

DISCRIMINATION ON GROUNDS OF RELIGION: THEORY AND PRACTICE

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Introduction

Discrimination on grounds of religion has been present in Irish law for some time, originally as part of our Constitution and now as part of recently implemented equality legislation applying to both the workplace pursuant to the Employment Equality Act 1998 and to the provision of goods and services pursuant to the Equal Status Act 2000. The only limitation on this general right of non-discrimination on grounds of religion relates to religious employers which is expected to continue upon implementation of the new European Directive which contains a specific exemption in relation to "occupational requirements". The EU Framework Directive on Discrimination in Employment¹ covers, inter alia, "discrimination on grounds of religion or belief"². Discrimination is defined in Article 2 as direct, indirect and harassment. The protection applies to all employees, both public and private sector, in relation to conditions of employment and access to employment, promotion and training³.

Even though the provisions have been in place for some time (and the right not to be dismissed from one's employment on grounds of religion has been in place for well over twenty years) the amount of litigation in the area has been extremely limited. Very few cases have been brought under the new equality legislation to date and none

¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

² Article 1.

³ Article 3

of them have succeeded on the facts, i.e. the equality officers were satisfied that their allegations of religious discrimination were unproven. Thus, in order to obtain some guidance as to how this concept of religious discrimination may be dealt with in practice, it is necessary to look beyond equality legislation as well as looking at how the issue has been dealt with in other jurisdictions.

1. Reaching a Definition of Religion: The Scope of the Protection

The Framework Directive does not provide any definition of religion beyond "religion or belief"⁴. The concept of discrimination is based on a comparative model of comparing one person who has been less favourably treated than another in a comparable situation on the prohibited grounds⁵ or imposing a practice on one person having a particular religion or belief thereby putting them at a particular disadvantage as compared with other persons⁶.

Similarly, both the Employment Equality Act 1998 and the Equal Status Act 2000 are based on a strongly comparative model, outlawing discrimination as less favourable treatment of one person as compared to another on the prohibited ground. The religion ground is defined somewhat sparsely as:

"that one person has a different religious belief from the other, or that one has a religious belief and the other has not".⁷

The only assistance provided by the Irish legislation in defining what is meant by a religious belief is that it expressly includes "religious background or outlook".⁸ It may be that including the word "outlook" suggests that an expansive definition was intended. What is certainly clear is that not having any religious belief, background or outlook is protected as much as having one that is different to the person to whom a person is being compared. No further guidance is provided on how the Equality Officers or the Courts should define what is meant by religion and no limitation whatsoever is placed on how far that definition might apply in practice, other than

⁴ Article 1.

⁵ Article 2(2)(a).

⁶ Article 2(2)(b).

⁷ Section 6(2)(e) Employment Equality Act 1998; Section 3(2)(e) Equal Status Act 2000.

⁸ Section 2 Employment Equality Act 1998; Section 2 Equal Status Act 2000.

specifically in relation to certain religious institutions⁹. This is in sharp contrast to some of the comparative models of religious discrimination found, for example, in the United States where the concept of "reasonable accommodation" familiar to us from disability discrimination is used to limit the circumstances in which an employer or service provider may be required to make special provision for a person on grounds of religion¹⁰. A closer comparative model can be found in Northern Ireland where the employment provisions of the Fair Employment Order 1998 do not apply

"... to or in relation to any employment or occupation where the essential nature of the job requires it to be done by a person holding, or not holding, a particular religious belief".

Thus, the potential scope of the protection afforded by the Irish legislation and particularly in circumstances that fall outside of the exemption provided to religious employers in Section 37(2) is very wide having regard to the broad range of activities that could be found to be covered by the concept of "religious background and outlook".

A number of sources are useful in indicating how the scope of discrimination on grounds of religion might be defined and possibly limited in practice.

⁹ Section 37(2) Employment Equality Act 1998; see further below at 3.

¹⁰ Religion is defined in Section 701(j) of the Civil Rights Act 1964 as follows:

"The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

1(i) *The Constitutional Dimension*

The Irish Constitution contains a number of provisions on religion, as well as discussing the Holy Trinity and the Divine Lord, Jesus Christ in the Preamble. Whilst Article 44 specifically mentions "Almighty God" in undertaking to "protect and honour religion", the protection afforded to religion is not necessarily confined to Christianity. Henchy J. in *Quinn's Supermarkets v Attorney General*¹¹ found that Article 44

"acknowledges that the homage of public worship is due to Almighty God but it does so in terms which do not confine the benefit of that acknowledgement to members of the Christian faith."

Whilst the extending of the protection beyond Christianity is certainly welcome, it is perhaps not enough, particularly in a society that is becoming increasingly diverse and multi-cultural. It is interesting to examine the approach taken in another multi-cultural society. The U.S. courts have declined to limit "religion" to formal, organised or recognised faiths but have extended the scope of protection to fundamental or ethical standards and beliefs that occupy in the eyes of the possessor a place parallel to that filled by a God.¹²

Article 44.2.1 of the Irish Constitution provides for the freedom of profession and practice of religion as follows:

"Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen."

Attempts have been made in litigation to rely on Article 44.2.1 in permitting a citizen freedom of conscience, thereby extending the protection afforded to religion to social or political type views, but this was rejected by the Supreme Court in *McGee v Attorney General*¹³ where Fitzgerald C.J. stated:

"What the Article guarantees is the right not to be compelled or coerced into living in a way which is contrary to one's conscience and, in the context of the Article, that means contrary to one's conscience as far as the exercise, practice or profession of religion is concerned."

¹¹ [1972] I.R. 1.

¹² *United States v Seegar* 380 U.S. 163, 85 S.Ct. 850 13 L.Ed.2d 733 (1965).

¹³ [1974] I.R. 284.

However in the same judgement the Chief Justice did confirm that the Article, as well as protecting the citizen's right to profess and practice the religion of his choice, he is also free to

"have no religious beliefs or to abstain from the practice or profession of any religion."

Article 44.2.2.3 goes on to provide:

"The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status."

This clearly applies only to the State and attempts to rely on it in disputes between private parties have been unsuccessful.¹⁴ The scope of this protection has been expounded by Henchy J., in terms of its purpose, as follows:

"In proscribing disabilities and discriminations at the hands of the State on the ground of religious profession, belief or status, the primary aim of the constitutional guarantee is to give vitality, independence and freedom to religion... Far from eschewing the internal disabilities and discriminations which flow from the tenets of a particular religion, the State must on occasion recognize and buttress them. For such disabilities and discriminations do not derive from the State; it cannot be said that it is the State that imposed, or made them; they are part of the texture and essence of the particular religion; so the State, in order to comply with the spirit and purpose inherent in this constitutional guarantee, may justifiably lend its weight to what may be thought to be disabilities and discriminations deriving from within a particular religion."¹⁵

Thus, in order to enable citizens to enjoy their constitutional right to the full and free practice of religion, it may, on occasions, be necessary to distinguish between persons or bodies on grounds of religious profession, belief or status.¹⁶ The correct approach was summarised by the Supreme Court in *Re. Article 26 and the Employment Equality Bill 1996*¹⁷ as follows:

"It would therefore appear that it is constitutionally permissible to make distinctions or discriminations on grounds of religious profession belief or status insofar - but only insofar - as this may be necessary to give life and

¹⁴ *Schlegel v Corcoran and Gross* [1942] I.R. 19; *McGrath and O'Ruairc v Trustees of Maynooth College* [1979] ILRM 166.

¹⁵ *McGrath and O'Ruairc v Trustees of Maynooth College* [1979] ILRM 166 at 187.

¹⁶ *Quinn's Supermarkets v Attorney General* [1972] I.R. 1; *Molloy v Minister for Education* [1975] I.R. 88.

¹⁷ [1997] 2 I.R. 321.

reality to the guarantee of the free profession and practice of religion contained in the Constitution."¹⁸

1(ii) *The Unfair Dismissals Acts 1977 – 1993*

For over twenty years in Ireland, amongst the grounds of a deemed unfair dismissal has been the "religious or political opinions of the employee".¹⁹ The Unfair Dismissals Acts 1977-1993 do not provide any indication as to what might constitute such opinions. To that end it is not even clear that the scope of the protection equates to that provided by the equality legislation which expressly includes religious belief, background and outlook. The Unfair Dismissals legislation could be viewed very narrowly as covering only a religious opinion, or it could be defined widely with the concept of opinion going beyond belief, background and outlook to social or political type views that might be interpreted as being sourced in a person's religion²⁰.

The protection against unfair dismissal on this ground has been invoked very rarely. A broad approach was adopted by the Circuit Court in the case of *Merriman v St. James Hospital*²¹ where an employee who had been dismissed as a result of her refusal to carry religious objects to the bedside of a dying patient for the purpose of a religious ceremony. She was reinstated by Judge Clarke on her undertaking to carry out her duties in accordance with her contract, including every necessary assistance to patients in relation to religious rites and services provided for them, but with the proviso that

"she need not participate in any religious ceremony or rite; and allowing that her particular scruple as to the actual erection of crucifix or candles should be respected and this be dispensed with in her case."

This would appear to suggest that the claimant's right not to be unfairly dismissed on grounds of her religious opinions encompassed a right to be excused from participating in religious practices to which they might object.

¹⁸ At 358.

¹⁹ Section 6(2)(b) Unfair Dismissals Act 1977 as amended by the Unfair Dismissals (Amendment) Act 1993.

²⁰ Although that approach has broadly rejected in the United States, see below at 2(i).

²¹ UD 365/1986; Circuit Court unreported, 24 November 1986, Clarke J. See generally Redmond M. *Dismissal Law in Ireland* (2nd ed., Butterworths, Dublin, 1999) at 274.

One of the few other cases in which an attempt was made to rely on the religious or political opinions of an employee in impugning a dismissal was *Loscher v Mount Temple Comprehensive School*²². The claimant in that case had written a controversial book on the infamous X case²³ which had not been published in this jurisdiction but which had received some press coverage, as a result of which some of the parents of his pupils had expressed concern. The claimant was later dismissed on grounds of redundancy. The Employment Appeals Tribunal, in a brief determination on this aspect of the case, held that

“there was no evidence whatsoever to support the claimant’s contention that he was dismissed as a result of religious or political discrimination”.²⁴

Whilst the tribunal did not expressly reject the contention that views taken on the X case and on the general issue of abortion could not come within the ambit of dismissal on grounds of religious or political opinions as provided for in the legislation, it would appear that a high standard of proof would have been required of such treatment before impugning a dismissal on those grounds.

1(iii) *Article 9 of the European Convention on Human Rights*

Article 9 of the European Convention on Human Rights²⁵ states:

- "1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice or observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society 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."

²² Employment Appeals Tribunal; [1994] ELR 284.

²³ A constitutional case involving a fourteen year old girl who had become pregnant as a result of a rape whose parents wished to take her to the UK to have an abortion. The girl’s right to travel to avail of such services abroad was challenged by the State pursuant to the Right to Life provisions in the Constitution.

²⁴ Interestingly the point was abandoned entirely by the claimant when the case was appealed to the Circuit Court.

²⁵ Due to be brought into Irish law by the Human Rights Bill 2001, although expressly subordinate to domestic legislation.

The scope of the protection clearly extends to non believers. The Court has described Article 9 as a "precious asset for atheists, sceptics and the unconcerned".²⁶ It is not necessary for the State to approve of the beliefs once they are held²⁷. In practice the scope of the limitations placed on the freedom by Article 9(2) are probably wide enough to prevent the protection from being abused.

Article 9 expands on how a person's religion or belief may be manifested, i.e. in worship, teaching or practice. The concept of "practice" is probably what might allow for the widest scope of what is protected, particularly in the absence of any guidance as to who or what is to judge what is or is not in compliance with a religious belief. The Court has, to an extent, drawn a distinction between a practice that *expresses* a religion or a belief and a practice that is *motivated* by a religion or a belief. For example in *Arrowsmith v United Kingdom*²⁸, where a pacifist had been convicted for distributing leaflets which encouraged British army troops to refuse to serve in Northern Ireland, the Commission held:

"the term 'practice' ... does not cover each act which is motivated and influenced by a religion or belief."

A further approach that has been adopted by the Commission is to assess whether or not the practice in question is a necessary expression of the religion or the belief. In *X v United Kingdom*²⁹ a Buddhist prisoner was refused permission to send out articles for publication in a Buddhist magazine. He argued that communication with other Buddhists was an important part of his religious practice but the Commission rejected his claim as

"he has failed to prove that it was a necessary part of this practice that he should publish articles in a religious magazine."

²⁶ *Kokkinakis v Greece* (1994) 17 E.H.R.R. 397 at para. 31.

²⁷ *Manoussakis v Greece* E.H.R.R. 387, September 29 1986 at para. 47 where the Court stated: "The right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate."

²⁸ No. 7050, Rep. 1978.

²⁹ App No 5422/72, (Dec) December 20, 1974, 1 D.R. 41.

2. Some Comparative Caselaw

2(i) *The United States*

Title VII of the Civil Rights Act of 1964 recognises the right of an employee or a prospective employee to be reasonably accommodated in their religious observance or practice. A broad concept of religion has been adopted by the courts. As was discussed above, the U.S. courts have declined to limit "religion" to formal, organised or recognised faiths but have extended the scope of protection to fundamental or ethical standards and beliefs that occupy in the eyes of the possessor a place parallel to that filled by a God.³⁰ However notions devoid of religious or moral content will not be considered either as a religion or a religious practice. For example an attempt to prove that eating cat food was a religious practice failed because it in no way related to a "theory of man's nature or his place in the Universe".³¹ Thus social and political beliefs have been distinguished from religion. In particular the courts have not accepted as a religion either Marxism or membership of an organisation such as the Klu Klux Klan whose goals are predominantly social and political rather than religious³². Whilst this is probably sensible, it can be very difficult in practice to distinguish between unprotected social or political beliefs and protected religious beliefs. For example an Inland Revenue Service employee who objected to processing requests for tax exempt status for abortion clinics was assumed to be asserting a religious belief.³³ Drawing on that analogy, could a pro-Choice advocate in this jurisdiction who found their employment to be in jeopardy upon their opinions being made public rely on their right to a workplace free from discrimination on grounds of religion in protecting their employment?

Much of the caselaw in the US centres around whether or not an employer has made reasonable accommodation for an employee's religious observance or practice. Similar to the concept of reasonable accommodation in disability discrimination in Irish law, an employer has a defence to a claim of religious discrimination where they can show that such accommodation would cause "undue hardship" on the conduct of

³⁰ *United States v Seegar* 380 U.S. 163, 85 S.Ct. 850 13 L.Ed.2d 733 (1965).

³¹ *Brown v Penna* 441 F.Supp 1382 (SD Fla.1977), affirmed mem. 589 F.2d 1113 (5th Cir. 1979).

³² *Bellamy v Mason's Stores Inc.* 508 F.2d 504 (4th Cir. 1974).

³³ *Haring v Blumenthal* 471 F.Supp. 1172 (D.D.C.1979).

their business. Thus reducing the level of weekend work an employee was expected to do to an absolute minimum was found to be reasonable accommodation for an employee whose religious beliefs prevented him from working on a Saturday. Interestingly there is no such limitation on the scope of the protection in Irish law, other than in the context of indirect discrimination where the discriminatory treatment may be objectively justifiable.

2(ii) *The United Kingdom*

There is no religious discrimination legislation in the United Kingdom and instead employees who find themselves having been less favourably treated on grounds of their religion have to, somewhat artificially, bring themselves within the Race Relations Act 1976 in order to secure protection. This can only be done where the individual can show that the religious grouping of which they are a part is sufficiently cohesive to constitute a distinct ethnic group. Thus, a male Sikh who was not permitted to wear a beard at work for hygiene reasons³⁴ and a female Sikh who was not permitted to wear trousers underneath her uniform skirt were both found to come within the protection of the legislation. On the other hand a Muslim who was not permitted to take holidays during a Muslim festival, was found to have failed to establish that the employer had the intention of treating him unfavourably on racial grounds.³⁵

2(iii) *Northern Ireland*

One of our few close neighbours who have implemented Religious Discrimination legislation is Northern Ireland where the Fair Employment (Northern Ireland) Acts, 1976-1989 deal with religious and political discrimination. Discrimination is defined in broadly familiar terms as both direct, indirect and by way of victimisation³⁶. The

³⁴ *Singh v Rowntree MacKintosh Ltd* [1979] I.C.R. 554.

³⁵ *J.H. Walker Ltd v Hussain* [1996] I.C.R. 291.

³⁶ Section 16.

scope of the legislation is simply in employment³⁷. There are specific exemptions in relation to the employment of school staff, clergy, ministers of religion or any employment where a person is required to hold a particular religious or political belief. Those exemptions are given a particular protection in Article 15 of the European Framework Directive in relation to tackling under-representation of the Catholic community in the Northern Ireland police force and the recruitment of teachers in Northern Ireland schools.

In practice the focus of the application of the legislation has been somewhat narrow with most cases dealing with overt discrimination in selection for employment or dismissal rather than somewhat more sophisticated questions relating to the reasonable accommodation of religious groups. A typical example can be seen in *Paisley v Arts Council of Northern Ireland and An Comhairle Ealaion*³⁸ where a well known DUP councillor claimed that she had not been appointed to a position of Arts Development Officer on grounds of her religious or political beliefs. The reason given by the interview board for her non-appointment to the position was her lack of knowledge of the arts and local government in the Republic of Ireland. The Fair Employment Tribunal did not accept this and found that the interview board had treated the applicant unfairly on account of "perceptions held as to her political opinions and/or religious beliefs". The tribunal went on to assess her skills and found her to have been better qualified than the appointee and were unable to rely on the respondents' explanation for her non-appointment. Compensation of £24,249.31 was awarded.

An interesting point has arisen in Northern Ireland in relation to the reasoning behind the compensation awarded in a successful religious discrimination case. In *McConnell v Police Authority for Northern Ireland*³⁹ the applicant was a Roman Catholic who was not appointed to a position. All six appointees were Protestant. The tribunal found that he was better qualified than three of the appointees and awarded compensation for discrimination of £22,639 which included £10,000 for injury to feelings and a further £2,500 by way of aggravated damages. The level of

³⁷ Section 17.

³⁸ [1998] 8 B.N.I.L. 30.

³⁹ [1997] IRLR 625.

aggravated damages were stated to be on account of the respondent having defended the case before the tribunal by criticising the applicant's performance at interview and accusing him of lying. The Court of Appeal upheld the employer's appeal against the award for injury to feelings and aggravated damages. Carswell J⁴⁰ held that:

"[A]n award of aggravated damages should not be an extra sum over and above the sum which the tribunal of fact considers appropriate compensation for the injury to the claimant's feelings. Any element of aggravation should be taken into account in reckoning the extent of the injury to his feelings, for its part of the cause of that injury. It should certainly not be treated as an extra award which reflects a degree of punishment of the respondent for his behaviour."⁴⁰

3. The Right to Discriminate on Grounds of Religion: The Scope of the Exemptions

3(i) Article 4 of the Framework Directive

Article 4 of the Framework Directive states:

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 the 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

⁴⁰ At 629-630.

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 rights of churches and other public or private organisations, 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 exemption provided for in Article 4 is initially general in relation to "a genuine and determining occupational requirement" and then more specific in relation to the occupational activities of organisations whose ethos is based on religion or belief. In the case of the latter, the occupational requirement must be "genuine, legitimate and justified .. having regard to the organisation's ethos." In addition, the direct employees of such organisations can be lawfully required to "act in good faith and with loyalty to the organisation's ethos."

It is useful to examine how the European Court of Justice has approached the concept of occupational requirement in justifying discrimination on grounds of sex or marital status in the context of the Equal Treatment Directive⁴¹. Article 2(2) of the Directive allows Member States to treat men and women differently with regard to occupations in respect of which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor. For example the case of *Commission v. France*⁴² applied to a practice of separate recruitment of men and women into the police service and as head warders of prisons. The European Court found that the system of separate recruitment according to sex was contrary to the Equal Treatment Directive on the ground that it was too wide in covering access to the police force in general rather than specific activities. Therefore it was not proportionate. In coming to this conclusion the Court took the opportunity to clarify the principles which govern the application of Article 2(2).

"It follows from [the provisions in the Directive] that the exceptions provided for in Article 2(2) may relate only to specific activities, that they must be sufficiently transparent so as to permit effective supervision by the Commission and that in principle they must be capable of being adapted to social development."⁴³

⁴¹ Council Directive EC 76/207/EEC.

⁴² *Ibid.*

⁴³ Judgment, at para 26.

The Court went on to hold that derogations from an individual right such as the right to equal treatment should not exceed the limits of what is necessary to achieve the legitimate objective in view⁴⁴ and that

‘The principle of proportionality makes it necessary to reconcile, as far as possible, equal treatment of men and women with the requirements which are decisive for carrying out the specific activity in question.’⁴⁵

Thus, it would appear that the European Court will not accept blanket refusals to employ women in certain professions as falling within Article 2(2) of the Equal Treatment Directive, but will seek to confine the restriction to specific duties within the profession where sex constitutes a determining factor and where the restriction of occupations to a given sex is in conformity with the principle of proportionality.

Assuming a similar jurisprudence will be applied to Article 4(1) of the Framework Directive, the scope of that aspect of the derogation will be somewhat limited in justifying discrimination on grounds of religion as it would be necessary to show that a person's religion is a determining factor in their actual ability to discharge the duties of their job rather than simply showing the perception that their employer or user of the employer's services may have of them or of their religion or their beliefs.

The remainder of Article 4 allows for considerably more latitude to a religious employer to discriminate on grounds of religion. Article 4(2) allows a Member State to either maintain existing legislation or to implement new legislation incorporating pre-existing national practices permitting discrimination on grounds of religion by a religious employer where, by reason of the nature of the activities of the job or the context in which it is carried out, a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement having regard to the employer's ethos. Thus a person's religion or belief may have nothing to do with the duties they are expected to discharge but may be relevant to the context in which they are expected to discharge them.

⁴⁴ Judgement, at para 28.

⁴⁵ *Ibid.*

The example of a teacher (possibly other than a religion teacher) teaching in a denominational school comes to mind. Unlike Section 37(2) of the Employment Equality Act 1998, Article 4(2) does not require proof of the need to discriminate against a person on grounds of religion in order to maintain or prevent the undermining of the organisation's ethos, but simply proof that their religion or belief is a genuine, legitimate and justified occupational requirement having regard to that ethos. This is arguably an easier test for an employer to satisfy than that provided for in Section 37(2), and is certainly made easier still by the final provision of Article 4(2) which permits such an employer to require their employees to act in good faith and with loyalty to the organisation's ethos, even where to do so may be inconsistent with the other provisions of the Directive. There is no expansion or clarification of the situations to which this expectation to act with loyalty to the ethos is limited, if at all, and to that end it could be viewed as covering all aspects of a person's life and not just their conduct in the workplace. Thus, the English teacher in a secular school who publically holds beliefs that are inconsistent with the ethos of that school but which she does not espouse in the course of her classroom teaching, could be treated less favourably on grounds of her religion or beliefs as a breach of her obligation to act with loyalty to that ethos.

The exemption provided for in Article 4(2) only applies to existing national legislation or future legislation incorporating pre-existing national practices. Therefore it may be immaterial that the scope of the derogation permitted from the right to a workplace free from discrimination on grounds of religion is possibly wider than currently provided for in Irish law, unless it could be successfully argued that there are pre-existing national practices, possibly reflected in the Constitutional provisions on religion and religious discrimination, that would permit the implementation of wider ranging Irish legislation derogating from the principle of non-discrimination on grounds of religion.

3(ii) Exemptions in Irish Equality Law

3(ii)(a) Religious Employers: Section 37(1) Employment Equality Act 1998

Section 37(1) states:

"A religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values shall not be taken to discriminate against a person for the purposes of this Part or Part II if -

- (a) it gives more favourable treatment, on the religion ground, to an employee or a prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of the institution, or
- (b) it takes action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution."

Not every employer with a religious connection will necessarily come within the ambit of this exemption. A number of criteria must be satisfied. Firstly it must be either a religious, educational or medical institution. Secondly it must be under the direction or control of a body that has either been established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values.

Many institutions that were, in the past, run directly by a religious order have handed the management over to a lay Board of Management which may or may not include members of the order. Some such institutions have retained an involvement by the order by acting as the Trustees. Given that some such orders, as a result of falling vocations, no longer have the personnel to maintain an involvement on either a board of management or a board of trustees it may very well be that many schools or hospitals that might be regarded as denominational are no longer under the direction or control of a religious body. In those circumstances such an institution may not come within the ambit of Section 37(1), unless the objectives of the institution expressly include the provision of services in an environment which promotes certain religious values.

Section 37(1) applies to two situations. Firstly where one person is preferred over another, whether in the context of access to employment or more favourable treatment at work in terms of terms, conditions, access to promotion or training etc., on grounds of their religion - i.e. a positive discrimination type situation. The test in those circumstances is whether or not the employer's preferential treatment is reasonable in order to *maintain* the religious ethos of the institution. Secondly where an employer takes certain action, presumably in relation to an employee. The test there is whether this action was reasonably necessary to prevent the *undermining* the religious ethos of the institution. Both tests are objective in that the action must be reasonable. The tests differ in terms of what is being prevented in relation to the ethos of the institution. The former can only be lawful where the ethos is being maintained, which would suggest something passive, whereas the latter is lawful to prevent the ethos from being undermined which would suggest a somewhat more active attack on the ethos of an institution.

What is or is not part of an "ethos" is something that will ultimately have to be decided upon by the Courts rather than the institution itself. In *Re Article 26 and the Employment Equality Bill 1996*⁴⁶ the Supreme Court held:

"Chambers English Dictionary gives, inter alia, the following meaning to the word [ethos] "the distinctive habitual character and disposition of an individual group". It is probably true to say that the respect for religion which the Constitution requires the State to show implies that each religious denomination should be respected when it says what its ethos is. However the final decision on this question as well as the final decision on what is reasonable or reasonably necessary to protect the ethos will rest with the court and the court in its overall decision will be conscious of the need to reconcile the various constitutional rights concerned."

A dismissal situation would have to fall to be considered under Section 37(1)(b) under the criteria as to whether or not the dismissal was reasonably necessary to prevent the undermining the religious ethos of the institution. The simple fact of someone's religious belief or outlook, or lack of it, would probably not be sufficient. The employer would have to show that the employee was engaging in some sort of conduct that had actual adverse implications for the ethos of the institution. The

⁴⁶ [1997] 2 I.R. 321.

Eileen Flynn⁴⁷ scenario where an unmarried teacher working in a convent school was dismissed after becoming pregnant by her married partner is an obvious example and one cited by a number of the teachers' unions at the time of the drafting of the legislation. It would appear that Section 37(1)(b) might permit a school to dismiss a teacher in similar circumstances as Eileen Flynn found herself on the basis that it was reasonably necessary to dismiss a teacher who was openly having a relationship with a married person in order to prevent the undermining of the religious ethos of the school. To the extent that the *Flynn* case might not be decided the same way today arising from the developments in the law on pregnancy discrimination since 1985, it may be that Section 37(1)(b) would have the net effect of ensuring the same result whereby Costello J. in the High Court held that a religious school were entitled to take into account their aims and objectives, which differed from those of a secular institution, and concluded that Ms Flynn's behaviour amounted to a rejection of the religious tenets which the school had been established to promote, thereby justifying the dismissal.

The constitutionality of Section 37(2) was upheld by the Supreme Court⁴⁸ on the basis that:

"it is constitutionally permissible to make distinctions or discriminations on grounds of religious profession belief or status insofar - but only insofar - as this may be necessary to give life and reality to the guarantee of the free profession and practice of religion contained in the Constitution."⁴⁹

The Court found that the subsection represented:

"a balancing between the rights of free profession and practice of religion on the one hand and the right to equality before the law and the right to earn one's livelihood on the other."⁵⁰

⁴⁷ *Flynn v Power* [1985] I.R. 648.

⁴⁸ [1997] 2 I.R. 321.

⁴⁹ At 358.

⁵⁰ At 358.

3(ii)(b) Working Abroad: Section 37(4) Employment Equality Act 1998

Section 37(4) makes specific provision permitting what would otherwise be unlawful discrimination on grounds of religion where the job:

"is likely to involve the performance of duties outside the State in a place where the laws or customs are such that those duties could not reasonably be performed by a person who does not have that relevant characteristic."

As with the exemptions provided to religious employers in Section 37(2), the test would appear to be objective in that it must be shown that the duties could not reasonably be performed by a person of a different or no religious background or outlook.

3(ii)(c) Access to Vocational Training: Section 12 Employment Equality Act 1998 and Section 7(3)(b) of the Equal Status Act 2000.

Section 12 of the Employment Equality Act 1998 permits discrimination on grounds of religion by certain educational or training bodies for nurses or primary school teachers by preferring certain people for training places in order to ensure

"the availability of nurses to hospital and teachers to primary school which are under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values, and in order to maintain the religious ethos of the hospitals or primary schools."

The section effectively permits positive discrimination in favour of the members of certain religions in providing places on training courses for nurses and primary school teachers. The test is that of *maintaining* the ethos, similar to the positive discrimination type provision of Section 37(2)(a) but unlike that section, there is no need to show that discrimination is reasonably necessary for the maintenance of the ethos.

The Supreme Court upheld the constitutionality of the section on the basis that it:

"represents a reasonable balancing between the principles of equality before the law on the one hand and the principle of the free profession and practice of religion on the other hand."

Section 7(3)(b) of the Equal Status Act 2000 permits a similar type of positive discrimination in favour of the members of one religion by an institution established for the purpose of providing training to ministers of religion and admits students of only one gender or religious belief.

3(ii)(d) Access to Denominational Education: Section 7(3)(b) Equal Status Act 2000

Section 7 of the Equal Status Act 2000 provides for the principle of non-discrimination on each of the nine grounds in relation to admission of, access to or expulsion of a student from an educational institute or in relation to the terms or conditions of participation in that institute by a student. An exemption is provided in relation to discrimination on grounds of religion for denominational primary or post primary schools by Section 7(3)(b) which states that an educational establishment does not discriminate by reason only:

"where the establishment is a school providing primary or post-primary education to students and the objective of the school is to provide education in an environment which promotes certain religious values, it admits persons of a particular religious denomination in preference to others or that it refuses to admit as a student a person who is not of that denomination and, in the case of a refusal, it is proved that the refusal is essential to maintain the ethos of the school."

Again there is a positive discrimination being permitted in favour of the members of a certain religion as well as a more active type of conduct in actually refusing access to the school. In relation to the latter, which presumably applies other than to the situation where a person is refused simply because there are no places left, a high standard of proof is required that it is *essential* to act in that manner in order to maintain the ethos of the school.

Conclusions

At a first glance the protection against discrimination on grounds of religion appears to be potentially very wide in both Irish and European law, particularly if the courts take a liberal view to what may constitute a religious belief or outlook. However a closer examination of the exemptions permitted by law show that many of the situations in which a claim of discrimination on grounds of religion might actually arise have been limited by the legislature. Whilst it is always necessary to ensure the balancing of legitimate interests in granting rights and imposing obligations, it may be that too much of a preference has been shown for religious employers. The extent to which a broad or narrow approach to those exemptions and to the scope of the protection itself will be taken in practice remains to be seen.

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