SUMMARY

2016/39 Not selecting a candidate for a job on account of her veil was directly discriminatory on grounds of religion (IT)

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Facts

Sara Mahmoud is an Italian citizen of Egyptian descent. Being a Muslim, she wears a hijab, a veil that covers her hair.

Sara was on the mailing list of a staffing agency event called Evolution Events. In 2015, Evolution Events sent her an invitation to apply for a two-day job as a hostess at a major footwear exhibition in the new Rho-Fiera exhibition hall in Milan. The job consisted of distributing leaflets to the exhibition's visitors. Evolution Events was charged by its client, Arte, to pre-select hostesses for this job. The final selection was to be made by Arte itself.

The invitation specified that the successful candidates would need to be good looking, at least 1.65 metres in height, have shoe size 37, wear clothing size 40-42 and have a good command of English.

Ms Mahmoud applied, attaching her photograph. Evolution Events responded: “Hello Sara, I would be delighted to have you working for us because you look very nice, but are you willing to remove your veil?” This prompted the following exchange:

Ms Mahmoud: “I wear the veil for religious reasons and I am not willing to take it off. I can however combine the proposed uniform with the veil”.

Evolution Events: “I imagined you would not, unfortunately clients will never be so flexible, thank you anyway”.

Ms Mahmoud: “Since I am just supposed to do some leafleting, I do not understand what kind of flexibility clients are asking for”.

Evolution Events responded by sending Ms Mahmoud a copy of the request it had been sent by its client Arte. It included the following text:

“We need two good looking, energetic and enterprising girls, preferably with a height of around 1.65, long, loose and fluffy hair, good make up, and nails with a light enamel. They will wear a short white dress, size 40/42 with which we will provide them, along with sampling shoes size 37. English required. They need to distribute advertising material within the exhibition with the scope to attract the public and to bring them to our stand, where they will find some sales personnel waiting for them. Looking forward to receiving from you a general indication of these characteristics, with a picture of the candidates you found. However, we wish to make the final selection of the young ladies.”

Ms Mahmoud brought legal proceedings against Evolution Events, alleging religious discrimination. She asked the court to:

declare that Evolution Events had discriminated against her, when not admitting her to the selection criteria for prospective choice of hostesses;

order Evolution Events to immediately stop the discriminatory behaviour;

ask the Court to adopt any appropriate measure to stop the discriminatory behaviour;

requesting the Court pursuant to section 29(5) of Legislative Decree 150 of 2011 to order Evolution Events:
to offer her a similar job within three months which she can perform without removing her hijab;
not to exclude wearers of the hijab from selection for similar work;
to pay her € 140 in compensation for loss caused;
to pay compensation for immaterial damages, of a suggested amount of € 1,000;
to publicise the Court's decision on the home page of the defendant's website for six months; and/or publish the decision in a daily national newspaper, which can give the announcement proper visibility;
to pay the plaintiff's legal costs.

The court of first instance rejected the claim. It considered the way Evolution Events had treated Ms Mahmoud constituted neither direct nor indirect discrimination, since the request was based on its need for candidates who projected a certain image and this was not compatible with wearing any kind of head-dress.

Judgment

Ms Mahmoud appealed successfully. The Court of Appeal began by noting that discrimination does not require an intention to discriminate. Therefore, the judge need not consider the motive of the person alleged to have acted in a discriminatory way. A person can be guilty of discriminatory behaviour, even when acting in good faith.

Italian Decree 261/2003, which transposes Directive 2000/78, prohibits discrimination on grounds of religion (amongst other grounds). Given that Evolution Events disadvantaged Ms Mahmoud based on clothing that directly related to her religion, the Court of Appeal found that Evolution Events had discriminated directly, not indirectly, on grounds of religion.

The Court went on to assess whether this direct discrimination fell within the scope of a 'genuine and determining occupational requirement', under Article 4(1) of the Directive. This exception allows Member States to provide that a difference in treatment does 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". The court did not accept that the conditions for applying this exception were satisfied. Evolution Events was not required to employ hostesses or draft their contracts: all it had to do was make a preselection, following which Arte would make the final selection. There was nothing in Arte's letter to explain beyond all doubt that uncovered hair was an essential requirement of the job. On the contrary, Arte's letter preceded the list of requirements by the word "preferably". On these grounds, the Court of Appeal overturned the lower court's judgment and found Evolution Events to have discriminated against Ms Mahmoud.

As for the remedy, the court took into account that in the end, Arte had not hired any hostess from Evolution Events. This meant that Ms Mahmoud had not suffered any material loss. The court assessed her immaterial damages at € 500. Her other requests were denied.

As cases of this kind are relatively new in Italian case law, the Court of Appeal did not make an order for costs against either party and therefore each party was left to pay its own costs.

Commentary

The Court of Appeal suggested to Evolution Events ways in which it might avoid a similar decision in future, by separating out which kinds of requirements are essential to a selection process and which are not. But it should be noted that, since 1970, when the Workers' Statute came into force, employers have been forbidden from setting conditions or characteristics for a workplace that are not essential to the working activity. The definition of what is essential is left to the courts, but as an example, criminal records can only be requested in relation to certain types of work, and in one case, such a request for a position as a road sweeper was found to be unlawful.Interestingly, the Court of Appeal explained how it considered the reason Ms Mahmoud gave for wearing the hijab to be religious. If the explanation had been any less clear, for example, if she had said: "because my mother wants me to wear it", the court may not have found discrimination on religious grounds.This case may be good timing because by end of the year, two decisions on a similar subject will be issued by the ECJ, preceded by conclusions from the respective Advocate Generals, which seem to be contradictory. The two cases are C-157/15, Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijiding – v – G4S Secure Solutions NV; and C-188/15, Bougnaoui – v – Micropole SA.These two cases were heard on the same day but resulted in opposing opinions, as follows:Ms Kokott, AG for the Achbita case, concluded as follows:

- The fact that a female employee of Muslim faith is prohibited from wearing an Islamic headscarf at work does not constitute direct discrimination based on religion within the meaning of Article 2(2) of Directive 2000/78/EC if that ban is founded on a general company rule prohibiting visible political, philosophical or religious symbols in the workplace and not on stereotypes or prejudice against one or more specific religion or against religious beliefs in general. The ban may, however, constitute indirect discrimination based on religion under Article 2(2)(b) of that Directive.

- Such discrimination may be justified in order to enforce a policy of religious and ideological neutrality pursued by the employer in the company concerned, insofar as the principle of proportionality is observed.

the size and conspicuousness of the religious symbol;
the nature of the employee's activity;
the context in which she has to perform that activity; and
the national identity of the Member State concerned.

- A rule laid down in the workplace regulations of an undertaking which prohibits employees of the undertaking from wearing religious signs or apparel when in contact with customers of the business involves direct discrimination on grounds of religion or belief, to which neither Article 4(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation nor any of the other derogations from the prohibition of direct discrimination on grounds of religion or belief which that directive lays down applies. That is the case when the rule in question applies to the wearing of the Islamic headscarf alone.

- Where there is indirect discrimination on grounds of religion or belief, Article 2(2)(b)(i) of Directive 2000/78 should be construed so as to recognise that the interests of the employer's business will constitute a legitimate aim for the purposes of that provision. Such discrimination is nevertheless justified only if it is proportionate to that aim.

Comments from other jurisdictions

Finland (Kaj Swanljung and Janne Nurminen, Roschier, Attorneys Ltd): The question of prohibiting employees from wearing religious symbols at the workplace based on the employer's right to direct the work is topical in Finland. Discrimination based on religion (along with other circumstances) is prohibited in the Finnish Employment Contracts Act (55/2001, as amended) as well as in the Finnish Non-Discrimination Act (1325/2014, as amended).

However, authoritative Finnish case law on the issue is rare. In 2014, the District Court of Helsinki found managers of a clothes store guilty of discrimination in a case in which they had terminated a shop assistant's employment because she was wearing a headscarf. The employer was not able to establish a proper and justified reason for this action and it was therefore found that she had been treated less favourably than another person would have been treated, on grounds of her religion. Wearing religious symbols at the workplace was also considered in another case, though in that case, the relevant employers' association and employee representatives agreed on an interpretation of the collective agreement which allowed bus drivers to wear a Sikh turban as a part of their uniform.

Despite this, the legal status of unusual work attire is not completely clear in Finland. For example, in 2006 a prosecutor decided to waive prosecution when an employer forbade a muslim restaurant employee from wearing a headscarf for both hygiene and image reasons. In another ruling from 2014 it was held that prohibiting the wearing of a non-religious scarf was not discriminatory (TT 2014-88).

Germany (Paul Schreiner and Nadine Schmökel, Luther Rechtsanwaltsgesellschaft mbH): In Germany, the case would have been decided the same way. An employer must observe the German Equal Treatment Act (AGG), which transposes Directive 2000/78/EC. By sections 7 and 1, employees must not be discriminated against because of their religion. The AGG provides for both direct and indirect discrimination in this context. Direct discrimination is present if an employee has been treated less favourably than a real or hypothetical comparator in a comparable situation due to religion. An intent to discriminate is not required. Different treatment based on religion may be lawful if religion constitutes an essential and determining professional requirement for the type of occupation or conditions of practice (section 8(1) AGG). Therefore, the purpose is must be lawful and the requirement appropriate.

The BAG (10 October 2002, 2 AZR 472/01) clarified that the wearing of a hijab for religious reasons is protected by the Constitution of the Federal Republic of Germany (GG). It is covered by the protective scope of freedom of belief and creed (section 4(1) GG) as well as the freedom of exercise of religion (section 4(2) GG). This fundamental right includes the freedom to live and act according to one's religious beliefs.

Therefore, an almost identical case was decided along these lines by the Labour Court of Berlin (28 March 2012, 55 Ca 2426/12). In that case, a muslim applicant was excluded from an application process because of her refusal to remove her hijab during working hours. The court stated that the hijab was demonstrative of her religion. It was not just an ordinary garment or trinket, but an act of religious observance. Wearing the hijab and religiosity were inextricably linked and therefore the court ruled that there had been unequal treatment on

grounds of religion. In the case at hand, there was no objective need for the employer to act as it did (under section 8(1) AGG), nor was there a general justification. Therefore, this would constitute discrimination.

Note that even though unequal treatment based a need for employees not to wear a hijab can in theory be justified by section 8(1) AGG, cases of this kind are rare. An essential and determining requirement only exists if the occupation cannot be exerted whilst wearing a hijab. However, unequal treatment on grounds of religion may be justified if the employer is a religious community (section 9 AGG). Therefore, the BAG (24 September 2014, 5 AZR 611/12) ruled that a church could prohibit the wearing of a hijab.

Greece (Harry Karampelis, KG Law Firm): Directive 2000/78 provides for the prohibition throughout the EU of any direct or indirect discrimination based on religion or belief, with a view to the attainment of a high level of employment and social protection (Recital clause 11). The Directive lays down minimum requirements, leaving to the Member States the option of introducing or maintaining more favourable provisions.

Under Greek law, employment rights and non-discrimination requirements fall under the protective scope of the principles of proportionality, the right to life, human dignity and free development of personality (Articles 2, 5 and 25 of the Greek Constitution).

In the present case, it seems that neither of the two courts addressed Ms Mahmoud's query about the impact of her wearing a veil might have on attracting customers. The context of where she performs the work is also important, as is the nature of the activity. In my view, the court should have compared the two conflicting rights under examination i.e. the candidate's right to wear a veil for religious reasons and the employer's right to base the hiring criteria on the nature of the employment.

Another interesting point is that according to the Court of Appeal, because the employer's good faith did not protect it from liability for discrimination the court also made an award for immaterial damages. Under Greek law, if the court had found the employer to have acted in good faith, it would not have awarded moral damages.

The Court of Appeal said in its ruling that (i) Evolution Events was not responsible for employing the chosen candidates, but solely with preselecting candidates and (ii) Arte's letter preceded the list of requirements by the word "preferably". The Court thus concluded that Evolution Events had discriminated against Ms Mahmoud. In my view, the Court might have ruled differently if Ms Mahmoud had brought legal proceedings against Arte, the Court could then have looked at whether the requirements were a "genuine and determining occupational requirements" under Article 4(1) of the Directive.

As to the "lookism" issues raised by this case, one could reasonably question: is it unlawful for Arte to have limited its hiring policy to good-looking people? Appearance and attractiveness are questionable qualifications upon which to base employment decisions. Appearance is normally an immutable characteristic that does not relate to work performance. If appearance raises religious or gender-based discrimination issues, it should also fall within the protective scope of the law and be subject to the scrutiny of the courts. Greek law does not explicitly prohibit lookism, but employees can (i) claim against the employer for moral harm based on appearance; (ii) claim regarding rehiring or compensation for invalid dismissal; and/or (iii) report a criminal matter based on verbal abuse.

In the US, there are two theories about lookism. Several arguments in favour of protecting employees against discrimination are found in the 'disparate treatment' doctrine articulated by the US Supreme Court in the case McDonnell Douglas Corporation – v – Green (1973) and modified later by Community Affairs – v – Burdine (1981) and St Mary's Honor Center – v – Hicks (1993). This involves shifting the burden of proof as follows: the complainant must first provide credible evidence to establish a prima facie case of discrimination. If this is established, the defendant employer must next provide a legitimate, non-discriminatory explanation for its actions; and finally the burden shifts back to the employee to establish that the employer's reason conceals discrimination. The other legal route claimants may choose to prove employment discrimination claims is the 'disparate impact' or 'adverse impact' doctrine. This first appeared in the US Supreme Court case of Griggs – v – Duke Power (1971) and further refined in Albemarle Paper Company – v – Moody (1975). By this theory, it is unlawful for an employer to apply a neutral employment policy that has a disparate, or disproportionate, negative impact on employees and applicants of a particular race, colour, religion, sex, or national origin, unless the policy is job-related and necessary to the operation of the business, or, in the case of age, the policy is based on a reasonable factor other than age. This disparate impact legal doctrine does not require proof of an employer's intent to discriminate. Rather, "a superficially neutral employment policy, practice or standard may violate the law if it has a disproportionate discriminatory impact on a protected class of employees" and the employer cannot justify the practice out of legitimate business necessity.

The Netherlands (Peter Vas Nunes, BarentsKrans): A telling detail in this case report is that the appellate court did not order Evolution Events to pay Ms Mahmoud any compensation for the considerable legal expenses she must have incurred to litigate this matter in two instances, the reason being "that these cases are quite new in the Italian case law". To me, this was a blatant case, not only of religious discrimination, but also of gender discrimination. According to EU law, the remedy in such cases should be dissuasive and proportionate to the damage suffered. The remedy in this case strikes me as neither dissuasive nor proportionate.

Moreover, it was only against Evolution Events and not also against Arte.An interesting aspect of this case, that does not seem to have played a role, is that Arte required its hostesses to be good looking, not too short, not too fat or skinny (dress size 40-42), long-haired and well made-up. This constitutes what is sometimes known as 'lookism'. Lookism is not prohibited by EU law as such. Although Dutch law does not prohibit this explicitly either, I doubt whether a Dutch court would have looked favourably on Arte's requirements for hostesses. I am told that lookism is prohibited by law in one American state (Michigan) and some American cities. Readers interested in the American approach to this are directed to Jacqueline Schiavo et al – v – Marina District Development Company, LLC, Superior Court of New Jersey, 17 September 2015, docket No. A-5983-12T4, also known as the 'Borgata Babes' case, a 57-page judgment in a well-publicised lawsuit concerning lookism.

Italy (Caterina Rucci, Bird & Bird): I fully agree with Peter Vas Nunes' position. However, even though 'lookism' is not factor under Italian law, it should still be remembered that the Workers Statute does prohibit any "investigation" of facts that are not relevant for the working activity to be carried out. In my view, this is another way by which lookism might be considered discriminatory or unlawful, namely, when good looks are required for activities where this is not a fundamental requirement for those activities.

On costs, I agree that the plaintiff should have received them, but it should be noted that Mr Guariso, who assisted Ms Mahmoud, works for an association that does pro bono work. Therefore, it is likely that Ms Mahmoud was not asked by her lawyer to pay.

United Kingdom (Bethan Carney, Lewis Silkin LLP): In the UK this would have been analysed as a case of indirect discrimination not direct discrimination. The grounds for the treatment were that Arte (or Evolution Events on behalf of Arte) did not want the hostesses to wear a head-covering. They would have presumably objected to her wearing a headscarf or a hat even if she wanted to do so for non-religious reasons. Furthermore, they were not refusing to select her because she was muslim but because she did not comply with their dress code, so they were applying a criterion that they would apply to everyone. However, the reason she wanted to wear the hijab was for religious reasons, and their decision not to select anyone who chose to wear a headscarf would impact disproportionately on muslim women. The distinction between direct and indirect discrimination is relevant because in the UK it is possible to justify indirect discrimination but not direct discrimination. However, it is difficult to see how this requirement could be justified as being a proportionate means of achieving a legitimate aim.

Under UK law, Arte would probably be liable for the act of Evolution Events in these circumstances (and therefore also guilty of discrimination) even if it had no knowledge that

Evolution was going to refuse to select anyone wearing a hijab.

Furthermore, under UK law, Evolution Events would not have escaped liability just because an instruction to discriminate came from a client, such as Arte (if such an instruction had been given). Evolution Events could still be liable for discrimination if it followed an instruction not to select anyone wearing a head scarf. Evolution Events would have a defence if it could show that it relied upon a statement by Arte that the action was not discriminatory but only if it was reasonable for them to rely upon it. In these circumstances, it seems unlikely that even if Arte had given such a statement, it would be reasonable to rely upon it.

Subject: Discrimination; religion

Parties: Sara Mahmoud – v – Evolution Events

Court: Corte d'Appello di Milano (Court of Appeal of Milan)

Date: 4 May 2016

Case number: 1239/2014

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