



Religion at work. The Belgian experience¹

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When it comes to sensitive issues such as religious practices at a company workplace, judges must resolve conflicts with solutions intimately bound to the national context: traditions, culture and the approach to various phenomena differ from one country to the other. The Belgian context was brought under the limelight in the *Achbita v G4S Secure Solutions* case, the first reference for a preliminary ruling on this subject brought before the Court of Justice of the European Union (CJEU), which was then followed, a month or so later by a question from France in the *Bougnaoui v Micropole Universe* case.

The *Achbita v G4S Secure Solutions* case is closely tied to a particular national context. For the past ten years or so, Belgian judges have had to decide an astonishing number of cases centering on the conflict between an employer and a worker who wishes to wear the veil at work. In this particular case, the dispute arose between a Muslim worker and a company located in the Antwerp region, which provides reception and customer services to clients from both the public and the private sectors. Ms. Achbita was employed at the company as a receptionist, an activity which she carried out on the premises of her employer's clients. A company rule, initially unwritten but well known to all,³ forbade staff to wear outward signs of political, philosophical and religious beliefs at the workplace. For three years, the worker complied with the rule without protest, wearing the headscarf only outside her workplace. Later, however, she decided to wear it also during working hours. Her employer objected, referring to its neutrality policy. Despite several discussions regarding the subject, in the presence of representatives of the Trade Union Organization and the Center for Equal Opportunities and the Fight against Racism and Discrimination (hereinafter referred to as the Center for Equal Opportunities),

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³ At the time the dispute arose, the obligation of neutrality was a well-known verbal rule and its existence was not contested (para. 11 of the judgment).

no agreement was reached, with the dispute resulting in Ms. Achbita's dismissal with compensation in lieu of notice.

Ms. Achbita lodged a claim with the court. I will come back⁴ to this case and its aftermath below. At this point, it should be mentioned that Ms. Achbita's case was supported by the Center for Equal Opportunities, who was anxious for a preliminary reference to be submitted to the Court of Justice of the European Union to obtain a decision in principle. At first, the worker and the Center lost their case. Then the Court of Cassation referred a question for a preliminary ruling to the Court of Justice; and the reply given by the latter in its judgment of 14 March 2017⁵ is not in conflict with Belgian law, but much rather consolidates majority case law.

While the *Achbita v G4S Secure Solutions* case may give the impression that the Belgian legal order is uncompromising in respect of religious signs, it will be argued that Belgian labor law displays, in many respects, a certain openness, including its approach to religious minorities, with the exception of the veil, an issue of particular acuteness today.

To understand the position of Belgian law, it is worth referring to its specific context (1). This will be followed by a study of three particular domains in which the following question arises: when a worker argues that his/her religious commandments are in conflict with his/her employer's instructions, how does Belgian law or indeed the Belgian judge respond? First, I discuss adjustments to the work schedule for religious reasons (2); next, I turn to conscientious objections (3), concluding with the thorny question of wearing religious symbols or clothing (4).

1. The Belgian context

The Belgian State, a small country of just over 11 million inhabitants,⁶ is characterized by a mutual independence of the Church and the State, balanced by the public funding of religious denominations. The two cardinal rules upon which the relationship between Church and State rests may be construed as follows. First of all, the state has an obligation of neutrality: it shall not side with one religion or another and cannot favor one faith over the others. Moreover, the state also has the obligation to promote the free exercise of worship. Indeed, the Belgian Constitution guarantees, in its Articles 19 and 20, the freedom of religion and the freedom of expression on all matters, including beliefs, whether these are religious or not. These provisions, conceived as early as 1831 in reaction to the Dutch-Protestant regime, were intended to prevent any interference by public authorities with the freedom of religion, to prevent them from imposing a dominant religion and its commandments, including rules governing

⁴ No 14.

⁵ ECJ, 14 March 2017, *G4S Secure Solutions*, C-157/15, ECLI:EU:C:2017:203.

⁶ Figures available on http://www.ibz.rrn.fgov.be/fileadmin/user_upload/fr/pop/statistiques/population-bevolking-20180101.pdf.

the days of rest. As such, they were a bulwark against state action.⁷ The constitutional guarantee also requires that the state protect its citizens in the exercise of their freedoms. The legislator fulfilled this obligation in particular, by means of Articles 142 through 146 of the Penal Code.⁸ A number of religious denominations are subsidized: the Catholic, Protestant, Anglican and Orthodox churches as well as Judaism and Islam; and the same is true of the philosophical organization entitled organized secularism.⁹ The ministers of these religions as well as secular counselors are remunerated as civil servants (Article 181 of the Constitution). The state must maintain churches, mosques and synagogues, etc.¹⁰

Notwithstanding the above, Belgium is of Catholic tradition. It is well known that the royal family is Catholic. There is an emphatically Christian political party (which has not held a majority of the seats for a long time), a Christian union (holding the majority), a Christian mutuality, etc.

This Catholic tradition is reflected in substantive labor law, partly forged by the dominant culture, which in turn is shaped by centuries-old traditions of religious inspiration; these provisions are particularly apparent in the regulation of rest periods. This consistency between law and tradition has for a long time concealed the issues of religion in the fulfillment of an employment contract.

Two elements combined were to break this harmony.¹¹ The first was the end of our society's religious homogeneity. While the Roman Catholic religion is still the dominant faith of Belgians, over the last decades we have witnessed the deterioration not only of its practice but also of the number of its believers and the influence of the Church of Rome. Although there have not been any official figures from Belgium for several years, studies show that Roman Catholics still accounted for 72% of the population in 1981 but represented, in 2009, only 50%, with 2,5% of the population being other Christians, 0.4% Jews, 5% Muslims, 0.3% Buddhists, 9,2% atheists and 32,6% claiming to be "without religious affiliation".¹² This erosion of the Catholic faith is accompanied by a return to faith with a rush to Evangelical churches and other religious or sectarian movements. The immigration of Muslim workers adds to the diversity of beliefs and practices of minority groups, while the influx of Italian and Polish immigrants had not brought about such an upheaval giving rise to new questions.

⁷ V. DUJARDIN: Les droits constitutionnels originaires. In: M. VERDUSSEN – N. BONBLED (dir.): *Les droits constitutionnels en Belgique*. Bruxelles, Bruylant, 2011. 54–57.; S. WATTIEZ: *Le financement public des cultes et des organisations philosophiques non confessionnelles*, Bruxelles, Bruylant, 2016. 67–81.

⁸ F. PERIN: *Cours de droit constitutionnel*. Liège, Presses universitaires, 1985. Livre I, Les libertés publiques, 131.

⁹ On organized secularism, see <https://www.laicite.be>, and M. ALPARSLAN SAYGI: *La laïcité dans l'ordre constitutionnel belge*. Louvain-la-Neuve, Académia, 2015.

¹⁰ See J.-Ph. SCHREIBER – C. SÄGESSER: *Le financement public des religions et de la laïcité en Belgique*. Bruxelles, Bruylant, 2010. S. WATTIEZ: *Le financement public des cultes et des organisations philosophiques non confessionnelles*, Bruxelles, Bruylant, 2016.

¹¹ Comp. A. POUSSON: Convictions religieuses et activité salariée. In: *Mélanges dédiés au président Michel Despax*. Toulouse, Presses de l'université des sciences sociales, 2002. 286–289.; J.-C. SCIBERRAS: Travail et religion dans l'entreprise: une cohabitation sous tension. *Droit social*, 2010. 72–73.

¹² L. VOYÉ – K. DOBBELAERE – J. BILLIET: Une Église marginalisée ? In: L. VOYÉ – K. DOBBELAERE – K. AEBTS (coord.): *Autres temps, autres mœurs*. Bruxelles, RacineCampus, 2012. 147. The figures are not fundamentally different in Germany and the UK (T. LOCK: Religious freedom and belief discrimination in Germany and the United Kingdom: towards a common European standard? *European Law Review*, 2013. 655–676.).

The second phenomenon is linked to the central role of fundamental rights. Gone are the days when the employers' dominance in the work relationship made it possible to impose common prayers before and after work.¹³ Fundamental rights are universal; benefitting both women and men at work. Their increasing recognition, especially within companies, has led minorities to assert their rights when their religious commandments clash with employer's instructions.

2. Work schedule adjustments for religious reasons

Belgium, like many other European countries, including Turkey, has chosen Sunday as the weekly rest day. The Labor Act of 16 March 1971 prohibits the employer from having or letting his staff work on Sundays, with a few exceptions (Article 11). The Sunday rest, enshrined in the law in 1905, follows a custom shared by Christians and laypeople; it is not intended to force workers to observe the duties of Catholic worship. The choice of Sunday has been criticized since the elaboration of the – now repealed – law of 17 July 1905 on the Sunday rest in industrial and commercial enterprises. Some members of parliament argued that the provision violated the constitutionally guaranteed freedom of religion. This objection was rejected on the grounds that the provision was not intended to force anyone to observe the faith or the days of rest it enshrines. It merely establishes a right to rest; it does not forbid work, but rather forbids it to make others work, which is different. The choice of Sunday is explained both by tradition and by the fact that a day of rest only makes sense when it is taken collectively: “Sunday is the general, official day of rest foreseen under secular customs, public convention and the law in many areas. It would be absurd to think that a day of rest could be real, whole, comfortable, and pleasant on any other day of the week. Sunday is the day when children do not have to go to school, where strolls, family trips take place, when both worker and employer have the opportunity for entertainment, education etc.”¹⁴

As far as holidays are concerned, six out of ten originate in a religious holiday,¹⁵ some of which have pagan roots. Over time, these days of rest have become deeply embedded in Belgian culture and have become somewhat disconnected from their origins. Abolishing the day of rest on December 25 would trigger an outcry also in secular circles. Similarly, abolishing the Pentecost holiday would meet with

¹³ PH. AUVERGNON: L'expression des convictions religieuses sur le lieu de travail. In: *Droit et religion en Europe. Études en l'honneur de Francis Messner*. Strasbourg, Presses universitaires, 2014. 31.

¹⁴ *Pasinomie* (1905), 281–282. In the same vein, Mons, 9 December 1994, *Journal des tribunaux du travail* (1995), 54. See eg. Court of Arbitration, 12 November 1992, No. 70/92, para. B.2.5.: « In choosing Sunday, the legislator took into account religious and family traditions and cultural and sporting practices. It reasonably assumed that employees would choose Sunday if their choice was entirely free » and, in the same vein, Court of Arbitration, 3 mars 1994, n° 19/94, para. B.3. According to J. VANDE LANOTTE and G. GOEDERTIER, the same justification can be given for the choice of public holidays (*Handboek Belgisch publiekrecht*. Bruges, die Keure, 2010. 542., n° 801.).

¹⁵ Easter Monday, Ascension, Pentecost Monday, Assumption, All Saints' Day, Christmas (Article 1 of the Royal Decree of 18 April 1974).

strong opposition from the region of Entre-Sambre-et-Meuse which, with its folk marches in period dress, commemorates, at that date, the battles against Napoleon Bonaparte.

While the choice of these days of rest poses no difficulty for a large part of the population working in Belgium, workers of one minority faith may find themselves overlooked. Based on this observation, the Minister of Employment had, in 2009, surveyed social interlocutors through the National Labor Council on a proposal to transform one of the holidays into a moving holiday, so as to allow the worker to choose the day of rest according to his religious and philosophical convictions. Unanimously, the Council voted against this solution, giving rise to even more complications. The Council then took the opportunity to encourage companies to give the possibility for allowing workers to replace a holiday falling on a Sunday (or another habitual non-working day) with a religious holiday.¹⁶

There are, however, possibilities for the employee to obtain a change in his/her work schedule because of his/her religious or philosophical convictions.

Firstly, Article 20 (5) of the Employment Contracts Act of 3 July 1978 makes the employer liable to “give the worker the time necessary to fulfill his religious duties”. The origin of this provision may be found in the law of 10 March 1900 on the employment contract. At that time, the ban on Sunday labor was still under discussion (becoming a reality in 1905). While many companies had, on a voluntary basis, already adopted the six-day work regime, this was not the case for all. Working seven days a week prevented workers who from exercising their worship – if they wished to do so – or from fulfilling their civic obligations of acting as a guardian, a witness in court, and so on. That is why the 1900 Act forced employers to give workers the time necessary to do so.¹⁷

The employer’s obligation does not mean that the worker has the right to be absent all day; only a brief break must be granted, that is, the time necessary to observe religious commandments.¹⁸ Moreover, the employer may oppose it as long as he/she can justify his/her refusal on grounds that are free of discrimination.

Among the reasons that may be invoked by the employer are the threat of disorganization at work or the disproportionate prejudice resulting from rescheduling, for example in certain companies having continuous action.¹⁹ A teacher who is a follower of the Worldwide Church of God, dismissed for having absented himself several times without authorization to observe a ritual obligation, invoked, in support of his challenge, Article 20(5) of the Act of 3 July 1978, Article 9 of the European Convention on Human Rights and the constitutional right to freedom of worship. The labor court dismissed his claim with due consideration to the organizational constraints of the school justifying the employer’s

¹⁶ Opinion No. 1687 of 6 May 2009.

¹⁷ It is clear from the parliamentary debates that Christians are not the only target; Jews are expressly designated as beneficiaries of the provision (*Ann. Parl.*, Chambre, 1898–1899. 963 and 966).

¹⁸ *Pand. b.*, Bruxelles, Larcier, 1922., vol. 113, v° Travail (contrat de), col. 698, n° 900.

¹⁹ *Ann. Parl.*, Sénat, 1899–1900. 230.; P. HORION – G. DECHARNEUX: *Louage de services manuels*. Bruxelles, Bruylant, 1936. 40., n° 441.

decision.²⁰ The issue of work schedule adjustments is less acute in respect of Muslim workers than in the case of Jewish and Seventh-day Adventist observers who keep the Sabbath. There is no “day of the Lord” in Islam, which does not impose a day of rest, so much so that Algerian law, for example, does not require the employer to give the employees the facilities necessary to perform their ritual prayers; these are only permissible where the organization of work allows it.²¹ In any case, a worker who wishes to be absent for an Islamic holiday must ask for permission. A worker was dismissed for being absent without permission for a pilgrimage to Mecca. He was denied the right to unemployment benefits for having voluntarily given up his job. The court dismissed his claim, finding that he had other possibilities to meet his duties, including going on a pilgrimage during his annual vacation.²²

Reasons of hygiene can also be put forward to oppose the request of the employee. One company, a manufacturer of pharmaceuticals, permitted Muslim workers to pray at the workplace as long as it was done during breaks and in the break room. A worker had been dismissed because, despite several warnings, he had been absent from his workstation many times to pray outside the time provided for this purpose in the production room. For reasons of hygiene, it was forbidden to be barefoot and it was imperative that protective shoes be worn. The worker alleged the unfairness of his dismissal; the court dismissed it.²³

In addition, various international agreements concluded by Belgium with, inter alia, Morocco and Turkey, grant workers who come to Belgium within the framework of the Convention, the right to work without pay on statutory holidays (a part of which are religious holidays) of their country of origin. Absence on such days is unpaid but shall not be considered unjustified.²⁴

3. Conscientious objection

The law expressly provides for the right of members of certain professions to refuse to perform a grave act because their conscience prevents them from doing so. For example, doctors are not required to terminate a pregnancy, the law imposes then an information obligation to ensure that patients have access to services they are entitled to (Article 350 of the Penal Code).

Where there is no express provision, it has long been accepted in Belgium that conscientious objection allows a worker or jobseeker to be released from his/her obligations or to benefit from

²⁰ C. trav. Antwerp, 18 April 1989, *Limburgs Rechtsleven*, (1989) 105.

²¹ G. GRABA – M. KORICHE: Libertés, droits individuels et vie professionnelle en Algérie. In: PH. AUVERGNON (dir.): *Libertés individuelles et relations de travail : le possible, le permis et l'interdit ?* Bordeaux, Presses universitaires, 2011. 306.

²² P. GROENINCKX and D. PIETERS: Expressievrijheid en werkloosheid. *Revue de droit social* (1982), 346; D. PIETERS: *Passende arbeid. Een onderzoek naar de werkbereidheidsvereiste in het Belgisch recht*. Anvers, Kluwer rechtswetenschappen, 1983. 380.

²³ Trib. trav. Nivelles, 11 March 1994, *Revue de jurisprudence de Liège, Mons et Bruxelles*, (1994) 1400.

²⁴ Act of 13 December 1976 approving bilateral agreements on employment of foreign workers in Belgium (M.B., 17 June 1977) and, in particular, the Belgian-Moroccan Convention of 17 February 1964 on the employment of Moroccan workers in Belgium and the Agreement between Belgium and Turkey on the employment of Turkish workers in Belgium.

preferential treatment. Conscientious objection deserves the same protection as any other manifestation of religious freedom. In fact, it is not reserved for believers; agnostics are protected in the same way.

The refusal to perform a task for religious reasons should be assessed, *inter alia*, in the context of the challenge to the payment of unemployment benefits. In some cases, jurisprudence displays a lenient interpretation of the conditions for granting unemployment benefits to job-seekers making a conscientious objection to accept or to keep a job. If he/she wishes to be compensated through unemployment insurance, a jobseeker must be involuntarily deprived of work and remain available on the labor market; he/she is obliged to accept any suitable employment and not to abandon it without legitimate reasons. Otherwise, the jobseeker's behavior will be sanctioned.

In the case law, we may discern various approaches to the possibility of declining or giving up a job because of one's religious or philosophical convictions. Conditions under which the religious justification may be accepted can be summarized as follows:²⁵

- (i) the jobseeker must assert a religious or philosophical conviction;
- (ii) he/she must be a genuine observer of the faith/belief;
- (iii) the employment proposed must be irreconcilable with the faith or belief.

In principle, freedom of religion and belief includes the right to retain discretion about them and not to disclose them, since they pertain to the aspects of private life.²⁶ Nevertheless, when it is a matter for a person, and particularly for a worker, to solicit an exceptional regime for religious reasons, proof of the authenticity of his/her faith or belief may be required. Both European²⁷ and Belgian²⁸ case law converge in this direction.

Incompatibility between the proposed work and the belief can, for example, be of an organizational nature, related in particular to working hours. This was the case with a Seventh-day Adventist worker, a trained electrician, who had been offered and refused a job at the Ministry of Public Works with regular Saturdays. The National Employment Office (the body deciding on the granting of unemployment benefits) imposed a sanction on him (temporary refusal of unemployment benefits). This sanction was challenged in court.²⁹ The judges found that religious reasons may justify a refusal of employment: "A society which claims to respect the principles of freedom and human dignity obviously cannot lead an individual [...] to accept a job whose very nature compels him to act against

²⁵ Act of 13 December 1976 approving bilateral agreements on employment of foreign workers in Belgium (M.B., 17 June 1977) and, in particular, the Belgian-Moroccan Convention of 17 February 1964 on the employment of Moroccan workers in Belgium and the Agreement between Belgium and Turkey on the employment of Turkish workers in Belgium.

²⁶ ECtHR, *Sinan Işık v. Turkey*, App. No. 21924/05 (judgment of 2 February 2010), § 42.

²⁷ ECtHR, *Kosteski v. the former Yugoslav Republic of Macedonia*, App. No. 55170/00 (judgment of 13 April 2006). See eg. J. RINGELHEIM: *Droit et religion dans l'Europe des juges – La jurisprudence de la Cour européenne des droits de l'homme. In: Convictions philosophiques et religieuses et droits positifs*. Bruylant, Bruxelles, 2010. 522.

²⁸ C. trav. Mons, 8 November 1985, *Journal des tribunaux du travail*, (1986) 292.

²⁹ The procedure took four judicial instances before finding its epilogue; with the question of the proof of the refusal being at the heart of the controversy (See C. trav. Bruxelles, 21 January 1982, *Journal des tribunaux du travail*, (1982) 387 and Cass., 12 December 1983, *Journal des tribunaux du travail*, (1984) 37).

his deepest convictions [...]. The principle or commandment invoked must belong to the essential core of the faith (in its content) and be of absolute nature. The opinion asserted must refer to a fundamental belief which commits the very person who invokes it; and must also be, in the ethics of the person professing it, of a non-negotiable character". Employment that results in obligations clashing with the jobseeker's religious commandments cannot be considered appropriate for a sincerely observant job seeker.³⁰

Similarly, it has been held that an unemployed orthodox Jew shall not make himself unavailable on the job market by refusing to work on Saturdays.³¹

On the other hand, it was held in 1998 that Jehovah's Witnesses' visits on Saturdays and Sundays were not part of the core of their religious practice, so that a Jehovah's witness job seeker made himself unavailable on the job market by refusing to work on Saturdays and Sundays.³² The case law in the Netherlands also goes in this direction.³³ It is questionable whether these decisions are consistent with the most recent case law of the European Court of Human Rights, which includes under the practices protected by Article 9 practices closely related to belief, even if they are not imposed by it.³⁴

Incompatibility between the proposed work and the belief may be related to the activity to be performed. In this respect, there was only one scenario examined by Belgian judges. Since the 1970s, it has been well established that an unemployed person of Islamic faith can legitimately refuse a job involving the loading and unloading pork from trucks. For Belgian courts, it is irrelevant whether all Muslims obey this commandment or not; it is sufficient that the practice exists and that the jobseeker concerned firmly believes that he must comply with it, so that it forms a major obstacle for him in accepting the employment which is not suitable for him.³⁵

When the religious objection arises in the course of the contract, it has the effect, when accepted, of rendering the refusal of the employee lawful. No doubt he runs the risk of becoming unable to fulfil the employment contract, leading to the termination of the same. Such termination, however, shall not be attributable to a fault on his part.³⁶ It is still necessary to determine in which cases conscientious objection may give rise to release from an obligation; keeping in mind that religious freedom shall not always serve as a justification for insubordination; in the conflict between this

³⁰ C. trav. Mons, 8 November 1985, *Journal des tribunaux du travail*, (1986) 292.

³¹ Comm. appel (chômage), 21 December 1962, *Journal des tribunaux*, (1963) 285.

³² C. trav. Ghent, 28 April 1998, *Algemeen juridisch tijdschrift*, (1998–99) 928.

³³ D. CUYPERS: Werkloosheid, passende dienstbetrekkingen en godsdienst. *Rechtskundig Weekblad*, (1998–99) 852, No. 7, according to whom the difference between the case of the Jehovah's Witness and that of the Seventh-Day Adventist worker seems to hold to the extent of unavailability.

³⁴ ECtHR, *Leyla Şahin v. Turkey*, App. No. 44774/98 (judgment of 10 November 2005); ECtHR, *Eweida and others v. United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10 (judgment of 15 January 2013).

³⁵ C. trav. Brussels, 5 December 1974, quoted by Ph. GOSSERIES: Observations (sous C. trav. Mons, 8 novembre 1985). *Journal des tribunaux du travail*, (1986) 294, No. 3; C. trav. Brussels, 7 November 1974, *Tijdschrift voor bestuurrecht*, (1975) 164.

³⁶ In the same vein, M. WEISS: Droits fondamentaux, libertés individuelles et relations de travail en Allemagne. In: PH. AUVERGNON (dir.): *Libertés individuelles et relations de travail : le possible, le permis et l'interdit ?* Bordeaux, Presses universitaires, 2011. 123.

freedom and other rights, the latter may prevail; in this case, the employer will not have to take into account the conscientious objection.³⁷

4. Religious clothing and symbols

4.1. Public service

The applicable rules shall differ depending on whether the employee is employed by a private company or in public service. Civil servants hold the fundamental right to religious freedom, as well as the right to equal treatment. However, because they reflect the neutrality of public service, considered in Belgium to be a principle of constitutional law,³⁸ they may be subject to more stringent restrictions.³⁹ That is why, for example, it is inconceivable in present-day Belgium that a judge would wear a Sikh turban or an Islamic headscarf, as we see in the United Kingdom. That is also the reason why the prohibition of religious symbols is more easily admitted in jurisprudence, whether it concerns the teachers of public schools or the administrative staff of a public service institution,⁴⁰ with however a recent exception: some courts show more tolerance in case the employee does not come into contact with clients of the public service.⁴¹

4.2. An incoming tide of lawsuits

In the private sector, the debate is particularly heated. Belgium has few Jews and Sikhs and the Salafist beard has not been the subject of case-law so far. Therefore, the discussion centers on the Islamic headscarf worn by female workers coming into contact with customers.

³⁷ This is the case revolving around the refusal of housekeepers to work for gay clients (see *infra*, n° 19). See eg. the *Ladele* and *McFarlane* cases decided at the same time as the *Eweida* case [ECtHR, *Eweida and others v. United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10 (judgment of 15 January 2013)].

³⁸ In a democratic State governed by the rule of law, authority must be neutral, because it is the authority of all citizens and for all citizens and must, in principle, treat them equally without discrimination based on their religion, belief or preference for a community or party. For this reason, public officials can therefore be expected, in the performance of their duties, to observe strictly the principles of neutrality and equality of users with regard to citizens. Educational neutrality also aims to preserve the fundamental rights of pupils and their parents. These rights have as their primary purpose to protect human rights against abuses of power by organs of authority. It cannot be accepted that a public service employee, in this case a teacher in formal education, invokes a fundamental right to justify a lack of knowledge of the fundamental rights of citizens, in this case of pupils and their parents (Counsel of State, 21 December 2010, n° 210.000, para. 6.7.2, al. 2); see eg Constitutional Court, 15 mars 2011, n° 40/2011, para. B.9.5, al. 3.

³⁹ F. KRENC: Quelques considérations sur la religion dans la vie professionnelle. In: M. VERDUSSEN – P. JOASSART (ed.): *La vie privée au travail*. Limal, Anthemis, 2011. 128–129.; C. MATHIEU – P. DE HERT – S. GUTWIRTH: Le port de signes convictionnels par les agents publics. In: M.-C. FOBLET – J.-P. SCHREIBER (coord.): *Les assises de l'interculturalité*. Bruxelles, Larcier, 2013. 343–391.

⁴⁰ See Trib. trav. Brussels (réf.), 24 September 2012, *Chroniques de droit social*, (2014) 351.

⁴¹ Trib. trav. Brussels, 16 November 2015 (réf.), R.G. 15/78/28/A.

The grounds for prohibition put forward by employers vary: reasons of hygiene, the protection of sensitive clients (in a pediatric or psychiatric ward), the desire to present a neutral image of the company, the desire – be it sincere or not – of the employer to reflect a certain commercial image. From the mid-2000s, the issue of wearing headscarves in schools and in the public arena hit the headlines. In the business world too, conflicts arose and escalated within a short period of time. In less than 10 years, there have been eight court cases – not counting litigation that was not publicized – and at least three cases are still pending. In 2004 a dispute arose between the famous bookstore Club and one of its clerks, which resulted in a judgment delivered in 2008 by the Labor Court of Brussels.⁴² A dispute arose in 2006 – judgment pending – between Ms. Achbita and her employer. Then, in 2010, a pharmacy was confronted with the issue,⁴³ in 2011, a business,⁴⁴ in 2012, a public service institution of Brussels. In 2013,⁴⁵ it was at Hema that the dispute erupted, we will evoke this issue below, and, in 2015 the dispute emerged at Actiris (a public placement agency)⁴⁶ and in a supermarket.⁴⁷

The reasons for the ban on the veil are, almost always exactly the same: the employer says that religious signs are banned to reflect objectivity and neutrality. Apart from the *Hema* and *Actiris* cases, these reasons have been confirmed by the Belgian courts. The reasoning of the judges can be summarized as follows: the worker is not subject to the prohibition as a Muslim but because she wears a conspicuous symbol of her religious beliefs; all workers are subject to the same rule, the employer is not more intolerant of one conviction than another, hence, there is no discrimination.

The *Hema* case⁴⁸ is of particular interest because it is the first time that a worker has successfully asserted her claim, and because the judge laid down the theoretical guidelines foreshadowing the judgments that will be handed down by the Court of Justice in the next few years.

The facts are as follows. A young Flemish convert to Islam was put, as a temporary worker, at the disposal of a branch of the famous chain of Hema stores. While in the Netherlands, the uniform includes, for those who wish to wear it, a matching scarf, nothing is planned in Belgium. No indication is made in the uniform guide, hence, the worker wears her own scarf. A few weeks later, apparently due to criticism from some of the customers, the store manager asked the saleswoman to work without a scarf, which she refused. Two days later, Hema decided to stop using the services of this temporary worker, therefore, her temporary employment contract was not renewed by the temporary work agency.

⁴² C. trav. Brussels, 15 January 2008, *Journal des tribunaux du travail*, (2008) 140

⁴³ Trib. trav. Brussels, 2 November 2010, R.G. 05/22188/A.

⁴⁴ C. trav. Antwerp, 23 December 2011, *Chroniques de droit social*, (2014) 346.

⁴⁵ See Trib. trav. Brussels (réf.), 24 September 2012, *Chroniques de droit social*, (2014) 351.

⁴⁶ Trib. trav. Brussels, 16 November 2015 (réf.), R.G. 15/78/28/A. The court's decision is largely explained by the fact that the employer had not adopted a consistent and coherent policy

⁴⁷ Trib. trav. Brussels, 18 May 2015, R.G. 14/5803/A.

⁴⁸ Trib. trav. Tongeren, 2 January 2013, *Chroniques de droit social*, (2014) 356. ; and I. PLETS : La jurisprudence lue pour vous. *Orientations*, (2013/3) 22.

The court was sensitive to the fact that there was no clearly established principle of neutrality at the company, that the request to remove the headscarf was to satisfy the clients' wishes and that the termination of the contractual relations was due to the worker's refusal to refrain from expressing her religious beliefs at her workplace. This is direct discrimination, unless a genuine and overriding occupational requirement may be invoked to justify the difference in treatment. According to the court, such a requirement does not exist: the saleswoman's duties did not require an absence of a headscarf to be properly executed.

Already at that time, the Center for Equal Opportunities had decided to support women workers in their struggle; the institution intended to oppose neutrality policies pursued by private companies. The Centre joined the action of the employee and had, in vain, tried to convince the judge to submit a preliminary reference to the Court of Justice. Having not found direct discrimination, the court refused to grant this request.

4.3. *The Achbita judgment of the Court of Justice*

A few days after the judgment was rendered in the *Hema* case, the European Court of Human Rights delivered its *Eweida* judgment, which does not generally condemn all policies of neutrality: it found that the "employer's wish to project a certain corporate image [...] was undoubtedly legitimate."⁴⁹ The Court also emphasizes that domestic authorities enjoy a wide margin of appreciation. This finding fueled the debate at a time when the *Achbita v G4S Secure Solutions* case was still pending before the Court of Cassation.

As mentioned above, the Center for Equal Opportunities wanted to use Ms. Achbita's trial as a pilot case. There were two points around which the Center's vigorous arguments centered – achieving some success in its informal correspondence with employers. On the one hand, it argued, a private sector employer cannot adopt a policy of neutrality, since that is the exclusive right of the public sector.⁵⁰ It should be pointed out that this argument lacked all legal foundation and was purely the conviction of the Center. On the other hand, the Center strongly asserted that a prohibition to manifest one's religious or philosophical convictions is direct discrimination on the basis of religion, which implies that the employer can only justify it by invoking genuine and overriding professional requirements.

After the case was dismissed on the merits, Ms. Achbita and the Center for Equal Opportunities appealed on points of law, explicitly seeking the Court of Cassation to refer a preliminary question to the Court of Justice. The lengthy appeal criticized, in particular, the Labor Court for disregarding the

⁴⁹ ECtHR, *and others v. United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10 (judgment of 15 January 2013), § 94.

⁵⁰ CENTRE INTERFÉDÉRAL POUR L'ÉGALITÉ DES CHANCES ET LA LUTTE CONTRE LE RACISME ET LES DISCRIMINATIONS : *Les signes d'appartenance convictionnelle. État des lieux et pistes de travail*. 15., available on <http://signes.diversite.be/note-signes-convictionnels.pdf>.

concept of direct discrimination within the meaning of Article 2.2 of Directive 2000/78 establishing a general framework for equal treatment in occupational and employment relationships. The Court of Cassation, pursuant to Article 267 of the Treaty on the Functioning of the European Union, referred the question to the Court of Justice for a preliminary ruling, asking whether the ban on wearing a headscarf as a Muslim in the workplace constitutes direct discrimination within the meaning of Article 2.2 (a) of the Directive, where the rule in force at the employer's workplace prohibits all employees from wearing any outward signs of their political, philosophical or religious convictions at work.⁵¹

The preliminary ruling of the Court of Justice gave Ms. Achbita and the Center an answer which opposed both elements forming the backbone of their argument. Namely, (i) public authorities do not have the exclusive right to establish a policy of neutrality, since such a policy finds its legal justification in Article 16 of the Charter of Fundamental Rights of the Union. (ii) The company's internal rule cannot be categorized as direct discrimination owing to its general nature; this rule "refers to the wearing of visible signs of political, philosophical or religious beliefs and therefore covers any manifestation of such beliefs without distinction. The rule must, therefore, be regarded as treating all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, *inter alia*, to dress neutrally, which precludes the wearing of such signs." This rule was not applied to Ms. Achbita any differently than to other workers. It did not establish, the Court concludes, a difference of treatment directly based on religion or belief within the meaning of Article 2 of Directive 2000/78.

4.4. The consequences of the Achbita judgment

The *Achbita* decision was welcomed in public discourse as an important step forward. The Center for Equal Opportunities finally received the clarification it had been waiting for; trade unions and employers' organizations welcomed the legal certainty it brought about. Only academic circles deplore the lack of clarity, the implied statements and the shortcuts in the reasoning of the Court.

On a concrete level, the judgment has put an end to several debates. It can no longer be argued, first of all, that the concern for neutrality is reserved for public authorities. Freedom to conduct business allows a private company to use neutrality as a means to achieve its commercial objectives, namely to reflect an image of service-orientedness, as well as an image of cleanliness, politeness, punctuality, etc.

The discussion surrounding the direct or indirect nature of discrimination resulting from a policy of neutrality has also been brought to an end. Following word for word the judgment of the Court of Justice, the Court of Cassation dismissed Ms. Achbita's and the Center for Equal Opportunities' appeal by its judgment of 9 October 2017: the Labor Court of Antwerp found that the prohibition of

⁵¹ Court of cassation, 9 March 2015, *Pasicrisie*, (2015) 616.

wearing an Islamic headscarf in the workplace due to a policy of neutrality does not constitute direct discrimination.⁵²

In the same judgment the Court of Cassation recognizes that an internal rule of the company, even if unwritten, is sufficient for such a prohibition to be valid: it is not essential that the neutrality clause be enshrined in the by-laws of the company. This position stands in stark contrast with the decision adopted a few weeks later by the French Court of Cassation.⁵³

Finally, the judgment of the Court of Justice consolidates the direction taken by the majority of Belgian judges: the prohibition of religious signs is only permissible if it follows from a general policy of neutrality applied in a coherent manner. This condition is twofold. First, the policy must be general. If a dress code is stated in a general way, banning all religious signs, it does not constitute a difference of treatment directly based on religion. At the same time, the employer's policy cannot be directed against a particular religion or religious practice. This condition was already highlighted in the *Hema* case: the ban was found to be unlawful because it was a reaction solely to the wearing of the veil. Secondly, the policy must be enforced in a coherent and systematic way. This condition is of a precautionary nature, to prevent company policies from targeting a particular religion. In the *Hema* case this too was lacking: the employer did not have a genuine general neutrality policy. In this regard, it is worth drawing on the *Eweida* judgment of the European Court of Human Rights: the inconsistency of the employer (*British Airways*), combined with other factors, led to the conclusion that the interference and the sacrifice requested of Ms. Eweida was disproportionate.

The *Achbita* case is not over. The Court of Cassation dismissed the appeal on the ground of discrimination but quashed the contested decision on grounds of unfair dismissal. The referring court (the Ghent Labor Court) will still have to look into the issue of indirect discrimination because this qualification will be decisive in determining whether Ms. Achbita was subject to unfair dismissal.

In this context, the Ghent Court remains free to decide the ban on wearing the veil constituted indirect discrimination, that the policy of neutrality was (i) objectively justified by a legitimate aim and (ii) that the means used to achieve this objective were appropriate and (iii) necessary. In order to reach that conclusion, the court will have to take into account the various guidelines established by the Court of Justice in its judgment of 14 March 2017. The judge is thus asked to check, "taking into account the inherent constraints to which the undertaking is subject, and without G4S being required to take on an additional burden", whether the employer could offer the worker a position without direct contact with customers, without G4S being required to take on an additional burden. The judge's margin of appreciation is quite broad.⁵⁴

⁵² Court of cassation, 9 October 2017, *Revue de jurisprudence de Liège, Mons et Bruxelles*, (2018) 118.

⁵³ Court of cassation of France (Soc.), 22 November 2017, No. 2484.

⁵⁴ ECJ, 14 March 2017, *G4S Secure Solutions*, C-157/15, ECLI:EU:C:2017:203, para. 43.

The approach expected of the employer is similar to reasonable accommodation. However, it cannot be discerned, in my view, from paragraph 43 of the *G4S Secure Solutions* case that the Court of Justice formulated a reasonable accommodation *obligation*. Such an obligation exists in respect of disabled workers; the directive goes on to state that the obligation prevails, unless the measures to be put in place “would impose a disproportionate burden on the employer”. The *Achbita* judgment, on the other hand, is formulated much more restrictively: it foresees a possible change of position for religious reasons in case it does not cause any inconvenience to the employer (“without G4S being required to take on an additional burden”), an obligation well below what is stipulated in the directive for disabled workers.⁵⁵ The possibility of offering another position for religious reasons is only taken into account when assessing whether the prohibition of the veil was necessary:⁵⁶ in case the employer had attempted to adjust the working conditions of its worker, it will more easily pass the proportionality test.

The emerging public discourse and the fact that those concerned were satisfied with this line of jurisprudence, may be surprising since, in reality, disputes continue to arise. The Center for Equal Opportunities adopted a fallback position, pleading on the one hand the existence of indirect discrimination on the grounds of religion, and on the other, indirect discrimination on the basis of the worker’s gender.

Furthermore, in *Achbita*, the Court of Justice has (to date) not given a comprehensive ruling. The ruling does not apply to all cases. In this case, the worker was in contact with customers and it is this circumstance that formed the basis of an obligation to display an image of neutrality. It would be wrong to infer that the Court restricts the scope of the prohibition of religious symbols to the sole situation where the staff is in contact with the customers. This is substantiated first, by the adverb “notably” in paragraph 38, mentioned by the Court when assessing the legitimacy of the objective pursued (“notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer’s customers”), implying that there are other assumptions where customer neutrality may justify a neutral dress code. Think, for example, of employees who are in contact with suppliers.

More importantly, the Court does not say that it is solely a desire for neutrality vis-à-vis the outside world that would constitute a legitimate aim. Namely, it does not exclude objectives such as an aspiration for social peace, for example,⁵⁷ which may be disrupted by the fact that workers exercise

⁵⁵ In the same vein, F. DORSEMONT: *Vrijheid van religie op de werkplaats en het Hof van Justitie: terug naar de cuius regio, illius religio? Recht, Religie en samenleving*, (2016/2) 97–98.; E. BRIBOSIA – I. RORIVE: *Affaires Achbita et Bougnaoui : entre neutralité et préjugés. Revue trimestrielle des droits de l’homme*, (2017) 1035. See however, regarding the obligation to offer another position, D. CUYPERS: *Er zit meer onder en hoofdhoek(arrest) dan men vermoedt. Rechtskundig Weekblad*, (2016–2017) 1322.

⁵⁶ It was along these lines that Advocate General Sharpston argued in her Opinion preceding the *Micropole Univers* judgment (para. 125).

⁵⁷ In this vein, R. MCCREA: *Faith at work: the CJEU’s headscarf rulings. EU Law Analysis*, available at <http://eulawanalysis.blogspot.be/2017/03/faith-at-work-cjeus-headscarf-rulings.html>; J.-E. RAY : *De la laïcité de l’État à la neutralité religieuse dans l’entreprise. In: L’actualité au prisme du droit*, available at <http://www.leclubdesjuristes.com/3-questions-a-jean-emmanuel-ray-decision-de-cour-europeenne-de-justice-concernant-port-voile-entreprise/>, who, relying on the *Eweida* judgment, argued that in *Ms. Ladele’s*

their rights to different religions at their workplace, including their right, in the name of their religion and within the purview of their freedom of expression, to criticize the religious opinions of others.⁵⁸ Nor does the decision exclude the view that freedom of enterprise allows a private company to make neutrality a philosophy in the service of its other workers, who have the right not to have a religion at all. The Court has not been asked to rule on this point and the caution of its answer does not allow for a restriction of the scope of the judgment. For more certainty in this regard, the Court must be asked a specific question on this point...

Among the elements on which the Court remains silent, is the issue of the discreteness of the religious sign. The Strasbourg Court made it an element of assessment in *Eweida*; the Opinion of Advocate General Kokott preceding the *Achbita* ruling suggested that the size and conspicuous nature of the symbol should be taken into account in the framework of the proportionality test. But the Court did not include this element in the answer given to the domestic judge.

5. Conclusion

Nearly twenty years ago, Alain Pousson wrote that religious and philosophical convictions are both “a factor of cohesion and a leaven of corporate disorganization”.⁵⁹ The corporate context has proven to be a place of tension and confrontation between the rights of the various parties involved: the right of the employee to manifest his religion, the right of the employer to ensure that the work is carried out efficiently, the right to promote a brand image, the right to equal treatment, the freedom of other employees not to have a religion and the right to be free from proselytism, etc. Belgian law undoubtedly offers a very open legal framework for religious diversity. The reconciliation of the various interests is not always without difficulty, as evidenced by the debate on veil.

The debate surrounding religious practices does not stop here and is constantly reignited. An example would be the incident described by the Belgian daily newspaper *La Dernière Heure*, in June 2017 under the title “Cleaning ladies who refuse to work with gays”.⁶⁰ Several Belgian companies offering cleaning services to their private clientele have, since 2016, been faced with the situation that their employees refused to perform cleaning services for a client, on the grounds that he is a homosexual; the reasons given are religious. According to the article, the same tendency is increasingly observed in the home care sector. The Center for Equal Opportunities and the Fight against Racism

case, the infringement of her religious freedom was the consequence of a complaint made by her colleagues at work – and not by clients – against the preferential treatment she enjoyed because of her religious beliefs.

⁵⁸ Voy. C. MATHIEU: Le respect de la liberté religieuse dans l'entreprise. *Revue de droit du travail*, (2012) 17–23.; L. VICKERS: Freedom of religion and belief. In: F. DORSEMONT – K. LÖRCHER – I. SCHÖMANN (ed.): *The European Convention on Human Rights and the Employment Relation*. Oxford, Hart Publishing, 2013. 222.

⁵⁹ A. POUSSON: Convictions religieuses et activités salariées. In: *Mélanges dédiés au président Michel Despax*. Toulouse, Presses de l'Université des sciences sociales, 2002. 311.

⁶⁰ <http://www.dhnet.be/actu/societe/ces-femmes-de-menage-qui-refusent-de-travailler-chez-des-gays59399212cd702b5fbf0ac430>

and Discrimination, called upon by the association of companies active in the sector, considers that the facts of these cases do not fall within the scope of the law aimed at combating certain forms of discrimination because the discriminatory attitude is not displayed by the cleaning company, which is the contracting party to the victim, but by its employee, who does not fall under the scope of the law; and discrimination could only be established in case the employer refused to supply the service. As far as European law is concerned, there is no directive governing such situations.⁶¹ Meanwhile, the Council of the EU is at a stalemate in the debate on a directive proposed by the Commission in 2008⁶² extending the prohibition of discrimination based on religion, disability, age or sexual orientation to areas other than labor relations, such as access to goods and services and the provision of goods and services to the public.

The task of national judges is not easy. They have a wide margin of appreciation, and given the lack of consensus at European level, it is primarily the task of the Commission to reconcile conflicting rights and to find a balanced decision on what constitutes proportionate harm and what doesn't. I end these reflections quoting G. Gonzalez who claims that the case-law is developing in this area which is difficult to systematize.

⁶¹ F. KÉFER – P. WAULETEL: La préférence discriminatoire d'une travailleuse à l'égard de la clientèle ou l'affaire. *Bougnouli c. Micropole Univers* inversée. In: J. WILDEMEERSCH – P. PASCHALIDIS (coord.): *Liber amicorum Melchior Wathelet*. Bruxelles, Larcier, 2018. 495–522.

⁶² Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, 2 July 2008, COM(2008) 426 final.