

## Case Reports

2019/27

# No additional public holiday pay for working on Good Friday – Discrimination based on religion? (AT)

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### Summary

Under a former Austrian law effective until February 2019, Good Friday was a public holiday only for a minority belonging to certain Christian Evangelical churches. In the case at hand, Austrian courts had to assess if this regulation and its legal consequences were valid under European Union law, or if they constituted discrimination.

### Legal background

Under Section 7 paragraph 1 of the Austrian Act on Rest Periods and Public Holidays ('Rest Periods Act'), all employees are generally entitled to an uninterrupted rest period of at least 24 hours on public holidays. Section 7 paragraph 2 of the Rest Periods Act stipulates 13 public holidays that apply to all employees, regardless of their religious denomination (some of them referring to religion, others not). Until 17 February 2019, the old version<sup>1</sup> of Section 7 paragraph 3 of the Rest Periods Act designated Good Friday as an additional 14<sup>th</sup> public holiday, but only for members of the Evangelical Churches of the Augsburg and Helvetic Confessions,

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1. The Austrian National Council (*Nationalrat*) repealed this provision by resolution dated 17 February 2019, in response to the ruling issued by the ECJ on 22 January 2019 (C-193/17 (*Cresco Investigation*)), ECLI:EU:C:2019:43.

the Old Catholic Church, and the United Methodist Church.

Further, under Section 9 of the Rest Periods Act, employees are generally entitled to a full day's regular pay on public holidays, although they are not obliged to work. In addition to this public holiday pay, employees who are (based on several statutory exceptions) obliged to work on a public holiday are entitled to payment for the work performed. In this way, under the old version of the Rest Periods Act, members of these particular churches who worked on Good Friday received double payment. Other employees who were not members of these churches, however, were obliged to work on Good Friday as well, but were only entitled to their regular pay for the day's work.

In recent Austrian literature, there has been great controversy as to whether the provisions outlined above were in line with the principles of equal treatment. The Austrian legislature adopted the Equality Framework Directive, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation ('Directive 2000/78/EC'), mainly through the Austrian Equal Treatment Act (*Gleichbehandlungsgesetz*). The Equal Treatment Act prohibits discrimination in an employment relationship based on sex, ethnic affiliation, religion, belief or sexual orientation.

### Facts

The plaintiff was employed by a private detective agency in Austria. Since he was not a member of the relevant churches, having in fact no religious affiliation at all, he received no additional public holiday pay for his work on Good Friday, 3 April 2015. He sued his employer for the public holiday pay (EUR 109.09, plus interest) in addition to his received base salary, arguing discrimination based on religion.

The Court of First Instance dismissed the action, finding no discrimination and stating that the Good Friday regulation constitutes an objectively justified unequal treatment of employees who are not in a comparable situation. However, the Appellate Court disagreed and allowed the action. In particular, the Appellate Court ruled that employees who are formal members of the relevant churches are comparable to employees who are not. Since these comparable employees are treated differently on Good Friday based on their religious denomination, the Appellate Court found discrimination based on religion or belief, which violates

Article 21 of the Charter of Fundamental Rights of the European Union ('the Charter').

The case proceeded to the Austrian Supreme Court (*Oberster Gerichtshof*). Since several areas of EU law were concerned, the Austrian Supreme Court referred four questions to the ECJ for a preliminary ruling. The ECJ found the Austrian Good Friday provisions to be discriminatory based on religion, in violation of Directive 2000/78/EC and the Charter.<sup>2</sup> They ruled that until the Austrian legislature fixed the invalid provision, Austrian courts should grant the Good Friday benefits to all employees, regardless of their denomination. However, all employees would have to request a rest period on Good Friday from their employer in advance. If the employer were to refuse the request for the rest period, the employee would be obliged to work, but would also be entitled to receive the additional public holiday pay. Only employees who could prove that previous timely requests to take off Good Friday were denied would have claims for back pay, in the sense of foregone holiday pay. Since the Court of First Instance had not established in its evidentiary proceedings if the defendant had refused an explicit request of the plaintiff in advance to have a day off on Good Friday, the Austrian Supreme Court remanded the case back to the Court of First Instance in order to review the facts in light of the foregoing. Those proceedings have not yet concluded.

## Commentary

Under Article 2 paragraph 2(a) of Directive 2000/78/EC, direct discrimination occurs if one person is treated less favourably than another in a comparable situation based on any of the prohibited grounds. Therefore, one of the main questions raised by the case at hand is the definition of a 'comparable situation'.

In its request for a preliminary ruling, the Austrian Supreme Court pointed out that a majority of the 13 public holidays stipulated in Section 7 paragraph 2 of the Rest Periods Act are Christian religious holidays, two of them exclusively for the Catholic Church. These 13 public holidays apply to all employees, regardless of their denomination. The intent of the Good Friday regulation, however, is to allow members of certain minor Christian churches to practice their religion on a holiday particularly important to them.

In order to qualify for the Good Friday holiday, an employee must be a formal member of one of the Christian churches named in the statute, but there is no legal requirement that they devote that time to performing any kind of religious duty. The ECJ noted that, since these employees are free to use their time on Good Friday for rest and leisure, their situation is comparable to that of their work colleagues who would like to take off Good Friday for rest and leisure, but who do not receive

the benefit of the designated holiday. Further, the ECJ determined that employees, who were receiving double pay, because they were eligible for holiday pay but also chose to work on Good Friday, were in a comparable situation to their work colleagues because this difference was purely financial.

The ECJ therefore concluded that the Austrian Good Friday regulation in Section 7 paragraph 3 of the Rest Periods Act constitutes direct discrimination based on religion under Article 2 paragraph 2(a) of Directive 2000/78/EC and is not to be evaluated as an objectively justified unequal treatment of employees who are not in a comparable situation.

Since the Appellate Court's ruling, allowing the action to continue and finding the Good Friday regulation to be discriminatory, there has already been much controversy in Austrian legal literature on whether employees are in a comparable situation on Good Friday or not. Some experts have blatantly rejected the idea that the situation is comparable or could lead to a finding of discrimination. Others have argued that a comparable situation is delimited among religious groups, such that discrimination against an atheist cannot arise from a regulation intended to enable Christians to fulfil their religious duties.

The ECJ's ruling, that employees are generally comparable with respect to financial benefits, regardless of the original intent of a regulation, is perfectly reasonable from a pragmatic point of view. The question is what kind of precedent it sets for the future, and whether it has raised more issues than it has settled. Austria is only one of many EU countries struggling with the concept of public holidays associated with Christian (mostly Catholic) traditions, given the fact that membership in Christian churches is declining, and religious diversity is on the rise. In Austria, there are other regulations that may be affected by the ruling, such as one granting a public holiday for the Jewish community on Yom Kippur, based on collective bargaining agreements. In response to the ECJ's preliminary ruling, the Austrian legislature introduced the new legal concept of a so-called 'personal holiday' as a quick fix only several weeks before Easter in 2019. The 'personal holiday' entitles employees to unilaterally take a holiday from their statutory vacation entitlement on one day per year, which they (contrary to the general Austrian rules for vacation use) may choose freely and without the consent of the employer. However, the one thing that is clear at present is that the cultural motives underlying the designation of public holidays will require greater scrutiny in order to achieve harmonisation with the jurisprudence of discrimination.

2. ECJ 22 January 2019, C-193/17 (*Cresco Investigation*).

## Comments from other jurisdictions

*Denmark (Christian K. Clasen, Norrbom Vinding):* First of all, it is worth noting that there are no statutory public holidays for all employees in Denmark. It is, however, common that employees according to collective agreements or custom are entitled to a rest period on these days with or without pay. The public holidays specified in collective agreements apply to all relevant employees even if the holidays are based on religious tradition.

The judgment from Austria is highly relevant in Denmark as the Danish Board of Equal Treatment recently gave two decisions concerning discrimination on grounds of religion in relation to employees' obligation to work on specific days.

In the first decision, an employee refused to participate in an event for potential students at his workplace because the event took place on a Saturday. He was a member of the Seventh-day Adventist Church that holds the belief that Saturday is the day of rest. Due to his absence at the event, he was dismissed.

The Board stated that the employer's request for the employee to work on a Saturday appeared to be a neutral request but would nonetheless affect employees with the same belief as the claimant more in comparison to other employees. The Board found that the request was objectively justified by a legitimate aim and that the requirement was furthermore appropriate, as the teacher was the only person with the required qualifications at the event. However, as the employer had not adequately tried to find alternative solutions and, additionally, had not proved that it would be impossible to find another employee who could replace the claimant at the event, the requirement was not necessary. Therefore, the claimant was awarded compensation of 9 months' pay.

In the second ruling, an employee who was a member of Jehovah's Witnesses refused to participate in a Christmas event. Jehovah's Witnesses do not celebrate Christmas, and the employee believed that the activities at the event, including dancing around the Christmas tree, were religious acts. The employee asked for leave of absence or other tasks during the Christmas event. The employer refused this request, and on the day of the event the employee called in sick. A few months later, the employee was dismissed on grounds of her refusal to take part in the Christmas event as the employer no longer trusted that the employee would be able to fulfil her requirements in the position as a teacher.

The employee brought a claim before the Board, which gave the same reasoning as in the above-mentioned case. The request appeared neutral but would affect employees with the same belief as the claimant more than other employees. The Board once again found that the request was objectively justified by a legitimate aim and appropriate. However, as the employer had not adequately

tried to find an alternative to participation by the claimant, and due to the fact that other employees had been excused from the event with reference to holiday and knee problems, the request was not necessary. Thus, the employee was awarded compensation of 12 months' pay. These cases illustrate how in such cases, according to the Danish Board of Equal Treatment, it is decisive that the employer enters into a dialogue with the employee to try to find an alternative solution. If there were no other alternative solutions, the Board might have found the employers' requests appropriate and necessary. However, in both cases the employer had not thoroughly considered whether another employee could have carried out the relevant task instead.

Finally, it should be kept in mind that these recent decisions have been delivered by the Danish Board of Equal Treatment and that the reasoning by the Board has not at this stage been confirmed by the civil courts.

*Germany (David Meyer, Luther Rechtsanwaltsgesellschaft mbH):* In Germany, employees are entitled to a paid day off on public holidays. If a working day is cancelled due to a public holiday, employees still receive their regular salary. Employees who have to work (due to several statutory exceptions) on a public holiday, do not receive double payment as in Austria, but they receive an additional day off. This applies to all employees, regardless of their denomination.

Nevertheless, the number of holidays per year varies between employees depending on the federal state they work in. While there are 14 public holidays in Bavaria, employees in many other federal states have only 10 public holidays. This difference in leave entitlement does not constitute discrimination within the meaning of Directive 2000/78/EC, since the difference in treatment is not based on a prohibited means mentioned in Article 1.

In addition, there may be differences in the number of holidays within the federal states. For example, Bavaria's holiday provision stipulates that Assumption Day is exclusively a public holiday in parishes whose population mostly consists of members of the Catholic Church (i.e. 1704 of 2054 parishes). Similar regulations exist in the provisions of Saxony and Thuringia for Corpus Christi. However, these regulations do not constitute discrimination either. Unlike in the Austrian Good Friday provision, the unequal treatment is not based on the religion of the individual employee, but on their place of residence. For Non-Catholic employees, Assumption Day is also a public holiday if they live in a Catholic parish.

Another provision in the Bavarian Holidays Act (*Feiertagsgesetz*) is more similar to the Austrian Good Friday provision as employees are treated unequally due to their individual religion. According to Sec. 4 of that Act, Christian employees may still be entitled to a day off at Assumption Day even if they work in a non-Catholic parish. They are – unlike in Austria – not entitled to continued (or double) payment of their remuneration though. As employees of no denomination are not enti-

ted to choose this or another unpaid day off it seems questionable if this provision is in line with Directive 2000/78/EC.

*The Netherlands (Peter Vas Nunes)*: A good example of 'levelling up'. Going by what I can find on the internet, my guess is that no more than 4% of Austrians are affiliated to one of the religious denominations whose members were entitled to one extra day of paid annual leave. Thanks to this 4%, all Austrian employees received an extra day. It would be interesting to know how many Austrian employees have entered claims for not having been paid overtime on Good Friday in the past years.

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tion GmbH

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