

# Good Friday and direct discrimination on religious grounds

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## Introduction

Under Austrian law, Good Friday is a paid public holiday only for members of:

- the Evangelical Church Augsburg Confession;
- the Evangelical Church Helvetic Confession;
- the Old Catholic Church; and
- the United Methodist Church.

The members of these churches are therefore entitled to an additional, 14th public holiday. As with the other 13 public holidays, Good Friday is a paid holiday – meaning that employees who are members of any of the four churches will receive their regular salary for that day even though no work is performed. Further, members who work on Good Friday will receive holiday pay of the same amount, doubling their income.

An employee who belonged to none of the aforementioned churches took issue with this and sued his Austrian employer because he had received no paid public holiday or compensation (indemnity) for working on Good Friday, 3 April 2015. More specifically, he requested payment of €109.09 as an indemnity for work performed on that day, asserting that the statutory rule coupling the public holiday with an indemnity if a member of one of the four churches works on Good Friday constituted discrimination on the grounds of religion and belief with regard to working conditions and pay.

While the first-instance court dismissed the claim, ruling that differential treatment was objectively justified due to situations that were not similar, the appellate court reversed and granted payment, invoking Article 21 of the Charter of Fundamental Rights. The employer appealed to the Supreme Court, seeking to restore the judgment of the first-instance court.

The Supreme Court then requested a preliminary ruling by the European Court of Justice (ECJ). In his opinion of 25 July 2018, Advocate General Michal Bobek delivered what will likely also constitute the court's position on the issues raised.

## Questions referred to ECJ

The Supreme Court stayed proceedings and, in essence, referred the following four questions to the ECJ for a preliminary ruling:

- Does EU law preclude a national rule under which only members of one of the four churches are afforded an additional paid holiday on Good Friday and double pay where a member performs work on that day?
- Is this exception for a relatively small group of church members justified because it concerns

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a measure that is necessary to ensure the protection of the rights and freedoms of others – particularly the right to freely practise religion?

- Is this exception justified because it is a positive and specific measure in favour of the members of the four churches, designed to guarantee their full equality in working life?
- Assuming discrimination, must an Austrian employer grant the rights in respect of Good Friday to all employees, regardless of their religious affiliation (levelling up), or must the discriminating Austrian provision be disapplied in its entirety so that those rights are not granted to any employee (levelling down)?

### **Assessment by advocate general**

On the first question, Bobek concluded that the Austrian rule constituted discrimination on grounds of religion and belief within the meaning of Article 21(1) of the Charter of Fundamental Rights and Article 2(2) of the Employment Equality Framework Directive (2000/78).

The court applied the four-prong test commonly used in discrimination cases:

- Was the claimant treated in a less favourable manner (first prong)?
- Was this done in a comparable situation (second prong)?
- Was said discrimination based on a protected ground (third prong)?
- Was said discrimination lacking a valid justification (fourth prong)?

The opinion explains that in the case at hand a person was treated in a less favourable manner (first prong) and this less favourable treatment was rooted in religious affiliation (ie, based on a protected ground) (third prong).

The less favourable treatment constituted employees "who are not members of the four churches, receiving normal or 'single' pay for working on Good Friday, whereas members of the four churches effectively receive double pay".

More difficult to answer was whether the plaintiff was in a comparable situation (second prong). The comparability element requires clarification of who is being compared (individuals or groups) and what the characteristics of comparison are.

The opinion first states that in cases where the alleged discrimination stems from legislative provisions as opposed to conduct by an employer, the framework for comparability analysis is a group of persons, not individuals. It goes on to define the correct group in relation to the relevant point of comparison.

Applying a 'narrow comparator' (ie, the group being employees for whom Good Friday is the most important religious festival) would mean that the plaintiff was not in a similar situation to the members of the four churches, and, in the absence of comparability, would exclude discrimination. Unsurprisingly, this was the position of the Austrian government.

An 'intermediate comparator' (ie, the group being employees for whom there is a special religious festival not coinciding with any other public holiday) would refer the case back to the national court because it would be a question of fact whether the plaintiff belonged to any such potential group.

A 'broad comparator' (ie, the group being employees working on Good Friday who receive extra pay for their work because of their specific religious affiliation) would mean that the plaintiff was in a similar situation, as he claimed, and would imply discrimination.

The court's opinion considered the 'broad comparator' appropriate, because the aim of the national rule is to respect religious freedom by allowing persons to participate in religious festivals.

In practice, members of any of the four churches working on Good Friday would be paid double "specifically because of their religion". Employees of a different faith (or no faith) working on that day would receive only their normal pay, even if performing the same job. Under this assumption, the only difference is religious affiliation, which is not a relevant distinguishing factor between the groups compared. As Bobek put it, "Levels of remuneration and faith are, in principle, unconnected."

Besides, the stated aim to protect freedom of religion and worship remains unaffected because the favoured group can practise religion on the paid holiday even without being paid double for performing work on Good Friday.

Turning the Austrian government's logic on its head, the opinion concludes:

*Indeed, it might be argued – admittedly not without a pinch of cynicism – that the right to double pay for members of the four churches who work on Good Friday constitutes an economic incentive not to use that day for worship.*

Based on this assessment, the opinion concludes that the first question should be answered in the positive, such that EU law precludes a national rule that provides for double pay on religious grounds.

The second and third questions were answered in the negative. According to the opinion, protection of the rights and freedoms of others does not cover an indemnity (ie, double pay) in case of restrictions on those freedoms (ie, work on Good Friday by members of favoured churches). As Bobek pointed out, "That appears... to constitute not protection but compensation for the failure to protect."

In addition, the term 'others' in "protection of the rights and freedoms of others" under the directive was "intended to protect the general public from the nefarious behaviour of certain groups" and not vice versa.

Finally, the statutory Good Friday rule concerns only a specific group and therefore excludes all other groups that might have been disadvantaged in the past with regard to their religious rights and freedoms. Further, the rule is disproportionate. Both reasons show that the rule cannot be qualified as positive action within the meaning of the directive. Consequently, there is no valid justification for discrimination on religious grounds (fourth prong).

On the fourth question, Bobek differentiated between the 'interim period' (ie, the time between the ECJ's decision on incompatibility with EU law and the new national rule) and the past.

As for previous years, where the indemnity (double pay) was granted only to the favoured group, the appropriate remedy for past discrimination is levelling up so that employees outside the four churches should be awarded the same double pay (where such periods are not yet time-barred).

These remedies are not against the employer where – as in the case at hand – it has only complied with statutory rules. Rather, the opinion favours an action for damages against the state. It also avoids a duplication of litigation where the harmed party directly sues the party at fault instead of the employer, which is not at fault and must sue the state to recoup damages payments made to the employee.

Therefore, in cases involving proceedings between private parties, the injured party can rely on *Francovich* and subsequent cases decided by the ECJ where it was decided, on very abstract terms, that the member state could be liable for any loss incurred as a result of the failure to provide a legal framework compliant with EU law.

However, regarding the interim period, the opinion favours a levelling-down solution – effectively setting aside the discriminatory provision – because "it is not clear how 'levelling up', perhaps by paying all Austrian employees double or giving them a day off on Good Friday, would in any way advance freedom of religion".

Therefore, the fourth question was answered such that national law not in conformity with EU law must be disapplied (levelling down).

## **Comment**

It remains to be seen whether the ECJ will adopt the advocate general's opinion as its own decision,

as it often does.

A flood of lawsuits might follow, requesting that the Austrian government pay compensation to employees. Further, other religious groups (Austria is a predominantly Catholic country) might follow suit and claim discrimination against their religion or belief if they are not also afforded paid holidays on their own religious festivals.

With the next Good Friday fast approaching, the newly elected Austrian government will have to perform a quick fix on this decades-old religious discrimination to avoid further damage.

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