

Quando libertà religiosa e orientamento sessuale entrano in conflitto.

“Discrimination on another ground”: when religious liberty and sexual orientation collide.

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ABSTRACT

Nel famoso caso britannico *Ladele v London Borough of Islington*, una dipendente pubblica addetta all'attività di ufficiale del registro dello stato civile e che si rifiutava di officiare anche le unioni tra persone dello stesso sesso per via della sua fede cristiana, ha ritenuto di essere stata vittima di discriminazione diretta e indiretta per motivi legati alla propria religione. Più di recente, in Italia un'insegnante d'arte che lavorava per un istituto scolastico gestito da un ordine religioso e a cui era stato negato il rinnovo del contratto di lavoro per essersi rifiutata di rispondere a domande relative al suo orientamento sessuale, ha impugnato la cessazione del rapporto per discriminazione diretta. Sono solo alcuni esempi di un conflitto emergente tra la libertà religiosa e i diritti riconosciuti alla comunità LGBT e, più in generale, tra i diversi motivi di discriminazione, che, in ambito lavorativo, ricadono sotto un ombrello di protezione che, anzitutto a livello europeo, passa attraverso la direttiva 2000/78/CE del Consiglio. Il saggio intende analizzare, in una prospettiva comparata, il diverso scenario in vari Stati membri in merito allo specifico conflitto evidenziato, tenendo conto del ruolo che la giurisprudenza – europea e nazionale – può svolgere nel risolvere o bilanciare alcune delle sue ambiguità. In ultima analisi, si intende verificare se esista una gerarchia tra questi due fattori di rischio, o se invece possano coesistere.

Parole chiave: Discriminazioni – Rapporto di lavoro – Orientamento sessuale – Religione

In the famous UK case Ladele v London Borough of Islington, a civil servant working as a registrar and objecting to being required to officiate at civil partnership ceremonies due to her Christian beliefs, complained of direct and indirect discrimination on grounds of religion or belief and harassment. More recently, in Italy an art teacher working for a religious school, which had been refused the renewal of the employment contract as a result of the refusal to answer questions related to her sexual orientation, took the education institute to Court on the grounds on sexual orientation discrimination. These are only a few examples of an emerging conflict unfolding between religious liberty and LGBT rights, and more generally between different grounds of discrimination, which have to be taken into account under Employment Law, which, at European level, has established a general framework for equal treatment in employment and occupation (Council Directive 2000/78/EC). The paper will analyse, in a comparative perspective, the different scenario in various Member States concerning the specific collision described, taking into account the role of the case law –

also on a supra-national level - in solving or balancing some of its ambiguities. Ultimately, we will try to assess whether a hierarchy exists between these two different grounds of discrimination protection, or they can coexist.

Keywords: Discrimination – Employment contract – Sexual orientation – Religion

SOMMARIO:

1. Interactions and intersections between religious freedom and sexual orientation: an introduction. – 2. The interindividual conflict between religious freedom and sexual orientation in the workplace: from the relevance of opinions... – 3. ...to the performance of work tasks. – 4. Organisations with a religious ethos and their difficult relationship with sexual orientation. – 5. Concluding remarks: hierarchy or coexistence? Notes on a possible reconciliation.

1. Interactions and intersections between religious freedom and sexual orientation: an introduction.

In May 2014, Mr. Lee, a member of QueerSpace, a Northern Ireland LGBT association, commissioned Ashers Bakery a cake to be decorated with the words “Support Gay Marriage” for the closing event of the week against homophobia; despite having initially accepted the order and its payment, the McArthurs, owners of the company, took soon a step back, claiming their Christian faith would make impossible to fulfil such task. Mr. Lee sued the Bakery claiming to have been mistreated according to the *Fair Employment and Treatment (Northern Ireland) Order* 1998, which prohibits the discrimination in the supply of goods, facilities or services on the ground of religious or political opinions, as well as the *Equality Act (Sexual Orientation) Regulations (Northern Ireland)* 2006, which prohibits discrimination in the supply of goods, facilities or services on the ground of sexual orientation.

While the first two judgements were favourably concluded for the claimant, the Supreme Court¹ held that the case did not raise an issue of (direct) discrim-

¹ Supreme Court, *Lee (Respondent) v Ashers Baking Company Ltd and others (Appellants)* (Northern Ireland), [2018] UKSC 49. On the decision’s reasoning, L.E. PERRIELLO, *Discrimination on sexual orientation and religious freedom in European contract law*, in *The Italian Law Journal*, 4, 2, 2018, 639 ff.; M. CONNOLLY, *Lee v Ashers Baking and its Ramifications for Employment Law*, in *Industrial Law Journal*, 48, 2, 2019, 240 ff.; A. SPERTI, *Libertà religiosa e divieto di discriminazione in base all’orientamento sessuale: alcune riflessioni a partire dalle pronunce sull’obiezione del pasticcere*, in *GenIus*, 2019, 1 (forthcoming).

ination on the ground of sexual orientation: the McArthurs, in fact, had cancelled the order not because of the Mr. Lee's (actual or perceived) sexual orientation, but because of the requested message. In other words, it was not an issue of "personal characteristics", since the bakery had both LGBT customers and employees; nor it was a case of a different treatment, since the contested message would have been refused to anyone (including heterosexuals)², without it being an "alert" of sexual orientation³. The shop did not simply want to be associated with the support of gay marriage.

Whether agreeing or not with its outcome⁴, the case, which perhaps received less attention than the similar and almost contemporary *Masterpiece Cakeshop Ltd v Colorado Civil Rights Commission*, decided by the US Supreme Court⁵, lends itself to two important remarks.

The first, which this paper aims to investigate, is the increasing interaction between religious beliefs (and manifestation⁶) and sexual orientation. The two

² The cake is considered a means to spread the message, in the same way a printing house could be asked to print leaflets: «It was not as if he were being refused a job, or accommodation, or baked goods in general, because of his political opinion ... [the bakery was] quite prepared to serve him in other ways. ... It is more akin to a Christian printing business being required to print leaflets promoting an atheist message» ([2018] UKSC 49, [47]).

³ It is undisputed that «People of all sexual orientations, gay, straight and bi-sexual, can and do support gay marriage. Support for gay marriage is not a proxy for any particular sexual orientation». However, the European development of anti-discrimination protection has gone beyond such strict perspective, so to cover also discrimination by association (see EUCJ (Grand Chamber) 16 July 2015, C-83/14, *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*) and discrimination by perception (see ECtHR 13 December 2005, Cases no. 55762/00 and 55974/00, *Timishev v Russia*).

⁴ It could be argued that the Supreme Court, after ruling out a direct discrimination, should have valued the possibility to "frame" the order cancellation as indirect discrimination, as such practice would put LGBT NI community at a particular disadvantage, regardless of Mr. Lee's sexual orientation.

⁵ US Supreme Court, *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission et al.*, 4 June 2018, analysed in F. IOVINO, "A regola d'arte": quando un dolce è espressione dell'animo umano, in *Osservatorio costituzionale*, 2018, 3, 65 ff.; M.R. DIMINO, *A Foolish Inconsistency: Religiously and Ideologically Expressive Conduct*, in *The Italian Law Journal*, 4, 2, 2018, 619 ff.

⁶ It is generally acknowledged, also in the European jurisprudence, that religious freedom is worthy of protection if and when it is recognizable (also) on its external manifestations; see L. SAPORITO, F. SORVILLO, L. DECIMO, *Lavoro, discriminazioni religiose e politiche d'integrazione*, in *Rivista telematica www.statoechiese.it*, n. 18, 2017, and T. VETTOR, *Modelli e tecniche regolative della libertà religiosa nel lavoro: analisi e prospettive*, in *Il Diritto del Mercato del Lavoro*, 2005, 646.

factors have faced a very similar path of legal recognition, starting from the their irrelevance/indifference - through the affirmation of equal dignity and therefore of formal equality among citizens (e.g. Article 3 of the Italian Constitution), which was de facto translated into a mere "tolerance" by the dominant group - and only recently arriving at the unequivocal identification in anti-discrimination law both at a supranational and national level. It is sufficient here to recall Article 21 of the EU Charter of Fundamental Rights, which is now recognized as having the same value and relevance as the Union's fundamental treaties, as it prohibits any form of discrimination based, inter alia, on «religion or belief, political or any other opinion» and «sexual tendencies» and how it is connected to the Council Directive 2000/78/EC of 27 November 2000, which unites these two factors (together with disability and age), in a prohibition of discrimination, specifically in in employment and occupation, which assumes «the language of absolute rights, as the right to protect one's dignity»⁷.

Notwithstanding the Directive's merits and limits, and specifically regarding its formulation, perceived by some Authors as «general and generic»⁸, the leap from an 'on paper' equality to an effective prohibition of discrimination, in a social context increasingly characterized by both confessional and cultural pluralism, determines inevitably that the interaction between (the exercise of different) rights can become a real conflict⁹, which legal systems are called to regulate. In the case of Mr. Lee, whether the right not to be discriminated on the ground of sexual orientation should have given way to the bakery owners' religious freedom or whether the latter, also a "qualified" right, should have undergone some limitation in its full manifestation, it is an *actio finium regundorum* which pertains to the Law, identifying (possible) balances or hierarchies in their relationship¹⁰.

⁷ M. BARBERA, *Introduzione. Il nuovo diritto antidiscriminatorio: innovazione e continuità*, in M. BARBERA (a cura di), *Il nuovo diritto antidiscriminatorio. Il quadro comunitario e nazionale*, Giuffrè, Milano, 2007, XXXV.

⁸ G. ARRIGO, *Uguaglianza, parità e non discriminazione nel diritto dell'Unione europea (parte II)*, in *Rivista giuridica di diritto del lavoro*, 2016, I, 895.

⁹ On this topic, S. BENHABIB, *La rivendicazione dell'identità culturale. Eguaglianza e diversità nell'era globale*, il Mulino, Bologna, 2005; C. GALLI, *L'umanità multiculturale*, il Mulino, Bologna, 2008; in particular, on the interaction between religious freedom and LGBT rights, W.N. ESKRIDGE JR, R. FRETWELL WILSON (eds), *Religious Freedom, LGBT Rights, and the Prospects for Common Ground*, Cambridge University Press, Cambridge, 2019.

¹⁰ As pointed out by A. GUARISO, *Velo islamico e questioni connesse*, in *Lavoro Diritti Europa*, 2018, 1, 4, «Anti-discrimination law, although undoubtedly an articulation of the general

A second remark concerns the awareness that the effectiveness of the anti-discrimination legislation, both at European level as at national level, is conditioned primarily by the identification of its scope of intervention and therefore by the different intensity of the guaranteed protection. The cake order was discussed in the Belfast courtrooms precisely because it was the subject to a precise regulation - the above mentioned Equality Act (Sexual Orientation) Regulations (NI) 2006 - which prohibits discrimination based on sexual orientation in the supply of goods and services, in the exercise of public functions and in school education, all areas instead not covered, if not explicitly excluded¹¹, by the 2000/78 Directive¹².

As a consequence, in the face of what has been defined as a hierarchy among discriminatory factors at EU level¹³, it is national legislation that can autonomously attempt to realign the different protections to “higher” level ensured to

discourse on equality (it is not important here to establish whether it is, according to various opinions, the supporting beam because endowed with a particular efficacy, or of the poor relative because circumscribed within the sphere of protected factors), has nothing to do with the flattening of neutrality. Indeed, its historical function is exactly the opposite, which is to guarantee that different identities can be manifested without leading to a disadvantage».

¹¹ Article 3(3), in relation to «state social security or social protection schemes». The EU jurisprudence has, however, restricted the notion of social security to those benefits for which the concept of «pay», as provided for by Article 157 TFEU does not apply (see EUCJ (Grand Chamber) 10 May 2011, C-147/08, *Römer*); on the topic, M. BORZAGA, *Unioni civili, trattamenti pensionistici e discriminazioni fondate sull'orientamento sessuale: fin dove può spingersi il diritto comunitario del lavoro?*, in *Rivista italiana di diritto del lavoro*, 2012, II, 215 ff.

¹² The proposal put forward by the European Commission in 2008 to expand the scope of protection outside employment and occupation, covering therefore the area of services, education and social protection (European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM(2008) 426) has yet to succeed in the face of the strong opposition of some Member States (in particular, Germany), concerned not only with a strong interference with the principle of subsidiarity, but even more with the financial impact on national social security systems; see G. DE BÚRCA, *The Trajectories of European and American Antidiscrimination Law*, in *American Journal of Comparative Law*, 2012, 60, 10. Ten years later, the proposal is still discussed at the Council table, where it continues to be subjected to multiple “adjustments” (the text, as of 29 June 2019, of the proposal is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=consil:ST_10740_2019_INIT).

¹³ See M. BELL, *The Principle of Equal Treatment and the European Pillar of Social Rights*, in *Giornale di diritto del lavoro e di relazioni industriali*, 2018, 793-4; M. BELL, L. WADDINGTON, *Diversi eppure eguali. Riflessioni sul diverso trattamento delle discriminazioni nella normativa europea in materia di eguaglianza*, in *Giornale di diritto del lavoro e di relazioni industriali*, 2003, 373 ff.

race and ethnic origin. Being a policy choice (and not an imposed one), the normative picture that emerges is inevitably determined by a “variable geometry”, with vast differences among Member States¹⁴.

These distinctions are then increased by the exceptions and the justifications¹⁵ provided for each factor, enshrined in the European provisions first and variously implemented by the national legislations later: if «the juridical notion of discrimination is in fact a qualification of the inequality: law qualifies as inequality as unlawful in the very moment in which it gets prohibited»¹⁶, the extent of the exceptions and justifications affects and restricts the scope of inequalities that can be qualified as (even direct¹⁷) discrimination¹⁸.

Narrowing our analysis to the specific field of application of the 2000/78/EC Directive¹⁹, in the following pages we aim to take into account two possible

¹⁴ For an analysis of the Member States' implementation, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (FRA), *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States, Part I – Legal Analysis*, 2009, Wien. P. M. AYOUB, *EU Law as an (In)Direct Source of LGB Rights across Europe*, in U. BELAVUSAU, K. HENRARD (eds), *EU Anti-Discrimination Law Beyond Gender*, Hart, Oxford, 2019, 252, underlines further differences between the EU-15 and the Eastern European States which joined the EU after the dates set to comply with the 2000/43 e 2000/78 Directives.

¹⁵ Following the distinction set in M. BARBERA, *Introduzione. Il nuovo diritto antidiscriminatorio: innovazione e continuità*, XXXVII: «The prohibitions of direct discrimination allow exceptions, and the comparatively more disadvantageous effects precluded by the prohibitions of indirect discrimination admit justifications».

¹⁶ M.V. BALLESTRERO, *Eguaglianza e differenze nel diritto del lavoro. Note introduttive*, in *Lavoro e Diritto*, 2004, 511.

¹⁷ G. DE SIMONE, *I requisiti occupazionali*, in S. FABENI, M.G. TONIOLO (eds), *La discriminazione fondata sull'orientamento sessuale*, Ediesse, Roma, 2005, 147.

¹⁸ Such is the case of the 19th recital of the Directive, according to which «in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces. The Member States which make that choice must define the scope of that derogation».

¹⁹ Article 3(1): «Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to: (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion; (b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience; (c) employment and working conditions, including dismissals and pay; (d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the

levels of conflict between religious freedom and manifestation and sexual orientation in the workplace, observing the rules set by the same directive but also how they have been acknowledged at national level and the judicial the contribution to their interpretation. In the first place, therefore, we will look at the perspective of interindividual conflict, which can be rendered visible not only between workers carrying these two protected factors but also when the religious belief of a worker is in contrast with the fulfilment of a working obligation in relation to sexual orientation; secondly, we will look at the dimension of the conflict between the religious *ethos* of the employer and the sexual orientation of an employee (or aspiring employee).

2. The interindividual conflict between religious freedom and sexual orientation in the workplace: from the relevance of opinions...

In view of the diversity of opinions typical of a pluralistic and multicultural society, the workplace is probably the most natural place in which those opinions can be expressed and potentially come into conflict; and that conflict can be exacerbated not only when they are manifested in a way that could be considered offensive by the listener, but even more so when they are expressed with the intention – sometimes perceived as a moral duty – to proselytize or convince others of their truth²⁰.

benefits provided for by such organisations». For a wider perspective and the different EU and ILO approach to discrimination in the workplace, F. MARINELLI, *Divieto di discriminazione del lavoratore subordinato: ILO versus UE*, in *Diritto delle relazioni industriali*, 2018, 197 ff.

²⁰ «Religious identity is an extreme case of constitutive factor of personal identity, characterized by a strong expansiveness and voracity towards other profiles of individual identity, and by a combativeness on the public sphere, as evidenced by the importance of the role attributed to religious symbols, and to their claim and public display and in public spaces. In fact, religion is a powerful factor of belonging, it creates strong ties between those who share the same religious convictions, and consequently also strong dividing lines» (G. PINO, *Sulla rilevanza giuridica e costituzionale dell'identità religiosa*, in *Ragione pratica*, 2015, 2, 373). See also M. ETHERINGTON, *Religion as a Workplace Issue: A Narrative Inquiry of Two People—One Muslim and the Other Christian*, SAGE Open, 2019 (<https://doi.org/10.1177/2158244019862729>).

It is something that goes beyond the religious expression, manifesting in the public display of symbols²¹ or religious practices²², which ultimately involves exclusively the relationship between the worker and the employer who organizes the space in which this moves.

Here, instead, religious manifestation impacts and potentially conflicts with LGBT rights, also protected in the form of prohibition to discriminate by the 2000 Framework Directive and national legislation. A first scenario is offered when the religious belief induces an employee to express his convictions about the sinfulness of homosexuality or the sacredness of the family composed of a man and a woman; such a speech could be perceived by some colleagues as irritating, at best, and degrading at worst²³. It is a scenario which the 2000/78 Directive does not seem to deal directly with – and being instead confined, when it is the case, to the protection against insult (or the tort relevance of homophobia) - but that nonetheless can call for its intervention in a two-fold way.

On the one hand, in fact, such religion driven opinions can qualify as a conduct of “harassment”²⁴; on the other hand, they can move the employer to take action in order to re-establish equality and respect.

²¹ As explored, more recently, in *Achbita* (EUCJ (Grand Chamber) 14 March 2017, C-157/2015), *Bougnaoui* (EUCJ (Grand Chamber) 14 March 2017, C-188/2015) and *Eweida* (ECtHR 15 January 2013, on Cases 48420/10, 59842/10, 51671/10, 36516/10); as a starting point, see T. PAGOTTO, E. ERVAS, *Achbita v. Eweida: libertà d'impresa e libertà religiosa a confronto*, in *federalismi.it*, 2017, no. 2; V. NUZZO, *La Corte di Giustizia e il velo islamico*, in *Rivista italiana di diritto del lavoro*, 2017, II, 436 ff.; V. PROTOPAPA, *I casi “Achbita” e “Bougnaoui”*. *Il velo islamico tra divieto di discriminazione, libertà religiosa ed esigenze dell'impresa*, in *Argomenti di diritto del lavoro*, 2017, II, 1079 ff.; P. DIGENNARO, *Il difficile equilibrio tra libertà religiosa e libertà d'impresa*, in *Rivista giuridica del lavoro e della previdenza sociale*, 2017, II, 370 ff.; J. H. H. WEILER, *Je suis Achbita*, in *Rivista trimestrale di diritto pubblico*, 2018, 1113 ff., and A. OLIVIERI, *Discriminazioni di genere e tutela del desiderio: l'uguaglianza a tutti i costi e i costi dell'uguaglianza*, in *Diritto delle relazioni industriali*, 2019, 2, 513 ff.

²² E.g. religious festivities which demand an abstention from work or the compliance with religious practices (see A. DE OTO, *Precetti religiosi e mondo del lavoro*, Ediesse, Roma, 2007, specialmente 110 ss.; S. COGLIEVINA, *Festività religiose e riposi settimanali nelle società multiculturali*, in *Rivista italiana di diritto del lavoro*, 2008, I, 375 ff.; A. OCCHINO, *Orari flessibili e libertà*, in *Rivista italiana di diritto del lavoro*, 2012, 1, p.169 ff.) or particular dietary prescriptions (R. BOTTONI, *Le discriminazioni religiose nel settore lavorativo in materia di alimentazione*, in *Quaderni di diritto e politica ecclesiastica*, 2013, 1, 107 ff.).

²³ In the specific context of the UK regulation, M. PEARSON, *Offensive expression and the workplace*, in *Industrial Law Journal*, 2014, 43(4), 429 ff.

²⁴ L. VICKERS, *Is All Harassment Equal? The Case of Religious Harassment*, in *The Cambridge Law Journal*, 2006, 65(3), 579 ff.

As for the first perspective, the mere manifestation of one's religious conviction does not automatically qualify as harassment²⁵ which, in the antidiscrimination law scheme²⁶, concerns a conduct violating dignity and has the purpose and effect of creating «an intimidating, hostile, degrading, humiliating or offensive environment» in the workplace (Article 2(3) of the Directive). And yet, it is a sufficiently large notion to cover not only conducts intentionally aimed at the forbidden result, but also causing the unlawful effect; it does not offer predetermined criteria, such as repetitiveness or persistency, nor is it entrusted to the sensitivity of the victim. As opportunely pointed out, «the evaluation of the working condition defined as “environment” will have to be based on the prudent attitude of the judge examining the overall situation in which the subject who assumes to be the victim of the harassment finds himself/herself»²⁷.

As the appearance of a discriminatory case may lead to the employer's liability even when the conduct belongs to employees, it is surely likely that specific Codes of conduct²⁸, based on equality and equal treatment, will be adopted

²⁵ As pointed out by M. BONINI BARALDI, *La discriminazione sulla base dell'orientamento sessuale nell'impiego e nell'occupazione: esempi concreti ed aspetti problematici alla luce delle nuove norme comunitarie*, in *Diritto delle relazioni industriali*, 2004, 799, «The expression of generic negative opinions regarding homosexuality can be considered a hypothesis that places itself at the limit between freedom of thought and harassment, which requires a delicate work of balancing between opposite values».

²⁶ Without going into details in relation to each Member State's implementation of the Directive, it will be enough here to remark how the rise of the legal notion of “harassment” met regulatory framework which were completely devoid of any discipline on the subject (e.g. Italy; see P. CHIECO, *Le nuove direttive comunitarie sul divieto di discriminazione*, in *Rivista italiana di diritto del lavoro*, 2002, I, 93) and others where there were already such provisions (e.g. France, where the *Loi de modernisation sociale* 2002 had introduced the concept of *harcèlement morale*).

²⁷ S. SCARPONI, *La nozione di molestia secondo le direttive antidiscriminatorie*, in S. FABENI, M.G. TONIOLO (eds), *La discriminazione fondata sull'orientamento sessuale*, 242.

²⁸ In Spain, for example, the *Ley Orgánica* 3/2007 on equality between men and women, has modified the *Real Decreto Legislativo* 5/2000 by introducing a precise obligation for the company to adopt rules against harassment at work, also with reference to other factors of discrimination, such as sexual orientation, effectively determining the dissemination of company Codes of conduct (often the result of collective bargaining) which keep the employer immune from administrative sanctions and liability; see R. PLATERO, *Discriminación por orientación sexual e identidad de género*, in E. ÁLVAREZ, A. FIGUERUELO, L. NUÑO (a cura di), *Estudios interdisciplinarios sobre igualdad*, Iustel, Madrid, 169 ff. Also in Croatia, the recent labour law reforms (OG 93/2014, 127/2017) have imposed on the employer with at least 20 employees the obligation to adopt and publicize anti-discrimination measures (including those against discrimination for sexual orientation) when not already provided for by collective bargaining (Article 26 of the

as a means of adequate prevention, or that disciplinary actions (and sanctions) will be taken in their breach or in the face of (manifestations of) opinions which can lead to disharmony in the workplace or affect the reputation of the company. Predictably, the intensity of these measures and even their very establishment can be conditioned by the context in which the conduct takes place, e.g. if characterized by an obligation of impartiality and neutrality²⁹, or when aiming to be an inclusive environment. But it is equally clear that the difficulties in managing conflicting opinions on religion and sexual orientation in the workplace can trigger an escalation of claims and counterclaims. Just recently, news spread about an employee of a Polish IKEA plant, a fervent Catholic who, having published passages of the Bible on the company intranet to comment on the International Day Against Homophobia, Transphobia and Biphobia (with a final remark that «accepting and promoting homosexuality and other deviations is a source of scandal»), was fired for refusing to remove the homophobic post³⁰.

It is certainly not the first case in which the dismissal for expressing religious opinions on sexual orientation and gender identity has been challenged. In *Haye v Lewisham*³¹, a Christian employee of the London borough of Lewisham had

Labour Code). Moreover, as clarified in EUCJ 25 April 2013, C-81/12, *Asociația Accept*, the fact that the employer might not «have clearly distanced itself from the statements concerned is a factor which the court hearing the case may take into account in the context of an overall appraisal of the facts» (§ 50).

²⁹ A. FUCCILLO, *Diritto, religioni, culture: il fattore religioso nell'esperienza giuridica*, Giappichelli, Torino, 2018, 266; P. LO IACONO, *Neutralità della scuola pubblica e divieto di pregare: riflessioni sulla laicità e sul laicismo*, in *Il diritto di famiglia e delle persone*, 2018, 1442 ff.).

³⁰ The news (reported in <https://www.newsweek.com/ikea-poland-lgbt-lawsuit-1447954>), has also provoked an intense debate on the MNEs Codes of conduct forbidding discriminatory behaviours in not yet truly multicultural and pluralist social contexts; more generally, on the economic organizations' ideology and their influence on the employment relationship, see M. RANIERI, *Indennità, organizzazioni, rapporti di lavoro*, Cedam, Padova, 2017, 152 ff.

³¹ Employment Tribunal 16 June 2010, Case Number 2301852/2009; see M. PEARSON, *Religious discrimination and the 'hierarchy of rights': Non-existent, appropriate or problematic?*, in *International Journal of Discrimination and the Law*, 2016, 16(1), 37 ss. For a precedent, see *Apelgun-Gabriels v Lambeth* (London Employment Tribunal, February 2006, Case Number: 2301976/05), where the claimant had distributed a document to his colleagues with extracts from the Bible condemning homosexuality, after a prayer meeting held (by permission) on council premises: the decision is analysed in M. PEARSON, *Proportionality, Equality Laws, and Religion: Conflicts in England, Canada, and the USA*, Routledge, London-New York, 2017, 104. More recently, see *Powell v Marr Corp* (Bristol Employment Tribunal, 3 February 2018, Case Number: 1401951/2016), with reference to a Christian teacher dismissed for repeated homophobic

been fired for sending an email (from her work account) to the Lesbian and Gay Christian Movement, stating, among other things, that the association deceived its adherents into believing that it was acceptable to be gay and Christian at the same time and urged repentance and deviation from such sinful conduct before it was too late. The British Tribunal deemed the dismissal legitimate, rejecting the claim that it could be direct discrimination (the Council's decision would have been taken even if the opinions had been expressed without referring to one's own convictions as a Catholic) or indirect discrimination (the dismissal certainly did not meet any criteria, or practice, such as to put Christian employees at a particular disadvantage); nor it could be regarded as disproportionate, in the face of a conduct breaching the equal opportunities policy implemented by the local administration and the rules on the use of work e-mail.

As extreme as these cases may seem, they show that in the face of the non-discrimination legislation, not all religious opinions can be protected by law; and even if one wanted to dispute that an obligation to respect sexual orientation (or rather, independently of sexual orientation) could entail a disadvantage with respect to those who profess beliefs that have different views, a clearer picture can be drawn if we substituted the sexual orientation factor with race or gender and reassessed the examples we are presenting: wouldn't we come to the same conclusions? Nor can it be assumed that an employer who adopts disciplinary measures, even ones that lead to dismissal, to cope with homophobic opinions can be regarded as carrying out discrimination or harassment in relation to the religion professed by the employee: we could again change the terms of comparison, replacing the sexual orientation factor with that of the race and to imagine whether religion factor can be considered as an "exemption" or a "protection" before a clear contrast with the legal system's viewpoint.

3. ...to the performance of work tasks.

If, on a first standpoint, the intersection between religious freedom and sexual orientation arises in terms of "manifestation", a different but close scenario concerns the "practice", where the conflict arises between a worker's religion and an obligation to perform a task, even if disobeying a religious precept. It is more likely to happen as the legal systems move towards an effective promotion

comments aimed at her students and for the constant proselytizing activity carried out during maths lessons.

and protection of sexual orientation, regulating same-sex unions, parentage and adoption³².

Two cases, recently discussed by the European Court of Human Rights, demonstrate the potential and the struggle of such conflict.

In *Ladele v. London Borough of Islington*, the case concerned a registrar of the London borough of Islington, who, following the introduction of the Civil Partnership Act 2004, objected to being required to officiate at civil partnership ceremonies due to her Christian beliefs. When Islington Council insisted that she should undertake at least some of these duties and disciplined her, threatening her with dismissal, she alleged that she had suffered discrimination on the grounds of religion or belief under the *Employment Equality (Religion or Belief) Regulations* 2003³³.

It is interesting to mention that the original Employment Tribunal concluded that the claimant had suffered direct and indirect discrimination and harassment on grounds of religion or belief, without taking into consideration either the nature of the competing beliefs or the conduct of her employer³⁴. Both the Employment Appeal Tribunal and the Court of Appeal, however, overturned the case reasoning, suggesting that the refusal to accept the employee's requests was justified by the employer's prerogative to require all personnel to offer services to the general public regardless of their sexual orientation³⁵.

Even the European Court of Human Rights substantially confirmed this approach and therefore excluded any violation of the Article 9 (*Freedom of thought, conscience and religion*), together with Article 14 (*Discrimination*) of the Convention, arguing, on the one hand, that the duty to not discriminate same-sex couples is a consolidated principle in its own jurisprudence and therefore a legitimate aim pursued by the Islington council and, on the other hand ,

³² See C.F. STYCHIN, *Faith in the Future: Sexuality, Religion and the Public Sphere*, in *Oxford Journal of Legal Studies*, 2009, 29(4), particularly 736 ff.; M. HUNTER-HENIN, *Living Together in an Age of Religious Diversity: Lessons from Baby Loup and SAS*, in *Oxford Journal of Law and Religion*, 2015, 4(1), particularly 110 ss.

³³ Now absorbed in the *Equality Act* 2010, which collated and arranged over a hundred anti-discriminatory Acts; see S. COGLIEVINA, *Divieti di discriminazione e fattore religioso: la normativa britannica dopo l'“Equality Act 2010”*, in *Quaderni di diritto e politica ecclesiastica*, 2011, 2, 323 ff.

³⁴ London Employment Tribunal 3 July 2008, case number: 2203694/2007.

³⁵ Employment Appeal Tribunal, [2008] UKEAT 0453/08/1912; England and Wales Court of Appeal, 15 December 2009, [2009] EWCA Civ 1357.

that, since the Member States have a wide margin of appreciation for the fair balance of the conflict between the competing interests at stake, it could not be argued that in the case in question this appreciation had been exceeded and that it therefore resulted disproportionate³⁶.

Similarly, in *McFarlane v Relate Avon Limited* the case concerned the objection to fulfil a job task, i.e. the psycho-sexual counselling, offered by his company to both heterosexual and same-sex couples according to Relate's Equal opportunities and Professional Ethics policies. Once again, the employee asked to be exempted from counselling same-sex couples in psycho-sexual therapy, on the basis that it represented a form of support incompatible with being a practicing Christian; for these reasons, he was dismissed.

The judgements all agreeing in considering the dismissal non-discriminatory³⁷; in particular, the ECtHR explicitly stated that «an individual's decision to enter into a contract of employment and to undertake responsibilities which he knows will have an impact on his freedom to manifest his religious belief» needs to be weighed in the balance with the employer's action «intended to secure the implementation of its policy of providing a service without discrimination»³⁸, and therefore the choice to terminate the relationship with Mr. McFarlane could be deemed neither wrongful nor disproportionate .

The two cases offer a many interesting points to be considered, including the possibility of “upgrading” the refusal to comply with the job task to the level of “conscientious objection” for religious reasons, an expression that we intend to use in a broad sense, as (i) we are looking at tasks which are not exclusively imposed by a Public Authority (Relate is a charity) and (ii) in many jurisdictions, conscientious objection is recognized in relation to situations determined

³⁶ ECtHR 15 January 2013, on Cases 48420/10, 59842/10, 51671/10, 36516/10, already mentioned; however, the ruling was not unanimous (see note 42). An unfavourable evaluation of the judgement is offered by J.E.M. MACHADO, *Religious freedom and accomodation of conflicting worldviews in the workplace*, in M. RODRIGUES BLANCO (ed), *Law and religion in the workplace*, Comares, Granada, 2016, 19-21.

³⁷ Bristol Employment Tribunal, 6 January 2009; Employment Appeal Tribunal, 30 November 2009, UKEAT/0106/09/DA.

³⁸ The already mentioned ECtHR 15 January 2013, § 109.

by the law and within the formal limits the law itself defines³⁹; in many legislations, moreover, conscientious objection has been explicitly denied by the law when it comes to same-sex union registration⁴⁰.

A different point, although related to what has been discussed so far, is whether it is legitimate and, as a consequence, reasonable that a balance of the competing rights should translate into “reasonable accommodation” of the religious freedom of an employee with respect to the prohibition of discrimination on the ground of sexual orientation of his/her colleagues or third parties.

It is an argument already advocated by some Authors who move beyond the strict scope of Article 5 (accommodation in relation to disability)⁴¹ and that will

³⁹ See V. TURCHI, *I nuovi volti di Antigone. Le obiezioni di coscienza nell'esperienza giuridica contemporanea*, Esi, Napoli, 2009; F. GRANDI, *Doveri costituzionali e obiezione di coscienza*, Editoriale Scientifica, Napoli, 2014; L. MUSSELLI, C.B. CEFFA, *Libertà religiosa, obiezione di coscienza e giurisprudenza costituzionale*, Giappichelli, Torino, 2017; specifically analysing the conscientious objection in the context of employment relationship, M. AIMO, *Privacy, libertà di espressione e rapporto di lavoro*, Jovene, Napoli, 2003, 173 ff. Against the emphasis placed on the recognition of the right of the individual conscience to oppose legally imposed duties, see F. MASTROMARTINO, *Esiste un dritto generale all'obiezione di coscienza?*, in *Diritto e Questioni pubbliche*, 2018, 1, 159 ff.

⁴⁰ Such is the case of Netherlands, where in 2014 the civil code was modified so to prevent civil servants from objecting to their own functions (*Wet van 4 juli 2014 tot wijziging van het Burgerlijk Wetboek en de Algemene wet gelijke behandeling met betrekking tot ambtenaren van de burgerlijke stand die onderscheid maken als bedoeld in de Algemene wet gelijke behandeling*), or Spain and France, where similar results were given by a judiciary decision (respectively, *Tribunal Supremo, Interpuesto por Pablo de la Rubia Comos, Recurso Num. 69/2007, 11 Mayo 2009* and (*Conseil constitutionnel, Décision n° 2013-353 QPC du 18 octobre 2013*). For the Italian case, where a possible recognition of the conscientious objection to same-sex unions was rejected in the Parliament debate of the Law no. 76/2016 and therefore interpreted by the administrative Supreme Court as precluded when it came to its application (*Consiglio di Stato, Sezione Consultiva per gli atti normativi, 21 luglio 2016 n. 1695*), F. GRANDI, *Unione civile e obiezione di coscienza: “questo matrimonio non s'ha da fare, né domani, né mai”*, in *GenIus*, 2017, 1, 15 ff.

⁴¹ See D. NEJAIME, R SIEGEL, *Conscience wars in transnational perspective. Religious liberty, third-party harm and pluralism*, in S. MANCINI, M. ROSENFELD (eds), *The conscience wars. Rethinking the balance between religion, identity and equality*, Cambridge University Press, Cambridge, 2018, 187 ff.; K. ALIDADI, *Reasonable accommodations for religion and belief: adding value to Article 9 ECHR and the European Union's Anti-Discrimination approach to employment?*, in *European Law Review*, vol. 37, 2012, 693 ff.; L. WADDINGTON, *Reasonable accommodation. Time to extend the duty to accommodate beyond disability?*, in *NTM/NJCM Bulletin*, 2011, 36, 186 ff.; A. MCCOLGAN, *Class wars? Religion and (In)equality in the Workplace*, in *Industrial Law Journal*, 2009, 38(1), 1 ff., specialmente 24 ss. Less favourably, A.

be further developed in the concluding remarks. It will suffice to say here that the two cases show different point of views. In *Ladele*, the registrar had nevertheless been offered the possibility not to officiate same-sex unions (save some administrative tasks) and in the ECtHR decision it is mentioned that in other UK Councils organizational arrangements had been taken, without compromising the effectiveness of their services⁴²; in *McFarlane*, instead, any “compromise” had been declined by the employer. And yet, it remains to be seen whether a “reasonable accommodation” may ultimately not contribute to overcoming the situations of disparity and disadvantage that the legal framework aims to combat⁴³.

On a different level, it has to be examined, albeit briefly, whether the order to comply with a job task, in the cases here considered, may represent a direct discrimination or whether the exception of Article 4.1 of the Directive can apply.

The rule includes religion among the requirements, which, when genuine and determining, and proportionate to a (legitimate) objective, make a difference of treatment a lawful and non-discriminatory one⁴⁴; in other words, it

YIANNAROS, *Protecting the ‘rights of others’ in the UK: Religious expression, reasonable accommodation and the real meaning of non-discrimination*, in *Genlus*, 2017, 1, 34 ff.

⁴² That was the ground for the dissenting opinions of two ECtHR judges, Vučinić and De Gaetano: «The aim of the Borough of Islington to provide equal opportunities and services to all without discrimination, and the legitimacy of this aim, is not, and was never, in issue. [...] What is in issue is the discriminatory treatment of the third applicant at the hands of the Borough, in respect of which treatment she did not obtain redress at domestic level (except before the first instance Employment Tribunal, § 28). Given the cogency, seriousness, cohesion and importance of her conscientious objection (which, as noted earlier, was also a manifestation of her deep religious convictions) it was incumbent upon the local authority to treat her differently from those registrars who had no conscientious objection to officiating at same-sex unions – something which clearly could have been achieved without detriment to the overall services provided by the Borough including those services provided by registrars, as evidenced by the experience of other local authorities».

⁴³ A. YIANNAROS, *Protecting the ‘rights of others’ in the UK: Religious expression, reasonable accommodation and the real meaning of non-discrimination*, 42: «Given the wide scope of “beliefs” falling within the right to freedom of thought, conscience and religion, accommodating manifestations that are directly discriminatory could potentially open the floodgates of litigation for other religious or non-religious objectors seeking the right to be exempted from their professional duties on the basis of their religious, moral or philosophical beliefs».

⁴⁴ They are the so-called *genuine occupational requirements* or *bona fide occupational qualifications*; see M. FREEDLAND, L. VICKERS, *Religious Expression in the Workplace in the United Kingdom*, in *Comparative Labor Law & Policy Journal*, 2009, 30(3), 597 ff. and particularly

would be possible, when Article 4.1 applies, to demand the employee not to belong to a particular religion or in any case not to adhere a specific ideology.

It is also known how the “scope” of such exception was defined by 23rd recital, referring to «very limited circumstances» and therefore calling the Member States’ national legislation to identify those circumstances, rather merely repeating the formula, as instead happened in the subsequent implementation⁴⁵. In its absence, it will be the judges to assess the legitimacy of the objective to be achieved - in the cases considered, the pursuit of a policy of equality (and not of simple neutrality) appears not only legitimate, but in the case of public administration, even obliged - but the exact meaning of the genuine, determining and proportionate criteria, which should be weighed on the objective characteristics of the work organization and the job⁴⁶.

Similar conclusion, and with a stronger reasoning, can be reached if we consider the order to comply with a job task is valued against a possible indirect discrimination; the assessment here will dwell only on the «appropriate and necessary» the means used to achieve the legitimate objective, thus representing a hypothesis of justification of order (Article 2.2, b) of the Directive).

4. Organisations with a religious ethos and their difficult relationship with sexual orientation.

A different level of conflict between religious freedom and sexual orientation is manifested when the first is incorporated into the ethos of the employer. There are many ways in which this conflict can burst: e.g., when a religiously oriented organisation decides not to hire, or to terminate the relationship, based on the “diversity” of the candidate/employee or opinions (for example, regarding same-sex unions) deemed irreconcilable with the doctrine to which the organization informs itself; or else, when an organisation with a religious ethos

604 ff.

⁴⁵ EUROPEAN NETWORK OF LEGAL EXPERTS IN GENDER EQUALITY AND NON-DISCRIMINATION, *A comparative analysis of non-discrimination law in Europe 2018*, European Commission, Brussels, 2018. An exception is Denmark, where the identification of the genuine occupational requirement is subjected to an administrative procedure of evaluation and authorization by the relevant Ministry (with respect to the economic activity of the employer), having heard the Ministry of Labour (as to verify the job given) (LBK nr. 1001 af 24/08/2017 Gældende, Kapitel 3, § 6.2).

⁴⁶ See A. LASSANDARI, *Interesse dell'impresa e tutela antidiscriminatoria: considerazioni sulla disciplina comunitaria e nazionale*, in *Diritto Lavori Mercati*, 2008, I, particularly 99 ff.

demands its employee not to show his/her sexual orientation or not to contest its religiously oriented positions; in other words, when it is demanded the ethos to be adopted, in one way or another, by the employee⁴⁷.

These are not minor possibilities, to which Directive 2000/78/EC provides a balancing solution, not devoid of ambiguity and implementation issues. The answer is in the Article 4.2, worded moreover as an option («Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive ... »), but with the effect of crystallising, at the date of its entry into force, what has already been practiced at national level. It can be said, with a certain approximation, that the aim was to provide a specific exception for the different treatment set in place by those organisations which, to use a term well known to Italian labour lawyers, could be defined as “ideologically orientated organisations” (*organizzazioni di tendenza*) (and especially those based on religion).

Nevertheless, three aspects seem somehow impaired.

Firstly, the scope of the provision is identified in «churches and other public or private organisations the ethos of which is based on religion or belief»; it is evident that the rule is built on the acknowledgement of the distinctiveness of religious groups, and therefore as a show of the protection of collective religious freedom. However, the expression, willing to relate also to ideologically oriented entrepreneurial activities, ends up being much wider not only than the Declaration 11 on the status of churches and non-confessional organisations, attached to the Amsterdam Treaty⁴⁸ (as referenced in the 24th Recital of the

⁴⁷ As perceptively predicted by D. IZZI, *Eguaglianza e differenze nel rapporto di lavoro. Il diritto antidiscriminatorio tra genere e fattori di rischio emergenti*, Jovene, Napoli, 2005, 397.

⁴⁸ Later included in art. 17 TFUE. As observed by M. AIMO, *Le discriminazioni basate sulla religione e sulle convinzioni*, in M. BARBERA (ed), *Il nuovo diritto antidiscriminatorio*, 67, the original draft of the Directive contained a narrowed definition, referring only to organisations in the fields of education and expression of opinions.

Directive), but also than the prospective regulatory schemes and practices already identified at national level⁴⁹, for which the “time barrier” of the Directive’s entry into force represents a necessary, but insufficient, application of the more general principle of non-regression, explicitly stated in Article 8.2⁵⁰.

Hence, the interpretation of the scope of Article 4.2 determines an expansion (or, accordingly, a compression) of the “exemption” area of the authorized differentiated treatments.

Even though in some Member States, such as Sweden⁵¹, Portugal⁵² and France⁵³, the provision has not been implemented, thus keeping the organisations with a religious ethos within the general (and narrower) boundaries of the Article 4.1 of the Directive. In others, such as Germany, and in a certain sense

⁴⁹ In Italy, for example, Article 4 of Law no. 108/1990 recognised to these organisations a lesser protection in the case of dismissal, a privilege overcome by the recent Jobs Act reforms of 2015; however, the legal definition explicitly referred to non entrepreneurial and non-profit organisations of a political, unionist, educational, religious nature, as vastly supported by the jurisprudence (Cass. 27 maggio 2011, n. 11777, in *Diritto delle relazioni industriali*, 2012, 1, 178; Cass. 3 luglio 2017, n. 16349, in *Guida al diritto*, 2017, 33, 69). See A. VISCOMI, *Osservazioni critiche su lavoro e “tendenza” nelle fonti internazionali e comunitarie*, in *Lavoro e diritto*, 2003, 4, 586; ID., *Organizzazioni eticamente fondate e rapporti di lavoro*, in *Diritti Lavori Mercati*, 2009, 381 ff.; G. DE SIMONE, *I requisiti occupazionali*, 146; and after the Jobs Act reforms, A. BELLAVISTA, *Piccoli datori di lavoro e organizzazioni di tendenza*, in F. CARINCI, C. CESTER (eds), *Il licenziamento all’indomani del d.lgs. n. 23/2015*, ADAPT Labour Studies e-Book series, n. 46, 2015, 188 ff.

⁵⁰ See N. FIORITA, *Le direttive comunitarie in tema di lotta alle discriminazioni, la loro tempestiva attuazione e l’eterogenesi dei fini*, in *Quaderni di diritto e politica ecclesiastica*, 2004, 2, 368 and M. CORTI, *Diritto dell’Unione europea e status delle confessioni religiose. Profili lavoristici*, in *Rivista telematica www.statoe.chiese.it*, february 2011, 12.

⁵¹ Sw. Diskrimineringslagen 2008:567, 2.2; see L. FRIEDNER, *Law and religion in the workplace – Sweden*, in M. RODRIGUES BLANCO (eds), *Law and religion in the workplace*, 387 ff.

⁵² Article 25(1) e (2) Código de Trabalho; see M. MALHEIROS, A. ROSADO, *Report on measures to combat discrimination, Country report 2013, Portugal*, available at <https://www.ref-world.org/pdfile/5473520f4.pdf>.

⁵³ In France, an attempt to invoke a direct application of the exception for religious organisations had been made by the Court of Appeal of Paris in the case of *Baby Loup*, in the sense - contrary to what actually pursued at European level - of considering legitimate that a private nursery, as an organisation characterized by a secular ethos, could require a worker to remove her veil; however, the *Cour de cassation*, with the ruling of 25 June 2014, while acknowledging the employer’s right to impose a neutrality obligation on its staff, excluded any applicability of the Article 4.2, since the principle of secularity could not be traced back to either religious or philosophical convictions (no. 13-28.369, FR:CCASS:2014:AP00612). See S. HENNETTE VAUCHEZ, V. VALENTIN, *L’affaire Baby Loup ou la nouvelle laïcité*, LGDJ, Paris, 2014.

also Italy, the implementation of the provision has given rise to deviations favourable to those organisations⁵⁴.

In Germany, Article 9 of the *Allgemeines Gleichbehandlungsgesetz* (general law on equal treatment) of 14 August 2006 comfortably allows for difference in treatment based on the principle of self-determination of religious associations (recognized and protected by Article 140 of *GrundGesetz*); judges, *prima facie* at least⁵⁵, can only assess the plausibility of the differentiation on the basis of the «rules of ecclesial conscience», since the norm refers to a single criterion, that of justification, rather than the three («genuine, legitimate and justified») provided at European level for the occupational requirement⁵⁶.

In Italy, the simple pretermision in the Article 3, paragraph 5, of Legislative Decree no. 216/2003, after the words «other public or private organisations», of the circumstance that they have to be characterized by an «ethos [...] based on religion or belief», risks opening up an easy way out which the EU legislator did not have in mind⁵⁷.

A second point to be considered is in the specific provision of Article 4.2 by which that a difference of treatment from an organisation whose is ethos is based on ethos or belief is legitimate only when it comes to the specific factors

⁵⁴ Also in Ireland, until 2015, section 37 (1) of the Employment Equality Act 1998 provided for an exception to the principle of non-discrimination for the purpose of protecting the religious ethos of an institution more than what allowed by the EU Directive; only with the 2015 reform, the Act has found consistency with the European indication that the professional requirement that justifies the difference in treatment must be genuine, legitimate and justified, taking into account the ethos of the organisation. In the United Kingdom, on the other hand, the Employment Act 2010 has substantially reproduced the European discipline (Schedule 9, paragraph 3), but also includes a specific provision (Schedule 9, paragraph 2) that allows differentiating according to gender, marital status and sexual orientation, in a job «for the purposes of an organized religion», a much more limited concept than “religious organisation”, referring to specific activities (such as the ministry of worship or those which promote and represent religious confession); see R. SANDBERG, *Law and Religion*, Cambridge University Press, Cambridge, 2011, 119 f.

⁵⁵ Until the ruling of EUCJ, 17 April 2018, *Egenberger c. Evangelisches Werk für Diakonie und Entwicklung eV*, C-414/16, which will be soon considered.

⁵⁶ Analysing the Germany legislation, N. COLAIANNI, *Divieto di discriminazione religiosa sul lavoro e organizzazioni religiose*, in *Rivista telematica* www.statoechiese.it, 2018, no. 18; R. SANTAGATA DE CASTRO, *Discriminazioni nel luogo di lavoro e “fattore religioso”: l’esperienza tedesca*, in *Rivista italiana di diritto del lavoro*, 2011, I, 353 ff. and ID., *Le discriminazioni sul lavoro nel diritto vivente*, Editoriale Scientifica, Napoli, 2019, especially 197 ff.

⁵⁷ M. AIMO, *Le discriminazioni basate sulla religione e sulle convinzioni*, 73 f.; L. SAPORITO, F. SORVILLO, L. DECIMO, *Lavoro, discriminazioni religiose e politiche d’integrazione*, 15.

of religion and beliefs, and moreover «where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos». Although not explicitly mentioned, and therefore irrelevant in the exception here in question, sexual orientation could nevertheless 'rise' through belief: if the phrasing of the rule is accepted in its broader meaning of recognising one's ideological freedom of the person (the use of the term *weltanschauung* in the different linguistic versions of the directive should prove it⁵⁸), it could include also opinions related to the *social* dimension of sexual orientation.

The recent Polish case of the radio journalist dismissed from broadcasting a concert organized by the local diocese, as a consequence of his support to internet campaigning for the recognition of civil partnerships, highlights the contiguity of the two factors; the journalist understandably claimed the wrongful conduct to be both direct discrimination (by association) on the ground of sexual orientation and indirect discrimination on the ground of personal convictions and beliefs, from a viewpoint which was rejected in the first⁵⁹ and accepted in the second⁶⁰, and final, ruling, but only in relation to the indirect discrimination⁶¹. The judges had to decide whether to subsume the case in Article 5, no. 7 of the Law implementing the 2000/78 Directive (*Ustawa z dnia 3 grudnia 2010r. O wdrożeniu niektórych przepisów Unii Europejskiej w zakresie różnego traktowania*), which slavishly copied Article 4.2, and concluded that whatever the opinions of the journalist (and therefore without resolving that difficult distinction between the manifestation of sexual orientation and belief), they could not constitute in any case genuine, legitimate and justified occupational requirement when curating a lay concert.

The last remark, however, discloses also a third weakness of a provision that seems almost to contradict itself when, after excluding any discrimination in ethos-based organisation for reasons other than religion and belief, enables

⁵⁸ See P. CHIECO, *Le nuove direttive comunitarie sul divieto di discriminazione*, 80; L. DI PAOLA, *Discriminazioni sul posto di lavoro: si amplia l'area dei divieti*, in *Le nuove leggi civili commentate*, 2005, 861.

⁵⁹ Sąd Rejonowy in X; 16 Dicembre 2016, n. I C 1326/15.

⁶⁰ Sąd Okręgowy in S; 22 Marzo 2017; n. 75/17.

⁶¹ A brief overview of the case is available at <https://www.equalitylaw.eu/downloads/4290-poland-court-finds-discrimination-on-the-ground-of-sexual-orientation-by-association-pdf-152-kb>.

those employers «to require individuals working for them to act in good faith and with loyalty to the organisation's ethos». This is a clarification that, when implemented in some Member States' legislation (such as Bulgaria⁶² and Croatia⁶³) and interpreted independently from the overall structure of the Article, risks «turning a distinction based on sexual orientation into one based on personal convictions»⁶⁴. It cannot therefore be surprising that in legal systems providing a favourable discipline for religious organisations, some judicial outcomes appear to be contrasting with the wording and the purpose of the Directive; a clear case is given by the German ruling which considered lawful not to hire a candidate who was part of a registered civil union as the head of a Catholic kindergarten⁶⁵.

The recent decision of the European Court of Justice on the *Egenberger*⁶⁶ case - concerning a job offer, explicitly intended only for members of Evangelical or otherwise Christian churches, for the preparation of a report on the UN Convention on the elimination of all forms of racial discrimination - contributes greatly to overcome some of these ambiguities. The German Church, as a future employer, relied on the ample margin of discretion granted by the aforementioned Article 9 of the *Allgemeines Gleichbehandlungsgesetz*, which instead the Luxembourg judges have proceeded to channel through a restrictive interpretation of Article 4.2 of the Directive. First of all, by focusing on the “objective” meaning of the genuine occupational requirement, the Court specified the need for a “direct link” between the g.o.r. and the job in question. More importantly, the requirement has been ruled as not simply «genuine, legitimate and justified» (thus putting off any national provision not including all criteria)⁶⁷ but, in any

⁶² Cfr. Art. 7(1), n. 3, ЗАКОН за защита от дискриминация (Закл. изм. - ДВ, бр. 68 от 2006 г.)

⁶³ Cfr. Art. 9(2), n. 5, Anti-discrimination Act (OG 85/2008), come modificato nel 2012.

⁶⁴ Quoting L. CALAFÀ, *Le discriminazioni basate sull'orientamento sessuale*, in M. BARBERA (a cura di), *Il nuovo diritto antidiscriminatorio*, 219.

⁶⁵ Labour Court of Stuttgart, 28 April 2010, 14 Ca 1585/09, in *Neue juristische Online-Zeitschrift*, 2011, 1309.

⁶⁶ As mentioned already in note 55 and analysed by M. RANIERI, *Il primo incontro della Corte di giustizia con le organizzazioni orientate: tra slanci e qualche timidezza*, in *Argomenti di diritto del lavoro*, 2018, II, 1127 ff.; S. BALDETTI, *Requisiti occupazionali delle organizzazioni di tendenza e tutela del lavoratore. L'intervento della Corte di Giustizia nel caso Egenberger v. Evangelisches Werk*, in *Lavoro Diritti Europa*, 2018, no. 2; N. COLAIANNI, *Divieto di discriminazione religiosa sul lavoro e organizzazioni religiose*.

⁶⁷ «65. With respect to those criteria, it should be stated, first, as regards the ‘genuine’ nature

case, «proportionate», an adjective that although present only in the first and not in the second paragraph of Article 4.2, is offered as binding due to being a general principle of European law⁶⁸. Therefore, the reference to «act[ing] in good faith and with loyalty» that ethos-based organisations can expect from their employees, and, more generally, the whole Article 4.2 can be reclaimed as having an effective cohesion⁶⁹.

Some of these conclusions, however, are already in the Member States jurisprudence. Here it will suffice to mention the case regarding an art teacher of school run by a religious order which had been denied the renewal of her teaching contract as a consequence of not having disclosed her sexual orientation (or rather, denied rumours about her alleged homosexuality). Any claim that such conduct could be lawful in relation to a genuine occupational requirement (Article 3, paragraph 3, of Legislative Decree no. 216/2003) or the religious nature of the school (Article 3, paragraph 5, of Legislative Decree no. 216/2003) was rejected by the Tribunal⁷⁰ and the Court of Appeal⁷¹ ruling. It is interesting how

of the requirement, that the use of that adjective means that, in the mind of the EU legislature, professing the religion or belief on which the ethos of the church or organisation is founded must appear necessary because of the importance of the occupational activity in question for the manifestation of that ethos or the exercise by the church or organisation of its right of autonomy. 66. Secondly, as regards the 'legitimate' nature of the requirement, the use of that term shows that the EU legislature wished to ensure that the requirement of professing the religion or belief on which the ethos of the church or organisation is founded is not used to pursue an aim that has no connection with that ethos or with the exercise by the church or organisation of its right of autonomy. 67. Thirdly, as regards the 'justified' nature of the requirement, that term implies not only that compliance with the criteria in Article 4(2) of Directive 2000/78 can be reviewed by a national court, but also that the church or organisation imposing the requirement is obliged to show, in the light of the factual circumstances of the case, that the supposed risk of causing harm to its ethos or to its right of autonomy is probable and substantial, so that imposing such a requirement is indeed necessary».

⁶⁸ See § 68 of the ruling which references previous EUCJ decisions, such as 6 March 2014, *Siragusa*, C-206/13 (in particular, § 34) and 9 July 2015, *K e A*, C-153/14 (in particular, § 51).

⁶⁹ The reasoning has already been brought forward by C. CHACARTÉGUI JÀVEGA, *La direttiva 2000/78 e il principio di non discriminazione sulla base dell'orientamento sessuale nel diritto comunitario*, in S. FABENI, M.G. TONIOLO (eds), *La discriminazione fondata sull'orientamento sessuale*, 68 f., as the first part of Article 4 should inevitably affect the interpretation of its second part.

⁷⁰ Tribunale Rovereto (ord.) 21 giugno 2016, annotated by L. CALAFÀ, *Organizzazioni di tendenza e orientamento sessuale: il valore (non solo simbolico) del caso di Trento*, in *Genius*, 2017, 1, 43 ff.

⁷¹ Corte d'appello Trento 7 marzo 2017, n.14, annotated by R. SANTONI ROGIU, *Il caso della*

in the two decisions the principle of proportionality already emerged, reinforcing the criterion of the necessity of differentiation; as perceptively pointed out, «it is hard how the teacher's sexual orientation, as well as her private life, may be of any relevance when teaching art even in a school run by a religious order»; equally, the favour towards religious organisations persuaded the judges of a strict interpretation of the discrimination factors taken into consideration, so not to justify «discrimination based on other reasons other than religion or belief (and, therefore, not including sexual orientation). Although this clarification is not reproduced in Decree 216 of 2003, the same must be implied by paragraph 5 of the Article 3, both by virtue of the obligation of compliant interpretation, and because it is directly inherent to the achievement of the goal pursued by the Directive»⁷².

5. Concluding remarks: hierarchy or coexistence? Notes on a possible reconciliation.

In conclusion, we can return to the question posed in the introductory remarks, whether it is possible to identify, in the existing regulatory framework, both at European and national level, a hierarchy between the two factors of discrimination, i.e. religion (and belief) and sexual orientation, on the basis of an increasing conflict between them, also highlighted by judicial case studies.

Our analysis do not seem to indicate the prevalence of one over the other: both considered by the Directive 2000/78/EC, inhabiting the “smaller” area of protection, limited only to employment and occupation, religion and sexual orientation are equally considered with regards of the definition and the scope of direct discrimination and its exceptions, indirect discrimination and its justifications, as well as harassment. At most, a partial advantage would seem to be granted to religion when it “enters” the employer's organisation; and yet, in this case, sexual orientation is “preserved” by explicitly listing the factors destined to surrender in front of organisation's ethos (religion and belief) and clearly excluding the possibility of a «discrimination based on another ground» (Article 4.2 of the Directive).

If this is the abstract picture, the case law seems to tell a different story,

docente di una scuola religiosa: la discriminazione per orientamento sessuale nelle organizzazioni di tendenza, in *Rivista italiana di diritto del lavoro*, 2017, 4, II, 816 ff. and E. TARQUINI, *Discriminazione diretta per orientamento sessuale e organizzazioni di tendenza*, in *questionegiustizia.it*, 20 July 2017.

⁷² The quotes are from the Rovereto ruling.

which tends to see the bearer of a religious belief losing the battle with the (increasing) effectiveness of the prohibition of discrimination based on sexual orientation, moving towards a perspective of real *mainstreaming*⁷³.

Some speculation can be made. First of all, a difference could be immanent in the same nature of the two factors, if we were to believe that religion and personal beliefs, unlike sexual orientation (but also gender, ethnicity, disability, age) deal with a “choice” and not a status of the individual. It is certainly not in dispute that sexual orientation is a natural situation which therefore cannot tolerate inequalities, and which demands respect as an expression of identity and personal dignity⁷⁴ but it is doubtful that the protection of “religious identity” is in some way different: the very formation of religious affiliation does not always take place for a deliberate choice on the part of the person concerned⁷⁵. Similarly, doubts may arise if the comparison between the two factors is taken on the level of the historical and indisputable vulnerability determined by the prejudice linked to sexual orientation: even the protection of religious belief developed precisely to combat prejudices related to minority religious groups. It might be easier to argue, instead, that in the courtrooms, in a more or less conscious way, the judges may work on the intuition that the disfavour regarding sexual orientation (and the LGBT community at large) is the result of traditions, also of inspired by religion, which have long held beliefs, prejudices and stereotypes.

And this is perhaps the point. Religion conflicts with other protected characteristics such as sexual orientation, not in an absolute sense, but in the form of religiously driven conduct⁷⁶. In this dimension, if the freedom of religion and the individual right not to be discriminated against for it remain full, it is the

⁷³ E.g. the European Parliament resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, analysed in C. DANISI, *Tutela dei diritti umani, non discriminazione e orientamento sessuale*, Editoriale scientifica, Napoli, 2015, 229 ss.

⁷⁴ As remarked by M. BARBERA, *Eguaglianza e differenza nella nuova stagione del diritto antidiscriminatorio comunitario*, in *Giornale di diritto del lavoro e delle relazioni industriali*, 2003, 414.

⁷⁵ See, M. PEARSON, *Religious discrimination and the ‘hierarchy of rights’ Non-existent, appropriate or problematic?*, in *International Journal of Discrimination and the Law*, 2016, 16(1), 37 ff.; C. MCCRUDDEN, *Religion, human rights, equality and the public sphere*, in *Ecclesiastical Law Journal*, 2011, 13(1), 26 ff.; G. PINO, *Sulla rilevanza giuridica e costituzionale dell’identità religiose*, already mentioned.

⁷⁶ We are also aware that this is an inevitable over-simplification, as we are reasoning in terms of discrimination risks and not people: in other words, not all religious people are heterosexual, and viceversa.

conduct, the behaviour which is channelled within the rules set by the law, having to “undergo” its assessment in legal terms and boundaries. As it has been rightly pointed out, «the conflict, ultimately, must not frighten us if it is inserted within civil society, a democratic order [...]. On the contrary, it terrifies if it is placed in the dimension of so many individualities that confront each other in the limitlessness of their reasons and means to follow them: in this case, a Hobbesian fear prevails»⁷⁷. Thusly framed, the issue moves onto a field, certainly complex but not impossible, that, starting from the constitutional - both European and national - framework, tends to substantial justice, which cannot tolerate acts or behaviour of prejudice or detriment of other workers, due to their sexual orientation, in the intimate and relational dimension of their freedom of self-determination.

An author has recently suggested a provocative, but interesting, metaphor according to which «there is indeed a substantial phenomenological difference between the desire to express one’s own religious identity and the will to observe the precepts of one’s faith by putting into practice certain behaviours or - in other words - between prohibiting someone from expressing his/her religious identity and deliberately forcing him/her to breach rules deemed as sacred. [...] It is one thing to ask a vegetarian or a vegan not to exhibit a pin on the collar of his jacket during working hours, which proves support for animal rights; it is another thing to force that person to eat meat»⁷⁸; if we wanted to expand the metaphor, albeit in a coarse way, we should also remark that it would be even more different if the vegetarian or vegan were allowed to impose his/her diet on the rest of the group.

The reflection cannot of course end here. For the same reasons, in fact, the worker’s religiously oriented behaviour will again have to be considered in the perspective of a possible indirect discrimination, and therefore in the phase that evaluates the justification, weighing at the same time the interest of the other workers and that of the employer. In the recent jurisprudence of the European Court of Justice regarding the proportionality of the occupational requirement and the sanction of dismissal, a timid encouragement emerged with a view for the company to adopt a reasonable solution that, at no additional cost, guarantees a balancing between the conflicting interests.

Rather than suggesting the concept of reasonable accomodation to expand beyond its pertinent scope in the Framework Directive, and therefore admitting

⁷⁷ The quote is from F. GRANDI, *Doveri costituzionali e obiezione di coscienza*, 208.

⁷⁸ J. H. H. WEILER, *Je suis Achbita*, in *Rivista trimestrale di diritto pubblico*, already mentioned.

its “creative” interpretation⁷⁹, we need to further reason the principle of proportionality and legitimacy at the core of the exceptions and justifications for the different treatments and the disparate impact of the neutral treatments. This could lead us to a balance (between religious freedom and business interest) that does not compromise the dignity (of the LGBT workers and not only).

The construction of a pluralist and inclusive society goes from here too.

⁷⁹ See S. SCARPONI, *Rapporto di lavoro e simboli religiosi: neutralità e pregiudizio nelle sentenze della Corte di Giustizia sul velo islamico*, in *europeanrights.eu*, 2 may 2017.