

Towards a reasonable accommodation for religious reasons in EU law?

**Academy of European Law,
Trier, 11-12 March 2019**

Stéphanie Hennette Vauchez (University of Paris Nanterre)

stephanie.hennette-vauchez@parisnanterre.fr



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

- Notion of accommodation
- Notion of reasonable

Reasonable accommodation: What does it mean?

- The specific requirements of certain jobs may run against certain religious dictates (handling of prohibited or “impure” foods, or carrying out condemned gestures and actions).
- Some internal rules on the organization of work such as those that concern clothing may generate restrictions to the religious freedom of people (choice of headwear, Jewish tzitzit, etc.).
- The social organization of time through the general social calendar as well as the internal company calendar may convey certain religious traditions and infringe others.
 - Cf. CJEU, 12 November 1996, “UK vs Council” §37: “As to the second sentence of Article 5, whilst the question whether to include Sunday in the weekly rest period is ultimately left to the assessment of Member States, having regard, in particular, to the diversity of cultural, ethnic and religious factors in those States (second sentence of Article 5, read in conjunction with the tenth recital), the fact remains that the Council has failed to explain why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week. In those circumstances, the **applicant's alternative claim** must be upheld and the second sentence of Article 5, which is severable from the other provisions of the directive, must be annulled..
 - It is interesting to see that the “diversity of cultural, ethnic and religious factors” are among the elements taken into account;
 - Final version of the directive: it is up to the Member States to make sure that all workers have 24 hours of rest per week – but the text says nothing more on the day concerned: Directive 2003/88/EC concerning certain aspects of the organisation of working time, Article 5: “Member States shall take the measures necessary to ensure that, per each seven-day period, every worker is entitled to a minimum uninterrupted rest period of 24 hours plus the 11 hours' daily rest referred to in Article 3.”

Reasonable accommodation: Why?

- Article 5 of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation: Article 5: Reasonable accommodation for disabled persons: “In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.”
 - Cf. USA, Civil Rights Act 1964: obligation of reasonable accommodation (up to “undue hardship”) also comes into play in religious matters (e.g. Jewish employee of TWA transferred to a new position where his lack of experience made any accommodation on weekly rest days impossible) *Trans World Airlines, Inc. v Hardison*, 432 U.S. 63 (1977)

Reasonable accommodation: legal framework

Article 4§2b) of Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation: b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice is liable to affect adversely a person or persons to whom any of the grounds referred to in Article 1 applies, unless:

- i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving it are appropriate and necessary; or
- ii) As regards persons with a particular disability, the employer or any person or organization to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate the disadvantage entailed by such provision, criterion or practice.”

From the indirect discrimination to reasonable accommodation

- CJEU, 27 October 1976, C-130/75: A British national submitted an application for an open competition for recruitment of linguistic experts for the EU. When she received the notification of the dates of one of the tests, she informed the Council that the date posed a problem for her because it coincided with a Jewish holiday (Shavuot). She asked for an alternative date but was refused. She took her case to the European Court of Justice, and invoked the violation of the Status of EU civil servants, which prohibits discrimination on the basis of sex, race or beliefs, and Articles 9 and 14 of the European Court of Human Rights. The Court rejected her application: “If it is desirable that an appointing authority informs itself in a general way of dates which might be unsuitable for religious reasons, and seeks to avoid fixing such dates for tests, nevertheless, for the reasons indicated above, neither the Staff Regulations nor the fundamental rights already referred to can be considered as imposing on the appointing authority a duty to avoid a conflict with a religious requirement of which the authority has not been informed.” In the case at hand, in fact, all the candidates had been informed of the date of the test at the time when the petitioner referred the conflict to the Council; the Court considers that it is up to the Council’s discretion not to organize a new test on another date.
- References: Alidadi, K. (2012), ‘Reasonable Accommodations for Religion and Belief: Adding Value to Article 9 ECHR and the European Union’s Anti-Discrimination Approach to Employment?’, *European Law Review*, vol. 6, no. 37, p. 693; Bribosia, E., Ringelheim, J. (2009), ‘Aménager la diversité: le droit de l’égalité face à la pluralité religieuse’, *Revue trimestrielle de droit europ.*, no. 78, p. 319; Vickers, L. (2006), *Religion and Belief Discrimination in Employment – the EU law*, European Commission, p. 22.

Towards reasonable accommodation for religion?

Groupe France Télécom - Orange**Aménagements des horaires**

Orange accorde très largement des Autorisations Spéciales d'Absence rémunérées pour tenir compte des souhaits de pratique religieuse lors de fêtes non fériées quand les nécessités de service le permettent.

Par ailleurs, lors de jeûnes traditionnels, les managers d'Orange ont une approche souple de l'organisation de l'activité pour tenir compte de la fatigue générée : les salariés concernés compensant ultérieurement les aménagements proposés.

Article L. 1321-2-1 Labour Code:

“The Works Rules may contain provisions that enshrine the principle of neutrality and restrict the outward display of convictions of employees, if such restrictions are justified by the exercise of other fundamental freedoms and rights or by the need for the proper function of the company, and if they are proportional to the intended purpose.”

Les interdictions alimentaires

- Ce que l'entreprise peut envisager de faire :
 - prendre en compte les contraintes alimentaires liées aux différentes religions dans leurs cantines et restaurants pour les salariés
- Ce que l'entreprise ne peut pas accepter de la part d'un employé :
 - quand le salarié refuse de s'asseoir à une table collective qui ne fournirait pas une alimentation conforme aux obligations religieuses
 - quand le salarié refuse d'être à côté de quelqu'un qui a consommé un animal qui n'est pas sacré
 - quand le salarié refuse certaines tâches qui figurent pourtant dans ses attributions (par exemple, un salarié responsable de la manutention qui refuse de manipuler certains aliments)

Les pratiques vestimentaires

- Ce que l'entreprise peut envisager de faire :
 - proposer des alternatives d'adaptation d'un signe religieux dans la situation où il peut y avoir la volonté de créer une image collective
- Ce que l'entreprise ne peut pas accepter de la part d'un employé :
 - quand le salarié veut porter des signes religieux qui peuvent entraîner des risques de sécurité et d'hygiène

PSA Peugeot Citroën**Mesures ponctuelles**

Etant donné la présence forte de communautés religieuses (ex : musulmans...) sur certains sites industriels du Groupe, des mesures ponctuelles sont prises pour garantir la prise en compte de la diversité religieuse.

Elles s'articulent autour de quatre axes principaux :

- mise à disposition le cas échéant d'un lieu de culte (pour la prière des musulmans pratiquants)
- aménagement des pauses en respectant autant que possible le programme de production
- sensibilisation des managers (consigne de non-refus d'un jour de congé pour une fête religieuse, session de formation "manager la diversité"...)
- vigilance apportée sur les produits alimentaires (sandwichs...) dans les distributeurs automatiques afin de proposer une gamme de choix suffisante pour respecter les interdictions alimentaires de certaines religions.

Accommodation: possible, but not mandatory; (source: Corporate Social Responsibility Observatory)

- **Can the policy of religious, philosophical and political neutrality constitute indirect discrimination?**
- 37 As regards, in the first place, the condition relating to the existence of a legitimate aim, it should be stated that 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.
- 38 An employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers.
- 39 An interpretation to the effect that the pursuit of that aim allows, within certain limits, a restriction to be imposed on the freedom of religion is moreover, borne out by the case-law of the European Court of Human Rights in relation to Article 9 of the ECHR (judgment of the ECtHR of 15 January 2013, *Eweida and Others v. United Kingdom*, CE:ECHR:2013:0115JUD004842010, paragraph 94).

CJEU, GC, 14 march 2017 Achbita, C-157/15

- 40 As regards, in the second place, the appropriateness of an internal rule such as that at issue in the main proceedings, it must be held that the fact that workers are prohibited from visibly wearing signs of political, philosophical or religious beliefs is appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that that policy is genuinely pursued in a consistent and systematic manner (see, to that effect, judgments of 10 March 2009, *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 55, and of 12 January 2010, *Petersen*, C-341/08, EU:C:2010:4, paragraph 53)
- 41 In that respect, it is for the referring court to ascertain whether G4S had, prior to Ms Achbita's dismissal, established 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.
- 42 As regards, in the third place, the question whether the prohibition at issue in the main proceedings was necessary, it must be determined whether the prohibition is limited to what is strictly necessary. In the present case, what must be ascertained is whether the prohibition on the visible wearing of any sign or clothing capable of being associated with a religious faith or a political or philosophical belief covers only G4S workers who interact with customers. If that is the case, the prohibition must be considered strictly necessary for the purpose of achieving the aim pursued.
- 43 In the present case, so far as concerns the refusal of a worker such as Ms Achbita to give up wearing an Islamic headscarf when carrying out her professional duties for G4S customers, it is for the referring court to ascertain whether, taking into account the inherent constraints to which the undertaking is subject, and without G4S being required to take on an additional burden, it would have been possible for G4S, faced with such a refusal, to offer her a post not involving any visual contact with those customers, instead of dismissing her. It is for the referring court, having regard to all the material in the file, to take into account the interests involved in the case and to limit the restrictions on the freedoms concerned to what is strictly necessary.

CJEU, GC, 14 March 2017 Achbita, C-157/15

- EComHR, *X c. RU*, 12 March 1981, n°8160/78: the applicant accepted the teaching commitments mentioned in the contract of his own free will; it is therefore on account of this contract that he cannot travel and attend Friday prayers at the same time
- EComHR, 9 April 1997, *Stedman v UK*, n°29107/95: A woman employed in a travel agency was required to work on certain Sundays as part of a rotation system. After a certain time, she informed her employer that as a Christian, she was not prepared to work on Sunday; but her employer's response was to amend her contract so as to make Sunday a normal working day according to the rotation system, without extra pay. Here once again, the Commission simply notes that 'the applicant was dismissed for failing to agree to work certain hours rather than her religious belief'.
- ECHR, 13 April 2006, *Kosteski v Yugoslavia*, n°55170/00 : 'there is no right as such under article 9 to have leave from work for particular religious holidays'. In a general manner, the Court defers to the assessment of the employers when it comes to the proper running of the company

ECHR: of the freedom to resign owing to the proportionality based assessment

- ECHR, 15 Jan. 2013, *Eweida and others vs UK*, no. 4820/10, 59842/10.

ECHR: Of the freedom to resign owing to the proportionality based assessment
