Pride or Prejudice?

The CJEU Judgment in IX v Wabe and MH Müller Handels GmbH

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Rarely are CJEU judgments criticised as widely and unequivocally as the 2017 *Achbita* judgment, which allowed private employers to pursue a policy of neutrality – and ban visible signs of political, philosophical, and religious belief at work – in order to protect their financial interests at the expense of religious minorities. The joined cases *IX v Wabe and MH Müller Handels GmbH* offered the CJEU a second chance. Would it be willing to heed the arguments raised against Achbita and reconsider its decision? Or would it be too proud to admit past mistakes or too prejudiced to understand them? Hopes that the CJEU would be willing to revise *Achbita* diminished significantly after AG Rantos's disappointing Opinion in the case (analysed here). The decision in *IX v Wabe* (in short) to largely uphold *Achbita* was then also unsurprising, but nevertheless disappointing.

Facts of the cases

IX v Wabe: IX has been employed by WABE, a child day care centre, since 1 July 2014. After a period of parental leave, she returned to work in early 2016 wearing an Islamic headscarf. IX was requested to remove her headscarf as wearing religious clothing was against the company's policy of neutrality: employees are not allowed to wear visible signs of political, philosophical, or religious belief when interacting with customers. After she was suspended for refusing to comply with the rule, IX filed a complaint with the Hamburg Labour Court. This court asks the CJEU to reconsider its decision in *Achbita* that a policy of neutrality can be potential indirect discrimination but not amount to direct discrimination. In addition, it is critical of the CJEU's decision that an employer's desire to pursue a policy of neutrality towards customers is legitimate.

MH Müller Handels GmbH: MH Müller, a drugstore chain, does not allow its employees to wear large signs of political, philosophical, or religious belief at work, in order to protect its image of neutrality. One of its employees returned to work in 2014, after a period of parental leave, wearing an Islamic headscarf. Initially, she was allowed to perform work within the company where she did not have to remove her headscarf, but in July 2016 she was sent home for refusing to remove her headscarf. The German Federal Labour Court has asked the CJEU for clarification on the justification for a policy of neutrality. In addition, it wants to know whether the national constitutional right to freedom of religion can offer more favourable protection of the right to non-discrimination.

National Provisions Protecting the Right to Equality

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'. A concern raised by *Achbita* was that Member States could no longer apply more favourable national standards, and that the Franco-Belgian conception of neutrality endorsed in that judgment would have to be applied everywhere, thus imposing a diluted notion of the principle of equality on Member States with more favourable provisions (here and here). The reason for this concern was that the CJEU had ruled that the wish of employers to pursue a policy of neutrality is guaranteed by the right to freedom to conduct a business in Article 16 of the Charter of Fundamental Rights. Previously, it had ruled that Member States cannot apply more favourable legal provisions if they infringe the right to freedom to conduct a business (*Alemo-Herron*, para 31). The question was, therefore, whether *Achbita*

was merely being deferential to the Franco-Belgian conception of neutrality, or whether it imposed on states like Germany the obligation to adopt such a conception and deprive religious groups of the right to be free from discrimination.

In the present case, the CJEU clarified that national constitutional provisions protecting freedom of religion may be taken into account as more favourable provisions: 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' (para 86). It is a welcome clarification that the freedom of employers to conduct their business does not trump every other right, and that there still is a margin of appreciation for countries like Germany to adopt less regressive policies towards Muslims than the kind increasingly adopted in France and Belgium (see also here and here).

Yet we really do have the wrong notion of what EU non-discrimination law is for, and too low expectations of the CJEU if its conclusions on this point are seen as very positive. That there was concern that the law would be applied in such a way as to impose discrimination on religious minorities only shows how dreadful *Achbita* was. Moreover, we must be mindful of the margin of appreciation. First, the margin of appreciation can be used just as well to tolerate discrimination – *Achbita* is the case in point – and thus undermine the aims EU non-discrimination law seeks to achieve. Second, the CJEU would not have had to grant a margin of appreciation doctrine if it had simply accepted that the Directive 2000/78 sets minimum rules and allows more favourable national provisions. But it could not even accept that: it still demands such more favourable provisions to be balanced against the freedom to conduct a business, thereby leaving such provisions vulnerable to the financial interests of employers.

In *TSN*, the CJEU seemed to accept that when national rules are more favourable than the minimum rules in a Directive, they fall outside the scope of the Directive and therefore also the Charter (paras 52-53). It could have adopted the same approach in the present case and ruled that more favourable rules are not subject to the right to freedom to conduct a business in Article 16 of the Charter. Such a decision would have clarified its position on minimum harmonisation, but more importantly, it would have respected the choices of the EU legislature and provided better protection for religious minorities from discrimination.

Direct or Indirect Discrimination?

In *Achbita*, the CJEU held that a neutrality policy banning visible signs of political, philosophical, and religious belief at work does not amount to direct discrimination on grounds of religion and belief, since such a policy covers any manifestation of such beliefs without distinction (para 30). In the present case, the CJEU was asked to reconsider this decision. It affirmed *Achbita* on this point, however, and added that its finding that such policies do not constitute direct discrimination is 'not called into question … by the consideration that some workers follow religious precepts which prescribe certain dress'. A policy of neutrality may cause particular inconvenience to such workers but does not 'establish a difference of treatment between workers based on a criterion that is inextricably linked to religion or belief' (para 53). There is therefore no direct discrimination.

However, while the conclusion that a policy of neutrality is in principle not directly discriminatory may be correct, the CJEU later undermines its own analysis. The question posed by the referring court in *MH Müller Handels GmbH* is whether a ban on wearing visible signs of political, philosophical or religious beliefs is justified if that ban is limited to conspicuous, large-sized signs. The CJEU ruled that such a policy may be directly discriminatory: it 'is liable to have a greater effect on people with religious, philosophical or non-denominational beliefs which require the wearing of a large-sized sign' (para 72). In that case, the difference of treatment resulting from the rule is inextricably linked to the protected ground of religion and belief and 'must be regarded as directly based on that ground' (para 73).

This response is not consistent with the response to the first question: A neutrality policy that bans only conspicuous, large-sized signs, does amount to direct discrimination if, in practice, it has a greater effect on some religious people; yet a neutrality policy that prohibits the wearing of all visible signs does not constitute direct discrimination, even if it has a greater effect on some religious persons – and, evidently, blanket bans on religious, political, and philosophical signs have a greater effect on certain religious groups, namely people with beliefs which require the wearing of specific clothing or signs. If the CJEU is of the view that a policy amounts to direct discrimination if it is liable to have a greater effect on some religious people, one has to wonder why it does not classify all neutrality policies as directly discriminatory.

Justifying Neutrality

The CJEU seems to have learned from the criticism levelled at *Achbita* but responded thereto not by changing the unpalatable conclusions reached in that case, but by presenting them in a more appetising way.

In *Achbita*, it held 'that the desire to display … a policy of political, philosophical or religious neutrality *must* be considered legitimate' (para 37). In the present judgment, it ruled instead that such policies '*may be* regarded as legitimate' (para 63), thus leaving open the possibility that such policies are not legitimate. But then it makes the exact same mistake as in *Achbita*: it regards employers' financial interests and the subjective desires of their customers as more relevant than the right of religious employees not to be discriminated against. For a policy of neutrality to be legitimate, there must be a 'genuine need on the part of that employer, which it is for that employer to demonstrate' (para 64), and which it can demonstrate by considering 'the rights and legitimate wishes of customers or users' (para 65). Whether it should be acceptable to accommodate discriminatory customer wishes is not a question the CJEU seems to find relevant.

The CJEU was also wise enough not to repeat what it said in *Achbita* about the proportionality of neutrality policies, namely that they meet the condition of strict necessity when they cover only 'workers who interact with customers' (para 42). It ruled in that case that employers must, where possible, ban a Muslim employee to the back office, offering 'her a post not involving any visual contact with those customers, instead of dismissing her' (para 43). The CJEU may have realised as well that such conclusions are not very fitting for a court that likes to boast about its equality jurisprudence. However, not spelling out the unpalatable consequences of a judgment does not mean that they no longer follow logically from it. Unfortunately, the judgment in the present case will amount to exactly the same thing: if a neutrality policy is justified by the aim to accommodate the desires of customers, it will be strictly necessary only when it applies to employees interacting with customers; removing Muslim employees out of sight will then still be the least restrictive, and therefore 'best', company policy.

The main problem with the headscarf judgments is the approach to the justification of neutrality policies. How can the CJEU do better? The challenge is to see neutrality policies for what they are: neutrality is a secondary aim to that of several possible alternative aims. For instance, judicial officials may be prohibited to manifest their beliefs to avoid the appearance of partiality; teachers may be prohibited to manifest their beliefs to avoid children being influenced by such beliefs; and cashiers may be prohibited to manifest their beliefs in order to accommodate the wishes of customers. The stated aim of all these policies may be neutrality, but they clearly pursue very different aims. And what aim do private employers pursue by catering to the anti-religious sentiments of their customers? Indeed, they are pandering to prejudice in the name of profit (Opinion of AG Sharpston, para 133). Such aims should not be regarded as legitimate in the context of non-discrimination law.

Conclusion

IX v Wabe and MH Müller Handels GmbH is a missed opportunity for the CJEU to show that it understands the point of non-discrimination law and to protect religious minorities—and in particular female Muslims

—from discrimination. Unfortunately, the judgment shows that Brexit might have been a good thing for some social groups. In many respects, Muslim employees have always been better off in the UK than in other European countries. Under the CJEU's current jurisprudence, they may well be better off outside the EU than within it.

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