



EMPLOYMENT, PENSIONS AND EMPLOYEE BENEFITS

EU Head Scarf Ruling

by **Ciara O'Kennedy**

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Thin Veil of Protection for Employers Who Ban Religious Symbols in the Workplace.

In the first case of its kind the European Court of Justice (ECJ) has ruled that employers can ban employees from wearing visible political, philosophical or religious symbols while at work. The ECJ held that an employer can prohibit an employee from wearing a religious head scarf if to do so is in breach of the employer's dress code, provided such dress code applies equally to all employees.

This case involved an employee, Ms Samira Achbita, who worked as a receptionist for G4S Security Company who began wearing a head scarf to work. The Company had at that time implemented a dress code which prohibited employees from wearing such religious symbols in the workplace. Notwithstanding this internal rule Ms Achbita continued to wear her head scarf and was ultimately dismissed. This dismissal was challenged in the Belgian Courts.

The Belgian Court then referred a question to the ECJ as to whether a prohibition on wearing an Islamic head scarf could constitute direct discrimination within the meaning of the EU Equal Treatment Framework Directive, in circumstances where the employer expressly prohibited the display or wearing of any "political, philosophical or religious symbols while at work".

This Directive, implemented in Ireland by the Employment Equality Acts 1998 – 2015, prohibits direct and indirect discrimination on several grounds, including race and religion. The Directive provides that direct discrimination may be justified in very limited circumstances and that indirect discrimination may be objectively justified if a company can show it had a legitimate aim and acted proportionately.

The ECJ in considering the issue noted that the principle of equal treatment means that there can be no direct or indirect discrimination whatsoever on grounds of religion, which includes both a religious belief and the freedom to manifest that belief in public.

In considering the facts presented the ECJ was satisfied that the employer's rule applied to all employees of the Company in the same way, notably by requiring them, generally and without any differentiation, to dress neutrally. In those circumstances the rule did not introduce a difference of treatment that was directly based on religion or belief and therefore did not constitute direct discrimination.

The ECJ did note however that such a ban could potentially give rise to indirect discrimination but that a company may be able to establish that it was objectively justified. The ECJ then proceeded to give some helpful guidance on what may be considered to be objectively justifiable and protecting a public neutral image of a company would appear to come within that remit. The ECJ accepted that an employer's desire to project an image of neutrality towards its customers is legitimate provided the means of achieving that aim were appropriate, necessary and applied equally to all employees. In the case being considered the ECJ indicated that the rule should only cover customer facing employees. The ECJ left open the question as to whether the employer should have considered offering a non-client facing role.

In a similar case, *Bougnaoui v Micropole SA*, the French Courts asked the ECJ to consider whether taking account of a customer's wishes that an employee, Ms Bougnaoui, would not continue to provide a service to the customer wearing an Islamic head scarf, could be considered to be a "genuine and determining occupational requirement" within the meaning of the Directive that would justify indirect discrimination.

In that particular case Ms Bougnaoui was dismissed following refusing to remove her head scarf when requested by her employer after a customer complained that the employee had attended the site wearing a "veil" which made some of the other employees feel uncomfortable. The employee subsequently challenged her dismissal in the French Courts.

The ECJ was quick to point out that it is only in very limited circumstances that a characteristic, relating in particular to religion, may constitute a genuine and determining occupational requirement. In that case the ECJ was not satisfied that the willingness of an employer to take account of the wishes of the customer, in the absence of any internal rule prohibiting such dress, could be considered to be a genuine and determining occupational requirement. In those circumstances the actions of the employer amounted to direct discrimination.

These two recent ECJ rulings will it seems disproportionately impact on women of Muslim faith. Amnesty International has said that although it welcomed the Bougnaoui decision as a refusal to pander to the prejudices of clients, the ban on the right to wear head scarves in order to protect a company's neutrality had effectively opened a back door to precisely such prejudice.

The central issue for consideration in both cases concerned the way in which companies may be permitted to portray the image of their company by prohibiting certain dress codes, notwithstanding the potential implications of these dress codes on certain employees. In light of these recent rulings Employers should assess internal dress code policies or rules, ensuring a balance between the necessity for such a dress code or ban and the disadvantage likely to be suffered by an employee or group of employees.

It remains to be seen how the national courts will implement these decisions and the outcome will no doubt be eagerly anticipated by many.

For further information on this topic, please contact Ciara O'Kennedy at cokennedy@lkshields.ie.

About the Author



Ciara O'Kennedy
Partner

Ciara advises on both contentious and non-contentious employment issues.
T: + 353 1 638 5870 E: cokennedy@lkshields.ie