

Religious Discrimination in the Workplace

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Discrimination on Grounds of Religion or Belief: Some Complicating Factors

- Religion is a claim both for the right to be free of discrimination and the right to discriminate
- Discrimination on grounds of religion or belief overlaps with a fundamental right (the right to freedom of thought, conscience and belief)
- There is a tension between the individualistic nature of religious freedom (including a commitment to treat religious and non-religious beliefs equally) and the focus on collective disadvantage seen in the law on indirect discrimination.

- Directive 2000/78: No discrimination on grounds of religion or belief
- Equality of religious and non-religious belief is a key feature of the caselaw on Article 9 European Convention on Human Rights.

Directive 2000/78: Direct Discrimination

- Direct Discrimination: Article 2(2)(a): direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
- Direct discrimination can be justified only “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 2000/78: Indirect Discrimination

- (b) 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:
- (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

Discrimination against an individual on grounds of religion: Recent CJEU Rulings

- *Achbita* Case C-157/15: Reference from the Belgian Court of Cassation asking whether a ban on a female Muslim employee wearing the headscarf at work should be regarded as direct discrimination when the employer in question bans all employees from wearing any outward sign of political, philosophical or religious beliefs at work.
- *Bougnaoui* Case C-188/15: Reference from the French Court of Cassation asking whether the wish of a customer not to have services supplied by an employee in an Islamic headscarf could be seen as a genuine and determining occupational requirement under the Directive.

Bans of Symbols of Religion or Belief: Indirectly Discriminatory

- *Achbita* (paragraph 30): “the wearing of visible signs of political, philosophical or religious beliefs covers any manifestation of such beliefs without distinction. The rule must, therefore, be regarded as treating all workers of the undertaking in the same way, by requiring them, in a general and undifferentiated way, *inter alia*, to dress neutrally, which precludes the wearing of such signs”.

BUT:

- To avoid being directly discriminatory the ban must be “genuinely pursued in a consistent and systematic manner” (paragraph 40 *Achbita*)

Neutrality Requirement: A Legitimate Aim

- *Achbita* (paragraph 37): “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”
- Citing the freedom to conduct a business protected by Article 16 of the CFREU and ECHR caselaw on Article 9 ECHR.

- Thus a request for “no veil next time” is likely to be directly discriminatory as it targets one faith.
- A rule that says no religious, political or philosophical symbols” will be indirectly discriminatory.
(though for national court to decide on the facts)

Customer Preferences and GDOR

- *Bougnaoui* (paragraphs 37 and 38): a characteristic related to religion can be a GDOR “only in very limited circumstances”
- Jurisprudence is clear “that it is not the ground on which the difference of treatment is based but a characteristic related to that ground that must constitute a genuine and determining occupational requirement.”.

Achbita and Bougnaoui: Points to Note

- Neutrality requirement is legitimate but must be applied systematically and across the board
- Customer Facing Roles: The Court's judgment recognizes religious symbols as, like other symbols of political and philosophical belief, potentially controversial and therefore disruptive of harmonious relationships between the company and its customers. However, the controversial nature of religious beliefs is equally relevant to harmonious relationships within the workplace (e.g. *Ladele v Islington/Eweida v UK*).
- Controversial invocation of freedom to conduct a business (Article 16 CFREU)
- Compliance with customer preferences cannot be a GDOR

Religion as Opinion or Belief

Kokott AG in *Achbita*:

- "That requirement of neutrality affects a religious employee in exactly the same way that it affects a confirmed atheist who expresses his anti-religious stance in a clearly visible manner by the way he dresses, or a politically active employee who professes his allegiance to his preferred political party or particular policies through the clothes that he wears (such as symbols, pins or slogans on his shirt, T-shirt or headwear)."
- [thus, religion is not like] "immutable physical features or personal characteristics — such as gender, age or sexual orientation — rather than with modes of conduct based on a subjective decision or conviction, such as the wearing or not of a head covering at issue here."

Religion as Identity

AG Sharpston in *Bougnaoui*:

- “to someone who is an observant member of a faith, religious identity is an integral part of that person’s very being. The requirements of one’s faith – its discipline and the rules that it lays down for conducting one’s life – are not elements that are to be applied when outside work (say, in the evenings and during weekends for those who are in an office job) but that can politely be discarded during working hours. Of course, depending on the particular rules of the religion in question and the particular individual’s level of observance, this or that element may be non-compulsory for that individual and therefore negotiable. But it would be entirely wrong to suppose that, whereas one’s sex and skin colour accompany one everywhere, somehow one’s religion does not.”

- CJEU in *Achbita* and *Bougnaoui* notes that there is no definition of “religion or belief” in Directive 2000/78
- But notes that the recital to the Directive refers to Article 9 ECHR (the right to freedom of thought, conscience and religion)
- This approach predisposes the Court to following the view of religion seen in Kokott AG’s Opinion in *Achbita* rather than that of AG Sharpston in *Bougnaoui*.

Tension Between Freedom of Religion and Discrimination on Grounds of Religion

- The right to freedom of religion or belief has (rightly) been regarded by the courts as primarily an individual right that allows individuals to choose their beliefs and which does not distinguish between widely shared established beliefs and idiosyncratic or heterodox beliefs and does not favour religious over non-religious forms of belief.
- Indirect discrimination generally involves notions of collective disadvantage and the granting of extra rights to individuals who show they are part of a group facing additional “head-winds” on account of a salient characteristic shared with other members of that identifiable group (e.g. UK Court of Appeal in *Eweida v British Airways* EWCA Civ [2010] 80).

Discrimination in order to protect an employer's ethos

- Article 17 TFEU referred to in Para. 24 of recital of Directive 2000/78: “The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States...”
- Article 9 ECHR right of collective religious autonomy to be balanced against rights of employees to privacy, religious freedom and free expression e.g. *Fernandez Martinez v Spain* [2014] ECHR 615.
- US approach more absolutist based on “ministerial exemption” *Hosanna Tabor* 565 US 171 (2012).

Exemptions for ethos-based employers in Directive 2000/78

- Article 4(2) of the Directive: "*in the case of [employment] within churches and other private or public organisations the ethos of which is based on religion or belief a difference in 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 within 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 principles as well as the general principles of Community law and should not justify discrimination on another ground."*
- "Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other private or public 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".*

Exemptions for ethos-based employers in Directive 2000/78, II

- The exemption provided allows the religion of an employee to be treated as a GDOR either because of the reason of the nature of these activities (this would cover the need for a person employed as a Catholic priest to be a Catholic) or because of "the context within which they are carried out". This is important because it means that a role which does not appear to have a religious function may nevertheless be regarded as being legitimately reserved for those of a particular religious identity because it is carried out within a religious organization.
- The European Commission is of the view that as a departure from the principle of equal treatment, these exemptions ought to be narrowly construed (see McCrea, *Religion and the Public Order of the European Union* OUP 2010 p. 166)

Case C-414/16 *Egenbeger*

- German woman of no religion who was not given a temporary contract to write a report on racial discrimination by an organization run by the German Evangelical Church whose job announcement has specified that applicants had to be Protestants.
- German law allows religious organisations significant latitude to determine for themselves when a given religious identity is a GDOR. The Allgemeine Gleichbehandlungsgesetz sets down that this can be determined “having regard to the employer’s own perception”
- “where a given religion or belief constitutes a justified occupational requirement, having regard to the employer’s own perception, in view of the employer’s right of autonomy or by reason of the nature of its activities.” Paragraph 9(1) Allgemeine Gleichbehandlungsgesetz
- This self-perception is, under German law, subject only to “plausibility review”,

Opinion of AG Tanchev

- “EU’s constitutional imperatives reflect what one scholar has referred to as ‘value pluralism’. Pursuant to this, conflicts between differing rights, or approaches thereto, are considered to be normal and are resolved through balancing conflicting elements rather than according priority to one over another in a hierarchical fashion” (para. 100).
- The Directive does not permit a religious employer to “itself authoritatively determine whether adherence by an applicant to a specified religion, by reason of the nature of the activities or of the context in which they are carried out, constitutes a genuine, legitimate and justified occupational requirement, having regard to the employer/church’s ethos.” (para. 101).
- A balancing process had to be followed that had to take account of the significant Margin of Appreciation given to Member States to strike a balance in this area and to the right to institutional religious freedom. However, it also had to take account of the need, under the General Principles of EU law to avoid disproportionate restriction of other fundamental rights. In addition the reference in the Directive to ‘genuine, legitimate’ occupational requirements meant that it was necessary to analyse “the proximity of the activities in question to the defendant’s proclamatory mission”.

Religion and Law in Europe: Some General Comments

- Highly uncertain environment
- Unclear what approach works best
- Unpredictability
- Humility needed from international courts
- CJEU has given significant leeway but required fairness in application of rules and balancing of rights
- An emerging: a recognition that Member State authorities are best placed to decide how to regulate the role of religion in society coupled with a respect for the requirements of our shared EU legal order that requires that such regulation respect key principles and values such as equality and proportionality.