Freedom of religion: dismissal for wearing an Islamic headscarf, company's image and discrimination

28/10/2021

Ruling no 479 of 14 April 2021 (19-24.079) - *Cour de cassation* (Court of Cassation) - Social Chamber - ECLI:FR:CCAS:2021:SO00479

Dismissal

Only the french version is authentic

Appellant(s): Camaïeu international, société par actions simplifiée (simplified joint-stock company) Respondent(s): Ms A... X...

Facts and procedure

1. According to the ruling under appeal (Toulouse, 6 September 2019), Ms X... was hired by Camaïeu international on 11 July 2012 as a sales assistant.

2. The employee was on parental leave from 29 January to 28 July 2015. When she returned from leave, she came to her workplace wearing a headscarf that hid her hair, ears and neck. The employer asked her to remove her headscarf and, following the employee's refusal, placed her on leave from work on 6 August 2015, then dismissed her for actual and serious cause on 9 September 2015.

3. Claiming to be the victim of discrimination on the grounds of her religious beliefs, the employee sought remedies before the labour court on 4 February 2016 for the nullity of her dismissal and the payment of various sums.

Reviewing plea

On the first, second, third, fifth, sixth, seventh, and thirteenth parts of the plea, appended hereafter

4. Pursuant to Article 1014, paragraph 2 of the Civil Procedure Code, there is no need to rule by a specially reasoned decision on this plea, which is clearly not of a nature to lead to the quashing.

On the fourth and eighth to twelfth parts of the plea

Statement of plea

5. The employer objects to the ruling for declaring that the employee's dismissal was null and void and for ordering it to pay her a certain amount in damages, whereas:

"4°/ The rights of individuals and individual and collective freedoms can be validly restricted on an individual basis, on the basis of Article L. 1121-1 of the Labour Code, and that evidence is free in labour matters. In the absence of a neutrality clause in the internal regulations or in a memorandum subject to the same provisions as the internal regulations, proof of the existence of a neutrality policy may be provided by invoking individual restrictions formulated on the basis of Article L. 1121-1 of the Labour Code and, more generally, by any other lawful means of proof, except, where applicable, for reserving such an option solely to employers justifying a dismissal measure notified before 22 November 2017. In this case, the employer argued that there was a policy of neutrality within the company, illustrated by the collective restriction resulting from Article 11 of the internal regulations and the individual restrictions systematically adopted with regard to employees who came to work wearing a headscarf, and argued that such a policy was pursued consistently and systematically each time the company was confronted with the situation that had arisen upon the employee's return from parental leave, and defended it, whenever necessary, before the court, the HALDE (Haute Autorité de Lutte Contre les Discriminations et pour l'Egalité, French Equal Rights and Anti-Discrimination Commission), and, ultimately, the Defender of Rights. In order to conclude that the employee's dismissal was null and void, the cour d'appel (Court of Appeal) made proof of the existence of a policy of neutrality within the company conditional on the existence of a neutrality clause in the internal regulations or in a memorandum subject to the same provisions as the internal regulations, thus adding to Articles L. 1121-1, L. 1321-3, L. 1132-1 and L. 1133-1 of the Labour Code, a requirement of a

formal source of neutrality for the company that they do not contain, and infringed the said articles;

8°/ As soon as the employer invokes the benefit of the provisions of Article L. 1133-1 of the Labour Code, it is up to the court to examine all the elements that the employer puts forward to demonstrate that the difference in treatment at issue meets a genuine, determining and proportionate occupational requirement, pursuing a legitimate objective. Such justifications do not have to be derived exclusively from the internal regulations. In dismissing the existence of a genuine and determining occupational requirement within the meaning of Article 4, §1 of the Directive of 27 November 2000, without examining the arguments submitted to it in light of: (i) the nature of the activity carried out by the employee, (ii) the conditions under which Ms X... carried out her duties, namely that "the duties of a sales assistant are carried out mainly in a sales area specifically built around the customer's vision, and with the objective of highlighting the company's products", and "within a working group", (iii) "the company's willingness to guarantee compliance with the determination of its sales areas", (iv) "the company's willingness to ensure compliance with the contractual undertakings accepted by Ms X...", (v) "the spontaneous, ostentatious and permanent nature of the methods of expressing religious beliefs chosen by Ms X..." , (vi) "the consistent position adopted by the company each time it was confronted with the difficulty in question", (vii) "the length of time Ms X... had herself performed her duties without wearing a headscarf", (viii) "the right to employment of other employees of the company", (ix) "the ability of Ms X... to find a job compatible with the clothing shown in her exhibit no 4", and "the nature of the practice in question", and by stating that the employer's concern was explicitly placed solely in the area of the company's image with regard to the infringement of its commercial policy, and by limiting itself to verifying whether the company's image could in this case justify the dress code imposed by the company on its employees, the cour d'appel (Court of Appeal) disregarded its duty and infringed Article L. 1134-1 of the Labour Code;

9°/ Article 4 of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation provides that Member States may, where there is a genuine occupational and determining requirement, decide that there is no discrimination. In application of this text, Article L. 1133-1 of the Labour Code states that the prohibition of discrimination "does not preclude differences in treatment when they meet a genuine and determining occupational requirement and provided that the objective is legitimate and the requirement proportionate". The notion of occupational and determining requirement "refers to a requirement objectively dictated by the nature or conditions of the activity in question". In holding that the prohibition imposed on the employee to wearing an Islamic headscarf in her contacts with customers, in the absence of a clause expressly restricting freedom of religion in the company's internal regulations, and resulting only from an oral order given to the latter and referring to a specific religious sign is discrimination based on religious beliefs, and cannot be considered as a genuine and determining occupational requirement within the meaning of Article 4, §1 of the Directive of 27 November 2000, when the employer demonstrated (i) the existence of an essential occupational requirement based on the nature of the employee's job as a sales assistant, which involves direct contact with customers and membership within a work group, the content of the employment contract, the applicable job description, the applicable internal regulations, the nature of the company's activity, its brand image and its choice of commercial positioning, designed to express the femininity of its customers without concealing their body and hair, by means of shops designed to showcase the company's products, and (ii) the existence of a legitimate objective relating to its desire to project a certain commercial image, to guarantee compliance with the purpose of its commercial premises, to ensure compliance with the contractual undertakings accepted by the employee, with her job description and with Article 11 of the internal regulations, in view of the spontaneous, conspicuous and permanent nature of the methods of expressing religious beliefs chosen by the employee, and the consistent position already adopted by the company in comparable circumstances, and (iii) the existence of a proportionate requirement, in view of the length of time during which the employee had herself carried out her duties without wearing a headscarf, the reconciliation proposed by the company and the impossibility of a less restrictive reconciliation, the principle of freedom of enterprise and the right to employment of other employees, the company's willingness to reconcile the employee's freedom to manifest her religious convictions with the rights and freedoms of her colleagues and customers, the employee's ability to find a job compatible with the wearing of the Islamic headscarf, and the nature of the practice in question, all of which provide justification in accordance with legal requirements for the instruction given to the employee not to wear her headscarf on the sales floor, the cour d'appel (Court of Appeal) infringed Articles L. 1121-1, L. 1132-1 and L. 1133-1 of the Labour Code, implementing in domestic law the provisions of

Articles 2, §2 and 4, §1 of Council Directive 2000/78/EC of 27 November 2000;

10°/ The demonstration of the existence of an essential, determining and proportionate occupational requirement, pursuing a legitimate objective, within the meaning of Article L. 1133-1 of the Labour Code, is not subject to the existence of an objective disturbance. By criticising the employer for not providing any concrete evidence of a sufficiently intense disturbance affecting the economic interests of the company and its freedom of enterprise, in order to rule out the existence in this case of a genuine and determining occupational requirement within the meaning of Article 4, §1 of the Directive of 27 November 2000, when the employer argued "that any reference to the requirement of a demonstrated objective disturbance, within the meaning of French case law, is inoperative with regard to facts which, in this case, and by assumption, have a link with occupational life", that "the very reference to the concept of objective disturbance is inoperative in this case", on the grounds that "the wearing of work clothes that are incompatible with the company's brand image necessarily harms the company's image", that "Neither can the dismissal of an employee wearing clothing such as the clothing in question be made subject to proof of a "significant impact on the shop's turnover", or to the existence of a problem within the work group or with customers, for the simple reason that this would not imply an assumption: - of tolerating an actual activity by the employee which in itself undermines the company's brand image, the commercial purpose of its sales areas and the rights and freedoms of others; - and of allowing the multiplication of such situations within the company, by the mechanical effect of the principle of equal treatment" and that "In its ruling in Achbita, the Court of Justice of the European Union admits the possibility of a policy of neutrality with regard to customers, the justification of which is at no time subordinated to the demonstration of a prior objective disturbance", the cour d'appel (Court of Appeal) infringed Article L. 1133-1 of the Labour Code;

11°/ The employer is the sole judge of the consistency of the employee's clothing with the company's image, and that it is not up to the court to substitute its assessment for that of the employer, unless the employer is guilty of abuse. In order to rule out the existence in this case of a genuine and determining occupational requirement within the meaning of Article 4, §1 of the Directive of 27 November 2000, the cour d'appel (Court of Appeal) examined the company's project, from which it believed it could deduce the "allegedly universal" nature of the values set out in it, and referred to the employer's position in terms that showed that it was not its position, without taking into consideration the elements of the company's project that were precisely invoked by the letter of dismissal and by the employer's conclusions, and which led it to state that "the clothing worn by Ms X..., as illustrated by the two photographs she submitted as exhibit no 4, is clearly not representative: - of the image that Camaïeu has chosen to give to its trademark, as part of the normal use of its freedom of enterprise; - of Camaïeu's conception of femininity, as part of the normal use of its freedom of enterprise, and cannot therefore be considered as a "correct presentation" contributing to the company's purpose, within the meaning of Article 11 of the internal regulations. The cour d'appel (Court of Appeal), which nevertheless recognised that it is undeniable that the change in the employee's clothing disrupted the pre-established identities that the employer considered essential to the development of its commercial activity based on a conception of the image of women contrary to that commonly perceived among those who wear the Islamic headscarf, did not draw the conclusions that would infer its own findings, and infringed the principle of freedom of enterprise, recognised in Article 16 of the Charter of Fundamental Rights of the European Union;

12°/ If the wearing of the Islamic veil is part of a woman's dignity, it is only so in the eyes of the Muslim religion. Such a conception of a woman's dignity is foreign to European Union law and to the laws of the French Republic, which only consider the wearing of the Islamic veil in terms of freedom of belief. In holding that a company's taking into account of customers' expectations regarding the physical appearance of those who serve them gives precedence to the economic rules of competition over the equal dignity of human beings, the cour d'appel (Court of Appeal) referred to a concept of the dignity of persons, and especially of women, which does not exist in law, and thus deprived its decision of any legal basis with regard to Articles L. 1121-1, L. 1132-1 and L. 1133-1 of the Labour Code, implementing in domestic law the provisions of Articles 2, §2, and 4, §1 of Council Directive 2000/78/EC of 27 November 2000."

Court's response

6. It follows from Articles L. 1121-1, L. 1132-1, in its applicable wording, and L. 1133-1 of the Labour Code, implementing in national law the provisions of Articles 2, §2, and 4, §1 of Council Directive 2000/78/EC of 27 November 2000, that restrictions on religious freedom must be justified by the nature of the task to be performed, must meet a genuine and determining occupational requirement, and must be proportionate to the objective pursued. Under the terms of Article L. 1321-3, 2° of the Labour Code in its applicable wording, the internal regulations may not contain provisions that restrict the rights of individuals and individual and collective freedoms in a way that is not justified by the nature of the task to be performed or proportionate to the aim sought.

7. The employer, vested with the task of ensuring that all the fundamental rights and freedoms of each employee are respected within the working community, may include in the company's internal regulations or in a memorandum subject to the same provisions as the internal regulations, pursuant to Article L. 1321-5 of the Labour Code in its applicable wording, a neutrality clause prohibiting the visible wearing of any political, philosophical or religious sign in the workplace, as long as this general and undifferentiated clause is only applied to employees who are in contact with customers.

8. It also follows from the case law of the Court of Justice of the European Union (CJEU, 14 March 2017, Micropole Univers, C-188/15), that the concept of "genuine and determining occupational requirement", within the meaning of Article 4, §1 of Directive 2000/78 of 27 November 2000, refers to a requirement which is objectively dictated by the nature or conditions of exercise of the occupational activity in question. It cannot, however, cover subjective considerations, such as the employer's willingness to take into account the particular wishes of the customer.

9. Having first noted that no neutrality clause prohibiting the visible wearing of any political, philosophical or religious sign in the workplace was provided for in the company's internal regulations or in a memorandum subject to the same provisions as the internal regulations, the cour d'appel (Court of Appeal) rightly deduced that the prohibition on the employee wearing an Islamic headscarf characterised the existence of discrimination directly based on her religious beliefs.

10. After having noted, in a sovereign assessment of the facts and evidence submitted to it, that the employer's justification was explicitly based on the company's image with regard to the damage to its commercial policy, which, according to the employer, was likely to be adversely affected to the detriment of the company by the wearing of an Islamic headscarf by one of its sales assistants, the cour d'appel (Court of Appeal) correctly held that the alleged expectations of customers regarding the physical appearance of sales assistants in a retail clothing business cannot constitute a genuine and determining occupational requirement within the meaning of Article 4, §1 of Council Directive 2000/78/EC of 27 November 2000, as interpreted by the Court of Justice of the European Union.

11. The cour d'appel (Court of Appeal) rightly deduced that the employee's dismissal on the grounds of her refusal to remove her Islamic headscarf when she was in contact with customers, which was discriminatory, should be set aside.

12. The plea is therefore unfounded.

13. In the absence of reasonable doubt as to the interpretation of the provisions of European Union law at issue, there is no need to refer the question submitted by Camaïeu international to the Court of Justice of the European Union for a preliminary ruling.

ON THESE GROUNDS, the Court:

DISMISSES the appeal;

President: Mr Cathala
Reporting Judge: Ms Sommé
Advocate-General: Ms Trassoudaine-Verger
Lawyer(s): SCP Ricard, Bendel-Vasseur, Ghnassia - SCP Thouvenin, Coudray et Grévy

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Translated rulings