EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2016/25 Prohibition against displaying religious symbols breaches anti-discrimination legislation for lack of proportionality (BE)

<p>A general prohibition against displaying religious, political and philosophical symbols constitutes indirect discrimination which fails to meet the proportionality requirement. In this case the court took account of the fact that it was possible for the employer to distinguish between back-office and front-office work (the claimant worked in a back office position) and also because of the absence of complaints by colleagues or clients and the absence of any attempt by the claimant to encourage other women to wear a headscarf.</p>

Summary

A general prohibition against displaying religious, political and philosophical symbols constitutes indirect discrimination which fails to meet the proportionality requirement. In this case the court took account of the fact that it was possible for the employer to distinguish between back-office and front-office work (the claimant worked in a back office position) and also because of the absence of complaints by colleagues or clients and the absence of any attempt by the claimant to encourage other women to wear a headscarf.

Facts

On 1 October 2007, the claimant was hired by ACTIRIS, which is the public office in charge of implementing employment policy in the Brussels-capital region. The claimant wore a headscarf at the time of her entry into service.

On 5 December 2012, ACTIRIS adopted new work rules, with Article 19 reading as follows:

"Article 19 – Work clothes

Clothing suited to the workplace:

All staff members are required to adopt a form of dress (jewels, accessories, haircut, and makeup included) compatible with the work places of ACTIRIS, so as not to disturb the atmosphere necessary for the good performance of the tasks.
In other words, the form of dress and all aspects of this must remain discreet and not run counter to the mission of ACTIRIS. All headwear is prohibited."

In February 2013, the claimant and two other colleagues who also wore headscarves notified ACTIRIS that they deemed Article 19 to be unclear and therefore not applicable to them. As a consequence, the sentence regarding headwear was removed from Article 19. However, Article 10 of the work rules was as follows:

"All staff members undertake to respect the principle of neutrality of public service and the equal treatment of citizens in all situations [...] During their work, staff members of ACTIRIS do not show their religious, political or philosophical preferences, either in their manner of dress or in their behaviour. They do not pursue activities of a religious, political or philosophical character in the workplace, without prejudice to union activities and opinions within the framework of existing laws and conventions".

The claimant received a formal warning, as she continued to wear her headscarf despite these explicit work rules to the contrary. On 13 May 2013, she filed a complaint for discrimination on grounds of her religious beliefs.

On 10 June 2013, the claimant filed a writ of summons before the President of the Brussels Labour Tribunal and asked that the neutrality policy of ACTIRIS be deemed contrary to anti-discrimination legislation. She also requested that ACTIRIS be forced to cease implementing this policy on pain of a daily penalty of € 650. She finally claimed € 5,000 damages to cover her legal fees.

Judgment

On 6 August 2015, the public prosecutor's office delivered an opinion which concluded that Article 10 of the work rules had introduced a general prohibition on displaying religious, political and philosophical symbols which constituted indirect discrimination, as prohibited by the Legislative Order of the Brussels-capital region of 4 September 2008 for the promotion

of diversity and the combatting of discrimination in the regional civil service of Brussels.

The President of the Labour Tribunal followed this opinion in his ruling. He deemed that the Legislative Order of 4 September 2008 provided the legal background to the case. This order is one of the measures which implement Directive 2000/78 into Belgian law, with a specific focus on the civil service in the Brussel region. As such, it must be interpreted in conformity with that directive and the general principles of EU law, including those provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Article 9 of which reads:

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

The President went on to explain that one must distinguish between an 'inclusive' construction of the principle of neutrality, which requires that the users of public services be treated in a non-discriminatory way, and an 'exclusive' construction, which requires that public servants do not manifest their beliefs, as it is important to maintain an appearance of neutrality. It is the neutrality principle in the exclusive sense that ACTIRIS used to justify Article 10 of the work rules. It was used in an extensive manner also in that it applied to all members of staff.

The constitutional principle of neutrality upon which the Belgian state is grounded is traditionally considered to rely on the inclusive principle – which ACTIRIS could not invoke to justify its neutrality policy. Unmitigated support for the use of an exclusive construction cannot be found in the case law of the European Court of Human Rights either, since it does not allow for an absolute ban on religious signs in the workplace without reservation or justification, as shown by the Eweida – v – United Kingdom case

ECtHR 15 January 2013, application 48420, reported in EELC 2013-1, page 42.

"On one side of the scales was Ms Eweida's desire to manifest her religious belief. As previously noted, 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".

Although the President in this Belgian case did not reference Article 9(2) of the ECHR ("....such limitations as are prescribed by law...") explicitly, he did note that there must be a legal basis for limiting freedom to manifest one's religion, the only possible statutory basis in the case at hand being the legislative acts adopted by the Parliament for the Brussels region or the ministerial decrees for that region. However, none of those legislative acts or decrees allows for the 'exclusive' neutrality policy advocated by ACTIRIS. Moreover, the legislative provisions which prohibit discrimination on the grounds of religion or belief have to be read in combination with Article 9 ECHR, which protects the right to manifest one's religion or belief, so that the wearing of a religious sign in itself cannot be criticised.

Moving to the facts of the case, the President considered that the prohibition contained in Article 10 of the work rules involves those adhering to a religion which prescribes the wearing of a particular sign or for whom the wearing of a particular sign is important, being treated less favourably than others. There is discrimination, but the President does not undertake detailed analysis as to whether this is direct or indirect, since the forthcoming judgment of the ECJ in the Achbita case (C-157/15) referred by the Belgian Supreme Court should soon settle the issue

Reference for a preliminary ruling reported in EELC 2015-3 nr 25. Advocate-General Kokott delivered her opinion on 31 May 2016. At the time of writing, the ECJ has yet to deliver its judgment.

In addition, the President expressed doubts about the objective of neutrality used by ACTIRIS, for two main reasons. On the one hand, there is no legislative act adopted by the Parliament of the Brussels-capital region which would condone an objective of exclusive neutrality and, on the other hand, the work rules of ACTIRIS cannot be deemed to be 'law' in the formal sense of the term and therefore cannot be used to restrict the freedom of religion guaranteed by Article 9 ECHR.

The President also questions the proportionality of the exclusive neutrality imposed by ACTIRIS upon its employees. ACTIRIS does not establish the existence of an imperative social need to justify the sudden imposition of a general and absolute ban on religious signs.

ACTIRIS argued that it needed to be able to transfer its staff from one position to another and from one department to another freely, which meant that an employee who works in a back

office position one day may have to work in a front office position the next day. According to ACTIRIS, this meant that, as regards the wearing of religious symbols, it is not possible to make a distinction between front office workers, who are in direct contact with the public and must be seen to be religiously neutral and back office workers to whom this does not apply. The President was not impressed with this line of reasoning, given that the claimant was a junior employee who had worked in the call centre since 2009. In his view, rather than making a distinction between front and back office, it would be better to distinguish between, on the one hand, employees who hold a position where it is necessary to avoid giving the public concern about the employee's impartiality and, on the other hand, employees not holding such a position.

The President finally notes that there has been no attempt by the claimant to encourage other Muslim women to wear a headscarf, nor has there been any tension between colleagues or complaints by colleagues or public service users

In view of the above, the President deemed Article 10 of the work rules unlawful and ordered ACTIRIS to cease applying it. He also fined ACTIRIS €6.210 in damages to cover the legal fees of the claimant.

Commentary

This judgment departs from settled case law. Indeed, it is the first time, to the author's knowledge, that a Belgian judge has deemed a neutrality policy to be discriminatory on the grounds of religion or belief. The reasoning leading to this conclusion is also quite unexpected, considering existing case law.

The President of the Brussels Labour Tribunal accepts that the objective of implementing a neutrality policy which prohibits any visible sign of political, philosophical or religious belief can be legitimate but he questions its lawfulness for lack of a legal basis to underpin it in the region of Brussels-capital. However, this approach is questionable, as anti-discrimination law does not require legitimate objectives pursued by an employer to be underpinned by law. The President's requirement appears to flow from Article 9 ECHR but it is hard to understand how this can be imposed upon employers, either public or private, as the ECHR is an international convention applying to states and having no direct effect on individual employers. Consequently, the legality requirement should only apply to states acting as public authorities.

This judgment is also noteworthy for its detailed assessment of proportionality. Until now, the proportionality requirement has been treated fairly summarily in Belgium. Most judges would consider that an absolute and general ban on wearing religious, political or philosophical signs is appropriate and necessary, without considering the specific circumstances of the case. In

contrast, this judgment gives much thought to details such as the question of internal mobility, the feasibility of making a distinction between front-office and back-office functions, the absence of any complaint either from colleagues and users of the public service, and the fact that the claimant did not seek to encourage other Muslim women to wear a headscarf.Finally, this judgment is in line with the opinion that Advocate General Kokott filed on 31 May 2016 in the Achbita case. In that case, she suggested that a general company rule prohibiting visible political, philosophical and religious symbols in the workplace constituted indirect discrimination which might be proportionate on the facts, but she invited the Belgian Supreme Court to consider those facts before reaching any definitive conclusion, particularly with a view to the following:

the size and conspicuousness of the religious symbol;
the nature of the employee's activity;
the context in which he or she performs that activity; and
the national identity of the Member State concerned

If the ECJ followed this approach, a detailed proportionality analysis would become hard for Belgian judges to avoid and the judgment reached in this case, though currently controversial, might become the norm.

Subject: discrimination on the grounds of religion or belief

Parties: Mrs. Samira A.- v – ACTIRIS

Court: Tribunal du travail francophone de Bruxelles (Labour Tribunal of Brussels)

Date: 16 November 2015

Case number: RG no 13/7830/A

Publication: not yet published

Creator: Tribunal du travail francophone de Bruxelles (Labour Tribunal of Brussels)
Verdict at: 2015-11-16
Case number: RG no 13/7830/A