Employment

Religious expression and social media: the need for careful exercise of judgment

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In a democratic society people with deeply-held religious views should be free to express them. The professions which serve the public should do so without improper discrimination. Must these principles come into conflict when a member of a profession with strong personal beliefs publishes remarks which condemn same-sex relationships?

The Court of Appeal's judgment in *R (on the application of Ngole) v University of Sheffield* [2019] EWCA Civ 1127 shows how difficult it can be to uphold both of these principles. The case provides useful guidance for employers seeking to balance them.

Facts

Felix Ngole was a social-work student at the University of Sheffield. Successful completion of his accredited course would enable him to register as a qualified social worker and begin professional practice.

Mr Ngole is also a devout Christian who takes the Bible to be the full and authoritative word of God and relies on it for instruction in all matters.

In September 2015, when halfway through his two-year course, he posted about 20 comments on an American news website condemning same-sex relationships on religious grounds. They were posted from his personal Facebook account, and contained Biblical quotes as well as observations expressing his views. They included the following:

- "…If a man lies with a male as with a woman both of them have committed an abomination. Leviticus 18:22"
- "…Homosexuality is a sin, no matter how you want to dress it up"
- "…[O]ne day God will do away with all diseases and suffering. He will also get rid of the devil who is the author of all wickedness… But remember that He will also Judge all those who indulged in all forms of wicked acts such as homosexuality."

Following an oral hearing of the faculty's Fitness to Practise panel Mr Ngole was excluded from his accredited course. He was offered the opportunity to enrol on an alternative course which did not lead to professional qualification.

Law

It was agreed that the University's decision was an interference with Mr Ngole's right to freedom of expression under Article 10 of the European Convention. In both the High Court and the Court of Appeal, therefore, the central issue was whether the interference was lawful. Under Article 10(2), an interference will only be lawful if it is

(a) prescribed by law and

(b) necessary in a democratic society in order to achieve a (listed) legitimate aim.

Mr Ngole's Article 9 right to freedom of religion was not engaged, but the religious dimension of the case was relevant to proportionality.

Prescribed by law

The social work profession is regulated by the Health and Care Professions Council (HCPC) which was created by statutory instrument under the Health Act 1999 (as amended). Its over-arching objective is protection of the public, which requires maintenance of public confidence in the professions it regulates. To that end, it publishes standards of conduct, performance and ethics.

The HCPC also publishes general guidance for students and specific guidance on social media. Both guidance documents make clear that conduct outside the workplace, or outside a programme of study, may affect completion of study and the registration which follows it. In particular, the social media guidance says,

> "*You may use social networking sites to share your views and opinions… this is not something that we would normally be concerned about. However, we might need to take action if the comments posted were offensive, for example if they were racist or sexually explicit.*"

Both the High Court and the Court of Appeal agreed that the HCPC regulations and guidance were sufficiently clear and precise to enable Mr Ngole to ascertain what he was and was not permitted to do.

Proportionality

In *Bank Mellat v HM Treasury (No.2)* [2014] AC 700 Lord Sumption JSC summarised the approach to be taken in determining whether a measure which interferes with a Convention right is proportionate. The court should consider:

> "…(i) whether its objective is sufficiently important to justify the limitation of a fundamental right;
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> (ii) whether [the measure] is rationally connected to the objective;
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> (iii) whether a less intrusive measure could have been used; and
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> (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community…" (*Mellat*, at [20])

Both the High Court and the Court of Appeal found that protection of the public and maintenance of confidence in the profession were important and legitimate aims to which Mr Ngole's exclusion was rationally connected.

High Court

Sitting as a Deputy High Court Judge, Rowena Collins Rice held that Mr Ngole's challenge must fail. She found that the nature of the posts alone would not have justified removal from the course; however, she accepted the University's submission that Mr Ngole showed a serious lack of insight when challenged. On that basis she found that no less intrusive measure could have been used.

Court of Appeal

The Court of Appeal allowed Mr Ngole's appeal, quashing the University's decision and remitting his case for a new hearing before a differently constituted Fitness to Practise Committee. It held that to the extent that Mr Ngole's position became entrenched it was as a result of the University's failings.

In particular, it found that the University told Mr Ngole at an early stage that he could never express disapproval of homosexuality in a public forum, no matter what language he used and no matter the context. That position was not consistent with the HCPC's standards or guidance. It was therefore unsurprising that Mr Ngole reacted so strongly, since the University's position invited no nuanced response.

Comment

In the end, the case turned on the question whether each side had done enough to resolve the tensions between important public values which appeared to come into conflict.

In the High Court it was held that Mr Ngole had not done enough to show that he understood the impact his posts might have on vulnerable members of the public. In contrast, the Court of Appeal found that Mr Ngole's uncompromising position had been induced by the University's stance.

Employers would be well-advised to consider the following points:

- Where freedom of expression is in issue, a blanket ban on expressing opinions on social media will not be lawful. Engagement on social media will always require an exercise of judgment by employees, and it is therefore particularly important to provide examples of what is likely to be acceptable and what is not;
- It may be appropriate to explain that Biblical terms such as 'wicked' and 'abomination', when used outside an explicitly theological context, could be understood by non-religious people as instrusive and offensive;
- Disciplinary procedures should be designed and operated in a way which avoids entrenching positions at an early stage, so that employers and employees can engage in genuine discussion of the kinds of social media expression which might be acceptable in future;
- Decisions about imposing sanctions should take into account the importance of religious expression in a democratic society, as well as the nature of the employer's business and any relevant professional regulations.