SUMMARY

2013/20 The principle of secularism does not apply to the private sector (FR)

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Facts

Back in 2008, an employee was dismissed from her job at the private *Baby Loup* nursery school in *Chanteloup-les-Vignes* for refusing to remove her headscarf. This refusal was in breach of the nursery school's internal regulations, which imposed strict compliance with "the principles of secularism and neutrality" within the premises of the establishment and its annexes as well as during outdoor activities with the children.

The employee brought a claim before the Industrial Tribunal of *Mantes- la-Jolie* for discrimination, seeking for her dismissal to be deemed void and for € 80,000 in damages. Her claim was dismissed by the Industrial Tribunal, which ruled that *Baby Loup's* internal regulations were perfectly lawful in light of Article 1 of the French Constitution and that by violating them the employee had committed serious misconduct justifying her dismissal.

The employee appealed the case. The Court of Appeals of Versailles upheld the decision of the Industrial Tribunal by ruling, in particular, that young children at the nursery school should not be confronted with ostentatious displays of religious affiliation.

The employee then brought the case before the French Supreme Court.

Judgment

The Supreme Court overturned the decision of the Court of Appeal of Versailles by holding that the employee's dismissal amounted to religious discrimination and was therefore void. The Supreme Court held that: "*the principle of secularism established by Article 1 of the Constitution does not apply to employees employed in the private sector who do not provide a public service; it cannot therefore be invoked to deprive those employees of the protection afforded by the provisions of the Labour Code. Pursuant to Articles L. 1121-1, L. 1132-1, L. 1133-1 and* L. 1321-3 of the Labour Code1 restrictions on religious freedom must be justified by the nature of the task or an essential professional requirement and be proportionate to the aim pursued. The internal rules of Baby Loup state that the principle of freedom of conscience and religion of each employee cannot interfere with the principles of secularism and neutrality which apply to all activities of Baby Loup, both within the nursery premises and its annexes and during outdoor activities with the children. Said provision of the internal rules is a general and imprecise restriction and does not meet the requirements of Article L. 1321-3 of the Labour Code. Thus the employee's dismissal, based on discriminatory grounds, is void".

Commentary

France's tradition of religious neutrality known as *laïcité* is set by Article 1 of the French Constitution which provides that "*France is a secular, indivisible, democratic and social Republic*". This principle of secularism has, as a corollary, the principle of neutrality of 'public agents' (employees working in the public sector, no matter whether they are under private or public law contracts). In 2004, the Government took a further step towards secularism and banned the wearing of conspicuous signs of religion in public schools and in 2011 made it illegal to wear any face-coveringgarment in public.

In this regard, the French Supreme Court decision in the Baby Loup case draws a clear distinction between the public and private sectors. While secularism governs the former, in the private sector, religious freedom still prevails. Thus, any restriction on individual and collective freedoms of employees in the private sector must be, as required by Articles L.1121-1 and L.1321-32 of the French Labour Code: "*justified by the nature of the task to be carried out and proportionate to the aim pursued*" and respond to an "*essential and determining professional requirement*".

In another decision rendered on the same day3, the French Supreme Court validated the dismissal of an employee working in the public sector (the French Primary Sickness Insurance Fund, or 'CPAM') - who had refused to take off her headscarf, thus violating the provisions of the CPAM's internal regulations, which specifically forbade this. The Supreme Court held that the principles of neutrality and secularism of the public service apply to all public services, including those carried out by private organisations such as the CPAM.

In both cases, the Supreme Court applied the same legal reasoning, but came to diametrically opposed decisions. It goes without saying that the Baby Loup decision has caused quite a stir in France. Manuel Valls, the current Interior Minister, even said "*I regret the court's decision in the Baby Loup case, which has called secularism into question.*"

The Supreme Court's decision is open to criticism since the judges simply held that the restriction on the freedom of religion brought by Baby Loup's internal regulation was "*general and imprecise*" without verifying whether the restriction was justified "*by the nature of the task carried out*" by the employee and was "*proportionate to the aim pursued*", as provided in Articles L.1121-1 and L.1321-3 of the Labour Code.

According to French case law, a restriction on the freedom of religion can be 'justified' for example, by health and safety reasons, the need to avoid religious propaganda and above all, where there is direct contact with clients. In this case, staff were in contact with children and parents, who are their clients and who care about the religious neutrality of nursery staff.

The decision in the Baby Loup case appears to contradict the views of the European Court of Human Rights. In 2001, in Dahlab – v – Switzerland, the court considered that a measure prohibiting the applicant from wearing a headscarf while teaching, which derived from Swiss law and applied in state schools was "*necessary in a democratic society*" taking into account the fact that the applicant was a representative of the state, the tender age of the children and the fact that the wearing of a headscarf "*might have some kind of proselytising effect*"4.

This case illustrates that there is often a fine line between public and private service. Public service generally refers to an activity in the public interest, performed by a public or private institution, under the control of a public authority. There are both public and private nursery schools and some private ones receive public subsidies, as here. Therefore, the tribunal ruled that the nursery, albeit a private institution, was performing a public service. (By contrast, the appellate court did not clearly address this issue).

It is also debatable why private institutions cannot choose to be secular in a secular country and why the principle of religious neutrality should stop at the doorstep of private institutions.

The legal framework might change soon as, in reaction to the Supreme Court decision, a Bill extending the principle of secularism to private institutions in the health, social and medical sectors has been submitted to Parliament.

In the meantime, employers in the private sector that do not provide a public service, are well-advised to go through their internal regulations and make sure they do not contain any 'general' restrictions on freedom of religion and if they do, that any such restriction can be

"justified by the nature of the task and is proportionate to the aim pursued".

Comments from other jurisdictions

Germany (Klaus Thönißen): From a German point of view the Supreme Court's judgment deserves approval. Also in Germany a court has to make the distinction between a public and a private employer. It might not be understandable to everyone, but this distinction is in compliance with the German constitution.

In contrast to a private employer only the state as an employer is directly bound by the German constitution. Therefore the state is supposed to actively impose neutrality or secularism. In Germany for example, no public teacher is allowed to wear any kind of religious symbols and Christian crosses have been banned from every class room and from court rooms as well.

A private employer on the other hand is not directly bound by the German constitution. However, the constitutional rights of both the employer and the employee have to be recognized in an employment relationship. In 2002 the Federal Labour Court (the "BAG") found that the dismissal of an employee in a department store for wearing a headscarf was unlawful. In that case a female employee informed the employer that she would start wearing a headscarf after her maternal leave and the employer then terminated the employment relationship. The BAG held that even though an employer could demand a particular dress code in order to cover the customers' expectations and to maintain a "uniform" appearance of its employees, the employer did not show that wearing a headscarf actually affected its business. So the employee's constitutional right to free expression and practice of religion outweighed the employer's right to establish and operate a business.

As long as this distinction between the public and the private sector is constitutionally anchored, a court cannot decide otherwise.

The Netherlands (Peter Vas Nunes): The facts in The Baby Loup case reported above are different from those in the ECtHR's *Eweida* decision (see EELC 2013-1 page 42). Whereas British Airways allowed Sikh and Muslim check-in staff to wear a turban and a hijab, respectively, *Baby Loup* prohibited all manifestations of religion. The facts in the *Baby Loup* case have a strong resemblance to those in the *Dahlab* case, in which the ECtHR, by a majority, declared an application by a head-scarf-wearing teacher based on religions and sex discrimination inadmissible.

United Kingdom (Madeleine Jephcott): There are fundamental differences in the approach of the UK and France to secularism. Firstly, the United Kingdom does not have a written

constitution – its constitution is derived from a number of sources, principally laws passed by the UK Parliament and common law (legal precedents established by decisions of the courts). And secondly, secularism is not preserved in the UK in the same way as in France, as the Queen is both head of state and Supreme Governor of the Church of England, which is officially recognised by the state.

Statutory rules on religion or belief discrimination were introduced in the UK in 2003 and are now incorporated, along with other strands of discrimination legislation, in the Equality Act 2010 (the 'Act'). The provisions in the Act prohibiting discrimination on grounds of religion or belief do not make a distinction between the public and private sector, in contrast to the position in France.

The UK has seen similar challenges to employer rules as those brought in the Baby Loup and CPAM cases in France. Employees have relied on the indirect discrimination rules in the Act (prohibiting employers applying a provision, criterion or practice which disadvantages employees of a particular religion or belief) to challenge dress code rules which curtail their ability to manifest their religion or belief. A rule that employees should not wear a veil or headscarf in the workplace will give rise to potential claims for indirect religion or belief discrimination - female Muslim employees are placed at a particular disadvantage by such a rule. However, whether such a ban is lawful will depend on whether an employer can justify it (i.e. whether it is a proportionate means of achieving a legitimate aim).

On the one hand, the courts have found that an instruction to a Muslim teaching assistant to remove the veil (which covered all but her eyes) when carrying out her duties was not indirectly discriminatory. The instruction was a proportionate means of achieving the legitimate aim of providing the best quality education (in circumstances where face- to-face contact was necessary).

On the other hand, the recent cases of *Eweida v British Airways plc* and *Chaplin v Royal Devon & Exeter NHS Foundation Trust* (in which employees challenged a uniform policy preventing them from wearing a cross visibly at work) illustrate that whether or not such a ban can be justified will depend on the facts of each case. Employers will find it difficult to justify discrimination on the ground that the wearing of a headscarf does not fit the corporate image that the company wishes to project. However, evidence of an increase in health and safety risks are more likely to be accepted as providing justification for discriminatory treatment.

Footnotes

1. Article L. 1121-1 of the Labour Code: "No one can limit individual or col- lective freedoms and rights in a way that would be neither justified by the nature of the task to be accomplished nor be proportionate to the intended goal". Article L. 1132-1 of the Labour Code: "No one can be excluded from a hiring, internship, or training process in a company. No employee can be sanc- tioned, fired or subjected to a discriminatory measure, whether direct or indirect [...] especially in terms

of remuneration, [...] profit-sharing measures, measures relating to distribution of shares, training, redeployment, affectation, qualification, classification, professional promotions, mutations or renewal of contract and based on origin, sex, way of life, sexual orientation or identity, age, family situation or pregnancy, genetic characteristics, belonging or not, whether verified or assumed, to a race, nation, ethnicity, or on political opinions, union activities, religious convictions, physical appearance, last name or because of one's health or disability". Article L. 1133-1 of the Labour Code: "Article L.1132-1 does not constitute an obstacle to differences in treatment if said differences reflect an essential and determining professional requirement; and as long as the goal is legitimate and the requirement is proportionate".

2. "Internal regulations shall not contain: (1) provisions contrary to the laws and regulations as well as provisions of collective bargaining agreements applicable to the company/establishment; (2) provisions restricting the human rights and individual/collective freedoms which are not justified by the nature of the task and proportionate to the aim pursued; (3) provisions discriminating against employees because of their origin, gender, manners, sexual orientation, age, marital status, pregnancy, ge- netic characteristics, membership or non-membership of an ethnic group, nation or race, political opinions, trade union or mutual activities, religious beliefs, physical appearance, family, health, status or disability."

3. Cass. soc. 19 March 2013 n°12-11690.

4. ECtHR 15 February 2001 re Dahlab – v – Switzerland, appl. 42393/98 ECHR 2001- V p. 429.

Subject: Religious discrimination

Parties: Baby Loup – v – Ms. Afif

Court: Cour de cassation (French Supreme Court)

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