

Genuine Occupational Requirements in European Law

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When, if ever, is it appropriate to turn anti-discrimination law upside down? When, instead of saying that less favourable treatment on grounds such as ethnicity or sexual orientation is prohibited, can we say instead that having a such a characteristic is actually a requirement for the job? That is the question we set out to answer in considering the scope of genuine occupational requirements.

It is particularly interesting to consider this question today, since it is only last year that the ECJ considered the scope of the genuine occupational requirement exception in relation to Directive 2000/78 for the first time in an age discrimination case – *Wolf v Stadt Frankfurt am Main*¹. Previously, the rather sparse case law on this issue had arisen only in the context of sex discrimination, as we will see.

1 Context and ECJ jurisprudence

While there can be a defence of justification where an employer imposes a provision, criterion or practice which results in indirect discrimination against one of the protected groups, there is no defence to direct discrimination². Thus, the only circumstances in which an employer is able directly to discriminate on one of the protected grounds is *either* if there is an applicable genuine occupational requirement *or* if the situation falls within the limited circumstances where positive action is permitted³. The genuine occupational requirement concept was originally introduced in relation to sex discrimination and, until *Wolf*, the jurisprudence of the ECJ in relation to this concept so far comprised only cases on sex discrimination. This helps to explain why the genuine occupational requirement exception was developed: it is easy to think of situations in modelling, photography or performing where the sex of the participant would be critical

The provision in 2000/78 permitting the genuine occupational requirement derogation is in these terms:

Article 4: Occupational requirements

¹ Case C-229/08 [2010] 2 CMLR 849

² Except in relation to age discrimination: Directive 2000/78, Art 6.

³ See TFEU Art 157(4); Directive 76/207 Art 2(8); Directive 2002/54 Art 3; Directive 2000/43 Art 5; Directive 2000/78 Art 7. Further consideration of positive action is beyond the scope of this paper.

- (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.⁴

An examination of the legislative history of the genuine occupational requirement concept, informed by the jurisprudence of the ECJ, shows that hitherto, there has been increasing emphasis on the idea that the exception is to be seen as a highly unusual phenomenon, rarely to be relied upon. The legislation has also recognised that the genuine occupational requirement concept is inherently an evolving concept, which is liable to change as social and cultural attitudes change in society. For example, in 1983, in *Commission v United Kingdom*⁵ the ECJ accepted that it was legitimate to restrict the role of midwife to women only, because of the sensitivity of the relationship between the midwife and the woman giving birth. However, in 2000 the Commission reported that the profession of midwife was now fully open to men in all the Member States.⁶

Scope of the general genuine occupational requirement

As noted already, there is one specific genuine occupational requirement in 2000/78 Art 4(2) relating to religious organisations. This will be considered later. In this section, the general genuine occupational requirement is considered in more detail.

The first point to note is that the genuine occupational requirement provisions are permissive, not mandatory. There is no need for Member States to use this facility at all, as the ECJ stressed in *Commission v Germany*⁷. Secondly, the Directives do not say that race, sexual orientation, religion or belief, etc must themselves constitute the genuine occupational requirement: rather, the genuine occupational requirement need only be a *characteristic related to* any of the protected grounds, which is a wider formulation. *Wolf v Stadt Frankfurt am Main* provides an example: the case concerned an age restriction for entry into the fire service, based on a need to ensure sufficient

⁴ 2000/43 Art 4 is in exactly parallel terms:

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to racial or ethnic origin 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.

2000/78 Art 4(2) contains a further exception, to be considered later.

⁵ Case 165/82 [1983] ECR 3431.

⁶ COM (2000) 334 final p.8.

⁷ Case 248/83 [1986] 2 CMLR 588

firefighters with high physical capacities: this was a characteristic related to age, rather than age itself.

Thirdly, there are two alternative ways in which a requirement may be held to be genuine and determining: first, because of the *nature* of the particular occupational activities, or secondly, because of the *context* in which they are carried out: see *Johnston v Chief Constable of the RUC*⁸.

The fourth, and very important point, is that the principle of proportionality must be applied in considering the genuine occupational requirement exception. Again, this point was established in case law on Directive 76/207 Art 2(2): see *Johnston, Kreil and Sirdar v Army Board and Secretary of State for Defence*⁹, for example. In *Johnston*, the Court explained the principle in these terms:

“That principle requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view and requires the principle of equal treatment to be reconciled as far as possible with the requirements of public safety which constitute the decisive factor as regards the context of the activity in question.” (para 38).

While these cases give some flavour of how the principle of proportionality has been applied in practice, it may be felt that the particular application in *Sirdar* is at least ripe for review in the light of modern conditions. In particular, it seems strange that the Court appeared to have accepted that women could not perform the required role in the Royal Marines without investigation of whether this was in fact the case. Similarly, in *Johnston*, some commentators have criticised the Court’s willingness to accept that there could be an argument based on public safety restricting the arming of women police officers without factual evidence of any such increased danger. In both cases there is an element of gender stereotyping in the underlying attitudes about the capabilities of women compared with men.¹⁰

It should be noted that the circumstances in which a genuine occupational requirement can be claimed as stated in the Directive have been treated by the Court as exhaustive: that is to say, there are no circumstances in which Member States can argue for other special occupational exemptions: *Johnston*, where the argument that the Chief Constable’s actions were justified by considerations of national security, protection of public safety and public order were rejected by the Court:

“... the principle of equal treatment is not subject to any general reservation as regards measures taken on the grounds of the protection of public safety ...” (para 27)

Similar findings were made by the ECJ in *Sirdar* and *Kreil*.

⁸ Case 222/84 [1986] ECR 165.

⁹ Case C-273/97 [1999] ECR I-7403

¹⁰ Similar points could be made about *Commission v France* Case 318/86 [1988] ECR 3559.

On the other hand, the Court has accepted that Member States have some margin of discretion when adopting measures which they consider to be necessary in the interests of public security. This was stated in *Sirdar*¹¹ and is also evident from *Dory v Germany*¹².

The last principle is the requirement that any derogation must be transparent, so that it is capable of effective supervision by the Commission. This was established in *Commission v France*¹³.

2 *Wolf v Stadt Frankfurt am Main*¹⁴

Wolf is an interesting case for many reasons. It is the first case on genuine occupational requirements under Directive 2000/78/EC. It is the first to deal with a ground other than sex as an occupational requirement, and it is the first case in the ECJ on this area since 2000.

The claimant applied to become an intermediate firefighter. He was rejected because the service applied an age limit of 30 to recruitment to these posts and Mr Wolf was 31. The question referred to the ECJ by the German court was essentially, whether this was justified under Art.6(1) of Directive 2000/78. This is the provision which permits even direct discrimination to be justified where the ground is age, unlike the other grounds covered by the Anti-Discrimination Directives.

All potential recruits had to pass a demanding physical test before they were taken on: however, Mr Wolf did not even get this far because he had already been screened out by the age limit. The justification given for the age limit for recruits was the need to create a balanced age structure in the fire service in order to ensure its operational capacity and proper functioning. While the retirement age for firefighters is 60, evidence was given that few aged 45-50 were capable of carrying out frontline duties and effectively no one aged over 50 did so.

One of the most striking things about this case is that it was referred to the ECJ only under Art.6(1) of Directive 2000/78/EC, *i.e.* on the question of whether it was justified age discrimination, not under the genuine occupational requirement exception under Art.4(1). The reason for this was that the German court thought that, since physical fitness was looked at as a separate part of the selection process, the age limit could not be a genuine occupational requirement. Nonetheless, the Advocate General and the Court took up this point of their own motion. As the Court put it,

“... it is not the ground on which the difference of treatment is based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement.”

¹¹ *Sirdar op cit*, para 27

¹² Case C-186/01 [2003] ECR I-2479. The claimant challenged the national law which required men, but not women, to do national service, because this meant that men were disadvantaged in the labour market because they entered nine months later than women, and employers were hesitant to employ men who were liable to call-up.

¹³ Case 318/86 [1986] ECR 1651 paras 24-28.

¹⁴ Case C-229/08 [2010] 2 CMLR 849

Its (relatively brief) reasoning on the issue was as follows:

First, the objective of ensuring operational capacity and proper functioning of the fire service was accepted as legitimate – this was unarguable. Secondly, the uncontradicted evidence of the German Government that some of the tasks of intermediate firefighters required exceptionally high physical capacities meant that this could be regarded as a genuine and determining occupational requirement. Thirdly, the evidence showed that possession of these physical capacities was related to age. Fourthly, it was proportionate to impose the age limit, in order to ensure that firefighters would have a period of about 15-20 years in which they would be able to carry out the most demanding duties.

Wolf is notable for the fact that neither the Advocate General nor the ECJ made any reference to the earlier jurisprudence on genuine occupational requirements. The tenor of the decision is quite different from those earlier cases: there is no emphasis on the exceptional nature of allowing a genuine occupational requirement and the discussion of proportionality arguably gives insufficient attention to the issue of whether the legitimate aims of operational efficiency could not be met in some other, less burdensome manner. Indeed, it can be argued that in this case, the Court has been satisfied with a lower standard of proportionality than is usual, namely, that the employer's decision to impose the age limit was reasonable in the circumstances.

3 Questions which remain outstanding

One of the main issues which arises from *Wolf v Stadt Frankfurt* is the decision implies that there may now be different standards of review for genuine occupational requirements under the different Directives. This would go against the tide which has been running towards convergence in recent years, but seems to be a possible result. The case law on genuine occupational requirements for the purposes of sex discrimination law is well settled and longstanding and it seems unlikely that there will be an alteration in approach on that front. If, as proposed above, a less stringent standard is applied to the other Directives, then divergence would seem to be inevitable.

On the other hand, a difference in approach to the different grounds might mirror the position in the jurisprudence of the European Court of Human Rights in its approach to the open-ended prohibition on discrimination in Art.14 of the European Convention on Human Rights. It is also the case that some countries, both within and outside the European Union, differentiate between different grounds, some not permitting the concept in relation to some grounds. In the USA, for example, the

equivalent “bona fide occupational qualification” is permitted on grounds of religion, sex or national origin, but not on grounds of ethnic origin.¹⁵

Authenticity

When we consider the various grounds protected by Directives 2000/43 and 2000/78, we may find that different considerations come into play for each of them. An obvious example would be authenticity in relation to acting, modelling and other occupations where appearance is important. In *Commission v Germany* the ECJ noted that the laws and practices of Member States were similar with regard to exemptions relating to singing, acting, dancing and artistic or fashion modelling.¹⁶ But this is an example where, although it is easy to imagine sex being an obvious genuine occupational requirement, it is not by any means so clear that such occupational activities should come within the exception for other grounds. Authenticity of appearance could constitute a genuine occupational requirement on grounds of race: the Commission referred expressly to this in its proposal for Directive 2000/43¹⁷, although in acting this has not always been the case.¹⁸ Authenticity could also apply in relation to (apparent) age, but probably not in relation to the other protected grounds. Being heterosexual did not disqualify Sean Penn from playing Harvey Milk, the first openly gay man to be elected to public office in California, in the 2008 film, *Milk*. Indeed, it is possible that the knowledge that he was heterosexual was seen as making his success in the role the more praiseworthy and may even have contributed to his being nominated for an Oscar. In similar vein, Colin Firth was playing against type when he won a BAFTA award in 2010 for his portrayal of a gay man in the film, *A Single Man*, based on the novel by Christopher Isherwood¹⁹. However, this may not work in reverse: it is entirely probable that an openly gay actor may find his or her opportunities diminished because they are perceived as not credible in, say, a romantic leading role. This raises a further question: could credibility in an occupational role amount to a genuine occupational requirement, either because of the nature of the occupational activities or context in which they are carried out?

I have raised the question in relation to sexual orientation and acting. The same question could arise in relation to employment in organisations promoting the welfare or providing services to people in the protected groups. Could it be a genuine occupational requirement that the chief executive of an

¹⁵ USC sec 2000 e-1

¹⁶ *Commission v Germany* Case 248/83, para 34.

¹⁷ COM (99) 566 at p.8.

¹⁸ See G.Pitt, “Madam Butterfly and Miss Saigon: race and sex as GOQs”, in eds J Dine and B Watts, *Discrimination Law: Concepts, Limits and Justifications*, Longmans, 1996, pp 198-206.

¹⁹ At the UK premiere of *A Single Man*, in February 2010, Firth was quoted as saying, “If you're known as a straight guy, playing a gay role, you get rewarded for that. If you're a gay man and you want to play a straight role, you don't get cast - and if a gay man wants to play a gay role now, you don't get cast....I think we should all be allowed to play whoever - but I think there are still some invisible boundaries which are still uncrossable.”

organisation promoting the rights of disabled people or gay people should themselves be disabled or gay, in order to be credible in the role?

A related, but different issue arises where services are provided to people within one of the protected groups – are those services most effectively provided by people who share the relevant characteristics? In such a case, what would be the characteristics which are genuine and determining? Is empathy enough to constitute a genuine occupational requirement?

Security

It is noticeable that the cases which have arisen on the applicability of the genuine occupational requirement exception have mainly arisen in relation to the police, the armed forces and similar occupations. Directive 2000/78 Art 3(4) permits Member States not to apply the Directive to the armed forces in relation to discrimination on grounds of disability and age.

What level of evidence will a Member State need to produce to show that individuals do not have the required capacity? If, for example, Member States were to be allowed to exempt particular occupations under this principle, rather than to produce proof this on a case-by-case basis for each particular post and each particular individual, there is a danger of stereotyped assumptions about the capabilities of people with disabilities, or older people, being used in a negative fashion to limit opportunities²⁰. It appears from *Wolf* that particular posts rather than whole occupations may be exempted, but not on a case-by-case basis. The interplay with the duty of reasonable accommodation is also important in relation to disability. Where members of the armed forces, for example, are injured on active service, it may be felt that the armed forces should have a particular duty to attempt to accommodate them (and make use of their valuable training and experience) in suitable non-combat roles rather than to dismiss them as no longer having the required capacity to perform the range of functions a soldier *may* be called upon to perform.

Privacy

The privacy argument is important more generally. Hazel Oliver points out that there is a fundamental conflict between privacy and the genuine occupational requirement based on sexual orientation.²¹ Since the Directive prohibits discrimination on grounds “related to” sexual orientation, it follows that a claim may be pursued where an individual has been discriminated against because an employer thinks that he or she is gay, regardless of whether or not this is in fact the case. Indeed, there is no need for claimants to disclose at any point what their sexual orientation is – thus they can maintain their privacy. But if sexual orientation is said to be a genuine

²⁰ Comparable to the kinds of arguments accepted in *Johnston, Sirdar and Commission v France*, discussed above.

²¹ H. Oliver, “Sexual orientation discrimination: perceptions, definitions and genuine occupational requirements”, 33 *Industrial Law Journal* 1 (2004).

occupational requirement, it follows that anyone applying for such a post must also disclose their sexual orientation – which infringes their rights to privacy. The same sort of conflict also arises in relation to a genuine occupational requirement based on religion or belief and (perhaps) age and disability.

Access to employment

Another major difference between genuine occupational requirements based on sex and those based on the other protected grounds is that in relation to sex, a genuine occupational requirement can only be relied upon in relation to *access* to employment, or training for it, while under Directives 2000/43 and 2000/78 any difference in treatment may be a genuine occupational requirement. Is there any warrant for this?

Conclusions

The genuine occupational requirement exceptions permitted under Directives 2000/43 and 2000/78 are intended to be limited in scope and to be interpreted strictly. However, the recent decision of the ECJ in *Wolf v Stadt Frankfurt am Main*²² at least raises the question whether the same standard of strictness which has hitherto applied in sex discrimination cases will apply equally to genuine occupational requirements under the newer Directives. It is clear that there are a number of areas where it is not clear how far the exceptions will operate and it is not always possible to extrapolate principles from existing case law on sex equality in relation to the other protected grounds. The inconsistency between protection under Directives 2000/43 and 2000/78 and Directive 76/207 (and 2006/54), with the latter being restricted to access to employment while the others are at large, is at best puzzling, at worst a worrying anomaly. What is clearly of great importance is that the genuine occupational requirements should be kept under review and that we should constantly ask the question, are they really necessary?

²² (2010) 2 CMLR 849