

The Government's Two Faces on Religious Discrimination in Voluntary Aided Schools: A Legal Anomaly

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ABSTRACT

The School Standards and Framework Act 1998 permits religious voluntary aided schools to apply religious tests to the employment, remuneration, promotion and dismissal of teachers, by contrast with the general prohibition of such discrimination.

When the UK implemented the EU's framework directive on equality in employment in its Employment Equality (Religion or Belief) Regulations 2003 it explicitly exempted these School Standards and Framework Act provisions, an exemption repeated in the Equality Act 2010 despite serious reservations by the Joint Committee on Human Rights.

In April 2010 the British Humanist Association formally complained to the European Commission that the UK had failed adequately to transpose the Directive and the EC began an investigation. It dragged on for five years, being prematurely closed in 2014 but reopened after BHA protests. Finally the complaint was rejected in September 2015, with the Commission accepting the UK Government's contention that in any proceedings the court would read the law as permitting discrimination only where it would qualify under the Directive's "genuine occupational requirement" provision, making the exemption effectively meaningless.

In this paper I outline the above sequence of events, explore the highly anomalous position in which it leaves the law and touch on the possible implications of Brexit.

The 1944 Education Act, carefully negotiated by Rab Butler in the quagmire of religious rivalries - albeit less fierce than when in the 19th century they delayed the introduction of universal education for decades - created a fairly simple taxonomy of schools in England and Wales: there were county schools and voluntary schools, almost but not quite all of which were religious, and they were split between voluntary aided, with more religious influence, and voluntary controlled, with less.

The Act (s.30) provided that the appointment, pay & promotion of teachers must not be influenced by their religious opinions or practice, but there were exceptions for all teachers at VA schools and for a limited number of 'reserved teachers' at VC schools.

Fast forward to the School Standards and Framework Act in 1998 and the pattern was much the same. County schools were now called community schools, and there was a small number of foundation schools. The picture is now more complicated, with quasi-independent academies and other baroque inventions, but for the sake of brevity I shall focus exclusively on Voluntary Aided schools and exclusively on England and Wales. However, much the same considerations apply to Voluntary Controlled schools in respect of

reserved teacher posts and to religious academies and other schools - and there is a similar situation in Scotland where the legislation is of course different.

The School Standards and Framework Act re-enacted the permission for religious preference to be exercised over the appointment, remuneration, promotion and discipline of teachers in religious VA schools.¹

So far so good. But this was before the EU Employment Framework Directive² of November 2000 which banned all discrimination based on religion or belief in employment except in two cases.

The first is where there is a genuine and determining occupational requirement.³ This covers cases when a secular employer has a job that can only be done by a person of a particular religion - for example if a hospital needs a Muslim chaplain.

The second exception⁴ is for employers with a religious ethos: it limits religious discrimination to posts with 'a genuine, legitimate and justified occupational requirement' - but also provides that religious discrimination should not spill over into discrimination 'on another ground' - a point to which I shall return.

The Government implemented the EU Directive in the Employment Equality (Religion or Belief) Regulations 2003. But it chose explicitly to exclude the School Standards and

¹ Section 60(5) provides that:
If the school is a voluntary aided school—
(a) preference may be given, in connection with the appointment, remuneration or promotion of teachers at the school, to persons—
(i) whose religious opinions are in accordance with the tenets of the religion or religious denomination specified in relation to the school under section 69(4), or
(ii) who attend religious worship in accordance with those tenets, or
(iii) who give, or are willing to give, religious education at the school in accordance with those tenets; and
(b) regard may be had, in connection with the termination of the employment of any teacher at the school, to any conduct on his part which is incompatible with the precepts, or with the upholding of the tenets, of the religion or religious denomination so specified. Sections 124A(3) and 124AA(7) extend the same provisions to all religiously designated schools.
Sections 124A(2) and 124AA(6) extend the provisions in (a) to all religiously designated schools and sections 124A(3) and 124AA(7) do the same for the provisions in (b).

² <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:303:0016:0022:EN:PDF>

³ Paragraph 4(1) allows religious discrimination where there is "a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate."

⁴ Paragraph 4(2) provides that in "churches and other public or private organisations the ethos of which is based on religion or belief . . . where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. . . This difference of treatment . . . should not justify discrimination on another ground."

Framework Act from their orbit.⁵ This exclusion is now found, in more specific terms, in schedule 22 to the 2010 Equality Act:

4 A person does not contravene this Act only by doing anything which is permitted for the purposes of—

(a) section 58(6) or (7) of the School Standards and Framework Act 1998 (dismissal of teachers because of failure to give religious education efficiently);

(b) section 60(4) and (5) of that Act (religious considerations relating to certain appointments);

(c) section 124A of that Act (preference for certain teachers at independent schools of a religious character).

(d) section 124AA(5) to (7) of that Act (religious considerations relating to certain teachers at Academies with religious character).

In summary, the Act allows that religious schools can appoint, pay, promote and sack teachers on the basis of their religious belief and practice, including (as we have seen recently in the case of the sacking of a popular head of a Catholic school in Gosport⁶) their private life.

The Equality Bill survived two warnings from the Joint Committee on Human Rights, first in October 2009:

We also consider that the provisions of section 60(5) School Standards and Framework Act permit Voluntary Controlled and Voluntary Aided Schools to impose wide-ranging requirements upon employees to adhere to religious doctrine in their lifestyles and personal relationships which may go beyond what is permitted under Article 4(2).⁷

and again in March 2010, when they pointed out that the exemptions went beyond ‘a genuine, legitimate and justified occupational requirement’:

We note that further issues exist in respect of sections 58 and 60 of the School Standards and Framework Act 1998 (School Standards and Framework Act), which in reserving a certain proportion of posts in state-maintained or aided ‘faith schools’ for individuals who adhere to the religious beliefs and ethos of the school in question may be in breach of the Framework Equality Directive 200/78/EC, on the basis that the reservation of such posts is not restricted to circumstances where it can be shown that a genuine, legitimate and justified occupational requirement to adhere

⁵ 39.—(1) These Regulations are without prejudice to—
(a) sections 58 to 60 of the School Standards and Framework Act 1998 (appointment and dismissal of teachers in schools with a religious character etc). . .

⁶ Lyndon Strong, the acting head at St Mary's Catholic Primary School, Gosport, was refused permanent appointment because he was divorced and remarried - see www.telegraph.co.uk/news/2016/12/01/parents-call-change-rules-catholic-school-stops-teacher-becoming/

⁷ Legislative Scrutiny: Equality Bill. Twenty-sixth Report of Session 2008-09, p96.

*to a particular religious belief can be said to exist.*⁸

The British Humanist Association had already reached the same conclusion and in April 2010 we lodged complaints with the European Commission alleging failure by the UK to transpose the Directive. Over the course of the next 5½ years the Commission, the UK government and the BHA exchanged representations, correspondence and freedom of information requests. It took 2 years and 3 months for the Commission even to begin investigating the BHA's complaint!

April 2010	BHA sends complaint to EC
July 2010	EC agrees there is a case to answer – 'will contact UK government'
June 2013	UK response
March 2014	EC rejects complaint – 'no evidence of real-life impact' – tells UK government
Oct 2014	EC informs BHA
Jan 2015	EC reopens enquiry after BHA submission of numerous real-life examples
Sept 2015	EC finally clears UK - 'examples insufficient to make us modify our conclusion'

I will not go through the to-and-fro in detail, but will focus simply on the Commission's reasons for rejecting our complaint.

In October 2014 they told us that the UK (represented by the Department for Education) had "provided sufficient clarification as regards its narrow interpretation" of the exemption:

After careful analysis of all relevant elements, we have come to the conclusion that the UK has provided sufficient clarification as regards its narrow interpretation of Sections 58 and 60, which merely enables the faith-based education and is limited to ensure the maintenance of the religious character of the school. We consider that such an interpretation is in line with Article 4 of the Directive. . . We have not been able to identify any breach of EU law by the UK.

This was opaque in the extreme: what sort of clarification had got the UK off the hook it had seemed to be impaled on? We pursued the Commission and extracted from them what they had written seven months earlier to the Government:

. . . you have provided sufficient clarifications as regards the narrow interpretation of this legislation in line with the Directive. [The complaints concerned] the legislation itself and not individual cases. Since we have no evidence of incorrect application of the laws at stake, the clarifications you have provided are considered sufficient. However, we reserve the right to re-assess this position in case we in the future receive evidence of incorrect application, for example complaints concerning individual cases of incorrect application.

⁸ Legislative Scrutiny: Equality Bill (second report); Digital Economy Bill. Fourteenth Report of Session 2009–10, pp6-7.

This produced the new (and actually false) idea that our complaint had been made *in vacuo*, without citing any examples. So the BHA wrote back and pointed out that we had in fact provided examples of such discrimination. We gave them lots more⁹. As a result in January 2015 the Commission decided to re-open the case - only to “definitely close” it again in September that year.

Their new letter to us gave no adequate reason but merely reiterated their original conclusion in exactly the same words:

However, this information is not sufficient to make us modify our conclusion set out in our previous letter . . . Indeed, we still maintain that the UK has provided sufficient clarification as regards its narrow interpretation of Sections 58 and 60, which merely enables the faith-based education and is limited to ensure the maintenance of the religious character of the school. We consider that such an interpretation is in line with Article 4 of the Directive.

Does all this matter in practice? Yes it does. The results are serious. Religious Voluntary Aided schools make up 20% of all primary schools and nearly 9% of secondary schools - and on top of that there is the rapidly growing number of faith academies plus the reserved teacher posts in religious Voluntary Controlled schools, and so on. It means that non-religious teachers are ruled out of a significant proportion of all teaching posts, especially senior posts. Their careers can be seriously affected.

Yet this is plainly in common sense terms completely unjustified under the Employment Directive. A Voluntary Aided school could not possibly argue there was a genuine occupational requirement for a PE, maths or science teacher to be (say) a Catholic - and not only a Catholic but one who lives his or her life according to strict Catholic doctrine. Remember that only 14% of Catholics in this country support their church’s ban on abortion¹⁰ while almost all approve of contraception - worldwide it’s as many as 78%¹¹. Yet even these *Catholics*, like the Gosport headmaster, would be liable to dismissal from teaching posts in religious schools under the Equality Act.

Discriminatory job advertisements are easy to find: recent examples include schools saying their head of maths needs to be a committed and practising Christian, others saying it is desirable their heads of English and of ICT are practising Catholics and a primary school saying it will give preference to Catholics in all posts, not just those with religious duties. Recent examples include:

Head of Mathematics: person specification: ‘Personally committed and practising Christian, member in good standing of any denomination served by the school.’

Head of English: desirable to be a ‘Practising Catholic’

Head of ICT: particularly welcome applications from Practising Catholics

Primary school letter to candidates: ‘Some teaching posts include specific responsibility for providing leadership and direction in the religious life and Catholic identity of the school and

⁹ <https://humanism.org.uk/2015/02/20/european-commission-re-opens-investigation-whether-uk-faith-school-laws-break-european-employment-laws-uk-government-shifts-position/>

¹⁰ YouGov for Westminster Faith Debates, July 2013

¹¹ Poll of 12,000 Roman Catholics in 12 countries conducted for the US-based Spanish-language network Univision of Catholics - *Daily Mail* 10.2.14

in these cases there will be a requirement that the successful candidate is a baptised and practicing Catholic. In other appointments, where two or more candidates for teaching posts are equally strong in the context of the criteria for appointment, preference may be given to a candidate who is Catholic.'

So what had the Government actually said to the Commission to persuade them to ignore all this evidence? They said this:

Section 60(5)(a) [of the School Standards and Framework Act 1998] does potentially apply to all teachers at a voluntary aided school. However, the effect of the provision in practice must be considered in the context of other English law provisions. Thus, if a teacher brought a claim against a school (on the basis that the school, as an employer, had discriminated against them in their remuneration, for example), then the court or tribunal would consider the legislation in this wider context. There is a well-established principle in English and European law that legislation, to the extent possible, must be construed as being consistent with the requirements of European law. If that is not possible, it is to be dis-applied to the extent required for consistency with European law. Bearing this in mind, section 60(5)(a) could and would, if necessary, be construed and applied by a court or tribunal as permitting preferential decisions on grounds of religious belief, only to the extent that such decisions were consistent with genuine, legitimate and justified occupational requirements.¹² (*Emphasis in the original*)

Let us consider this statement, made by the Department for Education in private to the European Commission in response to a complaint that was plainly troubling it.

First, it is in stark contrast to the Government's public statements that it would be legal for a school to require all teachers to be of one faith and to base their appointment, promotion, remuneration, and dismissal on their religious beliefs and practice. Look, for example, at the Department for Education's official guidance to the EA 2010, as issued in 2014:

Voluntary-aided schools may apply religious criteria when recruiting or dismissing any member of their teaching staff. In recruitment, remuneration and promotion they may give preference to persons:

- *whose religious opinions are in accordance with the tenets of the religion of the school;*
- *who attend religious worship in accordance with those tenets...*

They have taken the same line in many statements, answers to questions in Parliament and so on.

Second, it is different from the position taken by the Catholic Education Service and most religious schools. The CES has a model application form that says: "Schools/colleges of a Religious Character are permitted, where recruiting for Teaching posts, to give preference to applicants who are practising Catholics". Note in passing that terms such as 'give

¹² UK Government, *Conformity of various UK laws with Article 4 of Directive 2000/78/EC: The observations of the United Kingdom Government*, June 2013 as quoted in *Conformity of various UK laws with Article 4 of Directive 2000/78/EC: Response from the British Humanist Association to the observations of the United Kingdom Government*, para 25.

preference', 'desirable' and 'particularly welcome' raise obvious legal difficulties: if being (e.g.) a Catholic is merely 'desirable' how can it be a Genuine Occupational Requirement?

Third, extraordinarily, it means that the exception in the Equality Act is, in the Government's eyes, pointless. The Act bans discrimination on grounds of religion or belief unless the employer can show that

having regard to the nature or context of the work
(a) it is an occupational requirement,
(b) the application of the requirement is a proportionate means of achieving a legitimate aim . . .

and then goes on to exempt religious schools from this requirement - but its defence to the Commission is that schools have to show a 'genuine, legitimate and justified occupational requirement' just as in the legislation from which they are supposedly exempt.

Fourth, it is far from clear that a tribunal or court dealing with a case would act in the way the UK Government says it expects. Tribunals would almost certainly regard themselves as bound by UK law and, even if invited, shy away from discounting it in favour of an EU directive.

Not that a tribunal case is likely: given the general view of the law as propagated by the government and the religious authorities, non-religious or other-religious teachers are highly unlikely even to apply for posts described explicitly as not for them, let alone to take a school to a tribunal after being rejected for such a post - the more so given the huge costs now of taking any tribunal case.

Fifth, this sort of imperfect transposition of a Directive is contrary to good practice as defined by the European Court of Justice. The BHA in their complaint actually quoted a ruling by the Commission on an earlier infringement by the UK:

... the European Court of Justice has consistently held that the provisions of Directives must be implemented with sufficient clarity and precision to satisfy the requirements of legal certainty. . .

[I]n relation to a common law legal system a Court of Appeal judgment with precedent value may constitute an adequate transposition of a provision of a Directive.¹³

But as we pointed out there is no such judgment relating to teaching posts in religious schools.

The ruling is so contrary to the facts, good practice and precedent that there must be a strong suspicion that the Commission was motivated by a political desire not to anger the UK government in the run-up to a referendum on Brexit.

So what is the position now, after the referendum?

¹³ Reasoned Opinion - Infringement No 2006/2450 - UK failure to transpose Council Directive 2000/78/EC Articles 2(4), 4 and 9, available at <http://www.secularism.org.uk/uploads/ec-reasoned-opinion.pdf>

The BHA has submitted detailed evidence to the Joint Committee on Human Rights for its enquiry on the implications of Brexit for human rights.¹⁴ But for the time being of course the legal position is unchanged, and is likely to remain so until the UK formally quits the EU. It is even possible that as part of whatever deal we strike with the 27 we may undertake to remain bound by the employment directive, or even to be subject to the European Court of Justice, though this seems increasingly unlikely. The so-called Great Repeal Bill (more like a Great Re-enactment Bill as so far described) is of course irrelevant as the Government's line is that the EU Directive has already been fully transposed.

It remains possible therefore, that someone, maybe with BHA assistance, will bring a test case to a tribunal.

However, in their final rejection letter the Commission referred to the roles not only of the courts but also of national equality bodies: they said:

it is for the courts or the national equality bodies within the limits of their competence to apply the law in individual cases.

And in December 2016 the UK's Equality and Human Rights Commission in its long awaited report on *Religion or belief – is the law working?*¹⁵ was outspoken about this very matter: the exceptions in the SSFA are, they say 'too broad' and 'do not comply' with the Directive. Moreover they picked up on that other aspect of the Directive I mentioned at the start. Its exemption for bodies with a religious ethos allows them to discriminate on grounds of religion *but not on grounds of another protected characteristic* - such as sexuality: but the permission in the SSFA to require that a teacher's private life can be the grounds for discipline or even sacking plainly breaches this proviso.

The Commission wrote:

We consider the School Standards and Framework Act provisions are too broad and do not comply with the requirements in the EU Employment Equality Directive Article 4 (2) that the exceptions be legitimate and proportionate. The School Standards and Framework Act provisions allowing voluntary aided schools to consider the conduct of teachers appear to permit discrimination because of other protected characteristics, such as sex or sexual orientation discrimination. This is not permitted by the EU Employment Equality Directive Article 4 (2) which requires that 'difference of treatment' 'should not justify discrimination on another ground'. . .

They recommended that the Government should take another look at how compatible the current law is with the EU Employment Equality Directive and said bluntly:

It is important that we ensure teachers are able to pursue their careers without unjustifiable limitations being placed upon them. . .

They even suggested that the Commission might support any suitable legal case.

¹⁴ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/what-are-the-human-rights-implications-of-brexit/written/40614.pdf>

¹⁵ <https://www.equalityhumanrights.com/en/publication-download/religion-or-belief-law-working>

In the interest of clarity and consistency of equality law, and given the breadth of the relevant provisions and significant proportion of schools involved, the UK . . . Government . . . should review the extent to which the provisions are compatible with the EU Employment Equality Directive. It is important that we ensure teachers are able to pursue their careers without unjustifiable limitations being placed upon them.

We consider that exceptions permitting a religious requirement which has a legitimate aim and is proportionate are an effective way of making appointments which protect the religious ethos of schools. The provisions regulating the appointment of teachers to schools with a religious character and denominational schools could be modelled on the current occupational requirement exception set out in the Equality Act. To this end, if cases are raised in relation to this issue, the Commission will consider providing assistance or intervening as a third party.

We recommend that:

- *There should be no change to the current occupational exceptions allowed under the Equality Act in employment for employers with an ethos based on religion or belief, or for employment for the purposes of an organised religion.*
- *The Department for Education (DfE) should review sections 60 (4) and (5) of the School Standards and Framework Act and the Scottish Government should review section 21 (2A) of the Education (Scotland) Act to ensure their compatibility with the EU Employment Equality Directive.*

The British Humanist Association will be taking this up either politically with a view to seeking legislative reform or in the courts with a view to getting a definitive ruling before Brexit happens. Any school trying to mount a defence of requiring a PE or maths teacher to be of the right religion would surely be in difficulties, given what the Government has said so explicitly to the European Commission.

And yet in the meantime religious schools blithely continue applying religious tests for teachers whose jobs have no occupational requirement for them to be religious - and the Government continues to encourage them to do so.