

Working time and religious beliefs: a matter of reasonableness.

Orario di lavoro e convinzioni religiose: una questione di ragionevolezza.

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ABSTRACT

L'articolo affronta il tema dei possibili collegamenti problematici tra le norme sull'orario di lavoro e le convinzioni religiose dei lavoratori. Dopo aver esaminato le sfumature del concetto di accomodamento ragionevole che è stato sviluppato nei sistemi giuridici nordamericani per gestire questi problemi, l'autore analizza la diversa strategia adottata nell'ordinamento italiano, concentrandosi sulle leggi di approvazione delle intese di cui all'articolo 8 della Costituzione. Infine, l'articolo prende in esame alcune delle principali questioni sollevate da una recente pronuncia pregiudiziale con cui la Corte di giustizia dell'Unione europea ha affrontato la tematica, nel quadro del diritto antidiscriminatorio.

Parole chiave: orario di lavoro – convinzioni religiose – ragionevoli accomodamenti – discriminazioni – integrazione.

The paper deals with the problematic links between working time regulations and workers' religious beliefs. After examining the nuances of the concept of reasonable accommodation, which has been developed in North American legal systems to handle these problems, the author analyzes the different strategy that has been adopted in Italy, focusing on the statutory law implementing the principles stated by Article 8 of Italian Constitution. Lastly, the article considers some of the main questions raised by a recent preliminary ruling in which the Court of Justice of the European Union expressed itself on this matter, within the framework of EU anti-discrimination law.

Keywords: working time – religious beliefs – reasonable accommodations – discriminations – integration.

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1. Introduction.

Over the last few decades, the coexistence of different cultures within the modern Western societies has raised complex issues, which often impose specific questions on the deep foundations of some traditional legal categories. From this point of view, the wide reflection on the universal basis of human rights and their relations with the principles pertaining to national constitutional traditions is probably one of the best-known examples¹. These topics, of course, are strictly connected with the core of the large debate concerning multiculturalism, which has today a strong influence on the different strategies of integration implemented all around the world².

As everyone may see, the challenges faced by such policies are not completely extraneous to labour law. Since the workplace is nowadays ever more a context where individuals with disparate cultural backgrounds are forced to meet, labour courts have been frequently compelled to solve new conflicts of interests, whose number is supposed to increase under the pressure of migrations. Not rarely, in Europe, some of the most relevant cases originated from the contrast between workers' religious beliefs and the employer's business needs and led to judicial pronouncements at the supranational level.

For instance, in 2017 the Court of Justice of the European Union (CJEU) dealt with a French dispute in which a Muslim employee was dismissed because she refused to take off her Islamic headscarf, despite the explicit request of the employer who would have liked to satisfy the preferences of his clients. On this occasion, the Luxembourg judges stated that the employer's willingness to take account of customer's wishes of no longer having the services provided by a worker wearing an Islamic headscarf «cannot be considered a genuine and determining occupational requirement» within the meaning of Directive 2000/78/EC³. Thus, that circumstance cannot be invoked in order to exclude the existence of a discrimination on the ground of religion.

However, as explained in another famous preliminary ruling of the same year, a justification may come from an internal rule of the company prohibiting the visible wearing of *any* political, philosophical or religious sign in the

¹ See, in the Italian literature, M. CARTABIA, *L'universalità dei diritti umani nell'età dei «nuovi diritti»*, in *Quad. cost.*, 2009, 537 ff.

² On this topic, see the debate between J. HABERMAS and C. TAYLOR, now published in A. GUTMANN (ed.), *Multiculturalism. Examining the politics of recognition*, Princeton University Press, Princeton, 1994.

³ CJEU, 14 March 2017, case C-188/15, *Asma Bougnaoui, Association de défense des droits de l'homme (ADDH) v. Micropole SA*.

workplace⁴. Referring to a case in which a Muslim woman did not want to comply with such a regulation, the CJUE clarified that the aforementioned prohibition does not constitute direct discrimination based on religion or belief, when it has a general and undifferentiated application. Moreover, it has been added that the pursuit by the employer of a neutrality policy can be regarded as a legitimate aim, notably where it involves only those workers who are required to have contacts with customers⁵.

Even if it is not possible to examine here the adverse criticisms that have been addressed to the latter decision, it is worth noting that the intense discussion generated by these episodes shows how difficult it may be to fulfil the expectation of keeping religion out of public life⁶. Instead of being a private matter, religious beliefs appear to represent an important part of a person's identity and, as such, tend to be manifested. One of the usual fields on which employers have to manage this reality concerns working time organization⁷, which is the specific subject of the following analyses.

2. Working time and reasonable accommodations for religion: North American experiences.

It is well known that each religion often has an impact on the rhythm of its believers' life. Indeed, not unusually a lot of doctrines establish religious festivals, days of rest and moments that should be dedicated to prayer. Not by chance, some international instruments include in the freedom of religion the

⁴ CJUE, 14 March 2017, case C-157/15, *Samira Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions NV*.

⁵ And, therefore, it could justify indirect discriminations that may arise from a neutrality policy.

⁶ In the Italian literature, see, for example, the criticism of: V. NUZZO, *Verso una società multiculturale. Gli inediti conflitti tra la libertà di vestirsi secondo la propria fede e l'interesse datoriale al profitto*, in *C.S.D.L.E. "Massimo D'Antona"*, 2017, 324, 13 ff.; V. PINTO, *Migrazioni economiche e rapporti di lavoro. Alcuni spunti di riflessione*, in S. D'ACUNTO - A. DE SIANO - V. NUZZO (a cura di), *In cammino tra aspettative e diritti. Fenomenologia dei flussi migratori e condizione giuridica dello straniero*, ESI, Napoli, 2017, 243 ff.

⁷ In the Italian literature, see, for instance: V. FERRANTE, *I criteri di bilanciamento degli interessi nella giurisprudenza comparata*, in *Quad. dir. lav. rel. ind.*, 1994, 15, 159 ff.; A. OCCHINO, *Il tempo libero nel diritto del lavoro*, Giappichelli, Torino, 2010; M. CORTI, *Diritto dell'Unione europea e status delle confessioni religiose. Profili lavoristici*, in *Stato, Chiese e pluralismo confessionale*, 2011, 2, 6 ff.; S. COGLIEVINA, *Festività religiose e riposi settimanali nelle società multiculturali*, in *Riv. it. dir. lav.*, 2008, 3, 375 ff.

possibility to celebrate periods of rest and holidays for religious reasons⁸.

On the other hand, the vast majority of employment contracts obviously require workers to observe working time, which sometimes could be incompatible with their religious dictates. As it is easy to understand, the main problems arise within horizons characterized by the presence of creeds whose precepts are not immediately adaptable to the traditional civil calendar applied in the workplace. Difficulties then may increase when there is a plurality of diversities among the employees, which can be an obstacle to the definition of a single point of equilibrium.

The matter is not new for Countries in which ethnic and religious pluralism is a feature of the civil society from a long time and more than elsewhere. In such contexts, the conflicts at issue led some national legal systems to develop regulatory techniques focused on the concept of “reasonable accommodation”. This is true for the United States, where Title VII of the Civil Rights Act imposes upon employers a duty to reasonably accommodate their employees’ religious beliefs, observances and practices, unless it would entail an undue hardship on their businesses⁹.

The notion of reasonable accommodation was originally absent from the U.S. legislative framework, which at first did not go beyond the provision of more traditional principles of non-discrimination. It was subsequently incorporated into statute in 1972, when the Congress decided to endorse some interpretative practices of the Equal Employment Opportunity Commission, the federal agency responsible for enforcing rules against workplace discriminations. Since its first activities, this administrative body held that, regarding religion, the anti-discrimination law implied that employers had to accommodate to the reasonable religious needs of employees, to the extent that it could be done without serious inconvenience¹⁰.

Such an approach seems to call for quite an individualized method which could suggest the idea that, at least in theory, promoting equality may require also differentiated treatments. Hence, accommodations have been seen as a form of adaptation of the entrepreneurial organization in order to make it more

⁸ See, for example, Art. 6, let. h) of the United Nations Declaration of 25 November 1981 on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

⁹ Cf. Civil Rights Act of 1964, 42 U.S.C. Section 2000e (j), as amended by the Equal Employment Opportunity Act of 1972, Section 2 (7). In general terms, see A. L. GOLDMAN, R. L. CORRADA, *Labor Law in the USA*, Wolters Kluwer, Alphen aan den Rijn, 2011, 202 ff.

¹⁰ See S. L. WILLBORN, *Reasonable Accommodation in the United States*, in *Bull. Comp. Lab. Rel.*, 93, 2016, 9 ff., who illustrates the evolution of the U.S. legislative framework referred above.

inclusive for workers¹¹. Similarly, it has been pointed out that they reflect the theorized new integrative function of labour law, aimed at fighting marginalization and social exclusion¹². In this perspective, for example, the duty to accommodate may mean for the employer to modify work schedule or shifts plan for allowing employees to fulfil their religious obligations.

However, the U.S. Supreme Court has given a very restrictive interpretation of the examined rule. In this respect, the leading case is *Trans World Airlines, Inc. v. Hardison*, which concerned a Saturday Sabbatarian who asked for a change of the normal shift system based on seniority, so that he would not have to work on Saturdays¹³. As it came out during the proceeding, this solution could have compelled the employer to replace the affected worker with other available employees, even through the payment of additional remunerations. Consequently, the approval of worker's demands could have involved costs, either in the form of lost efficiency or higher wages¹⁴. Considering this, the Court upheld the employer's position, by stating that requiring him to bear «more than a *de minimis* cost» to accommodate employee's religious needs is an undue hardship¹⁵. Moreover, it has been argued that giving to a worker a day-off for religious reasons might imply the denial of another employee's job preferences and that «Title VII does not contemplate such unequal treatment»¹⁶.

Starting from the principles stated in *Hardison*, following rulings adopted a strict approach, which frequently conduced to a rejection of workers' claims¹⁷.

¹¹ F. HENDRICKX, *Introduction*, in *Bull. Comp. Lab. Rel.*, 93, 2016, 1 ff.; G. DAVIDOV, G. MUNDLAK, *Accommodating All? (or: 'Ask Not What You Can Do for the Labour Market; Ask What the Labour Market Can Do for You')*, *Ibid.*, 191 ff.

¹² As it is well known, the «integrative function» of labour law was firstly theorized by B. HEPPLE, *The Future of Labour Law*, in *Ind. Law Journal*, 94, 1995, 320 ff. On the topic, see for instance S. SCIARRA, *The 'Making' of EU Labour Law and the 'Future' of Labour Lawyers*, in C. BARNARD, S. DEAKIN, G. S. MORRIS (eds.), *The Future of Labour Law, Liber Amicorum Sir Bob Hepple QC*, Hart Publishing, Oxford, Portland Oregon, 2004, 201 ff. On the specific ground of religious discriminations, see K. ALIDADI, *The 'Integrative Function' of Labour Law in Ebb? Reasonable Accommodation for Religion or Belief and Company 'Neutrality Policies' in Belgium*, in *Bull. Comp. Lab. Rel.*, 93, 2016, 119 ff.

¹³ S. L. WILLBORN, *supra* note 9, 17. The U.S. Supreme Court Opinion on this case, published in the *U.S. Reports*, 432 U.S. 63 (1977), is available on the website of the Library of Congress: www.loc.gov.

¹⁴ Cf. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), 84.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, 81.

¹⁷ See A. L. GOLDMAN, R. L. CORRADA, *supra* note 8; S. L. WILLBORN, *supra* note 9, underlining that one of the reasons for the «stingy interpretation» of the accommodation duty for

By the way, also among scholars in the U.S., there is a debate on the relation between reasonable accommodations and the non-discrimination regulations and, from some viewpoints, they are seen as distinct models¹⁸.

Things are different in Canada, where «the main obligations of employers to reasonably accommodate employees arise directly out of anti-discrimination law»¹⁹. This has been made clear since the famous judgment *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, with which the Canadian Supreme Court decided the case of a Seventh Day Adventist who did not want to work on Saturdays because her religion prohibited that²⁰. Notwithstanding the statutory law at stake did not establish an explicit duty to accommodate, the judges stated that the employee's right of not being discriminated «requires reasonable steps towards an accommodation by the employer»²¹. The protection against unfair practices thus has been interpreted as involving some positive conducts to safeguard workers' recognized interests²².

Following this direction, the Court then specified that, more generally, once a complainant shows a *prima facie* discriminatory behaviour, the employer can justify him/herself by demonstrating, in addition to others circumstances, that his/her policy or decision is reasonably necessary to the accomplishment of a legitimate work-related purpose²³. To this end, «it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics

religion may be the Establishment Clause of the U.S. Constitution, which «prohibits the government from favoring one particular religion over others or, more generally, from favoring religion over non-religion».

¹⁸ S. L. WILLBORN, *supra* note 9, 18. See *amplius* C. JOLLS, *Antidiscrimination and accommodation*, in *Har. L. Rev.*, 115, 2001-2002, 643 ff. and K. BANKS, R. NUNIN, A. TOPO, *The lasting influence of legal origins: Workplace discrimination, social inclusion and the law in Canada, the United States and the European Union*, in M. W. FINKIN, G. MUNDLAK (eds.), *Comparative Labor Law*, Edward Elgar Publishing, Cheltenham, UK, Northampton, MA, USA, 2015, 220 ff.

¹⁹ K. BANKS, *Reasonable Accommodation as Equal Opportunity in Canadian Employment Law*, in *Bull. Comp. Lab. Rel.*, 93, 2016, 27.

²⁰ *Ont. Human Rights Comm. v. Simpsons-Sears*, in *Supreme Court Rep.*, 1985, 2, 536 ff., available on the website of the Supreme Court of Canada: www.scc-csc.lexum.com.

²¹ *Ibid.*, 554-555.

²² K. BANKS, *supra* note 18, 31.

²³ *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, in *Supreme Court Rep.*, 1999, 3, 3 ff. On this decision see *amplius* K. BANKS, R. NUNIN, A. TOPO, *supra* note 17.

of the claimant without imposing undue hardship upon the employer»²⁴.

In this way, it seems that Canadian courts have expected employers to accomplish adaptations that may entail even more than a *de minimis* cost²⁵. Nevertheless, as mentioned above, accommodations shall not go beyond some realistic limits, which are defined by the notion of undue hardship²⁶. Drawing this threshold may imply a very context-specific assessment, which includes the consideration of costs to the employer, health and safety risks for other persons, legitimate operational requirements and interferences with collective agreements or rights of other employees²⁷. In any case, it seems uncontested that the duty to accommodate does not impose pay without work²⁸.

3. *The Italian regulatory framework.*

Differently from North American legal systems, the EU regulatory framework does not provide for a duty to reasonably accommodate workers' religious beliefs. As it is well known, in Europe, the main point of reference is Directive 2000/78/EC establishing general rules for equal treatment in employment and occupation. Regarding religion, this instrument is focused on more traditional prohibitions of discriminations, while reasonable accommodations are set forth only for guaranteeing the equal treatment of individuals with disabilities²⁹.

Correspondingly, even in Italy, a duty to accommodate exists only for furthering employment inclusion of disabled persons³⁰. It has been introduced in order to ensure the compliance of the national legal system with the EU directive, as indicated by an important ruling of the CJEU³¹.

²⁴ *British Columbia*, *supra* note 22, 32-33.

²⁵ See K. BANKS, *supra* note 18, 37-38.

²⁶ Cf. *Ont. Human Rights Comm.*, *supra* note 19, 555.

²⁷ K. BANKS, *supra* note 18, 35 ff.

²⁸ *Ibid.*, 38.

²⁹ Cf. Art. 5, Directive 2000/78/EC.

³⁰ Art. 3, co. 3-bis, D.lgs. no. 216/2003. See, for example: C. SPINELLI, *La sfida degli "accomodamenti ragionevoli" per i lavoratori disabili dopo il Jobs Act*, in *Dir. lav. merc.*, 2017, 1, 39 ff.; P. LOI, *Il principio di ragionevolezza e proporzionalità nel diritto del lavoro*, Giappichelli, Torino, 2016, 139 ff.; N. ROSSI, *Assistenza al familiare disabile e obbligo datoriale di adottare "ragionevoli accomodamenti"*, in *Arg. dir. lav.*, 2018, 6, 1654 ff.

³¹ CJEU, 4 July 2013, C-312/11, in *Riv. it. dir. lav.*, 2013, 2, 922, commented by M. CINELLI

Despite the absence of a general provision concerning religion, in the Italian context, there are statutory regulations that lay down employer's specific obligations, whose object sometimes appeared to be quite similar to a reasonable accommodation. It may be worth mentioning, in this respect, some of the rules stated by the acts approving the agreements concluded by the Government and certain non-Catholic Communities representatives, pursuant to Article 8 of the Italian Constitution³².

For example, Article 11 of *Legge* no. 516/1988 establishes that Adventists have the right to observe Sabbath rest, which goes «from sunset on Friday to sunset on Saturday», and to use such period as their weekly rest day. According to the same provision, this right shall be exercised «*within the framework of the flexibility of work organization*». Furthermore, whenever the employee does not work on Saturdays, working hours shall be recovered on Sundays or on other days, without any extraordinary compensation. Lastly, it is stated that no prejudices shall be caused to the crucial needs of the essential services.

Likewise, an analogous approach has been implemented also for workers practicing some other religions, though the peculiarities of each considered doctrine have led to recognize partially different rights. Thus, Article 4 of *Legge* no. 101/1989 allows Jewish not to work on Saturdays, by using a technique that is similar to the one just referred to. An equivalent regulation, then, is applied to a list of Jewish religious holidays³³ and to festivals of other religions, such as Buddhism³⁴ and Hinduism³⁵.

These rules seem to require the employer to take decisions on a case-by-case basis, by balancing all the interests at stake in each particular situation. In this sense, one may think that they grant to workers a right that should be exercised compatibly with the business organization. Nonetheless, as already highlighted, Italian labour courts have gone further and they interpreted the employer's obligations in a way that is not very far from a real duty to accommodate.

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³² Art. 8 of the Italian Constitution states that «[1] All religious Communities are equally free before the law. [2] Non-Catholic religious Communities have the right to organize themselves in accordance with their own regulations, provided that such regulations are not in conflict with the Italian legal system. [3] Their relations with the State are regulated by statute on the basis of agreements between the State and their respective representatives».

³³ See Article 5, *Legge* no. 101/1989.

³⁴ See Article 24, *Legge* no. 245/2012.

³⁵ See Article 25, *Legge* no. 246/2012.

Indeed, it has been held that the reference to the «flexibility of work» made by the aforementioned provisions alludes to the concrete possibility for the employer to *adapt* workers' performances and the employment of human resources to the changing needs of the service provided³⁶. As a result, when there are these conditions, the employer has to respect the employee's right³⁷. Conversely, exceptions are admitted if the business organization does not allow management to define shift plans so that workers can have time to observe their religious convictions³⁸. In light of this, it is necessary to assess whether the employer's activity can be organized in order to be suitable to the exercise of the employee's rights³⁹.

By applying such principles, Italian judges have considered discriminatory the Adventist employee's dismissal for «refusal to work on Saturdays»⁴⁰. Therefore, in the lack of objective reasons preventing work schedules re-organization, the employer's conduct has been qualified as a discrimination on the ground of religion⁴¹. From this point of view, it is interesting to note that, given the current dissemination of flexible working time regulations, the adoption of favourable solutions for the employee in practice could be seen as ever more reasonably achievable⁴².

Yet, it should not be overlooked that the method at issue is not immune from criticism and it has raised some objections. Specifically, it has been outlined that the days of rest provided for by the examined rules are not exactly comparable with the Sunday rest or with other Catholic holidays that are generally recognized⁴³. This is essentially because the latter are part of the Italian civil

³⁶ Pret. Bologna 9 May 1996, in *Riv. it. dir. lav.*, 1996, 4, 826 ff., commented by G. PERA.

³⁷ *Ibid.*, 830-831.

³⁸ Pret. Roma 6 November 1998, in *Dir. eccl.*, 2000, 2, 95 ff., commented by T. RIMOLDI and by C. VALSIGLIO.

³⁹ Cf. *Ibid.*, 99.

⁴⁰ Trib. Roma 26 March 2002, in *Quad. dir. pol. eccl.*, 2003, 3, 775; Pret. Roma 6 November 1998 *supra* note 37, 100-101.

⁴¹ *Ibid.*

⁴² Cf. E. VITALI, A. G. CHIZZONITI *Manuale breve. Diritto ecclesiastico*, Giuffrè, Milano, 2017, 266. On the current flexibility of Italian working time regulation, see: V. FERRANTE, *Il tempo di lavoro fra persona e produttività*, Giappichelli, Torino, 2008, 11 ff.; A. OCCHINO, *Orari flessibili e libertà*, in *Riv. it. dir. lav.*, 2012, 1, 169 ff.

⁴³ See P. BELOCCHI, *Pluralismo religioso, discriminazioni ideologiche e diritto del lavoro*, in *Arg. dir. lav.*, 203, 1, 205 ff.

calendar and they are now completely secular, whereas the former imply the explicit exercise of a religious choice⁴⁴. As a consequence, Catholic workers who would like not to work on their festive days cannot enjoy the protection coming from the freedom of religion and not rarely they may be obliged to work. This entails the paradoxical conclusion that, especially in some economic sectors, they may have more difficulties to observe their creed's dictates than their colleagues practicing some other religions, albeit Catholic festivals are undoubtedly part of the tradition of Italian people⁴⁵.

However, the model illustrated above has been repeatedly upheld by the legislator⁴⁶ and even by the collective bargaining, which sometimes introduced express references to the statutory duties just explained⁴⁷. Collective agreements then, on one hand, have established general commitments to avoid conflicts between business needs and employees' beliefs⁴⁸. On the other hand, notably at the local level, they have developed more specific arrangements, such as the chance of a special timing of working hours for facilitating the fulfilment of some workers' religious precepts⁴⁹. In this way, with their negotiating instruments, social partners have tried to implement solutions specifically fit for the concrete needs of certain productive contexts⁵⁰.

⁴⁴ A. OCCHINO, *supra* note 7, 146.

⁴⁵ P. BELLOCCHI, *supra* note 42, 206-207.

⁴⁶ See the aforementioned Art. 24, Legge no. 245/2012 and Art. 25, Legge no. 246/2012.

⁴⁷ See, for instance: Art. 37(7-8), Contratto Collettivo Nazionale di Lavoro per il personale non dirigente di Poste Italiane, 30 November 2017; Art. 36(4), Contratto Collettivo Nazionale di Lavoro, Gruppo ANAS, 16 November 2016.

⁴⁸ See, for example, Art. 28, Contratto Collettivo Nazionale di Lavoro per i dipendenti dei Laboratori di Analisi Cliniche e dei Centri Poliambulatoriali, 26 March 2019.

⁴⁹ See, for example, Art. 8, Contratto provinciale di lavoro per gli operai agricoli e florovivaisti della provincia di Trapani, 30 November 2017, which provides for the possibility to organize working time differently for accommodating Muslim workers during the Ramadhan period.

⁵⁰ See *amplius*: U. GARGIULO, *L'identità culturale nella contrattazione collettiva sulla regolazione del tempo*, in R. SANTUCCI, G. NATULLO, V. ESPOSITO, P. SARACINI (eds.), *"Diversità" culturali e di genere nel lavoro tra tutele e valorizzazioni*, Franco Angeli, Milano, 2009, 306 ff.; F. RICCIARDI CELSI, *Fattore religioso e lavoratori di religione islamica. Aspetti riguardanti la contrattazione collettiva e gli accordi sindacali*, in C. CARDIA, G. DALLA TORRE (eds.), *Comunità islamiche in Italia. Identità e forme giuridiche*, Giappichelli, Torino, 2015, 479 ff.

4. Recent perspectives of the CJEU.

More recently, the examined problems have been directly faced by the CJEU, with a preliminary ruling on an Austrian statutory provision establishing that Good Friday was a paid public holiday only for members of some specific Churches⁵¹. Precisely, after indicating a list of public holidays for all employees in Austria, Article 7 of *Arbeitsruhegesetz* (Act on Rest Periods and Public Holidays) stated that Good Friday is also a public holiday, but only for workers who are «members of the Evangelical Churches of the Augsburg and Helvetic Confessions, the Old Catholic Church and the United Methodist Church». Consequently, only those workers were entitled to earn, in addition to the remuneration for the work eventually done on that day, also the pay that is always owed in case of public holidays.

Despite this regulation, an Austrian employee who were not member of any of the aforementioned Churches sought the public holiday pay for the work he performed on Good Friday and claimed that he had been discriminated as a result of the denial of such payment. These claims have been substantially upheld by the CJEU, according to which «national legislation under which, first, Good Friday is a public holiday only for employees who are members of certain Christian churches 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».

In detail, it has been stated that the affected rule gave rise to a differentiated treatment that was directly based on the employees' religion, contrasting with the obligations laid down by Articles 1 and 2(2) of Directive 2000/78/EC. Although the Austrian provision was aimed at recognizing the importance of Good Friday for some religious communities, the Court outlined that the 24-hour rest period was granted to employees who were formally members of one of such communities, regardless of whether or not they perform particular religious duties on that day. Thus, the situation of those employees has been considered not different from that of other workers who wish to have a rest or leisure period on Good Friday⁵².

⁵¹ CJEU, 22 January 2019, C-193/17, *Cresco Investigation GmbH v. Markus Achatzi*, in *Labor*, 2019, 2, 169 ff., commented by E. GRAGNOLI.

⁵² *Ibid.*, para. 45-47.

Furthermore, the Court held that «until measures reinstating equal treatment have been adopted by the national legislature, it is for employers to ensure that employees who are not members of one of those churches enjoy the same treatment as that enjoyed only by employees who are members of one of those churches»⁵³. That is, the employer has to grant to all his/her employees the right to be absent from work on Good Friday, as if it were a public holiday for everyone, and to recognize that they are entitled to receive a payment in addition to their regular salary, when they are required to perform their tasks on that day⁵⁴.

This conclusion may arise some reflections. In a nutshell, it seems that, if generalized, the final decision of the CJEU risks to have practical consequences that may appear more unreasonable than the situation to which it is aimed at remedying. In fact, extending too much the principles stated by the ruling at issue could create obstacles to every kind of differentiated treatment on the ground of religion, even to those which do not conflict with the equality principle.

Similarly, it has been noted that the Court's perspective may have negative impacts on legal instruments protecting religious minorities in the workplace, such as the ones implemented in Italy, which have been explained above⁵⁵. These selective measures could be modified or perhaps repealed, if every employee were allowed not to work during all the days provided for by the Italian law for each different religious group⁵⁶.

Such an unreasonable effect could be avoided by highlighting some of the limits of the examined judgment. First of all, it is worth noting that the decision should not influence national legal solutions that are directly involved in the arrangement of official relations between EU Member States and religious organizations. As it is well known, according to Article 17(1) of TFEU «the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States». Even if in the case

⁵³ *Ibid.*, para. 83.

⁵⁴ *Ibid.* This conclusion has been founded on the basis of the prohibition of discriminations stated by Art. 21(1), Charter of fundamental rights of the EU, which is considered «sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law» (see para. 76 ff.).

⁵⁵ E. GRAGNOLI, *I lavoratori italiani possono chiedere il riposo nel giorno di Indù Dipavali?*, in *Labor*, 2019, 2, 169 ff.

⁵⁶ *Ibid.*

in question the Court appears to interpret this latter provision restrictively, it seems to be undeniable that sometimes organizing institutional relations with religious bodies may imply also the recognition of some individual rights of single believers⁵⁷. This is particularly true for Italy, where the mentioned working time accommodations are established by statutory regulations that actually reproduce the text of specific agreements reached by the State and some non-Catholic Communities. More importantly, as already noted, this peculiar legal tool is provided for by Article 8 of the Italian Constitution, which is part of the «Fundamental Principles» stated by the same Charter⁵⁸. For these reasons, it seems preferable to think that the recent ruling of the CJEU cannot affect this kind of national acts, even if they grant different individual freedoms to some workers.

On the other hand, given the existence of a plurality of various religions, admitting that the law does not impose a complete blindness to some actual differences could appear not always unreasonable. Even the Court seems not to deny this possibility, where it underlines the fact that Austrian legal system allows workers who are not members of the churches considered by the affected provision «to celebrate a religious festival that does not coincide with any of the public holidays [...] by the imposition of a duty of care on employers vis-à-vis their employees, which allows the latter to obtain, if they so wish, the right to be absent from their work for the amount of time necessary to perform certain religious rites»⁵⁹. In this perspective, one may think that the CJEU's ruling does not prevent the adoption of a general rule that, more radically than the Italian solutions, provides for a duty to reasonably accommodate religious needs of all workers. From a formal point of view, such an option would treat all workers in the same way, but in fact it may result in different accommodations.

However, implementing this kind of measure would lead to give to the judge a central role, which is after all typical of Common Law contexts where it has

⁵⁷ See CJEU, 22 January 2019, *supra* note 50, para. 33, where it is stated that «it is true that Article 17 TFEU expresses the neutrality of the European Union towards the organisation by the Member States of their relations with churches and religious associations and communities [...]. However, the national provisions at issue in the main proceedings do not seek to organise the relations between a Member State and churches, but seek only to give employees who are members of certain churches an additional public holiday to coincide with an important religious festival for those churches».

⁵⁸ See *supra* note 31.

⁵⁹ See CJEU, 22 January 2019, *supra* note 50, para. 60 and 67.

been developed. By the way, it is clear that broad standards like the ones under discussion should never become a channel for merely subjective interpretations, but they should be applied in accordance with the fundamental principles of the legal system, and notably with those stated by national Constitution. Moreover, the reasonableness of material measures required under such an approach should be necessarily assessed also on the ground of the actual limits of employer's organization. Not considering this aspect may risk to shatter every practical chance of good compromises. Such a result would fulfil neither workers' needs nor a sensible integration policy.