal import. There is no occupational requirement for a telephonist, a clerk or a cleaner to share the religion or belief of an organisation - it has nothing to do with their occupation.

We see no grounds for any other 'exemptions and derogations' from 'state regulations' for 'collective religious organisations'. We are appalled at the situation that we understand prevails in Australia of collective exemption for churches and even businesses owned by churches from general rules of good conduct including regulations governing financial services etc.

In particular, we are adamant that human rights, including rights to conscientious objection (on which see below), apply only to individuals and not to institutions. It is not acceptable that in the Belgian town of Mechelen the Catholic church progressively acquired all the hospitals and ended the previous ready availability of abortion, forcing women to travel considerable distances or to continue with unwanted pregnancies.[20]

As we have indicated above in relation to schools, private institutions with a religious ethos are fully entitled to apply whatever rules they wish within the law, but once they accept core public funding they become public services and liable to the same rules as those run directly by the government or other public authorities. This means (for example) that publicly funded hospitals should have no power to apply religious rules in deciding what services they provide: any right of conscientious objection belongs to individuals, not to the hospital governing body, still less the church that sponsors it.

As to individuals in the workplace, there are two linked aspects on which we wish to comment: accommodation and conscientious objection.

To start with accommodation, once again our approach is based on human rights and on equality and non-discrimination. The human right to manifest one's religion or belief save in narrowly prescribed circumstances points to the desirability of workplaces offering "reasonable accommodation". Those who recognise a religious duty to wear particular forms of dress - principally Muslims and Sikhs - should be accommodated so far as possible: as indicated above, there are strictly limited circumstances in which this may not be appropriate. Muslims who wish to follow their religious duty to pray during the time they are at work should if possible be offered the opportunity.

The difficulties derive from the need to make decisions where there is potential conflict between the rights of different people. For example, ostentatious 'statement making' by ardent religious employees may well not be acceptable in an otherwise neutral work setting if it is an annoyance to other employees or to third parties such as clients. Again, if some staff are regularly given time off for prayers, they should make up the time (or not be paid for prayer time): other staff should not simply be expected to work longer hours. Accommodation of a wish by some employees to observe holy days or religious festivals

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[20] Address by the Mayor of Mechelen to the European Parliament Platform for Secularism in Politics, 17 March 2010. In this case the town authorities were so incensed that they opened their own abortion clinic - a recourse that will rarely be possible.

may sometimes impose a burden on others who have to cover for them. It is not acceptable to expect non-Christian staff always to have to work over Christmas (which is also considered an important time for the family by most non-Christians). Normally, religious holidays should be accommodated by use of personal holiday entitlements.

Similarly, while it may be desirable that employers should provide facilities for prayers, they should take care that if staff recreation or rest rooms are used, they are not monopolised by members of a religious group, and should be aware that the display of religious objects may be offensive to people of other religions and to people with non-religious beliefs, even preventing them from using the room.

There is thus a need for flexibility and goodwill but it should not be one-way. There is scope for alternative methods of dispute resolution, but care is needed that these methods do not result in abuse of the rights of minorities in the face of the dominant position of one religion or belief.

As to conscientious objection, it is gradually being realised that this is a far from simple question. The European Convention on Human Rights protects "freedom of thought, conscience and religion" in Article 9(1) but manifestation of the dictates of conscience falls under Article 9(2) which (as noticed above) is subject to limitations "in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

Most commentators focus exclusively on the individual conscience without regard to the consequences. The assumption is that only a few individuals with unusual, normally religious, beliefs are affected, and that society can afford to accommodate them.

This was the case when a right to conscientious objection was first recognised - in wartime. It clearly marked an advance in civilised values that pacifists were allowed to apply to tribunals to prove their objections were based on genuine religious or moral principles. When after hard-fought campaigns abortion was legalised it was generally seen as a logical extension - and a politically useful concession - to allow doctors and nurses not to take part if they had conscientious objections. But in recent years claims for conscientious objection have extended to many new contexts, with claims being made implicitly or explicitly (as indicated above) that conscientious and religious objections should always supervene over other considerations.

Examples include magistrates refusing to handle adoptions by lesbian and gay couples; nurses refusing to take part in *in vitro* fertilisation; pharmacists refusing to dispense the 'morning after' contraceptive pill; doctors refusing to reveal their conscientious objection to patients wanting an abortion or to refer them elsewhere; Exclusive Brethren refusing to let their children to use computers or the Internet in school; Muslims refusing to allow their children to take part in physical education unless in single-sex groups and unless the girls especially are swathed in modesty-protecting garments, and so on. These cases obviously involve other people - for example, as service users or as children with rights to education. Assertion of an absolute right to conscientious objection in all cases might easily risk public safety, public order, health or morals, and the rights and freedoms of others.

A further complication is that conscientious objection seems often today to be asserted not as a result of deep moral feelings but as a political act of drawing attention to claims of underprivilege or persecution. This highly political context is at odds with the implicit assumptions of most discussions about conscientious objection. The claims articulated by the European Centre for Law and Justice, a powerful conservative Christian lobby organisation, in the context of a recent debate in the Parliamentary Assembly of the Council of Europe that focussed on abortion, are that conscientious objection applies to both individuals and institutions, to both direct and indirect participation, and even when referral is impossible; it includes complete immunity from liability and from discrimination; and it cannot be balanced with any rights patients have to treatment.[21] The result they appear to hope for is that, whether or not such treatments are lawful, they will in practice be unavailable. There are two routes to this end: by one, hospitals are increasingly taken over by religious institutions and impose total bans on such treatments, even by staff willing to provide them - as in the case of Mechelen, cited above. By the other, enough individuals concerned, even remotely, will be pressurised into exercising their right to conscientious objection to make provision of treatments impossible. Thus, in 2007 in Italy nearly 70% of gynaecologists and over 50% of anaesthetists refused to perform or assist with abortions - proportions that had risen sharply in the previous four years[22] in a process that will if continued end with a few doctors finding their lives intolerably dominated by providing abortions and therefore themselves pretending conscientious objection and opting out. Thus a lawful service will cease to be available by means of essentially dishonest use of the right of conscientious objection.

We attach at Annex IV a paper on this question by our President which ventures into further detail and makes some tentative proposals for approaches to a problem that is as yet not sufficiently recognised

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21 "Memorandum on the PACE Report, Doc. 12347, 20 July 2010, . . ." Grégor Puppinck and Kris J. Wenberg, (European Centre for Law and Justice, Strasbourg, September 2010) - see http://www.eclj.org/pdf/ECLJ_MEMO_COUNCIL_OF_EUROPE_CONSCIENTIOUS_OBJECTION_McCafferty_EN_Puppinck.pdf, accessed6 April 2013.

22 Republic of Italy, Ministry of Health, Report of the Ministry of Health on the Performance of the Law Containing Rules for the Social Care of Maternity and Voluntary Interruption of Pregnancy: 2007-2008, quoted in the original PACE report.