

Discrimination based upon religion : the approach of the CJEU

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PPT Centre Model - Version February 2014

FOCUS : Freedom of religion vs Discrimination based on religion or belief

- Freedom of religion at work
 - a) Employee works in a company that claims neutrality
 - b) Employee works in a company that relies on the religious basis of the organization
- Case law point to a tension between the prism of discrimination vs. freedom of religion, or the tension between the ECHR and Directive 2000/78.
- Between 2017 and 2018, the Court of Justice ruled for the first time on the scope of the prohibition of discrimination on the basis of religion and belief in 4 case positions:
 - a) Achbita (B) Micropole) F : Hypothesis A
 - b) Egenberger (D) and JQ : Hypothesis B**
- In 2019 : two particular issues of State legislation versus non discrimination :
 - a) Can statutory law with regard paid holiday discriminate on the basis of religion? (Cresco : Austria)
 - b) [Can a State(Greek) prohibit recognition of a lawyer (*avocat*) recognised as such in Cyprus on the basis of the fact that he is a monk? (Directive 98/5) (Monachos Eirinaios : Greece)]

Menu

- *In Liminis*
- *Pro Memoria*
- *Tendenzschutz*
- *Paid Holidays*
- *The lawyer-monk*

In liminis

- Religious freedom of expression is affected by two European instruments, two legal orders and two "Supreme Courts" (*due prime donne*).

Directive 2000/78 (prohibition of discrimination on grounds of religion or belief)

Artikel 9 ECHR (freedom of thought, conscience and religion and the freedom to manifest one's religion or beliefs)

In liminis

- Do both legal orders have the same view of the relation between the individual and the collectivity?
- Do both legal orders have a similar view of the *margin of appreciation* that States enjoy to legitimize restrictions and discriminations?

In liminis

- How to deal with divergences, contradictions between legal orders?

(a) The Luxembourg *Prima donna* has blocked the constitutional obligation (Article 6 TEU) to accede to the ECHR

(b) Article 52 (3) CFREU imposes dialogue

(c) Directive 2000/78 is a minimum Directive (Article 8)

d) Article 53 ECHR Safeguard for existing human rights .

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.

(e) Article 53 CFREU :

Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions

Pro Memoria : A French case A Belgian history

Micropole(F)

-private company consultancy
(advice-engineering-training)

working time substantially in back
office, occasionally with clients

-contract from June 2008 to July
2009

G4SSecure Solutions (B)

-private company providing
reception services in other
companies

working time essential for clients,
marginal in company

-contract from February 2003 to
June 2006

A French case A Belgian story

-Asma has always worn a headscarf in
the company, but drops it off at clients.

-At a certain point Asma refuses to
cover this canvas.

-Asma is dismissed without notice or
indemnity in lieu of notice

-Asma receives final severance pay, but
no compensation for discrimination

-Samira never wore a headscarf. If she
expresses the wish, the employer
refuses and the work regulations are
quickly amended.

-Samira is on sick leave

-Samira is dismissed with severance pay
(3 months)

-Samira does not receive any
compensation for abuse of dismissal or
compensation for discrimination,

Questions referred

- 'Must Article 4(1) of Directive 2000/78 be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?'
- 'Should Article 2(2)(a) of Directive 2000/78 be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?'

→

By its question, the referring court asks, in essence, whether Article 4(1) of Directive 2000/78 must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have that employer's services provided by a worker wearing an Islamic headscarf constitutes a genuine and determining occupational requirement within the meaning of that provision.

→By its question, the referring court asks, in essence, whether Article 2(2)(a) of Directive 2000/78 must be interpreted as meaning that the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking imposing a blanket ban on the visible wearing of any political, philosophical or religious sign in the workplace, constitutes direct discrimination that is prohibited by that directive.

Answers in Micropole

- **Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.**

Luxembourg and Strasbourg

- The dialogue with Strasbourg is intellectually incorrect
- the company's image is of a different order from freedom of religion
- discrimination based on expression is **direct** discrimination: people in different situations, treating differently
- reasonable adjustments can still constitute violations
- The ECJ ignores the idea of *prescribed by law*.
- (*Disclaimer* : There are no client *vulnerability* issues in the ECJ headscarf cases).

The French Court of Cassation

- Cass soc (fr), 22 November 2017
- For obvious reasons, the Court of Appeal has ignored the ruling: direct discrimination and no essential occupational requirements.
- Court interprets judgment Belgian case as the requirement of an *internal regulation* (!)
- *Baby Loup* overruled?

Can private companies invoke neutrality as an **essential professional requirement**?

Since issue is direct discrimination, open justification is NOT sufficient

The Belgian Court of Cassation

- Cass 9 October 2017
- Cassation does not constitute insubordination against the CJEU , even though the judgment of the Labour Court appears to comply with the directive in a number of *respects*.
- Test of abusive dismissal and test of discrimination not separate
- Subjective attitude of employer not relevant

Missa est

- Freedom of religion is a gift of the *moderate* Enlightenment (active pluralism, diversity)
- Freedom of religion also protects those who change religious beliefs, "lose" them or have strong liberal beliefs.
- Legitimate Borders : Prosyletism, social pressure of believers against non-believers, refusal to perform contractually stipulated work.
- Strasbourg and Luxembourg diverge

Egenberger

Egenberger

-Protestant Work for Diakonia and Development looks expert in 2012 in the field of race discrimination

-Vera Egenberger is a candidate, but not "ecclesiastical" herself

-EWDE does not invite her for this reason

-Is this direct discrimination based on religion justified *in this case*?

IR

- IR is head of internal medicine in a Catholic hospital
- IR married ecclesiastically, his wife left him, they divorce and in 2008 after the divorce he enters into a 'civil' marriage.
- IR is dismissed for this second marriage, as the church marriage was neither void nor dissolved:

The dismissal was based on the consideration that, according to the internal rules of the Roman Catholic Church in Germany (*the Grundordnung des kirchlichen Dienstes im Rahmen kirchlicher Arbeitsverhältnisse*), Catholic workers should conform in their personal lives to Catholic ethics, whereas non-Catholic workers were only bound to uphold the truths and values of the gospel.

- Is this dismissal discriminatory? IR claims that a Protestant would not have been dismissed *mutatis mutandis*

Differences between Egenberger and IR

- In *Egenberger*, an 'non believer' is discriminated against
- In *IR v. JQ*, a 'Catholic' is discriminated against by a Catholic employer in relation to his Protestant or e.g. non-believing counterpart.
- The hospital is open to diversity and takes this discontinuity into account in the fulfilment of the duty of loyalty.

The German Tendenzschutz

- WeimarVerfassung (Article 137):

(3) Each religious community shall order and administer its affairs independently within the limits of the law applicable to all. It confers its offices without the participation of the State or the bourgeois community.

-Church associations decide almost sovereignly whether membership of a church is required for a particular position.

-The Bundesverfassungsgericht held that judicial review was extremely marginal

The European Tendenzschutz

Article 4 (1) Directive 2000/ 601078

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, 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 (2) 2000-08208

- 2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, 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. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and 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 public or private 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.

The 'European' Tendenzschutz

- The Framework Directive does not mention the proportionality test

- The Framework Directive distinguishes between

an genuine and **determining** occupational requirement, *and*

Religion as an essential, legitimate and justified occupational requirement given the organisation's basis

- *In both cases :*

by the nature of the (particular) professional activities concerned or the context in which they are carried out

But Tendenzschutz: given the basis and no proportionality

The Court of Justice

- The Court of Justice gives priority to access to the national courts: *access to Justice (cf. Article 47 of the EC Treaty)* ----- *Karoly Nagy v Hungary* (14 September 2017) , ECHR
- The Court closely links the legitimacy test to the nature and context of the activity: objective tests, less the subjective belief of the person (cf. IR).
 - a) No cooperation with the definition of the basis, no proclamation task, no representative task (Egenberger)
 - b) In the case of IR, the role is to provide advise and medical care to the internal medicine department.
- The Court states that the principle of proportionality is a general principle of EU law and must be taken into account in the review.
- The Court suggests that it is unclear how a differentiated application is compatible with that objective approach and raises questions as to whether consent to a particular marital morality may be relevant.
- National courts must interpret in accordance with the directive or DO NOT apply national law in this case.

Paid Holidays

- *Cresco Investigation GmbH v Markus Achatzi* deals with the fact that Achatzi has missed a bonus of 109,9 € for having worked on a Good Friday, since he does not belong to one of the christian denominations listed in Article 7 ARG
- Achatzi does not seek to have such a holiday for religious purposes, but he has the right to suspend his work on an unpaid basis
- The EU Directive 2000/78 cannot as such be applied in such a horizontal situation

Paid Holidays (Preliminary Questions)

- The Court paraphrases three questions as such : Does the Austrian legislation constitute direct discrimination based upon religion ?
- Fourth Question boils down to the question whether the worker is entitled to the requested bonus, despite the discriminatory rules

Paid Holidays (CJEU)

- In liminis : Article 17 TFEU cannot be used to declare that the CJEU would lack competence
- The Austrian legislation does constitute direct discrimination
- This direct discrimination cannot be justified
 - a) Neither on the basis of Article 2 § 5
 - b) Neither on the basis of Article 7 § 1 Directive 2000/78
- Article 21 CFREU as a general principle of EU law can serve as a catalyst to ensure directly in horizontal relations the principle of non discrimination
- Discrimination needs to be restored *in melius* in absence of a statutory reform