

EISSN 2499-4650



Diretta da ENRICO GRAGNOLI

Numero straordinario

Variazioni su Temi di Diritto del Lavoro



G. Giappichelli Editore – Torino

Rivista trimestrale - Numero straordinario

www.dirittoalavorovariazioni.com

Variazioni su Temi di Diritto del Lavoro

Diretta da ENRICO GRAGNOLI

Numero straordinario



G. Giappichelli Editore – Torino

Direttore responsabile: Enrico Gragnoli

Direzione e Redazione

email: greco.vtdl@libero.it

www.dirittolavorovariazioni.com

© Copyright 2019 - G. GIAPPICHELLI EDITORE - TORINO

VIA PO, 21 - TEL. 011-81.53.111 - FAX 011-81.25.100

<http://www.giappichelli.it>

Servizio di stampa ad uso privato di Rivista Digitale.

Comitato di direzione

José Antonio Fernandez Avilés – Emilio Balletti – Vincenzo Bavaro – Franca Borgogelli – Alessandro Boscati – Stefano Brusati – Piera Campanella – Guido Canavesi – Carlo Cester – Maurizio Del Conte – Antonio Di Stasi – Madia D’Onghia – Loredana Ferluga – Valeria Fili – Alessandro Garilli – Andrea Lassandari – Fiorella Lunardon – Luigi Menghini – Michele Miscione – Antonella Occhino – Alberto Pizzoferrato – Maurizio Ricci – Antonio Vallebona – Carlo Zoli – Antonello Zoppoli

Comitato di redazione

Maria Giovanna Greco (*caporedattore*) – Mirko Altimari – Lucia Bello – Ilaria Bresciani – Ilaria Cairo – Francesco Capparelli – Massimo Cundari – Lorenzo Maria Dentici – Cristina Marani – Martino Matarese – Fabio Pantano – Susanna Palladini – Marta Selicorni – Luigi Sposato – Laura Torsello – Ester Villa – Valentina Zaccarelli

Comitato di valutazione

Luigi Angiello – Francesco Basenghi – Alessandro Bellavista – Stefano Bellomo – Paola Bozzao – Marina Brollo – Luca Calcaterra – Davide Casale – Matteo Corti – Luigi De Angelis – Michele De Luca – Marco Esposito – Vincenzo Ferrante – Maria Dolores Ferrara – Marco Ferraresi – Lorenzo Gaeta – Donata Gottardi – Renato Greco – Fausta Guarriello – Stella Laforgia – Chiara Lazzari – Stefano Liebman – Mariella Magnani – Sandro Mainardi – Valerio Maio – Massimiliano Marinelli – Oronzo Mazzotta – Roberta Nunin – Paola Olivelli – Antonello Olivieri – Roberto Romei – Riccardo Salomone – Francesco Santoni – Alessandra Sartori – Valerio Speciale – Adriana Topo – Paolo Tosi – Armando Tursi – Roberto Voza – Anna Zilli

Norme di autodisciplina

1. La valutazione dei contributi inviati per la pubblicazione, sia su iniziativa degli Autori, sia in quanto richiesti dal Comitato di direzione, è affidata a due membri del Comitato per la valutazione scientifica scelti a rotazione.
2. Il contributo è inviato ai valutatori senza notizia dell’identità dell’Autore.
3. L’identità dei valutatori è coperta da anonimato. Il parere anonimo è inviato all’Autore.
4. In caso di pareri contrastanti la direzione assume la responsabilità della decisione.
5. Ove dalle valutazioni emerga un giudizio positivo condizionato a revisione o modifica del contributo, la direzione promuove la pubblicazione solo a seguito dell’adeguamento del saggio assumendosi la responsabilità della verifica.

Indice

Index

Il tema

La libertà religiosa

| | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| ANTONIO OJEDA-AVILÈS, <i>The collective negotiation of reasonable accommodation of the religious acts in the company</i> | 1231 |
| CHRISTOPHE VIGNEAU, <i>Religious freedom at work in France</i> | 1253 |
| ALBERTO PIZZOFERRATO, <i>Freedom of Religion in the Workplace: the Current State of the Art</i> | 1263 |
| ENRICO GRAGNOLI, <i>Divine protection and human law. Work, the social marginality of religion and protection of freedom</i> | 1275 |
| LUCIANO GENOVESI, <i>Religious creed and law: two worlds apart?</i> | 1297 |
| STEFANIA SCARPONI, <i>The “fair balance” of fundamental rights in the European Court of Justice decisions in the matter of religious freedom at work and the impact of the principle of “proportionality”</i> | 1313 |
| ANTONELLO OLIVIERI, <i>The legal system between divine law and labour law: the one who is overmuch righteous, for this reason becomes unrighteous</i> | 1333 |
| MARCO BIASI-ALESSANDRO NEGRI, <i>Religious Freedom and Professional Sports: the Case of the NBA Players Observing the Ramadan Fast</i> | 1351 |
| CINZIA CARTA, <i>Companies’ policies of neutrality and the principle of non – discrimination</i> | 1367 |
| GIULIA CASSANO, <i>The freedom of religion in the workplace in the latest case law of the Court of Justice of the European Union: the Cresco investigation case and religious holidays</i> | 1379 |

| | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| CLAUDIA CARCHIO-ELISABETTA SARTOR, <i>The principle of secularity as a neutral approach and the indirect religious discriminations in the employment relationship</i> | 1391 |
| STEFANO MARIA CORSO, <i>Religious belief versus health and safety at work: labour law as a guarantor of respect for fundamental rights</i> | 1413 |
| BARBARA DE MOZZI, <i>Religious freedom and the right to rest days on religious festivals (of others).</i> | 1429 |
| PIERLUIGI DIGENNARO, <i>A critical assessment of the EUCJ case law on the manifestation of religious convictions at the workplace</i> | 1451 |
| INMACULADA MARÍN ALONSO-CARMEN SOLÍS PRIETO, <i>The impact of religious freedom in the Labor and Social Security Framework in Spain</i> | 1465 |
| CATERINA MAZZANTI-GIANLUCA PICCO, <i>The principle of laicism in the employment relationship from the perspective of National and European jurisprudence</i> | 1489 |
| FATIMA NOGAYLIEVA, <i>Accommodating Religion and Belief in Russian Labour Law: Silent Consent or Unspoken Tabu</i> | 1507 |
| MARCO PERUZZI-ANNA ZILLI, <i>Sexual orientation and work in organizations with religion or belief – based ethos</i> | 1519 |
| GIUSEPPE ANTONIO RECCHIA, <i>“Discrimination on another ground”: when religious liberty and sexual orientation collide</i> | 1539 |
| NICOLÒ ROSSI, <i>Working time and religious belief: a matter of reasonableness</i> | 1561 |
| MILENA S. ROUXINOL, <i>Brief thoughts on some problems arising from religious expression in workplace</i> | 1575 |
| CATERINA TIMELLINI, <i>Islam subtly enters the labor relationship between trade union negotiations and inclusive safety</i> | 1587 |
| LAURA TORSSELLO, <i>Religious freedom in the workplace, between new needs and the multi – dimensionality of protection</i> | 1603 |
| LUIS ANGEL TRIGUERO MARTINEZ, <i>Relaciones laborales y religión en la empresa: que lugar para la gestión de los riesgos psicosociales?</i> | 1617 |

Saggi

| | |
|------------------------------------------------------------------------------------------------------------------------------------------------|------|
| MARIA DEL FRATE, <i>Le Sezioni unite n. 16601 del 2017 in materia di punitiva damage: una possibile lettura in prospettiva giuslavoristica</i> | 1631 |
|------------------------------------------------------------------------------------------------------------------------------------------------|------|

| | |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| FRANCESCA DE MICHIEL, <i>Il reddito di cittadinanza, tra contrasto alla povertà e politiche attive del lavoro</i> | 1659 |
| IRENE DI SPILIMBERGO, <i>Ancora sulla tensione fra tutela e parità di genere nel lavoro</i> | 1693 |
| LOREDANA FERLUGA, <i>Il lavoro nelle cooperative sociali</i> | 1711 |
| VINCENZO FERRANTE, <i>Nullità e disciplina del rapporto di lavoro</i> | 1731 |
| CHIARA LAZZARI, <i>Sull'incerta vigenza dell'art. 8, commi primo – terzo, della legge n. 148 del 2011</i> | 1755 |
| GIAN PIERO MARCELLINI, <i>Il convivente more uxorio quale potenziale beneficiario del congedo straordinario per assistere un familiare disabile e l'età avanzata del titolare del diritto quale potenziale causale di subentro dei legittimati sussidiari</i> | 1785 |
| FEDERICO PISANI, <i>I diritti dei ricercatori universitari sulle invenzioni finanziate</i> | 1807 |
| GIULIA SCURZIO, <i>Una prospettiva internazionale sulla tutela della stabilità del lavoro</i> | 1829 |
| PAOLO TOMASSETTI, <i>Apprendistato di primo livello e legislazione speciale sul lavoro dei minori: profili critici e prospettive evolutive</i> | 1865 |
| <i>Autori</i> | 1893 |

The freedom of religion in the workplace in the latest case law of the Court of Justice of the European Union: the *Cresco Investigation* case and religious holidays

La libertà religiosa nel rapporto di lavoro alla luce della recente giurisprudenza della Corte di Giustizia dell'Unione Europea: il Cresco Investigation case e le festività religiose

Giulia Cassano

Dottoranda di ricerca in Diritto del lavoro nell'Università degli Studi di Milano

ABSTRACT

The present paper studies the freedom of religion in the workplace taking into consideration the latest case law of the CJEU. In particular, the Cresco Investigation case gives the chance to investigate the connection between anti-discrimination law on religious grounds and religious holidays. In fact, there can be some faiths that need to celebrate particular days – relevant for their religion – not taken into consideration by the official national calendar, for cultural and historical reason. The paper, therefore, aims to show the possible ways to face the issue, that can involve an intervention of national legislators or of the EU or can be regulated by private agreements.

Keywords: freedom of religion in the workplace – EU anti-discrimination law – official holidays calendar – religious holidays – reasonable accommodation on religious grounds.

Il contributo prende in esame la libertà religiosa sul luogo di lavoro alla luce della recente giurisprudenza della Corte di Giustizia dell'Unione Europea. In particolare, il caso Cresco Investigation offre l'occasione per investigare la relazione tra la normativa antidiscriminatoria basata sul fattore religioso e le festività religiose. Si deve infatti rilevare che i calendari ufficiali includono tra le feste nazionali le festività religiose rilevanti solo per alcune religioni (per ragioni storiche e culturali), mentre quelle di altre confessioni religiose non vengono in alcun modo prese in considerazione. Illustrata la problematica, si propone la regolazione di tali problematiche o da parte del legislatore o con accordi privati.

Parole chiave: libertà di religione sul luogo di lavoro – normative UE antidiscriminatorie – calendario ufficiale – festività religiose – accomodamenti ragionevoli per motivi religiosi.

SUMMARY:

1. The Cresco Investigation case and the freedom of religion in the workplace under European non-discrimination law. – 2. The justifications to the principle of non-discrimination: Article 2(5) and 7 of the Directive 2000/78/EC. – 3. The configurability of a right to reasonable accommodation on religious grounds. – 4. Final remarks.

1. *The Cresco Investigation case and the freedom of religion in the workplace under European non-discrimination law*

The freedom of religion in the workplace is one of the most important issue of modern times, arisen as a result of the increasing multiculturalism, integration and migration in Europe¹. There are many situations in which religion and employment may intersect².

The Court of Justice of the European Union (below “CJEU”) has ruled in several occasions recently about discrimination on religious grounds in the workplace, thus providing a fundamental guideline for the interpretation and the study of the matter (i.e. CJEU 14 March 2017, C-157/2015, Ahbita; CJEU 14 March 2017, C-188/2015, Bougnaoui; CJEU 17 April 2018, C-414/2016, Egenberger; CJEU 11 September 2018, C-68/2017, IR; CJEU 22 January 2019, C-193/2017, Cresco Investigation).

¹ E. RELAÑO PASTOR, *Towards Substantive Equality for Religious Believers in the Workplace? Two Supranational European Courts, Two Different Approaches*, in *Oxford Journal of Law and Religion*, 2016, 5, 279; S. MESEGUER VELASCO, *La integración de la diversidad religiosa en el ámbito de las relaciones laborales: la cuestión de las prácticas religiosas*, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, 2012, 28, 27; M. ELOSEGUI ITXASO, *El concepto jurisprudencial de acomodamiento razonable*, Editorial Aranzadi, Navarra, 2013, 202.

² S.H. VAUCHEZ, *Religious holidays in employment – Austria, France & Spain*, in *European Equality Law Review*, 2018, 2, 63; K. ALIDADI, *Religion, Equality and Employment in Europe: the Case for Reasonable Accommodation*, Hart Publishing, Oxford, 2017; E. HOWARD, *Religious clothing and symbols in employment. A legal analyses of the situation in the EU Member States*, *European Network of Legal Experts in gender equality and non-discrimination*, 2017, available at https://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=48810; S.H. VAUCHEZ, *Equality and the Market: the Unhappy Fate of religious discrimination in Europe*, in *European Constitutional Law Review*, 2017, 13, 744.

The present paper focuses on the Cresco Investigation case (CJEU 22 January 2019, C-193/2017, Cresco Investigation)³ and on the issues that it arises.

This ruling offers the chance to explore the legal status of religious holidays in employment relationship and its connections with the EU anti-discrimination law⁴.

At a European level, the freedom of religion is granted in Article 10 of the Charter of Fundamental Rights of the European Union (below “CFR”), as a right that «includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance».

As the extent of its content is not well defined⁵, the interpretation of the term “religion” is given in light of the international human rights instruments as elaborated in the case law of the European Court of Human Rights under Article 9 ECHR⁶. Therefore, this right covers theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief⁷.

In addition, as stated in the consistent CJEU jurisprudence, the freedom of religion protects both the *forum internum* – i.e. a person’s right to form, to hold and to change serious inner convictions and beliefs and that has absolute protection – and the *forum externum* – i.e. a person’s right to manifest or outwardly display a religion or belief, either alone or as part of a community⁸.

³ For an analysis of this decision see also E. GRAGNOLI, *I lavoratori italiani possono chiedere il riposo nel giorno di Indù Dipavali?*, in *Labor*, 2019, 2, 177 ff. and B. DE MOZZI, in this review.

⁴ S. H. VAUCHEZ, *op. cit.*, 63.

⁵ M. GATTI, *The Log in Your Eye: Is Europe’s External Promotion of Religious Freedom Consistent With its Internal Practice?*, in *European Law Journal*, 2016, 22, 2, 250; L. VICKERS, *Religion and Belief Discrimination in Employment—the EU Law*, European Network of Legal Experts in the Non-discrimination Field, European Commission, 26; E. RELANO PASTOR, *cit.*, 258.

⁶ See the case law mentioned in E. HOWARD, *Study on the implementation of Directive 2000/78/EC with regard to the principle of non-discrimination on the basis of religion or belief*, in *European Parliamentary Research Service*, 2016; see also E. ELLIS, P. WATSON, *EU Anti-discrimination Law*, Oxford University Press, Oxford, 2012, 35.

⁷ Human Rights Committee, General Comment 22, *The Right to Freedom of Thought, Conscience and Religion (on Art. 18)*, 1993; the Committee also states that the terms “religion” and “belief” are to be broadly construed and that Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.

⁸ S. CAÑAMARES ARRIBAS, *Igualdad religiosa en las relaciones laborales*, Editorial Aranzadi, Navarra, 2018, 22; see, to that effect, CJEU 14 March 2017, G4S Secure Solutions, C-157/15; CJEU 14 March 2017, Bougnaoui and ADDH, C-188/15; CJEU 22 January 2019, C-193/2017, Cresco Investigation.

The freedom of religion is also taken into consideration as a risk factor in Article 21 of the CFR as well as in Article 19 TFEU, that state the non-discrimination principle, a cornerstone of the European law⁹. The aim of this principle is to allow all individuals an equal and fair prospect to access opportunities available in a society – and, for what matters here, in the workplace – so that individuals who are in similar situations should receive similar treatment and not be treated less favourably simply because of a particular protected characteristic that they possess¹⁰.

As it is well known, the European legislator has had a crucial role for the development of the non-discrimination rules, according to a social integration policy¹¹. With this extent, the fundamental European rule regarding the discrimination on religious grounds is the Council Directive 2000/78/EC of 27 November 2000 (below “Employment Equality Directive”) that establishes a general framework for equal treatment in employment and occupation, in order to fight discrimination on the grounds of – for what here matters – religion or belief¹².

The structure of the Directive 2000/78/EC is based on the identification of risk factors, relevant for the scope of the law, and on the provision of different forms of conduct prohibited under the Directive. Moreover, some exceptions (also called justifications) to the prohibition of discrimination are allowed in situations prescribed in the Directive itself¹³.

⁹ J. CROON, *Comparative Institutional Analysis, the European Court of Justice and the General Principle of Non-Discrimination-or-Alternative Tales on Equality Reasoning*, in *European Law Journal*, 2013, 19, 2, 153. For a detailed history P. CRAIG, G. DE BURCA, *The Evolution of EU law*, Oxford University Press, Oxford, 2011, 611.

¹⁰ For an overview on the topic see G. ZICCARDI, *Il principio di non discriminazione nel rapporto di lavoro*, in *Questione giustizia*, 2014, 1, 173.

¹¹ F. MARINELLI, *Il licenziamento discriminatorio e per motivo illecito: contributo allo studio delle fattispecie*, Giuffrè, Milano, 2017, 55; G. CHITI, *Il principio di non discriminazione e il Trattato di Amsterdam*, in *Riv. it. dir. proc. civ.*, 2000, 3-4, 851; P. BELLOCCHI, *Divieti di discriminazione, interventi di contrasto e sanzioni specifiche contro gli atti discriminatori*, in G. SANTORO PASSARELLI, *Diritto e processo del lavoro e della previdenza sociale. Privato e pubblico*, Utet, Torino, 2017, 697.

¹² In the same year, the EU adopted also the Directive 2000/43/EC, prohibiting racial and ethnic origin discrimination and this was the first time the EU legislated against these grounds of discrimination; on the topic see E. HOWARD, *EU Anti-discrimination Law: Has the CJEU Stopped Moving Forward?*, in *International Journal of Discrimination and the Law*, 2018, 18, 60.

¹³ D. IZZI, *Eguaglianza e differenze nei rapporti di lavoro. Il diritto antidiscriminatorio tra genere e fattori di rischio emergenti*, Jovene, Napoli, 2005, 391; E. HOWARD, *Indirect Discrimination 15 Years on*, in *E-Journal of International and Comparative Labour Studies*, 2015,

Regarding the derogations to the non-discrimination principle, some of these are: the genuine occupational requirements (Article 4(1)); the difference of treatment imposed by churches and other public or private organisations the ethos of which is based on religion or belief (Article 4(2)); the exceptions based on Articles 2(5) and 7(1) of the Directive, that will be deeper discussed below.

Given the above concerning the European framework on the issue, the Cresco Investigation case arises questions on the connection between religious discrimination in the workplace and the official holidays calendar, provided that it concerns an Austrian legislation that granted holiday (or additional salary) on Good Friday only to employees members of certain churches.

It must be noted that most EU countries have an official calendar of holidays that includes some religious holidays, because of historical development. Given the overall predominance of Christianity in Europe, these official calendars unsurprisingly include Christian holidays as religious holidays¹⁴.

About the point, considering how deeply socially and culturally embedded the social organization of time is, some interpreters expressed the need for more attention on the eventual configurability of forms of discrimination due to choices such as a predominant rule of Sunday rest or official annual calendars, considering that official holidays constitute rest for all the employees, regardless of their religion¹⁵.

Therefore, there is an emerging discussion about the grant of days or other entitlements (such as a certain adjustment of the working time) that can be reserved for believers of faiths not taken into consideration by official calendar.

Therefore, for the purposes of the present research, the topic can be studied from two different perspectives.

Firstly, one that focuses on the issues that can arise when the needs of a particular church are taken into consideration by a national law. With this extent, the Cresco Investigation case is a guideline for the identification of situations that legitimate Member States to adopt measures that constitute a favourable treatment for religious minorities.

available at http://www.adapt.it/EJCLS/index.php/ejcls_adapt/article/view/321; E. HOWARD, *Study on the implementation of Directive 2000/78/EC with regard to the principle of non-discrimination on the basis of religion or belief*, in *European Parliamentary Research Service*, 2016, 35.

¹⁴S.H. VAUCHEZ, *op. cit.*, 67; S. MESEGUER VELASCO, *La integración de la diversidad religiosa en el ámbito de las relaciones laborales: la cuestión de las prácticas religiosas*, in *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, 2012, 28, 5.

¹⁵S.H. VAUCHEZ, *op. cit.*, 67.

Secondly, some of the interpreters investigated the configurability of a right to reasonable accommodation of the employees towards employers, in order to protect the freedom of religion of workers that are members of churches that impose celebrations or rituals not taken into consideration by the public holidays calendar.

In the analysis of the two perspectives, the difference between the prohibition of discrimination and the reasonable accommodation must be taken into consideration. On the one hand, the principle of non-discrimination constitutes a limit to employer's powers; on the other hand, reasonable accommodation is a specific right guaranteed to employees in certain situations provided by law¹⁶.

2. The justifications to the principle of non-discrimination: Article 2(5) and 7 of the Directive 2000/78/EC

For what concerns the first perspective under which the Cresco Investigation case can be studied, the analysis of the exceptions to the principle of non-discrimination prescribed in Articles 2(5) and 7 of the Directive can be conducted following the steps of the CJEU in the decision of the case at issue.

To begin, as already said, the Court of Justice of the European Union was required to rule on the compliance with the European anti-discrimination legislation of an Austrian legislation (below "ARG") 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 public holiday pay.

In the decision-making process, the CJEU, firstly, established that such a legislation could give rise to a difference in treatment between comparable workers, directly based on the religion of employees. And this in view of the fact that the grant of a public holiday on Good Friday is subject only to the condition that such an employee must formally belong to one of those churches and not to the condition that the employee must perform a particular religious duty during that day, thus making this situation entirely comparable to the one of other employees who wish to have a rest or leisure period on Good Friday¹⁷.

¹⁶M.T. CARINCI, *Il licenziamento discriminatorio alla luce della disciplina nazionale: nozioni e distinzioni*, in *Riv. it. dir. lav.*, 2016, III, 720; on the notion of the principle of non-discrimination as a limit to employer's powers see M. BARBERA, *Discriminazioni ed eguaglianza nel rapporto di lavoro*, Giuffrè, Milano, 1991, 51.

¹⁷CJEU 22 January 2019, C-193/2017, Cresco Investigation, parr. 38-51.

Given that the Austrian legislation at issue has the effect of treating comparable situations differently on the basis of religion, the Court questioned whether such direct discrimination may be justified on the basis of Article 2(5) of Directive 2000/78 or Article 7(1) of that Directive¹⁸.

In particular, Article 2(5) contains a general exception and states that «This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others».

In the first interpretation of the provision, it was pointed out that the purposes that allowed to derogate the principle of non-discrimination were not well defined, thus creating a wide area of lawful discrimination for the Member States, under the cover of the needs of a democratic society¹⁹.

However, the CJEU has stated – in the Cresco Investigation Case as well as in other occasions²⁰ – that Article 2(5) of the Directive must be interpreted strictly, thus reassuring the interpreters' concerns that thought that the exception at issue was formulated too broadly²¹.

In particular, the Court, in the discussed decision, recognised the ARG as a national law set out in order to protect the freedom of religion, objective, thus, included among those listed in Article 2(5) of Directive.

However, the CJEU noted that the right of employees not belonging to churches covered by the ARG to celebrate a religious festival not included in any public holidays, could be protected only by a permission given by the employer, which allows the worker to obtain the right to be absent from their work for the amount of time necessary to perform certain religious rites.

As a result, the Court established that national measures such as the ARG cannot be considered necessary for the protection of freedom of religion, within the meaning of Article 2(5) of Directive 2000/78.

Regarding Article 7(1) of Directive, entitled “*Positive Action*”, it provides that, with a view to ensuring full equality in practice, the principle of equal

¹⁸ CJEU 22 January 2019, C-193/2017, Cresco Investigation, par. 51-69.

¹⁹ P. CHIECO, *Le nuove direttive comunitarie sul divieto di discriminazione*, in *Riv. it. dir. lav.*, 2002, I, 95.

²⁰ As stated in earlier rulings: CJEU 12 January 2010, C-341/08 Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe; CJEU 13 September 2011, C-447/09, Prigge and Others v Deutsche Lufthansa AG.

²¹ E. ELLIS, P. WATSON, *EU Anti-discrimination Law*, Oxford University Press, Oxford, 2012, 402.

treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds covered by the Directive²².

As the initial words of the Article suggest, positive action can be set out in order to aim at substantive or factual equality rather than mere formal equality²³.

The measures in question are therefore authorised, although discriminatory in appearance, if in fact intended to eliminate or reduce actual instances of inequality which may exist in society.

Nevertheless, in determining the scope of this derogation to the principle of equal treatment, due regard must be given to the principle of proportionality, which requires that derogations remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued²⁴.

By failing to comply with the above requirements, a law like the one at issue in the discussed judgement of the CJEU could unexpectedly benefit the alleged disadvantaged groups of employees and, at the same time, result discriminatory towards the other employees not carrying the risk factor.

In fact, in the Cresco Investigation Case, the Court stated that the measures set out in the Austrian legislation went beyond what was necessary to compensate for that alleged disadvantage and established a difference in treatment among employees subjected to comparable religious duties.

Regarding the application of Article 7 of the Directive, it must be pointed out that many EU Member States have put in place positive action measures, most often in relation to disabled people. There are very few examples of positive action measures in relation to religion and belief²⁵.

On this point, part of the doctrine²⁶ noted that positive actions could hardly be used in religious matters by a Member State that claims to be a secular

²² P. CHIECO, *Le nuove direttive comunitarie sul divieto di discriminazione*, in *Riv. it. dir. lav.*, 2002, I, 114.

²³ M.V. BALLESTRERO, *Eguaglianza e differenze nel diritto del lavoro. Note introduttive*, in *Lav. dir.*, 2004, 3-4, 506; E. RELAÑO PASTOR, *op. cit.*, 261; E. HOWARD, *op. cit.*, 55.

²⁴ P. CHIECO, *op. cit.*, 115.

²⁵ E. HOWARD, *op. cit.*, 56.

²⁶ S. CAÑAMARES ARRIBAS, *Igualdad religiosa en las relaciones laborales*, Editorial Aranzadi, Navarra, 2018, 41; A. LOPEZ-SIDRO, R. PALOMINO, *¿Cabe la discriminación positiva en relación con el factor religioso?*, in *Revista General de Derecho Canonico y de Derecho Eclesiástico del Estado*, 2011, 25, 18.

state. In fact, a positive action pursued by a Member State in favour of a certain religious community could be seen as undue support to a religious conviction rather than another.

Generally, it must be said that the concept of positive actions (also called positive discrimination) is often demanded by the increase of religious pluralism in the Member States²⁷.

3. *The configurability of a right to reasonable accommodation on religious grounds*

After considering the Cresco Investigation case and the justifications to the principle of non-discrimination as examined by the CJEU, it is now necessary to refer to the concept of reasonable accommodation in order to investigate its relevance for the topic at issue.

Reasonable accommodation is related to quest for substantive equality and to the concept of indirect discrimination²⁸. It is based on the fundamental observation that some individuals, because of an inherent characteristic (religion, for instance), face barriers to full participation in society²⁹.

The right to reasonable accommodation was firstly recognised in Canada and in the United States³⁰, where it constituted a real obligation of the employer towards employees³¹. It must be noted that, in these countries, the concept emerged in equality law precisely as a means of handling religious diversity and was then applied to other grounds of discrimination.

For the development of the debate at a European level, it is worth mentioning that the jurisprudence of the European Court of Human Rights (below “ECHR”) on equality provided cases in which the device of reasonable ac-

²⁷ A. LOPEZ-SIDRO, R. PALOMINO, *op. cit.*, 18.

²⁸ M. ELOSEGUI ITXASO, *op. cit.*, 203.

²⁹ E. BRIBOSIA, I. RORIVE, *Reasonable accommodation beyond disability in Europe*, report of the European Network of Legal Experts in Non-discrimination field, available at <https://publications.europa.eu/en/publication-detail/-/publication/d7715f13-cd38-428e-873be21b8c6ecb71/language-en>.

³⁰ J. MACLURE, C. TAYLOR, *Laïcité et liberté de conscience*, La Découverte, Paris, 2010; M. FERRI, *Gli accomodamenti ragionevoli in materia di libertà religiosa tra giurisprudenza della corte europea e della corte canadese*, in *JUS*, 2015, 3, 307; S. CANAMARES, *Igualdad religiosa en las relaciones laborales*, Editorial Aranzadi, Navarra, 2018, 57.

³¹ To that extent, it was crucial the judgement *Ontario Human Rights Commission [and O'Malley] v. Simpsons-Sears Lts.* (1985), 9 C.C.E.L. 185 (S.C.C.).

accommodation has been at issue³², even if the Court doesn't have a favourable approach for its recognition.

In the reasoning of the ECHR – and in the common understanding – the idea of reasonable accommodation is closely linked to a pluralist conception of religious freedom, based on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities³³, that can be achieved ensuring that competing groups tolerate each other³⁴.

Regarding the European Union, the notion of reasonable accommodation was explicitly established in the Directive 78/2000/CE in Article 5, but only with respect to disability³⁵.

For this reason, the question of whether the right to reasonable accommodation can be extended also to the other discrimination grounds – and, for what here matters, religion – laid down in the Employment Equality Directive and, in particular, if it can be derived from the prohibition of indirect discrimination has arisen among the interpreters³⁶.

³² For a deeper study M. FERRI, *Gli accomodamenti ragionevoli in materia di libertà religiosa tra giurisprudenza della corte europea e della corte canadese*, in *JUS*, 2015, 3, 307 and the jurisprudence there examined; E. BRIBOSIA, I. RORIVE, *Reasonable accommodation beyond disability in Europe*, report of the European Network of Legal Experts in Non-discrimination field, available at <https://publications.europa.eu/en/publication-detail/-/publication/d7715f13-cd38-428e-873b-e21b8c6ecb71/language-en>; C. EVANS, *Freedom of religion under the European Convention of Human Rights*, Oxford University Press, Oxford 2001; K. HENRARD, *Duties of reasonable accommodation in relation to religion and the European Court of Human Rights: a closer look at the prohibition of discrimination, the freedom of religion and related duties of state neutrality*, in *Erasmus Law Review*, 2012, 5, 1.

³³ See among others ECHR, *Gorzelik and others v. Poland*, App. n. 44158/98, 17 February 2004, par. 92; M. FERRI, *Gli accomodamenti ragionevoli in materia di libertà religiosa tra giurisprudenza della corte europea e della corte canadese*, in *JUS*, 2015, 3, 307.

³⁴ See ECHR, *Serif v. Greece*, App. N. 38178/97, 14 December 2000, par. 53.

³⁵ In 2000, the concept of reasonable accommodation was relatively new and unexplored in the European arena, at least in the field of non-discrimination law, as pointed out by L. WADINGTON, *Implementing and interpreting the reasonable accommodation provision of the framework employment directive: learning from experience and achieving best practice*, in *EU network of experts on disability discrimination*, 2004, 6.

³⁶ S.H. VAUCHEZ, *Religious holidays in employment – Austria, France & Spain*, in *European Law Review*, 2018, 2, 72; L. VICKERS, *Religion and Belief Discrimination in Employment – the EU law*, European Commission, 2006, 22; K. ALIDADI, *op. cit.*, 693; see also: E. BRIBOSIA, J. RINGELHEIM, *Aménager la diversité: le droit de l'égalité face à la pluralité religieuse*, in *Revue trimestrielle de droit européen*, 2009, 78, 319.

The concept of reasonable accommodation for religious reasons means any modification or adjustment to a job that would enable an employee, of a cultural or religious background which is different from the majority population, to perform essential job functions on an equal basis with others and in accordance of his or her convictions³⁷.

In particular, reasonable accommodation for religious grounds, relevant in the workplace, could be like adapting working time or dietary requests of employees according to the duties imposed by a certain religion or again – for what specifically concerns the Cresco Investigation case – adjusting holidays in case that some churches impose celebrations or rituals not taken into consideration by the public holidays calendar or by the national legislation.

There are some issues for the extension of the notion of reasonable accommodation beyond disability.

In particular, as the reasonable accommodation duty requires an analysis of an individual's situation, it suits discrimination on disability grounds very well, but it could be more difficult in case of religion, that is a group phenomenon³⁸.

Other issues are connected to the principle of secularism in a democratic society: in fact, also employees that don't belong to a particular religion could have demands that could be protected with a reasonable accommodation by the employer (such as adapting working time for family needs)³⁹.

Therefore, it would be difficult to select which kind of requires should be covered by the reasonable accommodation duty and which ones not.

Furthermore, in case of discrimination grounds different than disability, meeting the special needs of vulnerable or disadvantaged groups to ensure their effective participation is usually considered to be adequately tackled by applying the indirect discrimination device (i.e. the justification test). And this even if reasonable accommodation and indirect discrimination are not overlapping concepts⁴⁰.

However, the debate around the application of reasonable accommodation for religious grounds at a European Union level is still open.

³⁷ E. RELANO PASTOR, *op. cit.*, 256.

³⁸ S. CAÑAMARES ARRIBAS, *op. cit.*, 59.

³⁹ S. CAÑAMARES ARRIBAS, *op. cit.*, 61.

⁴⁰ E. HOWARD, *op. cit.*, 56.

4. *Final remarks*

In conclusion, the issues related to the connections between the freedom of religion and the non-discrimination principle in the workplace are an emerging debate that will concern both national legislators and employers.

The topic of the adjustment of the official calendar according to religious needs of workers members of minority confessions is only one of the problems that, in practice, employers and employees will face.

Therefore, it seems relevant for interpreters investigating which could be the best device to give a legal framework to these situations and, in particular, whether the issue should be faced within the anti-discrimination law system or with the provision of a right to reasonable accommodation.

The difference between the two presented perspectives is based on the above-mentioned different legal qualification of the non-discrimination principle and reasonable accommodation: the first is a limit to an employer's power; the second is an effective right of the employee to demand an organizational change from the employer⁴¹.

This legal distinction brings with it an economic one, since the right to reasonable accommodation requires a greater effort by the employer than the compliance with the non-discrimination principle.

Moreover, from a different side, a further point to consider is the question at what level is preferable to have a regulation of the topic, whether national, private or European.

As demonstrated by the Cresco Investigation case, adopting a national law that takes care of the needs of the religious minorities can lead to discriminatory issues as well as dilemmas linked to the principle of secularism of the state.

On the other hand, private agreements – also subject to compliance with the principle of non-discrimination – at company level may be the best option to find the right balance between religious requires of employees and business needs of the employer. In this way, the parties could also give a specific regulation for the right of reasonable accommodation of workers towards employers, providing its extension and limits.

Even if this solution has the disadvantages of being based on free private initiative, it must be pointed out that employers will be encouraged to negotiate, in order to prevent conflicts among employees, given the increasing multiculturalism of European society.

In any case, also a framework regulation from the EU could be desirable, since it could mean, at least, an awareness of the emerging phenomenon and it could increase the public consideration of the issue.

⁴¹ M.T. CARINCI, *op. cit.*, 720; M. BARBERA, *op. cit.*, 51.