Freedom of religion at the workplace

CJEU cases Achbita and Bougnaoui

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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

   o comp. question raised by the referring court and its reframing by the CJUE in Bougnaoui

   o “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)

   o Choice of comparator (Achbita)

     o Intentional discrimination?

     (CJEU, CHEZ, C-83/14, 2015)

 Indirect discrimination applied to religion

 Indirect discrimination exists:

 o « 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)

 o « 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