Freedom of Religious Association: Towards a Purposive Interpretation of the Employment Equality Exceptions[1]

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ABSTRACT

The exceptions to the principle of equality in employment for employers in Britain with a religious or belief ethos (or who employ personnel for the purposes of organised religion), are ambiguous in scope and lack any clear foundational principle to guide judicial interpretation. In view of the consequent risk of inconsistency in decision-making, this article addresses the question of how best to understand and interpret the exceptions.

Whilst the exceptions should be regarded as limited derogations from the equality principle, it is nonetheless important that recognition is afforded to their underlying rationale which, I argue, derives from the fundamental human rights of religious association. Though the concept of associative rights and related ideas have not featured heavily in appellate judgments on the exceptions to date, I argue that such a purposive approach to interpretation of the exceptions could assist the judiciary to reach fair, balanced and consistent decisions in this highly contested area of the law by inviting consideration of the relationships among an employer's ethos, its employees, and the religious group it serves, and by encouraging engagement with the discriminatory impacts which an exercise of these rights may entail.

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1 INTRODUCTION

In the past, responsibility for navigating the relationship between religion or belief interests and equality rights in the workplace has lain largely with the judiciary. Incremental development of the law in this area through case law is the preferred approach of the Equality and Human Rights Commission (the 'EHRC')[2] and legislative reform of the relevant law does not currently figure on the Government's policy agenda. It is surely right that the law on religion or belief in employment should develop in this way. The outcomes in discrimination complaints which involve religion or belief are particularly sensitive to the factual matrices in which they are engaged. The array of beliefs protected under the banner, 'religion or belief' is immeasurable. The modes of manifestation of religion or belief, moreover, are innumerable. Legislation is too blunt an instrument to accommodate, in each factual situation, the delicate balancing exercise among religion or belief and competing interests. The judiciary must lead the way.

There is, today, no shortage of case law on the employment of individuals with religious or belief interests who are engaged to work in so-called 'secular' workplaces. Most notably, questions as to the extent to which an employer's practices and policies ought to accommodate an individual's religion or belief have often been raised and considered.[3] In contrast, the opportunity has arisen only very rarely to determine the parameters of the exceptions to the principle of equality in employment, on which employers in Britain who engage staff in workplaces with a religious or belief ethos or who engage personnel for the

[2] Equality and Human Rights Commission, 'Religion or Belief: Is the Law Working?' (Equality and Human Rights Commission, December 2016).

[3] See, for example, *Eweida v the United Kingdom* (2013) 57 EHRR 8.

purposes of an organised religion can rely.[4] Only a handful of cases on these exceptions have been heard by our appellate courts[5] – somewhat surprising, perhaps, given the level of discussion on their scope in Parliament[6] and the uncertainty which remains surrounding their reach.[7]

In several of the widely reported decisions, the judiciary has regarded the employment exceptions as limited derogations from the equality principle.[8] This was to be expected. Although not all exceptions were introduced to implement European measures, they must be interpreted, where possible, in a manner which is consistent with the equality laws of the European Union (the 'EU'). This interpretive obligation compels the judiciary to regard the exceptions as strictly defined derogations from the equality principle. For as long as the UK remains bound by EU law, the judiciary must therefore continue to interpret the exceptions in this way. Although the UK may be able to depart from this interpretation if it leaves the EU, it might be supposed that the judiciary should continue, even then, to treat the exceptions as strictly defined derogations to ensure that equality is sufficiently protected. There is, however, a risk that understanding the exceptions solely as limited derogations from the

[4] This article considers the employment equality exceptions available to employers in Great Britain pursuant to the Equality Act 2010 (which applies in Scotland, England and Wales), the Education (Scotland) Act 1980 (which applies in Scotland) and the School Standards and Framework Act 1998 (which applies in England and Wales). Separate legislative exceptions to the principle of equality in employment are available to employers in Northern Ireland: these will not be addressed in this article. For a useful comparison of the employment exceptions in Northern Ireland, Ireland and Great Britain, see Mark Coen, 'Religious Ethos and Employment Equality: a Comparative Irish Perspective' (Sep 2008) 28 LS 452.

[5] *Glasgow City Council v McNab* [2007] IRLR 476 (EAT); *Pemberton v Inwood* [2018] ICR 1291; *Gan Menachem Hendon Ltd* v *De Groen* 2019 IRLR 410.

[6] See, for example, HL Deb 17 June 2003, vol 649, col 791; HC PBC (Equality Bill) 9 June 2009, col 68-78; PBC Deb (Equality Bill) 23 June 2009, col 442-457; Joint Committee on Human Rights, 'Legislative Scrutiny: Equality Bill (Twenty-Sixth Report of Session 2008-2009)' (TSO 12 November 2009); HL Deb 25 January 2010, vol 716, col 1198-1266.

[7] For comment on the uncertainty surrounding the organised religion exception see Russell Sandberg and Norman Doe, 'Religious Exemptions in Discrimination Law' (2007) 66 CLJ 302, 312; and Russell Sandberg, 'The Right to Discriminate' (2011) 13 EccLJ 157, 173-78.

[8] *Reaney* v *Hereford Diocesan Board of Finance* ET 1602844/2006 [100]; *McNab* n 5 [60]; *Pemberton* v *Inwood* [2017] IRLR 211 (EAT) [88]. See also *R (on the application of Amicus)* v *The Secretary of State for Trade and Industry* [2004] EWHC 260 (Admin), [2007] ICR 1176 [115].

equality principle fails to offer much assistance with how they should be interpreted: advocating for a 'narrow' interpretation of the exceptions, moreover, may detract from interpreting them in a manner that is true to their purpose.[9]

In applying legislative exceptions to the principle of equality in employment, the courts are asked to answer difficult questions. Is the entity seeking to rely on the derogation a relevant employing entity for the applicable legislative provision? Does the discriminatory treatment pursue a legitimate aim? Is the requirement justified by the objectives of the employer, or by the nature or context of the work? How should the rights of the employer be balanced with the equality rights of individuals? Though the answers to these questions are not usually straightforward, the courts in the USA and Canada have, at least, clear principle, in church and state relations and freedom of association respectively, to guide their analysis. The British courts, by contrast, have no such obvious reference point. This makes it difficult to predict judicial determinations and risks inconsistency in the case law. This is particularly concerning given the most recent report by the EHRC into religion or belief in the workplace and service delivery. The EHRC's report, published at the end of 2016, examined whether the protection afforded by the law both to individuals with a religion or belief and to the 'distinctiveness' of religion or belief organisations, was adequate and appropriate. It recognised that case law on religion or belief discrimination was in its infancy and acknowledged the importance of legal judgments in, 'clarifying our understanding of the interaction between equality and human rights law, and balancing competing rights'. [10] Other

[9] Beetz J of the Supreme Court of Canada in *Brossard (Town)* v *Quebec (Commission des droits de la personne)*, [1988] 2 SCR 279 (CanLII), (1988) 53 DLR (4th) 609 (cited to SCR) recognises the limits of advocating for a narrow construction of a legislative provision when he comments in the context of the group employment exception of the Quebec Charter at [97]: 'To say that the very nature of the second branch of s.20 lends itself to one of either a restrictive or liberal interpretation oversimplifies the provision and is not, in my view particularly helpful in discovering its meaning.'

[10] Equality and Human Rights Commission, n 2, 17.

than recommending that the provisions in the Education (Scotland) Act 1921 (the ' E(S)A') and the School Standards and Framework Act 1998 (the 'SSFA') which permit schools to impose religious requirements on their employees are reviewed for compatibility with the European Council Directive on equal treatment in employment (the Directive),[11] the EHRC did not recommend any amendments to the law pertaining to the definition of religion or belief, the individual manifestation of religion or belief in the workplace, religion or belief requirements in employment, or religion or belief in the provision of services. As far as the EHRC was concerned, the law was, in the main, 'working'. It did, however, state that 'clarification' was needed in some areas, including in the definition of belief and in the measure of freedom of expression and freedom of thought, conscience and religion afforded to religious organisations.[12] That clarification, however, was not to be given by the legislature, but by the judiciary through case law.

It is therefore all the more important that the judiciary has a clear understanding as to the principles guiding interpretation of the employment exceptions. According to the EHRC, 'When assessing whether the legal framework is effective, our starting point has been that the law needs to protect competing rights fairly'.[13] Fairness can only be assessed when there is a clear understanding as to why particular rights, individuals and groups are afforded protection in the first place. Without this, decisions may turn on the different perceptions of fairness held by the judges in each case. There is a risk that the inconsistent decisions which ensue are not regarded as a problem, as such, but are instead explained by reference to their 'fact sensitive' nature. Moreover, without clear guiding principle, defending the exceptions model

[11] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OC L303.

[12] Equality and Human Rights Commission, n 2, 16.

[13] ibid 15.

to those who oppose it, whether because too narrow or too wide, is made more challenging. Having clear principle to support the exceptions model will not quieten all its critics. In such a contested area as law and religion, consensus is not a realistic goal. It would, however, at least provide a common starting point for the debate.

I will argue in this article that whilst the employment exceptions should continue to be regarded as limited derogations from the equality principle, it is nonetheless important that recognition is also afforded to their underlying rationale.[14] Such a rationale may be found with the fundamental human rights of religious association. Though the concept of associative rights and related ideas have not featured heavily in the judgments to date, I will argue that such a purposive approach to interpretation of the exceptions could assist the judiciary to reach fair, balanced and consistent decisions in this highly contested area of the law.

In the next part of this article I will outline the nature of the employment exceptions, highlighting ambiguities in their scope before exploring them from a historic perspective in part 3 to enquire whether any clear foundational principle can be uncovered. Freedom of religious association will be put forward in part 4 as the preferred interpretative tool and an identity-protecting model will be presented. After identifying in part 5 the scope permitted within the current model of exceptions for application of the interpretative model argued for, the benefits of such an approach will be explored in part 6 through consideration of case law from Canada.

[14] It is the aim of this paper to consider how best the exceptions to equality norms can be understood and interpreted, rather than to challenge the existence of the exceptions.

2 THE EXCEPTIONS

The Equality Act 2010 (the 'EA') brought together and harmonised the provisions of its predecessor legislation on religion or belief exceptions in the context of work. There are now two exceptions in the EA directed towards employers with religious or belief interests: the 'organised religion' exception;[15] and the 'ethos' exception,[16] each of which purport to implement article 4 of the Directive. As well as these exceptions in the EA, education legislation offers further exceptions to the principle of equality in employment, which can be relied on by those employing staff in certain schools with a religious character. Each exception will be briefly outlined below.

A. The Organised Religion Exception

If employment is for the purposes of an organised religion, and two additional criteria are satisfied, employers may apply certain requirements in relation to employment: that the employee is male or female, or that the employee is not transsexual, married or a civil partner (or married to, or the civil partner of, a person who has a former living spouse or civil partner). Other permissible requirements are those which relate to sexual orientation (a stipulation, for example, that employees do not engage in homosexual physical relations) or those which relate to the circumstances in which a marriage or civil partnership came to an end. The two additional criteria which require to be satisfied refer to the reason for imposing the requirement. The reason must be either: (i) to comply with the doctrines of the religion (the 'compliance principle'); or (ii) because of the nature or context of the employment, to

[15] EA 2010, sch 9, para 2.

[16] ibid, sch 9, para 3.

avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers (the 'no-conflict principle').[17]

Determining whether employment is for the purposes of an organised religion is far from straightforward. Parliamentary material suggests that the scope of this concept is narrow, extending to clergy and only a small number of lay roles including those which exist to represent and promote religion.[18] As the employment in question in the two widely-reported cases on this point concerned personnel who, on the facts, quite clearly either promoted or represented religion,[19] it remains unclear to what extent the organised religion exception might extend to other lay posts, which do not involve the same degree (or indeed any) promotional or representational functions.[20]

Practical difficulties with both the compliance and the no conflict principles have also been identified: it has been argued convincingly that the application of the no conflict principle is hindered by the absence in some religions of any definition of membership,[21] making it difficult to determine whether a significant number of followers may be adversely affected and that the application of the compliance principle is hindered by the variety of views as to the content and interpretation of doctrine[22] and reluctance on the part of the courts to determine doctrinal questions.[23] Perhaps more significantly, doubts remain as to whether the no conflict and compliance principles are qualified by a requirement that the employer act

[17] ibid, sch 9, para 2.

[18] HL Deb 17 June 2003, vol 649, col 779 (Lord Sainsbury of Turville).

[19] *Reaney*, n 8; *Pemberton*, n 5 and n 8.

[20] See also discussion in Sandberg on the implications of Parliament's rejection of the Government's proposed definition in, Sandberg 'The Right to Discriminate' n 7, 174-76.

[21] Sandberg and Doe, n 7, 312.

[22] ibid 312.

[23] Sandberg, 'The Right to Discriminate', n 7, 177-78.

proportionately.[24] Although there is no express proportionality requirement in the relevant legislative provision and the judiciary has on more than one occasion opined that no such requirement exists,[25] it has been argued that support for an implied proportionality qualification can be found in the Parliamentary material[26] and in the explanatory notes to the EA.[27]

B. The Ethos Exception

The ethos exception permits employers with 'an ethos based on religion or belief' to apply a requirement to be a particular religion or belief where, having regard to the ethos and the nature or context of the work, being of a particular religion or belief is an occupational requirement and the application of the requirement is a proportionate means of achieving a legitimate aim.[28] Organisations proselytising religion or belief are not the only type that can rely on the ethos exception: so too can organisations with values rooted in or inspired by religion or belief.[29] Still, 'ethos' has been described as a, 'fluid and indeterminate concept'[30] and it is not difficult to foresee disputes over whether or not a particular employer has the required ethos. A question posed in the House of Lords debate on the Employment Equality (Religion or Belief) Regulations 2003 (the 'ROB Regulations') as to whether the ethos exception could be relied on by, 'ordinary commercial concerns as well as religious or

[24] ibid 176-77.

[25] *Amicus*, n 8, [123]; *Pemberton*, n 8, [78].

[26] ibid 176-77 and fn 140.

[27] ibid 176-77 referring to the Explanatory Notes to the EA 2010, para 791.

[28] EA 2010, sch 9, para 3.

[29] It was not, for example, disputed in *Hender* v *Prospects for People with Learning Disabilities* ET 2902090/2006 and *Sheridan* v *Prospects for People with Learning Disabilities* ET 2901366/2006 that Prospects, a charity which provided housing and care services to people with learning disabilities, had an ethos based on Christianity.

[30] Coen, n 4, 458.

environmental charities' was, disappointingly, not answered during the debate.[31] Whether organisations which work across several religions or beliefs, such as Interfaith UK,[32] would ever be regarded as having an ethos based on religion or belief similarly remains uncertain. The explanatory notes to the EA provide that, 'it is for an employer to show that it has an ethos based on religion by reference to such evidence as the organisation's founding constitution'.[33] What level of importance, however, must religion or belief have in an organisation's founding constitution? A denominational school might be considered the quintessential example of an organisation with an ethos based on religion or belief. Yet, if the employing entity is the local authority (as is most often the case in Scotland), and not the religious organisation itself, it will not be able to demonstrate it has the required ethos.[34]

Some consider that it is unlikely the courts will become embroiled in debates over whether an employer has a 'religious ethos' since in most, if not all, cases in which an employer wishes to rely on the ethos exception, the general occupational requirement exception (the 'OR' exception)[35] will also be available.[36] This, of course, begs the question why Parliament considered it necessary to legislate for the ethos exception at all? Certainly, there are features of the ethos exception which distinguish it from the OR exception. Firstly, only the ethos exception requires regard to be had to the 'ethos' of the organisation in

[31] HL Deb 17 June 2003, vol 649, col 791. Baroness Miller of Hendon, who asked the question, was referring to family orientated businesses operated by the Brethren. The Lord Sainsbury of Turville agreed in the debate (at col 794) to respond to the question by letter.

[32] https://www.interfaith.org.uk/.

[33] Explanatory Notes to the EA 2010, para 795.

[34] For example, in *McNab* n 5 Glasgow City Council was not permitted to reply on the ethos exception to defend a decision to restrict applications for the position of Assistant Principal of Pastoral Care in a Roman Catholic school to those of the Roman Catholic faith.

[35] EA 2010, sch 9, para 1.

[36] See Gwyneth Pitt, 'Keeping the Faith: Trends and Tensions in Religion or Belief Discrimination' (2011) 40 ILJ 384, 401. Speaking of the ethos exception Pitt says 'It is frankly difficult to imagine cases where this would apply where the standard occupational requirement (in Schedule 9 paragraph 1) does not.'

determining whether religion or belief is an occupational requirement and a proportionate means of achieving a legitimate aim. If its asserted ethos is reflected in the organisation's day-to-day operations, the employer, it seems, will have a stronger claim that religion or belief is an occupational requirement.[37] Still, this does not fully explain why or in what way the ethos of an employer is relevant to its claim for autonomy, and it remains uncertain whether having regard to the employer's ethos makes it more or less difficult for the employer to demonstrate an occupational requirement.[38]

A further ambiguity in the ethos exception is the extent to which it permits an employer to require its employees to abide by standards of behaviour which accord with the tenets of its religion. It would appear from the terms of article 4(2) of the Directive that the ethos exception will not be engaged when the difference in treatment implicates a ground of discrimination other than religion or belief (sexual orientation, for example).[39] It is less clear, however, whether the ethos exception could permit employers to take action on the basis of an employee's behaviour when it is contrary to religious tenets but does not implicate another protected characteristic, such as the dismissal of an employee because he has engaged in non-marital sexual relations contrary to the tenets of the employer's religion, for example. In its second consultation on the ROB Regulations, the Government stated that, 'where an employee of a religious organisation conducted him or herself in a manner that was inconsistent with the organisation's ethos, disciplinary action against the employee might be

[37] *Muhammed v The Leprosy Mission International* ET/2303459/2009 c.f. *Sheridan,* n 29.

[38] Lucy Vickers identifies some of the issues which can arise from a requirement to have regard to the employer's ethos when there are, as she says, different 'shades of religious opinion' within the one religion in Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (OUP 2016) 185.

[39] Art 4(2) expressly stipulates, 'This difference of treatment … should not justify discrimination on another ground.'

appropriate where it was clear that the conduct would undermine the ethos'.[40] Yet, when the ethos exception was considered by the Joint Committee on Human Rights in 2009, the committee appeared to reach a different conclusion.[41]

C. The Faith School Exceptions

In England and Wales and in Scotland, schools with a religious character in the state-maintained sector enjoy additional protections against interference in their employment affairs. In Scotland, the E(Sc)A provides that any teacher appointed to a post on the staff of a denominational state school must be approved as regards his religious belief and character by representatives of the relevant church or denominational body.[42] In England and Wales, the protections afforded to schools with a religious character are more complex and vary according to whether the school is a foundation school, a voluntary controlled school or a voluntary aided school.[43] Under the SSFA, 'voluntary controlled'[44] and 'foundation'[45] schools with a religious character can, when appointing the head teacher, consider the applicant's religion and 'ability and fitness to preserve and develop the religious character of

[40] Cabinet Office, 'Towards Equality and Diversity: Implementing the Employment and Race Directives' (Cabinet Office December 2001), para 13.13.

[41] Joint Committee on Human Rights, 'Legislative Scrutiny: Equality Bill (Twenty-Sixth Report of Session 2008-2009)' (TSO 12 November 2009) (para 175) 'We agree with the Government that it is "very difficult to see how in practice beliefs in lifestyles or personal relationships could constitute a religious belief which is a requirement for a job, other than ministers of religion'. However, note the comment by the tribunal in *Ms Z De Groen* v *Gan Menachem Hendon Ltd* ET 3347281/2016 (reported by the EAT in *Gan Menachem Hendon* n 5 at para 36) that a requirement not to co-habit could be an occupational requirement pursuant to the ethos exception.

[42] Education (Scotland) Act 1980 (E(Sc)A 1980), s 21(2).

[43] See generally Lucy Vickers, 'Religion and Belief Discrimination and the Employment of Teachers in Faith Schools' (2007) 4 Religion and Human Rights 137, 151-53; Russell Sandberg, *Law and Religion* (Cambridge University Press, 2011) 164-65.

[44] In voluntary controlled schools, the land and buildings are owned by the church but the local education authority employs the staff, controls admissions and funds the school (Vickers, 'Religion and Belief Discrimination' (n43) 150).

[45] In foundation schools, funding is provided by the local education authority, but the buildings are owned by the governing body, and the governing body employs the staff (ibid 150).

the school'.[46] They are also entitled to reserve up to one fifth of their teaching staff (including the head teacher) who can be 'selected for their fitness and competence' to give religious education in accordance with the tenets of the school's specified religion.[47] In respect of reserved teachers, the school can give preference in appointment, remuneration or promotion decisions to persons who hold religious opinions, attend religious worship or who give (or are willing to give) religious education, in accordance with the tenets of the school's religion.[48] The school is also entitled to have regard to any failure on the part of a reserved teacher to comply with the tenets of the religion in taking decisions on termination.[49] 'Voluntary aided'[50] schools which have a religious character, by contrast, can give preference in their appointment, remuneration or promotion decisions concerning any teaching post on the basis of religious opinions, attendance at worship and/or whether the individual gives (or is willing to give) religious education.[51] Importantly, conduct on the part of any teacher which is 'incompatible with the precepts, or with the upholding of the tenets of the religion', can also be taken into account in decisions on termination.[52]

3 A CLEAR FOUNDATIONAL PRINCIPLE?

A. Church and State, and Religious Freedom

[46] School Standards and Framework Act 1998 (SSFA 1998), s 60(4).

[47] SSFA 1998, s 58(2) and s 58(3).

[48] ibid, s 60(3) and s 60(5)(a).

[49] ibid, s 60(3) and s 60(5)(b).

[50] In voluntary aided schools, the land and buildings are owned by the church, the governing body employs the staff and controls admissions, but the funding for the school comes, in the main, from the local education authority (Vickers, 'Religion and Belief Discrimination' (n43) 150).

[51] SSFA 1998, s 60(5)(a). SSFA 1998, s 124A contains a similar provision for independent schools with a religious character.

[52] ibid, s 60(5)(b). SSFA 1998, s 124A contains a similar provision for independent schools with a religious character.

In the United States, the 'wall of separation' between church and state, and the constitutional protection of religious freedom on which it has rested since the end of the 18th century, has famously provided the legislature and courts with a firm and clear basis on which to develop and interpret its law on religious autonomy in employment.[53] Identifying and agreeing on the foundational principle underlying the British employment exceptions is somewhat more difficult.

Notwithstanding Britain's history of establishment, the doctrinal independence of religious communities has been cited by policy makers as a rationale for the organised religion exception. Reporting on the draft Employment Equality (Sexual Orientation) Regulations 2003 (the 'SO Regulations'), the Joint Committee on Statutory Instruments commented that the Government inserted the organised religion exception into the draft regulations based on evidence collected in consultation exercises and, 'the Government's view that the Regulations should not interfere in matters of religious doctrine'.[54] Yet judicial reluctance to interfere with religious doctrine cannot fully explain the organised religion exception. After all, the organised religion exception does not only permit employers to apply requirements relating to sex, sexual orientation etc. for the purposes of doctrinal compliance. It also allows employers to impose such requirements to avoid conflict with a

[53] In *Hosanna-Tabor Evangelical Lutheran Church and School* v *Equal Employment Opportunity Commission* 132 SCt 694 (2012), the United States Supreme Court, Chief Justice Roberts asserted that the ministerial exception (a judicial exception to equality laws which applies to the employment of members of the clergy and other lay employees performing similar roles) was required by the free exercise and establishment principles of the first amendment to the US Constitution. The first amendment was also influential in the crafting of the exemption in Title VII equality laws available to religious entities – see *Little* v *Wuerl* 929 F2d 944, 949-50 (3rd Cir 1991). However, see also arguments that present interpretations of the free exercise and establishment principles no longer support the ministerial exception in the USA, in Caroline Mala Corbin, 'Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law' (2007) 75 Fordham LRev 1965, 1998-2001 and 2004-28.

[54] Joint Committee on Statutory Instruments, 'Twenty-First Report of Session 2002-03' (House of Lords and House of Commons 13 June 2003) para 16. See also comment by Mr Gerry Sutcliffe, the then Parliamentary Under-Secretary (Trade and Industry) (Employment Relations and Consumer Affairs) at HC Fourth Standing Committee on Delegated Legislation (Draft Employment Equality (Religion or Belief) Regulations 2003 and Draft Employment Equality (Sexual Orientation) Regulations 2003) 17 June 2003, col 029 and 040.

significant number of the religion's followers. There is no stipulation that the 'conflict' should relate to religious doctrine.[55] Nor do expressed concerns about doctrinal independence explain the ethos and faith school exceptions. The rationale for these exceptions has been better explained by the perceived need to preserve the religious character of the employer, or school.[56]

Has religious freedom perhaps had a greater influence on the law pertaining to religious autonomy in employment than church and state relations? Russell Sandberg asserts convincingly that a phase of positive religious freedom in England did not occur until the Human Rights Act 1998 (the 'HRA') permitted enforcement of the right to freedom of religion against public authorities in UK domestic courts in 2000[57] and that prior to the HRA the European Convention on Human Rights (the 'ECHR') had 'little effect' on laws pertaining to religion.[58] If this is to be accepted, it is perhaps unsurprising that the influence of religious freedom on the employment exceptions has been weak. Exceptions for religious employers to generally applicable principles of non-discrimination were first introduced in the Sex Discrimination Act 1975 (the 'SDA'), an Act which was made in the shadow of the UK joining the then European Community in 1973 and signing the Treaty of Rome.[59] It is unlikely that any notion of positive religious freedom influenced the inclusion of this exception in the SDA given that such a notion was at best in embryonic form in 1975. Although the SO Regulations were made following the HRA coming in to force and in a

[55] EA 2010, sch 9, para 2.

[56] For example, see Cabinet Office, n 40, para 13.14 and comment by Baroness Blackstone on the draft Equal Treatment Directive at HL Deb 30 June 2000, vol 614, c 1238.

[57] Sandberg, *Law and Religion* n43, 36-7.

[58] ibid 33.

[59] Sex Discrimination Act 1975, s 19.

phase, referred to by Sandberg, of 'positive religious freedom'[60] the decision to include an exception for organised religion which replicated almost in its entirety the exception in the SDA, suggests that the guarantees of religious freedom in the HRA were not a driving force in the legislature's crafting of the exception. Indeed, there is only cursory mention of the right to religious freedom in reported case law on the exceptions.[61] Whereas the religious exceptions in the USA have their origins in strong guarantees of religious freedom, the ethos and organised religion exceptions in the EA have emerged from European equality principles as limited derogations. Their narrow scope is indicative of a view that they should be regarded as tolerated exceptions to equality norms, rather than as positive religious rights. Nor can the introduction of the faith school exceptions be attributed to any conscious desire to promote positive religious freedom. The exceptions in the E(Sc)A and the SSFA originate from legislation which transferred denominational schools in Scotland and voluntary schools in England and Wales to the state sector:[62] legislation which was enacted long before Sandberg's phase of positive religious freedom and long before discrimination on grounds of religion or belief or sexual orientation was prohibited.[63] The faith school exceptions, at least at their inception, may have represented a compromise among interested parties in the transfer of voluntary schools to the state sector[64] and it is the interest in preserving the

[60] Sandberg, *Law and Religion*, n43, 29.

[61] In his article comparing the employment equality exceptions in the US and the UK, Jerold Waltman declares, in part explanation of the differences between the two countries, that 'The rigid view of rights held in the United States, as inviolable and as determinedly guarded by the Courts, still has no parallel in Britain.' Jerold Waltman, 'Churches and Equal Employment Policy in the United States and the United Kingdom' (2011) 166 Law and Justice: Christian Law Review 37, 47.

[62] Education (Scotland) Act 1918 and the Education Act 1902.

[63] Education (Scotland) Act 1918, s 18(3) provided that all teachers had to be approved by the relevant denominational or church body as to their character and religious beliefs; Education Act 1902, s 7(7) gives the managers of schools which were maintained but not provided by the local education authority the exclusive power (subject to exceptions laid out in the statute) of appointing and dismissing teachers.

[64] Callum Brown, Thomas Green and Jane Mair remark that the safeguards contained in the 1918 Act with regard to the approval of teachers were among provisions included in the legislation 'to satisfy both the Catholic Church and the trustees of the various Catholic schools in Scotland' in Callum Brown, Thomas Green and Jane Mair, *Religion in Scots Law: Report of an Audit at the University of Glasgow* (Humanist Society Scotland 2016) 151.

religious character of their schools which is often cited as a defence to discrimination in denominational schools.[65]

B. Compromise, Concession and Mixed Motives

The influence on the exceptions at their inception of church and state relations and positive religious freedom is at best unclear and at worst, lacking. Instead of providing illumination on a foundational principle for the exceptions, a closer look at the background to the European framework from which the exceptions today derive their authority reveals compromise and concession. In its original draft form, the Directive which required member states to implement measures to outlaw employment discrimination on grounds of religion or belief and sexual orientation contained a tightly drawn exception to the principle of equal treatment in article 4(2), which was directed specifically at religion or belief employers. The exception in article 4(2) could only be relied on by, 'public or private organisations which pursue directly and essentially the aim of ideological guidance in the field of religion or belief with respect to education, information and the expression of opinions' and only for, 'the particular occupational activities within those organisations which are directly and essentially related to that aim'. Even then, discrimination based on a relevant characteristic related to religion or belief would only be excused where, 'by reason of the nature of these activities', the characteristic amounted to a genuine occupational requirement.[66]

In the period of consultation which followed, the UK Government, in its negotiations on the draft, expressed concerns about its impact on the ability of religious organisations, and

[65] For example, see comment by William Fittal, then Secretary-General of the General Synod of the Church of England, in HC PBC (Equality Bill) 9 June 2009, col 78.

[66] Art 4(2) of the draft directive contained in COM (1999) 565.

particularly schools, to recruit staff of a particular religion where justified.[67] The exception to equal treatment for religion or belief employers which was included in the final version of the Directive is markedly different.[68] In many ways, the final version of article 4(2) is wider than the version which was first introduced. It can be relied on by any organisation with an ethos based on religion or belief, and whether religion or belief is an occupational requirement is considered by looking not only at the nature of the work, but also at the context in which it is carried out having regard for the employer's ethos. Yet, in two important respects, it is narrower. Firstly, whereas the original version of article 4(2) permitted discrimination on the basis of any characteristic 'related to' religion or belief, which could, for example, arguably include sex or sexual orientation, the final version of the exception only excuses discrimination which is 'based on a person's religion or belief'. Secondly, the final version of article 4(2) provides that derogations from the principle of equal treatment for employers with an ethos based on religion or belief will be permitted where 'necessary' to maintain the status quo in the member state at the date the Directive came into force. The original version of the exception was not conditioned in this way. The stipulation that article 4(2) will only apply to permit member states, 'to maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive', is a strong indicator that, rather than being agreed from a point of principle, the final text was born out of a desire to alleviate the

[67] See comments by the then Minister for Employment Welfare to Work and Equal Opportunities Tessa Jowell in European Standing Committee C, 24 July 2000. For example, Jowell remarks, 'As things stand, there is clear statutory protection for schools in preserving their religious ethos. One of our key negotiating objectives is to retain the present relevant legislative framework under the School Standards and Framework Act 1998. We want Church schools to remain free to recruit teaching staff of the faith in question.'

[68] For comment on the draft and the amendments made to it, see Ian Leigh, 'Clashing Rights, Exemptions, and Opt-Outs: Religious Liberty and "Homophobia"' in O'Dair R and Lewis A (eds), *Law and Religion: Current Legal Issues*, Vol 4 (OUP 2001) 268-70.

concerns of member states that their status quo would be upset by the new provisions on equal treatment.

Thus, rather than being rooted in church and state relations or buttressed by principles of religious freedom, the ethos exception, which is based on article 4(2) of the Directive, began life as a product of political compromise. As further evidence that article 4(2) is more a political concession than a rule grounded in principle, in a statement made by the EC Employment and Social Policy Council the negotiations with member states are described as 'difficult' and the final text as a 'compromise'.[69]

The efforts of the UK Government to protect religious organisations in its negotiations on article 4(2) appear to have stemmed more from a desire to maintain the status quo, particularly in denominational schooling, than from any attempt to achieve substantive equality for the religious individual or group. Denominational schooling in the UK has a long history and it will be recalled that statutory privileges permitting discrimination in the employment of staff in denominational schools to preserve the school ethos existed prior to the Directive. When the text of the Directive was ultimately agreed, the UK Government issued a press release in which it quoted then Employment Minister Tessa Jowell claiming to have been 'successful' in 'negotiations to protect the traditions of religious schools in line with existing UK legislation'.[70]

Article 4(2) of the Directive, from which the ethos exception in the EA derives, is not the only example of political compromise in the exceptions model. The organised religion

[69] Employment and Social Policy Council press release, 17 October 2000 available at <http://europa.eu/rapid/press-release_PRES-00-378_en.htm> accessed 31 May 2019.

[70] DfEE press release, referred to in Timothy Edmunds and Julia Lourie, 'Employment Equality Regulations: Religion and Sexual Orientation' (House of Commons Research Paper 03/54, 9 June 2003) 13-14.

exception to sexual orientation discrimination can also be traced to political lobbying. It was not contained within the first draft of the SO Regulations but was included, instead, following submissions from certain Church representatives, including the Archbishops' Council of the Church of England.[71] Whilst concerns about the propriety of courts or tribunals interpreting religious doctrine may well have impacted on the Government's decision to include the organised religion exception in the SO Regulations, it is likely that the political pressure of the church representatives was influential. Although the Government claimed in committee debate on the SO Regulations that the organised religion exception was, 'not a compromise between two sides of a debate' its explanation that it did, 'justice to the directive, to the traditions in this country, and to the right of people, enshrined in article 9'[72] calls attention to the piecemeal array of influences on the development of the law in this area.[73]

A variety of motivations, then, appear to have influenced the British approach to religious autonomy in employment: the history of established churches and the long tradition of denominational schooling; the requirement to respond to the European equality programme; the incorporation of the ECHR; and the political compromises made along the way. These historical, constitutional and political influences present as inconsistent at times: the established nature of church state relations and the move to positive religious freedom; the history of denominational schooling and the response to the European equality

[71] *Amicus* n 8, [90].

[72] HC Fourth Standing Committee on Delegated Legislation (Draft Employment Equality (Religion or Belief) Regulations 2003 and Draft Employment Equality (Sexual Orientation) Regulations 2003) 17 June 2003, col 032.

[73] Referring more generally to the law on exceptions to equality legislation for religious organisations, Julian Rivers comments that 'the law creates rather narrow exceptions expressed in terms which are unreasoned, or at best a matter of temporary political expedient' in Julian Rivers, *The Law of Organised Religions: Between Establishment and Secularism* (OUP 2010), 334. In his monograph, Rivers conducts a comprehensive review of the law of organised religion in the UK as it manifests itself in various areas, identifying inconsistencies and reaching the conclusion that it lacks coherent principle. For a review of Rivers' monograph see Lucy Vickers, 'Twin Approaches to Secularism: Organized Religion and Society' (2012) 32 OJLS 197.

programme, for example. Driven and shaped by a variety of sometimes competing influences, the model of employment exceptions in Britain currently lacks a clear and strong principled underpinning to guide the judiciary in future.

4 FREEDOM OF ASSOCIATION

Could the human right to freedom of association provide a useful tool for interpretation of the employment exceptions?

A. Religious Group Autonomy and Human Rights

Religious group autonomy is often justified by reference to the principle of freedom of religion expressed in article 9 of the ECHR. Article 9 ECHR grants individuals the right to manifest their religion either alone or *in community with others*. It is nonetheless freedom of association, protected by article 11, which limits State interference in the 'social structures'[74] that facilitate communal religious exercise. It has been said that freedom of association, 'protects the associative structures in society which help to give life and reality' to the personal freedoms of religion and expression.[75] It is therefore freedom of religion and freedom of association which *together* form the basis of the right to religious autonomy. Support for this proposition is found in the oft quoted dicta of the ECtHR in the case of *Hasan and Chaush* v *Bulgaria*:

> Where the organisation of the religious community is at issue, therefore, Article 9 must be interpreted in the light of Article 11 of the Convention which safeguards associative life against unjustified State interference. Seen in this perspective, the

[74] Eoin Daly, 'Freedom of Association Through the Prism of Gender Quotas in Politics' (2012) 47 IJ 76, 98.
[75] ibid 97.

believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention.[76]

The close relationship between freedom of religion and freedom of association is illustrated by the conjoined reference to them in the constitution of the Republic of South Africa.[77] The Supreme Court of Canada has, more significantly, recognised the importance of freedom of association to religious autonomy claims in the employment context, finding it the rationale for the employment exceptions in several of the human rights statutes of the Canadian provinces and territories.[78]

Notwithstanding the apparent relevance of article 11 to our law on religious autonomy and the obligation on our courts to interpret laws in a manner consistent with the ECHR, the principle of freedom of association remains an underdeveloped concept in the jurisprudence on the employment exceptions.[79] In his judgment on the compatibility of the employment

[76] *Hasan v Bulgaria* (App no 30985/96) (2002) 34 EHRR 55 (*Hasan*) [62]. The dicta has, for example, been quoted with approval in *Supreme Holy Council of the Muslim Community* v *Bulgaria* (App no 39023/97) (2005) 41 EHRR 3 and *Metropolitan Church of Bessarabia v Moldova* (App no 45701/99) (2002) 35 EHRR 13.

[77] 'Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community – (a) to enjoy their culture, practice their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.' Constitution of the Republic of South Africa 1996, s 31(1).

[78] *Caldwell v Stuart* [1984] 2 SCR 603, 626 (CanLII), (1985) 15 DLR (4th) 1 (cited to SCR); *Brossard* n 9, [100].

[79] It would appear that freedom of association may be an underdeveloped concept in the context of religious autonomy in other jurisdictions too. Mark E Chopko and Michael F Moses have remarked that freedom of association is, 'often overlooked' as a source of religious autonomy in the United States in, Mark E Chopko and Michael F Moses, 'Freedom to be a Church: Confronting Challenges to the Rights of Church Autonomy' (2005) 3 The Georgetown Journal of Law and Public Policy 387, 390. See also Patrick Lenta criticising the judgment of the Equality Court of South Africa in *Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park* 2009 (4) SA 510 (T) (Equality Court of South Africa) for only referring to freedom of association briefly once in Patrick Lenta, 'Taking Diversity Seriously: Religious Associations and Work-Related Discrimination' (2009) 126 SALJ 827, 834. See also Daly n74, 116 where Daly, referring to the Republic of Ireland, remarks 'Freedom of association remains one of the least theorised, and doctrinally underdeveloped of constitutional rights in this jurisdiction.' In his article, Daly considers the right to freedom of association in the context of legislation to promote gender equality in political parties' candidate nominations.

exceptions in the SO Regulations with the Directive, Richards J of the Queens Bench Division gives only the briefest of mentions to dicta of the ECtHR that article 9 ought to be interpreted in light of article 11.[80] No explicit mention of article 11 whatever is made in any of the widely reported case law on the exceptions, and there is only sparse mention of freedom of association in relevant Parliamentary debates and material.[81]

B. Context: A Membership Analysis

What might be the reason for the lack of attention afforded to freedom of association in the context of religious autonomy in employment? Since at least the 1980s, an individualistic frame of reference has dominated the employment policies of successive governments, with individual human rights and equality claims appearing prominently in the jurisprudence on law and religion.[82] British case law on freedom of association (sparse as it is) primarily concerns *membership* organizations and particularly the relationship between the organization and its members or prospective members.[83] The apparent judicial reluctance to explore the relevance of the principle of freedom of association in the context of the employment exceptions may derive from concern that employment relationships are fundamentally different to relations between an organisation and its members, and that the more private and voluntary nature of 'membership' justifies a more compelling claim to the

[80] *Amicus* n 8.

[81] Parliamentary material which refers to freedom of association includes: per John Mason at HC PBC (Equality Bill) 23 June 2009, col 442 and col 444; Per Baroness O'Cathain at HL Deb 25 January 2010, col 1212; per JCHR at Joint Committee on Human Rights, 'Legislative Scrutiny: Equality Bill (Twenty-Sixth Report of Session 2008-2009' (TSO 12 November 2009) 59.

[82] According to Brown, Green and Mair, '"New" religion is the religion of individual human rights and of equality, and in these regards the direction of change is towards increased presence. Since the mid-twentieth century, and particularly in the last few decades, new rights for individuals have been introduced, designed to ensure that they have their religious and other beliefs respected and protected. This is an area where there has been considerable legislative reform and where it seems likely we will now see many more cases in years to come.' Brown, Green and Mair n64, 354.

[83] E.g. see *Associated Society of Locomotive Engineers and Firemen (ASLEF)* v *United Kingdom* (2007) 45 EHRR 34 (ASLEF).

protections which freedom of association offer. It is not disputed that the employment relationship is of a more 'public' nature. There are convincing reasons why the state should have a greater interest in the employment decisions of an organisation than in its membership criteria. The undisputed opportunities which employment affords individuals, and the imbalance of power in employment relationships, give the state a moral justification for greater regulation of employment decisions than membership policies.[84]

Yet, I would argue that there is a conception of freedom of association originating in principles of membership protection, which justifies its application to the employment decisions of religious employers. Religious employers, after all, can be regarded as serving the interests of 'members' of a group defined by their religion. The employment decisions of an organised religion – a church, synagogue, mosque or temple, for example - may serve the interests of its congregation, as members. In Catholic schools, meanwhile, the 'members' whose interests are served by employment decisions may be the Catholic parents in the local catholic parish to which the school is attached, or the church and parent representatives on the school's governing board. Other religious organisations, such as religious or faith-based charities, are often set up by churches, or by individuals who see faith in action as their 'calling'. In these cases, the 'members' who are served by employment decisions of the organisation might be the church community, or the trustees, or top-layer of management. Sometimes the service users in whose interests the employer acts will be the relevant members. Exceptionally, the employees themselves might be the 'members' whose interests the organisation serves. It has been argued, for instance, by Shaun de Freitas, that Alvin

[84] David Bilchitz refers to the history of his jurisdiction (South Africa), the economic and societal import of employment as well as its effect on individuals, and the imbalance of power between employer and employee to explain why in South African law, the employment relationship is not treated as solely a private matter in David Bilchitz, 'Why Courts Should Not Sanction Unfair Discrimination in the Private Sphere: A Reply' (2012) 28 SAJHR 296, 312.

Esau's 'organic' theory of employment[85] regards employees of religious organisations as being in 'membership' with them.[86]

It is important, however, to exercise caution with any interpretation that assumes the employees *in* a religious organisation can also be the members *served by* the organisation. This may be an accurate description of employment in some religious organisations, but it certainly will not be in others, or even in most. Any religious organisation could engage a religiously homogenous staff and then argue that the employees are akin to members whose interests are served by continuing their restrictive recruitment practices. If this were too readily accepted, the scope for discrimination could become unacceptably wide.

Still, there may be some force in the argument that an employer's employees are the relevant 'members' whose interests the employer serves if it can be demonstrated that the primary purpose of the organisation is to provide a forum for religious believers to put their faith into action. The Ontario Superior Court of Justice held in the case of *Ontario Human Rights Commission* v *Christian Horizons* (hereafter referred to as *Heintz*) that a religious organisation can be primarily engaged in serving the interests of, among others, its

[85] Alvin Esau, '"Islands of Exclusivity": Religious Organisations and Employment Discrimination' (1999-2000) 33 UBC LRev 719

[86] Shaun de Freitas, 'Freedom of Association as a Foundational Right: Religious Associations and Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park' (2012) 28 SAJHR 258, 267-68. According to De Freitas, Esau's 'organic' theory of employment 'emphasises 'membership' of a religious institution as an important factor irrespective of the task expected of such a person – the person (employee or independent contractor) is invited into a relationship and into membership with the group, and on obtaining membership, the person becomes inextricably related to the religious ethos of the relevant group which has a core relational understanding encompassing it'. The European Commission's finding in *Young, James and Webster* v *the United Kingdom*, nos 7601/76 and 7896/77, (Commission's report, 14 December 1979), para 167 available at <https://hudoc.echr.coe.int/eng#{"itemid":["001-73526"]}> accessed 3 June 2019, that the 'relationship between workers employed by the same employer cannot be understood as an association in the sense of Art. 11 because it depends only on the contractual relationship between employee and employer' arguably does not take into account this interpretation of employment in a religious organisation.

employees.[87] The court acknowledged the tribunal's findings that Christian Horizons (an Evangelical Christian organisation that ministered to individuals with developmental disabilities) was, 'structured as a community of co-religionists' and that it saw itself as, 'a vehicle through which individuals who identify as Evangelical Christians can live out their faith'.[88] This included the staff, who were found to, 'live out their Christian calling' in their work.[89] Importantly, providing a forum in which Evangelical Christians could exercise their faith through employment endeavours was a primary reason for Christian Horizons' existence. Whilst the Christian Horizons model is not unique, neither is it the norm. Most organisations with a religious or faith-based ethos do not serve the interests of their employees as a primary purpose, notwithstanding some employees might consider employment in the organisation as a religious 'calling'. These organisations must recognise other persons as members of an identifiable group defined by religion whose interests their work serves if they want to rely on associative freedom grounds to justify employment decisions.

It follows that if an employer serves the interests of a group of people defined by their religion or belief, its discriminatory employment policies could be justified on associative freedom grounds. Importantly, if it is article 11 of the ECHR which protects, 'associative life' then it is in fact article 11, and not article 9, which is responsible for setting the contours in which individuals may enjoy the collective dimension of their freedom to exercise religion or belief.[90] Applying freedom of association to the collective aspect of freedom of religion

[87] *Ontario Human Rights Commission* v *Christian Horizons* 2010 ONSC 2015, [73]-[77] (CanLII), (2010) 102 OR (3d) 267 (*Heintz* cited to ONSC).

[88] ibid [75].

[89] ibid [75].

[90] How existing case law principles on the application of article 11 to the trade union context should be applied in this new context is an interesting area of further enquiry, outwith the scope of the present article. Article 11 case law on an association's right to determine its membership will surely be relevant in those situations where employees themselves are the members whose interests the employer serves (see, for example, *Cheall*

provides an important context for the protection of religious association under various guises, including the employment exceptions. This context, centred round membership protection, is critical in both justifying, and setting the limits of, the employment exceptions.[91]

C. Parameters: An Identity-Protecting Model

If it were to be accepted that the employment exceptions derive their rationale from freedom of association because they serve the legitimate interests of members of a religious group, an understanding of the nature of these interests could assist with determining the scope of the exceptions. What are the individual interests protected by freedom of association?[92] Individuals are nurtured and mature through their autonomous choice of relationships and their collaboration to achieve shared goals. On one view, the collective identity of an association is but representative of aspects of its members' individual identities.[93] Whilst there can, and in larger associations may likely be, divergence among the membership in relation to the content of, and/or weight to be given to, the various objectives of an association, the *identity* of the association must be protected if members are to enjoy the full benefit to self that freedom of association offers. Safeguarding the religious employer's

v *United Kingdom* (1986) 8 EHRR CD74 and *Associated Society of Locomotive Engineers and Firemen (ASLEF)* v *United Kingdom* (2007) 45 EHRR 34). In other situations, existing case law on other aspects of the positive right to associate, as well as case law exploring the extent of the state's obligation to ensure compliance (and avoid interference) with article 11, should be of assistance to developing case law jurisprudence in this new context.

[91] Beetz J of the Supreme Court of Canada has considered that recognising freedom of association as the underlying policy for the employment exemption in the Quebec Charter of Human Rights and Freedoms indirectly provides a parameter for its application in *Brossard* n 9, [133].

[92] For a discussion, see part 1 of Amy Gutmann (ed), *Freedom of Association* (Princeton University Press, 1998); and Larry Alexander, 'What is Freedom of Association, and What is its Denial?' (2008) 25 Social Philosophy and Policy 1.

[93] Acknowledging the importance of religious practice to human dignity, de Freitas observes: 'This experience of a specific identity via religious practices is also attained within a collection of individuals who have the same religious beliefs and interest and respective practices, and who are but an extension of the private domain.' de Freitas n86. 262. de Freitas argues at 267 that if follows from the 'private' nature of the religious association that its membership decisions should attract more respectability.

ethos, I argue, is critical to protecting the collective identity of the members which it serves. If a church's ethos as employer is grossly at odds with the ethos it seeks to maintain as a collection of individuals, the opportunities for its members to benefit from the group and its endeavours may suffer. Associative freedom can thus defend religious discrimination in employment when it is necessary to maintain the employer's ethos, provided (in recognition of the *qualified* nature of the right to associate) that it does not disproportionately impact on the rights and freedoms of others.[94]

Deriving, as it does, from a principled analysis of religious associational freedom, this suggested identity-protecting model is a sound basis for interpreting the employment exceptions. De Freitas also argues on the basis of freedom of association as a foundational right for, 'an approach to appointments by religious associations, based on "religious ethos",[95] believing that 'a religious association represents a unique and important ethos (especially and foremost to its members)'.[96] He is particularly concerned that discrimination is permitted in those roles which do not, to an outside observer, appear to involve religious functions if the discrimination is required by the religious ethos of the organisation. According to de Freitas, the religious ethos might require discrimination in circumstances where the organisation considers that the particular job has a 'religious foundation' because, for example, it involves prayer or because the organisation regards the post holder as being in

[94] Ira Lupu refers to the relationship between employees and organisational purpose, aims and interests in support of his argument on freedom of association grounds that a religious association should be permitted to exclude 'non-members' from employment positions of 'associational significance'. Lupu, however, considers that religious associations should (acting in good faith and consistently with membership policies) be able to reserve any employment position for members, regardless of the equality interests affected. Ira C Lupu, 'Free Exercise Exemption and Religious Institutions: the Case of Employment Discrimination' (1987) 67 BULRev 391, 431-42. For other suggested approaches to exclusionary policies grounded in freedom of association principle see Stuart White, 'Freedom of Association and the Right to Exclude' (1997) 5 The Journal of Political Philosophy 373 and Lenta, n 79.

[95] de Freitas, n 86 271.

[96] ibid 259.

'community' with other believers in the workplace.[97] I would add that it is not only the 'relational' aspects of employment which might necessitate employees to hold the religion or faith of the organisation. Insisting that religion is an occupational requirement for those employees who are in leadership roles or who are responsible for spreading the word of their religion, may also be justified by the need to preserve the identity of the organisation, recognising that these individuals represent and personify the organisation's ethos internally and externally.

The identity-protecting model offers a principled understanding of the employment exceptions and a sound basis for interpreting their limits. The model requires the judiciary and other decision-makers to take a, 'cognitively internal' viewpoint of the needs and interests of religious employers,[98] and to weigh this against the personal impact of discriminatory behaviour. It asks the judiciary to engage with the employer's claim to discriminate on a level that takes full cognisance that its roots lie in religious and associational freedoms, and its purpose is to protect identity. Importantly, it takes the otherwise abstract notion of an employer's 'religious freedom' and gives the claim substance by focusing on the individuals defined by their religion whose interests the employer serves.

[97] ibid 269-71. Iain Benson also argues for a 'permeated ethos' approach to religious employer exemptions, asserting that 'it is the identity of the religious employees and their group beliefs in co-operation' which justifies protecting religious group autonomy, in Iain T Benson, 'An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion' (DPhil thesis, University of the Witwatersrand 2013) 149 available at <http://wiredspace.wits.ac.za/jspui/handle/10539/14004?mode=full> accessed 28 December 2018.

[98] The concept of a 'cognitively internal' perspective is explained in N MacCormack, *Legal Reasoning and Legal Theory* (Oxford, 1978), 292 and is referred to in Christopher McCrudden, 'Religion, Human Rights, Equality and the Public Sphere' (2011) 13 EccLJ 26, 31-32 where McCrudden argues that judges should take a 'cognitively internal' point of view when determining cases which concern religious issues: a perspective he argues has been lacking in certain recent decisions. See also argument by Iain Benson for an approach to religious employer exemptions which he describes as 'seeing through the associational lens' in Benson, n97, 157.

5 APPLYING THE IDENTITY-PROTECTING MODEL TO THE BRITISH EMPLOYMENT EXCEPTIONS

It is possible to describe the current framework of employment exceptions as offering a hierarchy of protection, depending on whether employment is for the purposes of an organised religion or in a faith school or otherwise. The organised religion exception is arguably the most protective of associative religious needs insofar as it permits discrimination on several protected grounds, including sex, sexual orientation and marriage, in certain prescribed circumstances, without any express requirement to demonstrate that the discrimination is a proportionate means to a legitimate end. This contrasts with the religious ethos exception, which sits at the bottom of the hierarchy and only allows employers with an ethos based on religion or belief to impose a requirement to be a particular religion or belief when it is an occupational requirement and proportionate. The faith school exceptions could be positioned somewhere in the middle of the hierarchy. Employers can exercise preferences in employment decisions because of religious beliefs unhindered, it would seem, by any requirement to demonstrate proportionality. Further, discrimination on grounds other than religion may be permissible in decisions on dismissal insofar as behaviour inconsistent with the precepts or the upholding of the tenets of the religion can be considered.

Could the identity-protecting understanding of the principle of freedom of association explain this hierarchy? There is certainly a cogent argument that a claim by the membership of a religious association for protection of its associative identity is strongest in the context of employment for the purposes of an organised religion. The personnel who lead the members of an organised religion in religious worship and those who represent and promote the religion have a particularly strong influence on the members' associative identity. The membership concept, moreover, sits most comfortably with organised religion: members of a parish, synagogue, temple or mosque, for example, are relatively easy to identify. The strong

claim by members of an organised religion to protect their associative identity through the autonomous selection of their leaders and spokespeople may justify the organised religion exception's position at the top of the hierarchy. The no-conflict and non-compliance principles of the organised religion exception further serve to put membership interests at the forefront. The no-conflict principle expressly refers to the religion's 'followers' and permits discrimination where necessary to avoid conflict with their strongly held convictions. The non-compliance principle, meanwhile, seeks to preserve the integrity of religious doctrine which is, of course, of primary significance to the members who subscribe to it.

The associational claim for identity protection may also explain why faith schools have greater latitude to discriminate in their employment practices than other types of religious organisation. It has been argued that faith schools have a unique and special purpose. The aim of education in a Roman Catholic denominational school, for example, has been described as, 'not merely the transmission of knowledge and development of skills, but rather the integral formation of the whole person according to a vision of life that is revealed in the Catholic tradition'.[99] Religious values have been said to infuse every aspect of the pupil's educational experience in a denominational school and, to this end, the teachers' roles have been found to be, 'fundamental to the whole effort of the school, as much in its spiritual nature as in its academic'.[100] In this regard, the school's membership, whether comprised of the parents in the parish to which the school is attached, or the representatives of the religion on the governing boards, may give rise to a particularly strong associational claim to justify

[99] *Daly* v *Ontario (Attorney General)* (1999) 4 OR (3d) 349, (1999) 172 DLR (4th) 241, 1999 CarswellOnt 1085, [34] (WL Intl) (ON CA) (cited to CarswellOnt) per Weiler J.A.

[100] *Caldwell* n 78, 624.

discrimination in the schools' employment practices for protection of the identity of these associations.

Whilst an identity-protecting analysis of freedom of association could explain the hierarchy of protection apparent in the British model, to what extent can such an analysis be used an interpretative tool in the application of the employment exceptions? The ethos exception provides the judiciary with the most scope to assess the interests of the membership served by an employer in protecting its identity. It requires the judiciary to have regard to the employer's ethos, the nature of the work or its context, and to assess whether religion is an occupational requirement and a proportionate means of achieving a legitimate aim.[101] Although it is debatable whether the organised religion exception engages the judiciary in assessing the proportionality of a particular requirement, it nevertheless provides some scope for the judiciary to assess the interests of the members served by the employer. In determining who is, 'employed for the purposes of an organised religion', for example, the judiciary could have regard to those posts most relevant to the members' associative identity. Further, it may not be straightforward in every case to determine whether any requirement, such as sex or sexual orientation is necessary to comply with a religion's doctrine or to avoid conflict with the religion's followers. There might be a dispute over the meaning or existence of a particular doctrine, or dubiety over the identity of the religion's followers, or the level of objection that is required to engage the no-conflict principle.[102] In these more difficult cases, the judiciary could assess, in the context of doctrinal requirements and membership interests,

[101] EA 2010, sch 9, para 3.

[102] See comment in part 1.A above. Sandberg acknowledges the difficulties with determining whether there has been offence caused to a 'significant number' of followers, particularly in respect of those religions that do not have a definition of membership in Sandberg, 'The Right to Discriminate' n 7, 177 and fn 142.

the extent to which the discrimination is necessary to protect the members' associative identity.

The opportunity to incorporate the identity-protecting analysis of freedom of association into the faith school exceptions is admittedly more limited. The faith school exceptions afford schools considerable latitude in their employment practices and do not expressly require them to demonstrate that their actions are proportionate. Still, the associative claim for identity protection could be important to the judiciary's determination of unfair dismissal claims brought by teachers dismissed from employment because of behaviour inconsistent with the precepts or the upholding of the tenets of the school's religion. Although the faith school exceptions (at least in England and Wales) permit employers to take such behaviour into account they will still be bound to demonstrate that any dismissals are fair. In determining the question of fairness, the judiciary could benefit from assessing the extent to which the school's actions were required to protect the associative identity of its 'members'.

6 TOWARDS A PURPOSIVE INTERPRETATION: ILLUSTRATIONS FROM CANADA

The potential benefit in the judiciary embracing freedom of religious association as the rationale for the British employment exceptions can be illustrated through consideration of aspects of the Canadian jurisprudence. The approach taken in Canada to equality exceptions for religious employers varies by province and territory.[103] Many of the provinces and territories, however, provide for exceptions or exemptions in their equality legislation directed particularly at (among others) religious groups. Canada's Supreme Court first

[103] For a description of the various approaches see Gillian Demeyere, 'Discrimination in Employment by Religious Organizations: Exemptions, Defences, and the Lockean Conception of Toleration' (2009-2010) 15 CanLab&EmpLJ 435.

declared in 1984 that the purpose of these exceptions and exemptions was to protect the fundamental freedom of individuals to associate for specified purposes.[104] Dicta from the Supreme Court to this effect has been cited with approval in subsequent cases,[105] and consideration of the Canadian case law draws attention to the opportunities freedom of religious association creates if adopted as the primary principled basis for the British employment exceptions.

A. Rights-conferring

Importantly, in basing its group employment exceptions on freedom of association, the Canadian judiciary openly recognises that the exceptions confer rights. The rights-based nature of the exceptions is emphasised in many of the judgments. The parties in *Caldwell* v *Stuart* (a case about a Catholic school's decision not to renew the contract of one of its Catholic teachers because, contrary to Catholic teachings, she married a divorced man in a civil ceremony), were described by the Supreme Court, for example, as each asserting a, 'clear legal right'.[106] The Board of Inquiry in *Parks v Christian Horizons* (a case concerning an Evangelical Christian organization's detrimental treatment of employees because of their non-marital living arrangements), meanwhile, referred to the Ontario Human Rights Code as creating, 'two sets of equal but competing individual and group rights'.[107] The Board of Adjudication in *Schroen* v *Steinbach Bible College* (a case concerning the refusal of a Mennonite Bible College to employ a Morman in the role of accounting clerk), expressed a similar sentiment when it observed, in a case on the *bona fide* occupational requirement

[104] *Caldwell*, n78, 624.

[105] See, for example, *Parks v Christian Horizons* (1991) 16 CHRR D/40, 1991 Carswell Ont 6678, [39] (WL Intl) (Ont Bd of Inquiry) and *Kostiuk* v *Toronto Community Housing Corp.* 2012 HRTO 388, [43] (CanLII).

[106] *Caldwell*, n78, 625.

[107] *Parks*, n105 [43].

provision in the Manitoba Human Rights Code, that the case 'involves the rights of one religious group and the religious freedom of an individual'.[108]

There are two relevant consequences of regarding the employment exceptions as 'rights-conferring' rather than simply as derogations from the equality principle. Firstly, this invites an interpretation of the exceptions in light of the interests they protect, which is a more meaningful guideline than an instruction to interpret them 'narrowly'. MacIntyre J in *Caldwell* made this observation in respect of the group employment exception in British Columbia's Human Rights Code:

> It is therefore my opinion that the courts should not in construing s.22 consider it merely as a limiting section deserving of a narrow construction. This section, while indeed imposing a limitation on rights in cases where it applies, also confers and protects rights.[109]

It is a second and related consequence of the recognition that the employment exceptions confer rights, that an 'internal' perspective of the needs and interests of the religious employer or the group it serves is invited. Iain Benson has considered the religious employer exemptions in Canada and South Africa and has argued for an approach which he refers to as 'seeing through the associational lens' or 'the use of the oculus'.[110] According to Benson, it is necessary 'to imagine life through other people's eyes and come to offer respect for their vision, their difference and their way of seeing'.[111] If the exceptions are interpreted

[108] *Schroen* v *Steinbach Bible College* 1999 MHRBAD No2, 1999 Carswell Man 634, [53] (WL Intl) (cited to CarswellMan).

[109] *Caldwell*, n78, 626.

[110] Benson, n97, 157.

[111] ibid 158.

as rights-conferring (rather than, *solely* as derogations from the equality principle), there may be a greater incentive to properly understand the real interests that they protect and, particularly, the relationships among a religious employer's ethos, its employees and the members it serves.

B. Relationships: Ethos, Members and Employees

Whereas the judicial understanding of the relationships among ethos, members and employees in a religious group is underdeveloped in the context of the employment exceptions in Britain, there is evidence that the application of freedom of association principle to group employment exceptions in certain Canadian provinces assists the judiciary to better recognise the intricacies of these bonds. This recognition offers an important context in which to balance the right to associate with the right to be free from discrimination.

There is evidence, firstly, of the Canadian judiciary having regard to the task of identifying the membership interests served by the employing entity. Indeed, the judiciary in several of the Canadian provinces is compelled to undertake this enquiry by the statutory language of the group employment exception applicable in its jurisdiction. The employment exception in Ontario's Human Rights Code, for example, only applies where, 'a religious … institution or organisation … is primarily engaged in serving the interests of persons identified by their … creed'.[112] In *Caldwell*, the Supreme Court accepted the finding of the Board of Inquiry that 'the persons interested are not just the pupils in the School, but are the members of the Catholic faith who have created the School and who support it'.[113] In *Parks*,

[112] Human Rights Code, RSO 1990, c H-19, s 24(1).

[113] *Caldwell*, n78, 627-28.

the Board of Inquiry found that the interests which were served by Christian Horizons included, 'the Evangelical Christian interests of its founding and present executive personnel and membership',[114] a finding which was largely followed by the court in *Heintz*.[115] Even in *Schroen*, which concerned a claim under a general bona fide occupational qualification provision rather than a group employment exception of the type which the Supreme Court of Canada has held protects freedom of association, the Board of Adjudication heard evidence of the ties the college had with Mennonite church groups, which owned the college, and supported it financially, and on the impact of the college's employment practices on the 'support and confidence' of this constituency.[116]

Identifying the membership interests served by the employing entity at the outset is useful in providing the context in which to interpret the employment exceptions. Importantly, understanding in whose interests the employers act, adds vital substance to their claims to maintain an ethos. One consequence of this is that job roles could be more confidently related to the ethos of the organisation. So, in *Caldwell*, for example, the Supreme Court arrived at the conclusion that a requirement of religious conformance on teachers was justified because the right to denominational schooling, enjoyed by the members of the Catholic community served by the school entailed the right to, 'preserve the religious basis', of the school.[117] In *Schroen*, the Adjudicator was clear that consideration of the specific job duties of the accounting clerk was insufficient. Instead, as he put it, 'consideration must be given to allow a religious group to achieve its religious objectives'

[114] *Parks,* n105, [53].

[115] *Heintz,* n87, [76]-[77].

[116] *Schroen,* n108, [21] and [25].

[117] *Caldwell,* n78, 628.

and this required reflection as to the manner in which the role, 'relates to the overall functioning in the institution'.[118]

A focus on the membership interests served by the employing entity can also assist with setting the boundaries within which the employment exceptions are to operate: discrimination must be necessary for protection of these interests. The decision of the court in *Heintz* is illustrative. The court found that the interests served by Christian Horizons were those of the founders, members and employees, in living out their Christian faith and performing their Christian ministry. It was in that context that the tribunal assessed the argument by Christian Horizons that religious conformance was necessary in the role of support worker. Finding that the, 'Christian environment' in the homes comprised prayer, hymn singing and Bible reading,[119] and that there was no attempt to instil in the residents Evangelical beliefs or lifestyle, the court held that the imposition of a religious conformance requirement was not justified. Put another way, the imposition of the religious conformance requirement was unnecessary for protection of the interests of the members in performing their Christian ministry. The Christian culture in the homes, maintained by staff through participation in prayer, hymn signing and Bible reading adequately served these interests.

C. Discriminatory Impacts

Although the British judiciary has more recently been obliged under the HRA to have regard to ECtHR jurisprudence, criticisms have been raised regarding the judicial reluctance to consider the impacts of discrimination and to weigh these in the balance with competing

[118] *Schroen*, n108, [53].

[119] *Heintz*, n87, [101].

rights and interests.[120] An approach to the employment exceptions, however, which regards their rationale as based in fundamental human rights of religious association could encourage the judiciary to focus on the discriminatory impacts of a proposed measure and pay greater regard than it has previously to Strasbourg's approach to balancing competing interests.[121]

The reason for this is that freedom of association (like freedom of religion), after all, is not absolute. Article 11 of the ECHR provides that freedom of association can be limited, if prescribed by law and necessary for the protection of the rights and freedoms of others. When an employer exercises their right to religious association, those most often infringed are freedom of religion and equality rights.

There have been many justifications offered for the limits imposed by anti-discrimination laws on freedom of association, including social engineering, perfectionist-paternalism and legal moralism.[122] Discrimination can inflict on individuals, 'major physical, emotional, psychological and social harm',[123] and in cases of sexual orientation discrimination, the harm can be particularly severe. Counsel for the claimant in *Reaney* v *Diocese of Hereford* submitted before the employment tribunal (the 'ET') that the purpose of the SO Regulations was, in part, to, 'remove and approach the concealment of sexual orientation which is corrosive of integrity'.[124] He referred the ET to a South African case in which the court approved comments made by the ECtHR on the 'often serious psychological

[120] Aaron Baker, 'Proportionality and Employment Discrimination in the UK' (2008) 37 ILJ 305, 321-23.

[121] For comment on the ECtHR approach to balancing religious autonomy with individual rights, see Ian Leigh, 'Balancing Religious Autonomy and Other Human Rights under the Convention' (2012) 1 OJLR 109, 120-24.

[122] See discussion in Alexander, n92, 15-20.

[123] Greg Walsh, 'The Right to Equality and the Employment Decisions of Religious Schools' (2014) 16 The University of Notre Dame Australia Law Review 107, 127.

[124] *Reaney*, n 8, [84].

harm' suffered by homosexual victims of discrimination.[125] There must also be appreciation of the financial harm suffered by individuals who are subject to discrimination because excluding individuals from employment opportunities because of protected characteristics results in inequality of opportunity for economic advancement.[126]

Perhaps most importantly, though, equality laws protect individuals against the harm caused to their dignity interests when subjected to discrimination on grounds of a protected characteristic.[127] A person's interest in his own sense of self-worth can undoubtedly be affected by unlawful discrimination, but so too can the wider public view of that person's worth.[128] For this reason, one United States Supreme Court judge has referred to discrimination as causing a, 'stigmatizing injury'.[129] Obtaining and retaining employment is a significant contributor to feelings of self-worth, and therefore discrimination in employment can have a substantial adverse effect on dignity interests. The dignity interests affected, moreover, are not restricted to those of the individual who is the subject of the discriminatory act. Rather, all those in the community to which the individual belongs can suffer from the knowledge that the state has permitted rejection of an individual because of a protected characteristic, which they all share.[130]

It is noteworthy that dignity could form the basis both for freedom of religious association and for the right to non-discrimination. Some have even argued that dignity itself

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[125] ibid [84] referring to *The National Coalition for Gay and Lesbian Equality, South African Human Rights Commission v The Minister of Justice, The Minister of Safety and Security, and The Attorney General of the Eitwatersrand* [1998] ZACC 15, [23] (Constitutional Court of South Africa).

[126] Stuart White considers that, 'Individuals have an *economic opportunity interest* in not being excluded specifically from … goods-conferring associations.' White, n94, 383.

[127] See discussion in ibid 384-85 on the dignity interest infringed by exclusion on categorical grounds.

[128] ibid 384.

[129] Justice Brennan J in *Roberts* v *United States Jaycees* 468 US 609 (1984) at 625, discussed in White, n94, 384.

[130] Walsh, n123, 129.

could be useful in determining the outcome in cases where these rights compete.[131] Though the concept of dignity is certainly beneficial to a deeper understanding of equality law and human rights, it is doubtful it is a robust enough concept to provide much assistance to the judiciary in balancing competing interests.[132] Though some have argued that general principles ought to guide mediation of the conflict between freedom of association, on the one hand, and the right to equality of opportunity, on the other[133] there is no basis in the ECHR for any hierarchical ordering of freedom of association and rights to equality. A case-by-case approach is required to assess the relative strength of each claim in the conflict, and the facts of each case must inform a comparison of the claim to equality with the claim to associate freely.[134]

Of course, at present, only the religious ethos exception incorporates an express proportionality test that the judiciary can use to assess the relative strength of the claim to associate freely with the claim to equality on a case-by-case basis. Proportionality is entirely absent from the faith school exceptions and there is dubiety over whether proportionality is implicitly incorporated into the organised religion exception. Proportionality provides a mechanism for decision-makers and the judiciary to consider the discriminatory impact of a proposed measure and to ask whether an alternative with less of a discriminatory impact

[131] Gay Moon and Robin Allen, 'Dignity Discourse in Discrimination Law: A Better Route to equality?' [2006] EHRLR 610.

[132] See discussion in Walsh, n123, 131-32 and Walsh's reference to dicta of the Canadian Supreme Court in *R v Kapp* [2008] 2 SCR 483, [21]-[22] (CanLII), 294 DLR (4th) 1 that, 'human dignity is an abstract and subjective notion that … cannot only become confusing and difficult to apply; it has also proven to be an *additional* burden on equality claimants, rather than the philosophical enhancement it was intended to be'.

[133] For example, Rawls has argued that basic liberties (like freedom of association) should always be prioritised over equality of opportunity. See discussion in Peter De Marneffe, 'Rights, Reasons and Freedom of Association' in Gutmann, n92, 149.

[134] Peter De Marneffe argues against general principles to guide the approach in ibid 149-56. He concludes that, 'whether it is permissible or impermissible for the government to interfere with a liberty for reasons of equality depends not upon the category of liberty it falls within, but upon the relative weight of this reason of equality and the reasons against interference. We should resolve conflicts between freedom of association and equality or opportunity not by considering general principles, then, but by considering the details of each case.' ibid 156.

would suffice to achieve the employer's purpose.[135] The requirement to act proportionately in the circumstances of each case ensures that due respect is afforded to all competing interests in the contexts in which they arise. Proportionality is an essential component for affording the dignity interests of all affected parties sufficient weight.

Arguments have been made that the lack of any express stipulation that discriminatory requirements must be proportionate renders the organised religion exception and the faith school exceptions incompatible with the Directive.[136] This may become a moot point if the UK leaves the EU. Still, amending the organised religion exception and the faith school exceptions to include an explicit requirement on the employer to act proportionately would provide greater scope for freedom of association to guide interpretation of the exceptions by offering a more flexible and nuanced mechanism to balance competing rights.

7. CONCLUSION

I have argued in this article that freedom of religious association offers a principled guideline for development of the law on the exceptions to equality in employment available to employers with a religious or belief ethos, and to those employing individuals for the purposes of organised religion or in faith schools. Such a guideline is desirable, I have suggested, because of the uncertainty surrounding the scope and application of the exceptions, which itself is compounded by the conclusion that the exceptions lack any clear

[135] For comment on the doctrine of proportionality, competing interests, and the range of factors which may be relevant in balancing religious freedom with other rights and freedoms, see Vickers *Religious Freedom*, n 38, 65-96.

[136] For comment on the organised religion exception, see Sandberg, *Law and Religion*, n43, 122. The EHRC has recommend that the Department of Education and Scottish Government should review the faith school exceptions 'to ensure their compatibility with' the Directive in Equality and Human Rights Commission, n 2, 25-29.

foundational principle. The lack of appellate decisions in this area to date makes the search for a principled guideline to assist the judiciary in its interpretation of the exceptions even more pressing.

While the traditional focus of academic and judicial consideration of the principle of freedom of association has concerned its application to membership organisations, and particularly trade unions, I have argued in this article for the significance of the principle to interpretation of the employment equality exceptions. The ECtHR has held that the rationale for religious autonomy derives from both freedom of religion *and* freedom of association. Yet, there has been little engagement to date with the importance of freedom of association to the understanding and interpretation of the employment equality exceptions in Britain.

The application of the principle of freedom of religious association to the employment equality exceptions is the basis for the interpretative model I have put forward in this article which regards the exceptions as protective of employer ethos for the benefit of the members whose interests the employer serves. Such a model can explain the current hierarchy of protection which our legislative exceptions promote and can be applied in cases involving the exceptions, albeit some modification of their form would enhance the potential of the model as an interpretive tool.

Applying the principle of freedom of association to interpretation of the employment exceptions in the manner argued for invites consideration of the precise interests the employer seeks to protect and therefore provides a useful context for consideration of the claim to discriminate. It encourages engagement with the relationships among an employer's ethos, its employees, and the religious group it serves and, importantly, demands a commitment to ensuring the discriminatory impacts of an exercise of the freedom do not outweigh the benefit.