MEMENTO

OF THE EMPLOYER 05

TOPICS

NEWS

PARTENA PROFESSIONAL

APPLICATION OF THE "ANTI-DISCRIMINATION RULES" IN EMPLOYMENT RELATIONS

The press regularly reports on decisions handed down by Belgium's labour courts against employers that commit discrimination offences against their employees. Since enactment of the three "2007 statutes" aimed at combating various forms of discrimination, the courts' judgments under the new laws have followed one another in quick succession. In this article, we illustrate the main principles underlying the anti-discrimination rules, using a number of particularly interesting recent decisions.

01 THE ANTI-DISCRIMINATION RULES: THE PRINCIPLES

On **9 June 2007**, three statutes aimed at combating discrimination came into force. They are:

- the Act of 10 May 2007 against certain forms of discrimination (= **"the Anti-discrimination Act"**);
- the Act of 10 May 2007 amending the Act of 30 July 1981 to repress certain acts inspired by racism and xenophobia (= **"the Race Discrimination Act"**);
- the Act of 10 May 2007 against discrimination between women and men (= **"the Sex Discrimination Act"**).

1 FIELD OF APPLICATION

The field of application of these three statutes is vast, since they prohibit discrimination based on a number of grounds (see below) in a number of domains, including labour relations.

In particular, they apply **notably** to:

- the conditions for gaining **access to employment** (e.g.: the wording of offers of employment or vacancy advertisements; the possibilities for promotion; fixing and applying selection criteria and means of selection used in the recruitment process);
- the provisions and practices concerning **employment conditions** and **pay** (e.g.: determination and application of working time and working hours; the grant and fixing of salary);
- the provisions and practices concerning **termination of employment** (e.g.: dismissal decisions; fixing and applying the conditions and procedures for dismissal);

and they apply in both the **public sector** (regardless of whether the employee is under a statutory or contractual regime) and in the **private sector**.

The rules apply to those working as **salaried workers** (whether under a contract of employment, a traineeship contract, a vocational immersion contract, an apprenticeship contract or a first-job contract) and those working **self-employed**.

2 DEFINITIONS: DISCRIMINATION VERSUS DISTINCTION

Differences in treatment applied between certain categories of workers (based on a protected criterion, see below) will not necessarily constitute an act of (proscribed) discrimination.

The "anti-discrimination rules" thus use the concepts of **"discrimination"** and **"distinction"** (= a difference in treatment).

Whereas the term "distinction" means a difference in treatment (based on one of the protected criteria) whose connotation is neutral in terms of lawfulness or unlawfulness, the term "discrimination" is set aside solely for behaviour that constitutes a distinction in treatment (based on one of the protected criteria) that cannot be justified and, accordingly, is proscribed.

A distinction in treatment does not therefore necessarily constitute proscribed discrimination (see below).

3 PROHIBITED GROUNDS FOR DISCRIMINATION (OR PROTECTED CRITERIA)

The "anti-discrimination rules" set forth a limited list of prohibited grounds for discrimination, i.e. the **criteria on which discrimination may not be based**.

They are:

- under the **"Anti-discrimination Act"**: age, sexual orientation, marital state, birth, wealth, religious or philosophical convictions, political convictions, trade union convictions, language, current or future state of health, a disability, a physical or genetic characteristic and social origin;
- under the **"Race Discrimination Act"**: nationality, supposed race, skin colour, ascendance and national or ethnic origin;
- under the **"Sex Discrimination Act"**: sex.

The criteria of pregnancy, childbirth, maternity and change of sex are equated to the sex criterion.

4 PROSCRIBED BEHAVIOUR

Any form of discrimination based on one of the protected criteria (see above) is proscribed.

Under the "anti-discrimination rules", this concerns:

- **direct discrimination**, i.e. direct distinction based on one of the protected criteria, which cannot be justified on the basis of the provisions inherent to each of the three statutes;
- **indirect discrimination**, i.e. indirect distinction based on one of the protected criteria, which cannot be justified on the basis of the provisions inherent to each of the three statutes;
- an **order to discriminate**, i.e. any behaviour consisting of instructing someone to practise discrimination based on one of the protected criteria against a person, group, community or any of their members;
- **bullying**, i.e. undesirable behaviour linked to one of the protected criteria and whose aim or effect is to harm the dignity of the person and create an intimidating, hostile, offensive, humiliating or hurtful environment;

- **sexual harassment**, i.e. unwanted behaviour linked to a sexual connotation expressed physically, verbally or non-verbally whose aim or effect is to impair someone's dignity and, in particular, to create an intimidating, hostile, degrading, humiliating or offensive environment;
- **refusal** to make **reasonable arrangements** to accommodate a **disabled person**.

5 PERMITTED DISTINCTIONS IN TREATMENT

Direct or indirect distinction based on one of the protected criteria does not constitute discrimination if it can be justified.

Direct distinction is defined as being the situation that arises where, based on one of the protected criteria, someone is treated less favourably than someone else is, has been or would be in a comparable situation.

Indirect distinction is defined as being the situation that arises where an ostensibly neutral provision, criterion or practice is liable to entail, in relation to others, a particular disadvantage for those otherwise falling within one of the protected criteria.

GROUNDS FOR JUSTIFICATION OF FORMS OF DIRECT DISTINCTION

The rules for justifying direct distinction vary depending on the protected criterion on whose basis the direct distinction is effected. What is involved, therefore, is more a "closed system" than an "open system" of justification.

➡ **"Closed system" of justification**

Direct distinction based on:

- age,
- sexual orientation,
- religious or philosophical convictions,
- a disability,
- supposed race,
- skin colour,
- ascendance/national or ethnic origin or
- sex

is only permitted (and therefore **does not constitute** proscribed direct **discrimination**) if it can be justified by **essential, decisive business requirements**.

There can only be said to exist an **essential, decisive business requirement** where:

- a given characteristic linked to age, sexual orientation, religious or philosophical convictions, a disability, supposed race, skin colour, ascendance/ national or ethnic origin or sex is essential and decisive by virtue of the nature of the specific occupational activities concerned or the context in which they are carried on; and
- the requirement rests on the legitimate objective and is proportionate thereto.

> **NB**
>
> It is a matter for the court to examine, case by case, whether the given characteristic linked to the aforementioned protected criteria constitutes an essential, decisive business requirement. A list of sample situations in which a given characteristic linked to one of the aforementioned protected criteria constitutes an essential, decisive business requirement may be set down in a royal decree.

➡ **"Open system" of justification**

Direct distinction based on:

- marital status,
- birth,
- wealth,
- political convictions,
- trade union convictions,
- language,
- current or future state of health,
- a physical or genetic characteristic,
- social origin or
- nationality

is not permitted (and therefore **constitutes** proscribed direct **discrimination**), unless this direct distinction is **objectively justified** by a **legitimate aim** and the means for achieving that aim are **appropriate** and **necessary**.

GROUNDS FOR JUSTIFYING INDIRECT DISTINCTION

Any indirect **distinction** based on one of the protected criteria constitutes (proscribed) indirect **discrimination**, unless:

- the ostensibly neutral provision, criterion or practice on which this indirect distinction is

founded is **objectively justified** by a **legitimate aim** and the means for achieving that aim are **appropriate** and **necessary**;
- in the case of indirect distinction based on a **disability**, it is shown that no reasonable arrangements can be put in place.

GENERAL GROUNDS FOR JUSTIFYING FORMS OF (DIRECT AND INDIRECT) DISTINCTION

Direct or indirect **distinction** based on one of the protected criteria will not in any form be deemed **discrimination** proscribed by the "anti-discrimination rules" where:

- Either it constitutes a **positive action** measure, i.e. a specific measure aimed at preventing or offsetting the disadvantages linked to one of the protected criteria in order to ensure full equality in practice.

  Positive action measures may only be implemented in compliance with the following provisions:
  - there must exist a state of manifest inequality;
  - elimination of this inequality must be identified as an objective needing to be encouraged;
  - the positive action measure must be temporary in nature and intended to be revoked once the objected aimed at is achieved;
  - the positive action measure must not restrain the rights of others to no purpose.

NB

A royal decree is needed to set down the situations and conditions in which a positive action measure can be implemented. Failing this regulatory framework, employers cannot deploy positive action measures to justify instituting a distinction in treatment between the workers within their businesses.

- Or it imposed by or pursuant to a law.
  There exist provisions of statute and regulation that effect direct or indirect distinction based on protected criteria (e.g. the pay ceilings for calculating notice periods in the Employment Contracts Act of 3 July 1978 or the provisions on occupational reclassification applying only to workers aged 45 and over). Because these forms of distinction are provided for by or pursuant to a law, they do not constitute discrimination within the meaning of the "anti-discrimination" rules and are therefore permitted.

SPECIFIC GROUNDS FOR JUSTIFYING FORMS OF DISTINCTION

By way of a derogation from the justification rules set out above, the "anti-discrimination rules" lay down specific grounds of justification for forms of distinction effected on the basis of certain criteria.

➡ Distinction based on age

Direct distinction based on age is permitted (and does not therefore constitute proscribed discrimination) where:

- It is objectively and reasonably justified by a legitimate objective. A legitimate objective is particularly a legitimate employment or labour market policy objective or any other comparable legitimate objective.
- And the means for achieving this objective are appropriate and necessary.

EXAMPLE

EA company sets an employment quota for workers aged 50 and over. To meet the quota, the employer prefers to recruit people aged 50 and over (and therefore rejects younger applicants).
The company is effecting a distinction based on age.
This distinction could be objectively and reasonably justified by a legitimate objective (i.e. contributing to reducing unemployment among older workers, provided the unemployment rate for the 50+ group is higher than for other target groups!).
The means for achieving this objective could be viewed as being appropriate and necessary.
There would therefore be no direct discrimination.

➡ Forms of distinction based on religious or philosophical convictions

In public and private organisations founded on a religious or philosophical conviction, direct distinction based on the religious or philosophical conviction does not constitute discrimination where, by virtue of the nature of the activities or the context in which they are carried on, the religious or philosophical conviction constitutes an essential, legitimate, justified business requirement having regard to the organisation's foundation.

EXAMPLES

01 – A Koran school hires only teachers of the Islamic faith. The school effects direct distinction based on religious convictions. Owing to the nature of the activities (i.e. teaching the Muslim religion), the requirement of being of the Islamic faith could constitute an essential, legitimate, justified business requirement having regard to the organisation's foundation. There will not therefore be any direct discrimination.

02 – A Koran school hires only Muslim cleaners. The school effects direct distinction based on religious convictions. Owing to the nature of the activities (i.e. cleaning the school premises), the requirement of being of the Islamic faith cannot constitute an essential, legitimate, justified business requirement having regard to the organisation's foundation. There will therefore be direct discrimination.

➡ **Forms of distinctions based on sex**

The "anti-discrimination rules" provide that the provisions dealing with **protection of pregnancy and maternity** are not to be deemed to be a form of discrimination. They are a condition for achieving **equal treatment** of men and women.

EXAMPLE

Under section 43 of the Employment Act of 16 March 1971, pregnant workers may, in some situations, refuse to do night work. This provision does not introduce any form of discrimination.

6 POSSIBLE FORMS OF ACTION

FILING A COMPLAINT

A complaint can be filed by:

- the employee, at company level according to the procedures in effect;
- the employee, with the Directorate General for Oversight of the Social Statutes at the Federal Public Service Employment, Labour and Social Dialogue;
- an interest grouping or, as the case may be, the "Inter-federal Centre for Equal Opportunities" in favour of the employee concerned with the company or the department employing them.

The complaint has to be dated, signed and served by recorded delivery post. It has to contain the grounds for complaint levelled against the culprit of the alleged discrimination.

COURT PROCEEDINGS

➡ **Claim for damages**

An employee who is the victim of an act of discrimination can raise proceedings before the **labour court** claiming damages for the harm caused to them.

The culprit of the act of discrimination must pay the employee compensation corresponding, at the employee's option, to:

- either the harm actually suffered by the employee, provided they can prove the quantum of their loss;
- or a lump sum in an amount equal to:
  - **6 months'** pay; or
  - **3 months'** pay if the employer shows that the unfavourable or disadvantageous treatment complained of would also have been adopted in the absence of discrimination; or
  - **€650** if the physical harm can be made good by applying the nullity penalty (see above); or
  - **€1,300** if the physical harm can be made good by applying the nullity penalty (see above) and the culprit of the act of discrimination cannot show that the unfavourable or disadvantageous treatment complained of would also have been adopted in the absence of discrimination or by dint of other circumstances.

➡ **Cease and desist action**

An employee who is the victim of an act of discrimination can raise proceedings before the **president of the labour court** seeking a cease and desist order (under the urgent applications procedure).

NB

An interest grouping, the public prosecutor, the labour prosecution service or, as the case may be, the "Inter-federal Centre for Equal Opportunities" or "Institute for Sex Equality" can also raise cease and desist proceedings before the president of the labour court.

Cease and desist order
If they find there exists an act of discrimination, the president of the court can order cessation of the act.

Compensation
On the victim's petition, the president of the court can order that they be paid the **lump-sum damages** referred to above.

Coercive fine
The president of the court can additionally order the culprit of the discrimination to pay a **coercive fine** if they fail to put an end to the act of discrimination.

Publicity measures
The president of the court can also order that their decision be made **public** at the guilty party's costs (i.e. paid for by the culprit of the act of discrimination):

- by ordering that the decision (or a summary of it) be posted up for such period as they order both inside and outside the business premises of the culprit or the premises belonging to it;
- by ordering publication or dissemination of the judgment (or a summary of it) in the newspapers or in any other manner.

These publicity measures can only be ordered if they are liable to contribute to cessation of the act complained of or its effects.

NB

An order will be handed down on the cease and desist action even of a prosecution has been raised based on the same facts. If the facts before the criminal court are cited in a cease and desist action, no decision can be rendered in the prosecution until the order in the cease and desist action has become *res iudicata*.

EXAMPLE

In reply to an advert, a person of Turkish origin applies for a job as a "cleaner" with a security company. The company sends an e-mail by return informing him that his application has been turned down. The company mistakenly encloses an e-mail thread in which the applicant reads: "Get shot of him. Foreigners selling security equipment is a no-no!"
The employer cannot show that the application was rejected for reasons other than **national and/or ethnic origin**. There is therefore direct discrimination.
Based on a finding that the security company cannot show that it has altered its recruitment policy (i.e. foreign applicants have the same chances of being hired as other applicants), the president of the labour court **orders cessation** of any act of discrimination based on national and/or ethnic origin not only against the applicant turned down but also against all future applicants. That means that the company must not exercise any distinction based on national and/or ethnic origin when handling job applications. Furthermore, if the cease and desist order is breached, the company may be ordered to pay a **coercive fine** for each new breach. The company also has to, at its own costs, ensure **that the judgment is published** in certain newspapers within a period of one month from service of the judgment *(President of Ghent Labour Court, 26 March 2007, www.jura.be)*.

➡ **Onus of proof**

When an employee (who believes they have been the victim of an act of discrimination), an interest grouping or, as the case may be, the "Inter-federal Centre for Equal Opportunities" or "Institute for Sex Equality", raises proceedings before the relevant court citing **facts indicative of the existence of discrimination based on one of the protected criteria**, it is up to the defendant to prove there has been no discrimination.

NB

This "sharing" of the onus does not apply to prosecutions.

The facts indicative of the existence of **direct discrimination** based on one of the protected criteria can especially consist of:

- evidence revealing a certain recurrence of unfavourable treatment against persons sharing a protected characteristic (e.g. various isolated occurrences reported to the "Inter-federal Centre for Equal Opportunities", the "Institute for Sex Equality" or an interest grouping);
- evidence revealing that the victim is subject to treatment that is unfavourable relative to the benchmark individual.

The facts indicative of **indirect discrimination** based on one of the protected criteria can particularly consist of:

- general statistics concerning the situation of the group that the victim of the discrimination forms part of or facts that are general knowledge;
- use of a distinction criterion that is intrinsically suspect;
- elementary statistical material that reveals unfavourable treatment.

➡ **Power of certain organisations (institutions) to raise court proceedings**

Certain **public authorities** are invested with the power to raise actions in court in all disputes to which application of the "anti-discrimination rules" could give rise.

They are, depending on the case:

- the "Inter-federal Centre for Equal Opportunities" (for disputes based on discrimination founded on age, sexual orientation, marital status, birth, wealth, religious or philosophical convictions, political convictions, current or future state of health, a disability, a physical or genetic characteristic, social origin, nationality, supposed race, skin colour, ascendance, national or ethnic origin, with the exception of disputes based on discrimination founded on language);
- the "Institute for Sex Equality" (for disputes based on discrimination founded on sex).

Additionally, **interest groupings** can sue in cases to which application of the "anti-discrimination rules" might give rise provided harm is inflicted in terms of the constitutional aims that the groupings have adopted as their mission.

These interest groupings are:

- any public utility establishment and any association whose constitution aims to defend human rights or fight discrimination;
- organisations representative of workers;
- organisations representative of employers;
- organisations representative of the self-employed.

NB

If the victim of an act of discrimination is an identified private individual or legal person, the action raised by the "Inter-federal Centre for Equal Opportunities", "Institute for Sex Equality" or an interest grouping will only be admissible if the organisation (or institute) proves that the victim has given their agreement.

7 PROTECTION AGAINST HARMFUL MEASURES

In order that an **employee** who thinks they have been the victim of an act of discrimination can file a **complaint** or raise **court proceedings** without fear of reprisals from their employer, they are accorded special protection.

Specifically, the employer may not take any **harmful measure** against the employee other than for **grounds** that have **nothing to do** with the complaint or proceedings.

PROTECTED WORKERS

Protection against harmful measures is accorded to employees:

- who have filed a reasoned complaint with the company or the department where they work in accordance with the procedures applying within the company;
- for which a reasoned complaint has been filed by the Directorate General for Oversight of the Social Statutes at the Federal Public Service Employment, Labour and Social Dialogue against the company or the department where they work;

- in favour of which a reasoned complaint has been filed by an interest grouping or, as the case may be, by the "Inter-federal Centre for Equal Opportunities" or "Institute for Sex Equality" with the company or the department where they work.

  A complaint filed by an employee with:
  - *Directorate General for Oversight of the Social Statutes at the Federal Public Service Employment, Labour and Social Dialogue;*
  - *an interest grouping or*
  - *as the case may be, the "Inter-federal Centre for Equal Opportunities" or "Institute for Sex Equality"*

  does not in and of itself confer protection against harmful measures. This protection only clicks in once the complaint has been filed by the employee, and the Directorate General for Oversight of the Social Statutes at the Federal Public Service Employment, Labour and Social Dialogue, the interest grouping or, as the case may be, the "Inter-federal Centre for Equal Opportunities" or "Institute for Sex Equality" has filed a complaint against the company.
  The reasoned complaint must be dated, signed and notified by recorded delivery post. It must set out the grounds for complaint levelled against the culprit of the alleged discrimination;

- who have raised a court action;
- in whose favour a court action has been raised by an interest grouping or, as the case may be, the "Inter-federal Centre for Equal Opportunities" or "Institute for Sex Equality".

LENGTH OF THE PERIOD OF PROTECTION

The protection period starts as of **filing of the complaint or filing of the proceedings** in court and ends:

- at the expiry of 12 months following filing of the complaint; or
- where a court action is raised, at the end of three months following the date when the decision handed down becomes final.

PROHIBITION AGAINST TAKING HARMFUL MEASURES

During the protection period, the employer is prohibited from taking any harmful measure:

- during the employment relations, e.g.:
  - terminating the employment relations (by serving notice or paying compensation in lieu of notice);
  - unilaterally amending any of the conditions of employment;
- after termination of the employment relations (e.g. non-renewal of a fixed-term contract where signing such a contract is justified and permitted by law).

LIMITATIONS

The prohibition against taking harmful measures against the employee is not absolute, however, since the employer may terminate the employment relations during the protection period on grounds that **have nothing to do** with the complaint or the court action.

In that case, it will be for the **employer** to **prove** that the harmful measure was taken for reasons that have nothing to do with the complaint or court action.

PENALTIES IF HARMFUL MEASURES ARE TAKEN

If the employer fails to respect the special protection accorded to the employee during the protection period, the employee (or the interest grouping to which they are affiliated) can file a claim for reinstatement.

In respect of the employee, this involves:

- in a case of dismissal, a claim for reinstatement within the company (or department); or
- in a case of unilateral amendment of their employment conditions, a claim that the duties should be carried out under the same conditions as previously.

➡ **Claim for reinstatement**

The employee (or the interest grouping to which they are affiliated) has to file the claim for reinstatement by recorded delivery post within 30 days following:

- the date of service of notice;
- the date of termination of the contract without notice; or
- the unilateral amendment to the employment conditions.

The employer has to state its position on the claim within 30 days of it being served:

- either, it **reinstates** the employee in the company (or department) or re-employs them in their position under the same conditions as previously; in this case, the employer has to:
  - first, pay the employee the pay lost due to their dismissal or the unilateral amendment to their employment conditions; and
  - second, pay the (employer and employee)

social security contributions due on that pay;
- or it **does not reinstate** the employee in the company (or department) or does not re-employ them in their position under the same conditions as previously; in this case, **and** provided the harmful measure has been judged as linked to the filing of the complaint or of court proceedings by the employee, the employer will be liable for **compensation** equal, at the employee's choice, to:
  - a lump sum corresponding to six months' gross pay; or
  - a sum corresponding to the loss actually suffered, provided the employee can prove the quantum of their loss.

➡ **If there is no claim for reinstatement**

Where the employee (or the interest grouping to which they are affiliated) files no claim for reinstatement, the employer has to pay the protection compensation referred to above **only** in the following cases:

- where the competent court finds that the facts constituting the discrimination on which the complaint is based are proved;
- where the employee themself terminates the employment contract on the ground of harmful measures taken by the employer against them in breach of the employee protection provisions and the competent court acknowledges that such a course of action was justified;
- where the employer terminates the employment contract on serious grounds and provided the competent court finds that the termination is unfounded and in breach of the employee protection provisions.

! NB

Protection against harmful measures also applies to an employee who:
- acts as a **witness** by virtue of the fact that, in the context of examining the **complaint**, they disclose to the person with whom the complaint is filed (in a dated, signed document) the facts that they themself have seen or heard and that have a bearing on the situation on which the complaint is based; or
- appears as a **court witness**.

02 WHAT DO THE COURTS SAY?

Many labour court decisions have been handed down relating to discrimination. Below is a selection that we comment on, based on the criteria of age, religious convictions and disability.

1 AGE

GHENT LABOUR COURT, 20 SEPTEMBER 2010 – DISMISSAL

A night watchman aged 50 was fired. It turned out that the reason for his dismissal was the fact that the employer could claim financial benefits under an aid programme for employing staff aged 18 to 30.

The court found that the employee was fired on the ground of his age. Moreover, the court took the view that this dismissal could not be justified by either essential, decisive business requirements or a legitimate objective.

The employee's dismissal was therefore held to constitute **direct discrimination** on the basis of age.

ANTWERP LABOUR COURT, 22 JUNE 2011 – EJECTION OF JOB APPLICATION

An employer rejected an application by a job-seeker on the ground that the business was looking for young applicants with a low qualifications and limited experience to take up a post as account manager. The job to be filled was a "junior position". The applicant's qualifications and professional experience (24 years) corresponded more to a "senior position".

The court held that rejection of the application did not constitute **either direct discrimination or indirect discrimination** based on age.

It was in effect the high level of qualifications and professional experience of the applicant that were the main reason for rejecting the application, and not their age, which was evidenced by the fact that the employer eventually hired an applicant aged 49 whose profile (degree and experience) matched what was sought to fill the job.

2 RELIGIOUS CONVICTIONS

The decisions commented on relate to **the wearing of headscarves**.

ANTWERP LABOUR APPEAL COURT, 23 DECEMBER 2011 – DISMISSAL

A female worker considered she had been unfairly dismissed by her employer because she wore a headscarf.

The appeal court held that the prohibition, which was laid down in the **work regulations**, against workers wearing visible signs of their political, philosophical or religious convictions in the workplace did not constitute **direct discrimination** because it did not draw any distinction between (groups of) workers and it did not apply any distinction criterion by which certain (groups of) workers were treated less favourably. The judgment shows that the prohibition was aimed without distinction at all visible expressions of belief whatsoever and therefore was directed at all the company's workers.

The court even **rejected** the existence of **indirect discrimination**, finding that, even though it was evidenced that there was an indirect distinction, there existed a possible objective, reasonable justification for the company's prohibition.

BRUSSELS LABOUR COURT, 24 SEPTEMBER 2012 – REFUSAL TO HIRE

A female student raised an action to cease and desist from discrimination against an employer (within the **public sector**) that, initially, refused to allow her to do her job while wearing a headscarf.

In the court's view, the **principle of neutrality** set down in the **work regulations** and in the **status of State civil servant**, interpreted such as to prohibit staff from wearing any religious, political or philosophical emblem, does not entail **any direct discrimination** based on the student's religious convictions, since the prohibition applies without distinction to the entire workforce, regardless of their religious, philosophical or political convictions.

Nor had the employer committed **indirect discrimination**. The prohibition against wearing any religious, political or philosophical emblem applies to all followers (of whatever belief) and non-followers. In any event, even if it were accepted that there was an indirect distinction, the prohibition against wearing any religious, philosophical or political emblem is objectively justified by a legitimate aim, being respect of the principle of neutrality. The means implemented to achieve this aim (a prohibition against wearing religious, political or philosophical emblems, was appropriate and necessary.

TONGEREN LABOUR COURT, 2 JANUARY 2013 – SIDE-LINING

The labour court held that side-lining a female worker made available to an employer by an interim agency because she wore a headscarf constituted **direct discrimination**.

In the court's view, wearing headscarves is a manifestation of a religious conviction and her refusal to remove the headscarf underlay the employer's decision not to pursue the employment relations. As a result, the employer directly made a distinction based on the manifestation of a religious conviction. In order not to constitute direct discrimination, the direct distinction had to be justified by essential, decisive business requirements. However, the absence of any religious emblem or emblem of a conviction is not an essential, decisive business requirement for accomplishment of the duties for which the employee was employed.

Furthermore, the court let it be understood that, if a policy of neutrality had been in effect within the company, the distinction based on religious convictions would have been indirect (and not direct) and could then have been justified more broadly.

CONCLUSION

On reading these decisions, it can be concluded that, where the employer's decision to prohibit the wearing of headscarves in the workplace is based on internal by-laws (say, prohibiting the entire staff from wearing distinctive emblems of political, philosophical or religious emblems), there is **no direct discrimination** based on the religious convictions of a female worker wearing a headscarf, since the prohibition applies without distinction to the entire workforce, regardless of their religious, philosophical or political convictions.

Nor is the employer guilty of **indirect discrimination** based on the religious convictions of a worker

wearing a headscarf provided the provision can be objectively justified by a legitimate aim and the means deployed to achieve that aim are appropriate and necessary.

The recent judgments referred to could lead us to conclude that, where the prohibition against wearing distinctive emblems of political, philosophical or religious convictions is contained in the **work regulations** and applies to all **staff members**, it does not constitute indirect discrimination based on religious convictions if it can be objectively justified by a **legitimate aim** (e.g., respect of the neutrality principle) and it is apparent that the **means** deployed to achieve that legitimate aim, i.e. the prohibition against wearing religious, political or philosophical emblems, are **appropriate** and **necessary**.

It can be assumed that a court would come to a similar conclusion in quite precise situations in which the employer based its decision to disallow the wearing of headscarves in the workplace on a provision of the work regulations prohibiting all workers employed in a given type of position from wearing headgear for safety reasons. The prohibition against headgear could be objectively justified by a legitimate aim, being the safety of workers, and the means deployed to achieve that legitimate aim, i.e. the prohibition against wearing headgear, could be held to be appropriate and necessary.

The situation would be different **if no clear provision were laid down in regulations** in force within the company or institution (say, prohibiting the wearing of distinctive emblems of political, philosophical or religious convictions or a form of headgear). In that case, employers prohibiting the wearing of headscarves could be regarded as **directly** laying down a **distinction** based on religious convictions. That direct distinction could be difficult to justify with an essential, decisive business requirement. It would therefore constitute **direct discrimination**.

We would nonetheless point out that the Antwerp Labour Appeal Court decision of 23 December 2011 was appealed to the Court of Cassation, which, on 9 March 2015, referred the following question to the Court of Justice of the European Union for a preliminary ruling: *"Are the anti-discrimination rules to be interpreted such that the prohibition against Muslims wearing headscarves in the workplace does not constitute direct discrimination where the employer has laid down a prohibition against any worker wearing distinctive emblems of political, philosophical or religious convictions in the workplace?"*

Watch this space, therefore ...

3 DISABILITY AND REASONABLE ARRANGEMENTS

BRUSSELS LABOUR APPEAL COURT, 9 JANUARY 2013 – DISMISSAL BASED ON FORCE MAJEURE

Further to a number of certificates from the doctor treating her and recommendations by the company doctor that she should be detailed permanently to a light duties, a worker asked to be able to carry out her restocking duties in a non-arduous manner. The employer argued that no other suitable position was available and confirmed that the contract was terminated for *force majeure* owing to the worker's permanent disability.

Apart from the fact that the labour appeal court did not recognise the permanent disability, it also ruled that the employer had committed **discrimination** by **refusing to put in place reasonable arrangements in favour of a disabled person**.

The court agreed with a very broad definition of **disability**, which is a *"limitation notably resulting from physical, mental or psychological ailments hindering participation by the person in question in occupational life"*. In the case before it, the court held that the employee proved she had a disability within the meaning of that definition. She could therefore assert against her employer the obligation of putting in place reasonable arrangements in favour of a disabled person, unless it proved that that would impose a disproportionate burden on it.

In the court's view, the employer did not prove that it had taken the slightest steps to adapt the worker's workplace.

There was therefore held to be discrimination.

BRUSSELS LABOUR COURT, 26 MARCH 2013 – REFUSAL TO REDUCE THE WORKING SCHEDULE

Due to pathologies that had the consequence of reducing her physical and mental capacities, a worker produced certificates from various doctors to her employer and asked to be able to work part time. The employer refused on the ground, especially, that shifting her to part-time working would hinder the proper functioning of the department.
The labour court ruled that the employer's **refusal to acquiesce in the worker's request to reduce her working time constituted discrimination in the sense of a "refusal to put in place reasonable arrangements in favour of a disabled person"**.

The court pointed out that "**reasonable** arrangements" were to be understood as *"appropriate measures*

based on needs in a specific situation to allow a disabled person to access, participate in and progress in areas to which the anti-discrimination law applies, unless such measures impose a disproportionate burden on the person requiring to take them…". In this case, the employer did not prove how the change in the working time would constitute a disproportionate burden.

There was therefore held to be discrimination.

Catherine Legardien, Legal Counsel

SOCIAL NEWS

SUSPENSION OF SUPPLEMENTARY TRAINING MEASURES IN 2015-2016

In October 2014, the Constitutional Court ruled (in its judgment no. 154/2014 of 23 October 2014) that the penalty mechanism applying to companies in sectors that do not engage in adequate training measures runs counter to the doctrine of equal treatment. The penalty amounts to an additional contribution of 0.05% towards measures in favour of persons falling within risk groups.

In the wake of this ruling, the Employment Improvement Act of 23 April 2015 (official gazette of 27.04.2015) **suspends the requirement to engage in supplementary training measures**. The act's provisions state particularly (sec. 7) that:

1) the requirement on the sectors to enter into CBAs on supplementary training measures is suspended for 2015-2016;
2) the additional employer contribution of 0.05% cannot be charged on training efforts relative to the years 2012, 2013 or 2014;
3) the additional employer contribution will not be levied for 2015-2016, i.e. during the suspension period.

Parliament has stated expressly that the percentage of training measures achieved in 2013-2014 has to be maintained at the same level in 2015-2016 (= 'stand still').

N.B.

Suspension of the requirement to engage in supplementary training measures in 2015-2016 also has the effect that the obligation of according each employee the equivalent of at least one day's advanced vocational training per year is temporarily not being applied.

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COLOPHON

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