



RELIGIOUS DISCRIMINATION IN THE WORKPLACE

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OUTLINE

1. FOUNDATIONAL TEXTS & CONCEPTS

2. HOLIDAYS

3. SIGNS

4. CONSCIENCE & WORK
(Religious employers & employees)

FOUNDATIONAL TEXTS & CONCEPTS

EU LEGISLATION

- +DIR. 2000/78 establishing a general framework for equal treatment in employment and occupation
- +Art. 1: prohibits discrimination based on religion or belief, disability, age, sexual orientation
 - + Prohibits both direct discrimination (DD) and indirect discrimination (ID)
 - + Applies to both public and private sector

Concept of DD under Directive 2000/78

- + Art. 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 Art. 1 »
 - + May be justified in exceptional circumstances to be interpreted strictly
 - + Art. 2(5): national measures for the protection of the public interest
 - + Art. 4(1): GDOR (see below)
 - + Art. 4(2): Church autonomy (see below)
 - + Art. 7(1): positive action

Concept of ID under Directive 2000/78

- + Art. 2(2)b: « indirect discrimination 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 as a particular disadvantage compared with other persons unless: (i) that provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.... »

EU CHARTER OF FUNDAMENTAL RIGHTS (CFR)

+ Art. 10: Freedom of religion

+ « 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 »

+ Art. 21: Non-discrimination

+ 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

ECHR

+ Art. 9: Freedom of thought, conscience and religion

+ ECHR, 25 May 1993, Kokkinakis v. Greece: « freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it ».

+ Art. 14: Prohibition of discrimination

CONCEPT OF RELIGION UNDER EUROPEAN LAW

- + Religion under directive 2000/78 encompasses both the *forum internum* (fact of having a belief) and the *forum externum* (manifestation of said belief)
 - + CJEU, Achbita, §28
- + Member States and their authorities, including judicial authorities, must, except in very exceptional cases, refrain from assessing whether the actual ethos of the church or organisation concerned is legitimate
 - CJEU, *Egenberger* (referring to ECHR, *Fernández Martínez v. Spain*, 2014)

HOLIDAYS

ACCOMMODATION

- + CJEU, 27 Oct 1976, *Vivian Prais v. Council*, C-130/75: a British national had applied for a concours that was being organized for the recruitment of linguistic experts for the EU. When she was notified the date of one of the tests, she informed the Council that it was problematic for her as it conflicted with a major Jewish holiday; she asked an alternative date – request denied. CJEU: « it is desirable that an appointing authority informs itself in a general way of dates which might be unsuitable for religious reasons and seeks to avoid fixing such dates for tests, nevertheless (...) neither the Staff regulations nor the fundamental rights already referred to can be considered as imposing on the appointing authority a duty to avoid a conflict with a religious requirement of which the authority had not been informed »
- + employers may accommodate, and may indeed be invited to do so but ultimately, organizational logics can prevail: POSSIBILITY (AS OPPOSED TO OBLIGATION) TO ACCOMMODATE

DISCRIMINATION

- + CJEU, 22 Jan. 2019, *CRESCO Investigations v. Achatzi*
- + Facts: Austrian legislation provides for an extra day of holiday leave on Good Friday for members of certain churches (or their right to extra pay if they work on that day)
- + LEGAL QUESTION: is that rule (presented by Gvt as positive action) discriminatory on the basis of religion?
- + CJEU: national legislation under which, first, Good Friday is a public holiday only for employees who are members of certain Christian churches and, second, only those employees are entitled, if required to work on that public holiday, to a payment in addition to their regular salary for work done on that day, constitutes direct discrimination on grounds of religion
- + §§39-51: (...) Paragraph 7(3) of the ARG establishes the right to a public holiday on Good Friday only for employees who are members of one of the churches (...). It follows that public holiday pay that can be claimed under Paragraph 9(5) of the ARG by an employee who is required to work on a public holiday is payable to employees who work on Good Friday only if they are members of one of those churches. **Therefore, the legislation at issue in the main proceedings gives rise to a difference in treatment that is directly based on the religion of employees.** The test used by the legislation in order to differentiate is based directly on whether an employee belongs to a particular religion (...).
- + However, as is apparent from the order for reference, **the grant of a public holiday on Good Friday to an employee who is a member of one of the churches covered by the ARG is not subject to the condition that the employee must perform a particular religious duty during that day, but is subject only to the condition that such an employee must formally belong to one of those churches (...).**
- + **It follows that the national legislation at issue in the main proceedings has the effect of treating comparable situations differently on the basis of religion.** This therefore amounts to direct discrimination on grounds of religion within the meaning of Article 2(2)(a) of Directive 2000/78.

RESIGNATION

+ Enduring failure to offer a significant protection to religious freedom & belief in the workplace - the shield of freedom of contract (and freedom to terminate employment contract)

+ Illustrations: EComHR, 12 March 1981, *X v. UK*, n°8160/78; EComHR, 9 April 1997, *Stedman v. UK*, n°29107/95; EComHR, 3 Dec. 1996, *Kontinnen v. Finland*, n°24949/94

+ → Freedom to resign rationale

+ See also: ECHR, 13 July 2006, *Kosteski v. Former Yugoslav Republic of Macedonia*: Disciplinary dismissal subsequent to unauthorized absence in order to participate in a religious festival; ECHR finds no violation of either Article 9 or Article 14; in particular: « there is no right as such under article 9 to have leave from work for particular religious holidays »

+ See also: ECHR, 2012, *Sessa v. Italy*: Jewish lawyer alleges that the refusal by the judicial authority to postpone the hearing set down for the date of a religious festival prevented him from taking part in his capacity as the representative of one of the complainants and infringed his right to manifest his religion freely. ECHR: interference, but no violation of Article 9 of the Convention; interference justified on grounds of the protection of the rights and freedoms of others - in particular the public's right to the proper administration of justice - and the principle that cases be heard within a reasonable time.

SIGNS

ECHR STANDARDS

- + PRINCIPLE: ECHR, 15 Jan 2013, *Eweida and others v. UK*, n°4820/10, 59842/10: balance of employers' rights and workers' rights to express their religion in the workplace
- + ECHR, 15 Jan 2013, *Eweida and others v. UK*, n°4820/10, 59842/10: balance of employers' rights and workers' rights to express their religion in the workplace
 - + Marketing / image justifications for a ban on religious signs: not admissible
 - + Health and safety reasons: admissible
 - + Christian official registrar's refusal to register same-sex marriages and counsellor's refusal to assist same-sex couples: no violation of art. 14 combined with art. 9
- + BUT TEMPERAMENT: many restrictions on religious freedom in the workplace continue to be found admissible under the ECHR
 - + Primary School Teachers: ECHR, 2001, *Dahlab v. Switzerland*, n°42393/98 : inadmissibility decision
 - + University Teachers: ECHR, 24 Jan 2006, *Kurtulmus v. Turkey*, n°65500/01 : inadmissibility decisions
 - + Social worker in public hospital: ECHR, 2015, *Ebrahimian v. France*, n°64846/11 : no violation of Art. 9, State margin of appreciation + legitimate aim to preserve the secular character of the State (duty of religious neutrality imposed on all public employees)

Notion of GDOR

- + Dir. 2000/78 Art. 4§1: Notwithstanding Article 2(1) and 2, Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination 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.
 - + Can neutrality in the expression of beliefs be construed as a GDOR?
 - + Can customer preferences be construed as a GDOR?

Recent case law

- + CJEU, GC, 14 March 2017, *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA*, C-188/15
 - + FACTS: veiled Muslim woman fired after company's customer complained about her wearing the hijab
 - + LEGAL QUESTION: is her firing discriminatory?
 - + CJEU: DECISIONMAKING BASED ON CUSTOMER PREFERENCES INADMISSIBLE
- + CJEU, GC, 14 March 2017, *Samira Achbita et Centrum voor gelijkheid van kansen en voor racismebestrijding contre G4S Secure Solutions NV*, C-157/15
 - + FACTS: veiled Muslim employee fired for failure to comply with internal policy requiring all personnel to refrain from expressing any convictions (religious, philosophical, political) in the workplace
 - + LEGAL QUESTION: is her firing discriminatory?
 - + CJEU: INTERNAL NEUTRALITY POLICIES: no DD, possible ID (but desire to project an image of neutrality = legitimate aim in principle)

Recent Case law - 2

- + CJEU, GC, 15 July 2021, *IX v. WABE EV*, C-804/18
 - + WABE: an association that operates childcare centers
 - + Employee wears headscarf
 - + 2018: WABE adopts neutrality policy (during employee's parental leave): employees who are in contact with children or parents may express no political, philosophical or religious beliefs (statements or signs)
 - + Employee is warned and then suspended
- + CJEU, GC, 15 July 2021, *MH Müller Handels GmbH v MJ*, C-341/19
 - + Müller: a chain of drugstores
 - + Employee wears headscarf
 - + Employee instructed to not wear conspicuous large-sized signs of pol/phil/rel beliefs
- + CJEU, 13 Oct., 2022, *SCRL*, C-344/20
 - + SCRL manages social housing
 - + A woman of Muslim faith applies for an internship; is not offered the position after indicating during interview that she would refuse to comply with internal neutrality policy by removing headscarf

Notion of GDOR – Customer preferences

- + « It follows from the information set out above that the concept of a 'genuine and determining occupational requirement', within the meaning of that provision, refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer »:
Bouagnaoui, §40
- + BUT: « in order to establish the existence of objective justification and, therefore, of a genuine need on the part of the employer, account may be taken, in the first place, of the rights and legitimate wishes of customers or users. That is the case, for example, of parents' right to ensure the education and teaching of their children in accordance with their religious, philosophical and teaching beliefs recognised in Article 14 of the Charter or their wish to have their children supervised by persons who do not manifest their religion or belief when they are in contact with the children with the aim, inter alia, of 'guaranteeing the free and personal development of children as regards religion, belief and policy', as mentioned in the staff instructions adopted by WABE »: *WABE*, §65

Notion of DD – Internal neutrality policies

- + "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 beliefs and therefore covers any manifestation of such beliefs without distinction. The rule must, therefore, be regarded as treating all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, inter alia, to dress neutrally, which precludes the wearing of such signs"; "Accordingly, it must be concluded that an internal rule such as that at issue in the main proceedings does not introduce a difference of treatment that is directly based on religion or belief, for the purposes of Article 2(2)(a) of Directive 2000/78": *Achbita*, §§30-32
 - + No DD
 - + Confirmation in WABE
 - + Rule prohibiting employees in contact with customers to express and pol/phil/rel belief does not treat employees differently on the basis of their religion or belief = all beliefs are treated equally so it is not DD
 - + Proceedings reveal that WABE has also demanded that an employee wearing a cross remove the sign: application of the internal rule made without any differentiation from any other worker
 - + Confirmation in SCRL
 - + « since every person may have a religion or religious, philosophical or spiritual belief, such a rule, provided that it is applied in a general and undifferentiated way, does not establish a difference in treatment based on a criterion that is inextricably linked to religion or to those beliefs » §34

Notion of DD – Internal neutrality policies

- + However, an internal policy prohibiting only large-size signs may amount to direct discrimination
 - + "an internal rule of an undertaking which, like that at issue in that case, prohibits only the wearing of conspicuous, large-sized signs is liable to have a greater effect on people with religious, philosophical or non-denominational beliefs which require the wearing of a large-sized sign, such as a head covering. As pointed out in paragraph 52 above, unequal treatment resulting from a rule or practice which is based on a criterion that is inextricably linked to a protected ground, in the present case religion or belief, must be regarded as being directly based on that ground. Accordingly, where the criterion of wearing conspicuous, large-sized signs of political, philosophical or religious beliefs is inextricably linked to one or more specific religions or beliefs, the prohibition imposed by an employer on its employees on wearing those signs on the basis of that criterion will mean that some workers will be treated less favourably than others on the basis of their religion or belief, and that direct discrimination, within the meaning of Article 2(2)(a) of Directive 2000/78, may therefore be established: Muller Handel, §72-73

Notion of ID – Internal neutrality policies

- + ID: « if it is established that the apparently neutral obligation ... in fact results in a particular disadvantage for persons adhering to a particular religion or belief »: Achbita, §34
 - + Comp. Dir. 2000/78 Art. 2(2)b: « ID occurs when an apparently neutral provision, criterion or practice is likely to place persons of one religion at a particular disadvantage.... compared with other persons »
 - + CJEU waters down the concept of ID

Notion of legitimate aim – Internal neutrality policies

- + ID: impugned rule or practice can be justified if pursues a **legitimate aim** and is pursued by means appropriate and necessary
 - + « An employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers": Achbita, §38
 - + Confirmation and addition: « the mere desire of an employer to pursue a policy of neutrality - while in itself a legitimate aim - is not sufficient, as such, to justify objectively a difference of treatment indirectly based on religion or belief, since such a justification can be regarded as being objective only where there is a genuine need on the part of that employer, which it is for that employer to demonstrate »: WABE §63 & 64 (idem in SCRL, §40)
 - + Addition: « prevention of social conflicts » also a legitimate aim: Muller Handel, §76

Notions of appropriateness and necessity – Internal neutrality policies

- + ID: impugned rule or practice can be justified if pursues a legitimate aim and is pursued by means **appropriate** and **necessary**
 - + "the fact that workers are prohibited from visibly wearing signs of political, philosophical or religious beliefs is appropriate for the purpose of ensuring that a policy of neutrality is properly applied, provided that that policy is genuinely pursued in a consistent and systematic manner": Achbita, §40
 - + "As regards...the question whether the prohibition at issue in the main proceedings was necessary, it must be determined whether the prohibition is limited to what is strictly necessary. In the present case, what must be ascertained is whether the prohibition on the visible wearing of any sign or clothing capable of being associated with a religious faith or a political or philosophical belief covers only G4S workers who interact with customers. If that is the case, the prohibition must be considered strictly necessary for the purpose of achieving the aim pursued": Achbita, §42
 - + WABE?
 - + Prohibiting large-size signs only may also amount to ID: « a policy of neutrality within an undertaking, such as that referred to by the first question in Case C-341/19, can be effectively pursued only if no visible manifestation of political, philosophical or religious beliefs is allowed when workers are in contact with customers or with other workers, since the wearing of any sign, even a small-sized one, undermines the ability of that measure to achieve the aim allegedly pursued and therefore calls into question the consistency of that policy of neutrality »: Muller Handel §77.

DISCUSSION

REASONING

- +LEGITIMATE AIM
- +APPROPRIATENESS
- +NECESSITY

OUTCOME

- +NEUTRALITY POLICIES IN THE WORKPLACE
- +BLUEPRINT FOR DISCRIMINATION
- +INTERSECTIONALITY

CONSCIENCE AND WORK

FAITH-BASED ORGANIZATIONS

- + Dir. 2000/78, Art. 4(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 »

Recent case law

- + CJEU, 17 April 2018, *Egenberger*, C-414/16
 - + Facts: an association connected with Protestant church advertises a position for research and writing that requires membership of the Church
 - + LEGAL QUESTION: is a church membership requirement a GDOR that falls under Directive 2000/78's art. 4§2?
 - + CJEU: Requirement of effective judicial review + GDOR of Art. 4(2) covers requirements that are necessary and objectively dictated, having regard to the ethos of the church or organisation concerned, by the nature of the occupational activity concerned or the circumstances in which it is carried out, and cannot cover considerations which have no connection with that ethos or with the right of autonomy of the church or organisation. Such requirements must comply with the principle of proportionality.

Recent case law - 2

+ CJEU, 11 Sept. 2018, *IR v. JQ*, C-68/17

- + FACTS: JQ, a Roman Catholic, worked as Head of the Internal Medicine Department of a hospital managed by IR, a limited liability company established under German law subject to the supervision of the Archbishop of Cologne (Germany).
- + When IR discovered that, after his divorce from his first wife, to whom he had been married in accordance with the Roman Catholic rite, JQ had married again in a civil ceremony without his first marriage having been annulled, IR dismissed him. In IR's view, by entering into a marriage that is invalid under canon law, JQ had clearly infringed his duty of loyalty arising under his employment contract.
- + CJEU: Such dismissal from managerial position due to employee's remarriage after divorce may constitute unlawful discrimination on grounds of religion: requirement that a Catholic doctor in a managerial position respect the Catholic Church's notion of marriage as sacred and indissoluble does not appear to be a genuine, legitimate and justified occupational requirement. However, that is for the German Federal Labour Court to determine in the present case
- + Effective judicial review
- + A difference of treatment, as regards a requirement to act in good faith and with loyalty to that ethos, between employees in managerial positions according to the faith or lack of faith of those employees is consistent with that directive only if, bearing in mind the nature of the occupational activities concerned or the context in which they are carried out, the religion or belief constitutes an occupational requirement that is genuine, legitimate and justified in the light of the ethos of the church or organisation concerned and is consistent with the principle of proportionality, which is a matter to be determined by the national courts.

Loyalty to religious employer's ethos under the ECHR

- + ECHR, 2010, *Schüth v. Germany*: Dismissal of organist and choirmaster from Catholic parish church for breach of duty of loyalty (adultery and bigamy). Violation of Article 8.
- + ECHR, 2010, *Obst v. Germany*: Dismissal from position of director for public relations of the Mormon church for breach of duty of loyalty (extramarital life). No violation of Article 8.
- + ECHR, 2011, *Siebenhaar v. Germany*: Termination without notice of a kindergarten teacher working in a school run by an evangelical parish because of her active membership in another religious community. No violation of Article 9.
- + ECHR, 2012, *Sidicatul Pastorul cel Bun v. Romania*: Refusal to register a union set by members of the clergy and lay members as trade union. No violation of Article 11.
- + ECHR, 2014, *Fernandez Martinez v. Spain*: Non renewal of employment contract of ex-priest who publicly advocated the abolition of celibacy requirements. No violation of Article 8.

Employees' request of religious exemption

+ ECHR, 11 Feb. 2020, *Grimmark v. Sweden*, n°43726/17

- + Midwife denied employment because of her religion-motivated refusal to assist in abortions: inadmissibility decision
- + There is interference with her Art. 9 rights, but it was prescribed by law: under Swedish law, an employee was under a duty to perform all work duties given to him or her. It had pursued the legitimate aim of protecting the health of women seeking an abortion. It had also been necessary in a democratic society: Sweden provided nationwide abortion services and therefore had a positive obligation to organise its health system in a way as to ensure that the effective exercise of freedom of conscience of health professionals in the professional context did not prevent the provision of such services.
- + The requirement that all midwives should be able to perform all duties inherent to the vacant posts was not disproportionate or unjustified.