

The Employee's Right to Observe the Religious Worship Day: Position of the Portuguese Constitutional Court

Susana Sousa Machado

Abstract—The present article seeks to carry out along the lines of interpretation of the recent Portuguese Constitutional Court case law on the possibility of an employee to observe a worship day imposed by religious beliefs. In this approach to the question, considerations on the subject of the relationship between religious freedom and labour relations will inevitably arise. We intend to draw conclusions of practical application from the court decisions on the matter of freedom of religion.

Keywords—Freedom of Religion, Religion Beliefs, Workplace, Worship Day.

I. THE WORSHIP DAY IMPOSED BY RELIGION: APPROACH TO THE QUESTION

BESIDES sacralising certain places, people and objects, religion also sacralises times. For the *homo religiosus*, time is not homogeneous, given the fact that certain periods of time are considered to be sacred due to their religious meaning.

In several religions we come across the idea that a certain portion of time ought to be destined to the compliance of acts of faith, hence, a great majority of religious beliefs dedicates a specific week day for rest and worship.

For the Jews, Saturday (*Sabbath*) is their worship day, in which the Decalogue takes place. In the Jewish tradition, the Decalogue corresponds to the fourth commandment. This happens because, according to the Torah, God rested from the work of creation on the seventh day. *Sabbath* must be observed from Friday sunset to Saturday sunset. It should be noted that some Christian groups, such as the Seventh Day Adventists follow this Jewish tradition.

To the believers of the Christian churches, the worship day corresponds, generally, to the first day of the week, insofar as it is the day of the Resurrection of Christ, that is, Sunday (*dies dominicus*).

For the Muslims, the worship day is Friday, since it is on the sixth day of the week, around noon, that they gather at the mosque for prayer.

However, the level of imperativity of the religious rule to observe one day of worship varies through the different religious traditions. The rules that the different religions impose upon their believers in terms of weekly rest days may have repercussions in the compliance or non-compliance of

the acts of faith when dealing the working life of the employee-believer.

This is a potential issue for conflict between employers and employees, especially for employees belonging to religious groups rather than the Catholic Church, given the fact that, in Portugal, the setting for the weekly rest day is embedded in the religious and cultural roots of the Christian tradition of the *dies dominicus*.

II. OBSERVANCE OF THE WORSHIP PERIODS IMPOSED BY THE RELIGION AND EMPLOYMENT RELATIONSHIP

The employee may be confronted – by virtue of his/her religious beliefs - with the need to observe a specific weekly rest day which does not coincide with the provisions of labour law. Numerous difficulties resulting from the multiplicity of religious beliefs may arise in a large enterprise in order to adjust the different requirements in terms of non-working periods on religious grounds.

Through the celebration of an employment contract, the employee places his labour force at the service of the employer. Nevertheless, the time-assigned availability of the employee when serving the employer has its limits. To start with, due to physiological and social reasons and, therefore, the duration of working time is regulated in order to protect the health and the social life of the individual.

The employee may wish to observe a specific worship day that does not coincide with the weekly rest day or the time-schedule assigned to him by the employer. At this point a conflict arises between the employees' right to religious freedom (Article 41 of the Constitution of the Portuguese Republic - CPR), the freedom of economic initiative (Article 61 of the CPR) and the freedom of entrepreneurial organization (Article 80 of the CPR) of the employer.

Religious freedom, in its external dimension, that is, insofar as the right to act according to one's convictions is not an absolute right and, even in the framework of the working relationship, the employee's religious freedom may suffer some compensation prompted by other interests and rights at stake.

III. PREVIOUS QUESTION: OBSERVANCE OF WORSHIP PERIODS BY THE EUROPEAN COURT OF HUMAN RIGHTS

In the case law of the European Court of Human Rights (ECtHR) cases involving compliance with a given day for worship due to religious reasons have long been analyzed which is not always easily articulated with the labour obligations of the religious and working individual.

Susana Sousa Machado is Lecturer at Polytechnic Institute of Porto – School of Technology and Management of Felgueiras and Researcher at Center for Research and Innovation Business Sciences and information Systems, Portugal; Phd. Candidate at the Faculty of Law - University of Santiago de Compostela, Spain; and is also Researcher in the Labour Law area (e-mail: scm@estgf.ipp.pt).

Amongst the decisions of the EctHR we highlight the case of *Tuomo Konttinen v. Finland*, December 3rd 1996 [1], in which an employee of the Finnish railway company began to profess the religion of the Adventists of the Seventh Day and was fired for refusing to work after sunset on Friday invoking a conflict between the obligations of his religion, which require compliance of the Sabbath and his work schedule.

However, the European Commission of Human Rights, who was responsible for deciding on the appeal, understood that what was at stake was a dismissal due to non-compliance of the duty of attendance for work and not a leave from work that could be framed within the employee's religious freedom.

Moreover, it was considered that, in case of incompatibility between religion and work, the employee should always have the possibility for resigning and that would be the final guarantee of his right to religious freedom.

This decision was not exempt from criticism since the reasoning does not correspond to the scale of the problem, to the extent that it does not bestow any relevance whatsoever to the protection of religious freedom. It is accompanied by the understanding that the EctHR adopted a narrow view of the problem insofar as it absolutely disregarded the religious beliefs of the employee, regardless of Konttinen's claim coming to be accepted or not. It is a "reductive and unsatisfactory response" to such a complex problem [2], which was based on an "overly simplistic" reasoning [3].

The argument that the plaintiff had the possibility of resigning his job and, therefore, the right for religious freedom was not violated led to a "great perplexity" of the authors [4]. As highlighted by some Portuguese authors this decision is totally diverse from the decisions of North-American and Canadian courts on the same question [5].

IV. PORTUGUESE LEGAL FRAMEWORK OF WORSHIP PERIODS

The Portuguese Constitution protects the religious freedom seeking that, in article 41, the freedom of religion is inviolable.

Besides that the principle of equality is granted in article 13 in the away that "No one may be privileged, favored, 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".

In Portugal, until the entry into force of the Law of Religious Freedom – LRF, approved by the Law 16/2001, of June 22, the minority religious denominations did not have the possibility to enjoy the weekly rest day on any other day rather than Sunday. Likewise, they did not have the possibility of not attending work or being absent from work due to religious reasons.

It was the Article 14, paragraph 1 (LRF), which came to foresee the right of leave from work, establishing that the employees, state officials and other public entities, as well as employees on an employment contract are entitled, upon request, to suspend work on the weekly rest day, on festivity days and in the time periods prescribed by their religious beliefs under the following conditions: a) work on flexitime;

b) being members of a registered religious community which has sent, the previous year, to the Government member responsible for the matter, indication of the mentioned days and time periods in the current year; c) to fully compensate the respective period of work.

The interpretation being put forward by the Portuguese case law in relation to the Article 14 of the LRF was not always consistent with the fundamental right to religious freedom as foreseen on the Article 41 of the CPR, and a literal and restrictive understanding of the words of the common legislator was favoured, especially in what concerns the notion of "flexitime".

This understanding of matters deserved the recent intervention of the Constitutional Court on two occasions and in order to interpret the rule of Article 14, paragraph 1 a) of the LRF [6].

V. THE PORTUGUESE CONSTITUTIONAL COURT ON THE COMPLIANCE OF WORSHIP PERIODS

The Portuguese Constitutional Court is the court with the particular competence to administer justice in matters of constitutionality. It has the duty of guaranty and defend the Constitution and, in particular, to review the constitutionality of legal norms. The Constitutional Court is entrusted with the responsibility of controlling whether the norms are in accordance to the principles and rules laid down in the Constitution.

Moreover, the Portuguese Constitutional Court do not control whether has been a direct violation of a fundamental right of a citizen, it only analyzes if the norms breach any constitutional principle or rule.

A. Recent Cases

In the Portuguese case law two quite recent emblematic cases are known pertaining to the compliance of a weekly rest day and consequent leave from work due to religious reasons.

In the Judgments n° 544/2014 and n° 545/2014 of the Constitutional Court, regarding believers of the Adventists of the Seventh Day Church which are compelled due to religious reasons, to observe Saturday as the rest day, worship and ministry and to refrain from all secular work, what was into question was the interpretation of Article 14 of the LRF which predicts some conditions for cumulative verification in order for the employees to be granted leave from work on weekly rest day.

B. Adventist Employee and Private Employer

The Judgement n° 544/2014, September 23, of 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 aforementioned employee who, being a believer of the Adventists of the Seventh Day Church, repeatedly refused to work after the sunset on Friday, when her shift ended after that time and thus to work overtime on Saturday.

After the denial of the employee's claim in all jurisdictional levels to which the appeal was made, the Constitutional Court

ultimately determined 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.

A rigid and closed interpretation of the concept of flexible schedules was thus removed, in the light of the fundamental right to religious freedom. 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. Adventist Employee and Public Sector Employer

The issue addressed in the Judgment n° 545/2014, September 29, of the Constitutional Court is in all aspects similar to the previous case but with respect to a public sector employer, since it deals with a believer of the Adventists of the Seventh Day Church performing duties as Prosecutor.

The constitutional case law contradicting preceding court decisions, reiterated that the norm of Article 14, paragraph 1 a) of the LRF, also encompasses those whose work is done in shifts. Thus, in this specific case, the condition of flexible schedules provided by law encompasses the work performed by the Prosecutor of the Public Prosecution Service subject to working shifts.

This, given the fact that the norm of Article 14, paragraph 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, in the present case, it appears to be conclusive that the regime of working hours applicable allows for compensation of the periods of time when work leave took place.

The Constitutional Court contradicted, thus, the restrictive understanding of the judgments under appeal regarding the concept of "flexible schedule regime", and ignored the perspective that the employee should choose between her profession and the religious beliefs she professed.

VI. REASONABLE ACCOMMODATION AND RELATED LINES OF ACTION

As we have already observed, protection of religious freedom requires, on the part of the employing entities (public or private), an obligation to accommodate the employee's requirements.

A. Protecting the Interests of All Parts Involved

The weighting methodology applicable to these cases asks for the engagement of the rights and interests of the employee and of the employer as well as of the other employees within the same organisation.

A requirement of triangular protection, multidimensionally structured, around the principle of proportionality, can thus be verified. This happens because the employee's claims with religious requirements may collide with those of his co-workers.

Of course, the accommodation herein being treated has, as a consequence, the adoption of a material differentiation measure among employees, with respect for the principle of equality and proportionality.

B. Practical Exercise of Reasonable Accommodation

On the subject of the application of the reasonable accommodation concept to the Portuguese law, two key aspects should be highlighted.

Firstly, in accordance with the Portuguese Constitution, the existence of a norm that requires the employer to blindly apply reasonable accommodation at all times, would be stained as unconstitutional.

This, due to the fact that out of respect to the principles of proportionality, equality and justice, the impact of reasonable accommodation in the field of the employer and other employees interests cannot but be taken into account. A practical compliance solution is therefore required which is contrary to linear solutions that, in face of the colliding rights at stake, prioritize, a priori, some over others.

Secondly, reasonable accommodation leaves a certain margin of appreciation to the employer. In fact, with this statement, we intend to point out that the concept of reasonable accommodation does not imply that the employer has to accept the employee's requirements to the precise extent of its application.

The employer will endeavour to meet the claims addressed to him, finding compromise solutions within a certain margin of conformation. Among these solutions we highlight, for instance, the transfer to another job, flexible schedules, labour compensation for work not performed, among others. In short, reasonable accommodation should always seek the options that will cause fewer restrictions on all rights involved in a given case [7].

C. Criteria

The accommodation of the employee's requirements on the grounds of religious freedom demands that a set of criteria ought to be considered in order to enable the solution of a given case to be based on the most elementary principles of justice.

First of all, it is essential to consider a company's size in terms of number of employees. These criteria should bear in mind both the number of employees applying for the accommodation as well as the number of employees affected by this practice [8].

Secondly it must also be applied, as weighting criteria, the actual costs that the employer will have to eventually support

with the accommodation of the employee's requests. To adopt accommodation measures can have a strong impact on a company and be almost irrelevant on another. This may happen, for example, according to the activity, location, company size, etc.

Lastly, the rights of the co-workers must not be forgotten, as the accommodation must be made on reasonable terms when it comes to restricting other entitlements such as vacations, absences, leaves, working hours, etc. In practical terms, there will almost always be a compression of the rights of other employees but always to the extent of what is reasonable and proportionate.

D. Undue Hardship

It is clear that, on accommodating the religious requirements of the employees, the employer will have to support the financial costs involved, which should be minimal within the concrete circumstances of the company.

Therefore, *prima facie* the employer should seek to comply with the accommodation obligation, not being required to submit to it if the accommodation represents an undue hardship, unenforceable and disproportionate to the employer and co-workers [9].

All parties involved have a duty to specifically examine all the possibilities for practical compliance. All this in order that treatment to dispense to the employee-believer does not violate the principle of equality and that the employer and co-workers do not suffer excessive and disproportionate damage. Therefore, it is necessary, in particular, to demonstrate the impact of accommodation.

VII. OBSERVATIONS ABOUT REASONABLE ACCOMMODATION AS THE SOLUTION TO BE IMPLEMENTED

The recent position of the Portuguese Constitutional Court in the domain of recognizing religious freedom in its dimension of a right to preserve as determined by religion deserves the applause of the legal community.

Contradicting the hitherto existing case law on the matter, it was crucial that the issue had been analyzed under the interpretive framework of Article 41 of the CPR, which guarantees the fundamental right to the freedom of conscience, religion and worship. Emphasizing, for this purpose, the contact points between the external aspect of the freedom of conscience, inasmuch as the freedom to act in conscience and the religious freedom expressed by the right to observe the Saturday in respect for religious precepts.

The employee's right to reserve certain worship days as prescribed by the religion he or her professes derives from the normative protection of religious freedom as such, which is constitutionally consecrated.

The common legislator took the needed care, on one hand, to provide for a system of suspension of work activities legitimized by the exercise of religious freedom and, on the other hand, to create, on the part of the employers, the obligation to respect that very right while also considering the rights and interests worthy of protection of the employer.

As is apparent from the recent position of the Portuguese Constitutional Court, the principle of tolerance and

accommodation of rights derived from the exercise of religion, which is not limited to the recognition of religious freedom in the employment sector through the principle of equality and non-discrimination, derives from the constitutional protection of religious freedom.

The solution ought to always undergo reasonable accommodation both in cases in which religious conversion occurs in the course of employment or when the employee professes a certain religion when hired. Indeed, "the external efficiency of religious freedom entails more than the observance of the principle of equality, positively binding the employer to undertake a certain measure for religion's accommodation" [10].

In view of the constitutional command of the right to religious freedom, the common legislator should seek the maximum effectiveness of the right in question, in accordance with the criteria of reasonableness and proportionality. Only a broad interpretation of the concept of flexible schedules did not allow for an excessive prevalence of the employers' interests – who is by nature responsible for defining the timetables of the employee-believer – to be given.

In Portugal there is still a long way to go for employers to become sensitive to these issues but these cannot be left oblivious of the duty of accommodating the fundamental right of religious freedom of their employees. And the recent position of the Constitutional Court gave an essential contribution towards the path we have to go through.

REFERENCES

- [1] Kontinen V Finland (1996) 87 DR 68 E Comm. HR, p.75.
- [2] Júlio Gomes, *Direito do Trabalho*, Vol. I, *Relações Individuais de Trabalho*, Coimbra: Coimbra Editora, 2007, pp. 308-309.
- [3] Alain Pousson, *Convictions religieuses et activité salariée*, *Mélanges dédiés au Président Michel despax*, Presses de l'Université des Sciences Sociales de Toulouse, 2002, p. 298.
- [4] David García-Pardo, *Descanso semanal y festividades religiosas islámicas*, in *Los musulmanes en España: libertad religiosa e identidad cultural*, Madrid: Editorial Trotta, 2004, p. 176.
- [5] Júlio Gomes, *Direito do Trabalho*, Vol. I, *Relações Individuais de Trabalho*, Coimbra: Coimbra Editora, 2007, p. 309.
- [6] Portuguese Constitutional Court, Decisions n.º 544/2014 (*Diário da República* n.º 183/2014, Série II, 2014-09-23) and Decision n.º 545/2014 (*Diário da República* n.º 187/2014, Série II, 2014-09-29), www.tribunalconstitucional.pt.
- [7] Bilal Zaheer, *Accommodating Minority Religion Under Title VII: How Muslims Make The Case For New Interpretation of Section 701(j)*, *University of Illinois Law Review*, 2007, p. 507.
- [8] Luna Droubi, *New Religious-Accommodation Law Further Limits Employers*, *City Law*, 18, 2012, p. 25.
- [9] Patrick Sterk, *To Pray or To Play: Religious Discrimination in the Scheduling of Interscholastic Athletic Events*, *Sports Law Journal*, 18, 2011, p. 243.
- [10] Jónatas Machado, *Liberdade Religiosa numa Comunidade Constitucional Inclusiva – Dos direitos de verdade aos direitos dos cidadãos*, Coimbra: Coimbra Editora, 1996, p. 265.