



ERA- WEBINAR - 25-6-2021

Applying EU ADL

**Religious discrimination
At the work place**

Prof. D. Cuypers
Universiteit Antwerpen



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

Universiteit Antwerpen

1

1



OVERVIEW

I. Introduction

Political debate, Judiciary: head scarf

II. Religion and LL

Horizontal effect

Perceptions

III. Religion and the ECHR

ECHR, What is religion ?,

Is religion different ? Sincerity test ?

Religious employers- Religious employees

Universiteit Antwerpen

2

2



IV. EU-Law

Text, Relationship ECHR-EU-Law

Religious employers

Head scarf: Achbita-case (B)

Bougnaoui-case (F)

Follow up cases: cass. x appeal courts

Pending C-341/18 (Germany)

V. Final Remarks

Reasonable accommodation

Intersectionality

Some optimism



1. INTRODUCTION

Belgium, France, The Netherlands, Germany = legal debate
= political debate (Head scarf in schools, Burqah)

M. Nussbaum: New religious intolerance (2013)

Minority rights require action from the state:
restore equality by reasonable accommodation

Integration= citizenship (!?)

Judiciary: uneasiness about role to decide about religion

A.G. Kokott (3): *"Ultimately, the legal issues surrounding the Islamic headscarf are symbolic of the more fundamental question of how much difference and diversity an open and pluralistic European society must tolerate within its borders and, conversely, how much assimilation it is permitted to require from certain minorities"*



2. Religion/belief and LL: not a new problem

Religion and human rights !

European heritage = religious conflicts (Grotius: 1583-1645)

ECHR: 1950= after WW II - Art. 9 ECHR

International treaties 1960s: Fundamental rights of migrant workers to observe religious duties. Direct effect ? No.

It does not concern only muslim migrants !

Jewish religion (kippah, sjeitel), Sikh (turban),
Jehova witnesses, fundamentalist Christians (crosses)
(ECtHR, Eweida a.o.)

ECtHR Thlimmenos v. Greece (2000)
(conscience objections)



2. Religion: from eclipse to crescent moon

Growing opinion: religion becomes less relevant in society
(Religion= forum internum)

What about traditional holidays ? Belgian Constitutional Court:
many holidays may have an historical religious background, but
that does not matter: the purpose has changed: sports, family,
recreation, freedom of legislator to fix collective free days off...

Cf. ECtHR (Lautsi-case: crucifixes: mere furniture ?)

But extra payment on Good Friday for some
christians=discrimination ! (ECJ 22/01/2019, C-193/17, Cresco)

Integration and right to be different//notion of "identity"

Constitutional provisions from Member States: "laïcité" (Fr.)

Margin of appreciation of Member States (ECtHR)

v. "National identity" Art. 4(2) TFEU



Horizontal effect of FR in LL

Labour law= conflicting interests:

Semi-public sphere

Profit making v. personal ambitions

Loyalty is required, but no fiduciary relationship

Employment= inherently a limitation on personal rights and freedoms: liberty, privacy, freedom of expression, religion, competition (secrets, IP)

Horizontalisation of FR (cases ECtHR)

-Indirect effect: interpretation of open norms

“summary dismissal- misconduct”, “unfair dismissal”

-Direct effect (less: judges are prudent)

What about the margin of appreciation of the employer ?

What is a functional dress code within the company ?

Religion//other FR: privacy (new technologies), freedom of expression (whistleblowers)



3. Freedom of religion as a fundamental right- ECHR

3.1. Sources

3.2. What is religion ?

3.3. Religion as a different ground

3.4. Restrictions at the work place

3.5. Religious employers

3.6. Religious employees



Freedom of religion as a fundamental right

Art. 9 ECHR- 1950

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.

Traditionally: little room for religious minorities on the work floor

Forum internum : not practical ! "Lived religion= practices"

Forum externum: finding ways to accommodate

Universiteit Antwerpen

9

9



Freedom of religion as a fundamental right

Art. 14 ECHR- 1950

*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.'*

Protocol XII-2000 (only 10 ratifications- EU Member States)
*The enjoyment of **any right** set forth by law 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.'*

Universiteit Antwerpen

10

10



3.2. What is religion/belief ?

Difficulty in defining the undefined...

Pitfall: deciding about religious questions: "*the State is in no position to be, nor should it become, the arbiter of religious dogma*" (Canada, Supreme Court, 2004)

Not everything falls under the scope of religion !

Religious manifestations v. religiously motivated practices

ECtHR Pichon and Sajous v. France (2001)

(Farmacists refusing to sell contraceptives)

ECtHR Eweida (2013): (cross) more flexible approach

Analogy: Conscience objections ? What about pacifists, vegetarians, human rights activists, unionists ?

Art. 9: conscience, beliefs // religion

Universiteit Antwerpen

11

11



Sincerity-test ?!

Serious problem: abuse of religious exception ?

(Church of the flying spaghetti-monster, Church of 4 Sundays)

Courts may verify "sincerity" ?!

What test ? (Sadurski, 1990)

1° conformity with traditions and prescriptions

2° congruence between belief and actions

3° willingness to undertake duties and burdens

ECtHR: Kosteski v. FYRM (2006): holidays

However: cf. ECtHR: Eweida a.o. (2013): more subjective approach

Sincerity: ECtHR N° 49972/16: Dyagilev v. Russia (2020): conscientious objector

Universiteit Antwerpen

12

12



3.3. Religion as a different discrimination ground

1° Discrimination grounds: sex, age, disability, sexual orientation, race= **immutable** physical features or personal characteristics (AG Kokott)

Religion/belief= **Subjective** decision or conviction ?

Balancing fundamental rights/freedoms, comp. "privacy"

2° Reasonable accommodation

Dir. 2000/78: only for disability

A "stolen" concept ? Cf. Canada, USA !

(USA: Amendment Civil Rights Act: 1964-1972)

(Canada: Supreme Court- 1985)

Reasonable accommodation=central concept of discrimination law= proportionality test

Universiteit Antwerpen

13

13



3.4. Restrictions: Legitimate aim

= Protection of other rights and freedoms
(= balancing act)

Most of fundamental rights are explicit
(privacy, association, equality)

Right of the employer to conduct his business ?= FR ?

Not in ECHR but Protocol n° I (property)

In most national constitutions

Strong in EU- law: Economic liberties !

E.g. TFEU: Art. 49: "*The freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms*"

E.g. Art. 16 CFREU: "*The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.*"

Universiteit Antwerpen

14

14



3.5. Religion and belief of the employers

(Tendenzbetriebe- Germany !)

- Obst: ECtHR 23-09-2010: Staff member: OK//Art. 8 ECHR
- Schüth: ECtHR, 23-2010: Organ player: Not OK//Art. 8 ECHR
- Siebenhaar, ECtHr, 3-2-2011, Kindergarten teacher:
OK// Art. 9 ECHR (proselytism)
- Martinez: ECtHR 7-5-2011 + Gr.Ch.ECtHR 12-06-2014:
Catholic religion teacher (8 v. 7 !) // Art. 9, 11, Quid art. 8
ECHR ? Dissenting opinions ! See merits of the case !
Did he seek publicity ? Criteria for proportionality test
- Yilmaz v. Turkey: ECtHR 2-6-19: Religion- Teacher criteria
headscarf of spouse, student arrest



3.6. Religious employees

Employees – Religious symbols and convictions

4 joint cases: Christians !

ECtHR 15-01-2013

- 1° Eweida
- 2° Chaplin
- 3° Ladele
- 4° McFarlane



Ladele en McFarlane what is in the job description ?

- 3° Ladele: Registrar- Londen-Islington- religious objections v. same sex relationships
 - Unilateral modification of labour conditions
 - Reasonable accommodation
 - Dismissal= harsh consequences: ECtHR: No violations
- 4° McFarlane: sex therapist- religious objections v. same sex relationships
 - Unilateral modification of labour conditions ?
 - Reasonable accommodation
 - Dismissal= harsh consequences: Unanimously
 - Mission statement of association= duty of the employee



Eweida en Chaplin not all crosses are equal

- 1° Eweida: Coptic christian, airhostess BA,
 - small cross on necklace: under/above uniform
 - Lab.Trib.: no religious obligation- individual expression
 - ECtHR: x art. 9: disproportionate (discrete, hesitation of BA)
- 2° Chaplin: nurse NHS, cross on necklace
 - reasonable accommodation for other religions
 - alternative employment
 - Medical reasons: //art 9
- Remark: collective relations and negotiation ?
 - Eweida: after v. Chaplin: before
 - D.Cuypers: relevance of collective relations for proportionality test: (finding justification)



4. EU-Law- Sources

Directive 2000/78: Art. 1,
Limited to employment: Art. 3
(goods and services: only proposal)

Art. 10 CFR- EU: 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.

Universiteit Antwerpen

19

19



4. EU-law

4.2. Relationship ECHR- EU law

Interaction: (Interpretation in the light of...)

But only: employment and occupation !

Complementary relationship (Vickers)

but sometimes: tension

ECHR= minimum, EU-law may provide more//less protection ?

Criteria for proportionality test = relevant for ECJ

EU-Law: no **margin of appreciation** ! DC: really ?

There is a margin of appreciation of the employer/undertaking !

Compare: A.G. Kokott v. Sharpston

= Lesser ground in hierarchy ?

No, but inherently more limitations possible

Religion= different, as is disability, age....

Universiteit Antwerpen

20

20



4.3. EU-law Religious employers

Religious employers: Art. 4.2. Dir 2000/78
(collective dimension of religion)

C-414/16 Germany

Egenberger v. Evangelisches Werk für Diakonie und
Entwicklung

Can an employer (church) determine (by himself) the religious
nature of the work ?

If not: is the German AGG still applicable ?

If not: what are the requirements in art. 4.2. ?



4.4. Headscarf in EU-law The opinions of the AG

Two cases: 14th March 2017 + two different opinions AG

C-157/15, Achbita v. G4S, Belgian case, AG Kokott 31.5.2016

Labour Court Antwerp 23.11.2011, Belg.Cass. 9.3.2015

C-188/15, Bougnaoui, French case, AG Sharpston 13.7.2016

Fr. Cass. 24.4.2015

Difference ? Yes, but also: different questions, different facts !

Difference= margin of appreciation: how far can the employer
limit FR ?



4.5. C-157/15, Achbita v. G4S, Belgian case

Facts:

2003: Employment contract

G4S: reception service

Unwritten rule: no religious signs

2006: wish to wear the veil

Refusal – sickness leave –

Works council: confirmation of work rules: no religious signs

Dismissal

Labour tribunal + Labour Court: no discrimination

Cass: Is the refusal to wear the veil direct discrimination ?

Universiteit Antwerpen

23

23



C-157/15, Achbita v. G4S, (Belgium) AG Kokott 31.5.2016

Ban on headscarf= **direct discrimination** ?

AG: No (opinion 46 e.f.)

No discrimination between religions !? (ECJ 22/01/2019, C-193/17)

National identity does not therefore limit the scope of the Directive as such, but must be duly taken into account in the **interpretation** of the principle of equal treatment which it contains and of the grounds of justification for any differences of treatment. Moreover, even France acknowledged, at the hearing before the Court, that such an approach is a viable way of preserving national identity. (32)

Is it religion ? Sincere belief is enough: no discussion about religious necessities (34-38)

Universiteit Antwerpen

24

24



C-157/15, Achbita v. G4S, (Belgium)
AG Kokott 31.5.2016

Genuine and determining occupational requirement ?

X Art. 4 (1): not necessarily in the form of laws and decrees
even by employer / works councils

Restrictive interpretation

But: employer "a degree of discretion" (AG N° 81), so YES !
(even on the basis of unwritten workrules !) (Sic)

Objective and proportional

Dress code=corporate identity=legitimate aim

Consumer preference ? Cautious, but not irrelevant

Policy of neutrality is absolutely crucial

Proportionality test

Universiteit Antwerpen

25

25



C-157/15, Achbita v. G4S, (Belgium)
AG Kokott 31.5.2016

Proportionality test

- ***Appropriate***

Conflict between manifestation and company policy

Suitable alternatives have not been identified during the
proceedings

- ***No undue prejudice***

manifestation of religion can be moderated

Dress codes, prominent role or position, contact with
customers, neutrality policy, does not affect other protected
grounds, equal treatment

- ***Rights and freedom of the employee***

OK, but must be balanced with the employer's "freedom to
conduct a business" Art. 16 CFR-EU

Universiteit Antwerpen

26

26



4.6. C-188/15, Bougnaoui, French case

AG Sharpston 13.7.2016

Difference between public and private sector ?

Yes ! Case is limited to private sector !

Direct or indirect discrimination ?

"genuine and determining occupational requirement"

Art. 4 Dir. 2000/78

AG: No, very restrictive framing, "in very limited circumstances" Not for a design engineer !

It may also be regarded as indirect discrimination

Dress code = neutral

1° legitimate aim: freedom of employer: yes but must be balanced

2° proportional: case by case approach

5% contact with clients

Universiteit Antwerpen

27

27



4.7. The ECJ

Achbita C-157/15= basic case

No definition of religion: cf. art. 9 ECHR and case law ECtHR= Art. 10 ECFR

protects forum internum + forum externum

- No direct discrimination: "any religious sign"
- *"It is not evident from the material in the file available..."* (31)

Neutral clothing is not against particular religion

Critics: not so obvious//other case law

What is neutral clothing ?

Companies: must really impose this on other clothing (T-shirts)

Court narrows appreciation by national judges

Strict proportionality: really necessary !

Universiteit Antwerpen

28

28



Genuine and determining occupational requirement

C-188/15, Bougnaoui

- AG Sharpston: no banalisation of g.d.o.r
- ECJ: "Consumer preference" = not decisive ! (40)
- "...such a requirement only 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out'."



Follow up- cases again in appeal procedure

France + Belgium: final judgement =
different outcome

- Cour d'appel de Versailles: 18th April 2019:
dress code invalid- no consumer preference
nullity of dismissal: 8.378,78 € (compensation in lieu of notice)
+ 15.234 € (nullity compensation)
- Arbeidshof Gent: 12th Oktober 2020
no discrimination: neutral dresscode is allowed
Work rules are OK
Webblogs of lawyers: to soon



PENDING: C-341/19 C-804/18

- Questions Bundesarbeitsgericht
- 1° It is unclear if the cases of 14/03/2017 contain a general principle of the power of the employer to impose "neutrality"
- 2° a) Can the court apply the proportionality test ?
Can the ECHR (art. 9) and CFREU (art. 10) be applied ?
Compare to Egenberger (C-414/16: rights of the employer)?
- b) If not: can a court apply national constitutional principles if they grant more rights to the employee ?
- 3° Does EU-law leave a margin of appreciation of MS to apply domestic constitutional law if more favorable to the employee ?
- Still: no opinion A.G. ?! **Provisional AG RANTOS (??)**
Shadow opinion former AG SHARPSTON !
Strange !



5. Conclusion- remarks

- 1° Relevance of dress codes
- 2° Reasonable accommodation
- 3° Intersectionality
- 4° Some optimism



2° REASONABLE ACCOMMODATION ?

Reasonable accommodation for Achbita !

= Another job ?

Very strange ! NOT IN DIRECTIVE !

NOT IN BELGIAN LABOUR LAW !

Only for disability (but also problematic)

Reasonable accommodation as general principle for discrimination law ?

Poor solution ? Religion in the back office ?



3° INTERSECTIONALITY ?

Multiple discrimination or intersectionality ?

Missed opportunity by the ECJ ? (Schiek)

Particular disadvantage for women ?

Dress codes may be of more importance for women-

Disproportionate impact is possible

Skirts and high heels as dress code

But intersectionality is difficult to handle

+ Avoiding discussion: only for women ? suppression of women v. freedom for women to dress as they like ?

"Men continue dictating the bodyware of women, because they want to control the woman's body".

(Belg. President Women's Counsel)

Dress codes remain interesting item and open for discussion.



Belgium- Brussels

- European battle in “Brussels fields” ?
- Head scarf in public transport
 - (judgement of labour tribunal)
 - Political discussion
- Institute for women/man

governmental commissioner: public function?

What about the distinction public-private sector ?

Strong political debate: divisions between parties

Change political point of view by socialist party!



4° Challenges and hope for labour law

Optimism: it works, cf. HRM-Research in Belgium (ULB)

Relevance of work councils !

Cf. “TORFS SHOES”: work rules=ban→ no ban

=Compromising between FR: employer, workers, customers

Consumer preference: may also include preference of Muslim customers

New challenge: shortage of qualified workers: necessity for an “inclusive” labour market: regardless of age, orientation, origin, beliefs

Discrimination law= stick; Diversity= gain for everyone

Real drama: talent is being wasted (cf. Feryn-case: vacancy not filled) Statistics of unemployment in Belgium: terrible !

Important: moving from “minority trap” to “diversity management” (Marko)