

Is the prohibition of employees wearing anything that manifests a religious belief in the workplace discrimination? Not necessarily, say the CJEU in *IX v WABE* & *MH Muller v MJ*

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Background facts

IX v WABE

1. WABE is an organisation that runs a number of child-care centres in Germany. It is non-partisan and non-denominational. IX was employed as a special needs carer at WABE from 2014. From 2016, she decided to wear an Islamic headscarf. She went on parental leave from October 2016 until May 2018. During this time, WABE adopted the 'Instructions on observing the requirement of neutrality'. Part of those instructions provided that *'in order to guarantee the children's individual and free development with regard to religion, belief and politics...employees are required to observe strictly the requirement of neutrality that applies in respect of parents, children and third parties....In that connection, the following regulations 'serve as principles for specifically observing the requirement of neutrality in the workplace:*

- ***Employees shall not wear any signs of their political, philosophical and religious beliefs that are visible to parents, children and third parties in the workplace***

2. An information sheet was provided with a Q and A section, one of which was:

Can the Christian cross, Islamic headscarf or Jewish kippah be worn?

No, this is not permitted as the children should not be influenced by the teachers with regard to religion.

3. On 1 June 2018 IX attended work wearing an Islamic headscarf. After she refused to remove it, she was temporarily suspended. IX returned to work on 4th June, again wearing her headscarf. She was given a warning and asked to remove it. She refused and was temporarily suspended again. During the same period, WABE required a female employee to remove a cross that she wore around her neck.
4. IX brought an action seeking an order that the warnings be removed from her file. She argued that the rule directly targets the Islamic headscarf and was therefore direct discrimination. It was also argued that as the rule exclusively affects women, it was discrimination on the grounds of sex. The referring court requested a ruling on this, and also on whether a policy of neutrality could constitute indirect discrimination on the grounds of religion or sex, and if so, whether such a policy could be justified by a policy of neutrality established in order to take account of customer's wishes.

MH Muller v MJ

5. MJ was employed as a sales assistant and cashier by MH Muller, a drugstore chain, from 2002. Since 2014 she has worn an Islamic headscarf. As she did not comply with an instruction to remove the headscarf, she was transferred to another post where she was allowed to wear it. However, in June 2016 she was again asked to remove it, and when she refused, she was sent home. In July 2016 she was instructed to return to work without the headscarf. The company had an internal policy prohibiting the use of conspicuous, large-sized political, philosophical or religious signs in the workplace to prevent conflicts between employees, which had occurred several times in the past.
6. MJ brought an action seeking a declaration that the instruction was invalid, invoking her freedom of religion and arguing that the policy of neutrality did not enjoy unconditional priority over the freedom of religion.

CJEU ruling in IX v WABE

7. Article 2(1) of Directive 2000/78 provides that "*the principle of equal treatment*" shall mean that there shall be no direct or indirect discrimination. Article 2(2)(a) provides that direct discrimination "*shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1*" [which sets out protected characteristics such as age, disability and so on].

8. Article 10 of the Charter of Fundamental Rights of the European Union provides for “*freedom of thought, conscience and religion*” which protects the wearing of signs or clothing to manifest religion or belief. Case law from the European Court of Human Rights provides that the right to freedom of thought, conscience and religion “*represents one of the foundations of a democratic society within the meaning of [that] Convention and constitutes...one of the most vital elements that go to make up the identity of believers and their conception of life*”.
9. In relation to less favourable treatment, previous case law has made it clear that this cannot be said to occur unless the treatment is experienced *as a result* of the religion or belief.
10. The Court placed reliance on the previous case of G4S Secure Solutions C-157/16, in which it was held that an internal rule prohibiting the wearing of any visible sign of political, philosophical or religious beliefs does not constitute direct discrimination so long as such a rule covers *any* manifestation of such beliefs without distinction and treats all workers in the same way, by requiring everyone to dress neutrally. In other words, if every single person was subject to the same rule, there was no difference in treatment.
11. Given that another employee of a different religion was also told to remove a religious sign (a cross necklace), it appeared to the Court that that rule was applied to IX without any difference of treatment.
12. The second issue considered was that of indirect discrimination, and whether if such discrimination existed, it could be justified. The referring court’s view was that the neutrality policy impacted on certain religions more than others, and that it affected women more than men. The latter point was not considered as this discrimination does not fall within the scope of Directive 2000/78.
13. The correct test to be applied when considering whether there was a difference of treatment indirectly based on religion or belief is whether an apparently neutral rule results in persons of a certain religion being placed at a particular disadvantage. The Court agreed that the rule concerns statistically almost exclusively female workers who wear a headscarf because of their Muslim faith, and thus concluded that indirect treatment based on religion was made out.
14. As regards justification, a legitimate aim would need to be shown, and that the means adopted were an appropriate and necessary way to achieve that aim. An employer’s desire to display, in relations with both public and private-sector customers, a policy of

political, philosophical or religious neutrality may be regarded as legitimate. In particular this is so where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers.

15. However, such an aim is not sufficient to justify a difference of treatment indirectly based on religion unless there is a genuine need on the part of that employer, which is for the employer to demonstrate. In that regard, account may be taken of the rights and legitimate wishes of customers or users. For example, this would include the rights of parents to ensure the education and teaching of their children in accordance with their religious and teaching beliefs or their wish to have their children supervised by persons who do not manifest their religion or belief when in contact with their children.
16. Particular relevance should be attached to the fact that the employer has adduced evidence that, in the absence of a policy of neutrality, its freedom to conduct a business would be undermined.
17. The prohibition should be limited to that which is strictly necessary, especially bearing in mind the fact that some religions require certain individuals to wear visible signs of their religions. Thus, the Court found that an indirectly discriminatory policy regarding the prohibition of religious manifestations *may* be justified, but whether it is will depend on the individual facts of the case.

CJEU ruling in MH Muller v MJ

18. The Court found that a prohibition on conspicuous, large-sized signs is liable to have a greater effect on people with religious beliefs which require the wearing of a large-sized sign, such as a head covering. Unequal treatment based on a criterion which is inextricably linked to a protected characteristic must be regarded as being directly based on that ground. Thus, the policy applied by MH Muller will mean that some workers will be treated less favourably than others on the basis of their religion or belief such that direct discrimination may be established.
19. Even if direct discrimination is not found to exist, a difference of treatment that results in a particular disadvantage to persons adhering to a particular religion or belief would constitute indirect discrimination unless justified. The aim relied upon here was a measure designed to avoid social conflicts, particularly in view of tensions which occurred in the past in relation to political, philosophical or religious beliefs. The issue is whether such an aim meets a genuine need. In that regard, the prevention of social conflicts and the

presentation of a neutral image to customers *may* correspond to a real need on the part of the employer. However, it needs to be shown that the particular policy is limited to what is strictly necessary. A prohibition that is limited only to large, conspicuous signs cannot be justified.

National provisions protecting the right to equality

20. Where several rights are engaged, it was held that the principle of proportionality must be applied in order to reconcile the requirements of the protection of various rights and to strike a fair balance. Directive 2000/78 establishes minimum harmonisation: Article 8(1) allows national provisions '*which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive*'. The CJEU clarified that national provisions protecting freedom of religion may be taken into account as more favourable provisions. It was held that the Directive '*leaves a margin of discretion to the Member States, taking into account the diversity of their approaches as regards the place accorded to religion and beliefs within their respective systems*'. Thus, it is clear that the freedom of employers to conduct their business does not trump every other right, and there is a margin of appreciation for countries like Germany to adopt less regressive policies towards Muslims than the kind increasingly adopted in some countries.

Commentary

21. Whilst one can understand how a blanket ban on *all* forms of outward manifestations of religion does not constitute direct discrimination as all religions are being treated in exactly the same manner, the conclusion in relation to indirect discrimination is more controversial. It effectively opens the door to employers to discipline or dismiss employees who continue to wear religious clothing such as hijabs or niqabs after being instructed not to. That is a concerning state of affairs for a large number of people. For many, the wearing of such items is considered to be an important part of their faith that is non-negotiable. It is not something which a lot of people view as a mere preference- it is a way of life. It is quite distinct from say a Christian choosing to wear a cross necklace.

22. It is also quite concerning that there was little consideration or interrogation of the parent's wishes in IX nor of the alleged need to avoid social conflict in MH Muller. There may be parents who hold discriminatory views about certain religions- is a mere request by parents for employees not to wear certain religious manifestations to be viewed as a good enough

reason to justify indirect discrimination? Surely the shielding of children from the existence of different religions does the opposite of promoting equality and diversity and the legal system should not be seen to allow the potentially discriminatory views of a small number of people to seriously undermine the employment rights of others? Similarly, if the fact of an employee wearing a certain type of religious garment has led to conflict in the workplace, surely the appropriate response is to seek to address the basis of such conflict and to resolve it if possible, or to potentially discipline those who are causing such conflict? It is also questionable that, where such conflict has already arisen, the abolition of manifestations of religious beliefs will resolve such conflict in any event. Indeed, it could in many circumstances serve to heighten workplace discord.

23. However, it should be borne in mind that following the UK's withdrawal from the EU, we no longer are obliged to follow the rulings of the CJEU (albeit reliance can be placed on such rulings if considered relevant to a particular issue). It seems likely to me that the UK courts will follow the conclusion that a blanket ban on all forms of religious or political manifestations will constitute indirect discrimination, but that such policies will rarely be justified, as it is difficult to envisage many situations in which a policy of complete political or religious neutrality will be deemed to be truly strictly necessary. If an employer does seek to apply some form of religious neutrality policy, they should ensure that it is very carefully worded and applies to all equally. They would need to be able to provide cogent reasons as to why such a policy was necessary, it being clear that the mere desire for religious neutrality is not of itself sufficient.

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