It its ruling in the *Eweida* case, the ECtHR held that the pursuit of this aim allows employers, within certain limits, to impose restrictions on the freedom of religion (§ 37-39).

Prohibiting employees from visibly wearing signs of political, philosophical or religious beliefs is an appropriate way to achieve the aim of projecting an image of neutrality, provided that the prohibition is genuinely pursued in a consistent and systematic manner (§ 40-41).

The referring court will need to determine whether the prohibition at issue was limited to what was strictly necessary. This is the case if the prohibition was limited to G4S employees who interact with customers and it was not reasonably possible for G4S, without taking on an additional burden, to offer Ms Achbita another position not involving visual contact with its customers, rather than dismissing her (§ 42-43).

Ruling

Article 2(2)(a) of Council 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 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.

ECJ (Grand Chamber) 14 March 2017, case C-188/15 (Bougnaoui), Religious discrimination

Asma Bougnaoui and Association de défense des droits de l'homme (Association for the Defence of Human Rights) – v – Micropole SA, formerly Micropole Univers SA, French case

Summary

The concept of a 'genuine and determining occupational requirement' within the meaning of Article 4 of Directive 2000/78 does not cover subjective considerations, such as the willingness of an employer to take account of customers' wishes.

Facts

Ms Bougnaoui was hired by Micropole in February 2008, initially as an intern and, from July that year, as a design engineer. Both during the student fair at which she first met with a Micropole representative and at her initial interview, during which she did not wear a headscarf, she was informed that she would, under no circumstances, be allowed to wear an Islamic headscarf whilst in contact with customers. Shortly after being hired she started to wear a headscarf. This did not create a problem until may 2009, when she was assigned to a customer that asked her to remove her headscarf, which she refused to do. She was dismissed for that reason.

National proceedings

Ms Bougnaoui brought an action. The court of first instance dismissed it. She appealed with the support of the French Association for the Defence of Human Rights ('ADDH'). The Court of Appeal dismissed the appeal. Ms Bougnaoui appealed to the Supreme Court. It referred a question to the ECJ on the interpretation of Article 4 (1) of Directive 2000/78, which provides that:

> *"Member States may provide that a difference in treatment which is based on a characteristic related to any of the grounds referred to in Article 1, shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational require-*

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ment, provided that the objective is legitimate and the requirement is proportionate."

The French Labour Code provides the same.

Opinion of Advocate-General Sharpston

The starting point of Ms Sharpston's analylsis was: *"that Ms Bougnaoui was treated less favourably on the ground of her religion than another would have been treated in a comparable situation. A design engineer working with Micropole who had not chosen to manifest his or her religious belief by wearing particular apparel would not have been dismissed"*. He goes on to state: *"I cannot see any basis on which the grounds which Micropole appears to advance in the dismissal letter […], that is to say, the commercial interest […] could justify the application of the Article 4(1) derogation"*. Direct discrimination cannot be justified by financial considerations and there is nothing to suggest that: *"because she wore the Islamic headscarf, she was in any way unable to perform her duties as a design engineer"*.

ECJ's findings

1. The concept of 'religion' in the Directive covers both the fact of having a belief and the manifestation of that faith in public. This is in line with the ECtHR and the EU Charter (§ 27-30).
2. If Ms Bougnaoui's dismissal was based on non-compliance with a rule in force at Micropole prohibiting the wearing of any visible sign of political, philosophical or religious beliefs, and if that apparently neutral rule resulted, in fact, in persons adhering to a particular religion being put at a particular disadvantage, there would be indirect discrimination on the grounds of religion, barring objective justification. By contrast, if the dismissal was merely based on Micropole's desire to accommodate a customer's refusal to accept the services of a person wearing a headscarf, that would constitute direct discrimination, unless Micropole's desire constituted a genuine and determining occupational requirement within the meaning of Article 4 of the Directive (§ 31-34).
3. The Court has repeatedly held that it is clear from Article 4(1) of Directive 2000/78 that it is not the ground on which the difference of treatment is based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement (§ 37).
4. It is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement. Moreover, such a characteristic may constitute such a requirement only 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out' (§ 38-39).
5. The concept of a 'genuine and determining occupational requirement', within the meaning of that provision, refers to a requirement that is objectively dictated by the nature of the occupational activities concerned or of the context in which they are carried out. It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer (§ 40).

Judgment

Article 4(1) of Council 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.

Commentaries on the Achbita and Bagnaoui cases

Commentary Peter Vas Nunes

Contradictory opinions?

On 14 March, the ECJ delivered its long-awaited judgments in two cases that addressed the issue of the Islamic headscarf at work. The judgments have been commented on widely, in many cases without distinguishing between them. In particular, much was made of a perceived difference, described by some in terms of contradiction, between the opinions of the Advocates-General: that of Ms Kokott in the Achbita case and that of Ms Sharpston in the Bougnaoui case. Ms Kokott concluded that the dress code in *Achbita* constituted only indirect discrimination and that it was likely justified by a "genuine and determining occupational requirement". Ms Sharpston considered the dress code in *Bougnaoui* to constitute direct discrimination that was not justified by such an occupational requirement. Admittedly, the two opinions appear to be contradictory at first glance. However, the perceived contradiction may have to do with a difference in assumption regarding the facts of the cases.

Ms Achbita was dismissed for breach of a prohibition against displaying religious or political or philosophical symbols while at work. According to A-G Sharpston, Ms Bougnaoui was treated less favourably (than a hypothetical comparator) on the ground of her religion, i.e. on the ground of religion only (not also political or philosophical belief) and, moreover, on the ground of her religion (as opposed to religion in general). Do the facts support this finding? All we know about the reason Ms

Bougnaoui was dismissed is what was written in the dismissal letter. It is true that the client where she was assigned to work wanted her to remove her headscarf, but we do not know why it wanted this. For all we know, it may have been because the client had a problem with any manifestation of belief, be it political, philosophical or religious, as in the Achbita case. A sentence in the dismissal letter indicates that this may indeed have been the case: "….we are constrained, vis-à-vis our clients, to require that discretion is used as regards the expression of the personal preferences of our employees" (emphasis added, PVN). In brief, Mr Sharpston's opinion seems to be based on an assumption, that is not borne out by the known facts, that Ms Bougnaoui was dismissed on account of her Muslim faith. Given this assumption, her finding of direct discrimination is not surprising.

Likewise, Ms Kokott's finding of indirect discrimination is also based on a finding that need not necessarily be true. Allow me to quote § 55 of her opinion: "The position would certainly be different, it is true, if a ban such as that at issue here proved to be based on stereotypes or prejudice in relation to one or more specific religions – or even simply in relation to religious beliefs generally. In that event, it would without any doubt be appropriate to assume the presence of direct discrimination based on religion. According to the information available, however, there is nothing to indicate that that is the case." Given this assumption, her finding of indirect, not direct, discrimination is also unsurprising.

- *Direct versus indirect*

To me, the most interesting aspect of the judgments reported above concerns the distinction between direct and indirect religious discrimination. The ECJ does not say much on this distinction in *Achbita*. In *Bougnaoui*, the court distinguishes between two scenarios: (i) the dismissal was based on non-compliance with a prohibition against wearing visible signs of political, philosophical or religious beliefs, in which case there may be, at most, indirect discrimination (§ 32); and (ii) the dismissal was not based on such a prohibition but on the willingness of Ms Bougnaoui's employer to respect a customer's refusal to accept the services of a person wearing an Islamic headscarf, in which case the discrimination is direct (§ 34). It is for the referring court to determine which of these two scenarios was the case. *Tertium non datur* (no third way), it would seem. However, the ECJ does take into consideration a third scenario, in which the customer's wish was for the assigned person to be dressed neutrally, i.e. without displaying any sign of religious or political or philosophical belief.

Ms Sharpston goes a long way in his effort to treat headscarf bans as direct rather than indirect discrimination. Point § 110 of his opinion suggests that, in order to be truly neutral, a company policy would need to ban a wide variety of clothing that is generally seen to be innocuous: *"In the analysis of indirect discrimination that follows, I shall assume that there exists a (hypothetical) company rule imposing an entirely neutral dress code on all employees. Thus, any item of apparel that reflects the wearer's individuality in any way is prohibited. Under such a dress code, all religious symbols and apparel are (evidently) banned – but so too is the wearing of a FC Barcelona supporter's shirt or a tie denoting that one attended a particular Cambridge or Oxford college"*. I trust that this remark was made tongue in cheek.

Let me conclude by focussing on point § 55 of Ms Kokott's opinion, already quoted above. If G4S's dress code had been based on stereotypes or prejudice in relation to one or more religions, or even simply in relation to religious beliefs generally, *"it would without any doubt be appropriate to assume the presence of direct discrimination based on religion*". It would have been interesting for Ms Kokott to elaborate on this point, which could be of greater practical significance than the brevity of her allusion to stereotype and prejudice suggests.

Let me give an everyday example. A prejudiced employer does not want headscarves in its front office. The number of Jews and Sikhs in the area is negligible, let alone Jews and Sikhs who insist on wearing religious apparel at work. The number of Christians who insist on wearing a visible crucifix is also very small. This example reflects the reality in The Netherlands and probably most other European countries. All the employer in the example needs to do to have its way is issue (and consistently and systematically apply) an undifferentiated policy of prohibiting all outward signs of religious, political and philosophical belief (where necessary, including FC Barcelona shirts and university ties!), ostensibly to project an image of neutrality. This way, the employer eliminates direct discrimination and, if we go by *Achbita*, even indirect discrimination. I would argue that in such a situation, contrary to what usually applies in discrimination cases, discriminatory intent is relevant. If a *prima facie* case can be made indicating insincerity of a 'neutral' dress code, that should negate the ECJ's findings in *Achbita*.

Commentary by Gautier Busschaert and Stéphanie De Somer, Van Olmen & Wynant (background and impact of decision in Belgium)

The *Achbita* judgment is of fundamental importance. Indeed, it is the first time that the ECJ has had the opportunity to rule on the sensitive question of the position of religion at work seen from the perspective of Directive 2000/78.

I. Direct discrimination

In that respect, one could have hoped that the ECJ would have substantiated to a greater extent its reasoning that a policy which prohibits the wearing of visible signs of political, philosophical or religious beliefs must not be regarded as direct discrimination. Indeed, how could the ECJ come to the conclusion that there is no direct discrimination when the protected criterion, here religion, is *explicitly* targeted by the regulation that sets out the policy? Usually, it is sufficient that a measure

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has been set up for reasons *related* to a protected criterion for the ECJ to find that there is direct discrimination.[1]

The link with religion is established in the present case, for an employee who manifests her or his religion will be dismissed, whilst an employee who does not manifest any religion will not be affected. Likewise, an employee who manifests beliefs that are not political, philosophical or religious will be outside the scope of the prohibition even if Directive 2000/78 clearly states that discrimination on the grounds of religion or, more widely, belief, is prohibited.

This criticism notwithstanding, well-settled case-law in Belgium already considers that a neutrality policy that prohibits all visible signs of political, philosophical or religious beliefs can only be deemed to be indirectly discriminatory.[2]

II. Legitimacy

One could also have expected greater justification before treating *"the desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality"* as a legitimate aim. The ECJ derives this legitimate aim from the freedom to conduct a business recognized in Article 16 of the Charter of fundamental rights of the European Union. At first sight, this may seem logical. Yet, should this freedom encompass the right for businesses to promote an image of (exclusive) neutrality? The ECJ refers to the *Eweida* case of the ECtHR, in which it was accepted that a company could invoke its intent to promote an image of neutrality as a legitimate aim to restrict the wearing of religious signs at work.[3]

However, in *Eweida*, the ECtHR has ruled against the company, holding that too much weight had been given to the interests of the company compared to those of the air hostess who invoked her right to wear a Christian cross around the neck. It is also important to note that in the *Chaplin* case, which was dealt with in the same judgment as the *Eweida* case, the ECtHR considered that the intent to promote neutrality is of secondary importance to other legitimate aims such as the protection of health and safety. This confirms that the desire to promote an image of neutrality is legitimate but not paramount in the case law of the ECtHR. Such a position is fundamentally different from the one adopted by the ECJ, which regards such a policy as a derivative of a fundamental right.

From the perspective of legitimacy, the impact of the present case on Belgian case law will be rather limited. Indeed, most courts already accept that the pursuit of a policy of neutrality within the company is legitimate and may justify a difference in treatment indirectly based on religion.[4]

III. Proportionality

As to the proportionality test, the ECJ deems the general prohibition against wearing philosophical, political and religious signs at work to be appropriate in order to reach the objective of promoting a corporate image of neutrality. The ECJ also considers that the prohibition *must* be considered strictly necessary if it is limited to employees in contact with clients. By doing so, the ECJ restricts to a great extent the margin of appreciation of the national judge. It also subscribes to a narrow construction of the notion of neutrality: neutrality here effectively implying *banning* all expressions of philosophical, political or religious signs from the workplace.

In Belgian public law, on the other hand, a distinction is made between an 'inclusive' construction of the principle of neutrality, which requires that users of public services be treated in a non-discriminatory way, and an 'exclusive' construction of neutrality, which requires that public servants must not manifest their beliefs. One could argue that an inclusive approach to neutrality also makes sense in a private law context. The ECJ should at least have explained why neutrality must necessarily be considered as excluding any expression of religious belief.

On the other hand, the ECJ innovates by extracting from the criterion of necessity a duty to look for another position within the company before dismissing an employee who refuses to take off her headscarf. This is a *soft* duty of reasonable accommodation if we compare it with the one applying in the field of disability. Indeed, the latter may impose an additional burden on the employer so long as it is reasonable and there is no limit as to the kind of accommodation measures that may be considered. At the same time, it is, to the authors' knowledge, the first time that the ECJ has imposed a duty of reasonable accommodation outside the field of disability, where it can rely on an explicit legal basis for doing so.

1. See e.g. ECJ, *Dekker*, 8 November 1990, Case C-177/88, paras 12 and 17; ECJ, *Handels- og Kontorfunktionærernes Forbund*, 8 November 1990, Case C-179/88, para. 13; ECJ, *Busch*, 27 February 2003, Case C-320/01, para. 39; ECJ, *Kiiski*, 20 September 2007, Case C-116/06, para. 55; CJUE, *Kleist*, 18 November 2010, Case C-356/09, para. 31; ECJ, *Ingeniørforeningen i Danmark*, 12 October 2010, Case C-499/08, paras 23 and 24; ECJ, *Maruko*, 1st April 2008, Case C-267/06, para. 72; ECJ, *Römer*, 10 May 2011, Case C-147/08, para. 52; ECJ, *Hay*, 12 December 2013, Case C-267/12, paras 41 and 44. See also ECJ, *CHEZ*, 16 July 2015, Case C-83/14, para. 95.
2. Trib. trav. Bruxelles, 2 November 2010, RG n° 05/22188/A, available on www.juridat.be; Cour trav. Anvers, 23 Decembre 2011, *Ors* 2012/3, p. 24, note I. PLETS; Trib. trav. Tongres, 2 January 2013, *Ors* 2013/3, p. 22, note I. PLETS. See also Trib. trav. Bruxelles (réf.), 16 November 2015, RG n° 13/7828/A, unpublished; Trib. trav. Bruxelles (réf.), 9 June 2016, RG n° 15/7170/A, unpublished.
3. Eur. Ct H.R. (gt ch.), judgment *Eweida and others – v – United Kingdom*, 15 January 2013, rep. n° 48420/10, 59842/10, 51671/10 and 36516/10.
4. Trib. trav. Bruxelles, 2 November 2010, RG n° 05/22188/A, available on www.juridat.be; Cour trav. Anvers, 23 December 2011, *Ors* 2012/3, p. 24, note I. PLETS; Trib. trav. Tongres, 2 January 2013, *Ors* 2013/3, p. 22, note I. PLETS; Trib. trav. Bruxelles (réf.), 16 November 2015, RG n° 13/7828/A, unpublished; Trib. trav. Bruxelles (réf.), 9 June 2016, RG n° 15/7170/A, unpublished.

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Finally, the ECJ does not provide any indication as to how proportionality should be examined. Proportionality requires that measures adopted to achieve the legitimate objectives pursued must be appropriate and not go beyond what is necessary in order to achieve those objectives. In the strict sense, proportionality also requires that such measures must not, even if they are appropriate and necessary for achieving legitimate objectives, give rise to any disadvantages which are disproportionate to the objectives pursued.

The ECJ does not assess this aspect of proportionality while it ranks foremost in the opinions of the Advocate Generals both in the *Achbita*[5] and the *Bougnaoui*[6] case. Likewise, in the *Eweida* judgment, a detailed assessment of strict proportionality is made and the ECtHR comes to the conclusion that there is a manifest disproportion between the aim pursued by the company and the disadvantages caused to the employee.

By refraining from this assessment, the ECJ confirms a trend in Belgian case law, which usually considers that a general prohibition against wearing religious signs at work is necessary, without any need to verify whether, on the facts, this creates a disproportion between the conflicting interests at stake.[7]

ECJ 27 April 2017, case C-680/15 (Asklepios Kliniken), Transfer of undertakings

Asklepios Kliniken Langen-Seligenstadt GmbH and Asklepios Dienstleistungsgesellschaft mbH – v – Ivan Felja and Vittoria Graf, German case

Summary

'Dynamic' referral clauses have effect after the transfer of an undertaking, if national law provides for the possibility for the transferee to make changes both consensually and unilaterally.

Facts

Ivan Felja and Vittoria Graf were employed at the hospital in Dreieich-Langen, Ivan Felja as caretaker and gardener from 1978 and Vittoria Graf as care assistant from 1986. The hospital was owned by a local authority. In 1995, the local authority transferred the hospital to a limited liability company and in 1997, the part of the hospital in which they were employed was transferred to KLS Facility Management GmbH ('KLS FM'). KLS FM did not belong to an employers' association and was therefore not bound to a particular collective bargaining agreement, but their employment contracts contained a 'dynamic' referral clause providing that their employment relationship would be governed – as it was before the transfer – by collective agreement 'BMT-G II', and that in future they would be governed by any collective agreements supplementing, amending or replacing it.

Subsequently, KLS FM became affiliated to a group of businesses in the hospital sector. On 1 July 2008, the part of the business where the workers were employed was transferred from KLS FM to another company in the group, namely Asklepios. Like KLS FM, Asklepios was not bound, as a member of an employers' association, either to BMT-G II or the TVöD, which had replaced it from 1 October 2005, or to the collective agreements on the transition of staff employed by municipal employers covered by the TVöD or to the rules relating to the transitional law.

National proceedings

The workers brought legal proceedings seeking a declaration, in accordance with the 'dynamic' referral clause in their contracts, that the provisions of the TVöD, the collective agreements supplementing it, the provisions of the collective agreement on the transition of staff employed by municipal employers to the TVöD and the rules relating to the transitional law applied all to their employment relationship in the versions in force at the date of their application.

Asklepios contended that Directive 2001/23 and Article 16 of the Charter preclude the legal consequence provided for in national law, whereby the rules of the public service collective agreements to which the contract of employment refers apply dynamically. Asklepios argued that, after the transfer of the workers to another employer, those agreements needed to be applied as they originally stood (statically), meaning that only the terms of employment agreed in the contract of employment concluded with the transferor employer, based on the collective agreements referred to by that contract could be relied on against the transferee employer.

The lower courts upheld the actions brought by the workers and Asklepios appealed to the referring court

5. Paras 112-127.
6. Paras 120-134.
7. C. trav. Bruxelles, 15 January 2008, *J.T.T.*, 2008, p. 140; Cour trav. Anvers, 23 December 2011, *Ors*. 2012/3, p. 24, note I. Plets; Trib. trav. Bruxelles, 2 November 2010, RG n° 05/22188/A, available on www.juridat.be; Trib. trav. Bruxelles, 8 June 2015, RG n° 12/7482/A, unpublished; Trib. trav. Bruxelles, 18 May 2015, RG n° 14/5803/A, unpublished; Trib. trav. Bruxelles (ref.), 9 June 2016, RG n° 15/7170/A, unpublished. See, however, Trib. trav. Bruxelles (ref.), 16 November 2015, RG n° 13/7830/A, unpublished.

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