SUMMARY

2013/42 Policy of neutrality can justify headscarf prohibition (BE)

<p>Belgian case law has to date accepted a policy of neutrality as justification for prohibiting religious symbols in the workplace. In the absence of clear rules on displaying religious signs at work, an employer commits unlawful direct discrimination on grounds of religion if it dismisses an employee based on her refusal to take off her headscarf.</p>

Summary

Belgian case law has to date accepted a policy of neutrality as justification for prohibiting religious symbols in the workplace. In the absence of clear rules on displaying religious signs at work, an employer commits unlawful direct discrimination on grounds of religion if it dismisses an employee based on her refusal to take off her headscarf.

Facts

Joyce Van Op den Bosch, a Muslim lady, started working as a temporary employee and shop assistant for Hema Belgium BVBA (part of a discount retail chain) on 17 December 2010. At the beginning of her employment, she was allowed to wear her headscarf and she continued to do so during her employment. At some point, she was even provided with a headscarf in the Hema colours, showing the Hema logo. Hema Belgium was satisfied with her performance and continued to extend her weekly temporary contracts.

On 17 February 2011, allegedly after receiving negative reactions from customers, Hema Belgium suddenly required Ms Van Op den Bosch to stop wearing her headscarf. She refused to comply and subsequently saw her employment terminated.

The Centre for Equal Opportunities and Opposition to Racism intervened on behalf of Ms Van

Op den Bosch and started discussions with Hema Belgium. Following these discussions, Hema Belgium offered Ms Op den Bosch the option to return to work, albeit in another position. She was offered a position in the stockroom where she would not be visible to the customers. She refused the offer and claimed before the labour tribunal for compensation in accordance with Article 18 of the Anti-Discrimination Act of 10 May 2007 (the 'Anti-Discrimination Act'). The Centre for Equal Opportunities and Opposition to Racism intervened voluntarily in the proceedings, requesting the tribunal to hold that Hema Belgium had unlawfully discriminated against Ms Van Op den Bosch, as prohibited under Article 14 of the Anti-Discrimination Act.

Judgment

The labour tribunal began its judgment with a detailed explanation of the legal principles, the prohibition of discrimination on grounds of religion (Article 3 of the Anti-Discrimination Act) and the freedom of religion (Article 9 of the ECHR).

The labour tribunal continued its analysis with the observation that a headscarf ban is currently considered appropriate within modern society. Various governments have enacted such prohibitions and these have repeatedly been considered valid by international courts. Moreover, jurisprudence exists which authorises a headscarf ban on employees in the private sector and which accepts that refusal to comply with such a prohibition may give rise to a dismissal.

The tribunal noted that religious freedom is a fundamental right, but that the right is not absolute and may be limited by the aim of achieving a peaceful working environment, provided the organisation in question has a policy of neutrality. Hema Belgium relies on an implicit policy of neutrality.

However, the tribunal was not persuaded that Hema Belgium had demonstrated that a policy of neutrality existed at the time. The uniform booklet did not include any prohibition against displaying signs of religion. Nor did the company code mention a policy of neutrality. It could not be deduced, in the absence of any rules on the matter, that wearing a headscarf would be prohibited. Moreover, Ms Van Op den Bosch even started her employment with Hema Belgium wearing a headscarf and later wore a headscarf in the Hema colours and with the Hema logo. In addition, the branch manager was not aware of a policy of neutrality and this suggested none existed. The tribunal therefore concluded that no rule, not even an unwritten rule, existed within Hema Belgium prohibiting employees from wearing apparel expressing political, philosophical or religious beliefs. The tribunal concluded that the termination of Ms Van Op den Bosch's employment was directly connected with the headscarf ban.

With reference to case law of the ECtHR, the tribunal held that expressions of religion, such as wearing a headscarf, belong to the protected characteristic of religion. As the discrimination was based on a protected characteristic, Hema Belgium had made a direct distinction.

As Hema Belgium could not rely on a policy of neutrality or a dress code, the question arose whether Hema Belgium was guilty of direct discrimination based on religion. Had Hema Belgium been able to rely on a policy of neutrality or dress code, there would have been an indirect distinction, which could more easily be justified by a legitimate aim.

The employment tribunal held that direct discrimination based on religion had indeed occurred. The protected characteristic is the religion or the expression thereof. Ms Van Op den Bosch had been treated less favourably because she could not continue working in the store if she chose to express her religion by wearing a headscarf.

The employment tribunal went on to question whether the direct discrimination could be justified. Justification is only possible on the basis of a genuine occupational requirement. The tribunal ruled that, for a shop assistant, a ban on wearing religious symbols could not be considered as a genuine occupational requirement. It therefore concluded that Ms Van Op den Bosch had been the victim of unlawful direct discrimination by Hema Belgium on religious grounds and granted her a compensation of six months' salary, equal to € 9,351.42, as provided in the Anti-Discrimination Act.

The tribunal discharged the claim against the employment agency Randstad, as it was of the opinion that Randstad had not imposed the headscarf ban and had even tried to find another position for Ms Van Op den Bosch after the incident.

Commentary

Hema Belgium declared on various occasions that it did not agree with the judgment of the employment tribunal. However, it did not appeal the judgment, presumably with the aim of avoiding further negative publicity.

The judgment is in line with previous Belgian case law which to date has accepted a policy of neutrality as justification for prohibiting a headscarf in the workplace.

Previous case law (Employment Tribunal of Brussels 15 January 2008, JTT 2008, 140; Employment Tribunal of Antwerp 27 April 2010, confirmed by the Labour Court of Antwerp 23 December 2011, *Or.* 2012/2, 61) is factually very similar to the case at hand. In all cases, it involved a female Muslim who was dismissed or whose contract was not renewed, because of her refusal to take off her headscarf. The respective employees were always in direct contact

with clients (e.g. a saleswoman in a shop or a receptionist). However, in none of these cases did the courts or tribunals conclude that the employee had been subject to unlawful discrimination on religious grounds.

The important difference with the case reported above lies in the fact that in all previous cases, a rule or practice existed within the company banning all religious symbols in the workplace. The employees were therefore fully aware of the ban. Whilst they had been working without a headscarf before, complying with the employer's rules, the employees decided at a certain moment in time to start wearing a headscarf. In the case described above, there were no rules and the employee worked with a headscarf from the beginning of her service.

These factual differences led to the conclusion that in this case the employee had been subject to unlawful discrimination on religious grounds.

Following Belgian case law, a company can on the basis of a policy of neutrality, ban religious symbols during working hours for employees who are in direct contact with third parties. The condition is that the employees must be aware of the rules (e.g. through a provision in the work regulations or a policy). If there are clear rules in the company and the employee refuses to take off her headscarf, in violation of the rules, the employee can be dismissed. Such dismissal will not be considered wrongful.

It is important to note that no court or tribunal has to date examined whether the employer's policy of neutrality was proportionate and whether the corresponding limitation on the freedom of religion was sufficiently legitimised.

In fact, it is likely that this simple acceptance of a policy of neutrality will come to an end following the *Eweida* case (*Eweida and Others - v - the United Kingdom*, nos. 48420/10, 59842/10, 51671/10 and 36516/10, judgment of 15 January 2013), pronounced two weeks after the Employment Tribunal's judgment. In *Eweida*, the European Court of Human Rights held that a policy of neutrality can justify a ban on religious symbols, but that each specific case should be examined to decide whether or not the ban is too sweeping a breach of religious freedom. This was the case in *Eweida*: Ms Eweida, a Coptic Christian employed by British Airways, was not allowed to wear her cross, while exceptions were made for a Sikh and a female Muslim. Moreover, the employer subsequently modified its policy and accepted religious symbols. Taking into account all these elements, the Court decided that British Airways unfairly used the existence of a policy of neutrality to justify a breach of freedom of religion.

The Belgian courts will thus no longer be able to limit their analysis to whether there is a

policy of neutrality within the company, as they have done in the past. If a policy exists, they will have to consider whether the limitations it places on religious freedom are proportionate to the company's (legitimate) aims.

Interestingly, shortly after the Hema incident, on 3 October 2011, the trade unions and employer's organisation within the Joint Labour Committee for Temporary Employment entered into a collective bargaining agreement with the purpose of preventing discrimination. The agreement includes a code of conduct which is binding on temporary agencies and its employees. Amongst other matters, it obliges temporary agencies to inform their clients that they cannot comply with discriminatory requests and, if the client persists, must report the matter to the Social Inspection. At the end of 2012 - presumably not coincidentally a few weeks prior to the judgement - Randstad announced in a press release that it had put an end to its cooperation with eight companies because those companies had been submitting discriminatory recruitment requests.

Comments from other jurisdictions

Austria (Andreas Tinhofer): Surprisingly, the Austrian Supreme Court has not yet had to deal with discrimination on the grounds of religion in the employment context. There are, however, five cases where the Equal Treatment Commission rendered its opinion on an employer's request to remove headscarves during work. All of the cases concerned job applicants that were denied the job after they had stated that they would not work without their headscarf for religious reasons. In essence, most of the cases focused on whether the rejection of the applicants was motivated by their denial to remove their headscarf or by other reasons. In almost all the cases the Muslim applicants contended that the employer had referred to "customer preferences" in order to explain their request. In only one case was the need to comply with the company's dress code (apron and cap) given as a reason why the headscarf must be removed. In this case, the employee contended that she offered to wear the headscarf below the cap, but this was not permitted by the employer.

Even though there is no case law as yet from the Supreme Court, the issue of headscarves and other religious symbols has been debated in legal literature. It seems to be the prevailing opinion that a ban on wearing headscarves can be lawful only in exceptional cases. As Peter Vas Nunes points out in his commentary, it may be difficult to establish whether such a ban constitutes direct or indirect discrimination. However, health and safety at work or specific hygienic requirements (e.g. at a hospital) are legitimate aims or "*genuine and determining occupational requirements*" (Art 4(1) of Directive 2000/78/EC) that may in principle justify an employer's prohibition against wearing headscarves or any other headgear at work. It is doubtful that the wish of an employer to pursue a policy of neutrality would also qualify as

such a legitimate aim.

Germany (Klaus Thönißen): From a German point of view, the courts have to make a distinction between public and private employers (see the French case report in EELC 2013/20, "T*he principle of secularism does not apply to the private sector*"). In Germany for example, no public school teacher is allowed to wear any kind of religious symbols and Christian crosses have been banned from every classroom 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 must be recognized in an employment relationship. The Federal Labour Court (the 'BAG') found, in 2002, that the dismissal of an employee in a department store for wearing a headscarf was unlawful. In this case, a female employee informed the employer that she would start wearing a headscarf after her maternity 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 meet customers' expectations and to maintain a 'uniform' appearance amongst 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 its business.

Even though some customers complained about the headscarf in the case at hand, the employer did not show any financial loss had been incurred because the employee had worn a headscarf. In addition, the employer hired the employee and let her work being fully aware that the employee was wearing a headscarf. Therefore, a German court would most likely have held the employer's later behaviour discriminatory.

The Netherlands (Peter Vas Nunes): This case illustrates that the line separating direct from indirect discrimination is a fine one. An employer who rejects a job applicant or dismisses an employee for wearing a headscarf because customers do not like headscarves discriminates directly on the ground of religion. But how about an employer who is motivated by a desire to observe neutrality? This question was not addressed directly in *Eweida* (ECtHR 15 January 2013; see EELC 2012-1 page 42) because the issue in that case concerned the application of Article 14 ECHR regarding the right to enjoy the rights and freedoms set forth in the ECHR (in this case, the right to manifest one's religion) without discrimination. The ECtHR did not need to address the issue of direct versus indirect discrimination.

In 2001, the Dutch Equal Treatment Commission was called upon to render its opinion on a dress code for judges and clerks. The dress code prohibited wearing any headgear or displaying any attributes over the gown. The rationale behind this prohibition was that judges

and clerks must be seen to be neutral as regards convictions. A Muslim applicant for the position of substitute clerk was turned down because she said she would not remove her headscarf during court sessions. In a controversial opinion, the Equal Treatment Commission found that this was indirectly, not directly, discriminatory, because the prohibition did not impact specifically Muslims or the adherents of any particular religion (opinion 2001-53). On the other hand, the Equal Treatment Commission and its successor the Human Rights Commission have delivered countless opinions condemning employers who banned headscarves for reasons of neutrality. One recent example out of many (Opinion 2013-62) concerned a gym that turned down an applicant for stating that she refused to remove her headscarf. The reason behind the rejection of the job applicant was that the gym was against all forms of religious expression. The Commission found this to constitute direct discrimination on the ground of religion. What is the difference between the 2001 case of the clerk and this 2013 case? In essence, the clerk was also turned down because the judiciary does not want judges and clerks to express personal beliefs through outward appearance.

In the case of the clerk and the gym applicant, the employer based the headscarf prohibition on the need for neutrality. In the highly publicised and controversial 2010 case of a tram driver who refused to remove his visible cross, the employer based the prohibition on wearing anything visibly other than its uniform (which included an optional headscarf) on the need for a professional corporate image. The Amsterdam Court of Appeal found this prohibition to be indirectly discriminatory on the grounds of religion, but objectively justified (JAR 2010/179). I interpret this to mean that if the employer in question had included a headscarf ban on that ground, the ban would also have constituted indirect, not direct discrimination.

In brief, it is not clear under what circumstances a headscarf ban is directly discriminatory and when it is merely indirectly discriminatory.

Another issue that is unclear is how far a temporary employment agency should go to deter its customers from acting in a discriminatory manner. The Dutch Human Rights Commission has held that an employment agency must refuse to accept a discriminatory search request, for example a request to supply a young, male or healthy temp, and must rebuke its customers for terminating a contract in respect of a temp for a discriminatory reason. But what if the customer takes no heed? Should an employment agency blacklist such a customer? I know of no judicial precedent in the Netherlands.

Subject: Religious discrimination

EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

Parties: Ms Joyce Van Op den Bosch – v - Hema Belgium BVBA and Randstad Belgium NV

Court: Arbeidsrechtbank Tongeren (Employment Tribunal of Tongeren)

Date: 2 January 2013

Publication: Limb. Rechtsl. 2013, afl. 1, 55, noot; Or. 2013 (weergave PLETS, I.), afl. 4, 109

Creator: Arbeidsrechtbank Tongeren (Employment Tribunal of Tongeren)
Verdict at: 2013-01-02
Case number: