

Legal Training Case Study

Vienna 12.9.2011



The facts of the case

Discriminated person:

- young Austrian citizen of Turkish origin
- wears Muslim headscarf
- has done her training as kindergarten assistant (no pedagogic tasks and duties)



The facts of the case

Discriminating employer:

- non-profit association in the social field
- about 1600 employees
- offers many social services, among them child care houses (CCH) for children aged 1 to 3



The facts of the case

- Ms M has been working as a „reserve pool free lancer“ since June 2009
- she was „hopping“ to fill short term vacancies in various CCH
- in Sept. 2009 she worked for 1,5 weeks in O.
- the manageress in O. asked her to replace a staff member during a 6 months vacancy



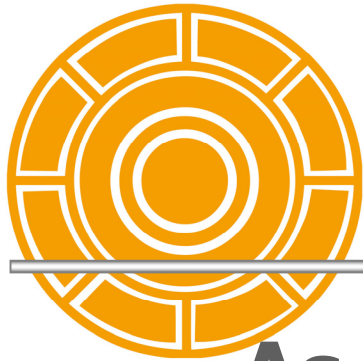
The facts of the case

- **The association**
 - offered Ms M a permanent working contract from Jan 2010 onwards
 - informed the parents that she would replace the staff member for 6 months
 - informed the Employment Office AMS where Ms M was registered as job seeking that she would be employed, because the AMS was to give a temporary subsidy to her salary



The facts of the case

- **The protest of parents against Ms M**
 - „We do not want our children to be forced to learn about different cultures in form of a mummied care-taker“
 - „We grew up in Christian belief, have achieved modern and developed living concepts and expect the same from the care-takers“
- A complain was made also to the Lord Mayor of O., who supports the CCH financially



The facts of the case

As a result, the association

- told Ms M that for the moment she had to stop work even as a free lancer
- said they would have to find out whether the head scarf would be a problem in other communities as well
- never contacted Ms M again although they had promised to do so



The actions taken by the EB

In a written intervention, the EB

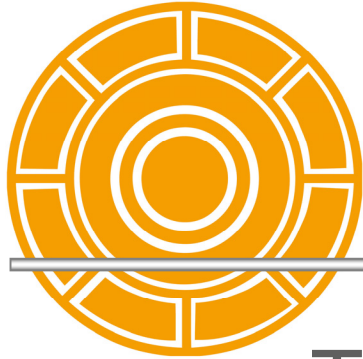
- assumed a discrimination at access to employment
- requested a statement
- mentioned the legal sanctions in form of financial compensation
- asked whether there was willingness to a friendly settlement



The actions taken by the EB

The employer's lawyer replied that

- no discrimination had taken place
- they were thinking of offering Ms M an internship for practical training
- they were not willing to pay compensation



The actions taken by the EB

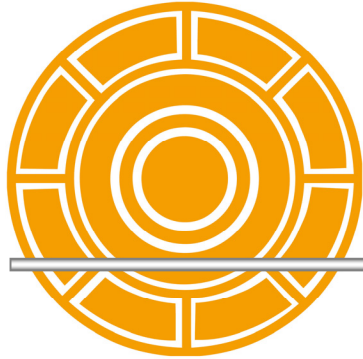
- The EB brought the case forward to the Equal Treatment Commission
- Before it could be discussed in the ETC, the employer showed interest in a friendly settlement



The actions taken by the EB

Finally, the friendly settlement included

- an oral apology for the discrimination suffered
- an offer for 20 hours part time work as kindergarten assistant in a CCH with a permanent contract and € 700.- (x 14)
- a compensation of € 3000.-
- the withdrawal of the case at the ETC



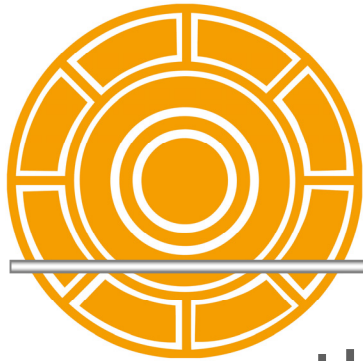
Justifications brought forward: the economic reason

- the employer got a financial subsidy from the AMS for employing another jobseeking lady instead of Ms M



Justifications brought forward: the economic reason

- if parents in O. decide to remove their children from the CCH because they feel violated in their religious and educational rights, the financial consequences could affect the association in a way that it has to close the CCH in O. which would be unfair to the other parents



Justifications brought forward: the reason of public interest

- the employer is the only service deliverer for CCH in O. and thus has an important service function in public interest. It is therefore not possible to ignore the wishes of customers (parents) and refer them to other CCH, because there are none in an acceptable distance



Justifications brought forward: the conflict of rights

- Ms M was asked to remove the head scarf, but refused
- the employer was forced to find a way between the religious rights of Ms M and those of the parents and children
- it would have been more just and reasonable for Ms M to remove the head scarf than for the employer to violate parents' and children's rights and risk the closing of the CCH



The reasoning of the EB regarding the conflict of rights

Relevant legal provisions:

Constitutional law:

- Art 14 StGG

The right of freedom of belief is guaranteed to everybody.

- Art 9 Convention of Human Rights

The freedom of belief includes the right to exercise religion in public and privately by adhering to religious customs



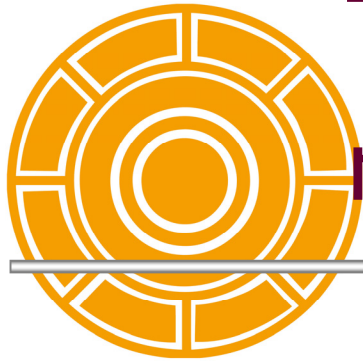
The reasoning of the EB regarding the conflict of rights

Relevant legal provisions:

Constitutional law:

- Art 2 of 1st Additional Protocol to Convention of Human Rights:

The State has to safeguard the right of parents to have education and teaching secured according to their own religious convictions



The reasoning of the EB regarding the conflict of rights

« In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. «



The reasoning of the EB regarding the conflict of rights

Relevant legal provisions:

Council Directive 2000/78/EC, Art 4:

« A difference of treatment based on religion shall not constitute discrimination where, by reason 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, provided that the objective is legitimate and the requirement is proportionate. «



The reasoning of the EB regarding the conflict of rights

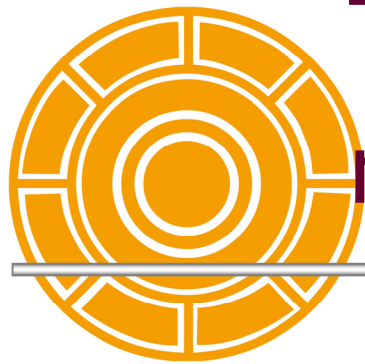
The „catalogue of professions“ used by the AMS describes the duties of a child care assistant – who doesn` t take part in pedagogic activities - as follows:

- to carry out games and physical exercises under the instruction of the kindergarten teacher
- to prepare sport and gymnastics tools
- to prepare the dishes and clean the rooms
- to take part in meetings with parents
- to fulfill administrative work



The reasoning of the EB regarding the conflict of rights

It is therefore no
occupational requirement
to NOT wear a Muslim
headscarf
for the work of a child care
assistant ...



The reasoning of the EB regarding the conflict of rights

...because

- the child care assistant performs solely auxiliary activities
- without the possibility to influence the children pedagogically
- the head scarf therefore has no missionary effect



The reasoning of the EB regarding the conflict of rights

ECHR 15.2.2001, Appl. 42393/98 / Dhalab - CH

Ms Dhalab was a civil servant in a public elementary school who wanted to work with a head scarf.

The relevant question was how the State confines and distances herself from the religious exercise of public teachers as her representatives.

Thus the case is no appropriate comparison, as in Ms M´ s case the employer is a private association.



The Results

- The consideration and appreciation of conflicting rights was in favor of Ms M,
- because a number of justifying reasons could be legally refuted
 - because it was not essential for the particular work to NOT wear a head scarf
 - because a private employer doesn't have the obligation to keep strict religious equidistance between employees and customers, but has to protect employee's rights



Questions for discussion

Would the result be different,

- if Ms M had been a kindergarten teacher?
- if Ms M was to look after children older than 3 years?
- if the employer claimed to be ideologically neutral and therefore wants to have only neutral staff ?
- if the employer was a public institution?