SUMMARY

2015/24 Protestant hospital may ban headscarf at work (GE)

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Summary

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Facts

The plaintiff, a nurse, had been employed by the defendant, a Protestant hospital, since 1996. The employment contract referred to a document setting out the terms and conditions of employment in the Protestant Church, including a dress code. The dress code prohibited headscarves and any other "private clothes" at work unless expressly permitted.

The plaintiff was on parental leave from March 2006 to January 2009[1] and subsequently ill until at least April 2010[2]. She had not worn a headscarf prior to her parental leave. In April 2010 she offered to return to work. It is disputed between the parties whether the plaintiff offered to return to work fully and without limitation or only gradually and under medical supervision. The latter is a kind of reintegration after a long illness ("*Wiedereingliederung*") and work done during reintegration is not considered to be job performance because, during this time, the employee is still deemed to be sick. The employee will not receive salary but

continue to receive sickness pay under the health insurance scheme.

The letter in which the plaintiff offered to return to work contained a request to be allowed to wear a headscarf for religious reasons. In effect, her offer to return to work was conditional on being allowed to wear a headscarf. The defendant refused to accept the offer to return to work, with reference to the dress code, which, for reasons of hygiene, did not only prohibit the wearing of head-scarves but the wearing of any private clothes that are not part of a nurse's uniform. The defendant claimed that it could not accept the plaintiff's service in these circumstances and decided not to pay her salary until she returned to work without the headscarf[3]. The plaintiff, on the other hand, felt that her freedom of religion had been infringed as well as her general right of personality. She sued for payment of salary from April 2010, as in her opinion, the defendant was not entitled to decline her offer of work.

The Labour Court decided in favour of the plaintiff. The Regional Labour Court then overturned the judgment and dismissed the claim. The plaintiff appealed.

Judgment

The Federal Labour Court (BAG) allowed the appeal in part but referred the case back to the Regional Labour Court for some further clarification. The BAG had not been able to determine whether the outstanding salary should be paid to the plaintiff, as it cannot hear new facts. It was unclear whether salary was owed, bearing in mind that the plaintiff had offered to return to work as part of the reintegration – which is not considered as job performance. Up until this point, she had not explained how she would have fulfilled her work duties during the reintegration.

With regard to the plaintiff's request to be allowed to wear a headscarf, the BAG, applying a balance of interests test, ruled that a religious institution may, as a general rule, ban employees from wearing head scarfs.

According to the BAG, the head scarf is considered as a symbol of the Islamic faith. The display of a dissenting religious symbol is not compatible with the special duty of loyalty of an employee in a religious institution to behave in a neutral manner with regard to religion. The employee, buy signing her employment contract, had accepted to follow the church's mission and to fulfill her tasks within the mission of the church. The employer may request employees to dress in a certain way to fulfill their work duties, especially if a need for good hygiene is involved. In a similar way, the employer may prohibit employees from dressing in a certain way. The obligation to refrain from wearing the headscarf followed directly from the dress code, which was an integral part of the employment relationship.

The German Constitution incorporates certain articles from the Weimar Reich Constitution of 1919. The Constitution of 1919 had provided that religious communities were public law bodies and this had lasted up until World War II. They were then given the right to remain that way if they could demonstrate their 'durability'. This would be determined by what it said in their constitution and the number of members they had.

In Germany, the church is autonomous in organisation and administration. This autonomy is not limited to the internal organisation of the churches but encompasses all institutions related to the church, although they may be independent in their legal form. The only precondition is an internal relationship with the religious mission of the church. This right to self-determination of the Protestant Church is to be weighed against the freedom of faith and conscience also granted by the Constitution. On balance, the Church does not have to tolerate any display of religion that is not its own. This extends to all institutions of the church.

Where it seems that the BAG should have ruled in favour of the defendant, it remained unclear whether the defendant (the hospital) was in fact related to the Protestant Church and was therefore entitled to claim the right to self-determination.

The BAG also determined that the employee had probably not been discriminated against because of her faith. The prohibition on wearing a headscarf was justified by the obligation of neutral behaviour provided by § 9(2) General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz, 'AGG'*), which transposes Article 4(2) of Directive 2000/78/EC). This deals with: "churches and oth-er public or private organisations, the ethos of which is based on religion or belief. In the case of occupational activities for such organisations:

(i) "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 constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos"; and (ii) those organisations may "require individuals working for them to act in good faith and with loyalty to the organisation's ethos".

Article 4(2) of Directive 2000/78/EC allows Member States to maintain national legislation incorporating national practices pursuant to which (in the case of occupational activities within churches and other public or private organisations), differences in treatment based on a person's religion or belief shall not constitute discrimination, provided a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement having regard to the nature of the activities, the context in which they are carried out and the organisation's ethos.

Section 9(2) of the AGG is national legislation of this kind and it takes into account the requirements of the German Constitution and its incorporation of Article 137 of the Weimar Reich Constitution of 1919. It provides that the prohibition against differential treatment on grounds of religion or belief does not prevent religious organisations, the facilities assigned to them and any organisations that have undertaken to practice a religion or belief with them (regardless of their legal form), from requiring individuals working for them to act in good faith and with loyalty to the ethos of the religious organisation.

Therefore, the only way of proving that the plaintiff had been discriminated against because of her beliefs would have been for her to show that other employees had been allowed to wear a headscarf, whereas she had not.

It remained unclear whether the hospital was in fact a charitable organisation associated with the Protestant Church and could thus legitimately impose such a duty of neutrality, and also whether the plaintiff was capable of working, given that she was still sick at the time. Thus, as mentioned, the BAG referred the case back to the Regional Labour Court for reconsideration. If the Regional Labour Court finds that the defendant is indeed associated with the Protestant Church, the ban on wearing a headscarf will have been lawful.

Commentary

This was not the first time that the BAG had had to address the issue of headscarves. In fact, the BAG has ruled on bans on headscarves in both private and public institutions. For example, a public school was allowed to enforce a ban on headscarves for teachers, as the school, being a public institution, had to remain neutral with regard to religion. However, in private companies in Germany, employees cannot be prohibited from wearing headscarves at work. As there is no obligation on private companies to remain neutral towards religion, the constitutional right of freedom of faith and conviction prevail in such cases.

In the present case, the BAG has bolstered the special status the churches still have in Germany. This special status stands above any possible religious discrimination because § 9 of the AGG specifically grants religious organisations the right to apply such stipulations.

The hospital in question - a protestant organisation - did not even require its employees to be protestant. In fact, they only asked their employees to respect the institution by behaving neutrally. This might be because it would be hard to find qualified personnel of the faith the hospital was linked to.

Thus, it is the fact that the employer in this case was a religious institution that differentiates it from other cases where muslim employees have been prohibited from wearing a headscarf.

For example, in a Belgian decision reported in EELC 2013-3, the employee in a private company was allowed to wear a headscarf at the beginning, was later required to wear one bearing the company's logo and was finally prohibited from wearing a headscarf at all. This allows these institutions greater freedom when it comes to imposing neutrality onto their employees.

Comments from other jurisdictions

Belgium (Emilie Morelli):Belgium has little case law on this matter in the private sector, but it is at least established that employers in the private sector can prohibit employees from wearing a headscarf and can therefore rely on principles of strict neutrality. This comes from a case with the Labour Tribunal of Antwerp of 27 April 2010 and an appeal with the Labour Court of Antwerp on 23 December 2011. However, the case is now pending before the European Court of Justice (Labour Court Brussels, 15 January 2008). In another case, the tribunal has stated that because of lack of regulation (i.e. the company had no specific rules or dress code), its prohibition against wearing a headscarf was direct discrimination (Labour Tribunal, Tongeren, 2 January 2013).

In the case at hand, the question concerned the interpretation of the German transposition of Article 4(2) of Directive 2000/78/EC. Article 13 of the Belgian Anti-discrimination Law is the transposition in Belgium of Article 4(2). Article 13 states that "*in the case of occupational activities within public or private organisations the ethos of which is based on religion or belief, a direct 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 constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.*" The Article therefore concerns both public and private organisations whose direct and essential purpose is to promote a religion or belief (e.g. a church or a religious school). As in the German decision, in Belgium, the question would also be whether the employer could be considered as an 'ethos organisation'. If the answer is yes, the scope for prohibiting religious signs (e.g. headscarves) will be greater than for other employers in the private sector (e.g. commercial companies).

The Netherlands (Peter Vas Nunes):

The issue of discriminatory prerogatives of religious and other confessional organisations has been a contentious one in The Netherlands. The debate has focussed on homosexual teachers. Until 1 July 2015, the General Anti-discrimination Law contained a provision known as the 'sole reason' provision. It allowed religious organisations to set religiously discriminatory

occupational requirements that are necessary with a view to the organisation's aim, provided this did not lead to discrimination solely on any other expressly prohibited ground. The implication, as interpreted by certain orthodox protestant groups, was that a candidate could be rejected or an employee dismissed on, for example, the ground of homosexuality in combination with another ground. The most publicised example was where a homosexual teacher was dismissed for being homosexual and having a relationship with a man. The provision was introduced in 1994 in order to get the Christian Democrats to vote in favour of the law. In 2008, the European Commission started in-fraction proceedings against The Netherlands. This eventually led to a change in the law, which is now in line with Directive 2000/78, on this point at least. The change came into force on 1 July 2015, i.e. very recently.
The Directive permits (Member States to permit) religious organisations to set genuine, legitimate and justified occupational requirements that are religiously discriminatory in two situations: (i) a person's religion is required by reason of the nature of his or her activities or (ii) a person's religion is required by the context in which he or she carries out his or her activities. The hospital in the case reported above accepted employees of all religions and I assume it accepted patients of all religions. Therefore, I cannot see that situation (i) comes into play. As for situation (ii), there is something I find strange: the hospital in this case was a protestant hospital. The Di-rective would have permitted the hospital, for example, to hire exclusively protestant doctors and nurses. What this hospital did was require neutrality. Is this not something one might expect a public hospital to want?
The Directive limits the special prerogative to religious organisations that already had the relevant discriminatory policy in place on the basis of 'national practices' existing at the time the Directive was adopted, i.e. in the year 2000. I assume this is to prevent newly formed organisations that wish to discriminate from claiming to be religious.

Footnotes

1 An employee on parental leave is eligible for 67% of last-earned salary (with a maximum), generally for a period of 12 months per child.

2 Most likely her employer paid her 100% of her last-earned salary for six weeks, following which she re-ceived sick pay at the rate of 70%.

3 It is not known whether the plaintiff received sick pay from April 2010.

Subject: Religious discrimination

Parties: unknown

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

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