

Freedom of religion at the workplace

CJEU cases *Achbita* and *Bougnaoui*

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This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

1/ Introduction

2/ What kind of discrimination?

3/ Justifying “neutrality”

4/ Conclusion

■ Introduction

➤ *Policies of neutrality v. Workers' right to protection against discriminations based on religion*

➤ *Two different situations*

➤ *Policies of neutrality v. Workers' right to protection against discriminations based on religion*

- Notion of religion
- Policies of neutrality and “ethos-based” organisations

Notion of religion

the concept of religion covers both the *forum internum* (the fact of having a belief), and the *forum externum* (the manifestation of religious faith in public)

Reference to the ECHR and constitutional traditions common to the Member states

“Ethos-based” organisations

“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”

Directive 2000/78, art. 4(2)

➤ *Two different situations*

- *Mrs Achbita*: working as a receptionist, decides to wear an Islamic headscarf 3 years after she started at *G4S secure solutions*
- *Mrs Bougnaoui*: design engineer, wore a headscarf at work for a year without being asked to remove it, until a client complained

■ **What kind of discrimination?**

➤ *Direct discrimination revisited*

➤ *Indirect discrimination applied to religion*

➤ *Direct discrimination revisited*

Strict interpretation

- comp. question raised by the referring court and its reframing by the CJUE in *Bouagnaoui*
- “measure inseparably linked to the relevant reason for the difference of treatment” (cf. for instance : *Dekker*, C-177/88, 1990 ; *Maruko*, C-267/06, 2008)
 - Choice of comparator (*Achbita*)
 - Intentional discrimination?
(CJEU, *CHEZ*, C-83/14, 2015)

➤ *Indirect discrimination applied to religion*

Indirect discrimination exists:

- « if it is established that the apparently neutral obligation it encompasses results, in fact, in persons adhering to a particular religion or belief **being put** at a particular disadvantage » (*Achbita*, § 34)
- « where an apparently neutral provision, criterion or practice **would put** persons having a particular religion or belief, (...) at a particular disadvantage » (directive 2000/78, art. 2(2) b)

■ Justifying “neutrality”

- *Occupational requirement (directive 2000/78, art. 4(1))*
- *Policy of neutrality as a legitimate aims*
- *Proportionality (appropriateness, necessity, right balance between the different interests involved)*

➤ *Occupational requirement*

- Is national legislation needed? Legal source of occupational requirements?
- Islamic headscarf = a “characteristic related to religion”?
- Islamic veil = “occupational” (requirement)?
- Requirement “**objectively** dictated by the nature of the occupational activities concerned or of the context in which they are carried out”
Does not “cover **subjective** considerations, such as the willingness of the employer to take account of the particular wishes of the customer” (*Bougnaoui*, § 40)

➤ *Policy of neutrality as a legitimate aim*

“The desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality must be considered legitimate”

“An employer’s wish to project an image of neutrality towards customers relates to the ***freedom to conduct a business***”

(Achbita, § 37-38)

➤ *Proportionality (appropriateness)*

Policy “genuinely pursued in a ***consistent*** and ***systematic*** manner”

=

“***a general and undifferentiated*** policy of prohibiting the visible wearing of signs of political, philosophical or religious beliefs

“in respect of members of its ***staff who come into contact with its customers***”

(Achbita, § 40-41)

➤ *Proportionality (necessity)*

○ Policy considered strictly necessary if it applies only to « workers who interact with customers »
(*Achbita*, § 42)

○ *Is reasonable accommodation* required?

The employer must offer a post not involving any visual contact with customers, instead of dismissal, if this reinstatement does not require the undertaking “to take on an additional burden”
(*Achbita*, § 43)

➤ *Proportionality (right balance between the different interests involved)*

Comp. CJEU, *CHEZ*, C-83/14 (2015)

Is the disadvantage caused by the practice disproportionate to the aim pursued, and does the policy unduly prejudices the legitimate interests of the persons concerned (cf. *CHEZ*, § 123) ?

Not mentioned in *Achbita*...

■ Conclusion

- A framework to reconcile non-discrimination on ground of religion and companies' freedom to conduct a "neutral" business
 - No inclusive conception of religious discrimination = regressive approach (political context)?
- Questions remain