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The ban on the wearing of the Islamic veil in creches: the Baby Loup case
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Employment law:

The ban on the wearing of the Islamic veil in crèches

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“Dieu et mon droit” (1), الله أكبر (2), *Deo Juvante* (3), *“Dios, Patria, Libertad”* (4), *“Für Gott, Fürst und Vaterland”* (5) or *“In God We Trust”* (6) : close to thirty States have a reference to religion in their motto. Be it a relic of the past or the symbol of close ties between government and religion, such a reference would be inconceivable in France, an *“indivisible, secular, democratic and social”* Republic (Article 1 of the 1958 Constitution).

After a century of tensions and several fruitless attempts, the Law of 9 December 1905 marked the break between political and religious powers by instituting a strict separation between Church and State. However, such a divorce is difficult to effect, as religion has been and continues to be inextricably woven into the fabric of European societies: public holidays are Christian; religious ceremonies (baptisms, marriages, funerals) continue to punctuate the lives of French citizens; time is measured by the Gregorian calendar; workers rest on the seventh day; schoolchildren enjoy holidays for Christmas, Easter and All Saints’ Day. Since the Revolution, the State has sought to “secularize” not only events (civil marriages; civil baptisms; the PACS or civil partnerships; extending marriage to same-sex couples), public holidays (May Day, remembrance days), but also administrations. Whilst clearly acknowledging “*freedom of conscience*”, the 1905 Law provides that *“the Republic neither recognises, pays salaries to nor subsidises any faith”* (7).

The constitutional principle of secularism is doubtless the most emblematic manifestation of the 1905 Law. This principle is expressed in the denominational neutrality of the Republic, its administration and its officials. The idea is that the State can only respect the beliefs of its citizens and remain independent of the religious authorities by maintaining constant and complete denominational neutrality. The latter is expressed, in particular, by the ban on the wearing of religious symbols by public service employees (8). The principle of secularism, and the neutrality that results therefrom, are deeply rooted in French culture – indeed, to such an extent that it is no longer possible to tell whether the principle of secularism remains solely a principle of the *“legal and political organisation of the Republic”* or whether it has also become a *“specific philosophical or political trend”* (9). This confusion has thus been maintained since the Law of 15 March 2004, which banned *users* (10) of the public services of primary and secondary education (no longer simply public service *employees*) from wearing any symbols or clothing conspicuously displaying religious affiliation (11).

Can an undertaking (12), like the State, wish to give the appearance of religious neutrality to its customers?

Salaried employees are not officers of the State; private-sector employers cannot, therefore, require their staff to comply with such a duty of neutrality (13) on the basis of the constitutional principle of secularism. Workers lease their labour to the employer in exchange for payment but they do not, for all that, thereby give up their individual freedoms. Religious freedom is an

individual freedom which must therefore be protected within a business. The latter consequently runs the risk of becoming a place of tension on the issue of religion, as the employer must ensure that business activities are conducted peacefully whilst respecting the freedoms of salaried employees. It is in this difficult context that the recently concluded *Baby Loup* case arose.

The Baby Loup case

"Baby Loup" is a group of community crèches, in a popular and multicultural neighbourhood, admitting children aged between two months and nine years; their aim is "*to develop activities directed at young children from underprivileged backgrounds and, at the same time, work for the social and professional insertion of women living in the neighbourhood*".

The crèche's internal regulations (14) provided that "*the principle of freedom of conscience and religion of all members of staff shall not prevent the observance of the principles of secularism and neutrality that apply in the performance of any and all activities developed by Baby Loup, both on the premises of the crèche or annexes and outside when accompanying children entrusted to the crèche*".

A salaried employee of the group, returning from parental leave, arrived at work wearing an Islamic veil. As her clothing contravened the provisions of the internal regulations, the employee was suspended (15); following her persistent refusal to respect the suspension, she was dismissed for gross negligence. She challenged her dismissal on grounds of discrimination and freedom of religion.

The case concluded, at least before the French courts, with a decision of the Court of Cassation sitting exceptionally in plenary session (16) on 25 June 2014 (17). It is, however, the case as a whole – not merely the final decision – which allows the veil to be lifted on the state of French law concerning the expression of religious beliefs in the workplace.

The relegation of the secularism principle to companies running public services

The *Conseil de prud'hommes* (18) or industrial tribunal, ruling on the case at first instance, held that the Baby Loup crèche could assume the neutrality attributes of a public service because it provided a service of general interest. While the Court of Appeal at Versailles overturned the decision to qualify the crèche as a public service (19), the argument as to the applicability of the principle of secularism was raised once again before the Social Chamber of the Court of Cassation (20). The latter firmly recalled that "*the principle of secularism established by Article 1 of the Constitution not being applicable to the salaries employees of private-sector employers who do not run a public service... it may consequently not be relied upon in order to deprive them of the protection that is guaranteed to them under the provisions of the Code du travail*". As a consequence, an employer must observe the prescriptions under Articles L. 1121-1, L. 1132-1, L. 1133-1 and L. 1321-3 of the *Code du travail* (Labour Code), which impose a requirement "*that any restrictions on religious freedom [be] justified by the nature of the task to be performed, [meet] an essential and determining professional requirement and [be] proportional to the ends to be achieved*".

In this case, the crèche did offer a service of general interest but this did not, for all that, amount to the delegation of a public service (21). The employer could therefore not require its employees to behave as though they were State employees, regardless of the nature of the activities of the

community group in question. In this case, it was the activity that proved the most problematic. Places in public crèches are scarce; criticising a private institution for wishing to replicate the terms and conditions for admissions applied by public institutions in order to compensate for their scarcity is therefore a delicate matter.

Conversely, where a salaried employee works in a private institution to which a public service has been delegated, then the regulations that apply to public services also apply to the employees therein, regardless of the nature of the activity. This split view of the world of work was illustrated by a second decision of the Social Chamber of the Court of Cassation, handed down on the same day as the judgment in *Baby Loup* (22). A salaried employee, who had no contact with the users of the public service in question (a *caisse primaire d'assurance maladie*, or local sickness insurance fund), had been dismissed for wearing a knotted headscarf in the workplace. The Court of Cassation held that *"the principles of neutrality and secularism within public services are applicable to all public services, including those instances where such services are provided by bodies governed by private law; and, while the provisions of the Code du travail are intended to apply to employees [of private institutions], the latter are nevertheless subject to specific constraints resulting from the fact that they perform public service functions, which forbid them in particular from displaying their religious beliefs through external symbols, and particularly their clothing"*.

The principle of secularism and the duty of religious neutrality resulting therefrom could not therefore extend beyond the public sector. However, some private companies could put forward an argument as to the protection of specific convictions in order to require compliance with the same on the part of their employees.

The rejection of the "entreprise de conviction" qualification

The *entreprise de tendance* has been defined under French legal doctrine as an undertaking or business in which *"an ideology, morality, philosophy or policy is expressly advocated"* (23).

The legal recognition of such a business has serious consequences (24) as it allows employers to introduce significant restrictions *"to the rights and freedoms of employees in the name of the values protected"* by the company: *"a solution permitted by European Community law (25) under which "owing to the nature of a professional activity or the conditions for its performance, the (religious) characteristic constitutes an essential and determining professional requirement, provided that the aim is legitimate and the requirement is established"* (26). This conception of the *entreprise de tendance* was argued by counsel for the crèche at the first appeal hearing on points of law (27) and went unmentioned by the Court of Cassation, likely owing to paragraph 2 of the Directive of 27 November 2000. The latter requires *"national legislation in force at the date of adoption of this Directive"* (i.e. a standstill clause) for the application of the exception for *entreprises de tendance* – legislation that France has never had (28).

The Court of Appeal to which the case was referred by the Court of Cassation (29) circumvented the standstill clause by skilfully taking pains to state that it was referring to the idea of *entreprise de conviction* *"within the meaning of the case law of the European Court of Human Rights"* (30). While the ECHR acknowledges that *"under the Convention, an employer whose ethos is based on religion or a philosophical belief may impose specific duties of loyalty on its employees"* (31), the Court endeavours closely to monitor the proportionality of any breaches of individual freedoms,

and above all to strike a balance between the justifications put forward and the opposing freedoms.

However, the Court of Cassation sitting in plenary session did not enter into this debate and refused to grant the label of *entreprise de conviction (laïque)* (32) (literally, an “undertaking of (secular) belief”) to the crèche, on the grounds that the group’s “purpose was not to promote and defend religious, political or philosophical convictions but, under the terms of its articles of association (33), “to develop activities directed at young children from disadvantaged backgrounds and to work for the social and professional reinsertion of women [...] whatever their political or religious affiliations””. The neutrality imposed on employees was therefore not connected to the promotion of a “secular philosophy” but was instead “an organisational method for a group intended to allow the coexistence of competing ideologies. It is therefore the opposite of an *entreprise militante* [literally, an “activist undertaking”]” (34). The Court thus approved the French doctrinal conception, according to which the *entreprise de tendance* or *de conviction* is one whose essential purpose is the defence or promotion of a doctrine or ethos.

This doctrinal stance is a marked deviation from the provisions of Article 4 (2) of the Directive of the European Council of 27 November 2000, which do not require the aim “of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief” to be the defence or promotion of a religion or specific beliefs.

As Gwénaële Calvès argues, such a restrictive definition of secularism results in “depriving the notion of any useful scope” insofar as “no major school of thought limits its activities to promoting doctrinal or spiritual beliefs”. Consequently, such logic may only be explained by a reluctance on the part of the courts to rule on the issue of the *entreprise de conviction laïque* (35).

Recognising the possibility of a company or undertaking claiming to be “*de conviction laïque*” (secular in its beliefs) in order to restrict the freedom to display one’s religion within the company strikes many as being fatal to freedom and contrary to the principle of secularism. Indeed, “whatever the reasons for a company wishing to exclude religion from its premises (social power, brand image, etc.), the mere intention not to offend non-believers may not be reason enough. This would amount [...] to giving carte blanche to employers in order to deprive their employees of their right to express their religious beliefs” (36). For others, it is little more than an acknowledgement of the ambivalence arising from the notion of *entreprise de tendance* itself. If a given religion can be promoted by means of an *entreprise de tendance*, then secularism – defined as the belief that religious neutrality is the best way of living together – ought also to be promoted (37).

There is an ongoing debate as to the issue of whether secularism can, in France, be a belief like any other or whether, on the other hand, it must be confined to a role as an organising principle for the State *vis-à-vis* religion (38). For the European Court of Human Rights, the matter appears to be settled, at least as regards the principle, as it takes the view that “supporters of secularism are able to lay claim to views that attain the “level of cogency, seriousness, cohesion and importance” required for them to be considered “convictions” within the meaning of Articles 9 of the Convention and 2 of Protocol No. 1” (39).

The recognition of an *entreprise de tendance ou de conviction laïque* (undertaking of secular belief or convictions) would necessarily bring about a marked decline in religion within companies, as all denominational businesses could potentially arm themselves with a neutrality clause in their internal regulations (whether it be in order to remain neutral in the eyes of their clientele or to ease relations within the company, for example). The restrictive definition adopted by the Court of Cassation sitting in plenary session ought, therefore, to allow trial judges to sort the convinced secularists from the opportunists – on condition, however, that those judges recognise the legitimacy of promoting *secular* convictions.

How then should one interpret the “*promotion and defence of religious convictions*” requirement in the recognition of an *entreprise de tendance*? As Gwénaële Calvès puts it, should the promotion and defence of such convictions be “*the direct, essential or exclusive purpose*” of the establishment in question? The uncertainty surrounding this definition will most certainly worry the multitude of denominational businesses whose primary purpose is not the promotion or defence of their religion. Be it a halal butcher’s shop, a kosher restaurant, a Catholic school – all exist to meet demand from a particular community in keeping with the convictions or beliefs of that community. The promotion and defence of religious dogmas may ultimately only be consequences of that type of activity.

In the absence of any recognition of the existence of an *entreprise de conviction laïque*, an employer may not rely on the duty of loyalty in order to require its employees to respect company doctrine. The Court in *Baby Loup* therefore decided to check the crèche’s internal regulations in light of ordinary law.

The assessment of the proportionality of the internal regulations in light of the aims pursued

It is on the point concerning the validity of the clause in the internal regulations imposing neutrality on employees that the Plenary Session repudiated the decision of the Social Chamber of the Court of Cassation.

Article L. 1121-1 of the Labour Code provides that “*no-one shall impose restrictions on rights of individuals, together with individual and collective freedoms, that are not be justified by the nature of the task to be performed or proportionate to the aims pursued*”. This rule is reiterated specifically at Article L. 1321-3 of the Labour Code in order to establish a framework for the provisions of internal regulations.

The proportionality of the clause

In the first decision on the *Baby Loup* case, handed down in 2013, the Social Chamber of the Court of Cassation held that “*the clause in the internal regulations, instituting a general and vague restriction, did not meet the requirements under provided Article L. 1321-3 of the Labour Code*”. The Court therefore concluded that “*the dismissal, decided on discriminatory grounds, was null and void*”. Indeed, where the internal regulations were illegal, the refusal to obey the same on the part of the employee was legitimate and her dismissal unjustified. Consequently, the dismissal is deemed “contaminated”. The latter being based on an illegal clause in the internal regulations, and that clause violating a fundamental freedom protected from all forms of discrimination, the dismissal in turn becomes discriminatory. Regardless of whether the dismissal is based on additional grounds other than the refusal to obey the specific clause, the dismissal has been contaminated by the existence of a discriminatory element and can no longer be justified.

The Court of Cassation sitting in plenary session took a different approach to the internal regulations. Rather than assessing its wording in an abstract way, it opted for an examination *in concreto*; i.e. regardless of the fact that the wording of the clause in question was formulated in general terms where the rule was intended to apply *de facto* to all members of staff by virtue of their position and to the premises where they performed their task. The Court ruled that, in light of the wording of the Baby Loup group's internal regulations and above all the context in which the regulations were intended to apply ("*a small-scale group, employing only eighteen members of staff, who were or could be in direct contact with the children and their parents*"), the Court of Appeal could have deduced therefrom that it was sufficiently "*justified by the nature of the tasks performed by the group's employees and proportional to the aims pursued*". Had the internal regulations been intended to apply to a large company in which the employees perform highly diverse and clearly distinguished tasks, with some in contact with customers and others not, then the clause would have been too general and vague as it would have been disproportional for some members of staff. However, as in the present case all employees could find themselves in contact with the children and their parents, it was irrelevant that the clause did not stipulate exactly which positions were concerned by the duty of loyalty (40) as it was justified for all employees. The Court sitting in plenary session therefore contented itself with providing a method for examining the provisions of internal regulations and left the issue to be decided by the lower court. This approach is interesting as it will serve in future to take account of the context in which the internal regulations are worded and, above all, to identify an employer's intention when drafting those regulations.

The justification for the measures in light of the legitimacy of the aims pursued

It is not simply a matter of examining the proportionality of the measure in question; the objective pursued must also be legitimate and justified. The grounds of the Court's decision are terse on those particular points. In putting the examination of the internal regulations in the hands of the lower court, it refused to give any guidelines, not to mention any explanation, on what would justify a violation on the freedom to express one's religion in the workplace. And yet it is on precisely that justification that public debate is based.

The justification is not to be found in the existence of a mission of general interest justifying the application of the secularism principle. The Court sitting in plenary session did not overturn the decision of the Social Chamber on this point: the principle of secularism, as provided under Article 1 of the Constitution, has no place in business.

The only indication offering a glimmer of an answer to this question lays in the designation, by the Court of Cassation, of those employees at whom the measure is directed: those who "*were or could be in direct contact with the children and their parents*". It therefore comes as no great surprise that the nature of the activity concerned appears to play a significant part in justifying a restriction on individual freedoms. But how does the presence of children and parents justify a crèche employee having to comply with a duty of neutrality? The answer to the latter question is to be found in the solution proffered by the Paris Court of Appeal, as the Court of Cassation sitting in plenary session contented itself with a limited review of the lower court's solution.

When the matter was referred back to the Paris Court of Appeal (41), the Public Prosecutor, François Falletti, recalled that the European Court of Human Rights considers that in order to "*protect an individual as a free and responsible person*", it is possible to protect from any

“religious influence [those] persons who lack judgement” (42). This decision concerned the wearing of the Islamic veil (*hijab*) at a primary school admitting children aged between four and eight years. The Court held that young children were *“a particularly suggestible and sensitive audience”*. The Baby-Loup crèche, which is both a crèche and a daycare provider, admits young children aged between two months and nine years. They therefore are indeed a *“particularly suggestible and sensitive audience”*. The fact remains, however, that the European Court of Human Rights has never had to rule on the issue of religious neutrality outside of school, except in Turkey where the Court admits the ban on religious symbols in higher education institutions on the grounds of freedom of thought, conscience and religion (43).

However, the argument whereby the duty of neutrality would be justified by the need to respect freedom of thought, conscience and religion *“to be constructed for every child”* (44) seems flimsy. It can immediately be countered with the argument that exposing children to cultures other than that of their parents could tend to get them *“accustomed [...] to social diversity”* (45).

The Court did, however, take care to state that it is not only proximity to “children” that justifies such a duty of neutrality, but also contact with the “parents”. There is consequently a swing towards a completely opposite line of reasoning, as the aim of such neutrality may be to avoid any interference in the educational choices made by parents. *“The duty of political and religious neutrality would therefore be justified by the need to care for children in circumstances that do not clash with... the convictions held by parents”* (46).

It is thus by means of an examination of the justification for the internal regulations in light of the specificity of the business that the Court cursorily recognizes the existence of an *entreprise de tendance laïque*. *“The Court notes that some parents consider secularism – in the “privatised” sense of promoting silence on religion in certain spheres of life in society – is a value that fits into a system of “political or philosophical convictions”*” (47).

Insofar as the crèche clearly displayed in its articles of association that its purpose was to admit children in a neutral environment, it could, where the aims pursued were legitimate and justified, require its employees to comply with such a duty of neutrality.

Conclusion

Despite the solemnity that accompanies any decision of the Court of Cassation sitting in plenary session, this judgment does not shed any light on the powers of employers in matters concerning the management of religion within the company – and that is fortunate. It is not for the courts to decree such a demarcation where a fundamental freedom is at stake. However, they can provide a definition for the *entreprise de conviction* which had been lacking previously, but this also raises more questions than it answers. With this new definition, what will happen to religious educational institutions, for instance, or specialist restaurants? There is no guarantee that their purpose will suffice in justifying an infringement of employee freedoms. Will they also have to draft their own internal regulations in order to establish clearly those particular duties with which they expect their employees to comply (including those instances where they are not legally bound to issue such regulations)? On the other hand, internal regulations may always provide for such infringements where these are justified and proportional to the aims pursued. In attempting to be all things to all people, the Court opted for a solution that is more technical than it is political. The Social Chamber has not been directly contradicted, particularly on the issue of the non-

applicability of the principle of secularism in companies governed by private law that do not provide a public service, but its method of assessing the internal regulations has been amended, resulting in a different solution.

The main question that remains is that relating to the decision's compliance with European law. It has been announced that the employee will take her case before the European Court of Human Rights, but it is very difficult indeed to predict the outcome. Will the employee's freedom of expression outweigh the crèche's freedom of association?

Notes:

- (1) Motto of the United Kingdom since the reign of Henry V, in French.
- (2) "Allah is Great", motto of Iraq.
- (3) "With God's Help", motto of the Principality of Monaco.
- (4) "God, Fatherland, Freedom", motto of the Dominican Republic.
- (5) "For God, the Prince and the Fatherland", motto of Liechtenstein.
- (6) Motto of the United States since 1956.
- (7) Art. 2 of the Act of 9 December 1905 concerning the separation of Church and State.
- (8) A public service is defined as an activity intended to meet a need in the general interest which recognised as such by the public authorities and not in light of the objective nature of that activity. But the general interest alone does not suffice in characterizing a public service. It is also necessary that a legal person governed by public law take on the management of that service. This is the central issue in the Baby Loup decision: some crèches are public services while others are not, based on the capacity of the person running the crèche. Litigation concerning public services is not heard by the ordinary courts but is instead brought before the administrative courts.
- (9) G. Calvès, interview by Nicolas Hervieu, "*Entretien croisé des Professeurs Gwénaële Calvès et Emmanuel Dockès sur le retentissant arrêt baby-Loup*", in *La revue des droits de l'homme* [online], Actualités Droits-Libertés, posted on 1 July 2014, para. 34 p.7.
- (10) The term "public service users" is revealing as to the French conception of a public service. There are no "customers" insofar as the purpose of a public service is not to turn a profit, or even to be viable.
- (11) Art. L. 141-5-1 of the *Code de l'éducation* (Education Code): "The wearing of symbols or clothing whereby students conspicuously display a religious affiliation is forbidden in state primary, lower secondary and higher secondary schools".
- (12) Conversely, the purpose of a private-sector undertaking is generally to make a profit. Where this is not the case, particularly in the charities sector, the distinction between a private-sector undertaking and a public service will be made based on the person running the activity in question.
- (13) In theory, at least.
- (14) The internal regulations allow an employer to set rules for all staff members relative to discipline, working hours, health and safety, together with the penalties applicable in the event of a breach of those rules.
- (15) Temporary suspension of the employment contract, decided by the employer, as a penalty.
- (16) The *Cour de cassation* (Court of Cassation) is the highest court in the French legal order. It is divided into six Chambers. The plenary session is an exceptional formation for the Court of Cassation and is composed of 19 members: the First Presiding Judge and three members from each Chamber.

- (17) Court of Cassation (plenary session)
Cass., ass. plén., 25 June 2014, F-P+B+R+I, n° 13-28.369, Dalloz, 2014, p. 1386 (see translation); *AJDA*, “*Point final à la saga de la crèche Baby-Loup?*”, 2014, p. 1293, note. J.-M. Pastor; Nicolas Hervieu, “*Entretien croisé des Professeurs Gwénaële Calvès et Emmanuel Dockès sur le retentissant arrêt baby-Loup*”, above; C. Willmann, “*Affaire Baby-Loup : entre souplesse et fermeté*”, *Lexbase Hebdo édition sociale*, La lettre juridique n°577 of 3 July 2014; F. Champeaux, “*Il fallait sauver le soldat Baby-Loup*”, *Sem. Soc. Lamy*, 30 June 2014, n°1637 ; “*Entretien avec C. Radé : l’après Baby-Loup*”, *Dalloz* 2014, n°26.
- (18) Decision of Industrial Tribunal at Mantes la Jolie:
CPH, Mantes la Jolie, 13 décembre 2010, n°10/00587,
- (19) Court of Appeal at Versailles: CA Versailles, 27 octobre 2011, n°10/05642, J-E Ray, “*À propos d’une rébellion*”, *Dr. Soc.* 2014. 4 ; F. Laronze, “*Affaire Baby Loup : l’épuisement du droit dans sa recherche d’une vision apolitisée de la religion*”, *Dr. Soc.* 2014. 100; J. Mouly, “*L’affaire Baby Loup devant la cour de renvoi : la revanche de la laïcité?*”, *Dalloz.* 2014. 65 ; J.-F. Akandji-Kombe, “*La valse « Baby-Loup », troisième temps : la laïcité dans l’entreprise privée à droit forcé*”, *Cahiers sociaux*, 1 February 2014 n° 260, P. 90 ; P.-H. Antonmattéi, “*Le port de signes religieux dans l’entreprise : au-delà de Baby Loup*”, *Semaine sociale Lamy*, suppl., 23 Dec. 2011, n° 1611, p. 9.
- (20) Cass. Soc. 19 mars 2013, Fatima X c/ Association Baby-Loup, FS-P+B+R+I, n° 11-28.845 : *Bull. civ. V*, n° 76; *Dalloz* 2013. *Actu.* 777; *Dalloz* 2013. *Pan.* 1026, obs. Porta; *RJS* 5/13, no 346; *Dr. soc.* 2013. 388, obs. Dockès ; *JS Lamy* 2013, no 342-2, obs. Lhernould ; *JCP S* 2013 no 1146 (2e esp.) note B. Bossu ; F. Rome, *Baby Loup dans la bergerie* : *D.* 2013, p. 761 ; *Dalloz actualité*, 27 March 2013, obs. M. Peyronnet; G. Calvès, “*La chambre sociale de la Cour de Cassation face à l’affaire Baby Loup : Trois leçons de droit, et un silence assourdissant*”, *Respublica*, 21 mars 2013; E. Dockès, “*Liberté, laïcité, Baby Loup : de la très modeste et très contestée résistance de la Cour de cassation face à la xénophobie montante*”, *Dr. soc.* 2013. 388 ; R. Schwartz, “*La laïcité paradoxalement consacrée*”, *Semaine sociale Lamy* 2013, n° 1577, p. 8, I. Desbarats, “*Affaire Baby Loup : laïcité fragilisée ou liberté religieuse renforcée?*”, *JCP S* n° 29, 16 July 2013, 1297.
- (21) The delegation of a public service is a contract under the terms of which a legal person governed by public law entrusts the running of a public service for which it is responsible to a public or private person, called the concession holder, whose remuneration is substantially linked to operations results (Article L 1411-1 of the *Code général des collectivités territoriales* (General Local Authorities Code)).
- (22) Social Chamber, Court of Cassation:
Cass. Soc. 19 mars 2013, Mme X c/ CPAM de Seine-Saint-Denis, FS-P+B+R+I, n° 12-11.690;
 F. Dieu, “*Le principe de laïcité s’impose à tous les employés des services publics*”, *JCP S* 2013, 1298 ; J.-P. Lhernould, “*Signes religieux au travail: arrêts Baby-Loup et CPAM 93*”, *Jurisprudence Sociale Lamy*, 2013, p. 342.
- (23) P. Waquet, *Loyauté du salarié dans les entreprises de tendance*, *Gaz. Pal.* 1996. 1427.
- (24) See the recent decision of the ECHR, *Fernández Martínez v Spain*, application n° 56030/07, 12 June 2014.
- (25) Art. 4 (1) of EC Directive n° 2000/78, 27 Nov. 2000, establishing a general framework for equal treatment in employment and occupation.
- (26) Isabelle Desbarats, *Affaire Baby Loup : laïcité fragilisée ou liberté religieuse renforcée ?*, *JCP S* 2013. 1297, § 7.

- (27) Social Chamber of the Court of Cassation:
https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/536_19_25762.html:
 at no point does the judgment address the issue raised by the respondent association.
- (28) Unless case law can be considered as "national legislation", in which case there is a legal scheme governing such an *entreprise de tendance* in the absence of a legal definition of the same: Cass. soc., 17 Apr. 1991, n°90-42.636, *Painsecq c/ Assoc. Fraternité Saint Pie X, Dr. soc.*, 1991, p. 485, note J. Savatier, *JCP G*, 1991, II, 21724, obs. A. Sériaux ; Cass., ass. plén., 19 May 1978, *Dame Roy c/ Assoc. Sainte Marthe*, D. 1978, p. 541, concl. Schmelck R., note P. Ardant ; *JCP G* 1978, II, 19009, note R. Lindon; P. Waquet, above; Soc. 20 Nov. 1986, *Fischer*, *JCP* 1987. II. 20198, note Revet.
- (29) This designates the court of appeal ruling on referral from the Court of Cassation. As the latter only rules on points of law, it makes referrals back to the courts of appeal for the purposes of applying the rule that it has just identified. It is when the court of appeal refuses to comply with the decision of the Court of Cassation that the matter may be brought before the Court sitting in plenary session.
- (30) CA Paris, 27 Nov. 2013, n° 13/02981, J. Mouly, "*L'affaire Baby Loup devant la cour de renvoi : la revanche de la laïcité ?*", *Dalloz.*, 2014, p. 65.
- (31) ECHR, *Schüth v Germany*, application n° 1620/03, 23 Sept. 2010; reported in France in *Dalloz* 2011. 1637, chron. J.-P. Marguénaud et J. Mouly ; *ibid.* 2012. 901, obs. P. Lokiec et J. Porta ; *RDT* 2011. 45, obs. J. Couard. In a case concerning the dismissal of a salaried employee working for a Mormon church, on grounds of extra-marital sexual relations, see ECHR, 3 Feb. 2011: *Dalloz* 2011, p.1637, note J. Mouly.
- (32) On the concept of *entreprise de tendance laïque*, see: F. Gaudu, "*La religion dans l'entreprise*", *Dr. soc.* 2010. 65, and "*L'entreprise de tendance laïque*", *Dr. soc.* 2011. 1186.
- (33) All constitutive provisions on legal personality.
- (34) J. Mouly, "*L'affaire Baby Loup devant la cour de renvoi : la revanche de la laïcité?*" note ss CA Paris, 27 Nov. 2011 : *Dalloz* 2014, p. 65; in the same vein, see E. Dockès, interview by Nicolas Hervieu, "*Entretien croisé des Professeurs Gwénaële Calvès et Emmanuel Dockès sur le retentissant arrêt baby-Loup*", *ibid.*, §37 p.7: "*neutrality of the antithesis of conviction, of belief. A crèche claiming to be secular or neutral does not defend a belief: it accepts them all*"; or E. Dockès, "*Liberté, laïcité, Baby Loup : de la très modeste et très contestée résistance de la Cour de cassation face à la xénophobie montante*": *Dr. soc.* 2013, p. 388.
- (35) G. Calvès, *ibid.* §33 p.7.
- (36) B. Bossu, "*Affaire Baby Loup : la décision en demi-teinte de l'assemblée plénière*", *JCL S*, n° 27, 8 July 2014, p. 1287: in this respect, he relies on a report from the *Commission nationale consultative des droits de l'homme* (French National Consultative Committee on Human Rights): *Avis sur la laïcité, 26 sept. 2013*.
- (37) In the same vein, see G. Calvès, "*La chambre sociale de la Cour de Cassation face à l'affaire Baby Loup : Trois leçons de droit, et un silence assourdissant*", *Respublica*, 21 March 2013, [online]: "*the idea of an association "de tendance laïque" is not surprising, unless secularism is reduced to its legal and political dimension. Secularism (be it liberal, open, strict, pluralist, based on recognition, etc.: there is no shortage of interpretations) may also be understood as a social project, worthy of being set up as the "proper purpose" of an entreprise de tendance*".
- (38) P. Adam, "*La crèche et l'au-delà*": *Semaine sociale Lamy*, 2011, n° 1515, p. 10.
- (39) ECHR, *Campbell & Cosans v United Kingdom*, 25 Feb 1982, series A n/48, § 36, cited in the [decision of the Grand Chamber in Lautsi and others v Italy, Application No °30814/06, 20 March 2011.](#)

- (40) The duty of loyalty is a corollary to the employment contract, resulting from the duty of good faith inherent to any contract under French law.
- (41) See *Rapport du procureur général* (Report from the Public Prosecutor) p. 11 in CA Paris, 27 Nov. 2013, n° 13/02981.
- (42) ECHR, *Dahlab v Switzerland*, Application N° 42393/98, 15 February 2001; French references: *AJDA*, 2001, p.480, note J.-F. Flauss ; *RFDA*, 2003, p.536, note N. Chauvin.
- (43) ECHR, *Sahin v Turquie*, Application N° 44774/98, 10 November 2005; French references: *AJDA*, 2004, p.1809, chron. J.-F. Flauss ; *D.*, 2005, P.204, note G. Yildirim.
- (44) Art. 14 of the New York Convention on the Rights of the Child, 20 November 1989.
- (45) E. Dockès, *ibid.* §17 p.4
- (46) G. Calvès, *ibid.* §47 p.9
- (47) *Idem.*

