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Faith — And Freedom From It — Clash In French Workplaces

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In France, the issue of wearing a religious symbol, and more specifically of wearing an Islamic headscarf, in the workplace is extremely sensitive. A recent survey, conducted by the Randstat Institute and French Observatory of Religious Practice in the Workplace (Observatoire du Fait Religieux en Entreprise), highlights that 23 percent of managers in France regularly face issues arising out of religious practices at work. The same survey evidences that 64 percent of managers support a prohibition of visible religious symbols in the workplace.

The result of this survey reflects a particular cultural approach of religious practice in the public sphere. The French legal framework in this respect is a careful balance between the core principle of secularism, on the one hand, and principles of religious freedom and nondiscrimination, on the other hand.

According to Article 1 of the French Constitution, "France shall be an indivisible, secular, democratic and social Republic. […] It shall respect all beliefs." This principle of separation of church and state (and, more generally, of state and all religious beliefs) traces its roots to the French Revolution, when it was crucial for the revolutionaries to free the government from the influence of the Catholic Church. This principle is also reflected in Article 10 of the French Declaration of Human and Civic Rights of Aug. 26, 1789: "No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order" and was later embodied in a law on Dec. 9, 1905.

The principle of secularism has imposed strict neutrality of public services. Under French law, if all public agents must equally treat all individuals and respect their freedom of beliefs, a public agent who manifests his or her religious belief is considered in breach of his or her contractual obligation.

Meanwhile, freedom of religion and nondiscrimination are rights guaranteed in the workplace by both internal and supranational legislation.

For instance, pursuant to Article L.1121-1 of the French Labor Code, there should be no restriction to employees' individual and collective rights if such restriction is not justified by the nature of the task or proportional to the objective sought.

The European Convention on Human Rights also guarantees nondiscrimination (Article 14) and religious freedom (Article 9). It provides that freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The balance point in the private sector between: (1) the principle of secularism and (2) the principle of not discriminating based on religious beliefs has been brought to light by two recent decisions from the French Supreme Court.

March 19, 2013

The principle of secularism in Article 1 of the French Constitution is not applicable to private-sector employees who do not run a public service.

In this particular case, a nursery had inserted in its internal regulation a rule that all employees, whatever their functions, must not wear signs of religious belonging. Notwithstanding this rule, an employee came to work wearing an Islamic headscarf and refused to take it off while working. The employee was then dismissed for misconduct.

The employee filed a claim before French employment courts for discrimination according to religious belief.

For its defense, the nursery responded that the children who were kept in the nursery should not, taking into account their young age, be faced with ostentatious symbols of religious affiliation.

Lower courts decided that the dismissal was justified, and the case went up to the French Supreme Court, which stated in its decision on March 19, 2013, that "the principle of secularism of Article 1 of the French Constitution is not applicable to employees of the private sector that do not run a public service. [This principle] cannot therefore be used to deprive [the employees] from the protection of the provisions of the French Labor Code."

The French Supreme Court then made clear that a distinction must be made between employees of the private sector not running a public service and employees of the public sectors or employees of the private sector running a public service. In this case, even if the nursery had a mission of general interest, the French Supreme Court deemed that it could not be considered running a public service.

On the contrary, in another decision rendered on the same day, the French Supreme Court confirmed that employees of the private sector running a public service are subject to a strict obligation of neutrality. As a consequence, judges have considered that an employee of the French social security services cannot wear an Islamic headscarf at the workplace. (See case here.)

However, following EU requirements, the French Supreme Court also mentioned that such bans could, under certain circumstances, be allowed if the following three cumulative criteria were met:

1. The ban is justified by the nature of the tasks to be performed.
2. The ban responds to a determining and essential professional requirement.
3. The ban is proportionate to the result searched.

Lower courts, however, resisted this decision, and the case has been brought before the French Supreme Court for a second time.

In a decision on June 25, 2014, without reconsidering its previous position, the French Supreme Court approved the decision of a court of appeals that validated the nursery's dismissal of the employee. In this decision, the French Supreme Court took into account the particularities of this nursery (e.g., the nursery was small and employed only 18 employees who were all in contact with children, and the nursery was created to cater to children from underprivileged backgrounds and to promote their social insertion and that of their mothers without distinction as to their political or religious beliefs) and considered that the three criteria set out in its decision of March 19, 2013, were met.

The French Supreme Court has been asked to provide more details on the circumstances where the above three criteria can be met.

April 9, 2015

The French Supreme Court asks the European Court of Justice to make a decision on the circumstances where an employer can prevent an employee from wearing an Islamic headscarf. (See case here.)

In another case, an employee had been hired as a study engineer by an information technology consulting company. After she completed a project within a client's company, her employer asked her to withdraw her Islamic headscarf in the future during her external interventions. Her employer company mentioned that it was acting in response to a client's request and that the client informed the company that its employees had been inconvenienced by the Islamic headscarf that she wore. She refused to withdraw her headscarf and was dismissed for disciplinary reasons.

The employee has challenged the validity of this dismissal, arguing that it constituted a discrimination based on religious beliefs.

The employer company responded by using the decision of the French Supreme Court from March 19, 2013, and argued that the circumstances met the three criteria mentioned above.

Given the sensitivity of this matter, the French Supreme Court has decided to refer this question to the European Court of Justice under the following terms:

Can the provisions of Article 4 Section 1 of the Directive 78/200/EC of the Council dated Nov. 27, 2000, be interpreted in a way that constitutes a determining and essential professional requirement, by reason of the nature of the professional activity or the condition of its performance, the wish of a client of an IT consulting company to not see the IT services performed by an employee, a study engineer, wearing an Islamic headscarf?

The French Supreme Court likely already has its opinion on this question, but given the political debate that followed its decision on March 19, 2013, it has decided to search for the support of a higher European authority to legitimize its position.

Similar questions have already been referred for a preliminary ruling in front of the European Court of Justice.

In a previous decision dated July 10, 2008, the European Court of Justice ruled that an employer stating publicly that it will not recruit employees of a certain ethnic or racial origin constitutes direct discrimination in respect of recruitment within the meaning of Article 2 of Directive 2000/43/EC of June 19, 2000, implementing the principle of equal treatment between persons regardless of racial or ethnic origins. In this case, the defendant, a Belgian company, argued that its recruiting policy was an attempt to comply with its customers' requirements, the latter being reluctant to give immigrants access to their private residences. (See case here.)

In this 2008 decision, the facts were different from the preliminary ruling referred to the European Court of Justice by the French Supreme Court in April 2015. However, in both cases, the defense line is similar. Both defendants use a client requirement as a shield against alleged discrimination.

Notwithstanding the fact that the European Court of Justice has not had yet the opportunity to rule on what should be considered as a "determining and essential professional requirement", a strict interpretation of the decision dated July 10, 2008, should lead the court to consider that preventing the employee from wearing her Islamic headscarf because of clients requirements should be, in principle, considered as unlawful discrimination in respect of European law provisions.

Some companies handle the lack of legal certainty surrounding these issues by inserting into their internal policies a general clause preventing employees from wearing religious symbols or clothing in the workplace. Other companies implement into their premises a secularism charter (charte de la laicite). Even if there seems to be a certain tolerance from the labor authorities, such provisions run the risk to be challenged in light of these recent case law developments.

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