

**The fair balance of fundamental rights in the European Court of Justice decisions  
in the matter of religious freedom and the impact of the principle of  
“proportionality”**

*Stefania Scarponi*<sup>1</sup>

*Abstract* - The paper will investigate the recent case-law of the European Court of Justice concerning employee’s religious freedom. It will focus on the interpretation of the discrimination ban against religious or belief, in the light of the Directive 00/78 Ce and the European Charter of Fundamental Rights, and on the restrictions of the religious freedom at work in case of direct and indirect discrimination according to the Art. 2 and Art. 4 of the Directive. First, the paper will analyze the ECJ interpretation of the limits arising from the rule of need to respect the “genuine and determining occupational requirements” according to the art. 4, par.1, D.00/78. It will also investigate if the “neutrality” as policy of corporate identity is an acceptable justification as “legitimate aim”, according to art. 2, par. 2, lett. b) i) D. 00/78, and which are her limits.

In the second part the paper deal with the concept of the fair balance of contrasting fundamental rights of both employee’s religious freedom and employer’s right of establishing workplace regulations, which is a crucial argument adopted by ECJ. One of the most interesting pillars of this vision is the impact of the “proportionality” principle, which is stated by art.2, par.2 b) i) of the Directive, but that is also a general principle in European Union law according with the decisions of ECJ ( the most recent ECJ *Egenberger* 2018; ECJ *I.R.* 2018). In the ECJ *Achbita* 2017, this principle has led to the substantial conclusion that the employer cannot dismiss an employee wearing an *Ijab* in contrast with the work regulation, but if possible he must find another solution, like her transfer in a new job with no direct customers contact. My thesis supports that the non-existing European legal duty of the employer to adopt “religious accommodation” can come from the creative interpretation of principle of “proportionality” by the ECJ.

With this perspective the paper in the final part will investigate some interesting examples internationally of the accommodation of job placement of employees with religious customs by reference to the United State and the Canada law system. One of the issue in this matter is the balance between the religious accommodation and the respect of the equal treatment of the co-workers that will analyzed comparing the solution of no European law perspective with the recent ECJ judgement *Cresco*.

---

<sup>1</sup> Full Professor of Labour Law, former at University of Trento

I - *The antidiscrimination law and the restrictions of the religious or belief freedom at work for employer's necessity*

The ECJ judgements on European Union antidiscrimination law on the ground of religious or belief raise very controversial issues about the relationship with the religious or belief freedom<sup>2</sup>. Analyzing the well-known ECJ case – law *Bagnaoui* and *Achbita*<sup>3</sup>, some scholars argue that they are in contradiction each other and not able to offer a really convincing interpretation of the concept of discrimination nor of the acceptance or refuse of the employer's justification<sup>4</sup>.

It is worth to remember that the antidiscrimination law, about the balance of the religious freedom or belief and the employer's necessity, provides for two separate criteria in case of direct or indirect discrimination. In the concept of direct discrimination, based on a different and negative treatment related to the religion or belief, the margin of the acceptance of the business necessity are very strict, and just in case of "genuine and determining occupational requirement" the employer can derogate the ban, according to the very restrictive vision stated by the "whereas (23)"<sup>5</sup> and the Art. 4 (1)<sup>6</sup> Directive n. 2000/78. In the concept of indirect discrimination, being the treatment at issue apparently neutral, the employer is permitted to derogate to the ban of discrimination in a broader way according to the art.2, (b) (i) of the same Directive<sup>7</sup>. This difference is justified by the fact that in the case of direct discrimination the responsibility

---

<sup>2</sup> On this matter in a philosophical perspective T. Khaitan and Jane Calderwood Norton: *The Right to Freedom of Religion and the Right against Religious Discrimination: Theoretical Distinctions*

<sup>3</sup> ECJ 14.3. 2017 *Achbita* C- 157/15 and ECJ 14.3. 2017 *Bougnououi* C- 188/15

<sup>4</sup> P. Dorsemont, *La liberté religieuse sur le lieu de travail et la Cour de Justice de l'Union Européenne. Retour au principe cuius regio eius religio ?*, in *Droit Comparé du travail*, 2017 n.2, p. 96

<sup>5</sup> Whereas 23: In very limited circumstances, a difference of treatment may be justified where a characteristic related to religion or belief, (disability, age or sexual orientation) constitutes a genuine and determining occupational requirement, when the objective is legitimate and the requirement is proportionate. Such circumstances should be included in the information provided by the Member States to the Commission.

<sup>6</sup> Art. 4 Directive: 1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature 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.

<sup>7</sup> Art.2 (a) Directive: indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation, at a particular disadvantage compared with other persons unless: ( i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary,

of the employer infringes directly the principle of equality: “direct discrimination shall be taken to occur where one person is treated less favorably than another is, has been or would be treated in a comparable situation”. On the contrary, the indirect discrimination depends on a treatment apparently not in conflict with the equality principle in the formal concept, even the behavior or treatment makes a disparate and less favorable impact against the protected person, or group of persons.

Further in the analysis, I wish to correctly prove that ECJ’s jurisdiction in terms of anti-discrimination has deepened the reflection upon the existing need of identify an objective correlation between the religious requirement and the work done by the employee. Moreover, it has reduced the distance in the space between the regulatory solutions, regarding direct and indirect discrimination concerning derogation in the matter of antidiscrimination law, by means the interpretation of the proportionality principle.

The decisions’ focus is based, as known, whether or not the employer decide to adopt a strategy of neutral public image. Given the lack of it, as in the case of ECJ *Bagnaoui*, the fact that has been asked to the employee to unveiled herself, if it was for a short period of time is irrelevant, only to satisfy a client’s preference. The fact that only Muslim religion faces this kind of clothing discrimination is per se a manifestation of hostility and prejudice towards that specific religion, therefore a direct discrimination, based on the already quoted Art.2(2) Directive 2000/78.

Therefore, the sentence correctly states, first and foremost, the need to verify if the request of unveiling, based on client’s preferences, constitutes a “genuine and determining” requirement for the carrying out of the job activities, or for its context, according to the aforementioned legislation. It does not apply, then, the general principle of reasonableness, though the rigorous parameters, defined by Art.4 (1), Directive n°78. One of the most important point of the argument states that the requirement must be “objectively necessary” regarding the carrying out of the job activities or the context in which it’s applied. This is not the case, since there’s no existing correlation between wearing a veil and any task concerning the correct functioning of a computer.

The employer’s excuses, regarding having preemptively informed the employee about the chance of having to unveil herself, at the time of hiring her, are worthless, since the same request was still based upon a client’s wish. The solution seems to be understandable since, from a moral point of view, accommodating the client’s request

would have meant agreeing on prejudices towards a specific religion and exploit them as justification to violate religious freedom, with an obvious logical and systemic discrepancy regarding the protected value<sup>8</sup>. It's a shared principle among law systems in which there's also the obligation of *Raisnable Accomodation* (*infra* II and III).

It is also important the *Bagnaoui* argument about the power limitation of the employer regarding dress codes: he can request some compliance about a specific dress code, including general indications about being appropriately dressed within a work environment and towards the public. He'll be able to give some specific rule, motivated by specific issues, such as the need to identify the personnel with uniforms, or for health, hygienic and safety protections reasons, both for the employees and the clients.

A crucial point of differentiation, compared to the situation we have just examined, from a framework and the consequentially applicable rules, is the *Achbita*'s case, in which the employer stated he had a strategy of a neutral work environment and there was a no-written rule applied at workplace banning every employee of customer service of any displaying of religious artifacts or other objects regarding private believes.

One of the most controversial point is whether or not this was an actual indirect discrimination case, as the ECJ affirmed, arguing that any group participating in the anti-discriminatory ban are equally treated and therefore the ban has neutral connotation.

It's important to notice how the *Achbita* decision establish that national court has to ascertain the actual and genuine implementation of neutrality policies during time in a consistent and systematic manner before the employee asked to be exempted from it, to avoid the exploitation of it with the intent to actually punish the Muslim female workers, with the pretenses of a generic ban. This is a very crucial issue because of the risk of the diffusion of an attitude of intolerance and prejudice on the base of religion – and specially against the Muslim and the Jewish religion - as focused by a prestigious scholar self-proclaiming “*Je suis Achbita*”<sup>9</sup>.

---

<sup>8</sup> Opinion by Law. Gen. Sharpston in *Bougnououi*. The principle is well established in the France, as noted by Peskine E., Wolmarcht C., *Droit du travail*, Dalloz : Paris 2015 p. 225.

<sup>9</sup> J. H. Weiler, *Je suis Achbita*, *International Journal of Constitutional Law*, Vol 15, Issue 4, October 2017, P. 879–906.

Only if this preliminary burden of proof would be satisfied, the qualification as an indirect discrimination would be correct: the dress – code at the workplace involving all workers gives a peculiar disadvantage to those having a duty established by their religion to wear the specific religious symbols, compared to those that are exempted of it. This kind of qualifying such situation is also criticized on the base of the need to protect the freedom of religion or belief in *forum externo*: by this point of view, the general application of the ban would be in conflict with this fundamental principle and would constitute a very direct discrimination<sup>10</sup>. This reasoning would be correct if the ban would be applied to all workers and to all sector of the undertaking as mandatory general rule, expression of the hostility against the religious or belief adherence of the employees.

As a matter of fact, this is a crucial point of the *Achbita* decision about the fair balance between employer freedom and employee religious freedom. We will analyze the reasoning that has a variety of arguments to be scrutinized.

## 2 - The image of “neutrality” qualified as legitimate aim of the employer and its limits

Scrutinizing the employer’s justifications according to art. 2, (2) b) i) of the Directive 00/78, in case of indirect discrimination, the Court stated that a strategy of an image of neutrality pursued by the employer is a “legitimate aim” on the basis of Art. 16 of the Charter of Fundamental rights that asserts the freedom to conduct a business, not as an absolute right, but in accordance with the Union Law and National Law<sup>11</sup>. The decision doesn’t offer any argument to support this point and it is very surprising, because it is the first time that this rule is affirmed by the ECJ. It is true that, under some national legal systems, the neutrality principle is established in the public sector, such as in France as consequence of the “*laïcité*” principle, or in Berlin Land in the educational sector, but it is less present in the private sector of employment.

In a general perspective, the “image of neutrality ” may be accepted because it is associated to a conception of the egalitarian universalism, and of the pluralism in the civil

---

<sup>10</sup> In Italian doctrine especially N. Colajanni (2017), *Il velo delle donne musulmane tra libertà di religione e libertà d’impresa. Prime osservazioni alla sentenza della Corte di Giustizia sul divieto di indossare il velo nel luogo di lavoro*, in [www.questionegiustizia.it](http://www.questionegiustizia.it) 21/3/2017.

<sup>11</sup> In Italian constitutional system, according to the art. 41, the right to conduct a business must respect the fundamental rights to freedom, dignity, and security

society, where many groups practicing different religions or beliefs live together in a pacific way. The neutrality could mean also that all people in relationship with the company - customers but also employees - will be treated equally.

But this conclusion raises one issue more. The neutrality in the case *Achbita* is conceived by a ECJ in a “negative” sense only, that is not to show any religious or belief symbols. On the contrary, the decision didn’t take into account the possibility of a positive sense of “neutrality”, according to witch everybody could wear the symbol of religious or belief adherence. This conception was practiced, for example, by the British Airways company, where many workers were permitted to wear religious symbols without any problems with the exception of Ms Eweida. An interesting line of reasoning is opened if we adopt a dialogical rather than a confrontational attitude towards the different identities.

It is important to note that the acceptance of the legitimacy of neutrality is accompanied by some limits. It is crucial in the *Achbita* reasoning the argument in favor of reducing the field of the observance of the prohibition related to the dress code at workplace, according to the “strictly necessity” criterion under Directive n. 78. The practice is legitimate notably where the employer involves in its pursuit of that aim only those workers who are required to come into contact with the employer’s customers”<sup>12</sup>. So the first conclusion is that the employer, even if s/he is free to pursue an image of neutrality of her/his company, is not permitted to establish a general prohibition of wearing religious or other ideological symbols at the workplace.

With regard to the exception of the religious freedom for the workers that interact with customers, nevertheless no specific reason has been given by the Court, could be justified by the need that in the first contact with the costumers at the front desk there is any filter of religious, philosophical or ideological identity, in order to assure that the company has an attitude totally fair to everybody. By this point of view, the value of the best relation between worker and customers is more important than the protection of the personal identity of the workers. However, this point remain not explored by the decision.

---

<sup>12</sup> The p. 42 is very clear : As regards, in the third place, the question whether the prohibition at issue in the main proceedings was necessary, it must be determined whether the prohibition is limited to what is strictly necessary. In the present case, what must be ascertained is whether the prohibition on the visible wearing of any sign or clothing capable of being associated with a religious faith or a political or philosophical belief covers only G4S workers who interact with customers. If that is the case, the prohibition must be considered strictly necessary for the purpose of achieving the aim pursued

Anyway, further consequences arise from this way of carrying out the fair balance between the freedom of employer and the religious freedom (or belief) as a logic. First, in order to comply with the condition of the “strictly necessity”, the workers in direct contact with costumers occasionally, because their principal tasks are different from those of the front –desk, would be exempted from the duty of neutrality. The *Achbita* case law don’t deal directly with this problem, but it is consistent with the restrictive approach of the Directive n. 78 about the limits of the legal derogation to the discrimination ban.

One more reasoning arises by the *Achbita* conclusion on this point: also the sector of the activity of the undertaking may be important in the light of the “particular contest where the activity is carried out” stated by the provision under art. 4 (1) Directive n. 78. In the case-law, the company developed her activity in the reception sector , and this factor justifies a specific attention to the way of the relationship with the customers. In different sectors, the imagine of the neutrality could be less important, so the claim to applying it may be more difficult to be justified. For instance, in the case *Bougnaoui*, if the employer would have decided to adopt a neutrality strategy for his company, it would be disputed that the prohibition of wearing religious symbol could be applied to the employee engineer of computers: her specific task was the computers maintenance and the contact with customers was a mere accessory condition; moreover the principal activity of the company was in the computers sector.

In a general perspective, my thesis is that only assuring the respect of those conditions it will possible to avoid the risk that the concept of the “neutrality” should remain too indefinite: a “neutrality” *à la carte* with wide space of arbitrary behavior (Auvergnon 2017).

### *The proportionality principle emerging from Achbita case – law and the duty of “reasonable accomodation”*

One of the most interesting part of *Achbita* decision is the evaluation of the worker’s dismissal according to the proportionality principle: the provision, criterion or practice must be “appropriate and necessary”, in order to exclude their nature of indirect discrimination applying the Art. 2 (2) let.b) i) of the Directive 2000/ 78. The measure of the dismissal was very heavy, as the France and the General Advocate underlined, but the

ECJ did not state the dismissal to be unfair. The decision adopts a different argument by introducing the duty of the employer to look for an alternative solution before adopting the dismissal, if it would be possible without additional burden. As we can see at p. 43 *Achbita*: “*In the present case, so far as concerns the refusal of a worker such as Ms Achbita to give up wearing an Islamic headscarf when carrying out her professional duties for G4S customers, it is for the referring court to ascertain whether, taking into account the inherent constraints to which the undertaking is subject, and without G4S being required to take on an additional burden, it would have been possible for G4S, faced with such a refusal, to offer her a post not involving any visual contact with those customers, instead of dismissing her. It is for the referring court, having regard to all the material in the file, to take into account the interests involved in the case and to limit the restrictions on the freedoms concerned to what is strictly necessary*” .

The decision imposes, as result of the fair balance between the contrasting fundamental rights – i.e, religious and beliefs freedom, on one hand, and the employer’s freedom, on the other - the duty of the employer to look for an alternative solution before dismissing the worker, taking into account the inherent constraints to which the undertaking is subject, but also the necessity to do really all the employer can do for satisfying the request of the worker based on a religion or belief. It will be on the employer the burden of proof that no solution is possible, or that the cost is too much high.

This principle, stated by the ECJ in a creative interpretation, is very important. It extends the enforcement of the duty to find a reasonable accommodation, stated by the Directive n. 78 only for the disabled persons<sup>13</sup>, also in the area of religious or belief freedom. Although the decision uses an attenuate formula, the gamma of the possible accommodations is wide, like the experience in this matter of the US system shows ( infra III). The solution emerging in the quoted case-law is to look for another position not in direct contact with customers, or to impose an uniform to employees with a headscarf of little dimension<sup>14</sup>, in the analogy of *Eweida* ECtHR decision, where the moderate feature

---

<sup>13</sup> Art.2, b) ii) : “*as regards persons with a particular disability, the employer or any person or organization to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice*”.

<sup>14</sup> This dress-code is adpted by Emirates Air Company where the headscarf is reduced in a symbolc way..



of the religious symbol that the worker asked to wear was one of the decisive arguments in favor to the right to wear the chain with the cross on the workplace.

The dismissal as *extrema ratio* is observed in many law systems of European countries, together with the duty to look for an alternative solution, in the field of religious freedom, based on the duty of fair performance of the contract, like in the Netherlands or the United Kingdom. In Italy the same principle is enforced by the labor law system in case of dismissal for business necessity (*giustificato motivo oggettivo*). My thesis is that we can now apply it also in the field of the refusal by the worker to respect the dress code for a religious freedom or belief protection.

#### *Some lessons arising from the US experience on reasonable accommodation*

The approach to the fair balance between the discrimination ban and the employer's interest leads us to analyze deeper the experience of the systems related to an important religious pluralism, as in the United State and in Canada.

The *Achbita* conclusion seems being directly inspired by the *Title VII, US Civil Rights Act* of 1964, 42 U.S.C. §2000e et seq, about the religious freedom, impose to the employer the «*religious accomodation*»<sup>15</sup>. According to the EEOC *Guidelines about Religious Discrimination and Raisonable Accomodation*, “*the reasonable accommodation means an employer may be required to make reasonable adjustments to the work environment that will allow an employee to practice his or her religion. Examples of some common religious accommodations include flexible scheduling, voluntary shift substitutions or swaps, job reassignments, and modifications to workplace policies or practices*”.

The duty is not absolute if “*Doing so would cause more than a minimal burden on the operations of the employer's business*”, or “*Unless it would be un undue hardship on the*

---

<sup>15</sup> Avv. Kokott' Conclusions in *Achbita*, quoting U.S. Supreme Court Decision 1° June 2015, Rs. 14-86, EEOC v. Abercrombie & Fitch Stores, 575 U.S. \_ 2015 (42 U.S.C. § 2000e-2).

*employer operation of its business*<sup>16</sup>, as we can read in the paragraph “*Religious Accommodation/Dress & Grooming Policies*” of the same document<sup>17</sup>.

For purposes of religious accommodation, undue hardship is defined by courts as a “*more than de minimis*” cost or burden on the operation of the employer's business. For example, if a religious accommodation would impose more than ordinary administrative costs, it would pose an undue hardship. This is a lower standard than the Americans with Disabilities Act (ADA) undue hardship defense to disability accommodation.

The balance between employers and employee’s interests through religious accommodation can find many solutions, for example in case of exception to workplace dress code: for example, wearing a long white skirt instead of the white short requested by a sports club, or wearing the headscarf with the color of McDonald’s brand, or wearing a Sikh Kirpan symbolic miniature sword, because of its little dimensions and being not sharpened, like a butter knife<sup>18</sup>.

In the Canadian law system, according to the Canadian Charter, the “reasonable accommodation” at workplace is similar - the burden of proof is on the employer - but the legal formula differs from the “minimum burden” required by the U.S. law. The limit of the duty at issue makes reference to an “extreme restraint” of the employer’s freedom<sup>19</sup>. According to the parameters elaborated by the Supreme Court, the financial cost for the employer could be also over the minimum if it is “acceptable”<sup>20</sup>; in the matter of undertaking organization a limit of the r.a. could stem from the need to assure the substitution of the workers, or the fact that in order to satisfying the request related to the

---

<sup>16</sup> “Unless it would be an undue hardship on the employer's operation of its business, an employer must reasonably accommodate an employee's religious beliefs or practices. This applies not only to schedule changes or leave for religious observances, but also to such things as dress or grooming practices that an employee has for religious reasons. These might include, for example, wearing particular head coverings or other religious dress (such as a Jewish yarmulke or a Muslim headscarf), or wearing certain hairstyles or facial hair (such as Rastafarian dreadlocks or Sikh uncut hair and beard). It also includes an employee's observance of a religious prohibition against wearing certain garments (such as pants or miniskirts)”.

<sup>17</sup> In [www.eeoc.gov/laws/religion.cfm](http://www.eeoc.gov/laws/religion.cfm) US Equal Employment Opportunity Commission, Religious Discrimination

<sup>18</sup> EEOC Compliance Manual : Religious Garb and Grooming in the Workplace; Right and Responsibilities, in [www.eeoc.gov/laws/religion.cfm](http://www.eeoc.gov/laws/religion.cfm), ex. N. 4 and 19

<sup>19</sup> U. Coiquaud, I. Martin, *L'expression des convictions religieuses au travail : Liberté de religion et obligation d'accommodement au Canada*, in *Convictions religieuses sur le lieu du travail*, Dossier thématique, *Révue du Droit Comparé du Travail et de la sécurité sociale* n. 2/2016, p.78.

<sup>20</sup> Canadian S. C. , case-law *Central Okanagan School District n.23 c. Renaud (1992)*, 2 RCS 970 , Martin 2017

religious accommodation the employer will have to modify in a deep way the working conditions, or create a specific position made to measure.

General limits also stem from the protection of the rights of other people, but if the r.a. measure cause them an important damage. The protection of safety, security, or health may justify denying accommodation in a given situation, like in the case of a worker in the building sector who was denied to wear the sick turban in order to wear the security helmet, ruled as legitimate by the Supreme Corte in 1985<sup>21</sup> but before the reform on the r.a. was in force, so some scholar doubts it will be reiterated now.

## *2. Final remarks about the reasonable accommodation and the balance with the co-worker: reflecting on the ECJ judgement Cresco*

One of the most relevant issue in the panorama of r.a., raising both from the U.S. and Canada systems, regards the effect of the measure related to r.a. on the other co-workers. If the measure constitutes an exception to the general conditions at the workplace, the equality principle could be violated.

On the contrary, in U.S. system the EEOC refuse that approach arguing that: “*When an exception is made as a religious accommodation, the employer may nevertheless retain its usual dress and grooming expectations for other employees, even if they want an exception for secular reasons. Co-workers non adherent to the same religion' disgruntlement or jealousy about the religious accommodation is not considered undue hardship, nor is customer preference*”.

In the Canadian system, Supreme Court deal with this problem, related to the demand by workers in order to have a leave in a working day to attend the religious service. In one of this case, also the union objected to grant the leave because it would be violated the schedule provided by the collective agreement applied to all employees and the “morale” of the other workers could be negatively impressed<sup>22</sup>. On the contrary, the Canadian S.C. ruled that those circumstances didn't make a “heavy violation” of rights of other workers but only allows to respect a fundamental rights related to the religious

---

<sup>21</sup> (1985) 2 R.C.S.56 1 quoted by U. Coiquaud, I. Martin, 2017, 85

<sup>22</sup> *Central Alberta Dairy Pool v. Alberta* (1990) R.C.S., 489

freedom. In this case the balance was in favor of the religious freedom and the decision adopted by the employer to satisfy it. Moreover, the decision pointed out that also the worker asking for reasonable accommodation has to facilitate to reach a reasonable compromise and that the employer has to take into account if the other workers feel to be treated in an unjust way. The best solution, according to some scholars, would be to allow to use the leaves for personal reasons settled by the collective agreement, without creating any disparate treatment within the workers<sup>23</sup>.

The issue is a very controversial point. In European Union law, the recent ECJ case - law *Cresco* 2019<sup>24</sup>, ruled a different principle about the grant of Good Friday as public holiday in favor of employees who are members of certain Christian churches, accompanied by a payment in addition to their regular salary for work done on that day. The ECJ state that a national legislation like this constitutes a direct discrimination<sup>25</sup>.

The decision pointed out that the grant of a public holiday on Good Friday is not subject to the condition that the employee must perform a particular religious duty during that day, but is subject only to the condition that such an employee must formally belong to one of those churches. “Thus, that employee remains free to choose, as he wishes, how to spend his time on that public holiday, and may, for example, use it for rest or leisure purposes” ( ECJ *Cresco* § 46). Having regard to this contradiction in the regulation of this matter by national law and by employer practice, the decision correctly state that “the situation of such an employee is no different in that regard from that of other employees who wish to have a rest or leisure period on Good Friday without, however, being entitled to a corresponding public holiday”. And the same reasoning was made about the financial aspects of the case-law<sup>26</sup>.

---

<sup>23</sup> G. Bouchard, C Taylor, *Fonder l'avenir : le temps de la conciliation, Rapport de la Commission de consultation sur les pratiques d'accomodement reliées aux différences culturelles*, Gouvernement du Québec, Québec mai 2008 <https://www.mce.gouv.qc.ca/publicationsCCPARDC-rapport-final-integral.fr.pdf> ; Coiquad , Martin 2017, 86

<sup>24</sup> ECJ 22/1/ 2019 *Cresco* C-193/2017

<sup>25</sup> “Articles 1 and 2(2) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as meaning that national legislation under which, first, Good Friday is a public holiday only for employees who are members and, second, only those employees are entitled, if required to work on that public holiday, to a payment in addition to their regular salary for work done on that day, constitutes direct discrimination on grounds of religion”

<sup>26</sup> *Cresco* § 48, 49: “ Only employees who are members of one of the churches covered by the ARG are entitled to public holiday pay if they work on Good Friday. Having regard to the financial nature of the benefit concerned by such different treatment and the inextricable link between the benefit and the grant of

This conclusion is not necessarily the expression of different value between European and non-European law system. It is worth to remember that in the systems where the employer has to apply the religious accommodation, a preliminary condition is required about the sincerity of the employee in the adherence to the religious practices, in order to exclude a mere opportunistic attitude.

Anyway, the ECJ decision point-out that in European Union law the prohibition of the discrimination in employment by the ground of religion cover non only the adherent but also the non - adherent in the same way, in a perspective where the principle of the equal treatment is the best value. In a different, but related perspective, it was discussed if such a measure could be legitimate according to Art. 7(1) Directive 2000/78. This is specifically and exclusively designed to authorize measures which, although discriminatory in appearance, are in fact intended to eliminate or reduce actual instances of inequality which may exist in society. Once more, the proportionality principle is the diriment decision's factor. According to §65: *“Further, in determining the scope of any derogation from an individual right such as equal treatment, due regard must be had to the principle of proportionality”* in consistence of which the decision state: *“it should be noted that the national legislation at issue in the main proceedings cannot be regarded as including specific measures the aim of which is to compensate for such a ‘disadvantage’ in accordance with the principle of proportionality and, as far as possible, the principle of equal treatment”*. In conclusion, applying the proportionality criterion, the decision state that: *“The characteristic of the regulation go beyond of what is necessary to compensate for that alleged disadvantage and establish a difference in treatment between employees who are subject to comparable religious duties<sup>27</sup>, that does not guarantee, as far as is possible, observance of the principle of equal treatment”*.

The difference of treatment between workers of different religious or non – religious groups would be perhaps avoided by a more accurate settlement of measures and the

---

a public holiday on Good Friday, it must also be concluded that, in respect of the grant of such a financial benefit, the situation of employees who are members of one of the churches covered by the ARG is comparable to that of all other employees, regardless of whether or not they have a religion”.

<sup>27</sup> According to Cresco § 67: “As stated in paragraph 60 above, the provisions at issue in the main proceedings grant a 24-hour rest period on Good Friday to employees who are members of one of the churches covered by the ARG, while employees belonging to other religions, whose important festivals do not coincide with the public holidays set out in Paragraph 7(2) of the ARG, can, in principle, be absent from work in order to perform the religious rites associated with those festivals only if they are so authorized by their employer in accordance with the duty of care”.

elaboration in the matter of reasonable accommodation arising from the experience carried out in other law systems can be very important to exploring the best solutions.