

Headscarves and the Wrong Balance

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Erica Howard

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This article belongs to the debate » [In Good Faith: Freedom of Religion under Article 10 of the EU Charter](#)

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Neutrality and Business v Freedom of Religion and Non-discrimination

To date, the CJEU has decided 6 cases concerning women who wanted to wear a headscarf at work for religious reasons but who were prohibited from doing so by their employer, losing their jobs as a consequence. [Achbita](#), [Bougnaoui](#), [Wabe and Müller](#), [LF](#) and [OP](#). There was no evidence that the wearing of the headscarf in any way prevented them from doing their job. Apart from *OP*, all other cases concerned private employers and here the freedom to conduct a business as recognised by Article 16 of the EU Charter of Fundamental Rights played an important role. The judgments in these five cases suggest that the employer's right under Article 16 can trump the right of the employee to freedom of religion as guaranteed by Article 10 of the EU Charter. In *OP*, where the employer was a municipal council, the CJEU held that the principle of neutrality of the public service can do the same. Although the CJEU made some general and abstract comments about the importance of freedom of religion, it did not really address what the bans, in practice, meant for the individual women involved. Neither did the CJEU pay any attention to the possibility that these neutrality rules could constitute sex, race and/or intersectional discrimination. The CJEU thus provide little protection for the rights of headscarf wearing Muslim women.

Direct and indirect religion or belief discrimination

The CJEU examined the six cases under the provisions against discrimination in Directive 2000/78/EC, which prohibits both direct and indirect discrimination (Article 2(2)(a) and (b)). Direct discrimination involves less favourable treatment because of, in this case, religion or belief; while indirect discrimination occurs where an apparently neutral provision or rule would put people having a particular religion or belief at a disadvantage, unless this is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. In contrast to this, direct discrimination can only be justified under very limited circumstances clearly laid down in the Directive.

The headscarf judgments

Although the CJEU stressed that this was for the national court to decide, it held that general neutrality rules were most likely indirect discrimination if they applied to all employees equally and covered all beliefs without distinction. The CJEU was criticised for not considering that there might be direct discrimination in these cases (e.g. [here](#) and [here](#)). The CJEU held that the workplace neutrality rules were justified: for private employers, Article 16 of the EU Charter provided the legitimate aim for indirect discrimination. In addition, the bans were appropriate and necessary as long as: these bans covered all visible signs; they were genuinely pursued in a consistent and systematic manner and, thus, applied equally to all employees and did not make a distinction between different religions or beliefs; and, the ban was limited to custom facing employees. In *OP* (32-33), the CJEU held that the aim of putting into effect the principle of neutrality of the public service was a legitimate aim. That was meant to guarantee, for service users and staff, an administrative environment devoid of visible manifestations of beliefs (40). For public authorities, including infra-state authorities, the CJEU dropped the requirement that bans should be limited to customer-facing employees.

Freedom of religion in the headscarf cases

The CJEU held that “religion” in Directive 2000/78/EC must be interpreted broadly to include both the *forum internum* – the fact of having a belief – and the *forum externum* – the manifestation of religious faith in public. Wearing a headscarf for religious reasons was such a manifestation (e.g. *Achbita* (27-28) and *Bougnaoui* (29-30)). In [Wabe and Müller](#) (48), the CJEU stressed, referring to the case law of the European Court of Human Rights (ECtHR) ([Dahlab v Switzerland](#)), the importance of the right to freedom of religion for society, as it represents one of the foundations of a democratic society and contributes to the pluralism indissociable from such a society; and, for the individual, as it is one of the most vital elements that go to make up the identity of believers and their conception of life (repeated in *LF* (35)). The CJEU also pointed out (84) its established case law that, when several fundamental rights and principles enshrined in the Treaties are at issue, the proportionality assessment must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and principles at issue, striking a fair balance between them.

The CJEU added to the requirements for justification of indirect discrimination that the employer had to prove that there is a genuine need for their neutrality policy and that they would suffer adverse consequences without such a policy ([Wabe and Müller](#), 64, 67). The employer also had to take account of the effect of such a policy on the right to freedom of religion of their employees who want, and often feel mandated by their religion, to manifest their religion through the wearing of religious symbols (69). However, the CJEU gave no indication of the weight to be given to the latter, it only stated that, in establishing whether there is a genuine need, the rights and legitimate wishes of customers or users may be taken into account (65).

Article 10 v Article 16

In none of the six headscarf cases did the CJEU engage with the practical effects of the neutrality rules on the individual women. Namely, on their employment – they all lost their job – and employment opportunities, but also on their wider inclusion in society, even though it stressed the importance of freedom of religion for the individual believer's identity and their concept of life. Should this important fundamental liberty right not play a more important role when balanced against the economic fundamental right to conduct a business? In *Achbita* (39), the CJEU referred to the judgment of the ECtHR in [Eweida](#) (94) – where a British Airways employee was prohibited from wearing a small cross with her uniform – to support its argument that corporate image can be a legitimate aim. However, the CJEU reference to *Eweida* (94) ignored the rest of that paragraph, where the ECtHR pointed out the importance of the freedom of religion because a healthy democratic society needs to tolerate and sustain pluralism and diversity. And also because of the value to an individual, who has made religion a central tenet of their life, to be able to communicate that belief to others. The ECtHR concluded that the national courts had not struck a fair balance between the legitimate aim and the restriction on the applicant's freedom of religion and thus stated that the uniform rule was not proportionate. The CJEU should have followed the ECtHR in requiring a strict balancing test.

The freedom to conduct a business includes, according to the CJEU, the introduction of a neutrality policy for the workplace. But why would an employer, especially a private employer, introduce such a rule which seems to target especially Muslim women wearing headscarves? This appears to be because the employer wants to present a neutral image to their customers, which is, most likely, based on the wishes or anticipated wishes of these customers who do not want to be served by someone in a headscarf ([here](#)). But customers' wishes could very well be based on prejudice and “[neutrality can be an easy cover-up for prejudice](#)”. Pandering to prejudice should not be part of the freedom to conduct a business as this right does not include the right to conduct that business in a discriminatory way. Even a public employer, like the municipal council in *OP*, must show that there is a genuine need for the neutrality policy. The CJEU should have given more guidance to the national courts regarding the burden of proving this and the weight to be given to the freedom of religion of an individual employee.

The CJEU could also have mentioned that Article 31 of the EU Charter, which contains the right of every worker to working conditions which respect their dignity, should be weighed in the balance. Prohibiting the manifestation of religious beliefs in the workplace, which are a central part of a person's identity, clearly affects their dignity. Doing so would have been more in line with Article 22 of the EU Charter, which states that the Union shall respect cultural, religious and linguistic diversity.

Article 21 of the EU Charter and sex and race discrimination

Article 21 of the EU Charter prohibits discrimination on a large number of grounds, including sex, race and ethnic origin and religion or belief. In the headscarf cases, the CJEU never addressed the possibility that the neutrality rules could amount to sex and/or

race discrimination, although this was raised in some of the preliminary references. This is important because the protection against discrimination on the basis of sex and racial or ethnic origin is stronger than the protection given to religion or belief discrimination in the headscarf cases. In [Wabe and Müller](#) (59), the CJEU found indirect religious discrimination because the neutrality rule concerned “statistically, almost exclusively female workers who wear a headscarf because of their Muslim faith”. This would also suggest indirect sex discrimination, as a statistical difference between men and women is a classic example of *prima facie* evidence of such discrimination ([Seymour-Smith and Perez](#) (60)). The CJEU did not find it necessary to examine possible indirect sex discrimination because this ground does not fall within the scope of Directive 2000/78/EC ([Wabe and Müller](#), 58), and it never mentioned possible race discrimination. It could and should have done so, as it is settled case law that the Court may provide guidance on the interpretation of EU law, whether or not the referring court raises these issues in its questions ([Achbita](#) (33)).

Intersectional discrimination

The CJEU also did not address the possibility of discrimination on the intersecting grounds of religion or belief, sex and/or racial or ethnic origin, although these bans are often seen as prime examples of such intersectional discrimination. That is because they mainly affect Muslim women who are often from a migrant or ethnic minority background (e.g. [here](#) (21), [here](#) (21-37) and [here](#)). The CJEU might have felt that it could not address intersectional discrimination because of what it had held in [Parris](#) (80), where a claim combining age and sexual orientation discrimination was rejected on the basis that such a claim could not succeed if discrimination on each of the separate grounds did not exist. However, there are a number of reasons why *Parris* should be revisited as developments in the law and case law and opinions within the EU have moved on. First, intersectional discrimination is now explicitly defined as a form of discrimination in the recent EU Pay Transparency directive (Article 3(2) (e) of Directive 2023/970/EC). Second, although the CJEU has not used the term “intersectional discrimination” in its case law, it has shown an awareness that intersecting grounds can lead to discrimination. In [E.B.](#) (60), the CJEU took into account that the law of the time treated male and female homosexual acts differently, showing awareness of the intersection of sex and sexual orientation. Moreover, in [Bedi](#) (75) the CJEU recognised the intersection between age and disability. Third, the [EU Council](#) (Article 2(2)(a) and (b)), the [EU Commission](#) (4.4) and the [EU Parliament](#) have all recognised intersectional discrimination. The CJEU should follow suit and accept that intersectional discrimination is prohibited by EU anti-discrimination law and that workplace neutrality rules could well amount to intersectional discrimination against Muslim women.

Conclusion

In the headscarf cases the CJEU put too much emphasis on the right of the employers to conduct a business and on the neutrality of the public service, and not enough on the freedom of religion and the right not to be discriminated against of the employees, thus

getting the balance between Articles 10, 21 and 16 of the EU Charter wrong.



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