EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2019/28 An employer may impose a ban on the wearing of any visible sign of political, philosophical or religious beliefs on employees in contact with customers (FR)

Both the French Supreme Court and the Versailles Court of Appeal held that an employer, who must ensure that liberties and fundamental rights of each employee are respected in the working community, may lawfully prohibit the wearing of any visible sign of political, philosophical or religious beliefs in the workplace, provided that the rule contained in the company rules and regulations applies without distinction to employees in direct contact with the customers of the company only. But in the absence of such rules, sanctioning an employee who refuses to remove her Islamic veil based on the wish of a customer, which does not qualify as a genuine and determining occupational requirement, amounts to an unlawful direct discrimination and should consequently be held null and void.

Legal background

According to Article L. 1121-1 of the French Labour Code, any restriction imposed on personal rights or individual or collective liberties must be justified by the nature of the task to be performed and proportionate to the aim sought. It echoes Article L. 1321-3(2) of the French Labour Code which then stated that workplace regulations shall not contain provisions imposing restrictions on personal rights and on individual and collective freedoms which are

not justified by the nature of the task to be undertaken or proportionate to the aim that is sought to be achieved.
Regarding the French anti-discrimination framework, Articles L. 1132-1 and L. 1133-1 of the French Labour Code transposed the provisions of Directive 2000/78. Article L. 1132-1 prohibits both direct and indirect discriminatory treatment at work based on a set of criteria, including religious beliefs, while Article L. 1133-1 contains an exception by stating that Article L. 1132-1 shall not preclude differences of treatment arising from a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

Facts

The claimant worked as an engineer for a company which informed her during the recruitment process that although her freedom of opinion and her religious beliefs would be respected, wearing the veil can cause an issue when she will be in contact with the company's customers.
The employee's employment contract was terminated on 22 June 2009 after a customer of the company for which the claimant had worked had told the company that the fact that she had worn the veil at its premises had upset a number of its employees and had requested that she should not wear the veil in the workplace. Her dismissal was based on the fact that she had refused to remove her veil in the customer's workplace.
Despite ordering the payment of compensation in relation to her period of notice, considering that the conditions for instant termination were not met, the Paris Employment Tribunal (*Conseil de Prud'hommes*) dismissed her other claims, on 4 May 2011, based on the fact that the restriction put on the wearing of the headscarf was justified by her contact with the customers of the company for which she worked, and proportionate to the aim of protecting the company's image and of avoiding conflict with its customers' beliefs.
In April 2013, the Paris Court of Appeal (*Cour d'appel*) upheld the first instance decision by stating that a company must take into consideration the diversity of its customers and their convictions and, thus, that a company may require its employees in contact with its customers to observe discretion, provided that the restriction stemming from this is justified by the nature of the task to be performed and proportionate to the aim sought. The Court of Appeal inferred from the facts of the case that the restriction was proportionate since it was limited to contact with customers only. It subsequently held that her dismissal did not arise from discrimination in relation to the religious beliefs of the employee, since she was permitted to continue to express them within the company.

The ECJ preliminary ruling

As a result, the claimant appealed against that decision before the Social Chamber of the French Supreme Court (*Cour de cassation*) which in turn referred the following question to the ECJ for a preliminary ruling:

[m]ust Article 4(1) of Directive 2000/78 be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?

The Grand Chamber of the ECJ responded on 14 March 2017 establishing a distinction on whether or not the termination of employment was based on non-compliance with a company rule, prohibiting the wearing of any visible sign of political, philosophical or religious beliefs. If so, the difference in treatment may amount to indirect discrimination, unless justified by a legitimate aim and the means of achieving the aim are appropriate and necessary. On the contrary, in the absence of a company rule, the prohibition on wearing the veil amounts to direct discrimination, unless justified by a genuine and determining occupational requirement. The Grand Chamber then held that:

Article 4(1) of Directive 2000/78 must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.

The case then returned before the French Supreme Court.

Judgments

The French Supreme Court's judgment

The Social Chamber of the French Supreme Court first relied upon Articles L. 1121-1, L. 1132-1 and L. 1133-1 of the French Labour Code which transposed Articles 2(2) and 4(1) of Directive 2000/78 to state that restrictions brought to freedom of religion must be justified by the nature of the task to be performed and proportionate to the aim sought. It then restated Article L. 1321-3(2) of the French Labour Code which dictated, at the material time, that workplace regulations shall not contain provisions imposing restrictions on personal rights and on individual and collective freedoms which are not justified by the nature of the task to be undertaken and proportionate to the aim that is sought to be achieved.
The Supreme Court subsequently referred to the above ECJ ruling that:

Article 4(1) of Directive 2000/78 must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf cannot be considered a genuine and determining occupational requirement within the meaning of that provision.

The Supreme Court also referred to the ECJ case C-157/15 *Samira Achbita – v – G4S Secure Solutions NV* in which the ECJ held that Article 2(2)(a) of Directive 2000/78 must be interpreted as meaning that:

the prohibition on wearing an Islamic headscarf, which arises from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, does not constitute direct discrimination based on religion or belief within the meaning of that directive.

Nevertheless, the ECJ also stated in that case that:

[b]y contrast, such an internal rule of a private undertaking may constitute indirect discrimination within the meaning of Article 2(2)(b) of Directive 2000/78 if it is established that the apparently neutral obligation it imposes results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage, unless it is objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its customers, of a policy of political, philosophical and religious neutrality, and the means of achieving that aim are appropriate and necessary, which it is for the referring court to ascertain.

The Supreme Court went on to affirm that it resulted both from the mentioned Articles and from the aforesaid European cases that the employer, who is vested in the mission of ensuring that liberties and fundamental rights of each employee are respected in the working community, may lawfully prohibit the wearing of any visible sign of political, philosophical or religious beliefs in the workplace provided that the rule contained in the workplace regulations applies without distinction to employees in direct contact with the customers of the company only. In addition, the Supreme Court held that in the case of a refusal from the employee to comply with this rule, it is for the employer to ascertain whether another position which does not require visual contact with the clients is available prior to dismissing them, taking into account the inherent constraints to which the company is subject, and without it being required to take on an additional burden.
Following this, the Supreme Court pointed out the fact that in the case at hand the prohibition of the wearing of any visible sign of political, philosophical or religious beliefs in the workplace was not contained in either the workplace regulations or in any other document

required to comply with the same formalities as workplace regulations. It also underlined the fact that the prohibition on the wearing of the headscarf resulted from an oral directive and that the prohibition pointed at a single religious sign only. The Supreme Court inferred from these findings a direct discrimination on the ground of religious beliefs and, drawing on the answer given by the ECJ to its preliminary question, considered that this was not justified by a genuine and determining occupational requirement. It consequently overruled the decision of the Court of Appeal, considering that the latter misunderstood the meaning of the French Labour Code interpreted in light of Directive 2000/78.

The Versailles Court of Appeal's judgment

The Versailles Court of Appeal's decision, handed down on 18 April 2019, ended the judicial case of *Asma Bougnaoui and Association de défense des droits de l'homme – v – Micropole SA*. Following the Supreme Court's judgment, the case reverted to the Versailles Court of Appeal which was asked to give a final decision, by taking into consideration the findings of the Supreme Court. The Versailles Court of Appeal relied upon two main facts. Firstly, it noticed that the rule prohibiting the wearing of religious signs was not contained within the employer's workplace regulations while only those regulations can impose such a ban. Second, it pointed out the fact that the ban concerned religious signs only, leaving philosophical and political signs unrestricted, and did not demonstrate the existence of a general rule. Further, the Court referred to the minutes of the meeting prior to termination with the employee, mentioning the client's request. The Versailles Court of Appeal concluded that (i) the prohibition established a direct discrimination, and (ii) as stated by both the ECJ and the Supreme Court, the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf could not be considered a genuine and determining occupational requirement. As a result, the Versailles Court of Appeal considered that the dismissal was based on the applicant's right to manifest her religion and, thus, discriminatory. It consequently held that the termination was null and void and awarded the applicant compensation of approximately EUR 27,000, corresponding to the minimum amount of six months' salary set by the French Labour Code. It further rejected the employee's claim for additional damages based on vexatious termination. It finally awarded EUR 1 to the association against islamophobia in France, considering that the discrimination damaged its interests.

Commentary

This case allowed the French Supreme Court to clarify the requirements that need to be complied with for the employer to impose on its employees a neutrality clause that prohibits the wearing of any visible sign of political, philosophical or religious beliefs in the workplace,

in line with the ECJ rulings.
Previously, the Supreme Court had already been called upon by a claimant to render a decision dealing with the wearing of visible sign of political, philosophical or religious beliefs in the workplace. By a decision of 25 June 2014, the Supreme Court had declared lawful a neutrality clause of an association managing a crèche based both on the fact that it had been designed as applying to employees in contact with children only and on the fact that the dismissal had been found to be legitimate and proportionate as regards the limited size of the association which had employed eighteen employees at the material time (French Supreme Court, 25 June 2014, no. 13-28.369).
In this *Bougnaoui* case, the Supreme Court obviously chose not to simply make a decision on the case at hand but beyond, to issue precise guidelines to employers intending to impose neutrality in the workplace. For a neutrality clause to be binding upon the workforce, the conditions are now clearly set by the commented decision. Firstly, the clause must be contained either in workplace regulations or in a document required to comply with the same formalities as workplace regulations. Workplace regulations or aforesaid documents are required to comply with a set of rules, such as the consultation of the Social and Economic Committee (Article L. 1321-4 of the French Labour Code). Second, the prohibition must operate without distinction (it cannot prohibit the religious symbols of a particular religion). Finally, the prohibition must apply to employees in direct contact with the customers of the company only. In addition to these requirements, in the case of a refusal from an employee to comply with that prohibition, the employer is required to ascertain whether another position which does not require visual contact with the clients is available prior to dismissing them, taking into account the inherent constraints to which the company is subject, and without it being required to take on an additional burden. In other words, the employer is asked to search for another position which does not require direct contact with the customers of the company, if available, but must not create a new position to accommodate the employee's religious beliefs.
The Supreme Court's decision now needs to be put into perspective of the new French legislation environment. Article L. 1321-2-1 of the French Labour Code, which was introduced by Law No 2008-496 of 8 August 2016, provides that workplace regulations may contain a neutrality clause restricting the manifestations of freedom of beliefs provided that these restrictions are justified either by the exercise of other fundamental liberties or rights, or by the operational requirements of the company. In addition, these restrictions must be proportionate to the aim sought. This Article was introduced after the complaint of the claimant, so that Article L. 1321-2-1 of the Labour Code could not be applied in this case. Questions arise as to the possibility given to employers to implement a neutrality clause that would not be constrained to employees in contact with customers only. Indeed, the scope of

Article L. 1321-2-1 seems to be much broader than the scope of the neutrality clause as being described in the commented case, since Article L. 1321-2-1 does not focus on a particular category of employees, while the Supreme Court narrowed the scope of the neutrality clause as being able to be imposed on employees in contact with the customers of the company only. The requirement of proportionality may however question the lawfulness of a neutrality clause imposed upon all the employees thus allowing full alignment with the Supreme Court decision.

Comments from other jurisdictions

Belgium (Pieter Pecinovski, Van Olmen & Wynant): The *Bougnaoui* case should also be analysed in light of the other important ECJ case: *Achbita* (14 March 2017, C-157/15, Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding/G4S Secure Solutions NV). In the *Achbita* case, the Labour Court of Antwerp ruled that a dismissal for wearing a headscarf was not a direct, but an indirect discrimination because the dismissal was not the result of adherence to Islam, but of non-respect for the neutral dress code ('seemingly' neutral criterion). The Antwerp Labour Court accepted the ban on wearing a headscarf because of the legitimate objective of safeguarding a peaceful and tolerant society through a neutral appearance. This judgment was confirmed by the Antwerp Labour Court of Appeal, in view of the inclusion in the work rules of the company of the prohibition on wearing outward signs of political, philosophical or religious convictions. However, the *Achbita* case came before the Court of Cassation, which submitted a preliminary question to the ECJ to clarify whether a general ban on the expression of beliefs (in the form of a headscarf) in the workplace constitutes direct or indirect discrimination. Following Advocate General Kokkot, the Court of Justice held that the distinction in this case does not constitute a direct discrimination on the basis of religion or belief within the meaning of the Discrimination Directive, in contrast to the view of Advocate General Sharpston and the Court in the *Bougnaoui* case. On the other hand, such a prohibition may constitute indirect discrimination if it is established that the seemingly neutral obligation it imposes has the de facto effect of placing persons adhering to a particular religion at a particular disadvantage. However, that indirect discrimination may be objectively justified by a legitimate aim, such as the pursuit by the employer, in its relations with its clients, of a policy of political, philosophical and religious neutrality, provided that the means of achieving that aim are appropriate and necessary. In this case, the employer must implement the policy of neutrality in a coherent and systematic manner, in other words, by including it in the work regulations. Currently, the *Achbita* case is still awaiting its final (Belgian) judgment before the Labour Court of Appeal of Ghent, where it was referred to by the Court of Cassation.

Germany (David Meyer, Luther Rechtsanwaltsgesellschaft mbH): Germany currently faces

similar lawsuits as in France concerning visible signs of political, philosophical or religious beliefs. These are often subject to political discussion as well. In particular, the prohibition of Islamic symbols like veils of any kind (e.g. burka, niqab, hilab) results in various disputes between employees and employers.
The jurisdiction in Germany is not uniform and differs between the labour courts. Several courts of first and second instance like the regional labour court of Nurnberg have judged cases like the French case in favour of the female claimant. In one case, the claimant worked as a cashier in a supermarket. After returning from parental leave, she wore a headscarf. The local store manager forbade wearing that headscarf, citing the employer's dress code. This code prescribed a "neat, professional appearance" for employees in contact with customers and forbade "especially training and jogging suits and headgear of all kinds". Though this code did not focus on Islamic veils and thus was not considered direct discrimination the court held that it was not a genuine and determining occupational requirement for a cashier. In our opinion, this decision does not seem to be in line with the ECJ's decision in the *Achbita* case (C-157/15).
The Federal Labour Court ('Bundesarbeitsgericht' (BAG)) follows the rather liberal jurisdiction of the ECJ and – so far – allows company guidelines prohibiting visible signs like headscarves. Though the BAG and the labour court of Hamburg recently filed another preliminary ruling and asked the ECJ if a "general order in the private sector, which also prohibits the wearing of conspicuous religious signs, is always justified under discrimination law because of the entrepreneurial freedom protected by Article 16 of the Charter of Fundamental Rights of the European Union [CFR]". The BAG particularly asked the ECJ if the religious freedom of the female worker according to the CFR, the European Convention on Human Rights and the German constitution could be taken into consideration. The decision of the ECJ is yet to to handed down as the requests were only filed in January 2019.
Unless the ECJ decides on the preliminary ruling the courts, employers and employees in Germany will still deal with an uncertain legal situation. In addition, the situation may vary according to the respective regional court's jurisdiction. In our opinion it can be expected that the ECJ upholds its jurisdiction in the *Achbita* case and specifies manageable requirements for the courts.

United Kingdom (Richard Lister, Lewis Silkin LLP): It is interesting to see how French law has been developing in this area as a result of further judgments in the *Bougnaoui* case, following the ECJ's ruling. It is clearly of paramount importance for French employers to develop and implement clear rules and regulations on the wearing of religious clothing or symbols. From the commentary above, though, it appears there are outstanding issues as to how far such policies need to be restricted to employees in direct contact with customers. It seems likely there will be further cases in France to clarify the circumstances in which a broader neutrality

clause might be legitimate and proportionate.
There has been extensive debate in the UK about the implications of the ECJ's judgments in *Achtiba* and *Bougnaoui*. Prohibitions or restrictions on religious attire or symbols in the workplace have generally been treated as an issue of indirect discrimination in the UK, because they are neutral and not directed at a specific group. Importantly, the ECJ's judgment in *Achtiba* was consistent with this approach. A ruling that such policies amounted to direct discrimination would have made them much more difficult for employers to justify – they could only rely on the limited exception of a "genuine occupational requirement", which is far narrower than the objective justification defence for indirect discrimination.
A major focus of the ECJ's decision in *Bougnaoui* was on the concept of "neutrality", reflecting the fact that principles of secularism and neutrality have particular significance in several EU jurisdictions including France and Belgium. In contrast, the UK has no such prevailing ethos of secularism, with the existence of an established State religion (the Church of England) leading to more of a principle of religious tolerance and freedom, as opposed to strict neutrality. As a result, UK courts and tribunals tend to look for a compelling justification from employers in cases of this type, based on reasons such as health and safety or the employee's ability to communicate (rather than the employer's image). In one case, for instance, it was found to be unlawful indirect discrimination to require a hair stylist to remove her headscarf so that her hair was on show to customers. Arguments such as in *Bougnaoui*, that customers do not like seeing religious clothing, are likely to carry much less weight in the UK.
The central issue in most cases will inevitably be justification – whether the employer had a legitimate aim and whether its policy was proportionate. In the UK, there is perhaps more of an imperative than in other European jurisdictions rigorously to ensure a fair balance between the reason for any dress code and the disadvantage likely to be suffered by an employee. Businesses need to consider their dress code or appearance policies with utmost care and treat employees' requests to circumvent a rule for religious reasons sensitively and respectfully.

Subject: Religious discrimination
Parties: Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) – v – Micropole SA, formerly Micropole Univers SA
Courts: Supreme Court of France and Court of Appeal of Versailles
Dates: 22 November 2017 (Supreme Court of France); 18 April 2019 (Court of Appeal of Versailles)
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Creator: Cour de cassation (French Supreme Court)
Verdict at: 2017-11-22
Case number: 13-19.855