Islamic headscarves in the workplace – the CJEU rules that a ban is permitted in limited circumstances (10 April 2017)

Speed Read

- The Court of Justice of the European Union (“CJEU”) has issued two long awaited rulings on employees wearing headscarves in the workplace and whether the prohibition of the wearing of headscarves by an employer is religious discrimination.

- The original cases were referred from courts in Belgium (the “Achbita case”) and France (the “Bougnaoui case”).

- The CJEU interpreted the concept of ‘religion’ as covering both the fact of having a belief and the manifestation of that belief in public.

- The CJEU ruled that an internal company rule prohibiting all staff from wearing any visible sign of political, philosophical or religious beliefs does not constitute direct discrimination.

- However, the CJEU went on to say that such an internal company rule may constitute discrimination if it established that the apparently neutral rule puts persons adhering to a particular religion or belief at a particular disadvantage. This would be indirect discrimination, which may be objectively justified by a legitimate aim, where the means of achieving that aim are appropriate and necessary.

Background

- Both cases concerned Muslim employees working for private companies.

- Both employees commenced employment without wearing the full headscarf which the employers ultimately objected to. The employers’ decision to dismiss the employees followed the employees’ change of practice.

- In the Achbita case the claimant expressed, after 3 years of working as a receptionist with her head uncovered, her intention to wear an Islamic headscarf. She was advised by management that this would not be tolerated as it would be contrary to the company’s rules which applied to everyone described as a “policy of neutrality”. Due to her continued insistence on wearing the headscarf, she was dismissed from her employment.

- In the Bougnaoui case the claimant was warned prior to commencing her internship with the company that the wearing of an Islamic headscarf might pose a problem when she was in contact with customers of the company and she would not be able to wear the Islamic headscarf in all circumstances. Ms Bougnaoui wore a simple bandana during her internship and once employed began to wear an Islamic headscarf. Ms Bougnaoui was subsequently sent to work with a customer and the customer complained about her wearing the headscarf, requesting that she not wear it the next time. Ms Bougnaoui refused to stop wearing her headscarf and was dismissed as a result.

- The Achbita case was referred from the Court of Cassation in Belgium, Case C-157/15 Achbita & Anor v G4S Secure Solutions NV to ask the CJEU to consider whether not a prohibition on the wearing of a headscarf in the workplace constitutes direct and/or indirect discrimination on the grounds of religious belief. The Bougnaoui case was referred from Court of Cassation in France Case C-188/15 Bougnaoui & Anor v Micropole to ask the CJEU to consider whether an employer’s willingness to accede to a customer’s request for an employee to cease wearing a headscarf could amount to a “genuine and determining occupational requirement”, which is a defence to discrimination. The rulings were delivered on 14 March 2017.

What did the CJEU say?

In Ms Achbita’s case:

- the CJEU found that the rule precluding the wearing of visible signs of political, philosophical or religious beliefs covered any manifestation of such beliefs without distinction. It regarded the rule as treating all workers in the same way by requiring them in a general and undifferentiated way to dress neutrally. It therefore found there to be no direct discrimination.

- as regards whether the internal rule amounted to indirect discrimination, the CJEU found that the company’s desire to display a policy of neutrality was legitimate. Whether the rule was appropriate, the CJEU found the prohibition to be appropriate for the purpose of ensuring the policy of neutrality is properly applied, provided the policy is “genuinely pursued in a consistent and systematic manner”. In relation to whether the rule was necessary, the issue to be decided was whether the prohibition was limited to what is strictly necessary i.e. that it only covered workers who interact with customers, but left this to the referring court to ascertain. The CJEU, when considering what is strictly necessary, also suggested that the referring court consider whether the company should have offered Ms Achbita another post which did not involve visual contact with customers instead of dismissing her.

In Ms Bougnaoui case:

- The CJEU ruled that an employer’s willingness to accede to a customer’s request that no headscarf be worn by an employee did not amount to a “genuine and determining occupational requirement” because this was subjective rather than objective. It went on to say that only in very limited circumstances could a characteristic, specifically one relating to religion, constitute a genuine and determining occupational requirement.

- The CJEU agreed with its decision in the Achbita case that the prohibition of the wearing of the headscarf, while not directly discriminatory, could amount to indirect discrimination.

So what is the position in Ireland?

Ireland transposed the Directive into Irish law pursuant to the Employment Equality Acts 1998 to 2004 (the "Act"). Employees and agency workers in Ireland enjoy protection against discrimination in the workplace on nine protected grounds: age, gender, civil status, family status, sexual orientation, disability, race, colour, nationality or ethnic or national origins, religious belief and membership of the traveller community.

Direct religious discrimination occurs when one person is treated less favourably than another in a comparable situation on the ground of religious belief. 

Indirect religious discrimination occurs when an apparently neutral provision or practice, puts persons having a particular religious belief at a particular disadvantage compared with other persons who have different religious beliefs or none unless it is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

There have been relatively few cases of religious discrimination in Ireland, likely due to the absence of non-Christian faiths in Ireland in the past. Ireland’s largest groups of immigrants have been British, Polish or other European nationalities who tend to share Ireland’s Christian heritage.

The most recent case of note was an appeal to the Labour Court by South Tipperary County Council against the decision of the Equality Tribunal which found in favour of John McAteer’s claim of discrimination on grounds of religion and awarded him €70,000 (2015) 26 E.L.R. 267.

Mr McAteer was an Evangelical Christian who claimed that he was discriminatorily dismissed for preaching the Gospel, an important requirement and manifestation of his religion.
The County Council asserted that the reason for his dismissal was Mr McAteer’s refusal to follow a lawful instruction not to engage in preaching during his employment, in the office or to members of the public including during his lunch break, following several warnings.

The Labour Court found that the notion of religion included the right to manifest ones religion in teaching and observance and it relied on the decision of the European Court of Human Rights in *Eweida v United Kingdom* [2013] I.R.L.R. 231.

The Labour Court found that Mr McAteer had been indirectly discriminated against. It found that the prohibition against preaching during working hours could place the complainant at a particular disadvantage to those of no religious belief or those of a different religious belief whose beliefs do not require them to evangelise in the same manner.

The County Council sought to justify the measure on the basis that Mr McAteer’s conduct, in interacting with members of the public, had the potential to bring the County Council into disrepute. However, no evidence to support or suggest its reputation had been brought into disrepute was tendered. In addition, there was no evidence to show that Mr. McAteer’s conduct adversely impacted on his ability to perform his duties of employment. The Court also found that Mr McAteer was treated differently to others in that his conduct was monitored and restricted during his lunch break. As the County Council failed to show a legitimate aim, the Labour Court did not go on to assess whether the measure was appropriate or necessary and affirmed the decision of the Equality Tribunal.

**What are the key takeaways for employers in Ireland?**

Where an employer wishes to promote a policy of neutrality as regards religion, philosophy and politics, it is strongly recommended to put a written policy in place.

When implementing a policy of neutrality and to avoid a claim of direct discrimination, employers should ensure that it is applied consistently and to all manifestations of a belief e.g. Christian crosses, Jewish skull caps and so on.

To avoid a claim of indirect discrimination, such a written policy must:
- have a legitimate aim;
- be appropriate in ensuring the policy of neutrality is properly applied; and
- be limited to what is strictly necessary.

Employers should balance any intention to demonstrate a policy of neutrality to customers with employees’ right to freedom of conscience and religion including the right to manifest religion or belief in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union and the Irish Constitution.

The issue of the manifestation of religious belief in the workplace has come under scrutiny in recent years. Given the more recent immigration into Ireland from countries outside the European Union, this is an area to watch for employers.

For more information please contact Ciara McLaughlin, Partner, Maria Pittack, Solicitor, or your usual contact on the A&L Goodbody Employment Team.

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