Religious Autonomy and Secular Employment Standards: Developments in the European Court of Human Rights

Professor Carolyn Evans, Centre for Comparative Constitutional Studies, Melbourne Law School
Religion and Law Conference, Utah, October 2010

The debate over the relationship between religious autonomy and employee rights is one that has been growing in intensity in recent years. It has become one of the key areas in which secular and religious values come into conflict and require resolution by political and legal institutions. Many people undertake work either directly for a religion or indirectly in an organisation owned or managed by a religion. The wide variety of workers include the Archbishop of a diocese, a volunteer who cleans a place of worship without pay, a nurse employed in a hospital operated by a religious order, or a cleaner or gardener employed in a religious school. Part of the reason that the employment conditions of these workers have become so contentious is because of the significant numbers of employees involved. Two of the cases from Germany that I will discuss in more detail later in this paper, note that the two main Catholic and Protestant Churches in Germany employ over one million people between them, making them the largest non-State employers in Germany. This pattern is replicated in many countries, meaning that determinations about the extent to which secular employment law applies to religious employers impacts on a very large proportion of employees.

The debate is made particularly complex because of the competing legitimate claims on both sides based on human rights arguments. When States intervene to protect the rights of workers, they are accused by religious groups of inappropriately invading their autonomy. When States refuse to intervene in religious employment conditions, they are accused by employees of failing to protect their rights (often rights to equality, privacy, family life and freedom of expression).

Three recent cases before the European Court of Human Rights have begun to develop the approach of the Court to these types of cases. In all three cases, former employees of religious organisations challenged their terminations before domestic courts and ultimately lost in those courts. The former employees then challenged the failure of the domestic courts to

protect their rights in the European Court of Human Rights. The European Court upheld the decision of the domestic courts in one case and found a violation in two others.

In this paper, I will give a brief overview of the facts of the three cases and then address 4 key issues:

1. The narrowing of a jurisdictional approach to religious autonomy
2. Respect for contractual relations in private law
3. Procedural limitations on autonomy and
4. Substantive limitations on autonomy.

The Cases

The first case in this series is that of *Lombardi-Valluari v Italy.* Professor Lombardi Valluari had his employment at a Catholic University terminated, after twenty years of having it renewed annually, because the Congregation of Catholic Education, an agency of the Holy See refused to give an approval that was required before the faculty could renew the contract. Approval was refused on the basis of unspecified concerns that some of Mr Lombardi Valluari's positions were 'clearly opposed to Catholic doctrine.' No reasons were given and Professor Lombardi Valluari had no chance to defend himself. He brought a case challenging his effective dismissal in the Italian courts and the Council of State ultimately decided the matter by holding that 'no authority of the Republic can evaluate Church authority ... it is outside their scope of competence.' The applicant complained of the breach of several rights, including religious freedom, but in the end the European Court of Human rights decided only on the claims that Article 10 (freedom of expression) and Art 6 (fair hearing) rights. It found for the applicant in both instances, holding that his free speech and fair trial rights had been breached.

The next two cases, which came down only a couple of weeks ago, both came from Germany and were decided by the same Chamber of the Court using identical reasoning except for the application to the particular facts. In the *Obst* case, Michael Obst was terminated from his employment as the Director for Public Affairs in Europe for the Church of Jesus Christ of the Later Day Saints or Mormon Church. He admitted to his superior that he was having an extra-marital affair and, as this was a serious offence within the Church, his employment was terminated without notice. The decision of the Church was ultimately upheld by the German courts and was also upheld by the European Court of Human Rights. The second case, handed down on

the same day, was that of *Scuth v Germany*. Mr Scuth was an organist in a Catholic Church in Germany. He left his wife and began living with another woman, who later became pregnant to him. When this became known, his position was terminated on the basis that he breached the teachings of the Church that he was required adhere to. Again, the German Courts ultimately upheld the decision of the Church. However, in this case, the European Court held that Mr Scuth's rights had been violated.

Jurisdiction

In all three cases, the European Court moved away from what I will call the jurisdictional approach to religious autonomy issues. The jurisdiction approach was best exemplified by the Italian courts in *Lombardi Valluari* when they said that they simply did not have the power to review the processes, reasoning or substantive decisions made by an agency of the Catholic Church within the area covered by religious autonomy. The courts neither approve nor disapprove of such decisions – they say that they have no jurisdiction with respect to them and thus leave the outcomes to be determined by the religious employer. Such an approach is strongly protective of religious freedom. As Professor Gerhard Robbers, intervening for the Mormon Church in the *Obst Case* put it:

'If the Church could not [..] make fulfilling worthiness and loyalty of its employees a condition of employment, the ability of the Church to carry out its mission in accordance with its beliefs and doctrines would be seriously undermined. The Church's ability to preach its message and carry out its mission with authenticity and without compromise would be subjected to the vicissitudes of the beliefs and practices of individual employees or secular powers.'

The European Court remains sympathetic to the jurisdictional approach with respect to certain aspects of its decision making but has narrowed its scope. In the *Lombardi Valluari Case*, the Court implicitly but without much detail held that respect for religious autonomy meant that it was not for secular courts, including the European Court, to make determinations on religious teachings or orthodoxy. This point was reiterated with greater clarity in the two German cases, in which the significance of adultery as a serious sin within both the Catholic and Mormon Churches was accepted by the Court. The Court made the point that it was not endorsing the general principle that all employers could legitimately terminate employment for adultery or even

that all religious employers could do so. It merely acknowledged that these religious employers had clearly demonstrated the importance of marital fidelity within their own teaching.

So, matters of religious significance, orthodoxy and teaching are largely matters that remain within the domain of the religious employer according to these judgments. However, even here, there is a potential carve out. In the *Scuth* case, the German courts were criticized for failing to take into account arguments about the consequences of adultery in ecclesiastical documents and arguments put forward by the applicant. This is a potentially serious and significant issue, although as it is only touched on briefly by the European Court, it is difficult to know how extensive its implications will be. However, if it means that secular courts will be called on to determine religious orthodoxy in a dispute between a religious organization and an individual, the potential consequences of this for religious autonomy are significant and problematic. Determinations of religious orthodoxy should be avoided whenever possible by secular courts which have neither the expertise nor the legitimacy to determine them.

Religious Autonomy as a Matter of Private Contract Law
In all three cases, but particularly the German cases, the position of the religious employer was bolstered by contract law and private law notions of consent In *Lombardi Valluari*, the contract required a process – that of obtaining the agreement of the Vatican body – and that requirement was set out clearly. In the *Obst Case* the relevant contract included the requirement that employees of Mr Obst's level of seniority – who had heightened duties of loyalty - be members of the Church in good standing. What is more, the European Court found that Mr Obst knew that this required him to refrain from adultery even though this was not explicitly set out in the contract. While there is less detail about the contract in the *Scuth* case, it was not a standard labour contract but rather one based on Christian social teaching and Mr Scuth had taken a oath to 'fulfill my professional obligations and to respect and observe the requirements clergy.' The relevant Church regulations required someone in Mr Scuth's position 'to respect and comply with the fundamental principles of Catholic moral and religious precepts'. Again, it was alleged by Germany that Mr Scuth was aware of the seriousness of adultery within the Catholic Church and the potential consequences for adultery, but in this case the European Court found that 'one can not interpret the signature by the applicant on this contract as an

unequivocal personal commitment to live in abstinence in cases of separation or divorce.'

It is unclear how important a role this private law bolstering of the public law doctrine of religious autonomy played. It would certainly be far more difficult for a religious organization to terminate the employment of an employee if the moral or religious requirements that went above ordinary employment obligations were not made clear to the employee. It would certainly become impossible to argue, as the churches did in the German cases for example, that the employee had waived a right to privacy about sexual matters unless there was a basis in contract for making this claim. So cautious religious employers should certainly look to ensuring that there is some degree of specificity in employment contracts, although this will not be sufficient in and of itself to protect the interests of the organization because, as I will now turn to, the European Court's recognition of religious autonomy with respect to certain issues was coupled with several limitations on that autonomy.

Procedural Limitations on Religious Autonomy

The European Court took the opportunity presented by these judgments to consider the limitations of autonomy. These limitations were both procedural and substantive. I will start with the procedural limitations that were best set out in the *Lombardi Valluari* case. While the Court in that case recognized that it was for religious organizations to determine their own orthodoxy and possibly punish those who publicly deviated from it, that did not mean that secular courts played no role in cases of these kinds. Instead, the Court took something of an administrative law turn. While it was not for courts to analyse the substance of the decision or to take sides in theological debates, it could play a supervisory role with respect to maintenance of some degree of procedural fairness. In the view of the European Court, the Italian courts should have questioned the failure to provide the applicant with the views of which he was accused and to have given him a chance to defend himself. It thus concluded that the Italian government had not demonstrated that 'the University's interest in providing education based on Catholic doctrine could not extend to the essence of the procedural safeguards' to which the applicant was entitled before his Article 10 rights were limited. Similarly, the Court found a breach of the Article 6 fair hearing right on the basis that the national courts had not allowed for a challenge to the absence of information on the claims against the professor or the link between those claims and his teaching role. The fact that the decision was made by the

Holy See, a foreign jurisdiction and a religious authority, was given little weight by the Court, even though Italy argued that these factors made it improper for the Italian courts to probe the reasoning of the Congregation of Catholic Education. Religious autonomy is therefore not breached if the secular courts require some compliance with basic fair process requirements.

States indeed violate their obligations if they fail to protect the rights of individuals to at least a minimum of procedural fairness. Precisely how far this minimum extends is not yet clear. *Lombardi-Valluari* was a particularly egregious case with no reasons for termination given, no chance of refutation, no appeal – in short, absolutely no procedural protection whatsoever. How far beyond this the Court will go in requiring State intervention is not clear and the extent to which procedural considerations might eventually bleed into substantive considerations over time is also unclear. Once a religious group is forced to give reasons, will secular courts be willing to leave an assessment of the quality of those reasons solely to religious authorities, even in cases that seem absurd or fanciful to the judges?

Finally, it is worth noting that even requiring procedural safeguards has some implications for religious freedom. Some religions are (for historical and theological reasons) more secretive, hierarchical, or put value on 'virtues' such as blind obedience than others that might be more legalistic and process oriented. Forcing some degree of procedural fairness on a religion does intervene in its autonomy.

Substantive Limitations on Religious Autonomy

While *Lombardi-Valluari* focused on the procedural limitations on the right to religious autonomy, the two German cases went a step further and arguably started to develop a substantive limitation on employment autonomy. The European Court held that the German courts were required to give full and proper consideration to the rights of the employees when determining whether to uphold the termination in particular cases. In *Scuth*, the European Court held that the focus of the German courts had been exclusively on the rights of the religious organization and its autonomy – it had failed to consider factors such as the right to privacy and family life, as well as relevant contextual details such as the amount of time that Mr Scuth had been employed by the Church, his age and the difficulty that he would have in finding employment as an organist outside of the Church. By

contrast, the decision of the courts in the *Obst* case was upheld because it was clear that the domestic courts had taken these factors into account.

Now this looks to some degree like a procedural requirement – that courts take all relevant rights related factors into account – but it is in reality a disguised form of substantive limitation and likely to cause far more difficulties for religious employers than the procedural requirements in *Lombardi Valluari*. What is required to comply with those procedural requirements is fairly clear – employers will be in the strongest position if they set out the requirements clearly in contract, explain to employees why they intend to terminate their position in sufficient detail and give employees a chance to speak in their own defence to rebut the charges or to explain why they should not result in termination. Some religious organizations might find this irksome and it certainly intrudes on their autonomy, but it is unlikely to cause too many practical difficulties or prove particularly onerous, while providing employees with some basic protections.

The German cases, however, imply that religious employers cannot merely look to their own teachings, practices or interests in making decisions to terminate employment. They need to look also to the rights of the employee. So it is not enough that the Catholic Church believes that adultery is a serious sin and that employing an organist who is known to be living in an extra-marital relationship to play in religious services would undermine the Church's moral teaching. The Church must also consider the right to privacy, family life and employment prospects of the employee. And the domestic courts are obliged to also consider this issue. They probably (although not certainly) should accept the Church's evidence about the seriousness with which the behaviour is viewed in religious terms, but they must weigh this against other rights.

As long as the domestic courts engage in a proper weighing process, it appears that the European Court will grant them a fairly wide margin of appreciation insofar as the substantive outcome is concerned. The Court noted in *Obst* that the applicant had no cause of compliant just because the German courts gave the relevant rights a different weighting to the one that he would have liked them to. In *Scuth*, by contrast, the applicant succeeded not because the outcome of the cases was unacceptable, but because of a failure by the German courts to engage with the arguments of the applicant. But note – this margin is given to domestic authorities; certainly courts and probably governments and legislatures. It is not given to religious bodies

themselves, although if they genuinely engage in such a weighing exercise their decisions might be more likely to be accepted by the secular authorities.

These requirements are far more complicated for religious groups to predict or comply with. It may require them to give – or at least feign giving – consideration to secular values that they may not share (such as respect for the private or family life for those that it considers to be living in relationships that do not deserve respect). It means that it will be unpredictable in advance as to whether domestic courts will uphold their religious autonomy in particular cases or not. Employees also will be uncertain of their likelihood of success in litigation as much will depend on how courts weigh a range of complex factors.

As is often the case with European Court judgments, the reasoning in the two German cases is far from transparent. It will probably take several more cases before the principles are better bedded down and, even when they are, the ultimate approach of the court is likely to be criticized legitimately for creating uncertainty. However, in conclusion, let me return to my opening point – this is a complex area with legitimate claims to be made on both sides. There are two potentially clear and coherent legal responses to the conflict. One is to effectively cloak religious organizations in immunity and say that religious autonomy always trumps the rights of employees and that employees who contract with religious organizations accept that they have waived certain rights that other employees possess. The alternative would be to say that religious organizations are in precisely the same position as every other employer (possibly with a limited carve out for small defined classes of people such as clergy or religious education teachers) and that religious autonomy has little or no impact on employment law. Each of these two solutions has it adherents and each is far more conceptually clearer than the point arrived at by the European Court and by courts in several other jurisdictions. Yet, it is likely to be the compromising, messy and somewhat unpredictable legal solutions that win the day at least in the medium term because these are the solutions that recognize the real world complexity of the issue at stake and try to deal with it fairly, if not always coherently. The European Court is directing national courts to pay serious regard to religious autonomy but not to simply disregard the rights of the millions of individuals who are employed by European religious organizations. Whether the compromise that the court has struck is enduring or the best or clearest compromise that can be struck is not yet clear – I suspect not. But I do

believe that some compromise position will be the final and probably the best solution to the dilemma of the competing rights of religious employers and employees.

European Law if Needed

78/2000/EC Council Directive of the European Union of 27 November 2000 establishing a general framework for equal treatment in employment and occupation states:

Consideration (24)

"The European Union has recognized in its Declaration No 11 on the status of churches and religious organizations, annexed to the Final Act of the Amsterdam Treaty, it respects and does not prejudice the status enjoyed by under national law of churches and religious associations or communities in the Member States and it equally respects the status of philosophical and non-denominational. In this context, Member States may maintain or lay down specific provisions on genuine occupational requirements, legitimate and justified, may be required to exercise a professional activity."

Article 4
Professional Requirements

1. (...) Member States may provide that a difference of treatment based on [religion or belief] does not constitute discrimination where, because of the nature of work or conditions of its exercise, characteristic constitutes a genuine occupational qualification and requirement, provided that the objective is legitimate and the requirement is proportionate.
2. Member States may maintain national legislation in force (...) or provide for future legislation incorporating national practices existing at the date of adoption of this Directive provisions whereby, in the case of professional activities Churches and other public or private organizations whose ethos is based on religion or belief, a difference of treatment based on religion or belief of a person shall not constitute discrimination where, by the nature of these activities or the context in which they are exercised, religion or belief constitute a genuine occupational requirement, legitimate and justified, having regard to the ethics of the organization. (...)

Provided that its provisions are otherwise complied with, this Directive is without prejudice to the right of churches and other public or private organizations whose ethos is based on religion or belief acting in accordance with constitutional provisions and laws, to require individuals working for them to act in good faith and loyalty to the ethics of the organization."