

Religious discrimination at the workplace and the CJEU case law

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Martijn van den Brink



**Universiteit
Leiden**
The Netherlands



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Outline

- Applicable EU law
- CJEU case law on religious discrimination
 - Religious clothing (headscarves)
 - Religious employers
- Criticism of CJEU case law

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Applicable EU law

- Charter of Fundamental Rights
 - Art 10: 'Everyone has the right to freedom of thought, conscience and religion'
 - Art 21: 'Any discrimination based on ... religion or belief ... shall be prohibited'
 - Art 22: 'The Union shall respect cultural, religious and linguistic diversity'

- Treaty on the Functioning of the European Union
 - Art 10: 'In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'
 - Art 17: 'the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States'

- Directive 2000/78/EC: Framework Directive combatting discrimination on the grounds of *religion or belief*, disability, age or sexual orientation

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Directive 2000/78/EC – relevant provisions

- Art 1: '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'

- Art 2: Direct & indirect discrimination

- Art 3: (scope): this Directive shall apply to all persons, as regards both the *public* and *private sectors*, including public bodies, in relation to *employment and occupation*

- Art 4: occupational requirements (more information later)

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Religion and belief

- Art 1: ‘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’
- C-804/18 *IX v Wabe*, para 47
 - “religion” and “belief” must be analysed as two facets of the same single ground of discrimination’
 - ‘the ground of discrimination based on religion or belief is to be *distinguished from ... “political or any other opinion”*’
 - ‘the ground of discrimination based on religion or belief ... *covers both religious beliefs and philosophical or spiritual beliefs*’

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CJEU case law on religious discrimination

1. Right to wear religious clothing at work
 - C-157/15 *Achbita*; C-188/15 *Bouagnaoui*; C-804/18 *IX v Wabe*; C-344/20, *LF v SCRL* (private sector)
 - C-148/22, *OP v Commune d’Ans* (public sector)
2. Right of religious employers to discriminate against non-believers
 - C-414/16, *Egenberger*; C-68/17, *IR v JQ*
 - C-258/24, *Katholische Schwangerschaftsberatung* (pending case)

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Religious clothing at work

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Religious clothing at work – direct discrimination (I)

CJEU case law in a nutshell:

- If an individual was refused a job or dismissed for wearing religious clothing, and this was based on a company rule prohibiting visible signs of political, philosophical, or religious beliefs, then likely no discrimination
- If an individual was refused a job or dismissed for wearing religious clothing, and this was not based on a company rule prohibiting visible signs of political, philosophical, or religious beliefs, then direct discrimination

Direct discrimination (*C-188/15 Bougnaoui*)

- Ms Bougnaoui was dismissed for refusing to remove her headscarf
- The company had no rule in place prohibiting the wearing of any visible sign of political, philosophical or religious beliefs
- CJEU ruling: direct discrimination & no justification possible

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Religious clothing at work – direct discrimination (II)

When the company prohibits the wearing of any visible sign of political, philosophical or religious beliefs:

*“an internal rule of a private undertaking prohibiting the wearing of any visible sign of political, philosophical or religious belief in the workplace **does not constitute direct discrimination** ‘on the [ground] of religion or belief’ ... 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”*

*“an internal rule of an undertaking which prohibits only the wearing of conspicuous, large-scale signs of, inter alia, religious or philosophical belief **may constitute direct discrimination** ... where that criterion is inextricably linked to one or more specific religions or beliefs”*

C-344/20, *LF v SCRL*, paras 31-33

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Religious clothing at work – indirect discrimination (I)

When the company prohibits the wearing of any visible sign of political, philosophical or religious beliefs:

an internal rule [prohibiting the wearing of any visible sign of political, philosophical or religious belief] may constitute a difference in treatment that is indirectly based on religion or belief, for the purposes of Article 2(2)(b) of Directive 2000/78, if it is established ... that the apparently neutral obligation it encompasses results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage

such a difference in treatment would nonetheless *not constitute indirect discrimination*, within the meaning of Article 2(2)(b) of that directive, if it were *objectively justified by a legitimate aim* and the means of achieving that aim were *appropriate* and *necessary*.

C-344/20, *LF v SCRL*, paras 37-38

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Religious clothing at work – indirect discrimination (II)

Art 2(2)(b) of Directive 2000/78/EC: indirect discrimination shall be taken to occur where an apparently neutral practice would put persons having a particular religion or belief ... at a particular disadvantage ... unless that practice is *objectively justified by a legitimate aim* and the means of achieving that aim are *appropriate* and *necessary*

- Employment relations in the **private** sector
- 1. Legitimate aim:
 - “an employer’s desire to display, in relations with both public- and private-sector customers, a policy of political, philosophical or religious neutrality *may be* regarded as legitimate” (C-804/18 IX v Wabe, para 63)
 - “the mere desire of an employer to pursue a policy of neutrality ... is not sufficient, ... , since such *a justification can be regarded as being objective* only where there is *a genuine need on the part of that employer* (C-804/18 IX v Wabe, para 64)
 - When does a genuine need exist? Schools who want to create an environment of religious neutrality or companies who would ‘suffer adverse consequences’ (C-804/18 IX v Wabe, paras 65-67)
- 2. Appropriateness:
 - neutrality policy must be ‘genuinely pursued in a consistent and systematic manner’ (C-804/18 IX v Wabe, para 68)
- 3. Necessity:
 - prohibition to observe religious beliefs must be ‘strictly necessary in view of the adverse consequences that the employer is seeking to avoid by adopting that prohibition’ (C-804/18 IX v Wabe, para 69)

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Religious clothing at work – indirect discrimination (III)

Art 2(2)(b) of Directive 2000/78/EC: indirect discrimination shall be taken to occur where an apparently neutral practice would put persons having a particular religion or belief ... at a particular disadvantage ... unless that practice is *objectively justified by a legitimate aim* and the means of achieving that aim are *appropriate* and *necessary*

- Employment relations in the **public** sector
- 1. Legitimate aim:
 - “the policy of ‘exclusive neutrality’ which a public administration ... intends to impose on its employees ... with a view to establishing within it an entirely neutral administrative environment may be regarded as being objectively justified by a legitimate aim” (C-148/22, OP v Commune d’Ans, para 33)
- 2. Appropriateness:
 - “neutrality policy must be ‘genuinely pursued in a consistent and systematic manner’ (C-148/22, OP v Commune d’Ans, para 37)
- 3. Necessity:
 - “an entirely neutral administrative environment can be effectively pursued only if no visible manifestation of beliefs ... is allowed when employees are in contact with users of the public service or with other employees, since the wearing of any sign, even a small-sized one, undermines the ability of that measure to achieve the aim allegedly pursued and therefore calls into question the consistency of that policy. *Such a rule is therefore necessary*” (C-148/22, OP v Commune d’Ans, para 39)

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Religious clothing at work – more favourable national provisions

Art 8(1) of 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”

“National provisions protecting freedom of thought, belief and religion ... may be taken into account as provisions more favourable to the protection of the principle of equal treatment, within the meaning of Article 8(1) of Directive 2000/78, when examining what constitutes a difference of treatment based on religion or belief”

“National provisions making the justification of a difference of treatment indirectly based on religion or belief subject to higher requirements than those set out in Article 2(2)(b)(i) of Directive 2000/78 would fall within the scope of the possibility offered by Article 8(1)”

C-804/18 IX v Wabe, para 89

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Religious employers

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Religious employers – the context

- C-414/16, *Egenberger*: applicant for a job to draw up a report on the UN Racial Discrimination Convention for the Protestant Church was not invited to job interview because she was not a member of the Church
- C-68/17, *IR v JQ*: A medical doctor was dismissed by a Catholic hospital for entering into a marriage that was invalid under Catholic law
- C-258/24, *Katholische Schwangerschaftsberatung* (pending): A person working for a Catholic organization providing counselling on family issues (pregnancy, abortion, children) was dismissed for leaving the Church

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Religious employers – occupational requirements

Article 4(1) of Directive 2000/78/EC

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

Article 4(2) of Directive 2000/78/EC

Member States may maintain national legislation in force 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.

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Religious employers – Article 4(1) of Directive 2000/78/EC

Article 4(1) interpreted in *C-188/15 Bougnaoui* (paras 38-40)

- “It is only in very limited circumstances that a characteristic related, in particular, to religion may constitute a genuine and determining occupational requirement”
- “A genuine and determining occupational requirement ... refers to a requirement that is objectively dictated by the nature of the occupational activities concerned ... It cannot, however, cover subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer”

Article 4(1) in context of religious employers:

- Article 4(1) can justify discrimination by religious employers when sharing the organization’s religious beliefs is strictly necessary for the exercise of the occupational activity in question
 - Jobs that involve the teaching or promotion of a religion

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Religious employers – Article 4(2) of Directive 2000/78/EC

A person's religion or belief must constitute a *genuine*, *legitimate* and *justified* occupational requirement

1. *Genuine*: ‘professing the religion or belief on which the ethos of the church or organisation is founded must appear necessary because of the importance of the occupational activity in question for the manifestation of that ethos or the exercise by the church or organisation of its right of autonomy’ (*Egenberger*, para 65)
2. *Legitimate*: ‘the requirement of professing the religion or belief on which the ethos of the church or organisation is founded is *not used to pursue an aim that has no connection with that ethos* or with the exercise by the church or organisation of its right of autonomy’ (*Egenberger*, para 66)
3. *Justified*: ‘the supposed risk of causing *harm to its ethos or to its right of autonomy is probable and substantial*, so that imposing such a requirement is indeed necessary’ (*Egenberger*, para 67)

What does this mean concretely?

- Whether religious employer can invoke Article 4(2) depends on occupational activity
- However, many types of employment in religious organisations can be performed by non-believers without probable or substantial harm to the organisation’s ethos (e.g. medical specialists, janitors or legal advisers)

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Criticism of CJEU case law

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Criticism of religious clothing case law

- Main criticism: neutrality policies are *directly not indirectly* discriminatory
- Definition direct discrimination in Case C-83/14 *Chez*: 'it is sufficient for there to be direct discrimination ... that ethnic origin *determined* the decision to impose the treatment'
- What *determines* neutrality policies?
 - The wishes of customers [towards religious employees]
 - The wishes of colleagues [toward religious employees]
- Indeed, it is very plausible to argue that neutrality policies are directly discriminatory

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Criticism of religious employers case law

- Main criticism: The CJEU did not show sufficient respect for national (constitutional) law
- Art 17 TFEU: 'the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States'
- Art 4(2) of Directive 2000/78/EC: 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.
- Did the CJEU show sufficient respect for national constitutional law?

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Questions

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