Preserving Prejudice in the Name of Profit

Martijn van den Brink 2021-03-01T15:14:07

Few CJEU judgments in recent years have received more criticism than the 'headscarf judgments', *Achbita* and *Bougnaoui*. In particular the decision in *Achbita* that private employers can legitimately pursue a policy of neutrality and ban expressions of political, religious, or philosophical belief at work, proved contentious. A wealth of incisive and insightful criticism of the judgment has been provided (e.g., here and here), and it is now for the CJEU to show whether it is prepared to address past mistakes. Two other headscarf cases, *IX v Wabe* and *MH Müller*, are currently pending before the CJEU and provide it with an excellent opportunity to do so. However, the first signs are not promising: Last week, Advocate General Rantos delivered his Opinion in these cases, which may be even more unpalatable than the *Achbita* judgment itself.

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 acceptance that an employer's desire to pursue a policy of neutrality towards customers is in principle 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. She filed a legal complaint that is currently pending before the German Federal Labour Court. This court has submitted questions to the CJEU, asking 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.

Justifying indirect discrimination

In *Achbita*, the CJEU ruled that a prohibition on wearing visible signs of political, ideological, or religious belief does not amount to direct discrimination. Commentators who criticised this decision then (here and here) will probably also criticise AG Rantos for reaching the same conclusion. Like the CJEU, he does not think that such a rule constitutes direct discrimination, as it applies equally to all beliefs (para 55). However, rules that introduce an indirect difference on the ground of religion or belief are also unlawful, unless they are justified. In my view, this is where the real problem lies: The justificatory burden is set too low, both by the CJEU in *Achbita* and by AG Rantos in his Opinion.

The question is whether an indirect difference in treatment based on religion be justified by an employer's desire to accommodate customer preferences. Or to put the matter more bluntly: can catering to the prejudiced views of customers be a legitimate aim within the scope of the Equal Treatment Framework Directive (Directive 2000/78)? Can an employer discriminate against black or LGBT people because their skin colour or sexual preferences causes offence to customers? Obviously not. So much seems clear from judgments in cases like *Feryn* or *Asocia#ia Accept*. Can an employer then discriminate against religious people because a headscarf causes offence to its customers? The obvious answer to this question has so far eluded the CJEU.

In *Achbita*, it decided that employers can legitimately display a policy of neutrality towards both public and private sector customers (para 37). AG Rantos blindly follows this position and thereby misses the point of non-discrimination law. Non-discrimination law seeks to reduce advantage gaps between specific social groups in our societies. Therefore, policies that discriminate against such groups are permissible only where they are clearly justified. Yet, when it comes to religion and belief, derogations from the principle of non-discrimination are not at all interpreted strictly by the CJEU.

First of all, it is remarkable that it is accepted that private employers pursue a legitimate aim by promoting an image of neutrality. What aim is served by banning garment expressing a personal belief? Private employers that pursue an image of neutrality only do so in order to increase profit by 'pandering to prejudice', as AG Sharpston aptly put it. That their desire to satisfy the prejudices of customers is uncritically accepted as legitimate (Opinion AG Rantos, paras 60-61) is highly problematic.

Equally problematic is the AG's cursory application of the proportionality principle. A common criticism of *Achbita* (e.g., here) is that the CJEU failed to apply 'strict proportionality', the final subtest of the proportionality assessment. Seeing the literature cited by the AG, he must have been aware of this criticism. And yet, he does not address it or apply 'strict proportionality'. Furthermore, the proportionality assessment, like his entire Opinion, is based on a strangely schizophrenic application of fundamental rights. He insists on the application of fundamental rights that justify restrictions on the right to wear religious clothing but denies the

applicability of rights that strengthen the position of vulnerable religious groups. For example, he invokes the 'freedom to found educational establishments with due respect for … the right of parents to ensure the education and teaching of their children in conformity with their … convictions' in Article 14(3) of the Charter (para 65). He also invokes 'the freedom to conduct a business' in Article 16 of the Charter (para 66). However, not only does the AG forget that restrictions can be placed on the exercise of these rights (*Giordano v Commission*, para 49), he also largely denies the application of the right to freedom of religion in Article 10 of the Charter (eg., paras 96-97). Used this way, it cannot surprise that fundamental rights do more harm than good to religious minorities.

That AG Rantos does not put *Achbita* to more rigorous scrutiny must be because he himself subscribes to its logic entirely. Consider his reply to the question of whether a policy of neutrality can be justified if it prohibits only large and clearly visible signs of personal belief, and not also small and indiscreet signs. The AG believes that it can, as small signs will not '*cause offence* to clients of the company' (para 74 – translation from Dutch language version). So he recognises that wearing large religious signs is prohibited so as not to cause offence to prejudiced customers, and yet he does not grasp the problem. That an Advocate General thinks that that it is not the perpetrator of discrimination who must change his intolerant attitudes, but rather the victim of discrimination who must change her religious practices, beggars belief.

Imposing prejudice on all?

What the decision in *Achbita* left unclear was whether the standards contained therein apply to all Member States or whether they leave room for more extensive protection of the right to non-discrimination. The referring courts in *IX v Wabe* and *MH Müller* seek to obtain clarification on this point. They ask whether national constitutional provisions which protect religious freedom can be regarded as more favourable provisions within the meaning of Article 8(1) of Directive 2000/78. According to this provision, 'Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive'. This is a crucial question. It is one thing to accept that states like France and Belgium can maintain their conception of neutrality but quite another to expect that states like Germany must adopt this conception and deprive religious groups of the right to be free from discrimination (see also, here).

AG Rantos' response to this question is disconcerting. Contrary to the unambiguous meaning of Article 8(1), he proposes to interpret the provision in a way that will make it more difficult to provide more favourable protection of the right to religious equality. He flatly rejects the idea that constitutional provisions protecting the right to freedom of religion can be used to offer more favourable provisions, since, he argues, this right is not intended to combat discrimination (paras 87-89). The right to freedom of religion and the right to freedom from discrimination may rest on different rationales, but that is beside the point here. As a matter of fact, the right to freedom of religion is sometimes used to offer more favourable protection to the right to non-discrimination, which is permissible according to Article 8(1).

Also disappointing is the fact that AG Rantos does not reflect on the point of minimum harmonisation. There have been worries that *Achbita* imposes a watered-down conception of the principle of non-discrimination on all Member States (here and here). This fear is born out of the decision in *Achbita* 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 (para 38). In a different context, the CJEU held that adopting more favourable measures is impermissible if they infringe the right to freedom to conduct a business (*Alemo-Herron*, para 31). If that principle also restricts Article 8(1) of Directive 2000/78, national fundamental rights that are more favourable to the protection of religious equality cannot be applied if they conflict with Article 16 of the Charter. The right to freedom to conduct a business would then prevent the protection of the right to freedom from discrimination.

However, in the *TSN* judgment, the CJEU seems to be taking a different course. It held that where a Directive allows for the adoption of more protective measures, such measures do not fall within the scope of the Directive (para 52). For this reason, such measures 'cannot be assessed in the light of the provisions of the Charter' (para 53). This would mean that more favourable measures adopted under Article 8(1) would not be subject to Article 16 of the Charter. As a result, countries like Germany could set more favourable standards and protect religious minorities from prejudice in the workplace. The Opinion of AG Rantos is a missed opportunity in this respect. He does not examine how the questions raised by the referring courts relate to those judgments, nor does he take the opportunity to clarify that the right to freedom to conduct a business is not intended to impose prejudice on all Member States.

The only positive aspect of the Opinion regarding the question of whether Member States may provide more favourable protection is that the AG seems to contradict himself. He considers that the right to freedom of religion cannot be used to provide more favourable protection, but also that this right need not be set aside when assessing the justification for a rule prohibiting visible signs of political, ideological, or religious belief. This seems inconsistent. Either the right to freedom of religion can be applied, or it cannot. According to the AG, the application of the right to freedom of religion is permissible, provided that the principle of non-discrimination is respected (para 108), but this is an odd response to the preliminary questions submitted. The national courts want to know whether they can apply the right to freedom of religion to *protect* the right to non-discrimination, not to *prejudice* it. AG Rantos does not clearly answer whether they can do so.

Pride and prejudice

This is only a partial analysis of the Opinion, but enough to show that it is seriously flawed. *Achbita* can perhaps be passed off as an unfortunate mistake, but to uphold this judgment would amount to gross negligence. Let us hope that the CJEU is not too proud to admit its past mistakes, or too prejudiced to understand them. In particular, it should consider again whether private employers pursue a legitimate aim in pursuing a policy of neutrality. But even if it remains convinced of its judgment in *Achbita*, it must find that Directive 2000/78 only sets minimum standards, and

that Member States may provide more favourable protection of the right to non-discrimination on the ground of religion.
