



RELIGIOUS DISCRIMINATION AT WORKPLACE

CJEU and ECtHR case-law analysis

Applying EU Anti-Discrimination Law

Seminar for Legal Practitioners

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Religion and belief: an issue at workplace

> How should 'religion' and 'belief' be defined?

- Employment Equality Directive, EUCFR and ECHR
- *Forum internum & forum externum*: a wide definition
- What should be a 'belief'? And a 'non-belief'?

> What is a religious identity?

> What is a manifestation of religion?

- A workplace is a place in which many people manifest their convictions (...) UN Special Rapporteurs on Freedom of Religion

> What is a religious discrimination?

- Direct & indirect discrimination, disparate treatment, harassment and multiple discrimination



Conflicts at workplace mediation and judicial intervention

> Judicial cases involving employees

- Regarding **religious symbols** and dress/grooming
- Regarding requests for **time off** to observe **religious duties**
- Regarding **exemptions of job duties** that contradict religion
- Regarding **autonomy rights** of religious organisations

> Is there a right to reasonable accommodation on the basis of religion or belief at workplace? Is it a duty for the employer?

> What is at stake when conflicts arrive to courts?

Balance of rights

secular traditions
vs
personal identities

Social
integration

Gender



Contextualizing religious discrimination

Discrimination in EU (Eurobarometer 2019)

* On the grounds of ethnic origin: 59% but Roma (61%)

* On **the grounds of religion**: from 51% in 2015 to 47 % in 2019

Working with a Jewish colleague 96% in NL to 64% in Austria

Working with a Muslim colleague 93% in UK to 35% in Czechia

Working with a Christian colleague 97% in GR to 74% in Romania

Working with a Atheist colleague 95% in NL to 68% in Hungary

ENAR 2016 Report: “Forgotten Women: the impact of Islamophobia on Muslim Women”

* Perception of “Muslimness” at work: Applications with headscarf in CV photos

*Names or questions during job interviews

*Islamophobia as symptom of the desintegration of human values



Contextualizing religious discrimination

Council of Europe

“European countries appear to face another crisis beyond budget deficits: the disintegration of human values. One symptom is the increasing expression of intolerance towards Muslims and Islamic culture” (T. Hammarberg, Council of Europe CHR, 2010)

Fundamental Rights Agency (FRA)

European Union Minorities and Discrimination Survey, 2009

United Nations

2014 Annual Report of the UN Special Rapporteur on
Freedom of Religion or Belief: religion at workplace



Contextualizing religious discrimination

2013 Amnesty International Report

Choice and Prejudice: Discrimination against Muslims in Europe

Recommendations to all governments, among the others:

- (1) Collect data on multiple discrimination affecting Muslim women
- (2) Ensure domestic legislation against discrimination at work





Specificities of the religious discrimination: legal framework

> EU law and Council of Europe

→ Freedom of religion and belief (FORB): Art. 10 EUCFR and Art. 9 ECHR

→ Limitations of FORB: Art 9.2 ECHR and Art. 52.1 EUCFR

Art. 9.2: prescribed by law and art. 52.1: provided for by law

Necessary in a democratic society: pressing social need



Legitimate aims (art. 9.2), proportionate and necessary



margin of appreciation

> Right not to be discriminated against

→ EU Direct & indirect discrimination plus Art. 2 and 21.1 EUCFR

→ Art. 14 ECHR and Protocol 12 to the ECHR (only 10 States)



Religious clothing or symbols at work

The state of art in EU Member States (European Network of legal experts in gender equality and non-discrimination, 2017)

Member State	Legislation in force?	Legislative proposal?	Debates?	Case law?
Austria	Yes, in force: 1 October 2017	No	Yes	Yes
Belgium	Yes, at national and state level	No	Yes	Yes
Bulgaria	Yes	No	Not much	No
Croatia	No	No	Yes, in relation to schools and hospitals and public outrage after CJEU decisions	No
Cyprus	No	No	No	No
Czech Republic	No	No	No, but outrage about Muslim student who was not allowed to wear headscarf	No
Denmark	Only in relation to judges	No bill yet, but bans discussed	Yes	Yes, one case
Estonia	No	No	No	No
Finland	No	No	No	Yes, two cases
France	Yes, national and local	No	Yes	Yes



Religious clothing or symbols at work

Member State	Legislation in force?	Legislative proposal?	Debates?	Case law?
Germany	Yes, at state (Länder) level	No	Yes	Yes
Greece	No	No	No	No
Hungary	No	No	No, except in relation to one case	Yes, one case
Ireland	No	No	Academic debate only	Yes
Italy	No	No	No	Yes
Latvia	No	Yes	Yes, on draft law	Yes
Lithuania	No	No	No	No
Luxembourg	No	Yes, minister has been asked to prepare bill	Only on the wearing of the veil	No
Malta	No	No	No	No
Netherlands	No	Yes	Yes	Yes
Poland	No	No	No, but research by Equality Body planned	Yes
Portugal	No	No	No	No
Romania	No	No	No	No
Slovakia	No	Proposed but rejected	Some after proposal	No
Slovenia	No	Proposed but rejected	No	No
Spain	No		Yes	Yes
Sweden	No	No	No	Yes
UK	No	No	Yes	Yes



Religious discrimination at the CJEU

Case law of the Luxembourg Court

> Religious clothing at workplace

Achbita (2017)

Bouganaoui (2017)

> Collective dimension of religious freedom

- Religious organization's ethos and the balance of rights

Egenberger (2018)

IR v JQ (2018)

- Religious holidays granted to all individuals

Cresco Investigation GmbH (2019)



Religious discrimination at the CJEU

Ethos-based organizations: Genuine and determining occupational requirement (Art.4 2000/78/EC)

- > Art. 4.1: When the **nature** of the job or the **context** requires religion
- > Art. 4.2: rights of churches, the ethos based on religion

To act in *good faith* and with *loyalty* to the organization's ethos

- > The requirement has to be occupational, legitimated and justified
 - What about ban on Islamic headscarf?
 - What about receptionists, teachers, cleaning personnel?



Religious discrimination at the CJEU

Case C-414/16, Egenberger (2018) Case C 68/17, IR v JQ (2018)



Fair balance:
autonomy rights
of religious
organization and
**the right of
workers**

Tension between
German law and
EU law



A Catholic
doctor's
dismissal for
remarrying
constitute
unlawful
discrimination?

Not breach of
hospital's
religious ethos



Religious discrimination at the CJEU

Findings of Luxembourg Court in *Achbita* case (Religious dress in the workplace)

- Concept of religion interpreted as ECHR
- A ban on wearing visible signs of political, philosophical or religion beliefs is not directly discriminatory
- But that kind of internal rule could be indirectly discriminatory
- If it justified by a legitimate aim and the aims to achieve are necessary and appropriate
 - Legitimate aim: Image of neutrality
 - Freedom of conduct business prevailed
 - The ban covers only workers interacting with customers
 - Belgium Court of Cassation should check this conditions



Religious discrimination at the CJEU

Achbita judgment, problematic for several reasons:

- Indirect or direct discrimination?
- Dressing neutrality? A wrong comparison
- Right to conduct business: religion out of the picture
- Proportionality
 - Less restrictive alternative
 - Back office job
 - It encourages employers to hide diversity



Religious discrimination at the CJEU

Findings of Luxembourg Court in *Bougnaoui* case:

- The dismissal was not based on a previous internal rule
- Only in limited circumstances a genuine and determining occupational requirement could be applied
- Customers' wishes cannot be considered a genuine and determining occupational requirement

Luxembourg Court takes a contradictory approach:

- A discriminatory code is justifiable for customer-facing staff
- A customer preference is not valid as occupational requirement
- The rulings give greater leeway to employers to discriminate



Religious discrimination at the CJEU

Advocate General (AG) Kokott Opinion:

“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” (para. 3)

“while an employee cannot ‘leave’ his sex, skin colour, ethnicity, sexual orientation, age or disability ‘at the door’ upon entering his employer’s premises, he may be expected to moderate the exercise of his religion (...) in relation to his clothing” (para. 116)

Advocate General (AG) Sharpston Opinion:

“It would be entirely wrong to suppose that, whereas one’s sex and skin colour accompany one everywhere, somehow one’s religion does not.” (para. 118)



Religious discrimination at the CJEU

Some conclusions from the two cases

- ✓ Human dignity and personal autonomy in EU Law
- ✓ Neutral image of the company is not secularism
- ✓ Accommodation should be provided: proportionality
- ✓ EU duty to accommodate religion?
 - Essential to his/her religion?
 - Type of observance and size of the business
 - Activity and context: justification of the requirement



Religious discrimination at the ECtHR

Freedom of thought, conscience and religion in the ECHR

- ECHR is part of the general principles of EU law
- Article 52 (3) of the EU Charter of Fundamental Rights. A more extensive protection
- Article 9 and Article 14

Religious clothing and symbols in the ECtHR

- Many different contexts: Education & public sector
- Only 2 cases found a violation of freedom of religion (*Eweida* and *Ahmet*)
- Main restrictions have been grounded on secularism and neutrality of public authorities (*Ebrahimian v. France*)



Religious discrimination at the ECtHR

Religious symbols in the private sector

- *Eweida v UK (2013)*: *Eweida v British Airways*; *Chaplin v Royal Devon & Exeter NHS Foundation Trust*; *Ladele v Islington Borough Council*; *McFarlane v Relate Avon Ltd*
- What is a manifestation of religion?
 - » The manifestation of religion or belief is not limited to such acts the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfillment of a duty mandated by the religion in question (par. 82)
- A right to resign?
- Customer preferences or colleagues preferences (*Ladele*)



Religious discrimination at the ECtHR

Strasbourg Court (*Eweida*) vs. Luxembourg Court (*Achbita*)

Main differences:

- Human rights and business interest/rights
- The necessity test, proportionality test
- Lack of evidence of the harm
- Hiding the employee is not an option
- Christians symbols and Muslim symbols
- Margin of appreciation
- Personal identity (*Bouganaoui*)



Religious discrimination at the ECtHR

Autonomy of the religious groups at workplace in the ECtHR

Dismissal of an employee working for a church:

Obst v. Germany (2010)
Shüth v. Germany (2010)
Siebenhaar v. Germany (2011)

Fernandez Martínez v. Spain (2014): the 'ministerial exemption'

- Religious organization have an absolute exemption from non-discrimination laws?
- Is there a balancing test?
- Comparing *Fernández Martínez* to *Schüth v. Germany*
- Collective dimension of freedom of religion vs individual human right



Concluding remarks: comparing both Strasbourg and Luxembourg Courts

Religious clothing and symbols at workplace

- > A missed opportunity to protect diversity in CJEU
- > Substantive equality undermined under EU
- > Encouraging employers to reject Muslim veiled women
- > More fair balancing of rights in ECtHR

Religious organization's ethos and non-discrimination

- > CJEU provides wider and more reasonable protection to employees than the Strasbourg Court



Religious discrimination at workplace: CJEU and ECtHR case-law analysis

Thank you
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