# ARTICLE

## THE ECJ LIFTS THE VEIL

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Pursuant to two decisions entered on March 14, 2016,[1] the ECJ ruled on two dismissals relating to the wearing of Islamic headscarves at the workplace, one in a Belgian and the second in a French company, and gave guidance on this highly controversial issue, which has become a veritable societal issue.

Anxiety was at its peak upon the reading out, last summer, of the opinion of the Advocate General (British) in the French case, for whom, barring exceptions for health or security grounds, there should be no restriction on the right to exercise religious freedom in the workplace. The company's commercial interest and, more generally, freedom of enterprise, even where clearly prejudicial situations had been established, were simply supposed to bow their heads in shame and yield to a superior interest.

As the decision loomed, the worst could be expected.

The British Advocate General was in competition with the German Advocate General, who defended a diametrically opposed view in the Belgian case, and managed to sway the court, with dogmatic thinking giving way (finally) to common sense.

Companies can thus ban and impose sanctions, as applicable, on the wearing of headscarves in the workplace provided certain conditions are met.

In essence, for the ECJ, dismissing an employee who wears a headscarf is not discriminatory so long as three cumulative conditions are met (Belgian decision):

**1/ The existence of a ban (in particular, under an internal rule) on wearing visible political, philosophic or religious symbols in the workplace**

This internal rule would treat all employees in the same way in terms of the indivisible fundamental freedoms that are freedom of political and philosophical opinions, by banning any visible symbol relating thereto, and create an appearance of neutrality as applied equally to all employees. In principle, under such conditions it would not be possible to accuse a company of any form of direct discrimination.

However, the absence of direct discrimination does not prevent the existence of indirect discrimination, where *"an apparently neutral provision, criterion or practice would put persons having a particular religion or belief* […] *at a particular disadvantage compared with other persons*", as was recalled by the ECJ.

If there is no internal rule (in other words, no general policy) within the company (French case), then it is appropriate to determine whether "*a genuine and determining occupational requirement*" exists, with a legitimate objective and a proportionate requirement that justifies it. In other words, in the current stance of applicable law, unless the company qualifies as an 'organization based on belief', only limited and stringently assessed requirements pertaining to health and safety can serve to justify a ban on religious symbols. In such scenario, as illustrated by the French case before the ECJ, the argument that a client no longer wanted to work with an employee wearing a headscarf does not carry weight.

In contrast, this same argument would be perfectly admissible so long as the employer has an internal policy of neutrality, which is based on the company's wish to project a neutral image in its relationship with its customers. In such case, it would have a legitimate aim.

**2/ Existence of a justification / legitimate aim**

In this respect, an employer's "*wish to project an image of neutrality towards customers constitutes sufficient justification to ban the visible display of any religious sign by the employees of a private company*". Freedom of enterprise is, so to speak, and this is a good thing, "sanctified" by the ECJ as sufficient justification when the customer relationship is concerned. This relationship, which is the very *raison d'être* of a company, is sacred. It cannot be undermined by religion.

Whoever brushes up against it will be stung, as the saying goes (termination of employment contract, possibly for serious misconduct) provided, however, a third and last condition is respected:

**3/ Search for an alternative position prior to dismissal**

The ECJ has laid down an unprecedented requirement, which is that the employer is required, prior to dismissing the employee, to try and find an alternative position for the employee where she would not have any visual or eye contact with customers, without this entailing an additional workload for that employee. It is therefore clear that only when no alternative position is available or if the employee refuses the proposed solution can the employer consider her dismissal.

**Freedom of enterprise can thus stand its own against religion.**

To ensure that, interested companies should refer to the El Khomri legislation which has allowed, since August 2016, including in company policy the principle of philosophical, political and religious neutrality (which presupposes that the prior agreement of the staff representative bodies has been obtained, as well as control by the labor inspectorate).

This being said, this rule will have to apply to a specific professional situation/area. In other words, it must be applied in a pertinent and consistent way, a general and absolute ban being unlawful by nature. The customer relationship argument is therefore the best model to follow.

Once a company policy along these lines is in place, any employee who fails to abide by it will face dismissal, unless another suitable position can be offered to her within the company.

We have advocated for and even dreamed of this day: the ECJ did it!

[1] Cases C 157/1515 Achbita v G4S Secure Solutions and C 188/115 Bougnaoui v Micropole Univers.