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NEWS REPORT

Country:	France
Title:	Court of Cassation, 22 November 2017, n° 13-19855, <i>Asma Bougnaoui, ADDH v. Micropole SA</i> .
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<u>Context</u>	
Issue at stake:	Whether the request of a client that an IT engineer intervening on site dress in a neutral manner and remove an Islamic veil can be held to be a genuine and determining occupational requirement
Ground of discrimination:	Religion/belief
Source:	National court decision
Field:	Employment
Applicable law:	Article 4 par. 1 of Directive 2000/78; articles L1121-1, L1132-1, L1321-2-1 of the Labour Code

Content

Case: Ms Bougnaoui first contacted the respondent employer in October 2007 in the prospect of an internship at an event for the recruitment of young graduates. The employer is an IT engineering firm intervening on clients' premises. At the time of this first contact, it was mentioned to her that wearing the Islamic veil might pose a problem with certain clients. She was recruited.

She arrived at her internship wearing a bandana and eventually attended work wearing an Islamic veil. She was hired at the end of her internship on a permanent contract as IT study engineer in July 2008. In May 2009, a client requested that she remove her veil if she was to return on the premises. In June 2009, Micropole requested that she remove her veil when she was called upon to intervene with clients. She was dismissed for refusing to remove her veil when in contact with clients. Ms Bougnaoui brought a claim of discriminatory dismissal before the courts, and the Court of cassation referred the case to the CJEU for a preliminary ruling, asking whether the request of a client that an employee remove her Islamic veil can be held to be a genuine and determining occupational requirement.

Decision of the CJEU: On 14 March 2017, the CJEU rendered a decision (C-188/15) holding that Directive 2000/78 does not define the notion of religion, however in its first recital it refers to the ECHR which, at article 9, defines the protection of freedom of religion as covering the right "to manifest [one's] religion or belief, in worship, teaching, practice and observance." In the same recital, the Directive refers to the Charter of Fundamental Rights, which affords the same protection at article 10 par 1. Therefore, Directive 2000/78 must be interpreted as following the same conception of freedom of religion, which protects not only private faith but public expression of religious faith.

The CJEU states that the referral does not give sufficient indication to determine whether the dismissal is a result of direct or indirect discrimination. Therefore, it refers directly to the decision rendered the same day in the case *Achbita vs G4S Secure Solutions* (CJEU, 14 March 2017, C-157/15) regarding the reasoning applicable to neutrality policies that can give rise to indirect discrimination, and goes on to discuss justifications that can be raised to argue the legality of a decision dismissing an employee, directly based on religion.

The CJEU first states that an internal rule that forbids the expression of religious, political and philosophical beliefs does not constitute a direct discrimination. However, if this rule creates a disadvantage for persons of certain faiths, it could constitute an indirect discrimination on the ground of religion or belief in the sense of article 2 par 2 b) of the directive. The court concludes that pursuing a policy of neutrality towards the public can constitute a legitimate aim, but the means to carry out this objective must be proportionate and necessary.

The Court further examines whether religious neutrality can constitute a genuine and determining occupational requirement. It stresses that the requirement must not be related to the forbidden ground of discrimination itself, but must be a characteristic related to this ground. It stresses further that it is only in very limited circumstances that religion will be held to constitute a genuine and determining occupational requirement, subject to a strict necessity and proportionality test.

Examining the request of the client in this case, the Court finds that a genuine and determining occupational requirement cannot take the form of the sole desire of an employer to meet particular wishes of a client. The court seems to consider that since it will not be related to "the nature of the particular occupational activities concerned or of the context in which they are carried out", i.e. an appreciation related to the activity itself that must be defined by the employer.

Decision of the Court of cassation: The Social Chamber of the Court of cassation has rendered its decision discussing in detail the application of the decision of the CJEU.

First it explicitly refers to the reasoning of the Court of Justice as regards the scope of the protection afforded to religion and refers to article 9 of the ECHR as well as Directive 2000/78 to retain a notion of religion protecting both religion per se, and the requirements of religious practice as subjectively defined by the beholder.

Secondly it concludes that Micropole's decision to dismiss the claimant by reason of her refusal to remove her veil when clients so demand, constitutes a direct discrimination, and that therefore the only possible justification would be an exception provided by article 4 par 1 of Directive 2000/78 regarding genuine and determining occupational requirements, such requirements being justified by the nature of the task to be executed. In evaluating whether Micropole's justifications meet this requirement, it refers to the decision of the Court of Justice stating that the will of an employer to meet the desire of its client cannot be considered as a genuine and determining occupational requirement.

The Court continues by adding an *obiter dictum* referring to the decision of the Court of Justice in the *Achbita* case, a liberty it seldom takes.

It states that in-house regulations forbidding any philosophical, political or religious sign in the workplace do not constitute a direct discrimination on the ground of religion, but that it may give rise to indirect discrimination, if it has an adverse impact on persons of a particular religion. That in such a case, it will only be justified if it pursues the legitimate objective of a policy of neutral political, philosophical and religious identity towards its clients and that the means to implement this objective are appropriate and necessary, test which is to be evaluated by the National Court, by amongst other elements

evaluating whether another employment without contact with clients could be proposed to the employee. It concludes by stating that in the *Bouganoui* case there was no neutrality rule justifying disciplinary action, but an ad hoc rule targeting a specific religious sign.

The decision of the Court of Appeal of Paris of 18 April 2013 is quashed and the case is sent back before another chamber of the Court, where the Court of Appeal will render a new decision and should apply the principles set out by the social chamber, thereby concluding that the claimant's dismissal was discriminatory and awarding damages to the claimant.

Key points of analysis: In this case the Social Chamber of the Court of Cassation implements in French jurisprudence all the implications of the two cases decided by the Court of Justice in *Achbita* and *Bougnaoui*, with a clear intention to anticipate further debates related to the implementation of in-house regulations.

The Court of cassation has thus ceased the opportunity given by the statement of the Court of Justice stating that the National Court would have to decide whether the situation constituted direct or indirect discrimination, and referring to the *Achbita* decision.

The Court thus states its position as regards indirect discrimination on the ground of religion in relation to situations related to the prohibition of the Islamic Veil. In so doing, it goes beyond the facts of the case, since no in-house regulation was in force within Micropole. The Court anticipates upcoming scenarios by explicitly referring to situations where in-house rules forbidding the expression of religion and beliefs will be in force. Many employers have adopted such rules further to the adoption of Article 1321-2-1 of the Labour Code in the Law n° 2016-1088 of 8 August 2016 relating to employment, modernization of social dialogue and securing professional life ('Law El Khomry'), a provision that has apparently legalised the adoption of neutrality rules limiting the expression of religion and beliefs in the workplace. (See FR n° 82-FR-ND-2016).

Internet link source:

CJEU 14 March 2017:

Micropole:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=188853&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=125215>.

G4S Secure Solutions:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=188852&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=125307>.

Court of Cassation 22 November 2017:

https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/2484_22_38073.html.