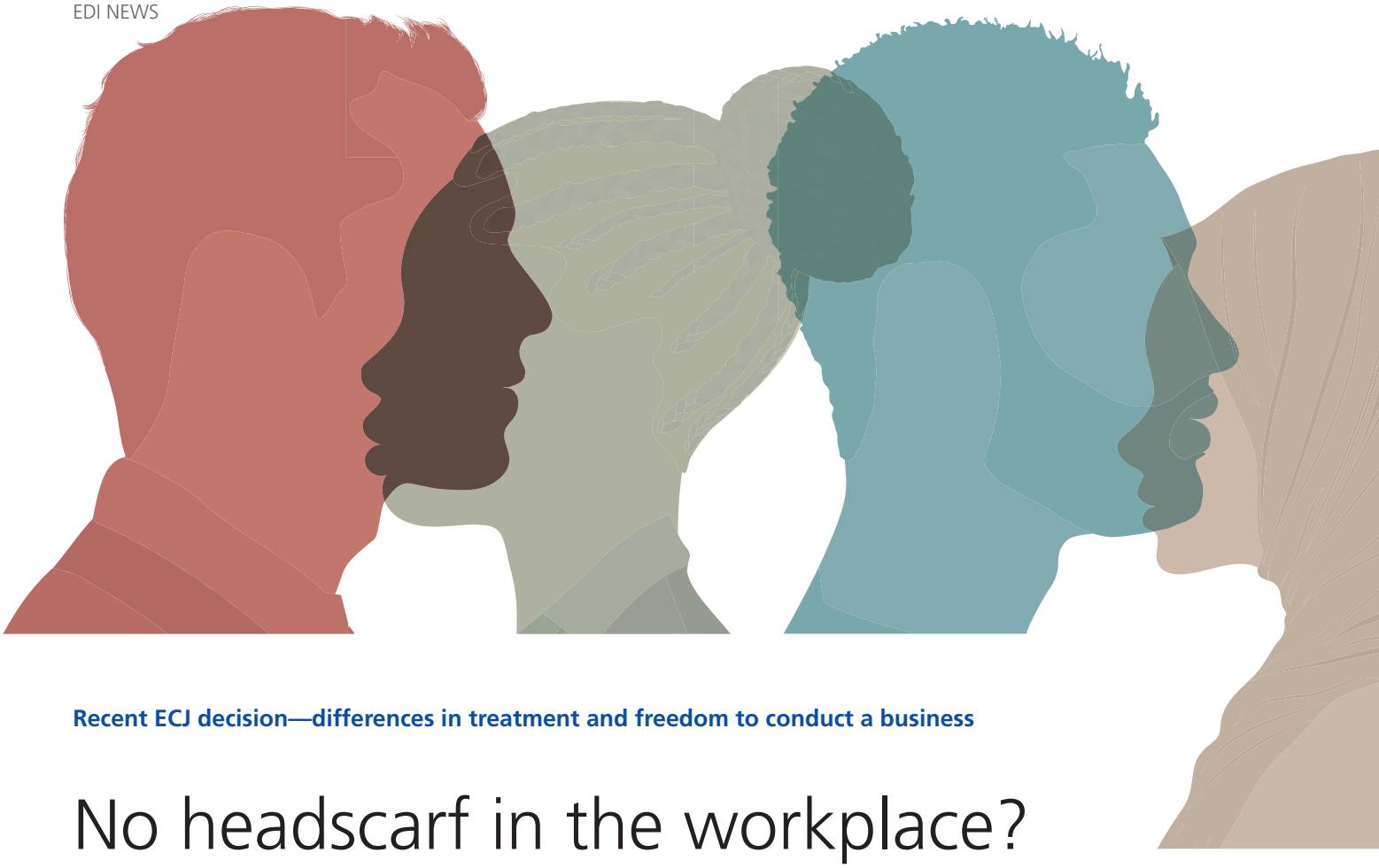


Recent ECJ decision—differences in treatment and freedom to conduct a business

No headscarf in the workplace?

An internal company rule prohibiting the wearing of visible signs of religious, philosophical or political beliefs does not constitute direct discrimination if it is applied in a general and undifferentiated way to all employees. This is the synopsis of the Court of Justice of the European Union (ECJ) judgement dated 13 October 2022.

According to the ECJ, "religion" and "belief" must be considered a single ground for discrimination, as otherwise the general framework for the achievement of equal treatment in employment and occupation as provided by Union law—in particular, Council Directive 2000/78—would be compromised.

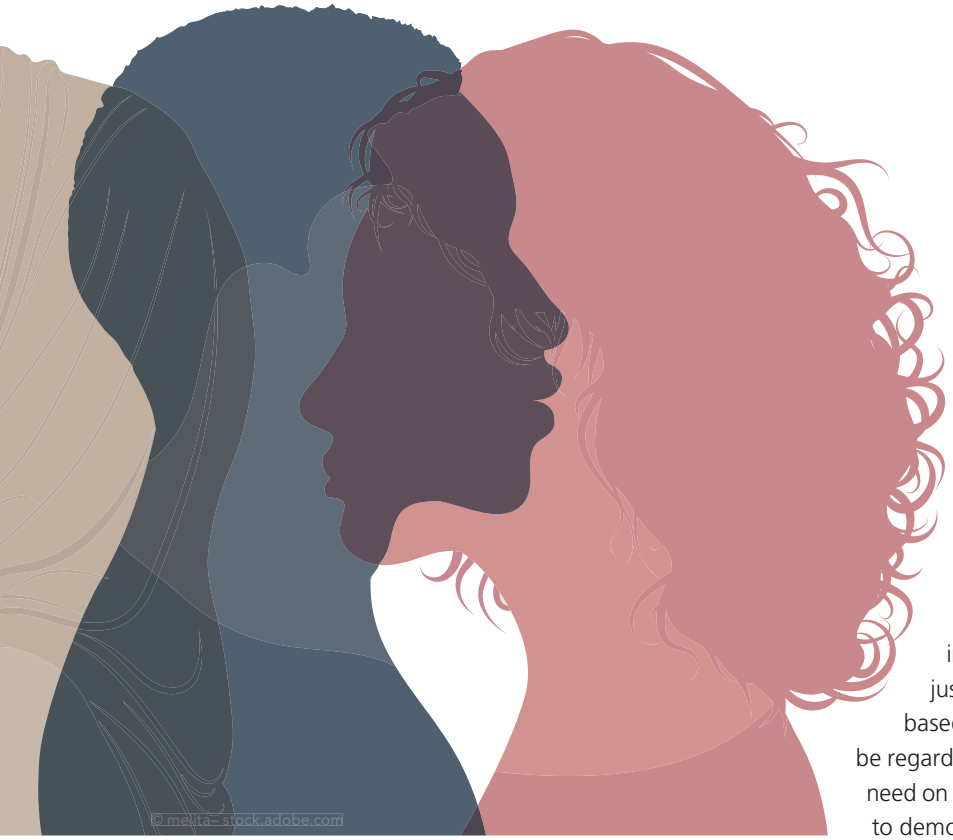
The case

Since 2018, L.F., a Muslim woman who wears the Islamic headscarf, and SCRL, a company that manages public housing, had faced off in a legal battle. This dispute was about the fact that an unsolicited application by L.F. for an internship was not considered because she had stated during an interview that she would refuse to remove her headscarf and comply with the neutrality policy in force at SCRL and laid down in its terms of employment. A few weeks later, L.F. renewed her request for an internship with SCRL and suggested that she wear a different head covering, which she was denied on the ground that no type of head covering was permitted on its premises, be it a cap, a hat, or a headscarf. L.F. then reported a case of discrimination to the independent public body competent to combat discrimination and brought an action for a prohibitory injunction before the (French-speaking) Brussels Labour Court. By that action, she complained that no internship agreement was concluded, which she believed to be directly or indirectly based on religious belief, and sought a declaration that there had been infringement by SCRL of, inter alia, the provisions of the General Anti-discrimination Law.

Discrimination in the workplace?

The Labour Court hearing the action then referred to the ECJ for a preliminary ruling the legal question of whether the terms "religion or... belief" used in Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[1] were to be regarded as two facets of a single protected characteristic or rather as two different characteristics.

In addition, the Labour Court asked the ECJ whether the prohibition to wear a visible sign or an item of clothing with connotations as laid down in SCRL's terms of employment, constitutes direct discrimination on the ground of religion.



In its judgement the ECJ Court of Justice of the European Union states that Article 1 of Directive 2000/78 must be interpreted as meaning the words "religion or... belief" contained therein must be interpreted as constituting a single ground of discrimination, covering both religious belief and philosophical or spiritual belief. The ECJ points out that the ground of discrimination based on "religion or belief" is to be distinguished from the ground based on "political or any other opinion".

With specific reference to the judgements the in G4S Secure Solutions case[2] and in the Wabe and MH Müller Handel case[3], the ECJ states that an internal rule of a private enterprise prohibiting the employees from expressing their political, philosophical or religious beliefs, whatever they may be, by words, clothing or otherwise, does not constitute direct discrimination "on grounds of religion or belief" within the meaning of Union law, provided that it is applied in a general and undifferentiated way.

Since every person may have a religion or religious, philosophical or spiritual belief, such a rule, provided that it is applied in a general and undifferentiated way, does not establish a difference in treatment based on a criterion that is inextricably linked to religion or to those beliefs.

The Court also stated that an internal rule such as that used by SCRL may constitute a difference in treatment that is indirectly based on religion or belief if it is established—which is for the referring court to ascertain—that the apparently neutral obligation it encompasses results, in fact, in persons adhering to a particular religion or belief being put at a particular disadvantage.

In addition, such a difference in treatment would nonetheless not constitute indirect discrimination if it were objectively justified by a legitimate aim and the means of achieving that aim were appropriate and necessary. However, the mere desire of an employer to pursue a policy of neutrality—while in itself a legitimate aim—is not sufficient, as such to justify objectively a difference in treatment indirectly based on religion or belief, since such a justification can be regarded as being objective only where there is a genuine need on the part of that employer, which is for that employer to demonstrate.

Finally, the ECJ stated that union law does not preclude a national court from ascribing, in the context of balancing diverging interests, greater importance to those relating to religion or belief than to those resulting from, inter alia, the freedom to conduct a business, provided that such an approach stems from its domestic law.

The degree of discretion afforded to the member states cannot go so far as to enable those states or their national courts to split one of the grounds of discrimination exhaustively listed in Article 1 of Directive 2000/78 into several grounds, as this would call into question the wording, the context and the intended purpose of that ground and undermine the effectiveness of the general framework for equal treatment in employment and occupation.

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[1] OJ 2000, L 303, p. 16

[2] ECJ judgement of 14 March 2017, G4S Secure Solutions, C-157/15

[3] ECJ judgement of 15 July 2021, WABE and MH Müller Handel, C-804/18 and C-341/19