

Religion In The Workplace: The Legal Framework In Portugal

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Abstract

This paper deals with a reflection around religion in the workplace, especially in the Portuguese context, from a legal perspective. Thus, the goal here is to identify the main focal points of the legal framework in Portugal. We intend to demonstrate the most significant aspects of protection but also the weaknesses of the system. This reflection goes about perfecting opportunities to the level of articulation between employers' organization rights and religious freedom of the employees.

Keywords: Freedom of religion, workplace, discrimination

Introduction

There is a growing number of disputes related to religious freedom at the various stages of the employment relationship (Fahlbeck, 2004) that can go from the struggle against discriminatory behaviors for religious reasons to real duties confrontations; i.e. duties that appear in the religious context and duties regarding the execution of the employment contract (García-Pardo, 2004).

Even in Portugal, with a predominantly Catholic population, recently appeared the first cases brought to the Constitutional Court. For that reason, and in the current socio-political context, is essential to reflect on the effectiveness of fundamental rights in the field of labour relationships.

The present text seeks to carry out along the lines of interpretation of the Portuguese law and present some case law on the possibility of express religious beliefs. In this approach to the problem, considerations on the field of the relationship between religious freedom and labour relations will inevitably arise. We intend to draw perspectives of reflection from the Portuguese framework on the matter of freedom of religion.

It is important to begin by observing, as a starting point, that the Portuguese law does not provide any definition of religion. Notwithstanding, some authors consider that a belief in a supernatural entity is inherent to the

concept of religion (Machado, J., 1996). Therefore, a legal definition of religion could constitute a State interference, prohibited by the constitution, in the religious freedom of individuals. J. Machado points out that the notion of “religion is a matter of personal conviction, and not of coercion” (Machado, J., 2005).

The employees’ protection from discrimination on grounds of religion Constitutional background

In the Portuguese legal system, the freedom of consciousness, religion and cult is recognized on the Article 41 of the Constitution, consecrating three distinct but related rights: “The freedom of conscience, of religion and of form of worship is inviolable” (Article 41 no. 1). In that sense “No one may be persecuted, deprived of rights or exempted from civic obligations or duties because of his convictions or religious observance” (Article 41 no. 2). The principle is repeated in regard of religion, with enormous practical consequences, in no. 3: “No authority may question anyone in relation to his convictions or religious observance, save in order to gather statistical data that cannot be individually identified, nor may anyone be prejudiced in any way for refusing to answer”.

Associated to this freedom is also the principle of equality and prohibition of discrimination, based on religion, political ideologically beliefs (Article 13): “No one may be privileged, favoured, prejudiced, deprived of any right or exempted from any duty for reasons of ancestry, sex, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation”. Regarding that, the Portuguese Constitution establishes a general principle of non-discrimination on several grounds, including religion, and considers the active promotion of equality as a fundamental task of the State (Brito, 2012).

These dispositions should be interpreted in accordance with Article 16: “1. The fundamental rights contained in this Constitution shall not exclude any other fundamental rights provided for in the laws or resulting from applicable rules of international law. 2. The provisions of this Constitution and of laws relating to fundamental rights shall be construed and interpreted in harmony with the Universal Declaration of Human Rights.” Among the applicable rules of international law are those of the European Convention of Human Rights.

Labour code

The Portuguese Labour Code (Articles 22 and 23) prohibit employers from discriminating against an employee or job applicant on the basis of religion among other grounds. Therefore, the labour law prohibits employers from treating persons differently because of their religion; it establishes a

non-discrimination principle, on the grounds of religion, in the field of employment and working relations.

The meaning of some notions in this field, such as direct (Article 23 no. 1a) and indirect discrimination (Article 23 no. 1b), have been transposed into the Portuguese Labour Code and are consistent with European law.

The definition on direct and indirect discrimination is almost duplicated with that of Directive 2000/43/EC, but a greater scope of discrimination can be found in the Labour Code. Its Article 23 considers in no. 1 that: “a) direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation, on the basis of a ground of discrimination; b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put a person on the basis of a ground of discrimination at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary”. And specifies in no. 2 that “the simple order or instruction that purports to damage someone on the basis of a ground of discrimination constitutes a discrimination”.

The Labour Code implemented the Directive 2000/43/EC and the Directive 2000/78/EC (Machado, S. S., 2010). And in that sense, Article 24 forbids the practice of discrimination on certain grounds such as “ancestry, age, sex, sexual orientation, civil status, family situation, economic situation, education, origin or social condition, genetic patrimony, impaired work capacity, disability, chronic disease, nationality, ethnic origin, language, religion, political or ideological belief and membership of a trade union”.

Law on Religious Freedom

The Law no.16/2001 (Law on Religious Freedom - LRF) recognizes a principle of equality regarding religion in its Article 2: “1. No one can be privileged, benefited, aggrieved, persecuted, deprived of any right or exempt from any duty on account of his or her convictions or religious practice. 2. The State shall not discriminate any church or religious community in relation to others.”

In addition, Article 14 of the LRF provides that employees are authorized to suspend their work on the days of rest, festivities and during the periods determined by the religion to which they adhere, subject to certain conditions. But it is important to underline that the employee must make a request to his employer in order to exercise this right to suspend his work.

Enforcement to accommodate an employee's religious beliefs: religious holidays and worship days

There are no legal provisions in Portuguese law which requires the employer to provide an employee with a concrete reasonable accommodation for his religious beliefs. As noted, the Labour Code only contains provisions regarding non-discrimination on the basis of religion but does not include positive actions of practical application.

Overall the solution should involve the application of the freedom of religion as a fundamental right with all the principles which lie behind it. In a more concrete perspective, the LRF could be seen as creating a form of burden on the employer, namely to permit employees to take time off during working hours in accordance with their religious beliefs.

As stated above, the Law no. 16/2001 allows the employees to suspend work on the day of the weekly rest, on the days of festivals and during hourly periods that are prescribed for them by the religion that they profess. Such request is subjected to three conditions:

- a) They shall work according to a flexible schedule ;
- b) They shall be members of a church or a registered religious community, that has sent a list of the aforementioned days and hourly periods for the current year, to the Minister of Justice during the previous year ;
- c) There shall be full compensation for the respective work period.

This normative provision has high practical significance because the majority of public holidays in Portugal, aside from the civil holidays, are related to Catholic festivities. Regarding other minor religions, the prerogative to take absence from work is similarly provided under Law no. 16/2001.

Until recently, there have been no known disputes of employers failing to comply with these legal provisions when properly requested by their employees. This is certainly a mechanism to promote equality.

Case law: a conclusion of practical application of the main principles

In the Portuguese case law the disputes related to freedom of religion are very recent but, because of that fewness, they are emblematic cases. The existing case law is concerning to the compliance of a weekly rest day and consequent leave from work due to religious reasons.

The lack of cases to point out regarding the individual aspects of exercise of freedom of religion, notably from a labour law perspective could be explained by the fact that the Roman Catholic religion is dominant in Portugal and other religions have smaller numbers of believers.

According to a chronological order, we can begin to present a case that although not related to the employment relationship served as a booster

mechanism for the following decisions. Thereafter, we present two cases decided in 2014 by the Constitutional Court.

a) The applicant was on probation to be admitted to the Barristers Association and the final examination was fixed for a Saturday and this day is a religious holiday for Adventists of the Seventh Day Church believers. The Association refused the candidate request to take the examination in a day other than Saturday. The Appeal Court considered that the Barristers Association had violated the right to religious freedom on the grounds of Articles 13 and 41 of the Portuguese Constitution. And, because of that, the Association was forced to schedule a new date for a new examination.

b) The Constitutional Court, addresses the appreciation of the regularity and legality of the dismissal of an employee by the employer due to the behaviour of the employee who, being a believer of the Adventists of the Seventh Day Church, repeatedly refused to work after the sunset on Friday, when her working period ended after that time and thus to work overtime on Saturday. The Constitutional Court decided that the right for work leave due to religious reasons should apply to all cases where it is possible to match the duration of work with that of the leave, namely in shift work.

It can be understood from the judgment that a literal reading of the paragraph 1 of Article 14 of the LRF, which establishes the requirement of flexible schedules and compensation of the suspension period, would lead to an excessive and not to reasonable understanding of religious freedom, in terms not allowed by the proportionality principle. Indeed, the principle of flexible schedules cannot fail to accommodate all situations where it is possible to match the duration of the work with that the work leave of the employee for religious reasons, thus being verified the accommodation of the employee's fundamental rights (Machado, S. S., 2015).

A rigid and closed interpretation of the concept of flexible schedules was thus removed, in the light of the fundamental right to religious freedom (Machado, S. S., 2015). The Constitutional Court's argumentation is structured so as to oblige employers to seek solutions for managing labour organization which seek to protect and to take into account the exercise of the employees' fundamental rights.

c) A member of the Public Prosecutor's office who adhered the Seventh Day Adventists Church claimed before the Constitutional Court that the provision of Article 14 no. 1a of the Law on Religious Freedom, when interpreted as meaning that the suspension of work on a weekly rest day, as prescribed by the religion that she believes, is only applicable to workers in a flexible schedule is unconstitutional. The Constitutional Court argued that according to the Portuguese Constitution religious freedom is not restricted to the principles of freedom and non-discrimination but also involves reasonable accommodation in order to guarantee real equality. The Court

decided that the flexibility of working hours demanded by the law, in order to settle compliance with the exemption from working on Saturdays for religion reasons, covers the work done by a public prosecutor which is subjected to shifts (Machado, S. S., 2015).

Given the fact that Article 14 no. 1) of the LRF, in establishing - both for employees of the public and private sectors - the possibility of suspension of work under certain conditions, in the weekly rest day which is prescribed to them by the religion they profess, is no more than the enforcement of the right to religious freedom. And, particularly, the regime of working hours applicable allows for compensation of the periods of time when work leave took place. The Constitutional Court denied a restrictive understanding of the concept of flexible schedule regime, and ignored the perspective that the employee should choose between her profession and the religious beliefs she professed (Machado, S. S., 2015).

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