Key Issues: **Social Policy – Equal Treatment – Religion - Preliminary Ruling**

Case: **IX v WABE eV**

Reference: **Case C-804/18, CJEU (Grand Chamber), 15 July 2021**

Legislation: **Directive 2007/78/EEC**

Background

WABE runs a large number of child day care centres in Germany, in which more than 600 employees work and which care for approximately 3,500 children. It is non-partisan and non-denominational.

WABE follows and wholly endorses the recommendations of the City of Hamburg (Germany) for the education of children in day care facilities, published in March 2012 by the Office for Employment, Social Affairs, Family and Integration of the City of Hamburg. Those recommendations state, inter alia, that '*All child day care facilities have the task of addressing and explaining fundamental ethical questions as well as religious and other beliefs as part of the living environment. Child day care centres therefore provide space for children to consider the essential questions of joy and sorrow, health and sickness, justice and injustice, guilt and failure, peace and conflict and the question of God. They support the children in expressing feelings and beliefs on these questions. The possibility of looking at these questions in a curious and inquisitive manner leads to consideration of the substance and traditions of the religious and cultural orientations represented in the group of children. This develops appreciation and respect for other religions, cultures and beliefs. This consideration increases the child's self-understanding and experience of a functioning society. The children also experience and actively contribute to religiously rooted festivals in the course of the year. By encountering other religions, children experience different forms of reflection, faith and spirituality*.'

IX is a special needs carer and has been employed by WABE since 2014. At the beginning of 2016, she decided to wear an Islamic headscarf. From 15 October 2016 to 30 May 2018, she was on parental leave. In March 2018, WABE adopted the *'Instructions on observing the requirement of neutrality'* with a view to applying them in its establishments. IX learned of those instructions on 31 May 2018. Those instructions state, inter alia, that WABE is '*non-denominational and expressly welcomes religious and cultural diversity. In order to guarantee the children's individual and free development with regard to religion, belief and politics, … employees are required to observe strictly the requirement of neutrality that applies in*

respect of parents, children and third parties. WABE pursues a policy of political, philosophical and religious neutrality in respect thereof'. With the exception of teaching staff, the obligations imposed in order to comply with the principle of neutrality do not apply to WABE employees working at the registered office of the undertaking since they have no contact with either the children or the parents. In that connection, the following regulations '*serve as principles for specifically observing the requirement of neutrality in the workplace.*

– *Employees shall not make any political, philosophical or religious statements to parents, children and third parties in the workplace.*

– *Employees shall not wear any signs of their political, philosophical or religious beliefs that are visible to parents, children and third parties in the workplace.*

– *Employees shall not give expression to any related customs to parents, children and third parties in the workplace*'.

The '*information sheet on the requirement of neutrality*' issued by WABE answers the question whether the Christian cross, Islamic headscarf or Jewish kippah may be worn as follows:

'*No, this is not permitted as the children should not be influenced by the teachers with regard to a religion. The deliberate choice of religiously or philosophically determined clothing is contrary to the requirement of neutrality*.'

On 1 June 2018, IX came to her workplace wearing an Islamic headscarf. After she refused to remove that headscarf, she was temporarily suspended by the head of the child day care centre. On 4 June 2018, IX came to work again wearing a headscarf. She was given a warning on that same day for having worn the headscarf on 1 June 2018 and was asked, in view of the requirement of neutrality, to perform her work without a headscarf in future. As IX again refused to remove the headscarf, she was sent home and temporarily suspended. She received a further warning on the same day. During that same period, WABE required a female employee to remove a cross that she wore around her neck.

IX brought an action before the Labour Court, Hamburg. The Labour Court decided to stay the proceedings and to refer a number of questions to the Court of Justice of the EU for a preliminary ruling.

Consideration by CJEU

The CJEU noted that, in accordance with Article 1 of Directive 2000/78, the purpose of that directive is to establish a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment. Under Article 2(1) of that directive, '*the "principle of*

equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1' thereof. Article 2(2)(a) of that directive provides that, for the purposes of applying Article 2(1) thereof, direct discrimination is to be taken to occur where one person is treated less favourably than another person in a comparable situation, on any of the grounds referred to in Article 1 of that directive, which include religion or belief.

As regards the concept of 'religion', within the meaning of Article 1 of Directive 2000/78, the Court has already held that it must be interpreted as covering both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public.

The wearing of signs or clothing to manifest religion or belief is covered by the '*freedom of thought, conscience and religion'* protected by Article 10 of the Charter of Fundamental Rights of the EU. The specific content of religious precepts is based on an assessment which it is not for the CJEU to carry out.

In that regard, it should be added that Article 1 of Directive 2000/78 refers to religion and belief together according to which the EU legislature may take appropriate action to combat discrimination based on, inter alia, '*religion or belief*', and Article 21 of the Charter, which refers, among the various grounds of discrimination which it mentions, to '*religion or belief*'. It follows that, for the purposes of the application of Directive 2000/78, the terms '*religion*' and '*belief*' must be analysed as two facets of the same single ground of discrimination. As is apparent from Article 21 of the Charter, the ground of discrimination based on religion or belief is to be distinguished from the ground based on '*political or any other opinion'* and therefore covers both religious beliefs and philosophical or spiritual beliefs.

It is also apparent from the case-law of the CJEU that, by referring, first, to discrimination '*on*' any of the grounds referred to in Article 1 of Directive 2000/78 and, secondly, to less favourable treatment '*on*' any of those grounds, and by using the terms '*another [person]*' and '*other persons*', the wording and the context of Article 2(1) and (2) of that directive do not permit the conclusion that, regarding the protected ground of religion or belief referred to in Article 1 thereof, the prohibition of discrimination laid down by that directive is limited only to differences in treatment between persons having a particular religion or belief and those who do not. On the other hand, it follows from the expression '*on*' that discrimination on the grounds of religion or belief, for the purposes of that directive, cannot be said to occur unless the less favourable treatment or particular disadvantage at issue is experienced as a result of the religion or belief.

The CJEU held that:

1. Article 1 and Article 2(2)(a) of Council Directive 2000/78/EC must be interpreted as meaning that an internal rule of an undertaking, prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, does NOT constitute, with regard to workers who observe certain clothing rules based on religious precepts, direct discrimination on the grounds of religion or belief, for the purpose of that directive, PROVIDED that that rule is applied in a general and undifferentiated way.

2. Article 2(2)(b) of Directive 2000/78 must be interpreted as meaning that a difference of treatment indirectly based on religion or belief, arising from an internal rule of an undertaking prohibiting workers from wearing any visible sign of political, philosophical or religious beliefs in the workplace, MAY be justified by the employer's desire to pursue a policy of political, philosophical and religious NEUTRALITY with regard to its customers or users, provided, first, that that policy meets a GENUINE NEED on the part of that employer, which it is for that employer to demonstrate, taking into consideration, inter alia, the legitimate wishes of those customers or users and the adverse consequences that that employer would suffer in the absence of that policy, given the nature of its activities and the context in which they are carried out; secondly, that that difference of treatment is appropriate for the purpose of ensuring that the employer's policy of neutrality is properly applied, which entails that that policy is pursued in a consistent and systematic manner; and, thirdly, that the prohibition in question is LIMITED to what is strictly necessary having regard to the actual scale and severity of the adverse consequences that the employer is seeking to avoid by adopting that prohibition.

3. Article 2(2)(b)(i) of Directive 2000/78 must be interpreted as meaning that indirect discrimination on the grounds of religion or belief resulting from an internal rule of an undertaking prohibiting, at the workplace, the wearing of visible signs of political, philosophical or religious beliefs with the aim of ensuring a policy of neutrality within that undertaking can be justified only if that prohibition covers ALL visible forms of expression of political, philosophical or religious beliefs. A prohibition which is limited to the wearing of conspicuous, large-sized signs of political, philosophical or religious beliefs is liable to constitute direct discrimination on the grounds of religion or belief, which cannot in any event be justified on the basis of that provision.

4. Article 2(2)(b) of Directive 2000/78 must be interpreted as meaning that national provisions protecting the freedom of religion may be taken into account as more favourable provisions, within the meaning of Article 8(1) of that directive, in examining the appropriateness of a difference of treatment indirectly based on religion or belief.

Why is this decision important?

Many employers struggle with the issue of religious images and religious clothing worn by employees in the workplace. Employers need to establish a "genuine need" to impose a prohibition. This can be based on the employer's desire for a neutral environment for workers or customers. Any prohibition must be limited to what is necessary. The prohibition, once adopted, should apply to all such imagery and clothing. The employer is entitled to take account of the legitimate wishes of those customers or users and the adverse consequences that that employer would suffer in the absence of a policy of prohibition.

The material on these pages is for information purposes only. You should not act or rely on this information without seeking professional advice.

CLfE (6/2021)

Elliott Duffy Garrett | **40 Linenhall Street** | **Belfast** | **BT2 8BA**

W:	**www.edglegal.com**	**E:**	**kevin.mcveigh@edglegal.com**
T:	**+44 (0) 28 9024 5034**	**F:**	**+44 (0) 28 9024 1337**