

Ministers of Religion in UK civil law: obstacles to employment status and potential reforms to achieve a degree of employment protection.

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Abstract

The scheme of this thesis is to look at the possibility of conferring employment status on ministers of religion in the United Kingdom by examining various apparent obstacles, legal and non-legal, to this and seeing if in fact they do pose such obstacles as to make employment status legally impossible.

It begins with an examination of the legal obstacles in identifying who is a minister and who is the employer and then moves to the central issue of whether ministers can be classified as employees as such. Looking first at the possibility of ministers being classified as employees as a question of pure employment law. The conclusion here is that, provided that there is a contractual relationship, many relationships between ministers and their church could satisfy the common law tests for employee status. However, this is to look at the question in isolation from other issues beyond employment law, matters which the courts have consistently regarded as vital considerations. That being so it is necessary to look at other ways of classifying the relationship. This thesis argues that whilst some of these ways, such as where ministers act voluntarily, are clearly appropriate in particular cases, the main way in which the courts have classified the relationship, that of office holding, has never been properly analysed and is in fact indistinguishable from employment except in a small number of cases. The thesis then moves to a detailed examination of the case law where employee status for ministers has been in issue and here we attempt a classification of the case law under three headings: the office holder category, the 'intention to create legal relations category' and the construction of terms category.

The thesis then moves to two other areas beyond employment law. There is first the question of whether the autonomy of churches as a general principle of law would be compromised by the conferment of employee status, one which the courts have not regarded as important but which this thesis contends is a significant obstacle to employment status. The final potential obstacle is the ecclesiology of churches and this involves an examination of both legal and non-legal sources as well as looking at individual churches rather than at churches as whole.

The conclusion reached is that there are significant and, in the case of some churches, insuperable obstacles to employee status. However, it is strongly argued that justice demands that ministers should have some rights akin to those of employees without actually having the status of employees. So, in the final chapter, a scheme is suggested for giving ministers certain 'employee type' rights together with proposals on how this scheme would be administered. The thesis gives a detailed account of how the scheme might work supported by case studies.

Introduction

1. Rationale for the thesis.

1.1. General

The Independent for 30th April 2015 ran this headline in the wake of the decision in *Sharpe v Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester*:¹ ‘Vicars employed by God not the Church says court in landmark ruling’.²

This was quite inaccurate as no one has suggested that God is in the position of a secular employer but it also came at the conclusion³ of yet another case where a minister of religion has claimed the status⁴ of an employee in order to assert rights arising out of what is claimed to be unjust treatment in the course of their ministry.

¹ [2015] EWCA Civ 399, [2015] I.C.R. 241

² The actual piece more accurately stated: ‘vicars are not employed by the Church, but *called by God*’ (italics mine) but it would be the headline that readers would remember!

³ There was no appeal to the Supreme Court.

⁴ I have adopted the definition of status in *Jowitt’s Dictionary of English Law* 4th edn. (2015) as: ‘The status of a person is his legal position or condition’. Thus, it does not connote any special right, rank or privilege but simply a recognition of the legal position of a person, in this case their position as an employee.

Moreover, there is a widespread feeling that the present position is unsatisfactory. In a House of Lords debate on clergy employment status Baroness Turner of Camden said that 'in the 21st century it is unacceptable for any group of employees to be outside the provisions of employment law, perhaps with no remedy against unfair dismissal and, in the case of women, no remedy against sexual discrimination'.⁵

When finishing this thesis, I was struck by another issue which is parallel to this enquiry. On 9th August 2018 the Independent Inquiry into Child Sexual Abuse published its report into allegations involving two Roman Catholic schools, Ampleforth and Downside.⁶ One theme running through this and other reports on abuse of children in church institutions is the conflict between the duties under secular law and procedure of those in charge to take appropriate action when cases of suspected abuse are reported and their responsibility as bishops, abbots and so forth to take pastoral care of their clergy.⁷ In effect secular law cuts right across their pastoral understanding. It is not pressing the point too far to say there is the same problem in this situation. Here too the demands of secular employment law cut across the idea of those in ecclesiastical authority as shepherds and guardians of their flock. A bishop, for instance, sees himself/herself as caring for those in his/her charge and not as a defendant to actions brought by them under civil law. It is this tension which will become apparent in Chapter Three, when we look at cases brought by clergy under employment law and Chapter Five, when we consider the ecclesiology of churches.

1.2. Justifications for this thesis

⁵ Hansard 12 June 2002 coll. 257-60.

⁶ See <https://www.iicsa.org.uk/investigations/investigation-int> (accessed 20th August 2018).

⁷ G. Evans, in *Discipline and Justice in the Church of England* (Gracewing 1999) refers to this (at 78) as 'The pastoral-judicial dilemma'.

There are then two justifications for the present enquiry: the clearly pressing need to ask if ministers of religion should have the status of an employee or at least be able to claim some employment rights, and in the course of this to dispel the misconceptions that surround this area as evidenced by the quotation with which we began this thesis.

1.3. Aim of the thesis

The aim of this thesis is to enquire into the present status of ministers of religion⁸ when they are in a situation of dependent labour in the UK. We use the term 'dependent labour'⁹ as a generic term which avoids using the terms 'employee', 'worker' 'office holder' or 'independent contractor' as it is one purpose of this thesis to ask if these terms are appropriate in the situation of a minister of religion in relation to his or her church.

1.4. Originality of this thesis

The originality of this thesis is fourfold:

- (a) There has been no detailed examination of the question of who is a minister of religion in this context – see Chapter One.
- (b) There has been no systematic analysis of the case law on clergy employment status to bring out the different rationales for the decisions -see Chapters Two and Three.
- (c) There has been no attempt to engage in applied employment law by taking established principles of employment status and applying them to a particular area whilst at the same taking account of the mix of other considerations which act as factors in determining this status. These are brought together in Chapters Four and

⁸ I am aware that the exact term to be used when referring to 'ministers of religion' can be loaded theologically. For example, some denominations use the term 'priest' yet others would reject this. Thus, the term 'minister of religion' has been chosen although the word 'minister' is used for shorthand and also where appropriate 'clergy' and 'clerics'.

⁹ I consider this term in Chapter Two.

Five under the headings of the autonomy of churches (Chapter Four) and the ecclesiology of churches (Chapter Five).

(d) There has been no attempt to recognise that, given the failure, now extending back over 100 years, to find employee status for the clergy, another solution is needed and this is what is presented in the final chapter, Chapter Six.

1.5. Focus on Christian Churches

Turning to one particular issue, the thesis focusses on ministers of Christian churches because it would be impossible in the space allowed to add in the extra material needed to deal properly with the background detail on the beliefs, customs and practices of non-Christian religions. However, when we investigate the case law on ministers and employment status in Chapter Three it is appropriate to look at those cases which involved the employment status of ministers of non-Christian religions as well in order to illustrate how the courts have approached this question.

Turning to which Christian churches are examined, I have noted the most recently available statistics from *British Religion in Numbers*.¹⁰ These show that in 2015¹¹ total church attendance was 2,474,200. Of these 660,000 were Anglican, 608,000 were Catholic, 200,000 Methodist and 226,000 Baptist. This amounts to 1,694,000 and well over half the total. This basis alone justifies the concentration on these churches and in particular on the first three, which are singled out for detailed consideration in Chapter Five, which looks at

¹⁰ British Religion in Numbers, British Academy Research Project www.brin.ac.uk/figures (accessed 23rd January 2019)

¹¹ The statistics are compiled at five yearly intervals and so these are the latest figures.

the ecclesiology of individual churches. Moreover, most of the cases examined in Chapter Four concern the Anglican and Methodist churches. In Scotland out of a total attendance of 457,600, 176,000 were Roman Catholic and 145,700 were Church of Scotland, comprising 321,000 of the totals justifying the examination of the Church of Scotland. Chapter Five contains further justification for concentrating on the ecclesiology of the Anglican, Roman Catholic and Methodist Churches and it is here that we examine the different approaches taken by different denominations regarding their clergy.

2. Research questions

My research questions are:

- (a) First to investigate the apparent obstacles, legal and non-legal, to ministers of religion in the United Kingdom having employee status. These are:
 - (i) Obstacles in defining who is a minister and who is the employer of ministers (see Chapter One)
 - (ii) Obstacles stemming from the law of employment and in particular the need to establish that there is a contract of employment (see Chapters Three and Four).
 - (iii) Obstacles because of the principle that religious bodies should enjoy a measure of autonomy from the State (see Chapter Four).
 - (iv) Obstacles, here both legal and non-legal, from the ecclesiology of churches: their self-understanding, based on their particular ecclesiology, including canon law, of whether their clergy are indeed employees or office holders. This is considered in Chapter Five alongside the fundamental teachings of churches about justice in society and in particular justice for workers.

(b) Secondly, whether, if there are insurmountable obstacles to employee status, what potential reforms are needed to achieve a degree of employment protection. I wish to examine a possible status for ministers of religion which gives adequate protection to their rights, although not placing them in the same position as employees, whilst also taking account of their special position and in particular the spiritual nature of their duties, and also the need for religious bodies to enjoy a certain degree of autonomy from secular jurisdiction.

3. Methodology

My methodology is doctrinal. I look at printed sources, relying on civil law¹² legal sources but also sources from church law and other documents such as reports produced by churches together with some non-legal material on the relationship between church and state and the ecclesiology of churches. In general, there were no problems in gaining access to this material. However, it was made clear to me when I asked for certain material that access would not be granted to material dealing with specific cases where there had been disputes with clergy on 'employment' issues.

3.1. Literature review

The existing literature does not address any of the points set out at 1.4. above setting out the rationale for this thesis. Thus, the thesis, whilst drawing on the existing literature, adds

¹² I use the term civil law here in opposition to canon law.

substantially to it not only in the depth of the discussion but also in the drawing together of different themes and in its conclusion. ¹³

There is a great deal of discussion in the case law on employee status in general there is much less on this particular topic. For example, Deakin and Morris' *Labour Law* ¹⁴ devotes 16 pages to what is termed 'quasi-dependant labour', dealing with categories which fall outside the normal employer-employee model. Of this less than one page is devoted to ministers of religion. Other employment law textbooks are understandably scant in their treatment of this subject. The one text book which has a detailed treatment of this area is by Gillian Evans: *Discipline and Justice in the Church of England* ¹⁵. However, this is not only out of date but its main focus is not so much on employment status but, as its title indicates, disciplinary procedures and in one church only. Nevertheless, it is still most valuable for its insights although given that the author is not a lawyer, but a medieval theologian, the focus of the book is to some extent non-legal.

Textbooks on law and religion do have sections on this topic. Julian Rivers in *The Law of Organised Religions* ¹⁶ has a separate section entitled Ministers of Religion and Ian Leigh and Rex Ahdar in *Religious Freedom in the Liberal State* ¹⁷ also has a lengthy section although in both books matters other than employment status of ministers are considered such as the rights of what Leigh and Ahdar call 'religious persons' in employment. Books dealing specifically with church law likewise give this topic scant attention. Hill's

¹³ See 1.4. above

¹⁴ 6th edn, Hart Publishing 2012

¹⁵ Gracewing 1998.

¹⁶ OUP 2010.

¹⁷ 2nd. edn, OUP 2013.

*Ecclesiastical Law*¹⁸ simply states that ‘...the employment status of clergy merits a brief mention in the light of certain recent developments’ and devotes one paragraph¹⁹ to the matter. *Moore’s Introduction to English Canon Law*²⁰ mentions employment status in passing at the end of a chapter on ‘Ecclesiastical persons’ and then only in connection with a mention of ‘common tenure’.²¹

Consideration of the topic in academic literature has also been slight. The first article was in 1996 by Emma Brodin in the *Industrial Law Journal*²² ‘The ‘Employment Status of Ministers of Religion’ but, although useful, this is now quite out of date. Following this the main consideration has been in the *Ecclesiastical Law Journal*, *Law and Justice*, *the Christian Law Review* and the *Oxford Journal of Law and Religion* as well as the occasional article in the *Industrial Law Journal*, although there has recently been a most interesting piece by Russell Sandberg in the *Journal of Religion and Human Rights*.²³ These articles have tended to be on specific cases and it is noteworthy that as interest in the whole area of the relationship between law and religion has blossomed so has the treatment of this area in articles in the above journals. For example, the important decision in *President of the Methodist Conference v Parfitt*²⁴ received no discussion at all at the time as *Law and Justice*, the *Christian Law Review* only mentioned occasional current case law and the other two journals of its type, the *Ecclesiastical Law Journal* and the *Oxford Journal of Law and Religion* did not

¹⁸ 3rd edn, OUP 2007

¹⁹ 4.42

²⁰ T. Briden, (4th edn Bloomsbury Continuum 2013).

²¹ See 155. Common tenure is considered here in Chapter Six.

²² 25 (3) ILJ 1996 211

²³ ‘The Employment Status of Ministers: A Judicial Retcon?’ (2018) 13 Religion and Human Rights 27

²⁴ (1984) QB 868

exist. In more recent years, by contrast cases such as *Percy v. Church of Scotland Board of National Mission*²⁵ *Preston v President of the Methodist Conference*²⁶ and *Sharpe v Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester*²⁷ have been extensively considered leading to more general evaluations of the case law in such articles as that by Sandberg (above) and also one by Peter Edge²⁸ which looks at the history of the case law here and attempts to draw out some principles. What these articles do not do, and what this thesis does do, is to set the law in a wider context by looking at issues such as the identification of the parties, church-state autonomy and the ecclesiology of churches.

The major general journals such as the *Law Quarterly Review*, *Modern Law Review* and *Cambridge Law Journal* tend to neglect this area. For example, the decision of the Supreme Court in *Preston v President of the Methodist Conference*²⁹ was ignored by them although it was noted in specialist employment bulletins such as IDS Employment Law Brief. These are extremely useful but do not engage in the level of academic debate that a decision of this kind demands. What is noteworthy is that the decision of the Supreme Court in *Various Claimants v Institute of the Brothers of the Christian Schools*³⁰ resulted in major consideration of that decision in both the *Cambridge Law Journal* and the *Law Quarterly Review*. This was, I suggest, because the decision involved a more mainstream area, that of vicarious liability, and because of the social significance of the decisions as they involved the liability of churches for sexual abuse committed by priests.

²⁵ [2005] UKHL 73, [2006] 2 A.C. 28

²⁶ [2013] UKSC 29, [2013] 2 AC 163

²⁷ (2013) UKEAT/0243/12/DM, (2015) EWCA Civ. 399, [2015] I.C.R. 241

²⁸ “Judicial crafting of a ministerial exception: The UK experience”, *Ox. J Law Religion* (2015) 4(2): 244-25

²⁹ [2013] UKSC 29, [2013] 2 AC 163

³⁰ [2012] UKSC 56, [2013] 1 All ER 670

The topic has received much more detailed treatment and analysis in the USA with an article by Alvin Esau³¹ being especially helpful, but the focus is different as there is no protection from, for example, unfair dismissal in the USA and here there is a constitutional aspect to the discussion as the conferment of employment rights can be seen as crossing the boundary between church and state.

Finally, in keeping with the overall vision for this thesis I have not hesitated where appropriate to use non-legal sources. One instance is the passage in Graham Greene's *The Power and the Glory* on the enduring character of the RC priesthood as evidence that this is inconsistent with employment status (see Chapter Five)..

4. Thesis Structure

The first five chapters consider different obstacles to employment status for the clergy with the final chapter looking at a potential reform. Chapter One looks at the first two potential obstacles to employment status: defining the parties to a contract of employment: a minister of religion and his/her employer. There has been remarkably little discussion in UK law of the question of who a minister is, possibly because in the cases which have involved ministers of religion there has been no doubt as to their status. However, if an increasing number of cases involving ministers do come before the courts and if employment rights in some form are given to the clergy, then there are bound to be borderline situations. This means that a definition of a minister of religion is essential and one is offered. This is then tested against those who are generally considered as ministers and those who occupy positions to some

³¹ 'Islands of Exclusivity: Religious Organisations and Employment Discrimination' (2000) 33 UBC L Rev. 719

extent analogous to ministers. One example is a stipendiary lay reader in the Church of England.

The question of who the employer of a minister is has received more attention from the courts but the problem remains that of identifying an employer amongst the often-diffused structures of ecclesiastical authority and the question is whether an otherwise sound claim should be defeated by this problem.

The conclusion to this chapter is that, despite problems, the identification of who is a minister of religion and who is the employer do not present insuperable obstacles to employment status but this, as it were, only solves the bookends of the relationship: what of the content of the relationship between the parties? This is the focus of both Chapters Two and Three.

Chapter Two looks at the obstacles to employment status for ministers of religion clergy by examining how they sit in the general categories of dependent labour which could apply them including office holder, employee, worker, voluntary worker and those in the position of a beneficiary under a trust. It concludes that office holding is a misunderstood category and as informal office holding is often indistinguishable from employment status it is not an answer to the question of an appropriate employment status for ministers but instead a barrier. Moreover, it is problematic on the basis of the tests for employment status that ministers could qualify as employees although, if they have contracts, they could qualify as workers.

Consideration of the tests for employment status then leads on to Chapter Three which looks at the case law involving claims by clergy to have the status of employees or at least workers and looks at the obstacles the courts have erected to employment status for ministers by the way they have tackled this question. In order to bring some coherence to what is a confusing body of case law, it proposes three categories into which the cases on this topic can be fitted: the 'office holder category', the 'presumption against intention to create legal relations category' and the 'construction of terms' category, all of which can overlap, and then examines the case law against these categories. This examination of case law demonstrates the obstacles to employment status for the clergy as a general principle due to the various tests often inconsistently applied by the courts.

Chapter Four deals with another potential obstacle: the fact that giving the clergy the right to claim a bundle of employment rights against their religious body would infringe the principle that churches should enjoy autonomy in the regulation of their affairs. It looks first at this question on a theoretical level as part of the continuing debate on the relationship between church and state and examines the impact of the Human Rights Act 1998. The chapter ends with an examination of the applicability of judicial review and the principles on which the courts review the decisions of ecclesiastical courts and tribunals. The conclusion is that although the UK courts recognise some principle that churches and other religious bodies do enjoy a degree of autonomy its scope is not entirely clear. Thus, there is an obstacle to employment status but we cannot be sure of its extent. The discussion of judicial review is significant for the conclusion, as we shall see.

The non-secular legal obstacles to employment status are the focus of Chapter Five which is divided into the perspectives of churches first drawn from their teachings and then from their

ecclesiology. In the first section we argue that rights and their assertion in the context of a church must be considered in the light of what that church says about these matters and, in particular, what it says about the rights of workers. Quite simply, if a church proclaims its teachings about justice in society then should it not also afford justice to its clergy?

The second section asks what is meant by ecclesiology and considers the question of employment status against the self-understanding of churches of the status of their clergy. It looks at three particular areas: the nature of orders and employment status, the concept of incardination in the RC Church and the Canonical Oath of Obedience in the Church of England. The main conclusion is that in the context of the ecclesiology of particular churches there are insuperable obstacles to employment status. Incardination is one obvious example and so is the nature of orders.

Chapter Six, which is the conclusion, returns to the research questions and the obstacles to employment status which, as we have seen, are likely to be insuperable in most cases from both the legal and non-legal point of view. So, this leads to our second research question: what potential reforms are needed to give ministers of religion adequate protection?

One possibility, of course, would be to leave matters as they are but the continual flow of cases to the courts shows that there is a need for better protection for the clergy and it is no answer to revert to the trite saying alluded to at the start that 'Vicars are employed by God'.

The proposed alternative gets away from the vexed question of status, whether employee, office holder or otherwise and instead utilises the definition of a minister of religion set out in Chapter One and focusses on the idea in the title of a 'degree' of employment protection. It

takes the form of a detailed scheme of an 'inner core' of rights applicable to all clergy where their church had adopted the scheme and an 'outer core' of rights where each church could decide which rights applied to their clergy. Most cases involve dismissal, either actual or constructive, and under the scheme this is dealt with in two ways: an effective grievance procedure together with a policy for dealing with claims by the clergy that in the course of their ministry they are victims of bullying or harassment. This would be in the inner core of rights. This should filter out many cases which would otherwise have gone to the courts. Unfair dismissal would be in the outer core of rights with the inevitable consequence that if a person was a minister of a church which had not adopted the 'outer core' they would not have the right to bring a complaint on this ground. However, this is an inevitable consequence of respecting both the autonomy of churches and their ecclesiology as argued above. One appropriate mechanism for enforcing the scheme would be judicial review, as considered in Chapter Four.

We conclude by noting the tension between the strong impulse of many clergy that employment status is inappropriate for their ministry with the equally strong impulse that in justice there needs to be some mechanism for resolving the type of issues which we have considered.

Chapter One: Obstacles to Employment Status through Problems in Identifying who is a Minister and who is their Employer.

1. Introduction

This chapter investigates two linked obstacles to ministers of religion in the United Kingdom having employee status: problems in defining who is a minister and who is the employer of ministers. The question of who is a minister of religion has not yet arisen in the cases involving claims to employee status by ministers to enable them to claim employment rights but there seems little doubt that it will do so at some future time especially as it has arisen in other areas.³² One possibility is where there is a claim to employment status by a minister in one of the 'independent' and 'new' churches³³ where the structure is less hierarchical and the 'setting apart' of persons to be ministers may be less distinct. This chapter divides examination of this question into two areas: what is meant by 'religion' and what is meant by 'a minister'. In the absence of a clear definition of a minister of religion one is proposed at 2.2.5. The issue of who is the employer of a minister has received judicial consideration and this is examined in detail. However, as difficulties in identifying the employer have not proved an insuperable obstacle to claims to employment status in the past it seems unlikely that they will do in future and so the main problem lies in defining who is a minister.

2. Defining a minister of religion

³² Especially in claims to be exempt from military service.

³³ See the Introduction

2.1. What is meant by religion?

2.1.1 Christian and non-Christian religions.

This thesis is concerned only with the employment status of ministers of Christian religions whilst by contrast in other areas the courts have been exercised by attempting a definition of religion that encompasses religions other than Christian. It would be possible to attempt a definition for this thesis which only included Christian religions but this would be a mistaken attempt for two reasons:

- (a) It would fail to make use of the most recent attempt by Lord Toulson in *R (on the application of (Hodkin) v Registrar of Births, Deaths and Marriages*,³⁴ to arrive at a definition of religion which certainly *includes* Christian religions.
- (b) It would mean that, if the proposals in Chapter Six for a resolution of the problem of clergy employment status were adopted, they could only ever apply to Christian religions when, if they turned out to be successful in this context, they might in fact be applied to ministers of non-Christian religions.

The problem is, in today's pluralistic society, how to arrive at a definition which both encapsulates the somewhat elusive nature of religion and also includes religions other than Christianity and in particular those which are not monotheistic and those which do involve a belief in a personal God. As a general point we might note the comment of Latham CJ in *Adelaide Company of Jehovah's Witnesses Inc. v The Commonwealth*³⁵ who observed that: "It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world."

³⁴ [2013] UKSC 77 [57]

³⁵ (1943) 67 CLR 116, 123

2.1.2. A Definition of Religion

*R v Registrar General, Ex p Segerdal*³⁶ did not concern a definition of religion as such but a place for 'religious worship' and Denning MR held that, with some exceptions such as Buddhist temples, the governing idea behind the words 'place of meeting for religious worship' is that it should be a place for the worship of God. This was clearly rooted in the Judeo-Christian tradition and statute law has now moved on. The Equality Act 2010 prohibits discrimination on the grounds of religion and belief and s.10 provides that religion means any religion and a reference to religion includes a reference to a lack of religion but this does not get us far. What is more helpful is a wider definition applied to religious charities by s. 3 (2) (a) of the Charities Act 2011 which provides that 'religion' includes 'a religion which involves belief in more than one god, and a religion which does not involve belief in a god'. However, the case law did not encompass, for instance, Scientology, and was still rooted in the *Segerdal* decision.

In *R (on the application of (Hodkin) v Registrar of Births, Deaths and Marriages*,³⁷ the Supreme Court adopted Lord Toulson's working definition of religion:

I would describe religion in summary as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with that belief system. By spiritual or non-secular, I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science . . . Such a belief system may or may not involve belief in a supreme being, but it does involve a

³⁶ [1970] 1 QB 430

³⁷ [2013] UKSC 77 [57]

belief that there is more to be understood about mankind's nature and relationship to the universe than can be gained from the senses or from science.

He then observed that: 'I emphasise that this is intended to be a description and not a definitive formula'. It is suggested that in dealing with abstract concepts such as 'religion', where there is the need to give clear guidance to the courts whilst at the same time being inclusive, that is exactly what we need and as Juss points out: 'the judgment's attractiveness lies in its avoiding a detailed consideration of questions of theology'.³⁸

What we can say is that it would be extremely unlikely that a minister claiming employment status would fail on the ground that he/she was not a minister of *religion*, as distinct from whether he was in fact a *minister*. For instance, in Chapter Three we examine claims to employment status by ministers from both Christian and non - Christian religions, including a priest at a Sikh temple and imams. In all cases the minister would be a minister of religion within the above definition³⁹ whereas Denning MR's reasoning in *Ex p Segerdal* would arguably have excluded them. We shall adopt this definition for this thesis and can now proceed to the second, more difficult question.⁴⁰

³⁸ 'Back to the future: justiciability, religion, and the figment of "judicial no-man's land"(2016) PL Apr. 198,202. This discussion of the meaning of religion is also relevant to the issue of justiciability or non-justiciability of disputes involving religious bodies which is considered in the context of this thesis in Chapter Four.

³⁹ See the discussion in Chapter Three of one of these cases in particular: *Santokh Singh v Guru Nanak Gurdwara*.

⁴⁰ In 'Defining the Divine' (2014) Ecc. L.J. 16(2) Sandberg refers to the work of the sociologist Linda Woodhead who has identified different concepts of religion. Sandberg suggests that Lord Toulson's definition in *Hodkin* meets her concept of religion as 'meaning and culture' as distinct from that of 'belief and meaning' which, in effect, was what was applied in *Segerdal*. See L. Woodhead 'Five concepts of religion' (2011) 21.1. International Review of Sociology 121-143

2.2 What is meant by a minister?

2.2.1 The Nature of the Problem.

One could say that this is just a matter of distinguishing between clergy and laity but, as Briden points out 'the sharpness of the distinction has varied from time to time and place to place'.⁴¹ It could be argued that the matter is a straightforward one in cases of an ordained ministry. Those who are ordained are ministers; those who are not ordained are not. Thus, in the Roman Catholic (RC) Church Can.1008 states that:

By divine institution, the sacrament of orders establishes some among the Christian faithful as sacred ministers through an indelible character which marks them. They are consecrated and designated, each according to his grade, to nourish the people of God, fulfilling in the person of Christ the Head the functions of teaching, sanctifying, and governing.

Can. 1009 §1. then provides that: 'The orders are the episcopate, the presbyterate,⁴² and the diaconate'.

In the Church of England Canon C1 provides that:

The Church of England holds and teaches that from the apostles' time there have been these orders in Christ's Church: bishops, priests, and deacons...

There are however, others who exercise ministerial type functions in Churches and here there may be difficulties in deciding if that person is a minister. One instance is that of Readers in the Church of England who are lay people who have been selected, trained and

⁴¹ *Moore's Introduction to Canon Law* T. Briden (4th edn, Bloomsbury 2013) 148 where there is a useful short account of different offices in the church.

⁴² Priesthood

licensed by the Bishop of a diocese to preach, teach and lead worship in a pastoral context.⁴³ Are they ministers? In *Barthorpe v Exeter Diocesan Board of Finance*⁴⁴ the EAT held, in a case where the Reader held a paid post, that it was possible for them to be employees of the church and there was an assumption that they were ‘ministers’ but the matter does not seem to have been fully argued. The same problem applies in many other churches where the laity exercise ministerial type functions. We shall return to this later when we consider a possible definition of a minister. Finally, ‘ministers’ may not be ordained at all. An instance of where this was not so is in *Guy v Mackenna*⁴⁵ considered below.⁴⁶

2.2.2. When the question of ministerial status is likely to be significant

In practice this will be in two situations:

- (a) Where the religious organisation does not have a clear hierarchical structure.
- (b) Where a person performs services, which are akin to those of a minister but does not have the formal title which that religious group confers on its ministers.

⁴³ See Canon E 4 of the Church of England (the Canons are usefully set out in M. Hill, *Ecclesiastical Law* (3rd edn, OUP 2007) – see here 353. The ministry of reader is usefully explained by T. Briden *Moore’s Introduction to English Canon Law* (4th edn. (Bloomsbury, 2013) at 152

⁴⁴ [1979] ICR 900. This case is further considered in the section dealing with the case law on employment status of ministers.

⁴⁵ [1917] J.C. 59

⁴⁶ In the RC Church the matter of who is a minister is complicated by the fact that RC Canon Law also recognises the concept of an ecclesiastical office defined by Canon 145 §1 as ‘any function constituted in a stable manner by divine or ecclesiastical ordinance to be exercised for a spiritual purpose’. As Huels (‘Towards Refining the Notion of ‘Office’ in Canon Law’) *The Jurist* 70 (2010) 396 points out, this is vague and imprecise and could apply to positions such as catechists, sacristans, and godparents. If the courts use the extended meaning of office in Canon 145 §1 to decide if a person is an office holder in civil law (see Chapter Two) this might include those above as office holders when in fact they are not really holders of an office in the legal sense at all.

The question of ministerial status originally arose in connection with claims to exemption from military service and began with the introduction of universal conscription in 1916, authorised by the Military Service Act, 1916. Thus, they did not involve employment status but liability to be called up for national service and so these decisions are of limited importance but they do give useful pointers. In addition, as we shall see the term in question was not minister but 'regular minister'.

2.2.3. The Current Position

The First Schedule to the Military Service Act, 1916 exempted persons from service under the Military Service Acts if they were: 'men in holy orders or regular ministers of any religious denomination.'⁴⁷ It is noteworthy that these cases, as one might assume, did not involve ordained ministers as such but persons who would in other denominations be classified among the laity but who, through the way in which their denomination operated, or because of its ecclesiology, claimed to be 'regular ministers' under the First Schedule.⁴⁸

There were a number of cases which turned on this provision, the most fully argued of which seems to have been *Guy v Mackenna*⁴⁹. Here the claim was by an elder who was elected by the members of the International Bible Students' Association in Glasgow. It was held that he was not a 'regular minister' in the sense of the Schedule, and accordingly was not exempted from liability to military service. The association had no 'ministers' and could elect

⁴⁷ One might note that there was no such exemption in France: here 32,699 clerics served in the French Army. (M. Burleigh *Earthly Powers* (Harper 2005) 454-455)

⁴⁸ There is a useful general discussion of clergy exceptions from military service in J. Rivers *The Law of Organised Religions* (OUP 2010) 140

⁴⁹ (1917) J.C. 59

an unlimited number of 'elders' to perform, without remuneration, the usual duties of a clergyman within the association. They were not paid and their appointment lasted for six months but was renewable. Moreover, elders carried on their ordinary secular occupation.

In holding that the claim was not made out Lord Anderson held that

a regular minister is one whose sole occupation is ministering to the religious needs of his flock. But perhaps a better test to apply—for the rule of construction is that words are to be taken in their ordinary signification when they occur in an Act of Parliament—is to ask: How would you describe the appellant? You would not call him a minister. I do not think you would even call him an elder; you would call him a wood carver, because that is his business. On the other hand, if you were asked to describe a clergyman, you would describe him as a clergyman or as a minister.

One could say that the last sentence simply re-states the problem!

In later years the questions of exemption from national service became important and one case which reached the House of Lords is *Walsh v Lord Advocate*.⁵⁰ The National Service Act 1948 Sch 1, included amongst the persons not liable to be called up for service in the armed forces of the Crown the same two categories as in the earlier legislation: 'a man in holy orders or a regular minister of any religious denomination.'

The appellant held the offices of 'pioneer publisher' and 'congregation servant' in the body known as Jehovah's Witnesses. Lord MacDermott said that 'In my opinion, the words "a regular minister" connote a class which forms but a part of the denomination in question and

⁵⁰ [1956] 1 W.L.R. 1002

is acknowledged by that denomination as having a superior and distinct standing of its own in spiritual matters'.⁵¹ He later observed that this involved: 'at least two elements, namely, a ministering or clerical element and a lay element to which it can minister.'

The problem here was that in the Jehovah's Witnesses every person baptised into the organisation is a minister regardless of sex, age, education or any other qualification. However, it was argued that the appellant was a minister on the basis of a different test: in Lord Keith of Avonholm's words⁵² what they argued set him aside 'was his functions or vocation. The appellant was discharging full-time spiritual functions as a congregation servant and pioneer publisher'. Lord Keith disagreed saying that to adopt this method of classification 'would exclude many ordained ministers who were not discharging any, or at least full time, spiritual functions.' One example would obviously be a retired minister and Lord Keith's point seems beyond argument.

It followed that the organisation had no ministers within the meaning of the Act and consequently no regular ministers and the appeal was dismissed.

The House of Lords seemed to pay no regard to how the minister was classified by his church: it reasoned that just because a person was called a minister by the church did not mean that they were ministers in law. In this particular case, where all members were ministers, that may have made sense, but as a more general principle one would expect the

⁵¹ At 1010

⁵² At 1012

courts to accept the classification adopted by the church or other denomination.⁵³ Lord MacDermott held that: ‘the question of construction now to be resolved is as to the nature of this class. After that the issue ceases to be purely one of law and becomes substantially one of fact; the primary facts and circumstances must be weighed and considered and a finding reached as to whether or not they bring the person concerned within the ambit of the exemption.’⁵⁴

However, if we leave the matter as a question of fact then this leaves a wide area of factual analysis for each court engaged in this question. The rationale for the attempt below to arrive at a workable definition is to limit as far as possible the element of fact involved so that the definition of a minister becomes one of law to a greater degree.

2.2.4. Towards a New Definition

None of the attempts by the courts to define the term ‘minister’ have been successful. The notion of a minister having; ‘a clergyman status’ which sets him apart from and places him over the laity of his denomination in spiritual matters is not satisfactory as it begs too many questions: what is ‘clergyman status, what is meant by being ‘set apart, what are ‘spiritual matters’? Despite Lord McDermott’s belief in *Walsh v Lord Advocate* that a precise definition of a minister of religion is impossible it is suggested that an attempt must be made and it is suggested that any definition should take account of the following elements which

⁵³ See, for instance the analysis of Lady Hale in the Supreme Court in *The President of the Methodist Conference v Preston* [2013] UKSC 29 regarding the Methodist Church and the doctrine of the priesthood of all believers. This underlies how important it is to have regard to the ecclesiology of individual churches, a matter considered in Chapter Five.

⁵⁴ At 1010

taken together comprise the matters which would need to be considered in deciding if a person is a minister.

(a) *The appointment of a minister.* What is vital is to avoid, in Gillian Evans's phrase, is 'ecclesiological load-bearing terms'.⁵⁵ The term 'Ordination' is often used here but it frequently denotes a 'laying on of hands' by a bishop. In the Roman Catholic Church, the process is laid down in detail the fundamental provision being Can. 1008⁵⁶ which provides that:

By divine institution, some among the Christian faithful are marked with an indelible character and constitutes as sacred ministers by the sacrament of holy orders. They are thus consecrated and deputed so that, each according to his own grade, they may serve the people of God by a new and specific title.

Thus, the words 'consecrated and deputed' imply a very clear process and this is set out in Canons 1010-1023 so that in the RC Church there should be no problem in identifying who is a minister. In the Church of England there is a similar clear process, the fundamental provision being Canon C1 1: that no one:

shall be accounted or taken to be a lawful bishop, priest, or deacon in the Church of England, or suffered to execute any of the said offices, except he be called, tried, examined, and admitted thereunto according to the Ordinal....

⁵⁵ In *Discipline and Justice in the Church of England* 17

⁵⁶ Code of Canon Law. (Paulist Press, 2013)

Once again, we see the formal requirements in the words 'called, tried and examined'.⁵⁷

However, the term 'ordination' is not used in churches with a less hierarchical structure or may be used together with other terms. One example where there is no 'ordination' as such is with the Jehovah's Witnesses as noted in *Walsh v Lord Advocate* (above). Furthermore, the Methodist Church provides that: 'Those who have been accepted into Full Connexion⁵⁸ with the Conference shall, unless already ordained or to be ordained elsewhere, be ordained in a service.'⁵⁹ Thus acceptance into 'Full Connexion' precedes, and is linked to, ordination. Appointment indicates some formal process, which I suggest is essential, but does not connote any particular form of process. There should also be, within this, some understanding that the appointment should be for such a length of time which indicates that that person is clearly set apart from other members of the denomination to act as a minister in order to deal with cases where a person is appointed to act for a short time and is in no real sense a minister as generally understood.⁶⁰

(b) *The conduct of services.* The term 'services' is used as it is reasonably neutral and is better than 'worship' as some denominations may not have what is strictly called 'worship'. One example is the problem caused by applying this term to services held by the Church of Scientology as in *Segerdal*.⁶¹

⁵⁷ See M. Hill, *Ecclesiastical Law*, (3rd edition, Oxford University Press, 2007) at paras. 4.06-4.08 for further discussion of these provisions.

⁵⁸ In effect ministers. This is considered in more detail in Chapter Five.

⁵⁹ *The Constitutional Practice and discipline of the Methodist Church* part 742 www.methodist.org.uk/media/1841903/conf-2016-cpd-vol-2.pdf (accessed March 20th 2017).

⁶⁰ See e.g. *Guy v Mackenna* above and below.

⁶¹ *R v Registrar General, Ex p Segerdal* [1970] 1 QB 430

(c) *A formal position of leadership in the community.* This takes up the point made by Lord MacDermott in *Walsh v Lord Advocate* that a minister 'is acknowledged by that denomination as having a superior and distinct standing of its own in spiritual matters'.⁶² Various people may be authorised to conduct services who would not be considered 'ministers'. One way of distinguishing between them and ministers would have been to specify that the service must be the main service of the week. This would not do, however, as for one thing it might be difficult to decide which service was the 'main' service and also lay people may conduct main services. One example is in the Methodist Church where a lay preacher often conducts the main Sunday service. Therefore the notion of providing 'leadership' is introduced to provide a means of distinguishing between those lay people who conduct services and the minister. The word 'formal' is needed to make sure that this only applies to those designated as such and not to those who may consider themselves leaders.

(d) *Whether solely or in conjunction with others.* Many churches, especially Baptist ones, have leadership teams. Thus, the minister might not be in a position of sole leadership or even be the leader of any team.

(e) *He/she may carry out other functions normally associated with a minister of religion such as visiting the sick and acting as a chaplain to a body or person.* The whole idea of a minister is used in the sense of to 'minister' for instance by performing what the RC Church knows as the 'Corporal Works of Mercy'⁶³ of which visiting the sick is one.

⁶² At 1010

⁶³ These also include *inter alia* visiting the imprisoned and burying the dead. These are set out in many Catholic works: see e.g. *The Explanatory Catechism of Christian Doctrine* (Burns and Oates 1921) 42.

This would not be a determinant of status as a minister as of course many others do this but might be a useful indicator where the application of the above requirements for ministerial status do not produce a clear result. The same would apply where the person acts as a chaplain.

- (f) *Some form of remuneration, sufficient to qualify as consideration for a simple contract, is offered for those services and that remuneration is actually received.*

Here we have a difficulty: if this is included then it automatically removes some clergy because if they do not receive remuneration there is no contract as there is no consideration. If we take the RC Church as an example, we will see that a parish priest conducts services, such as offering Mass, and also has a position of leadership in his parish community. He also carries out other functions such as visiting the sick and so far, he would seem to be a minister. At this point he satisfies the definition. However, as we shall see in Chapter Five (ecclesiology), he has no guaranteed right to remuneration and so if this element is here the priest would not be a minister of religion. However, if it is not included then there is no question of a contract and so no question of a contract of employment. I suggest that, bearing in mind the conclusion reached in Chapter Six, that here we have alternatives: if the issue is one of contract, then this element is of course included. If, however, we aim at some status apart from contract for ministers to enable them to claim some employment rights then this part is retained only as a possible but not essential indicator of employment status.

2.2.5. The New Definition

On the basis of the above points I propose the following definition which I have constructed. It does not anticipate whether ministers will be classed as employees but, if they are, this

definition or a variant of it, may be useful. Likewise, it will be useful in any scheme conferring employment rights on ministers.

A minister of religion is one who is appointed by his/her religious body to conduct services according to the beliefs and practices of that religious body and to be in a formal position of leadership within their own religious community, whether solely or in conjunction with others. The appointment should be for such a length of time which indicates that that person is clearly set apart from other members of the denomination to act as a minister. .

In addition, he/she may carry out other functions normally associated with a minister of religion such as visiting the sick and acting as a chaplain to a body or person.

If the claim is to employee status then the minister must be in a position where some form of remuneration, sufficient to qualify as consideration for a simple contract, is offered for those services and that remuneration is actually received. If, however, it is a claim to a status not dependent on contract then this is a possible but not essential indicator of employment status.

Note: The term 'religion' in this definition has the meaning adopted by Lord Toulson in *R (on the application of (Hodkin) v Registrar of Births, Deaths and Marriages*.⁶⁴

This is not only because, as argued above at 2.1. above, this definition is exactly what we need but also because, as it was delivered in a recent Supreme Court

⁶⁴ See also C. Kenny, *The Art of Defining Religion* (2014) 16 (1) *Ecc LJ* 18

decision, future courts would be likely to follow it in all cases where the meaning of religion was in issue.⁶⁵

2.2.6. How this definition would apply to particular classes of persons in a church.

We shall look at two cases discussed above and then at two offices in different churches where the office certainly shares some characteristics of the above definition of a minister.

(a) In *Guy v Mackenna*⁶⁶ it will be recalled that the claim was by an elder in an association which could elect an unlimited number of 'elders' to perform, without remuneration, the usual duties of a clergyman but they were not paid and their appointment lasted for six months but was renewable. Moreover, elders carried on their ordinary secular occupation. One immediate possible obstacle would be the lack of remuneration but, leaving that aside, the elder was appointed by 'election', conducted services and had a formal position of leadership in the community. However, the fact that the appointment was for only six months would not satisfy the requirement in criteria (a)⁶⁷ that it should be for such a length of time which indicates that that person is clearly set apart from other members of the denomination to act as a minister (see criteria (a) above) and so it is suggested that with the above definition we would reach the same result as did the court and hold that the claimant was not a minister.

⁶⁵ It will be interesting to see if Lord Toulson's definition is used by the courts to flesh out the definition of religion under s. 3 (2) (a) of the Charities Act 2011

⁶⁶ (1917) J.C. 59

⁶⁷ See 2.2.4. above

(b) In *Walsh v Lord Advocate*⁶⁸ the offices of ‘pioneer publisher’ and ‘congregation servant’ in the Jehovah's Witnesses would not satisfy the definition as there was no system of appointment, no conduct of services and apparently no formal position of leadership in the community. Once again, we reach the same result as the courts.

The following two offices⁶⁹ come from different churches and involve persons who might be regarded as ministers by a casual visitor to a church who attended a service conducted by either of them:

(a) A RC Extraordinary Minister of the Eucharist appointed under Canon 910.2 of the Code of Canon Law.⁷⁰ They bring communion to the sick and housebound thus satisfying (e) above and they can also lead Eucharistic services thus satisfying (b). However, they are not in any formal position of leadership in the church (see (c)) and so, even if they did receive remuneration, which would be most unusual, they would not be ministers.

(b) Readers in the Church of England. We noted their position earlier and by Canon E4 (2) their duties include ‘visiting the sick, to read and pray with them, to teach in Sunday school and elsewhere, and generally to undertake such pastoral and educational work and to give such assistance to any minister as the bishop may

⁶⁸ [1956] 1 W.L.R. 1002 discussed fully at 2.2.3. above.

⁶⁹ I use the term ‘office’ in a general sense here without presupposing if these are offices in Canon Law. See 2.2.1. above and the discussion in Huels (‘Towards Refining the Notion of ‘Office’ in Canon Law’) *The Jurist* 70 (2010) 396 cited at fn. 35

⁷⁰ Code of Canon Law of the Roman Catholic Church (Paulines Press, 2013)

direct'. This does not on its face include the taking of services but from the evidence in *Barthorpe*⁷¹ it seems that Readers do. Thus, provided that they also exercise formal positions of leadership in their own religious community they could qualify as ministers provided that they receive some remuneration. In practice they generally do not and so would not be ministers. *Barthorpe* was a case where the Reader was a Stipendiary Reader at the Devonport Naval base.

We shall return to this definition in Chapter Four and in the conclusion.

2.2.7. Conclusion on the question of identifying who is a minister

Of the two issues mentioned at the start of this chapter that of what is a religion seems most clear cut if the formula of Lord Toulson in *R (on the application of (Hodkin) v Registrar of Births, Deaths and Marriages*.⁷² is used and we have argued above at 2.1.1. and 2.1.2. that it is appropriate to use it in this context. The issue of who is a minister presents a number of difficulties of which the initial one is that this term can mean different things in different churches because of their differing ecclesiologies.⁷³

The answer does not necessarily lie in confining 'minister' to ordained ministers as ordination does not have the same meaning in each church and may not be used at all. In addition, there are others who exercise ministerial type functions in Churches who may be considered 'ministers.' Moreover, the case law on this topic is old, as we have seen,⁷⁴ and does not deal with the term 'minister in an employment context.

⁷¹ *Barthorpe v Exeter Diocesan Board of Finance* [1979] ICR 900

⁷² [2013] UKSC 77. This definition is set out in Chapter Two.

⁷³ The term 'ecclesiology' will itself be examined further in Chapter Five

⁷⁴ The most recent decision, *Walsh v Lord Advocate*, dates from 1956 and none of the cases examined above on the question of who is a minister dealt with a claim to employment rights as against an employer.

It is submitted that we need to start afresh and attempt a definition to assist in resolving the question of who is a minister of religion. If that is so, then the next question is whether it is possible to identify an employer for ministers of religion and we now turn to this.

2.3. Who is the employer of the minister?

2.3.1. Two Fundamental Problems

There are two fundamental problems with identifying the correct employer in the context of a dispute involving a minister of religion.

- (a) The first is the fact that ecclesiastical bodies do not always have legal personality and are generally not a body corporate. In *Percy v. Church of Scotland Board of National Mission*⁷⁵ Lord Hope observed that the

Church is not a body that has been incorporated by statute. It has, of course, its own distinctive identity and its own constitution,.... But its status in law is that of a voluntary association, of which its adherents, whether they be elders, communicants or baptised persons, are all members. As such, it does not have the capacity in its own name to own any property, whether heritable or moveable, or to enter into contracts in its own name.'

Although he was referring specifically to the Church of Scotland his remarks are applicable to most religious bodies.

In relation to the Church of England Lord Hobhouse of Woodborough declared in

⁷⁵ [2005] UKHL 73

*Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*⁷⁶

that: 'the Church of England is not itself a legal entity'. The same remark would apply to many other churches.

In practice many of their activities are carried on under a trust as, for example, Diocesan Trusts in the RC Church and the actual title of 'Church' is really often an umbrella term for many activities carried on by 'the church' in its name. So in *Re Barnes, Simpson v Barnes*⁷⁷ Romer LJ approved of the statement by FitzGibbon L.J. in the Irish case of *McLaughlin v. Campbell*⁷⁸ that the term 'church' 'used in conjunction with the name of the denomination (e.g. the Church of Rome or the Church of Ireland) 'prima facie imports the operative institution which ministers religion and gives spiritual edification to its members'. Although in *Re Barnes* Romer LJ did indeed quote with approval a statement from Halsbury's Laws of England⁷⁹ that the term 'church' could mean the 'quasi corporate institution which carries on the religious work of the denomination whose name it bears', the term 'quasi corporate' really does not get us anywhere as it has no legal meaning.⁸⁰

(b) The second is the fragmentary nature of the organisational structure of many churches, with their often diffuse and complex organisational structure. This really

⁷⁶ [2004] 1 AC 546

⁷⁷ [1930] 2 Ch. 80 at 81. This case actually concerned the validity of a gift 'to the Church of England absolutely' which was held valid. The whole question of the legal status of a 'church' is discussed by Doe, *The Legal Framework of the Church of England*, (Clarendon Press 1996) 7-12, where he points out that the RC Church has also been described as a 'quasi-corporate institution'. There is a considerable literature on the legal personality of religious bodies: see the references in Doe, above.

⁷⁸ [1906] 1 IR 588 at 597

⁷⁹ Vol. 11., p. 3

⁸⁰ We ought to note, before leaving this topic, that so far as the Church of England is concerned Diocesan Boards of Finance are bodies corporate; Hill, *Ecclesiastical Law* (3rd. edn) 2.29

follows from point (a) and does pose a problem because in this context we are left with having to identify persons or bodies such as bishops or trusts or corporations who can be said to represent the church for this purpose. In practice this is likely to mean that problems with employer identification will be more likely to arise where the organisation is larger and has been established longer. More recently established religious organisations are more likely to have clothed themselves with a legal structure, normally a company. One example is *New Testament Church of God v Stewart*⁸¹ considered below. This contrasts with the problems just explored in identifying a minister of religion where, as we saw, problems were more likely with smaller religious groups.

2.3.2. The existing case law

S. 230 (4) of the Employment Rights Act (ERA) 1996 provides that 'the employer in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed'. Whilst this is hardly enlightening it does emphasise one vital point: the employer is the person or body with whom the minister has a contract. One could then conclude that if no employer can be identified then there can be no contract as one of the parties does not exist.

In some cases, the identification of the employer is a simple exercise. In *New Testament Church of God v Stewart*⁸² the issue was who the employer of the Rev. Stewart was. Pill LJ, in the Court of Appeal, explained the legal position of the respondent, the New Testament Church of God: 'In the UK it is a company limited by guarantee and a registered charity. It has around 108 churches in the United Kingdom.' Thus, the possible obstacle of

⁸¹ [2007] IRLR 178 at 597

⁸² [2007] IRLR 178 at 597

lack of legal personality did not apply. Moreover, although there were local churches and the New Testament Church also existed in the USA, there was a far less complex position than obtains in, for instance, the RC Church or the Church of England. Nevertheless, one of the grounds of appeal was that the Employment Tribunal had misdirected itself in finding that this was the employer as it had not been established that the respondent, instead of either the local church or the Church of God in the USA, was the employer. However, Pill LJ dismissed this point shortly and held that he did not consider the proposition that either was the employer 'to be tenable'. On the facts there was a clear relationship between the Revd. Stewart and the respondent with, as we shall see, the exercise of a significant level of control over him by the national office which also paid the salary.⁸³

In the case of other churches without a clear hierarchical structure identification of the employer may also be easier. Thus, in the case of Baptist Churches Goodliff points out that: 'Almost all Baptist Trust deeds leave the church free to appoint whomsoever it discerns is being called by God to serve as its minister'.⁸⁴ In that case one would assume that the local church would be the employer and not the central body, the Baptist Union. However, matters may not be quite so simple because Goodliff also refers to: 'the Baptist conviction that while the embodiment of the church is normally the local congregation, it is not the totality of the church' as the Baptist Union has a significant role. '⁸⁵

⁸³ See the discussion of this case in Chapter Three.

⁸⁴ 'Baptist Church Polity and Practice' (2012) 168 Law and Justice 5,10

⁸⁵ Ibid. at 5

If there was little difficulty in *Stewart* in identifying the employer this issue caused Mummery LJ much soul-searching in *Diocese of Southwark v Coker*⁸⁶ which involved a claim against the Church of England. He held that:

The Diocese of Southwark was not his employer; it is the district under the supervision of the bishop and is not a legal person with whom a contract can be concluded. The Church Commissioners paid Dr. Coker's stipend and the Diocesan Board of Finance made the necessary arrangements for that payment. Neither of them appointed him, removed him, controlled the performance of his functions, or had any contract with him. It was not contended that either of the vicars had a contract with Dr. Coker. That leaves only the bishop, chief pastor of the diocese, who has legal responsibility for licensing the appointment of assistant curates, on the nomination of the incumbent, and the termination of such appointment, or revocation of it. But that relationship, cemented by the oath of canonical obedience, is governed by the law of the established church, which is part of the public law of England, and not by a negotiated, contractual arrangement.

However, the fact that there was no employer did not affect the result as the claimant was held not to be an employee, the two issues were linked as it is clear from Mummery LJ's judgement that a major factor in his holding that the claimant did not have employee status was *precisely that* there was no employer. Earlier in his judgement he had emphasised that:

The legal implications of the appointment of an assistant curate must be considered in the context of that historic and special pre-existing legal framework of a church, of an ecclesiastical hierarchy established by law, of spiritual duties defined by public law

⁸⁶ [1998] ICR 140.

rather than by private contract, and of ecclesiastical courts with jurisdiction over the discipline of clergy.

It was exactly this 'pre-existing legal framework' with its fragmentation of authority and responsibility, which, in Mummery LJ's view, showed that the relationship was not one of contract, resting on a relationship between employer and employee. As we shall see in Chapter Five,⁸⁷ Church of England clergy take an oath of Canonical Obedience to their bishop, which could be considered a parallel situation to the duty of employees to obey their employer in secular situations.⁸⁸ However, a secular employer will pay the wages of employees yet, as Mummery LJ pointed out, Church of England clergy are paid by the Church Commissioners.⁸⁹

2.3.3. The problem that authority in the church may be fragmented

The fact that authority was fragmented did not trouble the House of Lords in *Percy Church of Scotland Board of National Mission*⁹⁰. Lord Nicholls of Birkenhead noted:

But the "Church" may not be an entity capable of making a contract or of suing or being sued. This is so with the Church of England. It is equally so with a diocese of the Anglican Church, for the reason given in *Diocese of Southwark v Coker* [1998] ICR 140 , 148. This is also true of the Church of Scotland.

However, he then went on to observe that:

⁸⁷ See 4.5

⁸⁸ See 4.5.1.

⁸⁹ The position will of course be different where the clergy are paid as chaplains to hospitals, prisons etc. where they will have a contract with the body employing them who will also pay them.

⁹⁰ [2005] UKHL 73

Then the fragmentation of functions within such an “umbrella” organisation may make it difficult to pin the role of employer on any particular board or committee. But this internal fragmentation ought not to stand in the way of otherwise well-founded claims.

So, if the courts have decided that the relationship of employer-employee or, as in this case, employer-worker should exist, then the fact that authority is fragmented will not, on this view, stand in the way of such a finding.

However, this by itself is not enough as there must be a legal principle that at least indicates who can sue and be sued. Moreover by S. 230 (4) of the ERA 1996 that person or body must be ‘the employer’. In *Percy Lord Hope* held that it is ‘the bodies in whose name the matter at issue has been conducted that determines the body that is to sue or be sued in respect of it’ although he avoided calling that person ‘the employer’.⁹¹ However, it is not clear quite what is meant by Lord Hope’s words ‘the matter at issue has been conducted’. Does he mean the body in whose name a defence to the claim was entered or the person who was responsible for the initial decision which led to the action? What we can say is that in each case where there is no person or body with whom one can definitely say that the contract was made, then the matter becomes fact sensitive.

Despite Lord Hope’s words the attempt to find an employer defeated the employment judge in *Sharpe v Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester*⁹² who said that ‘I do not see that within the complex statutory structure of the Church it is possible to imply ... any relationship between a freehold rector in the Church such as [Reverend

⁹¹ [2005] UKHL 73 at para. 251

⁹² [2013] UKEAT 0243_12_2811

Sharpe] and any identifiable person or body which could be said to be consensual and contractual'.⁹³ Arden LJ in the Court of Appeal essentially agreed. Whilst she did not doubt that 'the courts must not allow fragmentation to prevent a person from exercising his rights as an employee' she then observed that that 'can only be so where the employee can show that he would have had a remedy arising out of an employment contract if there had been no fragmentation.'⁹⁴ This does not take us any further as the issue is, once again, who is the employer against whom that remedy would be sought? In this case Arden LJ could find 'no one legal person with whom there was an exchange of promises to do work in exchange for a wage.' In this way the problem of identification of an employer becomes one aspect of the wider issue, which we shall come to later, of whether there is a contractual relationship at all. It is not possible to offer any general definition of an employer in the same way that we did for an employee. This is because, at a high level of generality, all ministers of religion perform the same functions but not all churches are organised in the same way.⁹⁵

There are two different approaches here. If the claim is well-founded in principle, the issue of who the employer is will be determined by examining who, within the diffused structures of the church, should be identified, in the words of Lord Hope in *Percy* as the 'bodies in whose name the matter at issue has been conducted'. The other, as put forward by Mummery LJ in *Coker* and by Arden LJ in *Sharpe*, treats the issue of who is the employer as part of the

⁹³ Ibid. para. 181

⁹⁴ (2015) EWCA Civ. 399 at para. 105

⁹⁵ We ought to note, before leaving this topic, that so far as the Church of England is concerned Diocesan Boards of Finance are bodies corporate; Hill, *Ecclesiastical Law* (3rd. edn) 2.29

factual matrix which determines whether a contractual relationship exists at all. We shall turn to look at this ‘factual matrix’ in detail in Chapters Two and Three. ⁹⁶

2.4. Conclusion on the question of identifying who the employer of the minister is

One of the bookends to the relationship proved easier to identify than the other as in arriving at a possible definition of a minister we were able to start from an identifiable person and then develop certain ‘ministerial’ characteristics from that person. We do not have such a person to start from when trying to identify the employer and the difficulty in identifying the employer remains a potential obstacle to employment status for the clergy. However, the courts have not always been deterred from investigating claims by problems in identifying

the employer and so the obstacle may not be fatal to these claims but it remains a significant issue. ⁹⁷

Having now considered the possible obstacles to employment status for the clergy in identifying the parties we now turn to looking at the actual relationship between them and consider in the next two chapters whether this can be analysed in terms of a contract or any other relationship.

⁹⁶ The identification of the ‘employer’ has caused problems in other jurisdictions. See N. Foster ‘The Bathurst Diocese Decision in Australia and Its Implications for the Civil Liability of Churches’ (2017) 19(I) Ecc LJ 14. Although the main case considered in this article does not concern the employment status of the clergy it does raise important issues on the identification of an employer. Note also the tangential issue of who is a qualifications body for the purpose of unlawful discrimination claims. See *Ganga v Chelmsford Diocesan Board of Finance and the Bishop of Chelmsford* (2015) ET 3200933/2013. and *Pemberton v. Inwood* (2017) ICR 929, [2018] EWCA Civ. 564

⁹⁷ It is worth noting that problems identifying the employer exist in other areas too: see for instance the recent decision in *Dynasystems for Trade and General Consulting Ltd. v Moseley* (2018) UKEAT/0091/17/BA

Chapter Two: Obstacles to Employment Status for Ministers in the general law on employment.

1. Introduction

Chapter One looked at the actual parties to a contract but now we turn to the relationship between ministers and their church or other religious body and in the first part of this chapter ask it can be analysed in terms of a contract of employment. The conclusion is that in most cases this is not possible. This then brings us to the present position and so the second part of the chapter looks at the various categories into which the relationship between them has been analysed up to now. We shall see that the alternative to employment status has generally been office holding but an examination of this shows that this is an unsatisfactory category because, as we shall argue, it has been used by the courts as a convenient way to solve the question of clergy employment status without any real analysis of what office holding means. This will then lead to the next chapter which looks at actual cases involving clergy claims to employment status.

This and the next chapter are to some extent two parts of a whole: This chapter aims at a positivist/theoretical assessment of the issue whilst Chapter Three is the realist/practical assessment.

One particular point must be stressed as failure to pay heed to it has caused a good deal of trouble: we are not looking for a contract *per se* but a contract of employment.

Part One

2. Can the relationship between a minister and their church or other religious body be analysed in terms of a contract of employment?

2.1 Introduction: The debate on employment status for ministers in the context of the wider debate on employment status for other groups

Any debate on employment status for ministers has to some degree become entangled with a wider debate on the extent to which employment status can and should be conferred on groups, of which ministers of religion is one, which do not conform to the traditional pattern of the employer- employee relationship such as casual workers, agency workers and agency workers⁹⁸. English law of employment is predicated on what Freedland has called 'the binary divide of modern employment law'.⁹⁹ Thus, the great mass of statutory rights now available to both employees and workers are available to those who lie on one side of this divide and have a contract whether this is of employment or not.¹⁰⁰ Those on the other side of this divide are labelled as independent contractors or office holders¹⁰¹ and, in general, do not have access to employment protection rights.

All other workers who are on the boundary between the supposed binary divide have a contract even if not of employment otherwise they would have no right to any payment for their work. Ministers of religion, as we shall see in the next chapter, may not have a contract at all. Nevertheless, we need to recall that ministers are in a situation of 'dependent labour'. For instance, the '*The Twelve Rules of a Helper*', 1753, that set out the rules governing

⁹⁸ Often called 'atypical workers.

⁹⁹ In 'The Role of the Contract of Employment in Modern Labour Law' in L. Betten (ed.) *The Employment Contract in Transforming Labour Relations* (Kluwer Law International 1995). This is not to say that he agrees that there actually is a clear divide: see his *The Personal Employment Contract* 60-86.

¹⁰⁰ For the rest of this chapter we will refer to contracts of employment as including those who are classified as workers or those with a contract personally to do work unless the context requires otherwise.

¹⁰¹ We shall see later that the term office holder can include a person in an employment relationship.

itinerant preachers in what became the Methodist Church, and which still form part of The Constitutional Practice and Discipline of the Methodist Church, state that:

It is your part to employ your time as our Rules direct: partly in preaching, and visiting from house to house; partly in reading, meditation and prayer. Above all, if you labour with us in our Lord's vineyard, it is needful that you should do that part of the work which the Conference shall advise, at those times and places which they shall judge most for His glory.¹⁰²

Here are clear instructions, and it is important to emphasise that they are *instructions*, as to how to carry the work out and the body responsible (Conference) is identified. Indeed, the section commencing 'Above all.' could be thought analogous to that in a modern employment contract where there is a clause that the employer can require the employee to do anything else incidental to the specified duties.¹⁰³

So it is worth making the effort to see if a formula for identifying dependent labour can include the clergy on the assumption that not only a contract can be found, which is dealt with in the next chapter, but also that an actual employer can be identified.¹⁰⁴

2.2. Clergy employment status in the context of attempts to broaden the coverage of employment rights generally

2.2.2. Davidov's ideas and rights theories.

¹⁰² See *The Constitutional Practice and Discipline of the Methodist Church* available at <https://www.methodistpublishing.org.uk/> (accessed 25th January 2017).

¹⁰³ The practice and doctrine of the Methodist Church is considered more fully in Chapter Five.

¹⁰⁴ See Chapter 2

Thus, instead of looking for detailed characteristics shared by a group of workers with the result that we can label them all 'employees', Davidov argues that we should look for a relationship 'which can be likened, following Wittgenstein, to family resemblance'. If this seems somewhat nebulous, and I think it is, a more helpful tool may be provided by his suggestion that 'it would be appropriate to define the group of employees somewhat over inclusively regarding aspects that are difficult to apply, in order to make sure that uncertainty does not mean exclusion of workers in need of protection. We are, in fact, getting close here to a presumption in favour of employment status for all workers.'¹⁰⁵

This may seem to be getting somewhere but any presumption of an intention that there should be an employment relationship would immediately flounder on the clear view of all religious bodies that the relationship between a minister and his/her religious body is not intended to be contractual.¹⁰⁶ Thus, any attempt to link a possible solution to the question of ministerial employment status to a more all-encompassing notion of who is an employee seems bound to failure.

Another way forward is to grant rights, including employment rights, to all citizens, of whom ministers would be one category. Collins, Ewing and McColgan¹⁰⁷ point out how the

¹⁰⁵ As indeed suggested by Freedland in the *Personal Employment Contract* at 111. There have been other attempts to establish workable formulae, see, for instance for instance Hepple 'Restructuring Employment Rights' (1986) 15 ILJ 69 and the Supiot Report Meeting of Experts on Workers in Situations needing Protection (The Employment relationship: scope (Geneva. International Labour Office 2000 available at: <http://www.ilo.org/public/english/dialogue/ifpdial/publ/mewnp/> and see also Supiot, Alain, (ed) *Beyond Employment. Changes in Work and the Future of Labour Law in Europe*. (OUP 2001). However, one senses that we are just restating the nature of the problem rather than working to resolve it.

¹⁰⁶ See Chapter Five for evidence of this

¹⁰⁷ In *Labour Law, Text and Materials*, (2nd ed. Hart Publishing 2005). This has some echoes of the famous contract v. status debate with the idea that workers might here have a status not dependent on contract. See O. Kahn-Freund 'A Note on Status and Contract in Modern Labour Law' (1967) 30 MLR 635. A useful and provocative article is R. Carlson R. 'Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying' (2001) 22 Berkeley J. Emp. & Lab. L. 295

European Union Charter of Fundamental Freedoms (the Nice Treaty) grants social and economic rights and in some cases, these are expressly granted to citizens ¹⁰⁸ such as Article 30 which provides that 'Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.'

Wedderburn¹⁰⁹ examines the Italian Workers Statute which guarantees rights to, for example, organise trade unions and to strike. One possibility is that the proposals in '*Working Life*'¹¹⁰ could be adopted. This suggests that what it calls the 'core of rights' in the employment relationship should apply to all who work under a contract to personally execute any work or labour and who are economically dependent on the business of the other. One obvious example is the right to protection from unfair dismissal but in fact employment law has moved so far since then in areas such as protection from bullying that this 'core of rights' would now be just a starting point, albeit a useful one at that. The common feature of all these proposals is that they show a concern for the rights of all at work, which could include the clergy.

However, this is to apply a civil law solution to what I consider is an issue where very special considerations apply. Nevertheless, what is valuable here is the recognition that all those who work in whatever capacity should have certain basic rights and we shall take this forward and in particular return to it in the conclusion in Chapter Six.

¹⁰⁸ This refers to citizens of the EU which is a very wide definition and even includes third country nationals who have a right to reside in the EU.

¹⁰⁹ In *Employment Rights in Britain and Europe Selected Papers in Labour Law* (Lawrence and Wishart 1991) see chapter 9.

¹¹⁰ Institute of Employment Rights, 1996.

2.2.3 The DTI Discussion Document and s.23 of the Employment Rights Act 1999

A practical result of the linkage of ministerial employment rights with rights for other atypical workers was the White Paper 'Fairness at Work' (1998) ¹¹¹ which signalled the beginning of an attempt to extend a wider definition of who is entitled to employment protection rights, ¹¹² whether the term 'worker' or 'employee' is used. One result was the inclusion in the Employment Relations Act 1999 of s.23 which allows the Secretary of State to extend the scope of employment legislation to groups not already covered by it which was the basis of the DTI Discussion Document ¹¹³ which not only asked for views on extending employment status in general to workers not covered at that time but in particular asked for views on whether employment status should be extended to homeworkers, agency workers, casual workers, labour only subcontractors, office holders and the clergy.¹¹⁴ As regards the clergy it pointed out that ¹¹⁵

Generally, the courts have established that the relationship between the church authorities and the minister is not a contractual one at all. This means in effect that ministers of religion are unable to seek redress through the legal system in the event of any dispute over their treatment by the church authorities

Beyond this the document did not consider the clergy in detail and gave very little rationale for why they were considered at all.

¹¹¹ (1998) Cm 3968

¹¹² Much of this was due to a move from changing patterns of employment with the shift away from traditional patterns of work in manufacturing industries to a more service-based economy. See Fredman S. 'Labour Law in Flux – the Changing Composition of the Workforce' (1997) 26 ILJ 337

¹¹³ Discussion Document on Employment Status in Relation to Statutory Employment Rights (2002 DTI URN 02/1058)

¹¹⁴ The section on the clergy was only one brief paragraph (para.78) and looks like something of an afterthought.

¹¹⁵ Para. 78

The responses by some churches to the proposals is discussed in Chapter Five but we can note here that they were uniformly unfavourable to the idea that the clergy should have employee status. What did come of this were two lengthy reviews¹¹⁶ of the status of their clergy by the Church of England which led to the system of ‘common tenure’ to which we referred above and will consider in more detail in Chapter Six and which gave clergy holding on common tenure some rights akin to employee ones.

2.3. The instrumental and organic view of employment

Alvin Esau¹¹⁷ looks through the prism of a distinction between what he calls the *Instrumental*¹¹⁸ view of employment where ‘a person is given a defined task to do and the duty of the employee is to do that task and no more’, and the *organic* view of employment where ‘the employee is expected to participate in the mission of the organization as a whole, and is expected to join the whole community, the whole body, in a way that transcends any narrowly defined job description.’¹¹⁹ Applying the organic approach to religious organisations Esau argues that ‘the workplace itself constitutes a community of believers where relationships are as important, if not more so, than narrowly defined role tasks. To a degree, the religious workplace is a church where people worship together, not just *at work*, but

¹¹⁶ Published as: The General Synod Review of Employment Status and the Clergy Part One 2003, GS 1488, and Part Two, 2005, GS 1564.

¹¹⁷ ‘Islands of Exclusivity: Religious Organisations and Employment Discrimination’ (2000) 33 UBC L Rev. 719. In this section I have also drawn on the very helpful discussion of Esau’s views in Ahdar and Leigh ‘*Religious Freedom in the Liberal State*’ 2nd edn, (OUP 2013) 338-339.

¹¹⁸ Author’s italics throughout.

¹¹⁹ At. p. 734.

through work.'¹²⁰ So in principle the instrumental approach leads in the direction of employee status and the organic approach leads against it.

Esau argues that where there is an instrumental relationship an 'employee might be dedicated to the employer, interested in other employees, and feel that the workplace is the most important community in their life, but nevertheless the formal relationship is still narrowly instrumental for both the employer and the employee.' However, where there is an organic relationship, employees are as much members of a religious organisation as employees. We could go further and say that when things are going well the religious employee (not just the minister of religion but others) will be working under the organic approach but where the employee is either not performing the task assigned to him/ her or there is some other situation where the individual and that organisation are in a position of conflict then the organisation switches to an instrumental view of the relationship and focuses on what has gone wrong.

The organic approach has been used in case law, although without the label 'organic' as such. For instance, in *Davies v Presbyterian Church of Wales*¹²¹ Lord Templeman said¹²²

The duties owed by the pastor to the church are not contractual or enforceable. A pastor is called and accepts the call. He does not devote his working life but his whole life to the church and his religion. His duties are defined and his activities are dictated not by contract but by conscience. He is the servant of God

¹²⁰ P. 734

¹²¹ [1986] ICR 280. We shall discuss this case in more detail in Chapter Three.

¹²² At 279-80

Esau's distinction is intended to apply to others than ministers of religion who are working for religious bodies, some of whom may be employees, and it is clear that an argument that ministers of religion are not employees cannot be built on the instrumental/organic dichotomy alone. For example, the model contract for teachers in Catholic schools issued by the Catholic Education Service¹²³ refers (at 4.1) to the 'ministry of a teacher' and states (at 4.1 c) that this ministry must be exercised in accordance with *inter alia*, 'Canon Law in relation to the governance and nature of the school' and then states at 4.2, that a teacher 'must have regard to the Catholic character of the school and not to do anything in any way detrimental or prejudicial to the interest of the same'.

However, although it may not unlock the question of ministerial employment status. the organic approach has some merit as distinguishing the clergy from other workers where the view of employment is more instrumental, and so be evidence of an obstacle to ministerial employment status. We now turn to the common law tests for employee to see if they can take us further.

2.4. The common law tests for employee status – general issues

2.4.1. Terminology

Until at least the late 1960s it was common for lawyers to refer to 'master and servant' and not to 'employer and employee'.¹²⁴ Moreover, the use of the term 'servant' often led naturally to the term 'contract of service' to describe what we would now call 'contract of employment'

¹²³ This example is taken from the 'Model Contract Fast Track Teacher, Teacher and Newly Qualified Teacher see www.catholiceducation.org.uk/schools/application-forms accessed 10th September 2017

and indeed it is still used.¹²⁵ Throughout this discussion the terms ‘employer and employee’ and ‘contract of employment’ will be used but in quotations from judgements the older terms will appear.

2.4.2 Methodology

This section presents some challenges. This is because, although it is clearly important in principle to see if ministers of religion can be considered as employees on the basis of tests which apply to other employees, in some cases the courts have not used these tests to any great extent when considering employment cases involving the clergy. For example, in *The President of the Methodist Conference v Preston*¹²⁶ the leading judgement of Lord Sumption does not mention one of main tests, that of mutuality of obligations, at all and only the idea of control in passing. Instead, the focus has been on the exact nature of the relationship between the minister and the church. The methodology will be to set the tests out with some reference to their applicability to ministers of religion whilst looking at how they might apply in particular cases in more detail later. In addition, the tests will be applied in the context of particular aspects of the duties of ecclesiastical persons as set out in Canon Law without advertent to the spiritual nature of their duties at this stage. In this way a clearer picture may emerge.

It is also important to note that the extent to which a particular test is particularly significant has differed with the passage of time and the nature of the issues which faced the courts. The control test was especially useful when attempting to distinguish between manual and non-manual labour whereas in more recent times the courts have placed especial emphasis

¹²⁵ See Etherton MR in *Pimlico Plumbers Limited and anor. v. Smith* [2017] EWCA Civ 51 at para. 58: ‘persons employed under a contract of service’.

¹²⁶ (2013) UKSC 29. The actual decision and its implications will be considered later.

on the mutuality of obligation test when faced with the questions of whether casual workers, agency workers and freelance workers are employees or fall into the other categories. Thus, this test can be regarded as the one that deals with more contemporary issues and we shall place especial emphasis on it when looking at ministers of religion.

It is also vital to look at these tests in context. May LJ observed in *President of the Methodist Conference v Parfitt*¹²⁷ that 'the question in the instant case has to be considered in the context of a Christian church and one of its recognised ministers.' May LJ drew a contrast between the present case where the status of a minister of religion was in issue with that where the context was also not the normal industrial or commercial one but 'that of one of the world's finest orchestras composed of some of the world's finest musicians' as in *Winfield v. London Philharmonic Orchestra Ltd*¹²⁸. In other words, as he put it, 'in deciding whether or not you are in the presence of a contract of service you look to the whole of the picture.'

The leading case is *Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance*¹²⁹. The facts are not germane to the present discussion but in the course of his judgement MacKenna J. stated that a contract of service existed if

- (a) the employee agreed in consideration of a wage or other remuneration to provide his own work and skill in the performance of some service for his employer

¹²⁷ (1984) QB 368 at 375

¹²⁸ [1979] I.C.R. 726

¹²⁹ (1968) 2 QB 497

(b) the employee agreed that in the performance of the service he would be subject to the control of the other party sufficient to make him his master

(c) the other provisions of the contract were consistent with its being a contract of service.

This formulation is really an example, although the phrase is not used, of the 'mutuality of obligations' test, which is considered below.

The significant point is therefore that there is no one test of employment status. As Freedland puts it¹³⁰

The various tests which have been put forward turn on examination to identify factors which are rarely totally present or totally absent in employment situations. There is little agreement about how strongly a factor has to be present in order a work contract one way or the other

In the context of cases involving the clergy Arden LJ observed in *Sharpe v Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester*:¹³¹ that 'the employment judge reminded himself that it was an error to concentrate on the control "test" alone and as the authorities supplied by the parties made clear, he had to have regard to all the circumstances of a case'. It should also be noted that since the *Ready Mixed Concrete* case the matrix by which employment status is determined has developed and there is now an

¹³⁰ *In The Personal Employment Contract* 61

¹³¹ [2015] EWCA Civ. 399

emphasis on the extent to which the person renders personal service, although one could say that this is implicit in MacKenna J's words in that case.

With that caveat we shall now pass to examine the tests.

2.5. The tests themselves

2.5.1. Control Test

In *Walker v Crystal Palace Football Club Ltd.*¹³² the issue was whether a footballer was employed by the club so as to enable him to claim compensation under the Workmen's Compensation Act 1906 as a result of an accident whilst playing in a match. It was argued for the club that he was not covered by the Act and reliance was placed on the words of Bramwell L.J. in *Yewens v Noakes*¹³³ where he defined an employee as 'a person subject to the command of his master as to the manner in which he shall do his work'. The Court of Appeal in *Walker* nevertheless held that it was enough that he was obliged to obey the general directions of the club even though he clearly exercised his own judgement as to how to play. What is clear is that the notion of control has changed. In *White and anor. v Troutbeck SA*¹³⁴ Sir John Mummery referred to the legal error of the employment tribunal 'in treating the absence of day-to-day control as the determinative factor' and in *Sharpe v Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester* Arden LJ in the Court of Appeal argued that in *White v Troutbeck SA* 'the court confirmed that the

¹³² (1910) 1 KB 87

¹³³ (1881) 6 QBD 530

¹³⁴ [2013] EWCA Civ. 1171

employment relationship was all about residual control. The absence of day-to-day control is not determinative.’¹³⁵

In the context of ministers of religion, Ward LJ explained in *E v English Province of Our Lady of Charity and another*¹³⁶ that:

Today it is not realistic to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee. Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus the significance of control today is that the employer can direct what the employee does, not how he does it.

Ministers of religion are very unlikely to be subject to exact day to day control over how they do their work as in many cases their superiors will be some distance away. For instance, in the Roman Catholic Church, it is common for bishops to visit parishes only for confirmations and other special events. However, in other cases, where there is no ecclesiastical hierarchy and the church is run by, for example, a local committee of management, there may be scope for day to day control. In addition, it is worth noting the remarks of the Court of Appeal in *Walker v Crystal Palace Football Club Ltd* that it is sufficient if one is obliged to obey the general directions of, in this case, the club. This could be applied to churches, as we shall see when we discuss in Chapter Five the prevailing ecclesiology on the position of its ministers taken by different churches.

¹³⁵ At para. 86. In fact nowhere in the one short judgement in *White v Troutbeck* is the term ‘residual’ control used. It can, however, probably be implied from the judgement.

¹³⁶ [2012] EWCA Civ. 938

The most detailed consideration of the control test in the context of ministers of religion was in *Sharpe v Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester*.¹³⁷

2.5.2 The Organisation Test.

This is really more of a factor to be considered than a test in itself and, like the ‘business reality test, below, was developed as it was felt that the control test did not by itself always give a true picture. In *Stevenson Jordan and Harrison Ltd. v McDonald and Evans* ¹³⁸

Denning L.J. suggested that a person would be an employee if their work was integrated into the business rather than accessory to it. It was referred to more recently in *James v Redcats (Brands) Ltd.*¹³⁹ by Elias J who said that:

in a general sense the degree of dependence is in large part what one is seeking to identify-if employees are integrated into the business, workers may be described as semi-detached and those conducting a business undertaking as detached-but that must be assessed by a careful analysis of the contract itself.

This test has an attractive simplicity to it but it is fair to say that it is not generally used on its own. Thus, in *Hospital Medical Group Ltd v Westwood* ¹⁴⁰ Maurice Kay LJ emphasised that it was not one of general application.

In fact, in one way it could be argued that ministers are fully integrated into their organisation: the complex provisions found in the Roman Catholic, Anglican and Methodist

¹³⁷ We shall look at this in some detail in Chapter 5 when we analyse the powers of control given to a bishop by the Oath of Canonical Obedience taken by the clergy. See 4.5.2.

¹³⁸ (1952) 1 TLR 101

¹³⁹ [1997] ICR 1006

¹⁴⁰ [2012] EWCA Civ. 1005. See C. Pigott ‘In search of a common thread’ (2012) 162 NLJ 1241 on this line of cases.

Churches¹⁴¹ are clear evidence of that. However, when looked at in conjunction with other factors, this test may not be too significant.

We will return to this theme when we consider the integration' test below under worker status.

2.5.3 The Business Reality Test

This asks whether the worker is working for himself/herself or is working for another. If the worker takes the risk of making profits or losses then he/she is not likely to be held to be an employee. The test appears to originate from decisions in the U.S.A. and Canada. In *United States of America v Silk*¹⁴² the US Supreme Court said that it was whether workers 'were employees as a matter of economic reality'. The test was applied in *Market Investigations v Minister of Social Security*¹⁴³ where Cooke J. outlined a number of factors to assist in deciding whether a person was in business on his/ her own account or not:

whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task

¹⁴¹ See the references to the Roman Catholic Code of Canon Law, the Canons of the Anglican Church and the The Constitutional Practice and Discipline of the Methodist Church considered in more detail in Chapter 5.

¹⁴² (1946) 31 US 704

¹⁴³(1969) 2 QB 173

It is suggested that this is really more appropriate to that of a commercial entity rather than to any profession or vocation. Moreover, as Cabrelli points out,¹⁴⁴ it is not wholly clear if there is any difference between asking if a person is working on their own account and simply asking if they are an employee or self-employed. If we apply this to ministers of religion we could say that they generally have a good deal of autonomy in how they organise their work and in particular parishes the minister will often be responsible for upkeep of the church and, possibly hiring his/her own helpers such as an organist or parish secretary. However, this does not take us much further than the control test.

In terms of financial risk referred to by Cooke J. above a comparison cannot really be made with a minister of religion. One could argue that in the Anglican Church, for instance, there is a system of parish quotas but Hill argues that this 'is probably not a legally enforceable obligation, since it lacks the qualities of a binding contract.' Thus, there is no legal obligation to meet it and it is a voluntary contribution.¹⁴⁵ In the Roman Catholic Church funds are held by the Diocesan Trustees and not the parish and there really cannot be any argument based on a parish being a financial entity on its own in the same way as a business.

2.5.4. The Mutuality of Obligations Test

This test has gained currency in recent years in dealing with casual workers and other workers, such as home workers, who do not fit into the traditional pattern of employment. It focuses on the obligations which the parties owe each other to decide if there is an employment relationship and one would look at, for example, whether there was an

¹⁴⁴ *Employment Law, Text and Materials* (OUP 2014) at 80.

¹⁴⁵ Hill *Ecclesiastical Law* 3rd. edn, at 3.85.

obligation to provide work and whether there was an obligation to accept work if it was offered. In *Carmichael v National Power plc*¹⁴⁶ guides at power stations who worked on a 'casual as required' basis were held to be employees only when actually working.

Mutuality of obligations is a difficult concept to apply to ministers of religion in this context. It was not mentioned in *Sharpe v Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester* and in only one of the speeches in *Percy v Board of National Mission of the Church of Scotland*.¹⁴⁷ Here Lord Nicholls of Birkenhead, having referred to the rebuttable presumption against an intention to create legal relations, observed that: 'Without more, the nature of the mutual obligations, their breadth and looseness, and the circumstances in which they were undertaken, point away from a legally-binding relationship.' This language is not easy to follow: what Lord Nicholls seems to be saying is that where the facts do not point to such a presumption against intention and the court is left to find, or not find, an employment relationship on the facts, then the nature of the mutual obligations in this case pointed away from such a relationship.

This is important: there is no doubt that, where the relationship between a minister and the church is governed by a set of detailed rules, whether or not termed canon law, there are a host of obligations owed by both the minister to the church and vice versa. However, if these are set against the background of a spiritual relationship then, in Lord Nicholls phrase 'the circumstances in which they were undertaken' may well point away from an employment relationship.

¹⁴⁶(1999) 1 WLR 2042 See L. Clarke 'Mutuality of Obligations and the Contract of Employment' (2000) 63(5) MLR 757 who looks at both this case and also at *Clark v Oxfordshire HA* (1998) IRLR 125, another case on this point.

¹⁴⁷ (2005) UKHL 73, at para. 23

This could be taken as an example of the ‘construction of terms’ approach as distinct from a spiritual relationship one, a distinction which will be explored in Chapter Four. ¹⁴⁸

2.5.5 The extent to which a person is obliged to render personal service

Suppose that an employee, or other worker, is allowed by the contract to find another to perform the work as a substitute. Is this compatible or not with the existence of a contract of employment? One is immediately struck with the use of the term ‘vicar’ in the ecclesiastical context, as this word comes from the Latin ‘*vicarius*’ and so the term ‘vicar’ originally meant a member of the clergy who acted as priest of a parish where the position of rector had been appropriated by a monastic house.¹⁴⁹ Accordingly, they acted as a ‘substitute’ for the rector and although this use has gone the term ‘vicar’ persists in common usage today.

The term ‘vicar’ is used in other contexts, such as a vicar general in the Roman Catholic Church whose powers are set out in canon law ¹⁵⁰ and, as the New Commentary on the Code of Canon Law ¹⁵¹ points out, the power of the vicar general ‘is vicarious, not proper, because he exercises it not in his own name but in the name of the diocesan bishop’.¹⁵²

¹⁴⁸ A useful exercise is to contrast the position of ministers with agency workers and look in particular at the extent of control and mutual obligations in both situations. See *Montgomery v Johnson Underwood Ltd.* [2001] EWCA Civ. 318. See hereon P. McTigue ‘Beyond the Contractual Veil: agency workers, employee status and commercial reality’ (2007) 16(1) Nott. L.J. 2007 54 who also looks at other cases

¹⁴⁹ Issues such as the division of tithes and other matters between vicars and rectors were a fruitful source of litigation. See R. Helmholz *Oxford History of the Laws of England* Vol. One, The Canon Law and Ecclesiastical Jurisdiction from 1597 to the 1640s. (OUP 2004) 458-460.

¹⁵⁰ CIC 475-481

¹⁵¹ CIC 884

¹⁵² One could also point out, of course, that the Pope is himself the Vicar of Christ, but the employment implications of this lie beyond this thesis!

The notion of a vicar is also used by the Anglican Church in the Mission and Pastoral Measure 2011 which provides for how team ministries are to function. By s. 6 (2) the team members are divided into three categories: the team rector; one or more team vicars; and other members of the team, clerical or lay; by s.6 (5) the team rector has ultimate legal responsibility, with and under the diocesan bishop, for the Church's pastoral care of those whom the team ministry serves and by s.6 (6) team vicars share the 'cure of souls' with the team rector; and, subject to the terms of the bishop's licence, have authority to perform the same offices or services in the area of the benefice as an incumbent.

What all of the above shows is that within ecclesiastical structures there is frequently provision for the holder of one office, such as diocesan bishop or team rector, to allow another, whether it is a vicar general or a team vicar, to act to some degree as a substitute in exercising the functions of his or her office. Moreover, in both cases there seems no barrier to all the functions of the office being exercised. In addition, the power here is not merely to delegate particular functions of an office, which will often be routine, as where a Roman Catholic Bishop delegates his power to confirm.¹⁵³ Instead these provisions allow someone to act in place of the appointed person for, if necessary, all functions and so be a substitute.

Suppose that a bishop or team rector claimed employment status, would this right to engage a substitute act as a barrier to such a status?

¹⁵³ CIC 882

There has been a good deal of litigation on this area in recent years. In *Express and Echo Publications Ltd. v Tanton* ¹⁵⁴ a clause in Tanton's contract stated that 'In the event that the contractor is unable or unwilling to perform the services personally he shall arrange at his own expense entirely for another suitable person to perform the services'. Peter Gibson L.J. in the Court of Appeal held that 'where, as here, a person who works for another is not required to perform his services personally, then as a matter of law the relationship between that person and the person for whom he works is not that of employer and employee'. Lindsay J. in the EAT in *McFarlane v Glasgow City Council* ¹⁵⁵ categorised the clause in *Tanton* as 'extreme. The individual there, at his own choice, need never turn up for work. He could, moreover, profit from his absence if he could find a cheaper substitute. He could choose the substitute and then, in effect, he would be the master'.

The latest statement of the law is in *Pimlico Plumbers Ltd. and anor. v. Smith*. ¹⁵⁶ This involved a claim to the status of a 'worker' under s.230 (3) of the ERA 1996¹⁵⁷ in order that a claim might be made for, *inter alia*, disability discrimination. It was held that to be a self-employed contractor there would need to be an unfettered right of substitution and on the facts there was not. Etherton MR helpfully set out five principles,¹⁵⁸ the first two of which are especially relevant here:

¹⁵⁴ (1999) ICR 693

¹⁵⁵ (2001) IRLR 7

¹⁵⁶ [2017] EWCA Civ. 51. See J. Prassi 'Who is a Worker?' (2017) 133 LQR 366 which examines this case alongside other recent cases on 'worker status'. In the appeal to the Supreme Court in the *Pimlico* case ([2018] UKSC 2) Lord Wilson, with whom the other Supreme Court justices agreed, did not refer to Etherton MR's principles and so, in the absence of any overruling, it is submitted that they represent the law.

¹⁵⁷ Discussed below at 7.

¹⁵⁸ At Para. 84

Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional...

If we apply this to the situations outlined above, we will see that there is apparently an 'unfettered right' on the part of the bishop to substitute another, the vicar-general, to do the work and that the right is not conditional under Etherton MR's second point. The same could be said of the position of a team rector in Anglican Canon Law. However, one must then say that to view these situations in isolation makes no sense at all and instead they have to be viewed in their context which in both cases is that of a complex scheme involving the interworking of various offices to enable the work of the church to be carried out. Whether that is also an argument against employment status at all is another matter.

2.6 Worker Status

2.6.1. *The Nature of Worker Status*

S. 230(3) of the Employment Rights Act (ERA) 1996 provides that a worker is either a person who has entered into a contract of employment or who has entered into any other contract 'whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual'. This last proviso is termed by Freedland the 'profession or business to client or customer

exception,'¹⁵⁹ a term that we shall use as convenient shorthand. What is vital for our purposes is that a contract *per se* is still required for this although not a contract of employment. The consequence is that much of the discussion in 6. above on the problems with the clergy not having a contract apply here. As Davies points out¹⁶⁰: '(despite efforts by Parliament to broaden the scope of protection) the courts are unshakeable in their view that contract marks the outer boundary of permissible employment claims'.

In *Pimlico Plumbers Limited and anor. v. Smith*¹⁶¹ Etherton MR categorised those in the category of workers as: 'persons who are self-employed and provide their services as part of a profession or business undertaking carried on by someone else' as distinct from those 'persons who are self-employed, carrying on a profession or a business undertaking on their own account, and who enter into contracts with clients or customers to provide work or services for them'.

Moreover, the term 'worker' is used in EC law in connection with various rights amongst them the right of free movement provided for by Art. 45 of the Treaty on the Functioning of the European Union (2007). Although the Treaty does not define the term 'worker', case law has established the 'Tripartite Definition of Economic Activity' where the essential feature of an employment relationship is that it is for a certain period of time, a person performs services for and under the direction of another person, in return for which he receives

¹⁵⁹ In *The Personal Employment Contract* at 25.

¹⁶⁰ 'The employment status of clergy revisited: *Sharpe v Bishop of Worcester*' (2015) ILJ 551 at 562

¹⁶¹ [2017] EWCA Civ 51

remuneration.¹⁶² The issue of control will be discussed later in this chapter but, as ever, the question of this status for a minister may well flounder on the lack of remuneration.

The vital point for our purposes is that a worker can claim under anti-discrimination law, now contained in the Equality Act 2010,¹⁶³ but the status of a worker does not enable a person to claim for unfair dismissal, as shown in *Percy v Board of National Mission of the Church of Scotland*¹⁶⁴ where worker status was successfully claimed.¹⁶⁵ In addition, 'worker' status enables a person to claim various other statutory rights such as statutory 'whistleblowing' rights under Part IVA of the ERA 1996, a point which arose in *Sharpe v Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester*¹⁶⁶ together with, *inter alia*, statutory rights under the Minimum Wage Act 1998 and the Working Time Regulations 1998.

2.6.2. Tests to establish if a person is a worker as distinct from an employee

Some difficulty has been found in differentiating an 'employee' from a 'worker'.¹⁶⁷ In *Clyde & Co LLP and another v Bates van Winkelhof*¹⁶⁸ Lady Hale held that: 'There can be no

¹⁶² *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)* (2000) Case C176-96

¹⁶³ s.83(2) of the Equality Act provides that employment for the purposes of this Act means employment under a contract of employment, a contract of apprenticeship or a contract personally to do work; and by s.230(3) of the ERA 1996 a worker is a person who has agreed to work under a contract of employment or a contract personally to do work.

¹⁶⁴ [2005] UKHL 73. The relevant legislation is s.94(1) of the ERA 1996 which provides that an employee has the right not to be unfairly dismissed by his employer. An employee is defined by s.230(1) of the ERA 1996 in narrower terms to that of a worker in s.230(3). In particular it excludes persons who, whilst not employees, have a contract personally to do work.

¹⁶⁵ This point is discussed in the next chapter.

¹⁶⁶ [2015] EWCA Civ. 399 In fact, the term 'worker' can also have an extended meaning in these cases: see s.43K of the ERA1996.

¹⁶⁷ See e.g. G. Davidov 'Who is a Worker?' (2005) 34 ILJ 57.

substitute for applying the words of the statute to the facts of the individual case' but then added: 'There will be cases where that is not easy to do'. As Berry points out, the court held in this case that 'it was more important to focus on applying the words of the statute in question to the facts of the case at issue, and no single test of worker status was determinative'.¹⁶⁹

One question has been whether some element of subordination¹⁷⁰ is an essential element in the definition of a worker so as to distinguish them from persons really working on their own but Lady Hale in the above case was unwilling to make this a requirement: 'While subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal characteristic of being a worker'.¹⁷¹ In fact there is generally an element of subordination of some kind in the relationship of the minister to his/her church.

With regard to mutuality of obligation, Elias P. pointed out in *James v Redcats (Brands) Ltd*¹⁷² that some element of mutuality is essential as 'If there are no mutual obligations of any kind, there can be no contract. That is a simple principle of contract law, not unique to contracts of employment.' However, where the status of a worker is claimed rather than an employee then he observed that: 'The only obligations which in practice are likely to arise

¹⁶⁸ (2014) UKSC 32

¹⁶⁹ E. Berry 'When is a partner/LLP member not a partner/LLP member? The interface with worker/employee status'. (2017) 46(3) ILJ 309,329

¹⁷⁰ A test which clergy would of course be likely to meet: see the discussion on the 'canonical duty of, obedience' in Chapter Five

¹⁷¹At 39

¹⁷² (2007) ICR 1006

are some duty on the employer to offer work and some duty on the worker to accept work if offered. ‘

The obligation for personal service as the dominant feature of the contractual arrangement could be said to be satisfied as there is no doubt that the essence of ministry is actual service. Mutual obligations are less of a problem as we noted¹⁷³ that they seem to be reduced to some duty on the employer to offer work and some duty on the worker to accept work if offered. On this basis the ministers and their religious organisation would seem to satisfy this: there is no doubt that when a person is ordained or in some other way called to ministry there is an obligation to offer them work and they would be under a duty to accept this. The proviso as ever is that there must actually be a contract.

2.7. Implied Duties owed by the Employer to the Employee and by the Employee to the Employer

The question of employment status for ministers of religion also needs to be considered from another angle: if they were held to be employees, to what extent would the traditional duties owed by employers to employees and vice versa sit with this status? This question is rarely if ever examined and I suggest that it is just as significant as the tests for employment status. The methodology will be to select, in Chapter Five, one of these duties, that of obedience in the Canon Law of the Anglican Church, and to test this against the notion of obedience in employment law. The rationale for this is that here we have a clear parallel between church and civil law and as we are dealing in Chapter 5 with particular aspects of the ecclesiology of individual churches it is logical to select this one from the Anglican Church as it received

¹⁷³ At 6.6.4. above

detailed consideration in one of the major cases on clergy employment law, *Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester Sharpe* ¹⁷⁴

2.8. Conclusion to Part A

On the question of employment status, we considered the approach of Davidov who advocated a wider approach to employee status. We also noted the idea of basing the relationship between a minister and their church on a 'rights' approach. However, these did not provide a way forward in itself as we argued that both approaches were applying a civil law solution to what we consider is an issue where very special considerations apply, a point which will be developed further in subsequent chapters, notably when we examine the case law in the next chapter and in Chapter Five on the ecclesiology of churches.

On the tests for employment status we looked at on a day to day basis and without regard to the spiritual nature of the ministry nor paying undue regard to the ecclesiology of churches, there is certainly an arguable case that there is sufficient control of the minister, he/she is integrated into the organisation and that he/she is obliged to render personal service.

Although there are exceptions in the case of the latter, we can conclude that they are not significant enough to change this conclusion. The 'business reality' test is not felt to be applicable, but then it is not used so often by the courts today. The mutual obligations test is really impossible to consider in isolation from ecclesiology and Canon Law. So mathematically 60% of the tests were satisfied and so, looked at from an employment law perspective, there is no absolute all-embracing obstacle to ministers having employment status subject to there being a contract. We reached a similar conclusion on worker status.

¹⁷⁴ (2015) EWCA Civ. 399. The same might have also applied in *President of the Methodist Conference v Preston*.

The problem of course is that all of the above presupposes the existence of a contract, which, as we shall see in Chapter Three, has proved an insuperable obstacle to employment status in the great majority of cases. In addition, the above discussion isolated all other considerations than employment law ones in order to sharpen our analysis. Although this was valuable it does mean that we have not looked at any of the wider considerations which have proved decisive in deciding employee status, principally what the courts have labelled the spiritual relationship between ministers and their church. It is for these reasons that the courts have placed the relationship between clergy and their churches in other categories. We shall, in the rest of this chapter, examine these categories in themselves before turning in Chapter Three to the case law on this area.

Part Two

Can the relationship between a minister and their church or other religious body be analysed in ways other than a contract of employment?

This assists in answering the research question because, if these other bases are satisfactory then, although the obstacles to employment status remain their resolution will be less important. We shall now look in detail at these categories.

3 That the minister has no right to remuneration of any kind and so does not have a contract. Instead he/she acts in a voluntary capacity.

3.1. Where the minister is a member of a monastic or other community, generally known as ‘religious’ where vows or other promises of poverty and also obedience are taken.

An obvious example would be a Benedictine monk. Thus chapter 33 of the Rule of St. Benedict entitled ‘Whether monks should have anything of their own’ begins with this stern injunction: ‘It is of prime importance that this vice should be completely rooted out of the monastery. No one should presume to give or receive anything without the abbot’s permission.’¹⁷⁵

The idea that a person in a monastic order might claim employment status is not quite as far-fetched as it sounds: suppose that a Benedictine monk, who has been ordained as a priest serves in a parish, as often occurs. Employment status has been conferred on ministers of religion. A priest in a neighbouring parish, who is secular,¹⁷⁶ has successfully brought a claim under employment law. The Benedictine naturally wonders if he can do so too. The answer in his case will be no, but the effect will be that we have created two classes of Roman Catholic parochial clergy; those who have employment status and those who have not. The same could apply in the Anglican and Orthodox churches although, as there are fewer priests in vows who are parochial clergy, the effect will be less.

3.2. Where the minister acts in a voluntary capacity but has not taken vows of poverty.

¹⁷⁵ This is taken from C. Wybourne ‘*Work and Prayer, the rule of St. Benedict for lay people*’ (Burns and Oates 1992) 93.

¹⁷⁶ That is, a diocesan priest, not subject to vows as in the case of religious. but under the jurisdiction of the bishop rather than the abbot of a monastery. The RC Code of Canon Law does not distinguish between the secular and religious as they are both priests the difference being that religious are also subject to the rules of their particular religious order.

This seems to be the explanation of some early cases in this area, many of which involve what were then termed 'dissenting congregations' where there was a dispute as to who would be the minister. This was the case in *Porter v Clarke*¹⁷⁷ where problems were caused by disputes between ministers and other members of the church. In this case some members wished to appoint another minister to act as co-pastor with the existing incumbent, who was the claimant here, but he contended that his consent was needed and he would not give it. The result was that the claimant was dismissed and the other minister took his place. The court held that the minister was 'dependent, entirely, on the voluntary contributions of the members of the congregation' and so it followed that it could not interfere. It was also held that 'it was very reasonable that a minister who depended entirely upon voluntary contributions should be dismissible'.¹⁷⁸

The effect is that ministers in this category are in the general category of volunteers and although in number they may be relatively small and beyond the scope of employment protection they do have rights under, for example, the Health and Safety at Work Act 1974 and other safety laws and may be covered under the insurance policy of the church.¹⁷⁹ Any extension of employment rights to them would require a fundamental shift in employment law and would almost certainly not be welcomed by many, especially those in 3.1. above, as

¹⁷⁷ [1829] 2 Simons 520. Rivers *The Law of Organised Religions* 79 views this as a possible missed opportunity to utilise a trust, a matter which we shall examine below at 4.

¹⁷⁸ At p. 523

¹⁷⁹ The National Council for Voluntary Organisations has further details: see <https://knowhownonprofit.org/people/volunteers/keeping/treating> (accessed 13th March 2018). See also D. Morris 'Volunteering and Employment Status' (1999) 28(3) I.L.J. 249. P. Morgan 'Recasting Vicarious Liability' (2012) 71(3) C.L.J. 615 argues for what he calls 'an account of vicarious liability' which will encompass liability in tort for the actions of volunteers. See also M. Freedland *The Personal Employment Contract* (OUP 2003) for a useful analysis of volunteer status at 62-64.

the notion of members of a religious community suing one another would surely be destructive of that community.

4. Where the minister, whether employed under a contract or not, is in the position of a beneficiary under a trust and so is entitled to equitable remedies

This will apply of necessity only in cases where there is a trust deed that governs the matter and this will be, in practice, in what are now termed the 'Free Churches', but which were known as 'Dissenters'.¹⁸⁰ In *Porter v Clarke*,¹⁸¹ the court found that the trust deed was silent on both the method of electing the minister and his continuance in office and the clearest instance of trust law applying is *Daugars v Rivaz*.¹⁸² Once again, the problem was caused by disputes in a Dissenting Church involving co-pastors, here the French Protestant Church in London and the governing body dismissed one of them. There was evidence of a contract between the churches as the emoluments of the pastors were fixed 'according to the funds of the church' but the contract point was not pursued.¹⁸³ This seems a pity as, for one thing, such a finding would have been an exemplar of Davidov's argument that we should look for a relationship 'which can be likened, following Wittgenstein, to family resemblance'.¹⁸⁴ Could this, with some adventurous judicial reasoning, have been an example of a wider notion of a

¹⁸⁰ That is, Dissenters from the Established Church. The idea of a Free Church is that it is free from hierarchical control.

¹⁸¹ [1829] 2 Simons 520

¹⁸² [1860] 23 Beav. 233

¹⁸³ Rivers in *The Law of Organised Religions* says (at 79) mentions that the relationship between the minister and the church might constitute a 'special contract' but on the facts the church drew up such a contract to govern *future* disputes.

¹⁸⁴ In 'The Reports of My Death are Greatly Exaggerated: 'Employee' as a Viable (Though Over-Used) Legal Concept' in G. Davidov and B. Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing 2006) at 144.

contract bearing a 'family resemblance' to more orthodox types and so paved the way for a recognition of a type of contract linked to a private trust in clergy cases? Instead It was found that there were two trusts, one for the support of the poor, and the other for the maintenance of the ministry and the other church matters and it was on the basis of the second trust that the court asserted jurisdiction holding that as the governing body could withhold the emoluments due to the pastor this constituted a trust in his favour. On the facts, the conduct of X did not constitute a ground for his removal and so an injunction to restrain it was ordered. This is, with respect, a strange decision: it is difficult to see how, on the facts it was justified as a matter of law. Although the relationship of contract does not preclude one of trust,¹⁸⁵ the trust here was contained in a 16th century French document which did not receive much detailed analysis from the court.¹⁸⁶

The trust point resurfaced recently, and rather surprisingly, in the final passage of Lord Sumption's judgement in *The President of the Methodist Conference v Preston*¹⁸⁷ where he said that:

Careful written arguments were presented to us on the question whether, and if so on what basis, a minister could enforce a claim to a stipend and to the occupation of a manse in the absence of a contract. I am inclined to think, with Lord Templeman in *Davies v Presbyterian Church of Wales [1986] ICR 280* , that the answer to that question is that these benefits are enforceable as part of the trusts of the Church's property, but I should prefer to leave that question to a case in which it arises and in which fuller material is available

¹⁸⁵ See, for instance, *Barclays Bank v Quistclose Investments* [1970] AC 567

¹⁸⁶ Nor did the Law Report translate it!

¹⁸⁷ (2013) UKSC 29 at para. 28

What seems to be in the background is an idea that ministers may be given protection under trust law either in addition to, or instead of, protection under employment law. We need to return to first principles of trust law.

The essence of a trust is that the beneficiary acquires an equitable proprietary interest in the property which is the subject matter of the trust.¹⁸⁸ At once we see the problem: a relationship between two people is not property. There is no subject matter of the trust.

The only way in which the trust concept might be utilised is if specific property were held for the benefit of the minister but here we find another difficulty: a holding today that a trust of church property also included a private trust in favour of the minister could affect the charitable status of the church as it would be alleged that there was a lack of public benefit.¹⁸⁹ The point in *Daugars v Rivaz* that there were two trusts, one for the poor, and the other for the maintenance of the ministry and other church matters, does not help as presumably the minister would benefit under the second and this would have charitable status. The type of trust referred to by Lord Sumption in *Preston* looks like a private trust as he refers to the minister's stipend being held on trust for him/her. Presumably this trust would be an implied

¹⁸⁸ See Hanbury and Martin *Modern Equity* (J. Glister and J. Lee, 20th edn, Sweet and Maxwell 2015) 41: 'The subject matter of the trust must be some form of property'.

¹⁸⁹ The law is now in s.2 (1) (b) and s.4 of the Charities Act 2011. See also the Charity Commission's guides: one dealing with the requirement to have only charitable purposes which are for the public benefit (*Public Benefit: The Public Benefit Requirement*) (PB1), and then a separate guide (*Public Benefit: Running a Charity*) (PB2) dealing with the requirement that there must be actual benefit to the public. These are available on their website: <https://www.gov.uk/government/organisations/charity-commission> (accessed 13th March 2018).

one alongside the general public trust. This seems a strange legal beast and why should a trust be implied? None of the usual situations where trusts are implied are present.¹⁹⁰

If against all the evidence there was a trust for the minister then on a breach of that trust the minister could use equitable remedies but it is difficult to see how they could work. A claim to a stipend which was not paid could be enforced through a claim for equitable compensation¹⁹¹ but the action would be entirely novel. If there were a trust of the manse or other clergy house one would have the extraordinary situation where church property could not be used for church purposes as it was the subject of a private trust and could be subject to equitable remedies *in rem*.¹⁹² This does not bear serious consideration.

The conclusion must be that, save perhaps in exceptional cases, the trust mechanism is unsatisfactory for resolving clergy employment cases.

5. That a minister is an office holder and so in effect self-employed.

This is an important category as the courts normally hold that ministers are office holders rather than employees. As such it merits detailed consideration. We shall first examine the concept of office holding in general and then see how it could apply to ministers of religion.

¹⁹⁰ These are set out in an accessible form in *Moffat's Trusts Law, Text and Materials* (J. Garton 6th edn, CUP 2015) 605-607

¹⁹¹ See *Target Holdings v Redferns* (1996) 1 AC 421 and *AIB Group (UK) Ltd. v Mark Redler & Co. Solicitors* (2014) UKSC 58. Televantos A. and Maniscalco L. (2015) 'Stay on target: compensation and causation in breach of trust claims' 4. Conv. 348 usefully analyse what is a developing area.

¹⁹² See e.g. *Hanbury's Modern Equity* Ch. 24

5.1. What is an office holder in law?

The problem is that this category is a kind of repository of various offices, including (possibly) company directors, registrars of births marriages and deaths¹⁹³ and coroners¹⁹⁴ in addition to ministers of religion, none of which have any obvious connection with each other. They have simply been labelled 'office holders' without any systematic analysis of exactly what this term means.

As Duddington points out: 'Much confusion has been caused by failing to distinguish between those who hold what is called an office and those who are office holders in the strict legal sense'¹⁹⁵ Not only this but there may be no clear distinction between office holders and employees, especially where there is only informal office holding, as we shall see below. As Lady Hale put it in *President of the Methodist Conference v Preston* ¹⁹⁶:

The other matter which has clouded the question is that many of the posts held by ministers of religion may be characterised as offices, in the sense that the post has a permanent existence irrespective of whether there is currently an incumbent. It was for a long time the law that people who held offices in the service of the Crown did not have contracts of employment. This still applies to police officers, but it no longer applies to the generality of civil servants. But outside the service of the Crown, it has always been possible for a person to be both an office holder and an employee.

¹⁹³ *Miles v Wakefield Metropolitan District Council* [1987] AC 539. See 5.2.5. below.

¹⁹⁴ See Coroners and Justice Act 2009 considered below.

¹⁹⁵ In *Employment Law* (2nd edn, Pearsons 2007) at 71.

¹⁹⁶ (2013) UKSC 29

The clearest exposition of the law on office holders was, it is submitted, given by Lord Nicholls of Birkenhead in *Percy v Board of National Mission of the Church of Scotland*¹⁹⁷ who distinguished between two types of office holders, which we can label ‘formal office holding’ and ‘informal office holding’.

5.2. Formal office holding

Freedland argues that formal office-holding¹⁹⁸ has three elements: (1) payment is made by virtue of the office rather than in respect of work done; (2) office holders occupy positions within institutional structures rather than being employed in the contractual sense; (3) office holding is governed by a normative regime with some basis other than contractual.¹⁹⁹ Lord Atkin in *McMillian v Guest*²⁰⁰ appeared to add a further requirement when he approved of the statement by Rowlatt J. in *Great Western Railway Co. v Bater*²⁰¹ where an office was defined as ‘a subsisting, permanent, substantive position, which had an existence independently of the person who filled it, and which went on and was filled by successive holders.’

One could say that the essence is that the office itself has a separate existence from whoever holds it.

¹⁹⁷ [2005] UKHL 73.

¹⁹⁸ He does not actually say ‘formal’ but this is, I think, his meaning. See *The Personal Employment Contract* (OUP 2003) 66

¹⁹⁹ We shall refer to these as the ‘Freedland criteria’. See 5.2.2. below.

²⁰⁰ (1942) AC 561 at 564

²⁰¹ (1920) 3 KB 266 at 274

5.2.1 Who is a formal office holder?

As Lord Nichols pointed out: 'An office may be of ancient common law origin, such as the office of constable. Indeed, some offices were regarded by the common law as incorporeal hereditaments, belonging to the current office holder.'²⁰² One example might be that of a coroner.²⁰³ Police constables are another example of formal office holder and are entitled to public law remedies²⁰⁴ but s.201 of the ERA 1996 provides that they have no rights under employment protection legislation except the right to a Statement of Initial Employment Particulars, a minimum notice period and redundancy pay. However, they are covered by anti-discrimination legislation and disciplinary matters come under the Police Regulations. Another instance is a superintendent registrar of births, deaths and marriages.²⁰⁵

5.2.2. Church of England Clergy as formal office holders.

As far as ministers of religion are concerned, the traditional view is that only those who can be considered to hold a public office are clergy of the Church of England. This is because of the Established nature of the Church of England which has the consequence that the ecclesiastical law of that Church is part of the law of England.²⁰⁶ Doe²⁰⁷ observes that:

²⁰² In *Percy* at para. 19

²⁰³ See the Coroners and Justice Act 2009. Schedule 3 part 4

²⁰⁴ See *Ridge v Baldwin* (1964) AC 40

²⁰⁵ See *Miles v Wakefield DC* (1987) AC 539 considered below.

²⁰⁶ The exact nature of Establishment has been much debated. It clearly implies some association between a particular church and the state. The literature on establishment in the UK is extensive: see for an introduction D. Harte 'The Church of England and the State: A National Church for a Plural Nation' (2012) 168 *Law and Justice* 22 and for a longer analysis P. Avis *Church, State and Establishment* (SPCK 2001). We return to this in Chapter Four.

'Though admission to ordination and appointment to a ministerial post are based in a fundamental way upon agreement, clergy are treated legally as holders of an ecclesiastical office'. He goes on to say that: 'The expression 'office' commonly occurs in ecclesiastical legislation as denoting an order of ministry generically or a particular ministerial position created by law'.

However, we need to distinguish between those clergy who hold a benefice and those who do not and who now hold under common tenure. To take beneficed clergy first Hill points out that:

A benefice is a freehold office, the holder of which is known as 'the incumbent' but may also be styled 'rector' or 'vicar'. The incumbent is a 'corporation sole' and has a freehold interest in the emoluments of the benefice until retirement or vacation of the benefice²⁰⁸

How does this fare against the criteria of Freedland (above)? On the question of payment by virtue of the office itself beneficed clergy will not fit the first criteria in one way as they have no right to payment as such (usually termed a stipend) yet in another way they will as any payments will certainly not be contractual.²⁰⁹ They certainly occupy positions within institutional structures rather than by virtue of a contract and their office holding is governed

²⁰⁷ In *The Legal Framework of the Church of England* (Clarendon Press, 1996) 198-199

²⁰⁸ *Ecclesiastical Law* 3rd edn, 4.17. Note though that by the Ecclesiastical Offices (Age Limitation) Measure 1976 incumbents must normally retire at 70. See R. Bursell 'The parson's freehold' (1992) *Ecc. L.J.* 2(10) 1992 259 for reflections on the freehold and church discipline. Although somewhat dated they are still valuable.

²⁰⁹ Contrast the position where clergy hold under 'common tenure' – below and in the RC Church – see Chapter Five. In practice the majority of beneficed clergy receive a stipend funded by their congregations – *SEE* <https://www.churchofengland.org/more/clergy...clergy-hr/clergy-pay-and-expenses> accessed 16th March 2018.

by a normative regime rather than by a contract. One could also add that by virtue of being a corporation sole they satisfy Lord Atkin's criteria of their office having an 'existence independent of the person who holds it'.²¹⁰

The trouble is that this does not take us very far. Those who do not hold a benefice are unbeneficed clergy and include all those who do not hold a freehold office such as priests-in-charge of parishes, vicars in team ministries, assistant curates etc.²¹¹ Since 31st January 2011 all of these will now have 'common tenure' as will all clergy holding new appointments made since 31st January 2011 and beneficed clergy who choose to transfer to common tenure. This status was established by the Ecclesiastical Offices (Terms of Service) Measure 2009 and the Ecclesiastical Offices (Terms of Service) Regulations 2009 and the effect will be that when all existing beneficed clergy have retired or have exercised their right to transfer to common tenure then the status of beneficed clergy will no longer exist in the Church of England.

The question is then whether clergy on 'common tenure' are also formal office holders. If we take the 'Freedland criteria' ²¹²then there is a guaranteed right to payment because reg. 11 of the 2009 Regulations provides that 'office holders' have an entitlement to a stipend which shall be not less than the national minimum weekly stipend. The second criteria that office holders must 'occupy positions within institutional structures rather than being employed in the contractual sense' is now doubtful. Although those holding by common tenure may not

²¹⁰ *McMillian v Guest* (1942) AC 561 at 564

²¹¹ See M. Hill *Ecclesiastical Law* 3rd. edn, 4.29

²¹² See above.

have contracts in the civil law sense they do have rights akin to those in a contract.²¹³ Not only this but they do not occupy a set position in the way that beneficed clergy do: a beneficed priest *holds a benefice*: clergy on common tenure *are appointed under common tenure*. The difference may be subtle but it is real. The final criteria, that office holding is governed by a normative regime with some basis other than contractual is in theory right and given that clergy are not only subject to the rules on common tenure but also to the Canons of the Church of England may still be satisfied. Finally, Lord Atkin's criteria that the office has an 'existence independent of the person who holds it and which is goes on and is filled in succession by successive holders'²¹⁴ is not satisfied where there is common tenure as the freehold has gone.

So, we can conclude that whereas in the case of beneficed clergy there is a strong case that they are office holders this is less so where there is common tenure.

So far we have considered the matter through the prism of civil law and in particular the 'Freedland criteria'. However, in line with a principle of this thesis that we need to also see how churches view the status and rights of their clergy we must turn to Church of England Canon Law.

In the Canons of the Church of England although the term 'office' is used it is sometimes done so alongside the concept of orders. Canon C 1 'Of holy orders in the Church of England' says that:

²¹³ These are considered in more detail in Chapter Six.

²¹⁴ See fn 212 above

The Church of England holds and teaches that from the apostles' time there have been these orders in Christ's Church: bishops, priests, and deacons; and no man shall be accounted or taken to be a lawful bishop, priest, or deacon in the Church of England, or suffered to execute any of the said offices....

So whilst starting from the term 'orders' in connection with the three orders of ministry we then find, with no clear rationale, the term 'office' introduced. However, Canon C 5 (*Of the titles of such as are to be ordained deacons or priests*) does refer explicitly to an office:

Any person to be admitted into holy orders shall first exhibit to the bishop of the diocese of whom he desires imposition of hands a certificate that he is provided of some ecclesiastical office within such diocese, which the bishop shall judge sufficient, wherein he may attend the cure of souls and execute his ministry.

The conclusion here is that where clergy of the Church of England are on common tenure it is at least doubtful, on the criteria we have used, that they are formal office holders. They would then fall into the category of informal office holders which we examine at 5.3. below.

5.2.3. Problems caused by the application of s.50 of the Equality Act 2010.

There may also be a distinction between an 'office' and a 'public office' as under s.50 of the Equality Act 2010 where it is unlawful for a person to discriminate in either making appointments to a public office or in the terms on which such an appointment is offered. One definition of a public office is in s.50 (2) (b): 'an office or post, appointment to which is made on the recommendation of, or subject to the approval of, a member of the executive'. This could include Church of England bishops as technically they are appointed by the Crown. However, it was felt that if bishops were appointed to a public office and if s.50 *did* apply this could cause problems where a female bishop was appointed and there was the expectation that male bishops would exercise oversight of

parishes which did not want a woman bishop.²¹⁵ The result was that s.2 of the Bishops and Priests (Consecration and Ordination of Women) Measure 2014 amends schedule 6 of the Equality Act by providing that ‘The office of diocesan or suffragan bishop is not a public office’. If that is so, then we are entitled to ask: what then is it? There can only be two answers:

- (i) An office which is not a public office, which takes us into the uncertain area of informal office holding described above where we have argued that the position of an informal office holder may be indistinguishable from that of an employee.
- (ii) An employee.

Given that (ii) would not be accepted by the Church the conclusion must be that it is (i). It would have been clearer had the amendment to the Equality Act stipulated that the statement that the office of bishop was not a public office only applied for the purposes of the Equality Act 2010 but it does not. Where does that leave us though? The curious paradox is that it leaves bishops in arguably a less clear position than their clergy to whom this concession does not of course apply. Once again, we see the consequences of a failure to develop any clear rationale of what an office holder is and what their rights are.²¹⁶

²¹⁵ The thinking was that presumably a bishop could claim under the Equality Act as they are ‘workers’ – see *Percy v Board of National Mission of the Church of Scotland* considered below. But do they have a contract? There is muddled thinking here!

²¹⁶ This question of whether Church of England clergy are office holders has recently become of practical importance because of the prosecution of Peter Ball, the former Bishop of Gloucester, for the offence of misconduct in a public office, to which crime he pleaded guilty in September 2015. But did he hold an office? The Law Commission is producing a Report on this offence scheduled for publication in late 2018.

5.2.4 Clergy of other churches.

Other denominations also regard their clergy as office holders but they would be informal office holders. We shall note below the very clear statement that they are office holders by Rev. Paul Goodliff, Head of Ministry, Baptist Union of Great Britain²¹⁷. It is also worth noting that there is no evidence, whether from responses to the DTI Discussion Paper (below) or from the case law on this area (to be examined in Chapter Four) that any church holds the view that its ministers are not office holders but employees.²¹⁸ However, it is arguable that this is based on the mistaken belief that what is here informal office holder status is a separate category to employment status when, if there is any dichotomy at all, it is only between formal office holding and employment status.

However, the courts have not always been clear about whether non-Church of England clergy are office holders, and the judgments reflect some of the earlier judicial confusion referred to above about the distinction between formal and informal office holders. For instance Lord Hoffman in *Percy v Church of Scotland Board of National Mission*²¹⁹ observed that:

The proposition that a minister of a church has no employer but holds an office, subject to rules which impose upon him certain rights and entitle him to a salary, stipend and other benefits, has been stated so often and for so long that I would not have thought that it was open to question

²¹⁷Goodliff P. 'Baptist Church Polity and Practice' (2012) 168 Law and Justice 5. See 5.3.2. below in this chapter.

²¹⁸ It may be that some small independent churches regard their ministers as employees but I have not come across such a view.

²¹⁹ (2005) UKHL 73 at para. 56

He based this statement on the observation of Lord Kinnear in *Scottish Insurance Comrs v Church of Scotland*²²⁰

I think that the position of an assistant minister in these churches is not that of a person who undertakes work defined by contract but of a person who holds an ecclesiastical office, and who performs the duties of that office subject to the laws of the church to which he belongs and not subject to the control and direction of any particular master.

However, this case concerned not only the Church of Scotland²²¹ but also the United Free Church which is not established and Lord Hoffman then proceeded to consider the decision in *In re National Insurance Act 1911 In re Employment of Church of England Curates*,²²² which of course did concern the established church. The point is that there is here no attempt to make a clear distinction between office holders in the established church and those outside it so that, in Lord Hoffman's speech, all clergy become, by some seamless process, office holders.²²³

Moreover, the DTI Discussion Paper of 2002²²⁴ which asked for views on the possibility of using s.23 of the Employment Relations Act 1999 to extend employment status to ministers

²²⁰ (1914) SC 16, 23

²²¹ One could argue anyway that the Church of Scotland is not established in the same way as the Church of England: see Chapter 4 at 6.1 and 6.2

²²² [1912] 2 Ch 563

²²³ This is not of course always so. Contrast, for instance, the clear view of Lady Hale in *Percy v Church of Scotland Board of National Mission* (2005) UKHL 73 at paras. 142-148

²²⁴ URN 02/1058

of religion²²⁵ said²²⁶ that 'Members of the clergy are usually held to be ecclesiastical office holders' but gave no authority nor rationale for this.

The position of Roman Catholic clergy as office holders was considered in *JGE v English Province of Our Lady of Charity* and another²²⁷ where MacDuff J observed that:

It seems clear to me that a bishop and priest would not regard their relationship as being one that could be adjudicated upon by the civil courts; and Father Baldwin would have been considered as a holder of an office rather than an employee of the defendant

Yet this conclusion was arrived at without any analysis of the term 'office' in the context of either civil law or indeed Roman Catholic Canon Law. When the case reached the Court of Appeal Ward LJ held that 'The appointment to the office of parish priest was truly an appointment to an ecclesiastical office and no more.' He then went on to say that: 'Father Baldwin was not the servant nor a true employee of his bishop.' This may well be so, but in fact Ward LJ reached this conclusion on a close analysis of the actual relationship between a priest in the RC church and his bishop together with other factors and it is submitted that the finding that the priest held an ecclesiastical office as such was strictly unnecessary to the decision.

²²⁵ Considered in more detail later in this chapter at 6.3.

²²⁶ At para. 78

²²⁷ (2011) EWHC 2871. Note that this case involved the issue of vicarious liability and not employment status. See D. Tan 'A sufficiently close relationship akin to employment' (2013) 129 L.Q.R. 30

Although the use of the terms 'office' and 'office holder' may be a convenient way of describing the post held by a minister of religion and his relationship with his (or her) church it clearly is not legally load-bearing.

5.2.5. Rights of formal office holders

On the assumption that some clergy at least may be formal office holders what are their rights? These have never been fully worked out. Where the office derives from statute then the provisions of the statute governing that office will provide some guidance but the question then becomes whether the courts are prepared to imply more rights and duties into the office as in *Miles v Wakefield MBC*²²⁸ where the claimant had been appointed by the defendant under s. 6 of the Registration Service Act 1953 as superintendent registrar of births, deaths and marriages. He subsequently refused, as part of industrial action, to conduct weddings on Saturday mornings. It was held that the council was entitled to deduct 3/37ths of his salary for the time when he should have been performing weddings and the question was the exact basis on which this right arose.

The case proceeded on the basis that the claimant did not have a contract of employment but Lord Oliver held that:

Nevertheless, the nature of his remuneration and the terms of his tenure of office are so closely analogous to those of a contract of employment that any claim by him to salary payable pursuant to the statutory provisions and the local scheme made

²²⁸ (1987) AC 539 See J. McMullen 'The legality of deductions from a striker's wages' (1988) 51(2) MLR 234

thereunder ought, in my judgment, to be approached in the same way as a claim to salary or wages under such a contract’.

The effect was that the court treated the matter in the same way as if he had a contract and once again we see a blurring of the line between office holders and employees. By contrast the claimant (unsuccessfully) contended that the starting point should be his rights and duties as an office holder *per se*. Counsel for him argued that any disciplinary or other powers exercised over the claimant had to come from the statute and said that:

by virtue of section 6(4) of the Act of 1953, the sole power of dismissal from office vests in the Registrar General. No other and lesser disciplinary sanction is either expressly or impliedly provided.

This discussion is important as it shows that even if some clergy are treated as office holders their precise rights and duties remain uncertain. If we apply the argument of counsel in *Miles* to clergy then their rights would, in the absence of any statute governing the matter, be solely under ecclesiastical law. We shall argue in Chapter Six that this would often give inadequate protection to the clergy but at least we would know the extent of these rights which is not the case with office holding.

There is an argument that the very existence of formal office holding with specific rights (whatever they are) is now anomalous. Lady Hale in *Percy v Church of Scotland Board of*

National Mission (2005)²²⁹ pointed out that before the introduction of protection from unfair dismissal by the Industrial Relations Act 1971 and all the employment protection legislation which followed it was a positive advantage to be an office holder as they had a right, denied to employees, to a hearing before being deprived of their office.²³⁰ In *Ridge v Baldwin* Lord Reid pointed out that a master could terminate the contract with his servant at any time and for any reason or for none.²³¹ By way of contrast, some office holders could be dismissed only for good cause. As Lord Nichols observed in *Percy*²³² the rationale was that they were insulated against improper pressures. The result was that it was a positive advantage in what were then called master and servant cases to find an element of public employment or service, or anything in the nature of an office or status capable of protection.²³³

Now of course employees have the benefit of the multitude of employment protection rights which have been introduced in the last 50 years. If office holders are a separate category, distinct from employees, then they will not have these rights and it will be necessary to develop a set of rights, perhaps based on public law remedies, which would be available to those holding formal, as distinct from informal, offices. At present there is a gap as and our conclusion must be that if, which must now be doubtful, some clergy are still formal office holders this is an unsatisfactory status for ministers of religion and indeed, for anyone else.

One last point needs to be made: most of the office holders mentioned above have been in positions of authority, such as coroners and judges. Clergy by contrast are generally in

²²⁹ (2005) UKHL 73

²³⁰ At 142. See e.g. *Ridge v Baldwin* [1964] AC 40, 65–68.

²³¹ See [1964] AC 40 at 65–68.

²³² At 15

²³³ See *Malloch v Aberdeen Corporation* (1971) 1 WLR 1578

positions of subordination to ecclesiastical authority.²³⁴ On a practical level they may well need employment protection more than other office holders and office holder status does not give this.

5.3. Informal office holding

Any clergy who are not formal office holders may fall into this category. This appears to include all clergy other than those holding a benefice in the Church of England and this includes virtually all of them. Informal office holding is where a person is simply labelled an office holder by an organisation. As Lord Nichols put it in *Percy*²³⁵ 'Less clear cut are cases where an organisation, ranging from the local golf club to a huge multi-national conglomerate, makes provision in its constitution for particular posts or appointments such as chairman or vice-president. In a broad sense these appointments may well be regarded as "offices".' He went on to point out that in these cases a person can be both an office holder and an employee: 'If "office" is given a broad meaning, holding an office and being an employee are not inconsistent. A person may hold an "office" on the terms of, and pursuant to, a contract of employment. Or like a director of a company, a person may hold an office and concurrently have a service contract.' A good illustration of this is *Secretary of State for Trade and Industry v Bottrill (2000)*²³⁶ where the Court of Appeal held that there was no rule that where a director was the controlling shareholder of a company then he/she could not be an employee.

²³⁴ This point is more fully developed in Chapter Five

²³⁵ at 20.

²³⁶ (2000) 1 All ER 915

Is there really any difference between an informal office holder and an employee?

5.3.1. Rights of informal office holders

If we found difficulty in identifying specific rights and duties of formal office holders there is even more of a problem with informal ones. We need to ask: what use does the term 'office' have in these cases? A glance at offices other than clergy ones may help. The duties of a trustee, who is often considered to hold an office, are defined by case and statute law, such as the Trustee Acts 1925 and 2000 and their essence is that the trustee is in a fiduciary position: he "is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and his duty conflict".²³⁷ What does the term 'office' add to this?

In the case of a company director, Lord Hoffman observed in *Percy* that: 'A director of a company does not, as such, have a contract with the company and is not an employee. He is an officer of the company. His duties and remuneration as a director are determined by the law and pursuant to the company's constitution. He may in addition have a service contract, but that is a separate relationship'.²³⁸ However, and with respect, although a person may indeed be both a director and also have a contract of employment, the attaching of an additional label of 'office holder' to the relationship adds nothing. The relationship is governed by company law in respect of their position as directors *per se* and by employment law in respect of their position as employees *per se* if they are employees.

²³⁷ Lord Herschell in *Bray v. Ford* (1896) AC 44 at 51. See Hanbury and Martin *Modern Equity* 20th edn, 589-600

²³⁸ At 54

The result is that informal office holders are often held to be also employees and so informal office holding gives them no rights as such. If it turns out that the clergy are not employees then informal office holding gives them no employment protection rights at all and is an unnecessary obstacle to such protection.

Freedland ²³⁹ refers to the search for a clear dichotomy between employment status and self-employed status as being 'as elusive as the Philosopher's Stone'. One might say the same for the distinction between employees and office holders.

5.3.2. What evidential relevance is placed on the description given by the parties to their relationship?

This is, I suggest, a vital consideration as churches and indeed ministers themselves nearly always consider themselves office holders and not employees and are generally described as such by the churches. One clear statement, among very many, of the position is by Dr. Paul Goodliff, Head of Ministry, Baptist Union of Great Britain:

Despite the status of ministers for tax purposes moving from self-employed to PAYE during the last century, the employment status of Baptist ministers remains that of office-holder.... Baptists, having argued that the final place where the mind of Christ is discerned is the Church Meeting, are loathe to forgo this theological principle of the rule of Christ, and grant to an Employment Tribunal the final court of decision. Indeed, for the State to encroach upon this sphere of church polity not only

²³⁹ In *The Personal Employment Contract* 22.

contradicts Baptist self-understanding but may also contravene the rights to religious freedom enshrined in human rights legislation, (Article 9 of the European Convention on Human Rights.)²⁴⁰

This last point will be considered below²⁴¹ but it is worth keeping this very clear statement of the position in mind. Furthermore, we can say that if a description of the minister as an office holder is decisive then that ends the matter provided that the term office holder denotes a different employment relationship from that of employer- employee. However, as we have seen, it is by no means clear that this is the case.

Other cases, not involving ministers of religion, have principally concerned what are known as 'sham contracts' where a description of the worker as 'self-employed' is used to disguise what is in reality employment status. No one suggests that the churches are engaged in a deception by labelling their ministers as in effect self-employed to disguise their employment status but the cases do set out the principles used by the courts to establish what the real nature of the relationship is.

The fundamental position was stated by Megaw LJ in *Ferguson v John Dawson and Partners (Contractors) Ltd*:²⁴² 'I find difficulty in accepting that the parties, by a mere

²⁴⁰ P. Goodliff, 'Baptist Church Polity and Practice' (2012) 168 Law and Justice 15. The issue of Article 9 of the ECHR will be explored in Chapter Four

²⁴¹ In Chapter Four.

²⁴² (1976) 1 WLR 1213

expression of intention as to what the legal relationship should be, can in any way influence the conclusion of law as to what the relationship is’.

In *Autoclenz v Belcher*²⁴³ Lord Clarke adopted the formulation of Smith LJ in *Firthglow Ltd v Szilagyi*²⁴⁴ who said that

In my judgment the true position... is that where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties. To carry out that exercise, the tribunal will have to examine all the relevant evidence. That will, of course, include the written term itself, read in the context of the whole agreement. It will also include evidence of how the parties conducted themselves in practice and what their expectations of each other were.

If we apply this to the relationship between ministers and their churches then I suggest that any description of the minister as an office holder needs to be considered alongside the following factors:

- (a) As we shall see below the term ‘office holder’ may not exclude an employment relationship.
- (b) The context of the whole agreement, to which Smith LJ referred, must here include the ecclesiology of the church and in particular any relevant provisions of its canon law and any terms of service which are applicable to the clergy, a point considered in

²⁴³ [2011] UKSC 41. The facts are not relevant for our purposes but briefly they concerned workers who were required to sign contracts stating that they were self-employed.

²⁴⁴ [2009] ICR 835

detail in Chapter Five where we ask how the ecclesiology of churches bears on employment status.

- (c) In particular one must give some weight at least to the spiritual nature of the duties of the minister, a matter considered by the courts as we shall see in the next chapter.
- (d) When one considers, in Smith LJ's phrase, 'how the parties conducted themselves in practice and what their expectations of each other were' then in addition to the matters in (b) one must look at the actual practice of churches as applicable to their ministers and also at how ministers view their relationship with the church.²⁴⁵ This again takes us to Chapter Five.

5.4. Another view

The view above that office holding is not appropriate for the clergy has been challenged by Rivers ²⁴⁶ who argues for office holding as appropriate for ministers of religion on three grounds:

- (i) The terms and conditions of office holding can be set by the organisation concerned and this may make the office holder more or less secure than an employee.
- (ii) Office holding has a proprietary dimension²⁴⁷ with the result that 'a person

²⁴⁵ In line with the approach of both the Court of Appeal and the Supreme Court in *Pimlico Plumbers v Smith* ((2017) EWCA Civ. 51 and (2018) UKSC 29

²⁴⁶ In *The Law of Organised Religions* 112

²⁴⁷ See, for example, *Forbes v Eden* (1867) 1 SC & Div. AC 568.

can occupy an office without there being any need to identify any other persons parties to a bilateral contract'. Moreover, 'the terms and conditions on which the office is held can be set by the internal law of the organisation.' An example of this would of course be Roman Catholic Canon Law.

- (iii) Enjoyment of the office can be protected according to its terms subject only to the requirements of natural justice.²⁴⁸

All of these reasons are valid in themselves but they presuppose that there is a clear and sharp distinction between office holders and employees. This may be so in some of the cases but in others and in particular informal office holding, which I have suggested above applies to clergy other than those of the Church of England, the courts have emphasised that there may be no distinction between an office holder and an employee.²⁴⁹ Nor does it take account of the subordinate position of many clergy who, if they are office holders, will have no rights save those granted to holders of their office under ecclesiastical law. In the next chapter we will see numerous instances of where the clergy have had to resort to civil law to seek to vindicate their rights. If office holding were appropriate this would not have been necessary. One obvious instance, as seen in *The President of the Methodist Conference v Preston*²⁵⁰ and *v Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester Sharpe*²⁵¹ was the absence of an effective grievance procedure in ecclesiastical law. Nevertheless, the advantages proposed by Rivers for office holding might well apply

²⁴⁸ The extent to which the clergy can avail themselves of public law remedies will be explored in Chapter Four.

²⁴⁹ See Lady Hale in *President of the Methodist Conference v Preston* above

²⁵⁰ (2013) UKSC 29.

²⁵¹ (2015) EWCA Civ. 399. The same might have also applied in *President of the Methodist Conference v Preston*.

where there is a special category of relationship for ministers of religion and we shall return to this in the conclusion.

9. Conclusion

In conclusion we can say that where the relationship is clearly voluntary then, although this in itself is no help on answering our research question, it is useful in identifying those clergy who could not on any view have any kind of contractual relationship. The notion of a trust is also useful in clearing the ground in identifying the different categories of relationship which ministers have with their church but it is impossible to see the notion of a private trust as a solution to what is essentially a question of unlocking the status of a bilateral relationship.

On the question of office holding as a status then, although this term is often used, the courts seem to treat informal office holding as coterminous with employment and indeed formal office holders may have rights akin to employment. The result is that office holding as the term is used at present is an obstacle to employment status for ministers but given that this concept is largely empty of significance it is an unnecessary obstacle.

The result is that as these other categories are clearly not the answer to an enduring status for the clergy in their relationship with their church our research question remains: can we remove the obstacles to employment status and, if not, what potential reforms are needed to give a degree of employment protection?

We must now turn from the positivist/ theoretical assessment of the issue to the realist/practical assessment and examine how the courts have dealt with claims by the clergy to employee status.

Chapter Three: Obstacles to employment status in the case law on the possible status of ministers of religion as office holders, employees and workers

1. Introduction

We concluded in the previous chapter that, looked at from an employment law perspective, there is from a positivist/ theoretical assessment no absolute obstacle to ministers having employment status. Here we move to a realist/practical assessment and examine the cases where clergy have claimed employee status or where this has been in issue. The problem, which will become apparent at an early stage in this chapter, is that the courts have veered from one possible rationale to another in holding that the clergy are not employees. So, in order to bring a measure of cohesion to this area we shall seek to develop a taxonomy against which the different cases can be measured. In many ways, this chapter is the very heart of the thesis.

2. Case Law on the Employment Status of Ministers of Religion: four fundamental problems

Edge has remarked on the fact that all of these cases²⁵²

implicate the (putatively) special position of the minister in the religious, as opposed to non-religious, workplace. Similarly, within these different contexts we see a variety of technical approaches taken to resolve the question of how far the relationship is regulated by state law.

²⁵² "Judicial crafting of a ministerial exception: The UK experience", *Ox. J Law Religion* (2015) 4(2): 244-259 at 256

This gets us to the heart of the problem: the courts have accepted that ministers should enjoy a special place in the workplace and have adopted various means to establish what that special position should be. The question is whether they have succeeded.

There are four underlying flaws in the case law which have led to much confusion:

2.1. The failure to develop any clear rationale for why employment status should be denied to ministers of religion

Davies²⁵³ remarks that: 'What is not clearly articulated in any of the leading employment cases is the reason for the courts' general reluctance to adjudicate on disputes involving ministers of religion'. The 'variety of technical approaches' referred to by Edge above have included office holding, a presumption against an intention to create legal relations, the fact that the minister's position is governed by church law and so on, all of which will be examined below. At the end of an examination of the case law in this chapter one is left with the sense that there is a kind of innate reluctance by the courts to categorise the clergy as employees, based perhaps loosely on the courts' reluctance to interfere in spiritual matters, and that, to give effect to this, the courts are casting around for some legal doctrinal peg on which to hang the denial of employment status.

2.2. The failure to identify precisely what characteristics are present in a 'spiritual relationship'.

This is really a particular example of the problem in 2.1. above. One weapon in their armoury deployed by the courts to deny employment status is that the relationship between a minister and his/her church is a spiritual one but the courts rarely explain what they mean by it. As

²⁵³ 'The employment status of clergy revisited: *Sharpe v Bishop of Worcester*' (2015) ILJ 551 at 555

Edge says²⁵⁴: ‘the term has been used without any clear explanation of its meaning, which has contributed to the 21st-century scepticism over a distinction between spiritual and other services’. Moreover, what actually counts as ‘spiritual duties’ may in fact differ according to the ecclesiology of particular churches. As Gillian Evans points out: ²⁵⁵

There has been a tendency to assume in this group of cases that ‘spirituality’ is a single defining quality common to all relationships between ministers of religion and the religious bodies they serve, and that therefore any incompatibility with a contractual relationship is everywhere the same

We shall note this point when we look at the cases and the whole question of ecclesiology is dealt with in Chapter Five.

There is a crucial need to have some clarity of what spirituality means in this context. One possibility would be to use the term ‘religion’ as synonymous with spirituality and so adopt the working definition of Lord Toulson in *R (on the application of (Hodkin) v Registrar of Births, Deaths and Marriages*.²⁵⁶ This will not do, though, as spirituality can exist outside religion and I suggest also that by answering the question of what a religion is, which connotes a body of believers, we are not quite getting to the heart of what is meant by ‘a spiritual relationship’ which has a strong personal element.

2.2.1 A possible definition of spirituality

I offer this possible working definition of spirituality which is linked with the definition of a minister of religion offered in Chapter One.

²⁵⁴ Ibid. 258

²⁵⁵ In *Discipline and Justice in the Church of England* 23

²⁵⁶ [2013] UKSC 77. This definition is set out in Chapter Two.

A spiritual relationship is one which a person, including a minister of religion as defined above, has, not with any secular body or person but either with God or with whoever or whatever is seen as the object of that relationship and which is given actual expression through that person's lived vocation in the world by prayer, worship and the service of others.

Two points can be made:

- (i) The advantage of this definition is that it gets away from simply saying that spiritual connotes a relationship with God and focusses on the manifestations of that relationship in ways that can be measured.
- (ii) The words 'with God or with whoever or whatever is seen as the object of that relationship' is intended to include religions that are not monotheistic and also to encompass the idea of a relationship.

We shall look at this definition below in relation to the decision in *Santokh Singh v Guru Nanak Gurdwara*²⁵⁷.

2.3 The failure to distinguish between a contract per se, for instance that held by an office holder, and a contract of employment.

This is shown by a failure to be clear about what is meant by 'an intention to create legal relations' in this context. An intention to create legal relations means just that: the transaction does create legal relations of *some* kind and so a presumption against legal relations means a presumption against the legal transaction in question having *any* legal force at all. Yet case law on this area often assumes that if there is no intention to create

²⁵⁷ (1990) WL 754370

legal relations then the alternative is to hold that the minister is an office holder.²⁵⁸ However, if this is so then *ipso facto* there *will* be legal relations of some kind as the very nature of an office is a legal concept, as we saw above. What is really meant is that there is no intention to create the type of legal relations that apply between employers and employees founded on a contract of employment.

This error can be seen in the remark in the Court of Session in *Percy* by the Lord President, Lord Rodger of Earlsferry, who said that:

where the appointment was being made to a recognised form of ministry within the Church and where the duties of that ministry would be essentially spiritual, there would be no intention that the arrangements made with the minister would give rise to obligations enforceable in the civil law²⁵⁹

He then considered that the presumption was not rebutted as the arrangements 'did not point to a contract of service or for services' but in so doing overlooked the possibility that legal relations other than contractual ones may still exist. Lord Hoffman picked up this point in the House of Lords in *Percy* when he said, in relation to Helen Percy, that: 'There was plainly an intention to create legal relations. But those legal relations were not a contract of employment. They were an appointment to a well-recognised office, imposing legal duties and conferring legal rights.' We shall see below how Arden LJ appeared to overlook the contract/contract of employment distinction in the *Sharpe* case.²⁶⁰

²⁵⁸ This must, for instance, be the reading of *President of the Methodist Conference v Parfitt* (1984) QB 368. See 7.1. below.

²⁵⁹ [2001] SC 757

²⁶⁰ See pps. 120-122

2.4. The confusion around whether, if there is a contract of any kind, its terms are express or implied.

This will be considered below in particular in the discussion of the *Preston* and *Sharpe* cases where we shall see that the most recent approach sees no, or little room, for implication of terms.

3. A possible taxonomy

A case could be made out for saying that the fundamental reason why the courts deny employment status to ministers is because they have a spiritual relationship with their church or other religious body. However, there are cases where the spiritual relationship has been hardly alluded to by the courts at all.²⁶¹ What seems to be the case is that the existence of a spiritual relationship underlies much of the case law, especially where there is an argument that there is a presumption against intention to create legal relations.²⁶²

I suggest that the cases fall into three categories which often overlap. We shall first identify these categories and then see if they can be applied to the cases so at least a clear picture emerges of how the law has developed.

- (a) *The office holder category*. We have examined the background to the concept of office holder above but we need to discuss it specifically in relation to cases involving ministers of religion and employment rights.
- (b) *The 'intention to create legal relations category'*. This generally leads to a presumption against such an intention and, again generally, leads to a finding that there is no employment relationship. The idea that there is a separate requirement in

²⁶¹ One example is *Percy v Church of Scotland Board of National Mission* (2005) UKHL 73. See pps. 112-113.

²⁶² One could say this of *Sharpe v Worcester Diocesan Board of Finance and the Bishop of Worcester* (2015) EWCA Civ. 399.

contract formation of an intention to contract is not an old one and dates from *Balfour v Balfour*²⁶³ in 1919, as has most recently been convincingly demonstrated by Saprai.²⁶⁴ That being so, it is not surprising that this requirement does not figure in the earlier cases, which are in the office holder category, and only appears much later, from *President of the Methodist Conference v Parfitt*²⁶⁵ when it is linked to the idea of a spiritual relationship between the minister and the church.

(c) *The 'construction of terms' category* where the emphasis is not on any uniqueness of the relationship between the minister and the church but on a strict construction of the terms of appointment and work in exactly the same way as the court would for any other person. This does not mean that the spiritual nature of the relationship is ignored but that it is seen as a factor to be evidenced by the documents and other evidence. The clearest example of this is the judgement of Lord Sumption in *The President of the Methodist Conference v Preston*²⁶⁶ but another earlier example is that of *Rogers v Booth*.²⁶⁷

These terms will be used throughout this discussion in an attempt to give some signposts to what a confused area this can be. Moreover, as mentioned above, the idea that the existence of a spiritual relationship negates a contractual relationship pervades many of the judgements and influences findings which appear on the surface to be based on one or more of the above grounds.

4.The influence of modern employment law

²⁶³ (1919) 2 KB 571

²⁶⁴ 'Balfour v Balfour and the separation of contract and promise' (2017) 37(3) LS 468. A useful recent example of this rule is *Blue v Blue* (2017) EWHC 1928 (Comm.)

²⁶⁵ (1984) 2 WLR 84

²⁶⁶ (2013) UKSC 29. The actual decision and its implications will be considered at 9 below.

²⁶⁷ [1937] 2 All E.R. 751

However, before we turn to the cases in detail we must note the influence of modern employment law. This really dates from 1963 and the passing of the first piece of what came to be called employment protection legislation, the Contracts of Employment Act. Cases prior to then were not generally concerned with employment rights at all and instead of 'contract of employment' the term was 'contract of service' and instead of 'employee' one spoke of 'servant'. This had its origin in the nineteenth-century law of master and servant and the question of what we now call 'employment status' was initially relevant in deciding questions of vicarious liability where an employer could be liable for the acts of his servant whom he employed under a 'contract of service' but not for an independent contractor whom he employed under a 'contract for services'.

In fact, the question of who is an employee for the purposes of vicarious liability has been treated separately by the courts from that who is an employee for employment protection purposes²⁶⁸ and cases on vicarious liability are not direct precedents in this area. Even so they can be useful guides. So, Davis LJ in *Sharpe v Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester*²⁶⁹ said that:

I also note that, as recent decisions on vicarious liability in the case of Roman Catholic priests indicate, a degree of control capable of supporting a finding of vicarious liability can co-exist with a position where there assuredly is no contract of employment.

We now turn to the cases and we shall adopt a chronological approach seeking to identify how the courts have used different criteria as the law has developed.

²⁶⁸ See *JGE v English Province of Our Lady of Charity and another* considered in Chapter Three at 5.2.4.

²⁶⁹ [2015] EWCA Civ. 399 at para. 129. However, it is noteworthy, as illustrating the fundamental lack of relevance of concepts drawn from vicarious liability that neither of the other two Lords Justices of Appeal referred to it although their judgements were considerably more detailed.

5.The first cases: from office holding to construction of terms

5.1. The significance of office holding

These did not involve employment protection legislation as there was none at the time but involved payment of National Insurance contributions and entitlement to compensation under the Workmen's Compensation Acts.²⁷⁰ As Petchey points out ²⁷¹ when the legislation (which established a 'no-fault' system for compensation for employees in respect of accidents at work) was extended and consolidated in 1906 by the Workmen's Compensation Act they covered those who were employed under 'a contract of service'. Thus s.13 of the Act defined a workman as: "any person who enters into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, is oral or in writing."

Similarly, the National Insurance Act 1911 introduced the notion of a national insurance scheme, still with us today. S 1 (I) of this Act provided that 'subject to the provisions of the Act, all persons aged sixteen and upwards "who are employed" within the meaning of Part I of the Act 'shall be, and any such persons who are not so employed but who possess the qualifications hereinafter mentioned may be, insured'. The advantage of insurance was that insured persons 'shall be entitled in the manner and subject to the conditions provided in this Act to the benefits in respect of health insurance and prevention of sickness conferred' by Part I.

Thus questions of employment status for the clergy did not initially arise in any contentious way in that a minister was claiming against the church and needed to establish employment

²⁷⁰ The first of these was the Workmen's Compensation Act (1897).

²⁷¹ Philip Petchey (2003). Ministers of Religion and Employment Rights: An Examination of the Issues.7 Ecc LJ 157-175

status to bring the claim but instead in the context of who was covered by national insurance.

These pieces of legislation led to four cases brought under the National Insurance Act 1911 by way of actions by the Insurance Commissioners for declarations as to whether ministers of religion were in fact employed under a contract of service.

5.2. The cases on office holding

The first was that of *In Re National Insurance Act, 1911 In Re Employment of Church of England Curates*²⁷² where a curate claimed that he was employed under what Parker J. called 'something in the nature of a contract of service.' There were two obstacles in the way of holding that there was such a contract: one was the question of whether the curate was an office holder and the other was the identification of an employer.²⁷³ Thus this decision neatly encapsulates the two issues which are of central importance in this thesis.

On the question of whether there was a contract of service the curate's argument was that

Without any permission from the bishop, the vicar can dismiss the curate and the curate can quit the vicar's service. The relation of master and servant does not necessarily involve the performance of menial services, and the fact that the duties are spiritual is immaterial. The relation between an incumbent and his curate is very like that between a medical man and his assistant or a solicitor and his clerk

²⁷² [1912] 2 Ch. 563

²⁷³ See Chapter One.

By contrast counsel for the vicar relied on the spiritual nature of the curate's duties when he argued that: 'A curacy is a spiritual office: Burn's Ecclesiastical Law, 9th ed. vol. ii. p. 54, sub-title Curates. The nature of that office is shewn by the Ordination Service in the Book of Common Prayer'.

It is interesting that the curate relied on the 'construction of terms' argument and brushed aside the 'spiritual relationship' issue. The vicar, by contrast, relied on the office holder point.

Parker J, however, disagreed and held that 'when I come to consider the duties of the curate, it appears to me that those duties are in no way defined by any contract of employment between him and anyone else. He owes, no doubt, a certain amount of obedience to the vicar as to the precise extent of which there may be some question—at any rate into that part of the case I do not intend to enter at any length—but the duty which he owes to the vicar is not a duty which he owes because of contract, but a duty which he owes to an ecclesiastical superior'.²⁷⁴ Thus Parker J. held that: 'I have come to the conclusion that the position of a curate is the position of a person who holds an ecclesiastical office, and not the position of a person whose duties and rights are defined by contract at all'.

The weakness of Parker J's approach was that, having decided that there was no contract of service, or employment as we would now term it, he then decided that there was no contract at all and he did not consider the possibility that there might be a contract of some other kind, such as one for services. Nor did he explore the possibility that the existence of an

²⁷⁴ The question of obedience under Canon Law is analysed in Chapter Five.

office might not in itself exclude the possibility of a contract of employment, although on the state of the authorities at that time one could argue that this point had yet to be recognised by the courts.²⁷⁵ Instead he considered that Church of England clergy are governed by the fact that the Church, as the established church, is itself governed by statute law, or rules made thereunder, so that their position is a public one. Yet is this sufficient to arrive at the conclusion that they are office holders and not employees?

If we attempt to fit this case into our taxonomy of 'office holder – intention to create legal relations - construction of terms' there was a close analysis of the relationship not in terms of any contract nor emphasis on the spiritual nature of the curate's duties but in terms of the position of a curate in ecclesiastical law. The ratio was that the curate was an office holder but with some analysis of the terms of the relationship. The net result was that the case firmly placed the clergy in the category of office holders and drew a sharp distinction between office holders and employees.

At least this decision was arrived after a fairly full consideration and analysis of the situation unlike that of *In re Employment of Ministers of the United Methodist Church*²⁷⁶ which also involved the applicability of the National Insurance Act 1911 and where Joyce J decided that Methodist ministers are not employed under contracts of service. The decision seemed to rest on the proposition that it was not possible to argue that Methodist ministers have a contract of employment but as May LJ observed in *President of the Methodist Conference v*

²⁷⁵The decision of Parker J that the curate did not have a contract of service but was an office holder also depended on an analysis of the position of a curate in ecclesiastical law. See P. Petchey 'Ministers of Religion and employment rights: an examination of the issues' 7 Ecc LJ 157 at 167 see fn. 36

²⁷⁶ (1912) 107 L.T. 143

*Parfitt*²⁷⁷: 'I do not doubt that the decision was correct, but the judgment of Joyce J. is so tersely reported that no help can be derived from it beyond the mere fact of the decision'. It is impossible to fit it into any category.

The next decision, *Scottish Insurance Commissioners v Church of Scotland*,²⁷⁸ was again on the applicability of the National Insurance Act 1911 but is of considerable interest as it involved the court in considering the status of assistant ministers where the court found no difficulty in holding that they were office holders in the same way as curates in the Church of England had been held in *In Re Employment of Church of England Curates (above)*. The analysis of Lord Kinnear, who gave the leading judgement in the Court of Session was that the presbytery licences:

the person named to preach the Gospel of Christ and to exercise his gifts as a probationer for the holy ministry. When a person so licensed is appointed to be assistant to a minister, I think that his authority to perform the duties that belong to that office does not arise from any contract between himself and the minister, or himself and the kirk-session or anybody else but arises from the licence given to him by the presbytery to exercise his gifts. He is, therefore, in my opinion a person who is in no sense performing duties fixed and defined by a contract of service

Although Lord Kinnear mentioned office holders the decision in fact rests on both the underlying concept of a spiritual relationship with the opening remarks of Lord Kinnear on 'preaching' and 'holy ministry' but also, as the very fact of these leads him to look to

²⁷⁷ [1984] Q.B. 368 at 376

²⁷⁸ [1914] SC 16

the licence as the source of the minister's authority, to an instance of construction of terms. So here are three issues tangled up without much analysis of what a spiritual relationship is. In addition, Lord Kinneir saw no difference in relation to this question between the position of the Established Church in Scotland ²⁷⁹ and that of the United Free Church. He observed that:

The status of the classes of persons in question seems to me to depend upon the same considerations in both Churches, and I do not think that from either side of the bar it was suggested that any sound distinction could be taken between them.²⁸⁰

This is distinctly unhelpful as it does nothing to clarify whether there is fact a distinction between the positions of different clergy based on establishment in Scotland. ²⁸¹

This case emphasises the need for a clear identification by the courts of what is meant by 'spiritual' as we emphasised earlier²⁸² and also takes us forward to Chapter Five where we consider the extent to which the ecclesiology of each church bears upon whether there is an employment relationship.

²⁷⁹ For the Established Church in Scotland see the remarks of Lord Mackay in 'Does Establishment have a Future?' (2013) Law and Justice 7,16

²⁸⁰ At p.22.

²⁸¹ The court also considered the status of student missionaries and lay missionaries. There are some remarks here of Lord Kinneir which are helpful in distinguishing between ministers and those who hold other positions in the church especially in connection with the proposed definition of a minister in Chapter One at 2.2.4.

²⁸² See the proposed definition of spirituality at 2.2.1. above.

6. The dawn of modern employment law and its effect on the status of ministers of religion

We actually need to begin before the dawn with a case decided in 1937. *Rogers v. Booth*,²⁸³ was a decision involving compensation for injury at work by a lieutenant in the Salvation Army. She claimed against the General of the Salvation Army that that she was entitled to compensation for an injury suffered in the course of her duties and brought her claim under the Workmen's Compensation Act 1925 (being the legislation then in force) as she had a 'contract of service'. Here we have the first case involving an actual claim by a minister where their employment status was decisive in the success of that claim. It was held that she was not an employee. The Court of Appeal did, however, unlike in the previous case but very much like Lord Sumption in *Preston*, subject the constitutional documents of the Salvation Army to detailed analysis together with the forms used when officers were appointed. It did not find that these helped the contention that there was a contract of employment. For example, the Orders and Regulations for Officers of the Salvation Army stated (at II.I) that

The Salvationist, having accepted the principle of leadership and placed himself under the guidance of those whom he believes to be his leaders by divine appointment, should render to those leaders a constant and cheerful obedience. He should take his instructions as from God and obey them without controversy or complaint

²⁸³ [1937] 2 All E.R. 751

These and other documents went to great lengths to make it clear that the arrangement was voluntary. Indeed, on being granted her commission the claimant had signed a document which included her assent to a question which ran: 'Do you understand and agree that there is no contract of service and that your position will be that of a voluntary co-operator in the Army's work for God' As Rivers points out ²⁸⁴ 'the decision in this case 'was not based on any presumption but on a careful review of the evidence concerning the nature of the Salvation Army and the status of its officers'.

In this respect the reasoning in *Rogers v Booth* is firmly based on the 'construction of terms' category and in essence is no different from that of Lord Sumption in *President of the Methodist Conference v Preston* in 2013. One could also argue that it can be considered the first modern decision in this area and deserves more prominence than it has been given.

It is worth noting that the Salvation Army operates to some degree under two statutes, the Salvation Army Acts of 1929 and 1980, passed in order to amend its constitution. It may have been that in *Rogers v Booth* that the court, bearing in mind that at the date of this case the first statute had been passed only eight years previously, was keen to respect the autonomy of the Salvation Army and so held that this piece of statute law did not apply to it.

In all the cases except *Rogers v Booth* there is a clear emphasis on the fact that an ecclesiastical office is held and an acceptance that as this then leads to the relationship being spiritual there is no contractual relationship. Thus the starting point is the office and

²⁸⁴ *The Law of Organised Religions* (OUP 2010) at 113

not the spiritual relationship. Moreover, there is no mention of the spiritual nature of the post precluding an intention to create legal relations. *Rogers v Booth* was simply a case of construction of documents. It is suggested that it represented a better approach as it looked at the reality of the situation rather than coming to the situation with a preconceived notion about the status of office holding. This pattern was continued in the next case.

*Barthorpe v Exeter Diocesan Board of Finance*²⁸⁵ was the first case involving a claim to employment status in order to be able to claim rights under employment protection legislation. It did not concern a minister but the holder of the office of Reader in the Church of England. The complainant was licensed by the Bishop of Exeter to exercise the office of reader in the Church of England in his diocese under the control of the diocesan authority. What is called the 'office of reader' is now governed by Canon E4 (1) which provides that:

A lay person, whether man or woman, who is baptized and confirmed and who satisfies the bishop that he is a regular communicant of the Church of England may be admitted by the bishop of the diocese to the office of reader in the Church and licensed by him to perform the duties which may lawfully be performed by a reader according to the provisions of paragraph 2 of this Canon or which may from time to time be so determined by Act of Synod

²⁸⁵ [1979] ICR 900

These duties include, by Canon E4 (2) to: visit the sick, to read and pray with them, to teach in Sunday school and elsewhere, and generally to undertake such pastoral and educational work and to give such assistance to any minister as the bishop may direct.

However, it is also possible to be a stipendiary reader and the complainant subsequently obtained such a post for a period of one year. This appointment was not renewed and he complained that this failure to renew amounted to unfair dismissal under the then law, the Trade Union and Labour Relations Act 1974. He had received a document headed 'Terms of reference for employment' stating his annual salary, his leave entitlement and that 'for the purpose of National Health Insurance contributions the status will be that of employed' but, as he said, 'this was the best I could get by way of a contract of employment.'

The EAT held that:

We accept that the mere licensing of a lay reader, most of whom are not paid, does not create a contractual relationship and certainly not one of service. Where, however, there is an appointment of a person to a full-time stipendiary post it seems to us that it is for the industrial tribunal to decide whether there was a contract (and, as part of that necessarily, with whom) and, if so, whether such a contract is one of service or otherwise

On this basis they held that the complainant was an employee and remitted his claim to the Industrial Tribunal to decide the case on its merits. One could see the case as a simple one, easily distinguishable from the others that we are considering, in that the complainant appeared to quite clearly have a contract of employment and was not an ordained minister. However, he conceded, surprisingly perhaps, that he was the holder of an ecclesiastical office in the same pastoral category as an assistant curate. This then brought the court

directly to the decision of Parker J. *in Re National Insurance Act, 1911. In Re Employment of Church of England Curates* where we saw that Parker J. had held that the fact that there was no contract of service meant that there was no contract at all. Here the EAT had no difficulty in holding that:

With deference to the judgment of Parker J., we doubt whether the mere fact that a curate is licensed by the bishop and appointed by him on the nomination of an incumbent necessarily means there can be no contract at all. It may be difficult to establish who is the other contracting party, but we are not satisfied that clergy when working within the framework of the Church cannot be engaged under a contract.

Although Slynn J. did not use the term 'spiritual relationship' he did hold that the mere fact that the applicant may have been an office holder and the fact that he performed pastoral work (which can be considered an aspect of a spiritual relationship²⁸⁶) did not exclude the existence of a contract. As he pointed out:

Merely to say that someone holds an office does not seem to us to decide the question which has to be decided under this Act. Some office holders may well not be employed under a contract of service. It does not follow that an office holder cannot be employed under a contract of service. The question, as we see it, under the Act is whether the office he holds is one the appointment to which is made by, or

²⁸⁶ Note the definition of a spiritual relationship offered at 2.2.1. in this chapter.

is co-existent with, a contract of service. If it is, then he is entitled to the protection of the Act of 1974.

In terms of our taxonomy this case does not attach importance to office holding *per se* nor does it refer to a spiritual relationship. If anything, it rests on the construction of the terms of the relationship because the Industrial Tribunal was directed to examine the actual merits of the case. Moreover, the clear distinction drawn between a contract *per se* and a contract of employment makes this a remarkably adventurous judgement. If the law had developed from this decision and the previous one in *Rogers v Booth* we might well be further forward today.

7.Parfitt and the presumption against intention to create legal relations.

7.1. Parfitt itself

In fact, the law did not develop along these lines but arguably became unnecessarily obsessed with the question of whether a presumption against an intention to create legal relations applied in cases where there was an alleged contract between a minister and his/her church. This occurred in *President of the Methodist Conference v Parfitt*²⁸⁷

The applicant was admitted as a minister in full connexion (in RC and Anglican terms he was ordained) of the Methodist Church in 1958 and served on a number of circuits. In 1980 disciplinary charges were brought against him which were substantiated and he was relieved of his clerical duties. Having exhausted his internal remedies, he made a complaint of unfair dismissal to an industrial tribunal whereupon the preliminary issue of whether he was an employee immediately arose. The interest of this case is that it was the first detailed

²⁸⁷ (1984) 2 WLR 84

consideration of this area by the courts, with the exception of *Rogers v Booth*, where the minister concerned was not a minister of the established Church of England or Scotland and, whether or not as a consequence of this, the concept of office holding as a barrier to employment status was not the issue. Instead the crucial issues were the existence of a spiritual relationship linked to an intention to create legal relations.

Dillon LJ, who gave the leading judgement in the Court of Appeal, held that: 'the courts have repeatedly recognised what is and what is not a contract of service and I have no hesitation in concluding that the relationship between a church and a minister of religion is not apt, in the absence of clear indications of a contrary intention in the document, to be regulated by a contract of service.'²⁸⁸ For the first time we meet the presumption against an intention to create legal relations. May LJ gave a concurring judgement but did not expressly refer to a presumption against an intention but instead held that there was no intention on the facts which is not actually the same thing as saying that there was a presumption against this.

The Court reached its decision by an examination of The Constitutional Practice and Discipline of the Methodist Church (the C.P.D.) looking at such matters as the priesthood of all believers,²⁸⁹ and the payment of a stipend. Here they found that according to a pamphlet headed 'The Methodist Ministry':

No minister is paid for his services. He cannot be paid for that which he gives without measure in whole-hearted devotion to Christ and his church but, as he gives himself,

²⁸⁸ At 376-377

²⁸⁹ See Chapter Five for a detailed examination of this notion.

leaving no time or energy to provide for the material need of himself and his family, the church undertakes the burden of their support and provides for each man according to his requirements...'

This, although the court did not say so expressly, was clearly felt incompatible with the existence of a contract of employment.

Dillon LJ concluded that:

.. the spiritual nature of the functions of the minister, the spiritual nature of the act of ordination by the imposition of hands and the doctrinal standards of the Methodist Church which are so fundamental to that church and to the position of every minister in it make it impossible to conclude that any contract, let alone a contract of service, came into being between the newly ordained minister and the Methodist Church when the minister was received into full connection. The nature of the stipend supports this view.²⁹⁰

I find this passage unsatisfactory as Dillon LJ never spells out in terms precisely why the spiritual nature of the relationship is such an obstacle to a contract of employment. Why does the spiritual nature of the minister's functions and the spiritual nature of the act of ordination, coupled with the 'doctrinal standards of the Methodist Church' make a finding of a contract impossible? He does indeed analyse parts of the C.P.D. and it would be perfectly possible to argue convincingly that these provisions are incompatible with a contractual relationship²⁹¹ but it is difficult to see what the addition of the word 'spiritual' without analysis

²⁹⁰ P..275

²⁹¹ As Lord Sumption did in *President of the Methodist Conference v Preston* as we shall see below.

or explanation leads to. This underlines the need for some definition of a spiritual relationship such as was offered earlier in this chapter.²⁹²

In the next sentence Dillon LJ continues: 'In the spiritual sense, the minister sets out to serve God as his master; I do not think that it is right to say that in the legal sense he is at the point of ordination undertaking by contract to serve the church or the conference as his master throughout the years of his ministry'. This, with respect, misses the point. Many people with a profound sense of vocation would see their 'master' in the sense of who they serve, as their clients. One thinks, for example, of health care professionals. However, this does not stop them from having a 'master' in the employment sense of the word.

What Dillon LJ could have stressed, but did not, is, as Rivers points out,²⁹³ the spiritual nature of the ministry as one of vocation: 'the complete and lifelong call of God to exercise ministry in the church' in contrast to the element of reciprocity present in commercial contracts. I do not serve as a minister in order to acquire a benefit from someone else; I serve out of a sense of vocation. So, looking at the arrangements with regard to the stipend and the manse, the context in which they are provided is to enable the minister to exercise his or her ministry free from having to worry about how to support themselves or their family. Other professions, nursing being an obvious instance, are also those where one serves out of a vocation.

²⁹² At 2.2.1. in this chapter

²⁹³ In *The Law of Organised Religions* 115.

Emma Brodin²⁹⁴ criticises this decision on the ground that ‘there seems to be no sound policy reason to exclude an intention to create legal relations here as there is, for example, in arrangements between spouses’. This is undoubtedly true but the missing element here is the ecclesiology and autonomy of churches, which is dealt with later.

What is not, with respect, entirely helpful, are the attempts by both Dillon LJ and May LJ to suggest some circumstances where there could be a contract, if not one of employment. Thus, Dillon LJ acknowledged that: ‘it would be possible to draft a legally binding offer and a legally binding acceptance between the minister and the circuit which invites him, with enforceable clauses as to the stipend and the manse and its contents and an enforceable obligation on the part of the minister to hold a particular number of services’. It is not clear when Dillon LJ thought that this could take effect but he seems to be saying that to see the arrangement in purely bilateral terms leaves out the background against which ministers agree to serve and the church’s understanding of that relationship. It is not clear what this adds to the argument. Similarly, May LJ, having held that there was no contract as there was no intention to create legal relations, then observed that if he was ‘wrong about the nature of the relationship between Mr. Parfitt and the church, and a contract enforceable at law did come into existence between them, then nevertheless I cannot accept that this was a contract of service.’ One is then entitled to ask, then, what type of contract is it? May LJ does not supply the answer.

It is suggested that a better way forward would have been to emphasise the lack of reciprocity in the arrangements and thus the lack of any bilateral element. Put simply, could

²⁹⁴ ‘The Employment Status of Ministers of Religion’ (1996) 25 ILJ 211 at .214.

it not have been said that there was a lack of a *quid pro quo*? What was the bargain? Should the decision have been based on the fact that the arrangement was not on the basis of the minister giving services in return for a stipend, a manse and so forth but that instead the minister just *gave* his service? In contract terms the issue was consideration and not intention. This point is important as it became the accepted wisdom as a result of this case that there was a presumption against intention to create legal relations stemming from the spiritual nature of the relationship when if the decision had been based on mixed fact and law and not law alone this case would have been in the 'construction of terms' category. This branch of the law eventually reached this conclusion, as we shall see, but it might have done do a good deal sooner if this approach had been adopted.

Applying our taxonomy, this case, above all others, is the one where the spiritual nature of the relationship was the paramount factor leading to the case being placed in the 'presumption against intention to create legal relations' category. Dillon LJ expressly referred to the spiritual relationship as the ground of his decision and May LJ, although never using the word 'spiritual' implicitly recognised that this was why there was no intention to create legal relations.²⁹⁵ However, it must be said that although the case has been cited as authority for the proposition that there is a presumption against intention this only appears in the judgment of Dillon LJ.

Finally, Dillon LJ recognised, and this is a matter of some practical importance, that there could be binding contracts in relation to some ancillary matters such as the compulsory superannuation scheme and the obligation on trainees to repay a proportion of the expense

²⁹⁵ The third member of the Court of Appeal, Donaldson MR simply concurred with the judgements of both the other Lords Justices.

of their training if they do not remain in the ministry for at least 10 years. However, these would not of course be contracts of employment.

7.2 The effect of *Parfitt* in subsequent decisions

7.2.1 *In decisions involving a non- Christian Church*

One of the few cases to involve a minister of a non-Christian religion as well as being the first post-*Parfitt* decision is *Chishti v Keighley Muslim Association*²⁹⁶ a decision of an Industrial Tribunal. An imam was dismissed and claimed unfair dismissal. It was held that he was an employee and this is very much a 'construction of terms' case as the tribunal analysed the documents governing the applicant's relationship with the mosque and held that on the facts they created a contract. Reliance was placed on the point made by Slynn J. in *Barthorpe* that pastoral work is not inconsistent with a contract. However, the Tribunal then went on, having analysed the terms of the contract, to hold, following *Parfitt*, that:

It was a question of looking at the individual facts of the case. The conclusion that we come to in this particular case is that there was an intention to create legal relations here...²⁹⁷

These two sentences are, with respect, inconsistent: if one analyses the facts then there is no room for any presumption. It is suggested that the ratio of this case is in fact the first sentence, in line with *Barthorpe*, and not the second, which follows *Parfitt*. This decision also shows the confusion created by the move away from the construction of terms approach, which was taking shape in *Rogers* and in *Barthorpe*, with the sudden imposition of a presumption in *Parfitt*.

²⁹⁶ (1985) WL 1213962

²⁹⁷ At para. 22

The next case is of particular interest as it involved an analysis of the duties performed by the priest to see if they were spiritual. In *Santokh Singh v Guru Nanak Gurdwara*²⁹⁸ the appellant was a Granthi or priest at a Sikh Temple whose employment had been terminated and who claimed unfair dismissal. Neill LJ pointed out that: 'There is no ordination into the priesthood of the Sikh religion nor is there any special qualification for being a priest' and so the court had to examine his duties. The Industrial Tribunal (IT), whose reasoning the CA adopted, broke the duties down into three categories: 'some are manifestly spiritual and ceremonial; some are ancillary to those religious functions, such as teaching; some are more obviously secular'.²⁹⁹ In the first category was the daily leading of prayer, the second included music for the services and the third comprised a number of duties such as instruction in music and visiting colleges and schools to lecture on Sikhism. On this basis the IT held that he was a priest as he carried out duties in the first two categories. Here we see the advantage of a clear understanding, if not definition, of spirituality.³⁰⁰

If we apply this to the definition of a minister of religion put forward in Chapter One we see that the applicant was in a formal position of leadership within his own religious community as he led prayers. Whether he carried out other duties normally associated with a minister of religion such as visiting the sick is not clear but it is not necessary to carry these out to be a minister as our definition only says that he 'may' carry these out.

On the actual question of employee status, the Court of Appeal held that the IT had been

²⁹⁸ (1990) WL 754370

²⁹⁹ At p. 4

³⁰⁰ See 2.2.1. above.

correct in law in deciding that the claimant was not an employee and based this on what amounted to two reasons:

- (a) Construction of terms. Neill LJ, who gave the only reasoned judgement and with whom the other Lords Justices agreed, said of the IT: 'In accordance with the guidance given by the House of Lords in the Davies case, they examined and construed the constitution'.³⁰¹
- (b) The lack of any intention to create legal relations. Neill LJ approved of the fact that the IT 'took account of the principle in *Parfitt* that this presumption had to be rebutted.'³⁰²

Two points need to be made here. First, this seems to be the wrong way round. If indeed there is such a presumption then this needs to be looked at first and only if it is rebutted so that there *is* intention should one construe the terms of the contract. Secondly, the decision itself is surprising as the IT had found as a fact that the applicant's duties were contained in a document headed: 'Employees of the Sikh Temple', he received pay taxed at source and when he left he was sent a P45. In addition, the IT found that there was substantial control by the Temple of the appellant's activities. This does not look like a real construction of terms case but one where although the duties were examined they were labelled as spiritual and this led inexorably to the conclusion that there was no intention to create legal relations.

Finally the Temple, who were the defendants, had argued that a close parallel between Christian churches and Sikh temples should not be drawn as each Sikh temple was autonomous and the Sikh church as a whole was not a centralised body. Instead each temple negotiated its own terms with those whom it employed. Although Neill LJ described

³⁰¹ P.5

³⁰² P.6

these and other arguments as 'powerful' he did not refer to them in detail and clearly did not find this point convincing.

The last of this trilogy of cases, *Birmingham Mosque Trust Ltd. v Alavi*³⁰³ concerned a claim for unfair dismissal by a professor of Islamic studies who was director and khateeb of the Birmingham Central Mosque. The IT, having first undertaken a similar analysis of the applicant's duties as in *Santokh Singh*, found that: 'He is basically an academic who undertook, as part of his duties with the [trust] certain priestly work'³⁰⁴ and held that he was an employee. However, Wood J., in the EAT, held that 'on the facts of the present case it seems to us that almost the entirety of the applicant's functions at the trust were connected with the Islamic religion.'³⁰⁵ The case was remitted to the IT as it had failed to apply *Parfitt* correctly. As Wood J. put it: 'they allowed those matters which are based on a religious appointment to be deemed to be obligations related to employment rather than related to the appointment as a religious person.'³⁰⁶ This looks very much like an extension of *Parfitt* so that 'obligations of a religious person' might negate the finding of a contract rather than lead to a presumption against it. If anything, the case has to be part of the 'intention to create legal relations' category. It is surprising, incidentally, that *Chishti v Keighley Muslim Association*,³⁰⁷ which also involved a mosque albeit here the appointment of an Imam, appears not to have been cited. However, in view of what we have argued was a confused approach by the Industrial Tribunal in that case, it is doubtful if this would have been

³⁰³ (1992) ICR 445

³⁰⁴ At p. 440

³⁰⁵ At. p. 444

³⁰⁶ At. p. 444

³⁰⁷ (1985) WL 1213962

especially helpful.

7.2.2. In Decisions Involving a Christian Church

The above case at least showed a consistency of approach in that *Parfitt* was applied albeit unsatisfactorily. The striking feature of the speech of Lord Templeman in the next case, *Davies v Presbyterian Church of Wales*,³⁰⁸ was the way in which the decision in *Parfitt* was ignored.³⁰⁹ This was the first time that this issue was considered by the House of Lords. The applicant was ordained as a minister of the Presbyterian Church of Wales in 1974 and was inducted into a full-time paid pastorate in accordance with the church's book of rules. In 1981 he was dismissed from his pastorate in accordance with the provisions of the book of rules and made a complaint of unfair dismissal to an industrial tribunal. As with *Parfitt* he succeeded at the Industrial Tribunal but the EAT and the Court of Appeal dismissed his claim holding that he was not an employee and the House of Lords agreed.³¹⁰

However, although Lord Templeman appears to be construing the terms of the relationship he does not in fact do so and indeed says that the question is one of law and not fact. What is not clear is precisely what laws were involved. Lord Templeman says that "it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual' without saying when this may be. Once again, we see the need for a clear definition of spirituality.

³⁰⁸ (1986) 1 WLR 323. All the other Lords agreed with him.

³⁰⁹ This is even more so given that proceedings in *Davies* had been adjourned pending the decision of the Court of Appeal in *Parfitt*.

³¹⁰ In fact the claim was stayed pending the decision in *Parfitt* and, when this was known, leave to appeal to the House of Lords was successfully sought.

The applicant's case was that, in Lord Templeman's words: 'when he was appointed pastor he entered into a contract with the church on the terms and conditions specified in the book of rules'. Lord Templeman saw this as a question of law and not fact: 'whether upon the true construction of the book of rules a pastor of the church is employed and is under a contract of service.' There was no attempt to distinguish between a contract and a contract of employment.

The applicant's claim was rejected on the basis that:

the applicant cannot point to any contract between himself and the church The book of rules does not contain terms of employment capable of being offered and accepted in the course of a religious ceremony. The duties owed by the pastor to the church are not contractual or enforceable. A pastor is called and accepts the call. He does not devote his working life but his whole life to the church and his religion. His duties are defined and his activities are dictated not by contract but by conscience. He is the servant of God.³¹¹

What is unclear is how this fits with his earlier statement that, in effect, a spiritual relationship does not by itself prevent the existence of a contract. What he describes above are spiritual matters and they are said to negate the finding of a contract. As in *Parfitt*, we are tantalised; why, we ask, are these duties not enforceable? There is a hint that this is because of the spiritual nature of the relationship as he is 'the servant of God' which leads us back to where

³¹¹ This last sentence was aptly described as 'true for a believer but superfluous metaphor for a lawyer' by Lord Hoffman in *Percy* (para. 61).

we were before. However, the point made in relation to *Parfitt* that there can, in this case, even though contrary to biblical precedent,³¹² be two masters applies here too. This is not made clearer by Lord Templeman's digression into the realm of 'property rights'. . For in the next sentence he says that: 'If his manner of serving God is not acceptable to the church, then his pastorate can be ended by the church in accordance with the rules'. In that case surely the minister will have some redress? Not so in contract as Lord Templeman states that: 'The duties owed by the church to the pastor are not contractual'. He then goes on to cast the right in terms of property: 'The law imposes on the church a duty not to deprive a pastor of his office which carries a stipend, save in accordance with the procedures set forth in the book of rules. The law imposes upon the church a duty to administer its property in accordance with the provisions of the book of rules.'

The authority for this is stated as *Forbes v Eden*³¹³ yet as Rivers points out³¹⁴ the idea of casting rights of members of religious bodies in terms of property is really too narrow: why should it be necessary to show that a member of a religious body has a legal or equitable interest in the church's property? Taken to its fullest extent Lord Templeman's words could make a significant difference to the position of ministers as they would have a proprietary right in their stipend, for example. However, the language of property law remedies seems inappropriate here save perhaps for an injunction which can of course be claimed anyway where the matter is contractual.

³¹² See Mt. 6:24

³¹³ (1867) L.R. 1 H.L. Sc. & Div. 568. This case is considered in detail in Chapter Four at 7.2.

³¹⁴ In *The Law of Organised Religions* p.89

As we argued in relation to *Parfitt* and as Woolman argues here³¹⁵: 'Surely the issue was a mixed question of fact and law and not a pure question of law.' There was insufficient analysis of exactly why Mr. Davies could not claim unfair dismissal and it is difficult to see how this decision takes us forward. It is in fact noteworthy, as Woolman points out, that all six laymen who examined the issue in both cases³¹⁶ thought there was a contract of service between a minister and his church. They clearly saw the matter in purely factual terms: as Woolman says: 'A minister pays income tax under Schedule E, has his National Insurance contributions deducted at source and has a variety of holiday and other entitlements'. Yet despite all this the matter may not be so straightforward, as we shall see.

A final point in relation to both *Parfitt* and *Davies* is that although in *Davies* there is a mention that the minister held an office and in *Parfitt* the court referred to the CPD of the Methodist Church with its reference to the office of minister, there was no suggestion that this precluded a contract. The fact that they held an office, albeit what we have called an informal one as distinct from the formal office holding of the Church of England, could have been significant but was not.

This is the most awkward case of all to fit into our taxonomy. There was an emphasis on the underlying issue of a 'spiritual relationship' but this was not developed and there was no attempt to link the existence of such a relationship to a presumption against intention to contract. Again, there was a mention of the terms but this was not subjected to any detailed analysis. There is simply the bald statement that: 'The book of rules does not contain terms

³¹⁵ 'Capitis deminuto' (1986) 102 (1) LQR 356

³¹⁶ In the Industrial Tribunal and the EAT in *Parfitt* and in the Industrial Tribunal in *Davies*.

of employment capable of being offered and accepted in the course of a religious ceremony'. If anything, this must be a construction of terms case because, as Woolman says: 'Lord Templeman found that it was not possible to fashion a contract out of the book of rules.' But one might say that he did not try very hard!

One conclusion that can be drawn from these three cases involving non-Christian religions is that the fundamental principles are the same as with Christian religions. This is surely right as the basic principles, such as the existence of a spiritual relationship and the finding of a contract, are the same.

The first case involving an unfair dismissal claim by a minister of the Church of England was *Diocese of Southwark and others v Coker*³¹⁷ involved a claim by an assistant curate in the Church of England, where, as one might expect, the issue of an ecclesiastical office was raised along with the question of whether the relationship as spiritual precluded a contract and the linked, but separate, question of a presumption to create legal relations in these cases.

The facts were familiar: Rev. Coker, a priest of the Church of England, held two stipendiary positions as an assistant curate in parishes in the Diocese. The applicant failed to secure a parish of his own and when his second appointment was terminated he was removed from the diocesan pay-roll. He claimed unfair dismissal and the matter came before the courts on the preliminary issue of whether he was an employee. It is noteworthy that this was the first case which raised the question of whether a minister of the Church of England, as opposed

³¹⁷ (1998) ICR 140

to a minister of a non-established church, had the status of an employee to claim unfair dismissal under s.153 (1) of the Employment Protection (Consolidation) Act 1978 (the predecessor of the Employment Rights Act (ERA) (1996), the statute currently in force)). S. 153(1) is in the same terms as s.230 (1) of the ERA.

Mummery LJ in the Court of Appeal, with whom the other judges agreed, simply applied the rule first enunciated in *Parfitt* that there was a presumption against intention to create legal relations and this was not rebutted.

He held that:

The legal implications of the appointment of an assistant curate must be considered in the context of that historic and special pre-existing legal framework of a church, of an ecclesiastical hierarchy established by law, of spiritual duties defined by public law rather than by private contract, and of ecclesiastical courts with jurisdiction over the discipline of clergy. In that context, the law requires clear evidence of an intention to create a contractual relationship in addition to the pre-existing legal framework. That intention is not present, either generally or on the appointment of an assistant curate,

This looks as though the court treated the presumption against intention as in *Parfitt* as a rule that there is no intention, certainly in the case of Church of England clergy.

Yet we are entitled to ask: why? Mummery LJ says that there is no intention but is it not clear why this should be. There is no analysis of what might result if there was such an intention to contract. This again results from the failure to engage with what is actually meant

by 'spiritual relationship'. Clearly this case is within the 'intention to create legal relations' category but it is not clear why it should be.

Sandberg³¹⁸ argues that *Coker* is authority for saying that there is *no*³¹⁹ presumption for there being an intention to create legal relations in these cases but it is not authority for saying that *there is* a presumption against such an intention. It is, however, difficult to square this with Dillon's words in *Parfitt* quoted above that 'the relationship between a church and a minister of religion is not apt, in the absence of clear indications of a contrary intention in the document, to be regulated by a contract of service.' This is surely saying that there is a presumption and Mummery LJ in *Coker* by saying that 'the law requires clear evidence of an intention to create a contractual relationship' was using words to the same effect. The point is surely that, however one phrases it, the courts talk about the need for intention in these cases whereas in a case involving a commercial contract they would not do so.

One has to say that the group of three cases, *Parfitt*, *Davies* and *Coker*, are unsatisfactory. *Parfitt* introduced for the first time the idea of a presumption against intention as though it were settled law when it was not. *Coker* followed this. *Davies* is somewhat tenuously in the 'construction of terms' category, the other two in the 'intention to create legal relations' category. In all of them the idea that a spiritual relationship negates a contract is present but there was no analysis of what a spiritual relationship means.

³¹⁸ R. Sandberg 'The Employment Status of Ministers: A Judicial Retcon?' (2018) 13 Religion and Human Rights 27 at 33

³¹⁹ My italics here

It was time for the law to move forward, which it did in the *Percy* case.

8. Percy: a retreat from Parfitt?

Parfitt established that in these cases there is a presumption against an intention to create legal relations but this was overturned by the decision of the House of Lords in *Percy v Church of Scotland Board of National Mission (2005)*³²⁰. Mrs. Percy was an ordained minister of the Church of Scotland and was an associate minister of a parish in Angus. It was alleged that she had had an affair with an elder in the parish and an enquiry was set up to investigate. It found that there was a case to answer and preparations for a formal trial were put in hand. However, at a mediation meeting she was counselled to resign as a minister and this she did.

She claimed that she was the victim of sex discrimination contrary to the Sex Discrimination Act 1975 on the basis that in similar circumstances the church had not acted against male ministers who had been known to have had extra marital sexual relationships in similar circumstances. The facts were never found by the courts as the case was fought on the preliminary issue of whether she was entitled to claim.

It is essential to be clear that her claim was not that she was an employee with a contract of employment or service as defined by s.230 (1) of the ERA 1996. If she had claimed unfair dismissal this would have been necessary but where the claim is that there has been unlawful discrimination then it is only necessary to show that there is a contract personally to execute work. This was concept was explained in Chapter Two and it is only necessary to

³²⁰ UKHL 73. See F. Cranmer and S. Peterson 8 Ecc LJ 392 – 405 for an account of this decision.

add here that at the time this was governed by section 82(1) of the Sex Discrimination Act 1975 and now arises under S.83 (2) (a) of the Equality Act 2010.

Her claim involved four issues:

- (a) The extent to which Helen Percy was an office holder and the significance of this. We have discussed this case in relation to office holding in Chapter Two³²¹ although we shall touch on it again here.
- (b) The extent to which she was a worker and the relevance of the existing case law that there is a presumption against legal relations. This is the one area which we shall consider here in detail.
- (c) The applicability or otherwise of Article IV of the constitution of the church as set out in the Church of Scotland Act 1921 which was concerned to declare the exclusive jurisdiction of the church in certain matters. This is discussed in Chapter Four³²².
- (d) Assuming that she did have a contract, who was it with? We considered this in Chapter One.³²³

8.1 The presumption against an intention to create legal relations

The essential point is that the HL unanimously held that there was no presumption against an intention to create legal relations in these cases and to the extent to which they held

³²¹ See pps. 47-48

³²² See 6.2.

³²³ See Chapter One, 2.3.

otherwise *Parfitt* and *Coker* must be taken to be overruled. So Lord Nicholls of Birkenhead said;

The context in which these issues normally arise today is statutory protection for employees. Given this context, in my view it is time to recognise that employment arrangements between a church and its ministers should not lightly be taken as intended to have no legal effect and, in consequence, its ministers denied this protection³²⁴

All the other Law Lords agreed although Lord Hoffman held that although there was intention it was intention to create an office and not a contract.

In reaching this conclusion their lordships analysed the details of Ms. Percy's appointment and so it is clear that this case falls within our 'construction of terms' category and not that of a spiritual relationship. The exception is Lord Hoffman who would place it in the office holder category.

Lady Hale saw no value in the notion of a 'spiritual relationship' between a minister and his or her church as there were other professions where 'higher principles', which she equated to a 'spiritual relationship' were relevant.

The nature of many professionals' duties these days is such that they must serve higher principles and values than those determined by their employers. But usually there is no conflict between them, because their employers have engaged them in

³²⁴ At para. 26.

order that they should serve those very principles and values. I find it difficult to discern any difference in principle between the duties of the clergy appointed to minister to our spiritual needs, of the doctors appointed to minister to our bodily needs, and of the judges appointed to administer the law, in this respect.

Although on the surface this may seem perfectly reasonable it misses the point made by Rivers in relation to *Parfitt*:³²⁵ the spiritual nature of the ministry as one of vocation: 'the complete and lifelong call of God to exercise ministry in the church' in contrast to the element of reciprocity present in commercial contracts.

It is important to stress that *Percy* held that the courts are neutral on the question of intention to create legal relations. As a consequence of this it will still be open to a court or tribunal to hold that a minister of religion is an office holder rather than a minister of religion.

Alternatively, it might, in line with *Percy*, hold that a minister is a worker under s.230 (3) of the ERA 1996 but not an employee under s.230 (1). What *Percy* did not do is hold that there is a presumption that there is a contract in these cases.

8.2. Exclusion of the jurisdiction of the courts

Lord Hope gave a further reason for abandoning the presumption against intention. He held that its effect would be to enable the parties to contract out of the provisions of the Sex Discrimination Act, and this was prohibited by s.77 of this Act. As he put it:

³²⁵ In *The Law of Organised Religions* 115. Note here the definition of spirituality offered above at 2.2.1.

By invoking the proposition that it must be positively established that there was an intention to create a binding contractual relationship enforceable in civil law.....the respondents are seeking to achieve the same result by another route ³²⁶

Surely this is not so. What is prohibited by what is now s.142 of the Equality Act 2010 is where the parties have made a contract and that contract then seeks to exclude, for instance, the provisions of the Equality Act so as to enable discrimination to be lawful. Thus s.142 (1) states: 'A term of a contract is unenforceable against a person in so far as it constitutes, promotes or provides for treatment of that or another person that is of a description prohibited by this Act.' Yet the presumption, if applied, would mean that there was no contract at all.

If Lord Hope's view prevails then the same point would apply to claims for unfair dismissal as s.203(1) of the ERA 1996 provides that: 'Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports:

(a) to exclude or limit the operation of any provision of this Act'. This point is considered further below.³²⁷

8.3. The effect of the Equal Treatment Directive

The Equal Treatment Directive³²⁸ states that the purpose of the Directive is to put into effect the principle of equal treatment for men and women as regards, for example, working

³²⁶ Para. 107

³²⁷ At 10.1.

conditions which here includes dismissal. Under the *Marleasing*³²⁹ principle when a court is called on to interpret national law it must do so as far as is possible in the light of the wording and purpose of the Directive and the House held that this meant that Mrs. Percy should, if at all possible, be within the scope of the Sex Discrimination Act. In addition, this reinforced the conclusion of the House that the provision of a remedy for unlawful discrimination is a civil matter and not a spiritual one and accordingly the jurisdiction of the civil courts was not excluded by Article IV of the constitution of the church as set out in the Church of Scotland Act 1921.³³⁰

It is important to emphasise that this particular reason for holding that there was worker status to bring a discrimination claim would not apply, for instance, to claims for unfair dismissal which are not governed by an EC Directive and derive from UK law.

8.4. Assuming that there was an intention, was there a contract at all?

The question was really whether there was sufficient certainty in the arrangements to amount to an agreement. The House held that there was, on the basis of the clear documentation provided to Helen Percy when she was offered an appointment as an associate minister. There were clauses dealing with aims and duties of the post, length of appointment, salary, and other matters. From this a clear picture of a contractual relationship emerged. As Lord Scott pointed out, if her salary was withheld then she would surely have been able to sue for non-payment. There was an interesting small point that may well be significant later: Helen Percy was appointed as an associate minister. Ministers are

³²⁸ Directive 76/207/EC

³²⁹ *Marleasing SA v La Comercial Internacional de Alimentacion SA* (1990) ECR I-4135

³³⁰ For a strong argument that the courts should not have claimed jurisdiction in this matter see Peterson in 8 Ecc LJ pps. 398 – 405. This matter is considered in detail in Chapter Four at pps. 147-151.

appointed differently and Lord Hope took this point. He observed that associate ministers are appointed by the Parish Re-appraisal Committee, a central body, on terms defined in writing (see above) whereas the process of appointment of ministers is dealt with by the presbytery. It is therefore open to a future court to hold that ministers, as opposed to associate ministers, do not have a contract for services.

This is the most fascinating case of all in this area with the meticulous and detailed examination of all the issues by the House. It is clearly an instance of the 'construction of terms' category as, apart from Lord Hoffman, the House held that Ms. Percy was a 'worker' and not an office holder and the idea that there is a presumption against legal relations was firmly put to rest. Thus, the way was cleared for an examination of the actual terms of the relationship. The idea of a spiritual relationship was not a prominent feature of any of the speeches except for that of Lady Hale who, as we saw, attached little or no importance to it. Does this then mean that the end of the presumption has resulted in there being no distinguishing feature of the relationship between ministers and their church so that it is viewed in the same way as any other relationship that simply has to be analysed according to its terms? We shall see if later cases have taken this view.

8.5. The application of Percy

The effect of the *Percy* decision was to leave the position of ministers of religion in an unfortunate kind of limbo: provided that they had a contract, they could have rights under discrimination law³³¹ but not necessarily under other parts of employment law, notably unfair

³³¹ The *Percy* decision seems to be accepted as conferring 'worker status' on the clergy so enabling them to claim for unlawful discrimination. See, for instance, *Rev J Gould v Trustees of St John's Downshire Hill* (2017) UKEAT/0115/17/DA where this was accepted without question.

dismissal. This gap was plugged, for a few clergy at least, by this decision in *New Testament Church of God v Stewart*.³³²

We have already met this case in Chapter One in connection with the identification of an employer and will consider it in Chapter Four when we examine the possible impact of Article 9 on this area. Here we are concerned with the substantive issue of employment status. The New Testament Church of God had removed the applicant from his church at Harrow after financial irregularities had been found after an audit. He claimed that he had been unfairly dismissed. The Court of Appeal³³³ decided, on the facts of this case, that the Rev, Stewart was indeed an employee of the church. There was detailed control over ministers of the Church, they were expected to report regularly to the national office and salary was paid from that office. Standards which were expected of a minister and guidelines as to what a minister was expected to do were clearly set out. A document following from a ministers' seminar held in 2003 stated that ministers were office holders and not employees but, and this was crucial, the fact that the government was reviewing the employment status of ministers of religion³³⁴ was, in the words of Pill LJ 'viewed with apparent equanimity and without reference to it being contrary to the appellant's religious tenets.

Pill LJ observed that the House of Lords in *Percy* had established that 'the fact-finding Tribunal is no longer required to approach its consideration of the nature of the relationship

³³² (2007) IRLR 178. See two discussions of this decision: in 9 Ecc LJ 239 (F. Cranmer) and in 2007 158 Law and Justice (J. Duddington).

³³³ (2007) EWCA Civ 1004

³³⁴ This referred to the Discussion Document put out by the Department of Trade and Industry which is considered in Chapter Two.

between a minister and his church with the presumption that there was no intention to create legal relations'. However, he was at pains to stress that earlier cases³³⁵ which had held on the facts that there was no intention were not overruled by *Percy*.

This decision was greeted with predictable enthusiasm by the Trade Union Unite, which has a Faith Workers Branch. Rachel Maskell, its national officer for the Not for Profit Sector, stated on its website³³⁶ 'This marks a historic judgement. Unite has been campaigning for 13 years for its clergy members to be recognised as employees and today's historic judgement concludes that debate. This ruling will finally entitle ministers to the same employment rights as all other employees..... Prior to this judgement a minister could lose their job, vocation and home without recourse. From today that can never happen again'.

This very sweeping interpretation of the decision was misplaced. The case did not decide a general principle that ministers of religion have employment rights as employees. It simply looked at this particular relationship and decided that it was contractual and so it clearly fell into the 'construction of terms category. This was emphasised in *Macdonald v Free Presbyterian Church of Scotland*³³⁷ Mr Macdonald was inducted as a Free Presbyterian Minister in 2001. He did not receive either a written contract of employment or a statement of terms and conditions. In January 2007 he was suspended temporarily and in May 2008

³³⁵ *President of the Methodist Conference v Parfitt* (1984) ICR 176; *Davies v Presbyterian Church of Wales* (1986) ICR 280; *Diocese of Southwark and others v Coker* ICR 140. In any event, as Pill LJ pointed out, the decision in *Davies* was one of the House of Lords itself and would have needed express overruling by the House in *Percy*, which did not happen.

³³⁶ www.unitetheunion.org

³³⁷ [2010] Appeal No. UKEATS/0034/09/BIUKEATS/0034/09/BI. See on this case F. Cranmer 'Clergy Employment, Judicial Review and the Free Presbyterian Church of Scotland' (2010) 12(3) *Ecc LJ* 355. Another aspect of this decision, the availability of judicial review, is considered in Chapter Four.

suspended *sine die* – in effect, dismissed – for refusing to comply with an order to apologise for criticising a fellow-minister in a book which he had written and circulated. His claim for unfair dismissal was rejected by an Employment Tribunal on the grounds that he was not an employee of the Church but an office-holder.

Lady Smith upheld the decision of the ET and dismissed the appeal but she also considered the possibility that a worker who was an office-holder might also be an employee.³³⁸ The duality of office-holding and an employer-employee relationship depended on the parties having had an intention to create legal relations. There was no rule either that all ministers of religion were employees or that they were *not* employees. In upholding the conclusion that Mr Stewart was an employee in *New Testament Church of God v Stewart*, Pill LJ had been careful to add that his conclusion did not ‘involve a general finding that ministers of religion are employees. Employment tribunals should carefully analyse the particular facts, which will vary from church to church, and probably from religion to religion, before reaching a conclusion.’³³⁹ There were no hard-and-fast rules about what features a relationship had to have before it amounted to a contract of employment but it would normally include the minimum of mutual intention to create a legally-enforceable relationship and sufficient control over the worker’s activities as to categorise him as a ‘servant’ – and the worker would be working in return for a salary rather than on his own account.³⁴⁰

³³⁸ *Per* Lord Hope in *Percy v Board of National Mission of the Church of Scotland* 2006 SC (HL) 1 para 87.

³³⁹ [2007] EWCA Civ 1004 at para 55.

³⁴⁰ *Ready Mixed Concrete (South East) Limited v Minister of Pensions & National Insurance* [1968] 1 AER 433.

Macdonald is a corrective to the assumption made by many³⁴¹ after *Percy*³⁴² and *Stewart v New Testament Church of God* that Percy involved what the applicant in *Stewart* described as a 'sea change' with the implication that clergy would be regarded as employees almost by default unless there was overwhelming evidence to the contrary. In this case, the Employment Judge had looked at the basis on which ministers, elders and deacons of the Free Presbyterian Church were ordained and concluded that there was no intention to create an employer-employee relationship. In effect the construction of terms approach prevailed.

9.A return to Parfitt or not?

9.1. Methodist ministers as employees?

The first major case following *Percy* was *President of the Methodist Conference v Preston*³⁴³ which showed that the *Parfitt* approach, that clergy were presumed *not to be* employees, was no longer good law whilst also showing that *Percy* did not decide that there was any presumption that they *were* employees.

The claimant was ordained as a minister of the Methodist Conference and was appointed superintendent minister of a circuit for a period of five years She subsequently resigned and made a complaint of unfair constructive dismissal. She won in the Court of Appeal³⁴⁴ on the

³⁴¹ See, for instance, the reaction of the Unite Union – fn. 298.

³⁴² *Percy v Board of National Mission of the Church of Scotland* 2006 SC (HL) 1.

³⁴³ (2013) UKSC 29

³⁴⁴ (2011) EWCA Civ 1581. Maurice Kay LJ also considered – and rejected – the possibility that Article 9 of the ECHR was engaged – See Chapter Four.

preliminary issue of whether she had a contract of employment. Maurice Kay LJ upheld the reasoning of the EAT³⁴⁵ that:

In our view the Claimant's contract was one of service. Once it is accepted that there is nothing in the Claimant's spiritual role which is inconsistent with her being an employee and once the question whether there was anything special about the nature of the Claimant's remuneration is decided all the indications point one way'

There was some surprise when the Supreme Court reversed this by a majority of 4:1 and held that she did not have a contract of employment. Lord Sumption, who delivered the main judgement, based his conclusions on the nature of the ministry as set out in the Church's Constitution and Standing Orders and held that the manner in which a minister was engaged was incapable of being analysed in terms of contractual formation because neither ordination nor admission to full connexion was contractual. He observed that 'In my view both courts below over-analysed the decision in *Percy* and paid insufficient attention to the Deed of Union and the standing orders which were the foundation of Ms Preston's relationship with the Methodist Church'. He went on to note that ministers received a stipend and a manse by virtue only of their admission into full connexion and ordination and ministers had no unilateral right to resign, even on notice. The rights and duties of ministers arose from their status under the Constitution of the Church rather than from any contract. On that basis, the Methodist ministry was a vocation and Mrs Preston's claim failed.³⁴⁶

³⁴⁵ [2011] EWCA Civ 1581 para. 27

³⁴⁶ See, for a detailed analysis, F Cranmer: 'Methodist Ministers: Employees or Office-Holders?' (2013) 15 Ecc LJ 3

Lord Hope,³⁴⁷ who agreed, held that what the court cannot:

ignore is the fact that, because of the way the Church organises its own affairs, the basis for the respondent's rights and duties is to be found in the constitutional provisions of the Church and not in any arrangement of the kind that could be said to amount to a contract

The key to unlocking what Lord Sumption said is that he treated the matter as a construction of terms one and it followed that he was construing the terms of an express contract with no room for implication of terms and did not apply the necessity test³⁴⁸ to see if there was room for implication. He said that:

whatever the legal classification of a Methodist minister's relationship with his Church, it is not sensible to regard it as implied. It is documented in great detail in the Deed of Union and the standing orders. The question is whether the incidents of the relationship described in those documents, properly analysed, are characteristic of a contract and, if so, whether it is a contract of employment. Necessity does not come into it³⁴⁹

Lady Hale dissented and, interestingly, based her decision partly on the ecclesiology of the Methodist Church: The Church 'holds the doctrine of the priesthood of all believers', so Ministers are not a class apart from any other member of the Church; rather, they are people

³⁴⁷At para. 34. Both he, and Lady Hale, were also members of the Appellate Committee in *Percy*.

³⁴⁸The most recent consideration by the Supreme Court of the principles by which terms should be implied was in *Marks and Spencer plc. v. BNP Paribas* (2015) UKSC 72 which of course came after its decision in *Preston*. The essence of the Supreme Court's judgement was that the traditional tests for implication of a term still applied and here necessity plays a significant part. See J. O'Sullivan 'Silence is golden: implied terms in the Supreme Court' (2016) 75(2) CLJ 199

³⁴⁹ At para. 12

who hold 'special qualifications for the discharge of special duties' and this led her naturally to hold that this was a reason in favour of employment status. In addition, she distinguished:

between being a minister – being in full connexion with the Methodist Church — and having a particular 'station' or 'appointment' within it. That distinction was not as fully explored in the courts below as it was with us. But once it is, in my view the position becomes clear. Admission to full connexion brings with it a life-long commitment to the Church and its ministry

Thus far this looks like a finding of no employment status but she continued:

that can be contrasted with the particular posts to which a minister is assigned...

The assignment is to a particular post, with a particular set of duties and expectations, a particular manse and a stipend which depends (at the very least) on the level of responsibility entailed, and for a defined period of time. In any other context, that would involve a contract of employment in that post ³⁵⁰

I personally find her analysis the more persuasive because it links the overall concept of being in 'full connexion' with the actual day to day reality of ministry in a particular post where it is easier to identify elements of employment status. However, what is noteworthy is what may be called the low-key nature of the judgements with the focus being very much on the 'construction of terms' approach whereas in *Percy* there was much discussion and analysis of the matter in the light of office holding and Church and State relations.

On the basis of our taxonomy this case is firmly in the category of construction of terms.

We return to this case below in the context of whether it is possible to contract out of employment protection legislation.

³⁵⁰ At para. 47

9.2 Anglican Vicars as Employees?

Preston was followed by *Sharpe v Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester*³⁵¹ which by contrast to *Preston* concerned a Church of England priest, Kevin Sharpe. The matter came before the EAT on the preliminary issue of Mr. Sharpe's employment status and so the facts were not in issue although in earlier proceedings it seemed that Sharpe's relationship with the local community broke down and he then resigned, accusing the Church of failing to support him. He claimed that his dog had been poisoned, his telephone lines cut and his tyres slashed because he was considered an "outsider". He presented two claims, one that he had suffered detrimental treatment, as a result of making protected disclosures, which involved 'worker' status, and that he was then constructively and unfairly dismissed involving employee status. It should be noted that, as Cox J. pointed out in the EAT,³⁵² the Ecclesiastical Offices (Terms of Service) Measure 2009 and the Ecclesiastical Offices (Terms of Service) Regulations 2009 postdated the appointment of Mr. Sharpe as Rector of the Benefice of Teme Valley South in 2005. This is important because, as we shall see in the Conclusion in Chapter Six, these pieces of legislation give certain rights to Church of England clergy which were not available to Kevin Sharpe, including the right to bring an unfair dismissal complaint to an Employment Tribunal. In the EAT Cox J. held that³⁵³ 'the focus should have been on whether there was an express contract between the Claimant and the Bishop, having regard to the rules and practices of the Church and the particular arrangements made with the Claimant.' This was exactly the approach of Lord Sumption in *Preston*. On this basis she conducted a detailed

³⁵¹ [2015] EWCA Civ. 399

³⁵² Para 21

³⁵³ (2013) UKEAT/0243/12/DM. Para 179

analysis of the relationship between Mr. Sharpe and the Church of England and found evidence indicating that Mr. Sharpe could be an employee.

In the Court of Appeal, the decision was that Mr. Sharpe was not an employee but it is very difficult to establish any clear ratio in view of the entirely different ways in which Arden and Lewison LJ, who gave the longest judgments, approached the matter.

Arden LJ first considered whether there was an express contract between Sharpe and the Church. This, in principle, was in line with the 'construction of terms' approach of Lord Sumption in *Preston* but, as we shall see, it was not followed through. Arden LJ set out in detail the reasoning of the Employment Judge on the relationship between the parties³⁵⁴ but did not herself subject them to the kind of detailed analysis that Lord Sumption had done in *Preston*. There were, in effect, two sets of documents to be considered: those relating to church law *per se* and what are known as the 'Bishop's Papers' which are to some degree a kind of staff handbook for Church of England clergy. Two particular points emerge:

(a) Arden LJ appeared impressed, as was the Employment Judge, with the respondent's argument that as the terms of the appellant's appointment were determined by church law, except for the remuneration package, there was no room for any negotiation and so no room for a contract. As Davies³⁵⁵ points out, however, 'the vast majority of employees have little opportunity to negotiate their terms and conditions of employment and are instead expected to sign a standard form contract on a "take it or leave it" basis'.

(b) She did not accept that the existence of the 'Bishop's Papers', which were certainly more capable of negotiation than church law, could be evidence of the existence of a

³⁵⁴ See in particular para. 44

³⁵⁵ 'The employment status of clergy revisited: *Sharpe v Bishop of Worcester*' (2015) ILJ 551 at 558

contract and so avoid the obstacle to the appellant's case mentioned in (a) above. For one thing some were merely guidelines and moreover this issue had not been pursued to any great degree in the ET and so the appellant was not entitled to a 'second bite of the cherry'.

Two other points on this judgment need to be mentioned:

The first is the seeming confusion between contracts per se and contracts of employment. This is seen, for example in the passage of Arden LJ's judgement where she discussed the relevance of the Bishop's Papers. She said that she was following the approach in *Ready Mixed Concrete v Minister of Pensions and National Insurance*³⁵⁶ which laid down indications for the existence of a contract of employment. Yet here we have jumped from asking if there was a contract at all to asking if there was a contract of a particular type: one of employment. Admittedly later on in her judgement ³⁵⁷ she did make this distinction but she dealt with the matter somewhat cursorily and, with respect, it is a pity that this two-step approach was not pursued throughout her judgement.

The second point is whether a contract could be implied and Arden LJ held that there could not be any 'space' for a secular employment contract because the whole relationship between the parties was governed by church law.³⁵⁸ So, as the employment judge had concluded:

³⁵⁶ (1968) 2 QB 497

³⁵⁷ Para. 81

³⁵⁸ Para. 90.

there was no agreement on other terms which might be terms of an employment contract because the duties imposed on Reverend Sharpe were not imposed on him by the bishop but were an incident of his office-they were set by ecclesiastical law

Although Arden LJ purported to follow Lord Sumption in *Preston* it is suggested that in reality she was saying something entirely different: Lord Sumption had used church law as the basis for seeing if there were terms which could form an express contract; Arden LJ used their existence for holding that there could not be a contract.

One wonders if Arden LJ is not reintroducing the concept of a presumption against intention to create legal relations because, as Davies points out: 'it is clear that she could not discern any 'secular legal space' for a contract of employment'.³⁵⁹ This is reinforced by her statement that: 'by accepting office as rector he or she agrees to follow their calling. They do not enter into an agreement to do work for the purposes and benefit of the Church as a commercial transaction'.³⁶⁰ This is in total contrast to Lord Sumption's words in *Preston* that:

in modern conditions, against the background of the broad schemes of statutory protection of employees, it should not readily be assumed that those who are engaged to perform work and receive remuneration intend to forgo the benefits of that protection, even where the work is of a spiritual character.

By contrast the judgement of Lewison LJ focussed on a lengthy exposition of what he called 'the interface between two parallel systems of justice (ecclesiastical and secular)'.³⁶¹ Having occupied nearly fifty paragraphs on this Lewison LJ then somewhat shortly disposed of the issues here by saying that:

³⁵⁹ 'The employment status of clergy revisited: *Sharpe v Bishop of Worcester*' at 561 and see the judgement of Arden LJ especially at paras. 90-91.

³⁶⁰ Para. 108

³⁶¹ Para. 134

In my judgment there are no features of the method of Reverend Sharpe's appointment, the duties imposed on him by law or the means by which he could be deprived of his benefice which would support the existence of a contract between him and either the bishop or the diocesan board of finance.³⁶²

He dismissed the Bishop's Papers as evidence of a contract by holding that they were merely a 'helpful procedural guide'. Although he expressly approved of Lord Sumption's words quoted in the discussion on *Preston* he did not analyse them in relation to the facts of *Sharpe*.

He made one final point of interest: that the existence of ecclesiastical courts and tribunals itself militates against a resort to civil courts as this would be 'to permit a collateral attack on a tribunal of competent jurisdiction from which there are already extensive rights of appeal.' This is an unhelpful observation because, had Lewison LJ analysed the powers and jurisdiction of the relevant ecclesiastical tribunals it would have become apparent at once that they gave no redress at all for the kind of harm that Mr. Sharpe had suffered.³⁶³

One concludes the discussion of *Sharpe* with the thought that this is an unfortunate decision: the judgements lack the clarity and decisiveness of those of the Supreme Court in *Preston* and a categorisation of this case under our taxonomy would place it somewhere between the office holding category and that of a presumption against intention and not in that of the construction of terms as in *Preston*.

There was also the issue of whether Mr. Sharpe was a worker for the purpose of the

³⁶² Para. 182.

³⁶³ The other judgement, that of Davis LJ, agreed with the other two in holding that there was no contract and, in particular that the Bishop's Papers were not relevant here.

whistleblowing provisions of s.43 K (1) of the ERA 1996 but, having held that the existence of a contract was needed to have the status of a worker, it inevitably followed that as Mr. Sharpe did not have this status his claim here failed also.

It should be noted that this case is also discussed in Chapter One in relation to the problems of identifying an employer, and in Chapter Five, in relation to the effect of the Canonical Oath of Obedience and its effect on powers of control.

9.3. Shepherds in Charge as Employees?

The latest reported case is *Celestial Church of Christ v Lawson*³⁶⁴ where the decision, like that in *Sharpe* is unsatisfactory. It involved a dispute between the trustees of a religious charity and the "Shepherd in Charge" of the charity's congregation, who, for our purposes, we can term a minister of religion and who was the defendant here. The dispute did not only involve employment law as one of the declarations sought was that the defendant (the minister) 'has ceased to be a trustee, member or employee of the Parish'.

The defendant together with others left another parish where the church had burnt down and founded a new one of which he later became 'Shepherd in Charge' and also a trustee. However, there were complaints about his conduct, for instance it was alleged that he had often used the pulpit as a platform for verbal abuse and attacks against members of the church and leadership of the Parish, and it was sought to remove him as a member of the church, a trustee and an employee.

HHJ Hodge QC, sitting as a Deputy Judge of the High Court noted that

the claimants' case is that the parties understood that the defendant would be paid for undertaking the role of shepherd in charge as an employee, that significant

³⁶⁴ (2017) EWHC 97 noted by F. Cranmer at (2017) 178 Law and Justice 127-129.

aspects of his role were subject to the supervisory control of the Parish, that the parties treated him as an employee in their arrangements for tax and National Insurance, and that the parties understood that it was necessary under the constitution that such payments should be made to the defendant as an employee

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Moreover, the defendant was subject to the overall control of the Parochial Committee.

HHJ Hodge held, however that 'the crucial features in the present case are the spiritual nature of the role of the shepherd in charge and the absence of any written contract or terms and conditions of employment between the Parish and the defendant'.³⁶⁶ The Shepherd was not subject to control in the way he carried out his spiritual duties and any payment he received was held to be 'consistent with the payment of a stipend to the shepherd in charge as the holder of an office rather than as an employee'.

Thus, the Shepherd was not an employee and so could be removed from office and so also ceased to be a trustee.

Although the court analysed the degree of control in respect of the Shepherd's employment status it is difficult to avoid the conclusion that in other respects it treated the spiritual nature of the Shepherd's office as a determining factor and not one of many factors to be used as a determinant of employment status. Moreover, precisely what the spiritual nature of the Shepherd's office entailed was not analysed. Why; for instance, should the payment of remuneration to a minister be treated *ipso facto* as payment to the holder of an office and not to an employee? Although *Preston* was cited in the judgement it is submitted with respect

³⁶⁵ Para. 31

³⁶⁶ Para. 34

that the ratio of that case, that one must proceed to construe the terms of the agreement without applying presumptions or preconceived notions, was not in fact applied. Finally, it seems regrettable that once again the courts are jumping straight to the question of whether there is a contract of employment and not asking if there is, in the first place, a contract at all.³⁶⁷

In terms of our taxonomy this case is partly an instance of construction of terms but also has echoes of the presumption against intention to create legal relations as although this term was not mentioned the emphasis on the spiritual nature of the Shepherd's Office can only lead to such a presumption. Although it was mentioned that the Shepherd held an office there was no analysis of office holding and so the case does not fit into this category.

We shall have some concluding remarks on the case law at 10.3 below but first we need to note two other matters.

10. Is it possible for a church or other religious organisation to act to prevent the application of employment law to its ministers?³⁶⁸

On the assumption that it is now settled law that in some cases at least ministers of religion can be held to be employees and thus able to claim the protection of employment protection legislation, it is possible for churches and other religious organisations to in effect launch a pre-emptive strike and so secure a kind of opt- so that their ministers are excluded from claiming?

³⁶⁷ The court also investigated the hearing held by the church to determine whether the Shepherd should be dismissed to see if it complied with rules of fair procedure. This aspect of the question of employment status is examined in Chapter Four.

³⁶⁸ It is worth noting that this might also apply as a defence to criminal proceedings e.g. criminal penalties for employing illegal workers as laid down in s.21 of the Immigration, Asylum and Nationality Act 2006 as amended by sections 34 and 35 of the Immigration Act 2016. Would this be acceptable?

10.1 By contracting out ³⁶⁹

This is the direct way so that the contracts of ministers simply state that they are not to have recourse to an Employment Tribunal. The answer here is, as one might expect, that this is not possible. In relation to unfair dismissal claims, Section 203(1) of the ERA 1996 renders void any agreement 'to exclude or limit the operation of any provision of any part of this Act or to preclude a person from bringing any proceedings under this Act before an employment tribunal.'³⁷⁰ There is a similar provision in s.142 (1) of the Equality Act 2010 which provides that 'A term of a contract is unenforceable against a person in so far as it constitutes, promotes or provides for treatment of that or another person that is of a description prohibited by this Act.'

The courts are particularly keen to ensure that this provision is not circumvented as in *Igbo v Johnson Matthey Chemicals Ltd* ³⁷¹ where the employee signed an agreement that if she did not return from holiday by a stated date then her employment contract would be deemed to be automatically terminated. This was held to be void under s. 203(1), because what was in essence an agreement for self-dismissal was clearly an attempt to exclude the unfair dismissal provisions of the Act.

³⁶⁹ Note here the discussion of this point in the *Percy* case at 8.2. above.

³⁷⁰ Note that there are exceptions to this where, for instance, the parties have decided to discontinue proceedings where a conciliation officer has intervened (s.203(2)) but these do not affect the general principle.

³⁷¹ (1986) ICR 505

10.2 By specifically providing that ministers do not have contracts as there is no intention to create legal relations

This possibility is of more significance as in most cases which we have looked at the churches have denied that there is a contract at all and this is what the Methodist Church is aiming to do in its response to the *Preston* case, discussed above.

The Church, following *Preston*, looked again at the prospect of future litigation on the employment status of its ministers and the Law and Polity Committee presented a report to the 2017 Methodist Conference. It pointed out that the Church, as with a number of other religious bodies, is an unincorporated association but that in the case of the Methodist Church it should make it clear that the relationship between its members is not on the basis of contract. As a result, the Committee made the following recommendation which, in the way in which it refers to all members and not ministers as a special class as such, is firmly within the ecclesiology³⁷² of the church:

constitutional provisions about entry into membership should make it clear that becoming a member is a covenantal expression of commitment to Christian discipleship within the Methodist Church and of acceptance of its discipline, but is not intended on either side to create legal relations, and that those about reception into full connexion should establish that what is involved is entry into wider responsibilities and authority within the church, in addition to those already exercised by virtue of membership and existing offices, but not the creation of a new legal relationship.

³⁷² See Chapter Five.

The Conference of 2017 adopted the report and resolved to amend the Deed of Union and Standing Orders accordingly,³⁷³ but the amendment to the Deed of Union requires consultation and confirmation by the Conference of 2018, so none of the amendments will actually be in force unless and until that happens.³⁷⁴

Four points arise here:

- (a) The effect is to introduce a *Parfitt* presumption against intention but rather than the courts inferring this presumption it is enshrined in the discipline of the Church.
- (b) One agrees with the approach taken of asking if there is a contract at all rather than going at once to the question of whether there is a contract of employment. As we saw in *Sharpe* above the failure to approach the question of ministerial employment status using this two-step approach led to confusion in the judgement of Arden LJ.
- (c) This approach ought to prevent the application of Section 203(1) of the ERA 1996 as there is a specific declaration that there is no contract at all rather than the situation where there is a contract but the right to complain to an Employment Tribunal is excluded. Although Lord Hope in *Percy* held that it would not be effective to do so it is difficult why this is so and no other member of the House expressed an opinion on

³⁷³ See WWW.CFBMETHODISTCHURCH.ORG.UK/DOWNLOADS/JACEI-ANNUAL-REPORT-2017

³⁷⁴ It is understood that this matter is still under consideration. This is all dealt with in full in a most illuminating article by Hicks J... 'Preston: Another Lap of the Circuit or a Signpost?' (2017) 179 Law and Justice 159, 165-167.

this point.³⁷⁵

(d) However, on a less positive note the effect of this provision is to remove altogether the contractual basis of the relationship between members of the Methodist Church whether that relationship is in issue in relation to employment claims or any other type of claim. The report acknowledges that the Church is an unincorporated association and that the relation between members of such associations is contractual. However, the report does also say that 'the absence of any contractual relationship with members or ministers, as such, was very far from excluding the law of the land altogether from the affairs of the church, for example in such matters as trusts, charity law and duties of care'.³⁷⁶

Suppose that a church is dissolved. What normally seems to happen is that it amalgamates with another church and the question is whether that church is entitled to the assets of the dissolved church.³⁷⁷ However, it is possible that the church may simply cease to exist. What would then happen to its property?

Although when this issue has arisen on the dissolution of other unincorporated associations there has been some intermingling of a contract and a trust approach³⁷⁸ it is clear that the matter is now governed by contract. The joint judgement of Lord Neuberger PSC, Lord Sumption and Lord Hodge JJSC in *Shergill v Khaira & Ors.*³⁷⁹

³⁷⁵ See above in the discussion on *Percy*.

³⁷⁶ Hicks *ibid*. See also the discussion of the question of the rights of members of religious organisations in Rivers *The Law of Organised Religions* 88-94.

³⁷⁷ See Rivers *The Law of Organised Religions* 96-100.

³⁷⁸ See *Re West Sussex Constabulary's etc. Fund* (1971) Ch. 1

³⁷⁹ (2014) UKSC 33 at 47-48. This case concerned another issue and is more fully considered in Chapter Five.

puts it clearly:

The governing bodies of a religious voluntary association obtain their powers over its members by contract. They must act within the powers conferred by the association's contractual constitution

This is in line with the most recent case on assets on dissolution of an unincorporated association, *Hanchett-Stamford v Att-Gen* where the court proceeded on the basis that the assets of the association were held on a contractual basis³⁸⁰ and it was also used by Walton J. in *Re Bucks Constabulary Fund (No. 2)*.³⁸¹

If the correct basis is the contractual one then the effect of the provision made by the Methodist Church would be that as there was no contract between the members they would have no claim to the property of the Church which might then as a last resort, go to the Crown as *bona vacantia*.³⁸² So the Methodist Church, by attempting to solve the problem of ministerial claims to employment status would, by taking the entire relationship between its members out of contract, bring about a most unsatisfactory situation in an unrelated area.³⁸³

This whole discussion is important because on the basis of the above arguments this type of attempt by churches to deal with possible claims to employment rights by clergy is unsatisfactory and so the obstacles to employment status indicated in this chapter and the previous one remains. Thus, another solution may be needed, as we

³⁸⁰. (2009) Ch. 173. The whole matter is considered by Hanbury and Martin *Modern Equity* 20th edn. 235-242.

³⁸¹ (1979) 1 WLR 936

³⁸² As in *Re West Sussex Constabulary's etc. Fund*

³⁸³ There is no evidence that other churches are thinking along these lines, principally, I suspect, because this discussion was prompted by a case (*Preston*) involving a Methodist Minister and this was the reaction of the Methodist Church to it.

shall see in Chapter Six. *L*;

10.3 Exemptions under the Equality Act 2010

A short mention is needed of the provisions in the Equality Act 2010 dealing with cases where there is an exemption for churches who wish to, in effect, discriminate in recruitment. The exemption for what the Equality Act 2010 calls an 'organised religion' is contained in sch. 9 of the Act which replaces s. 19(1) of the Sex Discrimination Act 1975.

The only relevance here will be where a church has an exclusively male (or female) priesthood such as the Roman Catholic Church. Here provided that employment is for the purposes of an organised religion (see sch. 9 2(1)), as would be the case with the RC Church, then if the requirement is imposed to comply with the doctrines of that religion (Sch. 9 (2) (5)) a requirement to be of a particular sex would not be caught by the Act. Here the doctrines of the RC Church (see Canons 235, 247 and 291 of the Code of Canon Law 1984) provide that the priesthood shall be exclusively male. A claim by a woman who claimed that her denial of admission to the priesthood was in breach of the Equality Act 2010 would be met by this exemption.

In fact, any claim would depend in any event on her being able to bring a claim and this requires that she is a worker under s.230(3) of the ERA 1996. As we have seen above, the courts have not held that all ministers of religion are workers and it may well be that her claim would fall at this initial filter stage.

11. Conclusion

The history of attempts by the courts to grapple with the question of employment status for ministers of religion is a most unhappy one as there is a total the lack of consistency in the reasons given for the denial of employment status.

The first cases dealt with the matter on the basis of office holding which, whilst this might have been appropriate when applied to clergy of the Church of England, made no sense when applied to clergy of other denominations. It seemed that in *Rogers v Booth* and later in *Barthorpe v Exeter Diocesan Board of Finance* that the courts were starting to look in detail at the actual terms of the relationship but this then suffered a setback with the imposition of a presumption against intention to create legal relations in *President of the Methodist Conference v Parfitt*. Although the House of Lords in *Percy v Church of Scotland Board of National Mission* held that this presumption was no longer good law it still surfaces in references to the spiritual nature of the minister's relationship with the church as we have seen in *Sharpe v Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester* and *Celestial Church of Christ v Lawson*. Moreover, the welcome attempt by the Supreme Court in *President of the Methodist Conference v Preston* and in particular the judgement of Lord Sumption to focus once again on the actual terms of the relationship seems to have borne little fruit in the two cases, *Shape* and *Lawson*, which have followed.

In Chapter Two we concluded our positivist/ theoretical assessment of the issue by saying that there was no absolute all-embracing obstacle to ministers having employment status subject to there being a contract. The assessment of the case law in this Chapter has changed the picture: on a realist/practical assessment looking at the actual application of

employment law to the question the obstacles seem very apparent. Yet one is left unsatisfied: why should this be so? Returning to our observation at the start of this chapter, there is still the sense that courts have a kind of fundamental instinct that in most cases employment status is not appropriate for the clergy and this is obviously a more or less insurmountable obstacle.

We must now turn to look at the question from wider angles than employment law. We do this in the next chapter by looking at the question from the point of view of the autonomy of churches in relation to the state and then in the following chapter by examining it against the ecclesiology of individual churches.

Chapter Four: Obstacles to employment status for the clergy: Autonomy of religious bodies

1.Introduction

In Chapters Two and Three we saw that, from an employment law perspective, there appears to be insurmountable obstacles to employment status for the clergy. However, our examination of the cases showed at many points, not least the repeated references by the courts to the significance of a 'spiritual relationship', that we cannot confine ourselves to considerations of employment law alone. This then takes us to this chapter and the next one where we consider the autonomy of churches and their ecclesiology and ask to what extent they amount to obstacles to employment status.

As we noted in the Introduction,³⁸⁴ giving the clergy the right to claim a bundle of employment rights against their religious body could infringe the principle that churches should enjoy autonomy in the regulation of their affairs and we consider this in detail here. This chapter is also the place to look at the impact of Art. 9 of the Human Rights Act 1998 both on the question of autonomy in general and its impact on the question of employment status for the clergy.

Sandberg remarks ³⁸⁵ that the question of ministerial employment status and church autonomy raises the same basic tension as is found in debates on, for instance, sharia law and the operation of religious tribunals:' Like these controversies, the question about the

³⁸⁴ At 4

³⁸⁵ Sandberg 'The Employment Status of Ministers: A Judicial Retcon?' (2018) 13 Religion and Human Rights 27 at 28

employment status of ministers boils down to a conflict between “secular” individual rights and the desire to preserve the autonomy of religious groups.³⁸⁶

2. Three main issues linked to autonomy

This chapter will seek to unravel three distinct issues:

- (a) The general question of whether churches should enjoy autonomy in their self-governance.

In this context we consider the issue of employment status against the background of the continuing debate on the extent to which the State can and should intervene in the internal affairs of churches and this will involve considering questions of secularism and establishment. If we can establish that some degree of autonomy is both theoretically right and required by current law this will lead to the second question:

- (b) The extent to which church autonomy is actually mandated where the conferral of employment status of ministers of religion is in issue. This is linked to the final question:

- (c) To what extent is it possible to erect a kind of island³⁸⁷ of around churches in their self-governance or is it the case that their actions will inevitably have an impact beyond their boundaries?

³⁸⁶ This is clearly seen in the USA: one recent case is *Hosanna- Tabor Evangelical Lutheran Church and School and Equal Employment Opportunity Commission* (2012) 132 SCt.694. See J Waltman ‘Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission: Defining the ‘Ministerial Exception’ in U.S. Employment Law’ (2012) 169 Law and Justice 210.

³⁸⁷ The idea of an island comes from A. Esau ‘Islands of Exclusivity: Religious Organisations and Employment Discrimination’ (2000) 33 UBC L Rev. 719 considered in Ch. 2

3.What is meant by ‘autonomy’?

The claim by churches to some degree of autonomy from the state is a very old one. One might trace it back at least to St. Augustine in *The City of God*, who distinguished between the city of this world, the city of the Roman authorities and the pagans, and the City of God. Some attempts have been made to construct a theory of church and state from this³⁸⁸ this but a more promising start is with the letter written by Pope Gelasius 1 to the Emperor Anastasius in 492 that although he was ‘a Roman born, I love, respect and honour the Roman Emperor’ there was, as it were, another side to the coin: ‘... there are two powers by which the earth is chiefly ruled: the sacred authority of bishops and the royal power.’³⁸⁹ What is clear is that from the early days of Christianity the Church has claimed for itself a distinct sphere in which it can operate. It is the extent to which the State will grant this that has proved more problematic.

The word ‘Autonomy’ of course comes from the Greek noun *autonomía*, independence, which is itself derived from two nouns: *auto* meaning self and *nomos* meaning law.

Chambers Dictionary³⁹⁰ defines autonomy as ‘the power or right of self-government, especially partial self-government’. The addition of ‘partial self-government’ is interesting because, as we shall see, the conferral of absolute autonomy on a church would, certainly in modern times, be impossible. A useful working definition for our purposes is that of Doe who says that ‘a fundamental element of the principle of autonomy is the duty of the State

³⁸⁸ But as D. Knowles points out *The City of God* (Penguin Books 1972) p. xvii the cities do not have a political distinction.

³⁸⁹ See E. Duffy, *Saints and Sinners: A History of the Popes* (Yale University Press 1997).

³⁹⁰ Chambers Harrop Publishing, 10th edn. 2006.

not to interfere in the internal affairs of a religious organisation'.³⁹¹ What exactly are internal affairs is, as we will see, a loaded question. We are talking about the religious freedoms of groups as Ahdar and Leigh explain: 'Religious group autonomy is the freedom asserted by religious communities as groups. This freedom is not merely a 'compound' or aggregation' of individual members freedoms: it is the right the group asserts to its own religious exercise'.³⁹²

As Doe points out³⁹³ autonomy is not only jurisdictional, in that it protects the internal jurisdiction of churches, but also relational in that it protects that jurisdiction in relation to the state. However, we need to go further because as Rivers says,³⁹⁴ autonomy does not only mean the power of self-government under one's own law but also 'it requires the power to create legal effects in church law'. So, as he points out, there needs to be a recognition of religious law 'and deference towards it by the State', an example being the appointment of a minister. Here the State must accept the word of the church that the appointment was valid in order for it to be able to determine disputes about church property and, most importantly for the present enquiry, any possible adjudication by the State of a dispute between the church and that minister. Furthermore, as Rivers points out, 'There is also a question of the extent of the subject matter over which religious law may range' where, at its fullest extent, autonomy may create a 'complete legal/political community' where the law of the State is

³⁹¹ In *Law and Religion in Europe: a Comparative Introduction* (OUP 2011) 120 (hereinafter *Law and Religion in Europe*). The assistance of Chapter 5 of this book, 'The Autonomy and Ministers of Religious Organisations' is especially valuable on this issue.

³⁹² J. Ahdar and I. Leigh, *Religious Freedom in the Liberal State* (2nd edn. OUP 2013) 375. This is why it is important to distinguish the discussion of autonomy here from that in relation to individuals where the matter often arises in questions of medical ethics. See, for a summary of the debate on this J. Duddington, *Christians and the State* (Gracewing 2016) 76-78. See also M. Hill 'Church Autonomy in the United Kingdom' in G. Robbers (ed.), *Church Autonomy: A Comparative Study* (Peter Lang, 2001) 267-283. J. Oliva and H. Hall, *Religion, Law and the Constitution, Balancing Beliefs in Britain* (Routledge 2018) is very useful on this area, especially Ch. 1.

³⁹³ Ibid; p. 120

³⁹⁴ In *The Law of Organised Religions* 335

excluded altogether. Although it is not the case that any mainstream church in the UK claims that degree of autonomy this point does bear on the question touched on earlier that we need to look at the degree of autonomy in particular cases, here the employment status of the clergy, as well as autonomy as a theoretical concept.³⁹⁵

4. Why should churches enjoy autonomy?

Having examined what autonomy means we must ask why should the State, in this case the UK, give actual autonomy to churches at all? What is so special about them in the eyes of the law that autonomy is warranted?

4.1 Is autonomy granted in other areas?

We could urge that as there are other cases where the State recognises the autonomy of various bodies, recognition of the autonomy of churches does not by itself require particular justification. One example could be the Rule in *Foss v Harbottle*³⁹⁶ in company law that as a corporation is a legal person separate from its members, it follows that for a wrong done to it the corporation, it is itself is the only proper claimant. The effect is to confer a degree of autonomy on companies because this Rule requires a shareholder to exercise his influence

³⁹⁵ There is too the divergence between Catholic and Protestant views of the relationship between church and state and how this bears on church autonomy. Luther is seen as advocating a dualism between the secular and the sacred and, by contrast with Pope Gelasius' two powers where the secular was nevertheless subject to the sacred, Luther seems to be implying a separation between the two. See, for a valuable account of Luther's 'Two Kingdoms' theory and its implications J. Witte, Jr. *Law and Protestantism* (CUP 2002) 105-117. Nevertheless, all religious traditions would agree on the need for a degree of church autonomy.

³⁹⁶ (1843) 67 ER 189. See for a recent evaluation D. Kershaw 'The rule in *Foss v Harbottle* is dead: long live the rule in *Foss v Harbottle*' (2015) 3 JBL 274

over the fortunes of the company by the exercise of his voting rights in general meeting.³⁹⁷ However, it is precisely because of the alternative rights given to shareholders that the rule in *Foss v Harbottle* cannot be used as any general precedent for granting autonomy but instead it sits within a scheme of control of a company laid down in Company Law.

Another supposed example of autonomy is what is known as the *Wednesbury* principle set out in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*.³⁹⁸ Here Greene MR set out the limits to which a court can control the activities of local authorities and other statutory bodies and persons. Put briefly, persons entrusted with a discretion must direct themselves properly in law, not consider irrelevant matters nor do something so absurd that no sensible person could ever dream that it lay within the powers of the authority. The consequence is that where the decision meets this threshold then the courts cannot consider the merits of a decision³⁹⁹ and so to this degree local authorities and other public bodies enjoy autonomy in their decision making.

Once more, however, any thoughts that this is an example of autonomy which might serve as a general precedent are mistaken for on closer examination the 'Wednesbury' principle turns out to be an application and, one might say, an extension, of the *ultra vires* principle, that anybody with statutory powers must not exceed those powers. The corollary being that

³⁹⁷ See the explanation of *Foss v Harbottle* in *Prudential Assurance Co. v. Newman Industries Ltd.*, [1982] 1 All ER 354

³⁹⁸ [1948] 1 K.B. 223. The literature on this celebrated case is naturally extensive. See, for a survey of recent case law on it and on whether it should be replaced by a doctrine of proportionality R. Williams 'Structuring substantive review' (2017) PL 99

³⁹⁹ See *B (A Child) (Care Proceedings: Appeal), Re* [2013] UKSC 33 where it was emphasised that this is a supervisory jurisdiction and is distinct from an appellate jurisdiction where the test is whether a decision was "wrong"

provided that acts are within those powers they are not subject to the supervisory jurisdiction of the court and thus, legally, they have autonomy.

We can conclude that a claim by a church or churches to autonomy is a claim to something which is not recognised in other areas because what appears to be a recognition of a claim to autonomy in the two areas above can, on closer inspection, be seen to rest on other foundations.

4.2. Reasons why religion and religious belief is worthy of protection

Given that a claim to autonomy by churches appears to be unique we must ask if religious belief itself is worthy of protection and if this principle should have a degree of recognition in English Law. This is because this question, and that of autonomy, is ultimately about religious freedom. The view of the Roman Catholic Church as expressed in the *Compendium of the Social Doctrine of the Church* links these two questions when it says: 'The principle of autonomy involves respect for every religious confession on the part of the State, which "assures the free exercise of ritual, spiritual, cultural and charitable activities by communities of believers. In a pluralistic society, secularity is a place for communication

between the different spiritual traditions and the nation'.⁴⁰⁰ One imagines that most if not all churches would take this view.⁴⁰¹

One would of course naturally assume that the churches would take this view but how does the State and through it, the law view the matter? The extent to which the European Convention on Human Rights (ECHR) bears on this question will be discussed later but for now the fundamental question is whether religion is simply an instance of a human right, along with other human rights, or if its exercise merits protection beyond that afforded to other human rights. Religion can be seen as simply a matter of choice as Sedley LJ argued in *Eweida v British Airways*,⁴⁰² when referring to the 'protected characteristics' in the Equality Act 2010 where discrimination is prohibited. Here he observed that 'One cannot help observing that all of these apart from religion or belief are objective characteristics of individuals; religion and belief alone are matters of choice'. It is this argument of Sedley LJ that must be met if any claim to religious autonomy is to be sustained.

Vickers in *Religious Freedom, Religious Discrimination and the Workplace*⁴⁰³ advances various reasons for protecting religion as such, apart from the question of whether it should

⁴⁰⁰ Pontifical Council for Justice and Peace (English edn, Bloomsbury Publishing, 2005) para. 572. It is of course the case that the Orthodox Churches have historically had a close relationship with the state – or rather – nation, for complex historical and theological reasons which cannot be explored here. See, for a start on this area see J. Meyendorff, *The Byzantine Legacy in the Orthodox Church* (SVS Press 2001) esp. 43-88 and also Patriarch Kirill of Moscow, *Freedom and Responsibility*, (Darton, Longman and Todd, 2011) for a current Orthodox view.

⁴⁰¹ See the evidence collected in Doe, *Law and Religion in Europe*, Ch. 5 on the extent to which differing European states recognise the autonomy of churches – this has clearly been prompted by a view of churches that this is essential to their ministry.

⁴⁰² [2010] EWCA Civ 80.

⁴⁰³ 2nd. edn. Hart Publishing 2016

extend to the workplace, of which the fundamental ones, in her view, are those of dignity and autonomy. She refers⁴⁰⁴ to the 'Kantian idea that humans should be treated as ends rather than means. They all have an essential dignity, which sets them apart from non-humans and makes them uniquely valuable.' She then argues that the basis for endowing humans with dignity is their capacity to develop an individual concept of the good life, of which a religious belief must be an important component. She makes a similar argument on the basis of autonomy: as she says: 'maintenance of a full range of beliefs about the contents of the good life is a necessary precondition to full respect for human autonomy'.⁴⁰⁵

It should also be pointed out that claims to religious freedom most often arise where religious beliefs are in conflict with other rights which count as 'protected characteristics. Of these those which give rise to the most high-profile cases and apparent areas of conflict today are the rights of gays and lesbians.⁴⁰⁶ This does not arise in the context of this thesis and so any argument based on autonomy in this context is thereby strengthened at least.

4.3. Reasons why religious bodies enjoy a measure of autonomy from the State

If we can say that there is an argument in favour of protection of religious belief as such and the autonomy of religious bodies we now need to sharpen our analysis and look at autonomy more specifically in relation to the State.

⁴⁰⁴ at 45 *ibid.*

⁴⁰⁵ at 48 *ibid.*

⁴⁰⁶ The most recent example being *Lee v Ashers Baking Co.* (2018) UKSC 49

Doe⁴⁰⁷ identifies these reasons why churches ought to enjoy a measure of autonomy from the state:

- (a) The collective right of churches to manifest their religious freedom in practice. This, as Doe remarks, is the most common reason and is instanced by the different national laws guaranteeing autonomy which we will note below.
- (b) The fact that religious organisations are private bodies and so the State cannot play a part in their internal affairs. Clearly this depends on a recognition that churches are indeed private bodies and this is normally the case.
- (c) A faith community is, as Doe puts it 'autonomous because this is how it may conceive of itself in terms of its own doctrine and religious law'. One instance of this is the Code of Canon Law of the Roman Catholic Church⁴⁰⁸ where Canon 1311 provides that: 'The Church has the innate and proper right to coerce offending members of the Christian faithful with penal sanctions.' There are similar provisions in the Church of Scotland Act 1921⁴⁰⁹ but, as we shall see,⁴¹⁰ *Percy v Church of Scotland Board of National Mission* (2005) shows that such statements do not necessarily prevent the courts from adjudicating on disputes within the church.

Although there are no explicit constitutional guarantees of autonomy in the UK which would satisfy ground (a) the UK courts have to some extent accepted it⁴¹¹ but more reliance has

⁴⁰⁷In *Law and Religion in Europe* at.117-120.

⁴⁰⁸ All references are to the current (1983) Code of Canon Law.

⁴⁰⁹ See the discussion on *Percy* below.

⁴¹⁰ At 6.2. below.

⁴¹¹ See the discussion below in this chapter at 7 on the attitudes taken by the courts to adjudicating on disputes involving the doctrine and practice of religious bodies.

been placed on (b) which we shall consider when we look below ⁴¹² at cases involving the autonomy of churches and other religious bodies under UK law. Ground (c), which brings in the ecclesiology of the churches, has had a mixed reception as we saw in the *Percy* case in Chapter 3. ⁴¹³

As there is no general principle in UK law that autonomy is conceded to specified bodies or persons, we must look elsewhere for a rationale of the autonomy which religious bodies claim. In fact, as Doe says: 'The duty of the State to respect the autonomy of religious organisations is...a core principle of national laws.'⁴¹⁴ One might even go further and almost claim that is a principle of international law, certainly in Europe, that autonomy should be granted to religious bodies.⁴¹⁵

The dawning of a principle of autonomy in the UK can be found in the original 1215 edition of the Magna Carta which proclaimed, as its first article, 'That We have granted to God, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired.' Too much and also too little has been claimed for this celebrated provision. On the one hand, as Carpenter points out ⁴¹⁶ 'it was of no specific help when, for example, the government challenged the jurisdiction of church courts, the immunity of clerks from criminal

⁴¹² See 7 below.

⁴¹³ See 8 at Chapter 3

⁴¹⁴ *Law and Religion in Europe* at 115

⁴¹⁵ See the ECtHR in *Hasan and Chaush v Bulgaria* (2002) 34 EHRR 55 at para. 62: 'the autonomous existence of religious organisations is indispensable for pluralism in a democratic society...' This case, and the impact on the area of Art. 9 of the ECHR, are considered at 5 below.

⁴¹⁶ *Magna Carta* (Penguin Books 2015) 437-8

prosecution, and the claims of various bishops and monastic houses to have the amercements⁴¹⁷ that were imposed on their men by the king's judges set aside'. Famously too, it did not avail Thomas More when he tried to raise this at his trial against the Act of Supremacy 1535 declaring Henry VIII Head of the Church. Instead he was roughly brushed aside. Yet we are in danger of claiming too little for this principle: as Carpenter points out,⁴¹⁸ the first chapter of Magna Carta does illustrate the separation of church and state even though, as he puts it, it was something of an uneasy divide' as it is today too.

In practice, as we shall see below in the case law on decisions involving religious bodies, the courts, without enunciating any great principle of church autonomy, have accepted it in principle.

4.4. Autonomy and secularism

Underlying the notion that in the UK churches enjoy a degree of autonomy from the state is the corresponding notion that that state is itself secular. It is not then if the state was confessional⁴¹⁹ churches would not enjoy any autonomy at all. What is secular and secularism? I adopt the taxonomy of Jonathan Chaplin⁴²⁰ who has written⁴²¹ that the UK

⁴¹⁷ A financial penalty, usually following a court conviction. This would now be called a fine.

⁴¹⁸ Op.Cit. 123

⁴¹⁹ As was the case in Ireland where the 1937 Constitution by Article 44.1.2. provided that: 'The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens'. This was repealed in 1973.

⁴²⁰ There are various ways of classifying the autonomy of religious bodies vis-à-vis the state (see, for instance, that of R. Minnerath 'Church Autonomy in Europe' IN G. Robbers (ed.) *Church Autonomy: A Comparative Study* (Peter Lang, 2001). The advantage of Chaplin's taxonomy is that it explicitly looks at autonomy and secularism.

adopts positions of both 'impartial secularism' and 'justificatory secularism' towards religious bodies. Impartial secularism means that the State 'does not endorse any one religious faith and thus adopts a stance of impartiality towards the different religions represented among its population' and justificatory secularism means that a state 'refrains from presenting religious justifications for its law or policies, offering only those reasons which will be acknowledged as legitimate policy reasons by most of its citizens'. So as the UK is strictly a secular state any special provision for religious bodies needs to be justified as we have explained above.

5. Autonomy as a principle of human rights law

Article 9 (1) of the European Convention on Human Rights (ECHR) provides that: 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.'⁴²²

In *Hasan and Chaush v Bulgaria*⁴²³ there was an explicit recognition that the ECHR protects the autonomy of religious bodies:

Where the organisation of the religious community is at issue, Article 9 must be interpreted in the light of Article 11 of the Convention which safeguards associative

⁴²¹ See J. Chaplin, 'In The Place of Religious Arguments for Law Reform in a Secular State' (2009) *Law and Justice* 162 18. A very useful survey of the field in the UK and Europe is by F. Cranmer and J. Oliva, 'Church – State Relationships, An Overview' (2009) *162 Law and Justice*, 4.

⁴²² This draws on Article 18 of the Universal Declaration of Human Rights Ch. 3

⁴²³ (2002) 34 EHRR 55. See the discussion on this case in J. Dingemans, *The Protection of Religious Rights* (OUP 2013)

life against unjustified State interference. Seen in this perspective, the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention.

The question here is whether the autonomy granted to religious bodies by Article 9 can prevent the courts holding that an employment relationship exists between a minister and his church when that would conflict with the beliefs of that church. This of course relates very much to the ecclesiology of that church, which is considered in the next chapter, but here we need to examine the view taken by the courts.

This question has received remarkably little attention in the UK courts.⁴²⁴ The relevance of the ECHR arose indirectly in *Re Thomas Tyler*⁴²⁵ where a clergyman of the Church of England was (on a retrial) found guilty of adultery in the Consistory Court and deprived of his living. He complained to the ECtHR under Art. 6 (right to a fair trial) but it was found that his case was not made out and so the application was declared inadmissible.

In employment cases the ECHR was not mentioned in *Percy* nor in *Sharpe* and was only considered by the Court of Appeal in *Preston (formerly Moore) v President of the Methodist Conference*⁴²⁶ where the argument that Article 9 could be relevant received short shrift. Maurice Kay LJ in the Court of Appeal was entirely unsympathetic to the view that Article 9 could be relevant and simply said, in relation to Lawrence Collins LJ's statement in *Stewart* (above) that he was doubtful: 'So am I' without going any further into the matter. The other

⁴²⁴ See P. Edge 'Judicial Crafting of a Ministerial Exception' (2015) *Ox. J. Law and Religion* 244. This article has the most detailed examination of this point.

⁴²⁵ (1994) *Ecc LJ* 3

⁴²⁶ [2011] *EWCA Civ.* 1581

judges in the Court of Appeal simply agreed with Maurice Kay LJ.

This is presumably why it was not pursued in the appeal to the Supreme Court. The one case where it received detailed consideration was *Stewart*. Arden LJ faced up to the ECHR issue squarely⁴²⁷

A religious organisation may, as one of its beliefs, consider that ministers should not have contracts of employment or that the state should not interfere in the way they conduct their organisation. If the state interferes with that belief, there may be an interference with the group's article 9 right (though the interference will not constitute a violation of article 9 if the conditions in article 9(2) are satisfied).

Arden LJ rejected the submission of the claimant that for Article 9 to be engaged it had to be an express tenet of the religion that no contract is formed between the minister and the religious body or some part of it. Instead she held that the correct test was that there 'must be religious beliefs that are contrary to or inconsistent with the implication of the contract or a contract of employment. It follows that the implication of a contract of employment is not automatically an interference with religious beliefs'.

Thus, the question boils down to the ecclesiology of each church; if the church has beliefs which are 'contrary to or inconsistent with the implication of the contract or a contract of

⁴²⁷ At 61.

employment' then on Arden LJ's analysis it would be in breach of that church's Article 9 rights to hold that one existed.

Pill LJ agreed but Lawrence Collins LJ dissented and held that:

If, contrary to the belief of one of the parties that there is, or should be, no contract, the court gives the other party contractual or statutory remedies, I am doubtful whether that could be regarded as a limitation on, or interference with, the right to freedom of thought, conscience and religion under article 9.

However, he gave no reasons for this sweeping view.

The result is that the ECHR, even if engaged, has limited effects. If a church has, in Arden LJ's words in *Stewart* 'beliefs which are contrary to or inconsistent with the implication of the contract or a contract of employment' then this will go first to the question of whether there was an intention to create legal relations. Thus, on this basis Article 9 is unlikely to be decisive of the question on its own but instead be part of the factual matrix which determines intention. Its significance would lie then in the extent to which the courts take account of the ecclesiology of particular churches and this will be considered in the next chapter. One might reflect in conclusion that although this question has not received any further judicial consideration, we surely have not heard the last words on this matter.⁴²⁸

6.Church autonomy in two particular situations

⁴²⁸ The reluctance of UK courts to consider if Article 9 is engaged can be contrasted with the approach of the Grand Chamber in *Fernández Martínez v Spain* [2014] ECtHR (No. 56030/07). See also *Obst v Germany* [2010] ECtHR (No. 425/03) and *Schuth v Germany* [2010] ECtHR (No. 1620/03 involving the application of Article 9 to church workers although not ministers.

We can now look at the autonomy of religious bodies in the light of the position of the two established churches in the UK.

6.1. The Position of the Church of England and Establishment⁴²⁹

There is an obvious need to mention the position of the Church of England as it can be argued that its position as the established church means that it is not autonomous from the State in the way that other religious bodies are and that this may have an impact on the employment status of their clergy. We have mentioned establishment in Chapter Three⁴³⁰ in connection with Church of England clergy as office holders but we need to be clear here exactly what it means. The link between church and state with establishment can be overstated. I suggest that Eberle does this by stating that ‘Under the Established church of the UK the government often controls significant elements of the state church’.⁴³¹ In fact, the idea of control is quite misleading. Hill refers to establishment as ‘a complex matter of history, ecclesiology, sociology and politics’⁴³² which gets nearer the mark. Given that we are not concerned with establishment as such it suffices here to say that in the cases which we examined in Chapter Three the fact of establishment did not play a significant part as if it did one would expect to find a greater divergence in the case law between ministers of the Established Church and other churches. In fact, there is not⁴³³ and all one can say is that establishment was a factor in the earlier cases in holding that the clergy were formal office holders. As Dingemans says: ‘the religious rights of its members do not

⁴²⁹ M. Hill, *Ecclesiastical Law* 3rd edn. (OUP 2007) usefully catalogues the gradual ways in which the Church of England achieved legislative independence from the State beginning with the passage of the Church of England Assembly (Powers) Act 1919.

⁴³⁰ At 5.2.2. in connection with Church of England clergy as office holders.

⁴³¹ E. Eberle, *Church and State in Western Society* (Ashgate 2011) 115

⁴³² M. Hill *Ecclesiastical Law* 1.19

⁴³³ In the judgements in *Sharpe v Diocese of Worcester* (2015) EWCA Civ. 399 establishment was mentioned only once and then by Lewison LJ in a historical context – see para. 107.

enjoy any greater protection in law than those of other faiths'.⁴³⁴ This applies in employment law as well as other areas.

In any event although it may be that at the high constitutional level the church is indeed established⁴³⁵ at the level of internal church government such as in employment matters the church operates independently of the State.⁴³⁶ We shall see clear evidence of this when we examine the present terms and conditions of Church of England clergy in the conclusion in Chapter 6.

The other issue is whether the Church of England is a voluntary body so that the remedies discussed below, where the rules of such a body have been broken, apply to the Church of England. Lord Kingsdown in *Long v Bishop of Cape Town*⁴³⁷ appeared to distinguish between the Church of England and other churches when he referred to 'The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body...' However, the legal status of the Church of England was not part of the ratio of this decision and was discussed in Chapter One where Lord Hobhouse of Woodborough declared in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*⁴³⁸ that: 'the Church of England is not itself a legal

⁴³⁴ *The Protection of Religious Rights* (OUP 2013) 1.53

⁴³⁵ See, for an account of what this means, D. Harte, (2012) 'The Church of England and the State: a National Church for a Plural Nation' 168 *Law and Justice* 22.

⁴³⁶ Until 2007 the Prime Minister was involved, to some degree at least, in the appointment of Church of England bishops but Gordon Brown, as Prime Minister, virtually relinquished this. See 'PM to withdraw from choosing diocesan bishops (Archived; subscription only)" *Church Times* (#7530). 6 July 2007. The machinations involved in the previous selection process are entertainingly but also authoritatively described in B. Palmer, *High and Mitred: Prime Ministers as Bishop Makers 1837-1977* (SPCK 1992).

⁴³⁷ (1863) 1 Moore New Series 411 See below at 7.

⁴³⁸ (2004) 1 AC 546

entity'. Thus we can conclude that for the purposes of allowing actions by members of voluntary bodies against each other the Church of England is a voluntary body.

6.2 The effect of the Church of Scotland Act 1921 and the decision in Percy

*Percy v Church of Scotland Board of National Mission*⁴³⁹ is the only case in which the question of the autonomy of religious bodies has been squarely faced in the context of claims by ministers to employment status.⁴⁴⁰ The facts of *Percy* were given in Chapter Three and it will be recalled that the appeal to the House of Lords concerned two main issues: the first, whether the claimant and the Church of Scotland had entered into a contract of employment, was considered in Chapter Five. Here we are concerned with the second: whether the jurisdiction of civil courts was excluded by the Church of Scotland Act 1921. If it was then that would amount to giving the Church a degree of autonomy.

The determination of this question involved consideration of the Church of Scotland Act 1921 which was concerned to declare the exclusive jurisdiction of the church in certain matters, the relevant words being in Article IV of the constitution of the Church. These provide that the church has the power

to adjudicate finally in all matters of doctrine, worship, government, and discipline in the church, including the right to determine all questions concerning membership and office in the church.

⁴³⁹ (2005) UKHL73

⁴⁴⁰ Although the word 'autonomy' never actually appears in the judgements.

Despite these strong words their Lordships were unanimous⁴⁴¹ in holding that they were intended to deal with spiritual matters and did not therefore exclude the jurisdiction of the courts and tribunals in contractual disputes.

The fundamental issue was whether a line could be drawn between matters spiritual, where the church would have autonomy, and matters civil, where it would not and where the civil courts would claim jurisdiction. This links to our concluding chapter where we look at a possible way forward on the whole question of ministerial employment status. The essence of the speeches in the House of Lords was that such a line could be drawn. Was this correct?

The Lords reached their conclusion by holding that, as there was a contract, (the first issue) then this necessarily took the matter out of the realm of the spiritual and made it subject to the civil law and so resolved the second issue. So the provisions of the 1921 Act did not apply. In effect the two issues were conflated: the resolution of the first issue, was there a contract, decided the second: was the matter spiritual so as to give the church autonomy? So Lord Nichols of Birkenhead adopted the words of the Lord President, Lord Rodger, in the First Division of the Court of Session in this case that ⁴⁴²

by entering into a contract of employment binding under the civil law the parties have deliberately left the sphere of matters spiritual in which the Church courts have jurisdiction and have put themselves within the jurisdiction of the civil courts.

⁴⁴¹ The most detailed speech on this point was that of Lord Hope.

⁴⁴² (2001) SC 757,769

This, with respect, avoids the issue: by deciding that there is a contract, what might be called the micro-issue, the macro-issue, that of a divide between spiritual and civil jurisdiction, is emptied of all significance. In Chapter Five we shall examine the question of employment status against the background of the ecclesiology of particular churches yet here there was no attempt to do so here. Cranmer and Petersen make the intriguing point that:

The fact that a contract exists between the Church of Scotland and its ministers does not mean that the employment relationship is entirely civil and must therefore meet all of the requirements for non-discrimination under civil law, as the judges seem to think that it does ⁴⁴³

Ahdar and Leigh emphasise the need for an element of discretion in the reasoning of courts 'when determining whether a contract exists in the first place based on their analysis of the facts' and they point out that 'the boundary between the spiritual sphere of church governance and the employment sphere subject to the courts' jurisdiction is less self-evident than may appear'. ⁴⁴⁴ All of these points made by commentators can be summed up by saying that in treating the resolution of the contract issue as also resolving the spiritual- civil issue the House of Lords failed to give due weight to the nuances inherent in the relationship between minister and church.

⁴⁴³ 'Employment, Sex Discrimination and the Churches: *The Percy Case*' (2006) 8 Ecc LJ 396, 402

⁴⁴⁴ *Religious Freedom in the Liberal State* 2nd edn. (OUP 2013) 343

Nor is it at all clear how the members of the House thought that the apparent tension between spiritual and civil relationships should be resolved. Lady Hale attempted to distinguish between them in this way:

The Church is free to decide what its members should believe, how they should manifest their belief in worship and in teaching, how it should organise its internal government, and the qualifications for membership and office. But the processes whereby they make decisions about membership and office may be subject to the ordinary laws of the land. It will all depend upon what that law says and means.⁴⁴⁵

As Cranmer and Petersen remark, there are 'serious borderline issues involved in making any of these decisions'. Suppose that the Church makes it a disciplinary offence to act as a surrogate mother, which of course applies to women ministers but not to men. The rationale for this would be that acting as a surrogate was against the beliefs of the Church, which would take it within Lady Hale's statement that: 'The Church is free to decide what its members should believe'. Yet this rule would appear to be discrimination against women. Nor is it clear what Lady Hale meant by saying that 'the processes whereby they make decisions about membership and office may be subject to the ordinary laws of the land.' Was she drawing a distinction between procedural matters and substantive ones? This may well be so, as Lord Hope observed in his speech that, in connection with whether Article IV barred a civil claim:

⁴⁴⁵ Para. 152

A claim of unlawful discrimination in the employment field has nothing to do with matters of doctrine, worship or government or with membership in the Church. But it may have something to do with the way that discipline is exercised, and it may also have something to do with the way a person is deprived of an office in the Church.⁴⁴⁶

It was indeed true that there were supposed to be procedural shortcomings in the manner in which the Church dealt with these matters,⁴⁴⁷ but in holding that the civil courts had the power to decide the substantive issue of whether there had been unlawful discrimination the courts went beyond merely looking just at ‘the way in which discipline is exercised’. Judicial review seems the obvious solution here.⁴⁴⁸ This is because it enables the courts to exercise a supervisory jurisdiction over the actions of tribunals and other bodies to ensure that basic procedural norms are upheld⁴⁴⁹ whilst allowing them a degree of space to determine matters which are properly within their competence. The extent of this ‘degree of space’ is examined below.

All of this is matters very much because, in the Conclusion in Chapter Six we shall examine whether it would be possible to establish a scheme whereby employment status was granted to ministers of religion but with a proviso that the courts would not exercise jurisdiction where the matter is in issue was doctrinal. If we read doctrinal for spiritual in this context, the precedent in *Percy* is not encouraging.

⁴⁴⁶ Para.132

⁴⁴⁷ See again Lord Hope at para. 132

⁴⁴⁸ See the discussion on this at 8 below.

⁴⁴⁹ The rules of natural justice etc.

7. Autonomy in action: distinction between civil and spiritual matters

7.1. Autonomy in practice

Having established that some degree of autonomy is accorded by the State to the Church in the UK we must now turn to how this works in practice. One initial matter needs to be cleared up at once. The courts constantly refer to ‘religion’ and ‘matters spiritual’ as kinds of warning signs to them that here is a boundary that should be approached with caution and probably not crossed. For example Lord Hope in *R v JFS Governing Body*⁴⁵⁰ referred to *Percy v Board of National Mission of the Church of Scotland*⁴⁵¹ and said:

It has long been understood that it is not the business of the courts to intervene in matters of religion...It is just as well understood, however, that the divide is crossed when the parties to the dispute have deliberately left the sphere of matters spiritual over which the religious body has exclusive jurisdiction and engaged in matters that are regulated by the civil courts. In *Percy v Board of National Mission of the Church of Scotland* [2006] 2 AC 28, for example,...⁴⁵²

So here in one sentence Lord Hope refers to religion and in the next to matters spiritual but he does not tell us precisely what he understands by these terms⁴⁵³. So there are boundary signs but no clear boundary. We must go further. The question of what is meant by ‘religion’ can now I suggest, be decided by reference to Lord Toulson’s working definition in *R (on the*

⁴⁵⁰ (2009) UKSC 15. See paras. 157 and 158. This was not a clergy employment case.

⁴⁵¹ (2006) 2 AC 28

⁴⁵² That part of the decision in *Percy* which bears on the question of autonomy is examined at 6.2. above.

⁴⁵³ See my proposed definition of spirituality in Chapter Three.

application of *(Hodkin) v Registrar of Births, Deaths and Marriages*,⁴⁵⁴ referred to in Chapter One. With regard to spiritual, in so far as that needs a different definition, we can refer to the definition I offered in Chapter Three.

Taking these definitions, we can now see how the issue of autonomy is important in clergy employment cases in these examples:

Example One

X, a minister of Y church, is deprived of permission to act as a minister because of alleged misconduct with a married woman, Z, in his parish. X says that he did not do this but argues that, even if he did, according to the tenets of the church this behaviour is not regarded as sinful. He also argues that the procedure under which the church acted was in breach of natural justice because one of those who decided the matter was W, the husband of Z.

We can see that this involves three issues:

- (a) The question of fact whether X did commit misconduct with Z.
- (b) The question of whether this misconduct was in fact not misconduct at all according to the tenets of the church.
- (c) The procedural question of whether, assuming that there was a breach of the rules of natural justice, this provides a cause of action.

Example Two

⁴⁵⁴ [2013] UKSC 77

A is a human relations consultant who entered into a contract with a church to revise its employment procedures and be paid £5,000 for the work. When A has completed the work the church refuses to accept liability to pay on the ground that the person, B, who asked her to do the work, was not authorised to do so.

We can see that this involves one issue: liability to pay a debt.

In Example One we have a distinction between what are termed civil and spiritual matters: in Example Two the matter is entirely civil and does not have any spiritual element at all. Thus there seems to be no reason why the courts should not claim jurisdiction and no question of autonomy is involved. In Example One, by contrast, civil and spiritual matters appear to be mixed: in (a) the issue is in principle justiciable by the courts as it involves a question of fact but the battleground is with (b): can the courts claim jurisdiction here? We shall see how this and the issue in (c) develops as we go through this question.

We should note in passing that there is an element of tension here: although I have suggested that the idea that the courts should afford a measure of autonomy to churches is a good one, if too great a measure of autonomy is conceded that that will involve the courts in declining jurisdiction altogether in matters such as in Example Two and so deprive clergy and indeed others who work for the church of civil remedies at all. How is this played out in the cases?

There are two principles used by the courts to decide if they can adjudicate on disputes with a 'religious' element: the neutrality and the non-justiciability principle. As we shall see, they appear to accord differing degrees of space to religious bodies in how they arrive at

decisions and so they necessarily bear on the question of how far they affect the autonomy of churches and other religious bodies in the area of clergy employment rights.

7.2. The Neutrality Principle

This states that the courts are neutral on issues of religious doctrine and government. The effect is that the courts do not deny themselves jurisdiction on matters where religious doctrine is involved but, as Rivers points out:⁴⁵⁵

they were offering assurances of neutrality to the parties. They were pointing out that it was not the role of a court of law to act as a religious insider delivering 'correct' answers to the underlying substantive theological or ecclesiological dispute between the parties. However, they would regularly proceed to point out that questions of fact might well be relevant to determine the outcome of the case

An application of this principle can be seen in *Forbes v Eden*⁴⁵⁶ which was a claim by a minister of the Episcopal Church of Scotland that when the Church adopted new Canons of 1863 this had imposed on him the maintenance of doctrines and the adoption of a practice

⁴⁵⁵ *Law of Organised Religions* 73

⁴⁵⁶ (1867) LR I Sc & Div. 568

which were different from those of 1838 to which he bound himself on his ordination.

Cranworth LC said:

Save for the due disposal and administration of property, there is no authority in the Courts either of England or Scotland to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs.⁴⁵⁷

The effect is that if, as in this case, there is a property right then the courts will need 'to take cognizance of those rules and regulations' and, as in this case, that can involve examining them as matters of fact to determine, in this case, whether the Canons of 1863 had indeed replaced those of 1838 under which the claimant was ordained.

7.3 The principle of non-justiciability and the decision in Wachman

This differs from the neutrality principle in that it endeavours to create a space around matters spiritual and say that the court cannot determine them. As Rivers points out, unlike the doctrine of neutrality, non-justiciability means that 'the courts should not even resolve disputed questions of religious doctrine and government as matters of fact'.⁴⁵⁸ Here we have a clear example of a kind of island around churches in their self-governance.

Its application can be seen in *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex p Wachmann*⁴⁵⁹ where the Chief Rabbi

⁴⁵⁷ At 581.

⁴⁵⁸ *The Law of Organised Religions* 73.

⁴⁵⁹ (1992) 1 WLR 1036. See the discussion of this case in R. Sandberg, *Law and Religion* (CUP 2011) 74-76 who refers to this as the principle of non-interference. and see also J. Dingemans in 'The Need for a Principled

appointed a commission of inquiry and, following its report, declared the applicant was “no longer religiously and morally fit to occupy his position as rabbi.” The applicant's congregation then terminated his employment. The applicant sought leave to apply for judicial review of the Chief Rabbi's declaration on the ground that his decision had been flawed by both the conduct and make-up of the commission of inquiry. We shall consider the judicial review aspect later but it is significant that Simon Brown J held that the court was hardly in a position to regulate what was essentially a religious function—in that case, the determination whether someone was morally and religiously fit to carry out the spiritual and pastoral duties of his office. As he put it, ‘the court must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognised divide between church and state....’⁴⁶⁰

One could also add that the claimant had anticipated the objection that his case involved matters of religion by basing his case solely upon the common law concept of natural justice. However, Simon Brown J. met this by holding that: ‘it would not always be easy to separate out procedural complaints from consideration of substantive principles of Jewish law which may underlie them’. Rivers ⁴⁶¹ remarks that the doctrine of non-justiciability of judicial decisions, which seemed to be the doctrine relied on by Simon Brown J., is unsatisfactory as it ‘can lead to the denial of any legal remedy. The religious dimension infuses the entire dispute and takes it out of court’.⁴⁶² This is exactly what happened in the above case. On the other hand, Rivers points out that non-justiciability can have the

Approach to Religious Freedoms’ (2010) 12(3) Ecc LJ (2010) 371 who is critical of the principle of non-justiciability.

⁴⁶⁰ At 1043

⁴⁶¹ *The Law of Organised Religions* page 73

⁴⁶² See also on this point the Australian case of *Scandrett v Dowling* (1992) 27 NSWLR 483 discussed by S. Fisher ‘Judicial Intervention in Church Affairs in New South Wales’ (1993)118/9 *Law and Justice* 51.

positive effect that the religious dimension is filtered out leaving a residue of 'legally cognisable fact'. We shall return to this particular point in the conclusion together with Simon Brown J's view of the difficulty in separating procedural matters from substantive matters of religious law.

7.4 Back to non-justiciability: the decision in *Shergill & Ors v Khaira*

& Ors. ⁴⁶³

Unlike *Wachman* this case did not involve individual rights but instead whether a particular person was the spiritual leader of the Nirmal Sikh community and as such had the power to remove and appoint trustees of two gurdwaras used by members of that community.

The actual decision need not concern us but what was significant were the remarks by Lord Neuberger who said that non-justiciability refers 'to a case where an issue is said to be inherently unsuitable for judicial determination by reason only of its subject matter.'⁴⁶⁴ However, 'where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment.'⁴⁶⁵ Thus, having referred to various authorities he said that: 'This clear line of authority contradicts the idea that a court can treat a religious dispute as non-justiciable where the determination of the dispute is necessary in order to decide a matter of disputed legal right.'⁴⁶⁶ In this Lord Neuberger disagreed with Mummery LJ in the

⁴⁶³ [2014] UKSC 33. see F. Cranmer 'Sikh charity - appointment of trustees - justiciability of matters of doctrine and practice' (2014) 173 Law and Justice 237

⁴⁶⁴ Para. 41

⁴⁶⁵ Para. 45

⁴⁶⁶ Para. 53

Court of Appeal⁴⁶⁷ who regarded earlier cases as authority for the proposition that in the absence of objective juridical standards by which to decide an issue, a court must regard it as non-justiciable. One could say that, in short, Mummery LJ in the Court of Appeal adhered to the *Wachman* principle of non-justiciability whereas Lord Neuberger in the Supreme Court returned the law to the earlier doctrine of neutrality.

Smith argues, and I think correctly, that:

Khaira...potentially heralds a return to what has been described as the 'nineteenth-century' concept of non-justiciability, where judges sought 'neutrality' and detachedness by 'pointing out that it was no role of a court of law to act as a religious insider delivering "correct" answers to the underlying substantive theological or ecclesiological dispute between the parties' but would 'regularly proceed to point out that questions of doctrine and discipline might well be relevant as questions of fact to determine the outcome of the case' through the use of evidence.⁴⁶⁸

If we return to the examples above then if the principle of non-justiciability applies the question of fact in Example One (a) of whether X did commit misconduct with Z may be justiciable as a separate issue but that in (b), whether this misconduct was in fact not misconduct at all according to the tenets of the church, will not be. This is because it will involve the precise point which Simon Brown J in *Wachman* held was fatal to a claim that the court should consider the matter: 'the determination whether someone was morally and religiously fit to carry out the spiritual and pastoral duties of his office'.

⁴⁶⁷ [2012] EWCA Civ 983

⁴⁶⁸ 'The Problems of Non-Justiciability of Religious Defamations' (2016) 18(1) Ecc LJ 36, 51.

If the principle of neutrality applies then although the answer to question (a) would be the same, that to question (b) would, I suggest, be different. If we apply Lord Neuberger's words in *Shergill* that 'where a claimant asks the court to enforce private rights and obligations which depend on religious issues, the judge may have to determine such religious issues as are capable of objective ascertainment' then, given that the court is being asked to enforce private rights, that of permission to act as a minister, the court can see if it is possible by any objective assessment to determine if this was in fact not misconduct at all according to the tenets of the church. To that extent too there is less of an island around the religious body.

If this conclusion is correct and if the principle of neutrality applies then this is of enormous importance for the employment status of a minister as it will mean that where a minister is dismissed and under the law could claim unfair dismissal then where in Example One (b) the matter does involve the tenets of his or her church the court can investigate the matter and see if it is capable of, in Lord Neuberger's words, 'objective assessment'. If we then link this to other matters then we see that:

- (a) This has implications for the whole notion of autonomy of religious bodies
- (b) A detailed examination of the beliefs of religious bodies under the principle of neutrality can only create tension with the ecclesiology of some religious bodies where there are obvious barriers to employment status.

8. The availability of judicial review

Judicial review could have been considered in detail in Chapter Three when we considered the remedies available to ministers in employment situations. It is, however, more convenient to consider it here because the question of its applicability in these types of

disputes arose principally in the *Wachman* case and may arise in future cases where the court is asked to adjudicate on a matter such as in Example One (b).

We have shown that on the basis of the neutrality test there is a greater chance that the courts will seek to resolve matters with a 'religious' element and in doing so limit the autonomy of churches than if the non-justiciability test is applied. There is, though, a more fundamental issue if this arises by an application for judicial review: is review available at all? This is the difference between (b) and (c) in Example One.

Simon Brown J. in *Wachman* held that: 'To attract the court's supervisory jurisdiction there must be not merely a public but potentially a governmental interest in the decision-making power in question.' He then enunciated what we have termed the doctrine of non-justiciability to which we have referred and said:

One cannot, therefore, escape the conclusion that if judicial review lies here, then one way or another this secular court must inevitably be drawn into adjudicating upon matters intimate to a religious community.⁴⁶⁹

It is arguable that the doctrine of non-justiciability was unnecessarily linked to the availability of judicial review as Simon Brown J. eventually came to his conclusion that judicial review did not lie because the proceedings were not justiciable rather by way of his original point that there was no 'governmental interest' in the matter. In effect he conflated the substantive issue, that of supposed non-justiciability, with the procedural one of the availability of judicial review. Sandberg criticises this on the basis that the test for judicial review is the presence of 'public' functions and not 'governmental' ones and Rivers⁴⁷⁰ cites

⁴⁶⁹ At 1043.

⁴⁷⁰ *Law of Organised Religions* 104

with approval the view of Lord Woolf who, writing extra judicially in 1992, suggested that judicial review should be available to anyone caused prejudice by the unlawful exercise of authority. and asked: 'Why should a policeman be in a better position than a sportsman or a minister of religion?' ⁴⁷¹

The extent to which the courts can supervise religious domestic tribunals, including the ecclesiastical courts, forms an important part of this thesis, a point to which we shall return in the Conclusion in Chapter Six.

Wachman is authority for saying that judicial review cannot lie to a decision of such a tribunal where there is no 'governmental interest in the matter' which would include, as in *Wachman* ⁴⁷² cases where there is a dispute between a minister and a religious body. However, this is only a first instance decision and, in the appeal courts the matter may be regarded as still open.

In fact there were complex and contested issues around which of the old prerogative orders could lie to challenge the decisions of the ecclesiastical courts of the Church of England and Hill suggested that ⁴⁷³ whilst the old orders of prohibition and mandamus ⁴⁷⁴

⁴⁷¹ The reference is to Lord Woolf, 'Judicial Review: A Possible Programme for Reform' [1992] PL 211, 235.

⁴⁷² We ought, before leaving *Wachman*, to note that there was no mention in the judgement of any previous cases on the availability of judicial review against domestic religious tribunals. This was a great pity.

⁴⁷³ See M. Hill, 'Judicial Review of Ecclesiastical Courts' in N. Doe. M. Hill and R. Ombres (eds.) *English Canon Law* (University of Wales Press 1998). See also the discussion in N. Doe, *The Legal Framework of the Church of England* (Clarendon Press 1996) on the applicability of judicial review to quasi-judicial actions in the Church of England at 139-141.

⁴⁷⁴ Now prohibiting orders and mandatory orders – see Part Four of the Civil Justice Rules.

would lie certiorari⁴⁷⁵ may not, but this is concerned with the totality of the jurisdiction of the courts and does not deal specifically with employment matters.

In *R v The Bishop of Stafford ex parte Owen*⁴⁷⁶ there had been tensions in a parish and eventually the bishop handed the applicant a letter stating that his tenure as team rector would not be renewed. The applicant sought to quash this decision and submitted that the consultation procedure adopted by him prior to coming to his decision was likely to give rise to unfairness and actually did so. The High Court assumed jurisdiction but did not finally rule as a matter of law on whether it had jurisdiction over the actions of the bishop. It examined the procedure, of which it was critical, but Schiemann J. held that any procedural flaws 'were not causative of the decision of the bishop'. Thus, on the facts no case for judicial review was made out. This case takes us no further forward except for the significance of the fact that the court was prepared to at least consider its merits.

The same could be said of the decision in *R v The Provincial Court of the Church in Wales, ex parte Reverend Clifford Williams* (1998).⁴⁷⁷ This was also an application for leave for judicial review, this time to quash two decisions of the Provincial Court, which found the applicant guilty of clerical indiscipline, recommended deposition,⁴⁷⁸ and refused to grant leave to the applicant to appeal to the Supreme Court of the Church in Wales. The grounds for review were that the wrong standard of proof had been applied, deposition was a disproportionate punishment and there was a breach of natural justice as the bishop was

⁴⁷⁵ Now known as a quashing order.

⁴⁷⁶ (2001) ACD 14

⁴⁷⁷ Unreported, 23 October 1998 but noted in detail by G. Evans in (1998) 138/9 Law and Justice 127.

⁴⁷⁸ According to G. Evans *ibid.* this sentence was 'unprecedented in living memory in the Church in Wales'.

both prosecutor and judge. Latham J. dismissed the application although he did permit Williams to continue it as if begun by writ.⁴⁷⁹ He held that the Church in Wales was a domestic tribunal to which submission was voluntary and so the High Court lacked jurisdiction to review its decisions.

Evans is critical of the decision on several grounds, one being that the court was in error in holding that the Provincial Court of the Church in Wales was a domestic tribunal to which submission was consensual which she argues was 'not in accordance with the theology of ordination in an episcopal church'. Instead, although there is a voluntary element, in that 'the ordinand can refuse to submit to the laying on of hands', the definitive element is 'an act of God in conferring Holy Orders'. Here we meet the point that in any discussion of civil liabilities in this area it is crucial to take account of the ecclesiology of the church and in effect it is Evans' argument that here the court failed to do so.⁴⁸⁰ It is not clear whether, if it had, there would have been a different outcome as there were other grounds on which judicial review was refused but at least this obstacle in the way of judicial review would have gone if Evans' point had been accepted.

Decisions of the courts of Scotland have recognised the availability of judicial review. In *Brentnall v Free Presbyterian Church of Scotland*⁴⁸¹ it was held that the suspension of a minister *sine die* was in breach of natural justice and the court approved of the statement by

⁴⁷⁹ Now a claim form. There is no report of these proceedings which may well have been settled out of court.

⁴⁸⁰ Simon Brown J. in *Wachman* also dismissed the consensual argument. See here Rivers *The Law of Organized Religions* 104.

⁴⁸¹ (1986) SLT 470. The matter is illuminatingly discussed by F. Cranmer in 'Judicial Review and the Church Courts of Scotland' (1998) *Denning Law Journal* 49,54

Lord Justice Clerk Aitchison in *McDonald v Burns*⁴⁸² that decisions of religious bodies were reviewable where the tribunal had acted beyond its own constitution to 'affect the civil rights and patrimonial interests of any of its members'. Moreover, in *Macdonald v Free Presbyterian Church of Scotland*⁴⁸³ judicial review proceedings were begun at the same time as those alleging unfair dismissal. The proceedings were stayed pending the outcome of the dismissal claim but there was no suggestion that in principle the judicial review proceedings were wrong in law.

In the little noticed case of *Gibbs v Bishop of Manchester*⁴⁸⁴ it was⁴⁸⁵ accepted that judicial review could be sought of a decision by a bishop to revoke the claimant's licence to exercise the office of church army captain following an investigation after a risk assessment. Munby J. simply stated⁴⁸⁶: that 'It is common ground that because it relates to an office in the Established Church, the claimant's claim is, in principle, amenable to judicial review.' No authority was given for this but, if this is so, then the matter of whether judicial review is available in clergy employment cases, certainly involving clergy of the Established Church, is settled. I suspect, though, that the courts will need to return to this question.

⁴⁸² (1940) SC 376

⁴⁸³ [2010] Appeal No. UKEATS/0034/09/BIUKEATS/0034/09/BI. See also Chapter Three.

⁴⁸⁴ (2007) EWHC 480 (Admin)

⁴⁸⁶ At para. 9

A puzzling case is *Buckley v Cathal Daly*⁴⁸⁷ where the Northern Ireland High Court considered whether a RC priest had *locus standi* to seek a declaration that his Bishop had unlawfully removed him from his position. This case is examined fully in Chapter Five but it was held on the facts that he did not have *locus standi* to pursue his claim and Doe suggests that here the court did at least entertain judicial review proceedings.⁴⁸⁸ If this is so then this case is an authority for the proposition that judicial review may, in some cases, be sought in disputes between a minister and his or her church where this church is not the Established Church. In fact, it was not mentioned in either *Wachman* nor in *Shergill* and it is arguable that judicial review was not in fact sought. Although the remedy claimed was a declaration the action was brought in the name of the plaintiff and not the Crown, which would have been so if judicial review had been sought, and the term 'judicial review' was not mentioned. Instead the action appears to have been brought under 9 below.

What does seem clear is that in number of cases the courts have recognised the availability of judicial review against ecclesiastical bodies and tribunals and it is submitted that *Wachman* can no longer be considered authority for any contention that it does not lie in these cases.

9. Challenges to the contractual jurisdiction of a voluntary association

9.1. General principles

There is a further principle: that as many religious bodies are voluntary bodies what

⁴⁸⁷ [1991] ITLR. This case is considered more fully in Chapter Five.

⁴⁸⁸ *The Legal Framework of the Church of England* 141

Sandberg⁴⁸⁹ calls the 'doctrine of consensual compact' applies and so the law recognises the binding effect of their rules as founded on a contract between the members. ⁴⁹⁰ I suggest that this can be viewed together with the neutrality principle because once the court has identified, in Lord Neuberger's phrase in *Shergill*. the 'religious issues as are capable of objective ascertainment', the doctrine of consensual compact will then be a tool for the resolution of the dispute once these religious issues have been assessed. This was recognised by Lord Cranworth in *Forbes v Eden* when he observed that a court 'must necessarily take cognizance of those rules and regulations for the purpose of satisfying itself as to who is entitled to the funds' and in employment terms this would mean that a court recognised the rules of the religious body under which a minister was appointed.

This area has similarities to the law on office holders, explored in Chapter Two in that it has never been subjected to rigorous analysis and remains on the fringes of the law. The result is that there may be two heads, and not just one head, of jurisdiction:⁴⁹¹

(a) One stemming from the judgement of Lord Kingsdown in *Long v Bishop of Cape Town* that:⁴⁹²

The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body-in no better, but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body

⁴⁸⁹ *Law and Religion* (CUP 2011) 74-76.

⁴⁹⁰ This argument does not, of course, apply where the Church is established. See the discussion above on the Church of England and on whether the Church of Scotland is established see the remarks of Lord Mackay in 'Does Establishment have a Future?' (2013) *Law and Justice* 7,16 and the very useful account in Sandberg *Law and Religion* at 70-72.

⁴⁹¹ See Rivers *The Law of Organised Religions* 106

⁴⁹² (1863) 1 Moore New Series 411 Another aspect of this case is discussed in Chapter Five.

which will be binding on those who expressly or by implication have assented to them.

In *Shergill* the Supreme Court emphasised the contractual aspect when Lord Neuberger said that the law⁴⁹³:

...views the constitution of a voluntary religious association as a civil contract as it does the contract of association of a secular body: the contract by which members agree to be bound on joining an association sets out the rights and duties of both the members and its governing organs.

(b) A wider principle under which the rules of natural justice operate not as a supplement to the procedural rules of the association but as an essential requirement. There is a hint of this in the words of Lord Kingsdown in *Long* but the principle is more fully expressed by Denning LJ in *Lee v Showmen's Guild of Great Britain*⁴⁹⁴ when he said that:

The tribunal must, for instance, observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary would be invalid. They cannot stipulate for a power to condemn a man unheard....⁴⁹⁵

9.2 Application to the law on ministerial employment status

This point is vital for the development of the law on the employment rights of ministers as here we have identified one area where the possibility of protection already exists.

⁴⁹³ At 46

⁴⁹⁴ (1952) 2 QB 329, 342

⁴⁹⁵ See also *Nagle v Fielden* (1966) QB 633

Admittedly the degree of protection is small as if a challenge to the rules on the basis of breach of natural justice or *ultra vires* succeeds then it can only be on the basis of a flawed procedure and not on the substantive issues and would have been of limited help to, for example, Mark Sharpe in his claim for alleged ill-treatment by the Diocese of Worcester.⁴⁹⁶ Thus, a remedy is likely to be a declaration, as in *Buckley v Cathal Daly*, and any damages would be limited to those flowing from a breach of procedure.

However, any move away from the jurisdiction being founded on contract is helpful to ministers in three ways:

- (a) It removes the obvious answer to claims by ministers that they have no contractual relationship with their church.
- (b) It removes the argument that clergy of the Church of England cannot take advantage of this rule as their Church is not a voluntary association based on a contract between its members. It was argued above⁴⁹⁷ that this view is mistaken but Lord Kingsdown in *Long* saw a clear distinction between the Established Church and others.
- (c) It would negate the attempt by the Methodist Church noted in Chapter Three to deprive their clergy of their employment rights by providing that there is no contractual relationship between its members, including its clergy.

We shall return to this possible remedy in our conclusion and see if it could be used, along with others, to form a workable scheme for the protection of ministers in employment situations.

⁴⁹⁶ *Sharpe v. Worcester Diocesan Board of Finance* (2015) EWCA Civ. 399. See Chapter Three.

⁴⁹⁷ At 6.1.

10. Conclusion

On one view this chapter lists a series of missed opportunities. The first is the failure by the courts to engage with the issue of employment status of the clergy against the background of autonomy of church as against the state, the second is the failure to engage fully with the implications of Art. 9 of the ECHR to this question and the third is the confusion over whether decisions of religious bodies are susceptible to judicial review. On that basis we are not talking here about actual obstacles but possible and perhaps unrecognised ones.

However, the renewed focus on neutrality as the governing principle when the courts adjudicate on the decisions of religious bodies opens the door to the courts at least investigating religious issues as opposed to just declaring them non-justiciable and also gives a new avenue for clergy seeking relief where they allege unfair treatment in 'employment' situations. In this way an obstacle is removed.

Chapter Five: Obstacles to employment status for ministers of religion: The Perspectives⁴⁹⁸ of Churches

1. Introduction

This chapter continues the theme of the previous one by considering issues specific to clergy employment status. So, having looked at the autonomy of churches, we now turn to look at obstacles to employment status for the clergy from the perspectives of the churches themselves and in particular their ecclesiology.

2. The perspectives of churches drawn from their teachings.

2.1. Perspectives drawn from biblical teachings on conflict resolution.

The extent to which there is a biblical prohibition on taking cases to court has been endlessly debated but if one can establish at least a discouragement to litigation then that is a powerful argument against the granting of employment status to the clergy. As Reed says; 'If a member of the clergy were to seek legal redress in an industrial tribunal over their treatment by the church, then something would have gone seriously wrong.'⁴⁹⁹

Jesus seems to be encouraging settlement of disputes out of court when he says: 'Come to terms with your opponent in good time while you are still on your way to the court with him, or he may hand you over to the judge and the judge to the officer, and you will be thrown into

⁴⁹⁸ The plural here reflects the different perspectives which different churches have on this question.

⁴⁹⁹E. Reed, *The Ethics of Human Rights* (Baylor University Press, 2007) 15. The quotation is in the middle of a valuable discussion of the place of 'rights' culture in Christian thinking which we shall come back to later. Industrial tribunals are now of course named employment tribunals.

prison'.⁵⁰⁰ Although it would be going far too far to regard this as an endorsement of some form of Alternative Dispute Resolution the whole passage can be read as an injunction not to let grievances fester but to deal with them promptly. This could be taken as a recommendation that employers should at least enforce proper grievance procedures.

Paul⁵⁰¹ enjoins the Corinthians to settle disputes among themselves: 'How dare one of your members take up a complaint against one another in the lawcourts of the unjust instead of before the saints? As you know, it is the saints who are to judge the world'. Yet as the Jerome Biblical Commentary points out,⁵⁰² this is really saying that 'The Community should witness to a divisive world by exhibiting its ability to reconcile its own members'. Moreover, Professor Anthony Thistleton⁵⁰³ has convincingly argued that these words refer to the situation in Corinth when Paul wrote when justice was only available to those with superior social or financial power.⁵⁰⁴ Once again here we have a powerful plea for some kind of internal dispute resolution which, in this case, could only come with either employment status or the conferral of rights akin to those of employees but without the express conferral of employment status as such.

⁵⁰⁰ Matt. 5:25. In fact, as so often with biblical quotations, this text may have been given more weight than it can bear. As Fenton points out (J. Fenton, *Saint Matthew, Pelican New Commentaries on the Bible*, (Penguin Books Ltd. 1963) 87 similar words in Luke (12:57-59) are much less of an 'exhortation to reconciliation' and he suggests that it is in Luke's version that we come nearer to the words of Jesus. All quotations are from the New Jerusalem Bible.

⁵⁰¹ 1 Cor. 6:1-7

⁵⁰² *New Jerome Biblical Commentary*, (Geoffrey Chapman, 1968) 803

⁵⁰³ In Annex 3 of 'Review of Clergy Terms of Service' the Report of the Church of England on the first phase of its work in response to the DTI Discussion paper (2002) URN 02/1058

⁵⁰⁴ Some would say that, with the decline in the state funding of litigation in the UK we are not far from this situation today!

Although the biblical precedents give no clear guidance one can say that they enjoin settlements of disputes promptly and, if possible, without lengthy and costly litigation.

2.2. Perspectives drawn from fundamental teachings about justice in society

Here we are concerned with the very foundational biblical teachings about justice in society whereas in 2.3. below we consider the application of those teachings in the context of the world of work.

Justice is a familiar theme of, in particular, the Old Testament. Thus Isaiah proclaims that

But Yahweh is waiting to be gracious to you, the Exalted One, to take pity on you, for Yahweh is a God of fair judgement; blessed are all who hope in him. Yes, people of Zion living in Jerusalem, you will weep no more. He will be gracious to you when your cry for help rings out; as soon as he hears it, he will answer you.⁵⁰⁵

This theme is repeated throughout the Old Testament⁵⁰⁶ and is also found in the New. In Matthew⁵⁰⁷ the scribes and Pharisees are taken to task for having 'neglected the weightier matters of the Law- justice, mercy, good faith'. In addition, the passage in Acts 17:26 stresses the unity of the whole human race: 'From one single principle he not only created the whole human race so that they could occupy the entire earth, but he decreed the times and limits of their habitation.'

When we narrow our focus to look at biblical teaching on the rights of workers, we find various biblical references of which one is in I Cor. 3:8: 'It is all one who does the planting

⁵⁰⁵ Is. 30.18

⁵⁰⁶ See, for instance, Deuteronomy 32:3-4

⁵⁰⁷ 23:23

and who does the watering, and each will be duly paid according to his share in the work'.⁵⁰⁸

Pope John Paul II makes an explicit connection between biblical teaching and rights of workers in his encyclical *Laborem Exercens*⁵⁰⁹ when he points to the words in Genesis 1:28: 'Be fruitful and multiply, and fill the earth and subdue it'. As the Pope says, although these words do not 'refer directly and explicitly to work, beyond any doubt they indicate it as an activity for man to carry out in the world'. Moreover, the Christian principle that all humans have an innate dignity⁵¹⁰ by virtue of their being made in the image and likeness of God⁵¹¹ requires Christians to advocate worldwide standards of justice for workers.

If we then can conclude that fundamental Christian teachings require an engagement by Christians with the rights of workers we need then to ask: what specific rights should there be, and should we talk of 'rights' at all?⁵¹²

2.3. Perspectives drawn from fundamental teachings about the rights of workers

This section looks at employment status from the point of view of the churches and so we must consider the question of whether Christians consider that they should be arguing for

⁵⁰⁸ Biblical references to labourers (i.e. workers) take up a column and a half of *Eerdmann's Analytical Concordance to the RSV of the Bible* (Eerdman's Publishing Co., 1988)

⁵⁰⁹ Catholic Truth Society, 1981

⁵¹⁰ One of the most succinct and clear recent account of the Christian principle of human dignity is, I think, to be found in A Fisher *Catholic Bioethics for a New Millennium* (Cambridge University Press, 2012) at pps. 218 - 228. Although of course here the emphasis is on bio ethical issues there is much in the discussion of general value.

⁵¹¹Gn. 1:26-27

⁵¹² On the secular level H. Collins (In 'Theories of Rights as Justifications for Labour Law' in *The Idea of Labour Law* edited by G. Davidov and B. Langille (OUP, 2011) draws on the work of John Rawls (principally in *A Theory of Justice* (OUP, 1972) and in *Political Liberalism* (Columbia University Press, 1993) to suggest that what Rawls calls 'primary goods' such as rights to freedom of movement and free choice of occupation might be used to buttress employment rights. Note though the criticisms by Collins of this at pp. 145-146 of the *Idea of Labour Law*.

'rights' at all. Does this promote a culture of selfishness? Reed ⁵¹³ argues forcefully that, certainly in this context, a claim based on 'rights' is a just one:

Arguably, the churches should welcome the move to extend statutory employment protection to the clergy because of the opportunity for witness with respect to the minimum standards that society should afford all workers. Rights and rights claims are not integral to the Christian ethos but are increasingly recognised by the churches as the kind of law that love requires in a fallen world

The point is well made but I suggest that we must not bypass the 'rights' debate quite so quickly. 'Rights' are today seen as part of 'human rights' and many Christians have a fundamental objection to the notion of rights at all. I have written that 'Christians feel ambivalent about using the language of rights with its connotations of individuals asserting what they want at the expense of a Christian concern for others. To put it bluntly, a concern for human rights is seen as selfish'. ⁵¹⁴ Accordingly clergy might feel uneasy about promoting a scheme of guaranteed employment 'rights' as such if it was seen in the context of a secularist notion of human rights as exemplified by the comment of Vanessa Klug that: 'Human rights are seen as a possible alternative common morality for the UK'. ⁵¹⁵

However, the picture changes if we locate human rights, whether employment rights or others, in the Christian context of human rights as based not on some secular discourse but

⁵¹³ E. Reed 'Labour Law and the Employment Status of Clergy' (2003) *Crucible* 3 429 – 435

⁵¹⁴ In *Christians and the State* (Gracewing, 2016) 146

⁵¹⁵ In *Values for a Godless Age* (Penguin, 2000) 192.

on what is seen as the innate dignity of all humans as made in the image of God.⁵¹⁶

Moreover, there is a strong argument that the very idea of human rights derives from natural law and is thus a specifically Christian concept.⁵¹⁷ Indeed, any engagement with the human rights debate in the context of fundamental rights for workers means that we are to contemplate the possibility that, if Christians do *not* hold to the concept of fundamental human rights, then these specific workers' rights do not exist.

Stephen Trott, writing from the standpoint of an Anglican priest, has forcefully argued that work is a basic human right and must not be seen as just 'a contract to sell or buy labour. It is a fundamental part of our lives, so much so that we are shaped by it, for good or ill... It can bring us a tremendous sense of fulfilment or it can grind us down'.⁵¹⁸ From this he argues that 'work is a basic human right, and more than that, to claim that dignity at work must be part of the equation'. This is a view with which few Christians would disagree.

So the conclusion here must surely be that, accepting that human rights do have a Christian basis, there is an assured place for the fundamental rights for workers in a schedule of basic human rights.

⁵¹⁶ See, for a lucid account, R. Ruston *Human Rights and the Image of God* (SCM Press, 2004). R. Reed in *The Ethics of Human Rights* considers the matter from a specifically Protestant angle.

⁵¹⁷ See, for an exposition of the Christian viewpoint, D. McIlroy, 'A Christian Understanding of Human Rights' a lecture delivered at Swansea University on 20 March 2013 and available at <https://lawcf.org/resources/.../Christian-understandings-of-human-rights>

⁵¹⁸ 'Dignity at Work' (2001) *Ecc LJ* 51

If we are to accept that Christians uphold the notion of these rights, what should the content of them be? A major source is to be found in Catholic Social Teaching and in particular in two papal encyclicals, *Rerum Novarum* of Leo XIII in 1891⁵¹⁹ and *Laborem Exercens*⁵²⁰ of John Paul II, published in 1981 to mark the nineteenth anniversary of *Rerum Novarum*. A further detailed source is the *Compendium of the Social Doctrine of the Catholic Church* compiled by the Pontifical Council for Justice and Peace.⁵²¹ Although these documents represent the Roman Catholic position it will be seen that they represent ideas and ideals which are common to all Christians and so our discussion will be based on them but with references to other non-Catholic sources also.

In *Laborem Exercens* the Pope remarks in the Introduction that ‘.. the church considers it her task always to call attention to the dignity and rights of those who work, to condemn situations in which that dignity and those rights are violated.’⁵²² The encyclical then goes on to enunciate what it sees as the fundamental issue: that of ‘just remuneration for work done’⁵²³ and then goes on to deal with various specific rights of workers and these, together with principles drawn from this and *Centesimus Annus*⁵²⁴ and *Rerum Novarum*, are helpfully collected in the *Compendium of the Social Doctrine of the Catholic Church*.⁵²⁵

⁵¹⁹ A. Esolen, *Reclaiming Catholic Social Teaching* (Sophia Institute Press, 2014) contains, at ch.7, a detailed analysis of the teaching of Pope Leo XIII on this area.

⁵²⁰ Catholic Truth Society, 1981

⁵²¹ Bloomsbury Publishing, 2004.

⁵²² At 1.

⁵²³ At 19. This section also contains discussion of other rights whereas section 20 deals with rights of unions.

⁵²⁴ Another encyclical of Pope John Paul II issued in 1991.

⁵²⁵ Op.Cit. at 155. Examples are the right to a just wage and the right to a pension and to insurance for old age, sickness and in the case of work-related accidents; the right to social security connected with maternity;

Given that the clergy are certainly ‘workers in the Lord’s vineyard’⁵²⁶ the point is obvious: why should the Church deny its own ‘workers’ rights that it claims for others? This is precisely the point made by Trott ⁵²⁷ who takes his argument, discussed above, that dignity at work is a fundamental right to mean that, as he says: ‘it follows that all who work for a business, or in the voluntary sector, *or in the churches*,⁵²⁸ should have the rightful expectation of dignity of treatment according to law and according to the terms of their service’. However, this argument, whilst superficially attractive, leaves out the question of the extent to which the ecclesiology of the churches bears on the question of whether their ministers should have a contract at all and it is to this that we must now turn. Before we do this, we can note that so far in this chapter we have not discovered obstacles to clergy employment rights but a general encouragement to the recognition of some rights, if not necessarily contractual employment ones.

3. The perspectives of churches drawn from their ecclesiology

3.1. Why is the concept of ecclesiology relevant to a discussion of the employment status of ministers of religion?

It is a central argument of this thesis that the question of the employment status of the clergy cannot be understood by looking at secular law alone but must also have regard to the beliefs, practices and customs of individual churches. Although all Christian churches have

⁵²⁶ See Matt. 20: 1-16. This passage is not by itself a guide to workers’ rights!

⁵²⁷ ‘Dignity at Work’ (2001) Ecc LJ p. 55

⁵²⁸ Italics mine.

to some extent a shared ecclesiology, there are considerable divergences. In *Christian Law; Contemporary Principles* Norman Doe seeks to develop a set of principles common to all Christian Churches and at the outset⁵²⁹ he draws a distinction between ecclesiology and ecclesiality regarding ecclesiology as 'the theological study of the Church Universal' whereas ecclesiality is its territoriality, sociality and polity. This is a similar distinction to that drawn by Avis except that ecclesiality seems to include matters which Avis would regard as under the realm of polity as such. However, the important point for our purposes is that although Doe has indeed put forward an extended definition of ecclesiality valid for all Christian churches⁵³⁰ each church has its own self understanding of what its particular ecclesiology is and this is of central importance for this thesis as it is precisely because of this divergence in self-understanding that when considering whether a minister of a particular church does have employment status the courts have to take into account different considerations and may in the end reach a different result.

The methodology will be to first clarify our understanding of what ecclesiology means for the purposes of this enquiry and to then set the discussion in context by looking at situations where the ecclesiology of a particular church has had an impact on employment status for the clergy.

3.2. What is ecclesiology?

3.2.1. Ecclesiology

⁵²⁹ Cambridge University Press, 2013 at 12.

⁵³⁰ Ibid. p.388.

We need to take a step back and look at the final basis of the teaching of churches, whether Christian or otherwise. In *Christianity and Social Order* Archbishop William Temple wrote that: ‘ .. it is always necessary that dogma and theology should be the basis of the church’s life’.⁵³¹ This is of course undoubtedly true, although it cannot bear too much repetition. Dogma, as Temple pointed out, is the ‘divinely given truth which it believes itself called on to proclaim; this is worked out in its theology’. Ecclesiology is a branch of theology. Thus, in an article in the *Ecclesiastical Law Journal*⁵³² Paul Avis wrote of ecclesiology as ‘a shared theological understanding of the nature and mission of the church’.⁵³³ It is important for our study to be clear on the impact of the ecclesiology of a church on the legal status of its clergy because, as we shall see, that very status flows from its ecclesiology.

The word *ecclesiology* comes from the Greek *ekklesia* meaning *assembly*. It has, however, now acquired a specific meaning where it is considered as, to put it very generally, a theological understanding of the nature and mission of the church. This differs to some degree with each Christian church and this is of fundamental importance for this thesis as it leads us in the direction of differing answers on the question of employment status for particular churches. For instance, one could say that the fundamental ecclesiology of the Methodist Church is to be found in Wesley’s Rules of the Society where at para. 2. where we find that:

This was the rise of the UNITED SOCIETY, first in London, and then in other places. Such a Society is no other than ‘*a company of men, having the form, and seeking the power, of godliness; united, in order to pray together, to receive the word of*

⁵³¹ Op. Cit. This quotation is from p. 46 of the edition published by Shephard- Walwyn in 1976.

⁵³² ‘Polity and Polemics: The Function of Ecclesiastical Polity in Theology and Practice’ (2016) Ecc LJ 2

⁵³³ At. 4

*exhortation, and to watch over one another in love, that they may help each other to work out their salvation.*⁵³⁴

This idea of a 'company of men' (now people) is then given shape in our context by the doctrine of the priesthood of all believers set out for our purposes in Section 2, clause 4 of the Deed of Union:

The Methodist Church holds the doctrine of the priesthood of all believers and

consequently believes that no priesthood exists which belongs exclusively to a particular order or class of persons but in the exercise of its corporate life and worship special qualifications for the discharge of special duties are required and thus the principle of representative selection is recognised.

This, as Gillian Evans points out ⁵³⁵ whilst conceding that that there has to be a special ministry does not accept that this consists in a personal priesthood and 'thus denies a complex of assumptions that would be made in Orthodox, Roman Catholic and much Anglican ecclesiology',

The fundamental ecclesiology of the Roman Catholic Church was expounded in the encyclical of Pope Pius XII *Mystici Corporis Christi*, (of the Mystical Body of

⁵³⁴ See the Section 'Historic texts' in '*The Constitutional Practice and Discipline of the Methodist Church*' volume 1 www.methodist.org.uk accessed 6.8.16

⁵³⁵ In *Discipline and Justice in the Church of England* at 17

Christ).⁵³⁶ This is a much 'higher' view of the church than a 'company of men' and this is reflected in the ecclesiology of the Roman Catholic Church in relation to the priesthood which is set out in the *Catechism of the Catholic Church*.⁵³⁷

The whole Church is a priestly people. Through Baptism all the faithful share in the priesthood of Christ. This participation is called the "common priesthood of the faithful." Based on this common priesthood and ordered to its service, there exists another participation in the mission of Christ: the ministry conferred by the sacrament of Holy Orders, where the task is to serve in the name and in the person of Christ the Head in the midst of the community.

So by contrast with the Methodist Church there is a very clear distinction between the 'common priesthood' and the ministerial priesthood and this is significant for our purposes because;

- (a) One would have thought that in view of this clear 'setting apart' it would be more difficult to establish an employment relationship in the Roman Catholic Church than in the Methodist Church. Whether this is actually so remains unclear at present as Methodist ministers have, as we have seen, been held not to be employees⁵³⁸ and the matter has yet to be tested in relation to Roman Catholic clergy.

⁵³⁶ www.papalencyclicals.net/Pius12 accessed 26th April 2016.

⁵³⁷ English pocket edition: Geoffrey Chapman, 1995, para 1591

⁵³⁸ In *The President of the Methodist Conference v Preston* – see Chapter Three.

(b) The very existence of a ministerial priesthood has led to a large amount of Canon Law setting out the rules applicable to it and this, as we shall see below, can constitute an obstacle to employment status.⁵³⁹

The fundamental ecclesiology of the Church of England on this issue is, I suggest, to be found in the Declaration of Assent to be made by all bishops, priests and deacons when they are translated, instituted, installed, licensed or admitted to any office. This Declaration is in Canon C 15 paragraph 1(1):

The Church of England is part of the One, Holy, Catholic and Apostolic Church worshipping the one true God, Father, Son and Holy Spirit. it professes the faith uniquely revealed in the Holy Scriptures and set forth in the catholic creeds, which faith the Church is called upon to proclaim afresh in each generation..... In the declaration you are about to make will you affirm your loyalty to this inheritance of faith'.⁵⁴⁰

Although this declaration dates in its present form only from 2005 its wording is very similar to that required of clergy by the Clerical Subscription Act 1865 which itself drew on earlier legislation.⁵⁴¹

⁵³⁹ This is not to deny that there are special provisions in the Doctrine and Discipline of the Methodist Church dealing with presbyters and deacons; only to say that there is not the same setting apart of them as distinct from other members of the church that one finds in RC Canon Law.

⁵⁴⁰ <https://www.churchofengland.org/about-us/.../churchlawlegis/canons.asp> (accessed 29th April 2016).

⁵⁴¹ See the very helpful account of the development of this in R. Bursell 'The Clerical Declaration of Assent' (2016) 18 Ecc LJ 165.

These formulations are inevitably not pitched at a level which enables much constructive engagement on the part of the lawyer seeking the application of ecclesiology to actual issues. As Avis says, 'Ecclesiology ... is always at the risk of remaining abstract, theoretical and ungrounded unless it is translated into polity'.⁵⁴² On the other hand as Ombres points out, any faith community has in some ways to relate its regulatory norms (religious law) to its beliefs (theology).⁵⁴³ Thus we can for this study relate theology as expressed in ecclesiology to the religious law and polity of churches and so we turn to ecclesiastical polity and canon law.

3.2.2. Polity and Canon Law

What, then, is polity? Bassett⁵⁴⁴ says that polity refers to 'governance, the administration of the church and its decision-making agencies. It carries the distinction between leaders and members, their respective duties and competencies within the church, and how the church internally manages its personnel, resources and mission'. Here one can see clearly a point of engagement between the issue of employment status and ecclesiology.

Avis helpfully distinguishes between polity and canon law. He argues that 'The realm of polity may be said to embrace the political, pastoral and administrative structures of a church and to determine its organisational shape'⁵⁴⁵ and then sees a third tier, canon law. As he

⁵⁴² Ibid., p.5

⁵⁴³ Ombres R. 'Canon Law and Theology' 14 Ecc LJ 164 at 164.

⁵⁴⁴ Bassett W. essay on 'Religious Organisations and the State' in J. Witte and F. Alexander (eds), *Christianity and the Law* (CUP, 2008) at. 293. The classic exposition is R. Hooker *Laws of Ecclesiastical Polity* (1593), vol. 1 of 2 G. Edelen G. and W.S. Hill *Complete Works of Richard Hooker*, (Harvard University Press, 1977-1980)

⁵⁴⁵ *ibid.*, p. 4

points out, the polity of a church rests on a body of church law (canon law) 'which generally gives legal status to key ecclesiological principles and also prescribes the parameters of their application in practice in the realm of polity'.⁵⁴⁶

3.2.3. The Courts and Ecclesiology

In this section we are concerned with how the churches themselves understand their ecclesiology *vis-à-vis* the employment status of ministers and the impact which this has had on decisions of the courts. An illustration of where the courts took account of ecclesiology is *President of the Methodist Conference v Parfitt*⁵⁴⁷ where these words of Waterhouse J in the EAT received the express approval of Dillon LJ and May LJ in the Court of Appeal:⁵⁴⁸

I consider that the starting point of any consideration of the relationship between the Methodist Church and its ministers must be an examination of the faith and doctrine to which they subscribe and they seek to further. The concept of a minister as a person called by God, a servant of God and the pastor of His local church members seems to me to be central to the relationship ... I am unable to accept that either party to the present proceedings intended to create a contractual relationship ... The submission by the Methodist Church that a minister is, in effect, a person licensed by the Methodist Conference to perform the work of a minister in accordance with the doctrine of the church and subject to its discipline is, in my judgment, the most persuasive description of his status and role.

⁵⁴⁶ *ibid.*, p.5

⁵⁴⁷ [1984] 2 W.L.R. 84

⁵⁴⁸ The other judge, Donaldson MR, agreed with both Dillon and May LJ.

Here then is a clear example of the decisive part played by the ecclesiology of a church in this question. Waterhouse J. starts with a statement of the relationship between the church and its ministers and this leads him to conclude that they do not have a contractual relationship and so they do not have employment status. Again, in *The President of the Methodist Conference v Preston*⁵⁴⁹ the speech of Lady Hale, who dissented in the result, was notable for its detailed analysis of the position of Methodist ministers under the ecclesiology of that church. She observed (para. 40) that: 'The Church 'holds the doctrine of the priesthood of all believers', so Ministers are not a class apart from any other member of the Church; rather, they are people who hold 'special qualifications for the discharge of special duties'.

3.3. The self-understanding of a church on whether its ministers are employees

It is course essential that this is not approached in some generalised way on the basis that, for example, because of the spiritual nature of a minister of religion's calling there cannot be a contract of employment. This point was clearly made in *The President of the Methodist Conference v Preston* where Lord Sumption (at para. 26) observed that: 'Part of the vice of the earlier authorities was that many of them proceeded by way of abstract categorisation of ministers of religion generally. The correct approach is to examine the rules and practices of the particular church and any special arrangements made with the particular minister'. One can see by even the most cursory examination of the cases how the character of the churches involved in these types of cases differs: the two most recent cases on this area which have reached the highest court have involved the Church of Scotland, which is 16th century Presbyterian (*Percy v Board of National Mission of the Church of Scotland*)⁵⁵⁰ and

⁵⁴⁹ (2013) UKSC 29.

⁵⁵⁰ [2005] UKHL 73

the Methodist Church which is 18th century Congregationalist (*The President of the Methodist Conference v Preston*).

It is not possible here to examine the ecclesiology of each and every Christian church and a number of issues have been selected from the Roman Catholic Church, the Church of England and the Methodist Church, bearing in mind that we have already referred in some detail to the Methodist Church. There are two reasons for this selection:

- (a) The Church of England and the Methodist Church were the subject of the two most recent significant cases in this area whereas the Roman Catholic Church has not been the subject of any direct claims by one of its ministers to employment status but has been the subject of claims on the basis of vicarious liability on the premise that its clergy were employees for this purpose, as we have seen.
- (b) As mentioned in Chapter Two,⁵⁵¹ in 2002 the government issued a discussion paper in which it proposed to use s.23 of the Employment Relations Act 1999 to confer employment rights on ministers of religion. This allows the Secretary of State to provide that individuals shall be treated as parties to contracts of employment or to workers' contracts. The way in which individual churches responded to this on the basis of what they saw as their own ecclesiology provides a fruitful way in which to engage with this area. The methodology will not necessarily be to accept any claims at face value but, having stated them, to then look at them in the light of both modern objectives of employment law and also at the tests for employment status which were outlined in Chapter Two.

⁵⁵¹ At 6.3.

4. Particular issues arising in the ecclesiology of these three Churches.

There are many different issues arising in these three churches which can militate against the imposition of employment status. An overriding concern for all three is the issue of holy orders. There are also some issues which are pertinent to individual churches and which potentially act as obstacles to the imposition of employment status e.g. incardination, outside activity and TU membership, the issue of obedience and the issue of payment. These will now be considered.

4.1 The nature of orders and employment status

In the case of Roman Catholic priests and deacons Can. 290 provides that: 'Once validly received, sacred ordination never becomes invalid.' However, a distinction is then drawn between sacred orders and the clerical state, which can be lost, as Can. 290 continues: A cleric, nevertheless, loses the clerical state:

1. by a judicial sentence or administrative decree, which declares the invalidity of sacred ordination;
2. by a penalty of dismissal legitimately imposed;
3. by rescript of the Apostolic See which grants it to deacons only for grave causes and to presbyters only for most grave causes.

The effect is that once ordained a person retains the sacred orders conferred on him for life⁵⁵² but Can. 292 provides that by losing the clerical state 'He is prohibited from exercising the power of orders'. So, for instance such a priest cannot say Mass and normally cannot hear confessions. There is, however, one exception: Can. 976 provides that: 'Even though a

⁵⁵² The most vivid demonstration of this is in Graham Greene's *The Power and the Glory* (Penguin 1991) when the priest is on the run and it is suggested that he could renounce his faith. His reply is memorable: 'There's no way. I'm a priest. It's out of my power.' Note too that the priest asks for his last confession to be heard by a priest who has left the priesthood and married – see the next point.

priest lacks the faculty to hear confessions, he absolves validly and licitly any penitents whatsoever in danger of death from any censures and sins, even if an approved priest is present.' So, if for example a priest who had left the clerical state many years ago and had long ceased to say Mass or regard himself as a cleric came across a person in danger of death and heard his or her confession, then by his priesthood, which has never left him, he would have acted in the name of the church.

The Anglican Church similarly provides by Canon C. 2.

No person who has been admitted to the order of bishop, priest, or deacon can ever be divested of the character of his order, but a minister may either by legal process voluntarily relinquish the exercise of his orders and use himself as a layman, or may by legal and canonical process be deprived of the exercise of his orders or deposed therefrom.

Again, we have the distinction between the actual lifelong conferment of orders, and a process whereby the ability to exercise the functions of those orders, which can be relinquished. There are similar, but not identical provisions dealing with hearing of confessions, known as the 'ministry of absolution'. The normal rules as to who can hear confessions is set aside by Canon B29 (4) which states, in slightly wider terms than in Can. 976 in the RC Church that: 'Provided always that, notwithstanding the foregoing provisions of the Canon, a priest may exercise the ministry of absolution anywhere in respect of any person who is in danger of death or if there is some urgent or weighty cause.'

The position of the Methodist Church needs to be considered carefully as its Doctrine and Discipline does not, as we have seen, recognise the setting apart of priests, deacons and bishops by the conferment of orders. Instead, the Church 'holds the doctrine of the priesthood of all believers', so Ministers are not a class apart from any other member of the Church; rather, according to the Clause 4 of the Deed on Union they are people who hold 'special qualifications for the discharge of special duties'.

Despite this there is still a recognition by the Church that presbyters, who correspond to priests in the other churches, have a lifelong ministry. Thus Section 700 of 'The Constitutional Practice and Discipline of the Methodist Church'⁵⁵³ says that:

(1) Presbyters are ordained to a life-long ministry of word, sacrament and pastoral responsibility in the Church of God which they fulfil in various capacities and to a varying extent throughout their lives

(5) Presbyters who are not in the active work, that is, supernumeraries and those without appointment, remain accountable to and accounted for by the Church, and continue to exercise their ministry as they are able according to their circumstances.

⁵⁵³ Seventh edition 1988, Volume 2-revised annually. www.methodist.org.uk/media/1841903/conf-2016-cpd-vol-2.pdf (accessed 10th March 2017)

There are similar provisions at 701 relating to deacons but of course, in the UK at any rate, the Methodist Church does not ordain bishops.

The practice of confession in the sense understood in the RC and Anglican Churches is not used in the Methodist Church and so, although there are detailed provisions at 760 for resignation and at 761 for reinstatement, there are no provisions for hearing confessions in danger of death.

The conclusion on this issue must be that the whole way in which orders are conferred seems incompatible with employment status because of the lifelong commitment they involve. However, if a claim to employment status by ministers is to be made then we must show that a comparison can be made with those in secular employment. One obvious possible comparison is where a person is, for instance, admitted to practise as a solicitor or a doctor. S.47(2) of the Solicitors Act 1974 provides that 'on the hearing of any application or complaint made to the Tribunal under this Act, other than an application under section 43, the Tribunal shall have power to make such order as it may think fit, and any such order may in particular include provision for any of the following matters-

- (a) the striking off the roll of the name of the solicitor to whom the application or complaint relates;⁵⁵⁴

Although it is possible under s.8 (2) of the Solicitors Act 1974 for a solicitor whose name has been struck off the Roll to apply for it to be re-entered, unless this is done he/she is no

⁵⁵⁴ Other sanctions are listed which need not concern us here.

longer a solicitor. The difference between this secular position and that of the churches considered above is that, whilst on the surface there is a similarity in that clergy may, in effect, lose their right to practise their calling just as a solicitor might, the clergy still have the sign upon them that they are indeed clergy whereas a struck off solicitor is just that; not a solicitor.⁵⁵⁵ The lifelong ability of an Anglican or Roman Catholic priest to hear confessions from a penitent in danger of death may not seem of great significance in itself but it points to a deeper reality: as the Catechism of the Catholic Church states at para. 1583:⁵⁵⁶

It is true that someone validly ordained can, for a just reason, be discharged from the obligations and functions linked to ordination, or can be forbidden to exercise them; but he cannot become a layman again in the strict sense because the character imprinted by ordination is for ever. The vocation and mission received on the day of his ordination mark him permanently.

The Anglican Communion thinks in the same theological terms and, although the Methodist Church would put it differently, we have seen above that it too regards ministry as lifelong.

Furthermore, there is a vital point often missed: in the case of those in secular employment the body which exercises disciplinary powers, such as the Solicitors Disciplinary Tribunal, is not the employer of that person. The same will apply to other regulatory bodies. However, the church which will exercise disciplinary powers is also the body, which, if not the employer, exercises functions akin to that of an employer such as issuing directions on what work is to be done and dealing with the question of payments to be made to ministers. Thus the relationship between ministers and their church encompasses both what we might term

⁵⁵⁵ There are similar provisions relating to doctors: see Part III A of the Medical Act 1983 and the same applies in other professions.

⁵⁵⁶ Geoffrey Chapman, 1994.

day to day supervision and also regulation, which are split in many cases of secular employment. There are indeed a few cases where the supervisory and the regulatory body are the same, one possible example being the members of the armed forces, but here it has been held that they are not employees.⁵⁵⁷

Furthermore, as we saw in Chapter 4⁵⁵⁸ there is the additional difficulty in analysing the relationship created by ordination in terms of contract, certainly in the case of Methodist ministers.

As Lord Sumption pointed out *The President of the Methodist Conference v Preston*.⁵⁵⁹

It is clear that the life-long character of the ministry is more than just an aspiration. A minister can cease to be in full connexion⁵⁶⁰ only in limited circumstances, none of which is wholly dependent on his or her wishes. Under standing order 760, he or she may send a notice of resignation to the President of the Conference, but it is up to the President, advised by a special committee, to decide whether to accept it. Otherwise, a minister may cease to be in full connexion if a disciplinary charge is brought and a Disciplinary Committee exercises its power under standing order 1134 to decide that he or she shall “cease to be a minister ... in full connexion.

This led him to say that: ⁵⁶¹

⁵⁵⁷ *Broni and ors. V. Ministry of Defence* [2015] EWHC 66 (QB).

⁵⁵⁸ At 9.1

⁵⁵⁹ (2013) UKSC 29 at para. 17

⁵⁶⁰ When ministers or deacons are ordained in the Methodist Church, they are 'received into Full Connexion.'

⁵⁶¹ At para. 20

the manner in which a minister is engaged is incapable of being analysed in terms of contractual formation. Neither the admission of a minister to full connexion nor his or her ordination are themselves contracts. Thereafter, the minister's duties are not consensual. They depend on the unilateral decisions of the Conference.

This leads to the conclusion that the relationship between ministers and their churches is of a different character than that in the secular field. This is because of the very nature of ordination and the way in which disciplinary functions are exercised. However, this does not pre-empt the question of whether, when we look at the ecclesiology of different churches, there may be other obstacles to employment status. All we can say for now is that we are starting our investigation with what seems an obstacle in the way of the clergy being considered employees.

4.2. Incardination in the Roman Catholic Church and Employment Status

4.2.1 The principle of incardination

The Catholic Bishops' Conference of England and Wales, the National Conference of Priests' standing committee and the Conference of Religious made a joint submission on the issue of employment rights to the Department of Trade and Industry.⁵⁶² It first rejected employment status on the basis that ⁵⁶³ 'Any extension of employment rights to the clergy would not only alter radically and undermine the relationship between a priest and a deacon

⁵⁶² See Chapter Two 6.3

⁵⁶³ at 5.1

and his bishop, but also would also attack the very basis of Christian ministry'. It then went on and referred specifically to incardination at para. 2.4 and stated that:

Most importantly, in the Catholic understanding of ministry, all priests and deacons are bound by ordination to a diocese or religious order by incardination. This bond is life-long and is the source of mutual rights and obligations between the individual cleric and his bishop or religious superior.Unlike the clergy of the Church of England or clergy of some other denominations, Catholic priests normally remain within the same diocese or religious order for the whole of their lives'.

4.2.2. Is incardination in fact an obstacle to employment status?

Incardination⁵⁶⁴ is dealt with in the Code of Canon Law (cc. 265-272). As the New Commentary on the Code of Canon Law ⁵⁶⁵ points out:

Clerics are linked to the church as a door is attached to a wall; the life of the church hinges, through incardination, on the service of the ordained ministers who provide the fullness of sacramental life to the people of God. All clerics are ordained for service; they serve in collaboration with one another, under the direction and authority of ecclesiastical leadership

⁵⁶⁴ An interesting comparison can be drawn here with the Church of England, where there is no concept of incardination and clergy frequently move from diocese to diocese and there is a procedure where the priest's present diocese gives a 'current clergy status letter' to the one to which he has applied. A glance at the pages of the *Church Times* will show that appointments are advertised in the same way as in secular employment. The same applies to other churches – see e.g. *The Methodist Recorder*. This does not occur in the RC Church.

⁵⁶⁵ J. Beal, J. Coriden and T. Green (eds), *New Commentary on the Code of Canon Law*: Paulist Press 2000. Hereinafter referred to as 'The Commentary'.

As Fox remarks 'With the concept of incardination, we also have the foundation for every cleric being answerable to a particular hierarchical authority'.⁵⁶⁶ This emphasis on authority is important in this context, as we shall see.

It is implicit in incardination that there will be a closeness in relationships between bishops and their priests. Cardinal Vincent Nichols, the present Archbishop of Westminster, has written ⁵⁶⁷ of that which existed between one of his predecessors, Cardinal Basil Hume and his priests:

When priests in his care got into difficulties, they turned to him for support and acceptance. Many found support in his compassion. He never turned any away. Their burdens became his, for he recognised that bond between bishop and priest as being like father and son.

Incardination then results in a far closer bond than pertains to an employee's relationship with her employer. The principle is given shape by Can. 265 which provides that: 'Every cleric must be incardinated either in a particular church or personal prelature ⁵⁶⁸ or in an institute of consecrated life or society,⁵⁶⁹ in such a way that unattached or transient clerics are not allowed at all'. The idea is to safeguard the church from wandering clerics, known as

⁵⁶⁶ J. Fox, 'Extra –Judicial Processes in the Roman Catholic Church' in *Faithful Discipleship: Clergy* in M. Hill (ed), *Discipline in Anglican and Roman Catholic Canon Law* (Centre for Law and Religion, Cardiff University, 2001).

⁵⁶⁷ Essay on Basil Hume in *English Catholic Heroes* (Gracewing, 2008) 250.

⁵⁶⁸ Such as The Prelature of the Holy Cross and Opus Dei.

⁵⁶⁹ This refers to e.g. monastic orders and others such as Jesuits and Dominicans.

vagi, or vagantes. who used to roam around the country with no accountability.⁵⁷⁰ As Woodall ⁵⁷¹ puts it: 'By the juridical act of incardination this service of the church is 'organized' or 'delimited' in that a particular person's service is orientated towards, rooted in, and committed to, a particular part of Christ's people'. The principle underlying all this is to ensure that when a member of the laity comes into contact with an ordained minister and in particular receives the sacraments from them, they can be confident that that minister is indeed ordained for service in the Roman Catholic Church.

However, incardination does not carry with it a status where clerics have no rights at all. For instance, if a bishop wishes to transfer a priest from one parish to another and the priest objects then the bishop must comply with Canons 1748-1752. If he does not, then the priest may appeal to the Holy See which can declare that the bishop is in breach of Canon Law.⁵⁷² However, this argument cuts both ways: the fact that the bishop must comply with Canon Law when transferring priests shows that priests do have rights under Canon Law, but the fact that if the bishop does comply with the procedures then he can force an unwilling priest to accept a transfer shows the degree of subordination to which priests are subject. If we contrast this with those who work for secular employers the difference is obvious: an employee is entitled, on giving the prescribed amount of notice, to leave his or her employment and work for someone else. Under the doctrine of incardination this is just not possible for a RC priest and shows that incardination is incompatible with employment status as the following case study also demonstrates.

⁵⁷⁰ The classic account of the *vagantes* is H. Waddell, *The Wandering Scholars* (Collins, Fontana, 1968). This is written from a literary perspective but is a wonderful study.

⁵⁷¹ G. Woodall *A Passion for Justice* (Gracewing, 2011) 94

⁵⁷² This occurred in the Diocese of Galloway – see G. Woodall, *A Passion for Justice* 80.

4.2.3. A case study in incardination and employment status: *Buckley v Cathal Daly*

The whole question of incardination has been the subject of litigation in *Buckley v Cathal Daly*⁵⁷³.

We have already met this case in our discussion of church autonomy⁵⁷⁴ but here we are concerned with the analysis of the concept of incardination by the Northern Ireland High Court as this raised the question of whether the removal had been unlawful at all. The issue was whether the claimant was incardinated in the diocese of Down and Connor and as such was entitled to rights in church property, in particular his position, stipend, income, residence and other property. The claimant accepted that the actual Canon Law power of incardination was valid and the question of employment status and its possible incompatibility was not in issue. Instead the issues revolved around the actual exercise of the powers consequent on incardination.

The matter was complicated by the fact that some of the events occurred when the 1917 Code of Canon Law was in force and others when the present (1983) version was but we will concentrate on the analysis of the 1983 Code. Campbell J. referred to the initial incardination of the claimant in the Archdiocese of Cardiff followed by a request by him to leave which was granted by the Archbishop in a letter granting him 'an absolute discharge' which meant that he had permission to leave the Archdiocese permanently. This took effect as a letter of excardination from Cardiff. This brought into play Can. 267 §1. which provides that: 'For a cleric already incardinated to be incardinated validly in another particular church, he must obtain from the diocesan bishop a letter of excardination signed by the same bishop

⁵⁷³ [1991] ITLR

⁵⁷⁴ See 8 at Chapter 4

and a letter of incardination from the diocesan bishop of the particular church in which he desires to be incardinated signed by that bishop'. Thus, although the claimant had a letter of excardination he also needed a letter of incardination into a new diocese in line with the policy of the church to guard against wandering clerics. In fact this never occurred.

The claimant found work in the diocese of Down and Connor from 1978 to 1986 but there was no formal process of incardination into that diocese. However, there is an alternative method of incardination: that of tacit incardination⁵⁷⁵ provided for by Can. 268 §1. which provides that: 'A cleric who has legitimately moved from his own particular church to another is incardinated in the latter particular church by the law itself after Five (*sic*) years if he has made such a desire known in writing both to the diocesan bishop of the host church and to his own diocesan bishop and neither of them has expressed opposition in writing to him within four months of receiving the letter'. The question was whether on the facts this had occurred and it was held that it had not. Although the claimant had applied to the Bishop of Down and Connor, who had not expressed opposition within the time limit, he had failed to make this desire known to the Archbishop of Cardiff, given that the requirements of Can. 268 had to be applied strictly.

This analysis of *Buckley v Cathal Daly* shows, I suggest, that the concept of incardination is inconsistent with a contract of employment. If we assume that the claimant had a contract of employment with the Archdiocese of Cardiff then on common law principles, he was free to

⁵⁷⁵ The 1917 Code also provided for 'virtual incardination'; where a cleric obtained a residential benefice in another diocese with permission from his bishop but, although this was the subject of discussion in this case this provision did not appear in the 1983 Code and will not be considered here. Tacit incardination was introduced by a *motu proprio* of 11th October 1966 and seems to have operated alongside virtual incardination, which in effect it replaced.

leave and to seek work elsewhere. If not, then *prima facie* there is a breach of the doctrine of restraint of trade. The issue is then whether this was a lawful restraint. The classic formulation of the doctrine of restraint of trade is that of Lord Macnaghten in *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co Ltd*⁵⁷⁶ where he laid down that:

restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public

It might be arguable that some restraint on employment in the form of incardination might be in the public interest as incardination is in effect a form of clergy regulation which operates in the same way as, for instance, the Solicitors Regulation Authority (SRA) regulates the admission and conduct of solicitors. Thus, it safeguards the public against wandering clergy on the basis that, for example, a marriage, funeral or baptism might be conducted by a person professing to be a cleric who is not in fact validly ordained. However, leaving out the obvious point that solicitors are not employed by the SRA, other denominations do not have this concept and, from this point of view, seem to manage perfectly well without it. Moreover, even if a case could be made out for the restraint operating in the public interest it is difficult to see how it could satisfy the first requirement, which is that it must be in the interest of the parties. Suppose that in the *Cathal Daly* case the Archbishop of Cardiff had refused to give Father Buckley a letter of excardination as required by Can. 267 §1 to be allowed to be

⁵⁷⁶ [1894] A.C. 535

incardinated in another diocese. The effect would have been to tie Father Buckley to the Archdiocese of Cardiff, possibly for the rest of his life presumably against his will, He would indeed have almost certainly received some remuneration ⁵⁷⁷ but he might not have been assigned to another parish and thus prevented from fulfilling his calling.

A parallel situation is the retain and transfer system which was operated by Association Football clubs until it was declared to be in unlawful restraint of trade in *Eastham v Newcastle United Football Club Ltd. and Others*.⁵⁷⁸ Players were engaged, under a written contract, for periods of 12 months. On the last day of the season each club sent to the league its retain and transfer list, which named the transfer fee for a player. A player could not be transferred without his consent, but if he was on the transfer list he could not seek re-employment except with a club willing to pay the fee. The only alternative was to play for a non-league team but at a considerably lower salary. The claimant, a professional football player registered with a league club, who had asked to be transferred but whose club had given him notice of retention and refused to release him, then refused to re-sign with his club. His claim that these rules were in unlawful restraint of trade were upheld by the High Court. Wilberforce J. held that:

when a man is retained and it is made known that his club is open to offer, or when a man is put on both the transfer and the retain list - he cannot escape outside the league, all he can do is (in the latter case) to apply to have the transfer fee reduced. But even if it is reduced, no club in the league may pay it, and yet he cannot go outside.

The parallel with incardination is clear: as with the retain and transfer system, the cleric

⁵⁷⁷ See Can. 281 but note too Can. 1752 both above.

⁵⁷⁸ [1964] Ch. 413

cannot, to adopt Wilberforce's J's words, go outside the diocese. If the bishop or other authority decides not to issue a letter of excommunication then this is the same in principle as the action of a football league club putting a player on the retain and transfer list.

It seems clear that the doctrine of incardination is an obstacle to employment status. Nevertheless, in case this argument fails, we shall examine other restrictions on RC clergy to see if they are, or are not, obstacles to employment status.

4.3. Payment of RC clerics.

Can. 281 provides that: 'Since clerics dedicate themselves in clerical ministry, they deserve remuneration which is consistent with their condition...by which they can provide for the necessities of life as well as the equitable payment of those whose services they need'. As the Commentary points out, quoting the Second Vatican Council ⁵⁷⁹ the term 'remuneration' was deliberately chosen rather than 'pay' or 'salary' to avoid 'the usual association of job and wages'. This may be so but of course the courts will enquire into the substance of a transaction and not be deterred by the label attached to it by the parties. Thus the use of the term 'remuneration' is not by itself significant. The other term in Can. 281 to note is 'deserve' remuneration: there is no sense of actual entitlement. ⁵⁸⁰ This may, taken with other factors considered below, have more significance.

⁵⁷⁹ *Acta synodalia Sacrosancti Concilii Oecumenici* 4, paras. 7, p.226. n.22

⁵⁸⁰ It is understood that some dioceses, such as the Archdiocese of Westminster, do provide a minimum level of remuneration for clerics but this is still subject to Canon 281.

The question of entitlement or otherwise to remuneration was considered by Mgr. Gordon Read, a Roman Catholic priest and Canon Lawyer called as an expert witness in *E v English Province of Our Lady of Charity and another*⁵⁸¹ who gave his opinion that:

Neither the bishop nor the priest would regard their relationship as having legal consequences or as one that would be adjudicated by the civil courts. The means of financial support provided for a parish priest [are] largely dependent on the free will offerings of the faithful. In a poor parish he may well have little disposable income or even go hungry.

What is of great significance is Can. 1752, the final canon, which ends with: ‘the salvation of souls, which must always be the supreme law in the Church, is to be kept before one’s eyes’,⁵⁸² which one could argue is an example of that tension between the fundamental position in ecclesiology of service by the cleric and its regulation by law. In this case it is service that is paramount. Although the first part of Can. 1752 is concerned with the specific issue of transfers between parishes and disputes between a cleric and the bishop, the Commentary points out that by placing these words at the very end of the Code they are intended to govern the whole Code. So if a bishop told a cleric that there was not enough support in the parish to enable him to receive remuneration as laid down by Can. 281 then the cleric would have no claim provided that, as the Commentary says: ‘the necessities of

⁵⁸¹ [2012] EWCA Civ 938.

⁵⁸² This is the famous *salus animarum* clause.

life could be met'. To hold otherwise would mean that there would be no one to care for the parish and this would conflict with the principle in Can. 1752.⁵⁸³

Here is a case of the obligations of the bishop, or other authority, being less than is consistent with a contract of employment. In other cases, they may be more. For the idea of incardination, discussed above, brings with it a commitment to lifelong support from the church authorities. Thus Can. 281§ 2 provides that: 'Provision must be made so that they (i.e. clerics) possess that social assistance which provides for their needs suitably if they suffer from illness, incapacity or old age'. Contrast this with the position at common law where there is no general implied term in contracts of employment that workers are entitled to sick pay, although in particular cases one might be implied. There are often express terms but there is no general principle of a contractual entitlement to sick pay. There is indeed the Statutory Sick Pay Scheme but that is exactly what it says: statutory and not a contractual obligation.⁵⁸⁴

The conclusion is inevitable: there is no wage related bargain in the contractual sense and so there cannot be a contract between the RC Church and its clerics, even leaving on one side the problems which the doctrine of incardination would cause.⁵⁸⁵ In the case of RC clergy at least we meet insurmountable obstacles to employment status.

⁵⁸³ Provision for remuneration for married deacons is slightly different and is governed by Canon 281§ 3 but always subject to Canon 1752.

⁵⁸⁴ See *Mears v Safecar Security Ltd* (1981) IRLR 99 where on the facts a term that an employee was entitled to sick pay could not be implied.

⁵⁸⁵ Matters might have taken a different turn had the suggestion in 1825 of the RC Bishop of Kildare and Leighlin been accepted that the clergy might accept state payments for their services. The idea was that, in Ireland at least, by ensuring that the clergy were not financially dependent on their congregations for financial

In the contractual sense that ends the matter but, as in the conclusion in Chapter Six we explore whether some rights could be conferred on the clergy irrespective of contract, so we need to look at two other employment rights and see if they can apply to RC clerics.

4.4. Restrictions on RC clerics

4.4.1. General

There are a series of restrictions on the activities in which a cleric can engage and we need to ask if they are inconsistent with the existence of a contract of employment. The rationale here is not that these activities are harmful in themselves but that they are not becoming to the clerical state. So Can. 282 § 1 states that 'Clerics are to foster simplicity and are to refrain from all things that have a semblance of vanity'. The emphasis is on the whole life of the cleric, unlike employment where the obligations owed to one's employer extend only to matters relating to that employment. Canon 285 § 3 prohibits clerics from assuming public offices which entail a participation in the exercise of the civil power. This in itself could be said to be comparable to the prohibition on civil servants engaging in political activity and so not incompatible with employment status.⁵⁸⁶ The prohibition is absolute although it is possible that by Can. 87 § 3 it may be dispensable.⁵⁸⁷ Canon 286 then provides that:

support they would be detached from those congregations politically and this might be attractive to the British Government. Nothing of course came of this. See E. Norman, *The English Catholic Church in the Nineteenth Century* (Clarendon Press 1996) 42. Had the suggestion been accepted RC clerics might have had the status of civil servants as in do Church of Denmark Lutheran clergy. (N. Doe, *Law and Religion in Europe* (OUP 2011) 130

⁵⁸⁶ See Civil Service Code issued under the Constitutional Reform and Governance Act 2010

⁵⁸⁷ See the discussion in *The Commentary*. 376-377.

'Clerics are prohibited from conducting business or trade personally or through others, for their own advantage or that of others, except with the permission of legitimate ecclesiastical authority'. Here the prohibition may be dispensed with and the Commentary gives as a possible example where the cleric has inherited a viable business that could not be relinquished without loss.

It is of course the case that some activities of an employee outside work can be in breach of what is now most often termed the employee's implied duty of loyalty.⁵⁸⁸ However, this concerns only matters that have an impact on the economic running of the employee's business. The Model Contract issued by the Catholic Education Service⁵⁸⁹ provides at 4.2. (c) that a teacher must have regard to the Catholic character of the school and not to do anything in any way detrimental or prejudicial to the interests of the same. However, even here there is a clear link to activities that could damage the business (i.e. the school in this case), whereas Can. 282§ 1 is directed to the whole life style of the cleric.

An interesting parallel is with *Adrian Smith v Trafford Housing Trust*⁵⁹⁰ where an employee posted a statement on his personal Facebook page that he believed gay marriage was a "step too far". He was dismissed because his employer considered the comment could be harmful to its reputation and could breach its equal opportunities principles but the High Court found that the employer could not reasonably have been brought into disrepute and he was wrongfully dismissed. Here there is, I suggest, a clear distinction between the rights of

⁵⁸⁸ The classic example is *Hivac v Park Royal Scientific Instruments Ltd.* (1946) Ch. 169

⁵⁸⁹ See www.catholiceducation.org.uk/employment.../template-contracts (accessed 14.3.16)

⁵⁹⁰ (2012) EWHC 3221

employees in civil law where a line is drawn between the expression of personal views and those which could damage the employer's business, and the position of RC clerics where there is no line between 'work' and 'home' and the Code of Canon Law covers the whole life of the cleric.

It is submitted that it is very difficult to see these wide prohibitions on what clerics can do as anything other than an obstacle to employment status.

4.4.2 Trade Union Membership

Can. 287 §2 prohibits clerics from having 'an active part in political parties and in governing labor⁵⁹¹ unions unless, in the judgment of competent ecclesiastical authority, the protection of the rights of the Church or the promotion of the common good requires it'. Here not only is the Canon not absolute and can be dispensed with, but it actually sets out the principles on which that dispensation may be granted. Whether this actually prohibits membership of trade unions and political parties is a matter of doubt as the Canons only refer to 'taking an active part' and so technically a cleric might be able to simply pay a subscription but no more.

Ombres⁵⁹² notes that in the discussions on the drafting of this Canon one consultant wanted to forbid clerics from playing an active part in *directing*⁵⁹³ political parties and trade unions but this was rejected as it would allow clerics to play an active part so long as this did not involve directing. The rationale was that *any* active involvement could produce divisions in

⁵⁹¹ I am using a US translation of the Code which uses the US term 'labor' rather than 'trade' union.

⁵⁹² R. Ombres, 'Priests and Politics in Canon Law' (1985) 70 Clergy Review 180-183

⁵⁹³ My italics.

the Christian community 'whilst the priest, as minister of Christ, is to be a sign and an element of unity'. Here we see a clear division between the way in which an employer views his or her employees, which is of course in relation to their work for him or her, and the way in which the RC Church views her clerics, where the whole person of each cleric is invested with a particular character.

One could also read Can. 278 §3 as containing an implied prohibition against trade union membership: 'Clerics are to refrain from establishing or participating in associations whose purpose or activity cannot be reconciled with the obligations proper to the clerical state or can prevent the diligent fulfilment of the function entrusted to them by competent ecclesiastical authority'.

In fact, it is understood that a number of RC clerics have joined the Faith Workers Branch of UNISON although none of them is active in it and as far as is known no action has been taken against them as a consequence.⁵⁹⁴

The position in UK law is that employees do not have a right to trade union membership as such but this is implied by Art. 11 of the ECHR: 'Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.' However, in practice secular employers may not encourage trade union membership amongst their employees and indeed may not deal with them. However, this is not the same as forbidding employees from

⁵⁹⁴ Note the judgement of the ECtHR in *Sindicatul Păstorul cel Bun v Romania* (Application 2330/09), [2013] ECHR 646 (GC) involving a claim to recognition by a trade union for clerical and lay employees in the Orthodox Church.

engaging in trade union activities, and possibly trade union membership at all, which is what RC Canon Law does.

It would be interesting if a RC cleric challenged the Canon Law prohibition against trade union membership on the ground that it infringed Art.11 but so far this has not occurred. In UK law itself there are various rights associated with trade union membership: for instance, Section 137 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) makes it unlawful to refuse employment on the grounds of union membership and Section 152(1) of TULRCA provides that a dismissal of an employee will be automatically unfair if the reason, or principal reason, is that the employee:

1. Was, or proposed to become, a member of an independent trade union.
2. Had taken part, or proposed to take part, in its activities at an appropriate time (defined as either outside working hours or within working hours with the employer's agreement).
3. Was not a member of a trade union or had refused to become or remain a member.

It would be wrong to see the contrast between the very restricted rights of clerics to trade union membership as compared to the rights enjoyed by employees as evidence *per se* that clerics are not employees as this would amount to using denial of trade union membership rights as evidence of lack of employment status, something of which an unscrupulous employer could take advantage. However, it is contended that, taken with the other evidence from RC Canon Law, and especially the concept of incardination and its effects, this restriction on trade union membership rights is further evidence that the ecclesiology of

the RC Church, as set forth in the 1983 Code of Canon Law, is incompatible with, and an obstacle to, employment status.

4.5 The oath of canonical obedience in the Church of England.

We shall focus on the Canonical Oath of Obedience and compare it with the duty of obedience owed at common law under a contract of employment to see if they are compatible. In this case the methodology will be to set out the common law duty first and then to compare it with the Canon Law.

4.5.1 The duty of obedience at common law as both an express and an implied term of the contract.

A fuller and more accurate statement of this duty is that it is to obey orders and instructions permitted by the terms of the contract. In practice one first turns to the express terms of any contract but where this does not specify the nature of the duty then one turns to the duty implied at common law.

.A typical express term is:

You are employed as...., and your duties will be in line with the Job Description for this post. However, this description should not be regarded as exhaustive. The Employer reserves the right to ask you to undertake other duties as may from time to time be reasonably required

Where the duty has not been spelt out as above then one can be implied from the job title as the duty will be to do those duties associated with that job. In *Pepper v Webb*⁵⁹⁵ Karminski LJ held that: 'It has long been a part of our law that a servant repudiates the contract of service if he wilfully disobeys the lawful and reasonable orders of his master.'

There are three points:

- (a) The order must be permitted by the terms of the contract but goes no further. As Denning MR said in *Secretary of State for Employment v ASLEF (No. 2)*⁵⁹⁶: 'a man is not bound to do more for his employer than his contract requires. He can withdraw his goodwill if he pleases.'
- (b) The order must not be to perform an illegal act. In *Morrish v Henlys*⁵⁹⁷ the employee was unfairly dismissed because he refused to acquiesce in a falsification of records.
- (c) The order must not be to do something which would put him/her in danger. In *Ottoman Bank v Chakarian*⁵⁹⁸ the employee was held to have been justified in disobeying an order to remain in Constantinople where he had previously been sentenced to death and was in danger of a further arrest. This can be seen as an

⁵⁹⁵ (1969) 1 WLR 544 It is worth noting that the common law duty is strictly only relevant where there is a claim at common law for wrongful dismissal. The significance of this duty has decreased since the introduction in 1971 of the right to claim for unfair dismissal. Now the issue, in an unfair dismissal claim, is the reasonableness of the employer's conduct, although the extent to which any dismissal was in breach of the implied duty is still relevant.

⁵⁹⁶ [1972] 2 QB 455

⁵⁹⁷ [1973] 2 All ER 137

⁵⁹⁸ [1930] AC 277

instance of the notion referred by to Karminski LJ in *Pepper v Webb* (above) that orders must be reasonable.⁵⁹⁹

4.5.2. The canonical oath of obedience in the Church of England

The oath can cut into the debate on employment status in two ways: first, it can be argued that the very nature of the oath makes it incompatible with employment status but it can also be argued that the degree of control which is implicit in the taking of the oath is compatible with the control test for employee status. This second point was considered in *Sharpe v Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester*⁶⁰⁰ as we shall see below when we shall also examine why the Church of England did not place much, if any, emphasis, on it.

There are two obvious differences between the concept of obedience in Church of England Canon Law and that in the law of contract: the first is that it does not rest on contract and thereby on agreement and the second is that it is imposed by an oath.

Our starting point is once again the wording and here in the case of priests and deacons Canon C1 (3) provides that:

According to the ancient law and usage of this Church and Realm of England, the priests and deacons who have received authority to minister in any diocese owe canonical obedience in all things lawful and honest to the bishop of the same, and

⁵⁹⁹ As such this will be fact sensitive. Compare this decision with that in *Walmsley v Udec Refrigeration* [1972] IRLR 80 where an employee was not held to be entitled to refuse an order to go to Eire because of a general fear of IRA activity.

⁶⁰⁰ [2015] EWCA Civ. 399

the bishop of each diocese owes due allegiance to the archbishop of the province as his metropolitan.⁶⁰¹

Furthermore Canon 14 (3) prescribes an oath of obedience to be taken by those ordained priests or deacons:

Every person who is to be ordained priest or deacon shall first take the Oath of Canonical Obedience to the bishop of the diocese by whom he is to be ordained in the presence of the said bishop or his commissary, and in the form following:

Finally, Canon C14 (5) provides that the Oath of Canonical Obedience shall be reaffirmed by 'Every bishop, priest or deacon who is to be translated, instituted, installed, licensed or admitted to any office in the Church of England or otherwise to serve in any place'. This shall be to either the archbishop of the province or the bishop of the diocese.

It is worth noting that Doe⁶⁰² views these complex provisions as badly drafted because, as he points out, one or other of Canons C14 and Canon C 1(3) are superfluous as the oath prescribed by Canon 14(3) is 'a promise to fulfil a pre-existing obligation to obey episcopal directions arising by operation of Canon C1 (3): the oath has merely symbolic significance'.

⁶⁰¹ See also Canon C14 (I) in the case of bishops which is to similar general effect with the substitution of archbishops for bishops.

⁶⁰² *The Legal Framework of the Church of England* (OUP 1994) 213

When we first look at the nature of the obligation two points immediately strike one by contrast with the common law duty.

First the obligation is enforced by an oath rather than a contractual promise. As Bray remarks,⁶⁰³ 'There can be no doubt that the oath of canonical obedience as we now know it bears the strong imprint of medieval feudalism, nor that its closest relative is the oath of allegiance to a secular lord, comparable to the one which the clergy have sworn to the monarch since the late sixteenth century.'

Secondly, the oath is taken to a particular person rather than to an organisation as it might be in the case of the common law duty. It is of course true that the common law duty would be owed to a particular person where one is employed by a sole trader but this misses the point: the Canonical Oath is part of, and indeed buttresses, the hierarchal nature of the church as provided by Canon C 1 (1): 'The Church of England holds and teaches that from the apostles' time there have been these orders in Christ's Church: bishops, priests, and deacons..' So the duty of obedience is owed by priests and deacons to their bishop and by bishops to their archbishop. Indeed, Doe heads his discussion of this topic as 'Obedience to Episcopal Directions'.⁶⁰⁴ It may be that in practice in an organisation the duty is to obey one's line manager but the duty is enforced by the organisation itself not by that person. Here the duty will be enforced by the bishop or archbishop.

⁶⁰³ G Bray, *The Oath of Canonical Obedience* ((Latimer Trust (Latimer Studies 58 Oxford 2004)) quoted by Bursell in 'The Oath of Canonical Obedience' (2014) (2) Ecc LJ 168.

⁶⁰⁴ *Op.Cit.* 212

When we consider the extent of the duty imposed by the canonical oath of obedience the leading authority is *Long v Bishop of Cape Town*.⁶⁰⁵ The case involved the legality of sentences of suspension and deprivation pronounced by the Bishop, the defendant, against Revd. Long, the claimant, but for our purposes the significant point is this statement of Lord Kingsdown:

The oath of canonical obedience does not mean that the Clergyman will obey all the commands of the Bishop against which there is no law, but that he will obey all such commands as the Bishop by law is authorized to impose

On this basis it was in fact held that the Bishop had no authority to pronounce sentences of suspension and deprivation.

There are numerous instances of cases involving disobedience to the lawful commands of the bishop. For instance, in *Tuckniss v Alexander*,⁶⁰⁶ decided in the same year as *Long v Bishop of Cape Town*, it was held that a clergyman was in disobedience by refusing to perform a marriage when his diocesan bishop had issued a licence requiring him to do so. There are many other instances, usefully collected by Bursell⁶⁰⁷ all of which make the point, as Bursell puts it, that 'it is clear that in each case the disobedience was against commands that the bishop by law was authorised to impose.'⁶⁰⁸

⁶⁰⁵ (1863) 1 Moore New Series 411

⁶⁰⁶ (1863) 1 Moo PCCNS 411

⁶⁰⁷ 'The Oath of Canonical Obedience' (2014)16(2) Ecc LJ 168 and see also Bursell R. 'The Clerical Oath of Allegiance' (2015) 17(3) Ecc LJ 295.

⁶⁰⁸ The most recent was *Calvert v Gardiner* (2002) EWHC 1394

There is another issue: C1 (3) refers to canonical obedience in all things lawful and *honest*⁶⁰⁹ and this phrase is repeated in the oath prescribed by Canon 14 (3). Does the word 'honest' add anything? Doe⁶¹⁰ remarks that 'it is unclear when an episcopal direction is not honest'. Bursell⁶¹¹ quotes Bray⁶¹² as saying that 'here is no consensus about the meaning of the word 'honest' in the phrase 'all things lawful and honest'. Is it possible for something to be lawful, but not honest'? It is at least significant that it is there at all as the word 'honest' gives a general moral flavour to the oath of obedience which we noted also in connection with the concept of incardination in the RC Church. This seems at odds with employment status.

What seems clear from the foregoing is that the Oath of Canonical Obedience does play a significant role in the ecclesiastical structure of the Church of England. This makes it all the more surprising,⁶¹³ that its importance was to a large extent brushed aside in *Sharpe v Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester*.⁶¹⁴ The facts were given in Chapter Three but here we are concerned with the Oath taken by Mr. Sharpe to his diocesan, the Bishop of Worcester. Here the Oath was used by the claimant as evidence that the Bishop exercised sufficient control over him to make the Bishop his employer.

Professor McClean gave evidence to the Employment Tribunal 'that the oath of canonical obedience was largely symbolic and in practice had little effect.' Moreover, although it was

⁶⁰⁹ My italics.

⁶¹⁰ *The Legal Framework of the Church of England* 214. Doe has various pertinent criticisms of the drafting of these provisions relating to the Canonical Oath of Obedience but which need not concern us here.

⁶¹¹ 'The Oath of Canonical Obedience' (2014)16(2) Ecc LJ at 185

⁶¹² G Bray, *The Oath of Canonical Obedience*

⁶¹³ See below for an explanation of why this appeared to be so.

⁶¹⁴ [2015] EWCA Civ. 399

found on the facts that the bishop did give instructions to Mr. Sharpe, and no doubt to his other clergy, and indeed on one occasion gave Mr. Sharpe ‘a jolly good roasting’ there was a lack of degree of compulsion or instruction on the bishop’s part. Indeed, the Court of Appeal noted that:

Professor McClean gave evidence that the powers of the bishop in the Canons were in fact “toothless provisions” and that he had known bishops being reduced to “weeping” because they were unable to interfere in situations not to their liking, or to issue binding directions (employment tribunal judgment, para 77)⁶¹⁵

The Court of Appeal accepted, on the authority of *White v Troutbeck SA* ⁶¹⁶ that it was sufficient that the residual control was left with the bishop but it nevertheless held, as Arden LJ put it that: ⁶¹⁷ ‘The powers of the bishop in relation to appointment are slight. The powers of the bishop to control what an incumbent does are exiguous.’ The result was that the claimant’s submission that ‘the oath of canonical obedience represents the highest degree of control by the bishop’ was rejected.

One cannot help feeling that something is missing here. It was in Mr. Sharpe’s interest to argue that there was control⁶¹⁸ to claim employment status; it was in the interests of the Bishop, and the wider Anglican Church, to argue that there was no such status and so the Church underplayed the significance of the Canonical Oath of Obedience when, had it taken

⁶¹⁵ Para. 34

⁶¹⁶ [2013] EWCA Civ 1171

⁶¹⁷ Para. 86

⁶¹⁸ See the discussion of the control test in Chapter Two

a different standpoint, it might have argued the reverse. Had the Church taken this line then the whole issue of Canonical Obedience might have received a more detailed treatment in this context and a useful precedent might have been set for other cases perhaps involving different issues.

One point that should have been argued is that, although the Oath and its requirement to observe the Canons might not have been part of everyday practice that did not mean that they were insignificant. In many employment situations when an employee is given instructions or, as the case may be, reprimanded, one does not immediately refer to the precise terms of the contract of employment nor to disciplinary sanctions. One tries to achieve one's aim by negotiation and consent. However, that does not mean that the terms of the contract are meaningless nor that the powers of the employer are 'toothless'. It simply means that they lie in the background, which is the notion of 'residual control'. Surely this is the same with the Anglican Church.

Nor, with respect, it is easy to agree with Prof. McClean's statement in evidence⁶¹⁹ that: 'There was no sanction for disobeying a bishop or the oath of canonical obedience.' A failure to observe the Oath or indeed the Canons is an ecclesiastical offence and Doe lists the sanctions for this, of which the highest is deprivation.⁶²⁰

Similarly, many employees will spend all their working life without coming up against the possibility of sanctions for disobedience to a term of their contract of employment. The point is not that these do not matter but that they are in the background and do not have to

⁶¹⁹ Para. 32

⁶²⁰ One instance of where these were initially imposed was *Bland v Archdeacon of Cheltenham* [1971] 3 W.L.R. 706

be specifically referred to. The same is surely true of the clergy.⁶²¹

One can conclude this section by observing that there is not the same clear disjunction between employment status and the Canonical Oath of Obedience as we saw with the provisions in RC Canon Law with incardination and the fact that RC clerics lack any guaranteed right to payment. Moreover, as we explained above, the inclusion of the word 'honest' in the oath, even if it does not seem to add anything, is at odds with what one would find in a contract of employment where one would simply expect to find a duty to obey lawful orders. Again, the fact that the oath is taken to an individual and its history in medieval feudalism argue against it as being compatible with employment status. Finally, there is the whole background against which the oath is taken of a hierarchical structure and the conferment of Holy Orders. If pushed then one would concede that taking the oath on its own is not wholly repugnant to employment status but set in the wider context of church structures and authority then it is an obstacle.⁶²²

5. Conclusion

- (a) There is no overall concept of ecclesiology applicable to all Christian churches⁶²³ and so it follows that cases involving claims to employment status will inevitably fall to be decided on a church-by-church basis.

⁶²¹ It is worth noting that an interesting comparison could be made between the practice of the Anglican Church in issuing what Doe calls 'quasi-legislation' and managerial policies and procedures in secular employment. See N. Doe 'Ecclesiastical Quasi-Legislation' in N. Doe, M. Hill and R. Ombres (eds) *English Canon Law* (University of Wales Press, 1998).

⁶²² The duty of obedience applies in other churches too, of course. See G. Evans, *Discipline and Justice in the Church of England*, 27-32 for a useful survey.

⁶²³ This would of course apply *a fortiori* to non-Christian denominations although they are outside the scope of this thesis.

- (b) Taking each church on its own, it is clear that the concept of incardination in the RC Church imposes a formidable, if insuperable, obstacle to employment status for RC clergy.
- (c) If clergy have no right to remuneration then this is a fatal obstacle to the existence of a contract in their case.
- (d) With regard to other churches it would be possible to look on particular features of the relationship and argue that there is no insuperable obstacle to employment status. One could mention that clergy do receive remuneration and that, although I personally would have reservations, the nature of obedience *in practice* is no different to that demanded by a secular employer.
- (e) One needs to view the minister-church relationship in a wider context and here barriers to employment status are very much apparent through in particular the nature of orders, the lifelong nature of the calling of the minister and the hierarchical structure of the church.

Chapter Six: Potential reforms to achieve a degree of employment protection

1. Introduction

There were two parts to the research question posed in the Introduction. The first was to investigate the apparent obstacles, legal and non-legal, to ministers of religion in the United Kingdom having employee status. The second question, leading on from this, was whether, if there are obstacles to employee status, what alternative status in employment law is needed to give ministers of religion adequate protection? ‘

2. Obstacles, legal and non-legal, to ministers of religion in the United Kingdom having employee status.

In Chapter One we were able to overcome the obstacle of who is a minister of religion by utilising the working definition of ‘religion’ put forward by Lord Toulson in *R (on the application of (Hodkin) v Registrar of Births, Deaths and Marriages*⁶²⁴ and by putting forward our own definition of a minister. However, identifying any precise person or body as the employer remains a problem where the actual religious body is not a legal entity.

In Chapter Two we adopted the suggestion of Davidov that we must accept that there is no single category which can cover all employment relationships and so one should adopt a

⁶²⁴ [2013] UKSC 77.

piecemeal approach by identifying different types of dependent workers and conferring a varying degree of employment protection rights on each category. This leads us away from the formal conferment of employment status to looking at deciding which rights are appropriate for the clergy and conferring them by a separate scheme. When we examined the common law tests for the existence of an employment relationship, we concluded there is no absolute all-embracing obstacle to ministers having employment or worker status subject to there being a contract.

Chapter Three considered the actual application of employment law to the question of employment status for ministers and here obstacles to employment status seemed very apparent although the search for any overall reason for this proved tantalisingly elusive. Office holding, meanwhile, proved something of a blind alley and an unnecessary obstacle to employment status.

Chapter Four concluded that the need to preserve the autonomy of religious bodies might have been an obstacle but has not been so. The renewed focus on neutrality as the governing principle when the courts adjudicate on the decisions of religious bodies opens the door to the courts at least investigating religious issues and also gives a new avenue for clergy seeking relief where they allege unfair treatment in 'employment' situations. In this way an obstacle is removed.

In Chapter Five we concluded that the biblical precedents at most enjoin settlements of disputes promptly and, if possible, without lengthy and costly litigation and fundamental Christian teachings do require an engagement by Christians with the rights of workers. However, this does not mean that the clergy should be employees. On the ecclesiology question we noted that there is no overall concept of ecclesiology applicable to all Christian

churches but looking at individual churches there were significant obstacles to employment status such as the concept of incardination in the RC Church and possibly the Canonical Oath of Obedience in the Church of England.

We answer our first research question by saying that there are weighty obstacles, legal and non-legal, to ministers of religion in the United Kingdom having employee status and in the case of some churches these are absolutely insurmountable. These are dealt with in detail in Chapter Five but amongst the obstacles are the lack of any right to remuneration, which immediately cuts off any question of a contract and so any employee status, and also, in the case of RC clergy, the doctrine of incardination. Added to this is the consistent attitude of the courts, considered in detail in Chapter Three, that the relationship between clergy and church is not apt for employee status. This leads us to look at an alternative status for ministers.

3. An alternative status in employment law to give ministers of religion adequate protection.

This must take account of:

- (a) The need to give justice to clergy who feel that they have been treated in such a way that, had they been employees, they might have had a remedy under civil employment law.
- (b) The need to avoid the relationship of employee founded on a contract of employment.
- (c) The fact that ministers with a contract already have the status of workers and as such are protected under discrimination law.

- (d) The need to respect the autonomy of churches and of individual clergy.
- (e) The need to take account of the ecclesiology of individual churches

Therefore any scheme must have three features:

- (a) It must be sufficiently robust to meet point (a) above and provide justice for the clergy.
- (b) It must be one single overarching scheme but there must be an element of flexibility to take account of the ecclesiology of particular churches.
- (c) It must be an internal scheme in order to respect the autonomy of both churches and individual ministers but with an element of oversight⁶²⁵ by the civil law in order to ensure that minimum standards, both procedural and substantive, are observed.

How these features could apply in practice is explained below.

3.1 The Proposed Scheme

It is suggested that any new scheme could be based on existing schemes used by the Church of England and the Methodist Church. These schemes, which are considered in detail below, provide valuable guidance as to how employment protection might develop whilst avoiding the vexed question of employment status which, as we saw at 2 above, has insurmountable obstacles to it.

3.1.1. Utilisation of the Church of England Scheme

The Scheme adopted by the Church of England is a useful starting point.

⁶²⁵ Considered below at 4.7

The Church in response to the DTI Discussion Document⁶²⁶ and after much consultation⁶²⁷ put forward the Ecclesiastical Offices (Terms of Service) Measure 2009 and the Ecclesiastical Offices (Terms of Service Regulations 2009.⁶²⁸

The Measure sets out the general principles and the Regulations contain the details. The term 'office holder' is used throughout and most importantly section 9(6) of the Measure provides that 'Nothing in this Measure shall be taken as creating a relationship of employer and employee between an office holder and any other person or body.' To emphasise this the term 'office holder' is used throughout to refer to the clergy to whom it applies.

Thus the notion of office holding is preserved but, unlike as we saw under the present civil law, office holders are given specific rights. It is worth pointing out that not all clergy are covered by the Measure but only those holding office under common tenure. Those with the freehold are not covered although there is provision for freeholders to convert to common tenure.⁶²⁹

The following main rights are given to clergy holding by common tenure by the Regulations: Statement of initial particulars of office (reg. 3); Right to itemised statement of stipend (reg.

⁶²⁶ See 6.3. at Chapter Two.

⁶²⁷ Published as: The General Synod Review of Employment Status and the Clergy Part One, 2003, GS 1488, and Part Two, 2005, GS 1564.

⁶²⁸ See 'In the Service of the Saints; A Consideration of the Draft Ecclesiastical Offices (Terms of Service) Measure' (2008) 10(3) *Ecc LJ* 310. Various authors, writing from both different perspectives and backgrounds give their views on the draft measure. This is essential reading for anyone interested in this area.

⁶²⁹ See the discussion on both common tenure and freehold in Chapter Three in connection with the *Sharpe* case.

8); Entitlement to stipend of office holders which shall be not less than the national minimum weekly stipend (reg. 11); Weekly rest period (reg. 21); Entitlement to maternity, paternity, parental and adoption leave (reg. 23); Right to time spent on public duties (reg. 24); Right to time off for ante-natal care (Reg. 25); Payment of stipend during time off or time spent on public duties (reg. 26); Provisions relating to sickness including the duty to report sickness absence and to make alternative arrangements (reg. 27) and the right of bishops and archbishops to direct the holding of a medical examination (reg. 28).

Moreover by reg. 32 the Archbishops' Council, acting under powers in S. 8 of the Ecclesiastical Offices (Terms of Service) Measure must issue a Code of Practice containing procedures for enabling an office holder to seek redress for grievances.

The provisions relating to unfair dismissal are found in reg. 31 which provides that the diocesan bishop⁶³⁰ may, if he considers that the performance of an office holder affords grounds for concern, instigate an inquiry into his/her capability to perform the duties of that office. Reg. 31 deals with the general principles under which this is to be carried out, supplemented by a Code of Practice.

If a minister's appointment has been terminated by notice following adjudication under procedures carried out under regulation 31 above, then by reg. 33 'the office holder shall have the right not to be unfairly dismissed'. Thus a complaint can be brought to an Employment Tribunal in the same way as if the minister is an employee and the same

⁶³⁰ There are also parallel provisions dealing with capability procedures against bishops and archbishops.

provisions will apply. We will ask below whether this might or might not be incorporated into any new scheme.

However, it is vital to note that the above provisions only apply to dismissal on grounds of capability and not to dismissal on any of the other grounds specified in s. 98 of the Employment Rights Act (ERA) 1996 and in particular it does not apply to dismissal on the grounds of conduct (see s.98 (2) (b) of the ERA). This is because clerical misconduct is dealt with by the Clergy Discipline Measure (2003) as amended by the Clergy Discipline (Amendment) Measure 2013 and the Safeguarding and Clergy Discipline Measure 2016 and where there is no provision for a complaint to an Employment Tribunal. The procedure is contained in the Clergy Discipline Rules 2005 as amended by the Clergy Discipline (Amendment) Rules 2016. We will look below at possible reasons for why conduct is dealt with separately.

3.1.2 Methodist Church Scheme

It would clearly be desirable that any scheme is not based solely on the Church of England scheme both because the widest perspective possible is desirable and because other churches might resist a scheme founded purely on the model of one church. Another scheme is that used by the Methodist Church, set out in Parts 8 and 11 of its Standing Orders (SO) and headed 'Terms of Service'. Lady Hale in *President of the Methodist Conference v Preston*⁶³¹ usefully summarised those in Part 8 as follows:

⁶³¹ (2013) UKSC 29 at para. 43

These deal with the right to a stipend (SO, 801), the right of a Circuit minister to be provided with a manse as a base for the work of ministry as well as a home (SO, 803), membership of the pension scheme (SO, 805), parenthood (SO, 806), including antenatal care, maternity, paternity, adoption and parental leave (SO, 807 to 807D)

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Part 11 of the Standing Orders deals with complaints and discipline. Unlike the provisions in the Church of England scheme this applies to all members of the Church and the term 'complaint' is widely drawn by SO 1101 (i) (a) as 'objecting to the words, acts or omissions of another member of or person holding office in the Church'. Thus, unlike the Church of England scheme there is no distinction between capability and conduct.

4. The Details of the New Scheme

Now that we have looked at two schemes in detail, we need to see how they might be translated into a new comprehensive scheme.

4.1. Fundamental Principles

The scheme should begin with a statement of the following fundamental principles:

(a) Nothing in it is intended to, and shall not confer, employment status on the clergy.

This is vital as unless this statement appears most churches would refuse to be involved. It is also vital as a future court might use the existence of this scheme as a reason for holding that ministers do have employment status. Thus Lady Hale in

⁶³² The provisions are set out in detail in the Constitutional Practice and Discipline of the Methodist Church Vol. 2 (2016) available at www.methodist.org.uk/media/1841903/conf-2016-cpd-vol-2.pdf accessed 28th August 2017

President of the Methodist Conference v Preston ⁶³³ having, as we saw above, examined the rights given to Methodist ministers then used these rights as evidence of their employment status.⁶³⁴ This is despite the fact that the Methodist Church, in its Response to the DTI Discussion Document⁶³⁵ said that ministers would argue that their status of being “in full Connexion” describes a relationship which is entirely different from that of employee and employer.

- (b) It applies to clergy who come within the definition of a minister of religion set out in Chapter One.
- (c) Each church to whom the scheme applied would nominate a person or body who would be the respondent in any claims. This would avoid the problem which, as we saw, in Chapter One, exists at present of identifying who is the employer. It would also deal with the problem where churches have a loose organisational structure and so there is no one obvious respondent. Here it would be up to the church to nominate someone.
- (d) Each church shall be bound by the scheme but may decide to opt out of it. Opting out could be either on the basis that the whole church opts out or that a church decides that particular clergy shall be opted out. One obvious instance would be to opt out clergy who are members of monastic communities. However, given point (b) above most of these clergy would not come within the definition of a minister of religion anyway. Another instance could be where there is a church which is

⁶³³ (2013) UKSC 29 at para. 43

⁶³⁴ See paras. 45-49. Lady Hale mentioned other factors also but she certainly attached significance to this point.

⁶³⁵ See 6.3. at Chapter Two. Lady Hale did not refer to this point.

broadly congregational in structure with no body which has decision making powers. Here it would be too administratively burdensome for the scheme to apply. What would be wrong is to abandon the scheme purely because of this problem.

The statistics show ⁶³⁶ that in 2015 weekly attendance at 'Independent' Churches was 170,000, a steep decline from 239,200 in 1980 and at 'New' Churches it was 166,000, a large increase from 1980 when the figure was 75,000. This shows that 'New' Churches are experiencing considerable growth and, as many of these are congregational in structure, there may come a time when, if their growth continues, the proposed scheme may need to be amended to take account of the problems in fitting them in to it. However, as at present their attendance at 166,000 is a very small proportion of the total attendance at church of 2,474,000 there is no reason at present not to bring the scheme into operation because of possible future difficulties in accommodating these types of churches.

- (e) The scheme should be divided into two parts: an inner core of rights which would apply to all clergy where their church has opted in and has specified that the scheme applies to those clergy, and an outer core where each church could decide which rights applied to them.

- (f) The scheme would clarify that all clergy are workers on the basis of the *Percy* decision and so would be protected by discrimination law although the safeguards provided for churches under the Equality Act 2010 would remain. This would involve a change in the law as at present the finding that a minister is a worker depends on the existence of a contract. However, one must ask; why should

⁶³⁶ British Religion in Numbers, British Academy Research Project www.brin.ac.uk/figures (accessed 20th January 2019)

churches be able to discriminate against their clergy? One obvious instance is disability discrimination.

4.2. The inner and outer core of rights

The distinction between rights contained in an 'inner core' and an 'outer core' may seem complex but seems to be the only way to take account of the ecclesiology of particular churches. One example would be the right to a stipend. As we saw in Chapter Five RC clergy have no right to remuneration at Canon Law. On the other hand, clergy of the Anglican Church do, as we saw above, have an entitlement to a stipend of not less than the national minimum wage and Methodist clergy are also entitled to a stipend. Thus this would have to go in the 'outer core'. Another example would be a right to claim for unfair dismissal as this again would be resisted by many churches as contrary to their understanding of the relationship between a minister and his/her church. The principle governing the inclusion of rights in the inner core should be that no rights be included that are directly contrary to the Canon Law of Churches or any other instrument governing the rights of their ministers.

One possible way to identify the contents of the inner core would be to start with the Statement of Good Practice contained in the Draft document brought by the Department of Trade and Industry to the Clergy Working Group for its meeting on January 26, 2005. This provided that 'such statements' might cover some or all of the following areas:

Arrangements for special leave in cases of sickness and caring responsibilities

Entitlement to annual leave and rest breaks

Arrangements, where appropriate, for maternity, paternity, ante-natal and adoption leave

Provision of accommodation, where appropriate

Role of spouses and locums, and the division of responsibilities within team ministries

Agreement to provide a written statement of grounds for termination of appointment

Provision of time off to look for another appointment or arrange training in the event of loss of post

Rights to belong to and be active in a trade union

Minimum periods of notice

Pension arrangements, where appropriate

Of these I suggest that trade union rights be either amended to include only the right to belong to a trade union as distinct from being active in it or put in the 'outer core'. This is because, as explained in Chapter Five, RC clergy are certainly prohibited by RC Canon Law from being active in trade unions and there is a doubt about whether actual trade union membership is prohibited. This would be the kind of issue to be dealt with in discussions. The fact that clergy of some churches are celibate need not mean that the section on maternity, paternity, ante-natal and adoption leave need be removed as it contains the words 'where appropriate'. Others, such as the right to have a written statement of grounds for termination of appointment would need careful consideration as under civil employment law this could be relevant to any possible unfair dismissal claim whereas under this scheme claims for unfair dismissal would not be in the inner core.

What would need to be added is

- (a) A Statement by each Church of the rights applicable to the clergy on the lines of the Statement of Initial Employment Particulars given to employees under s.1 of the ERA 1996.

(b) An effective grievance procedure. In *Sharpe v Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester*⁶³⁷ it seems clear that, had there been a grievance procedure in place⁶³⁸ then the complaint would at least have stood a good chance of being resolved at that stage. The same might be said of *President of the Methodist Conference v Preston* where Lady Hale⁶³⁹ pointed out: 'The Church may well have had good reasons to be troubled about the respondent's performance. But the allegation is that, instead of addressing those directly, they reorganised the Circuits so as, in effect, to make any investigation of whether or not those complaints were justified unnecessary,....' It is not clear if Ms. Preston had used an internal grievance procedure but if a formal one of the kind proposed had been in place it is possible that her concerns about Circuit reorganisation could have been addressed then. Moreover, as we saw in Chapter Five, the biblical precedents enjoin settlements of disputes promptly and, if possible, without lengthy and costly litigation. This emphasises mediation through use of a grievance procedure. Moreover, both *Sharpe* and *Preston* ended up as constructive dismissal cases and the use of an effective grievance procedure could assist in preventing similar cases arising.

(c) A procedure for dealing with complaints by the clergy that they are victims of bullying or harassment. The Faith Workers Branch of Unite has suggested a Charter of Care for clergy⁶⁴⁰ and this could be part of the procedure. There is a good deal of evidence, some of it anecdotal and never proved, of the alleged treatment by his

⁶³⁷ [2013] UKEAT 0243_12_2811

⁶³⁸ It was found on the facts that there was not. See Arden LJ at para. 31.

⁶³⁹ At para. 49

⁶⁴⁰ See <https://en-gb.facebook.com/unitefaithworkers>

parishioners of Mark Sharpe,⁶⁴¹ that there a good deal of bullying of clergy goes on and that their superiors do not always give appropriate support.

(d) A statement confirming that clergy are covered by health and safety legislation.

The outer core of rights could then consist of further rights based on those in the Church of England and Methodist Church schemes set out above. However, I suggest that unfair dismissal is treated separately.

4.3 How the Scheme might apply in practice.

Example One: X is a minister of Y church which has accepted all the rights in the inner core and the outer core. The scheme applies to him. His bishop wishes to use the capability procedure against X. He can do so.

Example Two: X is a member of a monastic community and his church has decided that the scheme will not apply to him. Moreover, he does not come within the definition of a 'minister of religion' in the scheme. X wishes to complain that there is no induction loop in the monastery chapel and as he has a hearing loss he cannot hear the services. This, if proved, is disability discrimination and as all clergy are workers under the scheme he can claim.

⁶⁴¹ The claimant in *Sharpe v Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester* One stresses again that the ill treatment of Sharpe was never proved.

Example Three: X is a member of Z church which has decided that it will adopt all the rights in the inner core but not those in the outer core except for the right to a stipend. The scheme applies to him. X complains that his bishop has told him that due to a shortage of clergy he cannot take his annual leave this year. This is in the inner core and so X can make a claim.

Example Four: This is set out below in the Appendix.

4.4. Unfair Dismissal

It is important to consider this separately not only because it has been by way of dismissal claims that the issue of clergy employment status has come before the courts but also because of its inherent importance. Although the Church of England does give a right to clergy to complain to an Employment Tribunal on this ground this seems to be unique to this church. I suggest that the distinction between capability and conduct is maintained in order to reflect the ecclesiology of churches that, in general, it is the church itself which has the responsibility for the teaching of doctrine and that, in a case where misconduct involves a question of doctrinal teaching or practice, this must be left to the Church itself. The distinction between which matters were to be left to the church as doctrinal would need to be very clearly developed to avoid what I suggested in Chapter Five was a mistaken crossing of the divide in the *Percy* case.

All the present schemes would be abolished, including the right of Church of England clergy to complain to Employment Tribunals, which seems to have been hardly used. They would all be incorporated into the new scheme.

4.6. Administration of the Rights

The Scheme could be given effect to by an order under s. 23 of the Employment Relations Act 1999 where, by s.23 (2), the Secretary of State may by order make provision which has the effect of conferring employment rights on individuals who are of a specified description. The order could incorporate the terms of the scheme which would previously have been negotiated by the churches. The alternative is a non-statutory scheme but there seems no good reason why it should not be statutory in view of the extent to which it takes account of the ecclesiology and autonomy of churches.

Instead of recourse to the courts or an Employment Tribunal, which would be unacceptable to many churches,⁶⁴² I suggest a tribunal composed of three members of the church, always including the bishop, or person possessing similar status,⁶⁴³ or his nominee. There would also be one member from another church and a legally qualified chair. Where the matter in question involved church doctrine or practice the bishop would have the final say.

4.7. Enforcement of the Rights

Remedies awarded by the tribunal could be based on those for discrimination contained in s.124 of the Equality Act 2010:

⁶⁴² An obvious instance is the RC Church and, almost certainly, the Orthodox Churches.

⁶⁴³ The phrase 'similar status' is included to deal with cases where the church does not have episcopal orders. In such a case the church would nominate someone and it would be left to the church to decide who had sufficient status. One possible example could be a superintendent minister in the Methodist Church.

- (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
- (b) order the respondent to pay compensation to the complainant;
- (c) make an appropriate recommendation.

Orders for monetary compensation would be enforceable as County Court Judgements but I hope that the other orders would be used more often, in a spirit of mediation and conciliation which, as we noted at the start of Chapter Five, has clear biblical precedents.

In addition, clergy will be able to use judicial review as a remedy where they allege that the procedure by which they were dealt with is in breach of natural justice. The usefulness of this will be enhanced by the renewed focus on neutrality as the governing principle when the courts adjudicate on the decisions of religious bodies.

4. Final thoughts

In the many years that I have been studying, teaching and writing about this topic the importance of preserving clerical independence has been constantly stressed by clerics and others. As one Diocesan Registrar put it: 'Independence in the ministry of word and sacrament'. That is one side of the coin.

The other was vividly illustrated by remarks of Cardinal Ludwig Müller who, just as this thesis was reaching its conclusion, criticised the manner in which Pope Francis dismissed him as head of the Congregation for the Doctrine of Faith (CDF). In an interview with the German newspaper *Passauer Neue Presse*, the cardinal said that on the last working day of his five-

year term as a prefect of the Congregation for the Faith, Pope Francis informed him “within a minute” of the decision not to extend his mandate. ‘He did not give a reason,’ Cardinal Müller added: “I cannot accept this way of doing things. As a bishop, one cannot treat people in this way.’⁶⁴⁴

Here we have the tension which underlies this topic. On the one hand there is the need to maintain that degree of clerical independence mandated not only by the ecclesiology of individual churches but also by the principle that churches enjoy a degree of autonomy from the state, a principle which, as we have seen, has endured virtually throughout the history of Christianity. On the other hand, when churches preach that workers in the secular sphere should enjoy fundamental principles of justice then they ought to ensure that these are also enjoyed by their own workers. It is this tension that this thesis has explored and, in this conclusion, suggested a way by which it might be resolved.

⁶⁴⁴ The remarks were widely reported. See catholicherald.co.uk/.../pope-names-jesuit-as-successor-to-vatican-doctrinal-chief-card...

Appendix: Analysis of cases substantially discussed in Chapter 3: The case law on the employment status of ministers of religion.

NB: The column setting out how the new scheme would apply is Example Four at 4.3.

Case	Main issue	Outcome	Place in taxonomy	New Scheme
<i>In Re National Insurance Act, 1911 In Re Employment of Church of England Curates</i>	Whether C of E curate was an employee for national insurance purposes	Held to be an office holder	Office holding	Not applicable – employment rights not in issue.
<i>In re Employment of Ministers of the United Methodist Church</i>	Same issue as above but in relation to a Methodist minister	Held to be an office holder?	Office holding? Can only be tentative as exact ratio cannot be ascertained from report.	Not applicable – employment rights not in issue.
<i>Scottish Insurance Commissioners v Church of Scotland</i>	Same issue as above in relation to Assistant Ministers in the Church of Scotland and the United Free Church of Scotland	Not a contract of employment but less emphasis on office holding than in the first case.	Construction of terms.	Not applicable – employment rights not in issue.
<i>Rogers v Booth</i>	Claim for industrial injury compensation on the basis that the minister was an employee.	Not a contract of employment.	Construction of terms.	Now covered by the Health and Safety at Work Act 1974 but the scheme would emphasise this.

<i>Barthorpe v Exeter Diocesan Board of Finance</i>	Claim for unfair dismissal by a C of E reader in a salaried position.	Held to be an employee.	Construction of terms	Now covered by the scheme provided that the church had adopted the unfair dismissal rights in the 'outer core'.
<i>President of the Methodist Conference v Parfitt</i>	Claim for unfair dismissal by a Methodist Minister	Not an employee	Emphasis on the spiritual nature of the relationship. Dillon LJ held that this led to a presumption against intention to create legal relations.	Now covered by the scheme provided that the church had adopted the unfair dismissal rights in the 'outer core'.
<i>Chishti v Keighley Muslim Association</i>	Claim for unfair dismissal by an imam.	Held to be an employee.	Construction of terms but some evidence of confusion	Now covered by the scheme provided that the claimant satisfied the definition of a minister and the

				religious body had adopted the unfair dismissal rights in the 'outer core'.
<i>Davies v Presbyterian Church of Wales'</i>	Claim for unfair dismissal by a minister of the Presbyterian Church of Wales	Held not to be an employee.	Construction of terms but also underlying emphasis on the existence of a spiritual relationship precluding a contract.	Now covered by the scheme provided that the church had adopted the unfair dismissal rights in the 'outer core'.
<i>Santokh Singh v Guru Nanak Gurdwara</i>	Claim for unfair dismissal by priest at a Sikh Temple	Held not to be an employee.	Construction of terms and presumption against intention to create legal relations.	Now covered by the scheme provided that the claimant satisfied the definition of a minister and the religious body had adopted the unfair dismissal rights in the 'outer core'.
<i>Birmingham Mosque Trust Ltd. v Alavi</i>	Claim for unfair dismissal by a professor of Islamic studies who was	Case remitted to the IT as it had failed to apply <i>Parfitt</i>	Presumption against intention to create legal	Now covered by the scheme provided that the claimant

	considered to be a minister.	correctly.	relations.	satisfied the definition of a minister and the religious body had adopted the unfair dismissal rights in the 'outer core'.
<i>Diocese of Southwark and others v Coker.</i>	Claim for unfair dismissal by an assistant curate in the Church of England.	Held not to be an employee.	Presumption against intention to create legal relations.	Now covered by the scheme provided that the church had adopted the unfair dismissal rights in the 'outer core'.
<i>Percy v Church of Scotland Board of National Mission</i>	Claim for unlawful sex discrimination by an associate minister in the Church of Scotland.	Held to be a worker and thus able to claim.	Construction of terms	Now covered by the scheme – right in the 'inner core'.
<i>New Testament Church of God v Stewart</i>	Claim for unfair dismissal by a pastor of the New Testament Church of God.	Held to be an employee.	Construction of terms	Now covered by the scheme provided that the church had adopted the unfair dismissal rights in the 'outer core'.
<i>Macdonald v Free Presbyterian Church of Scotland</i>	Claim for unfair dismissal by a minister of the Free Presbyterian Church.	Held not to be an employee.	Construction of terms.	Now covered by the scheme provided that the church had adopted

				the unfair dismissal rights in the 'outer core'.
<i>President of the Methodist Conference v Preston</i>	Claim for unfair (constructive) dismissal by a Methodist Minister	Held not to be an employee	Construction of terms.	Now covered by the scheme: grievance procedure in the 'inner core' and right to complain of constructive dismissal in the 'outer core'.
<i>Sharpe v Worcester Diocesan Board of Finance Ltd. and the Bishop of Worcester</i>	Claim for unfair (constructive) dismissal and also unfair dismissal under the whistleblowing legislation by a Church of England rector.	Held not to be an employee (unfair dismissal claim) nor a worker (whistleblowing claim).	Office holding and presumption against intention to create legal relations.	Now covered by the scheme: grievance procedure in the 'inner core' and right to complain of constructive dismissal in the 'outer core'.
<i>Celestial Church of Christ v Lawson</i>	Declaration sought to, inter alia, remove the 'Shepherd' of the Church.	Held not to be an employee.	Reference to the terms of the relationship. Emphasis on the spiritual nature of the relationship – possible reintroduction of a presumption against intention to create legal relations.	Now covered by the scheme provided that the claimant satisfied the definition of a minister and the religious body had adopted the unfair dismissal rights in the 'outer core'.

Analysis

If we look at the above seventeen cases then in the first three the implementation of the proposed scheme would make no difference as employment rights were not in issue. In four of the other fourteen there was a finding of employee/worker status and so the proposed scheme at first glance would not have made a difference. However, in *Percy* there was no finding of employee status and so a possible claim for constructive dismissal was barred. Thus, I suggest that *Percy* should be included with the other ten where under the proposed scheme a claim was barred.

We can conclude that of the fourteen cases the implementation of my scheme would have allowed a claim in eleven which amounts to 79% of these cases. The only caveat to this is that in two of these cases we are not certain if the 'minister' satisfied my definition of a minister. If not, they would not be covered by the scheme.

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