


RELIGIOUS DISCRIMINATION AT THE WORKPLACE – RECENT CJEU CASE LAW

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Anti-Discrimination Law
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STRUCTURE

- Legal framework
- Islamic headscarf
- Religious ethos
- Religious public holidays
- Some open questions

LEGAL FRAMEWORK

- Treaty on the Functioning of the European Union
- Charter of Fundamental Rights of the EU
- Directive 2000/78/EC
- ECHR

3

ISLAMIC HEADSCARF

CASE C-157/15, SAMIRA ACHBITA, CENTRUM VOOR GELIJKHEID VAN KANSEN EN VOOR RACISMEBESTRIJDING V. G4S SECURE SOLUTIONS NV, GRAND CHAMBER JUDGMENT OF 14 MARCH 2017

- Reference by the Hof van Cassatie (Court of Cassation, Belgium)
- Ms Achbita was employed by G4S as a receptionist. Unwritten, but commonly known policy prohibiting the wearing of any religious, political or philosophical clothing or symbols at work.
- After 3 years of employment, in April 2006 the claimant announced that she, as a practising Muslim, was going start to wear her hijab (headscarf) at work. Management informed her that this would not be tolerated, due to G4S's policy of neutrality.
- Soon after, on 29 May, the G4S works council approved an amendment to the workplace regulations, prohibiting visible signs of political, philosophical or religious beliefs
- She was dismissed on 12 June, due to her wish to wear an Islamic headscarf.

4

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- Religion not defined in the Directive... CJEU referred to the ECHR Art. 9 and the CFREU Art. 10 to give a broad definition, incl. *forum internum* and *forum externum*
- No direct discrimination, as the rule applies to all employees in the same way... however, CJEU analysed indirect discrimination on its own motion
- Proportionality test: Neutrality policy accepted as legitimate aim, especially if limited to those workers who are required to come into contact with customers – reference to freedom to conduct a business, Art 16 CFREU and ECtHR's Eweida judgment
- Internal rule may be appropriate if genuinely pursued in a consistent and systematic manner
- The prohibition can be accepted as necessary if it covers only G4S workers who interact with customers. However, the referring court should ascertain if G4S could have offered a post without contact with customers (to limit restrictions to what is strictly necessary).

5

ISLAMIC HEADSCARF

CASE C-188/15, ASMA BOUGNAOUI, ASSOCIATION DE DÉFENSE DES DROITS DE L'HOMME (ADDH) V. MICROPOLE SA, GRAND CHAMBER JUDGMENT OF 14 MARCH 2017

- Reference from the Cour de cassation (Court of Cassation, France)
- Ms. Bougnaoui worked as a design engineer at the employer for over a year, wearing a headscarf. Prior to being hired, she was informed that the wearing of an Islamic headscarf might pose a problem when she was in contact with customers.
- A customer complained ('no veil next time'), following which she was asked not to wear a veil. She refused and was subsequently dismissed.
- Micropole referred to its principle of neutrality and the interests of the company
- Could a customer's request not to wear a headscarf be understood as a genuine and determining occupational requirement?

6

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- Definition of religion: same considerations as in Achbita
- If there was a company policy → reference to Achbita
- If no policy, just the wish of the customer, could it be a GDOR?
- GDOR related to religion only acceptable 'in very limited circumstances' and 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out' → no subjective considerations, such as willingness of the employer to take account of the particular wishes of the customer!

7

ISLAMIC HEADSCARF

JOINED CASES C-804/18 AND C-341/19, IX V WABE EV AND MH MÜLLER HANDELS GMBH V MJ, JUDGMENT OF THE COURT (GRAND CHAMBER) OF 15 JULY 2021

- Reference from Arbeitsgericht Hamburg (Labour Court, Hamburg, Germany) and Bundesarbeitsgericht (Federal Labour Court, Germany)
- In WABE, IX, working at a child daycare centre was suspended from her duties following her refusal to comply with a rule imposed by WABE prohibiting employees from wearing any visible political, philosophical or religious sign at the workplace when they are in contact with the children or their parents.
- IX worked at the company since 2014, started to wear the headscarf in 2016. The company rule was adopted in 2018. During the same period (June 2018), WABE required a female employee to remove a cross that she wore around her neck.
- IX referred to the rule directly targeting the wearing of the Islamic headscarf. She also referred to gender discrimination and discrimination on the basis of ethnic origin.

8

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JOINED CASES C-804/18 AND C-341/19, IX V WABE EV AND MH MÜLLER HANDELS GMBH V MJ, JUDGMENT OF THE COURT (GRAND CHAMBER) OF 15 JULY 2021 – CONTINUED

- In MH, MJ was working at the company operating a chain of drugstores in Germany since 2002. In 2014 she started wearing the Islamic veil. MH requested her to remove the veil and as she refused, she was transferred to another position within the company.
- In 2016, she was asked to remove the headscarf again and received instructions to refrain from wearing, conspicuous, large-sized political, philosophical or religious signs.
- MJ referred to her freedom of religion and claimed that MH's policy of neutrality cannot have unconditional priority over that.
- MH argued that neutrality is also necessary due to past conflicts between employees linked to such political, philosophical or religious signs.
- Questions relating to economic harm and to the relevance of prohibiting just large-sized signs

9

ISLAMIC HEADSCARF

JOINED CASES C-804/18 AND C-341/19, IX V WABE EV AND MH MÜLLER HANDELS GMBH V MJ, JUDGMENT OF THE COURT (GRAND CHAMBER) OF 15 JULY 2021 – CONTINUED II

- CJEU elaborated on the question of direct discrimination in WABE, finding that as long as the rule is applied in a general and undifferentiated way, there is no direct discrimination (c.f. also WABE's request to another employee to remove a cross)
- Gender discrimination not examined at all, as reference related to Dir 2000/78/EC
- Mostly affects women wearing Islamic headscarf: prima facie indirect discrimination
- Legitimate aim, appropriateness and necessity to be interpreted strictly
- Employer's policy of neutrality not enough, need to demonstrate genuine need and adverse consequences – ref. to Bougnaoui (no internal rule) and Feryn (alleged wish of customers)

10

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- The policy has to be genuinely pursued in a consistent and systematic manner (c.f. Achbita), limited to what is strictly necessary – consider freedom of religion, CFREU Art. 10(1)
- Prohibition only of large-sized signs: liable to constitute direct discrimination on the grounds of religion or belief (greater effect on people with beliefs which require the wearing of a large-sized sign, such as a head covering)
- When several fundamental rights are at issue, a fair balance has to be struck between them (freedom of religion and prohibition of discrimination vs freedom to conduct a business and right of parents re. their children's education)
- Margin of discretion left for MS, specific context can be taken into account

11

RELIGIOUS ETHOS

ARTICLE 4(2) OF THE EED

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.

12

RELIGIOUS ETHOS

CASE C-414/16, VERA EGENBERGER V EVANGELISCHES WERK FÜR DIAKONIE UND ENTWICKLUNG EV, JUDGMENT DELIVERED ON 17 APRIL 2018

- Reference from the Bundesarbeitsgericht (Federal Labour Court, Germany)
- Offer of fixed-term employment for a project for producing a parallel report on the UN CERD
- Church membership and identification with the diaconal mission were required. Ms. Egenberger was of no denomination → not invited to an interview.
- Evangelisches Werk referred to the churches' right of self-determination protected by the Constitution and German law and claimed that it represented a justified occupational requirement → Can churches themselves determine what constitutes a genuine, legitimate and justified occupational requirement?

13

RELIGIOUS ETHOS

CASE C-414/16, VERA EGENBERGER V EVANGELISCHES WERK FÜR DIAKONIE UND ENTWICKLUNG EV, JUDGMENT DELIVERED ON 17 APRIL 2018 - CONTINUED

- EU law (and in particular Art. 4(2) of the EED) would be deprived of its effect if in case of doubt the review of compliance would not be independent
- Right to non-discrimination and in particular Art. 9 (Defence of rights) and 10 (Burden of proof) of the EED and Art. 47 (Right to an effective remedy and to a fair trial) vs Art. 17 TFEU (status and autonomy of churches) and Art. 10 CFREU (freedom of religion) → Art 4(2) of the EED aims to strike a fair balance
- The church's assertion must be subject to effective judicial review
- The legitimacy of the ethos of the church should in principle not be subject to judicial review → the review should cover the occupational requirement in light of that ethos
- Need for the 'objectively verifiable existence of a direct link between the occupational requirement imposed by the employer and the activity concerned'

14

RELIGIOUS ETHOS

CASE C-414/16, VERA EGENBERGER V EVANGELISCHES WERK FÜR DIAKONIE UND ENTWICKLUNG EV, JUDGMENT DELIVERED ON 17 APRIL 2018 – CONTINUED II

- Genuine → requirement necessary due to the importance of the activity for the manifestation of the ethos
- Legitimate → requirement must be connected with the ethos
- Justified → requirement is necessary in light of the risk of causing harm to its ethos
- The requirement needs to be proportional as well
- If national law isn't in compliance with EU law, it has to be disapplied: the prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law + Art. 21 and 47 of the CFREU → horizontal direct effect

15

RELIGIOUS ETHOS

CASE C-68/17, IR V JQ, GRAND CHAMBER JUDGMENT OF 11 SEPTEMBER 2018

- Reference from the Bundesarbeitsgericht (Federal Labour Court)
- IR is a German limited liability company under the aegis of the Roman Catholic Church, inter alia operating hospitals
- JQ was a Catholic doctor in one of IR's hospitals. He separated from his first wife in 2005 and remarried in 2008. He was dismissed in 2009 due to the second marriage.
- JQ claimed discrimination as a Protestant or a person of no faith would not have had any consequences for employment.
- The CJEU clarified that IR may rely on Art. 4(2) of the EED as a private organisation, as long as its ethos is based on religion or belief.

16

RELIGIOUS ETHOS

CASE C-68/17, IR V JQ, GRAND CHAMBER JUDGMENT OF 11 SEPTEMBER 2018 –
CONTINUED

- The employer's decision must be open to effective judicial review (reference to Egenberger)
- The employer may rely on Art 4(2) second subparagraph ('to require individuals working for them to act in good faith and with loyalty to the organisation's ethos'). However, the criteria in Art 4(2) first subparagraph also apply ('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' + should not justify discrimination on another ground)
- Meaning of genuine, legitimate and justified – reference to Egenberger

17

RELIGIOUS ETHOS

CASE C-68/17, IR V JQ, GRAND CHAMBER JUDGMENT OF 11 SEPTEMBER 2018 –
CONTINUED II

- CJEU guidance: adherence to the Catholic notion of marriage does not appear to be necessary for the promotion of IR's ethos, bearing in mind the occupational activities carried out by JQ → for the referring court to determine, but potentially not a genuine requirement under Art. 4(2)
- If national law isn't in compliance with EU law, it has to be disapplied: similar arguments as in Egenberger (general principle of EU law + Art. 21 of the CFREU)

18

RELIGIOUS PUBLIC HOLIDAYS

CASE C-193/17, CRESCO INVESTIGATION GMBH V MARKUS ACHATZI, GRAND CHAMBER
JUDGMENT OF 22 JANUARY 2019

- Reference from the Oberster Gerichtshof (Supreme Court, Austria)
- Under Paragraph 7(3) of the ARG (Law on Rest Periods and Public Holidays), Good Friday is a paid public holiday for members of four specific churches. If a member of one of those churches does nevertheless work on that day, he is entitled to additional pay in respect of that public holiday.
- Mr Achatzi is not a member of any of the churches covered by the ARG and he worked on Good Friday, without extra pay.
- Does the 'the protection of the rights and freedoms of others' justify this measure?
- Could this be seen as a positive action measure?
- If the measure infringes EU law, should everyone be granted the public holiday? Or no one?

19

RELIGIOUS PUBLIC HOLIDAYS

CASE C-193/17, CRESCO INVESTIGATION GMBH V MARKUS ACHATZI, GRAND CHAMBER
JUDGMENT OF 22 JANUARY 2019 - CONTINUED

- Difference in treatment that is directly based on the religion of employees
- Comparable situation: the granting of the public holiday depends solely on formally belonging to a church, irrespective of the intention to celebrate the religious festival
- Thus, national legislation treats comparable situations differently based on religion
→ direct discrimination
- Art 2(5), 'the protection of the rights and freedoms of others': as an exception, has to be interpreted strictly. → the measure isn't necessary for the protection of freedom of religion of the persons concerned
- Art 7(1), intended to eliminate or reduce actual instances of inequality which may exist in society → the measures go beyond what is necessary, thus, not positive action

20

RELIGIOUS PUBLIC HOLIDAYS

CASE C-193/17, CRESCO INVESTIGATION GMBH V MARKUS ACHATZI, GRAND CHAMBER
JUDGMENT OF 22 JANUARY 2019 – CONTINUED II

- If national provisions cannot be interpreted in a manner consistent with EU law...
- Prohibition of all discrimination on grounds of religion or belief as a general principle of EU law → horizontal direct effect (reference to Art 21 of the CFREU)
- All employees should be granted the same advantages if they request prior permission to be absent and be entitled to public holiday pay if they have to work

21

SOME DIFFICULT QUESTIONS

- Indirect discrimination? 'Hidden' direct discrimination?
- Neutrality policy & freedom to conduct a business vs freedom of religion? (Eweida)
- Internal rules of employers?
- Customers' wishes (prejudices?) accepted as justification?
- Level of protection against discrimination based on religion or belief?
- Gender discrimination?
- Intersectionality?

22

