An unholy trinity? **Religion, employees and the workplace**

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Snapshot

- Religious issues can arise in a range of workplace settings, including the contract of employment and religious discrimination.
- Religious law can be incorporated into Australian employment contracts, as a recent Supreme Court of NSW case highlights.
- Employers should take care to abide by their multi-faceted anti-discrimination obligations in the religious context, whether regarding hiring, dress codes or religious opinion.

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 furore surrounding the marriage equality survey demonstrated, religious issues sometimes intrude into the workplace. Companies large and small took vocal positions for and against marriage equality; in September a contractor in Canberra was terminated for expressing her religiously-motivated intention to vote no.

The intersection between religion and employment is vexed. Drawing the boundaries between private and public life, determining reasonable concessions for religious observance in the workplace and exempting religious organisations from general law require delicate judicial and legislative policy judgments. This topic is also inevitably a controversial one. What to an atheist might represent a reasonable compromise between religion and employment would likely be entirely different for a devoutly religious person.

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 law may be incorporated within that relationship.

Intention to create legal relations

The mutual intention to create legal relations is an essential requirement in the formation of a contract (*Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 457). Traditionally, it was considered that family, religious and community settings gave rise to a presumption against the existence of such intentions.

The Australian position was altered in the seminal case of *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 ('***Ermogenous***') in which the High Court highlighted the dangers of such presumptions. The Court held that the proper inquiry requires an 'objective assessment of the state of affairs between the parties' (at 105). Accordingly, '[t]o say that a minister of religion serves God and those to whom he or she ministers may be right, but that is a description of the minister's spiritual duties. It leaves open the possibility that the minister has been engaged to do this under a contract of employment' (at 110).

Of course, *Ermogenous* did not say that a religious worker necessarily has a contract of employment with the relevant religious organisation. While in that case the question was remitted to a lower court, which upheld the existence of a valid contract ((2002) 223 LSJS 459), subsequent judgments have retained the view that typically no legal relationship arises in the religious context. In *Redeemer Baptist School Ltd v Glossop* [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]).

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 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 'consensual compact ... based on religious, spiritual and mystical ideas' (*Scandrett v Dowling* (1992) 27 NSWLR 483, 513).

Religion in the contract of employment

Many religious creeds have distinct bodies of rules that govern different aspects of the conduct of their members – Sharia law in Islam, Halacha in Judaism and so on. From time to time, interesting questions have arisen concerning how these legal systems interact with non-religious law. In June, the Supreme Court of NSW was forced to confront this issue, with Brereton J delivering a lucid judgment on the intersection between Australian employment law and Jewish law (*Re South Head & District Synagogue (Sydney) (admin appt)* [2017] NSWSC 823).

Benzion Milecki was the Rabbi of an orthodox Jewish synagogue in Sydney. Since 1985, he had been employed pursuant to a contract which provided that 'the relationship between the Rabbi and the congregation shall be defined in accordance with the *Halacha*' (at [4]). Rabbi Milecki received a base wage and considerable expenses – his total salary in 2015 was $843,000. In April 2017, voluntary administrators were appointed to the synagogue in light of its financial difficulties. They advised the Rabbi that his employment was being terminated on the grounds of redundancy, as there were insufficient funds available to meet his future contractual entitlements (at [5]).

Rabbi Milecki sought injunctive relief against the administrators, arguing that his 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 incorporated or implied into his contract, such that the administrators were in breach by purporting to terminate the employment relationship. The administrators resisted these propositions, seeking to distinguish between the Rabbi's spiritual relations with the congregation and his contractual relations with the Synagogue.

Brereton J found for the Rabbi. His Honour found it 'inconceivable' that Jewish law, and the associated life tenure, was not intended to be incorporated into the contract (at [27]). Alternatively, Brereton J held it to be an implied term: 'any other arrangement would have been antithetical to the Orthodox Jewish life to which the [synagogue], the Rabbi and the congregation all subscribed' (at [33]). 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 divergent strands), or where it is inconsistent with the local law with which it coexists. These points were expounded in *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals* [2004] 1 WLR 1784, involving a contract that sought to be governed by both Sharia law and English law, in circumstances where the former was 'inevitably repugnant' with the latter (at [52]). It might also be that the courts would preclude the incorporation of religious law where it was contrary to public policy, 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. *Discrimination Act 1991* (ACT) s 7(1)). Many of these are applicable in the workplace context. 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* [2004] QSC 58). In NSW, 'ethno-religious' origin is included within the definition of 'race', which would include some religions (Judaism, Sikhism) but not others (Christianity, Islam).

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). However, this section *does not apply* where the adverse action is 'not unlawful under any anti-discrimination law 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 ethno-religious belief), although the *Fair Work Act* provides a backdoor 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 waitress 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 on such matters is sparse. One case provided 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 Marett* [1989] VR 789, 793).

The catch-cry 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.

Exceptions for religious organisations

Finally, religious organisations are – to varying degrees – exempt from anti-discrimination obligations. The *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 injury to the religious susceptibilities of adherents 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 bodies.

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 – even in the modern age, few topics rouse emotions (and, it seems, litigation) like religion. **LSJ**