

***OP v Commune d'Ans*: another step in the wrong direction for headscarf wearing women**

1. INTRODUCTION

The judgment in *OP v Commune d'Ans*,¹ handed down by the Grand Chamber of the Court of Justice of the European Union (CJEU) on 28 November 2023, was the Court's sixth judgment concerning bans on the wearing of religious symbols at work. All six cases concerned women who wanted to wear Islamic headscarves which cover the hair and neck but leave the face free. In contrast to the previous five cases,² which all concerned private employers, this was the first case where the neutrality rule was introduced by a public employer, a municipal authority. The earlier judgments led to the conclusion that Muslim women who wanted to challenge workplace neutrality rules as religious discrimination had little chance of being successful because the CJEU upheld the right of employers to introduce such rules provided certain conditions were met. In an article analysing *LF v SCRL*,³ I concluded that that judgment was disappointing because it mainly repeated what was said in the previous judgments and did not engage with any of the points of criticism raised;⁴ that *LF v SCRL* and the other headscarf judgments have done little to prevent restricting the employment opportunities and wider integration of Muslim women who wish to wear headscarves at work for religious reasons; and, that this restriction could amount to gender and racial or ethnic origin discrimination, as well as intersectional discrimination on a combination of these three grounds. The CJEU, in the five earlier cases, failed to take account of both these issues. Unfortunately, the judgment in *OP v Commune d'Ans*, can also be criticised for these reasons. In fact, the judgment suggests that the CJEU allows public employers to go even further in deciding to ban the wearing of religious symbols, as they can choose to impose such a ban on all employees, whether they have contact with customers or not.

¹ Case C-148/22 *OP v Commune d'Ans*, ECLI:EU:C:2023:924.

² Case C-157/15 *Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v G4S Secure Solutions NV*, ECLI:EU:C:2017:203 (*Achbita*); Case C-188/15 *Asma Bougnaoui, Association de Défense des Droits de l'Homme (ADDH) v Micropole Univers SA*, ECLI:EU:C:2017:204 (*Bougnaoui*); Joint cases C-804/18 *IX v Wabe eV* and C-341/19 *MH Müller Handels GmbH v MJ*, ECLI:EU:C:2021:594 (*Wabe and Müller*); Case C-344/20, *LF v SCRL*, ECLI:EU:C:2022:774.

³ E. Howard, 'LF v SCRL and the CJEU's Failure to Engage with the Reality of Muslim Women in the Labour Market' (2023) 52, 4 *Industrial Law Journal*, 997-1014.

⁴ For these points of criticism, see Howard (n.3), 998-1001.

There were two main issues in all six headscarf cases: first, whether the employers' neutrality rules amounted to direct or indirect religion or belief discrimination against Directive 2000/78/EC;⁵ second, whether such discrimination could be justified. This article will start with an examination of the facts and referred question, the opinion of Advocate General Collins and the CJEU judgment. The subsequent analysis focuses on two main issues: the margin of discretion and gender, race and intersectional discrimination.

2. THE FACTS OF THE CASE AND THE REFERRED QUESTIONS

OP had worked as a lawyer for a municipal council, Commune d'Ans, since 2016, mainly dealing with public contracts. She did not often have contact with customers. She was promoted and received salary increases over the years. She never wore a headscarf but, on 8 February 2021, she requested that to be allowed to wear a headscarf from 22 February 2021. The council decided to prohibit OP from displaying convictional signs while carrying out her work. On 29 March, the council amended their regulations by inserting a requirement of 'exclusive neutrality' in the workplace, understood as prohibiting all municipal workers from any form of proselytising and from wearing any visible sign that might reveal their ideological or philosophical affiliation or political or religious beliefs, whether they were in contact with the public or only with superiors and colleagues.⁶ OP challenged these decisions as discrimination on the grounds of both religion and belief and gender.

The Liège Employment Tribunal viewed the individual decisions about prohibiting OP from wearing a Islamic headscarf before 29 March 2021 as constituting direct discrimination against Directive 2000/78/EC, based on her religion in comparison with other members of the council staff, because other signs of beliefs – religious in particular – when worn discreetly, had been and were still tolerated in the workplace.⁷ The Tribunal considered that the changed work regulations, aiming to ensure that

⁵ Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16. This Directive prohibits discrimination on the grounds of disability, age, religion and belief and sexual orientation.

⁶ *OP v Commune d'Ans* (n.1) [12-15].

⁷ *Ibid.*, [16-17].

both the actions and the appearance of public officials were strictly neutral, whatever the nature and context of their duties, constituted indirect discrimination, because the rule was neutral, but the application by the council varied in consistency. The Tribunal provisionally permitted OP to wear a visible sign of her religion, but only when not in contact with users of the council services or when not exercising a position of authority.⁸ The Tribunal referred the following questions to the CJEU: first, does Article 2(2)(a) and (b) permit a public administration to establish an entirely neutral administrative environment which prohibits all members of staff from wearing signs which might reveal religious beliefs, whether they are in direct contact with the public or not? Second, does this article permit a public administration to do so 'even if that neutral prohibition appears mostly to affect women, and may thus constitute disguised discrimination on grounds of gender'?⁹

3. THE OPINION OF ADVOCATE GENERAL COLLINS

Advocate General Collins started with pointing out that bans by employers were particularly controversial and sensitive and that these required reconciling the fundamental right to freedom of religion and the prohibition of any discrimination based on religion, 'with other freedoms and principles, such as the freedom to conduct a business, the principles of secularism, neutrality and impartiality, and the protection of the rights and freedoms of others'.¹⁰ Collins addressed the question regarding gender discrimination first and expressed that this question was inadmissible because the referring court did not define the factual and legislative context of the question or explain the factual circumstances, nor did the order for reference contain any factual evidence which would make it possible to assess whether there was any gender discrimination.¹¹

Moving on to the first referred question, Collins expressed his opinion that Directive 2000/78/EC leaves a margin of discretion to the Member States to reconcile the different rights and interests involved.

⁸ Ibid., [18].

⁹ Ibid., [19-20].

¹⁰ *OP v Commune d'Ans*, Opinion AG Collins, ECLI:EU:C:2023:378 [1].

¹¹ Ibid., [35-39].

This discretion is particularly broad where the principles at stake might involve the national identities of the Member States, which the EU has the obligation to respect under Article 4(2) of the Treaty on European Union (TEU). However, this discretion is not unlimited, and the conception of the national identity must be consistent with the founding values of the EU in Article 2 TEU. According to Collins, the imposition of restrictions on the manifestation of political, philosophical or religious beliefs for public sector employees maybe be of such importance to some Member States that it forms part of their national identities which are inherent in their fundamental structures, political and constitutional.¹²

Collins referred to and followed the judgments in *Achbita* and *Wabe and Müller* in expressing his opinion that there was no direct religion or belief discrimination, provided that the ban was applied in a general and undifferentiated way, which was for the referring court to decide. The workplace neutrality rule covered any manifestation of belief without distinction and treated all employees in the same way. Therefore, it did not constitute direct religion or belief discrimination.¹³ Collins mentioned that the referring court had indicated that the council ‘applies neutrality variable in space and time; exclusive as regards OP and ... more inclusive in respect of her colleagues with other beliefs’; and, ‘that OP had provided “sufficient evidence” in that connection’ which indicates that there is direct discrimination according to OP and the observations submitted by the Swedish Government.¹⁴ However, this is for the referring court to ascertain. Collins then proposed that the CJEU answers the first question by holding that there is no direct discrimination, provided that the neutrality rule is applied in a general and undifferentiated way.¹⁵

In the five previous headscarf cases, the CJEU had found the legitimate aim for the neutrality rules in the freedom to conduct a business in Article 16 of the Charter of Fundamental Rights of the European

¹² Ibid., [44-46].

¹³ Ibid., [49-53].

¹⁴ Ibid., [55].

¹⁵ Ibid., [56].

Union (the Charter).¹⁶ In examining the justification of indirect discrimination, Collins stated that this could not be a legitimate aim for a public body, but that this aim here could be grounded in the need to protect the rights and freedoms of others, in particular for the purpose of respecting the philosophical and religious belief of citizens as well as the need to ensure equal and non-discriminatory treatment of the users of the public service.¹⁷ Collins mentioned that, in Belgium, different conceptions of the principle of state neutrality coexist: inclusive neutrality 'is based on the idea that a public employee's appearance must be separated from the way in which he or she provides the public service'; and, exclusive neutrality 'rests on the premiss that both the public employee's actions and his or her appearance must be strictly neutral'. Commune d'Ans had opted for an exclusive neutrality.¹⁸

Collins continued that the council must prove that there was a genuine need for following an exclusive neutrality policy. The referring court needed to assess whether this was well-founded from two, not necessarily cumulative perspectives: first, that there does not appear to be any legislative or constitutional obligation in Belgium requiring employees of a municipal authority to observe exclusive neutrality. Second, it should be ascertained by the national court whether the facts justify the council's choice. The fact that the wearing of signs of philosophical or religious belief is unconditionally permitted in other cities in Belgium legitimately raises the question whether the prohibition at issue is appropriate.¹⁹ These perspectives are 'not necessarily cumulative' which suggests that it is sufficient if either one is fulfilled. More important is that Collins here suggests that the neutrality in this case concerning a Belgian municipal authority, would not be appropriate and necessary and thus not justified.

As a final point, Collins concluded that neither Article 2(5) nor Article 4(1) of Directive 2000/78/EC applied. He rejected the French government's observation that neutrality was a genuine and

¹⁶ *Achbita* (n.2) [38]; *Wabe and Müller* (n.2) [63]; *LF v SCRL* (n. 2) [39].

¹⁷ *OP v Commune d'Ans*, Opinion AG Collins (n.10) [64].

¹⁸ *Ibid.*, [66-67].

¹⁹ *Ibid.*, [68-73].

determining requirement for public sector employees, because the wearing of an Islamic headscarf would not in any way prevent OP from carrying out her duties. This was especially so since, in other Belgian municipal authorities, the same tasks are carried out by employees without any restrictions being imposed on them as regards wearing items of clothing, whether they were in direct contact with the public or not.²⁰

Collins, therefore, clearly suggests that the referring court could either decide that there is direct discrimination, as there is evidence that the neutrality rule is not applied in a general and undifferentiated way. This discrimination is not justified as Articles 2(5) and 4(1) of Directive 2000/78/EC do not apply. Alternatively, it could accept that there was indirect discrimination and that this is not justified.

4. THE JUDGMENT OF THE CJEU

In *OP v Commune d'Ans*, the CJEU repeated what it had held in the previous cases, that it is up to the national court to decide whether neutrality policies at work which prohibit the wearing of signs of religious, philosophical or political beliefs are direct or indirect discrimination, but that they more likely amount to indirect discrimination; and, that, in the latter case, neutrality rules would be justified if they pursued a legitimate aim and if the means to achieve that aim were appropriate and necessary.²¹

The CJEU then examined whether indirect discrimination could be justified. The legitimate aim was to put into effect the principle of neutrality of the public service, which was based on the principles of impartiality and neutrality of the State in Articles 10 and 11 of the Belgian Constitution. The CJEU held that a policy of 'exclusive neutrality' with a view to establishing an entirely neutral administrative environment may be regarded as a legitimate aim; and, that the Member States and infra-State bodies have a margin of discretion to decide whether to prohibit all workers or only those who come into

²⁰ Ibid., [91].

²¹ *OP v Commune d'Ans* (n.1) [26-30]. *Achbita* (n.2), [32-35]; *Wabe and Müller* (n.2) [52-55] and [60]; *LF v SCRL* (n.2) [33] and [38].

contact with customers from wearing religious symbols, or to allow all employees to do so.²² In *Wabe and Müller*, the CJEU had mentioned that Directive 2000/78/EC allows the Member States a margin of discretion in achieving the necessary reconciliation of the different rights and interests involved.²³ In this case, the CJEU expands this margin of discretion to infra-State bodies as well.

In *Achbita*, the CJEU held that workplace neutrality rules would be appropriate and necessary, and thus justified, if they fulfilled three conditions: first, the rules must ban all visible signs and not just some signs of religious, philosophical and political beliefs; second, the rules must be genuinely pursued in a consistent and systematic manner and, therefore, must apply to all employees equally and not distinguish between different religions or beliefs; and, third, the rules must be limited to customer facing employees.²⁴ In *OP v Commune d'Ans*, the CJEU dropped the third condition for public employers and held, as mentioned, that they had discretion to decide whether to introduce a neutrality rule and to which workers this would apply. Another requirement of the earlier cases was also dropped by the CJEU for public employers. In *Wabe and Müller*, the CJEU had added that the employer must prove that there is a genuine need for the neutrality policy, which includes showing that their business would suffer real harm without such a policy.²⁵ In *OP v Commune d'Ans*, the CJEU did not mention the genuine need, although Advocate General Collins had expressed his opinion that Commune d'Ans had to prove the genuine need for an exclusive neutrality policy. The CJEU simply stated that it was up to the referring court to weigh up the interests at stake: the rights in Articles 10 (freedom of religion) and 21 (non-discrimination) of the Charter and the principle of state neutrality.²⁶

The CJEU followed the Opinion of Advocate General Collins in relation to the question regarding gender discrimination and declared this question inadmissible because the referring court did not explain why it considered a reply to this question necessary to enable it to give judgment. EU law required it to set

²² *OP v Commune d'Ans* (n.1) [32-33].

²³ *Wabe and Müller* (n.2) [88].

²⁴ *Achbita* (n.2) [40-42], repeated in *Wabe and Müller* (n.2) [52]; *LF v SCRL* (n.2) [39].

²⁵ *Wabe and Müller* (n.2) [64] and [67]; the 'genuine need' requirement was repeated in *LF v SCRL* (n.2) [40].

²⁶ *OP v Commune d'Ans* (n.1) [40].

out clearly the factual and legal context and the factual circumstances. Moreover, sex discrimination is covered by Directive 2006/54/EC²⁷ and not by Directive 2000/78/EC, the only act the referred question mentions.²⁸ This is in line with what the Court did in *Wabe and Müller*,²⁹ although it explained this in more detail here.

5. ANALYSIS

In the article on *LF v SCRL*, I concluded that the CJEU, in its previous five headscarf cases, did not give any attention to the possible restrictions on the employment opportunities of Muslim women who wish to wear headscarves at work for religious reasons. This exclusion from the labour market not only goes against the founding values of the EU as laid down in the TEU and the Charter, but also against the aims of Directive 2000/78/EC and wider EU anti-discrimination law.³⁰ The judgment in *OP v Commune d'Ans* goes even further and gives Member States and public employers licence to ban Muslim women and others who want to wear religious symbols at work, from all public employment in order to preserve an entirely neutral administrative environment. In the words of Davies, 'the effect is to *de facto* exclude such women from municipal employment, but the CJEU considered this less important than the preservation of this neutrality'.³¹

In this analysis, the focus will be on two further points of criticism that can be raised against the judgment in *OP v Commune d'Ans*: first the expansion of a margin of discretion; second, the refusal of the CJEU to engage with other forms of discrimination, such as gender, race and intersectional discrimination.

A. Margin of Discretion

²⁷ Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation [2006] OJ L 204/23.

²⁸ *OP v Commune d'Ans* (n.1) [42-50].

²⁹ *Wabe and Müller* (n.2) [58].

³⁰ Howard (n. 3) 1008-1011.

³¹ G. Davies, 'OP v Commune d'Ans: The "Entirely Neutral" Exclusion of Muslim Women From State Employment', *European Law Blog*, post 55/23, 14 December 2023: <https://europeanlawblog.eu/2023/12/14/op-v-commune-dans-the-entirely-neutral-exclusion-of-muslim-women-from-state-employment/> (accessed 17 January 2024).

In *OP v Commune d'Ans*, the CJEU affords not only the Member States but also infra-State bodies a margin of discretion in achieving the necessary reconciliation between freedom of religion and the legitimate aim that may be invoked to justify indirect discrimination. Therefore, the CJEU goes beyond *Wabe and Müller*, by expanding the margin of discretion to 'infra-State bodies'.³² The introduction of discretion into anti-discrimination law and the expansion of the discretion in this case is a troublesome development for a number of reasons. First, it leads to legal uncertainty because it allows a wide range of public bodies to decide how to regulate the wearing of religious symbols in their workplace and, by doing so, potentially exclude a significant number of religious people from employment. Vickers writes that the extension of the margin of discretion to the local level 'has the potential to reduce the protection for non-discrimination rights of workers significantly'.³³

The CJEU bases the margin of discretion on the lack of consensus at EU level and the diversity of approaches to the place Member States and their infra-State bodies accord to religious and philosophical beliefs within their respective systems. Whether there is indeed a lack of consensus can be questioned. As Vickers comments, 'across Europe there is, in practice, a large consensus allowing for the wearing of the headscarf in employment, particularly in back office roles'.³⁴ The CJEU states that this margin of discretion 'must go hand in hand with supervision by the national and European judicature', to determine whether the measures taken are justified and proportionate.³⁵ However, as in the previous headscarf cases, in *OP v Commune d'Ans*, the CJEU does not apply this supervision and does not use a very strict justification test. Davies argues that the reasoning of the CJEU on this is significantly incomplete and that it should have unpacked this justification some more, including what the public interest in this is.³⁶ In other words, it should have examined whether there is a genuine need

³² *OP v Commune d'Ans* (n.1) [34-35].

³³ L. Vickers, 'Religious Discrimination, Headscarves and 'exclusive neutrality': backsliding by the CJEU', *Oxford Human Rights Hub*, 18 December 2023: <https://ohrh.law.ox.ac.uk/religious-discrimination-headscarves-and-exclusive-neutrality-backsliding-by-the-cjeu/> (accessed 17 January 2024).

³⁴ *Ibid.*

³⁵ *OP v Commune d'Ans* (n.1) [34].

³⁶ Davies (n.31).

for 'exclusive neutrality'. Vickers writes that 'the CJEU further limited the protection against religious discrimination by undertaking a limited review of the appropriateness and necessity of the need for neutrality', which contrasts 'with the stricter standard of review of AG Collins in the case'.³⁷ The CJEU has consistently held that exceptions to the principle of equal treatment must be interpreted strictly.³⁸ Justification of indirect discrimination is such an exception. Therefore, by not applying a strict justification and proportionality test, the CJEU appears to go against its own settled case law.³⁹ This weak justification test also contrasts with the CJEU's strict application of the justification and proportionality test in relation to religion or belief in Article 4(2) of Directive 2000/78/EC in *Egenberger* and *IR v JQ*.⁴⁰

Second, not only can the CJEU be criticised for giving discretion to such a large group, but also for introducing a margin of discretion in this area of law, as such a margin is not given to other grounds covered by EU anti-discrimination law. The CJEU generally aims for uniform application of EU equality law. In *Chacon Navas*, it held that the meaning and scope of Community law and the principle of equality should be 'given an autonomous and uniform interpretation throughout the Community'.⁴¹ Allowing a margin of discretion in relation to religion and belief discrimination and not for the other grounds of discrimination goes against this, but it also conflicts with the aims of EU anti-discrimination law: the protection of vulnerable groups and the promotion of full participation and inclusion in employment.⁴² The six headscarf judgments allow employers to discriminate and tolerate prejudice by allowing them to exclude certain religious people, and especially Muslim women, who are known to

³⁷ Vickers (n.33).

³⁸ Case C-222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206 [36]; Case C-273/97 *Sirdar v the Army Board and Secretary of State for Defence*, ECLI:EU:C:1999:523 [23]; Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe*, ECLI:EU:C:2010:4 [60]; Case C-447/09 *Prigge and Others v Deutsche Lufthansa AG*, ECLI:EU:C:2011:573 [56] and [72].

³⁹ See further: E. Howard, *Headscarves and the Court of Justice of the European Union* (Routledge, 2024), 90-111.

⁴⁰ Case C-414/16 *Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV*, ECLI:EU:2018:257 (egenberger); Case C-68/17 *IR v JQ*, ECLI:EU:C:2018:696. See Howard (n.39).

⁴¹ Case C-13/05 *Chacon Navas v Eurest Colectividades SA*, ECLI:EU:C:2006:456 [40].

⁴² See, for example, Recitals 9 and 11 of Directive 2000/78/EC.

be a particularly disadvantaged group, from part or even the whole of their employment against these aims.

Third, allowing a margin of discretion in relation to religion or belief discrimination, but not for the other discrimination grounds covered by EU equality law could lead to a hierarchy of discrimination grounds, with the protection against some grounds stronger than that against other grounds, and the protection against religion or belief discrimination the weakest. As Davies writes, 'some equalities are more equal than others' and 'the equality of Muslims is currently at the bottom of the pile'.⁴³

Fourth, this hierarchy, with less protection for some grounds, also risks a levelling down of the protection against other grounds as the margin of discretion could spread to other grounds. In contrast to this, the common approach has usually resulted in levelling up of protection. For example, following the acceptance that the protection against age discrimination is based on the principle of equality, which is a general principle of EU law,⁴⁴ the CJEU held that equality on the grounds of religion or belief was also a general principle of EU law.⁴⁵

B. Gender, race and multiple discrimination

The CJEU declared the question regarding gender discrimination inadmissible because the referring court did not indicate the reason why this was important, nor did it set out the factual and legislative context or mention Directive 2006/54/EC. However, it appears from the reference and from the second referred question itself that the referring court thinks that there is indirect gender discrimination as it 'mostly affects women'. Therefore, it asks the CJEU to explain this. In *Achbita*, the CJEU held that it is settled case law that the fact that the referring court's question refers to certain provisions of EU law does not prevent it from giving the national court all the guidance on interpretation which may be helpful 'whether or not that court has referred to those points in its question'.⁴⁶ The CJEU could, thus,

⁴³ Davies (n.31).

⁴⁴ Case C-144/04 *Mangold v Rüdiger Helm*, ECLI:EU:C:2005;709 [75]; Case C-176/12 *Association de Médiation Sociale*, ECLI:EU:C:2014:2 [47].

⁴⁵ *Egenberger* (n.40) [76].

⁴⁶ *Achbita* (n. 2) [34].

have engaged with this question and it is regrettable that it did not, because all six headscarf cases indicate that workplace neutrality rules specifically affect Muslim women. Bans on the wearing of religious clothing generally affect women more than men⁴⁷ and, therefore, such rules can also be challenged as gender discrimination under Directive 2006/54/EC. Relano-Pastor writes in relation to *Achbita* and *Bougnaoui*: ‘in practice, these kinds of general restrictions specifically affect Muslim women like the applicants in the cases considered here’ [italics added].⁴⁸ As the neutrality rules affect mainly people from a migrant or ethnic minority background, racial or ethnic origin discrimination could also be present.⁴⁹ Xenidis mentions as an example of workplace discrimination, ‘a Muslim woman wearing an Islamic headscarf’ and continues that ‘such a case might involve harmful stereotypes based on religion, but also on race and gender’.⁵⁰ There could thus also be intersectional discrimination, discrimination on a combination of these three grounds, not just discrimination on each ground separately.⁵¹ All three grounds are covered by EU anti-discrimination law. As Vickers writes, a further disappointing aspect of *OP v Commune d’Ans* is ‘the refusal of the court to engage with the critical question of intersectional discrimination’. This ‘could have been considered as part of the assessment of proportionality by considering the particular impact of the neutrality requirement upon women’.⁵²

⁴⁷ See for example: A. Blair, ‘Case Commentary: R (SB) v Headteacher and Governors of Denbigh High School – Human Rights and Religious Dress in Schools’ (2005) 17 *Child and Family Law Quarterly* 411; A. McColgan, ‘Class Wars? Religion and (In)equality in the Workplace’ (2009) 38, 1 *Industrial Law Journal* 18; See on this also: T. Loenen, ‘In Search of an EU Approach to Headscarf Bans: Where to go After *Achbita* and *Bougnaoui*?’ (2017) 10 *Review of European Administrative Law* 67; E. Relano Pastor, ‘Religious Discrimination in the Workplace: *Achbita* and *Bougnaoui*’, in Belavusau, U. and Henrard, K. (eds.), *EU Anti-Discrimination Law Beyond Gender* (Hart Publishing, 2018), 197.

⁴⁸ Relano Pastor (n.47) 197.

⁴⁹ Racial or ethnic origin discrimination is prohibited by Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22. See on this also: Loenen (n.47), 67; J. Mulder, ‘Religious Neutrality Policies at the Workplace: Tangling the Concept of Direct and Indirect Religious Discrimination. Wabe and Müller’ (2022) 59, 5 *Common Market Law Review* 1508.

⁵⁰ R. Xenidis, ‘Multiple Discrimination in EU Anti-Discrimination Law. Towards Redressing Complex Inequality?’, in Belavusau and Henrard (n.47) 41.

⁵¹ See also: D. Schiek, ‘On Uses, Mis-uses and Non-uses of Intersectionality before the Court of Justice (EU)’ (2018) 18, 2-3 *International Journal of Discrimination and the Law* 83-103; Howard (n.3) 1010.

⁵² Vickers (n.33).

It is argued that a challenge against headscarf bans at work should be considered under provisions against gender or racial or ethnic origin discrimination because the protection against these forms of discrimination is stronger than the protection provided against religion or belief discrimination as interpreted by the CJEU in the headscarf cases. This is because, despite the fact that the CJEU confirmed, in *Wabe and Müller*, that the concept of a legitimate aim and the appropriate and necessary nature of the means taken to achieve it, must be interpreted strictly,⁵³ the CJEU applied a fairly loose justification test.⁵⁴ Vickers writes that the standard of justification for gender discrimination is very high and that the same strict test applies to race discrimination.⁵⁵

The possibility that the neutrality rules in the headscarf cases amounted to either gender or race discrimination was never really addressed by the CJEU. In *Achbita* and *Bougnaoui*, the referred questions did not mention gender discrimination and the CJEU did not engage with it. In *Wabe and Müller*, IX argued that Wabe's workplace neutrality rule was religious and also gender discrimination, because it exclusively affected women, and, ethnic origin discrimination, because it had a greater impact on women with migration backgrounds.⁵⁶ However, the referred questions only mentioned gender discrimination and the CJEU found it unnecessary to examine this as gender discrimination did not fall under Directive 2000/78/EC.⁵⁷ In *LF v SCRL*, Advocate General Medina mentioned that there was a 'real possibility' of double discrimination against Muslim women on the ground of religion and gender, but she did not mention race discrimination.⁵⁸ The CJEU, in *LF v SCRL*, did not mention gender or race discrimination.

⁵³ *Wabe and Müller* (n.2) [61].

⁵⁴ See above, Howard (n.39). In the same vein, Mulder (n.49), 1514.

⁵⁵ L. Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (2nd. ed. Hart Publishing, 2016) 271-272. In the same vein: E. Relano-Pastor, 'Towards Substantive Equality for Religious Believers in the Workplace? Two Supranational European Courts, Two Different Approaches' (2016) 5, 2 *Oxford Journal of Law and Religion* 259.

⁵⁶ *Wabe and Müller* (n.2) [30].

⁵⁷ *Ibid.*, [58].

⁵⁸ *LF v SCRL*, Opinion AG Medina ECLI:EU:C:2022:328 [66].

In *Wabe and Müller*, the CJEU mentioned that the rule in *Wabe* ‘concerns, statistically almost exclusively *female workers* who wear a headscarf because of their Muslim faith’ [italics added], and then concluded that this indicates that there might be indirect religious discrimination.⁵⁹ If a rule concerns statistically almost exclusively female workers, it would amount to indirect gender discrimination, as it puts persons of one gender at a particular disadvantage compared to persons of the opposite gender.⁶⁰ A statistical difference between men and women is, in fact, the classic example of prima facie evidence of indirect gender discrimination.⁶¹ The CJEU has held that the objective justification test for gender discrimination has three parts: 1) the means chosen to achieve the legitimate aim must correspond to a real need on the part of the undertaking; 2) they must be appropriate with a view to achieving the objectives pursued; and, 3) they must be necessary to that end.⁶² The third requirement includes considering whether there are alternative, less discriminatory ways of achieving the aim pursued.⁶³

In relation to indirect racial or ethnic origin discrimination, the CJEU has also held, in *Chez*, that the justification test has three parts: 1) there must be a legitimate aim; 2) there must be appropriate and necessary means, which includes the question whether a different measure would achieve the legitimate aim just as well without the discriminatory effect; and, 3) there must be proportionality: this include examining whether the disadvantage caused was not disproportionate to the objective pursued.⁶⁴ Although these tests are formulated in a different way, the three elements in the *Bilka* test can be seen as covered by parts 2 and 3 of the *Chez* test, while the first element of the latter, the legitimate aim, is part of the conditions for justification in the EU anti-discrimination Directives. In the

⁵⁹ *Wabe and Müller* (n.2) [59].

⁶⁰ Case C-170/84 *Bilka Kaufhaus v. Karin Weber von Harz*, ECLI:EU:C:1986:204, [31] (*Bilka*).

⁶¹ See, for example, Case C-167/97 *Secretary of State for Employment, ex parte Nicole Seymour-Smith and Laura Perez*, ECLI:EU:C:1999:60 [60].

⁶² *Bilka* (n.60) [36].

⁶³ D. Schiek, ‘Indirect Discrimination’, in D. Schiek, L. Waddington and M. Bell, (eds.), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing, 2007) 357.

⁶⁴ Case C-83/14 *Chez Razpredelenie Bulgaria AD v. Komisija za zashtita ot diskriminatsia*, ECLI:EU:C:2015:480, [112] (*Chez*).

six headscarf cases, the CJEU did not apply either of these three-part tests. This strongly suggests that a claim for indirect gender or racial and ethnic origin discrimination would be more successful in these cases.

Could a claim be made on multiple and/or combined grounds: religion or belief, gender and racial or ethnic origin discrimination? It can be argued that the women in the headscarf cases were discriminated against because they were female *and* Muslim *and* from an ethnic minority. They were discriminated against because of the combination of these grounds together. This was not mentioned by the CJEU or the Advocates General in the six headscarf cases, with the exception of Advocate General Medina's reference to 'double discrimination' in her Opinion in *LF v SCRL*, which suggests that she saw this as intersectional discrimination on a combination of religion and gender, Directive 2000/78/EC explicitly recognises multiple discrimination in Recital 3, which refers to the fact that 'women are often the victims of multiple discrimination'.⁶⁵ As mentioned, many authors have pointed out that bans on the wearing of religious symbols, including the headscarf, could amount to intersectional discrimination on the combined grounds of religion, gender and race.⁶⁶ Frantziou writes that an analysis of intersectional discrimination might have led to a different outcome as 'it could have heightened the proportionality scrutiny'.⁶⁷ Whether the CJEU would accept a claim for discrimination on the combined grounds of religion, gender and race remains to be seen after its judgment in *Parris*, which concerned sexual orientation and age discrimination.⁶⁸ Although the CJEU recognised that 'discrimination may indeed be based on several of the grounds set out in Directive 2000/78/EC',⁶⁹ it held that there was no direct or indirect sexual orientation discrimination; no direct age discrimination; and, that no new category of discrimination resulting from the combination of more than one of those

⁶⁵ Recital 14 of Directive 2000/43/EC also refers to this.

⁶⁶ Relano Pastor (n.47), 197; Schiek (n.51) 83-103; Xenidis (n.50) 41; Vickers (n.33). See also: E. Frantziou, 'Joined Cases C-804/18 and C-341/19, IX v Wabe eV and MH Muller Handels GMBH v MJ: Religious Neutrality in a Private Workplace? Employer Friendly and Far from Neutral' (2021) 46, *European Law Review*, 674-684; Howard (n.3) 1010.

⁶⁷ Frantziou (n.66) 681.

⁶⁸ Case C-443/15 *Parris v. Trinity College Dublin and Others*, ECLI:EU:C:2016:897 (*Parris*).

⁶⁹ *Ibid.*, [80].

grounds may be found to exist where discrimination on the basis of each ground taken in isolation did not exist.⁷⁰ Unfortunately, the CJEU did not follow Advocate General Kokott's opinion in this case. Kokott recognised that the discrimination was attributable to a combination of two factors, neither of which in itself gave rise to discrimination; and, that the CJEU's judgment 'would reflect real life only' if it duly analysed this combination.⁷¹ The CJEU thus appears to have rejected a claim on a combination of discrimination grounds if there is no discrimination on either of the individual grounds and it was criticised for this.⁷² However, if it wants to reflect 'real life', as Kokott writes, if it wants to reflect the reality of the discrimination Muslim women face in employment and beyond, it should find religious, gender and/or race discrimination in future headscarf cases as well as intersectional discrimination on the combination of these three grounds.

Conclusion

The CJEU judgment in *OP v Commune d'Ans* is problematic because of the expansion of the margin of discretion in EU anti-discrimination law and because of the CJEU's refusal to engage with gender discrimination. Both negatively affect the (public) employment opportunities of Muslim women who want to wear a headscarf at work. The margin of discretion could set a dangerous precedent because it could lead to a hierarchy of discrimination grounds covered by EU law and to a levelling down of the protection against all grounds. Moreover, the refusal of the CJEU to engage with gender and racial or ethnic origin discrimination and with intersectional discrimination is disappointing, because bans on the wearing of religious symbols mainly affect Muslim women from a minority ethnic background and the CJEU ignores this reality. Although EU anti-discrimination law aims to combat prejudice and exclusion, this judgment, and the previous headscarf judgments could lead to more prejudice and

⁷⁰ Ibid., [50], [61], [62] and [78].

⁷¹ *Parris*, Opinion AG Kokott ECLI:EU:C:2016:493 [4] and [footnote 47].

⁷² See further: M. Möschel, 'If and When Age and Sexual Orientation Discrimination Intersect: *Parris*', (2017) 54 *Common Market Law Review*, 1835-1852; S. Atrey, 'Illuminating the CJEU's Blind Spot of Intersectional Discrimination in *Parris v Trinity College Dublin*' (2018) 47, 2 *Industrial law Journal* 278-296; Howard (n.39), 137-161.

exclusion of people already vulnerable to discrimination because of the wearing of visible signs of their religion, such as Muslim women.

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