Religious dress: human rights & discrimination (Pt 2)

John Bowers QC examines some ground-breaking decisions on religious dress & calls for balance between competing perspectives

IN BRIEF

▶ A number of recent cases demonstrate the many different interests involved in responding to the interconnection between workplace dress codes and religious dress.

In Part 1 of this article I considered the general provisions of the human rights and EU provisions caselaw (see 'Religious dress: human rights & discrimination (Pt 1)', *NLJ* 15 January 2021, p11). Here I move on to consider the *Eweida* cases and the veil cases, before reaching conclusions.

Eweida v United Kingdom

The four conjoined cases known together as *Eweida v United Kingdom* [2013] IRLR 231, [2013] All ER (D) 69 (Jan) broke new ground in relation to religious manifestation generally and religious dress in particular, and rejected the proposition that there was no breach of Art 9 of the European Convention on Human Rights (ECHR) because the employee might resign the employment or the student might go elsewhere to school. If at all, this was relevant in the overall weighing of proportionality and not as a jurisdictional restriction. Only two of these cases related to religious dress.

Ms Eweida, an employee of British Airways (BA) working on the check-in counter, wore a 'discreet cross' under her uniform, which included an open-necked shirt, to signify her religious devotion, although it was not mandated by the tenets of Christianity. When she was told to take it off because it contravened BA dress policy, she sued BA for discrimination on the grounds of religion; she lost at the Court of Appeal level, but succeeded in Strasbourg.

The UK government (which was by then the defendant as the contracting state) argued before the European Court of Human Rights (ECtHR) that there was no breach because BA was entitled to conclude that the wearing of a uniform played an important role in protecting its business reputation as the employer and to promote its brand, but the court found that there was in fact no evidence that the wearing of other items of religious clothing which had previously been authorised, such as turbans or hijabs, had any negative impact on BA's brand or image, so that this was not borne out in the case of Ms Eweida's small cross. The conclusion which was reached by the ECtHR was that 'in these circumstances where there is no evidence of any real encroachment on the interests of others, the domestic authorities failed sufficiently to protect her right to manifest her religion'.

The partly dissenting opinion of two judges referred to the facts that the procedures within BA were properly followed and the dress code was reviewed, and the fact that the claimant was reinstated.

In the conjoined but factually contrasting case of *Chaplin v Royal Devon and Exeter Hospitals NHS Foundation,* a Christian nurse was asked to remove a crucifix, but this was held to be justified on health and safety grounds since it might cause injury if a patient pulled on it which was likely to occur as she worked on a geriatric ward. The court thought that matters of clinical safety were best addressed at the local level and found this decision to be justified and proportionate. At para [99], the court said: 'the protection of health and safety on a hospital ward was inherently of a greater magnitude than that which applied in respect of Ms Eweida'.

The Muslim cases

One important issue in ECtHR jurisprudence is the extent to which the interests of the state are engaged at all in relation to a private employer. There is an argument that state employment justifies more restriction because wearing a religious symbol may carry the suggestion that the state endorses those symbols and the practices behind them.

In *SAS v France* (2015) 60 EHRR 11, the Grand Chamber Court held (repeating the view which was expressed in *Eweida* at para [81]) that, provided that a complainant's views attain a certain level of cogency, seriousness, cohesion and importance, 'the state's duty of neutrality and impartiality is incompatible with any power on the state's part to assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed' (para [55]).

In *Achbita and another v G4S Secure Solutions NV* (2017) C-157/15, [2017] All ER (D) 108 (Mar), a ban on the Muslim headscarf being worn by an employee was held by the European Court of Justice not to be a breach of EU discrimination laws at all. It was instead seen as an aspect of treating all the workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, to dress neutrally, thereby precluding the wearing of such signs and symbols. The court held that such a rule did not introduce a difference of treatment directly based on religion or belief but, as it was indirectly discriminatory, it had to be limited to what was strictly necessary. This was the approach taken in *Eweida*, but appears to be a somewhat harsh application of it. This is mixed up in the *Achbita* case in a somewhat confused way with notions of state neutrality and state secularism which may have particular resonance in France with its strictly secularist tradition (para [38]).

One broad difference between human rights and discrimination jurisprudence is that under the ECHR there is always a proportionality defence in the case of qualified rights, whereas in the discrimination provisions of the EU it is necessary to fall within one of the narrowly defined exceptions for there to be a defence if the case can be framed as direct discrimination. The significance of this differentiation may be seen in the important decision in *Bougnaoui and another v Micropole SA* (2017) C-188/15, [2017] All ER (D) 107 (Mar) which was decided by the Court of Justice at the same time as *Achbita*. A design engineer employee of a digital information company was told that the wearing of the headscarf might be a problem when she was in contact with clients. At

interview they emphasised the need for 'neutrality' (para [14]). The only time she was prohibited from wearing a headscarf was when she was in contact with customers, which was no greater than 5% of the time spent at work.

She was dismissed soon after being hired without notice on the basis that it was by reason of her own conduct. The company wrote to her of their need for 'neutrality' although it was unclear precisely what this meant. They relied on the derogation in Council Directive 2000/78/EC but the occupational requirement which provides a defence to a claim must be 'genuine' and 'determining'.

The Advocate General in *Bougnaoui* at para [96] focused on the meaning of 'genuine and determining' in the derogation from discrimination so that she said that the derogation must be limited to what is *absolutely necessary* (para [99]). She also emphasised the question of personal autonomy so that a person should not be deprived of autonomy in areas of fundamental importance to their lives. Only rarely would religion constitute a genuine and determining occupational requirement (*Bougnaoui*, para [38]).

In relation to a defence to the right of religious manifestation, the obvious area of application is so as to protect health and safety. Here it was not impossible for her to perform duties while wearing the veil as is required for the derogation to apply. Another basis would be if an employer could show that its business would lose money or reputation if a particular form of dress was adopted.

The court held (at para [25]) that the question was whether Art 4(1) of Directive 2000/78 'must be interpreted as meaning that the willingness of an employer to take account of the wishes of a customer no longer to have that employer's services provided by a worker wearing an Islamic headscarf constitutes a genuine and determining occupational requirement within the meaning of that provision'. This was answered in the negative. It had to be an objective matter which was put forward by the defendant.

The factors involved in assessing proportionality include the size of the undertaking concerned so that: 'The bigger the business, the more likely it will be to have resources allowing it to be flexible in terms of allocating its employees to the tasks required of them' (*Bougnaoui* at para [125]). In *Bougnaoui* the Advocate General said at para [39]: 'It is only where the external appearance of school teachers may create or contribute to a sufficiently specific risk of an impairment of State neutrality or peaceful coexistence within the school system that such a prohibition may be justified'.

The range of objections accepted by the ECtHR in respect of the veil or similar coverings for Islamic women in different circumstances is too wide:

- In *Şahin v Turkey* App No 44774/98 (2004), it was said that the wearing of the headscarf by a student may put other students under pressure to adopt more fundamentalist approaches to their faith (although this risks being characterised as paternalistic).
- In *SAS v France,* it was decided that the aim of living together (*le vivre ensemble*) could justify the ban as long as it was proportionate (although no hint of what that lack of proportionality might be was given). This justification holds that a concealed face inhibits the right of citizens to easily socialise and coexist, although this has been undermined by experience during the pandemic. It is noteworthy that at para [120] the court recognised 'that the apparel in question is perceived as strange by many of those who observe it… it is [however] the expression of a cultural identity which contributes to the pluralism that is inherent in democracy'.
- *Dahlab v Switzerland (admissibility decision)* [2001] Lexis Citation 5118 was a claim by a teacher of young children 'of tender age' to wear a headscarf and it was decided that she had the influence over the intellectual and emotional development of the young. The claim of breach failed for reasons that wearing the veil might lead to proselytism and it was inimical to gender equality.
- In *Karaduman v Turkey* App No 16278/90 (1993), the wearing of a headscarf by a university professor was not permitted, but she had chosen to pursue her higher education in a secular university and it was decided that she had thereby submitted to the university dress rules (although this would not have been the case after *Eweida* where that point would have fed into the general question of proportionality).
- *Ebrahimian v France* App No 64846/11 (2015): a claim by an employee in the psychiatric services unit of a public hospital was rejected because of the wide margin of appreciation of the state parties and the acceptability of a system that elevates secularism to a constitutional principle and uses it as a basis for restricting individual expressions of religion by persons associated with the state.

This bears out the statement made by the ECtHR in *Şahin v Turkey* that: 'A margin of appreciation is particularly appropriate when it comes to the regulation of by the contracting states of the wearing of religious symbols in teaching institutions since rules on the subject vary from one country to another depending on national traditions…'

Conclusion

Thus the cases demonstrate the many different interests involved in responding to the interconnection between dress codes and religious dress, including the employer's interest in promoting diversity at work and the freedom to create a religiously neutral workplace. The cases are of course quite fact-specific. The answer to the question may indeed differ depending as to who is asking the question, a student or employee, and in what context. There may also be fair trial and health and safety considerations and questions of the ability to communicate to others. The debate may also raise issues of gender equality.

Wearing religious symbols may also be seen as an expressive act, so can be mixed in with issues of freedom of expression. It may also express cultural or ethnic identity. There is a perspective which argues that states and employers are often more willing to dictate to women what they can choose to wear, which filters into the caselaw in different ways (whether it is said that it is a general requirement of a religion that women cover, or whether it is a firmly held personal preference/obligation).

Good reasons must be put forward to justify restrictions and it assists if the employer seeks to reach compromises. The balance to be struck is perhaps best encapsulated in *Şahin v Turkey*, paras [104]–[111] recognised the need in some situations to restrict freedom to manifest religious belief, the value of religious harmony and tolerance between opposing or competing groups and of pluralism and broadmindedness; the need for compromise and balance; the role of the state in deciding what is necessary to protect the rights and freedom of others; and the permissibility in some contexts of restricting the wearing of religious dress.

It is not the case that a person is allowed to manifest one's religion at any time and at any place of one's own choosing. What is not seen in the existing caselaw is a requirement for reasonable accommodation with religious requirements, although in *Bougnaoui,* the Advocate General recommended that accommodation be reached if possible between the needs of the employer and employee (para [133]). The decisions on the Muslim veil appear harsh. NLJ

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