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Religious discrimination and workplace clothing policies: consistency, comparators, and some persisting confusion?

Laurene Veale, barrister, Cloisters, reviews the recent decision of the Court of Justice of the European Union (CJEU) in *LF v SCRL* C-344/20 ◆ [2022] ECLI:EU:C:2022:774, October 13, 2022, which has brought religious discrimination to the fore once again in a case about a Belgian company's refusal to hire a woman because she was not willing to remove her headscarf at work. The author argues that the CJEU's finding that the employer's exclusionary clothing policy was not direct discrimination, although consistent with previous case law on this same issue, is unsatisfactory. While going some way towards encouraging workplace diversity, the judgment fails to squarely recognise the exclusionary effect of workplace clothing policies or give guidance on when they can be said to go too far. The decision is also difficult to reconcile with the court's more recent case law on direct disability discrimination.

Implications of the CJEU decision

This is the fifth case to come to the CJEU concerning women being denied work because of their hijab.

The judgment is noteworthy both in what it says and what it does not say. It provides welcome clarification on the distinction between religion and belief, and whether national laws treating religious, philosophical and political belief as separate grounds for discrimination provide equivalent or better protection than Council Directive 2000/78/EC of November 27, 2000 establishing a general framework for equal treatment in employment and occupation (the Framework Directive).

The judgment also brings some clarity on the tricky question of comparators in discrimination claims, and specifically whether intra-group comparisons, such as between workers of different religions, or of the same religion but manifesting it differently, are permissible. However, on the circumstances in which such intra-group comparisons can reveal direct discrimination, the judgment raises more questions than it answers. For example the judgment fails to convincingly set out when less favourable treatment – such as refusing to hire a job applicant because of the manifestation of her religion – will amount to direct discrimination and when it will amount to a neutral policy with different impacts on different applicants.

In relation to indirect discrimination, and in particular the balance between workers' freedom of religion and employers' freedom to conduct business, this case is significant in that it is the first time that the CJEU has expressed a concern to encourage, in the context of workplace clothing policies, tolerance of a greater degree of diversity. It is also the first time that the court has recognised the risk of employers abusing so-called 'neutrality' clothing policies to the detriment of some workers. However, the court did not take the opportunity to provide guidance on which factors can legitimately weigh into this balance. How far can business concerns be taken into account? Putting it bluntly, can an employer rely on the potential loss of Islamophobic customers to justify a policy preventing workers from wearing any religious sign?

The judgment falls short of addressing the criticism which the court's stance on workplace headscarf bans has attracted in recent years. Nevertheless, it opens a fascinating new chapter in the dynamic debate about religious discrimination in the workplace.

◆ [2022] IRLR 70

The facts of the case

The claimant was refused an internship in a social enterprise in Belgium because she had indicated in the recruitment interview that she would not remove her headscarf to comply with the company's so-called *'policy of neutrality'* which required workers *'not to manifest in any way, either by word or through clothing … their religious, philosophical or political beliefs'*. [para 16]

When she realised that this was the reason for the refusal, she offered to wear another type of head covering, but the company maintained its refusal, on the ground that no type of head covering was allowed, not even a cap or hat.

"... the *'religion or belief'* protected characteristic will include spiritual or philosophical beliefs but not political or other beliefs ... religion and belief are two facets of the same protected characteristic..."

This scenario will have been familiar to the CJEU, which has already ruled on four cases – two in 2017 and two in 2021 – in which Muslim women in Belgium, France and Germany were dismissed because they were not willing to remove their hijab at work.

The questions referred by the Belgian court

The Belgian court referred three questions to the CJEU, which can be summarised as follows:

1. Are religion and belief two facets of the same protected characteristic, or are they two distinct characteristics?
2. Does Belgian law, which treats religious, philosophical and political beliefs as three separate grounds of discrimination, lower the level of protection envisaged in the Framework Directive?
3. Does the employer's policy of imposing 'neutral' clothing at work, with the practical effect of prohibiting headscarves, amount to direct discrimination?

This third question was broken down into six sub-questions, which essentially sought clarification about the appropriate comparator. Would it be a worker with no protected belief? Or one with a philosophical or spiritual belief, but no religious belief? Or one who adheres to a religion but who does not manifest it? Or a worker who holds the same religious belief but manifests not by wearing a headscarf but by wearing a beard?

Religion and belief as a single ground of discrimination

The court first specified that the *'religion or belief'* protected characteristic will include spiritual or philosophical beliefs but not political or other beliefs. This is because Article 21 of the EU Charter of Fundamental Rights refers to *'religion or belief'* and *'political or any other opinion'* separately, and Article 1 of the Framework Directive refers only to the former and not the latter. Therefore, *'political or trade union belief'* and *'artistic, sporting, aesthetic or other beliefs or preferences'* do not enjoy protection under the Framework Directive [para 27-28]. EU member states are free to legislate to protect those beliefs (as Belgium, France and Northern Ireland have done – among other jurisdictions – in relation to political beliefs) but that would be outside the scope of the Directive.

In answer to the first and second questions, the CJEU held that religion and belief are two facets of the same protected characteristic, and national laws splitting them as separate grounds of discrimination are not in accordance with the Framework Directive. Why does it matter? The question is not merely one of semantics; it can affect the choice of a comparator. This is key, because different comparators (or different comparison pools in indirect discrimination claims) can yield different outcomes to a discrimination claim.[1]

1 As explained by Advocate General Medina in this case, and by Advocate General Bobek in *Cresco* Case C193/17 [paras 55 and 62].

The Belgian court made the argument (as did Advocate General Medina) that separating the grounds of religion and philosophical or spiritual belief into two distinct grounds of discrimination would enhance protection from discriminatory treatment, since it would allow comparisons between religious workers on the one hand and workers with another type of protected belief on the other. As explained in Advocate General (AG) Medina's Opinion, that would bring to light discrimination which might not be visible if comparison is only between workers with a protected belief and those without [para 41]. On the facts of *LF*, it might be said that if other internship applicants who hold religious beliefs (but don't wear a visible religious sign) can comply with the employer's clothing policy, there is no less favourable treatment of them when compared to applicants without a protected belief, therefore any disadvantage faced by the hijab-wearing applicant cannot be because of religion. Instead, AG Medina argued, if the comparison is between two applicants with a religious belief but one manifests it through clothing and the other does not, unequal treatment resulting from the employer's clothing rule is more likely to be regarded as 'inextricably linked' to the religion of applicants concerned by religious clothing obligations *'given that those employees would be unable to meet the requirements of that rule unless they abandon the observance of the obligations prescribed by their faith.'* [para 42]

In its judgment, the CJEU clarified that:

> *the existence of a single criterion, encompassing religion and belief, does not prevent comparisons between workers motivated by religious belief, on the one hand, and those motivated by other beliefs, on the other; nor does it prevent comparisons between workers motivated by different religious beliefs.* [para 59]

... intra-group comparisons are permissible in EU equality law if they assist in identifying discriminatory treatment.

In other words, intra-group comparisons are permissible in EU equality law if they assist in identifying discriminatory treatment. But, according to the CJEU, the question of comparators is only relevant to direct discrimination claims, which this case was not [para 58]. For this conclusion, the court referred to its previous case law, specifically *Achbita v G4S Secure Solutions NV C-157/15* [2017] ECLI:EU:C:2017:203, March 14, 2017; Briefing 829 [2017]; and the joined cases of *IX v WABE eV* C-804/18 and *MH Müller Handels GmbH v MJ* C-341/19 [2021] ECLI:EU:C:2021:594; Briefing 1004 [2022], July 15, 2021.

The 2017 case of *Achbita*, and the related case of *Bougnaoui v Micropole SA* C-188/15 [2017] ECLI:EU:C:2017:204 March 14, 2017, heard on the same day, concerned women (a receptionist and a design engineer respectively) dismissed for refusing to remove their headscarves at work. The court held that direct discrimination was not made out because the two employers' rules against the wearing of visible signs of political, philosophical or religious beliefs had applied to all workers without distinction. The court maintained this position four years later, in *WABE* and *MJ*, which were again about two women dismissed for refusing to remove their headscarves at work. The CJEU rejected the argument made by AG Sharpston that the employer's clothing policy singles out members of non-Christian religions who regard themselves as obliged to wear mandated religious apparel, and that this *'looks very much like direct discrimination'* on the prohibited ground of religion [para 123 of her Opinion]. The court recognised that the policy was capable of causing *'inconvenience'* to these workers [para 52], but since everyone may have a religion or belief, the rule did not create differential treatment based on a criterion inextricably linked to religion [para 53].

However, the court in *Wabe* accepted that a rule prohibiting the wearing of *'conspicuous, large scale signs'* of religious, political or philosophical belief (as opposed to all signs of such beliefs) could constitute direct discrimination, since such a rule was capable

of being '*inextricably linked to one or more specific religions or beliefs*' [para 73]. In other words, a policy banning conspicuous signs could potentially target some religious manifestations – such as headscarves – over others and therefore might not be said to apply consistently to all without distinction.

What is puzzling is that, if a clothing policy against large-scale or conspicuous religious signs can be directly discriminatory, why isn't a ban of all religious signs also discriminatory, in that it targets certain religious beliefs (those that come with clothing precepts) over others?[2] As AG Sharpston explained in her Opinion in *Wabe*:

> *It seems to me to follow that a total ban on all religious signs will necessarily discriminate against all religious groups who consider themselves to be obliged to wear mandated religious apparel as compared with (i) members of religions in which specific apparel is not mandated and (ii) those employees who are atheist or agnostic*. [para 122]

The conclusion in *LF*, rejecting the argument that an employer's refusal to hire a hijab-wearing applicant does not constitute direct discrimination, is even more puzzling in light of the CJEU's reasoning in the 2021 case of *VL v Szpital Kliniczny im. dra J. Babinskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie* C16/19 [2021] ECLI:EU:C:2021:64; Briefing 963 [2021], January 26, 2021 [para 34]. This case was about an employer granting disabled workers a financial allowance if they had applied for a disability certificate after a certain date. The claimant had applied for the certificate before that date and was denied the allowance. The CJEU held that this could amount both to indirect and direct discrimination. The start date for applications could be seen as a neutral criterion applied to all disabled workers without distinction, but having the effect of putting certain workers (those who had applied for certificates before the date) at a disadvantage because of the nature of their disability (for example, a worker with a visible or severe disability might have sought a certificate at an earlier date). That would be indirect discrimination. However, the court also held that the employer's refusal to give an allowance to some workers but not others was less favourable treatment which would amount to direct discrimination if the national court found that the refusal was based on a criterion '*inextricably linked to the disability of the workers who were refused that allowance*'. [para 51] One factor which might indicate that the criterion for the refusal was inextricably linked to their disability was the fact that the disability certificate gave rise to specific rights, which some workers, because of the nature of the disability, may have sought to exercise as early as possible, therefore applying for the certificate prior to the date set by the employer.

If the refusal of the allowance in *VL* was less favourable treatment, the refusal of an internship must surely also be.

It is difficult to see why the court did not apply this reasoning in *LF*. If the refusal of the allowance in *VL* was less favourable treatment, the refusal of an internship must surely also be. The question is then whether the refusal is because of something inextricably linked to the applicant's religion. The wearing of signs or clothing such as a headscarf is a manifestation of religion (as recognised by the court in *Achbita* [para 30] and *Wabe* [para 46]). That manifestation is inextricably linked to religion.

In support of its conclusion that there was no direct discrimination on the facts in *LF*, the court noted that it had not been alleged that the claimant '*has been treated differently from any other worker manifesting his or her religion or religious or philosophical belief through the visible wearing of signs or clothing or in any other way.*' [para 36]

2 AG Medina in her Opinion in *LF*, expressed her disagreement with the conclusion in *Wabe* in this regard: in her view, the court's approach '*diluted the references to differential treatment regarding employees who are not merely manifesting their religion or religious beliefs but observing them by wearing particular clothing.*' [para 50]

But this appears to use the wrong comparator: the appropriate comparator for a direct discrimination claim is someone who does not have the specific protected characteristic said to be the cause of the less favourable treatment, in this case the manifesting of religion through a visible sign or clothing. In *VL*, the court did not ask: has the claimant been treated differently than any other worker who applied for a disability certificate before the employer's specified date? Instead, it compared those disabled workers who were able to comply with the employer's specified date, and those disabled workers who could not, and left it for the national court to decide if the reason for any difference in treatment was inextricably linked to their disability. Applying the same approach in *LF*, it becomes clear that the comparison is between a worker who can comply with the employer's clothing policy and is hired, and a worker who cannot so comply and is not hired. The reason for the difference seems clear: the latter is manifesting her religion by wearing a headscarf, the former is not.

LF therefore leaves the position on direct discrimination in a somewhat unsatisfactory place, since the confusion arising from some of *Wabe* reasoning remains, and there appears to be some inconsistency with the approach in *VL*.

Indirect discrimination: the justification of exclusion

Unsurprisingly, the CJEU in *LF* recognised that the employer's clothing policy could amount to indirect discrimination. But on the question of justification, the judgment in *LF* does not row back on the controversial position – established in *Achbita* and *Wabe* – that the aim for an employer to display to customers '*a policy of political, philosophical or religious neutrality*' is legitimate [para 40] and that preventing workers from wearing clothing deemed to have religious connotations is an appropriate means of achieving this aim (*Achbita* [para 42]).

... the aim for an employer to display to customers '*a policy of political, philosophical or religious neutrality*' is legitimate.

Nevertheless, to be justified, the policy needs to be '*genuinely pursued in a consistent and systematic manner*' (*Achbita* [para 40]) and limited to what is strictly necessary – for example, applying the policy only to customer-facing workers, as was suggested in *Achbita* [para 42]. One factor which might be relevant is whether the employer could have, without '*being required to take on an additional burden*', offered the worker a non-customer facing role instead of dismissing her (*Achbita* [para 43]).

In *Wabe*, the court went somewhat further than *Achbita*, stating that an employer needs to show not just that the policy is genuinely pursued, but also that it responds to a '*genuine need*' on the part of the employer [para 64]. To establish a genuine need, account can be taken of the '*rights and legitimate wishes of customers or users*', for example a parent's '*wish to have their children supervised by persons who do not manifest their religion or belief when they are in contact with the children*' [para 65]. The court also held that '*particular relevance should be attached*' to any evidence that the employer might suffer adverse consequences in the absence of the 'neutral' clothing policy (for example loss of profit) [para 67].

The court received criticism for placing a low bar for employers to justify so-called 'neutrality' clothing policies in the workplace, leaving little room for tolerance of workers who wish to respect certain religious clothing precepts.[3] One criticism was that in permitting an employer's freedom to conduct its business to trump a worker's right to manifest her religion, the court went beyond what is permitted by the International Covenant on Civil and Political Rights (to which all EU countries are signatories). The Covenant allows a restriction to the freedom of religion only if it is necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

3 For example, see E. Howard, *Islamic headscarves and the CJEU: Achbita and Bougnaoui*, in *Maastricht Journal of European and Comparative Law*, 2017, p. 357.

Freedom to conduct a business is not among the freedoms recognised in the Covenant.

A further criticism is that although the court has emphasised that the freedom to conduct business is recognised in Article 16 of the EU Charter of Fundamental Rights, it is caveated in the Charter as being a freedom to conduct a business '*in accordance with Community laws and national laws and practices*'. Arguably, the Charter therefore does not stop EU equality law limiting the freedom to conduct business in a manner that ensures equality of treatment.

Perhaps in response to these criticisms, the court in *LF* emphasised the significance of the right to freedom of thought, conscience and religion [para 35], and expressed '*the concern to encourage, as a matter of principle, tolerance and respect, as well as acceptance of a greater degree of diversity*' [para 41]. It also recognised, for the first time, the possibility of '*abuse of a policy of neutrality established within an undertaking to the detriment of workers who observe religious precepts requiring the wearing of certain items of clothing*' [para 41]. This language is significant in that it puts an emphasis on the desirability of diversity and tolerance in the workplace, a position which might inform the assessment by courts of an employer's justification for the exclusionary effects of its clothing policy. But *LF* does not go so far as specifying when an employer can be deemed to be abusing a 'neutrality' policy, or what factors might indicate such abuse (which would, in all probability, be the same factors indicating that the policy was not genuinely pursued and/or limited to the strictly necessary).

...'the concern to encourage, as a matter of principle, tolerance and respect, as well as acceptance of a greater degree of diversity'.

Another notable aspect of the judgment in *LF* is that the court does not take up the opportunity to provide guidance on which factors can legitimately be considered when assessing an employer's genuine need for imposing a 'neutrality' clothing policy on its workers. In *Wabe* it was held that the '*legitimate wishes*' of customers can be taken into account, which inevitably leads to the question: what is a legitimate wish? Is it legitimate for a customer to prefer to receive a service only from workers who do not wear any religious signs? Can a business rely on such a preference to restrict its workers' right to the freedom to manifest their religion?

LF also fails to explain what weight may be given, in the balance between freedom of religion and freedom to conduct business, to the potential adverse economic consequences on an employer of the absence of a 'neutrality' policy. Can employers rely on an anticipated (but not actual) loss of business from customers who are not tolerant of religious signs, or worse still, of specific religions? Looking at the facts of *LF*, would the possibility of the company losing Islamophobic customers be enough to tip the balance towards justifying the headscarf ban? Couldn't it be said that this possibility always exists, given that the general public includes people with a range of degrees of tolerance, including, inevitably, very intolerant people?

The principle that businesses can hide behind the prejudices of customers might be said to fly in the face of the principles of equality underpinning the Framework Directive. The CJEU's case law has long made clear that businesses cannot rely on the xenophobic or racist preferences of customers to get away with discriminatory treatment. Nearly 15 years ago, the court in *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn* C-54/07 [2008] ECLI:EU:C:2008:397 July 10, 2008 found that an employer committed direct discrimination by declaring that it would not employ Moroccan immigrants in line with the preferences of its customers [para 25]. By analogy, would an employer who refuses to hire a hijab-wearing worker, citing as justification the potential loss of customers intolerant of Islamic religious signs, not also be liable for discrimination?

LF does not answer these questions. The judgment merely emphasises that EU law does not stop member states from legislating to ascribe greater importance to the freedom to exercise or manifest a religion or belief than other freedoms, such as for example the freedom to conduct a business [para 52]. This might be said to amount to shying away from addressing the very serious problem raised in *LF*, and which AG Medina succinctly describes in her Opinion:

> *as a consequence of the judgment in WABE, employees observing religious clothing obligations are faced with the dilemma, in the literal sense of the word, of deciding between retaining a job in an undertaking or respecting the obligations prescribed by their faith'*. [para 50]

Many fear, as explained by AG Medina in her Opinion, that if such policies were to be generalised, Muslim women will suffer *'a deep disadvantage to becoming employees'* and a risk of being excluded from the labour market, creating a situation where '*double discrimination is a real possibility*', namely religious and sex discrimination [para 66]. *LF* does little to address this.

Relevance to the UK

CJEU decisions which post-date Brexit are not binding on UK courts but s6(2) of the European Union (Withdrawal) Act 2018 specifies that courts may *'have regard'* to such decisions so far as it is relevant to the matter before them. In practice, this decision will have inevitable relevance to courts in the UK not only in providing some guidance on how the Framework Directive is to be interpreted (implemented in the UK by the Equality Act 2010 (EA)), but also because the judgments touches on fundamental principles of equal treatment at work. UK courts are unlikely to adopt a more lenient approach to assessing the lawfulness of exclusionary clothing policies at work. On the contrary, courts may well go beyond the CJEU's stance, to hold that on a plain reading of the EA, and specifically section 13 which sets out the prohibition of direct discrimination, an employer refusing to hire a worker due to her headscarf amounts to less favourable treatment on the ground of religion or the manifestation thereof.

Conclusion

The judgment in *LF* will come as a disappointment to those hoping for a reversal of the CJEU's position on whether banning religious signs in the workplace can constitute direct discrimination. Despite some welcome clarification on the distinction between religion and belief, and the possibility of intra-group comparisons to reveal discrimination, the court has maintained the position that excluding workers who cannot comply with a 'neutral' clothing at work policy is not directly discriminatory. On indirect discrimination, and specifically when such policies will be justified, the judgment goes some way towards encouraging diversity in the workplace and brings attention to the risk of abuse of such policies to the detriment of some workers. Nevertheless, it leaves many questions unanswered, especially in relation to which arguments an employer might legitimately deploy to justify an exclusionary clothing policy.