Insight from Brussels on dress codes and religious symbols at work

The Scotland Legal Team is delighted to present an article from our guest contributor in Brussels, Imane El Morabet. Imane is a legal advisor at Unia, the Interfederal Centre for Equal Opportunities. UNIA supported the claimant and was a party in the much anticipated case of Achbita at the European Court of Justice (CJEU).

In Achbita and Bougnaoui, the CJEU ruled that a business’ internal policy which prohibits the visible wearing of any political, philosophical or religious sign does not constitute direct discrimination, but is capable of constituting indirect discrimination.

The Commission is grateful to Imane for offering her unique perspective on the cases. In this in-depth article, Imane analyses the Court’s decision against the background of the conflicting opinions from Advocate General Sharpston and Kokott. She gives an insight into the practical implications of the decisions for employers and the impact so far in Belgium.

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On 14 March 2017 the Court of Justice of the European Union (CJEU) gave further consideration of the principle of non-discrimination on the grounds of religion. The CJEU ruled that a business’ internal policy which prohibits the visible wearing of any political, philosophical or religious signs does not constitute direct discrimination, but is capable of constituting indirect discrimination.
The CJEU expressed the view that a policy of political, philosophical and religious neutrality is a legitimate aim to justify an indirect distinction. However a private company can only prohibit a religious sign, in this case a headscarf, on the basis of its neutrality policy, for those employees who are in visual contact with the customers. If the employer decides that staff must have a neutral appearance, this policy must be applied in a coherent and systematic manner.

The employer must also consider whether employees who openly wish to wear religious symbols, could be assigned to a different job, without any visual contact with the customers.\(^1\) Finally the CJEU confirmed that a client’s demand for neutrality does not amount to an acceptable occupational requirement.\(^2\)

**Facts of the cases**

The case of *Achbita* was referred to the CJEU by the Belgian Court of Cassation, and the case of *Bougnaoui* by the French Court of Cassation. Both cases concerned women who were working in jobs which involved being sent out to work for client companies. These women lost their jobs because of their refusal to comply with their employers’ request to take off their headscarves in their workplaces. Mrs Achbita started wearing a headscarf at work in her fourth year of employment. She was immediately confronted by her employer’s objection, based on the company’s ‘neutrality’ policy. This policy was incorporated in the employees code of conduct after the dismissal. Mrs Bougnaoui on the other hand was asked to remove her headscarf at work after the company received a complaint from a client, specifically that her veil had embarrassed certain employees.

The case of *Achbita* was much anticipated, due to the state of uncertainty that was created by the national case law on the issue of

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\(^1\) Case C 157/15 Samira Achbita, Centrum voor gelijkheid van kansen en voor racimebestrijding v G4S Secure Solutions NV, 14 March 2017

\(^2\) Case C-188/15 Asma Bougnaoui, Association de défense des droits de l’homme (ADDH) v Micropole SA, formerly Micropole Univers SA, 14 March 2017.
whether or not a commercial private employer could invoke a neutrality principle to prohibit the wearing of any religious (but also philosophical and political) sign. Neutrality has been accepted as a ground for rights restrictions when applied to the public sector, under certain conditions. But now it is increasingly invoked by private employers. Several lawsuits in Belgium have shown that the question was regularly an issue of debate.

The important question that the CJEU had to answer was whether a private commercial employer – similar to a public administration – could prohibit the wearing of philosophical and religious symbols by employees, because he wished to be “neutral”.

**Questions referred for Preliminary Ruling**

In the case of Achbita the formal question posed to the CJEU was: “Should Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer’s rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?”

The French Court of Cassation wanted to know if: “Article 4(1) of Council Directive 78/2000/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must 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?”

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3 For example the respect of the principle of proportionality. *Ebrahimian v France 2015 [ECHR] 1041*
The question for Preliminary Ruling in *Achbita* is legally important, as the possible justifications may vary depending on whether the underlying difference of treatment is directly or indirectly linked to religion and/or belief. Direct discrimination in the sphere of employment is almost impossible to justify, with the exception of a genuine and determining occupational requirement. The test is very strict: the required personal characteristic that is related to a discrimination ground should be indispensable in order to carry out the job. 4

Indirect Discrimination allows for objective justification. The distinction must pursue a legitimate aim (the aim must not be unlawful) and the means for achieving that aim must be appropriate and necessary (there should not be any reasonable alternatives) and the consequences must not be disproportionate.5

The question for Preliminary Ruling in *Bougnaoui* was also important as it was seeking confirmation of the position in *Firma Feryn*6 on the weight to be given to customer preferences.

**Advocate- General Opinions**

Interestingly, Advocate General Kokott in *Achbita* and Advocate General Sharpston in *Bougnaoui* reached opposite conclusions in their opinions, based on diverging interpretations of several aspects of the EU Directive. In short, for Kokott, there was no discrimination, for Sharpston, there was.7

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6 Case C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV, 10 July 2008.
Kokott concluded that “the ban at issue applies to all visible religious symbols without distinction. There is therefore no discrimination between religions” (par. 49). Kokott clarifies this point of view by stating that “requirement of neutrality affects a religious employee in exactly the same way that it affects a confirmed atheist who expresses his anti-religious stance in a clearly visible manner by the way he dresses, or a politically active employee who professes his allegiance to his preferred political party or particular policies through the clothes that he wears (such as symbols, pins or slogans on his shirt, T-shirt or headwear)” (par. 52).

Sharpston concluded otherwise: “a general ban on the wearing of religious signs when attending the premises of those customers is a direct distinction on the basis of religion, because it refers directly to the manifestation of a religious belief. The fact that the ban applied to all religions and beliefs doesn’t undermine this conclusion” (Par. 87-89). Ms Bougnaoui was treated less favorably on the ground of her religion than “another would have been treated in a comparable situation because 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” (par. 88).

Sharpston also referred to previous case-law of the CJEU concerning various EU-law prohibitions on discrimination, and underlined that the CJEU generally had adopted a broad understanding of the concept of direct discrimination, and has always assumed such discrimination to be present where “a measure was inseparably linked to the relevant reason for the difference of treatment⁸. Kokott also acknowledged this, but defended her opinion by arguing that “all of those cases were without

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⁸ For example, the judgments in Dekker (C-177/88, EU:C:1990:383, paragraphs 12 and 17), Handels- og Kontofunktionærernes Forbund (C-179/88, EU:C:1990:384, paragraph 13), Busch (C-320/01, EU:C:2003:114, paragraph 39), Kiiski (C-116/06, EU:C:2007:536, paragraph 55), Kleist (C-356/09, EU:C:2010:703, paragraph 31), Ingeniørforeningen i Danmark (C-499/08, EU:C:2010:600, paragraphs 23 and 24), Maruko (C-267/06, EU:C:2008:179, paragraph 72), Römer (C-147/08, EU:C:2011:286, paragraph 52) and Hay (C-267/12, EU:C:2013:823, paragraphs 41 and 44); see also, to that effect, the judgment in CHEZ Razpredelenie Bulgaria (C-83/14, EU:C:2015:480, paragraphs 76, 91 and 95).
exception concerned with individuals’ immutable physical features or personal characteristics — such as gender, age or sexual orientation — rather than with modes of conduct based on a subjective decision or conviction, such as the wearing or not of a head covering at issue here” (par. 45).

Kokott did however accept that the ban “is in practice capable of putting individuals of certain religions or beliefs at a particular disadvantage by comparison with other employees, what constitutes an indirect distinction that has to be justified” (par. 45). For Kokott neutrality is a legitimate aim, on the basis of the fundamental freedom to conduct a business. According to Kokott, further analysis must be made by the national courts, but she also indicated that the ban is appropriate and necessary to achieve the legitimate aim of neutrality, because other alternatives are not conceivable without presenting a disproportionate burden to the employer, (par. 100- 110).

Sharpston once again reached the opposite conclusion. Supposing the CJEU would consider the ban to constitute an indirect distinction, it was difficult for her to see how the prohibition could be found to be proportionate. For example when an enterprise has a policy requiring its employees to wear a uniform, it is not unreasonable to require employees to do as much as possible to meet this policy. An employer can therefore stipulate that those employees who wear an Islamic headscarf should adopt to the colour of that uniform when selecting their headscarf (or the employer should propose a uniform version of that headscarf) (par. 123).

**Summary of the Judgments**

In the case of *Achbita* the CJEU partially followed the opinion of Kokott. It held that there was no direct discrimination, because “the internal rule at issue … refers to the wearing of visible signs of political, philosophical or religious beliefs and therefore covers any manifestation of such beliefs without distinction. The rule must, therefore, be regarded as treating all
workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, inter alia, to dress neutrally, which precludes the wearing of such signs. (para. 30)"

The CJEU then continued to consider the matter of indirect discrimination, which is lawful under the Directive if the measure is objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary.

The CJEU accepts "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. An employer’s wish to project an image of neutrality towards his customers relates to the freedom to conduct a business that is recognized in Article 16 of the Charter. It is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer’s customers (par. 37-38). By adding the adjective “notably”, the CJEU does not exclude the possibility that neutrality could be legitimately invoked, but confines itself by explicitly stating that neutrality is a legitimate aim if it’s applied to employees who have visual contact with clients.

The CJEU further considered the ban appropriate for the purpose of pursuing a policy of neutrality: “provided that that policy is genuinely pursued in a consistent and systematic manner”(par. 40). These additional conditions were not considered necessary by Kokott. The CJEU seems to set the bar higher than Kokott did; only neutrality policies that are genuinely applied in a consistent and systematic manner are legitimate and appropriate.

Finally the CJEU ruled that the ban can be considered ‘strictly necessary’ if two conditions are met. Firstly, it should cover only the employees who visually interact with customers. Secondly, dismissal is allowed only if it is not possible (taking into account "the inherent constraints to which the undertaking is subject" and without taking on an "additional burden") to offer the applicant a post not involving any visual contact with customers.
Unlike Kokott, the CJEU gives a strict interpretation to the necessity requirement, and suggests that employers should look for alternatives.

In the case of Bougnaoui, where the headscarf ban was not part of a general neutrality policy, but was based on client preferences, the CJEU ruled that this was a case of direct discrimination on grounds of religion. Direct discrimination can only be justified in the case of a ‘genuine and determining occupational requirement’ (art. 4(1) of the Directive). The CJEU found direct discrimination on the ground of religion because:

“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.” (para. 41).

**Conclusion**

The Bougnaoui judgment is in line with previous case law ruling that client preference cannot be a genuine occupational requirement.⁹ The same conclusion cannot be drawn from the Achbita case: even though the CJEU has a tradition of a wide interpretation of direct discrimination, the CJEU chose a very formalistic approach in the Achibita case and concluded that there was no direct discrimination.

It is also questionable that the CJEU accepts neutrality as a legitimate reason to limit a fundamental right. Obviously a company can decide to have a neutral policy. But unlike the public sector, there is no legal obligation for private commercial companies to do so. The same restrictions cannot be justified, certainly where they involve fundamental rights. Companies do have the freedom to conduct a business, but this right is not absolute.

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⁹Case C-54/07 Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV, 10 July 2008.
The difference between front and back office is also very vague. For example what about an accountant of a private company who wears a headscarf and works in an ‘open plan’ office, where at times clients are being welcomed? It is not her professional duty to be in contact with these clients. Is the fact that clients can potentially see her enough reason to say that she occupies a front office post?

A further question arises on the proportionality test. Should an employer allow neutral headgear, which doesn’t express a religion, but which meets the workplace dress code such as a bandana or a hat? Reasonable accommodation for religious practices is not required by the EU directives in the clauses protecting against discrimination on the basis of religion but the future will indicate the implications of the proportionality test in comparable cases.

It’s now up to the national courts to pronounce a final decision taking into account these judgments. The French Court is due to rule by September on Bougnaoui. Only time will tell what the impact of the case of Achbita will be. In Belgium for example the decision gave an incentive to some employers to reaffirm their inclusive diversity policy, by clearly stating publicly that “employers should be themselves at work. That is what brings up their best talents”.10 The Achbita decision explains what is legally permissible, but it’s important to emphasize that neutrality for private employers is not an obligation and that they are free to implement and apply their diversity policy in an inclusive way.

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10 This is the case of Axa, a private bank: http://m.deredactie.be/#/snippet/58c833ee486a0f7110d11d2b/533acdc50cf2d9c934419e6d

The Guidance states that if an employers want to implement a dress code or uniform policy, they must ensure that this does not directly or indirectly discriminate against employees with a particular religion or belief or no religion or belief. See our guide to the law to find out more about direct and indirect discrimination.

Any requests to change a workplace dress code or uniform policy must be considered separately as there may be clothing requirements that relate to some roles and not others. For example, wearing a religious symbol on a chain may be more of a health and safety risk when the employee’s role involves working with machinery with which it could become entangled than where their role is office based. For other roles there may be security justifications for not allowing an employee to wear clothing which makes it hard to verify their identity.

If you agree to a change in uniform policy on religious grounds for one person, you do not have to do it for everyone. It is not unlawful direct discrimination to treat people differently if their situations are different. For example, an employer agrees to a change in a uniform policy for a religious employee because otherwise they would be indirectly discriminating against that employee because of their religion. Another employee asks for the same change to the policy because they find the uniform uncomfortable. It would not be direct discrimination to refuse this request because this employee’s circumstances are not the same as the religious employee’s, and the request does not relate to religion or belief or any other characteristic protected under the Equality Act 2010. The employer could also have refused the religious employee’s request if it was based on comfort alone.