

## **Religion at the Workplace**

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## **Freedom of religion**

- Freedom of thought, conscience and belief a recognised human right
- UDHR Article 18
- European Convention on Human Rights (ECHR) Article 9
- EU Charter of Fundamental Rights (CFR) Article 10
- “equality approach” v. “human rights approach”

## Workplace issues

- Dress and grooming codes
- Time off for religious observance
- Requests to be excused from particular work tasks
- Voicing beliefs and seeking converts
- Employer requiring sign-up to organisation's ethos

## The legal background

- Directive 2000/78
- Prohibition on discrimination on grounds of religion or belief
- Article 4(2) – special exception for organisations with an ethos based on religion or belief

## European Convention on Human Rights Article 9

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 in private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

## European Convention on Human Rights

- Note also Article 14:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

## Charter of Fundamental Rights Article 10

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.
2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

## Charter of Fundamental Rights

- Note also Article 21 – general prohibition on discrimination
- Article 52(3) – rights corresponding to ECHR have the same meaning

## ***Eweida and others v UK (2013)***

- ECtHR abandons “voluntary acceptance” rule
- I.e., freedom not guaranteed merely because employee is free to resign
- - although this is a factor to be considered in assessing proportionality

## **The *Eweida* litigation**

- *Eweida v UK* - wearing a cross; private sector employer
- *Chaplin v UK* – wearing a crucifix; public sector employer
- *McFarlane v UK* – refusal of work tasks; private sector employer
- *Ladele v UK* – refusal of work tasks public sector employer

## *Eweida and others v UK*

- ECtHR held in first three cases:
- Prima facie interference with freedom of religion contrary to Article 9(1)
- BUT justified under Article 9(2) for Chaplin and McFarlane, but not for Eweida
- Ladele – no breach of Article 14

## *Points from Eweida v UK*

- Emphasis on justification under Art. 9(2)
- Revision of voluntary acceptance rule
- Subjective test of what is required by religion or belief
- Change in requirements while job is ongoing not decisive
- **Margin of appreciation** – to take account of domestic circumstances

## CJEU – the “headscarf cases”

- *Achbita v G4S Secure Solutions*  
Case C-157/15
- *Bougnaoui v Micropole SA* Case C-188/15
- Judgments 14 March 2017

## *Achbita v G4S Secure Solutions*

- Receptionist working at premises of her employer’s customer
- “Unwritten” rule that no visible signs of political, philosophical or religious beliefs to be worn at work
- Dismissed for refusing to comply
- Was this direct discrimination on grounds of religion or belief?

## Is religion a matter of choice?

- A-G Kokott – distinction between “immutable characteristics” and “modes of conduct based on a subjective decision or conviction”
- A-G Sharpston – “It would be entirely wrong to suppose that, whereas one’s sex and skin colour accompany one everywhere, somehow one’s religion does not.”

## Opinion of A-G Kokott

- Not direct discrimination
- Potentially indirect discrimination
- Factors relevant to justification:
  - size of symbol
  - nature of employment
  - context of employment
  - national identity of state



## ***Achbita* – CJEU decision**

- Not direct discrimination, because all religious, political and philosophical beliefs were treated equally
- Potential indirect discrimination
- Policy of religious etc neutrality was a legitimate aim
- Could also be proportionate if limited to employees with customer-facing roles
- Could she have been offered a “behind the scenes” role?

## ***Bougnaoui v Micropole SA***

- Design engineer working at premises of her employer’s client
- Client requested “no veil next time”
- Dismissed for refusing to comply with request not to wear a Muslim headscarf when in contact with customers
- Was client’s wish capable of being a genuine occupational requirement?

## ***Bouagnaoui v Micropole SA***

- A-G Sharpston: this **is** direct discrimination
- “Religion” includes manifestations of religion – such as wearing a headscarf
- Customer preference **NOT** a genuine occupational requirement
- If indirect – headscarf ban unlikely to be proportionate

## ***Bouagnaoui* – decision of CJEU**

- CJEU – agrees that “religion” includes manifestations of religion
- **BUT** ban on all religious etc symbols is not direct discrimination
- GDOR must be objectively required – not based on subjective matters such as customer preference
- Rare for religion/belief to be a GDOR

## Critique of CJEU decisions

- Justification established too easily
- Insufficient examination of whether employers really needed to insist on neutrality
- Insufficient examination of whether headscarf ban needed to ensure neutrality
- Unduly ethnocentric approach?

## Implications – dress codes

- What if the employer's code is not neutral as between beliefs?
- Direct or indirect discrimination?
- Possible differences between public and private sector
- NB – issues around justification based on neutrality may be different in other Member States

## Tweet from G4S:

*“It is our policy to comply with local laws in all countries in which we operate and this applies in relation to the wearing of religious symbols and dress. In many countries such as the UK where there is no strong tradition of religious and political neutrality, G4S permits the wearing of religious dress such as Islamic headscarves.”*

## Implications – time off

- Time off for religious observance as a manifestation of religion
- Neutral rules likely to raise indirect discrimination issues, so questions of justification/proportionality arise
- NB – no duty of reasonable accommodation

## Implications – refusal of duties

- Issues of indirect discrimination
- NB CFR Article 16 – freedom to conduct business
- *Ladele v UK* and *McFarlane v UK*
- A right of conscientious objection?
- CFR Article 10(2)

## Implications – expressing views

- Can employers ban discussion of religion or belief?
- Also engages freedom of expression: ECHR Article 10/CFR Article 11
- Possible harassment liability
- ECtHR – proselytising is a manifestation of religion
- Importance of employment context

## Employers with an ethos based on religion or belief

Directive 2000/78 Article 4(2):

- May discriminate on grounds of religion or belief, provided that:
- This is a “genuine, legitimate and justified occupational requirement” by reason of nature or context of the employment
- Having regard to the organisation’s ethos

## Article 4(2)

- May require employees to be loyal to the ethos of the organisation
- BUT
- (i) national legislation must provide for this exception
- (ii) it does not justify discrimination on grounds other than religion or belief

## What is religion or belief?

- Huge amount of Convention jurisprudence on this: recognised religions/beliefs include:
- Church of Scientology; Moon sect; veganism; Communism, etc, etc
- Liberal interpretation for purposes of ECHR Art.9(1)
- Focus on Art.9(2)
- Not necessarily appropriate for CJEU