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## Headscarves, Handshakes, and Plastic Underarm Covers

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## Headscarves, Handshakes, and Plastic Underarm Covers

### *Recent developments on religion in working life in Sweden*

Jenny Julén VOTINIUS\*

#### 1. Introduction

Sweden is a highly secular country, sometimes referred to as the least religious country in the Western world.<sup>1</sup> Until recently, questions relating to religion in working life has not caused much debate. However, in the last few years, the area has gained increased attention. There is a growing number of religious persons within the population, mainly as a result of immigration.<sup>2</sup> In addition, many of these persons are religious in a way profoundly linked to identity and a sense of belonging. Scholars note that religion is a growing political and social force in the Swedish society.<sup>3</sup>

Questions about religious manifestations in the workplace are highlighted in the media and raised in the public discourse. The body of case law is expanding, even if still only a few cases on the matter have been tried before a court, and there is a growing interest in the matter in legal scholarship.<sup>4</sup> Against the background of the legislation on freedom of religion and the ban against religious discrimination in national Swedish law, this article discusses recent case law within the field.

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<sup>1</sup> Pippa NORRIS – Ronald INGELHART : *Sacred and Secular: Religion and Politics Worldwide*. New York, Cambridge University Press, 2011. 257. See also ‘Sweden “least religious nation” in Western world’, *The Local* 2015-04-13, referring to a study performed by WIN/Gallup International as part of its 2014 End of Year Survey. Cf. Magnus HAGEVI: Religious Change over the Generations in an Extremely Secular Society: The Case of Sweden. *Review of Religious Research*, 59 (2017) 499.

<sup>2</sup> Johanna Gustafsson Lundberg : Christianity in a Post-Christian Context: Immigration, Church Identity, and the Role of Religion in Public Debates. In: Schmiedel ULRICH – Graeme SMITH (eds.) : *Religion in the European Refugee Crisis. Religion and Global Migrations*. Palgrave Macmillan, Cham, 2018.

<sup>3</sup> Joel Halldorff : *Gud – Återkomsten*. Libris, 2018.

<sup>4</sup> Susanne FRANSSON : Internal workplace policies of neutrality – risk and barriers that hinder an including working Life. A jurisprudential investigation of the conflict between freedom of religion and freedom to conduct a business. Conference paper, Nordic Working Life Conference. Oslo, June 2018.; Kavot ZILLÉN : *Hälso- och sjukvårdspersonalens religions- och samvetsfrihet. En rättsvetenskaplig studie om samvetsgrundad vägran och kravet på god vård*. Uppsala University, 2016.; Anna-Sara LIND – Mia LÖVHEIM – Ulf ZACKARIASSON (eds.): *Reconsidering Religion, Law and Democracy. New Challenges for Society and Research*. Nordic Academic Press, 2016.; Victoria ENKVIST: *Religionsfrihetens rättsliga ramar*. Iustus, 2013.; Reinhold Fahlbeck : *Bed och arbeta. Om religionsfrihet i arbetsliv och skola*. Liber, 2011.

## 2. Freedom of religion – an absolute right with a narrow scope of application

In the Swedish Constitution, freedom of religion is an absolute right that does not allow for any exceptions.<sup>5</sup> This is in contrast to the ECHR, which permits a balancing between freedom of religion and other, concurring, rights or interests. Nevertheless, in relation to the issue of religion, a legal argumentation based upon the ECHR is normally more fruitful than one based upon the Swedish Constitution. This is because the Swedish Constitution applies a comparatively narrow definition of freedom of religion, meaning only that the State must refrain from interfering in religious practice.

Within the Swedish constitutional context, most religious matters outside the actual act of worship fail to qualify as religious practice.<sup>6</sup> This is for instance the case with religious clothing, which is thus not considered under the right to freedom of religion. Instead, religious clothing falls under the right to freedom of expression, just like other forms of clothing or appearance.

Even though there are constitutional aspects to take into consideration, protection against adverse treatment in working life due to religion is not primarily a constitutional matter in Sweden. Instead, the substantial protection is to be found in statutory legislation, primarily in the Discrimination Act (2008:567), which is designed closely to the non-discrimination directives in EU law.<sup>7</sup> The same act also contains an obligation for employers to take active measures to create an including and accessible workplace. In the following, this obligation will be explained and some representative examples of religiously based requests for active measures will be highlighted. After that, the discussion will turn to the provisions on religious discrimination in working life, followed by relevant case law.

## 3. Active measures to create an including and accessible workplace

Since its very introduction in 1979, Swedish legislation on equal treatment in working life has combined the ban on discrimination with a statutory requirement on the employer to pursue active measures to create an including and accessible workplace. In 2017, the provisions on active measures in the Discrimination Act were revised. Up until then, the employer's work on active measures were to be carried out in three year-cycles (or, before 2008, once every year). The three year-cycle is now repealed; instead the employer must continuously and actively seek information from their employees on needs that may arise in relation to different grounds for discrimination within the areas of working conditions, pay and other terms of employment, recruitment and promotion, and education and training. The aim of the investigation is to gain knowledge on the general level of the needs

<sup>5</sup> Chapter 2, Section 1 para 6 of the Instrument of Government (1974:15).

<sup>6</sup> Victoria ENKVIST : Religion in School – a Judicial Perspective. In: Anders SJÖBORG – Hans-Georg ZIEBERTZ (eds.) : *Religion, Education and Human Rights. Theoretical and Empirical Perspectives*. Springer, 2017.

<sup>7</sup> Discrimination Act 2008:567.

represented within the organisation. The employer is not meant to map out ethnicity, religion, sexual orientation or other personal conditions on the individual level, and shall not increase the registration of personal data.<sup>8</sup> The information gathered must then be transposed into active measures to create an including and accessible workplace. Employers with at least 25 employees are required to document all elements of their work on active measures. The implications of this new working process on active measures is yet to be seen.<sup>9</sup>

As regards active measures to promote equal treatment in terms of working conditions, the requirements that may be imposed on the employer vary depending on the size of the organisation, the geographical location of the work place, sector, composition of the workforce and so on. The adjustments must be reasonable from an economic point of view, and in deciding what adjustments can be required, the needs of the employee must be balanced against the abilities of the employer. Normally, this means duties that are more extensive for a large and economically stable company than for a small or economically weak one. In very small companies, where family members run the large part of the everyday business, the requirement for adjustments is of extremely limited, if any, importance.<sup>10</sup>

In relation to religion, the preparatory works explain that the employer must make it possible for people of different religion to work or train for work in different parts of the organisation. To this end, the provisions on active measures in the Discrimination Act means that the employer must consider and, if appropriate, make reasonable adjustments to meet the needs of the employee. The adjustments may regard for instance work organisation, working site, working tools, and working hours.<sup>11</sup> Religiously based food restrictions may raise a need for adjustments in cases where the employer provides free or subsidized meals as part of the remuneration. There is no general requirement for prayer rooms in a workplace, but if an employee asks for a place to pray, the employer must try to solve the matter. Likewise, there is no requirement that the employer shall reorganize the work or the working time to meet the needs of the employee, although the increased stress on active measures since 2017 may turn out to play a role also in this matter.

#### **4. Work life practices concerning religion**

In many cases, there are already established practices in working life to accommodate religious needs. One aspect of the duty to adjust working conditions is that the employer may have to consider vacation or leave of absence in relation to religious holidays. In 2007, the collective agreement for around

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<sup>8</sup> Government Bill Prop. 2015/16:135, p. 37.

<sup>9</sup> Government Bill Prop. 2015/16:135, p. 32.

<sup>10</sup> Government Bill prop. 2007/08:95, p. 330.

<sup>11</sup> Government Bill prop. 2007/08:95, p. 536.

33 000 engineers and architects introduced a possibility for employees to replace the free days for holidays in the Christian calendar with leave during the holidays of their own religion.<sup>12</sup> Today, many collective agreements include this right, and in addition, many companies apply the same right as a workplace policy.

Generally, the attitude towards religious clothing in working life is, and has been, very permissive. There is no difference between private and public companies. There are firemen and military staff wearing hijab. The Swedish Police provides for hijabs as part of the police uniform, and police officers are also allowed to wear kippa or turban. In a survey conducted by the Swedish Television in 2017, six big companies in for instance fast food, grocery, consumer electronics sectors, confirmed that they accepted religious clothing, and in some cases provided hijab as an optional part of the working uniform.<sup>13</sup>

Questions may also arise regarding adjustment of the content of the work. If necessary, an employer must always consider the possibilities to adjust the tasks to religious needs. That obligation follows from the provisions on active measures in the Discrimination Act. The detailed implications of this obligation is to be decided in the individual case. It is very clear, however, that an employee may *not* refuse to perform tasks on religious grounds, as long as the tasks are included in the employment. This follows from the few court cases on this matter, which will be described further below, after the next section on the prohibition against discrimination based on religion.

## 5. The ban on discrimination on grounds of religion

In working life, and elsewhere, discrimination on the ground of religion is prohibited through the Discrimination Act (2008:567), which is designed closely to the non-discrimination directives in EU law. In 2009, the Discrimination Act replaced the then four separate acts on discrimination; on the grounds of gender, sexual orientation, disability, and ethnicity (including religion). The Discrimination Act defines six different forms of discrimination: direct discrimination, indirect discrimination, inadequate accessibility (in connection with disability), harassment, sexual harassment (which is not related to religion and will not be addressed in the following), and instructions to discriminate.<sup>14</sup> Discrimination in the form of harassment refers to a conduct that violates a person's dignity with reference to any of the protected grounds for discrimination, and where the harasser is aware that the exposed person does not welcome the behaviour.<sup>15</sup> Instructions to discriminate refers to the situation

<sup>12</sup> The 2007 agreement between on one hand the Swedish Federation of Consulting Engineers and Architects, and on the other the Swedish Industrial Service Association, the Swedish Association of Graduate Engineers, and Architects Sweden.

<sup>13</sup> <https://www.svt.se/nyheter/inrikes/manga-svenska-foretag-tillater-religiosa-symboler>, compare a similar survey conducted by the newspaper Dagen <https://www.dagen.se/religiosa-klader-inget-problem-i-svenska-storforetag-1.945542?paywall=true>

<sup>14</sup> Ch. 1 Sec. 4 of the Discrimination Act.

<sup>15</sup> Government Bill Prop. 2007/08:95, p. 104f and 492f.

where an employer orders someone in a subordinate or dependent position to discriminate against a person who is protected by the act.

Direct and indirect discrimination are the most important forms of discrimination.<sup>16</sup> When someone is disadvantaged by being treated less favourably than someone else who is treated, has been treated or would have been treated in a comparable situation, and the disadvantaged treatment is associated with religion, this treatment constitutes direct discrimination.<sup>17</sup> In cases where the question of religion is not directly addressed, but where the employer instead emphasizes criteria implicitly related to religion, this indicates indirect age discrimination.<sup>18</sup>

In the individual case, the court must decide upon the accuracy of this indication based on all the relevant circumstances, often including statistical material. A provision, criterion or procedure implicitly related to religion can be justified if it has a legitimate purpose, and if it constitutes a means that is appropriate and necessary to achieve that purpose. This balancing of interest is built into in the very definition of indirect discrimination and must be carried out before the existence of such discrimination can be established at all.

Also directly discriminatory acts of the employer can be deemed to be lawful, if it falls under an exemption clause. The Discrimination Act permits exemptions in four cases, out of which only one is applicable in relation to religion as a ground for discrimination. This exemption clause regards decisions on employment, promotion, or education or training for promotion. Differential treatment is allowed by reason of the nature of the work or the context in which the work is carried out, provided that a characteristic associated with the particular ground for discrimination constitutes a genuine and determining occupational requirement that has a legitimate purpose, and that the requirement is appropriate and necessary to achieve that purpose.<sup>19</sup>

In most labour disputes, their trade union represents employees. This applies also in disputes regarding discrimination. Within the national dispute resolution system, grievance negotiations between the employer and the trade union where the employee is a member have a key function. In practice, grievance negotiations between the employer and the trade union is clearly the dominant mechanism for the prevention and resolution of individual labour disputes. In the vast majority of labour disputes – estimated at more than 90 percent and perhaps as much as 98 percent of the cases – a settlement can be reached through this mechanism, thus avoiding a Swedish Labour Court trial.<sup>20</sup> In cases where the employee is not represented by a trade union, or where the trade union refrains from bringing action, the employee may turn to the Equality Ombudsman, which has legal standing and

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<sup>16</sup> Ch. 1 Sec. 4 of the Discrimination Act, compared to Art. 2.2a and 2.2b of the Framework Directive.

<sup>17</sup> Government Bill Prop.2007/08:95, p. 486f.

<sup>18</sup> Government Bill Prop. 2007/08:95, p. 490. Indirect discrimination is at hand when a person is being disadvantaged by a provision, a criterion or a procedure that appears neutral but that particularly disfavours people of a certain religion.

<sup>19</sup> Government Bill Prop 2007/08:95, 158. Cf Case C-229/08 *Colin Wolf*.

<sup>20</sup> Julén VOTINIUS – Jenny SWEDEN. In: Minawa EBISUI – Sean COONEY – Colin FENWICK (eds.): *Resolving Individual Labour Disputes. A Comparative Overview*. Geneva, ILO, 2016. 239.



may represent the employee in court. When possible, the Ombudsman should always try to reach a reconciliation where the employer pays a damage without a court trial. Most discrimination cases are resolved through reconciliation, and only a very small number reaches the Courts.

## 6. Case law on religion in working life

### 6.1. Introduction

In the mid-eighties, the Swedish Labour Court and Stockholm District Court ruled in two cases regarding employees within public transportation who wanted to carry a Sikh turban with their uniform.<sup>21</sup> The value of these first precedents regarding religion at work is limited, as they originate from before Swedish law had adopted the ban on discrimination on the ground of on ethnicity or religion (in 1994), and before Sweden's ratification of the ECHR (in 1995).<sup>22</sup>

Not until 2005, almost twenty years after the 'turban cases', came the third ruling from the Swedish Labour Court in a case on religion at work, where a member of Jehovah's Witnesses refused to carry out certain work tasks due to her religious beliefs. After yet another five to seven years, all of a sudden the issue of religion at work was gaining more attention. The number of complaints on the matter filed to the Equality Ombudsman increased, and new cases were brought before court.

In 2017, the Swedish Labour Court, ruled in a high profile-case concerning a Christian midwife who refused to perform abortions, which will be described below. However, the vast majority of the reconciliations regarding discrimination on the ground of religion mediated by the Equality Ombudsman, as well as the majority of the few Court cases on the same matter, has concerned Muslims. The main topics have been work place dress codes or neutrality policies restricting religious clothing (here, headscarfs), health and safety regulations restricting the use of religious clothing (here, plastic underarm covers), and work place requirements on gender equality demanding employees to greet women and men equally by shaking their hands.

### 6.2. Religiously motivated refusal to carry out certain tasks

The question of whether employees may refuse to carry out certain tasks on the ground that this would be in conflict with their religious beliefs was first laid before the Swedish Labour Court in 2005. The case concerned a member of Jehovah's Witnesses who rejected a number of the tasks that

<sup>21</sup> Swedish Labour Court judgement AD 1986:11, and Stockholm District Court 1987, DT 536/87, T 3-107-86, June 11 1987.

<sup>22</sup> Act (1994:134) against Ethnical Discrimination.

were included in her assignment as recreational therapist, as these tasks involved actions that would be in contravention with her religious beliefs. The Swedish Labour Court ruled that the employer's decision to remove the employee from the assignment had *not* been based on her religion, but on her refusal to carry out certain tasks, and that the employer would have made the same decision for anyone who had refused to carry out the same task, irrespective of their religion.<sup>23</sup> Therefore, the discrimination claim was dismissed.

In 2017, the Swedish Labour Court ruled in a similar case. The case, which drew a lot of media attention, concerned a midwife who had applied for a position in a maternity ward explicitly stating that she refused carry out abortions on the ground of her religious beliefs.<sup>24</sup> Likewise, she refused to prescribe contraceptives. She had then been informed that she could not be employed unless she agreed to perform abortions, as that was part of the employment. Action was brought by the claimant herself represented by a lawyer funded by an American anti-abortion association.

According to the procedural rules that apply when an employee brings action without the support of a trade union or the Equality Ombudsman, the case was brought to the District Court in the first instance, and on appeal to the Swedish Labour Court. Both courts dismissed the discrimination claim, on the basis that the midwife had not been denied employment because of her religious beliefs, but because she was not prepared to carry out the tasks that were included in the employment. Shortly after the appeal judgment, another case on the same topic (and with the same funders) was brought on appeal before the Swedish Labour Court, which did not grant a leave to appeal. In this case, the claimant has mainly argued on the basis of freedom of conscience, but the claim also regards discrimination on the ground of religion. In 2017, the two midwife cases were filed before the European Court of Human Rights.

### *6.3. Religious clothing in relation to work place dress codes*

For a long time, the position of the Equality Ombudsman has been that there is virtually no legal possibility to restrict the use of Islamic headscarf. The authority has settled a number of reconciliations regarding headscarfs, but out of the settlements reached before 2017, only one has concerned working life. In 2013, a jobseeker in a hotel had been informed that employees was not allowed to wear any headgear, according to the dress code of the hotel. Following a reconciliation procedure before the Equality Ombudsman, the employer agreed to pay a damage of about 5000 euros. Some reconciliations at the Equality Ombudsman, as well as some cases from the District Courts, regards the use of headscarf in working life, but in situations outside the employment relation: i.e. the situation of apprenticeship

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<sup>23</sup> Swedish Labour Court judgement AD 2005:21.

<sup>24</sup> Swedish Labour Court judgement AD 2017:23.



and the situation of labour market programs. In these situations, the general approach of the Equality Ombudsman, as well as of the District Courts, has been that headscarfs must be allowed. The Swedish National Agency for education has ruled that individual schools may prohibit the pupils to wear fully covering veils (niqab or burqua) as such clothing may impact negatively on the interaction between pupil and teacher. However, there is no case law concerning the use of fully covering veils for persons working in schools.

Considering the hitherto very permissive approach that has characterized Sweden as regards headscarfs, the judgments of the CJEU of March 2017 in cases *Abchita* C-157/15 and *Bougnaoui* C-188/15 thus meant a significant change.<sup>25</sup> As the two cases were pending in the CJEU, a new headscarf case was filed to the Equality Ombudsman. A woman wearing an Islamic headscarf had applied for a position in the check-in crew at Scandinavian Airlines (SAS). She was informed that the company applied a uniform policy for employees in visible contact with customers, prohibiting the wearing of all religious symbols. The Equality Ombudsman chose to await the ruling of the CJEU before deciding on how to move on with the case. As soon as the CJEU judgments had been delivered, the Equality Ombudsman decided on the case. Referring in detail to the reasoning of the *Achbita* C-157/15 case, the Equality Ombudsman concluded that the uniform policy of SAS did not infringe the ban on discrimination on the ground of religion. In this context, the case law from the CJEU has marked a new direction to some extent. It is very possible that the Equality Ombudsman would have found the abovementioned SAS uniform policy to be discriminatory on the ground of religion, if it had occurred before the cases of the CJEU in 2017.

#### *6.4. Religious clothing in relation to health and safety regulations*

Totally different from the matter of religious clothing in conflict with work place dress codes, the use of plastic underarm covers in the health care sector also concerns religious clothing at work. Here, the issue at stake has been whether an employee may deviate from health and safety regulations by covering her underarms due to her religious beliefs.

In 2016, the Stockholm District Court ruled in a case concerning a Muslim student in the dental program who were to begin her clinical training at Karolinska Institutet.<sup>26</sup> According to the work place policy, which had been developed in accordance with guidelines from the National Health and Welfare Board, all clinical staff were required to work with bare underarms. The application from the

<sup>25</sup> Case C-157/15 *Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. G4 S Secure Solutions NV*, EU:C:2017:203, and Case C-188/15 *Asma Bougnaoui, Association de Défense des Droits de l'Homme (ADDH) v. Micropole Univers SA*, EU:C:2017:204.

<sup>26</sup> Stockholm District Court judgement T 3905-15 of November 16 2016. Cf. P. NORBERG: *Country report Non-discrimination Sweden 2017*. European network of legal experts in gender equality and non-discrimination, available at: <http://www.equalitylaw.eu/downloads/4388-sweden-country-report-non-discrimination-2017-pdf-1-59-mb>, 99., 106.

student to wear plastic underarm covers due to religious convictions was declined. As the claimant was a student and the respondent was therefore the educational provider, this case was not tried before the Swedish Labour Court. The District Court found that the requirement of having bare underarms was more burdensome for some Muslim women compared to other groups. As it could not be established with certainty that plastic underarm covers caused genuine hygienic concerns, the District Court did not find that the educational provider had succeeded in showing an objective justification of a possible indirect discrimination. The discrimination claim was thus approved. In line with this case, the Equality Ombudsman in August 2017 decided in a working life case regarding another large hospital.<sup>27</sup> The authority made clear that the hospital could no longer uphold its requirement of bare underarms for staff at the maternity ward.

However, in December 2017, a very similar case was brought before the Labour Court, which came to quite the opposite conclusion.<sup>28</sup> Notwithstanding the judgement in the case of Karolinska Institutet, the public dental care provider Folktandvården Stockholm upheld its requirement for all dentists to work with bare underarms. The Equality Ombudsman brought Folktandvården before the Swedish Labour Court, representing a Muslim dentist who was denied to wear plastic underarm covers. Just like in the Karolinska Institutet case, the Swedish Labour Court found that the requirement to work with bare underarms is more burdensome for some Muslim women compared to other groups, and that the case was to be tried as a case of indirect discrimination. Although the proof regarding the hygienic concerns was exactly the same as in the Karolinska Institutet case, the Labour Court found that the employer had succeeded in meeting the requirement for objective justifications. Even though it could not be established with certainty that plastic underarm covers caused genuine hygienic concerns, the Labour Court Stated, a wide margin must be allowed for setting hygienic rules aiming at reducing risks regarding patient security. Hence, the discrimination claim was dismissed.

Recently, in April 2019, the Equality Ombudsman initiated an investigation against a private company, which had refused to hire a Muslim woman on the motive that the headscarf would risk to hamper her side vision. The Equality Ombudsman has asked the employer for an explanation, along with information on whether the company applies a dress code policy and, if this is the case, how that policy is motivated.<sup>29</sup>

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<sup>27</sup> The Equality Ombudsman, decision GRA 2017/26 of August 29 2018.

<sup>28</sup> Swedish Labour Court judgement AD 2017:65.

<sup>29</sup> <https://sverigesradio.se/sida/artikel.aspx?programid=112&artikel=7204415>

### *6.5. Religiously motivated refusal to shake hand with the opposite sex*

Another matter regarding religion at work, that has drawn a lot of attention in recent years, is religiously motivated refusals to shake hands with the opposite sex. In cases outside working life, a couple of Court decisions points to that a person may not be subject to detrimental treatment due to his/her refusal to shake hands with the opposite sex, as this would constitute indirect discrimination on the ground of religion.

In April 2017, a District Court ruled in the first handshake case in working life.<sup>30</sup> A Muslim man had worked for a short time as a substitute in a residential care home for children and young persons. During the employment period, it turned out that the man refused to shake hands with women, and he did not get a prolonged employment contract. The employer stated that the decision had not been primarily based upon the fact that the man refused to shake hands with women. Instead, the claimant's refusal of body contact with women made him less suitable for the work, as it rendered him unable to act in physical situations involving girls. The Court found that the employer would have denied prolongation of any employee who would reject tasks involving physical contact with some of the young persons at the residential care home, and thus rejected the discrimination claim. The judgement did not bring any clarification as regards the matter of handshaking.

In 2018, two other handshake cases were decided, both brought by the Equality Ombudsman before the Swedish Labour Court. Again, one of the cases regarded a substitute who did not get a prolonged contract, this time a Muslim woman working as a substitute schoolteacher. The claimant stated that the employer had been clear about the fact that the decision not to prolong the employment was due to that she had refused to shake hands with the opposite sex. The employer acknowledged that the claimant had been asked about her view on the statutory requirement of equal treatment on the ground of gender, which also was laid down in the policy of the school. However, the employer denied that the decision not to prolong her employment would be based on her refusal to shake hands with the opposite sex. The Swedish Labour Court found that the claimant had not succeeded in presenting facts from which discrimination could be presumed, and the claim was dismissed.

In the most recent case, action was brought by a jobseeker against a company providing interpretation services. The claimant is a Muslim woman who had applied for a position as an internal interpreter, to work with interpretations over the telephone or video link only. At a late stage of the recruitment process, she was called to an interview with a male manager. When she arrived, it turned out that she refused to shake hands with men. The company reacted by interrupting the interview and stopping the recruitment process. Action was brought before the Swedish Labour Court.

In this case, the Court approved the action and found that the woman had been subject to indirect discrimination. The case revolves around two key questions: a) whether refusal to shake hands with

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<sup>30</sup> Lund District Court judgement FT 3174-16 of April 10 2017.

the opposite sex is protected by the ban on discrimination, and b) whether the promotion of equality in the workplace can justify certain policies that would otherwise be considered indirect discrimination on the ground of religion.

On the first point, the employer claimed that a refusal to shake hands with people of the opposite is not a religious manifestation protected by the prohibition of discrimination on the ground of religion. This is because such refusal is not an expression of, have a very close connection with, or is an accepted way of expressing Islam. The Court rejected this argument, stressing that the case law of the European Court of Justice particularly emphasizes that a religious manifestation is protected even if it expresses an interpretation of the religion that is controversial and only observed by a minority (S.A.S. v. France 43835/11 July 1 2014).

On the second point, the employer claimed that the company's greeting policy, which required employees to shake hands with both men and women, could be justified as it was necessary and appropriate to achieve a legitimate purpose. The company policy was a way to promote equality between men and women in the work place, and to prevent the discomfort that comes with not receiving a response to a greeting. The Court stated that the policy had the legitimate purpose to prevent the recruitment of staff holding a perception of men and women that might cause difficulties in the workplace or for the business. However, the policy was not an appropriate and necessary means to this end. A less intrusive and more appropriate measure would be to initiate a dialogue with the applicant in order to clarify whether his or her religion would cause difficulties in the work or for the business. The requirement on the job-seeker to shake hand with both men and women thus constituted indirect discrimination.

It bears noting that two of the five judges on the Court dissented. With reference to the arguments on equal treatment put forward by the employer, the two dissenting opinions found the company policy necessary and appropriate – in relation to the other people working in the company, as well as in relation to the professional role as a neutral interpreter.

## 7. Concluding remarks

Sweden is a secular country where religion, to the extent that it is practiced at all, has been regarded as something private that belongs outside working life. For a long time, the matter of religion in working life has not drawn much attention. A few court cases have appeared over the years, but they have rather had the character of one-off cases than precedents shaping the legal landscape. In the last few years, however, the situation has changed. Religion is now more present in the society and in the public debate. In 2013, the Equality Ombudsman designated discrimination of Muslims or presumed Muslims as one of its focus areas for the coming three years. The Equality Ombudsman has acted on

a number of cases regarding discrimination on the ground of religion. Some of these cases have been reconciled, while others have been brought to court.

It is clear that religion as a ground for discrimination, and the related right to freedom of religion, in important ways is different from other grounds protected by the Discrimination Act. Persons protected under the ground of religious belief and persons protected under other grounds for discrimination are to the same extent potentially exposed to prejudice and detrimental treatment related to their vulnerable position. However, differently from what applies in relation to other grounds, protection against discrimination on the ground of religion also involve a requirement for acceptance of actions motivated by the religious belief.

In some cases, this means that where the religious belief of one person comes in conflict with a different belief or conviction held by someone else, the religious belief must be given priority. Obviously, this is a potential source of discord, which goes beyond what may be the case in relation to the other grounds for discrimination. In particular, this would be the case when the religious belief that is to be given priority comes in conflict with convictions that are deeply rooted in the general mode of thought in society.

Expressions of such a discord can be discerned in the most recent judgement of the Swedish Labour Court. Here, the employer had argued that the requirement on employees to shake hand with both men and women was necessary to promote and safeguard gender equality in the work place. The Court made clear that the employer have the right to demand that the employees respect the principle of equal treatment for men and women. Furthermore, the Court explained that the historical roots of the interpretation of Islam represented by the female job-seeker are based on a view of the relationship between men and women that is not compatible with equality in work life. Nevertheless, the Court stated, this fact cannot justify the conclusion that a person in Sweden today, who observes this religious rule of conduct, would refuse to comply with other requirements on equal treatment set up by the employer.

The balancing of interest in this case raises the question of how the principles of gender equality and non-discrimination on the ground of sex, which are fundamental to the organisation of the Swedish society, stands up to some of the demands that are put forward in the name of religious freedom. This question is not only relevant in the individual cases where a possible conflict may arise between gender equality and manifestations based on a religious belief. To the extent that the expanding field of religious freedom in working life would imply a general weakening of the legal argumentation regarding the principles of gender equality and non-discrimination on grounds of sex, the normative implications of this development would be profound.