

Religious discrimination at the workplace

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EU Equality law and ECtHR related to religious discrimination

EU Equality Directive 2000/78 – includes religion and
belief grounds

Charter of Fundamental Rights of the European
Union - article 10

European Convention on Human Rights - Article 9

Lisbon Treaty 2009

EU Equality law and ECtHR

ECHR – rights-based focus with international supervision

EU law - economic focus extending to social focus

ECHR – Article 9

Freedom of thought, conscience and religion

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 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.

Application to Dress codes

Eweida v UK (2013):

Religious rights can be claimed at work, but the employer can restrict the employee's manifestation of religion when it interfered with other rights.

In this case this restriction was unjustified.

Chaplin (as above):

"the protection of health and safety on a hospital ward, was inherently of a greater magnitude than that which applied in respect of Ms Eweida. Moreover, this is a field where the domestic authorities must be allowed a wide margin of appreciation" (para 99)

Other dress codes cases

Ebrahimian v France (2015)

- Freedom of religion was not violated.
- As in earlier cases the Court noted the lack of consensus across Europe on the issue. It also noted national context.
- Court suggests that religious dress worn in the hospital context may make patients feel that they would not receive treatment on an impartial basis.
- Note dissent: Query on impartiality. Religious affiliation could also be shown by name.

Other discrimination cases

Eweida v UK (2013):

MacFarlane and Ladele

- Employees dismissed for refusal to provide services to gay and lesbian clients.
- This did not unlawfully interfere with the employees' religious freedom as their treatment was justified as proportionate to maintain the equality rights of others.

The use of the Margin of Appreciation

The Court reaches its conclusions relying on the wide margin of appreciation allowed to states when dealing with issues over which there is a lack of consensus in Europe.

EU Directive protection for religion and belief

EU Directive 2000/78 prohibits

On grounds of Religion and belief

- Direct Discrimination
 - person is treated less favourably on grounds of religion and belief
- Indirect Discrimination
 - 'where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief...at a particular disadvantage compared with other persons; unless [it] is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'

Article 4 and genuine occupational requirements

Article 4(1) applies where being of a particular religion is a genuine and determining occupational requirement of the job

Article 4(2) applies to organisations with an ethos based on religion or belief.

Applies where: by reason of the nature of the activities or the context in which they are carried out, a person's religion or belief constitutes a genuine legitimate and justified occupational requirement, having regard to the organisation's ethos.

EU Directive protection for religion and belief

Staff dismissed for wearing headscarves at work

Achbita v G4S Secure Solutions NV

- Is this direct (or indirect) discrimination?

Bougnaoui v Micropole

- Is a requirement not to wear a headscarf a genuine occupational requirement

EU Directive protection for religion and belief

AG opinions

Achbita v G4S Secure Solutions NV

- “even a direct difference of treatment is eminently justifiable under certain conditions” (27)
- Judge proportionality taking into account:
 - the size and conspicuousness of the religious symbol;
 - the nature of the employee’s activity;
 - the context in which she has to perform that activity;
 - the national identity of the Member State concerned.
- “an employee may be expected to moderate the exercise of his religion in the workplace”...[116]

EU Directive protection for religion and belief

AG opinions

Bougnaoui v Micropole SA

- Clear that business reasons and client choice can be suspect, and a cover for stereotype and prejudice
- Religion 'accompanies one everywhere'
- Different standards of protection should not be applied to different equality grounds.

EU Directive protection for religion and belief – the CJEU

The CJEU

Achbita v G4S Secure Solutions NV

- Restriction is justified as proportionate means to achieve a legitimate aim (of neutral policy)
- Consider offering alternative back office role.

Bougnaoui v Micropole SA

- GOR related to client wishes cannot be justified.

Lessons for EU anti-discrimination law?

Bougnaoui

- Requirement must be objectively needed for the job: Customer preference is not sufficient reason to restrict religious practice.

Achbita

- The desire to display neutrality to customers *must* be considered legitimate.
- The wish to project neutral image relates to the freedom to conduct a business. (Article 16 EU Charter of Fundamental Rights)
- Attempt to accommodate staff by offering non-customer-facing roles helps show proportionality.

Article 4(2)

- Egenburger [2018] EUECJ C-414/16

Job preparing a report for a church on Germany's compliance with the CERD. Requirement of membership of the church. Egenburger applied and was not appointed.

Could the church determine that a GOR applied to this role, or was this a question for a court?

Article 4(2)

- Egenburger [2018] EUECJ C-414/16

CJEU – held that it had to be possible for the balancing between competing rights to be reviewed by an independent authority.

Article 4(2)

- Egenburger [2018] EUECJ C-414/16

The church can rely on its own ethos to set the requirement, but there must be a space for review:

It is for the court to decide whether or not the criteria of a “genuine, legitimate and justified” requirement has been satisfied from the point of view of that ethos.

NB the CJEU inserts a requirement of proportionality into Art 4(2)

Article 4(2)

- Compare: Muhammed v Leprosy Mission (UK)

IR v JQ Case C-68/17

Head of Department of a Catholic hospital dismissed for divorce and remarriage. Can a GOR (to be loyal to teaching of Catholic church) be applied?

Article 4(2)

Opinion of AG Wathelet on 31 May 2018

GOR difficult to justify:

- Hospital is supervised by Catholic Church, but not necessarily a religious ethos organisation
- Test should be whether the requirement is sufficiently linked to the job itself
- The hospital employed other staff who were not Catholic, who would not be dismissed for divorce, so belief cannot be a GOR.
- This must be subject to review by a court.

Article 4(2)

Lessons:

- A religious employer cannot just assert that it has a religious ethos – this is subject to review by the court.
- Although the word ‘proportionate’ does not appear in Art 4(2), a test of proportionality is implied into the meaning of ‘justified’, and is implied by general EU Community law.

Religious discrimination in employment

Lessons from the CJEU so far:

- It is for courts, rather than religious organisations themselves, to review the limits of protection.
- The protection is subject to a test of proportionality
- Guidance on what proportionality may require is scarce, and there is some suggestion that the CJEU will accept different levels of protection in different member states.

Lessons for EU anti-discrimination law?

- Any comments or questions?

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