

## Religious discrimination in the workplace and CJEU case law regarding headscarves

Marie Mercat-Bruns  
CNAM/Sciences Po Law School  
ERA 19 June 2023



Funded under the "Citizens, Equality, Rights and Values (CERV) programme 2021-2027" of the European Commission

## Outline of the presentation

- 1) Introduction:
  - ECHR, CJEU and religion in the Member States
  - Religious freedom v. religious discrimination (different standards used)
- 2) The various cases on the headscarf at work: what are the facts?
- 3) The contours of religion as a prohibited criterion in employment: the headscarf as a religious symbol in CJEU case law
- 3) Direct discrimination in the workplace and the headscarf in the light of CJEU case law
- 4) Indirect discrimination at work and the headscarf in the light of CJEU case law
- 5) Developments in case law concerning the nature of the domestic rule of neutrality: what influence do the terms have on judicial review?
- 6) Developments in case law concerning the balancing of religious freedom and other fundamental rights
- 7) Conclusion: The complex relationship between direct and indirect discrimination, the accounts of claimants wearing a headscarf and the risk of intersectional discrimination

# 1) Introduction

---

- Complexity of European law and religious discrimination in the workplace: how can equality and freedom be reconciled? Individuals or groups?
- Different legal frameworks combine to protect religious practice as a fundamental right:
- The right to freedom of thought, conscience and religion: Article 9 ECHR and see also Opinion (2018) UN Human Rights Committee Int. Covenant. on Civil and Political Rights on the Babyloup case
- The EU framework (freedom and non-discrimination): EU Charter of Fundamental Rights (Art.10,21), Directive 2000/78
- Member States' constitutions reflect different traditions: for example, different perspectives in France and Germany?

# 2) The various cases on the headscarf at work: what are the facts?

---

- CJEU 14 March 2017 **Achbita** Case C-157/15: Dismissal of a Belgian employee wearing a headscarf in a security company which adopted a rule of religious, political and philosophical neutrality at work.
- CJEU 17 March 2017 **Bougnouli** Case C-188/15: Dismissal of an engineer following a complaint from a client of the company who did not want the services of this employee who was wearing a headscarf
- CJEU 15 Jul 2021 **MÜLLER** C-341/19: cashier/vendor wearing a headscarf in a shop (drugstore) who was ordered to remove her headscarf because of an internal rule of philosophical and religious neutrality prohibiting the wearing of conspicuous and large political, philosophical or religious signs.
- CJEU 15 Jul 2021 **WABE** C-804/18: special needs carer who receives warnings in a child day care center in Germany which has adopted a policy of political, religious and philosophical neutrality which prohibits any expression and any conspicuous sign.
- CJEU 13 Oct. 2022 **L.F.** C-344/20: Unsolicited application from a trainee wearing a headscarf to a company managing social housing. Unsolicited application not taken into consideration because during an interview L.F. indicated that she would refuse to remove her headscarf in order to comply with the neutrality policy. A few weeks later, she reapplied for a traineeship with S.C.R.L., proposing to wear a different type of head covering, which was refused on the grounds that no head covering was permitted, whether a cap, bonnet or scarf.

### 3) The contours of religion as a prohibited criterion in employment: the headscarf as a religious symbol in CJEU case law

- NO DEFINITION :
- 25 As regards the meaning of the term 'religion' in Article 1 of Directive 2000/78, it should be noted that the directive does not contain a definition.
- INDIVIDUAL OR GROUP :
- 26 Nevertheless, in the first recital in the preamble to Directive 2000/78, the EU legislature referred to the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 9, which provides that everyone has the right to freedom of thought, conscience and religion; this right includes freedom, either individually or in community with others and in public or private, to manifest his religion or beliefs in worship, teaching, practice and observance.
- REFERENCE TO THE CONSTITUTIONS, Art. 9 ECHR AND Art. 10 EU CHARTER
- 27 In the same recital, the European legislature also referred to the constitutional traditions common to the Member States as general principles of EU law. Among the rights resulting from these common traditions, which have been reaffirmed in the Charter of Fundamental Rights of the European Union, is the right to freedom of conscience and religion enshrined in Article 10(1) of the Charter. ...This right includes freedom to change religion or belief, and freedom, either individually or in community with others and in public or private, to manifest religion or belief in worship, teaching, practice and observance. As is clear from the explanations relating to the Charter of Fundamental Rights, the right guaranteed in Article 10(1) of the Charter corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope.
- SHOULD THE NOTION OF BELIEF AND MANIFESTATION/PRACTICE, PUBLIC/PRIVATE, SUBJECTIVE/OBJECTIVE, BE TAKEN INTO ACCOUNT?
- 28 In so far as the ECHR and, subsequently, the Charter use the term 'religion' in a broad sense which includes the freedom of individuals to manifest their religion, it must be assumed that the Union legislature intended to adopt the same approach when it adopted Directive 2000/78,
- The concept of 'religion' in Article 1 of the Directive must therefore be interpreted as covering both the **forum internum**, i.e. the fact of having a belief, and the **forum externum**, i.e. the manifestation of religious faith in public.

### 3) The contours of religion as a prohibited criterion in employment: the headscarf or other head covering as a religious sign in CJEU case law ("religion or belief" ground)

- However, as regards the contours of the prohibited ground of religion, in the more recent case of Belgium LF 2022
- Reminder: a candidate for a traineeship with a company that manages social housing was willing to wear another head covering instead of a headscarf, but the company refused all head coverings.
- the Court states that Article 1 of Directive 2000/78 (similar wording to Article 19 TFEU and Article 21 of the Charter) must be interpreted as meaning that the words 'religion or belief' contained therein constitute a single ground of **discrimination covering both religious beliefs and philosophical or spiritual convictions**.
- It points out in this respect that its case law shows that the ground of discrimination based on "religion or belief" must be **distinguished from that based on "political or any other opinion"**.
- Otherwise, the general framework of equal treatment in employment and occupation provided for by community law, in particular by Directive 2000/78, will be undermined [which would lead to the creation of sub-groups of workers (those with religious beliefs and those with other beliefs)].

### 3) Direct discrimination in the workplace and the headscarf in the light of CJEU case law (no exception for customer instruction)

---

- *EUCJ Bongnaoui* Case C-188/15
- Directive 2000/78: Direct discrimination :
- Article 2(2)(a): direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1
- **Direct discrimination may be justified only by reason of the nature of the particular occupational activities concerned or the nature of the employment or the context in which they are carried out;** such a characteristic constitutes a genuine and determining occupational requirement, **provided that the aim is legitimate and the requirement is proportionate.** Article 4(1)

### 3) Direct discrimination in the workplace and the headscarf in the light of CJEU case law (no exception for customer instruction)

---

- **Not a reason but a characteristic as an essential/genuine and determining professional requirement**
- 37 That being so, it should be borne in mind that the Court has held on a number of occasions that it derives from Article 4(1) of Directive 2000/78 that it is not the ground on which the difference in treatment is based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement (see Case C-229/08 Wolf [2010] ECR I-0000, paragraph 35).
- IN VERY LIMITED CIRCUMSTANCES
- 38 It should also be borne in mind that, in accordance with recital 23 in the preamble to Directive 2000/78, there are only very limited circumstances that a characteristic linked, in particular, to religion may constitute a genuine and determining occupational requirement.
- NATURE OF THE PROFESSION OR THE CONTEXT IN WHICH IT IS CARRIED OUT: DESIGN ENGINEER
- 39 It should also be pointed out that, according to the actual wording of Article 4(1) of Directive 2000/78, such a characteristic can constitute a requirement only " by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out ".
- OBJECTIVELY DETERMINED BY THE PROFESSION OR THE CONTEXT OF THE JOB, NO SUBJECTIVE CONSIDERATIONS, WILLINGNESS OF THE EMPLOYER TO TAKE ACCOUNT OF THE CUSTOMER'S WISHES
- 40 It follows from the foregoing that the concept of 'genuine and determining occupational requirement', within the meaning of that provision, refers to a requirement objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. **On the other hand, it cannot cover subjective considerations, such as the employer's wish to take account of the customer's particular wishes.**

#### 4) Indirect discrimination at work and the headscarf in the light of CJEU case law

---

- DIRECTIVE 2000/78 ARTICLE 2 :
- Indirect discrimination occurs where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:
  - (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary
- ECJ Achbita §34 an apparently neutral obligation in fact results in people adhering to a particular religion or belief being at a particular disadvantage

#### 4) Indirect discrimination at work and the headscarf in the light of CJEU case law

---

- EUCJ Achbita § 30
- In the present case, the internal rule at issue in the main proceedings refers to the wearing of visible signs of political, philosophical or religious convictions and therefore covers any manifestation of those convictions without distinction. Accordingly, that rule must be regarded as treating all employees of the undertaking in the same way by requiring them, in a general and indiscriminate manner, in particular, to wear neutral clothing, which excludes the wearing of such signs.

## 4) Indirect discrimination at work and the headscarf in the light of CJEU case law

- EUCJ Achbita § 35
- Under Article 2(2)(b)(i) of Directive 2000/78, however, such a difference in treatment does not constitute indirect discrimination if it is objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary within the meaning of Article 2(2)(b) of the Directive.
- 37 **As regards, first, the condition relating to the existence of a legitimate aim**, it should be made clear that the desire to display, in relations with customers in both the public and private sectors, a policy of political, philosophical or religious neutrality must be regarded as legitimate.
- **Image of neutrality justified by freedom of enterprise and only for workers in contact with customers**
- 38 An employer's desire to project **an image of neutrality towards customers is part of the freedom of enterprise** recognised in section 16 of the Charter and is, in principle, legitimate, in particular where the employer involves in the pursuit of that objective only those workers who are called upon to come into contact with the employer's customers.

## 4) Indirect discrimination at work and the headscarf in the light of CJEU case law

- **A coherent and systematic policy**
- 40 **Secondly, as regards the appropriateness** of a national rule such as that at issue in the main proceedings, it must be held that prohibiting employees from visibly displaying signs of their political, philosophical or religious convictions is appropriate for the purpose of ensuring the proper application of a policy of neutrality, provided that policy is genuinely pursued in a consistent and systematic manner.
- **A general, undifferentiated policy?**
- 41 In that regard, it is for the referring court to ascertain whether G4S had, prior to Ms Achbita's dismissal, introduced a general and indiscriminate policy prohibiting the visible wearing of signs of political, philosophical or religious convictions by members of its staff who come into contact with its customers.
- **A ban limited to what is strictly necessary**
- 42 **As regards the third question whether the prohibition at issue in the main proceedings was necessary**, it must be determined whether that prohibition is limited to what is strictly necessary. In the present case, it must be ascertained whether the prohibition on the visible wearing of any sign or clothing which might be associated with a religious denomination or with a political or philosophical belief is aimed solely at G4S employees who interact with customers. If this is the case, the ban must be considered strictly necessary to achieve the objective pursued.
- **Reasonable accommodation?**
- **Proportionality**...Possibility of offering a position that does not involve visual contact with customers
- 43 In the present case, as regards the refusal of a worker such as Ms Achbita to give up wearing the Islamic headscarf in the performance of her professional duties with G4S's customers, it is for the referring court to ascertain whether, having regard to the constraints inherent in the undertaking, and without G4S being required to assume 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.

## 5) Developments in case law concerning the nature of the domestic rule of neutrality: what influence do the terms have on judicial review?

---

- The CJEU has confirmed in subsequent cases (Luxembourg, 15 July 2021, judgment in joined cases C-804/18 WABE and MH Müller Handels and a more recent Belgian case, **2022 LF v. /SCRL**) that company internal rules which impose policies of neutrality with regard to political, religious and philosophical convictions do not constitute direct discrimination **even if, in the Belgian case 2022, the policy is more detailed and prohibits employees from manifesting, by words, by clothing or in any other way, their religious or philosophical convictions, whatever those convictions may be, if it applies to all employees in a general and indiscriminate manner.**
- According to the Court, since any person may have a religion or religious, philosophical or spiritual convictions, such a rule, **provided that it is applied in a general and undifferentiated manner**, does not establish a difference in treatment based on a criterion inseparably linked to religion or those convictions. This rules out a ban on neutrality limited to conspicuous and large signs.
- **The Court in Müller Handels** points out that such a limited prohibition is likely to have a greater effect on people with religious, philosophical or non-denominational beliefs which require the wearing of a large sign, such as a head covering.
- Thus, where the criterion of wearing conspicuous and large signs of the **above-mentioned beliefs is inseparably linked to one or more specific religions or beliefs**, prohibiting the wearing of such signs on the basis of this criterion will result in some workers being treated less favourably than others on the basis of their religion or belief, which would amount to **direct discrimination, which cannot be justified.**

## 5) Developments in case law concerning the nature of the domestic rule of neutrality: what influence do the terms have on judicial review?

---

- **A rule applying only to conspicuous religious symbols** may constitute direct discrimination (Müller, C-341/19 § 76 - 78)
- The CJEU considered that it would be difficult to justify limitations, in the name of neutrality, to conspicuous symbols alone: 'neutrality' can only be achieved if it applies to all signs.

## 5) Developments in case law concerning the nature of the domestic rule of neutrality: what influence do the terms have on judicial review?

- The CJEU has confirmed in all recent cases concerning headscarves (Wabe, Müller, LF), including in 2022, the need for the courts of the Member States to verify whether domestic rules on neutrality may constitute indirect discrimination:
- The Court states that an internal rule such as that applied within SCRL in the recent 2022 case or in the Wabe and Muller Handel cases may nevertheless constitute a difference in treatment indirectly based on religion or belief if it is established:
  - that the apparently neutral obligation which it encompasses in fact results in a particular disadvantage for persons adhering to a particular religion or belief.
- added that a difference in treatment would not constitute indirect discrimination if it was objectively justified by a legitimate aim and the means of achieving that aim were appropriate and necessary,
- LF § 40: the Court has also held that the mere desire of an employer to pursue a policy of neutrality, although constituting in itself a legitimate aim, is not sufficient, as such, to justify objectively a difference in treatment indirectly based on religion or belief, since the objective nature of such justification can be identified only where there is a genuine need on the part of that employer, which it is for him to demonstrate (also judgment of 15 July 2021, WABE and MH Müller Handel, C-804/18 and C-341/19, EU:C:2021:594, paragraph 64).
- Harmful economic effect to justify the customer neutrality rule?

## 6) Developments in case law concerning the balancing of religious freedom and other fundamental rights

- The Court confirmed that, when applying the proportionality test, for certain Member States with different constitutional traditions, it is possible to balance the freedom of enterprise that justifies the need for an internal neutrality rule against other freedoms such as religious freedom in Germany, for example.
- In the most recent Belgian case C-344/20 LF and confirming the Wabe Muller Handels case, the Court held that: national provisions protecting freedom of religion may be taken into account, as more favourable provisions, when examining the appropriateness of a difference of treatment indirectly based on religion or belief):
- where several fundamental rights and principles enshrined in the Treaties are at stake, compliance with the principle of proportionality shall be assessed in the light of the need to reconcile the requirements of the protection of the various rights and principles at stake, striking a fair balance between them.
- By leaving it up to the Member States and their courts to achieve this reconciliation, the European legislator has made it possible to take account of the specific context of each Member State and has left each Member State a margin of discretion to achieve this reconciliation.



## 6) Developments in case law concerning the balancing of religious freedom and other fundamental rights

- The CJEU has therefore confirmed that Directive 2000/78 and Article 16 of the Charter (freedom to conduct a business) do not preclude national rules which grant additional protection to freedom of religion or belief.
- In WABE, the Court left the national courts a margin of appreciation in assessing the proportionality of any restriction on religious symbols, in order to achieve the necessary reconciliation of the different rights and interests at stake (freedom of religion, freedom of enterprise).
- Any restriction on freedom of religion must be strictly necessary in the light of the national and constitutional standards of certain Member States, so that the national courts can strike a fair balance between rights using the proportionality test.
- In LF, however, the Court states in this regard that the margin of appreciation accorded to the Member States cannot go so far as to allow them or the national courts to **divide** one of the grounds of discrimination listed exhaustively in Article 1 of the Directive **into several grounds**, failing which the wording, context and purpose of that ground and **undermining the useful effect of the general framework** for equal treatment in employment and occupation established by Union law.

## Conclusion: the complex relationship between direct and indirect discrimination, the accounts of claimants and judicial review of intersectional discrimination

- The Achbita and Bougnaoui cases were landmark cases that enabled the courts of the Member States to better assess, in practice, the implementation of the right to non-discrimination in terms of religion in private companies (by showing the complex relationship between direct and indirect discrimination) with regard to headscarves in the light of companies that impose a policy of political, philosophical or religious neutrality.
- Despite the rather broad initial view of religion adopted by the Court in these two cases in interpreting Directive 2000/78, **intersectional discrimination against women workers wearing headscarves appears to continue to be the subject of national and European litigation.**
- See the book: *Interviews with the plaintiffs Bougnaoui and Babyloop (Les catégories dans leur genre: genèse, enjeux, productions, Mercat-Brauns, Lechevalier, Ricciardi TESEO 2022).*
- However, there is still hope for a more specific clarification. In the most recent Belgian case, LF v. SCRI, §59, the Court stated that
- 'the prohibition of discrimination laid down in Directive 2000/78 is not limited to differences in treatment between persons having a particular religion or belief and those who do not' (WABE and MH Müller Handel).
- **In other words, the existence of a single criterion, encompassing religion and beliefs, does not prevent comparisons between workers motivated by religious beliefs, on the one hand, and those motivated by other beliefs, on the other; nor does it prevent comparisons between workers motivated by different religious beliefs. Let's wait and see.**

