

# *Sexual Orientation and Work in Organisations with Religion or Belief-based Ethos*

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## ABSTRACT

*Il documento si concentra sulla protezione dei lavoratori dalle discriminazioni basate sull'orientamento sessuale, all'interno delle organizzazioni di tendenza basate sulla religione o sul credo. In particolare, l'analisi sottolinea la differenza tra la clausola generale di "giustificazione oggettiva" prevista dall'art. 4, par. 1, dir. 2000/78 / CE e la clausola speciale prevista dall'art. 4, par. 2, dir. 2000/78 / CE per quanto riguarda le predette organizzazioni. Nella seconda parte lo scritto si concentra sulle discriminazioni nelle assunzioni, intese come forma più subdola di esclusione dall'impiego.*

**Parole chiave:** Orientamento sessuale – Organizzazione di tendenza, basate sulla religione o sul credo – Definizione – Protezione – Lavoratore – Assunzione – Sanzioni.

*The paper focuses on the protection of employees against discriminations on the ground of sexual orientation, within religion or belief-based organisation. In the first part the analysis stresses the difference between the general 'objective justification' clause provided by art. 4, par. 1, dir. 2000/78/EC and the special clause provided by art. 4, par. 2, dir. 2000/78/EC regarding religion or belief-based ethos organization. In the second part the paper focus on the protection of the jobseeker, also considering the burden of proof.*

**Keywords:** Sexual orientation – Religion or Belief-based ethos Organization – Definition – Protection – Worker – Hiring – Sanctions.

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**SOMMARIO:** 1. Introduction. – 2. The so called GOR exemptions in Directive 2000/78/EC. – 3. Expression of sexual orientation and of related beliefs in organisations with religion or belief-based ethos. - 4. Sexual orientation and hiring process in organisations with religion or belief-based ethos. - 5. Punish or perish: the removal of the discrimination.

## 1. Introduction

The purpose of this paper is to examine the protection of employees against discriminations on grounds of sexual orientation, within churches and other public or private organisations, the ethos of which is based on religion or belief.

The analysis is structured as follows.

In the first part, Paragraphs 2 and 3 analyse the regulatory framework as laid

down by Dir. 2000/78/EC, focusing on the scope of the possible exemptions from the equality principle. After explaining why sexual orientation can never constitute a legitimate and justified occupational requirement in itself, two questions will be addressed. Specifically, the analysis will investigate whether the above-mentioned organisations can require their workers not to express their personal beliefs of support to gay rights (e.g. by wearing rainbow symbols, declaring their participation to gay pride events, expressing their support for a legal recognition and protection of same-sex relationships as well as for adoptions by gay couples); and on whether they can require their workers not to declare or make known their same-sex relationships, at least in the workplace.

The second part of this paper will focus on these unlawful practices in religion or belief-based ethos organisations. Paragraphs 4 and 5 consider the effectiveness of the regulatory framework in the management of the employment relationship, calling for particular attention to the hiring process. It is well-known that the phase of recruiting is the less effective stage in the protection of the (still not) employee. Such discrimination occurs when an employer selects a candidate based on criteria other than the applicant's qualifications. Even though the law prohibits discrimination based on sex and sexual orientation, it is very hard to demonstrate that the jobseeker was not hired due to unfair employment practices.

## *2. The so called GOR exemptions in Directive 2000/78/EC*

All the EU directives concerning workers' protection against discrimination allow a derogation from the principle of equality when a specific requirement is necessary to carry out the occupational activities involved in the employment relationship. This is the so called GOR exemption<sup>1</sup>.

For the purposes of this analysis, one main aspect is worth noting: the provisions regulating this general exemption allow a GOR to be represented only by a characteristic related to a covered ground, not by a covered ground as such.

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<sup>1</sup> The GOR exemption «does not apply automatically» (Opinion AG Sharpston, *Bouagnaoui*, C- 188/15, par. 91). The ECJ explained that it is for the Member States to choose whether to provide for it in their legal system or not (Judgement of 14 March 2017, *Bouagnaoui*, C- 188/15, par. 36). However, as highlighted by AG Kokott in his Opinion in the case G4S, once the exemption is provided in the domestic law, it is not necessary that «the occupational requirements justifying a difference of treatment» are laid down by the member states «in the form of laws or decrees»; it is «sufficient that an undertaking applies a rule imposing such a requirement within its organisation» (par. 67). In any case, the GOR exemption is designed by a strict set of rules, which makes it applicable «in very limited circumstances», as the 2000/43 and 2000/78 directives specify in their Recitals no. 18 and 23.

This was also stressed by the ECJ when dealing with the case of workers wearing items of clothing connected to a specific religion<sup>2</sup> as well as of workers losing particular physical capacities over a certain limit of age.

Only Directive 2000/78/EC adds a further and specific GOR exemption, to be applied within organisations whose ethos is based on religion or belief<sup>3</sup>.

When comparing the general GOR exemption with this latter one, two relevant differences can be highlighted.

In the case of the special GOR exemption, which is regulated by Art. 4.2, it is the covered ground as such, and not a mere characteristic related to it, that can constitute the necessary occupational requirement. The grounds that can be considered as a GOR under this provision are the ones qualifying the ethos of the above-mentioned organisations, namely religion or belief.

Secondly, the special GOR exemption seems to have a broader scope than the general one, as long as it does not ask for the requirement to be also determining and proportionate<sup>4</sup>. However, despite the different wording, the recent ECJ case-law explained that the proportionality test applies also within the context of Art. 4.2, as it is implied in the evaluation of whether the requirement is «justified» or not<sup>5</sup>. Still, the «determining» quality of the requirement could

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<sup>2</sup> As remarked by the ECJ in the judgement of 14 March 2017, *Bougnaoui*, C-188/15, «it should be borne in mind that the Court has repeatedly held that it is clear from Article 4(1) of Directive 2000/78 that it is not the ground on which the difference of treatment is based but a characteristic related to that ground which must constitute a genuine and determining occupational requirement» (par. 37). See also judgments of 12 January 2010, *Wolf*, C-229/08, par. 35; of 13 September 2011, *Prigge and Others*, C-447/09, par. 66; of 13 November 2014, *Vital Pérez*, C-416/13, par. 36; and of 15 November 2016, *Salaberria Sorondo*, C-258/15, EU:C:2016:873, par. 33.

<sup>3</sup> Once again, it is for the Member states to provide for it in their legal system. Only few countries have not implemented this provision, see LAULOM S., *Religion at work: European Perspectives*, in *Hungarian Labour Law*, 2019/1, 3.

<sup>4</sup> Specifically, while to the purposes of Art. 4.2 the occupational requirement needs to be «genuine, legitimate and justified», Art. 4.1, which regulates the general GOR exemption, asks for «a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate».

<sup>5</sup> In the judgement of 11 September 2018, *IR*, C-68/17, the Court explains that «the term ‘justified’ implies [...] that the church or organisation imposing the occupational requirement is obliged to show, in the light of the factual circumstances of the individual case, that [...] the imposition of such a requirement is necessary. In that regard, the requirement in the first subparagraph of Article 4(2) of Directive 2000/78 must be consistent with the principle of proportionality» (par. 53-54). Previously, in the case *Egenberger*, the ECJ explained that «while that provision, unlike Article 4(1) of the directive, does not expressly

mark a difference between the two exemptions: the fact that the ground-related characteristic needs to be an essential causal condition for carrying out the work narrows the scope of the general exemption.

Having said that, the purpose of paragraphs 2 and 3 is to assess the extent to which the above-mentioned GOR exemptions apply and how they interact in the case of homosexual workers employed in organisations whose ethos is based on religion or belief (from now on, only for the purposes of this analysis, “ethos-based organisations”<sup>6</sup>).

In particular, given that a specific sexual orientation cannot constitute a GOR itself, neither under Art. 4.2 nor under Art. 4.1, and therefore no organisation can ever exclude workers because they are homosexual or perceived as homosexual, one can wonder whether a belief or a characteristic related to homosexuality could constitute a legitimate GOR<sup>7</sup>.

Let us think about the expression of support for gay rights. Regardless of whether the person expressing such support is homosexual or not, one could wonder if under Art. 4.2 ethos-based organisations could prevent their employees from expressing such support, inside or outside the workplace, for its contrast with the religion or belief that qualifies their ethos, or even exclude those that refuse to express the specific beliefs on this matter embraced by the organisation.

Let us think about the choice to make public and known a gay relationship, by declaring and showing it in the workplace<sup>8</sup>. Can we consider this choice as a characteristic related to sexual orientation for the purposes of Art. 4.1, and

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provide that the requirement must be ‘proportionate’, it nonetheless provides that any difference of treatment must take account of the ‘general principles of Community law’. As the principle of proportionality is one of the general principles of EU law, the national courts must ascertain whether the requirement in question is appropriate and does not go beyond what is necessary for attaining the objective pursued» (par. 68). According to S. LAULOM, «as a consequence, the application of the two exceptions, the one of Article 4.1 and the one of Article 4.2, has become very similar. The approach of the ECJ slightly to the one of the European Court of Human Rights, and it could explain the silence of the ECJ with regards to the European Convention in the Egenberger and IR cases» (*Religion at work*, cit., 4).

<sup>6</sup> The notion of ethos-based organisations relevant for the purpose of Art. 4.2 Dir. 2000/78 is different from the one adopted by the Italian Law n. 108/90 under art. 4; see A. VISCOMI, *Organizzazioni eticamente fondate e rapporti di lavoro*, in A. VISCOMI (ed.), *Diritto del lavoro e società multiculturale*, Ed. Scientifica, Napoli, 2011, 412.

<sup>7</sup> See F. RIZZI, *Soffia il vento del cambiamento: sapremo costruire i mulini?*, in *Genius*, 2016, 212.

<sup>8</sup> A different case could be represented by someone outed by someone else in the workplace.

consider it possible for ethos-based organisations to require their employees not to show this aspect of their private life, at least in the workplace?

The next paragraph will focus on these two questions, taking as given that the conditions set by Art. 4 are met, as interpreted by the recent case-law of the ECJ. This means that when examining the cases mentioned above, it will be assumed that the activity to be performed by the workers concerned «involves taking part in the determination of the ethos of the church or organisation in question or contributing to its evangelising mission», or it is to be carried out in circumstances «where it is necessary to ensure that the church or organisation is presented in a credible fashion to the outside world» (*IR*, par. 50; *Egenberger*, par. 62-63)

### *3. Expression of sexual orientation and of related beliefs in organisations with religion or belief-based ethos.*

Any debate on the possibility for ethos-based organisations to require their employees not to express their support for gay rights implies a preliminary reflection on two aspects: the notion of belief applicable for the purposes of Art. 4.2 and the extent to which a difference of treatment based on a belief can imply a difference of treatment based on another ground, such as sexual orientation.

Directive 2000/78/EC does not define the notion of belief nor a definition can be found in any EU legislative source. In order to understand what is covered by this notion, one needs to refer to both the rulings of the ECJ and of the ECHR<sup>9</sup>.

According to the rulings of the ECHR, whereas the concept of belief is broad and it does not necessarily imply religious convictions, it is not so broad to include all opinions or convictions. Specifically, in order to benefit from the right

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<sup>9</sup> In fact, Directive 2000/78/EC is to be interpreted in the light of the Charter of Fundamental Rights of the European Union (“the Charter”), which protects the right to hold and manifest a religion or belief at Article 10.1. Not only does this provision use the same wording of Article 9.1 of the European Convention on Human rights (“the Convention”), but it has also to be interpreted in line with its meaning and scope, as stated by Art. 52.3 of the Charter. See P. WATSON – P. OLIVER, *Is the Court of Justice of the European Union finding its religion?*, in *Fordham International Law Journal*, 2019, 847. As confirmed by the ECJ in the case *Bougnaoui*, «as is apparent from the explanations relating to the Charter of Fundamental Rights, the right guaranteed in Article 10.1 of the Charter corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52.3 of the Charter, has the same meaning and scope» (par. 29).

to «freedom of thought, conscience and religion», a personal or collective conviction must attain «a certain level of cogency, seriousness, cohesion and importance»<sup>10</sup>. For the purposes of this analysis, it is noteworthy that these arguments were confirmed in the Judgment related to the case *Eweida and Others v. the United Kingdom*. This Judgement concerned, among others, the case of Ms Ladele, a marriage registrar, who refused to register and perform same-sex civil partnerships as she held «the view that marriage is the union of one man and one woman for life» and sincerely believed «that same-sex partnerships are contrary to God’s law». It also concerned the case of Mr McFarlane, a therapist who refused to counsel same-sex couples, as he held «a deep and genuine belief that the Bible states that homosexual activity is sinful and that he should do nothing which directly endorses such activity». As for both cases, the Court excluded any violation of the Convention, yet it confirmed the applicability of Art. 9 as well as the inclusion of the above-mentioned convictions of Ms Ladele and Mr McFarlane within the notion of belief. This is key for answering the question of whether the support for gay rights can be qualified as a belief: if the opposition to the legal recognition and protection of same-sex relationships is to be considered as a belief, the same argument cannot but be applied to convictions that symmetrically work on the opposite side, in favour of gay rights.

For the Court of Strasbourg, the right to hold a belief encompasses the freedom to manifest it, as long as the act is «intimately linked to the religion or belief» on the basis of «a sufficiently close and direct nexus» (case *Eweida*, par. 82).

The same notion of religion or belief is embraced by the ECJ. As confirmed in the case *Bougnouli*, «in so far as the ECHR and, subsequently, the Charter use the term ‘religion’ in a broad sense, in that they include in it the freedom of persons to manifest their religion, the EU legislature must be considered to have intended to take the same approach when adopting Directive 2000/78». Following this reasoning, the Court highlights that the concept of religion or belief covers «both the *forum internum*, that is the fact of having a belief, and the *forum externum*, that is the manifestation of religious faith in public» (par. 30).

If the right to hold a belief includes the right to express it in public, one could argue that, for the purposes of Art. 4.2 of Dir. 2000/78, what should mainly be taken into consideration is the *forum externum*, the outward demonstration of

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<sup>10</sup> Once this condition is satisfied, the ECHR excludes from its tasks and from the power of the State the possibility to enter into any interpretative controversy related to any given religious or non-religious conviction (for example, the question of whether an item of clothing or a practice is mandatory or not).

adherence to a particular religion or belief, as no organisation can really affect, impose and/or assess the *forum internum* of their workers. Basically, workers can be required to declare their adherence to the organisation's ethos (and be excluded if they do not) as long as this means acting consistently with a specific religion or belief, professing it and working to contribute usefully to the mission and objectives of the organisation<sup>11</sup>. On the contrary, they can hardly be required to really hold such belief.

Nevertheless, in the case *IR*, when explaining the interconnection between the first and second sub-paragraph of Art. 4.2, the ECJ makes a distinction between the affiliation or adherence to the belief of the ethos-based organisation, as a possible relevant GOR for the purposes of the first sub-paragraph, and the behaviour of those workers who share such religion and belief, which is referred to as the relevant GOR for the purposes of the second sub-paragraph. As known, this last provision sets out the right of ethos-based organisations to require their workers «to act in good faith and with loyalty to the organisation's ethos».

The reasoning of the ECJ seems to develop upon three interpretative choices.

First of all, the Court seems to single out a specific aspect of the *forum externum*, if not the *forum externum* itself, thus assuming the autonomous relevance of the *forum internum* as a GOR for the purposes of the first sub-paragraph.

Secondly, it relates the good-faith and loyal behaviour, referred to in the second sub-paragraph, to the *forum externum* of the belief.

As a consequence, it seems to make the possibility to require the workers «to act in good faith and with loyalty to the organisation's ethos» (second sub-paragraph) conditional on the fact that a requirement of adherence to a specific belief can be firstly legitimately imposed by the ethos-based organisation (first sub-paragraph)<sup>12</sup>.

These interpretative options are particularly relevant when dealing with the questions addressed by our investigation. In fact, as the analysis will highlight,

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<sup>11</sup> See G.F. MANCINI, *Il recesso unilaterale e i rapporti di lavoro. Il recesso straordinario*, Giuffrè, Milano, 1957, 100; M. RANIERI, *Identità, organizzazioni, rapporti di lavoro*, 2017, Cedam, Padova, 88.

<sup>12</sup> «A church or other public or private organisation the ethos of which is based on religion or belief can treat its employees in managerial positions differently, as regards the requirement to act in good faith and with loyalty to that ethos, *depending on their affiliation to a particular religion or adherence to the belief* of that church or other organisation *only if*, bearing in mind the nature of the occupational activities concerned or the context in which they are carried out, *the religion or belief is a genuine, legitimate and justified occupational requirement* in the light of that ethos» (par. 55).

when it comes to the possibility to ask workers to express the specific beliefs related to sexual orientation embraced by the organisation and/or not to express beliefs contrasting with them, the situation gets more complicated, and the above-mentioned interpretation of the second sub-paragraph of Art. 4.2 is put under stress.

First of all, it is important to highlight that the first sub-paragraph of Art. 4.2 permits belief-based differences of treatment as long as they do not result into a discrimination based on another ground. Does a difference of treatment based on a belief related to sexual orientation imply a discrimination on grounds of sexual orientation? If we conclude that this is the case of workers required not to express their support for gay rights, it may be argued that in such a situation ethos-based organisations are prevented from applying the GOR exemption.

Following from this premise, which will be further discussed later, there could still be a two-fold solution for ethos-based organisations.

Firstly, one could suppose the possibility to adopt a difference of treatment on grounds of belief related to sexual orientation under Art. 4.1 (general GOR exemption), as long as such belief can be covered by the notion of «characteristic related to» sexual orientation. In this regard, it is worth noting that, especially after the recent case-law of the ECJ, the difference of scope of the two exemptions is much less pronounced. Still, in the general one, the GOR is required to be also determining.

Within the scope of the special GOR exemption, one could reflect on the possible role of the second sub-paragraph of Art. 4.2, which, as already mentioned, sets out the right of ethos-based organisations to require their workers «to act in good faith and with loyalty to the organisation's ethos»<sup>13</sup>. In the case *IR* the ECJ seems to make the application of this provision contingent upon the adherence to a belief being possibly required as a GOR under the first paragraph. Can this provision work otherwise as a counter-limit when such adherence cannot be required because it would imply a discrimination on another covered ground, thus allowing ethos-based organisations to require workers to

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<sup>13</sup> According to the AG Tanchev (Opinion, case *Egenberger*), referring to the requirement to 'act in good faith and with loyalty to the organisation's ethos' is relevant only when dealing with workers' behaviour, not their belief. See the different position of G. DE SIMONE, *Dai principi alle regole*, Giappichelli, 2001, 88; G. DE SIMONE, *I requisiti occupazionali*, in S. FABENI – M.G. TONIOLLO (eds), *La discriminazione fondata sull'orientamento sessuale*, Ediesse, Roma, 2005, 150-151. According to DE SIMONE, this provision works as a counter-balance in favour of workers in the context of the regulations set by Art. 4.2, which otherwise lean towards the protection of the ethos of the organisation to the detriment of the protection of the worker.



act in loyalty with their ethos, regardless of the fact they hold a different belief? Can such right permit not as much to ask workers to express the beliefs related to sexual orientation embraced by the organisation, but rather to exclude those expressing and manifesting contrasting convictions?

Any interpretative solution to these questions implies a reflection on the essence of the right not to be discriminated against on grounds of sexual orientation as well as an investigation on where to strike the balance between this right and the right of ethos-based organisations to profess and disseminate their belief. In this perspective, it becomes key to assess whether the right not to be discriminated on grounds of sexual orientation as well as the fight against such discrimination is jeopardised and/or undermined in their essence if the individual possibility to hold and express a belief in favour of gay rights is repressed.

In this regard, it is noteworthy that according to Art. 52.1 of the Charter, any limitation on the exercise of the rights and freedoms recognised by the Charter must respect the essence of those rights and freedoms. Besides, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Keeping this provision in mind, it is worth recalling a Judgment of the ECHR regarding a case of repression of activities aimed at promoting and disseminating gay-related information in front of a children's library and a secondary school<sup>14</sup>.

The case has its own peculiarities and specific circumstances, which need to be taken in due consideration when making any comparison with the situation addressed by our analysis: the facts occurred in Russia, the opinions were not expressed within private premises, and the repression was carried out by public authorities according to the Russian laws prohibiting public activities aimed at promoting homosexuality among minors. Besides, the applicants complained a violation of Art. 10 of the Convention, concerning the right to freedom of expression, which includes freedom to hold opinions and to receive and impart information and ideas<sup>15</sup>, and not of Art. 9, regarding the freedom of thought, conscience, religion or belief.

Nevertheless, the reasoning of the ECHR shows to be particularly useful for

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<sup>14</sup> Case of *Bayev and others v. Russia*, 20 June 2017

<sup>15</sup> In the case *Balsytė-Lideikiienė v. Lithuania*, the ECHR explained that Article 10 of the Convention is a *lex specialis* in relation to Article 9 with regard to a grievance about an interference with the expression of one's beliefs by way of spreading information. As regards the right to freedom of expression see Art. 11 of the Charter.

the purposes of our analysis especially when it deals with the possibility to justify limitations to the right of expression of gay-rights supporters on the grounds of protection of the rights of others, such as the rights of parents to choose the religious and philosophical bases of their children education.

The ECHR overturns the approach proposed by the Russian authorities by pointing out the importance of the protection of children from homophobia as well as the need to provide objective information with respect to sexual orientation and gender identity, for instance in school curricula and educational materials. In its Conclusion, the Court says that by adopting such laws Russian authorities «reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society» (par. 83)<sup>16</sup>.

This ruling does not concern ethos-based organisations nor a legal system implementing the EU law. Nevertheless, it still concerns the interpretation of the balance between rights within the Convention, which needs to be taken into account when interpreting the Charter, and specifically it concerns the possible limitation to the right to manifest personal beliefs on topics related to sexual orientation, in favour of gay rights.

Moving from the reasoning of the ECHR, one could argue that repressing the expression of beliefs concerning gay rights results into a repression of homosexuality as such, and requiring workers not to express their convictions in favour of same-sex relationships' recognitions and gay rights could result into a reinforcement of homophobia in the workplace (or even among children if this occurs into an educational environment). In other words, such limitation would not respect the essence of the right not to be discriminated against on grounds of sexual orientation, as it would inevitably result into a damage and compromising attack for such right.

If this is so, when it comes to convictions related to sexual orientation, is there any room left for ethos-based organisations to require their workers «to act in good faith and with loyalty to the organisation's ethos», as set out by the second subparagraph of Art. 4.2?<sup>17</sup>

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<sup>16</sup> In the EU context, see the European Parliament Resolution of 4 February 2014 on the Roadmap against homophobia, (2013/2183(INI)). As reported by the European Commission, discrimination on grounds of sexual orientation has severe effects in education and health (SEC(2008)2180, par. 4.2.3).

<sup>17</sup> See D. IZZI, *Eguaglianza e differenze nei rapporti di lavoro*, Jovene, Napoli, 2005. In her opinion, in accordance with this provision, a Catholic school cannot penalise a teacher for being homosexual, but it can legitimately require that he/she does not wave an ideological flag in opposition to the official doctrine of the Catholic Church, in front of the

If we follow from the interpretation adopted by the ECJ in *IR*, which makes the requirement to act in good faith conditional on the fact that the adherence to the belief can be legitimately imposed, we should conclude that the second subparagraph of Art. 4.2 cannot play any role. As long as no adherence to a belief contrasting with gay-rights support can be imposed (because this implies a discrimination on grounds of sexual orientation), no requirement to act in good faith and with loyalty with such belief can be imposed either.

However, one could propose another possible interpretation, following from the assumption that the good-faith and loyal behaviour, referred to in the second sub-paragraph, cannot be merely related to the *forum externum* of the belief; and, as a consequence, the possibility to require the workers «to act in good faith and with loyalty to the organisation's ethos» is not conditional on the fact that a requirement of adherence to a specific belief can be firstly legitimately imposed by the ethos-based organisation.

Specifically, the clause «provided that [the provisions of Dir. 2000/78] are otherwise complied with» could be interpreted in the sense that the right recognised by the second subparagraph of Art. 4.2 can be exercised as long as this does not imply a violation of the other provisions of the directive (first of all, of the first sub-paragraph of Art. 4.2). In the case at hand, one could say that it can be exercised as long as it does not imply a discrimination on another ground by imposing an adherence to beliefs that would lead to it.

Following from this premise, a good-faith behaviour could be therefore required, as long as this amounts to requiring workers not as much to act consistently with such belief, but rather to act in a manner that does not jeopardise the essence of the right of the ethos-based organisations to hold and credibly evangelise their belief-based mission.

A censorable behaviour might occur, for instance, in the case of employees of a Catholic organisation with ethos-oriented positions (such as teachers in a Catholic school), that criticise, attack, try to diminish or to discredit the Catholic Church for its position on gay marriages and adoptions by gay couples.

One could say that the line between the right of workers not to conceal their

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students and maybe also of his/her colleagues (397-398). L. CALAFÀ brings into question the applicability of this provision in the situation at hand. She highlights that repressing the choice of a worker to manifest his/her sexual orientation is a discriminatory act and the use of the second paragraph of art. 4.2 for this purpose implies a “transformation” of a disparate treatment on grounds of sexual orientation in a disparate treatment based on belief (*Le discriminazioni basate sull'orientamento sessuale*, in M. BARBERA (ed.), *Il nuovo diritto antidiscriminatorio*, Giuffrè, Milano, 2007, 218-219).

support for gay rights and the prohibition to discredit and damage their employer for his position on this matter is quite thin.

Many arguments brought up during the analysis can be applied also when dealing with second question mentioned at the end of Paragraph 2, that is the possibility for ethos-based organisations to require their gay workers not to make public and known their possible relationships, by declaring and showing them in the workplace. As this case would not concern a difference of treatment based on the ground of a belief, any reflection needs to refer to the applicability of the general GOR exemption set out by Art. 4.1.

Regardless of the narrower scope of this exemption, its very applicability might be brought into question in the case at hand. As a matter of fact, can we consider the choice to make public and known a gay relationship as a characteristic related to sexual orientation or should we rather define it as a mere visible expression or disclosure of the ground as such<sup>18</sup>? Any answer should be chosen, it is worth recalling that a forced invisibility can affect health as well as reinforce shame-based emotional exclusion of LGBT people in the workplace and in the labour market<sup>19</sup>. Again, this limitation cannot be considered respectful of the essence of the right not to be discriminated against. And no GOR exemption could be therefore considered applicable.

#### *4. Sexual orientation and hiring process in organisations with religion or belief-based ethos.*

When discussing discrimination with respect to an employer as an *organisation with religion or belief-based ethos*, the topic is usually dealt with reference to dismissal, as is the case in most cases with jurisprudence linked to discrimination.

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<sup>18</sup> The inclusion of the external manifestation and characteristics of sexual orientation within the notion of sexual orientation as a covered ground is highlighted by K. WAALDIJK, M. BONINI BARALDI, *Sexual Orientation Discrimination in the European Union: National Laws and the Employment Equality Directive*, T.M.C. Asser Press, The Hague, 2006.

<sup>19</sup> See EESC, *Opinion on "Vulnerable groups" rights at the workplace* (2012/C 351/03), par. 3.3.1 and 3.3.2. With regard to the so called «tyranny of silence», see 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 *DRI*, 2004, p. 775 ss.; F. BILOTTA, *Diritto e omosessualità*, in P. CENDON (ed.), *I diritti della persona. Tutela civile, penale e amministrativa*, vol. I, 2005, Utet, Torino, p. 377; L. CALAFÀ, *cit.*

The subject of discrimination in access to work is much more insidious, both in relation to the case in question and in relation to the sanction for the violation of the principle of non discrimination.

First, we will focus on identifying discrimination in access to, or expectations of, work. It is a question of understanding the limits to which an employer, whether entrepreneur or not, is subjected in choosing the personnel to be hired.

It is said that the employer is free to hire anybody he/she wants, as long as his/her behaviour does not result in discrimination, as defined by the directives 2000/43 /EC and 2000/78/EC. But it is also known that in the assumption phase the worker, or rather the jobseeker, is in a particularly weak condition, which leads to not reporting the possible employer's misconduct.

The jurisprudence, both of the national courts and of the European Court of Justice, is really minimal.

In the case of *Feryn NV*<sup>20</sup>, the Court questioned the application of Directive 2000/43 / EC on equal treatment regardless of race and ethnic origin, in the case of an entrepreneur who, at the beginning of 2005, placed on the corporate land a large billboard for the search for personnel and, at the same time, openly declared his intention to hire only non-foreign personnel, since his clients (being a company installing overhead doors) feared to let foreigners enter their homes . In this affair, therefore, although it had not been proved that someone had presented himself as a candidate, his actual recruitment policy had been publicly exposed by the company, to discourage non-alien candidates from customers.

Following the appeal of the independent Belgian Authority (UNIA) to ascertain the discriminatory nature of the assumption policy of the company in question, the Brussels court had rejected the appeal, lacking the proof (or at least the indications) of the failure to recruit foreign personnel from the entrepreneur. The Court of Appeal of Brussels then submitted the matter to the Court of Justice, to clarify whether the public statements of an employer regarding the recruitment procedure could be traced back to the notion of "direct discrimination" present in Directive 2000/43/EC.

According to the Court, the less favorable "treatment" that someone suffers for a personal characteristic is the heart of the notion of discrimination, in which the legislator's objective becomes central, namely, to promote the conditions for a more active participation on the labor market.

This objective would be dissatisfied if one adhered to a literal interpretation

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<sup>20</sup> ECJ 10 July 2008, C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding c.Firma Feryn NV*, in *Riv. it. dir. lav.*, 1, 2009, 243, in *Riv. giur. lav. e prev. sociale*, 2008, 765, in *Common Market Law Review*, 2010, 47, 917.

of the directive, limiting its application only to the hypotheses in which the candidate was not hired or treated in an inferior way with respect to one of his colleagues, on the basis of one of his characteristics personnel.

The purpose of the directive is therefore much broader than protection during the recruitment procedure.

Thus, the Court identifies a potential effect of discrimination, prior to the start of the recruitment procedure, in the declarations publicly made by the employer not to want to hire employees with a specific ethnic or racial origin, thus dissuading certain candidates from presenting their own nominations.

In the subsequent *Asociația Accept* case<sup>21</sup>, a professional football team had not hired a footballer following the statements of a shareholder, who had made homophobic allegations against a player about to be transferred to that team of his. From the silence of the sports club which, following those statements, has never expressed a contrary opinion aimed at contrasting them, the Court has drawn sufficient evidence to suggest that the expressions of the shareholder were in fact the manifestation of the hiring policy concretely followed by the company.

Also, in this case, therefore, the Court of Justice accepts a very broad notion of the protection that the Directives grant in the event of discrimination. At this point one wonders how vast the scope of this potential effect is. And, that is, what is the boundary between freedom of thought and the prohibition of discrimination

To this end it seems useful to pay attention to a case referred to the Court of Justice by the Italian Supreme Court of Cassation on August 2, 2018 and currently pending, which sees a well-known lawyer, university lecturer and former member of Parliament, opposed to the Associazione Avvocatura for LGBTI rights - Lenford Network (Case C-507/18)<sup>22</sup>. During a nationally broadcast radio broadcast, after expressing his thoughts on homosexuals, the well-known character stated that he would never hire a person with this sexual orientation in his professional studio.

The association of lawyers, lawyers and practitioners Rete Lenford, which deals with the promotion and protection of LGBTI people (lesbians, gays, bisexuals, transsexuals and intersex) then appealed to the Court to declare the defendant's conduct discriminatory, and consequently, to request to the judge to

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<sup>21</sup> ECJ 25 April 2013, C-81/12, *Asociația Accept c. Consiliul Național pentru Combaterea Discriminării*, in *Riv. it. dir. lav.*, 2014, 1, II, 133, L. Calafà.

<sup>22</sup> F. Bilotta, *La discriminazione diffusa e i poteri sanzionatori del giudice*, in *Resp. Civ. e Prev.*, 2018, 1, 69.

remove the effects of such conduct and to order the defendant to pay damages.

Both in the first instance and in the appeal the questions of the Association were accepted<sup>23</sup>, with condemnation of the lawyer to the payment of a sum, by way of compensation, to the Association and the publication of the decisions on a national newspaper.

The sentenced lawyer then appealed to the Supreme Court of Cassazione, which asked the Court of Justice to rule both on the point of trial legitimacy of the Association, and (it is the profile that interests here) if a demonstration falls within the scope of anti-discrimination protection of thought contrary to the category of homosexual persons, although averted from any recruitment procedure and external to reveal their opinion.

As it is known, freedom of expression of thought is a fundamental right, safeguarded by Article 10 of the Charter of Fundamental Rights of the European Union, by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and evidently from article 21 of the Italian Constitution, relevant in the case. In the referral order, the Court of Cassation highlights how the decisions made by the Court of Justice of the European Union concerning anti-discrimination, and mentioned above, referred to events in which recruitment procedures could be detected in some way.

In the Italian affair, the judges of the Court of Cassation ask themselves whether any more or less offensive statement concerning a category of subjects falls within the European anti-discrimination legislation, even in the absence of an individual labor negotiation or a public offer of work in progress, or if, on the contrary, this can be configured as an expression of freedom of expression of thought, albeit deplorable.

In the reasoning that is going on here, it is clear that, where a subject could publicly declare that he does not want to hire workers in relation to their sexual orientation at any time, provided that while there are no selections in progress, the worker would bear the burden proof of non-employment.

For example, the worker should investigate the past conduct of the employer, therefore having to prove that in the past the sexual orientation has influenced the selection of candidates for the workplace. With the danger, in this case, of infringing the right to respect for the private life of other people, whether employed or not.

Nor can a better treatment be reserved for trend organizations, for which the GOR limits mentioned above have necessarily been interpreted restrictively,

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<sup>23</sup> Trib.Bergamo, 6 agosto 2014 (ord.) in *Foro it.*, 2014, I, 3614 and in *Riv. it. dir. lav.*, 2015, I, II, 106; C. App. Brescia, 11 dicembre 2014, *ibidem*, 112.

since they are better terms.

The transition, regarding the trend organizations, is represented by the aforementioned Egenberger case<sup>24</sup>, in which the Court offered for the first time a wide reconstruction of the limits that operate in general on recruitment by a confessional employer.

In fact, the story behind the main proceedings represented a novelty in the context of the Court of Justice's case law, since it was an explicit discrimination against a confessional employer in the context of a recruitment procedure.

First, it should be remembered that this profile also falls within the scope of the directive, treating itself the conditions of access and employment at work.

In the case in question, the Bundesarbeitsgericht (German Federal Labor Court) has submitted to the Court of Justice a request for a preliminary ruling concerning the interpretation of Article 4, par. 2, of Directive 2000/78, which establishes a general framework for equal treatment in employment and work. The applicant Egenberger identified a discriminatory profile in the advanced recruitment procedure by Evangelisches Werk (organization of the German Evangelical Church) for a project concerning the drafting of a report on the UN International Convention on the Elimination of All Forms of Racial Discrimination (!), from which it was excluded as not adhering to the religious confession (and, to tell the truth, to no other), a requirement this made explicit in the recruitment procedure.

In this context, the German Court considered it essential to ask the Court of Justice to rule on the art. 4, par. 2, of directive 2000/78, to understand if the aforementioned provision should be interpreted in the sense that a Church or an organization whose ethics is based on religion or personal convictions, in proceeding to an assumption, can itself determine, definitively, the professional activities with reference to which the religion constitutes, due to the nature of the activity or due to the context in which it is carried out, an essential, legitimate and justified requisite for carrying out the working activity, taking into account the ethics of such a church or organization.

The complexity of formulating the art. 4 of Directive 2000/78 / EC and the generic nature of its second paragraph do not clarify what the margin actually granted to trend organizations is in realizing differences in treatment based on religion or personal convictions, in matters of work. Consequently, this fundamental interpretative uncertainty has led the referring judge to ask himself to what extent the exercise of the Church's right of autonomy, expressed in the

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<sup>24</sup> EJC 17 April 2018, Egenberger, C-414/16.



German Constitution<sup>25</sup>, which it finds expressed also in accordance with the art. 17 TFEU, can justify the sacrifice of fundamental freedoms recognized by each individual, such as freedom of religion and the principle of non-discrimination.

On the one hand, in fact, Directive 2000/78, establishing a general framework for the fight against discrimination in order to make the principle of equal treatment effective in the Member States, concretises the general principle of non-discrimination contained in Article 21 of the Charter of Fundamental Rights of the European Union; on the other, the second paragraph of the art. 4 also intends to take into account the autonomy of Churches and organizations.

Consequently, the Court considers that Article 4, par. 2, of Directive 2000/78 aims to ensure a balance between the right to autonomy of Churches and trend organizations and the right of workers not to be discriminated against on the basis of religion or belief. The balancing must be able to be the subject, where appropriate, of an effective judicial review by an independent authority and, ultimately, by a national judge, in order to ensure that the criteria set out in Article are met. 4.

For its part, the Court of Justice also considers the jurisdictional syndicate on the choices made by the confessional employer indispensable, in case of controversy, in order to verify the correct balance between the right to self-determination of churches and the right of workers to not subject to discrimination.

With such an approach, the Court of Justice ensures the necessary coherence between the interpretation of the rights guaranteed by the Charter of Fundamental Rights of the European Union (for example the aforementioned articles 10 and 21) and, where corresponding to the rights guaranteed by the ECHR ( like articles 9 and 14), the interpretation of the latter, offered by the European Court.

### *5. Punish or perish: the removal of the discrimination.*

Having established the limits of the discriminatory case in some way, it now seems necessary to address the issue of protection offered to those who see themselves refused employment in relation to their sexual orientation. In fact, it must be remembered that the removal of the damaging effects deriving from the employer conduct represents, together with the compensation, the relief for the prejudices suffered.

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<sup>25</sup> J. Brockmann, *Occupational requirements within Churches or religious organizations in Germany*, in *Hungarian Labour Law*, 2019/1, 72.

On several occasions, and also in the judgments mentioned above, the European Court of Justice has referred to the national judges for the identification of the methods and measure of the sanctions to be imposed for the violation of European law. On the rare occasions when the judges had the opportunity to pronounce themselves about discrimination in access to work, they have otherwise solved the questions on the subject of protection requested by the parties.

For example, in the case faced by the Court of Rovereto (TN) in the ordinance of June 21, 2016<sup>26</sup> and confirmed in appeal in 2017<sup>27</sup> a private school<sup>28</sup>, run by nuns, was sentenced for not having renewed a term contract to a teacher because of her sexual orientation.

On that occasion, the appellant requested (in addition to compensation for damages resulting from the damage to personal dignity and the resulting media exposure) also the condemnation of the institution to formulate an open-ended job offer, having the characteristics of the last contract to fixed term or, alternatively to the hiring proposal, that an indemnity equal to fifteen monthly payments calculated on the amounts of the last employment contract, as if it were, in some way, an illegitimate dismissal, was recognized.

The Court considers that they cannot condemn the Institute to formulate a job offer for an indefinite period, as “there was no evidence in the documents, even if only of a presumptive type, which would lead to the hypothesis that the outcome of the multiple teaching assignments received in previous years would have been that of a hiring definitively” while, on the contrary, the court decided to compensate for the loss of temporary employment opportunities for the following school years.

And in fact, the applicant had been continuously in charge of teaching the subject of art education starting from the school year 2009. Although not determining a right or an expectation to confirm the contract for the following

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<sup>26</sup> Trib. Rovereto, ord., 21 giugno 2016, in *Foro it.* 2016, 7-8, I, 2564.

<sup>27</sup> C. App. Trento, 7 marzo 2017, n.14, in *Riv. It. Dir. Lav.*, 2017, 4, 816 R. Santoni Rugiu.

<sup>28</sup> As identified in the appeal ruling cit. it is a “private school under Law n. 62/00 managed by a religious order. That kind of school is part of the national education system and which school managed by a religious order enjoys the freedom referred to in paragraph 4 of art. 33 of the Constitution of cultural orientation and pedagogical-didactic orientation, but in compliance with the other principles of freedom guaranteed by the Constitution of the Italian State (art. 1). The private schools, which benefit from public funding and are authorized to issue qualifications with legal value, having a public service must receive the registrations of all the students who accept the educational project, must allow the exemption of the students who wish to do so from the activities extra-curricular that presuppose or require adherence to a specific ideology or religious denomination, must implement an educational project in harmony with the principles of the Constitution (art. 1)”.

years, the Court certainly considered the possibility founded for the worker to be offered new tasks. Taking into account the previous contracts, the appellant was therefore granted an amount equal to one year of remuneration as "pecuniary damage from discriminatory conduct in the assessment of professionalism", to be added to the recognition of non-pecuniary damage to honor and conviction, in favor (also) of subjects expressing collective interests (the union and an association), to the payment of further sums of money. By virtue of the recognition of only economic protection, the Court excluded, however, "the need - or even just the utility - to order the removal plan".

The decisions of the Court in terms of effectiveness of the protection must be deepened. It should be remembered that the condemnation of the employer to hire a worker is a very rare, if not a one-off, provision in the Italian legal system: but it is precisely in this way that one understands its enormous strength. In fact, precisely because there is no doubt that it is an exceptional act, it corresponds to the most effective and dissuasive measure that the system can introduce.

Nevertheless, this tool does not adapt to the generality of the cases, but to those in which the employer actually has an occupational need that the discriminated worker is able to satisfy for his skills and competences but which he is prevented from carrying out for a personal characteristic.

The alternative to such an effective measure can only be a sentence to the payment of sums actually huge, due to the conditions (not of the worker but) of the employer who has discriminated. The reference is to the subject of the c.d. punitive damages and / or private penalties, which cannot, for reasons of space, be investigated in this paper. Any other sum, paid as compensation for damage, corresponds to an injury to the worker's person and will therefore not have dissuasive efficacy by itself.