

Freedom of religion at the workplace

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Freedom of religion at the workplace

- Directive 2000/78/EC
- Charter of Fundamental Rights of the European Union
- Definitions 'religion' and 'belief'
- The headscarf cases pending at the CJEU:
- C-157/15 *Samira Achbita, Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v G4S Secure Solutions NV*
- C-188/15 *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole Univers SA*
- Reasonable accommodation to solve conflicts?

Directive 2000/78/EC

Religion or belief, prohibited conduct:

- direct discrimination
- Indirect discrimination (can it be justified? proportionate means to achieve a legitimate aim)
- Harassment
- Instruction to discriminate
- Victimisation



Freedom of thought, conscience and religion

Article 10 EU Charter

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance

Article 9 ECHR

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Article 52(3) EUCFR

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, **the meaning and scope of those rights shall be the same as those laid down by the said Convention.** This provision shall not prevent Union law providing more extensive protection.

Meaning 'religion' and 'belief'

- No clear definition in Article 9
- **European Court of Human Rights (ECtHR):**
 - needs to be given wide interpretation
 - All traditional religions and beliefs are covered
 - Also: Pacifism, Veganism, Atheism, the Church of Scientology, Druidism, Divine Light Zentrum and Krishna Consciousness. But, the Court has held that
 - the religion must have a clear structure and belief system



**EUROPEAN COURT
OF HUMAN RIGHTS**

religious or philosophical conviction or belief



ECtHR:

religious or philosophical conviction or belief must:

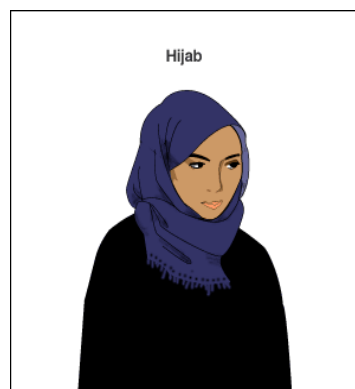
- attain a certain level of cogency, seriousness, cohesion and importance
- be worthy of respect in a democratic society
- not be incompatible with human dignity
- relate to a weighty and substantial aspect of human life and behaviour
- *Campbell and Cosans v United Kingdom App. Nos 7511/76 and 7743/76, 25 February 1982*

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CJEU: religion or belief discrimination

C-157/15: Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV

C-188/15: Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole Univers SA



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CJEU: Achbita

- referred by Court of Cassation in Belgium
- Muslim woman, receptionist, permanently contracted out to third party
- informed G4S of wish to wear Islamic headscarf
- was against G4S's strict neutrality rule in the workplace
- Dismissed after refusal to take off headscarf
- Belgian Court asked:

is there direct discrimination under the Directive when a Muslim woman is banned from wearing a headscarf when there is a workplace rule which prohibits all employees from wearing outward signs of political, philosophical and religious beliefs in the workplace

Article 4(1) Directive 78/2000/EC

Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate

Article 4(1) Directive 78/2000/EC

Genuine and determining occupational requirement:

- Nature of the particular occupational activities
- Context in which they are carried out
- Must have a legitimate objective
- Must be proportionate



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Advocate General Kokott in *Achbita*

- term 'religion' must be understood in a broad sense
- no direct discrimination but maybe indirect discrimination
- genuine and determining occupational requirement (art 4(1))?
 - the occupational requirements need not necessarily be officially laid down in the form of laws
 - Must be interpreted strictly and only applies in very limited circumstances
 - two elements: nature of the job and context of the job
 - Either has to apply, not both
 - Nature: can do work of receptionist just as well with or without headscarf
 - Context of job: requires her to refrain from wearing it
- So, ban can be regarded as a genuine and determining occupational requirement

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Advocate General Kokott in *Achbita*

- Can be genuine and determining occupational requirement
- Has legitimate aim: a policy of neutrality imposed because of the variety of customers served
- Proportionate? The factors that need to be taken into account:
 - The size and conspicuousness of the religious symbol
 - The nature of the employee's activity
 - The context in which she has to perform that activity
 - The national identity of the Member State concerned.

CJEU: *Bougnaoui*

- referred by the Court of Cassation in France
- design engineer, wore Islamic headscarf
- was told by employer to remove this while visiting clients, after a client's staff member had complained
- Dismissed after refusing to follow this
- The French Court asked:

Does the wish of a customer to no longer have the services provided by an employee wearing an Islamic headscarf amounts to a genuine and determining occupational requirement under Article 4(1) of the Directive.

Advocate General Sharpston in *Bougnaoui*

- exception for occupational requirements cannot be used to **justify a blanket exception** for all the activities that a given employee may potentially engage in
- **Narrowness** derogation reflected in wording Art. 4(1): occupational requirement must not only be “genuine”, it must also be “determining”: means that derogation must be limited to matters absolutely necessary in order to undertake professional activity in question

AG Sharpston in *Bougnaoui*

- No basis for what the employer here advances: ‘that the commercial interest of its business in its relations with its customers, could justify the application of the Article 4(1) derogation
- Accepting view of employer would **risk normalising the derogation**; cannot be right. It is intended that the derogation should apply only in the most limited of circumstances
- nothing to suggest that, because Ms Bougnaoui wore headscarf, she was in any way unable to perform her duties as a design engineer
- **the requirement not to wear the headscarf could not be a genuine and determining occupational requirement**

Referred questions

Achbita v G4S:

is there direct discrimination under the Directive when a Muslim woman is banned from wearing a headscarf when there is a workplace rule which prohibits all employees from wearing outward signs of political, philosophical and religious beliefs in the workplace

Bougnaoui v Metropole:

Does the wish of a customer to no longer have the services provided by an employee wearing an Islamic headscarf amounts to a genuine and determining occupational requirement under Article 4(1) of the Directive

Art 5 Dir 2000/78/EC: Reasonable accommodation for disabled persons

- In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, **reasonable accommodation** shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a **disproportionate burden** on the employer.
- Case C-130/75, *Vivien Prats v EU Council*

Existing duties

EU: duty disability
disproportionate burden

US: duty religion and
disability
undue hardship

Canada: duty all grounds
of discrimination
undue hardship

All three are linked to a finding of discrimination if the duty
has not been fulfilled

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Proportionality

Proportionality
Balancing

Right of employee to
manifest religious or other
practices

Interests of employer and
operation/management of his/her
business



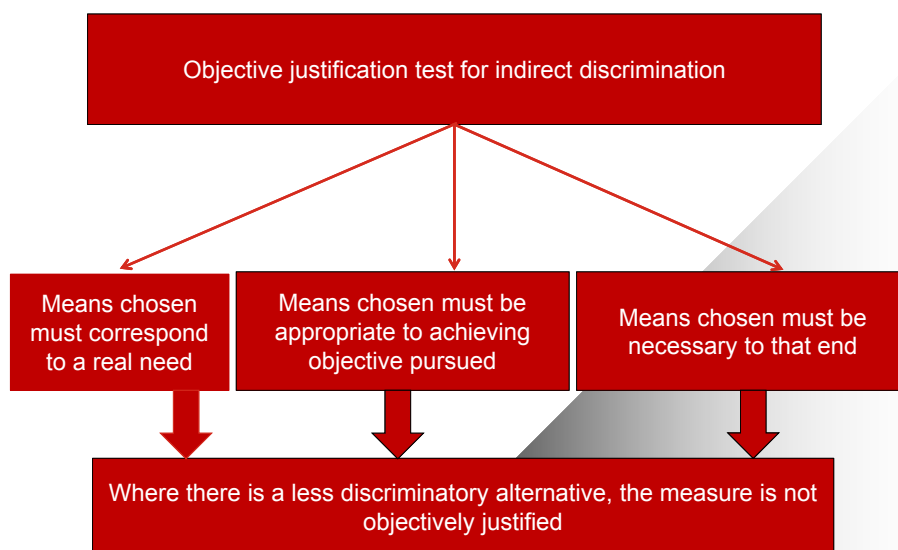
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Indirect discrimination EU Law

Article 2(2)(b) Directive 2000/78/EC: indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation 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**

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Bilka Kaufhaus GMBH v Karin Weber von Hartz C-170/84, para. 36



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Case law

- *HK Danmark v Dansk Almennyttigt Boligselskab and HK Danmark v Dansk Arbejdsgiverforening* C-335/11/C-337/11 (AG and CJEU)
- *Napoli v Ministero della Giustizia, Dipartimento dell'Amministrazione penitenziaria*, C-595/12

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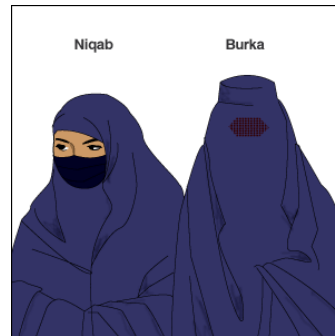
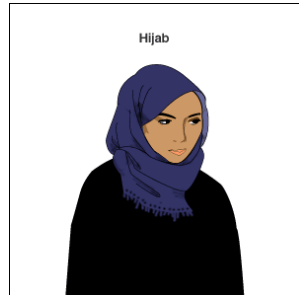
Duty of reasonable accommodation?

Case law suggests:

- standard of necessity requires an investigation of alternative measures that are less invasive of the right not to be discriminated against
- comes close to a duty of reasonable accommodation

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Example religious accommodation



- *Azmi v Kirklees Metropolitan Borough Council* [2007] IRLR 484 (EAT)

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Balancing test



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