

Religious Dress at UK Workplaces Revisited – is the fuss justified?

Article By:

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“Bosses can ban burkas, scarves, crosses” shouts the front page of last Tuesday’s Metro, followed by a commentary far too short to explain that this is almost always untrue.

This is the resurrection of an old debate concerning the extent of your right to manifest your religion at work through how you dress. When last seen, the European Court of Justice had decided in a ***Eweida v. British Airways*** that it would be religious discrimination to ban an employee from wearing a visible crucifix at work unless there was a good reason for it, for example health and safety. The two cases which led to yesterday’s headline (one of which – spoiler alert – said that bosses *couldn’t* ban religious dress) were considering slightly separate points. ***Bougnaoui v. ADDH*** considered whether it would be discriminatory for the employer to react to a customer complaint by banning the wearing of a Muslim head scarf, while ***Achbita v. G4S*** asked whether it would still be discriminatory if the employer banned *all* outward signs of religious or political belief.

In *Bougnaoui* the ECJ was clear – if you use the potentially discriminatory views of your customers as a ground for imposing dress restrictions on your employees, that will be unlawful. Ms Bougnaoui wore a headscarf at work but was asked to remove it after a customer complained. That was just visiting the customer’s views on the employer’s staff and so was unlawful.

However, in *Achbita* the employer maintained a written, comprehensive and consistent ban on the wearing of all religious and political symbols, regardless of the faith or political affiliation in question. It did this because it wished to present a picture of overt neutrality among its workforce. This was in turn a result of the nature of its business, supplying security and reception staff to a variety of Government and private sector clients, some in highly confidential and security-critical environments. It did not want those customers to have any reason, real or (particularly) perceived, to doubt the commitment, loyalty or intentions of the people G4S supplied to them.

The ECJ had to find that there was no direct discrimination on religious grounds since all religions and beliefs were treated exactly the same. Ms Achbita’s headscarf was no more or less welcome than would have been Ms Eweida’s little crucifix. It then asked whether G4S’s stance could constitute unlawful indirect discrimination, i.e. whether it was the imposition of a provision, criteria or practice (the ban on religious indicators in what you wear at work) which prejudiced more people with a particular characteristic than not (religion), affected the individual employee (Achbita’s headscarf)

and wasn't justifiable.

The question here therefore revolved around whether G4S's ban was justifiable, i.e. a proportionate means of achieving a legitimate aim. The objective of overt neutrality was accepted as a legitimate aim given the very particular circumstances of the services G4S provided and to whom. This will obviously be very much the exception as corporate objectives go, hence the misleading nature of the Metro's headline. But even given the legitimacy of the objective, was a blanket ban on religious or political wear a proportionate means of achieving it?

Reluctantly the ECJ decided that it was, largely since there was no other means of achieving that objective. Nonetheless, to satisfy that test G4S had to show that the policy was enforced regardless of religion and no matter how mainstream (and so probably uncontroversial) the political belief. That meant not just the items in the title but also what the employee manifested through badges worn and bags carried, etc. It meant showing there was rigorous enforcement of the rule – obviously you could not claim it as necessary if breaches were ignored. It meant also that G4S had to show that it had considered means by which the adverse impact of the rule had been minimised as far as practicable, for example by applying the rule only to those in sensitive public/client-facing roles and looking at the possibility of transferring affected staff out of those jobs where possible.

The ECJ's decision has been greeted with predictable dismay by religious leaders. "It will lead to an increase in hate crime", says one, and "shows that faith communities are no longer welcome", says another, both equally without supporting evidence. The issue here however is not suppressing religious belief at all, but in allowing businesses *where it really matters* (a tiny minority only) to provide a service where its customers do not have grounds to push back against individuals on perceived political or religious grounds. At one level, professional opportunity could thereby be said to be increased, not limited.

But I repeat – the businesses in which overt neutrality will be a legitimate aim will be very few in number indeed. These cases do not alter for a moment the basic rule that limiting religious manifestation in the workplace will be unlawful discrimination unless you have an exceptionally good reason to do so. But then you are left with the headline: "Bosses Can't Generally Ban Burkas", etc. and that somehow lacks the same punch.

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