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Can a church dismiss a pastoral worker without taking into account discrimination legislation?

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Can a church dismiss a pastoral worker without taking into account discrimination legislation?

Surprisingly, perhaps, the US Supreme Court says that it can. In *Hosanna-Tabor Evangelical Lutheran Church and School v EEOC* (No 10-553; 12 Jan 2012) the Supreme Court unanimously upheld the right of a church school to dismiss an employee who had religious duties, without complying with the provisions of US disability discrimination legislation. It did so because it upheld a doctrine that had been developed by lower Federal courts in discrimination cases involving churches and religious organisations, called the “ministerial exception”. This doctrine “precludes application of [discrimination] legislation to claims concerning the employment relationship between a religious institution and its ministers” (Roberts CJ, at 13.) The doctrine is grounded, the court held, both in the Establishment clause and also the Free Exercise clause of the First Amendment to the US Constitution.

Ms Perich was employed as a teacher at the School, run by the Lutheran church. Teachers at the school fell into two categories: those who were “called”, and had to undertake a course of religious studies and effectively be “ordained” by the local congregation, and casual teachers who need not fulfill those requirements. Ms Perich was a “called” teacher. Her duties were primarily to teach “secular” subjects, but she was required to teach a religion class on 4 days, to lead each morning in devotions, to attend chapel and occasionally to lead chapel services.

She suffered health problems that meant that she had to leave work for some time. When she wanted to return a dispute arose with the School as to whether there was a place available, and she was told that she was not needed. She indicated she would be taking the matter to court. Following that, the School dismissed her, basing its decision in part on the fact that she was taking the matter to a secular court, when the policy of the church was to resolve disputes within a church tribunal.

She then complained to the Equal Employment Opportunity Commission that she had been victimized because she made a complaint of disability discrimination, and that her dismissal was retaliation for her complaint. The EEOC took the church to court over the matter. The trial court refused to hear the complaint, saying that the “ministerial exception” doctrine applied. An appeal court over-turned this decision, partly because Ms Perich, it said, was not a “minister”. In its decision the US Supreme Court reinstated the decision of the trial judge and for the first time ruled that the ministerial exception, developed by the lower Federal courts, was good law and should be applied in these cases.

The Supreme Court, in an unusually unanimous decision in both reasoning and outcome, held that the First Amendment supported the ministerial exception doctrine. Roberts CJ referred to the historical roots of the Establishment clause in cases where courts had refused to get involved in appointment or dismissal of clergy. He also said that the Free Exercise clause meant that a religious body should be free to determine for itself who would lead it and represent its mission to the world. At p 13 he commented:

*By imposing an unwanted minister the state infringes the Free Exercise Clause, which protects a religious group’s right to shape its own faith and mission through its appointments.*

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The next question was whether Ms Perich was a “minister”. The majority judgment of Roberts CJ (joined by most of the rest of the court) said that this question did not need a complete definition for the purposes of this litigation, because a number of factors came together to say that the doctrine applied to Ms Perich here. In summary, she was a “called” teacher and regarded as ordained by the church; her role involved religious education; she had used the status herself to get benefits such as a housing allowance; and the work she did for the church was a central part of its ministry to children. Other members of the court had slightly different views on this issue. Thomas J regarded the matter as simply a question of whether the organisation “in good faith” regarded the person as a minister. Alito and Kagan JJ emphasised that it was not necessary that the word “minister” be used, but that the doctrine would apply to someone who was essential to the conduct of religious ceremonies and propagation of beliefs (see eg at p 2 of this judgment). But on any view Ms Perich fell within the doctrine.

Some other points worth noting:

- The exceptions in the ADA (Americans with Disabilities Act) for religious organisations (especially the one allowing a church to require that an employee comply with their tenets) were in a different part of the Act to that dealing with complaints of “retaliation”, which was the complaint made by Perich. Hence the need for the church to rely on an unwritten elaboration of the Constitution, rather than directly on the legislation.
  - One question raised is: does the recognition of a “ministerial exception” replace or add to the specific ADA provisions relating to employment by churches? So given that a church can take into account its own teachings in deciding to hire (due to the specific provisions of the Act), does this mean that it is also now allowed to refuse to hire for a discriminatory reason even if this is not supported by its teachings? The logic of the Supreme Court judgment would seem to indicate that this is so.
  - A tricky question not directly resolved but which seems to follow: so what if a church decided to sack a ministerial employee on a racial ground? The logic of the decision here seems to lead inexorably to the view that such a decision could not be challenged on the basis of discrimination laws. However, I may be missing something. I notice, though, that McClure v Salvation Army, 460 F. 2d 553, 558 (CA5 1972), upheld a ministerial exception in the area of sex discrimination some years ago.

- It is pleasing to see that the Court finds that both limbs of the First Amendment support the church’s case here. There has been something of a tendency in recent years for courts to downplay the effect of the Freedom of Religion clause. Even here, bizarrely, the EEOC tried to support a possible limited exception for churches on the basis of an implied “freedom of association” right rather than conceding that the Freedom of Religion clause was involved. Roberts CJ at 14 justifiably gives this argument short shrift:
The right to freedom of association is a right enjoyed by religious and secular groups alike. It follows under the EEOC's and Perich's view that the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club... That result is hard to square with the text of the First Amendment itself, which gives special solicitude to the rights of religious organizations. We cannot accept the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers.

- There is a very interesting comment that the question of whether or not the reason for dismissal was religious is not relevant. The exception seems to protect religious organisations, even if they behave for non-religious reasons. So in theory (as was argued here) the church may have behaved badly or on wrong grounds, but their decision to dismiss could not be attacked under discrimination law. Presumably the Supreme Court wants to avoid the messy business of deciding whether or not a reason to dismiss is “sufficiently” based on religious reasons. (See Alito J who makes this point at p 9 of his judgment.) While it sounds harsh this does in the end seem a sensible view. Even if it is a total pretext, if the church concerned has decided to terminate someone’s employment then it seems impossible to say the state should force the church to endure the person’s ministry. That very nature of Christian (or other religious) ministry would seem to dictate that result.
  - On the other hand, it could be argued that in some cases a dismissal was so unjustified that damages were a reasonable response. But the SC decision here would preclude that as well.
- Note that the Supreme Court explicitly declines to comment on possible breach of contract, or tortious, claims brought by a minister. Could a minister sacked for racial reasons bring a suit based on “infliction of emotional harm”? An implied contractual term that decisions would not be based on irrelevant racial grounds? These questions are not answered here.

**Application to Australia?**

The decision, of course, is not directly applicable to Australia. But it does raise interesting questions. Should a federal statute require a church to take into account discrimination law in dealing with its ministers, would s 116 of our Constitution invalidate that operation of the statute? Some of the anti-discrimination law applicable in the federal sphere contains an explicit exemption for churches. The *Sex Discrimination Act 1984* (Cth), for example, contains an exemption in s 37 which would generally mean that churches are permitted to discriminate on the basis of sex in ministerial appointments. But other legislation contains no such exemption. To take the Act most closely applicable to that in issue in *Hosanna-Tabor*, the *Disability Discrimination Act 1992* (Cth) does not contain any general exemption for religious bodies (and nor should it, in my view.)

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1 The question would not come up under State law, as s 116 does not apply to the States (unlike the US First Amendment, which does.)
2 Hence I think State laws dealing with discrimination on the basis of sexuality and sexual preference justifiably contain exemptions allowing religious bodies to put into effect very long-lasting discrimination law applicable in the federal sphere contains an explicit exemption for churches. The *Sex Discrimination Act 1984* (Cth), for example, contains an exemption in s 37 which would generally mean that churches are permitted to discriminate on the basis of sex in ministerial appointments. But other legislation contains no such exemption. To take the Act most closely applicable to that in issue in *Hosanna-Tabor*, the *Disability Discrimination Act 1992* (Cth) does not contain any general exemption for religious bodies (and nor should it, in my view.)

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Hence in Australia the question would be raised whether a minister who was dismissed on the basis of a disability contrary to the DDA, would be unable to litigate the issue because of an implied prohibition under s 116 against “establishment”, or because this would amount to “prohibiting the free exercise of any religion”? The answer seems fairly clearly in the negative. The High Court has not read s 116 as erecting a “wall of separation” between church and state, and a generally applicable regulation of the formal working relationship between a church and a minister would probably not fall foul of the law. “Free exercise” of religion would not in general require that a church be free of regulation in the area of discrimination, although where there are clear areas that churches have historically been sensitive about, this may require special treatment.\(^2\)

I have to say that I think the Australian law has a better approach than the US here, by legislating for an exemption in an area which is known historically to raise freedom of religion issues (the question of the appointment of female clergy is a longstanding one), but by leaving churches to be dealt with by the general law in other cases. Still, the approach of the US Supreme Court is a salutary reminder that freedom of religion is an important value, and not lightly to be set-aside in the interests of other values.

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\(^2\) Hence I think State laws dealing with discrimination on the basis of sexuality and sexual preference justifiably contain exemptions allowing religious bodies to put into effect very long-standing objections to extra-marital and same-sex behaviour.