Insight

IN-DEPTH DISCUSSION

MARCH 20, 2017

European Court Clarifies Legality of Banning Islamic Headscarves in the Workplace

BY STEPHAN SWINKELS, MICHAEL CONGIU, LESLIE NICOLAI* AND LAVANGA V. WIJEKOON

On March 14, 2017, the Court of Justice of the European Union ("ECJ")[1] issued a significant ruling clarifying when an employer may prohibit employees from wearing visible signs of their religious beliefs in the workplace.[2] The ruling was issued to address two instances – one in Belgium and the other in France – in which female Muslim employees were terminated for refusing to remove their headscarves. In short, the ECJ held:

- There is no *direct* discrimination in prohibiting an Islamic headscarf pursuant to the employer's neutral policy banning any political, philosophical or religious signs in the workplace;
- Such a neutral policy may cause *indirect* discrimination if employees of a particular religion are placed at a disadvantage;
- Such indirect discrimination is permissible if it is in pursuit of a legitimate aim, such as in demonstrating the employer's political, philosophical or religious neutrality towards customers;
- Where a legitimate, neutral policy leads to indirect discrimination, the employer may still have a duty to provide certain accommodations to an employee to alleviate the effects of discrimination, such as offering the employee an alternative position;
- In the absence of a neutral policy, an employer may not acquiesce to a customer's request to prohibit an Islamic headscarf, as such a request does not reflect a "genuine and determining occupational requirement."

1 The Luxembourg-based ECJ interprets and upholds the laws of the European Union ("EU"), and its decisions are binding on courts in the national courts of the 28 EU countries.

2 Judgments in C-157/15 *Achibita v. G4S Secure Solutions*, and C-188/15 *Bougnaoui v. Micropole Univers* (Court of Justice of the European Union, March 14, 2017).

The Belgian Case

The Belgian case before the ECJ arose from the termination of a Muslim receptionist at a security company. When the receptionist was hired, the company had an unwritten rule prohibiting employees from wearing visible signs of their political, philosophical or religious beliefs in the workplace. A few years later, the receptionist informed the company she intended to wear a headscarf, to which the company responded that the headscarf would violate the company's unwritten rule, which was shortly thereafter approved by the works council as a formal workplace regulation. The receptionist insisted on wearing the headscarf and was therefore dismissed. The receptionist challenged her dismissal in the Belgian courts, and the Hof van Cassatie (Court of Cassation) sought the ECJ's opinion whether the dismissal violated the European Union ("EU") directive on equal treatment in employment and occupation.[3]

The ECJ found that the security company's policy was applied neutrally, without creating any differential treatment based on a particular religion or belief. Therefore, the dismissal was not direct discrimination.

The ECJ ruled, however, that the neutral policy could cause indirect discrimination if it placed employees of a particular religion at a disadvantage. The policy would, therefore, be permissible only if it was justified by a "legitimate aim" and the means to achieve that aim were "appropriate and necessary." A "legitimate aim" includes an employer's desire to project an image of neutrality towards its customers – notably where the workers involved are customer-facing.

The ECJ returned the matter to the Belgian court for further fact-finding. Based on the ECJ ruling, the Belgian court must now determine whether the company had, prior to the receptionist's dismissal, established and implemented the policy in a neutral manner, and whether the prohibition covered only the customer-facing workers.

Additionally, the ECJ also asked the Belgian court to consider whether it would have been an undue burden for the company to offer the receptionist a post that did not face customers. This directive indicates that, where a legitimate, neutral policy leads to indirect discrimination, the employer may still have a duty to provide accommodations to an employee to alleviate the discrimination.

The French Case

The French case before the ECJ arose from the termination of a design engineer at an IT company. When the company first recruited her as an intern at a student fair, it informed her that wearing an Islamic headscarf may pose customer relations issues. Nonetheless, after first wearing a bandana, she started wearing a headscarf. But after a customer complained, the company asked her to cease wearing the headscarf, citing the need for neutrality in customer relations. The engineer objected and was dismissed. She sought relief in the French courts.

The French Cour de cassation (Court of Cassation) referred the matter to the ECJ to determine whether, under the EU directive, it is a "genuine and determining occupational requirement" for an employer to take into account the wishes of a customer to not have to deal with an employee in a headscarf. A "genuine and determining occupational requirement" is a requirement that is objectively dictated by the nature and context of the particular job. This concept parallels the "bona fide occupational qualification" concept in U.S. employment discrimination law.

The ECJ found it unclear whether the engineer's dismissal was pursuant to a violation of the company's neutral application of a legitimate policy prohibiting visible religious symbols in the workplace. The ECJ

3 Council Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

asked the French court to conduct further fact-finding to determine this question. It ruled that if the dismissal was pursuant to such a policy, then the French court should analyze the matter in accordance with the ECJ's ruling on the Belgian case – and the "genuine and determining occupational requirement" issue was therefore not relevant.

On the other hand, if the dismissal was not pursuant to such a policy, then that issue was relevant. In particular, the ECJ considered whether it is a permissible "genuine and determining occupational requirement" for an employer to take into account the wishes of a customer to not have to deal with an employee in a headscarf. The ECJ's ruling was a clear "no." It emphasized that a religious characteristic is only rarely a "genuine and determining occupational requirement," and the particular wishes of a customer is a subjective – as opposed to the required objective – consideration. Therefore, in the absence of a neutral policy, the company's dismissal of the engineer was discriminatory.

The Broader Context and Next Steps for EU Employers

Many commentators have viewed the ECJ's ruling as a "win" for employers. That is an overstatement. The ECJ's ruling reaffirms the permissibility of neutral policies prohibiting religious symbols only if they seek a legitimate aim and are consistently enforced. Moreover, the ECJ has emphasized that where such policies disadvantage employees of particular faiths, then the employer may have a duty to provide accommodations to those employees where such accommodations do not create an undue burden. Further, in the absence of such a neutral policy, an employer may not rely on such subjective considerations as a customer's preference to prohibit religious symbols. Together, these principles draw the bounds of an employer's freedom to conduct their business with regard to regulating employees' religious expression.

Indeed, the ruling is consistent with court decisions in other jurisdictions. For example, in France, the Cour de cassation has ruled that workplace regulations may prohibit employees from wearing religious signs, as long as the prohibition is applied neutrally, is proportionate to the aim pursued, and is justified by the nature and context of the particular job duties.[4] In the United States, however, the Supreme Court has held that employers are "affirmatively obligate[d]" to make exceptions to neutral employment policies to accommodate employees' religious beliefs and practices, and a failure to do so is discrimination.[5]

Even a 2013 ruling by the European Court of Human Rights holding that wearing a visible cross was a British Airways employee's right to manifest freedom of religion could be argued as consistent with the ECJ ruling, because the airline permitted the wearing of other religious symbols, including turbans and headscarves.[6]

In light of the ECJ's ruling, employers operating in EU countries should revisit policies prohibiting religious symbols and ensure that those policies serve a legitimate business aim. They should also ensure that those policies are communicated to all employees clearly and implemented in a consistent manner. While the ruling only involved Islamic headscarves, it also applies to other religious symbols, such as crosses, turbans, and yarmulkes. For example, a manager who prohibits an Islamic headscarf cannot allow visible crosses. Finally, where possible, employers should attempt to accommodate employees who wish to maintain their religious symbols.

---

4 *X v. Association Baby-Loup*, No. 13-28.369 (Cour de cassation, June 25, 2014).

5 *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028 (2015). For more detail on this case, *see* https://www.littler.com/files/2015_6_insight_what_matters_is_motive_religious_accommodation_need_motivating_factor

6 *Eweida v. United Kingdom*, ECHR 012 (2013) (European Court of Human Rights, January 15, 2013).

* Leslie Nicolaï is a Partner with Fromont Briens, a Member of Littler Global