



Freedom of religion at the workplace in the EU



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DE - Federal Constitutional Court

24 September 2003, 2 BvR 1436/02

27 January 2015, 1 BvR 471/10, 1 BvR 1181/10

NL - District Court Rotterdam,

21 January 2014, ECLI:NL:RBROT:2014:2368

FR - Cour de cassation (plenary session)

25 June 2014, Judgm. n° 612 (13-28.369)

European Court of Human Rights (ECHR)

15 January 2013

EWEIDA and others v. UNITED KINGDOM

Applications : 48420/10, 59842/10, 51671/10, 6516/10



Directive 2000/78/EC

establishing a general framework for equal treatment in employment and occupation

Article 1: no discrimination on the grounds of religion or belief, disability, age or sexual orientation



Court of Justice of the EU

Case C-157/15, G4S Secure Solutions NV (“Achbita”)

- *Hof van Cassatie (Court of Cassation), Belgium*



Case C-188/15, Bougnaoui and ADDH

- *Hof van Cassatie (Court of Cassation), France*

14 March 2017



Directive 2000/78/EC

establishing a general framework for equal treatment in employment and occupation

Case C-157/15, “Achbita” - Question referred

Should Article 2(2)(a)... be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer’s rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?

Directive 2000/78/EC

Article 2 Concept of discrimination

2. (a) “direct discrimination”

...where one person is treated less favorably than another is, has been or would be treated in a comparable situation ...

(b) “indirect discrimination”

...where an apparently neutral provision, criterion or practice would put persons ... at a particular disadvantage compared with other persons, unless that provision ... is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Conclusions delivered by AG Kokott

C- 157/15 « Achbita » 31 May 2016

- 1) *No direct discrimination* if the ban from wearing an Islamic headscarf is founded on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace and not on stereotypes or prejudice against religion(s) or religious belief in general.

The ban *may constitute indirect discrimination* under Article 2 par. 2 b).

- 2) Such discrimination *may be justified* in order to enforce a policy of religious and ideological neutrality in the company.

Principle of proportionality to be respected by taking into account, e. g.

- size of the religious symbol
- nature of worker's activity
- context in which work is performed
- national identity of the Member State

C- 157/15 « *Achbita* » 14 March 2017



- *Concept of religion covers ‘forum internum’ and ‘forum externum’*
- *at issue the prohibition on wearing a headscarf at the workplace based on the internal rule of the undertaking*
 - *does it give rise to difference in treatment of workers on the basis of their religion ?*
 - *dress neutrality applicable to all workers*
- ⇒ ***no direct discrimination***
for the purposes of article 2 (2) a) of directive 2000/78

C- 157/15 « *Achbita* » 14 March 2017



➔ ***Indirect discrimination*** of workers on the basis of their religion ?

Directive 2000/78 Article 2 (2)(b) “indirect discrimination”

...where an apparently neutral provision, criterion or practice would put persons ... at a particular disadvantage compared with other persons, unless that provision ... is ***objectively justified*** by a ***legitimate aim*** and the means of achieving that aim are ***appropriate*** and ***necessary***.

C- 157/15 « *Achbita* » 14 March 2017



- **Internal rule *objectively justified by legitimate aim* ?**
 - *Policy of political, philosophical or religious neutrality in relations with costumers*
 - *Article 16 EU Charter of fundamental rights: freedom to conduct a business*
 - *Judgment « Eweida » of the ECtHR*

- **Internal rule *appropriate* ?**
 - *Policy of neutrality consistent, systematic, general and undifferentiated*

- **Internal rule limited to what is *strictly necessary* ?**
 - *Prohibition can cover only workers who interact with customers*
 - *For the referring Court to ascertain that dismissal was strictly necessary*



Directive 2000/78/EC

establishing a general framework for equal treatment in employment and occupation

Case C-188/15, Bougnanoui and ADDH - Question referred

Must Article 4(1) ... be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?

Directive 2000/78/EC

Article 4 Occupational requirements

Difference of treatment based on a characteristic related to...[religion] shall *not constitute a discrimination* where

- by reason of the *nature* of the particular occupational activities concerned or of the *context* in which they are carried out
- characteristic constitutes a *genuine and determining occupational requirement*
- provides the objective is *legitimate* and
- the requirement is *proportionate*

Conclusions delivered by AG Sharpston

C- 188/15 Bougnaoui and ADDH 13 July 2016

- 1) *A rule layed down in the workplace regulations of an undertaking which prohibits employees... from wearing religious signs or apparel when in contact with costumers... involves **direct discrimination** on grounds of religion or belief, to which neither Article 4 (1) nor any of the other derogations from the prohibition of direct discrimination... applies. This is a fortiori the case when the rule in question applies to the wearing of the Islamic headscarf alone.*
- 2) *Where indirect discrimination ... (e. g. entire neutral dress code) the interests of the employer's business will constitute a legitimate aim (necessity of proportionality).*

*Conclusions delivered
by AG Kokott*

C- 157/15 Achbita

→ *indirect discrimination*

→ *Article 4 (1) does apply:*

*The ban may be regarded
as being a genuine,
determining and legitimate
occupational requirement.*

*Conclusions delivered
by AG Sharpston*

C- 188/15 Bougnaoui

→ *direct discrimination*

→ *Article 4 (1) does not apply:*

*The ban could not be a genuine
and determining occupational
requirement.*



C- 188/15 *Bougnaoui and ADDH* 14 March 2017

- ➔ *at issue the willingness of an employer to take account of a costumer's wish no longer to have services provided by a worker wearing an Islamic headscarf (if internal rule of the undertaking judgment « Achbita »)*
- *according to Article 4 (1) Member States may provide...*
- *relevance of Article 4 (1) in very limited circumstances (recital 23)*
- *Concept of a 'genuine and determining occupational requirement'*
 - ➔ *requirement that is **objectively dictated** by the nature of the occupational activities concerned or the context in which they are carried out*
 - ➔ ***subjective considerations not covered***

There is more to come....



C-414/16, Egenberger
lodged on 27 July 2016

C-68/17, IR
lodged on 9 February 2017

Bundesarbeitsgericht
Germany

Art. 4 (2) of directive 2000/78/EC

Right to clerical autodetermination related to employment and occupation

C-93/17, Cresco Investigation

lodged on 13 April 2017 by the **Oberster Gerichtshof**, Austria

Art. 1 and 2 (2) a) - direct discrimination, Art. 2 (5) - protection of the rights and freedoms of others, Art. 7 (1) - positive action of directive 2000/78

Art. 21 - non-discrimination, Charter of fundamental rights of the EU

Directive 2000/78/EC

Article 4 Occupational requirements

1. [...]

2. Member States may maintain national legislation ... pursuant to which, in the case of occupational activities within *churches* and *other public or private organisations the ethos of which is based on religion or belief*, a difference of treatment based on a person's religion or belief shall *not constitute discrimination* where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and *justified occupational requirement, having regard to the organisation's ethos*. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

..., this Directive shall thus *not prejudice the right of churches and other public or private organisations*, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, *to require individuals* working for them *to act* in good faith and *with loyalty to the organisation's ethos*.

Directive 2000/78/EC

Article 2 Concept of discrimination

1. - 4. [...]
5. This Directive shall be *without prejudice to measures* laid down by national law which, *in a democratic society*, are *necessary* for *public security*, for the maintenance of *public order* and the *prevention of criminal offences*, for the protection of *health* and for the *protection of the rights and freedoms of others*.

Directive 2000/78/EC

Article 7 Positive action

1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting *specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.*
2. [...]