

Lessons from the European Court's Hijab rulings

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Myriam Hunter-Henin examines the lessons from the recent rulings of the European Court of Justice on the Hijab for the complex question of religious discrimination in the workplace.



On 14th March 2017, the CJEU issued two rulings which for the first time clarified the concept of religious discrimination in the context of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation. Taken together, the two CJEU rulings suggest that a ban on the Islamic *hijab* in the workplace will amount to unjustifiable direct discrimination (*Asma Bougnaoui v Micropole ruling*), unless it relies on a company neutrality policy, in which case it will be characterized as justifiable indirect discrimination (*Achbita v G4S Secure Solutions*).

The *Bougnaoui* case concerned a design engineer, Ms Bougnaoui, employed by a French private IT Consulting Company, Micropole. Following some complaints by Microsoft's customers about Ms Bougnaoui's headscarf, she was asked to remove it on visits to customers and after she had refused, was eventually dismissed. It is not clear under the terms of the reference whether Microsoft's objections were exclusively based on their customers' preferences or whether they also relied on a company neutrality policy. Prior to the specific complaints which triggered Ms Bougnaoui's dismissal, the issue of the headscarf had indeed already been raised. It was mentioned in the very first instance, when Ms Bougnaoui met a Micropole representative at a student fair and was discussed again at the time of her recruitment when she was warned that the wearing of a *hijab* would not be possible when dealing face-to-face with customers. Whether these repeated discussions about the headscarf reflected an established company neutrality policy or were predictions (which proved to be

accurate) by Microsoft management of customers' preferences remains unclear. It will be up to the French Court de cassation to decide the issue, in light of the Court of appeal's findings on the facts.

Definition of Religion

The fact that Islam does not clearly mandate women to wear a *hijab* or that restrictions on religious symbols only affect the manifestation of religious beliefs (the *forum externum*) while allegedly leaving **intact** the beliefs themselves (the *forum internum*) is not relevant. The CJEU thus opts for a broad concept of religion (**para 30**), in line with the interpretation of religious beliefs under the European Convention on Human Rights (ECHR). Such broad approach is a welcome reminder to French courts which still at times tend to define religion in restrictive terms. In its *Baby Loup* plenary assembly decision of 25th March 2014, the Court de cassation held for example that a private nursery had lawfully required one employee to remove her non-face covering Islamic *jilhab* at work, in accordance with the general religious neutrality requirements contained in the nursery's policy ([see my article](#)). Curiously the Court of cassation did not think it necessary to examine whether the restriction amounted to discrimination on the ground of religion, presumably because it was satisfied, following the Procureur général's [non-legally binding opinion](#), that the employee concerned was still free to hold her Muslim beliefs.

The issue was therefore characterized as one of religious freedom (under article L. 1121-1 of the French Labour Code) and not as a discrimination question (under article L 1321-3 of the same code). Against this background, the *Bouagnaoui* ruling thus usefully clarifies that protection against religious discrimination under the Directive is to cover both religious beliefs and their manifestations. This is to be approved. A restrictive interpretation would in effect relegate religion to the private realm and betray the goal of the directive. Instead of "guaranteeing equal opportunities for all and contributing strongly to the full participation of citizens" (as per Recital 9 of the Directive), such restrictive reading of religion under the Directive would only superficially tackle religious discrimination. Rather than promoting tolerance in the work environment, it would merely remove the occasions for intolerance by eradicating religion from the workplace altogether. Religious individuals would then be left with the dilemma of choosing between their religious or work duties, a situation which the ECtHR has condemned in respect of article 9 religious freedom ECHR rights (*Eweida*).

Having decided that the wearing of the hijab was a religious manifestation covered under the Directive, the CJEU then goes on to rule that Ms Bouganoui's dismissal either amounts to direct discrimination under article 2(2)(a) of the Directive (in the absence of a company neutrality policy) or to indirect discrimination under article 2(2)(b) of the Directive (should such neutrality policy prove to have been in place). The distinction makes sense. In the former instance, the dismissal directly relies on the employee's religion (to which the wearing of the *hijab* must be assimilated) whereas in the latter, the impact on the religious employee's rights results from a rule which, albeit neutral, "puts religious employees (and especially Muslim female employees) at a particular disadvantage".

Customer preferences and Direct Discrimination

Whether the discrimination is characterized as direct or indirect, it may be justified. The justification test in case of direct discrimination is however stricter: a difference of treatment based on one of the protected characteristics may only be justified if it **corresponds to 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 (article 4(1) Directive). Justification of an indirectly discriminatory measure on the other hand is only subject to the requirements of legitimacy, proportionality and necessity under article 2(2)(b)(i).

The French Court of cassation's preliminary reference specifically invited the Court to clarify whether customers' preferences could amount to "a genuine and determining occupational requirement". The CJEU's response is unequivocal: "the concept of a genuine and determining occupational requirement" must be construed objectively in light of the activities concerned and cannot include "subjective considerations, such as the willingness of the employer to take account of the particular wishes of the customer" (para 40). This strict interpretation of the derogations allowed under article 4(1) complies with previous CJEU case-law and with the statement, in Recital 23 of the Directive, that article 4(1) should only apply in "very limited circumstances".

Tensions and inconsistencies between the two rulings

Having rejected subjective considerations under article 4(1), the CJEU reintroduces them under article 2(2)(b)(i), as justification for an indirect discrimination. In its *Achbita v G4S Secure Solutions* ruling, the CJEU states that "an employer's desire to project an image of neutrality towards both its public and private sector customers is legitimate, notably where the only workers involved are those who come into contact with customers". Paradoxically the CJEU seems content to deduce the legitimacy of this desired image of neutrality from mere contact with customers. In the *Achbita* case, the employee concerned was working as a receptionist for a security company. No objective reason can be put forward to explain how the *hijab* might have undermined the company's corporate image as a security expert or why an image of neutrality was desirable in the first place. The wearing of the *hijab* was seen as a problem only because the employee was in constant contact with customers who might object to her wearing signs of religious affiliation. Yet, because they had been anticipated and entrenched in a general company neutrality rule by G4S, customers' preferences and prejudices, dismissed in the *Bougnaoui* ruling, suddenly matter. The CJEU suggests that the discrimination suffered by the G4S employee ought to be held to be justified. In a sense however, Micropole had been more amenable to religious employees than G4S. It feared customers' objections but did not dismiss the employee until those fears had materialised. G4S on the other hand had prevented from the start any possibility of a reconciliatory position.

Put together the two CJEU rulings therefore seem contradictory. Customer preferences might have no say under article 4(1) to justify a measure which amounts to direct discrimination but they may justify a measure which only indirectly discriminates against employees on the ground of their religion under article 2(2)(b), ... and all that is needed for employers to fall under the grace of article 2(2)(b) and escape condemnation under article 4(1) is a unilateral internal company rule requiring neutrality from all employees. There is no doubt that employers will soon introduce such regulations in mass and close the discrimination route to employees.

Intrusive rulings into secularist debates

Such inconsistency can hardly be resolved by an appeal to the particular deference owed to

French and Belgium secularism. The significance attached to “contact with customers” in the *G4S* ruling portrays religion as a potential source of division and conflict. These suspicious accounts of religion certainly echo recent legal trends in France and Belgium which seek to neutralise visible signs of religion for the sake of social harmony under a new form of secularism entitled, “New Laïcité”, or in more pejorative words, a “falsified laïcité” or “distorted laïcité” ([see my article](#)). However in law, the concept of laïcité is still construed as a principle of State religious neutrality, rather than a tool of religious neutralisation. If private citizens have been in the last ten years increasingly subjected to restrictions upon their rights to manifest their religion in the French and Belgium public sphere, these legal developments have not been based on the concept of laïcité. The special committee set up to consider the issue of the wearing of the full veil concluded that the concept of laïcité was not relevant to the issue and the government’s text which led to the 2010 French legislative ban on the covering of the face in the public sphere did not rely on the notion. Similarly prior restrictions on religious manifestation in the workplace did not rely on laïcité, unless the work involved a mission of public service. *Laïcité*, had held the Court de cassation, could not serve as a legal basis for a restriction imposed in a purely private law employment context.

In such purely private law employment law contexts, religious individual rights traditionally come first. While deferring to national discretion in assessing the proportionality of indirectly discriminatory measures, the CJEU indicates that restrictions upon employees’ rights to manifest their convictions in the workplace (whether in the public or private sector) ought to be justified if they rely on a neutrality company rule. Even recent French legal developments had not allowed interferences with religious freedoms to such an extent. In the *Baby Loup* case, the dismissal of an employee who had refused to remove her *jilhab* was held legitimate and proportionate but only because ostentatious religious signs were construed as potentially harmful for children’s freedom of conscience. However debatable the suggestion that the wearing of a religious sign could harm children might have been, the rationale limited the scope of the legitimate restriction to the childcare sector. Since *Baby Loup*, the 2016 Act reforming French labour law had sought to justify company neutrality rules across all sectors but its phrasing still allowed French judges to step in should the restriction rely purely on subjective considerations and be unrelated to the work. Naturally, the present CJEU ruling does not prevent French judges from engaging with employers’ company neutrality rules in such a way but it makes clear that compatibility with the Directive does not require such careful scrutiny of employers’ powers. By seemingly adopting a deferential approach, the CJEU is in effect taking sides in national debates and giving support to the most virulent interpretations of secularism. It is argued that more restraint would have been welcome.

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- [Myriam Hunter-Henin](#) is Reader in Religion and Comparative Law in the UCL Faculty of Laws.

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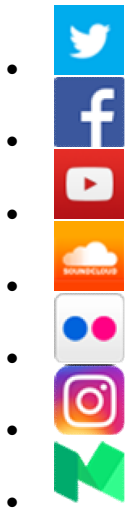
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