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### **The Religious and Ideological Freedom of Teachers in the English Legal Framework: Is the Balance between Collective and Individual Rights Appropriate?**

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## INTRODUCTION

How does the current legal framework safeguard the individual rights of teachers to religious and ideological freedom, whilst at the same time protecting the collective rights of school communities to provide an educational context aligned to identified values and principles? How does the law seek to find a resolution or accommodation where there is a clear conflict?

The relationship between religion, education, law, society, and citizenship has been a political hot-potato in England ever since the State first began to involve itself in schooling in a concerted and coordinated way. The Forster Education Act of 1870 marked the beginning of national educational provision, at least at an elementary level,<sup>1</sup> and it was no accident that this landmark statute famously contained the Cowper-Temple Clause.<sup>2</sup> This required all religious education to be non-denominational, reflecting the bitter wrangling between Anglican and Non-Conformist educationalists in the Victorian era.

In the contemporary context, domestic and international legal instruments<sup>3</sup> safeguard the ideological liberty of families and children.<sup>4</sup> For example, Article 2 of Protocol 1 to the European Convention on Human Rights explicitly requires States to respect the religious and philosophical convictions of parents in the provision of education.

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<sup>1</sup> G Parsons, *Religion in Victorian Britain* (Manchester University Press 1988) 60-61.

<sup>2</sup> Education Act 1870, s 14.

<sup>3</sup> N Lerner, *Religion, Secular Beliefs and Human Rights* (Martinus Nijhoff Publishers 2012) 63-64.

<sup>4</sup> There is a welcome and growing recognition amongst jurists and policy-makers alike, that children enjoy independent human rights in religion as in other spheres. See, for example, S Langlaude, *The Right of the Child to Religious Freedom in International Law* (Martinus Nijhoff Publishers 2007) and United Nations Convention on the Rights of the Child, Article 14.

The freedoms of parents and children are critical in this context, and there is rightly an overwhelming consensus that they should be protected. However, they are not the only stakeholders in the educational framework: national government, local authorities, grass-roots communities, faith and belief groups, as well as society as a whole all have an interest in the schooling of the next generation, and the way in which religion is dealt with in the education system is the subject of constant debate, as competing ideas and priorities collide. Nevertheless, what about the people who are directly responsible for delivering this much contested education? Ironically, those in the very eye of the storm are sometimes apt to be overlooked, although teachers also undeniably have human rights, including the right to hold and manifest beliefs, and these may come into conflict with other rights and interests at play, as has been evidenced by recent cases in the UK media<sup>5</sup> and courts.<sup>6</sup>

This article examines the reported case law on teaching staff in dispute with their schools on religious grounds, as well as considering whether their interests are adequately protected and whether an appropriate balance is struck between multiple competing needs in such cases. As a necessary preliminary to this investigation, we begin by setting out the ways in which different types of schools in England deal with religion in their institutional life. This is crucial, because the rights, expectations, understandings and agreements in place vary where faith and conscience are concerned, both for teachers and third parties, who have competing or parallel interests. Once we have laid these foundations, we will move on to our assessment of the position of teachers in situations of conflict and shall suggest way forwards in these controversial matters.

## **THE TREATMENT OF RELIGION WITHIN THE ENGLISH SCHOOLS FRAMEWORK**

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<sup>5</sup> Maya Oppenheim, 'Teacher suspended for referring to a transgender pupil as a girl rather than a boy' *The Independent* (14 November 17).

<sup>6</sup> *De Groen v Gan Menachem Hendon* (2017) ET Case Number: 3347281/2016 (*De Groen*).

## Forms of State Maintained School: Overall approaches to religion

The educational system in England has been accurately described as ‘an area of intricate interaction between State and religion’.<sup>7</sup> As Sandberg correctly points out, it is inappropriate to differentiate between faith schools and state schools.<sup>8</sup> The question of whether a school is state maintained,<sup>9</sup> and the question of whether it has a defined religious character, are in fact two entirely separate issues. The School Standards and Framework Act 1998 established the concept of schools with a ‘religious character’,<sup>10</sup> but it is important to appreciate that maintained and independent schools<sup>11</sup> alike can come within or without this category. Any school may be designated as having a religious character, and attract the legal consequences which accompany this status, regardless of what its funding source may be.

The desirability of faith schools funded in whole or in part from the public purse is a political question, and not one which we intend to explore within this discourse. Their existence has been consistently supported by Administrations led by both left and right-wing parties, and there are no indications of a dramatic shift in policy in this regard on the horizon. The State has chosen to subsidise collective religious freedom, by assisting faith communities in providing an educational environment in harmony with their belief system, rather than making this liberty a privilege of the rich. Clearly, in supporting faith schools, public authorities must grant such institutions some latitude and autonomy in developing an environment and ethos which is reflective of the values of the faith group, rather than the State, as otherwise the provision of funding is somewhat self-

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<sup>7</sup> R Catto, G Davie and D Perfect, ‘State and Religion in Great Britain: Constitutional Foundations, Religious Minorities, the Law and Education’ (2015) 17:1 *Insight Turkey* 79. The comments also encompass Wales.

<sup>8</sup> R Sandberg, *Law and Religion* (Cambridge University Press 2012) 152.

<sup>9</sup> We shall discuss the position of independent schools in the last subsection within this section.

<sup>10</sup> School Standards and Framework Act 1998, ss 58-69 (as amended).

<sup>11</sup> We have used the terms ‘independent’ and ‘private’ schools to refer to institutions not in receipt of funding from the State. We have avoided the English term ‘public schools’ in relation to fee paying institutions, as it may be confusing to an international readership.

defeating. Whilst the executive is entitled to take an interest in where and how its monies are being applied, and for example, it has indicated that it will not fund schools presenting Creationism or Intelligent Design as scientific or factual terms,<sup>12</sup> generally speaking, it will not seek to involve itself in the ideological character or self-understanding of the school.<sup>13</sup> Whether or not assisting faith-communities in providing such schooling is beneficial in terms of social policy, is a separate matter and beyond the scope of our legal investigation.

It should also be appreciated that no schools within the state supported sector are wholly divorced from religion, as is demonstrated by Rivers' insightful suggestion that almost *all* state maintained schools in England are in some sense "faith schools" by virtue of the out-workings of an established religion.<sup>14</sup> For instance, maintained schools with no religious ethos are required by statute to hold a daily act of worship,<sup>15</sup> which is '*wholly or mainly of a broadly Christian character*',<sup>16</sup> clearly demonstrating that such schools do not purport to have a truly secular nature. However, it should be stressed that the question of whether a given school is a faith school (in the commonly used sense of having a defined religious ethos) is a separate issue from the question of the legal model under which it is constituted and operates.

There are various forms of maintained schools in England: academies and free schools, voluntary aided and voluntary controlled schools, foundation schools, and community and community special schools. The categories are differentiated in terms of the kinds of legal entities that control each type of maintained schools, the groups and interests that contribute to schools' decision-making and

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<sup>12</sup> 'Richard Dawkins celebrates victory over creationists: free schools that teach intelligent design will lose funding' *The Guardian* (14/1/2012) <https://www.theguardian.com/education/2012/jan/15/free-schools-creationism-intelligent-design>

<sup>13</sup> Subject of course to the school satisfying the rigours of the relevant educational inspectorate, statutory provisions in relation to British Values and the Prevent Duty (Counter Terrorism and Security Act 2015) and the generally applicable law on child welfare and protection (Children Act 1989)

<sup>14</sup> J Rivers, *The Law of Organized Religions* (Oxford University Press 2010) 234. This comment encompasses Wales as well.

<sup>15</sup> Education Act 1996, s 390.

<sup>16</sup> *ibid* at sch 20.

funding, as well as the degree of autonomy which schools within each category enjoy. Clearly, this may be highly relevant to teachers as employees, in terms of the expectations placed upon them in the workplace, the ethos in which they are required to operate professionally and the people who make managerial and policy decisions which have an impact upon them.

Academies are funded directly by the Government, are independent of the local authority, are run by charitable trusts, and may be supported by corporate or other sponsors, including religious denominations. The religious nature of some academies has created a more robustly independent form of state funded faith school. Academies need not follow the national curriculum, but are bound by the same regulatory framework on admissions, special educational needs and exclusions which apply to other maintained schools.<sup>17</sup> Free schools function in much the same way as academies, but tend to be newly founded schools, rather than institutions which have converted from another model.<sup>18</sup>

Voluntary aided, voluntary controlled and foundation schools all have less autonomy than academies and free schools, although considerably more than community schools,<sup>19</sup> and all follow the national curriculum. Voluntary aided schools are supported by a charitable foundation, frequently a religious organisation, which contributes to operational and building costs, whilst having significant input into governance. Governors appointed by the foundation will outnumber other governors by a majority of two.<sup>20</sup> Voluntary controlled schools have a similar structure, but

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<sup>17</sup> HM Government, 'Types of Schools, Academies' <[www.gov.uk/types-of-school/academies](http://www.gov.uk/types-of-school/academies)> accessed 25 February 2018.

<sup>18</sup> Academies Act 2010.

<sup>19</sup> HM Government, 'Types of Schools' (n 16). Community schools still are controlled directly by the Local Authority.

<sup>20</sup> The Church of England, Diocese of Derby, 'Aided and Controlled Schools: What's the Difference?' (September 2005) 4 <<http://derby.anglican.org/education/wp-content/uploads/2013/07/whats-the-difference-leaflet.pdf>> accessed 25 February 2018 .

enjoy less freedom and do not receive any building costs from the foundation. In addition, foundation governors will be in the minority on the governing body.<sup>21</sup>

Faith schools tend to be voluntary controlled or voluntary aided schools, but some foundation schools do have a religious character.<sup>22</sup> Foundation schools are funded wholly by the local authority, but the governing body employs the staff and has responsibility for admissions to the school. It is worth noting that practices and policies vary greatly between individual schools, and that there is no evidence that the manner in which a religious ethos is made manifest strongly correlates to the governance model of the school in question. This is material to the position of teachers making career choices, as a potential job applicant could not make reasonable deductions about the outworking of a religious ethos based on the type of school offering employment.

Community and community special schools are the only types of maintained schools which cannot have a religious character, but significantly, the Government itself describes them not as secular, but as 'not influenced by ... religious groups'.<sup>23</sup> Such schools are nonetheless subject to the requirements of applicable legislation regarding religion.

Thus, as is evident from this brief overview of a somewhat byzantine system, religious bodies have considerable input into the governance of a number of categories of maintained schools. We now turn to the question of admissions of pupils.

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<sup>21</sup> *ibid.*

<sup>22</sup> L Vickers, 'Religious Discrimination in Schools: The Employment of Teachers and the Public Sector Duty' in M Hunter-Henin (ed), *Law, Religion and Freedoms in Europe: Education in Europe* (Ashgate 2011) 87.

<sup>23</sup> HM Government (n 16).

## Maintained Schools and Admissions

As might be expected, maintained schools in England without a religious ethos may not discriminate on faith grounds when it comes to admissions.<sup>24</sup> Maintained schools with a religious ethos are granted some exceptions from general discrimination law concerning the selection of pupils,<sup>25</sup> but the school must be over-subscribed before faith related criteria can be legitimately applied.<sup>26</sup> This safeguard is controversial in its practical application, given the difficulty of defining whether an individual is a member of a faith community. As Barber observes, the courts are in general reluctant to interfere with the determination of religious authorities on this point, but there remains scope for wrangling and in the worst case scenarios either litigation or deliberate exclusion of some groups.<sup>27</sup> The system strives for a balance between, on the one hand, interests of schools with a religious character in fostering it, and on the other, access for the wider community to the local maintained school.

Although the impact of these policies upon teachers will be an indirect one, it is apparent that there are a number of ways in which it will have a material influence on their working environment, and the attitudes and expectations of the student body will inevitably be shaped by the worldview within which they live. Furthermore, the concerns of the parent body may also be moulded by the teachings and practices of the religion to which they subscribe, and this clearly may have an impact upon decisions within the school community which influence subjects and policies not related to religion directly.

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<sup>24</sup> Equality Act 2010, s 4.

<sup>25</sup> *ibid* sch 11. Beyond the admissions policy itself, other manifestations of the school's religious ethos, such as dress codes [Schools Admission Code for 2007, paras 2.41–3] may also affect the make-up of the school by (consciously or unconsciously) discouraging some families from applying. [P Barber, 'State schools and religious authority-where to draw the line?' (2010) ELJ 224.] A requirement that women not wear mini-skirts, leggings or trousers on the school site, may make families from outside the faith community less likely to seek admission. Are the additional citations in this FN necessary, in light of the two subsequent notes?

<sup>26</sup> Schools Admission Code for 2007, paras 2.41–3.

<sup>27</sup> P Barber, 'State schools and religious authority-where to draw the line?' (2010) ELJ 224.



The effect may be more disconcerting for teachers whose religious identity differs from that of the school, when there is disagreement *within* the relevant faith community over a particular issue. The greater the numerical dominance of a given faith group, the higher the chances are that a critical mass of vociferous subgroups persuading the institution to support their agenda on a specific issue. For example, as C S Lewis and J R R Tolkien demonstrate, by no means all Christians object to children reading books about magic and witchcraft, but some conservative Christians do believe that such material is dangerous and should be banned from UK classrooms.<sup>28</sup> Equally, some, but by no means all, Muslim parents do not wish their children to learn musical instruments.<sup>29</sup>

Given the scope for disagreement within faith groups, and how nuanced some of the issues can be, it is not difficult to see how teachers not immersed in the relevant religion could be inadvertently causing controversy or offence. Admissions criteria relate to the strength and dominance of the religious character of the school, which in turn may affect how easy staff members find it to integrate themselves within the school community and respond sensitively to their environment. There is always the potential for parental complaints to lead to disciplinary matters, and such expressions of dissatisfaction must almost inevitably increase work-stress for those on the receiving end of negative feedback.

Needless to say, we are not suggesting that either those responsible for the governance of faith schools, or families who consciously choose to send their children there, will necessarily be hostile to different perspectives or inevitably generate a culture which is problematic for teachers who do not share the religious outlook of the school. Nevertheless, in creating an environment with limited

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<sup>28</sup> J Espinoza, 'Religious parents want Harry Potter banned from classrooms because it glorifies witchcraft' *The Telegraph* (16 December 2015) <[www.telegraph.co.uk/education/educationnews/12052212/Religious-parents-want-Harry-Potter-banned-from-the-classroom-because-it-glorifies-witchcraft.html](http://www.telegraph.co.uk/education/educationnews/12052212/Religious-parents-want-Harry-Potter-banned-from-the-classroom-because-it-glorifies-witchcraft.html)> accessed 25 February 2018.

<sup>29</sup> G Paton, 'Muslim pupils withdrawn from music lessons' *The Telegraph* (1 July 10) <[www.telegraph.co.uk/education/educationnews/7866176/Muslim-pupils-withdrawn-from-music-lessons.html](http://www.telegraph.co.uk/education/educationnews/7866176/Muslim-pupils-withdrawn-from-music-lessons.html)> accessed 25 February 2018.

diversity, admissions policies increase the *potential* for unconscious bias and conflict born of mutual misunderstanding.<sup>30</sup> Undoubtedly, it is possible for faith schools to take steps to counterbalance such intrinsic bias, and create a welcoming environment for all, but doing so requires some proactive initiative.

In any event, it is equally legitimate to ask how schools could reasonably be expected to maintain a religious ethos without some capacity to select pupils on religious grounds, and it must be acknowledged that the decision as to whether to support and facilitate faith schools is ultimately a political, rather than a legal one. As noted above, we are certainly not suggesting that in legal terms, having a faith-related admissions policy *inevitably* leads to less favourable treatment for employees who do not conform to the prevailing religious culture, but we are simply noting that there is a heightened risk of this occurring if the situation is not proactively managed. Once we have focused on admissions of pupils, it is timely to turn to the employment position of teachers.

### **Employment in Maintained Schools**

It should be noted at the outset that religion or belief is a protected characteristic under equality legislation and that direct discrimination on this basis will be unlawful unless a school can demonstrate its action comes within a specific statutory exemption.<sup>31</sup> Voluntary controlled and foundation schools may take faith into account during the appointment process for a head-teacher,<sup>32</sup> and such schools can also designate up to one fifth of appointments of '*reserved teachers*', as well as selecting them on the basis of their '*fitness and competence*' to deliver religious education

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<sup>30</sup> H Ross, *Everyday Bias* (Rowman & Littlefield 2014).

<sup>31</sup> Equality Act 2010, s 4.

<sup>32</sup> School Standards and Framework Act 1998, s 60 .

in accordance with the doctrines of the faith of the school.<sup>33</sup> Furthermore, failure to abide by these doctrines could potentially provide legitimate ground for disciplinary action, and even dismissal of head-teachers and reserved teachers, if their actions were such as to undermine their '*fitness and competence*' to perform the role they have been appointed for.

Voluntary aided schools have even greater discretion: faith related considerations may be taken into consideration when appointing *all* teaching staff and as a legitimate ground for disciplinary action and dismissal.<sup>34</sup> This latitude has serious implications for the personal freedoms of individual employees, particularly since warnings and sanctions could relate to personal life-choices outside of the school sphere (for example, engaging in extra-marital, homosexual or inter-faith relationships). Vickers perceptively observes that, in contrast with the provisions of the Equality Act 2010, the School Standards and Framework Act 1998 does not apply any test of proportionality, nor require a demonstration that the religious criteria are '*genuine occupational requirements*' (that the religious criterion is of practical relevance to fulfilling a legitimate aim of the school).<sup>35</sup> This commentator questions whether this framework is compatible with human rights law in a European context, given that it enables discrimination against individuals on religious grounds. Other scholars<sup>36</sup> express similar concerns about the apparent dissonance between the current framework and equality law.

Furthermore, the Equality and Human Rights Commission has echoed concerns about a *carte blanche* to discriminate, without any need to demonstrate necessity or proportionality,<sup>37</sup> and this in turn has been highlighted by Accord, a campaign group advocating their understanding of inclusion within education.<sup>38</sup> It must, therefore, be acknowledged that there are voices of disquiet in

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<sup>33</sup> *ibid*, s 58.

<sup>34</sup> *ibid*,s 60.

<sup>35</sup> Vickers (n 21)87-106.

<sup>36</sup> R Thompson, 'Religion, Belief, Education and Discrimination' (2015) 14 Equal Rights Rev 71.

<sup>37</sup> Equality and Human Rights Commission, *Religion or Belief: Is the law working?* (2016)23-29

<<https://www.equalityhumanrights.com/sites/default/files/religion-or-belief-report-december-2016.pdf>>

<sup>38</sup> 'Accord welcomes ECHR call to curtail teacher discrimination laws' <

academia, regulatory authorities and the educational sector, in relation to unrestricted freedom conferred by the School Standards and Framework Act 1998 .

In contrast, academies and free schools designated as religious are able to apply religious criteria to teacher-recruitment and discipline,<sup>39</sup> but because they are not within the special provisions of the School Standards and Framework Act, the provisions of the Equality Act 2010 apply unless the school can demonstrate that the religious criteria form a '*genuine occupational requirement*'.<sup>40</sup> The difficulties set out above in respect of other types of schools could be addressed if they were brought into line with this position, and obliged to demonstrate that they are not infringing the individual freedoms of teachers, except in so far as is objectively required to carry out the role for which they are employed.

### **Religion and Independent Schools**

It is now appropriate to turn, however briefly, to an analysis of the interaction between religion and independent schools. Given that as we shall discuss, some of these institutions are faith schools and benefit from some exemptions from general equality law provisions, it would leave a significant gap if they were excluded from our discussion. These fee-paying schools in England do not receive direct financial support from the State, even though many such schools are eligible for significant fiscal concessions as charities,<sup>41</sup> and as might be anticipated, they are less restrained by regulatory frameworks.

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<sup>39</sup> Thompson (n 35) at 76.

<sup>40</sup> N Shribman, 'A Victory for Common Sense' (2011) 161 *New Law Journal* 1248-50.

<sup>41</sup> Charities Act 2011, s 3(1)(b).

Independent schools control their daily schedule and their curriculum, despite the fact that the latter must be broad and balanced, as well as satisfying the requirements of either Ofsted or an alternative inspectorate approved by the Secretary of State.<sup>42</sup> Irrespective of being designated as having a religious character, independent schools can choose whether to teach religious education, denominational or otherwise, and whether to hold collective worship on a regular basis. If designated as having a religious character,<sup>43</sup> they may discriminate on religious grounds in relation to the admission of pupils,<sup>44</sup> regardless of being over-subscribed,<sup>45</sup> and they may also apply what would otherwise be unlawful discrimination in respect of teaching staff, on essentially the same basis as voluntary aided schools discussed above.

In other words, if operating as faith schools, establishments in the private sector may require staff members to conform to criteria which are necessary to further their institutional ethos, provided that the requirements being imposed are not disproportionate. Of course, all schools, independent or state maintained, with or without a religious ethos, will have a collective character and organizational objectives. This dynamic, by its very nature, sets up the possibility for conflict between the freedoms of individual teachers, and the values of the school as an institution, and it is to these situations of tension, and the case law discussing it, which we now turn.

## **CASE LAW ON TEACHING STAFF IN CONFLICT WITH SCHOOLS ON RELIGIOUS GROUNDS**

So, we move to the focal part of our discussion, which is assessing, what balance the courts have struck between the individual rights of teachers and the collective rights of their employing

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<sup>42</sup> Independent Schools Inspectorate <[www.isi.net/](http://www.isi.net/)> and <[www.gov.uk/education/inspection-of-independent-schools](http://www.gov.uk/education/inspection-of-independent-schools)> accessed 25 February 2018.

<sup>43</sup> In accordance with a procedure set out in secondary legislation: Religious Character of Schools (Designation Procedure) (Independent Schools) (England) Regulations 2003.

<sup>44</sup> *ibid*, sch 11, para 5(b).

<sup>45</sup> *ibid*, sch 3.

institution, and whether this has been appropriate. Clearly, a potential collision between institutional objectives and personal freedoms might arise in a wide variety of scenarios and guises. For the ease of analysis, we propose to consider the position in relation to three broad categories of situations: 1) Conflicts involving non-religious teachers employed in faith-schools; 2) Conflicts involving religious teachers whose views or conduct do not accord with the ethos of the faith school in which they work; and 3) Conflicts involving religious teachers in non-faith schools.

### **Conflicts involving non-religious teachers and faith-schools**

To what extent may faith schools require teaching staff to comply with the doctrines of the relevant religious community? On the one hand, the courts have adopted a fairly robust stance in relation to employers establishing a 'genuine occupational requirement', and constraints cannot be imposed without an identifiable and adequate reason. Nevertheless, individuals are potentially still left quite exposed when it comes to situations where either a genuine occupation requirement is clear and easy for the school to establish, or where religious criteria can be imposed without any genuine occupational requirement being demonstrated.<sup>46</sup> Two contrasting decisions illustrate the overall position well.

In the Scottish case of *Glasgow City Council v McNab*,<sup>47</sup> the court was not prepared to find being Roman Catholic a genuine occupational requirement for teaching Personal and Social Education. An atheist was employed by a Roman Catholic maintained school and was not appointed to, nor given an interview for, a senior post which involved teaching 'personal and social education', whereas a Roman Catholic teacher would have at least been interviewed. Teaching PSE did not amount to

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<sup>46</sup> School Standards and Framework Act 1998, s 58.

<sup>47</sup> *Glasgow City Council v McNab*, [2007] IRLR 476.

pastoral care, so the local authority could not rely on special arrangements which related to this provision. Moreover, the mere fact that the appointment in question had to be approved by the Roman Catholic Church did not render being Roman Catholic a 'genuine occupational requirement', and it was open to the Church to approve an atheist person or person of another faith if it so chose. Consequently, the finding that the applicant had been the victim of unlawful discrimination was upheld.

However, an interesting counterpoint to this decision is provided by the earlier *Board of Governors of St Matthias Church of England School v Crizzle*.<sup>48</sup> In this case, an Asian applicant argued that a requirement for a 'committed Communicant Christian' applicant was discriminatory with regard to a head-teacher post. The court found that the wording was indirectly, but not directly, discriminatory, and therefore open to justification on the basis of a genuine occupational requirement. The criterion was imposed for the express purpose of maintaining the ethos of the school, and was found to be reasonable and proportionate in all of the circumstances. Thus, although courts will scrutinise the claims of faith schools carefully in relation to genuine occupational requirements, they will respect them where they are found to apply.

Extrapolating from this, it seems clear that teachers who are not 'reserve' teachers, or otherwise lawfully recruited on faith-based criteria (e.g. in voluntary aided schools), cannot be expected to live as if they were members of a particular faith community, nor subjected to professional disadvantage for failure to conform to its practices, *unless* this had a demonstrable impact upon their ability to carry out their role. Reasoning from first principles this must surely be correct. Given that the statutory regime<sup>49</sup> deliberately limits schools' ability to discriminate on religious grounds, this objective would be fatally undermined if schools were able to circumvent the protection by imposing additional requirements which only members of a particular faith community would be willing or able to meet.

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<sup>48</sup> *Board of Governors of St Matthias Church of England School v Crizzle* [1993] IRLR 472, ICR 401.

<sup>49</sup> See eg Equality Act 2010 and the School Standards and Framework Act 1998.

Furthermore, courts considering these issues would also be mindful of the human rights dimension of such a situation. Article 9<sup>50</sup> requires States to provide individual employees with appropriate legal recourse if an employer has interfered with their right to manifest their religion or belief.<sup>51</sup> This does not, of course, guarantee a remedy or vindication of the right, but the legal framework should at least furnish individuals with a mechanism whereby the relevant interest can be weighed in the balance, in order to establish that any limitation comes within the bounds of Article 9(2). Limiting the freedom of an employee to manifest their atheist, agnostic or humanist worldview would be an infringement needing justification.<sup>52</sup>

The same consideration would apply to the expression of a political or ethical belief which violated the school's ethos. Consequently, for example, since the Church of England has indicated that supporting certain far-right groups is incompatible with the Anglican faith,<sup>53</sup> a teacher who openly promoted the British National Party might be disciplined for failing to live in accordance with Church teachings. In an instructive case from outside the educational context, *Redfearn v United Kingdom*,<sup>54</sup> a bus driver was dismissed because of his active involvement in the British National Party. He was unable to claim for unfair dismissal, as he had not completed the statutory minimum qualifying period for bringing such an action, so attempted to claim that he had been the victim of indirect racial discrimination. Unsurprisingly, the Court of Appeal was very unsympathetic to this argument, and dismissed it on the basis that no appropriate comparator had been proposed to demonstrate less favourable treatment on racial grounds,<sup>55</sup> but the Strasbourg Court regarded disciplining an employee solely for membership of an organisation as a violation of the Article 11 right to freedom of association.

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<sup>50</sup> European Convention on Human Rights, Article 9.

<sup>51</sup> *Eweida v United Kingdom* App no 48420/10 (ECtHR, 15 January 2013) (*Eweida*).

<sup>52</sup> *Kokkinakis v Greece* (1993) 17 EHRR 397, para31.

<sup>53</sup> The Church of England, 'BNP and National Front Incompatible with Teaching of the Church' <[www.churchofengland.org/media-centre/news/2014/06/bnp-and-national-front-incompatible-with-teaching-of-church.aspx](http://www.churchofengland.org/media-centre/news/2014/06/bnp-and-national-front-incompatible-with-teaching-of-church.aspx)> accessed 25 February 2018.

<sup>54</sup> *Redfearn v United Kingdom* [2013] IRLR 51, [2012] All ER (D) 112 (Nov).

<sup>55</sup> *Redfearn v Serco Ltd* [2006] IRLR 623, ICR 1367.



Essentially, the touchstone issue will be the significance of the belief and its accompanying expression in relation to the teacher's ability to perform their role and further their employing school's objectives. It is challenging to think of many hypothetical situations in which simply *holding* a belief would be sufficient basis to support any sanction, but making certain beliefs known might in some circumstances provide an employer with sufficient reason to take action, in order to maintain the collective goals and character of the institution.

As we shall see in our discussion below in relation to religious individuals who find themselves out of step with the doctrinal position of their employing faith school, both national courts and the Court of Strasbourg recognise the importance of protecting collective, as well as individual religious and ideological freedom. Consider, for instance, the reasoning of the Strasbourg Court with regard to *Ladele*, a registrar declining to conduct civil partnership ceremonies for same sex couples: if shielding adult colleagues from discriminatory expressions can justify limiting freedom of conscience or religion, then a fortiori, protecting young people in a school environment must surely be sufficient justification.<sup>56</sup>

A much more complicated question would arise where the teacher's conduct or opinions might be seen as undermining the religious ethos of the school, but would not be construed as harmful by wider society, e.g. support for *Humanists UK*<sup>57</sup> or *Stonewall*.<sup>58</sup> Considering *McNab* and *Crizzle* together, it is reasonable to infer two things. Firstly, it is highly unlikely that ideological status will, *in and of itself*, be sufficient reason to subject a non-reserved teacher to any disadvantage. However, if the school needed a member of teaching staff to model religious practice or provide preparation for religious rites of passage, and this was part and parcel of their role within the school, as was the case in *Crizzle*, then their employing faith school may well be able to demonstrate a genuine occupational requirement.

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<sup>56</sup> *Eweida* (n 51).

<sup>57</sup> Humanists UK <https://humanism.org.uk/>

<sup>58</sup> Stonewall <https://www.stonewall.org.uk/>

## **Conflicts involving religious teachers whose views or conduct do not accord with the ethos of the faith school in which they work**

In many respects, the position is isomorphic for that of religious teachers working in faith schools, where they find themselves out of step with the prevailing doctrinal culture. The courts will be resistant to any expansion of the parameters within which differential treatment can be accorded, the borders of statutory exemptions to equality law will not be pushed back, and where a genuine occupational requirement is necessary, it will not be inferred in the absence of objective evidence. Nevertheless, once again, if there is some evidence of a genuine occupational requirement being in place, individuals will struggle to argue that their religious freedom should trump that of the wider faith group.

In relation to the judicial maintenance of the parameters set by statute, *O' Neill v Governors of St Thomas More School* is a good illustrative example.<sup>59</sup> In this case, a religious education teacher was dismissed after becoming pregnant by a priest. She brought an action pursuant to the Sex Discrimination Act 1975, the applicable law at the time, and the school attempted to apply the defence contained in section 19 of the statute.<sup>60</sup> The response was given short shrift by the court, taking into account that s19 was implemented in order to protect the freedom of organised religious groups to restrict certain roles of members of a particular gender, and there was no suggestion that the job of teaching religious education in this school was confined to female applicants. As Rivers

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<sup>59</sup> *O'Neill v Governors of St Thomas More School* [1997] ICR 33,43F].

<sup>60</sup> Sex Discrimination Act 1975, s 19 - (1) *Nothing in this Part applies to employment for purposes of an organised religion where the employment is limited to one sex so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers. (2) Nothing in section 13 applies to an authorisation or qualification (as defined in that section) for purposes of an organised religion where the authorisation or qualification is limited to one sex so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers.*

correctly observed, the provision did not cover *all* forms of sex discrimination aimed at preserving a religious ethos, but only the very specific type outlined.<sup>61</sup>

Equally, a useful analogy can be drawn from *R v Governing Body of JFS*.<sup>62</sup> Here a pupil was denied admission to a school on the basis that he was not deemed Jewish according to the criteria being applied, as the conversion process which his mother underwent was not recognised by Orthodox Judaism, and he could not, therefore, claim membership of the religious community by virtue of Jewish matrilineal descent. The majority of the Supreme Court were of the view that the decision made by the school authorities amounted to direct discrimination on *racial* grounds, and as a result no relevant statutory exempt could be claimed. It is difficult to imagine that the court would have adopted a different approach to racial discrimination, had the case involved an applicant for a teaching position, rather than a pupil.

Similarly, where the court is considering a genuine occupation requirement, a robust approach will be taken in assessing the *genuine* part of the formula. De Groen<sup>63</sup> provides a recent example of this. In this case, a private Ultra-Orthodox nursery employed a teacher, and terminated her employment when it became known that she was cohabiting with her boyfriend. She continued to identify as Jewish, but held a different doctrinal understanding to that of her employer about the requirements of Jewish law concerning sexual relationships. She succeeded in establishing that she had been directly discriminated against on grounds of both sex and religion and/or beliefs, as well as also being indirectly discriminated against on grounds of religion and/or beliefs. It was found that a person who shared the Ultra-Orthodox belief that cohabitation outside of marriage was wrong would not have been subjected to the same detriment, and also that a male teacher in her position would not have been subjected to harassment and personal questions about the risk of pregnancy outside of marriage. Furthermore, a substantial pool of other people sharing the claimant's beliefs

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<sup>61</sup> J Rivers, *The Law of Organised Religions: Between Establishment and Secularism* (Oxford University Press 2010) 123.

<sup>62</sup> *R v Governing Body of JFS* [2009] UKSC 15, [2010] 1 All ER 319.

<sup>63</sup> *De Groen* (n 7).

on cohabitation and Judaism would also have been disadvantaged, allowing her to demonstrate indirect discrimination.<sup>64</sup>

As far as this sort of discrimination is concerned, the tribunal considered the justification and found that in order to rely upon this as a defence, an employer would have to show: 1) that it had an ethos based on religion or belief; 2) it had applied a genuine occupational requirement; and 3) having regard to that ethos and to the nature of the claimant's work, the requirement was both legitimate and justified.

The court stressed that *"life-styles and personal beliefs are almost always excluded from the scope of an occupational requirement...The greater the interference with the claimant's human rights, the more stringent the test should be"*.<sup>65</sup>

The defendants were unable to show that there was any genuine occupational requirement for a nursery teacher to have a domestic situation which accorded with Ultra-Orthodox norms. Whilst it might have been a cause for gossip amongst the adult community, living with her boyfriend in no way interfered with the claimant's capacity to provide appropriate instruction for the children in her care, nor otherwise had a negative impact on her behaviour and performance during working hours. In short, her living arrangements were irrelevant, and consequently could not be construed as a genuine occupational requirement.

As a result, it is undoubtedly the case that individual teachers are protected up to a certain point. Courts will not expand upon the concessions granted to faith groups in respect of equality law, and where an employer school is seeking to rely on a genuine occupational requirement, they must be in a position to demonstrate an objective need for the demand or restriction being imposed. However,

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<sup>64</sup> *ibid*, para 77.

<sup>65</sup> *ibid*, para 86.3.1.

if such an objective need can be identified, as was the case in *Crizzle*, it is highly likely that the school will be acting lawfully in imposing the requirement in question.

At one level, this is part and parcel of accommodating schools with a religious ethos within the legal framework. In pragmatic terms, it is challenging to see how educational institutions could be expected to maintain a religious character, if they were not permitted to ask their teaching staff to meet genuine needs in order to achieve this objective, and this position is, arguably, in harmony with the Strasburg case law on the protection of collective religious freedom. For instance, in *Fernández Martínez v Spain*<sup>66</sup> a religious education teacher's contract was not renewed, after he very publicly campaigned against the policy of the Roman Catholic Church in a number of areas, particularly clerical celibacy. He tried unsuccessfully to challenge this through the Spanish courts, and eventually took his case to the European Court of Human Rights, arguing a violation of Articles 8, 9, 10 and 14. He lost before both the Chamber and Grand Chamber, and the latter in particular stressed the importance of protecting the religious freedom of faith groups:

*"It is therefore not the task of the national authorities to act as the arbiter between religious communities and the various dissident factions that exist or may emerge within them".*<sup>67</sup>

It is important to emphasize that religious groups cannot function without the ability to live out their faith as a community, as well as arbitrating on their own matters of internal dogma and discipline, and this collective dynamic of religious liberty is likely to breakdown if state authorities intervene in doctrinal disputes. However, as we shall discuss further below, the position can be complicated where teaching staff are concerned, by virtue of the nature of their role. Once a genuine occupational requirement is established, individuals will have little possibility of asserting that their personal interests over and against the collective need for religious freedom, but the very nature of school life makes defining the scope of genuine occupational interests challenging.

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<sup>66</sup> *Fernández Martínez v Spain* App no 56030/07 (ECtHR, 12 June 2014).

<sup>67</sup> *ibid*, para 128.

One powerful consideration in this regard is the frequently blurred relationship between working and non-working time and activities. This has been acknowledged by the Supreme Court in relation to the significance of ‘non-directed time’ for the purposes of teachers’ employment contracts, and in twenty-first century Britain, teachers’ working hours are not regulated nor confined to time in the classroom.<sup>68</sup> In addition, they are expected to act as role models for pupils and professionally required to maintain standards of behaviour outside school as well as within it.<sup>69</sup> It is true that in the *De Groen* case the employer failed to show a genuine occupational requirement in relation to the teacher’s personal circumstances, but this should certainly not be taken as an indication that conduct outside of school will be irrelevant for genuine occupational requirements where they do arise.

There is great potential for personal and professional time and considerations to become enmeshed where teachers are concerned, as we shall see again in turning to our third context.

### **Conflicts involving religious teachers in non-faith schools.**

The provision which protects the religious and ideological liberties of teachers in maintained schools without a religious character is set out in s59 of Schools Standards and Frameworks Act:

*“No person shall be disqualified by reason of his religious opinions, or of his attending or omitting to attend religious worship-*

*a) From being a teacher at the school, or*

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<sup>68</sup> *Hartley and Others v King Edward VI College* [2017] UKSC 39, 4 All ER 637.

<sup>69</sup> Department for Education, *Teachers Standards* (June 2011; Updated June 2013) 14: *“Teachers uphold public trust in the profession and maintain high standards of ethics and behaviour, within and outside school”*.

*b) From being employed [or engaged] for the purposes of the school otherwise than as a teacher.<sup>70</sup>*

Teachers are also protected from being required to teach religious education, and from being subject to detriment for refusing to teach it,<sup>71</sup> or on the basis of their religious opinions, attendance or non-attendance at religious worship.<sup>72</sup> At first sight, these provisions appear to safeguard individuals from disadvantageous treatment on the grounds of their religious identity, or willingness to participate in worship (which as discussed above is still a statutory requirement in state maintained schools). Nevertheless, once we move beyond the areas specifically set out in statute as protected, we are once again faced with a position where individuals are exposed when it comes to expressing their beliefs, as opposed to passively and privately holding them.

A recent high profile controversy illustrates this point well. A dispute from an Oxford school, which is currently pending before an Employment Tribunal,<sup>73</sup> began when Joshua Sutcliffe was teaching Mathematics to a secondary school class, 'misgendered' a pupil and was suspended whilst an investigation took place. After having been accused of referring to a female to male transgender student as a girl, Sutcliffe acknowledged having done it, but protested that it was simply a slip of the tongue. Were this simply an innocent and isolated error, the response of the school authorities would have self-evidently been grossly disproportionate, but the pupil's family complained that this misgendering was part of a wider pattern of behaviour by Sutcliffe.

It must be acknowledged that Sutcliffe was a Christian pastor for a theologically conservative Church, and believed as a matter of faith that gender is determined by God and in harmony with biological sex. In fact, he had gone as far as to give an interview on national television in which he

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<sup>70</sup> School Standards and Framework Act 1998, s 59(2).

<sup>71</sup> *ibid*, s 59(3).

<sup>72</sup> *ibid*, s 59(4).

<sup>73</sup> 'Oxford Teacher investigated for misgendering to sue school' *BBC News* (11 December 2017) <[www.bbc.co.uk/news/uk-england-oxfordshire-42312342](http://www.bbc.co.uk/news/uk-england-oxfordshire-42312342)> accessed 25 February 2018.

was very open about his ideological objection to using male pronouns to refer to the student.<sup>74</sup> In this public appearance, he maintained that his policy was to use the pupil's first name, or the gender neutral 'they' when referring to him, thereby avoiding compromising his own beliefs, but demonstrating respect for the pupil. To put it differently, whilst the use of the term 'girls' was inadvertent, he had consistently refused to apply male pronouns to the pupil.

It is key to highlight that issues of gender identity are at the centre of current legal and social debate, and that a spectrum of views may be found both within and without faith communities.<sup>75</sup> Nevertheless, it is also fair to recognize that many citizens, transsexual or not, would find it uncomfortable if a third party in a position of power refused to use the pronoun which they believed applied to their gender, when this was not their general habit. The very fact that Sutcliffe praised the 'girls' demonstrates that he ordinarily used gendered language in referring to the people around him (as most speaking English people, of course, do). Consequently, the teacher was treating this pupil differently from others on the basis of their transgender status, and this had been motivated by his religious convictions. Furthermore, his profile in the local community as a pastor in a conservative Church must inevitably have influenced the way in which the pupil experienced this situation, particularly bearing in mind that in light of his public religious stance, there was no scintilla of doubt about the motivation for the different approach to gendered language between transgendered students and others (i.e. to avoid it in the former case but not the latter).

As a result he denied this pupil's gender identity, and such an approach was inevitably going to prove problematic in any maintained school, given that that the Public Sector Equality Duty applies

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<sup>74</sup> 'The Teacher Who Could Lose His Job For Misgendering A Pupil' *This Morning* (17 November 2017) <[www.youtube.com/watch?v=\\_9\\_b49s-xVg](http://www.youtube.com/watch?v=_9_b49s-xVg)> accessed 25 February 2018.

<sup>75</sup> H Hall, 'Gender Identity Shouldn't Be A Battleground' *HuffPost* (6 December 2017) <[www.huffingtonpost.co.uk/author/helen-hall/](http://www.huffingtonpost.co.uk/author/helen-hall/)> accessed 25 February 2018.



in this context, regardless of whether the institution a religious ethos.<sup>76</sup> The school as an institution had a duty to address discrimination and promote equality with regard to protected characteristics, which include gender identity, and Sutcliffe's religious expression as far as his differential treatment of the pupil in question is concerned, was undermining, rather than promoting, this institutional objective.

In the same way that courts have not been willing to allow the collective protection of religious freedom to expand beyond its statutory boundaries, as *O'Neill* and *JFS* demonstrate, it is highly unlikely that s59 of the School Standards and Framework Act would be allowed to operate in a way which went beyond protecting an individual from discrimination on the basis of holding religious beliefs, attending or not attending worship, and extended into enabling teachers to actively express views which would undermine the school's statutory duties or cause harm to third parties.

This is borne out by a recent decision of the Employment Tribunal, *Powell v Marr Corporation*, in which a teacher who engaged in an argument about the moral acceptability of homosexuality with her pupils, in which she shared her belief about its sinful nature, failed to establish a claim for discrimination on the grounds of religion or belief when disciplinary action was taken against her by her employer.<sup>77</sup> The tribunal highlighted, in relation to the human rights dimension to the case, that the freedom to manifest a belief is not absolute, and may be limited for good reason.<sup>78</sup> None of this is surprising or remarkable, but it emphasises that where a religious belief is being manifested in a way which conflicts with a school's proper and legitimate goals, neither the School Standards and Frameworks Act, nor equality law more broadly, will avail individual teachers. As was the case in

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<sup>76</sup> Equality Act 2010, s 149 (1) *A public authority must, in the exercise of its functions, have due regard to the need to—(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it; (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.*

<sup>77</sup> *Powell v Marr Corporation Ltd* ET Case Number: 1401951/2016 (February 2018).

<sup>78</sup> *ibid*, para 50.

relation to faith schools, this position is justifiable on the basis of the need to weigh personal rights against collective ones, albeit in a slightly different context here. , This observation is fundamental to the central theme of our article, namely the appropriate response of the legal system when faced with conflicts between individual and collective interests in this setting.

### **INDIVIDUAL VERSUS COLLECTIVE INTERESTS: APPROPRIATE RESPONSE?**

How does this recurring theme of individual versus collective interests relate to the operation of the legal framework? On the one hand, statutory law has set firm parameters in regard to the rights which individuals have in respect to equal treatment, and the specific ways in which Parliament has provided for these to be limited in relation to faith schools. Therefore, in this instance, teachers are shielded against direct discrimination, except in so far as the democratically elected legislature has chosen to allow it, in the interests of collective religious freedom in the education of children.

In addition, courts have been vigilant in guarding against what we would term 'manipulative discrimination'. In other words, situations in which schools try to impose a condition which is directly or indirectly discriminatory in nature, but is not aimed at furthering any genuine requirement of the institution beyond controlling or manipulating the religious/ideological profile of the staff team. Under these circumstances, the 'genuine' element of the genuine occupational requirement will be carefully assessed by the courts.

However, once this threshold is crossed and a genuine occupational requirement is identified, individual interests give way to collective ones, and this can be challenging in the context of teaching, because the boundaries of 'occupational' activity are frequently porous. Having said

which, we are not suggesting that the complexity of blurred lines between professional and private time is an issue which is completely unique to the teaching world, and a contemporary decision from the context of social work provides some interesting parallels. In *R (Ngole) v University of Sheffield*,<sup>79</sup> the applicant had his studies terminated following a dispute over some remarks posted in an online debate about homosexuality. The concerns which led the university and the relevant professional regulatory body to conclude that Mr Ngole could never become a competent member of the social work profession did not stem from the initial remarks, but his unwillingness and/or inability to appreciate the impact of the same on third parties.

From the applicant's point of view, he was manifesting his religious beliefs in his private time, he saw this as his human right, and recognised no inconsistency with his future role as a social worker. He maintained that he had not, and would not behave, in a discriminatory way towards anyone, and could in that sense compartmentalise his faith and his professional duties. Ngole further argued that because his views would never have a practical impact upon the way he interacted with colleagues and service users, they should be treated as a purely private matter.

In contrast, the respondent put forward a case that by very publicly expressing views condemning homosexuality the applicant was conducting himself in a way which would cause serious harm, were it to continue post-qualification. There was no dispute that the applicant was identifiable from the posts which he had left on a public internet forum, as this was how the university had initially become aware of the issue, and this raised two major concerns. Firstly, how service users might perceive their social worker if he expressed such sentiments, and secondly, how it might lead the social work profession and local authority to be perceived by the wider public.

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<sup>79</sup> *R (Ngole) v The University of Sheffield* [2017] EWHC 2669, ELR 87.

Not surprisingly, the Employment Tribunal found in favour of the respondent. Crucially, she was at pains to stress that there was no inconsistency between social work and conservative religious views:

*'There are no doubt plenty of excellent social workers with views as strongly and sincerely held as this student's-quite possibly the same or similar views'.<sup>80</sup>*

The problem was that Mr Ngole was manifesting those views in a way which was likely to have an adverse impact on both specific service users, and more generally, would damage the trust in Social Services. In this setting, the strength of public authorities' case was evident, and it is easy to appreciate why, for example, it would be difficult for a same-sex couple to feel confident in a social worker assessing their suitability to be adoptive parents, if he is openly condemning relationships like theirs on the internet. Moreover, pointing to probable and tangible harm from behaviours which the applicant saw no reason to reflect upon or amend was not difficult at all.

The tribunal also made some very pertinent comments about professional standards generally, which clearly have relevance to teachers:

*'Professional discipline, rightly, sits relatively lightly on its members outside the workplace, but it is never entirely absent where conduct in public is concerned. There, it always requires attention to the perceptions of others, especially those most directly interested in the performance of professional functions'.<sup>81</sup>*

Bearing this decision in mind, we wonder how a similar case might play out in an educational context in the future. *Ngole* serves as a useful reminder that the religious and ideological freedom of

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<sup>80</sup> *ibid*, para 172.

<sup>81</sup> *Ibid*, para 175.

teachers is not just circumscribed by the demands of a given employer, and they are also subject to the disciplinary procedures of their professional regulatory body, the National College for Teaching and Leadership. In fact, this applies to teachers in both maintained and independent schools.<sup>82</sup>

Teachers are required to comply with the Teachers' Standards, published by the Department of Education,<sup>83</sup> and a number of elements of the Standards are of particular relevance here. There is indeed an express requirement to '*make a positive contribution to the wider life and ethos of the school*',<sup>84</sup> and this would appear to suggest that, as might be anticipated, there is an expectation that contractual and professional requirements will work in tandem, whilst both demand that individuals promote and support the 'ethos' of the school, religious or otherwise.

Clearly, making a 'positive contribution' does not equate to subscribing to all aspects of any particular ethos. In practical terms, there is no need for a non-reserved teacher in a school with a Roman Catholic religious ethos to believe in the Roman Catholic doctrine or live in accordance with its tenets, but there is a requirement not to behave in a way which actively undermines it. How would this relate, for example, to individuals who wished to take part in a protest about a Papal visit, if this were to be done outside of school time, but nonetheless in an open way which would become known to the school community?<sup>85</sup>

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<sup>82</sup> National College for Teaching and Leadership, 'Guidance for Teachers Who May Be Subject To The Teacher Disciplinary Procedures' (17 April 2013) <[www.gov.uk/government/publications/teacher-misconduct-information-for-teachers](http://www.gov.uk/government/publications/teacher-misconduct-information-for-teachers)> accessed 25 February 2018.

<sup>83</sup> Department of Education, 'Teachers' Standards: Guidance for School Leaders, School Staff and Governing Bodies' (July 2011)[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/665520/Teachers\\_\\_Standards.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/665520/Teachers__Standards.pdf) accessed 25 February 2018 (Teachers' Standards).

<sup>84</sup> *ibid*, para 8.

<sup>85</sup> BBC News 'Thousands Protest Against Pope in London' (18 November 2010) <[www.bbc.co.uk/news/uk-11355258](http://www.bbc.co.uk/news/uk-11355258)> accessed 25 February 2018.

It is, at least arguable, that this would be a breach of the Standards for teachers in such a situation. In addition, the Standards also deal with Personal and Professional Conduct, demanding that teachers respect the rights and dignity of others, Fundamental British Values and those who hold different beliefs from themselves.<sup>86</sup> These Standards are themselves a limit upon the personal freedoms of teachers, and also bolster contractual limits which employers might impose. It would be difficult, therefore, for an individual to argue that requirements which merely mirrored governmental professional standards were inappropriate or excessive.

Of course, it should be stressed again that in this particular issue teachers are in no different a position from other professionals, such as doctors,<sup>87</sup> solicitors,<sup>88</sup> and as we have seen from Ngole, social workers.<sup>89</sup> Part and parcel of pursuing a professional vocation is to accept professional responsibilities which cannot be shed at the end of the working day, and conveniently put on again like a smart jacket when next on duty. These restrictions are there to protect those who rely upon professionals and are in a disempowered position, as well as preventing fellow professionals from collective damage caused by unethical behaviour.

Having said which, despite this general rule which is applicable to all professions, teachers *are* in a different position vis a vis religion and belief, and the requirement to respect the 'ethos' of the school is a qualitatively different professional obligation from that imposed in other contexts. There is a duty for religious teachers to respect the school of ethos of diversity and equality, even if this

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<sup>86</sup> Teachers' Standards (n 83), pt 2: *'treating pupils with dignity, building relationships rooted in mutual respect, and at all times observing proper boundaries appropriate to a teacher's professional position: having regard for the need to safeguard pupils' well-being, in accordance with statutory provisions; showing tolerance of and respect for the rights of others ; not undermining fundamental British values, including democracy, the rule of law, individual liberty and mutual respect, and tolerance of those with different faiths and beliefs ; and ensuring that personal beliefs are not expressed in ways which exploit pupils' vulnerability or might lead them to break the law.'*

<sup>87</sup> General Medical Council <[www.gmc-uk.org/](http://www.gmc-uk.org/)> accessed 25 February 2018.

<sup>88</sup> Solicitors Regulation Authority <[www.sra.org.uk/home/home.page](http://www.sra.org.uk/home/home.page)> accessed 25 February 2018.

<sup>89</sup> Health Care and Professions Council <[hpc-uk.org/aboutregistration/regulators/socialwork/](http://hpc-uk.org/aboutregistration/regulators/socialwork/)> accessed 25 February 2018.

runs counter to their faith based beliefs on gender and sexuality, and there is a contractual obligation placed upon teachers working in schools with a defined religious ethos to respect that culture, even if they reject it in whole or part.

Consider, for instance, the contrast between the position of teachers and the outcome of *Smith v Trafford Housing*.<sup>90</sup> This case concerned a manager in a housing trust, who sued for breach of contract when he was demoted for having posted some moderate opinions opposing same sex marriage in church on his private Facebook page. The court upheld his claim, ruling that his statements were not disrespectful or liable to bring his employer into disrepute, and that they provided no basis for taking disciplinary action. Nevertheless, read alongside *Ngole*, and taking into account the dispute in *Sutcliffe*, it is worth pausing for a moment to consider whether the outcome might have been different, had Smith been a teacher in a school. The impact upon pupils, especially if they or close family members were gay, might have been profoundly negative. How would seeing a teacher and role model whom they perhaps liked and respected expressing these views alter their perception of him and the school?

All things considered, it is very possible that had Smith been a teacher, the court might well have reached a different conclusion, but the same might also be suggested had he been a social worker. It is worth noting that generally speaking in contexts like social work, the parameters within which individuals will have to work will be broadly similar, regardless of where in the public sector they are employed, or in other words, they will have to be aware of universally mandated professional standards and the public sector equality duty.

Moreover, in regard to teachers there is also a need to take into account the ethos and aims of the particular institution in which they work, especially if it is a faith school. For instance, a teacher

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<sup>90</sup> *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch), [2013] All ER (D) 201 (Nov).

posting on social media criticising the beliefs or policy of a named faith organisation on a particular matter might not be behaving in a problematic way as far as school without a religious ethos was concerned, but could conceivably have done enough to trigger a disciplinary sanction in a faith school, closely allied with the organisation in question. Therefore, the line between acceptable and unacceptable professional behaviour is context specific for teachers in England, at least where expression of religion and belief is involved.

## **CONCLUSION**

So where does all this discussion take us? We have established that in some respects teachers are in a similar position to other workers with professional responsibilities to a disempowered group with whom they deal, as well as society as a whole, and that these may justify the imposition of certain restrictions upon personal autonomy. Yet we have also discovered that there are aspects of the teaching context which are unique, particularly in light of the complex tapestry of legal provisions relating to faith and education. A number of important threads can be drawn out:

Firstly, there is broad and justified consensus that the blanket freedom to directly discriminate conferred upon some faith schools in relation to teaching staff is problematic from an equality and human rights perspective. It would be preferable to require *all* faith schools to show a genuine occupational requirement when imposing demands or restrictions on staff relating to religion and belief. This would preserve their collective religious freedom, but would also limit discriminatory activity to the scope of what was necessary to achieve legitimate objectives.



Secondly, where a genuine occupational requirement is found to apply, it is appropriate for individual religious freedoms to be restricted in order to protect the collective institutional needs of the school, whether these are focused on maintaining its religious character, or in pursuing a broader agenda, such as complying with the Public Sector Equality Duty. Faith schools and non-faith schools alike may have good objective reasons to restrict *expressions* of belief, although owning a belief or identity should, in and of itself, never be sufficient reason to disadvantage an individual teacher.

Thirdly, it must be acknowledged, however, that the extent to which expressions of beliefs can and should be restricted is effectively context specific in relation to teachers in England. Different schools will lawfully and appropriately draw the line in different places, as they will have distinct genuine occupational requirements. This situation is the price for the collective ideological freedom accorded to religious communities in respect of faith schools, but is potentially challenging for individual teachers, especially in light of the often blurred boundaries between professional and private time and activities.

In many situations, schools could do more to avoid conflict by being proactive in setting expectations of employees, and simply stating that individual interests must sometimes give way is not sufficient to avoid destructive clashes arising. In cases like *Powell*, where there is a problematic manifestation of belief within working hours, the position is very clear cut, but it is more complex in settings like the Sutcliffe dispute, where activities in the teacher's private life were part of the context of discrimination.

In contrast to our previous conclusions, which have been quite context specific, this is a lesson which can be generalised to clashes around faith, belief and education in other jurisdictions.<sup>91</sup> Disputes between individual teachers manifesting beliefs and lifestyle choices which clash with the ethos of their employment context are a constant source of litigation, and familiar themes frequently reprised. This is precisely why it was instructive to consider *Fernández Martínez v Spain* above. Regardless of the legislative, or even cultural framework, within which a relationship between a teacher and a school is embedded, the very nature of that nexus opens up scope for mutual misunderstandings about obligations.

Teachers are necessarily role models, and parents and employers alike understand that their influence over pupils is more complex and profound than simply conveying academic information. The inevitable potential for teaching staff to shape the attitudes, habits and perceptions of students is such that their behaviour will always be the subject of scrutiny, and there will be legitimate disagreements about where to draw the lines with regard to practical requirements, due to their subjective nature. If there has not been an effective, open and respectful dialogue *on both sides* about boundaries and expectations, then there will be potential for differing ideas of acceptable conduct by employees, or reasonable requirements from employers, to lead to tensions.

Relationships between teachers and schools are, despite the intervention of statutes in a number of respects, still regulated by contract law in many jurisdictions. Of course, it goes without saying that within much of Europe, negotiation will happen within the shadow of the norms imposed by the ECHR and EU law. However, as the cases which we have examined in the English paradigm show us, these overarching guarantees leave many grey aspects about the extent of protection in certain areas, and it is not always clear in the abstract where the balance between individual and collective freedoms will be struck. Furthermore, the purpose of these instruments is not to remove all room

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<sup>91</sup> See, for example, discussions of similar disputes within the wider European context, set out in M Hunter Henin (ed) *Law, Religious Freedoms and Education in Europe* (Routledge 2012)

for manoeuvre when it comes to negotiating employment terms, and there necessarily remains scope for employers to seek employees able and willing to meet their specific, even idiosyncratic, needs. Were this not the case, the instruments themselves would stifle human rights and constrain the operation of the labour market. Consequently, the place and importance of contractual agreements should not be underestimated.

As is the case with *all* contractual relationships, it is crucial that the terms are clearly understood by both sides and articulated at the outset. This is especially true in a situation where complex and subjective demands are made by each party, and these often touch upon matters which go to the heart of personal matters such as belief and identity. In this sense, tensions between schools and teachers over religion can best be managed by schools and teachers, albeit within the parameters and safeguards laid out by human rights and equality law.