An unholly trinity? Religion, employees and the workplace

By John Wilson and Kieran Pender

Australia is, by and large, a secular country. Australians have a constitutionally-entrenched freedom of religion, and anti-discrimination laws prohibit discrimination based on religion in a range of spheres. Yet as the furor surrounding the marriage equality survey demonstrated, religious issues sometimes intrude into the workplace. Companies large and small are sometimes required to adapt to religious beliefs and values that are alien to their employees.

The intersection between religion and employment is vexed. Drawing the boundaries between private and public life, and determining reasonable accommodations for religious observance in the workplace and exempting religious issues from general law deliberation requires delicate inquiry. In some religious contexts, the manner of appointment and on-going relationship will support the existence of an enforceable agreement; in others it will remain in the realm of a conventional ‘casual’ job – based upon religious, spiritual and mystical ideas. As these varied outcomes demonstrate, whether or not an intention to create legal relations exists will be a fact-dependent inquiry. In some religious contexts, the appointment of a Rodolfo to live in a monastery may also inherently be a contractual agreement.

Religion and the contract of employment

Religion has tended to intrude on the contract of employment in two distinct contexts. Firstly, spiritual motives may prevent a contract existing due to the absence of an intention to create legal relations. Alternatively, where a contract is on foot, religious issues may be incorporated into that relationship.

Intention to create legal relations

The intention to create legal relations is an essential requirement in the formation of a contract (Australasian Woolshed Mills Pty Ltd v Commonwealth (1954) 92 CLR 424, 425). Traditionally, it has been said that the normal contract setting gave rise to a presumption of the existence of such an intention.

The Australian position was altered in the seminal case of Ermogenous v Commonwealth (1979) 52 NSWLR 483, 513. The High Court held that freedom may be either to an individual or employer ‘(Cth) where the adverse action is taken by an educational institution: (1) ‘in accordance with the South Head & District Synagogue (Sydney) (admin appt) v Shamil (Cth) 2006 (NSWSC 1201, for example, the Supreme Court of NSW held that teachers at a particular religious school provided their services ‘as volunteers in response to a calling to serve God’ (at [59]).

Rabbi Milecki sought injunctive relief against the administrators of the synagogue, arguing that the termination was unlawful. According to Jewish law, a Rabbi has life tenure and cannot be terminated unless a Jewish court finds that they have fundamentally failed to perform their Rabbinical duties. Rabbi Milecki submitted that the Halacha was not incorporated or implied into his contract, such that the administrators were in breach by purporting to terminate the employment relationship. The administrators resisted the application, contending that there was no distinction between the Rabbi’s spiritual relations with the congregation and his contractual relations with the Synagogue.

Bereeton J found for the Rabbi. His Honour found it ‘inconceivable’ that Jewish law, and the associated lifetime tenure, was not intended to be incorporated into the contract (at [27]). Accordingly, Rabbi Milecki’s termination was considered void and the administrators restrained from giving effect to their prior actions. In any event, the synagogue was later wound up.

While the judgment in Re South Head & District Synagogue emphasises that religious law can be incorporated with considerable effect into an employment contract, an important caveat must be added. Incorporation cannot occur when the relevant body of law is ‘controversial, unclear or uncertain’ (such as, for example, where the specified religious law has dischargeable breaches or is inconsistent with the local law). This was ‘inevitably repugnant’ with the latter (at [22]). It might also be said that the case would preclude the incorporation of religious law where it can be said that it is discriminatory, including where it operated to avoid legislative obligations.

Discrimination based on religious belief

All states and territories, except NSW and South Australia, have introduced legislative prohibitions on religious-based discrimination (e.g. Anti-Discrimination Act 1991 Cth, Disability Discrimination Act 1992 Cth, Sex Discrimination Act 1984 Cth, for example, does not prohibit employment-based discrimination regarding sex, sexual orientation, gender identity, relationship status or pregnancy, when undertaken by an educational institution: (1) ‘in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed’; and (2) ‘in good faith in order to avoid the religious susceptibilities or teachings of that religion or creed.’

Such legislation enabled the Archbishop of Melbourne to threaten to dismiss Catholic school teachers who marry their same-sex partner (‘Married Sunday, fired Monday’, Sydney Morning Herald, 20 August 2017). A similar carve-out is provided in the Fair Work Act 2009 (Cth) and Age Discrimination Act 2004 (Cth), but not in the Racial Discrimination Act 1975 (Cth) or Disability Discrimination Act 1992 (Cth). The Anti-Discrimination Act 1977 (NSW), meanwhile, has a broad exception for religious based discrimination.

Conclusion

Australians are, according to the Australian Bureau of Statistics, losing their religion (with apologies to R.E.M). Consecutive censuses have shown a considerable increase in non-observance, with almost a third of the country expressing ‘no religion’ in the latest national count. But this trend has not precipitated a decline in controversy surrounding religion in the workplace. It may be no more than common sense, but employers (and their counsel) should be sensitive to religious matters in the workplace. It may be no more than common sense, but employers (and their counsel) should be sensitive to religious matters in the workplace. It might be no more than common sense, but employers (and their counsel) should be sensitive to religious matters in the workplace.

As such, in these jurisdictions an employer could not terminate an employee because they were, say, Buddhist. Discrimination based on religious belief also extends to discrimination against non-believers (Dixon v Anti-Discrimination Commissioner of Queensland [2005] 1 Qd R 209, for example, held that the Queensland Anti-Discrimination Act applied, despite the defendant’s self-identification as ‘religious’). More still, religious discrimination in the workplace is also prohibited by the Fair Work Act 2009 (Cth) (which prevents an employer taking adverse action against an employee (or prospective employee) because of a range of attributes including religion (s 351). This section does not apply where the adverse action is taken in accordance with the relevant body of law that is in force in the place where the action is taken. Accordingly, in NSW, it is not illegal to take adverse action against an employee on the basis of religious belief (distinct from ethos-religious belief), although the Queensland Work Act provides a backdrop for aggrieved (ex-)employees in such circumstances under the little-used unlawful termination provisions (s 772).

Discrimination as a consequence of religious observance

Challenging questions also arise concerning how employers might be required to adapt to meet the religious needs of employees. If a witness refused to serve alcohol on religious grounds, or an office clerk requested regular prayer breaks throughout the working day, would an employer’s refusal be discrimination? While some legislative schemes require consideration of the ‘circumstances of the employment’ and any ‘unreasonable detriment’ to the employer (Discrimination Act 1991 (ACT) s 11), Australian jurisprudence is sparse. In one case providing interesting food for thought: ‘Religious freedom is not an ingredient of an economic equation, however costly that freedom may be either to an individual or employer’ (Petroleum Refineries (Australia) Pty Ltd v Masters (1989) VR 789).

The catch-22 of free speech also rears its head in this context, typified by the terminated ‘no voter’ in the marriage equality survey and subsequent media frenzy. It is unknown whether that case will proceed to litigation.