

The European Commission of Human Rights' Jurisprudence And Decision in Konttinen Case

Accommodating the Seventh-day Adventist Sabbath Observance in the Workplace

By Brighton G Kavaloh

Following the European Court of Human Rights' Judgement in the case of **Eweida and Others v the United Kingdom**,¹ I feel it is time for the European Court to seriously consider on a case by case basis, the provision of **reasonable accommodation** in the work place, especially when conflicts arise between scheduling and religious observance of the Sabbath. This pertains to the European Commission of Human Rights' ruling, following its alleged legal reasoning in 1996, in the **Konttinen v Finland case**.

The applicant, a Seventh-day Adventist was denied the right to observe the Sabbath in accordance with the dictates of his religious convictions. Mr Konttinen was prepared to work extra time in the summer when sunset fell later on Fridays. However, he was still dismissed.

The judgement issued by the Commission stated that:-

“In these particular circumstances the Commission finds that the applicant was not dismissed because of his religious convictions but for having refused to respect his working hours. This refusal, even if motivated by his religious convictions, cannot as such be protected by Article 9 Para. 1. Nor has the applicant shown that he was pressured to change his religious views or prevented from manifesting his religion or belief.

The Commission would add having found his working hours to conflict with his religious convictions, the applicant was free to relinquish his post. The Commission regards this as the ultimate guarantee of his right to freedom of religion. In sum, there is no indication that the applicant's dismissal interfered with the exercise of his rights under Article 9 para. 1.”²

1 www.echr.coe.int

2 Konttinen V Finland [1996] 87 DR 68 E Comm. HR, p.75.

Following such legal reasoning and findings, the Commission upheld that the applicant's complaint was "manifestly ill-founded".³ However, it is interesting to note that Lord Justice Rix, from a jurisprudential perspective, cast doubt on the 'Commission's doctrine' and conclusion in the Konttinen case.

He observed that:

"I wonder how many employers in today's multi-cultural society could operate, or would even wish to try to operate, the Commission's doctrine. As for employees, I suppose it is true that the 'ultimate' guarantee of their right to freedom of religion is self-abnegation. It is, however, to forestall the need for such ultimates that concern for human rights exists. I am unable to understand how it can be said that the applicant was not prevented from manifesting his religion by asking him to choose between his employment and his observance of the Sabbath"⁴

The Facts

The applicant, Mr Tuomo Konttinen was a Finnish national born in 1963 and lived in Hyvinkaa. He was represented before the European Commission of Human Rights by Mr Matti Wuori, a Lawyer practising in Helsinki.

The Circumstances of the Case⁵

The facts of the case may be summarised as follows:

³ Ibid.p.77

⁴ Copey (appellant) v WWB Devon Clays Ltd (respondents) Industrial Relations Law Reports, vol. 34, No. 10 October 2005 (IRLR), .p.819

⁵ Konttinen V Finland [1996] 87 DR 68 E Comm HR, p.75

The applicant had commenced employment with the Finnish State Railways in 1986. In 1991, Mr Konttinen joined the Seventh-day Adventist Church. Following the tenet of faith of its adherents, the applicant expressed the desire to observe the Sabbath on Saturdays, from sundown on Friday to sundown on Saturday. Under his contractual employment agreement the applicant worked from Monday to Friday particularly in clerical duties. This posed no difficulties except for about five times in the winter months, when sunset came early on Friday. Following his religious obligation, he started to leave his work early on Fridays before his shift had ended having alerted his employers and offering also to make up his missed hours by working longer in the summer months, when sunset on Fridays fell later. The State Railways had not argued such an arrangement would have been unreasonably difficult to implement. He still was dismissed.

Following the applicant's request for a re-examination of the dismissal decision, the Board of Civil Servants, on the 28th April, 1993 upheld it on grounds that he had continuously and fundamentally breached his official duties. Mr Konttinen had submitted that his work could easily have been accommodated, and this was supported by a minority of the Board of Civil Servants that noted his dismissal was not proportionate to his behaviour. The Government, as a respondent, submitted that the State Railways had not arbitrarily disregarded his freedom of religion since their efforts to transfer him to another post had not materialised and changes to the shift schedule would have led to inconveniences for both the employer and his fellow-employees. He was cautioned that his continued absences would lead to his dismissal.

The applicant further appealed to the Supreme Administrative Court arguing that his right to freedom of religion had been violated. His absence had resulted from irreconcilable conflict between his religious convictions and work duties and not from negligence. On 17th February, 1994, the Supreme Administrative Court upheld the Board's decision, finding no reason for amending it.

Commenting on this particular case, Gillian S Morris argues that, "It seems dubious as to how the Commission on point of fact and law concluded that Mr Konttinen's freedom of religious practice and observance had not been interfered with and it is not entirely clear why the Commission reached its decision in such a conclusory manner."⁶

6 Gillian S Morris, "The European Convention on Human Rights and Employment: To Which Act Does it Apply" European Human Rights Law Review [EHRL] issue 5, 1999, p.506.

Paul Diamond added, “In reality, this is a very crude decision”⁷, by the European Commission of Human Rights.

I feel that as the employment workforce continues to diversify in Europe that the example of the USA and Canada⁸ in accommodating religion in the work place be embraced by the European Court of Human Rights and other relevant institutions. The Court should endeavour to foster a realistic approach that promotes cooperation between the employer and employees and not apply measures that are restrictive.

Your comments and observations on this issue are most welcome

7 Paul Diamond Barrister (UK) “EU Trends in Freedom of Religion And Freedom of Speech.” World Family Policy Forum, 2003.

8 Ontario (Human Rights Commission) and O’Malley v. Simpsons-Sears [1985] S.C.J. No. 74 (QL), 2 S.C.R. 536. For a critical analysis see also: <http://ssrn.com/abstract=1781182>