



**Key Issues:** Equal Treatment – Religious Discrimination

**Case:** Cresco Investigation v Markus Achatzi

**Reference:** Case C-193/17, CJEU (Grand Chamber), 22 January 2019

**Legislation:** Directive 2000/78/EC

Under a provision of Austrian national law known as the ARG, Good Friday is a paid public holiday, entailing a 24-hour rest period for members of the Evangelical Churches of the Augsburg and Helvetic Confessions, the Old Catholic Church and the United Methodist Church (*“the churches covered by the ARG”*). If a member of one of those churches does nevertheless work on that day, he is entitled to additional pay in respect of that public holiday (*‘public holiday pay’*).

Mr Achatzi is an employee of Cresco, a private detective agency, and is not a member of any of the churches covered by the ARG. He claims that he suffered discrimination by being denied public holiday pay for the work he did on 3 April 2015, which was Good Friday, and, for that reason, seeks payment from his employer of EUR 109.09, plus interest.

The Oberster Gerichtshof (Supreme Court, Austria) observed that, of the 13 public holidays listed in the ARG, all — except for 1 May and 26 October, which have no religious connotations — have a link with Christianity, 2 of them being exclusively linked to Catholicism. Further, all of these public holidays are paid days off for all employees, regardless of their religious affiliation. The referring court goes on to note that the special regime established by the ARG seeks to allow members of one of the churches covered by the ARG to practise their religion on a religious holiday that is particularly important for them.

According to the referring court, the ARG makes the granting of an additional public holiday dependent on the employee’s religion, with the consequence that those who are not members of the churches covered by the ARG have one paid public holiday fewer than the members of one of those churches, which constitutes, in principle, less favourable treatment on grounds of religion.

However, even though the applicant in the main proceedings is not claiming that his religious needs were not taken into consideration on Good Friday, the referring court takes the view that it is necessary, in order to assess the compatibility of the national legislation at issue in the main proceedings with Directive 2000/78, to take account of the fact that the religious needs of some employees are not taken into consideration by that legislation. It is true that

some collective agreements contain provisions comparable to the ARG, in particular with regard to Yom Kippur in the Jewish religion or Reformation Day in Protestant churches. However, in the absence of any such provision, employees are largely dependent on the goodwill of their employer.

The referring court also points out that the difference in treatment at issue in the main proceedings may be addressed by EU law in a dispute between individuals, such as that in the main proceedings, only if that law is directly applicable. It points out that Directive 2000/78 was transposed, in Austria, by the Law on Equal Treatment, which does not take precedence over the ARG, and that the clear wording of the ARG precludes an interpretation consistent with EU law which extends the arrangement in respect of Good Friday to employees who are not members of the churches covered by the ARG.

The referring court also points out that, under Article 2(5) of Directive 2000/78, that directive is without prejudice to measures laid down by national law which, in a democratic society, are necessary for the protection of the rights and freedoms of others, and notes that, according to the case-law of the Court, freedom of religion and the right to practise a religion are two of the bases of a democratic society.

Therefore, that court is uncertain whether the regime set out in the ARG should be considered as constituting a measure that is necessary to protect the freedom of religion and the right to practise a religion of employees who are members of one of the churches covered by the ARG.

In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer a number of questions to the Court of Justice of the EU (CJEU) for a preliminary ruling.

### **Consideration by CJEU**

In the first place, the CJEU noted that, in accordance with Article 1 of Directive 2000/78, the purpose of that directive is to establish a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Under Article 2(1) of that directive, the “*principle of equal treatment*” is defined as meaning that there is to be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1 of that directive. Article 2(2)(a) of the directive states that, for the purposes of Article 2(1) thereof, direct discrimination is to be taken to occur where one person is treated less favourably than another is treated in a comparable situation, on any of the grounds referred to in Article 1 of the directive, which include religion. In that context, it is necessary, first, to determine whether the

legislation at issue in the main proceedings gives rise to a difference in treatment between employees on the basis of their religion.

As is apparent from the documents before the CJEU, the grant of public holiday pay to an employee who is a member of one of those churches and is required to work on Good Friday is dependent only on whether that employee is formally a member of one of those churches. Accordingly, that employee is entitled to such public holiday pay even if he worked on Good Friday without feeling any obligation or need to celebrate that religious festival. Therefore, his situation is no different from that of other employees who worked on Good Friday without receiving such a benefit.

**The CJEU held that:**

**Articles 1 and 2(2) of Council Directive 2000/78/EC must be interpreted as meaning that national legislation under which, first, Good Friday is a public holiday only for employees who are members of certain Christian churches and, second, only those employees are entitled, if required to work on that public holiday, to a payment in addition to their regular salary for work done on that day, constitutes direct discrimination on grounds of religion.**

**The measures provided for by that national legislation cannot be regarded either as measures necessary for the protection of the rights and freedoms of others, within the meaning of Article 2(5) of that directive, or as specific measures intended to compensate for disadvantages linked to religion, within the meaning of Article 7(1) of the directive.**

- 2. Article 21 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that, until the Member State concerned has amended its legislation granting the right to a public holiday on Good Friday only to employees who are members of certain Christian churches, in order to restore equal treatment, a private employer who is subject to such legislation is obliged also to grant his other employees a public holiday on Good Friday, provided that the latter have sought prior permission from that employer to be absent from work on that day, and, consequently, to recognise that those employees are entitled to a payment in addition to their regular salary for work done on that day where the employer has refused to approve such a request.**

**Why is this decision important?**

Following this judgment, employers in Austria must pay any employee who works on Good Friday regardless of that employee's membership of a church covered by the ARG. All employers should review their policy on holidays (with particular attention to "religious" holidays) to ensure they are not

discriminating against employees who are members of a particular religion and those who do not subscribe to any religion.

*The material on these pages is for information purposes only. You should not act or rely on this information without seeking professional advice.*

**CLfE (3/2019)**

**Elliott Duffy Garrett | 40 Linenhall Street | Belfast | BT2 8BA**

**W: [www.edglegal.com](http://www.edglegal.com)      E: [kevin.mcveigh@edglegal.com](mailto:kevin.mcveigh@edglegal.com)**  
**T: +44 (0) 28 9024 5034      F: +44 (0) 28 9024 1337**