

SUMMARY

2016/53 Landmark decision by Austrian Supreme Court: Face veil ban for employees is lawful (AT)

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The Austrian Supreme Court has ruled that the general prohibition of Muslim face veils by an employer does not constitute unlawful discrimination. In this landmark decision, Austria's Supreme Court expresses the view that an uncovered face is a prerequisite to proper communication. Thus, termination of employment by reason of an employee's refusal to come to work unless she can wear a face veil is not unlawful under the Austrian Equal Treatment Act. Whether this rule also applies to other religious clothing such as headscarves remains to be seen.

Facts

The plaintiff, an Austrian woman, had already converted to Islam before starting work as an employee for the defendant, a public notary. The defendant knew about the plaintiff's religion and even provided a private room to enable her to pray. After a while, the plaintiff asked the

defendant for permission to wear a headscarf during working time. The defendant denied the request at first, saying all his employees are obliged to dress discreetly and neutrally. However, the plaintiff started to wear headscarves anyway, after which the defendant reluctantly agreed to this in a conversation with her. From that point on, the plaintiff always wore headscarves and over-garments (known as ‘abaya’) at work.

Up to the plaintiff’s maternity leave, her tasks at work did not change, even though she was wearing religious clothing. During her maternity leave, the defendant agreed to the plaintiff’s request to part time work. Part time employment during maternity leave generally constitutes a second employment relationship between the parties, which terminates at the end of the maternity leave. The plaintiff had no direct client contact during this period of part time work. Following maternity leave, the plaintiff returned to her previous job, but on reduced working hours. She had less direct contact with clients during this period than she had before her maternity leave. The defendant also asked her less often to act as a witness for clients.

After a while the plaintiff became ill. Before returning from sick leave she asked the defendant for permission to wear a full face veil (known as a ‘niqab’) at work. The defendant rejected this request, arguing that it was not compatible with the working-environment of a notary public. The defendant wrote the plaintiff two emails in which he used the words “an experiment in ethnic clothing” and “pantomime”. However, the defendant also invited the plaintiff to have a further discussion. The plaintiff did not accept the defendant’s view and continued to insist she should be allowed to wear a veil. The plaintiff also decided not to accept the defendant’s invitation to talk further. Therefore, the defendant gave the plaintiff notice of termination. In the event, the plaintiff never actually worked, even for a day, with a face veil.

The plaintiff claimed a € 7,000 lump sum in compensation for the harm suffered because of the defendant’s discriminatory behaviour. The claim was based on three causes. First, that the termination was discriminatory because it was based on her religion. Second, that the reduction of direct client contact was linked in a discriminatory way to her religion. Third, that the defendant’s comments with regard to “an experiment in ethnic clothing” and “pantomime” were also connected in a discriminatory way to her religion.

The defendant argued that the termination of the employment was not based on the plaintiff’s religion, as wearing a face veil was not part of her religious worship. Moreover, the defendant claimed that the function of a notary public requires discreet clothing by the notary and its employees. Further, a face veil prevents identification of the employee. The defendant argued it had allowed the headscarf and over-garments and these were even published on the defendant’s website. The defendant also said the plaintiff was not prohibited from having

direct contact with clients because of her clothing, but the amount of direct contact was reduced as a result of the reduction in the plaintiff's working time.

The court of first instance dismissed the claim.

The appellate court found that the reduction of work tasks was directly discriminatory on grounds of religion and indirectly discriminatory on grounds of gender, as it is only Muslim women who wear headscarves. The defendant, moreover, failed to justify the discrimination. However, according to the appeal court, the termination of the contract was not unlawful discrimination and nor were the messages written by the defendant.

Judgment

The Supreme Court found that wearing a face veil is, for certain Muslims at least, an expression of religious worship. Unequal treatment by reason of religious dress, such as a face veil, may therefore qualify as direct discrimination on grounds of religion. The discrimination could not be justified by means of the defendant's argument that employees need to be identifiable, as the employee may still identify herself upon request. However, it held that one of the basic rules of interpersonal communication in Austria, especially in professional circles, is an uncovered face. Unimpaired communication and interaction with clients, co-workers and the employer is one of the main prerequisites to the plaintiff fulfilling her obligations under the employment contract. Hence, the termination of the employment was justified unequal treatment. The prohibition of face veils at a notary public is the only means by which unimpaired communication can be ensured and it is therefore an appropriate measure. The same justification applies to indirect discrimination based on gender.

However, with regard to the reduction in client contact after the plaintiff returned from maternity leave, the Supreme Court repeated that unequal treatment based on the wearing of religious dress, such as Muslim headscarves and over-garments, may qualify as discrimination on grounds of religion. The Supreme Court also stated that the reduction of client contact and opportunity to act as a witness were the result of the plaintiff's religious dress. However, the defendant had accepted for several years that the plaintiff had client contact and was a witness for testaments, even though she was dressed in Muslim headscarves and overgarments. Thus, the unequal treatment based on her religious dress that took place after she had returned from maternity leave was not justified.

The Supreme Court, moreover, stated that the comments of the defendant in his emails confirmed the motive of the defendant to discriminate against the plaintiff with regard to the other working conditions, namely the reduced client contact and the reduced opportunity to act as a witness for clients

To sum up, the Supreme Court ruled that the defendant could justify its discrimination against the plaintiff when terminating the employment because of the plaintiff's wish to wear a face veil. However, the discrimination that related to the plaintiff's reduced client contact and reduced opportunity to act as a witness for clients, which was based on a change of opinion of the defendant with regard to the headscarf and the overgarment, could not be justified by the defendant. Thus, the Supreme Court awarded the plaintiff € 1,200 out of the claimed lump sum compensation of € 7,000.

Commentary

This judgment is the first Austrian Supreme Court decision concerning discrimination against an employee in relation to religious dress under the Austrian Equal Treatment Act ('Gleichbehandlungsgesetz', 'GIBG').

It should be noted that the facts of this case are distinct from the facts of a recent Italian court case concerning discrimination during recruitment as a result of the wearing of a religious headscarf (Sara Mahmoud – v – Evolution Events, EELC 2016/39).

The GIBG implements Directive 2000/78/EC into Austrian law. Under the GIBG, the obligation on employers to treat its employees equally includes all types of employment based on a civil contract. Pursuant to section 17 of the GIBG, any direct discrimination (meaning less favourable treatment of an employee because of a particular attribute) or indirect discrimination (meaning a practice, policy or rule that is the same for every employee, but has an unfair effect on employees who share a particular attribute) on grounds of ethnic origin, religion or belief, age or sexual orientation in the context of employment is prohibited. The seriousness of the discrimination must be examined by objective criteria.

However, discrimination based on a characteristic related to ethnic origin, religion or belief, age or sexual orientation, may be justified under subsection 20(1) of the GIBG if the nature of the occupational activity or the context in which it is carried out means that the characteristic constitutes a genuine and determining occupational requirement. However, the objective must be legitimate and the requirement must be proportionate. Subsection 20(1) of the GIBG implements Article 4, section 1 of Directive 2000/78/EC into Austrian law.

With regard to the face veil, the Supreme Court stated that one of the basic rules of interpersonal communication in Austria is an uncovered face. This is especially true for an employee of a notary public. Thus, the unequal treatment could be justified under subsection 20(1) of the GIBG where prohibition of religious dress, such as a face veil, is the only legitimate and proportionate way to ensure the unimpaired communication necessary for the work. The same justification also applies to indirect discrimination based on gender. In this

regard, the Supreme Court is generally in line with the European Court of Human Rights' judgment in *S.A.S. – v – France* of 2014 (C-43835/11), which also upheld that an uncovered face plays an important role in social interaction.

However, with regard to other religious clothing, the Supreme Court did not allow for an unreasoned change of opinion by the employer. It thus held that a prohibition on religious dress cannot be justified by the employer if it previously had allowed it. The Supreme Court did not address whether the defendant could have forbidden headscarves and over-garments from the beginning of the employment relationship or in the recruitment process, such as happened in the recent Italian court case of *Sara Mahmoud – v – Evolution Events* (EELC 2016/39). Therefore, this issue remains unclear.

It is notable that there are currently two cases pending with the ECJ on Muslim headscarves. In the first case, the ECJ will have to answer whether the prohibition of a Muslim headscarf, based on a general prohibition of all religious clothing and signs qualifies as direct discrimination (ECJ Achbita, case 157/15). The Advocate General did not find discrimination in her Opinion, but indirect discrimination may still be possible.

In the second case, the ECJ must examine whether or not the termination of an employment relationship, based on a complaint by a customer that the employee was wearing a headscarf, is discriminatory (ECJ Bougnaoui, case 188/15). In her Opinion the Advocate General has come to the conclusion that unjustified discrimination occurred in this case.

Currently, it remains debatable whether a ban on religious dress at the workplace – other than face veils – complies with Austrian equal treatment law. It is therefore advisable that such bans should only be based on general and neutral company rules that apply equally to all employees. If the employer tolerates certain religious clothes or signs it may be difficult for it to ban them or other types of religious dress in the future. However, the rulings of the ECJ in the two pending cases may provide a higher level of certainty quite soon. Hence why in Austria, they are eagerly awaited.

Comments from other jurisdictions

Finland (Kaj Swanljung and Janne Nurminen, Roschier Attorneys Ltd): No similar questions regarding the use of the niqab have been tried before the Finnish courts. However, according to Finnish case law (District Court of Helsinki, R 13/5508), wearing a Hijab or any other similar religious headscarf, which still reveals the employee's face, is not considered as lawful ground for terminating the employment unless there is also an acceptable reason based on the nature of the work.

This is based on a case in which the employees of a clothing store were obliged to dress well and not wear the clothes of any competing brands in a way that could be seen. The employee in question visibly wore a scarf that was not from a competing brand and was willing to wear scarves made by her employer's company. Further, wearing a headscarf did not inhibit the performance of her work. The employer was found to have discriminated against her by preventing her from wearing the scarf without having acceptable grounds to do so. They were found to have done this on grounds of her religion. The employee's employment was considered 'cancelled' because she was prevented from beginning in her fixed-term employment before it had even started.

It could be argued that an employer in Finland may have acceptable grounds to prohibit the use of a full-face scarf such as a niqab if the work involves interpersonal communication which requires the identity of the worker to be clear. But this would be based on a case-by-case assessment.

Germany (Nina Stephan, Luther Lawfirm): The question of whether religious clothing can be prohibited – especially headscarves – is a topic of much lively debate in German law literature and has been the subject of several legal disputes. However, there have been no cases of the kind described in this case report.

The decisions of the German courts mainly concern cases of prohibitions of headscarves at Christian schools or other Christian institutions and the banning of headscarves in the civil service. There was one case in the Labour Court of Berlin, which had to decide whether exclusion from a recruitment process as a result of wearing a headscarf was discrimination on grounds of religion (28 March 2012 – 55 Ca 2426/12). This was similar to the Italian court case (Sara Mahmoud – v – Evolution Events, EELC 2016/39), in which it was held that exclusion from the process because of wearing a headscarf constituted discrimination.

Therefore, the Austrian Supreme Court case is also completely new to the German jurisdiction. It remains to be seen how Germany will be influenced by the further judgments of the European Court of Justice.

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Parties: unknown

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