



JAGIELLONIAN UNIVERSITY
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Recent developments in the area of religious discrimination, including the Commune d'Ans case of the CJEU

*Current reflections on EU Anti-Discrimination Law
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The scope of the lecture

- 1. Introductory remarks
- 2. Religion as protected characteristic
- 3. Problem of direct discrimination
- 4. Problem of indirect discrimination
- 5. Problem of multiply discrimination
- 6. Conclusions



1. Introductory remarks

Legal framework

- Art. 19. 1 EU Charter of Fundamental Rights:
- Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority property, birth, disability, age or sexual orientation shall be prohibited.
- Directive 2000/78 establishing a general framework for equal treatment in employment and occupation (religion or belief, disability, age, sexual orientation)
- Problem of manifesting religious convictions at the workplace

Art. 2.2. of the Directive 2000/78

- (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;
- (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, (...)

Case C-157/15 G4S *Secure Solutions*

- 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 art. 2(2)(a) of Directive 2000/78.
- By contrast, such an internal rule of a private undertaking may constitute indirect discrimination within the meaning of art. 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.

Recent CJEU case law

- Judgment of 15.07.2021, joined cases C-804/18 and C-341/19 *IX v. WABE eV and MH Müller Handels GmbH v. MJ*
- Judgment of 13.10.2022, case C-344/20 *L.F. v S.C.R.L*
- Judgment of 28.11.2023, case C-148/22 *OP v. Commune d'Ans*
- All the cases:
 - Employer's policy of religious, philosophical, ideological neutrality
 - Questions concerning discrimination of female Muslim workers for wearing Islamic headscarf at the workplace

Factual circumstances

- **Case C-804/18 *WABE*:**
- chain of child day care centre prohibited employees from wearing any visible political, philosophical or religious sign at the workplace when they are in contact with the children or their parents
- unilateral instruction from private employer
- female worker was suspended after she has refused to remove her headscarf

- **Case C-341/19 *Müller Handels***
- chain of drugstores prohibited employees from wearing conspicuous, large-sized political, philosophical or religious signs
- internal directive which has a nature of general rule (private employer)
- sales assistant was transferred to another post, and subsequently sent home, after she has refused to remove her headscarf

Factual circumstances

- **Case C-344/20 SCRL**
- plaintiff's unsolicited application to complete a six-week unpaid internship as part of her vocational studies
- refusal of admittance after the candidate has refused to remove a headscarf in order to comply with the company's rule not to manifest in any way, either by word or through clothing or any other way, religious, philosophical or political beliefs

- **Case C-148/22 Commune d'Ans**
- worker of a municipality who held the post of head of office, without being in contact with users of the public service (public employer)
- worker's request to wear a headscarfe denied
- subsequent modification of terms of employment at the municipality by inserting a requirement of `exclusive neutrality` in the workplace: prohibition from wearing any overt sign which might reveal workers' ideological or philosophical affiliation or political or religious beliefs



2. Religion as protected characteristic

The concept of „religion”

- CJEU: the concept of ‘religion’ in art. 1 of Directive 2000/78 covers both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public (case C-157/15 *G4S Secure Solutions*, C-157/15, para 28; case C-188/15 *Asma Bougnaoui*, para 30).
- The right to freedom of thought, conscience and religion includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. (...) The right guaranteed in Article 10(1) of the EU Charter of Fundamental Rights corresponds to the right guaranteed in Article 9 of the ECHR and (...) has the same meaning and scope (case C-804/18 *WABE*, para 81).

Protected characteristic

- As is apparent from art. 21 of EU Charter of Fundamental Rights, the ground of discrimination based on religion or belief is to be distinguished from the ground based on ‘political or any other opinion’ and therefore covers both religious beliefs and philosophical or spiritual beliefs (joined cases C-804/18 and C-341/19, para 47; case C-148/22, para 22)
- Directive 2000/78 (...) does not cover political or trade union belief; nor does it cover artistic, sporting, aesthetic or other beliefs or preferences (...) (case C-344/20, para 28)
- Article 1 of Directive 2000/78 must be interpreted as meaning that the words ‘religion or belief’ contained therein constitute a single ground of discrimination, covering both religious belief and philosophical or spiritual belief (case C-344/20, para 29).

Identifying discrimination

- The prohibition of discrimination laid down by the Directive 2000/78 is NOT limited only to differences in treatment between persons having a particular religion or belief and those who do not. On the other hand, it follows from the expression ‘on’ that discrimination on the grounds of religion or belief, for the purposes of that directive, cannot be said to occur unless the less favourable treatment or particular disadvantage at issue is experienced as a result of the religion or belief.
- The objective of Directive 2000/78 also supports an interpretation of Article 2(1) and (2) thereof whereby that directive does not limit the circle of persons in relation to whom a comparison may be made in order to identify discrimination on the grounds of religion or belief, for the purposes of that directive, to those who do not have a particular religion or belief (joined cases C-804/18 and C-341/19, para 49-50)

Opinion of AG Medina in case C-344/20

- 38. Recent judgments of the Court demonstrate, however, a shift towards an approach focused not on intergroup but rather on intragroup discrimination. In particular, in *VL*, a case concerning discrimination on grounds of disability, the Court has stated expressly that Directive 2000/78 does not specify in any way the person or group of persons that may be used as the benchmark for assessing whether there is discrimination on that ground. It considered thus that a prohibition of discrimination cannot be limited only to differences in treatment between persons who have disabilities and able-bodied persons, but should focus, instead, on the existence of differential treatment as between persons concerned by that common ground.

Opinion of AG Medina in case C-344/20

- 39. Intragroup comparison requires an assessment as to the existence of discrimination *within* a group composed of individuals that share the same protected characteristic. Its aim is, according to the Court, to avoid diminishing the protection granted by Directive 2000/78, by focusing on the detection of the relative burdens suffered by certain persons belonging to a group concerned by the same protected characteristic, rather than searching for similarities and differences between two groups not related by that common characteristic. From that perspective, intragroup comparison extends the reach of Directive 2000/78 with increased sensitivity to less visible disadvantages and also extends equality protection to the less privileged individuals within a particular group.

Summary

- Wearing religious symbols at work falls within the scope of „employment and working conditions” (art. 3.1 (c) of the Directive 2000/78)
- Religion and belief: the single ground of discrimination
- Broad scope of the prohibition of discrimination based on religion or belief: „criterion inextricably linked to a protected ground” (i.e. discrimination based on religion)
- Intra-group comparison is admissible (previously case C-16/19 *Szpital Kliniczny w Krakowie* on disability paras. 29-31)



3. Problem of direct discrimination

Problem of direct discrimination

- An internal rule of a private undertaking prohibiting the wearing of any visible sign of political, philosophical or religious beliefs in the workplace (...) does not constitute discrimination of that sort provided that it covers any manifestation of such beliefs without distinction and treats 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 (...) Since every person may have a religion or belief, such a rule, provided that it is applied in a general and undifferentiated way, does not establish a difference of treatment based on a criterion that is inextricably linked to religion or belief (joined cases C-804/18 and C-341/19, para 52).

Problem of direct discrimination

- As pointed out in paragraph 52 above, unequal treatment resulting from a rule or practice which is based on a criterion that is inextricably linked to a protected ground, in the present case religion or belief, must be regarded as being directly based on that ground. Accordingly, where the criterion of wearing conspicuous, large-sized signs of political, philosophical or religious beliefs is inextricably linked to one or more specific religions or beliefs, the prohibition imposed by an employer on its employees on wearing those signs on the basis of that criterion will mean that some workers will be treated less favourably than others on the basis of their religion or belief, and that direct discrimination, within the meaning of Article 2(2)(a) of Directive 2000/78, may therefore be established (joined cases C-804/18 and C-341/19, para 73; also case C-344/20, para 31; case C-148/22, para 25).

Problem of direct discrimination

- A provision of an undertaking's terms of employment which prohibits workers from manifesting, through words, through clothing, or in any other way, their religious or philosophical beliefs, whatever those beliefs may be, does not constitute, with regard to workers who intend to exercise their freedom of religion and conscience through the visible wearing of a sign or an item of clothing with religious connotations, direct discrimination 'on the [ground] of religion or belief' for the purposes of the Directive 2000/78, provided that that provision is applied in a general and undifferentiated way (case C-344/20, para 42).
- An internal rule decreed by an employer which prohibits the wearing in the workplace of any visible sign of beliefs – philosophical or religious in particular – does not constitute direct discrimination since it covers any manifestation of such beliefs without distinction and treats 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 (case C-148/22, para 26)

Summary

- Prohibition of any visible religious signs is not direct discrimination (all workers are treated in the same way)
- Employer's policy must be applied in a general and undifferentiated way
- Prohibition of conspicuous, large-sized signs that are inextricable linked to one or more specific religion or belief is direct discrimination



4. Problem of indirect discrimination

Problem of indirect discrimination

- It is apparent from the Court's settled case-law that an internal rule decreed by an employer prohibiting the visible wearing in the workplace of any sign of beliefs – philosophical or religious in particular – may constitute a difference of treatment indirectly based on religion or belief, within the meaning of that provision, if it is established that the apparently neutral obligation contained in that rule results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage (case C-157/15, para 34, joined cases C-804/18 and C-341/19, para 59; case C-148/22, para 29).
- Such a difference in treatment does not, however, amount to indirect discrimination if it is objectively justified by a legitimate aim and if the means of achieving that aim are appropriate and necessary (joined cases C-804/18 and C-341/19, para 60; case C-148/22, para 30).

Problem of indirect discrimination

- An employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognised in Article 16 of the Charter and is, in principle, legitimate, in particular 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 (joined cases C-804/18 and C-341/19, para 63; case C-344/20, para 39).
- (...) only where there is a genuine need on the part of that employer, which it is for that employer to demonstrate (joined cases C-804/18 and C-341/19, para 64).
- a sufficiently specific risk of that aim being undermined, such as the risk of specific disturbances within the undertaking or the specific risk of a loss of income (joined cases C-804/18 and C-341/19, para 85)

Problem of indirect discrimination

- [putting into effect] the principle of neutrality of the public service, which has its legal basis in Articles 10 and 11 of the Belgian Constitution, in the principle of impartiality and in the principle of neutrality of the State (case C-148/22, para 32).
- Article 2(2)(b) of Directive 2000/78 must be interpreted as meaning that an internal rule of a municipal authority prohibiting, in a general and indiscriminate manner, the members of that authority's staff from visibly wearing in the workplace any sign revealing, in particular, philosophical or religious beliefs may be justified by the desire of the said authority to establish, having regard to the context in which it operates, an entirely neutral administrative environment provided that that rule is appropriate, necessary and proportionate in the light of that context and taking into account the various rights and interests at stake (case C-148/22, para 41).

Summary

- Apparently neutral provision may constitute a particular disadvantage for persons adhering to a particular religion or belief, *i.e.* it can be indirectly discriminatory
- Image of neutrality can be a legitimate aim for employer's internal policy, *i.e.* it can justify an unequal treatment
- „Legitimate aim” must be interpreted strictly, employer's actions must be appropriate, necessary and proportionate
- „Genuine need” must be demonstrated by the employer (*e.g.* justified interest of public authority)



5. Problem of multiply discrimination

The prohibition to wear an Islamic scarf – problem of both indirect discrimination and multiply discrimination

- Multiply discrimination: less advantageous treatment based on more than one protected characteristic
- Intersectional discrimination: two or multiple grounds operate simultaneously and interact in an inseparable manner, producing distinct and specific form of discrimination
- It affects women only – an indirect discrimination based on sex?
- It may have a greater impact on women with migration backgrounds – an indirect discrimination on the grounds of ethnic origin?

Opinion of AG Medina in case C-344/20 (para 66)

- If employers impose internal neutrality rules as a generalised policy, Muslim women may in reality not only experience ‘particular inconveniences’, but a deep disadvantage to becoming employees. That may lead in turn to setting them apart from the labour market – a source of personal development and social integration – resulting then in discrimination going beyond religion and extending also to gender. (...) I find it important to highlight that double discrimination is a real possibility which can be legitimately addressed by Member States by enhancing the level of protection for religion and religious beliefs, as an autonomous ground of discrimination, under Art. 8 of Directive 2000/78.



6. Conclusions

Conclusions

- Consistent development of case-law on religious discrimination, CJEU assessment of both direct and indirect religious discrimination
- CJEU seems to focus on indirect discrimination, which gives broader room for employer to justify different treatment based on religion or belief (e.g. image of neutrality against customers, principle of neutrality of public service)
- Need to balance the freedom of conscience and religion with the right to conduct a business (private employer) or the protection of rights and freedoms of others (public employers)

Conclusions

- Further development: prohibition to wear visible religious signs (e.g. Islamic scarf) may require the assessment of the issue of indirect discrimination based on sex and the issue of multiply discrimination
- In general: developing story...



Thank you for your attention



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