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ANALES de DERECHO

A THINLY VEILED DISCRIMINATION

ECJ 14th March 2017 (C-157/15 & C-188/15)

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Abstract

On 14th March 2017, the European Court of Justice made two decisions which solved some questions regarding the interpretation of different articles of the Directive 2000/78. These questions are related to religious discrimination in the workplace. Both employees were dismissed on account of their denial to do without the Islamic headscarf the activities which implied an interaction with customers. It is put foward, among other matters, which reasons can justify a discriminatory behaviour by the employer and what consequences can produce for the company the worker showing of outward signs of religious beliefs within the contractual sphere. It is particularly analyzed the possible contractual default of the company with its customers.

Palabras clave*: Discrimination based on religion or belief, policy of religious neutrality, unjustified dismissal, contractual default, diligent behaviour.*

Resumen

El 14 de marzo de 2017 el TJUE dictó dos sentencias que dieron respuesta a cuestiones referidas a la interpretación de distintos preceptos de la Directiva 2000/78/CE, relacionadas con la discriminación por motivos religiosos en el ámbito laboral. En ambos supuestos las trabajadoras demandantes se negaron a prescindir del velo islámico durante la realización de actividades que implicaran una relación personal con clientes, motivo por el que fueron despedidas. Se plantean, entre otras cuestiones, qué motivos son susceptibles de justificar una conducta discriminatoria por parte del empleador y qué consecuencias puede producir para empresa la manifestación de las creencias religiosas del trabajador en el ámbito contractual, analizándose en concreto el eventual incumplimiento contractual de aquélla con sus clientes.

Palabras clave: *Discriminación por motivos religiosos, régimen de neutralidad religiosa, despido improcedente, incumplimiento contractual, actuación diligente.*

SUMMARY: I. INTRODUCTION. II. FACTS. III. DIRECT AND INDIRECT DISCRIMINATION IN RELIGIOUS BELIEFS. 1. The nature of the different professional activities. 2. The context in which the activities are carried out. IV. THE SUBJET AND RESPONSE TO REQUESTS FOR PRELIMINARY RULINGS. V. THE RISK OF EXTERNAL DISCRIMINATION AND NEUTRALITY AS POSSIBLE CONTENT OF THE DUTY OF CARE.

I. INTRODUCTION

The right to religious freedom, which covers ex Article 9 ECHR its public manifestation[1], is not unlimited and in certain circumstances could come into conflict with the right of entrepreneurial freedom (Art. 16 ECHR)[2]. This right not only allows businessmen to have free access to the market, but also to develop their economic activities in accordance to management and efficiency criteria they consider more appropriate or convenient[3] whenever they respect core labour standards. Therefore, it should be pointed out the scope and limitation of the external aspect of religious

[1] SALAS PORRAS, M. "Ponderación y modulación del ejercicio del derecho a la libertad religiosa en el contexto obligacional laboral: una mirada a la jurisprudencia española", *Revista crítica de historia de las relaciones laborales y de la política social*, n º 9, 2014, p. 48. «De otro lado, también existe una dimensión externa –el denominado agere licere- que permite a los ciudadanos externalizar ese claustro íntimo, actuando con arreglo a sus propias convicciones y manteniéndolas frente a terceros (STC 137/1990, de 19 de julio)». The ECHR has also referred in several occasions (such as judgement10th November 2005 *Leyla Sahin c. Turkish* CE:ECHR:2005:1110JUD004477498,§ 105) to the *forum externum*, which is contemplated in article 9 of the ECHR.

[2] VALDÉS DAL-RÉ, F. in "Libertad religiosa y contrato de trabajo", *Las transformaciones del derecho de trabajo en el marco de la Constitución Española*, Editorial LA LEY, Madrid, 2006, p. 14 «el ejercicio de la elección religiosa efectuada por el trabajador lleva asociado de manera ineludible el reconocimiento y respeto externos (…) ese ejercicio incide en la ejecución de la prestación laboral, provocando, esta vez sí, una colisión entre derechos: el derecho del trabajador a la observancia de las prácticas que impone su credo religioso entra o puede entrar en conflicto con el interés del empresario al desarrollo de su actividad económica con arreglo a sus opciones de eficiencia; confronta, en suma, con su libertad de empresa».

[3] CONTRERAS MAZARÍO, J.M. points it aout in *La igualdad y la libertad religiosas en las relaciones de trabajo,* Ministerio de Justicia.Secretaría General Técnica, Madrid, 1991, p. 283 «(…) el derecho de libre empresa no supone sólo la libertad de acceso al mercado o emprender actividades económicas; implica también la libre gestión empresarial, sometida a las leyes de un mercado libre. Esta libertad del titular de la empresa se manifiesta –según Entrena Cuesta- tanto frente a los poderes públicos como frente a los consumidores y frente a los trabajadores de la propia empresa».

freedom at work environment, in order to determine under which cases and conditions certain behaviour could be considered a discriminatory conduct and the dismissal it causes could be unlawful.

II. FACTS

On March 14th the ECJ issued two decisions which answered the preliminary rulings made by the French and Belgian Court of Cassation concerning challenge procedures for dismissal proceeding due to religious discrimination. The reason of both dismissals was the refusal of both employees to do without the Islamic headscarf while they were personally working with clients. This behaviour is considered as damaging by the companies which intend to be associated with an image of neutrality.

The first claimant worked as a receptionist since 2003 in a Belgian company which does not allow its workers to show any political, philosophical or religious symbols during their workday. This prohibition, which initially constituted an unwritten rule, was reflected in a text of rules of internal governance three years later, and it says:

«Employees are prohibited, in the workplace, from wearing any visible signs of their political, philosophical or religious beliefs and/or from giving expression to any ritual arising from them" (Case C-157/15)».

The plaintiff followed the requirements from the very first moment she started to work for this company and she did not wear the Islamic headscarf in her daily performance of the inherent duties to the job –which implied a direct and personal communication with customers-, but in May 2006 she informed her Line Manager her intention of wearing an Islamic headscarf because of religious reasons during the day work too. This was the reason why she was dismissed from her job on June 12th 2006.

On the other hand, the second plaintiff worked as a project engineer in a French engineering and consultancy company. In August 2008, when she joined the company, she was warned not to wear the hijab headscarf when visiting or being in personal contact with customers; but she refused to comply with the order. On May 15th 2009 the company received a customer complaint and decided to ask her to leave the company (Case C-188/15).

III. DIRECT AND INDIRECT DISCRIMINATION IN RELIGIOUS BELIEFS

Direct and Indirect discrimination coexist in Directive 2000/78/CE, each one relies on a related but different legal basis. The first one occurs when a person is given a worse treatment because of his/her religion (Article 2.2.a). The second one occurs when although the person is given a similar treatment to all the others, the criterion or practice applied is considered particularly burdensome on the grounds of his/her specific religion (Article 2.2.b).

To prohibit the wearing or display of any kind of religious, philosophical or political symbolism at work would not constitute Direct discrimination against anyone having these political, philosophical or religious beliefs. The Muslim worker would not be any worse –or better- treated than the others because of her religion. As it was rightly stated by the Advocate General[4], this prohibition is not an inter-religious discrimination (because it affects to all of them) and it is not a discrimination of religion (because political, ideological and anti-religious symbols are also considered in the same way). By contrast, the prohibition of a specific religion, as the Muslim, or a particular political ideology, as Communism, would be considered a Direct discrimination.

However, that ban –seemingly neutral rule- could lead to an Indirect discrimination if it strongly affects to a particular person because of his/her specific religion. In this respect, the Muslim woman who is obliged to follow a dress code by her religion is, as a result of this rule, in a more committed position than a Christian woman who does not need to dress in a special way to remain faithful to what she believes.

The legal assessment is significant as the causes for justification are different in each case: Direct discrimination for religious grounds can only be justified by certain limited reasons laid down by the Council Directive (the protection of the human rights

[4] She shows in the paragraphs 49-53 of her conclusions about case C-157/15 that «It must be emphasized first of all that the ban at issue applies to all visible religious symbols without distinction. There is therefore no discrimination *between religions*. (...) It is true that the Directive, (...) prohibits not only discrimination based on *a* religion but any form of discrimination based on religion *per se (...)* Even from this point of view, however, a case such as that at issue does not support the assumption of direct religious discrimination.(...) a company rule such as that operated by G4S is not limited to a ban on the wearing of visible signs of *religious* beliefs, but, at one and the same time, also explicitly prohibits the wearing of visible signs of political or philosophical beliefs. (...) That requirement of neutrality affects a religious employee in exactly the same way that it affects a confirmed atheist who expresses his anti-religious stance in a clearly visible manner by the way he dresses, or a politically active employee who professes his allegiance to his preferred political party or particular policies through the clothes that he wears (...)».

and freedoms of citizens ex Article 2.5 and the fulfilment of the special professional requirements ex Article 4.1) whereas the Indirect one is justified by the existence of any legitimate purpose –if the means used are appropriate and necessary- (Article 2.2.bi)[5].

The Article 4.1 of the Council Directive sets out that it could be justified the discrimination based in any characteristic related to Article 1 reasons –religion is found among them- when by reason of *the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement.*

On the other hand, **the nature of the particular occupational activities** carried out by the plaintiffs does not necessarily seem to exclude the general use of religious symbols or the hijab headscarf particularly. The activity performance carried out by a receptionist and an engineer is not conditioned by the use of the Islamic headscarf; dealing with customers and developing engineering designs are not impeded or hindered –regarding the natural acts for a expeditious work- because of wearing a headscarf or a cross. However, it should be considered that the wording of the article we are dealing with shows both: the nature of the activity as well as the context in which it takes place. Both are viewed as elements which can turn a particular characteristic to a genuine and determining occupational requirement. The connector "or" gives autonomy to the reasons previously mentioned. Consequently it should be taken under consideration if a neutral clothing could be in both cases a genuine and determining occupational requirement due to **the context in which the activities are carried out.**

[5] Case law of ECJ and Julianne Kokott, Advocate General of the Case C-157/15, have pointed out that «The distinction between direct and indirect discrimination is legally significant primarily because the possible justifications may vary depending on whether the underlying difference of treatment is directly or indirectly linked to religion. In particular, the possible objectives which may legitimately be relied on in order to justify a direct difference of treatment based on religion are fewer than those capable of justifying an indirect difference of treatment». Likewise, in her conclusions about the case Andersen (C-499/08) she highlights that «possible justifications for an *indirect difference in treatment* based on age are framed in very general terms in Article 2(2)(b)(i) of Directive 2000/78 ('objectively justified by a legitimate aim'), whereas a *direct difference in treatment* based on age is justifiable only by social policy considerations for the purposes of Article 6(1) of the Directive, (29) by specific occupational requirements within the meaning of Article 4(1) of the Directive (30) or by public policy requirements for the purposes of Article 2(5) of the Directive».

There are cases where it is clear that there is a need of requiring special clothing on grounds of security or hygiene. Thus, doctors and other hospital staff[6] or firefighters[7]; but employers can lay down rules concerning clothing at workplace in cases other than those of strict necessity. It is perfectly lawful that a company, in the exercise of its organizational power conferred by entrepreneurial freedom[8], defines its own policy whereby workers should dress in a certain way[9]. It is not unusual to require workers to wear a uniform or in a formal style because of reasons connected with the company image and not because its usefulness; but the important thing to be examined in both cases is if the compliance of rules related to clothing is a genuine and determining occupational requirement due to the context in which it is carried out.

Apart from that, the second fixed or specific ground which serves to justify any kind of discriminatory action is set out on the Article 2.5 of the Council Directive, which states: «*This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for (...) the protection of the rights and freedoms of others».* Reference has been made to measures covered by national legislation, consequently, unlike the occupational requirements present on Article 4, these measures must be of a public nature or at least based on a public authorization[10]

[6] Their uniform is often made of fabrics, which does not produce electricity in order to avoid explosions at the operating room and it is of certain colours (usually blue or green) for avoiding glare.

[7] Their uniform is made of specific fabrics such as cotton, which absorbs perspiration and humidity, expels body heat, does not generate static electricity, is a good insulator and withstands high temperature.

[8] See note 3. GIL GIL, JL. in "Poder directivo y apariencia externa del trabajador", *Relaciones Laborales, Nº 19/20, Sección Monografías, Octubre 2005, Año XXI, pág. 211, tomo 2, Editorial LA LEY, «*La libertad de apariencia externa del trabajador, protegida por los derechos fundamentales que acaban de mencionarse, y por la noción de vida personal del trabajador, puede colisionar con las facultades organizativas del empresario, garantizadas por el principio constitucional de la libertad de empresa (art. 38 CE (LA LEY 2500/1978))» and further on he refers to the judgement of the High Court of Spain 23rd January 2001, which recalls that «A falta de una regulación legal o convencional, de un uso o costumbre o de un pacto individual, el empresario puede restringir de forma unilateral la libertad de apariencia externa del trabajador».

[9] That was pointed out in the paragraph 94 of the judgment of the ECHR (Case of *Eweida and others v. The United Kingdom)*, which describes *«*the employer's wish to project a certain corporate image» as a «undoubtedly legitimate» aim.

[10]See to that effect judgment of ECJ 13th September 2011, C-447/09, *Prigge and others* (EU:C:2011:573, paragraphs 59 to 61): «In relation to the issue of whether a measure adopted by way of collective agreement can be a measure provided for by national law, it must be noted, as did the Advocate General at paragraph 51 of his Opinion, that the EU legislature, at Article 2(5) of the Directive, referred to measures falling within 'national law', and that neither Article 4(1) nor 6(1) of the Directive refer to any specific legal instrument. The Court has already held that the social partners are not bodies governed by

These limited grounds which justified Direct discrimination clearly constitute lawful purposes within the meaning of Article 2.2.b.i of the Council Directive, but they are not the only ones which can justify discrimination if it is Indirect. Thus, a rule requiring certain height to apply for a job as a security guard would constitute an Indirect discrimination on the grounds of sex and race and, as such, could be justified through the claim that such characteristic is a genuine and determining occupational requirement but also through any other purpose which could be consider lawful despite not being expressly laid down in the Directive.

IV. THE SUBJECT AND RESPONSE TO REQUESTS FOR PRELIMINARY RULINGS

The preliminary rulings made by the national courts refer to the interpretation of different precepts contained in the Council Directive 2000/78/EC of 27th November 2000 establishing a general framework for equal treatment in employment and occupation, but both are not sufficiently accurate in their wording as neither of them ask what is necessary for the resolution of the cases.

The **preliminary ruling of the Belgian Court** asks to ECJ: «Should Article 2(2)(a) of Council Directive 2000/78/EC of 27 November 2000 [establishing a general framework for equal treatment in employment and occupation] be interpreted as meaning that the prohibition on wearing, as a female Muslim, a headscarf at the workplace does not constitute direct discrimination where the employer's rule prohibits all employees from wearing outward signs of political, philosophical and religious beliefs at the workplace?».

A negative answer does not mean that the dismissal would be legitimate, as such a practice could lead to an unjustified Indirect discrimination. And a positive answer

public law (…) That ruling does not however prevent Member States from authorising, through rules to that effect, social partners from adopting measures, within the meaning of Article 2(5) of the Directive, in the domains referred to in that provision that fall within collective agreements. Those security clearance rules must be sufficiently precise so as to ensure that they fulfil the requirements set out in the said Article 2(5)».

would neither necessary lead to describe the dismissal as unlawful. Hence, what it seems unlike to assume referring the Court[11], Direct discrimination can also be justified. There is no chance of a useful response to the question posed by the Belgian Court which could assess the suitability or unsuitability of the dismissal. And it is the defective wording of an incorrect question what involves a greater risk.

If ECJ had simply answered to the specific question, the answer would have been considered satisfactory by the Belgian Court, which would have based its judicial decision on an erroneous motive. Maybe, this is why the ECJ does not only answer to the strictly required question, but apart from denying that such a requirement constitutes a Direct discrimination, it extends the resolution till the field of Indirect discrimination, warning that this kind of conduct previously mentioned could fit into this category. It points out that the conduct could be justified in accordance with Article 2.2.b.i of the Council Directive if the means of achieving that aim are appropriate and necessary, since it considers that the political, philosophical and religious neutrality policy followed by the company is a legitimate purpose.

Finally, the judgement confirmed that the **appropriateness** of the means requires corroboration by verifying that the neutrality policy shown by the company as base of its conduct was imposed to workers in general before the dismissal of the plaintiff; and its **necessity** through the confirmation that such prohibition only works in cases which become strictly necessary for the achievement of the intended aims: those where there is a personal contact with customers.

On the other hand, the preliminary ruling of French Court asks: «Must Article 4(1) of Directive 2000/78 be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information

[11] The Advocate General also deduces from the generic and insufficient preliminary ruling made by the Belgian Court that it relies on a false premise: «(…) in the present preliminary ruling proceedings, the question referred to the Court is, strictly speaking, concerned only with the concept of direct discrimination under Article 2(2)(a) of Directive 2000/78, and thus, ultimately, also with the distinction between direct and indirect discrimination, but not with whether discrimination (or a difference of treatment) — of whatever kind — is justified. This may be because the Belgian Court of Cassation seems to take it as read that, in a case such as this, indirect discrimination is justifiable, but direct discrimination is not.(…)However, as I shall explain in more detail below, even a direct difference of treatment is eminently justifiable under certain conditions» (paragraphs 26 and 27 of her conclusions).

technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?».

The question only refers to the attendance of one of the limited grounds which justifies any kind of discriminatory action. This evidences that or the assumption was that the conduct was a Direct discrimination or it wrongly accepted that only Article 4 of the Directive can justify a discriminatory behavior. This time, the ECJ merely states that a particular customer desire of being attended by a person who does not show or manifest his/her religious beliefs through his/her clothing does not make neutral clothing to become a genuine and determining occupational requirement. However, this does not mean that it does not constitute a legitimate purpose capable in itself of justifying an Indirect discrimination. The only aspect ruled out by this statement is that such a reason could justify a Direct discrimination.

Besides, both: the preliminary ruling originated in France and the ECJ judgement which responds to it, are referred to the wish of "a client", not to the wishes of the majority of the clients as an abstract business interest and it raises the question whether the operative part of the judgement would have changed if the preliminary ruling would have been referred to that abstract business interest instead. In this way, one of the arguments used by the Advocate General in her conclusions states that there is no legal basis by which «*the commercial interest of its business in its relations with its customers, could justify the application of the Article 4(1) derogation».* After that she recalls that the Court has claimed that *«direct discrimination (...) cannot be justified on the ground of the financial loss that might be caused to the employer».*

However, Article 4 mentioned by the Advocate General lets business interests justify Direct discrimination because it turns the attendance of genuine and determining occupational requirement into a justifying motive. This avoids the entrepreneur to assume economic damages produced by a service wrongly performed due to religious freedom expression. A public relations agency would not have to assume the interactive and visual limitation of the use of the yashmak or burqa to respect the right to religious freedom, and this precisely because of the economic damage that could be caused to the

entrepreneur. The claim of the Court that the Advocate General mentions is clearly insufficient in order to conclude if it is possible or not to justify the judged conducts by means of Article 4.1 of the Directive.

However, provided the restrictive nature with which Article 4 has to be interpreted and applied[12] and the evidence that the quality of the service provided by the plaintiff was not affected by her clothing, it seems that the operative part of the judgement should have been the same one.

It should be considered, in order to reconcile both pronouncements, that such wishes –as an abstract business interest- constitute a lawful purpose which could justify Indirect discrimination. It is not possible to detach the monitoring of a neutrality policy from the willingness of the company to consider its customers wishes: the first one is the instrument for the satisfaction of the second one. If the monitoring of a neutrality policy is a legitimate purpose ex Article 2.2.b.i. then the aim which it pursues should also be so.

V. THE RISK OF EXTERNAL DISCRIMINATION AND NEUTRALITY AS POSSIBLE CONTENT OF THE DUTY OF CARE

The use of religious symbols by the employees during their occupational activities can cause economical damages to the businessman. This injury can derive either from the decline in the quality of services provided by the worker –due to the specific way in which he/she expresses religious beliefs- or from the proper religious

[12] Recital 23 of Directive 2000/78 refers to Article 4.1 and states: «In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, disability, age or sexual orientation constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate». This has been pointed out by the ECJ in several of its judgements: 13th September 2011, Prigge and others (C-447/09, EU:C:2011:573), paragraph 72, 13th November 2014, Vital Pérez (C-416/13, EU:C:2014:2371), paragraph 47. In relation with Article 2.5 of the Council Directive, judgements 12th January 2010, Petersen (C-341/08, EU:C:2010:4), paragraph 60; 13th September 2011, Prigge and others (C-447/09, EU:C:2011:573), paragraph 56, and 12th December 2013, Hay (C-267/12, EU:C:2013:823), paragraph 46.

manifestation, that is, the loss of clients due to the expression of the worker´s religious beliefs. The use of burqa by a public relations officer in a company would objectively reduce the quality of the service provided and the entrepreneur could claim that having your face uncovered is a genuine and determining occupational requirement. However, when the economical damage suffered by the employer is not due to a decline in the quality of the service and it is due to the clients who decide not to hire the company because of its employee´s religion, it should be asked who should bear the risk of the discriminary conduct of the clients: the entrepreneur, suffering the economic impact due to the loss of clients, or the employees, giving their religious symbols away.

This seems to have been clarified by the ECJ, which states that the monitoring of a neutrality policy by a company is a legitimate purpose that could justify the Indirect discrimination. The aim of such a policy is none other than to avoid the possible economic damage that would entail that certain clients would decide to hire less or no longer hire the company because of the religious beliefs of its workers. All this is revealed by the judgement statement saying that neutrality only could be required to the workers who were in personal contact with clients[13]. This would lack of sense if the aim of the policy were a different one. It seems that faced with the conviction that a certain sector will act in a discriminatory way, and being unable to avoid such a behavioural trend, it is decided that workers bear the brunt of that discrimination. This means that the employee has to stop wearing religious symbols at work to avoid being discriminated and optimise his/her performance at work.

It follows from the above that entrepreneur should not bear the risk of loss of business because of the effective discrimination that potential clients could practice, and all this despite it makes more sense the business sector and not the worker, to assume the risk, absorve the economic damage caused and socialize the cost by means of increasing the prices. Not only the most qualified person would assume it, but, for a

[13] Judgement of ECJ Case C-157/15 (Paragraph 38): «An employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business (...) is, in principle, legitimate, notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer's customers».

more public view, this could be a legitimate imposition to discourage discrimination and promote enhanced freedom.

The business owner could prohibit the workers to wear religious or political symbols when developing the duties inherent to their job post (Indirect discrimination) to avoid that clients discriminate them, but it is not clear if it could also justify a Direct discrimination. If so, the entrepreneur, being conscious of the discrimination against Muslims in the area, could only ban the use of particular symbols of this religion to avoid that the discrimination of this specific group of people could affect him negatively. It seems that such a conduct could not be covered by Article 4 of the Directive, because it should be affirm that "not to use proper symbols of Muslim religion constitutes a genuine and determining occupational requirement" and there is not any job –apart from the ones developed under companies whose aim is to promote certain religious beliefs[14]- where to hide being a Muslim is «*absolutely necessary in order to undertake the professional activity in question*»[15].

However, there are essentially relational services, as those carried out by a mediator, an agent or a lawyer in which due to the nature of the service given, it could be questioned if showing an image of neutrality constitutes part of the customer due diligence. It must be determined if authorization of the use of religious symbols by employees, in cases where the company provides one of those services, could have any kind of consequences in contractual field. The commented judgement of the ECJ empowers the entrepreneur to require neutrality to his workers but he equally may choose not to do so and it must be determined if this could lead, in any case, to a breach of contract with his clients. That is, if the final client could terminate the contract with the entrepreneur because the mediator who intends to sell the client´s house in an intolerant area wears external religious symbols. Could it be considered that no wearing external religious and political symbols (which could reduce the chance of selling the

[14] CAMÓS VICTORIA, I. "La gestión de la diversidad religiosa en el ámbito del empleo y de las empresas de tendencia", *El ejercicio del derecho de libertad religiosa en el marco laboral*, CAMAS RODA, F. (Coord.), Editorial Bomarzo, Albacete, 2016, p.60: «(…) un límite legítimo el ejercicio del derecho fundamental de expresión del trabajador y de defensa de sus propias ideas, puede derivar de su ingreso voluntario en una organización productiva "de tendencia", en el que el respeto a esta tendencia puede considerarse como una exigencia organizativa y como una salvaguarda de la subsistencia de la estructura empresarial».

[15] Paragraph 96 of the conclusions of Eleanor Sharpston, Advocate General of the case C-188/15.

client´s house) is part of his/her duty of care? Could the showing of those symbols let the client terminate the contract signed with the entrepreneur?

Up to now, it has been stated that an entrepreneur can limit the religious expression of his workers because of the potential loss of clients –and incomes- . This affects to a pre-contractual stage, in which the discriminative client would clearly not hire such a company. But, it is not the same to assume losses arising from not hiring, than to breach signed contracts.

It might be understood that it is a crucial component of a dilligent service in this kind of positive obligations which consists on catching the willingness of others. It raises the question of the scope of the duty to act dilligently of the mediator[16] and any other person who is contractually obliged to seek the collaboration and closeness of a third party.

All above could face the limit of morality or even public order, which is identified with essential values and principles of the system[17]. It would imply to admit a contractual default which assumes discrimination as an effective reference. If it were considered that the fundamental right to religious freedom admits such a contractual default it should also be accepted that, within similar contracts, the service provider were required to hide any of his ideological, religious and personal trends -as his sexual orientation- if the person whose collaboration is required, discriminates any of those grounds. This would imply that, facing the possibility or probability of a person being discriminated, he should choose either hiding those personality features he could be discriminated for, or incurring breach of contract.

[16] It does not only consist of requesting and transmitting information about the people who would be the parties of the contract which it is intended to sign, but as MACANÁS, G highlights in *El contrato de mediación –o de corretaje- (Carencias y Posibilidades)*, Fundación Wolters Kluwer, Madrid, 2015, p. 298 «El contenido de esta acción diligente de mediación tendrá que ir más allá de la mera publicidad de la información proporcionada por el comitente, debiendo analizarla, completarla y difundirla conforme a su profesionalidad y capacidad, canalizándola hacia el mercado en general y sus actores en particular; para después, integrar la información relativa a la parte contraria en el marco del acuerdo posible, acercando posiciones y, en fin, coadyuvando activamente a la perfección del negocio querido por las partes».

[17] «el respeto a los derechos fundamentales y libertades públicas garantizadas por la Constitución es un componente esencial del orden público», Constitutional Court of Spain (Second Chamber), judgement 19/1985 13th February 1985 [RTC 1985/19] and in the same way, High Court of Spain (Civil Chamber), judgement 706/1992, 9th July 1992 [RJ 1992/6273].

It seems, therefore, that there are certain conducts, -such as the expression of religious beliefs– which should be tolerated within any contractual relationship for the sake of freedom, non-discrimination, equal treatment and free development of one´s personality -as contents of public order ex article 1255 of the Spanish Civil Code-. These conducts cannot lead, under any circumstances, to a breach of contract.

DECISIONS:

Community case-law

Number and date	**Case**	**Reporting Judge/Court President**
ECHR judgement 10th November 2005	44774/1998	*L. Wildhaber*
ECJ judgement 12th January 2010	341/08	*K. Lenaerts*
ECJ judgement 12th October 2010	499/08	*V. Skouris*
ECJ judgement 13th September 2011	447/09	*V. Skouris*
ECHR judgement 15th January 2013	48420/10	*David Thór Björgvinsson*
ECJ judgement 12th December 2013	267/12	*T. von Danwitz*
ECJ judgement 13th November 2014	416/13	*R. Silva de Lapuerta*
ECJ judgement 14th March 2017	157/15	*K. Lenaerts*
ECJ judgement 14th March 2017	188/15	*K. Lenaerts*

National case-law

Court, number and date	**Section or Chamber**	**Reporting Judge**
CCS 19/1985 judgement 13th February	Second Chamber	*Jerónimo Arozamena Sierra*
HCS 706/1992 judgement 9th July	First Chamber	*Jaime Santos Briz*
HCS 308/2001 judgement 23rd January	First Section	*Mariano Sampedro Corral*

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