Company dress codes—neutrality over diversity? (Achbita v G4S; Bougnaoui v Micropole)

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Employment analysis: In two cases involving the wearing of headscarves at work, what did the Court of Justice decide with regards to interpreting whether or not an employer's dress code is proportionate for the aim of achieving neutrality? Sarah Crowther, barrister at Outer Temple Chambers, says now is a sensible time for employers to review dress code policies to ensure that they meet business needs and expectations.

Original news

Achbita and another v G4S Secure Solutions NV, Case C-157/15, [2017] All ER (D) 108 (Mar)

The Court of Justice gave a preliminary ruling in which it decided that Article 2(2)(a) of the Employment Equality Directive 2000/78/EC had to be interpreted as meaning that the prohibition on wearing an Islamic headscarf, which arose from an internal rule of a private undertaking prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, did not constitute direct discrimination based on religion or belief within the meaning of that Directive.

By contrast, such an internal rule of a private undertaking may constitute indirect discrimination within the meaning of Article 2(2)(b)of the Employment Equality Directive, 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.

Bougnaoui and another v Micropole SA, Case C-188/15, [2017] All ER (D) 107 (Mar)

The Court of Justice gave a preliminary ruling in which it decided that Article 4(1) of the Employment Equality Directive should be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have the services of that employer provided by a worker wearing an Islamic headscarf could not be considered a genuine and determining occupational requirement within the meaning of that provision.

What were the background facts and the issues to be determined in Achbita and Bougnaoui?

Achbita

Samira Achbita was employed in Belgium by G4S as a receptionist. A practising Muslim, she wore a headscarf as part of her genuinely held religious belief that the Qu'ran requires women to dress modestly. On 12 February 2003 she started work and complied with the unwritten rule that workers would not wear visible signs of their political, philosophical or religious beliefs in the workplace—the so-called 'neutrality' rule.

In April 2006 Ms Achbita informed her employer that she intended to start wearing a headscarf during working hours as part of her religious belief. In May 2006, the works council approved a new written rule in the employee code of conduct prohibiting visible signs of religious belief. On 12 June 2006 Ms Achbita was dismissed for her insistence on wearing the headscarf. On 13 June 2006, the new code of conduct came into effect.

Ms Achbita brought a claim before the Antwerp Labour Court, stating that the rule forbidding visible signs of clothing based on religious belief was directly discriminatory against her due to her religious belief. Her claim was appealed to the Court of Cassation in Belgium, which referred the following issue to the Court of Justice:

'Should Article 2(2)(a) of Directive 2000/78 be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?'

Bougnaoui

Ms Bougnaoui met a representative of Micropole, an IT company, at a student fair in October 2007 and was told that wearing a headscarf might pose a problem when she was in contact with customers of the company. She was subsequently recruited as an intern, during which time she wore a bandana and then later an Islamic headscarf. Ms Bougnaoui was recruited to a permanent post on 15 July 2008.

She was dismissed on 22 June 2009 by letter which stated that she had been asked to work for a customer at their premises. The customer told Micropole that the wearing of a veil had upset a number of their employees and the customer had requested that there 'be no veil next time'. The letter reminded her that she had been told that she would not always be able to wear religious clothing when working a customer sites and that they applied a principle of 'neutrality'.

She brought a claim before the Paris Labour Tribunal but her claim for discrimination was dismissed. On appeal it was held that the dismissal was not connected to her religious beliefs because she was permitted to continue to express them within the undertaking and that there was a legitimate restriction arising from the fact that her freedom to manifest her religious beliefs went beyond the confines of the employer's undertaking but into the sphere of the feelings of the customers.

After further appeals, the Court of Cassation referred the following question to the Court of Justice:

'Must Article 4(1) of Directive 2000/78 be interpreted as meaning that the wish of a customer of an information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or the context in which they are carried out?'

What did the Court of Justice conclude in relation to direct discrimination in both cases?

Achbita

In the present case the internal rule at issue refers to:

'[…] the wearing of visible signs of political, philosophical or religious beliefs and therefore covers any manifestation of such beliefs without distinction. The rule must, therefore, be regarded as treating 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.'

As it was not 'evident' from the material available to the court that the rule was applied differently to Ms Achbita as compared to other workers, it was not direct discrimination for the purposes of Article 2(2)(a) of the Employment Equality Directive (see paras [31]–[33]).

Bougnaoui

The court started by noting (para [31]) that it was not clear from the order for reference whether the Court of Cassation had based its finding of discriminatory treatment directly on religion or belief, or a finding of a different of treatment based indirectly on those criteria. In fact, of course the reference only explicitly referred to Employment Equality Directive, art 4, which relates to 'genuine occupational requirement' exceptions to discrimination prohibitions.

What did the Court of Justice conclude in relation to indirect discrimination in both cases?

Achbita

The Court of Justice stated that it was possible that the referring court might make a finding that the apparently neutral obligation encompasses results that put persons of a particular religion or belief at a particular disadvantage.

Under Article 2(2)(b)(i) of the Employment Equality Directive, such a difference of treatment does not 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 (para [35]).

It should be stated that the desire to display, in relation with both public and private sector customers, a policy or political, philosophical or religious neutrality must be considered legitimate (para [37]). Such a desire on the part of an employer comes from the employer's freedom to conduct its business recognised in Article 16 of the Charter of Fundamental Rights (para [38]).

An internal rule for neutrality of dress is appropriate for pursuing that legitimate aim, provided that the policy is genuinely pursued in a systematic or consistent manner (para [40]).

The national court must thirdly determine whether the prohibition was necessary and this involves consideration of whether it was limited to what was strictly necessary to achieve the legitimate aim, which in this case means whether the prohibition covered only workers who interact with customers. If so, then the prohibition must be considered strictly necessary for the purpose of achieving the aim pursued.

Bougnaoui

The Court of Justice did not consider indirect discrimination separately, as set out above in relation to direct discrimination.

What did the Court of Justice conclude in relation to the exemption for genuine occupational requirements in Bougnaoui?

If the referring court finds that the dismissal was in fact due to failure to comply with a rule prohibiting wearing visible signs of religious belief and that the apparently neutral rule placed persons adhering to the Muslim belief regarding modest dress for women at a disadvantage, it would conclude that there was a different of treatment indirectly based on religion and would need to consider justification in the terms set out in the *G4S* judgment (para [33]).

However, if there was no internal rule of neutrality, then it becomes necessary to consider whether the dismissal, by reason of taking account of the customer's wish no longer to have services provided by a worker who wears a headscarf, is a determining occupational requirement within the meaning of Article 4(1) of the Employment Equality Directive (para [34]).

The scope of the genuine occupational requirement under Article 4(1) of the Employment Equality Directive has been limited in previous decisions of the court to characteristics related to the ground on which the difference of treatment is based rather than the ground itself—ie in this case it would have to be a requirement linked to the dress itself and not religious belief.

Moreover, recital 23 of the Employment Equality Directive makes plain that a characteristic related to religion will only constitute a genuine and determining occupational requirement in very limited circumstances (para [38]) and it must be objectively dictated by the nature of the occupational activities concerned or the context in which they are carried out (paras [39]–[40]).

Consequently, the wishes of a customer that the services not be provided by somebody wearing a headscarf cannot constitute a genuine and determining occupational requirement within the meaning of Article 4(1) of the Employment Equality Directive.

How surprising or unsurprising were the outcomes?

The element of surprise, if that be the correct term, arises implicitly from the rejection of the primary analysis adopted by AG Sharpston in her opinion in the *Bougnaoui* case. She concluded that one needed to look behind the façade of the 'neutrality' policy because, she argued, properly analysed, Ms Bougnaoui was treated less favourably on the ground of her religion since a design engineer who had not chosen to manifest his or her religious belief would not have been dismissed.

However, the Court of Justice did adopt the second plank of the AG's reasoning, namely that this would constitute 'prima facie' indirect discrimination and therefore would require the national court to consider whether there was a legitimate aim and whether the means chosen to meet that aim were both appropriate and necessary.

As a result of the Court of Justice's judgment in Achbita, will an employer's pursuit of an image of political, philosophical and religious neutrality always be regarded a legitimate aim in indirect discrimination claims?

To say 'always' overstates the findings of the Court of Justice in *Achbita*. This section of the judgment is prefaced by the following passage (at para [36]):

'although it is ultimately for the national court, which has sole jurisdiction to assess the facts and to determine whether and to what extent the internal rule at issue in the main proceedings meets those requirements, the Court of Justice, which is called on to provide answers that are of use to the national court, may provide guidance, based on the file in the main proceedings and on the written and oral observations which have been submitted to it, in order to enable the national court to give judgment in the particular case pending before it.'

However, the 'guidance' provided is in fairly clear terms and it is difficult to foresee circumstances in which it would be possible to depart from subsequent dicta that 'the desire to display…a policy of …neutrality must be considered legitimate'. The Court of Justice also deliberately quashes the idea floated by AG Sharpston in her opinion in *Bougnaoui* that differing considerations might be at stake in the public sector to the private sector of employment.

It is therefore going to be extremely difficult to argue that a 'neutrality' policy of itself is not a legitimate aim.

Is there a concern that the concept of 'neutrality' may in and of itself be inherently discriminatory if it is defined from the viewpoint of a particular majority in a Member State?

The fundamental issue which is not grappled by the Court of Justice is the point raised by AG Sharpston in her analysis at para [88] of her Opinion—a rule that expects every person to dress 'the same' is not neutral, because it is targeted at eliminating those who would dress differently because they have a genuine religious belief which requires them to do so.

However, in equality law terms, to analyse this situation in terms of direct discrimination (and therefore not amenable to any justification) may be a problematic blurring of the direct/indirect boundary. The Court of Justice has adopted the traditional analysis that 'direct' discrimination arises where there is a difference in treatment based on religious belief, but where the same rule is applied to all, but puts those with a religious belief in wearing a visible symbol at a disadvantage, then the discrimination exists, but is indirect.

It would, of course, be open to a claimant alleging discrimination, to seek to establish that the so-called policy was not genuine and that the claim of 'neutrality' was merely sophistry in an attempt to disguise a deliberately discriminatory policy. The chronology of the facts in *Achbita* gives rise to the suspicion that the so-called 'unwritten' policy of neutrality said to be in existence before Ms Achbita's employment and dismissal may not have been consistently applied in practice. Of course, this factual issue is one for the national court and not for the Court of Justice.

What factors are likely to be the most critical in determining whether or not an employer's dress code is proportionate (or in the court's words 'appropriate and necessary') to achieve the aim of neutrality?

The first step will be to ensure that there is evidence that a neutral dress code is a policy that is genuinely pursued by the employer, as stated above.

After that, the question arises as to whether the neutral dress code is 'appropriate'. The national court finding facts will have to consider whether the policy was:

- general
- undifferentiated, and
- related to visible signs of political, philosophical or religious belief

This may not be entirely easy to achieve in practice, because it requires considerable vigilance on the part of an employer to consistently apply a policy across the board to all visible signs of political or religious affiliation.

The third point on which the employer would bear the evidential burden is to establish that the extent of the policy was only as wide as was 'necessary'. There is less focus in the *Achbita* judgment on this aspect and it is likely that this will generate further litigation to ascertain the correct balance between employee's rights to manifest religious belief and the employer's policy. There does appear to be some disparity of approach with that taken by the European Court of Human

Rights in *Eweida and others v United Kingdom* [2013] ECHR 37 where the employer's policy of neutrality was too widely drawn when it included a small cross worn on a neck chain.

Relevant factual considerations are likely to include whether:

- it applies to all employees or those in 'customer-facing' roles (whatever that really means in practice)
- it applies to visible or all religious dress requirements
- there are other objective justifications such as health and safety
- there is a prescriptive uniform in place for all employees in that category
- concessions are made to permit use of symbolic clothing when employees are engaged in non customer-facing tasks

What advice should be given to UK employers following these judgments?

Now is a sensible time to review dress code policies to ensure that they meet business needs and expectations. If a written dress policy or requirements exist, provided that the usual consultative and other steps are taken, it should be possible to change it to introduce a requirement of dress neutrality, if this is in the business' interests.

Employers without any written guidance for employees on dress expectations should seriously consider whether one should be introduced.

However, a neutrality policy is not a panacea and will only justify action against employees if there is good evidence that the neutrality policy is both appropriate in its terms, necessary in its scope and consistently and genuinely applied in practice. There is a significant long-term business commitment to a neutral dress code policy and it is not one that should be adopted lightly or without good reason, because enforcement of such a policy is a burden on the business. Only those businesses whose philosophy or work really does demand such neutrality will find an overall benefit from a neutral dress code.

Sarah Crowther has a public law and human rights practice, which focuses on discrimination, especially in the supply of goods and services and employment fields. She has appeared successfully in the employment tribunal, High Court and the Employment Appeal Tribunal. Notably, she has appeared in the leading cases on religious rights discrimination, including representing the Christian hoteliers whose refusal to supply a same-sex couple with a double-bedded room led to the Supreme Court and currently, in Northern Ireland, where she acts on behalf of the bakery which refused to bake a cake with a message promoting same-sex marriage.

Interviewed by Kate Beaumont.

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