

## International Labor Rights Case Law\_Template for Commentaries

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Decision-making body:	Court of Justice of the European Union
Date of Decision:	28 November 2023
Case/Decision name:	OP v Commune d'Ans
Primary legal issues:	Whether a public-sector employer's rule prohibiting all staff, not only public-facing staff, from wearing religious or political signs at work amounted to direct or indirect discrimination, and if so whether any indirect discrimination was justified. An additional issue was whether it constituted discrimination on grounds of sex given that the rule had a greater impact on women.
Applicable legal provisions:	Article 2(2)(a) and (b) of Council Directive 2000/78/EC of 27 November 2000
Hyperlink to case:	<a href="https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62022CJ0148">https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62022CJ0148</a>
Related cases, if any:	<i>Achbita v. G4S</i> , Case C-157/15, 14 March 2017 <i>Bougnaoui and ADDH</i> , C-188/15, 14 March 2017 <i>IX v. WABE e.V</i> , Case C-341/19; <i>MH Müller Handels GmbH v. MJ</i> , Case C-804/18, 15 July 2021

Paragraph/page numbers to be extracted from decision/case:	Paragraph 22–30, 47–48
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Summary of decision: facts/arguments of the parties/ final decision/ motivation (approx. 250 words; opinions about the judgment must be avoided):	<p>OP, a member of staff in a municipality in Belgium whose work did not involve contact with the public, was refused permission to wear a hijab at work. The employer subsequently introduced a requirement of exclusive neutrality at work, prohibiting all municipal workers from wearing any visible sign of their religious or philosophical beliefs, whether or not they were in contact with the public.</p> <p>The Court of Justice of the European Union (CJEU) was asked, first, whether the ban on religious symbols could be justified by the municipality's desire to create an entirely neutral administrative environment. It ruled that any potential indirect discrimination caused by the ban could be justified. The aim of preserving an entirely neutral</p>
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	administrative environment was legitimate; and as long as it was imposed consistently, it could be proportionate. In particular, it was necessary that the rule be imposed on all visible manifestations of beliefs, not just conspicuous religious signs. The case, the first involving the public sector, can be contrasted with earlier decisions of the CJEU ( <i>Achbita v. G4S, IX v. WABE</i> ) in the context of private-sector workplaces, in which the Court indicated that limitations on the wearing of religious signs would likely only be justified in public-facing roles. The CJEU declined to consider a second referred question of whether the ban on religious symbols amounted to indirect discrimination on grounds of sex, given that it mostly affected women.
Title of Commentary:	Religious Discrimination, headscarves and the CJEU: Exclusive neutrality or exclusionary practice?

### *Introduction*

*OP v. Commune d’Ans* involves restrictions on the expression of religious or political beliefs through workplace dress codes, which can be discriminatory on grounds of religion or belief. The issue is relevant to labor law internationally, as evidenced by the protection provided under international and regional legal frameworks, including ILO Convention concerning Discrimination in Respect of Employment and Occupation 1958 (No. 111), the Universal Declaration of Human Rights, and the European Convention on Human Rights. Protection against religious discrimination in occupation and employment is also provided under EU Directive No. 2000/78 and it is within this latter framework that the case was heard.

OP worked for Ans municipality as head of office, a function that essentially had no contact with the public, known as a back office. After some years, she requested that she be allowed to wear a hijab to work. The municipal board rejected her request and introduced a requirement of exclusive neutrality in the workplace, prohibiting all municipal workers from wearing any visible sign that might reveal their religious or philosophical beliefs, regardless of whether they were in contact with the public. This rule only applied to the municipality of Ans: other Belgian municipalities operated without the same restrictions.

The case is the latest in a series of cases before the Court of Justice of the European Union (CJEU) on whether workplace dress codes such as bans on wearing head coverings amount to religious discrimination. Earlier cases established that restrictions are unlikely to amount to direct discrimination, as long as the restriction applied to all religious symbols, conspicuous or not.<sup>2</sup> However, they can amount to indirect discrimination unless they can be justified<sup>3</sup> with justification more likely where the restrictions are limited to public-facing roles.<sup>4</sup>

<sup>2</sup> *IX v. WABE e.V* C-341/19, *MH Müller Handels GmbH v. MJ*, Case C-804/18, 15 July 2021.

<sup>3</sup> *Achbita v. G4S*, Case C-157/15; *Bougnaoui and ADDH*, Case C-188/15, 14 March 2017.

<sup>4</sup> *Achbita*, para. 42.

In *OP*, the CJEU confirmed the position that rules that distinguish between conspicuous and inconspicuous symbols are directly discriminatory. However, in regard to indirect discrimination, it departed from its prior position and held that in the public sector a rule that excluded religious and political symbols could be justified as necessary to uphold a neutral administrative environment, despite the fact that it applied to all workers, public-facing or not, and that not all municipalities imposed such restrictions.

### *Analysis of decision*

The Court began by confirming its earlier decisions that restrictions applied only to conspicuous signs of belief amount to direct discrimination, but that general restrictions on all visible signs of belief will be indirectly discriminatory unless justified by a legitimate aim. It then confirmed that the decision on justification should take into account the importance of the fundamental rights at stake, namely, the right to freedom of religion and belief, the prohibition on discrimination on grounds of religion and belief, and the principle of neutrality particularly in public administration. The Court also noted that, to be justifiable, any rule should be applied consistently and systematically, and reiterated that states should be afforded a margin of discretion in their application of Directive 2000/78, to enable them to take account of their specific context. The Court then went further and allowed the neutrality requirement to be applied throughout the workplace and not only to roles involving contact with the public.

Although this ruling appears to confirm the decisions in *Achbita*<sup>5</sup> and *WABE*,<sup>6</sup> a number of factors give the decision some additional significance.

First, the margin of discretion allowed to states was extended and applied to local municipalities (infrastate bodies). The use of a margin of discretion at all in implementing EU equality law is already noteworthy. The CJEU has usually imposed a strict standard of necessity in assessing justification of indirect discrimination on other equality grounds and thereby set standards and challenged embedded discriminatory practices.<sup>7</sup> Thus the extension of that discretion to local level state bodies is particularly significant. The need to recognize the national identities of member states is accepted in EU law but should be applied very carefully in the equality context. Extending such discretion to the local level means that the Court accepts different interpretations of the requirement of state neutrality within a single member state.

Second, the CJEU also referred to the lack of consensus on the wearing of headscarves in employment as relevant to its decision. Although practice can vary across states, consensus is not synonymous with unanimity; in practice acceptance is very wide across Europe allowing the wearing of the headscarf in employment, and even more so in relation to back office roles. The Court could have taken a much stronger position here, noting that though many states maintain a neutral public service, most do so without banning headscarves in back office roles.

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<sup>5</sup> *Achbita; Bougnaoui and ADDH*.

<sup>6</sup> *IX v. WABE e.V* C-341/19; *MH Müller Handels*.

<sup>7</sup> Erica Howard, "EU anti-discrimination law: Has the CJEU stopped moving forward?" *International Journal of Discrimination and the Law* 18, no. 2-3 (2018): 60-81.

### *Implications of the decision*

Although in some respects merely confirming its earlier case law, the significance of the case lies in the extent to which the CJEU allowed greater limitations on religious expression at work.

In *Bougnaoui* and *Achbita*, the Court went further than the strict confines of the question to make it clear that restrictions could amount to indirect discrimination unless strictly necessary to meet the needs of clients. In particular, the Court underscored that the justification of the restriction depended on its being limited to client-facing roles. It was also clear in *Bouganoui* that there were limits on which aims might be legitimate, with customer preference being rejected. The decisions in *Achbita* and *Bougnaoui* can be criticized as inconsistent given that they decide, on the one hand, that it is legitimate for an employer to project an image of neutrality toward customers but, on the other, to say that neutral dress cannot be justified on the basis of complying with customer wishes. Moreover, the outcome risks invisibilizing religious minorities by limiting them to back office roles. However, despite these significant limitations, these decisions remain clear that strict limits should be applied to the extent to which employers can restrict religious dress.

The CJEU went further in setting standards for the protection against religious discrimination in *IX v. WABE* by establishing that restrictions on conspicuous signs only would amount to direct discrimination and could thus not be justified. Given the position in France and Belgium, countries which have traditionally drawn clear distinctions between the legal treatment of conspicuous and discreet signs, this position was significant in setting new standards for protection against religious discrimination rather than reflecting the status quo.

In contrast, the Court's acceptance in *OP* of restrictions on all staff, public-facing or not, is a backward step in the protection for religious minorities in the EU. The difference, arguably, was that the job was in the public sector, but it is not at all clear why this fact made it necessary to have a more extensive and restrictive rule. Indeed, it is arguable that a public-sector employer should be subject to stronger scrutiny. Certainly public-sector employers have a greater obligation to ensure equal participation of all minorities in the workplace.<sup>8</sup> This is even more the case given that tighter restrictions on religious dress affect women to a greater extent than men.

Furthermore, it is not clear why the Court felt it necessary to extend the margin of discretion allowed to member states in their interpretation of the EU directive to include local municipalities. Allowing a margin of discretion to member states reflects the political need within the EU to reflect different national contexts, identities, and traditions in the application of EU law. This is especially true in regard to different constitutional settlements between the church and state across the EU. However, concepts of neutrality and secularity, most clearly evident in the

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<sup>8</sup> Cynthia Estlund, *Working Together: How Workplace Bonds Strengthen a Diverse Democracy* (Oxford: Oxford University Press, 2003). See also Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Oxford: Hart Publishing, 2016), chap. 3.

French and Belgian concept of *laïcité*, apply to the state.<sup>9</sup> It is not clear that differences in treatment of fundamental rights within the state should be so readily justifiable.

In contrast, Advocate General Collins noted in his advisory opinion in the case that several Belgian municipalities limit their neutrality rules to those with public-facing roles, yet they still clearly operate within the Belgium's constitutional norms of neutrality in the public service. His conclusion that the scope of the restriction on religious symbols in the municipality of Ans arguably did not necessarily conflict with the approach of the CJEU shows that it is quite possible to subject potential indirect religious discrimination to greater and more careful scrutiny.

The case is also significant for what the Court did not do. Given that the requirement of neutrality was imposed in Ans only following OP's request to wear a headscarf, it could have been directly discriminatory had it been motivated by prejudice against a particular religious group even though the rule was framed neutrally as applicable to all.<sup>10</sup> However, the Court did not address this aspect of the facts.

Also, the Court refused to consider the question of whether the ban on religious symbols had a greater impact on women and therefore might amount to indirect discrimination on grounds of sex. The Court stated that no clear legal basis for the claim had been provided. Again this reasoning can be questioned: the Court has, after all, chosen to address issues not been directly referred to them on other occasions. In *Achbita*, the Court considered the potential for an indirect discrimination claim, even though the referred question related only to direct discrimination. It would thus not have been inappropriate for the Court to make some general remarks about the potential for an indirect sex discrimination claim. In effect, the Court missed the opportunity to discuss the broader questions of intersectional discrimination raised by the case.

### *Conclusions*

The decision in *OP v. Commune d'Ans* marks a step backward in the CJEU's jurisprudence on discrimination on grounds of religion and belief. As outlined, the decision allows significant scope to employers to restrict the wearing of headscarves and other symbols of religion and belief. Despite being framed in neutral terms as applicable to all religions and beliefs, the ruling will in practice nonetheless have by far the greatest impact on religious minorities, especially Muslim women.

The municipality's rule of exclusive neutrality allows all religious symbols and dress to be banned across the entire workforce. The aim may be to encourage workers to come to work in secular or neutral clothing. However, in practice the result is to exclude religious minorities from the public-sector workplace. Although the earlier cases could be criticized for relegating religious minorities to the back office, this new ruling goes further and allows them to be excluded from the workplace altogether. Not only does this risk increased exclusion of religious minorities from employment, it

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<sup>9</sup> Myriam Hunter-Henin, *Why Religious Freedom Matters for Democracy: Comparative reflections from Britain and France for a democratic 'vivre ensemble'* (Oxford: Hart Publishing, 2020).

<sup>10</sup> *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, Case C-83/14, 16 July 2015.

also stands in marked contrast to the treatment of other equality grounds, where the CJEU has worked to set common standards of protection across the EU.