

Religious discrimination at the workplace and the recent CJEU case law regarding headscarves and religious employers

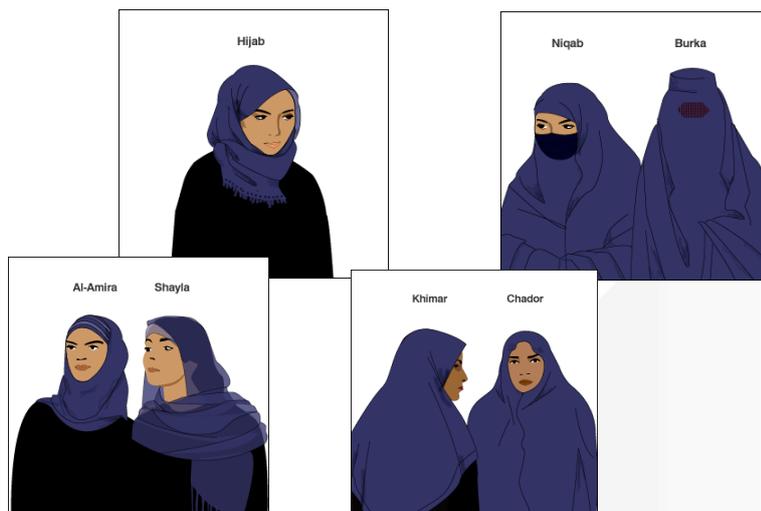
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Headscarves and face veils

Pictures: <http://www.bbc.co.uk/newsround/24118241>



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Legal provisions against religion or belief discrimination in the EU

Directive 2000/78/EC of 27 Nov. 2000
Establishing a General Framework for
Equal Treatment in Employment and
Occupation [2000] OJ L 303/16

religion or belief,
disability, age and
sexual orientation

applies in the areas of
employment and
occupation

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Article 2 Directive 2000/78/EC

(a) **direct discrimination** shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1 (religion or belief, disability, age, sexual orientation);

(b) **indirect discrimination** shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons **unless:**

(i) that provision, criterion or practice is **objectively justified** by a **legitimate aim** and the **means of achieving that aim are appropriate and necessary.**

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CJEU: headscarf cases

C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, EU:C:2017:203;

C-188/15 *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v Micropole Univers SA*, EU:C:2017:204;

Joint cases C-804/18 *IX v Wabe eV*. and C-341/19 *MH Müller Handels GmbH v MJ*, EU:C:2021:594.

C-344/20 *LF v SCRL*, EU:C:2022:774.

C-148/22 *OP v Commune d'Ans*, ECLI:EU:C:2023:924

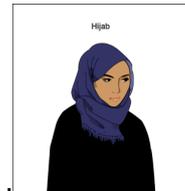


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Achbita and Bougnaoui



- Both women wanted to wear a hijab to work.
- Both refused to remove them and were dismissed.
- Achbita was a receptionist. Employer's work rule was that employees could not wear visible signs of political, philosophical or religious beliefs at work. Question: was this direct discrimination?
- Bougnaoui was a design engineer who occasionally went out to work at customers' sites. After visit to one customer was asked to remove hijab as a customer's staff member complained about it. Question: was the wish of a customer to no longer have services provided by an employee wearing a headscarf a genuine and determining occupational requirement under Article 4(1) of Directive 2000/78/EC?

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Achbita and Bougnaoui cases at CJEU

- *Achbita*: CJEU: no direct discrimination:
 - applied to all employees equally.
 - But was up to national court to decide.
- CJEU gave guidance on justification of indirect discrimination:
- Legitimate aim? Yes, Art. 16 EU Charter of Fundamental Rights.
- Appropriate and necessary means? Yes, as long as:
 - the ban was genuinely pursued in a consistent and systematic manner;
 - the rule was limited to customer-facing employees; and,
 - the employer had considered whether the employee could be moved to a job without contact with customers.
- *Bougnaoui*: wish of customer is not a genuine and determining occupational requirement.

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Facts Wabe and Müller

- IX was special needs carer in nursery run by Wabe. On return from parental leave, she was asked to not wear headscarf at work. Wabe had introduced neutrality policy prescribing that employees refrain from wearing any visible signs of political, ideological or religious beliefs. IX refused to remove headscarf and was released from work. IX challenged this as direct religion or belief discrimination and as discrimination on the grounds of gender and ethnic origin.
- Müller runs a number of chemist shops. On her return from parental leave, MJ started wearing a headscarf based on her religious beliefs. Müller asked her to remove the headscarf as it was against the company policy to wear any prominent and large-scale signs of religious, philosophical and political convictions. After twice refusing to take off her headscarf, MJ was sent home. She challenged this treatment as a breach of her right to freedom of religion and as religious discrimination.

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CJEU interpretation 'religion or belief'

- Concept of religion includes manifestation in public;
- Terms 'religion or belief' are two facets of the same single ground of discrimination;
- Terms need to be distinguished from the ground based on political or any other opinion;
- Terms covered both religious beliefs and philosophical or spiritual beliefs;
- Terms correspond to and must be interpreted in accordance with Art. 10 Charter and Art. 9 ECHR;
- prohibition of religion or belief discrimination in Directive is not limited to differences in treatment between persons having a particular religion and belief and those who do not;
- the less favourable treatment must be experienced as a result of the religion or belief.

discrimination because of wearing an Islamic headscarf falls in principle under the Directive.

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Direct or indirect discrimination - *Wabe*

In *Wabe*, CJEU follows *Achbita* and explains further:

- internal rule banning any visible sign of political, philosophical or religious beliefs is not direct religion or belief discrimination under Directive 2000/78/EC;
- As long as rule covers any manifestation without distinction;
- As long as rule treats all workers in the same way; (all idem *Achbita*);
- Such a rule is not inextricably linked to religion or belief, despite fact that some workers observe religious precepts which require certain clothing to be worn and that the application of such an internal rule is capable of causing particular inconvenience for such workers.
- IX not treated differently in comparison with any other employee.
- up to the referring court to make the necessary factual assessment and to determine whether the internal rule was applied in a general and undifferentiated way to all workers (idem *Achbita* and *Bougnaoui*).

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Direct or indirect discrimination - *Müller*

- CJEU: because neutrality policy only bans wearing of conspicuous, large-scale signs, this constitutes direct religion or belief discrimination, because some workers will be treated less favourably than others on the basis of their religion or belief.
- CJEU refers to argument of the European Commission that this rule: “*is liable to have a greater effect on people with religious, philosophical or non-denominational beliefs which require the wearing of a large-sized sign, such as a head covering*”.
- Inconsistent with judgment that there is no direct discrimination in *Wabe*?

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Arguments for direct discrimination in *Wabe*, 1

1. Ban likely to have greater effect on people with religious, philosophical or non-denominational beliefs which require the wearing of particular symbols (*Müller*).
2. C-54/07 *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v Firma Feryn NV*, EU:C:2008:397, paras 23-25: statement by an employer that he would not employ ‘immigrants’ because his customers did not want to give them access to their houses, constituted direct racial discrimination against Dir. 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22. CJEU held: such a statement is likely to dissuade some candidates from applying to this employer. Same can be said for the neutrality rules in the headscarf cases.

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Arguments for direct discrimination in *Wabe*, 2

3. C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, EU:C:2015:480, para. 76: a practice constitutes direct discrimination if the protected discrimination ground determined the decision for the discriminatory treatment or if a measure was introduced and/or maintained for reasons relating to a protected discrimination ground. Referring court: the rule in *Wabe* had an explicitly negative effect linked to characteristic of religion. If so, then it is direct discrimination.
4. Stereotypes and prejudices can lead to finding of direct discrimination (*CHEZ*, para. 82). CJEU should at least have examined this.

Conclusion: Courts should consider direct discrimination.

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Indirect discrimination *Wabe*

- Referring court: neutrality rule concerns, statistically, almost exclusively female workers who wear a headscarf because of their Muslim faith. Thus, CJEU starts from premise that *Wabe*'s neutrality rule constitutes indirect religious discrimination.
- Could be indirect gender discrimination if it affects statistically 'almost exclusively' female workers, but CJEU holds: no need examine whether there is gender discrimination, does not fall under Directive 2000/78/EC.

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Advice for future cases

- Claim gender discrimination against Dir. 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Recast) [2006] OJ L 204, 23; religious discrimination against Dir. 2000/78/EC; and racial or ethnic origin discrimination against Dir. 2000/43/EC, as bans affect mainly women with a migrant background.

National courts should also examine the facts regarding all possible grounds of discrimination and should mention all EU legislation against these forms of discrimination when referring questions to the CJEU.

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Justification indirect discrimination

- employer's desire to display, in relations with both public and private sector customers, a policy of political, philosophical or religious neutrality is a legitimate aim covered by the freedom to conduct a business in Art. 16 EU Charter of Fundamental Rights, particularly if it only applies to workers who come into contact with customers.
- mere desire of an employer to pursue a policy of neutrality is not sufficient to justify indirect religion or belief discrimination.
- employer must demonstrate that there is a genuine need: burden of proof on employer.

Must be genuine need

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Justification indirect religion/belief discrimination

What needs to be taken into account:

- Rights and legitimate wishes of customers or users.

Employer must prove:

- genuine need;
- that, without a neutrality policy, they would suffer adverse consequences given the nature of their activities or the context in which they are carried out;
- that rule is properly applied;
- that rule is pursued in a consistent and systematic manner;
- that rule is limited to what is strictly necessary.

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Proportionality

Proportionality Balancing

Right of individual to manifest
their religion
Art. 10

Freedom of employer to conduct
their business
Art. 16

Right to non-
discrimination
Art. 21

Right of parents
Art. 14(3)



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CJEU decision in *Müller*

- Rule here is direct discrimination.
- in case referring court decides it is indirect discrimination, CJEU analyses justification;
- CJEU: both prevention of social conflicts and presentation of neutral image of the employer vis-à-vis customers may correspond to a real need on the part of the employer, but employer needs to prove this.
- neutrality rule is only limited to what is strictly necessary if no visible manifestations of political, philosophical or religious beliefs are allowed at all. Allowing the wearing of small-sized symbols undermines the ability of the measure to achieve the aim pursued.
- So, if referring court concludes that there is no direct but indirect discrimination, this is not justified.

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More favourable national provisions

- Art. 8(1) Directive 2000/78/EC: Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive.
- German Constitution provides that employer's wish to pursue a policy of religious neutrality which restricts an employee's right to freedom of religion, is legitimate only if employer can show a sufficiently specific risk of that aim being undermined.
- CJEU: such a requirement forms part of the justification test for indirect discrimination based on religion or belief.
- CJEU: national provisions protecting freedom of religion may be taken into account as more favourable provisions under Art. 8(1) when examining what constitutes a difference of treatment based on religion or belief.

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LF v SCRL

- *LF v SCRL*, facts: woman who did not get internship when she refused to remove headscarf.
- CJEU mainly repeated *Wabe and Müller* regarding the terms 'religion or belief' being two facets of the same single ground of discrimination.
- neutrality rule: no direct discrimination but could be indirect discrimination; was for the referring court to decide.
- Referred question: if religion and belief were two facets of the same criterion could national law see these as two separate criteria under Art. 8(1) Directive?
- CJEU no, because would call into question wording, context and intended purpose of that ground and would undermine effectiveness of general framework for equal treatment introduced by that directive by creating subgroups of workers.
- CJEU: taking these grounds as a single criterion 'does not prevent comparisons between workers motivated by religious belief ... and those motivated by other beliefs, ...; nor does it prevent comparisons between workers motivated by different religious beliefs'. This was supported by the objective of the Directive.

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OP v Commune d'Ans

- Public employer (municipal council).
- OP requested to be allowed to wear headscarf at work.
- Council refused and then introduced rule of **exclusive neutrality** which prohibited all municipal workers from any form of proselytising and from wearing any visible sign that might reveal their ideological or philosophical affiliation or political or religious beliefs, whether they were in contact with the public or only with superiors and colleagues.
- OP challenged these decisions as discrimination on the grounds of both religion and belief and of gender.
- CJEU: more likely to amount to indirect discrimination.
- Justification of indirect discrimination: legitimate aim was to put into effect the principle of neutrality of the public service, which was based on the principles of impartiality and neutrality of the State in Articles 10 and 11 of the Belgian Constitution.
- Member States and infra-State bodies have a margin of discretion to decide whether to prohibit all workers or only those who come into contact with customers from wearing religious symbols, or to allow all employees to do so.

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OP v Commune d'Ans

- CJEU dropped third requirement of previous cases: that workplace neutrality rules had to be limited to customer facing employees. So, public employers can ban all employees from wearing religious signs, whether they come into contact with the public or not.
- CJEU did not repeat the requirement that the employer needs to prove the genuine need for a neutrality policy. It just stated that it was up to the referring court to weigh up the interests at stake: the rights in Articles 10 (freedom of religion) and 21 (non-discrimination) of the Charter and the principle of state neutrality.
- Referred question regarding gender discrimination was declared inadmissible because the referring court did not explain why it considered a reply to this question necessary to enable it to give judgment nor did it set out the factual and legal context, as EU law requires. Moreover, sex discrimination was covered by Directive 2006/54/EC and not by Directive 2000/78/EC, the only act the referred question mentions.

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Practical meaning for employers and courts

1. Public and private employers can introduce neutrality policy, but this must ban all visible signs of religious, philosophical and political beliefs, not just some signs.
2. rule must be genuinely pursued in a consistent and systematic manner.
3. rule cannot make a distinction between different religions or beliefs.
4. For private employers, this rule must be limited to customer-facing employees.
5. (employers must consider whether employee can be moved to job without contact with customers: only mentioned in *Achbita*, not in other cases).
6. Private employers must provide evidence of a genuine need, including that their business would suffer real harm. This appears not to apply to public employers.
7. Employers must take freedom of religion of employee and all other relevant fundamental rights into account and strike a fair balance between their own interests and the interests of the employee.

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Article 4 Directive 2000/78/EC

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of 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 of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.

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Article 4(2) Directive 2000/78/EC

Two elements to this exception

1. Occupational requirement: organisations with a religious ethos may treat a person's religion or belief as an occupational requirement where this is justified by the nature and the context of the activities. This should not justify discrimination on another ground.
2. Organisations with a religious ethos can require their employees to conduct themselves in a way that is in keeping with the organisation's ethos.

Up to Member States to decide whether to include this exception in national law.

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C-414/16 Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV EU:C:2018:257

- genuine and determining requirement in Article 4(2) must be '**genuine, legitimate and justified**'.
- **genuine**: the requirement of professing the religion on which ethos of organisation is based "must appear necessary because of the importance of the occupational activity in question for the manifestation of that ethos";
- **legitimate**: this requirement should not be used to pursue an aim that has no connection with that ethos;
- **justified**: religious organisation must show that supposed risk of causing harm to its ethos is probable and substantial, so that imposing such a requirement is indeed necessary.
- Considerations which have no connection with the ethos should not play a role.
- The requirement must also comply with the principle of proportionality, as this is one of the general principles of EU law.
- Confirmed in C-68/17 *IR v JQ* EU:C:2018:696.

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Cresco Investigations GMBH v Marcus Achatzi

- Case 193/17 *Cresco Investigation GmbH v Markus Achatzi*, EU:C:2019:43
- concerned Austrian national legislation determining that Good Friday was a public holiday only for employees who were members of certain specified Christian churches and that only those employees, if they were required to work on that day, were entitled to an extra payment in addition to their regular salary.
- Achatzi was not a member of any of the specified churches and challenged the legislation as religious discrimination.
- The Court of Justice of the EU held that this constituted direct discrimination on the ground of religion.
- Question for you: Do these last three cases fit with the headscarf judgments in relation to direct discrimination and justification?

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THANK YOU

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