2021/14

End of the Achbita saga in Belgium: National judge rejects indirect discrimination and criticises duty to look for alternative position in case of refusal to comply with neutrality policy (BE)

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Summary

On 12 October 2020, the Labour Court of Appeal of Ghent ruled that there was no indirect discrimination in the case of Mrs. Achbita, because a policy of neutrality does not disadvantage Muslim women who want to wear a headscarf more than any other worker. The Labour Court of Appeal was also of the opinion that the employer should not examine alternative job positions.

Legal background

Directive 2000/78/EC of 27 November 2000 (the 'Directive') establishes a general framework for equal treatment in employment and occupation. The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation. The 'principle of equal treatment' encompassed in the Directive means that there shall be no direct nor indirect discrimination whatsoever based on the aforementioned grounds among which include religion or belief.

Given the date of dismissal, the provisions of the Belgian Law of 25 February 2003 Combating Discrimination and amending the Law of 15 February 1993 establishing a Centre for Equal Opportunities and Opposition to Racism was applicable. The purpose of this Law was, *inter alia*, to implement the provisions of the Directive.

According to this Law and in accordance with the Directive, there is direct discrimination where a difference of treatment, which is not objectively or reasonably justified, is directly based on faith or belief. Furthermore, this Law states that there is indirect discrimination where an apparently neutral provision, criterion or practice has a detrimental effect on persons to whom one of the protected grounds of discrimination aforementioned applies, unless that provision, criterion or practice is objectively and reasonably justified.

Facts

Mrs. Achbita, a Muslim, was hired in February 2003 by G4S, a company providing reception services for clients in the public and private sector. She worked as a receptionist on an open-ended employment contract. At the time an unwritten rule was applied within the company stipulating that employees could not wear visible symbols expressing their political, philosophical or religious beliefs. Just over three years after she started working for G4S, Mrs. Achbita informed her employer that she would henceforth wear an Islamic headscarf during working hours. Her employer told her that this would not be permitted since it would be damaging to the company's neutral corporate image.

After a period of sick leave, Mrs. Achbita returned to work, reiterating her intention to wear a headscarf during working hours. Two weeks later, the company adapted workplace regulations introducing an explicit prohibition for employees on wearing in the workplace 'any visible symbols of their political, philosophical or religious beliefs and/or from engaging in any observance of such beliefs'.

Since Mrs. Achbita refused to comply with this rule, she was dismissed. She challenged her dismissal before the Labour Tribunal (*Arbeidsrechtbank*) of Antwerp in 2007. The Tribunal, however, did not offer any relief, since it found that G4S was not guilty of direct or indirect discrimination. Mrs. Achbita's appeal to the Labour Court of Appeal (*Arbeidshof*) of Antwerp in 2010 failed as well, since the Court confirmed the absence of any

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doi: 10.5553/EELC/187791072021006002003

form of discrimination and dismissed the claim that the right to freedom of religion would have been violated.
The case eventually reached the Court of Cassation, which then asked the Court of Justice of the European Union (CJEU) to clarify whether a general ban on the expression of beliefs in the workplace constitutes direct discrimination. The CJEU ruled that (Case C-157/15, *Achbita*, 14 March 2017, ECLI:EU:C:2017:203):

> Article 2(2)(a) of the 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.
> By contrast, such an internal rule of a private undertaking may constitute indirect discrimination within the meaning of Article 2(2)(b) of the 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.

Therefore, a policy of neutrality does not imply *direct* discrimination, but there could be *indirect* discrimination if persons adhering to a particular religion are disadvantaged. Yet, the legitimate pursuit of neutrality can still justify this policy if neutrality is achieved through appropriate and necessary means. This proportionality requirement can only be met if the private company only prohibits the headscarf for those workers who have visual contact with customers. If the employer decides that its personnel need to have a neutral appearance, that policy of neutrality also needs to be general and undifferentiated as well as pursued in a consistent and systematic manner. The employer must finally investigate whether employees who openly want to wear religious symbols can be assigned to another job without visual contact with customers.
After this ruling, the case was then referred by the Court of Cassation to the Labour Court of Appeal (*Arbeidshof*) of Ghent. Among other things, Mrs. Achbita and the Interfederal Centre for Equal Opportunities and Opposition to Racism and Discrimination (Unia) asked the Labour Court of Appeal to rule that a policy of neutrality which prohibits all staff, including those who have no visual contact with clients, from wearing visible signs of their philosophical or religious beliefs, constituted prohibited discrimination and that the employer, who fired Mrs. Achbita because she refused to comply with that policy, had committed an abuse of rights.

Judgment

The Labour Court of Appeal ruled in favour of the employer. For the Court, the neutrality policy whose existence prior to the request of Mrs. Achbita to wear her headscarf could not be seriously contested and did not put at a disadvantage a particular group of persons to whom Mrs. Achbita would belong. Mrs. Achbita and Unia had held that this group would include persons of a particular religion who feel compelled to wear a religious symbol or for whom the wearing of such a symbol is an important element for the expression of their religious beliefs.
The Labour Court of Appeal considered on the other hand that, in view of the division to be maintained between the state and the church, it is not for a judge to decide if a specific religion compels or not its believers to wear a specific symbol or if the wearing of that symbol is important in that religion, or if the wearing of a religious symbol in a specific religion should be given more weight because the believer feels obliged to wear it compared with the believer of another religion or philosophical belief that does not feel the same obligation. For the Court, Mrs. Achbita did not belong to a specific protected group which would suffer a detriment since persons of all beliefs are subject to the same prohibition and considering the fact that the importance or obligation to wear a specific symbol in a specific religion or philosophy cannot be taken into account.
Although the Labour Court of Appeal concluded that there was no indirect discrimination for the above-mentioned reasons, it still investigated if the policy of the employer pursued a legitimate aim and if the means were appropriate and necessary. As to the legitimacy of the policy, the Court considered that it falls within the discretion of the employer to pursue neutrality both with regards to positions which entail contact with customers and those where no such contact exists. An absolute ban on wearing religious symbols was appropriate to this aim, according to the Court. The means were also strictly necessary for the Court. In that respect, it criticised the *Achbita* ruling for providing that the employer should look for an alternative position when an employee refuses to comply with the neutrality policy before dismissing them, since the Directive only provides for a duty of reasonable accommodation with regard to disabled employees. At the same time, the Court noted that in the present circumstances of the case offering such a position would not have been possible, especially since most of the positions open in the company did involve contact with clients.
Based on the above, the Labour Court of Appeal dismissed the case and concluded that the anti-discrimination legislation had not been infringed.

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Commentary

This decision might be the final step in a very long judicial saga which has shed light on the difficulty of combining the right to freedom of religion and the freedom of the undertaking, more particularly when the employer wants to impose neutrality in the conduct of business relationships with clients. It is not yet clear if the case will stop here or go before the European Court of Human Rights. If it does, it will be interesting to see if the European Court of Human Rights agrees with the CJEU, considering that in the *Eweida* case (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013) it ruled in favour of a British Airway's hostess who was forbidden from wearing a discrete Christian cross based on a similar neutrality policy, thereby adopting a stricter view on the proportionality test when balancing the right of a company to protect its corporate image and the freedom of religion.

The Labour Court of Appeal considered that the general and undifferentiated neutrality policy of the employer did not adversely affect a protected group of persons as holders of a specific religion for which wearing a religious symbol would be important or even compulsory. This finding does not contradict the *Achbita* ruling since the CJEU had considered that it was for the referring court to ascertain if there was indirect discrimination. However, the Labour Court of Appeal mistakenly referred to Advocate General Kokott's opinion in the *Achbita* case to support its view, whereas the latter clearly wrote that "since such a rule is in practice capable of putting individuals of certain religions or beliefs – in this case, female employees of Muslim faith – at a particular disadvantage by comparison with other employees, it may, if it is not justified in some way, constitute indirect religious discrimination" (para. 57).

At the same time, the Labour Court of Appeal disregarded Advocate General Sharpston's opinion in the parallel *Bougnaoui* case (Case C-188/15, 14 March 2017, ECLI:EU:C:2017:204) who convincingly argued that even a perfectly neutral dress code would treat less favourably those whose religious convictions require them to wear particular apparel (para. 110). It also goes against the majority of the previous case law in Belgium which holds that neutrality policies do affect adversely persons adhering to a religion which imposes the wearing of a religious sign or for whom wearing such a sign is more important than for others. The Labour Court of Appeal invoked the division between state and church as a reason for not examining if a specific religion would compel its believers to wear a religious sign. Fair enough, but the anti-discrimination legislation does not protect a specific religion against any other nor does it call for any comparison between them. Religion is protected in itself, whatever its form of manifestation and/or nature, so that the decision of the Labour Court of Appeal appears rather surprising.

As regards the proportionality test, it is strange to say in the least that the Labour Court of Appeal seems to consider that an employer could validly set up a neutrality policy even for positions which do not involve contact with customers, whereas the CJEU expressly said in the *Achbita* judgment that such a policy is only necessary if it is limited to contact with clients (para. 42). One may also note that the Labour Court of Appeal is maybe too quick to criticise the CJEU for inserting the requirement to look for an alternative back-office position as this does not *per se* amount to creating a duty of reasonable accommodation outside the scope of the Directive. For, here, the employer, contrary to what is the case with disabled employees, cannot be required to shoulder any additional burden even if it would be reasonable to ask them to do so. So, this obligation even if its content remains unclear at this stage, seems less constraining than the duty of reasonable accommodation.

Finally, in line with most previous case law in Belgium, the Labour Court of Appeal does not seem keen to conduct a strict proportionality test in view of the concrete circumstances of the case. This would require verifying whether the general and undifferentiated prohibition in question imposes an excessive burden in comparison with the aims pursued, resulting in a manifest disproportion between the interests at stake. This is an essential element of the proportionality test more widely considered, which cannot succeed if this requirement, known as proportionality in the strict sense, is not met. At most, the CJEU urged the referring judge to 'take into account the interests involved in the case' having regard to all the material in the file, without giving any further direction in that respect. Advocate General Kokott was more directional in this respect, recommending the referring judge to "strike a fair balance between the conflicting interests, taking into account all the relevant circumstances of the case, in particular the size and conspicuousness of the religious symbol, the nature of the employee's activity and the context in which she must perform her activity, as well as the national identity of Belgium" (para. 127). Such an assessment has not taken place in Belgium.

Before the CJEU, the validity of neutrality policies has come to the fore once again with the *Wabe* and *Müller* cases (Joined Cases C-804/18 and C-341/19). In these cases, the CJEU has been asked whether an internal rule of a private undertaking which prohibits, in the context of a policy of neutrality, only the wearing of conspicuous, large-scale signs of political, philosophical or religious beliefs in the workplace can be justified for the purposes of the Directive. Advocate General Rantos, in his opinion delivered on 25 February 2021, advocates that it should be the case. The CJEU has yet to rule on the matter. Its decision will certainly be important, especially as it should give an indication as to the elements to be taken into account when assessing the proportionality of neutrality policies.

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Comment from other jurisdiction

Germany (Nina Stephan and Phyllis Schacht, Luther Rechtsanwaltsgesellschaft mbH): The question of whether a policy of neutrality can constitute discrimination on grounds of religion is also very topical in Germany. The *Wabe* and *Müller* cases mentioned above (Joined Cases C-804/18 and C-341/19) are the most recent decisions of German courts dealing with this issue and show quite clearly that the German courts also still see a need for clarification by the ECJ in many places. Nevertheless, the cases show very well the current situation of jurisdiction in Germany.

In the *Müller* case, the Federal Labour Court (*Bundesarbeitsgericht,* 'BAG') had to deal with a policy of neutrality that did not prohibit the wearing of any, but rather the wearing of conspicuous, large-scale signs of political, philosophical or religious convictions in the workplace. In contrast to the Belgian court, the BAG found that the policy of neutrality does imply indirect discrimination against the employee. According to the BAG, it is only necessary that the affected employee in the specific case feels compelled by their religion to wear a headscarf, which has to be decided on a case-by-case basis. Consequently, unlike the Belgian court, it did not deal with the question of whether or not the employee's religion compels the wearing of religious signs by all of its believers, but focuses on the believer.

Based on this, both German decisions have their focus on the question of whether the discrimination is justified, which is established if the policy pursues a legitimate aim and the means are appropriate and necessary.

In the light of the ECJ's *Achbita* decision (C-157/15) on a policy prohibiting any visible symbols of political, philosophical or religious beliefs, the BAG saw the necessity to confront the ECJ with the question of whether the policy that only prohibits the wearing of conspicuous, large-scale signs of political, philosophical or religious convictions in the workplace can constitute a legitimate means to pursue the employer's objective of employee neutrality.

In addition, the BAG asked for clarification as to whether a balancing of interests between the employee's freedom of religion and the employer's entrepreneurial freedom is required or not.

Referring to the decision of the European Court of Human Rights in the above-mentioned *Eweida* case (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013), the BAG assumed that such a balancing must be carried out. Based on this, the BAG therefore concluded that the policy of neutrality would not be necessary and would not be justified by the employer's entrepreneurial freedom because the disruptions caused to the employer would not be sufficiently significant to outweigh the freedom of religion.

Considering this in the given *Achbita* case a German court would probably have assumed – in contrast to the Belgian court – an indirect discrimination. Therefore, the question as to whether the discrimination is justified becomes more important. It seems that a German court would deny it, but the decision of the CJEU in this regard remains to be seen. So, at least in Germany, it appears that the judicial saga has not come to an end yet.

Subject: Discrimination, Neutrality, Religious Beliefs, Headscarf Ban

Parties: Samira Achbita and the Interfederal Centre for Equal Opportunities and Opposition to Racism and Discrimination (Unia) – v – G4S Secure Solutions NV

Court: Labour Court of Appeal of Ghent

Date: 12 October 2020

Case number: 2019/AG/55

Internet publication: https://www.unia.be/files/Documenten/Rechtspraak/2020_10_12__Arbh._Gent.pdf

doi: 10.5553/EELC/187791072021006002003