HUNGARIAN LABOUR LAW
E - J O U R N A L

Expressions of religious faith in companies

Consequences of the judgments of the Court of Justice of the European Union for France[*]

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The timeliness of the topic 'expressions of religious faith in the company'[1] does not mean it is well understood. Although it garners significant interests,[2] the phenomenon has not been studied extensively. There is no research that studies this topic in a systematic way, in order to identify expressions that may be described as 'religious' in companies within a defined scope. Furthermore, research relating to the number of disputes resulting in cases brought before the court are also lacking. Hence, the scope of religious expressions in companies and the signficance of ensuing litigation, are to date unknown.

To discover a basic trend, a study was conducted by the Observatory of Religious Faith in Business[3] based on a questionnaire completed by over a thousand employees pertaining to a specific category.[4] According to this study conducted for the year 2017, thirty-five per cent of the employees surveyed stated that they regularly observed their faith during work[5]. Moreover, the study indicates that it was in less than eight percent of the cases mentioned that the religious act observed resulted in some

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1 For the purposes of this contribution, expression refers to any event, request, behavior or purpose that has its origins in religious practice or belief that has an impact on or is manifested in a work relationship.

2 The subject gave rise to the publication of a volume by the Ministry of Labour in Januar 2017 a Practical Guide to religious matters in private companies available online. Articles were also published in the national press related to these issues (see, for example: « Religion : comment les entreprises font face », *Aujourd'hui en France,* 28 septembre 2017, 9.; « Religion en entreprise, gêne à la chaîne », *Le Monde,* 15 janvier 2018, 27.; « Le fait religieux en entreprise, source croissante d'inquiétude », *Le Figaro,* 2 février 2018, 9.; « Femmes voilées recherchent job désespérément », *Le Monde,* 5 février 2018, 10.). Lastly, several trade union organizations deal with this subject, see for example, (Le fait religieux en entreprise édition 2018, CFDT) or in the framework of roundtable discussions(Table ronde : la laïcité en entreprise, CGT, 10 juillet 2018).

3 Research program developed within the GDI plowing laboratory "Governance and Island Development" of the University of French Polynesia.

4 Namely, employees exercising managerial functions or executives not performing such functions.

5 Types of religious manifestations identified by this study: 22% visible wearing of a religious sign; 18% absence request; 14% refusal to work under the orders of a woman (8%) or with a woman (6%); 12% request for arrangement of working time; 10% prayer during the break; 5% prayer during the working time; 5% refusal to perform tasks; 5% proselytism; 4% stigmatization of people; 3% refusal to work with a colleague; 2% asks to work only with fellow worshippers.

'conflict'. Based on these numbers, both the extent of 'religious expressions in business' and the difficulties they raise seem relatively limited.

Some interesting decisions of the Court of Cassation, however, were rendered in respect of religious expressions. For example, in a case involving a Muslim butcher who refused to handle pork, the Social Chamber of the Court of Cassation stated that while "the employer is bound to respect the religious convictions of his employee", he "does not violate any rights in asking [the latter] to perform the task for which he was hired"[6]. Consequently, an employee who ceases work and refuses to perform the service for which he was recruited cannot validly demand severance pay without actual and serious cause. On the other hand, any dismissal is null and void if it is effected due to the religious convictions of the employee.

This rule was recently confirmed by the Court of Cassation in a case concerning an officer of public body responsible for Paris transports[7]. According to the public body's regulatory provisions, the officer was to take an oath before the President of the Tribunal de Grande Instance. On this occasion, she was to use the phrase "I swear". However, because of her Christian beliefs, she objected and proposed an alternative formula which the magistrate refused. Since she failed to take her oath, the officer was dismissed. The Court of Cassation declared however, that the dismissal was null and void, for it was effected because of the religious beliefs of the employee.

But it is above all the visible wearing of religious symbols, and in particular the Islamic headscarf or veil, which gave rise to remarkable judgements regarding the expression of religious faith in companies. Among the most recent is the judgment of the Social Chamber of the Court of Cassation rendered on 22 November 2017[8] in the context of a case which, in the framework of a preliminary reference[9], had been submitted to the Court of Justice of the European Union[10]. In this judgment, the Court of Cassation held that the employee dismissed for refusing to take off her veil had been a victim of direct discrimination, since her employer ordered her to observe the wishes of her customer. However, the Social Chamber was not satisfied with deciding only on this specific issue. In its judgment of 22 November 2017, it also declared that the prohibition was not merely the result of a judgment, but of an internal rule, not unlike in the Belgian case which had been decided by the Court of Justice of the European Union.[11] As such, the Social Chamber of the Court of Cassation took the opportunity to render a decision on principle. It therefore offers a synthesis – under national law – of the legal findings elaborated by the Court of Justice, in both the Belgian and the French case.

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6 Court of Cassation, social chamber 24 March 1998, *Bull. civ.* V, n° 171.

7 Court of Cassation, social chamber, 1 February 2017, à *paraître au Bulletin*, n° 16-10459.

8 Court of Cassation, social chamber 22 November 2017, à *paraître au Bulletin*, n° 13-19855.

9 Court of Cassation, social chamber, 9 April 2015, *Bull. civ.* V, n° 75.

10 C-188/15 *Bougnaoui et ADDH*, Grand Chamber.

11 C-157/15 *G4S Secure Solutions*, Grand Chamber.n° C-157/15. See the contribution in this volume by : Fabienne Kéfer, *Religion at work. The belgian experience.*

To fully understand this "*French sequel*" to the judgments of the Court of Justice of the European Union, it is important to return to the context from which the judgment of 22 November 2017 emerged (I). Upon this backdrop, it will be possible to deliver a critical analysis (II) of the various points of the findings of the Court of Cassation, which authorizes the employer to interfere with the employee's freedom of religion, provided that the employer invokes the correct provisions.

1. The French context

This French context is both a normative (1) and a judicial context (2).

1.1. The normative context

Several treaties[12] binding France as well as constitutional norms [13] enshrine the freedom of religion as such. This freedom, which includes the freedom to believe as well as the freedom to manifest or express one's beliefs, is also guaranteed by other legal institutions. An analysis of the same is necessary to better understand what this freedom entails in a state like France. In this respect, the principle of secularism (A) and the provisions of the Labor Code protecting employees' freedom of religion (B) should be examined in particular.

A) The principle of secularism

Article 4 of the Constitution of 4 October 1958 declares that "France is an indivisible, secular, democratic and social republic"[14]. As such, France is a state unrestricted by religious authority and belief, already guaranteed by the law of 9 December 1905 providing for the separation of church and State.

According to Article 1 of this law, "the Republic guarantees freedom of conscience. It guarantees the free exercise of fait under the sole restrictions provided for below in the interest of public order". Hence, secularism[15] does not mean that individuals must hide or conceal their beliefs; on the contrary,

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12 Examples include: the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 adopted by the Council of Europe (Article 9 - Freedom of thought, conscience and religion); the International Covenant on Civil and Political Rights of 16 December 1966 adopted within the framework of the United Nations (Article 18 - Right to freedom of thought, conscience and religion); the Charter of Fundamental Rights of the European Union of 18 December 2000 (Article 10 - Freedom of thought, conscience and religion).

13 According to Article 10 of the Declaration of the Rights of Man and Citizen of August 26, 1789, "no one shall be sanctioned for his opinions, even religious, provided that their manifestation does not disrupt the public order established by the Law".

14 Italics by me.

15 M. Miaille: *La laïcité. Solutions d'hier, problème d'aujourd'hui*. Dalloz, 3rd ed. 2016.

the secular Republic guarantees the freedom to express beliefs, in particular by wearing a cross, a kippah, a veil or even a burkini.[16]

Meanwhile, a secular state shall not favor or disadvantage any religion. Article 2 of the 1905 law states that "the Republic does not recognize, fund or subsidize any religion". It is in this sense that it is appropriate to speak of the "neutrality of the state", a corollary of the principle of equality governing the operation of public services. Thus, every person coming into contact with public administration must be treated the same way, regardless of his convictions, including religious belief. For its part, all administration must appear neutral. It is for this reason that the Council of State recently prohibited the installation of a Christmas nativity in a public facility[17]. And it is in light of this requirement of neutrality that administrative[18] and ordinary courts[19] have repeatedly held that public officials and public servants, in the performance of their duties, are prohibited from manifesting their beliefs, including the wearing of religious symbols. In other words, in the name of the neutrality of the State, restrictions on the wearing of religious symbols apply only to one category of workers: those exercising their activity in the public service.

B) Provisions of the Labor Code

Freedom of religion is also guaranteed by several provisions of the Labor Code. Two types of measures exist. Some allow for the freedom of religion to enter companies, while others, being rules

16 The Conseil d'État, by way of an order issued in the matter of an interim release of 26 August 2016, ordered the suspension of a municipal decree banning the wearing of burkinis on beaches. According to the Conseil d'État, such an order, taken in particular on the basis of the principle of secularism, was a grave and evidently unlawful violation of the freedom of conscience (as well as free movement and personal freedom).

17 See the decisions of the Conseil d'État of 9 November 2016, Fédération départementale des libres penseurs de Seine-et-Marne, n° 395122 et Fédération de la libre pensée de Vendée, n° 395223 : "On the premises of public buildings, headquarters of a public authority or a public service body, a public servant installing a Christmas nativity scene cannot, in the absence of special circumstances highlighting its cultural, artistic or festive character, be regarded as conforming to the requirements deriving from the principle of neutrality of public servants. On the other hand, in other public places, in view of the festive nature of the facilities related to the end of year festivities, especially on public roads, the installation on this occasion and during this period of a Christmas nativity scene by a public servant is admissible, since it does not constitute an act of proselytizing or expressing a religious opinion".

18 See, for example, the opinion of the Council of State of 23 June 2000 (Demoiselle Marteaux, application no. 217017, published in the compendium): "1) It follows from constitutional and legislative texts that the principle of freedom of conscience and the principle of the secularism of the state and the neutrality of public services apply to all; 2 °) While officials working in field of public education – like all other public officials – enjoy freedom of conscience which forbids any discrimination in the access to positions and in the course of their career which would be based on their religion, the principle of secularity nevertheless prevents them from having the right, in the public service, to manifest their religious beliefs; There is no need to distinguish between public service employees according to whether or not they are in charge of teaching duties; 3) It follows from what has been laid down above that the fact that an official in public education manifests his religious beliefs when exercising his functions, including wearing a sign intended to express his affiliation to a religion, constitutes a breach of his obligations".

19 Court of Cassation, Social Chamber, March 19, 2013, Bull. Civ. V, No 76: "whereas the Court of Appeal has held exactly that the principles of neutrality and secularism of the public service are applicable to all public services, including when they are provided by a private body and that, although the provisions of the Labor Code are intended to apply to the officials active in the ambit of primary health insurance funds, they are however subject to specific constraints resulting from the fact that they participate in rendering public services which forbids them, among other things, from manifesting their religious beliefs by was of external signs, in particular clothing".

of non-discrimination, require the employer to ignore the beliefs of employees and the manifestations of their faith.

Rights and freedoms of the employee, as is the case with freedom of religion, do not stop at the premises of a business. Two documents ensure their protection. The first document stems from the law of 4 August1982[20] which formed part of a wave of reforms designed to bring civil liberties into the companies.[21] These provisions framing the content of bylaws, are now included in Articles L. 1321-3 of the Labor Code[22]. The second document, originating from the law of 31 December 1992[23] is more general, since it extends the protection of rights and freedoms to the entire business life. Its provisions are enshrined in Articles L. 1121-1 of the Labor Code [24]. The two texts, drafted following the same model, prohibit bylaws or individual measures that would "restrict the rights of individuals or individual and collective freedoms, which cannot be justified by the nature of the task to be performed and are not proportionate to the aim pursued".

With the help of these standards, the employee, although subordinated to the employer, may nevertheless enforce the rights and freedoms he/she holds, including his/her freedom of religion, in labor relations. These rights may only be restricted subject to the double condition of justification and proportionality. For example, reasons of hygiene or safety prescribing the wearing of a helmet or hair net justify a restriction on the freedom to wear a veil, as long as the measure applies only to employees carrying out tasks that require protection.

These texts must be read together with other rules prohibiting discrimination, because the Labor Code also includes provisions that require indifference to religious faith. Namely, the employer must refrain from considering certain conditions, including "religious convictions"[25] when taking decisions

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20 Law n°82-689 on the freedom of workers in the company.

21 These reforms, made in 1982, are known as the Minister of Labor, Jean Auroux, at the origin of their elabouration. The latter submitted a report a year earlier, the main idea of which was summed up as follows: "citizens in the city, the workers must be so in the enterprise". The report stressed that "public freedoms, applicable to any citizen, must enter the company within the limits compatible with the constraints of production" (J. Auroux: Workers' Rights. Report to the President of the Republic and Prime Minister Minister, September 1981. *La Documentation française,* 1981. 7.).

22 "The rules of procedure may not contain:
1. Provisions contrary to the laws and regulations as well as to the provisions of collective agreements and agreements applicable in companies and establishments;
2. Provisions providing restrictions of the rights of individuals and individual and collective liberties which are not justified by the nature of the task to be performed, nor are they proportionate to the aim pursued;
3. Provisions discriminating against employees with equal professional capacity in their employment or work, because of their origin, sex, morals, sexual orientation or gender identity, age, family status or pregnancy, their genetic characteristics, their belonging or non-belonging, actual or presumed, to an ethnic group, a nation or a race, their political opinions, their trade union or works council activities, their religious convictions, physical appearance, their family name or because of their state of health or disability."

23 Law n° 92-1446 on employment, the development of part-time work and unemployment insurance.

24 "Restrictions of the rights of individuals and individual and collective liberties which are not justified by the nature of the task to be performed, or proportionate to the aim pursued are inadmissible".

25 Article L. 1132-1 of the Labor Code includes elements to be emphasized: "No one can be excluded from a recruitment procedure or access to an internship or a period of training in a company, no employee may be sanctioned, dismissed or subjected to a discriminatory measure, direct or indirect, as defined in Article 1 of Law n ° 2008-496 of 27 May 2008, which includes provisions implementing Community law in the field of the fight against discrimination, particularly with regard to remuneration, within the meaning of Article L. 3221-3, in respect of measures incentivizing, sharing or distributing actions for training, occupational reintegration and of qualification, integration, professional promotion, transfer or renewal of contract because of origin, sex, morals, sexual orientation, gender identity, age, family status or pregnancy, genetic characteristics, particular vulnerability resulting

or actions. These provisions, considered to be the transposition of the EC Directive of 27 November 2000[26], prohibit both direct and indirect discrimination. The difference between these two types of discrimination is whether they may be justified.

Direct discrimination is a measure directly based on a protected characteristic. As such, it cannot be justified. On the other hand, it may be shown that the criterion, which is in principle unlawful, constitutes an essential and decisive occupational requirement in light of the nature or conditions of the activity. For example, considering the characteristics of sex, age, skin color or physical appearance is unlawful. However, these same criteria constitute an essential and decisive occupational requirement when it comes to chosing an actress to play the role of Angela Davis. Similarly, coming back to our subject, the adherence of employees to the beliefs promoted by a company as a faith or belief may be an essential and decisive requirement.

Indirect discrimination is also prohibited. In this case, we are talking about seemingly neutral measures, which, in fact, result in a disadvantage for a category of persons characterized by a protected characteristic. In other words, it is not about a discriminatory aim, but a discriminatory effect. For example, a measure which tends to disadvantage part-time employees may constitute indirect discrimination on the basis of sex since, statistically, part-time jobs are mainly held by women. However, indirect discrimination may be more easily upheld. Namely, it must be shown that the measure serves an objective and legitimate aim, and that the means to achieve it are goth appropriate and necessary.

This normative framework is supplemented by the judicial context.

1.2. The judicial context

The 22 November 2017 judgment of the social chamber of the Court of Cassation is part of a particular judicial context, for it is not the first time that this court decided a case where an employee was dismissed for having refused to remove her Islamic veil. Reference is made here to the notorious *Baby Loup* case, the neighborhood association that ran a nursery and dismissed its deputy director for serious misconduct. The deputy director was accused of refusing to take off her veil even though a provision of the nursery's bylaws imposed a duty of neutrality on each staff member in the exercise of all activities of the association, both on premises of the nursery and outside when accompanying

from personal economic situation, apparent or unknown to the author of the action, membership or non-membership, actual or presumend, in an ethnic group, a nation or alleged race, political opinions, trade union or works council activities, religious beliefs, physical appearance, family name, place of residence or bank domicile, state of health, loss of autonomy or disability, ability to express oneself in a language other than French».

[26] Council Directive 2000/78 / EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

the children. This case resulted in contrary decisions handed down by two separate formations of the Court of Cassation, prompting the legislature to intervene.

Indeed, in a judgment of 19 March 2013[27] the social chamber of the Court of Cassation affirmed that the "principle of secularism established under Article 1 of the Constitution is not applicable to employees of private employers who do not offer a public service". Hence, the *Baby Loup* nursery's employee benefited from the protection guaranteed under the Labor Code: both the requirement that restrictions on religious freedom be justified and proportionate, and the prohibition of discrimination based, in particular, on religious belief. However, the social chamber found that the bylaw's restriction on the freedom of religion applying to all members of the staff, in respect of all activities and in all places, was too general and imprecise. Moreover, since the prohibition on wearing the veil did not constitute an essential and decisive occupational requirement, the dismissal of the employee was found to be null and void since it was based on a discriminatory reason.

The Court of Appeal did not uphold this decision, instead it found that the restriction on the freedom to manifest one's religion was, in view of the closed character of the association, justified and proportionate. Consequently, the employee brought a new appeal against this decision, which came before the plenary Court of Cassation. In its judgment of 25 June 2014[28] the Court of Cassation upheld with the judgment of the court of appeal, declaring that "the restriction on the freedom to manifest one's religion enshrined in the bylaws was not of a general nature, but was sufficiently precise, justified by the nature of the tasks to be performed by the employees of the association and proportionate to the desired purpose". As for the justification of the dismissal for serious misconduct, the plenary assembly of the Court of Cassation did not even consider it to fall under the scope of discrimination.

This judicial soap opera and dissension within the Court of Cassation, between the social chamber and the plenary assembly make the *Baby Loup* case all the more important. It may be considered to have been the reason for introducing a new article into the Labor Code. For employers who wish to impose a policy of neutrality within their company, the "Labor Act" of 8 August 2016[29] inserted the new article L. 1321-2-1[30]. According to this provision, "bylaws may contain provisions prescribing the principle of neutrality and restricting the manifestation of employees' religious beliefs if these restrictions are justified by the exercise of other fundamental rights and freedoms or by the requirements of the proper functioning of the business, in case they are proportionate to aim pursued".

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27 Court of Cassation, social chamber 19 March 2013, *Bull. civ.* V, n° 75.

28 Court of Cassatioon, plenary assembly 25 June 2014, *Bull. Ass. Plén.*, n° 1.

29 Law n° 2016-1088 on labor, modernizing social dialogue and securing career paths.

30 This provision was introduced by the Senate on first reading (Session of 14 June 2016) in order, according to Senator Françoise Labourde who introduced the amendment, "to avoid cases like that of Baby Loup nursery." Responding to the President of the Senate who asked the opinion of the Government on this amendment, the Minister of Labor, Myriam El Khomri, responded to the senator "we share your goal to fight against communitarianism, also in the are of enterprise". This text has not been the subject of any discussion in the National Assembly, the law having been adopted in application of Article 49 paragraph 3 of the Constitution which allows the Government to pass a provision without a vote in the National Assembly.

This provision is challenging since it differs, in its wording and content, from provisions introduced in 1982 and 1992 in the Labor Code to protect the rights and freedoms of the employee. Articles L. 1121-1 and L. 1321-3 of the Labor Code *prohibit* the restriction of the rights of individuals and individual and collective freedoms unless such restrictions are justified and proportionate. Article L. 1321-2-1 in turn, *allows* restrictions. Should the conditions of justification and proportionality persist, then this wording in fact reverses the logic, inverts the principle of prohibition. In addition, while the 1982 and 1992 provisions were intended to introduce freedoms into the workplace, the 2016 legislation is of a different nature. This provision enables employers to require employees to refrain from expressing any of their convictions in the company, not just their religious beliefs.

It is in this particular context that the Court of Cassation, more precisely, its social chamber, delivered the judgment of 22 November 2017, which will be analysed below.

2. A critical analysis

If the judgment rendered by the social chamber of the Court of Cassation on 22 November 2017 is the French case following the judgments of the Court of Justice of the European Union rendered on 14 March 2017, this is because it was the Court of Cassation which referred a question for a preliminary ruling. While it was the Court of Cassation that decided the dispute submitted to it (A), it went further by following the conclusions of the judgment of the Court of Justice of the European Union rendered in the context of a Belgian case,[31] one, with a distinct set of facts from the French case in that the ban on the wearing of a veil by an employee was derived from provisions of the relevant bylaws and not from a direct order of the employer. In this regard, the Court of Cassation provides a veritable user manual of so-called neutrality clauses that may be inserted into bylaws pursuant to Article L. 1321-2-1 of the Labor Code (B).

2.1. The dispute

The main contribution of the 22 November 2017 judgment of the Court of Cassation was to decide, in accordance with the interpretation set forth by the Court of Justice of the European Union, the dispute submitted to it.

This French case concerned an employee, Mrs Bougnaoui, a research engineer from a computer company, Micropole, who, since her hiring, had always worn the Islamic veil. However, following a meeting on the customer's premises, her employer asked her to stop wearing this a religious symbol

[31] See in this volume: Fabienne Kéfer.

because the customer had said that it had made number of employees feel uncomfortable and he asked that there be "no veil next time". The employee refused to comply with this instruction, and the employer dismissed her for cause.

To decide the case, the social chamber of the Court of Cassation decided to make a preliminary reference to the Court of Justice of the European Union[32], thereby positioning the dispute in the field of discrimination, a fact that had been ignored by the plenary assembly in the context of the Baby Loup case. According to Council Directive 78/2000/EC of 27 November 2000 establishing a general framework for equal treatment in the field of employment and occupation, discrimination based directly on religion or other beliefs are forbidden. However, Member States may set forth provisions declaring that a measure aiming to meet "an essential and decisive occupational requirement" that is based on one of these protected characteristics does not constitute discrimination. This is foreseen under Article L. 1133-1 of the French Labor Code[33].

The Court of Cassation, therefore, asked the Court of Justice whether the request of a customer of a computer consulting company to no longer have its IT services provided by an employee, an engineer wearing an Islamic headscarf, constitutes an essential and decisive occupational requirement, owing to the nature of the professional activity or the conditions under which it is exercised. The Court of Justice of the European Union answered this question in the negative in its judgment of 14 March 2017. It held that the concept of essential and decisive occupational requirement cannot "extend to subjective considerations, such as the willingness of the employer to take into account the particular requests of customers"[34]. It was then up to the Court of Cassation to decide the dispute submitted to it.

Unsurprisingly, in its judgment of 22 November 2017 the social chamber, held that the employee's dismissal for not complying with the employer's instruction to stop wearing the veil was a discriminatory measure, directly based on religious belief. In other words, the employer's ban on manifesting religious belief meant the consideration of a protected characteristic, even though wishes of customers cannot result in such objective prohibitions. The choice to wear a veil does not in any way impede the exercise research engineer duties and a contrary request from a customer does not constitute a professional and decisive requirement.

This would have been a welcome finding, one that would probably have not required the extra support of the Court of Justice of the European Union, in case the customer had demanded not to come into contact with a woman, a person living with a disability, a person of color or a homosexual. All this has been expressly confirmed in respect of the wearing of religious symbols. Nevertheless, the Court of Cassation arrives at its conclusion, declaring that such a ban is not based on a verbal

32 Court of Cassation, social chamber, 9 April 2015, *Bull. civ.* V, n° 75.

33 "Article L. 1132-1 does not preclude differences in treatment in case these meet an essential and decisive occupational requirement and provided that the objective is legitimate and the requirement proportionate."

34 C-188/15, *Bougnaoui et ADDH*, Grand Chamber, paragraph 40.

instruction of the employer, but much rather a written provision in the bylaws. In this respect, it resembles a user manual for neutrality clauses.

2.2. Neutrality clauses, instructions for use

The judgment of 22 November 2017 is particularly important because it declares findings going beyond merely deciding the case. For more clarity, the Court of Cassation has decided to publish an explanatory note on its website. In short, the Court of Cassation follows the conclusions of the two judgments of the Court of Justice handed down on 14 March 2017[35] and provides a first interpretation of the new provision of the Labor Code allowing the insertion of neutrality clauses into bylaws [36]. The Court's decision settles two important questions.

The first question is as follows: does the employer's ban on employees to manifest their convictions lose its discriminatory character in case it is enshrined in the bylaws?

This issue harks back to the Belgian case, where there was such a rule, first unwritten and then introduced into the company bylaws, which prohibited workers from wearing visible signs of philosophical, political and religious convictions at the workplace. In the opinion of the Court of Justice of the European Union, this prohibition does not constitute direct discrimination insofar as it is posed in a general and undifferentiated way: it aims to prohibit all visible signs of convictions, whatever their nature.

This finding is questionable. Namely, the prohibition, although general and undifferentiated, is nonetheless discriminatory. This is because the manifestation of all convictions, be they religious, philosophical or political, are protected by the rules governing the prohibition of discrimination. Therefore, a prohibition does not become permissible on the grounds that it is sweeping, encompassing several protected characteristics. On the contrary, it is all the more serious[37]. The Court of Justice thus confuses the absence of unequal treatment between persons displaying their convictions with discrimination.[38]

In its judgment of 22 November 2017, the Court of Cassation followed the interpretation given by the Court of Justice, since it was bound by it. It nevertheless restricts the scope of such bans. Indeed, according to the Court of Cassation, company provisions carrying such a prohibition can only result from bylaws or a memorandum (subject to the same provisions as the bylaws mentioned under Article

35 P. Adam: La CJUE ou l'anticyclone européen (À propos de la neutralité religieuse dans l'entreprise privée). *RDT,* 2017. 422.; S. Laulom: Un affaiblissement de la protection européenne contre les discriminations. *SSL,* 27 mars 2017. 6.

36 J. Mouly: Le voile dans l'entreprise et les clauses de neutralité : les enseignements de la CJUE "traduits" en droit interne par la Cour de cassation. *D.,* 2018. 218.

37 This would be even more obvious if were expressly aimed at (trade) unionist views – although references to political convictions actually include them as well.

38 Discriminate them all or you will give the impression of not discriminating any!

L 1321-5 of the Labor Code). Otherwise, the ban on manifestations of convictions is unenforceable against employees. This specific requirement under national law has two consequences. On the one hand, this means that the provision will be subject to mandatory consultation with staff representatives[39] and that it shall be communicated to the labor inspectorate[40] in charge of the company's supervision[41].

On the other hand, the Court of Cassation takes into account the new Article L. 1321-2-1 of the Labor Code which authorizes the insertion of a neutrality clause into the bylaws. In so doing, it renders this instrument to be the exclusive source of restrictive clauses for banning the expression of employee convictions. These guarantees, however, fail to solve a specific problem: bylaws are an instrument of power, they are documents drafted by the employer. Meanwhile, the decisions of the Court of Cassation and the Court of Justice of the European Union allow the employer to assert its normative power and prevent qualification as direct discrimination, even though it is equivalent to an order given to the employee verbally.

Since the classification of direct discrimination was – mistakenly – dismissed, the other question whether a statutory prohibition on wearing headscarves could constitute indirect discrimination was also raised.

Such a possibility is not excluded by the Court of Justice of the European Union. Indeed, it may be that this seemingly neutral measure – treating all workers of the enterprise in the same way, by forbidding them to express their convictions of any kind – in fact particularly disadvantages people adhering to specific beliefs, in this case, employees of the Muslim faith. National judges are therefore invited by the Court of Justice of the European Union to verify, on the one hand, that the measure is objectively justified by a legitimate reason and, on the other hand, that the means to achieve this objective are appropriate and necessary. Under these conditions, the qualification as indirect discrimination may also be rejected. However, the Court of Justice has provided two additional clarifications which bind the Court of Cassation.

First, in its judgment rendered in the Belgian case the Luxembourg Court identified grounds it considers to be legitimate and objective. According to the Court of Justice, "the desire to display, in relations with customers […] a policy of political, philosophical or religious neutrality must be regarded as legitimate"[42], this "the employer's wish ... relates to the freedom to conduct a business that is recognized in Article 16 of the Charter"[43] of Fundamental rights of the European Union. This position is surprising and even contradictory to that adopted in the context of the French case. Indeed, the Court of Justice held that the employer's willingness to take into account the wishes of customers was a subjective consideration that did not rule out direct discrimination. How then, could in the

39 Article L. 1321-4 of the Labour Code.

40 *Ibid.*

41 Article L. 1322-1 of the Labour Code.

42 C-157/15 *G4S Secure Solutions*, para 37.

43 Ibid., para 38.

event that there is a provision in the bylaws, this very same presumed wish of a possibly intolerant customer, become legitimate and objective grounds for restriction, so as to exclude qualification as indirect discrimination? Yet it is the same power that expresses itself through a different medium. Whether they are instructions made verbally, or enshrined in the bylaws, the two situations should be considered the same way[44]. Certainly the Court of Cassation adopts, in its judgment, a more cautious formulation, speaking of "the pursuit by the employer of a policy of neutrality". But the explanatory note published on the website makes reference to the "will of the company", to "a wish, relating to the freedom to conduct a business". Attaching it to the freedom to conduct a business is obsolete: such a will, by definition, is subjective. It cannot legitimize or render objective the prohibition of expressing convictions. In other words, a policy of neutrality cannot "self-legitimize" a neutrality clause!

Second, the Court of Justice of the European Union prescribes that the means to achieve this objective be appropriate and necessary. It gives some indications on how this condition may be fulfilled;[45] these were then followed by the Court of Cassation, declaring them to be conditions for the validity and the operation neutrality clauses. Thus, in order for it to be valid, the neutrality clause must be general and apply indiscriminately and may only concern employees who are in visual contact with customers.

In addition, in case of employees refusing to conceal their convictions under the operation of a valid clause, the employer must investigate whether it is possible to offer a workstation that does not involve direct visual contact with customers. Only if he/she does not succeed can he/she proceed to dismiss employees concerned. This new obligation of reorganization, which will have to be specified as to its scope and the types of jobs, promises to be a "litigation bees' nest".[46]

For the time being, the Court of Cassation only specifies that this obligation must be fulfilled taking into account the constraints inherent in the company, which must not be subjected to any additional burden. The fact remains that in stating these different conditions, the Court of Cassation supervises the application of the new article L. 1321-2-1 of the Labor Code, the wording of which does not contain any restrictions in respect of which employees may be concerned by the clause, nor does it foresee an obligation to reorganize workstations. This is to say the decision of 22 November 2017rendered by the social chamber already restricts the scope of this article.

Despite these restrictions, the solutions described above nevertheless give rise to certain doubts. Why distinguish between situations where the ban on wearing the veil stems from an individual order and where it is laid down in a provision in the bylaws? In both cases, the ban is in fact the manifestation of the same power held by the employer. It is only the medium that differs. In other words, while the employer cannot directly order an employee to remove her veil, this may be done by merely inserting

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44 In the same vein, see the passionate analysis by M.-F. Bied-Charreton: La liberté de manifester ses convictions dans l'entreprise par le port d'un signe extérieur. *Dr. Ouvr.,* 2018. 81.

45 Ibid. § 40, 42 et 43.

46 G. Calvez: Politiques de neutralité au sein des entreprises privées: un feu vert de la CJUE? *SSL,* 27 March 2017. 6.

a neutrality clause into the bylaws of the company. The objective, however, is the same, it is the expression of the same will, it results from the same power. Only, in the second case, the Court of Justice, and equally, the Court of Cassation are of the view that the measure is not discriminatory[47], while at the same time broadly acknowledging that the freedom to manifest all kinds of convictions, not only religious, of all employees shall be infringed.

In the wake of the *Viking* and *Laval* judgments, this jurisprudence is a new illustration of the importance freedom of to conduct a business has gained before the Court of Justice, becoming more a source of submission and restriction of freedoms, than a source of emancipation. In the area of the freedom of religion, this trend is now gaining ground also in French law, while more generally, it compromises the guarantees of the rights and freedoms of employees against the power of the employer. It is worth recalling what the Court of Cassation said in its Annual Report, ten years ago: "Because they are based on an irreducible conception of man, discrimination is, in principle, inadmissible. […] Discrimination can not be justified by any overriding reason, since its prohibition is designed precisely to protect a higher value."[48] Consideration of the freedom to conduct a business should not be free to deviate from this imperative.

47 This is not, however, the position of the Human Rights Committee, which on 16 July 2018 found against France, in the context of the Baby Loup case, for violation of the New York Covenant on Civil and Political Rights. See J. Mouly: L'affaire Baby Loup devant le Comité onusien des droits de l'homme: vers une révision déchirante de la jurisprudence internet? *D.*, 2018. 2097.

48 Court of Cassation: Rapport annuel 2008. *La documentation française,* 2008. 87.