Dismissal and the Religious Workplace

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This paper deals with the question of whether an individual should ever be dismissed from their workplace for conduct outside the workplace and working hours, with specific reference to religious workplaces. It explores the notion of whether there is anything that sets religious workplaces apart from other places of employment, allowing for a greater degree of control over the behaviour of its employees. It is argued that there is no special duty of loyalty attributable to religious workplaces and, given that individuals find their right to express their religion curtailed by the courts regularly, the autonomy granted to religious institutions goes against the fundamental concept of human rights.

Introduction

This paper will consider the question of whether an employer should ever be able to lawfully dismiss a worker because of his/her activities outside the workplace and working time. This paper is restricted to the issues arising from the dismissal of employees for their conduct outside the workplace and working hours. I argue that this should not be a lawful cause for dismissal in the religious workplace, with
the only exception being where the conduct is in breach of an essential qualification of work of the employee.

Religious freedom has been granted under Article 9 of the European Convention of Human Rights ("ECHR") and is applicable to the individual as well as to collective freedom of religion. However, in its implementation, the European Court of Human Rights ("ECtHR") has been far more liberal in determining collective freedoms, rather than individual freedoms. I believe the latter should guide their decisions. While religious institutions are granted increasing autonomy to determine their freedom, the same is far from true for individuals exercising religious freedom. My paper is a critique of this tendency of the ECtHR, specifically focusing on the dismissal of employees for their conduct outside work, vis-à-vis religious workplaces.

The first section considers whether certain views of employees in religious institutions can be considered ‘disloyal’ to the employer, and whether dismissal on those grounds is lawful. The second section assesses the argument of autonomy granted to religious institutions to make independent decisions. The third tackles the assumption that there is something special or unique about religious workplaces, which creates a higher duty of loyalty than others. Fourthly, I contend that the threshold for dismissing an employee on the basis of their conduct outside work should be based on ‘necessary qualification’, which is to say that an employee should only be dismissed if their conduct outside work interferes with the performance of their duties or quality of work produced. Finally, I will conclude by summarising my arguments and reiterating my view that employees should not ordinarily be dismissed for their conduct outside of work, save for when such conduct breaches the ‘necessary qualification’ criterion.
I. Duty of an Employee towards the Workplace

In decisions relating to religious workplaces, the argument has often been made that an employee who expresses views or conducts herself in a way that is not in accordance with the views of the employer, potentially betrays her duty of loyalty. In *Rommelfanger v Germany*¹ a doctor employed at a Roman Catholic affiliated hospital was dismissed for holding views on abortion that were contrary to the “opinion of the church concerning the killing of unborn human beings”². The European Commission of Human Rights (“EHRR”) held that it was not unreasonable for the church to demand that all its employees should agree with the so-called Christian principles on which the church functioned. This case demonstrated that when a hospital was run in accordance with ‘Christian principles’, not observing these principles in entirety would be a violation of loyalty, even if the quality of work is unaffected.

Interestingly, when a similar question arose in the matter of loyalty to the state in *Vogt v Germany*³, the applicant was held not to have breached her duty of loyalty by the ECtHR. Here, a secondary school teacher was dismissed from her position at a school for having been a member of the German Communist Party (“DKP”). Although her work was

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² Ibid.
³ Vogt v Germany App no 17851/91 (ECtHR, 26 September 1995).
considered satisfactory, she was held in high regard by her colleagues as well as the pupils and their parents prior to her dismissal.\textsuperscript{4}

The ECtHR held that the dismissal was a severe measure, and had the effect of causing the applicant to lose her livelihood. Further, the harm caused to her reputation and the difficulty she would face in finding another post as a teacher were also relevant to the majority decision.\textsuperscript{5} The majority was also of the opinion that it was well-established that there was no improper conduct by the applicant in the performance of her duties, and no criticism was levelled against her.\textsuperscript{6}

An argument in Vogt was made by the regional council that a civil servant has a special relationship of trust with the State, and cannot “deliberately support a party whose aims are incompatible with the free democratic constitutional system”.\textsuperscript{7} Despite this argument, the ECtHR held that Mrs. Vogt’s dismissal was disproportionate to the legitimate aim pursued.

Comparing the decisions in these two cases, it is unassailable that religious workplaces are given a special place to impose their principles on their employees, a privilege that is not even available to the state. The question could have been asked in Rommelfanger, whether a doctor would be disloyal to his or her Hippocratic oath by allowing the church to espouse and publicise views on abortion that are medically unsound, but the Commission was unwilling to undertake any

\textsuperscript{4} Ibid, para 10.
\textsuperscript{5} Ibid, para 60.
\textsuperscript{6} Ibid.
\textsuperscript{7} Ibid, para 16.
introspection, content to allow ‘Christian principles’ to guide its decision.

This question of ‘loyalty’ to a workplace lends itself easily to extremes. Would a supermarket cashier be disloyal if he shopped at a competing store? Would a journalist be disloyal if she preferred other publications? Surely not. It remains to be explored how the religious workplace is then so distinct from other employers in this context.

II. Autonomy of Religious Institutions

The privilege granted to religious workplaces often stems from the reasoning that religious institutions have autonomous principles, and it ought not to be the place of the courts to substitute its judgment as to the substantive value of these principles. However, it is not correct to assume that this religious autonomy of organisations is absolute. Procedural protection of the right to freedom of religion has been recognised as limitation to religious autonomy8.

Evans and Hood further argue that the decisions in Obst and Schuth9 and Siebenhaar10 place substantive limitations on

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8 Lombardi Vallauri v Italy App no 39128/05 (ECtHR, 20 October 2009); European Court of Human Rights Press Release, ‘Catholic University of Milan should have given reasons for refusing to employ a lecturer who had not been approved by the ecclesiastical authorities’, no 778, 20 October 2009.
9 Obst v Germany App no 425/03; Schuth v Germany App no 1620/03 (ECtHR, 23 September 2010).
10 Siebenhaar v Germany App no 18136/02 (ECtHR, 3 February 2011); European Court of Human Rights Press Release, ‘Dismissal of kindergarten teacher by Protestant Church for
religious autonomy. The effect of these cases is that termination of employment even by religious employers cannot be based entirely on their own principles, and must be balanced against other rights of the employees. Not just the religious institution, but also the courts have to consider these rights while making a final determination of the case.

The argument of absolute autonomy is also unsound when we consider that courts, including the EHRR and later the ECtHR, have justified the substitution of their own judgment in place of that of individuals seeking a protection of their religious rights in many cases, and have made value judgments regarding the beliefs of individuals. McCrea rightly observes while discussing Valsamis v Greece,

“[T]he Court simply substituted its view for that of the Jehovah’s Witness applicants who felt that being required to take part in a Greek national day parade violated their pacifist beliefs, deciding that the parade was not military in character.”

It is objectionable that greater privilege should be afforded to institutions than to individuals, especially where human rights are concerned. It seems unacceptable to me that active commitment to another religious community was justified, no 91, 3 February 2011.

12 Ibid, 102.
15 McCrea (n 13) 126.
individual freedoms are curtailed by the ECtHR in the name of ‘balancing’ these freedoms, but religious institutions (which are much less deserving of these freedoms) should not be subject to the same scrutiny.

The ECtHR has demonstrated its willingness to restrict individual freedoms to manifest religious belief in a number of cases, whether it be through limitations to the wearing of Islamic dress to maintain ‘secularism’16 or to “prevent state primary school teachers from wearing the Islamic headscarf on the basis that it was legitimate for the state to attempt to ensure the neutrality of the educational system.”17 As recently as 2014, in the case of SAS v France18, the ECtHR upheld a ban on full face veils in public places on the basis of the principle of ‘living together’. Therefore, the ECtHR has demonstrated repeatedly that it can and does restrict the rights of individuals to manifest their religious beliefs for various reasons, but it is hesitant to show the same perspicacity while dealing with a religious employer’s collective right.

III. The ‘Specialness’ of Religious Workplaces

Dealing with the question of loyalty to a religious workplace and what makes it so special – one aspect is the fact that a religious workplace has a mission or an ideology, and its employees are expected to represent that ideology in a way manner that would not be expected of a supermarket cashier.

So, for instance, where a public relations representative of the Mormon Church was found to have had an affair, his dismissal by the church for violating its principles was

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16 Ibid 128.
17 McCrea (n 13) 124.
18 SAS v France App no 43835/11 (ECtHR, 1 July 2014).
upheld by the ECtHR\textsuperscript{19}. This case illustrates the idea that where an employee is in a position to represent the views of the church, as a PR representative would be, said employee is accountable to the church for private conduct. Contrast this with a case where the employee is in a position where they are not representing the church at all, a position such as a janitor, a security guard, or in the case of \textit{Schuth v Germany}\textsuperscript{20}, an organist in a Catholic parish who had moved in with a new partner after his divorce.

A pertinent objection to this concept of ideology is that it can sometimes interfere with the other fundamental rights of an employee. For instance, Article 8 of the ECHR protects the private life of an individual, which includes the sexual orientation of the individuals. In \textit{Smith and Grady v UK}\textsuperscript{21}, the issue at hand was the dismissal of employees of the armed forces on the grounds of their homosexuality. The argument that there were sufficient ideological reasons for the dismissal since the presence of homosexuals in the armed forces had a “substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces”\textsuperscript{22} was not accepted as a sufficient ground for dismissal.

In the context of private life, a church or religious institution may require celibacy from its employees, which certainly qualifies as an interference with their family life under Article 8, whether or not it is considered legitimate. When the issue of ‘optional celibacy’ arose in the dismissal of a Catholic religious teacher, the ECtHR considered his dismissal lawful,

\textsuperscript{19} \textit{Obst (n 9)}.
\textsuperscript{20} \textit{Schuth (n 9)}.
\textsuperscript{21} \textit{Smith and Grady v UK} App no 33986/96 (ECtHR, 27 September 1999).
\textsuperscript{22} \textit{Ibid}, para 95.
despite there being no actual complaints regarding his conduct, and him having received a dispensation to be married. In this case, Fernandez Martinez v Spain\(^\text{23}\), the dissenting opinions of Judge Dedov and Judge Sajo require careful consideration. Judge Dedov has been criticised\(^\text{24}\) in many quarters for having opined that churches should not be allowed to impose totalitarian celibacy requirements on their priests. While the autonomy of the church is an extremely important principle, it should not be forgotten that the autonomy of the church to be its own legislator\(^\text{25}\) has also allowed it to perpetrate child abuse\(^\text{26}\) at a large scale without being held accountable. Celibacy might be a deeply held belief of the Church, where child abuse is an “enormous mistake”\(^\text{27}\) covered up by institutions across the globe “to

\(^{23}\) Fernandez Martinez v Spain App no 56030/07 (ECtHR, 12 June 2014).


\(^{27}\) Dan Smith, ‘Cardinal George Pell tells child abuse royal commission Catholic Church made ‘enormous mistakes” (ABC News, 29 February 2016) <http://www.abc.net.au/news/2016-02-
protect the institution, the community of the church, from shame”\(^2^8\), but it is undeniable that autonomy without any limitations creates a danger of abuse.

More relevant still is the dissent of Judge Sajo, who argued that “the right to live with one’s family without the threat of being dismissed for that reason go to the heart of the right to respect for private life”\(^2^9\). Sajo held that the ‘risk of scandal’ was not a sufficient reason for his dismissal.\(^3^0\) This goes to show that when the right to religious autonomy of a workplace is placed against a fundamental human right of an employee, the latter needs to be given very careful consideration, and I believe ordinarily, the latter should succeed.

### IV. The ‘Necessary Qualification’ Exception

Coming now to possible exceptions to the general principle that out of work conduct is irrelevant to the workplace, I propose that where the outside work conduct interferes with the quality of work or breaches an essential qualification of work, it becomes a lawful reason for dismissal. For instance, in order to be a lawyer, one must have the requisite state certification as an essential qualification. Similarly, if a lawyer is intoxicated while working, their dismissal for their consumption of intoxicants outside work is relevant as it is understood to interfere with their performance of their duty. This same notion is applicable to a religious institution.

\(^2^9\) access 14 December 2017.  
\(^2^8\) Ibid.  
\(^2^9\) Martinez (n 23) 57, para 1.  
\(^3^0\) Ibid.
In the context of the religious workplace, if a Catholic teacher is also a member of a Mormon Church and teaches in that capacity at a Mormon school, perhaps her conduct as a teacher would be affected by her membership in two religious organisations. However, I would argue that in order to dismiss an employee for personal conduct, the ‘risk’ of adverse effect is not sufficient ground. In *Siebenhaar v Germany*, a teacher who was a caretaker at the Protestant parish day care as well as a primary teacher at the Universal Church of Humanity, was dismissed by the protestant church for being a member of an organisation whose ideology was contrary to that of her employer.

On the face of it, this is a case where the ‘necessary qualification’ criteria may have been met, but it is also relevant that no complaints existed as to her standard of work, and “no arguments of proselytizing behaviour by the applicant were put forward by the Protestant church”. However, the ECtHR did not require any arguments of proselytism to determine that the dismissal of Ms. Siebenhaar was “necessary to preserve the Church’s credibility, which outweighed her interest in keeping her job.” The criterion therefore is that when making a decision regarding dismissal, whether the actual quality of work has suffered because of the out of work conduct, must be considered.

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31 *Siebenhaar* (n 10).
33 *Siebenhaar* (n 10) 3.
Conclusion

The privileges accorded to religious workplaces are far greater than any other workplace, when it comes to the question of ‘loyalty’ or the promotion of a specific ideology. This becomes even more questionable when the ECtHR has not allowed loyalty or ideology to be arguments in favour of state34 or armed forces35 as employers, who inarguably have more at risk by a ‘disloyal’ employee than a religious institution does. Another criticism of this privilege stems from the ECtHR’s blatant interference with individual rights when they pertain to manifestation of religious freedom36, while affording complete autonomy to religious institutions.

Further, it has been argued that the autonomy of religious workplaces often comes into conflict with Convention rights of individuals, such as the right to a private life37, and in such situations, the latter deserve greater protection. I propose an exception where the personal conduct outside working hours and the workplace is a sufficient ground for dismissal: if it violates a necessary qualification of work, or interferes with the work performance of the employee. The assessment of this exception is to be on the basis of actual adverse effect due to the breach, and not merely the risk or threat of adverse effect.

The religious workplace is not deserving of the very significant privilege that it receives from the ECtHR, and the primary purpose of Article 9 ought to be the protection of

34 Vogt (n 3).
35 Smith and Grady (n 21).
36 Dahlab v Switzerland (dec.) ECHR 2001-V 447; Dogru v France App no 27058/05 (ECtHR, 4 December 2008); Leyla Sahin v Turkey App no 44774/98 (ECtHR, 10 November 2005); SAS (n 18).
37 Martinez (n 23).
individual freedoms rather than collective rights. The current judicial trend, in my opinion, has not done nearly enough to achieve this purpose, and has a long way to go.
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