



European network of legal experts in gender equality and non-discrimination

NEWS REPORT

Country:	Belgium
Title:	Ruling of the Belgian Court of Cassation (<i>Cour de cassation</i>) in the <i>Achbita</i> case
Date	23 October 2017
Expert:	Bribosia Emmanuelle
Update of news report	Preliminary question to the CJEU on the prohibition to wear the headscarf at work (PDF 231 kB)
<u>Context</u>	
Issue at stake:	The Belgian Court of Cassation rendered its judgment in the <i>Achbita</i> case following the ruling of the Court of Justice concerning the ban of wearing religious symbols at work
Ground of discrimination:	Religious belief
Source:	Ruling of the Court of cassation of 9 October 2017
Field:	Employment
Applicable law:	<ul style="list-style-type: none">• Former Act of 25 February 2003 on combating discrimination and amending the Act of 15 February 1993 setting up the Centre for Equal Opportunities and Opposition to Racism• Directive Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Content

Case: The Belgian Supreme Court rendered its judgment in the “*Achbita* case”, following the preliminary ruling issued by the Court of Justice on 14 March 2017. The case started when Mrs Achbita, a Muslim woman, who worked as a permanent contract receptionist at G4S Security Services was laid off because she decided, in April 2006, three years after her hiring, to wear the Islamic headscarf during the working hours. She had not held any duty to wear a specific uniform so far. However, a few days after she decided to wear the headscarf at work, she was informed that it would not be tolerated because it was contrary to the neutrality policy of the company. The work regulations of the company were also amended in order to forbid the workers to wear any visible symbol expressing their political, philosophical or religious beliefs. Refusing to remove her headscarf within the premises of the company, the employee was laid off. In 2011, the Labour Court of Antwerp considered that the employer could prohibit the wearing of any religious signs by all employees in order to preserve the neutral image of the company. The applicant brought the case before the Belgian Court of Cassation alleging that according to her there was a direct discrimination and an abuse of the right to dismiss. The Court of Cassation decided to submit a preliminary ruling to the Court of Justice (see Flash-report Nr 35-BE-ND (2015)).¹ The CJEU considered that the general ban of wearing religious symbols did not constitute a direct discrimination since it was applicable to all employees

¹ Court of cassation, 9 March 2015, S.12.0062.N, www.UNIA.be/en.

regardless of their religion. It nevertheless stressed that it could constitute an indirect discrimination if it was demonstrated that a particular religion was more disadvantaged by this measure. If the proof of this disadvantage is noticed by the national judge, the measure may however be lawful if it pursues a legitimate aim and if it is proportionate. The CJEU underlined that a general ban of the wearing of religious symbols could be justified by the aim of a company to maintain its neutrality as it relates to its freedom to conduct a business as protected by Art. 16 of the Charter. The CJEU moreover considered that it could be proportionate if it only applied to employees in contact with clients and provided that the employer tried to offer another position to the employee, where she/he would not be in contact with clients.

Decision of the Court: In a ruling of 9 October 2017, the Belgian Court of Cassation overturned the decision of the Labour Court of Antwerp of 9 March 2015. Following the interpretation of the Court of Justice as to the absence of direct discrimination in the case at hand, the Court of Cassation dismissed the first argument ground on the existence of a direct discrimination. Nevertheless, the Court of Cassation accepted the second argument according to which there could be an abuse of the right to dismiss (and an indirect discrimination) even in the absence of a fault and even if the wrongful conduct has been committed unknowingly. It underlined that, in principle, an employer could not be held liable, according to Belgian law, for an abuse of the right to dismiss employees when the employer was not able to foresee that the dismissal was unlawful. However, the Directive 2000/78, as construed by the Court of Justice in its former case-law (including the case-law on equality between women and men), entails, according to the Court of Cassation, the liability of employers committing discrimination even in the absence of a fault and even if the wrongful conduct has been committed unknowingly. Therefore, the Court of Cassation considered that the recognition of liability of the employer for a breach of anti-discrimination rules could not be made conditional on the evidence, brought by the victim of the discrimination, that a fault had been committed. Hence, the Labour Court decision was unlawful to the extent that it considered that the employer could not be held liable for the breach of the anti-discrimination rules since s/he could not reasonably foresee that the dismissal was unlawful because of the uncertainty of the case-law on this issue and because the employee had not provided sufficient evidence of the existence of a fault in his chief. To conclude, the Court overturned the judgment of the Labour Court except with regard to the consideration that there was no direct discrimination in the case at hand. The case has been referred to the Labour Court of Ghent.

Key points of analysis:

- The dismissal for wearing a headscarf when internal rules prohibit the wearing of religious symbols does not constitute a direct discrimination, but might constitute an indirect discrimination;
- The liability of an employer committing unlawful discrimination regarding directive 2000/78 is not dependant on the existence of a fault;
- The liability of an employer committing unlawful discrimination regarding directive 2000/78 may not be conditioned on the evidence that a fault has been committed.

Internet link source: not yet available (not published yet).