

The Expression of Religious Belief in Employment Relationships

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Applying EU Anti-Discrimination Law - ERA Seminar, Barcelona, 4-6 May 2016

Expression of Religious Beliefs in Employment

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin
- **Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation**
- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between women and men in the access to and supply of goods and services
- Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (COM(2008) 426, 2.7.2008)
- **Relevance of the general principle of equal treatment and of freedom of religion (Art. 9 ECHR, Art. 10 of the EU Charter of Fundamental Rights):** as a means of interpretation of the Employment Equality Directive and as a duty to be taken into account in its implementation

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Directive 2000/43 (Racial Equality Directive)	Directive 2000/78 (Employment Equality Directive)
Protects from discrimination on grounds of race or ethnic origin	Protects from discrimination on grounds of religion and belief, disability, age, and sexual orientation
Work and employment but also social protection, social advantages, education, access to goods and services and provision of goods and services including housing.	Access to employment, to occupational training, working conditions, membership in professional organizations

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<p>Five forms of discrimination :</p> <ol style="list-style-type: none"> 1. 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... »: prohibition in principle absolute except for limitatively enumerated exceptions 2. Indirect discrimination : « shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, ... at a particular disadvantage compared with other persons unless ... that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary » 3. Harassment: « when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment » 4. Instruction to discriminate (5. Refusal to provide reasonable accommodation (art. 5 Dir. 2000/78))

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Direct discrimination – absolute prohibition except:

- a) **Genuine occupational requirement** : ‘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’ (art. 4 § 1 Dir. 2000/78)
- b) **Positive action** : ‘With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds ...’ (art. 7 Dir. 2000/78).
- c) **Churches or organisations whose ethos is based on religion or belief:**
Art. 4 § 2 Dir. 2000/78

Churches or organisations whose ethos is based on religion or belief: Art. 4 § 2 Dir. 2000/78

■ 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.

Churches or organisations whose ethos is based on religion or belief: Art. 4 § 2 Dir. 2000/78

■ **UK – Schedule 9(3) of Equality Act 2010**

■ A person (A) with an ethos based on religion or belief does not contravene a provision mentioned in paragraph 1(2) by applying in relation to work a requirement to be of a particular religion or belief if A shows that, having regard to that ethos and to the nature or context of the work—

- (a) it is an occupational requirement,
- (b) the application of the requirement is a proportionate means of achieving a legitimate aim, and
- (c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

■ **Example: Muhammad v The Leprosy Mission International, ET 2303459/0989 (Employment Tribunal, 16 Dec. 2009)** (Christian charity allowed to refuse applications from non-Christians for a position as finance administrator, since hiring a non-Christian would have a significant effect on maintenance of the Christian ethos)

The role of the case-law of the European Court of Human Rights concerning restrictions to freedom of religion within churches or organisations whose ethos is based on religion or belief

Eur. Ct. HR (GC), *Sindicatul Păstorul cel Bun v. Romania* (Appl. No. 2330/09), judgment of 9 July 2014

-32 Orthodox priests and 3 lay employees of the archdiocese decide to create a union in April 2008, but its registration is opposed by the Archdiocese of Craiova, on the basis of the Statute of the Romanian Orthodox Church, whose argument is followed by the Romanian courts

-In its judgment of 31 January 2012, a Chamber of the Eur. Ct HR found a violation of Article 11 of the Convention.

-Grand Chamber of the Eur. Ct HR disagrees: although « the duties performed by the members of the trade union in question entail many of the characteristic features of an employment relationship », « the work of members of the clergy ... also pursues a spiritual purpose and is carried out within a church enjoying a certain degree of autonomy. Accordingly, members of the clergy assume obligations of a special nature in that they are bound by a heightened duty of loyalty, itself based on a personal, and in principle irrevocable, undertaking by each clergyman ».

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Eur. Ct. HR (GC), *Sindicatul Păstorul cel Bun v. Romania* (Appl. No. 2330/09), judgment of 9 July 2014 (continued)

-« the Court considers that it was reasonable for the County Court to take the view that a decision to allow the registration of the applicant union would create a real risk to the autonomy of the religious community in question... The principle of the autonomy of religious communities is the cornerstone of relations between the Romanian State and the religious communities recognised within its territory, including the Romanian Orthodox Church » (paras. 162-163)

-« Respect for the autonomy of religious communities recognised by the State implies, in particular, that the State should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them that might pose a threat to their cohesion, image or unity. It is therefore not the task of the national authorities to act as the arbiter between religious communities and the various dissident factions that exist or may emerge within them » (par. 165)...

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Eur. Ct. HR (GC), *Sindicatul Păstorul cel Bun v. Romania* (Appl. No. 2330/09), judgment of 9 July 2014 (continued)

-The restriction is proportionate since « the Statute of the Romanian Orthodox Church does not provide for an absolute ban on members of its clergy forming trade unions to protect their legitimate rights and interests. ...there is nothing to stop the applicant union's members from availing themselves of their right under Article 11 of the Convention by forming an association of this kind that pursues aims compatible with the Church's Statute and does not call into question the Church's traditional hierarchical structure and decision-making procedures. The Court notes that the applicant union's members are also free to join any of the associations currently existing within the Romanian Orthodox Church which have been authorised by the national courts and operate in accordance with the requirements of the Church's Statute » (para. 170)

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Eur. Ct. HR (GC), *Fernandez Martinez v. Spain* (Appl. No. 56030/07), judgment of 12 June 2014 – non-renewal of the contract as religious teacher in a state-run secondary school of a married Catholic priest, following a decision of the Bishop – no violation of the ECHR

« the applicant, as he had been a priest and the director of a seminary, was or must have been aware, in accepting the task of teaching Catholic religion, of the potential consequences of the heightened duty of loyalty *vis-à-vis* the Catholic Church by which he thus became bound, for the purpose, in particular, of preserving the credibility of his teaching. ... As to the Church's autonomy, it does not appear, in the light of the review exercised by the national courts, that it was improperly invoked in the present case, that is to say that the Bishop's decision not to propose the renewal of the applicant's contract cannot be said to have contained insufficient reasoning, to have been arbitrary, or to have been taken for a purpose that was unrelated to the exercise of the Catholic Church's autonomy » (para. 151)

Conclusion

-Article 4 § 2 of the Employment Equality Directive to be interpreted in the light of the case-law of the European Court of Human Rights regarding art. 9 ECHR (freedom of religion) and its consequences on the autonomy of churches or organisations whose ethos is based on religion

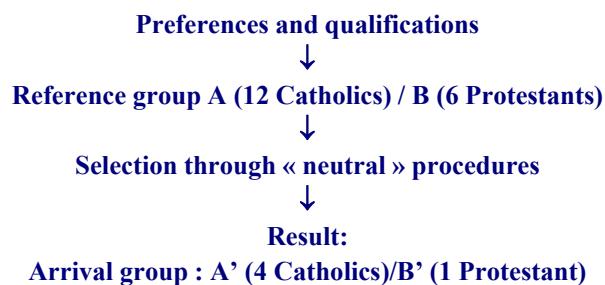
-Restrictions to individual rights are excessive where such autonomy is abusively invoked, to justified decisions that are arbitrary; but they are allowable where churches seek to preserve their credibility or the ability to preserve their internal decision-making structure, even though this may imply differences in treatment also on grounds other than religion

-Unclear to which extent this extends to religious organizations beyond Churches or to organisations whose ethos is based on (non-religious) belief – although *Tendenzbetriebe* are recognized by the European Court of Human Rights, the notion of « autonomy » is not to be understood in the same way

Two understandings of indirect discrimination

- **Indirect discrimination as a suspect measure:** ‘shall be taken to occur 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 that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary’
- **Indirect discrimination as disparate impact (cf Preamble, 15th recital of Directive 2000/78) :** ‘The appreciation of the facts from which it may be inferred that there has been direct or indirect discrimination is a matter for national judicial or other competent bodies, in accordance with rules of national law or practice. Such rules may provide, in particular, for indirect discrimination to be established by any means including on the basis of statistical evidence.’

Indirect discrimination as « disparate impact » discrimination:



- Presumption of discrimination against members of group B (Protestants) if $A/B < A'/B'$

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'SUSPECT' MEASURE BECAUSE IMPOSING A SPECIFIC DISADVANTAGE (dir. 2000/43 and 2000/78, and dir. 2006/54)	MEASURE HAVING A DISPROPORTIONATE IMPACT AS REVEALED BY STATISTICS (dir. 97/80)
Allows to challenge "suspect" measures (eg, place of residence in strongly geographically segregated societies), but does not allow to challenge measures that are apparently neutral even where there is a disproportionate impact	Allows to challenge measures with a disproportionate impact, including where this can only be shown by statistics (informal measures such as psycho-technical tests, interviews, ...; or received criteria such as eg height requirement or requirement of a driving license)
The victim is not required to present statistics	Requires 1° classification into different groups ; 2° access to statistics; 3° assessment of the acceptable impact

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<ul style="list-style-type: none"> ■ Vestimentary requirements that infringe on expression of religious beliefs – only allowable if (i) legitimate aim, (ii) means of achieving that aim are appropriate and necessary (art. 2 § 2 (b) of Employment Equality Directive and Article 9 ECHR – mutually supportive) ■ NL - District Court Rotterdam, 21 January 2014: a female pedagogical employee in a hospital, in charge primarily of supporting the parents of patients (with little physical contact with the patients themselves) refuses to comply with the clothing requirements (wearing short sleeves), which were changed in the aftermath of the outbreak of a bacterial infection, arguing that this is in violation of the Islamic dress code she adheres to. ■ FR - Court of Appeal of Paris decision of 27 October 2013 further to the prior decision of the Court of Cassation, Association Baby Loup, n° 536, case no 11-28.845 of 19 March 2013 – followed by plenary session of Court of Cassation, 25 June 2014 – may private associations invoke the principle of secularity (« laïcité », Art. 1 of the French Constitution) to impose restrictions on religious symbols exhibited by employees (Islamic hijab)? If not, may such organizations impose such restrictions based on a consideration for the rights of children to be raised in a neutral environment?

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- **FR – Court of Cassation, CPAM, n° 537, case no 12-11.690 of 19 March 2013.** A woman wearing the Islamic hijab (as an attached scarf attached in the back and covering her hair like a bonnet), hired by the Public Medical Insurance Fund (CPAM) in 2001 as reimbursement technician, having no contact with the general public. On 10 February 2004 the CPAM amends its in house regulation by “prohibiting the wearing of garments and accessories identifying clearly an agent as representative of a group, an origin, a religion or a political obedience, and among others the Islamic veil, even when worn in the form of an attached scarf (bonnet)”. This leads to the dismissal of the plaintiff for wearing an Islamic veil to work in violation of internal regulations.



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- **Eur. Ct. HR (4th sect.), *Eweida, Chaplin, Ladele and McFarlane v. United Kingdom*, judgment of 15 Jan. 2013.**
- Wearing of a visible crucifix at work in the British Airways, against company regulations (Ms Eweida)
- Wearing of a cross around the neck in a hospital context, leading to be moved to a non-nursing position (Ms Chaplin)
- Person opposed to same-sex civil partnerships on religious grounds employed by an English local public authority and refusing to perform same-sex civil partnership ceremonies following the entry into force of the 2004 Civil Partnership Act (Ms Ladele)
- Employee of the Relate Federation, a national private organisation which provides a confidential sex therapy and relationship counselling service, believes that the Bible condemns homosexuality and refuses to work on sexual issues with homosexual couples (Mr McFarlane).

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- **Eur. Ct. HR (4th sect.), *Eweida, Chaplin, Ladele and McFarlane v. United Kingdom*, judgment of 15 Jan. 2013 – the case of Eweida.**
- “...the Court has reached the conclusion in the present case that a fair balance was not struck. On one side of the scales was Ms Eweida’s desire to manifest her religious belief. ..., this is a fundamental right: because a healthy democratic society needs to tolerate and sustain pluralism and diversity; but also because of the value to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others. On the other side of the scales was the employer’s wish to project a certain corporate image. The Court considers that, while this aim was undoubtedly legitimate, the domestic courts accorded it too much weight. Ms Eweida’s cross was discreet and cannot have detracted from her professional appearance. There was no evidence that the wearing of other, previously authorised, items of religious clothing, such as turbans and hijabs, by other employees, had any negative impact on British Airways’ brand or image. Moreover, the fact that the company was able to amend the uniform code to allow for the visible wearing of religious symbolic jewellery demonstrates that the earlier prohibition was not of crucial importance” (para. 94)

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- **Eur. Ct. HR (4th sect.), *Eweida, Chaplin, Ladele and McFarlane v. United Kingdom*, judgment of 15 Jan. 2013 – the case of Chaplin.**
- “...the importance for the second applicant of being permitted to manifest her religion by wearing her cross visibly must weigh heavily in the balance. However, the reason for asking her to remove the cross, namely the protection of health and safety on a hospital ward, was inherently of a greater magnitude than that which applied in respect of Ms Eweida. Moreover, this is a field where the domestic authorities must be allowed a wide margin of appreciation. The hospital managers were better placed to make decisions about clinical safety than a court, particularly an international court which has heard no direct evidence” (para. 99)

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- **Eur. Ct. HR (4th sect.), *Eweida, Chaplin, Ladele and McFarlane v. United Kingdom*, judgment of 15 Jan. 2013 – the case of Ladele.**
- "... The Court takes into account that the consequences for the applicant were serious: given the strength of her religious conviction, she considered that she had no choice but to face disciplinary action rather than be designated a civil partnership registrar and, ultimately, she lost her job. Furthermore, it cannot be said that, when she entered into her contract of employment, the applicant specifically waived her right to manifest her religious belief by objecting to participating in the creation of civil partnerships, since this requirement was introduced by her employer at a later date. On the other hand, however, the local authority's policy aimed to secure the rights of others which are also protected under the Convention. The Court generally allows the national authorities a wide margin of appreciation when it comes to striking a balance between competing Convention rights (...). In all the circumstances, the Court does not consider that the national authorities, that is the local authority employer which brought the disciplinary proceedings and also the domestic courts which rejected the applicant's discrimination claim, exceeded the margin of appreciation available to them" (para. 106).

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- **Eur. Ct. HR (4th sect.), *Eweida, Chaplin, Ladele and McFarlane v. United Kingdom*, judgment of 15 Jan. 2013 – the case of McFarlane.**
- "... the Court takes into account that the loss of his job was a severe sanction with grave consequences for the applicant. On the other hand, the applicant voluntarily enrolled on Relate's post-graduate training programme in psycho-sexual counselling, knowing that Relate operated an Equal Opportunities Policy and that filtering of clients on the ground of sexual orientation would not be possible (...). While the Court does not consider that an individual's decision to enter into a contract of employment and to undertake responsibilities which he knows will have an impact on his freedom to manifest his religious belief is determinative of the question whether or not there been an interference with Article 9 rights, this is a matter to be weighed in the balance when assessing whether a fair balance was struck (...). However, for the Court the most important factor to be taken into account is that the employer's action was intended to secure the implementation of its policy of providing a service without discrimination. The State authorities therefore benefitted from a wide margin of appreciation in deciding where to strike the balance between Mr McFarlane's right to manifest his religious belief and the employer's interest in securing the rights of others." (para. 109).

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- **Conclusion on the position of the European Court of Human Rights**
- 1. Freedom of religion may be invoked even as regards manifestations of religious faith that are not an central tenet or a requirement of the religion (such as wearing a cross for Christians) (Eweida, Chaplin)
- 2. The fact that one has voluntarily entered into a certain occupation is not decisive (waiver can only be invoked as part of a general weighing of interests)
- 3. The desire by a company to maintain a certain “corporate image” is not an interest that may justify an infringement with freedom of religion (Eweida), however the interest of some organisations in sending out a message of tolerance and diversity has an important weight (McFarlane)
- **Comp. BE – Employment Tribunal Tongeren, Joyce Van op den Bosch v. Randtsad and Hema, 2 Jan. 2013**
- 4. Where the restriction aims at the protection of public health (for instance, to reduce the risks in hospital settings – Chaplin) or the rights of others (for instance, the right of same-sex partners to have access to civil partnership – Ladele), these interests are to be given an important weight

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BE – Employment Tribunal Tongeren, Joyce Van op den Bosch v. Randtsad and Hema, 2 Jan. 2013 (Belgian antidiscrimination law of 10 May 2007). May the employer prohibit religious signs due to its desire to give an image of neutrality? And may such employer invoke art. 4 § 1 of the Employment Equality Directive? May the employer invoke the potential reactions of the clients (see Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, 10 July 2008)?

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- **Case C-157/15, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* (referral from the Belgian Court of Cassation):** “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?”
- **Case C-188/15, *Asma Bougnaoui, Association de défense des droits de l’homme (ADDH) v Micropole Univers SA* (referral from the French Court of Cassation):** “Must Article 4(1) of Directive 78/2000 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?”

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- **Article 5 Dir. 2000/78/EC - 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.

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