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When it matters

Employment and Religious Freedom

David Ford

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TABLE OF CONTENTS

About the Author

David Ford is a partner at Carroll & O'Dea Lawyers, formerly at Emil Ford Lawyers. He practises mainly in commercial and employment law, particularly in the not-for-profit and education sectors. He has advised charitable institutions throughout Australia for over 40 years.

David is:

- A member of the Association of Workplace Investigators Inc and of the Australasian Association of Workplace Investigators
- A member of the Charity Law Association of Australia and New Zealand
- A member of the Australia and New Zealand Education Law Association and of the English, American and South African Education Law Associations
- The editor of *Education Law Notes*, which keep schools throughout Australia up-to-date with education law developments.
- A reviewer for the *International Journal of Law and Education*.
- A former Chairman of the Council of MLC School, Sydney.

David is often engaged by churches, charities and schools to prepare employment agreements, policies, codes of conduct, as well as conduct workplace and child protection investigations.

David has presented at conferences in the United Kingdom, South Africa, Belgium, the Czech Republic, New Zealand and throughout Australia, and published numerous papers on topics as varied as investigations; bullying (including cyber bullying); discrimination; transgender issues; discipline; and child protection enrolment procedures and conditions; counsellors and confidentiality.

David regularly presents in-school seminars for both staff and administrators on legal matters. He also consults to charities and their boards on governance issues.

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Employment and Religious Freedom

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What is this paper about?

The intersection between religion and employment is complex and brings with it many challenges. This paper will consider a number of issues religious institutions need to deal with when employing and managing staff, including:

(a) Faith as a key selection criterion for appointment and how the exemptions in anti-discrimination law apply.

(b) Employment contracts, codes of conduct and statement of faith statements.

(c) Holding views contrary to the employer's beliefs and ethos and sharing them outside the workplace, including on social media.

Faith as a key selection criterion for appointment

Some faith-based religious institutions want to employ only people who are adherents of that faith. The first issue addressed by this paper is whether the practice of a faith-based religious institution of employing only people who adhere to that faith is lawful in Australia.

Of course, there are several variations to the practice adopted by faith-based religious institutions. For example, using Christian religious institutions to illustrate:

(a) some will employ only Christian people;

(b) some will employ Christians wherever possible but are prepared to employ non-Christians if no Christian people apply for the position, provided that successful applicants are prepared to say that they are sympathetic with the Christian mission of the charity;

(c) some seek to employ Christians but will choose a sympathetic non-Christian person who is more competent than a Christian applicant for the position.

Of course, for most faith based religious institutions, when seeking to employ people of faith, they are looking at both the personal beliefs of the job applicant and at that person's behaviour. They are looking for beliefs

which are in accord with the institution's statement of faith and for behaviour which is consistent with the moral teaching of the faith. In many cases, they will also require the job applicant to attend a place of worship which is aligned to the faith of the institution or, at least, a place of worship which has a similar or identical statement of faith.

The law normally does not seek to legislate what people believe. At the same time, there has been a general acceptance that it is legitimate for a religious institution to employ people, particularly as religious practitioners (ministers, pastors, priests, rabbis and imams), who are adherents of the religion. Minds then differ as to how widely a religious practitioner should be defined. For example, in a Christian school, is it only the Principal and the Chaplain who are the religious practitioners, or is every member of staff, teaching and non-teaching, a religious practitioner?[1]

Fair Work Act 2009

Section 351(1) of the *Fair Work Act 2009* states that an employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of various attributes of the person including the person's sex, sexual orientation, marital status, and religion.

Adverse action includes refusing to employ a prospective employee or discriminating against a prospective employee in the conditions on which the employer offers to employ him or her. It also includes dismissing an employee or discriminating between the employee and other employees.

Section 351(2) qualifies subsection (1) by saying that it does not apply to action that is:

(a) not unlawful under any anti-discrimination law[2] in force in the place where the action is taken; or

(b) taken because of the inherent requirements of the particular position concerned; or

[1] *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012)
[2] This includes all the federal anti-discrimination acts and the *Anti-Discrimination Act 1977* (NSW), the *Equal Opportunity Act 2010* (Vic), the *Anti-Discrimination Act 1991* (Qld), the *Equal Opportunity Act 1984* (WA), the *Equal Opportunity Act 1984* (SA), the *Anti-Discrimination Act 1998* (TAS), the *Discrimination Act 1991* (ACT), and the *Anti-Discrimination Act* (NT).

(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed – taken:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Section 351(2)(a) has been the subject of several cases in the last couple of years where employees have been dismissed for expressing particular political views. In NSW and South Australia, one's religion and one's political views are not attributes which can found unlawful discrimination claims.

In *Quirk v Construction, Forestry, Mining and Energy Union,*[3] Perram J in the Federal Court was considering an application for summary dismissal of the proceedings which involved trying to remove some union officials because of their political views. The Union argued that section 351 could not be used because discrimination on the basis of political opinion was not prohibited by the *Anti-Discrimination Act 1977* (NSW). Hence, it was not unlawful. Perram J noted that the Explanatory Memorandum for section 351(2) suggests that it was intended to apply to matters which were exempted under the list of statutes in section 351(3) rather than operating on anything to which those statutes simply did not apply. He therefore felt it was a triable issue unsuitable for resolution in the application before the Court.

Then, in *Cameron v Goldwind Australia Pty Ltd,*[4] Ms Cameron sought an interlocutory injunction to restrain her employer, Goldwind, from terminating her employment. She was relying on section 351(1) saying that Goldwind had taken adverse action against her because of her political opinions associated with those advocated by Pauline Hanson's One Nation Party. The same issue with section 351(2)(a) arose. Goldwind argued that because dismissing someone on the ground of their political opinion was not covered by the *Anti-Discrimination Act 1977*, Goldwind's taking adverse action because of her political opinion would "not be unlawful" under that Act and so section 351(1) could not apply to such conduct.

[3] 2017
[4] Federal Circuit Court in June 2019

The argument is that, on its proper construction, section 351(2)(a) applies to any conduct that is not unlawful under an "anti-discrimination law", such as the *Anti-Discrimination Act 1977*. On this construction, the relevant question is whether the conduct said to constitute a contravention of section 351(1) would constitute a contravention of the *Anti-Discrimination Act 1977*. If the answer is no, that would have to mean that section 351(2)(a) applied, and there could therefore be no contravention of section 351(1).

The alternative argument is that section 351(2)(a) applies only to provisions of an anti-discrimination law that exempt conduct from the operation of the relevant anti-discrimination law. Given there is no provision in the *Anti-Discrimination Act 1977* that exempts conduct on the ground of political behaviour, section 351(2)(a) does not apply to the adverse action Ms Cameron alleged Goldwind had taken against her.

The judge felt that Ms Cameron had a reasonably arguable position.

Finally, in the most recent of these cases, *Rumble v The Partnership trading as HWL Ebsworth Lawyers*,[5] the law firm terminated Dr Rumble's employment because he criticised the Department of Defence and the Department of Veterans' Affairs, both of whom were clients of the firm. This was in breach of the firm's policy. Perram J found that the termination was permissible and accordingly Dr Rumble's claims failed. However, Dr Rumble also argued that he was dismissed because of his political opinions. The firm said that it was entitled to dismiss Dr Rumble from its employ because of his political opinion. Although *obiter*, the judge said he did not accept that "not unlawful" is limited to actions which are specifically permitted under an anti-discrimination law as opposed to where the relevant anti-discrimination law is silent on the issue. He said that such a construction does not sit with the plain meaning of "not unlawful". If an action is not proscribed by any anti-discrimination law, then plainly the action is not unlawful. Nor does it sit with the supplementary explanatory memorandum to the *Fair Work Bill 2008* (Cth), which explained an amendment changing the wording in section 351(2) from "authorised by" to "not unlawful" in the following terms (at [220]):

> *Paragraph 351(2)(a) … currently provides that action is not discriminatory if it is authorised by or under a Commonwealth, State*

[5] [2019] FCA 1409

> *or Territory anti-discrimination law. This exception is intended to ensure that where action is not unlawful under a relevant anti-discrimination law (eg, because of the application of a relevant statutory exemption) then it is not adverse action under subclause 351(1). The word 'authorised' may not capture all action that is not unlawful under anti-discrimination legislation, especially if the legislation does not specifically authorise the conduct but has the effect that the conduct is not unlawful. These amendments ensure the exception operates as intended.*

The use of the phrase "not unlawful" is expressed to capture actions beyond express statutory exemptions. As dismissal for political opinion is not unlawful under the *Anti-Discrimination Act 1977*, Perram J considered that, if Dr Rumble had been dismissed in NSW, that would not have contravened section 351.

All this applies equally to adverse action on the basis of religion.

Section 351(2)(b) raises the issue of what an inherent requirement is. In *Qantas Airways Ltd v Christie,*[6] Gaudron J (with whom Brennan CJ agreed) said:

> *A practical method of determining whether or not a requirement is an inherent requirement, in the ordinary sense of that expression, is to ask whether the position would be essentially the same if that requirement were dispensed with.*

Religious institutions are often quick to say that it is an inherent requirement of a position that their employees have a personal belief and commitment to the institution's statement of belief and that the employees must conduct themselves in accordance with the moral teachings of the institution's religion. Nevertheless, they can be in some difficulty when asked to demonstrate how the position would be different without the "belief and conduct" requirements.

Section 351(2)(c) is also relevant to religious institutions in that it provides a further exemption from the application of section 351(1). In other words, if the exemption applies, a religious institution cannot be found to have taken adverse action by not employing a person because of the person's sex, sexual orientation, marital status, or religion. There are several elements to be established by a religious institution seeking to rely on the exemption:

(a) the institution must be conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed;

[6] [1998] HCA 18 at [36]

(b) the discriminatory action must be taken in good faith; and

(c) the discriminatory action must be taken to avoid injury to the religious susceptibilities of adherents of that religion or creed.[7]

More about this is said below in relation to the similar exemption in section 37 of the *Sex Discrimination Act 1984* (Cth).

Part 6-4 of the Fair Work Act has additional provisions relating to the termination of employment. Section 772 states that an employer must not terminate an employee's employment for one or more of a long list of reasons, or for reasons including one or more of those reasons, which include sex, sexual orientation, marital status, and religion.

Sex Discrimination Act 1984 (Cth)

The *Sex Discrimination Act 1984* (Cth) makes unlawful direct and indirect discrimination on the grounds of a person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities.

One might wonder why I am even considering this Act in a paper about employment and religious freedom. However, the reality is that most religions include in their teaching much about relationships: marriage, extra-marital relationships, homosexuality, and so on. Therefore, the *Sex Discrimination Act* will often have application to religious institutions and their employment practices. In particular, it is common for those practices, on their face, to constitute unlawful discrimination.

Section 14 sets out the basic proposition in relation to employment:

(1) It is unlawful for an employer to discriminate against a person on the ground of the person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities:

(a) in the arrangements made for the purpose of determining who should be offered employment;

(b) in determining who should be offered employment; or

(c) in the terms or conditions on which employment is offered.

(2) It is unlawful for an employer to discriminate against an employee on the ground of the employee's sex, sexual orientation, gender

[7] Wesley Mission where it was said that the equivalent expression in the *Anti-Discrimination Act 1977* (NSW) did not mean that you had to show that the action was taken to avoid injury to all adherents of the religion but only a significant proportion of them.

> *identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities:*
>
> *(a) in the terms or conditions of employment that the employer affords the employee;*
>
> *(b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;*
>
> *(c) by dismissing the employee; or*
>
> *(d) by subjecting the employee to any other detriment.*

The *Sex Discrimination Act* provides for both direct and indirect discrimination, with indirect discrimination being subject to a reasonableness test in section 7B. For example, section 5A deals with discrimination on the ground of sexual orientation:[8]

> *(1) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person's sexual orientation if, by reason of:*
>
> *(a) the aggrieved person's sexual orientation; or*
>
> *(b) a characteristic that appertains generally to persons who have the same sexual orientation as the aggrieved person; or*
>
> *(c) a characteristic that is generally imputed to persons who have the same sexual orientation as the aggrieved person;*
>
> *the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person who has a different sexual orientation.*
>
> *(2) For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the aggrieved person's sexual orientation if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same sexual orientation as the aggrieved person.*
>
> *(3) This section has effect subject to sections 7B and 7D.*

Section 7B has a reasonableness test for indirect discrimination:

> *(1) A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in subsection 5(2), 5A(2), 5B(2), 5C(2), 6(2), 7(2) or 7AA(2) if the condition, requirement or practice is reasonable in the circumstances.*

[8] Section 5B deals with gender identity, section 5C deals with intersex status and section 6 deals with marital or relationship status.

> *(2) The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:*
>
> *(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and*
>
> *(b) the feasibility of overcoming or mitigating the disadvantage; and*
>
> *(c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice.*

Let me consider the situation of an interdenominational Christian organisation that does not want to employ a homosexual person in a role that involves working with various churches. If the organisation was able to establish that, in truth, its failure to offer the position to the person was not on the ground of his or her homosexuality but rather because the person was unable to satisfy the essential requirement imposed on all applicants that they be able to work with and have the support of the churches (all of which view an active homosexual lifestyle as sinful), this would not be unlawful **direct** discrimination. This requirement would have to be included in the job advertisement and employment contract. It would of course be necessary to show that the churches would not work with or support such a person.

The imposition of a requirement like this would be open to challenge on the basis that it amounted to **indirect** discrimination. The claimant would have to show that the requirement was one that had, or was likely to have, the effect of disadvantaging persons who had the same sexual orientation as the claimant. Although the onus of proof is on the claimant in this regard, as a practical matter, the organisation would need to show why the requirement was reasonable.

The test of reasonableness is an objective test which must be weighed against all relevant factors, which normally include the reasons advanced in favour of the condition, the nature and effect of the condition, the financial burden on the organisation of accommodating the needs of the claimant and the availability of alternative methods of achieving the organisation's objectives without recourse to the condition. For example, the organisation could argue, among other things, that the position would not be financially viable without the support of the churches whose members give money to the organisation to pay the wages of the employee.

If the claimant is able to show that the condition is unreasonable, the organisation would need to rely on the exemptions found in sections 37 and 38 of the Act. Section 37 reads:

> *(1) Nothing in Division 1 or 2 affects:*
>
> *(a) the ordination or appointment of priests, ministers of religion or members of any religious order;*
>
> *(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;*
>
> *(c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or*
>
> *(d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.*

Paragraphs (a), (b) and (c) are reasonably straightforward. Paragraph (d) requires greater attention. To come within the exemption, a religious institution must show:

> ***(a) that it is a body established for religious purposes; and***

This will involve looking at the institution's purposes (normally found in its constitution) and activities. Churches are clearly bodies established for religious purposes. Para-church and other organisations may also be established for religious purposes. However, not all organisations with a religious flavour will qualify. For example, in *Bevege v Hizb ut-Tahrir Australia,*[9] a lady complained of sex discrimination under the *Anti-Discrimination Act 1977* (NSW) when she attended a lecture staged by Hizb ut-Tahrir Australia and was required to sit in an area set aside for women and children, which was behind seating designated for male members of the audience. Hizb ut-Tahrir Australia bore the onus of establishing that it was "established to propagate religion", the test under the *Anti-Discrimination Act 1977*. There was no evidence of that. To the contrary, there was evidence that Hizb ut-Tahrir Australia described itself as a political party. Accordingly, it was unable to rely upon the section 56(d) exemption in the *Anti-Discrimination Act 1977*.

[9] [2016] NSWCATAD 44 (4 March 2016)

(b) that the refusal to employ the person:

(i) conforms to the doctrines, tenets or beliefs of the institution's religion; or

(ii) is necessary to avoid injury to the religious susceptibilities of adherents of the institution's religion.

There are clearly two limbs to this exemption. They are alternatives. The first limb involves judging an act or practice against the doctrines, tenets or beliefs of the institution's religion. The second involves judging an act or practice against the religious susceptibilities of the adherents of the institution's religion.

Having established that there is body established for religious purposes, the next step is to identify the body's religion. The majority in the NSW Court of Appeal in *OV & OW v Members of the Board of the Wesley Mission Council*[10] (the Wesley Case) found that, in relation to Christianity, the relevant religion could be a narrower version than the religion common to all Christian churches.

The difficulty, of course, will be demonstrating that, for the purpose of the first limb of the exemption, the relevant act or practice (that is, not offering a position to a person on account of their homosexuality) conforms to the doctrines of that religion when, more often than not, the doctrinal statements of a religious institution say nothing about things like homosexuality or gender identity. Ideally, the religious institution seeking to rely on the exemption will be able to provide extensive evidence of the existence of its beliefs about such matters, such as Dr Keith Garner provided in the Wesley Case. Obviously, such evidence can only be provided if it exists. The governing bodies of religious institutions need to put their mind to these matters and develop appropriate policies.

If a religious institution cannot show that the act or practice of refusing to employ a person who is a practising homosexual conforms to its beliefs, it must turn to the second limb of the exemption.

For many religious institutions, it will be equally difficult to demonstrate that, for the purpose of the second limb of the exemption (even though it is wider than the first limb), the relevant act or practice is necessary to avoid injury to the religious susceptibilities of the adherents of its religion. This does not

[10] [2010] NSWCA 155

mean all the adherents of its religion but rather a significant proportion of those adherents.[11]

While it would not be necessary for a religious institution to prove actual injury to the religious susceptibilities of adherents of its religion, it would need to demonstrate that its decision to refuse employment was made in good faith to avoid injury to the religious susceptibilities of those adherents. As Madgwick J said in *Hozack v The Church of Jesus Christ of Latter-Day Saints*:[12]

> *Action aimed at the avoidance of mere offence to the presumed social mores of church members, or of alarm to a faction not clearly amounting to "injury" to religious susceptibilities, would not suffice.*

In the Wesley Case, Basten JA and Handley AJA observed that the practice had to be judged against the religious susceptibilities of adherents to assess the likelihood of injury in the absence of such a practice.[13]

Also, in assessing the religious susceptibilities of adherents of the institution's religion, it is clearly relevant to know what that religion entails. This takes one back to its doctrines. It will be difficult to establish that the religious susceptibilities of adherents of the religious institution's religion will be injured by offering employment to a homosexual if the doctrinal statements say nothing about homosexuality.

Section 38 contains a specific exemption for educational institutions established for religious purposes:

> *(1) Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.*

This exemption is essentially identical to the exemption in section 351(2)(c) of the *Fair Work Act* referred to above.

[11] [2010] NSWCA 155 at para 12 per Allsopp P
[12] [1997] FCA 1300 (27 November 1997)
[13] [2010] NSWCA 155 at para 32 per Basten JA and Handley AJA

State and Territory Discrimination Legislation

Each of the states and territories has its own anti-discrimination legislation. All but the NSW[14] and South Australian Acts include religious beliefs and activities among the grounds upon which discrimination is unlawful. It is beyond the scope of this paper to consider them in detail. However, religious institutions need to be conscious of the requirements in this legislation as they will apply in addition to the requirements in the Federal legislation.

Religious Discrimination Bill 2019

On 22 November 2017, the Australian Government appointed an Expert Panel into Religious Freedom, chaired by Philip Ruddock, to consider whether Australian law adequately protected the right to freedom of religion. The Expert Panel reported to the then Prime Minister, Malcolm Turnbull, on 18 May 2018.

The Panel concluded that there was an opportunity to further protect, and better promote the right to freedom of religion under Australian law and in the public sphere. The report, *Religious Freedom Review*, made 20 recommendations to enhance the protection of the right to freedom of religion, both through legislative amendments to Commonwealth, state and territory legislation, and through non-legislative measures.

On 13 December 2018, the government released its response to the report. It accepted 15 of the Panel's recommendations. While noting and agreeing with the principle underpinning the remaining five recommendations, the government said that further consideration was necessary to address the complexities associated with these recommendations.

The government consulted with the states and territories on the terms of reference to the Australian Law Reform Commission and then, on 10 April 2019, formally asked the Commission to conduct an Inquiry into the *Framework of Religious Exemptions in Anti-discrimination Legislation*.

On 29 August 2019, the Attorney-General released exposure drafts of three draft bills, which together formed a legislative package on religious freedom. The main one was the *Religious Discrimination Bill 2019*.

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[14] On 13 May 2020, Mark Latham MLC introduced the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* into the NSW Parliament to make discrimination on the ground of a person's religious beliefs or activities unlawful.

At the same time, the Australian Law Reform Commission's Terms of Reference were narrowed by the Attorney-General on 29 August 2019 to exclude any issues covered by the *Religious Discrimination Bill*.

On 10 December 2019, the Prime Minister and the Attorney-General released second exposure drafts of the three bills. Submissions on this package closed on 31 January 2020.

On 2 March 2020, the Attorney-General amended the Australian Law Reform Commission's reporting deadline to be 12 months from the date the *Religious Discrimination Bill* is passed by Parliament.

COVID-19 has taken over since then and I do not expect any progress or a new Bill this year. When and if a new Bill is produced, there is no guarantee that it would be passed in the Senate, where there is considerable opposition to it. Accordingly, whether we ever get a *Religious Discrimination Act* is quite uncertain.

Employment contracts, codes of conduct and statements of faith as management tools

My long held view is that the employment contract plays a significant part in providing a solid framework for the employer/employee relationship to develop and thrive.[15] The importance of having a well thought out and prepared employment contract cannot be underestimated.

Religious institutions must have employment contracts which deal with their requirements for employees to have a commitment to a statement of faith and a code of conduct. Religious institutions for which it is important to appoint people who are personally committed to the institution's faith position need to obtain legal advice for, as seen above, the law is complex and the situation in the various states and territories differs. They must determine their position and prepare their employment contracts before they start to recruit employees.

Once the employee has commenced employment, the same principles apply as those that apply to the pre-employment period. The issue for religious institutions is whether they can terminate the employment of an employee when, after taking up the role, he or she abandons his or her

[15] *The Principal and the Board: An Essential Governance Dynamic* by David Ford www.emilford.com.au/imagesDB/wysiwyg/ThePrincipalandtheBoard-AnEssentialGovernanceDynamicPaper2016.pdf

faith or conducts himself or herself in a way that is inconsistent with adherence to that faith. This is where the employment contract needs to be drafted very carefully.

Codes of conduct and other policies are important documents. However, care must be taken when referring to them in an employment contract. It is not uncommon to see a provision saying that the employee must comply with the employer's policies. While that may sound reasonable and sensible, the law is that a provision of this type, even though it does not expressly oblige the employer to comply with those policies, is likely to incorporate into the contract all those policies. The consequence of that is that the employer and the employee are contractually bound to comply with them. A breach by either party of a policy could therefore give rise to a damages claim against the other.[16] Accordingly, the contract must be drafted carefully to avoid as far as possible such an undesirable consequence.

Holding/ sharing views contrary to employer's beliefs and ethos

It is common knowledge that employees do from time to time hold views which are different to those of their employers. In the past, those employees who shared their views did so in private settings which rarely saw the light of day. Now, employees are able to, and far too often do, share their views on social media. As a result, employers respond. The issue is to what extent employers are able to speak into the private lives of their employees.

A century ago, the Courts felt that employers should not be able to control the private lives of their employees.[17] Today, they are more willing to extend the rights of employers to act where the employee's conduct has caused serious harm to the employer's business or is contrary to the employer's policies. Indeed, such policies and codes of conduct may extend to things that are done outside of normal working hours and away from the usual place of work. For example, in *Colwell v Sydney*

[16] *McCormick v Riverwood* (1999) 167 ALR 689; [1999] FCA 1640; *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193; [2000] FCA 889 *Goldman Sachs v Nikolich* [2007] FCAFC 120; *Romero v Farstad Shipping* [2014] FCAFC 177

[17] *Australian Tramways Employees' Association v Brisbane Tramways Co Ltd* (1912) 6 CAR 35

International Container Terminals Pty Limited,[18] Commissioner McKenna said:

> *If an employee engages in conduct outside of the physical workplace towards another employee that materially affects or has the potential materially to affect a person's employment that is a matter which legitimately may attract the employer's attention and intervention. The use, out of work hours, of social media is one such example in the case of matters concerning bullying and sexual harassment.*[19]

and

> *This is not a case of an employer seeking to intrude too far into the private lives of employees or to attempting to exercise supervision over the private activities of employees. The respondent was not attempting to regulate the appropriateness of an employee's private use of social media; it was trying to respond to what was understood to be the dissemination of pornography to employees - and that considered against the background of concern arising in the context of the matters it was endeavouring to convey as to its values and approach to matters addressed in its policies and code, including potential sexual harassment of female employees. The material sent to employees by the applicant through the use of Messenger as out-of-hours conduct had the likely effect of presenting spillage or potential spillage into the workplace – where the employees would then work cheek-by-jowl together – and this in circumstances where they have received induction and instruction as to the values and culture that the respondent was endeavouring to engender.*[20]

The Commissioner also noted that "where there is a relevant nexus or 'connection' between the out of hours conduct and the interests of the employer (with those interests promulgated in the policies and code) an employer is warranted in conducting an investigation into those matters."[21]

This case concerned an employee sharing pornographic videos with other employees on social media. But what happens when employees share their religious views on social media, as Israel Folau did? In the English case of *Smith v. Trafford Housing Trust,*[22] Mr Adrian Smith, a practising Christian and occasional lay preacher, made comments on a Facebook page opposing same sex marriage, motivated by his religious views. This provoked numerous comments. At one point, Mr Smith wrote:

> *I don't understand why people who have no faith and don't believe in Christ would want to get hitched in church the bible is quite*

[18] [2018] FWC 174
[19] [2018] FWC 174 at para 74
[20] [2018] FWC 174 at para 111
[21] [2018] FWC 174 at para 98
[22] [2012] EWHC 3221

> *specific that marriage is for men and women if the state wants to offer civil marriage to same sex then that is up to the state; but the state shouldn't impose it's rules on places of faith and conscience.*

As a result, Mr Smith was suspended, made the subject of a disciplinary investigation which led to him being told that he had been guilty of gross misconduct for which he deserved to be dismissed. However, due to his long service record, he was demoted to a non-managerial position with a 40% pay cut. He then commenced proceedings seeking damages for breach of contract.

Mr Smith's employer, the Trafford Housing Trust, argued that his Facebook posts were in breach of its code of conduct and brought it into disrepute. The Court found that no reasonable reader of the posts could conclude that those posts about gay marriage in church were made on the Trust's behalf. The Trust also argued that the posts were likely to cause distress among other employees and its customers. The Court found that this was not the case, noting that the Trust encouraged diversity both amongst its customers and its employees and that this contributed to its well-deserved reputation. Such diversity among employees also meant that they would have widely different religious and political beliefs and views, some of which, however moderately expressed, could cause distress among the holders of deeply felt opposite views.

The Trust's code of conduct prohibited employees from attempting to promote their political or religious views. The Court found that this prohibition was not designed to prohibit any discussion of religion or politics, even in the workplace. The Court said:

> *The right of individuals to freedom of expression and freedom of belief, taken together, means that they are in general entitled to promote their religious or political beliefs, providing they do so lawfully. Of course, an employer may legitimately restrict or prohibit such activities at work, or in a work related context, but it would be prima facie surprising to find that an employer had, by the incorporation of a code of conduct into the employee's contract, extended that prohibition to his personal or social life.*[23]

Using the language found in *Colwell's Case*, the Court did not find a sufficient nexus between Mr Smith's Facebook posts and his work. Indeed, the Court noted that the situation would have been different had he composed some political or religious material and sent it by email to his work colleagues. However, based on the facts, what he did was inherently

[23] [2012] EWHC 3221 at para 66

not work-related. Although his Facebook page identified him as a manager at the Trust, he plainly used the page for the expression of personal views about matters which had nothing whatsoever to do with his work. The Court opined that to allow the employer to proscribe Mr Smith's social media activity would potentially interfere with his rights of freedom of expression and belief.

The Court concluded that the Trust did not have the right to demote Mr Smith because of his Facebook posts and that the demotion therefore constituted a breach of contract by the Trust.

Another case that raised issues of discrimination because of political and religious beliefs was the claim brought in the Victorian Civil and Administrative Tribunal against Ballarat Christian College by Rachel Colvin, a former teacher at the College, with the backing of Equality Australia. Like the Folau case, the Colvin claim was settled so we do not have the benefit of a court or tribunal's views on the matter.[24]

Mrs Colvin claimed that the College discriminated against her due to her political and religious beliefs, which included support for same-sex marriage. The College had made public its views on marriage as far back as 2015, before she was re-employed in 2016 (she had taught at the College some years before). Following same sex marriage being legalised in December 2017, the College amended its Statement of Faith through its constitution to make more explicit its position on marriage in accordance with orthodox Christian teaching.

Following the change in June 2018, College staff were made aware of the expanded document. Not long after, Mrs Colvin advised the College that she did not support the Statement of Faith. Equality Australia said: "Mrs Colvin offered to teach in accordance with the schools' beliefs. She simply wouldn't sign a statement purported (*sic*) to reflect her own beliefs that was actually at odds with her Christian beliefs." But another account has it round the other way: "the school requested that she still support and teach in accordance with the school's beliefs while being free to hold different personal views. The teacher was reportedly not prepared to do so."[25]

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[24] I have sourced most of my information about this case at https://csa.edu.au/religious-freedom-test-case-ballarat-christian-college/ and https://equalityaustralia.org.au/rachel-colvin-files-discrimination-complaint-against-ballarat-christian-college/

[25] https://www.eternitynews.com.au/australia/ballarat-case-highlights-school-staffing-issues-in-religious-discrimination-bill-debate/

The College began dispute resolution processes under its enterprise agreement but, before they could be finalised, she resigned in February 2019. She commenced proceedings in September 2019.

Christian Schools Australia commented:

> *The key issue in the matter being (sic) the difference of religious beliefs held by Mrs Colvin from those of the College. At stake is the ability of Christian schools to require staff to fully support the religious beliefs of the school as a Christian learning community. In ensuring that its Statement of Faith fully and expansively reflects its beliefs the College has done exactly what the Expert Panel on Religious Freedom recommended (recommendation 5) regarding making beliefs publicly available for employees.*

We have not seen the last of such cases!

Conclusion

We live in times where the view strongly held by many religious institutions that they ought to be able to employ people who are committed to their statement of faith and to live in accordance with it is under attack. Decisions in courts around the world have often indicated a complete lack of sympathy with those who hold "conservative" religious views.

The ongoing debate about religious freedom in employment and other areas could well see further restrictions imposed on the employment practices of religious institutions in Australia. Until that debate is concluded by legislation, religious institutions must engage and manage employees in accordance with the law as it is. With care, that is manageable.