SUMMARY

2015/25 Does a ban on visible outward signs of religious belief at work constitute direct discrimination? (BE)

<p>The Belgian Supreme Court (Court of Cassation) has asked the European Court of Justice whether Directive 2000/78 should be interpreted in such a way that a prohibition on wearing a headscarf at work does (not) constitute direct discrimination where the employer’s workplace rules prohibit all employees from wearing outward signs of political, philosophical and religious belief in the workplace.</p>

Summary

The Belgian Supreme Court (Court of Cassation) has asked the European Court of Justice whether Directive 2000/78 should be interpreted in such a way that a prohibition on wearing a headscarf at work does (not) constitute direct discrimination where the employer's workplace rules prohibit all employees from wearing outward signs of political, philosophical and religious belief in the workplace.

Facts

G4S Security Solutions is a large company specialised in reception and security services. A G4S Muslim employee working as an outsourced receptionist asked at a certain moment to wear the headscarf during working hours. Until that moment she had been wearing the headscarf outside of working hours, taking it off when starting work. The employer refused her demand, claiming that wearing a headscarf was not compliant with company's principle of strict neutrality. This instruction was not in writing, but was rather an unwritten rule of the

company, as confirmed by the employee's previous conduct.

The parties tried to reach an agreement, but this was unsuccessful. In the end the employer dismissed the employee with payment of the statutory severance indemnity.

Just one day after the dismissal the company applied a new version of its work rules, containing the following rule: *"Employees are prohibited to wear at work any visible sign of their political, philosophical or religious convictions and/or any ritual connected thereto"*.

The employee claimed additional payment equal to EUR 13,220.90 for unfair dismissal.

Both the judges at first instance (Labour Tribunal Antwerp, 27 April 2010) as on appeal (Labour Court Antwerp, 23 December 2011) rejected her claim.

In short, the Courts argued that there was no unfair dismissal: G4S Security Solutions were entitled to apply neutrality principles in the company by prohibiting employees to wear any visible sign at work of their political, philosophical or religious convictions. G4S therefore made an error in dismissing an employee who refused to work without a headscarf, taking into account the facts that the employee had been working for three years without a headscarf, G4S had given her numerous warnings and she had been paid the statutory severance indemnity.

According to the Labour Court there was no discrimination, either direct or indirect. There was no direct discrimination because the prohibition did not distinguish between different groups of employees and it did not use a criterion to distinguish them that treated certain groups of employees less favourably than others.

There was no indirect discrimination, because the prohibition against religious signs was considered proportionate to the legitimate aim of creating a neutral image towards customers and to facilitate peaceful co-existence within the company.

The employee, together with the Centre for Equal Opportunities and Opposition to Racism (CEOOR) decided to appeal before the Supreme Court (Court of Cassation).

Judgment

The Court of Cassation stated that the Labour Court judged that the unwritten rule that existed within G4S Security Solutions did not constitute direct discrimination because the latter is only possible when persons of a certain religion or conviction are treated less favourably than others, while the unwritten rule was meant for all visible signs of any religion or conviction without distinction. Hence, the rule aimed at all employees without distinction and in the same way.

The employee and the CEOOR argued that the Labour Court's position was not compatible with the text of Article 2.2 a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Article 2.2 a) says that 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 Article 1, such as religion or conviction.

Therefore, the Court of Cassation decided to refer the following question to the ECJ: *"Should Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?"*

The Court of Cassation requested the ECJ for a preliminary ruling on 3 April 2015. The case is referred to as Case C-157/15.

Commentary

Belgium has little case law on this matter in the private sector. No more than three relevant cases have been published. In all three cases, Muslim employees were dismissed or retaliated for not removing their headscarves during working hours.

In one case, the company had no specific rules or dress code: the tribunal stated that because of the lack of regulation this was a case of direct discrimination[1].

In the two other cases[2], the company had a specific rule, either written or unwritten. Employers used image and neutrality as arguments to justify their internal rules and ban on outward religious, political and philosophical symbols at work. The Courts accepted the neutrality argument in both cases: the commercial interests of the companies trumped those of an employee wishing to dress in accordance with his or her religious belief and habits.

The question as to whether a ban on wearing religious signs at work could be considered as direct or indirect discrimination based on religion is of course a crucial one.

If the ban is considered directly linked to religion, distinction would only be allowed if a person's (lack of) religion would be a genuine and determining occupational requirement. Neutrality would, in such a case, not be a good enough argument.

If the ban is considered indirectly linked to religion, distinction can still be objectively justified. In that case employers could still argue that a need for neutrality justifies the ban on

headscarves and other religious symbols.

However, taking into account the ECtHR's ruling in the *Eweida* case (*Eweida and others - v - UK*, 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013), the simple existence of a neutrality policy for dress can never be sufficient. Belgian Labour Courts should assess whether a neutrality policy or dress code can ever be a legitimate purpose for a company (e.g for image building, employer branding, and promotion of a certain brand) and whether commercial interests are more important than the interest of a Muslim employee to wear a headscarf.

Comments from other jurisdictions

Austria (Jana Eichmeyer / Anna Schmitzer): So far, there have been no decisions of the Austrian Supreme Court in labour law cases regarding headscarves, but the law concerning direct and indirect discrimination in Austria is determined as follows.

In Austria Directive 2000/78 has been implemented by the Federal Law on Equal Treatment (GlBG). According to section 17 GlBG, discrimination against anyone because of his religion, belief, age or sexual orientation is prohibited. This includes wearing headscarves, as a person's religion can be ascertained from what they wear.

Section 19(2) GlBG clarifies what is meant by indirect discrimination. It means an apparently neutral provision, criterion or practice which would result in a disadvantage for persons having a particular religion or belief. The sole exception would be a provision, criterion or practice that is objectively justified by a legitimate aim where the means of achieving the aim are appropriate and necessary.

In terms of jusitifcation, an employer could prohibit the wearing of a headscarf for the following reasons: because of the need to maintain harmony and religious and political neutrality in the workplace; for safety reasons (e.g. the need to wear a helmet or sterile headgear) or if a headscarf is not the usual clothing in the relevant business. Employers should ensure, however, that any prohibition against wearing religious symbols is not discriminatory, but neutral and proportionate.

The Netherlands (Peter Vas Nunes): Entering the Dutch word for headscarf on the website of the Human Rights Commission yields 176 rulings from 1996, including one on a similar case involving G4S Security (CGB 2013-101). Besides these and earlier rulings there are numerous judgments on headscarves by the courts (although no relevant Supreme Court rulings yet).

The issue, as I see it, is whether disfavouring an employee because he or she wears, or wishes

to wear, a headscarf (hijab, burka, turban, crucifix, etc.) at work constitutes direct or indirect discrimination on the ground of religion or belief. The relevance of the distinction between direct and indirect discrimination is, obviously, that the former cannot be objectively justified, whereas the latter can. Barring the exceptions allowed by Article 4 of Directive 2000/78 (occupational requirement and religious organisations), direct discrimination on the ground of religion or belief cannot be justified and is therefore always unlawful.

The author of this case report refers to the Eweida case, which was reported and commented on in EELC 2012 nr 43 (High Court) and EELC 2013 nr 1 page 42 (ECtHR). I will limit this commentary to Directive 2000/78, which in Article 2(1) defines direct discrimination as occurring "where a 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 Article 1".

When is a person treated less favourably "on the ground of" religion? Does this occur when a person is discriminated against because of his or her particular religion? Or is there also religious discrimination where religion as a whole is banned? Suppose, by way of example, that a company prohibits all manifestations of religion at work. Such a policy does not disfavour Muslims, Christians or Jews, it disfavours anyone whose religion encourages him or her to manifest that religion. This issue is, as it were, the converse of the issue raised in EELC 2012 nr 22, which dealt with discrimination on the ground of marital status. Being married or unmarried may not be a ground for unequal treatment, but does this also apply to being married to a particular person?

A related question concerns the borderline between direct and indirect religious discrimination. Let me give three examples:

a. You are dismissed because you are Jewish;
b. You are dismissed because you wear a crucifix, which violates our policy of religious neutrality;
c. You, a hairdresser in our upmarket saloon, are dismissed because we want our customers to be able to see (the quality of) your hair, which is not possible when you wear a headscarf.

Clearly, employer a. discriminates directly and employer c. discriminates indirectly. I would place employer b. in the category of indirect discrimination. The case resembles that of the tram driver reported in EELC 2010 nr 57. The public transport company of Amsterdam had introduced a new uniform that all tram drivers had to wear and a new dress code that prohibited visibly worn jewellery (other than modest jewellery), ostensibly to project a professional image. The Court of Appeal accepted that this policy was indirectly

discriminatory against an employee who felt that his religion obligated him to wear a necklace with a cross attached to it (but objectively justified).

I feel inclined to hold that employer b. discriminates directly on the ground of religion. The dismissal is directly related to religion, even though it does not disfavour any particular religion or group of employees.

In brief, the borderline seems to lie somewhere between b. and c. It is the objective of the employer's policy ("on the ground of") that determines the borderline.

United Kingdom (Bethan Carney): There is no equivalent in the UK of the principle of neutrality. It is generally accepted in this country that a ban on wearing religious symbols in the workplace would be directly discriminatory (even if it impacted equally on followers of several different religions) because the religious believers would be treated less favourably than those without religious beliefs. For example, if my employer did not allow me to wear a crucifix around my neck at work but allowed another employee to wear a necklace, my employer would be treating me less favourably than the other employee because of religion. This would be less favourable treatment even if my employer also prohibited Muslim colleagues from wearing headscarfs. In the Eweida case, the employer's dress code banned wearing visible forms of jewellery whether they were religious or not.

Footnotes

1 Labour Tribunal Tongeren 2 January 2013, *Ors.* 2013, afl. 3, 22 en *Or.* 2013, afl. 4, 109.

2 One is the case discussed here, the other is Labour Court 15 January 2008, *JTT* 2008, 140.

Subject: Religious discrimination

Parties: Samira A. and Centre for Equality of opportunities and Opposition to Racism - v - G4S Secure Solutions

Court: Cour de cassation (Supreme Court)";

Date: 9 March 2015

Case number: S.12.0062.N

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Creator: Cour de cassation (Belgian Supreme Court)
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Case number: S.12.0062.N