Accommodating Religion and Belief in Russian Labour Law:
Silent Consent or Unspoken Tabu

Nogaylieva Fatima
Lecturer at the Department of Labour Law
St. Petersburg State University (SPbSU)
Russia, Saint-Petersburg, Vasilyevsky Island, 22nd line, building 7
f.nogaylieva@spbu.ru +7 921 878 83 84

Abstracts: The article describes the problem of protecting the employees' religious rights in Russian law, which has become increasingly challenging due to the growing religious devoutness and commitment of Russian citizens (mainly, Orthodox and Muslims) and the migrants' inflows from Muslim countries of Central Asia. The current state of legislation and social consciousness concerning religion and belief is strongly influenced by the experience of the Soviet past, which had broken the tradition of respecting the religious needs of employees. In order to find ways of solving the problem, the article considers the adaptability of existing legal regulation means and outlines the new ways to ensure and to protect freedom of religion in the workplace.

Summary: Introduction. The background of the current state of legislation. Religious organization as an employer. Relations with secular employers according to the LC and judicial practice. Accessible means of ensuring employees' religious rights. Conclusion.

Keywords: religious employees, employees' religious rights, reasonable accommodation, indirect discrimination, prayer, religious organizations, clergy

Introduction

People today are more likely to seek self-identification through manifestation of religious convictions. Since the 1990s employees have increasingly expected employers to

accommodate their religious beliefs.[1] In Russia over the last two decades there has been the gradual but definite growth of religious commitment: the number of those who admit that their religious faith supports them in certain situations has grown by more than twofold (from 23% to 55%); the number of Orthodox Christian believers increased from 33% to 79%, and Islam from 3% to 7%.[2] This fact consistently effects on creating the infrastructure for social religious needs (for example, the construction of new cathedrals and churches, restoration and transfer of old ones to the Russian Orthodox Church, opening of prayer rooms, development of halal and kosher food industry, etc.)

There is also a number of legislative accommodations for religious needs and convictions of the individuals. Russian legislation stipulates certain conditions, allowing, for example, to withdraw autopsy of a deceased relative or to choose alternative civil service in lieu of national military service; or even to withdraw obtaining a national passport or other documents, merely invoking grounds of religious convictions and beliefs.

For this reason it's striking that labour and employment legislation does not provide such accommodations or any express rulings on how the parties should proceed to fit religious needs of a person in labour and employment relations. Currently the reasonable accommodation of religion and belief in fact is conditioned upon good practices, while the scant jurisprudence in this field is too contradictory to derive a principles-based approach from it. In this essay I consider briefly the preconditions of the existing state in legal regulation and also discuss probable ways of solving controversies at the intersection of religion and employment.

The Background of the Current State of Legislation

At first sight, it seems obvious that any person, regardless of whether he/she is employed or not, has the right to religious commitment as the part of freedom of religion and belief (of course, provided that commitment does not create a public danger); in the light of this, the main task to be solved is to ensure a balance of rights and interests of the employee, the employer and other employees of this employer. But in Russia parties to the

[1] V. Bader, K. Alidadi and F. Vermeulen, Religious Diversity and Reasonable Accommodation in the Workplace in Six European Counties, International Journal of Discrimination and the Law.

[2] VCIOM: Russia Public Opinion Research Center. Press release # 2888. Religion: for and against. 27.05.2015. URL: https://wciom.ru/index.php?id=236&uid=115329 (access on 13.06.2018).

employment contract face various complexities due to a number of reasons, primarily of legal and psychological nature. Both of these reasons can be explained on the pretext of the general framework on the freedom of religion and belief.

Before the October revolution of 1917, the late state policy of the Russian Empire implied religious tolerance rather than the freedom of religion and belief. Religious propaganda was prohibited for all religions except the Orthodox Christianity; in addition, Orthodoxy had been officially declared as the state religion. Nevertheless, irrespective of faith, employees were allowed to have time-off for commitment of prayers and religious holidays or the pilgrimage; requirements on the employee's appearance and wearing religious garb and symbols were minimal and were conditioned by the strict occupational and safety reasons. Religious practice and commitment had been essential fixture of social life; any kinds of religious worship had been treated by the employers (or leaseholders) the same way with celebration of state secular holidays. In this regard, the state had no need to give strict legal form to de facto social relations, concerning religion and belief at workplace (regardless of factory or agricultural labour). Harmonious coexistence of labour and faith had being achieved through the integrated social consciousness and, if it was necessary, as a consequence of individual arrangements of a religious employee and his employer (or leaseholder).

After the October revolution of 1917, the Soviet government had started intensive destruction of religious background, which is unprecedented in living memory. Between 1917 and 1987, about 50,000 temples, churches and monasteries were destroyed on the territory of the USSR, hundreds were turned into warehouses, museums of atheism, and even sports facilities and swimming pools. Hundreds of thousands of clergy and people with religious education were repressed, murdered or deprived of their condition; no one left to preserve and transfer religious knowledge, so that whole generations had been purposefully brought up in the spirit of atheism.

Constitutions of the USSR formally provided freedom of religion, but in practice one could not really enjoy it. In addition, atheistic propaganda had been declared one of the goals of public policy, serving state interest in maintaining lack of spirituality. Due to complete nationalization of the economy religious employees had to confront the Soviet state per se as the employer what was impossible under pain of death.

Democratic changes of 1990s led to inclusion in the Constitution of the Russian Federation of the following provisions:

- The Russian Federation is a secular state. No religion may be established as a state or obligatory one. Religious associations shall be separated from the State and shall be equal before the law (art. 14).
- Everyone shall be guaranteed the freedom of conscience, the freedom of religion, including the right to confess individually or together with other any religion or to confess no religion at all, to freely choose, possess and disseminate religious and other views and to act according to them (art. 28).
- The State shall guarantee the equality of rights and freedoms of man and citizen, regardless of …religion, convictions (art. 19).

In 1997, in furtherance of the provisions of the Constitution, the Federal Law «On Freedom of Conscience and Religious Associations» was adopted. The law, basically, settled the legal status of religious associations, while the regulation of human right to freedom of conscience and religion has been left scarce and uncertain. Besides, according to preamble, Christianity, Islam, Buddhism, Judaism and other religions are respected as an integral part of the historical heritage of the peoples of Russia, but at the same time the special role of Orthodoxy in the history of Russia, in the formation and development of its spirituality and culture is emphasized. Today, the Russian Orthodox Church, serving the interests of state authorities, is perceived by most of Russians as the fourth branch of power, but not at all as a moral and spiritual institution.

Terrible events of the Soviet period still have their long-term effect; discontinuity of religious and legal traditions along with broadly defined and vaguely worded rules of law have a profound impact on attitudes of Russians towards religious awareness and commitment. Religious beliefs and practices are exercised by a minority of the population and perceived in some cases as a manifestation of backwardness.[3] Many people are willing

[3] Such convictions of employees are also brought about by certain actions of employers who prefer to hire non-religious employees, refusing to employ, for example, women wearing hijabs or men observing Sabbath. According to the economic theory of statistical discrimination, employers may prefer one social group to another for rational considerations. If a characteristic correlates with the productivity of employees, they will, for example, provide employees with this characteristic only the worst positions. But later this restrictive practice will act according to the principle of a self-fulfilling prognosis: since the members of the discriminated minority weaken their incentives to invest in their human capital, their productivity actually turns out to be lower. History of Economic Thought / Ed. Vs Avtonomov. Moscow, 2002. p. 724.

to manifest their religious beliefs, but are in fear to be rejected or dismissed. Religion is now challenging social relations, including labour relations, in a new different way.

Religious Organization as an Employer

Labor Code of Russian Federation contains separate references to faith and religion. The most detailed and remarkable of them is in chapter 54 «Special procedures for employees of religious organizations». Parties in this relations are an employer (religious organization registered in the procedure set be the federal law) and an employee (a person over 18 years old), who concluded the written contract.

The labor contract may be concluded for a determined period of time and includes essential terms and conditions for the employee and the religious organization as an employer in accordance with the LC and internal regulation of the organization. The internal regulations of the religious organization are not to contradict the Constitution of Russian Federation, the LC and other federal laws. When concluding the labor contract the employee takes responsibility to perform any work specified in the contract and not forbidden by the law.

Work schedule of religious organization employees is determined taking into consideration the standard working hours specified by the LC and the schedule of religious rituals and other activity of the religious organization set by its internal regulations.

In addition to the general reasons foreseen in the LC a labor contract with a religious organization employee may be terminated upon the reasons specified in the labor contract. The terms of notification about labor contract cancellation upon the reasons specified in the labor contract with a religious organization employee as well as the procedure and conditions of granting guarantees and compensation payments to the abovementioned employee related to this dismissal are also specified in the labor contract. The individual labor disputes not settled between an employee and a religious organization as an employer are considered by court.

A rather detailed regulation of labor relations with a religious organization nevertheless gives rise to controversial situations. The first is the difficulty in understanding what kinds of organizations are considered religious. Federal law construes only those organizations that come with the strict set of conditions (certain religion and belief, worship, other religious rites and ceremonies; religious education and training of their adherent members)

and are officially registered as religious organizations. Meanwhile, today many commercial and non-profit organizations include an indication of a particular religion in the name and carry out their activities, directly or indirectly, based on religious values (for example, restaurants, shops, charitable foundations, cultural centers, creative spaces).

It seems fair that such quasi-religious organizations will be granted the same opportunities with religious organizations to demand a particular religious beliefs as a reasonable occupational requirement (for example, the employer's requirement to hire a practicing Muslim woman as a sales assistant to a clothing store for Muslims should be considered reasonable, the same way as the hiring a person practicing Judaism and having knowledge of the Jewish rules of Kosher as a cook of a restaurant of Jewish cuisine).

Another problem is the deprivation of labour rights of such category of religious organizations employees as a clergy. The law does not prohibit them to unionize for their rights protection, but this seems inadmissible from position of the Church authorities. The ban on unionizing has been imposed by several directives of the Russian Orthodox Church; it is justified by the nature of their serving duties: clergy are conductors of divine will in human life, they are serving people, thus, cannot expect anything in return. Besides, the extension of labor legislation to serving duties in religious organizations will entail significant obstacles to the activities of religious organizations.

Nonetheless, it's impossible to ignore the task at hand to protect clergy and religious personnel from the possible arbitrariness of the Church hierarchy; it is not about state regulation, which was recognized an interference to internal affairs of religious organizations by the European Court of Human Rights,[4] but about corporate rules that could, taking into account the specifics, establish collectively-agreed terms of labor regulation (in this case, the trade union could represent the interests of all persons engaged in activities of religious organization).

Relations with Secular Employers According to the LC and Judicial Practice

The fundamental principle of Russian labor law is the unity and differentiation of legal regulation. Unity means general principles, common for all employees and employers,

[4] Sindicatul «Păstorul cel Bun» v. Romania [GC] - 2330/09 Article. Information Note // HUDOC. July 2013. URL: 11https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-59&filename=002-59.pdf&TID=ihgdqbxnfi (access on 12.07.2018).

basic labor rights and duties; unity is established by the general rules of the LC, covering the entire territory of the Russian Federation and all employees and employers. Differentiation, on the other hand, indicates a need in different approaches to the legal regulation of labor, with allowances made for the following factors: 1) harmful and hazardous working conditions; 2) climatic conditions (the Far North region and associated areas); 3) personal characteristics of an employee (physiological characteristics of the female, the social role of a parenthood, the physiological characteristics of the adolescents, the need to continue education during employment, the limited working capacity of disabled); 4) the specifics of labor relations (seasonal or temporary employment); 5) features of labor in the industrial sector (sectoral differentiation). The rules of differentiated regulation are aimed to mitigate the effect of these factors and to enable certain categories of employees to enjoy their labor rights on an equal basis with others. Special procedures for these cases are provided in the rules, partially restricting the application of general rules or provide additional rules. The ultimate goal of these legal rules is promoting of substantive equality of employees rights.

The LC doesn't provide special procedures for employees with religious needs, working at secular organizations. It should be noted that the exhaustive list of differentiation factors has not been revised for more than thirty decades and is essentially outdated, lagging behind the realities of social life. All the grounds of differentiation have been introduced in labour legislation gradually during the Soviet period and served to achieve political aims, not only private freedoms and interests of the employees.

For example, the existing list of grounds refers to the List of industries, professions, and jobs with unhealthy and/or dangerous working conditions restricted or banned to women. The ILO and other international organizations regularly draw the attention of the Russian government to the fact that changing technological working conditions today allow women to deal easily with many types of difficult and hard jobs and professions. In addition, the women physical strength can differ greatly, thus, should also be taken into account when applying this List.

The same convictions build on the critique of the grounds of differentiation, which do not construe and do not make allowances for the diversity of labor force in a rapidly changing world; there is a lack of flexibility of legal rules for taking into account the needs of work-life balance. From this position, the problem of religious employees is one among many,

concerning other interests and needs of the employee. Actually, many states and societies has developed enough for establishing the general principle of the labour legislation «accommodation for all», but in Russian labour law it is still the development thrust both for the legislation and legal consciousness.

Another legal means for providing substantive equality for employees with religious needs are reasonable accommodation and protection from indirect discrimination. The concept of reasonable accommodation is developed in Russian legislation only with regard to disability law, including special labour rulings for disabled persons (for example, according to the federal law all the employers regardless of their organizational and legal forms and forms of ownership are obliged to create the necessary working conditions in accordance with an individual program of rehabilitation of disabled). In return, employers can rely on tax breaks or, in some cases, direct state subsidies for expenses on reasonable accommodation. In this manner reasonable accommodation is construed as the social preference for disadvantaged or marginalized groups, whilst the same cannot be said of religious employees, seeking to manifest their religion or belief.

Rules concerning the protection from discrimination in labour relations appeared in the Russian legal system with adoption of the new LC in 2002:

- No one can be constrained in his/her labor rights and freedoms or get any advantages irrespective of sex, race, color of skin, nationality, language, origins, property, social or position status, age, domicile, religious beliefs, political convictions, affiliation or non-affiliation with public associations as well as other factors not relevant to professional qualities of the employee (article 3);
- All and any direct or indirect restrictions or granting direct or indirect advantages at concluding a labor contract depending on the sex, race, skin color, nationality, language, origin, property, social and official status, domicile as well as on any other factors not connected with professional qualities of employees shall not be permitted, except for the cases stipulated by the federal law (article 64).

However, the protection of employee's rights under these provisions turns to be ineffective, mainly, because of unreasonable burden of proof in judicial trial. According to article 56 of the Russian Civil Procedure Code, each party must prove the circumstances to which it

refers as based on its claims and objections.[5] In judicial cases on discrimination in labor relations, this means that the religious employee must prove two circumstances: 1) the working conditions settled by of the employer disadvantage him relatively to the other employees of this particular employer; 2) the employer has the opportunity, without burden to its activities, to change the working conditions in accordance with religious needs of the employee. Given the limited information about the employers' opportunities available to the employee, proving the second circumstance turns out to be impossible for the employee.

The futility of the current rules on protection against employees' discrimination is also confirmed through judicial practice. In two similar cases, the court refused to uphold employees' claims to defend their freedom of religion at workplace. In the first case, the employee turned out the proposal of his employer to receive wages, being credited on a debit card, because the assignment of the individual number to it contradicted his religious beliefs. The court rejected his argument of indirect discrimination, stating that the employee could negotiate with the employer about paying him wages without obtaining a debit card.

In the second case, the hospital director fired the obstetrician who refused to provide an abortion service for religious and conscience reasons. The court did not support the employee, pointing out that the local acts of the employer and the collective agreement do not provide for the possibility of replacing one employee by another in the situations described; in addition, the employee could negotiate with the employer these features of his job duties when applying for a job. The main argument of the employer, supported by the court in these two cases, consists of the employee's ability to establish individual working conditions through negotiations with the employer. However, in the realities of the Russian labor market, where the labour supply in most professions and jobs exceeds the demand, the attempts of the job applicant to impose his conditions of employment, will inevitably result in refusal of employment. If the employee is keen to change some conditions already being employed, highly likely he will also get a refusal, which in turn will worsen the relations down to dismissal.

[5] The ILO supervisory bodies and ECSR asked the Russian Government to facilitate proof of discrimination and to shift it from an employee to employer, but have not received any response // Council of Europe. Conclusions of the European Committee of Social Rights, 2004. P. 495; International Labour Conference, 100th Session, 2011. Report of the Committee of Experts on the Application of Conventions and Recommendations. Report III (Part 1A). P. 500.

If you put this altogether, it means that effective protection of employees' freedom of religion and beliefs entails employer's obligation to take into account his special needs during the employment, should be laid down as legally binding. Russian legislation provides for the only case when employers have to compromise and give an additional day off on religious holidays. Article 112 of the LC sets up federal public holidays, including Christmas (remarkably, that it is not specified which kind of Christmas is implied, so one can only assume Eastern Orthodox Christmas). According to article 4 of the Federal Law «On Freedom of Conscience and Religious Associations» the authority of the territorial subject of the Russian Federation is entitled to declare religious holidays as non-working days in the respective territories at the request of religious organizations. Today this entitlement is exercised primarily in the territorial subjects with a significant part of the population professing other religions besides Orthodoxy (the Republic of Tatarstan, Republics of the North Caucasus, including Chechnya, the Republic of Kalmykia and others). But this single solution does not fully satisfy the demands of all religious employees at the given territories and leaves unaddressed other problems.

Accessible Means of Ensuring Employees' Religious Rights

According to article 9 of the LC, labour relations can be regulated by employees and employers concluding, amending, appending collective contracts, agreements, labour contracts. Seeking to avoid the negative consequences of the indirect discrimination, the religious employee may apply to set a contractually-agreed: 1) individual possibility for working conditions and accommodations (in the labour contract); 2) general possibility of such accommodations for the group of concerned employees (in collective agreements or in local acts of an employer).

The concerned employee may have a need to apply for changing such conditions, as employment functions, working hours and rest time, breaks for prayer, appearance and dress code, diet requirements at workplace canteens, providing prayer rooms, exemption from participation in collective prayers and religious celebrations, etc. Accommodating each of these conditions will have its own features and clauses deriving from the special procedures of working conditions, thus, mandatory rules of the LC and labour legislation should not be changed under any circumstances. For example, if the employee finds a

contradiction between his employment functions and religious convictions, the only way for the employee to protect his religious interests is to refuse to conclude an employment contract or dismiss at his own will (depending on the stage at which the negotiations are held). Should this happen, performing of these actions by the employee constitutes the freedom of labour and employment. In this regard, we conclude that both the job applicant at the stage of concluding an employment contract and the employee in labor relations do not have the right to demand a total change of his labor function or profession, but only selected activities, that contravenes religious convictions.

Furthermore, employee's right to accommodations must be subject to certain restrictions, normally provided by the labour legislation in similar situations. Reasonable accommodation of religion and beliefs must not: 1) endanger life and health of people, the safety of the employer's property; 2) lead to the need for the employer to introduce new staff or material costs; 3) lead to disruption of the employer's activities (equipment downtime); 4) lead to violation of human rights or discrimination of other employees or clients of the employer.

The main problem in this case is that contractually agreed possibility of reasonable accommodation of religion and beliefs is entirely conditioned by the employer’s discretion and will; lack of statute provisions deprives an employee any legal remedies of enforcement the employer to respond to his inquiry. There are no legally binding duties to negotiate for changing the conditions of employment in order to meet the religious needs of employees.

Conclusion

For different reasons in Russia the problem of religion at workplace has not yet received scientific comprehension and legislative solution. The growing number of scientific papers and materials of law-enforcement practice in foreign legal systems have not been studied in Russia until now. The main reason to point out is long period of exclusion of religion from the number of public institutions to be studied and practiced.

Rapidly changing social reality predetermined the need to explore the initial provisions and capabilities of labor legislation in matters of ensuring the employee’s freedom of religion and to find ways to improve it.

On the one hand, labor legislation provides for the protection of the employee from indirect discrimination. However, the procedural difficulties of proof make the demand of the employee to this remedy futile. On the other hand, the remedy specifically designed to level the position of employees with special needs (differentiation of legal regulation in the LC) does not extend to the criterion of religion and belief. Human labour is the reflection both of the physical and spiritual capacities, skills and inclinations of employees, implemented in the economic sphere of an employer. There is a strong case to assert, that religion and beliefs of religious employees should take their place among the grounds for differentiation of legal regulation. Introduction of employers' obligation to negotiate with employees in the LC could become the first and major step in providing the work-life balance and the implementation of the social function of labour and employment law.