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International Labour Law Reports

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Supreme Court
Rt. 1986 p. 1250

Discrimination — private college, right to ask job applicants about their religious views — ILO Convention 111.

HEADNOTES

Facts

Diakonhjemmet is a Christian foundation operating, i.a., hospitals, a nurses' college, a social workers' college and a theological-administrative college. The three colleges were established in the late 1960s in conjunction with a reorganisation of the foundation's training of deacons. The nurses' college and the social workers' college both offer a three year education of the same standing as that given by corresponding public colleges. Graduates of the two colleges may take a voluntary additional year at the theological-administrative college, thereby attaining the status of deacon.

In April of 1979 the Board of the social workers' college, here called Diasos, adopted personnel policy guidelines, subsequently endorsed by the General Board of Diakonhjemmet, that provided that applicants for posts as administrative director, as teachers or as research workers must be asked whether they shared the Christian faith, and that their attitude to the Christian faith should be amongst the factors to be taken into account in the filling of the posts in question. (The relevant points of the guidelines are cited under Judgment, *infra.*) The principal of the college and its chief educational officer separately informed the Board of Diasos, in writing, that they found themselves unable to comply with the policy guidelines on these points. They were later instructed in writing by the Board to abide by the policy guidelines, and were requested to acknowledge in writing their willingness to do so. Subsequently the principal was dismissed, with notice, and the Board of Diasos at the same time adopted a resolution of regret concerning the attitude that had been taken by the chief educational officer. She later tendered her own resignation.

The two former employees, along with their respective unions, then brought an action against the Board of Diasos before the City Court, contesting the validity of the personnel policy guidelines in relation to § 55 A of the 1977 Workers' Protection and Working Environment Act. A question of procedural law, on the admissibility of the suit with respect to the plaintiffs' 'legal interest' in the action, which was considered by all

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court instances, is not dealt with below. On the substantive issue the City Court found in favour of the plaintiffs with regard to the post as administrative director, but not with regard to the teaching and research posts. On appeal by the plaintiffs, the Court of Appeal found the requirement to ask applicants about their faith to be in contravention of § 55 A with regard to all the relevant posts. On the other hand the Court of Appeal found no such contravention to exist as concerns the point of the guidelines stating that the attitude of applicants to the Christian faith should be amongst the factors taken into account in the actual hiring. The Board of Diasos then appealed to the Supreme Court on the former point, while accepting the Court of Appeal's decision with respect to the post of administrative director. The appeal before the Supreme Court thus was limited to the question of the right to ask applicants to teaching and research posts — below referred to collectively as teaching posts — about their faith.

Decision

When interpreting the WPA § 55 A, importance should be attached to ILO Convention No. 111 previously ratified by Norway. A right to ask applicants about their faith exists in order to secure that employees share the religious outlook of an institution to the extent necessary for it to accomplish its purpose. In view of the particular purpose of the Diasos college, its educational aims and the role and tasks of its teachers, the requirement laid down in the personnel policy guidelines that applicants be asked about their faith in order to attain the aim that a majority of the teachers share the Christian faith was found to be lawful.

Law Applied

Workers' Protection and Working Environment Act WPA, 1977

§ 55 A Engagement (1977 wording)

An employer may not, when advertising vacant positions or in any other way, demand that applicants supply information concerning their political, religious or cultural views or on whether they are members of any trade union. Neither may the employer take steps to obtain such information by other means. These provisions do not apply if such information is justified by the nature of the post.

ILO Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation

Article 1 (1) For the purpose of this Convention the term 'discrimination' includes —

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

(2) Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

. . .

JUDGMENT

Mr. Justice (interim app.) Christiansen delivered the opinion of the unanimous Court: . . .

At the outset I find reason to repeat that the question on which the Supreme Court is to take a stand is whether Diasos had the right to ask applicants to teaching posts about their relationship to the Christian faith, cfr. point No. 2 of the personnel policy guidelines . . .

The case poses questions of both a legal and a factual character. I find it to the purpose first to clarify to the extent necessary how I understand the WPA § 55 A, before I discuss the factual aspect of the case.

Before the Workers' Protection and Working Environment Act was passed, Norway had ratified the ILO Convention No. 111, and it must be presumed that § 55 A of the Act is not in conflict with the obligations with respect to future legislation which were assumed by Norway through the ratification. I here also refer to what has been said in the preparatory work for the 1980 amendment of the Act with regard to the relation to the ILO Convention. I thus find it unquestionable that in the interpretation of § 55 A importance must be attached to the Convention.

According to § 55 A, third sentence, the provisions that prohibit the obtaining of information do not apply 'if such information is justified by the nature of the post'. The essential legal question in this case is whether this exception clause is to be so understood that the circumstances about which information is sought must relate to an absolutely necessary qualification for the individual post, or if it is sufficient that the quality in question is necessary within the category of posts concerned. The Court of Appeal has based itself on the former of these interpretations. However in my opinion neither § 55 A nor the ILO Convention No. 111 can be an obstacle to asking an applicant about his or her relationship to the Christian faith. A different interpretation might lead to an untenable situation for those outlook-based institutions in which it is not necessary that each one among all holders of posts within a category of posts share the institution's philosophy, but where it must be considered requisite to the purpose of the institution that most though not all of the posts are held

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by persons identifying with the ideal-objective of the institution. Should there be no right to ask about outlook where this circumstance was not an absolute qualification for each and every post, one might risk that gradually the posts were filled to such an extent by applicants not sharing the institution's outlook that the whole institution came to change its character. There must in my opinion therefore be a right to ask about outlook in order to ensure that the holders of posts to the necessary extent have the outlook upon which the attainment of the institution's objective is dependent.

I thus consider that questions about outlook in cases like these will refer to information which 'is justified by the nature of the post', *cfr.* § 55 A. I cannot find that this provision as worded in 1977 required the circumstance about which questions were asked to refer to a necessary condition for the individual post. Furthermore, this interpretation of the Act is sustained by statements in the preparatory work for the amendment of § 55 A in 1980, *cfr.* Ot.prp. No. 41 (1979—80) p. 18 and Innst. O. No. 59 (1979—80) p. 6. From this it emerges that the general purpose of the post may be taken into account as a factor in the assessment of the individual post. It is further stated that importance may be attached to whether the applicant shares the outlook which the institution is to promote, when filling posts which are important to this objective. I also make reference to the opinion by the Legal Department of the Ministry of Justice of 2 November 1979, which is based on a similar interpretation.

The interpretation of § 55 A which I make my basis here seems to be in accordance with what may be said to be a natural consequence of the provision of exception in the ILO Convention No. 111, art. 1, para. 2. In the English text this provision reads:

"Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination."

The expression 'inherent requirement' must be understood to refer to qualifications that are immanent in or naturally attached to the post. I thus cannot interpret the provision in such a way that it admits exceptions exclusively where qualities that are necessary for the performance of the work attached to the individual post are in question. I note that the preparatory work of the Convention, which to some extent has been cited by the attorney for the respondents, gives little guidance when it comes to the expression 'inherent requirement'.

The French text, which is equally authoritative with the English text — *cfr.* art. 14 of the Convention — reads:

"Les distinctions, exclusions ou préférences fondées sur les qualifications exigées pour un emploi déterminé ne sont pas considérées comme des discriminations."

Here, then, the words 'les qualifications exigées' are used. In a preceding draft the prerequisite implied in this expression was strengthened by

the word 'necessairement', which was deleted in the final formulation. I am of the opinion that this alteration corroborates my interpretation of the Convention's provision.

I then proceed to examine whether the personnel policy guidelines of Diasos are in conformity with the legal view that I have expressed. The guidelines stipulate in points Nos. 1 and 2:

1. It is a central objective of the college's personnel policy, i.e. recruitment and hiring, that the main part of the personnel group, administrative director, teachers and permanent research workers, must be professing Christians. The 'main part' is here to be taken to mean a 'qualified majority'. The concept is thus delimited from the meaning of 50/50 or 'narrow majority'.
2. All applicants to be considered for posts in the personnel group at Diasos must be asked about their relationship to the Christian faith, so that the Board may openly know how the individual applicant personally views this question.

The question is whether the college has an objective that provides a basis for asking applicants to teaching posts whether they are professing Christians. Further, there is the question whether the main part rule, as framed in point No. 1 of the guidelines, is suitable for and necessary for attaining the objective.

The tasks and the purpose of a post are for the employer to decide on, and it is the nature of the post at the time of hiring that must be decisive. The question whether Christian faith is necessary on account of the tasks that the holder of a post is to perform must depend on an assessment which the courts should exercise restraint in reviewing. I refer to the preparatory work for the amendment of § 55 A in 1980, where it was emphasised that the persons familiar with the undertaking from within are better suited for making the assessment as to whether the nature of the post is such that the exception clause may be applied, *cfr.* Ot.prp. No. 41 (1979—80) p. 19 and Innst. O. No. 59 (1979—80) S. 6.

I then proceed to examine the objective of the college.

It is admitted by the respondents that the college is operated on a Christian basis, but they dispute that it has a Christian objective. I disagree with this point of view. The college is owned and operated by Diakonhjemmet which according to its statutes builds on the word of God and the Lutheran teachings. The objective of Diakonhjemmet is, among other things, to train Christian youth as deacons. Professing Christians only are admitted as students. From the statutes of the college it follows that the objective of the college is to train social workers as a part of the total aim of Diakonhjemmet. From this, there can be no doubt that the college has an objective which is linked to the Christian faith. Diasos originates from the deacons' education which Diakonhjemmet has been providing for many years. Both when reorganising the education and later, it has been the intention and a desire that the graduates of the social workers' college

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should undertake the voluntary additional year at the theological-administrative college to qualify as deacons. This being the objective I attach little importance to the fact that recently only a small number of the graduates have extended their education.

When it comes to the teaching, Diasos has emphasised that Christian teachers have a special advantage over non-believers in dealing with the problems experienced by the students in the relationship between faith and profession. It is of great significance in this connection that the college only admits students that are professing Christians. In view of the faith of the students, the relationship between the Christian faith and professional problems will play an especially important part in the teaching, and it is of significance that the teachers should be professing Christians. That theological advisers are available who can guide teachers and students in the matter of such questions, does not weaken the importance of having Christian teachers. Since the aim is that the Christian faith should characterize the teaching, I can see nothing but that it may be of vital importance to have a strong element of believers on the teaching staff.

I further attach importance to the fact that research tasks are assigned to the teaching posts, particularly with a view to the college being a specialist body for and a 'supplier of premises' to the Church of Norway in the public debate on social questions. In their submissions to the Supreme Court the respondents have not challenged the argumentation of the college on this point. There is in my opinion no basis for departing from the considered opinion of the college that the tasks mentioned here presuppose the experience and insight that only a personal involvement in faith can give.

I also underline the importance of the teachers' connection to faith in those of their tasks at the college that are additional to their proper official duties, such as conducting prayers or being in charge of other activities which contribute to consolidating the Christian environment at the college and in which the teachers traditionally take part. This kind of involvement is also of importance to the college's objective and ought to be amongst the factors that may be taken into account in hiring, even if it here is a matter of activity on a voluntary basis.

Thereupon, the question is whether the main part principle of the guidelines' — point No. 1 — is suited to furthering the Christian objective of the college. The college has submitted a number of arguments to show that most, but not all of the teachers must be believers. For my part I do not find that I can disregard the assessment made by the management of the college on this basis.

I accept that it is not necessary that all of the teachers be Christians and that it is not necessary that the requirement of Christian faith be linked to particular teaching posts. The college has also indicated that in some cases it is necessary or desirable to appoint non-believers, as when there are no qualified Christian applicants or when it is desirable to engage a particular non-Christian holding special qualifications. Moreover, it has been emphasised that it may in itself be of value to have some non-Christian teachers at the college. A main part principle based on such considerations will in my opinion provide a basis for applying the provision of the exception in § 55 A so that applicants to posts may be requested to state whether they profess the Christian faith.

The appeal has been successful. . . .

[Source: *Norsk Retstidende*, 1986, p. 1250.]

ANNOTATION

The WPA § 55 A was introduced into the Act by the parliamentary committee at the very latest stage of the legislative process in 1977. It immediately sparked public debate, particularly concerning private ideological or outlook-based 'enterprises', from kindergartens to schools, hospitals and different kinds of organisations following particular ideals, regarding their freedom to pursue a policy of hiring personnel sharing the ideology or outlook of the enterprise. The legal issue in focus was — as illustrated by the above case — whether the expression 'the nature of the post' was to be interpreted as referring strictly to the individual post in question or whether weight could be accorded more generally to the aim and objective of the enterprise. The ILO Convention No. 111 was soon dragged into the debate.

§ 55 A was later amended twice. First, in 1980, as referred to in the above judgment, when the exception clause was rephrased to read:

> "These provisions do not apply if it is the express objective of the enterprise to further a particular political or cultural view or if such information is justified by the nature of the post."

The express intent of this amendment was that religious, political, cultural etc. organisations and institutions should not have their opportunities to operate in accordance with their objective curtailed, and that they should have ample scope for assessing which posts are of direct importance to the furtherance of the institution's objective. And this was further underlined by the May 1982 amendment when the exception clause (§ 55 A, third sentence) was modified so that it now reads:

> "These provisions do not apply if such information is justified by the nature of the post or if it forms a part of the objective of the enterprise of the employer concerned to further particular political, religious or cultural views and the post is of importance to the attainment of the objective."

In the reported case, the 1977 version of the provision was at issue. The Supreme Court's interpretation however appears to be clearly influenced by the later amendments, as is illustrated by the references

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made to the 1980 amendment and its preparatory work. Conspicuously, no mention is made of subsequent developments.

The Norwegian Trade Union Confederation (the LO) in June 1982 made a representation to the ILO, under art. 24 of the ILO Constitution, alleging non-observance by the Government of Norway of the ILO Convention No. 111. The tripartite committee appointed by the Governing Body to examine the representation noted in its recommendations, i.a., that § 55 A (in its 1982 wording) appears to be drafted in such a way that its exception clause could be applied in respect of jobs that do not by their nature carry with them a special responsibility to contribute to the attainment of the institution's objective and that, in these circumstances, measures should be taken to ensure that § 55 A 'is worded, interpreted and applied' in such a manner as to be in conformity with art. 1, para. 2, of Convention No. 111. The committee's report and recommendations were adopted by the Governing Body of ILO in March 1983.

As of yet, no definitive conclusions have been drawn in this matter. There has been some further exchange of communications between the ILO and the Government of Norway, including the submission of the judgment reported here. Now ILO is awaiting the stand taken by Norway with respect to a possible amendment of § 55 A subsequent to the presentation of a report on the matter, presently (March 1988) in preparation, by the Government to the Storting (parliament).

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