EMPLOYER'S INTERESTS OR FREEDOM OF RELIGION: WHAT PREVAILS?

S. T. Jakoeb

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1. Introduction

Since the terrorist attacks on September 11, 2001 combined with globalization, immigration patterns and a focus on workplace diversity have resulted in a more religiously diverse and devout workforce. The wall between religion and work is crumbling down and more workers are bringing their own religion into the workplace.[1] This brings new challenges for employers as they are receiving requests for religious accommodations and are being confronted with unexpected and sometimes awkward faith-related situations. [2] This raises a questions as to what extend may an employee be guided by his/her faith in his/her work. Are you, as an employer allowed to forbid headscarf at work when your employee is Muslim? And what when she refuses, can you fire her because of it? Or when an employer refuses an employee to wear a cross as a symbol of their faith, even if it is under their employers' uniform policy?

This discussion concerning religion on the workplace has been increasing in recent years resulting in a number of high profile cases including the case Eweida. The ruling covers four big cases which have been brought by Christian applicants who complained that they were subjected to religious discrimination at work. Other cases which also gained attention were that of the Belgian Samira Achbita and the French Asma Bougnaoui who were fired for wearing an Islamic headscarf in the workplace. These two cases are examples which illustrate one dimension of the debate concerning scarves, namely: the issue of freedom or agency.

Both the European Union and the Council of Europe have the ambition to fight against this type of discrimination. A comprehensive set of rules has already been created in particular to their respective courts, the Court of Justice of the EU (ECJ)

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[1] 'Religious Discrimination in Employment' (*HR Hero*, 28 February 2008) <*http*://topics.hrhero.com/religious-discrimination-in-employment/> accessed 17 December 2017

[2] 'Religion in the Workplace' (*FindLaw*, 10 August 2003) <http://employment.findlaw.com/employment-discrimination/religion-in-the-workplace.html> accessed 17 December 2017

and the European Court of Human Rights (ECtHR).[3] In the case law both courts clarified these rules, determining whether a situation is discriminatory or not.[4]

The next chapters will provide an overview of the two cases in which the Courts have had to determine the scope of the obligations of employers in protecting the rights of their employees in case of religious discrimination in the workplace. The question to be answered in this essay is: what are the arguments of the CJEU and the ECtHR, resulting them ruling differently in the case of freedom of religion on the workplace? The method chosen for this thesis is an analysis of two cases of the CJEU and ECtHR that are relevant to answer the research question.

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[3] Emilie Delcher, 'Overview of the case law on the prohibition of discrimination of the ECJ and ECtHR' (*Icelandic Human Rights Center*, 14 June 2013) <http://www.humanrights.is/static/files/Itarefni/an-overview-of-the-case-law-on-the-prohibition-of-discrimination-of-the-ecj-and-the-ecthr-emilie.pdf> accessed 17 December 2017

[4] Kristin Henrard, 'How the European Court of Human Rights' Concern Regarding European Consensus Tempers the Effective Protection of Freedom of Religion' (2015) Oxford Journal of Law and Religion, 398

2.0 Eweida v. United Kingdom

The origin of this case was when four Christian employees from various denominations have been sanctioned by their employer and eventually lost their job. In the cases of Ms. Eweida and Ms. Chaplin it was due to them respecting the commitments to their faith by wearing a small cross on a chain around their neck. With the case of Ms. Ladele it was refusing to register a same-sex partnership and with the case of Mr. McFarlane, who is a marriage counsellor, he was demised when he shared with his superiors that he had moral doubts for counselling same-sex couples. The cases if Ms. Eweida and Ms. Chaplin are examples of 'freedom of religion' (the freedom to wear religious items in public). The case of Ms. Ladale and Mr. McFarlane are example of cases of 'freedom of conscience' (conscientious objection to homosexuality). These last two cases fall outside the scope of this essay and will not be discussed further.

2.1 Ruling in the Eweida case

In the Eweida case the Court examined whether the right to express ones religion was adequately guaranteed in the UK legal order and whether a proper balance had been made between protecting the rights of Eweida and the rights of others. The Court first of all considered that there is no legislation in the UK concerning the wearing of religious clothing and/or symbols on the workplace. The Court however states that the States Parties should be granted a broad margin of appreciation when assessing whether the disciplinary measures imposed by a commercial company on its employees, if appropriate, are proportionate. Then the Court ruled that in this case a reasonable balance had not been reached. The cross symbol of Eweida was small and unobtrusive and furthermore the wearing of headscarves and turbans were allowed (and did not impact the image of the company in a negative way). The fact that recently the dress codes were changed proved that in first instance they had not really been necessary. That Eweida was not compensated for the time she was not allowed to appear at work is a fact the Court considered unacceptable and a breach of Article 9 ECHR.[5]

[5] Eweida and others v UK (2013) (ECtHR, 15 January 2013)

2.2 Ruling in the Chaplin case

In the case of Ms. Chaplin the Court tested along the traditional line of Article 9, second paragraph ECHR whether or not the fact Ms. Chaplin was summoned to take off her chain and cross was an unlawful violation of her religious freedom. Taken into consideration was whether the protection of the health and safety of patients are legitimate objectives for violating Ms. Chaplin's religious freedom. The Court did not express itself immediately whether this was a violation of Ms. Chaplin's religious freedom in the light was necessary in a democratic society. The Court merely states that the wish of Ms. Chaplin to carry her chain weighs heavily. However in this case a large margin of appreciation must be granted to the "domestic authorities", since the hospital managers were better able to make a decision about medical safety than the Court would be. The Court had no other direct evidence at hand, except that other employees were also told to get rid of potentially dangerous religious external characteristics. Due to this, the Court was 'unable to conclude' that the measures facing Ms. Chaplin were disproportionate. The Court considered that there has been no violation of Article 9 ECHR.[6]

2.3 Summary

Given that Ms. Eweida's employer was private, the ECtHR noted that the question was whether the UK had upheld its positive obligations under article 9. It ruled that, in itself, the law regulating discrimination on the grounds of religious belief was not insufficient to uphold this positive obligation. It however held that the UK Courts had violated Ms. Eweida's right under Article 9.[7] The small religious cross of Ms. Eweida could not have distracted much from her corporate appearance. There was also no evidence that on previous occasions, the wearing of a religious dress had effect on the BA's brand and/or corporate image. The state failed to adequately protect Ms. Eweida's right based on Article 9, since there was no evidence of encroachment on the interests of others.[8]

In the case if Ms. Chaplin the Court unanimously held that there had been no violation of her Convention rights. The Court could not conclude that the decision of

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[6] Jeroen Temperman, 'Of Crosses and Homophobia: The European Court of Human Rights on which Manifestations of Religion One May Bring to Work' (2013) Arbeidsrechtelijke Annotaties <https://ssrn.com/abstract=2316736> accessed 17 December 2017

[7] *'Case Summary Eweida and others v UK ECtHR Article 14 and Article 9'* [2013] (note)

[8] ibid.

her employer, a public authority which decided the removal of the cross, was disproportionate.[9] Not allowing to wear the cross in the manner she requested was not only for her health and safety but also that of the patients with whom she worked. The Court believed that removing the cross for health and safety was a reason of 'inherently greater magnitude' than the reason of corporate image as which was the case with M.s Eweida. In the case of Ms. Chaplin the authorities were, due to safety matters, entitled to a wide margin of appreciation.[10]

[9] ibid.
[10] ibid.

3.0 Bougnaoui & Achbita

With these two cases both women were working in their respective jobs when their company sent them out to work for client companies. They lost their jobs because they refused to comply with their employer's request that they were to take off their headscarf in the workplace. Ms. Achbita started wearing her headscarf at work when she was in her fourth year of employment. She was immediately met by the refusal of her employer, because her headscarf conflicted with the company's 'neutrality' policy, which was incorporated in the employee code of conduct shortly before she was dismissed. Ms. Bougnaoui was asked to remove her headscarf after the company received a complaint from a client. According to the client her "veil" had "embarrassed" a number of its employees.[11]

3.1 Ruling in the Bougnaoui/Micropole SA case

Can the preference of a customer to receive services from a company employee who does not wear an Islamic headscarf be considered a genuine and determining occupational requirement? This is the preliminary question on how article 4 (2) of Directive 2000/78 must be interpreted. The European Court of Justice (CJEU) ruled that due to absence of any company rule, the mere desire of an employer to take into account the wishes of a customer to ban religious symbols is direct discrimination. A ban like this cannot be regarded as a genuine and determining occupational requirement within the meaning of the Framework Directive.[12]

3.2 Ruling in the Samira Achbita case

The preliminary question in the case of Achbita asked how Article 2 (2) (a) 1 and 2 of Employment Framework Directive 2000/78 on equal treatment in employment and occupation must be interpreted. Is the prohibition on wearing an Islamic headscarf direct discrimination, even if it is set out in the general internal rules of a private company?[13] The CJEU found that all visible religious, political or philosophical symbols were banned and that this applied to all employers so as to secure a neutral

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[11] Eva Brems, 'Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace' (*Blog of the IACL, AIDC*, 25 March 2017) <https://iacl-aidc-blog.org/2017/03/25/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace/> accessed 17 December 2017

[12] Case C-188/15 *Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* [2017]

[13] Case C-157/15 *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* [2017]

company image. No distinction was applied in the internal rules. It explicitly prohibited the wearing of any visible sign of political or philosophical beliefs not just visible signs of religious beliefs. The Court concluded that the ban at issue could not be regarded as direct discrimination in the sense of Directive 2000/78.

The CJEU recognized that there is a possibility that such an internal rule could (eventually) lead to indirect discrimination. For example if the rules were capable of putting individuals of certain religions or beliefs at a particular disadvantage when compared with other employees. The Court however held an indirect difference of treatment may be objective justified by a legitimate aim, if the measure at issue is appropriate and necessary for achieving such an aim.

The CJEU concluded that the aim of an employer to present a neutral image towards its clients is legitimate, but only if these rules refer to employees whom are in direct contact with clients. According to the CJEU the national court has to determine if and to what extent a company rules comply with these requirements in practice.[14]

3.3 Summary

A headscarf can only be prohibited by a private company when workers have visual contact with customers. When an employer decides that all personnel should have a neutral appearance, it should uphold this policy in a coherent and systematic fashion, which means that it should not be in response to a specific request from a customer. An employer should however investigate whether employees who wish to openly wear religious clothing and/or symbols can be assigned to different jobs, where there is no visual contact with customers. This has been the ruling in both CJEU cases.[15]

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[14] Monique Steijns, 'Achbita and Bougnaoui: raising more questions than answers' (*EUtopia Law*, 18 March 2017) <https://eutopialaw.com/2017/03/18/achbita-and-bougnaoui-raising-more-questions-than-answers/> accessed 17 December 2017

[15] 'The Achbita case: clarity about the headscarf ban in the workplace' (*Unia*, 15 March 2017) <http://unia.be/en/articles/the-achbita-case-clarity-about-the-headscarf-ban-in-the-workplace> accessed 17 December 2017

4. Conclusion

As mentioned above, an answer will be given to the following research question:

What are the arguments of the CJEU and the ECtHR, resulting them ruling differently in the case of freedom of religion on the workplace?

The rulings with the cases of Achbita and Bougnaoui did not give employers the right to ban Islamic headscarves or any other symbols of one particular religion. An actual headscarf ban would not have been acceptable. The CJEU clearly stated that any bans should include all religious, philosophical and political symbols. This means that skullcaps, crucifixes and turbans as well as clothing or badges with political or philosophical slogans are banned as well. This ruling only applies to employees who are in direct contact with customers and therefore makes it difficult for employers to justify restrictions on clothing for those employees who do not come in contact with customers. The fact that the CJEU has determined that an employer should determine whether an employee can be moved to a job where he/she will not have to be in direct contact with customers, gives way that there is some obligation on the side of the employer, who should try and accommodate religious employees in another role within the company. Rejecting customer's wishes as a genuine and determining occupational requirement can also be seen as a very positive development.[16]

However in contrast to Eweida it can be argued that the ruling of the CJEU provides more space for employers to ban the wearing of religious symbols in the workplace without them violating the fundamental rights to freedom of religion and/or belief. With this ruling the mere wish of a company to present itself in a more neutral way is an objective justification, which could be understood as a confirmation for different treatment of employees.

As it stands now it is up to the national courts and law-makers to determine the conditions under which an internal / private company is allowed to ban religious clothing and/or symbols from the workplace.[17]

[16] Erica Howard, 'Islamic Headscarves and the CJEU: Achbita and Bougnaoui' (2017) Maastricht Journal of European and Comparative Law <http://eprints.mdx.ac.uk/id/eprint/22252> accessed 17 December 2017

[17] ibid 14.

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