Appeal No. UKEAT/0429/11/ZT

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 26 January 2012
Judgment handed down on 14 February 2012

Before

THE HONOURABLE MR JUSTICE BEATSON

MR B BEYNON

MRS M V McARTHUR FCIPD

MR T SINGH — APPELLANT

THE MEMBERS OF THE MANAGEMENT COMMITTEE OF THE BRISTOL SIKH TEMPLE AND OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR MICHAEL FORD (of Counsel) Instructed by: Messrs Thompson Solicitors 18 Lawford Street Old Market Bristol BS2 0DZ
For the Respondents	MISS DEBBIE GRENNAN (of Counsel) Instructed by: Lyons Davidson Solicitors 4th Floor, Greyfriars House Greyfriars Road Cardiff CF10 3AL

SUMMARY

WORKING TIME REGULATIONS – Worker

NATIONAL MINIMUM WAGE ACT - Worker

The issue was whether the Priest at a Sikh Temple was a "worker" within section 54(3)(b) of the **National Minimum Wage Act 1998**. The appeal against the decision that he was not was allowed. It was held that the Tribunal erred in relation to the questions of "mutuality" and "personal performance of services", and, in the light of **Moore v President of the Methodist Conference** [2011] ICR 819, affirmed *sub nom* **President of the Methodist Conference v Preston (formerly Moore)** [2011] EWCA Civ 1581, in its approach to the question of an intention, in the context of this Temple, to create legal relations.

THE HONOURABLE MR JUSTICE BEATSON

Introduction

1. These are the reasons for our decision, announced at the conclusion of the hearing on 26 January, to allow the appeal of Mr Tejinder Singh, against the decision of the Bristol Employment Tribunal in a judgment given on 4 April 2011. Mr Singh had served as the Granthi or Priest at the Bristol Sikh Gurdwara or Temple between 12 December 2002 and 18 November 2009. The Respondents are the members of the management committee of the Gurdwara. The sole issue is whether the Tribunal erred in law in deciding that the Appellant was not a "worker" within the meaning of the **National Minimum Wage Act 1998** ("the 1998 Act"). The Tribunal also found that he was not an "employee" within the meaning of section 230 of the **Employment Rights Act 1996** ("the 1996 Act"), and there is no appeal against that finding.

2. Section 54(3) of the 1998 Act provides:

> **"In this Act 'worker'…means an individual who has entered into or works under (or where employment has ceased, worked under) –**
>
> **(a) a contract of employment**
>
> **(b) any other contract, whether express or implied, and (if it is express) whether oral or in writing, whereby an individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of that contract that of a client or customer of any profession or business undertaking carried on by the individual**
>
> **and any reference to a worker's contract shall be construed accordingly."**

This definition is identical to the definition of "worker" in section 230 of the 1996 Act and Regulation 2(1) of the **Working Time Regulations 1998**, S.I. No. 1833 1998.

3. The question for the Tribunal in relation to section 54(3)(b) was to consider whether: (i) there was a contract between the Appellant and the members of the Temple's management committee, by which (ii) the Appellant undertook to perform personally any work or services. The question was thus whether there was an agreement between the Appellant and the members

of the Temple's management committee under which the Appellant owed a contractual obligation to serve personally.

The decision

4. The Tribunal's findings of fact are set out at paragraphs 4 – 24. The section of the decision on the application of facts and law is between paragraphs 29 and 43. Some of the matters to which we refer below are from the latter section. We refer to them here (as Miss Grennan, on behalf of the Respondent, did in the summary of the key findings of fact in her skeleton argument) because they are findings of fact or mixed findings.

5. The material findings of fact by the Tribunal are:

> **"(a) The appellant initiated contact with the respondent to enquire whether there was a need for a Granthi at the Gurdwara, was asked if he was willing "to serve" the Gurdwara "and he agreed that he would do so": paragraph 5.**
>
> **(b) A document dated 29 July 2001 entitled "duties of the Gurdwara Granthi" was not signed by the appellant or any representative of the respondent. The appellant accepted the document pre-dated his service as Granthi and was the only written document between the parties "regarding his services". The document does not refer to remuneration for the Granthi in any form: paragraph 6.**
>
> **(c) The appellant was provided with free accommodation for him and his spouse at the Gurdwara, and "food available from voluntary contributions by the congregation". The evidence on behalf of the respondent was that food had always been available to all at the Gurdwara: paragraph 7.**
>
> **(d) The appellant received cash payments "made up from voluntary donations from the congregation" which varied but were "around £50 on a weekly basis". They were paid to the appellant via the cashier. The appellant also received variable amounts of cash given to him directly by members of the congregation for performing prayers and blessings and in relation to events of special significance such as weddings. For some, but not all, of these the management committee set suggested levels of donation which were put on a noticeboard. The appellant "accepted the voluntary nature of the donations, giving evidence that no-one could impose any requirement on the congregation to give money to him". He also received donations directly from members of the congregation when attending their homes to perform blessings. Arrangements for these were made directly by members of the congregation and him. See paragraphs 8 – 10.**
>
> **(e) The Tribunal accepted the respondent's evidence that there was no need for the appellant to seek permission in advance before performing religious services at other Sikh Temples in Bristol for which he received payments: see paragraphs 11 – 12.**
>
> **(f) No tax or national insurance was deducted from the donations paid to the appellant, and he did not report his income to HMRC: see paragraph 13.**
>
> **(g) Every year or two the appellant took "extended holidays" to India, e.g. eight weeks in 2008. He was not paid during any such periods. During his absence, arrangements were made by him, or occasionally the management committee, for a replacement to perform services at the**

respondent Gurdwara. A number of individuals had performed the activities of the Granthi during periods when the appellant was absent. The substitution for lengthy periods of time took place on a regular basis; it was not a one-off scenario: paragraphs 14 – 15, and 30.1, sub-paragraph 2.

(h) On occasions others joined the appellant in performing the activities of the Granthi and on such occasion the cash donations were split between all those performing: paragraph 15.

(i) The Tribunal accepted the respondent's evidence that the appellant would book holiday and would then inform the management committee and discuss arrangements for a replacement, and that he was not required to request permission for a holiday: paragraphs 19 and 30.2 sub-paragraph 4.

(j) The respondent's management committee sent a number of letters to the Home Office between 2005 and 2009 referring to the appellant as being in "employment" as head priest or minister of religion, and to being paid "wages for employment services". The Tribunal accepted the respondent's evidence that the reason for these documents was to ensure that the appellant could return to the UK after extended periods of leave to India without any issue regarding immigration: paragraph 20.

(k) The Tribunal stated, in the light of the expert evidence, that there appeared to be two schools of thought within the Sikh religion as to how individual Gurdwaras should be run. Some are run on "traditional lines where Granthis perform service on a voluntary basis and receive voluntary donations or offerings from members of the congregation", but more recently, large or wealth Gurdwaras "employ Granthis directly under employment contracts": paragraph 23.

(l) Individual Gurdwaras have a high level of autonomy to decide whether or not to enter into employment relationships with Granthis performing services. The respondent is a small to medium-sized Gurdwara and has always been run on a voluntary basis, relying on a fairly strict interpretation of the Sikh scriptures with "a culture of voluntarism". The constitution provided under the heading "duties of office-bearers" that all the members of the management committee will work without any remuneration or any other personal gain. The Tribunal stated that this included the appellant. See generally, paragraphs 23 – 24 and 38.

(m) the more recent practice of large Gurdwaras employing Granthis under employment contracts is a development which occurred after the appellant commenced services for the respondent in 2002, some six years before such contracts were introduced by Southall in 2008, only a year before the appellant stopped serving as the Granthi for the respondent: see paragraphs 23 and 37."

6. Turning to the section of the decision on the application of facts and law, paragraphs 29 – 30 dealt with whether the Appellant was an employee. For present purposes, we only need to set out extracts from the third to fifth sub-paragraphs of paragraph 30.1, which were concerned with whether the Appellant undertook to provide his own work and skill in return for pay and remuneration. These provided:

"Turning to mutuality of obligation; there would always be a need for recital of and attendance on the holy book, so long as there is a congregation at the respondent Gurdwara. However, anyone with sufficient knowledge can and did perform those duties. The constitution notes that 'office-bearers' such as the [appellant] are to work without remuneration or any other personal gain.

The [appellant] and his wife were provided with accommodation at the Temple, which could amount to a form of remuneration but equally could be viewed as provision of facilities for a valued office-bearer to enable him to perform religious duties. …

…The fact that the cashier passed donations on to the [appellant] as intermediary does not affect the nature of the payment, which was voluntary and could not be guaranteed, as the [appellant] acknowledged in evidence. The regular of £50 per week was in recognition of the [appellant's] respected position as an office-holder, not as remuneration for his services."

7. The conclusions of the Tribunal on the question of "worker" are contained in paragraphs 31 – 34 of the decision. These state:

"Worker

31. In order to comply with the test for "worker" status there needs to be an irreducible minimum mutuality of obligation and then emphasis is to be placed on whether the [appellant] was required to provide personal service.

32. There was not sufficient mutuality of obligation as the [appellant] did not offer services in return for any certain remuneration, due to the voluntary nature of donations described above.

33. As any Sikh can perform duties of Granthi and the [appellant] was not required to provide services personally (recommending substitutes in his absence). The Tribunal finds there was insufficient personal service requisite for a finding of worker status.

34. Both parties accepted that all Sikhs are viewed as equals. No doubt, despite this, the position of Granthi holds a special position of respect within his congregation. The Tribunal notes the [appellant's] submission with regard to the legislative intent of the classification of 'worker'. However this equality of status indicates that the [appellant] does not fall within a class of persons which require special protection due to the subordinate nature of their relationship with their 'master'."

8. The material parts of the Tribunal's conclusions on religious beliefs, i.e. whether the religious beliefs of the parties were such that they could be said to have intended to enter into legal relations with each other, so as to preclude the formation of any contract, are:

"Religious Beliefs

35. The question for the Tribunal is whether the religious beliefs of the parties are such that they cannot be said to have intended to enter into legal relations with each other, so as to preclude the formation of any contract.

36. The expert evidence highlights that there are two schools of thought within the Sikh religion on this proposition. No doubt there are relationships between other Gurdwaras and Granthis which are governed by contracts of employment. However the Tribunal must consider which prevailed at the Respondent Gurdwara.

…

39. [The] traditional approach adopted by the Respondent Gurdwara is consistent with the translation of the Silver Book referred to by Dr Dilgeer which states:

> ***'the Sikh who is priest, he should not get much of offerings. He should get only for necessities of body (self). If he gets more he should distribute among others…'***

40. The Tribunal notes that the Respondents did not present evidence from a member of the management committee serving at the time of the [appellant's] appointment. The evidence the [appellant] gave about his appointment was that he approached the Respondent Gurdwara and agreed to 'serve'. The written constitution refers to voluntary service for the office of

Granthi. The Tribunal finds the evidence pertaining to this Gurdwara and the appointment of the [appellant] consistent with the evidence of Mr Javinder Singh that the appointment of a Granthi as a representative of the Sikh religion rather than an employee of a particular Gurdwara. Mr Javinder Singh viewed the relationship with the [appellant] as being based on voluntarism, and a traditional interpretation & application of the Sikh scriptures. The [appellant] was a missionary for the religion.

41. The evidence is not suggestive of an intention between the parties to create legal relations such as exist between employer and employee, particularly in view of the spiritual nature of the services the [appellant] performed. The situation was quite different to that in *Moore v President of the Methodist Conference* where the minister in question had accepted a specific posting of specified length with clarity as to terms of the appointment.

42. The Tribunal is mindful of the provisions of EHRC Article 9 and the need to balance the rights of individuals to ensure protection of rights (such as protection against exploitative employment practices). However in light of the findings of fact which relate to this particular Respondent Gurdwara the Tribunal finds that there can have been no intention to create legal relations. As such no contract of any kind can exist between the [appellant] and the Respondent Gurdwara."

The document dated 29 July 2001

9. The decision refers to the document entitled "duties of the Gurdwara Granthi (Sikh Temple Priest)" and the Respondent's written constitution. Paragraph 1 states that the Priest "must" recite daily the specified scriptures and paragraph 3 that, after he has prepared the "Guru Granth Sahib" for recitation and devotion, he "must" stay in the Temple until 11:00am, and in paragraph 4 that he "must be" in the Temple from 4:00 – 8:30pm. A note to paragraph 4 states that, if he needs to go out between those times, before leaving he should notify the President/Secretary present and place a notice on the door indicating the time of his return. By paragraph 5 the Priest "should take responsibility for cleaning and general care" of the Temple.

10. Paragraph 6 deals with donations received. Paragraph 7 requires the Priest to notify the President/Secretary if his services are required by another Sikh Temple. Paragraph 10 provides that the Priest "will instruct members" *inter alia* in religious music, holy scriptures, and other religious mattes in line with the management committee's advice and his own time availability.

The Gurdwara's constitution

11. This states that the responsibility for running and administering the Gurdwara rests on the executive committee. The constitution sets out the objectives of the Gurdwara, its functions and facilities (listing the manners of observing Sikh customs and ceremonies), education and other matters. There is provision for the annual election of an executive committee consisting of a President, Vice-President, General Secretary, Vice-General Secretary, Cashier, Vice-Cashier, Jathedar and Vice-Jathedar.

12. There is a section of the constitution headed "duties of office-bearers", which sets out their duties. The preamble to it states "all the members of the executive committee will work without any remuneration or any other personal gain" (emphasis added). It then sets out the duties of the members. The functions of the Cashier are stated to be to maintain the accounts, to pay the bills, and to post a monthly account report on the Gurdwara's noticeboard. It is to be noted that the Granthi is not included in the list of those who, earlier in the constitution, are stated to be members of the executive committee. He is the last person listed in the section headed "duties of office-bearers".

Discussion

13. For section 54(3)(b) of the 1998 Act to apply, the Tribunal had to decide that there was an agreement between the Appellant and the members of the Temple's management committee under which he owed a contractual obligation to serve personally. Logically the first question is whether the parties had the necessary intention to found a contract. If they did not there is no need to consider whether the other requirements of section 54(3)(b), "mutuality of obligation" and an undertaking to "perform personally any work or services", are met.

14. We have been assisted by helpful skeleton arguments by Mr Ford on behalf of the Appellant and Miss Grennan on behalf of the Respondent. Neither appeared before the Tribunal. We accept the submission in paragraph 13 of Miss Grennan's skeleton argument that the fundamental question is whether, on the evidence before it, the Tribunal was entitled to conclude that in this Gurdwara there was a culture of voluntarism which was inconsistent with an intention to create legal relations. But both the Tribunal's decision (perhaps reflecting the structure of the way the case was put to it) and the submissions of Mr Ford and, notwithstanding Miss Grennan's written submissions, her oral submissions, first deal with the other requirements of section 54(3)(b). Since Mr Ford submitted that the Tribunal erred in law in a number of other respects to its approach to the question of whether the Appellant was a "worker" within section 54(3(b) of the 1998 Act, and those errors affected its approach to "intention to create legal relations", we shall also do this.

15. We start with Miss Grennan's submissions. She submitted that, if, as she contended, the Tribunal did not err in relation to "intention to create legal relations", any alleged error in its approach to the question of mutuality of obligation, personal performance of services, or the consideration for those services for the purposes of section 54(3)(b) was immaterial. But she also submitted that the Tribunal did not fall into error in respect of those matters.

16. On mutuality of obligation, Miss Grennan accepted that the test of mutuality for section 54(3)(b) was different from the test in the context of determining whether there is a contract of employment and that it sufficed for a party to have provided some consideration for the services provided and that consideration need not be pay. But she submitted there was sufficient evidence before the Tribunal to enable it to find that there was no sufficient mutuality and that for this reason the Appellant was not within the status of "worker".

17. Miss Grennan submitted that there was no error in paragraphs 31 and 32 of the decision. The reference in paragraph 32 to "remuneration" was, in context, a reference to "consideration" because (see paragraph 30.1, sub-paragraph 4, set out above) the Tribunal had referred to the provision of accommodation as "a form of remuneration" when that might more accurately have been described as consideration. Because the case had been argued on the basis that remuneration need not be ascertainable in amount, the qualification of the term "remuneration" by the word "certain" did not mean that the Tribunal fell into error.

18. Miss Grennan argued that it was the "voluntary nature of donations" (the last phrase in paragraph 32) which the Tribunal considered prevented there from being any consideration in the legal sense for any services rendered by the Appellant. She submitted the Tribunal was entitled so to conclude. She relied on the Appellant's acceptance (see paragraph 30.1, sub-paragraph 5) that the payments were voluntary and submitted the Tribunal was entitled to find that the fact that the payments were passed to him by the Temple's cashier as an intermediary did not affect their nature. She also submitted that the absence of any evidence that the Respondent was under a contractual obligation to make any payment or any level of payment if, for example, no or insufficient donations were made, meant the Tribunal was entitled to reach the conclusion that it did.

19. In relation to the payments of £50 per week, Miss Grennan argued that the Tribunal was entitled to find that these were paid by virtue of the Appellant's office and not as recompense for his services. She submitted that there is no finding in the decision that the holding of an office and the existence of a contract were mutually exclusive, and that the Tribunal did not so find.

20. The next issue concerns the treatment by the Tribunal of the provision of accommodation for the Appellant and his spouse. It did not deal with this in the section of its decision which dealt with whether the Appellant had the status of "worker. This was only referred to in the section dealing with whether he was an employee. Miss Grennan submitted that, notwithstanding this, and although paragraph 30.1, sub-paragraph 4, which deals with it, did not state so expressly, it is clear that the Tribunal did not accept that the provision of accommodation amounted to consideration for services or meant there were contractually enforceable obligations between the parties.

21. Finally, Miss Grennan submitted that the Tribunal did not err in concluding that the Appellant was "not required to provide services personally (recommending substitutes in his absence)". She submitted that the Tribunal asked the correct question and applied the correct test, and that its conclusion was supported by three of its findings. First, that the Appellant was not obliged to carry out duties himself. Secondly, that he was not obliged to find a replacement himself, although he sometimes did this. Thirdly, that there was no evidence that his right not to perform personally was fettered in any way. There was regularly a substitute who performed the duties for long periods. The Appellant's absences were arranged without consulting the Respondents or obtaining permission.

22. We concluded that the Tribunal fell into error in considering whether the Appellant was a "worker". We accepted Mr Ford's submission that the Tribunal erred in its approach (see paragraph 32) to mutuality of obligation. The Tribunal appears to have applied the test for determining whether there was a contract of employment to the question of whether there was any contract at all. This may have been because it was not argued before the Tribunal that there was any material distinction between the tests. But, as Miss Grennan accepted, the requirement

of mutuality in the context of section 54(3)(b) of the 1998 Act is not the same as that in determining whether there is a contract of employment.

23. In the context of section 54(3)(b) "the significance of mutuality is that it determines whether there is a contract in existence at all": **Stephenson v Delphi** [2003] ICR 471 at [11]. The test is whether there is sufficient mutuality to found a contract at all. If there is a contract, other factors determine the type of contract: **Stephenson v Delphi** *op cit* and **Cotswold Developments Construction Ltd v Williams** [2006] IRLR 181 at [42] and [47]. For example, "control" is relevant in determining whether the contract is a contract of employment. That was the issue in the **Stephenson** and **Cotswold Developments** cases. For a contract to be a contract of employment, there must be an obligation to provide or pay for work on the one hand, and an obligation to perform that work on the other.

24. In the case of a contract other than a contract of employment, there is (see **Stephenson's** case at [12] and **Cotswold Developments** at [40]) "mutuality" has a less restricted meaning. What is required has been described as the "irreducible minimum of obligation": see the Employment Appeal Tribunal (*per* Elias J) in **Stephenson v Delphi** at [12] although the same phrase has also been used in the context of determining whether there is a contract of service, a contract of employment, for example in **Nethermere (St Neots) Ltd v Gardiner** [1984] ICR 612, 623 (Stephenson LJ) and **Carmichael v National Power plc** [1999] ICR 1226, 1230 (Lord Irvine of Lairg LC). But the use of the same phrase does not mean the requirement is the same.

25. In the present case, the Tribunal answered the section 54(3)(b) question by stating that there was no mutuality of obligation for that purpose because the Appellant "did not offer services in return for any certain remuneration". This is exactly the language used in the section of its decision dealing with whether there was a contract of employment between the

parties. Had this matter stood alone, it might have been possible to regard the elision of the language used in paragraph 32 with that in paragraph 30.1 as no more than a reflection of the way the matter was put in submissions. But it does not stand alone. For the reasons we shall give, we consider that the approach to the question of whether the Appellant was a "worker" for the purposes of section 54(3)(b) was flawed in other respects. Standing back and looking at the Tribunal's decision in the round, and taking those matters into account, we have concluded that the Tribunal fell into error in not distinguishing the test for mutuality of obligation to found a contract from that required to found a contract of employment.

26. Miss Grennan valiantly submitted that the word "remuneration" should be understood as "consideration", and the word "certain" as not excluding fluctuating pay. The reference by the Tribunal to "certain remuneration" is clearly problematic because many employees and workers receive fluctuating pay. We reject Miss Grennan's submission that, notwithstanding the use of the word "certain", in the light of the way the case was argued, the Tribunal did not fall into error. It is difficult to see what other meaning the word "certain" can be given, if it is not meant to exclude that which varied or could not be guaranteed. In any event, the Tribunal found (paragraph 8) that there was a regular payment of "around £50 per week" and referred in paragraph 30.1, fifth sub-paragraph to "the regular payment of £50 per week". In the light of this, its conclusion that he was not paid any certain sum is wrong, at least in respect of that sum.

27. Secondly, the treatment by the Tribunal of the fact that the money paid to the Appellant was derived from voluntary donations does not recognise that this is not inconsistent with an obligation on the part of the members of the management committee to pay the Appellant such sums as were collected from members of the Temple. In **New Testament Church of God v Stuart** [2008] ICR 282, the minister's salary was ultimately funded by voluntary contributions but it was held that the minister in that case was an employee. In these proceedings the

Tribunal focussed on what happened in practice to ascertain what the parties intended but did not consider whether the Temple or its cashier was free to refuse to pay the money so received from members to the Appellant.

28. Thirdly, there is the treatment of the fact that the Appellant was an office-holder. The holding of an office is not inconsistent with the existence of a contract personally to provide services: see **Percy v Church of Scotland** [2006] ICR 134. Miss Grennan is correct in submitting that there is no express finding by the Tribunal that the holding of an office is inconsistent with the existence of a contract personally to provide services. But the findings that the regular payment of £50 per week to the Appellant and the accommodation provided were respectively "in recognition of [his] respected position as an office-holder" and the provision of "facilities to a valued office-bearer to enable him to perform religious duties" were significant factors in its conclusion that the payments and the accommodation were not remuneration for his services.

29. In relation to accommodation, perhaps because of the way the Tribunal approached the requirement of mutuality and only considered accommodation in the section of the decision on whether there was a contract of employment, it did not consider, for example, whether the provision of free accommodation to the Appellant was pursuant to an obligation so as to give rise to a contract. It recognised in paragraph 30(1) that that the provision of accommodation could be viewed as remuneration as well as the provision of "facilities to a valued office-bearer to enable him to perform religious duties", but gave no explanation of why it fell into the latter rather than the former category. In relation to the weekly payments of £50 there is no explanation of why, although the Appellant remained an office-holder of the Temple when he was on holiday, if the money was paid to him in his capacity as an office-holder, it was not paid to him during such holiday periods.

30. We also consider that the Tribunal fell into error in its finding (paragraph 33) that the Appellant was "not required to provide services personally (recommending substitutes in his absence", and "there was insufficient personal service requisite for a finding of worker status". The power to recommend a substitute is not inconsistent with a contract to perform services personally unless the right not to do so is unfettered: see the summary of the authorities in **Yorkshire Window Co. Ltd v Parkes** [2010] UKEAT/0484/09. After referring *inter alia* to **Premier Ground Works v Jozsa** [2009] UKEAT/094/08, the Employment Appeal Tribunal (Judge Serota QC) stated "the right or obligation to employ a substitute will not necessarily mean there is no obligation on the part of the 'contractor' to perform personal services unless that right to employ a substitute is unfettered". There was no evidence or finding that the Appellant enjoyed an unfettered right not to perform any work for the Temple's management committee when he was available and not away on holiday. Similarly, the fact that others might perform the duties of a Priest is not relevant to the question whether the Appellant undertook to do so.

31. Moreover, the Tribunal appears to have accepted (paragraph 6) that the document headed "duties of the Gurdwara Granthi (Sikh Temple Priest)" described the Appellant's "duties". We consider that the prescription of times at which he "must be" in the Temple, the requirement to notify the President/Secretary if leaving during those times, and his responsibility for cleaning and general care, are such that it cannot be inferred from the length of the holidays taken by him that he owed no personal obligation to serve the Temple.

32. We turn to the question of intention to create legal relations. Miss Grennan submitted that the Tribunal was aware of the test as to burden of proof and had received submissions based on all the relevant case law. She submitted that it was entitled to conclude on the basis of

the expert evidence that this Gurdwara subscribed to traditional beliefs based on a strict interpretation of Sikh scriptures, and a culture of voluntarism which was inconsistent with an intention to create contractual relations.

33. We recognise the care the Tribunal took in approaching the question before it, a question which was, in the light of the evidence that there are two schools of thought within the Sikh religion, a sensitive one. We, however, have concluded that, in two respects it fell into error in its consideration of intention. The first is the impact of its analysis of "mutuality" and "personal performance of services". The second is that, in the light of the decisions of this Tribunal and the Court of Appeal in **Moore v President of the Methodist Conference** [2011] ICR 819, affirmed *sub nom* **President of the Methodist Conference v Preston (formerly Moore)** [2011] EWCA Civ 1581, too great a weight was placed on the spiritual role of a Priest in its finding that there was no intention to create legal relations.

34. As to the first, we reject the submission that the approach taken to these questions [of mutuality and personal performance of services] was immaterial to the Tribunal's approach to the question of "intention to create legal relations". The treatment by the Tribunal of the fact that the money paid to the Appellant was derived from voluntary donations and that he was an office-holder were, for the reasons we have given, important to its decision. What it referred to as a culture of voluntarism in the Respondent and the fact that the constitution referred to the role of Granthi as an "office", and (see paragraph 38 of the decision and our comments at [12] and [28]) specified "that office-bearers such as the Claimant will work without any remuneration or any other personal gain" are illustrations of this. We consider that the Tribunal's reasoning about the question whether the appellant was a "worker" affected its reasoning on the question of whether there was an intention to create legal relations. This was because, if the correct analysis was that the relationship between the Appellant and the

Respondent would otherwise give rise to a legally binding contract, this would be a central relevant consideration to the issue of whether there was an intention to create legal relations: see **Moore v President of the Methodist Conference** at [50] – [52].

35. We turn to the significance of the spiritual role of a Priest in the approach to determining whether there is an intention to create legal relations. At the beginning of the decision (in paragraph 3), when identifying the issues, the Tribunal states the issue as "whether the status of employee or worker for a Sikh Priest (Granthi) is permissible in the context of the Sikh religion". This, subject to one qualification, is correct. The qualification is that, as the Tribunal recognised in the later parts of the relevant section of its decision (see paragraphs 36, 38, 40 and 42), what is relevant is the position and the beliefs of the particular Gurdwara. However, having stated the issue as a question of permissibility in paragraph 3, in the later section of its decision the Tribunal did not make a finding that the imposition of a legally enforceable relationship would be inconsistent with the beliefs of the members of the Bristol Gurdwara.

36. It is apparent from paragraphs 27 and 28 of the decision that the Tribunal approached the question by asking first whether the Appellant was a worker within section 54 of the 1998 Act. As to religious beliefs, in paragraph 28 it stated that "the Tribunal must also consider whether their conclusions are altered by special considerations applying to Ministers of religion, in particular…whether the parties intended to create legal relations". It correctly cited **Percy v Church of Scotland** [2006] 2 AC 28 for the proposition that there is no longer a presumption of no intention to create legal relations between a Minister of religion and his or her church or congregation. In the later part of the decision, the only case cited is **Moore v President of the Methodist Conference**, which was distinguished (see paragraph 41) on the grounds that the Minister in question had accepted "a specific posting of specified length with clarity as to terms of the appointment". There is no further analysis of these decisions.

37. The Tribunal's decision was given shortly after the decision of this Tribunal in **Moore v President of the Methodist Conference**, but before the decision of the Court of Appeal upholding it. In the Court of Appeal, Maurice Kay LJ described the decision in **Percy v Church of Scotland** as causing "the tectonic plates to move". It is clear from **Percy's** case (see Lord Nicholls at [26] and Baroness Hale at [151]) that the threshold for a finding that the relationship between a religious institution and its offices are not intended to have legal effect is a high one, and that arrangements between a Church and its Ministers should not lightly be taken as intended to have no legal effect. In **New Testament Church of God v Stuart**, Arden LJ (at [62]) stated that "there must be religious beliefs that are contrary to or inconsistent with the implication of the contract, or a contract of employment". At [64] she described the situation in which the finding of a contract or a contract of employment would offend a religious belief as an "exceptional situation".

38. The problem is that the paragraphs of the decision dealing with this issue (set out at [8] above) do not approach the matter in this way. Paragraph 36 stated that the expert evidence highlighted that "there are two schools of thought within the Sikh religion" on the proposition stated in paragraph 35. That proposition was whether "the religious beliefs of the parties are such that they cannot be said to have intended to enter into legal relations with each other". Paragraph 37 stated that relationships between Gurdwaras and Granthis which are governed by contracts of employment are "a fairly recent development". Paragraph 38 stated that the Respondent has adopted a traditional approach with "a fairly strict interpretation" of the scriptures "with a culture of voluntarism". That, it is stated in paragraph 39, is consistent with the text of a passage quoted from the Silver Book.

39. Paragraph 40 considered the evidence given by the parties, and in particular that on behalf of the Respondent, which viewed the relationship as being based on "voluntarism and a traditional interpretation and application of the Sikh scriptures". There is, however, no finding in that paragraph or in paragraph 41 that a contractual relationship would be inconsistent with the text quoted or with the practice and beliefs at the Bristol Gurdwara. The Tribunal's view (at paragraphs 38 and 40) that the Granthi fell within the provision specifying that office-bearers "will work without remuneration or any other personal gain" is also erroneous. As we have observed (see [12] above), that provision only applies to members of the executive committee and the Granthi, although listed as an office-bearer, is not listed in the constitution as a member of the executive committee. Moreover, paragraph 40 of the decision states that "the written constitution refers to voluntary service for the office of Granthi", but the paragraph dealing with the Granthi in the section on office-bearers does not use the term "voluntary" or any synonym of that term. We also observe that the Tribunal did not, in this context, refer to the list of duties set out in the document dated 29 July 2001.

40. It is for these reasons that we concluded that the Tribunal fell into error on this issue. It may be that the true effect of **Percy's** case, identified by this Tribunal in **Moore's** case only two weeks before the decision of the Tribunal in this case, were not fully taken into account. This could possibly be because one result of what Maurice Kay LJ described as "a linguistic gentleness" in the approach of the judgments in **Percy** to the earlier decisions meant that the implications of that decision were not in fact fully appreciated.

41. This appeal is allowed. The case must be remitted to the Tribunal. We do not consider that this is a case which, in the light of the guidance in the authorities, should be remitted to a freshly constituted Tribunal. Accordingly, we remit it to the same Tribunal for reconsideration in the light of our decision.