Ministers of religion

Determining the contractual and employment status of ministers of religion has been a difficult issue for tribunals, partly because of the spiritual nature of their work, and partly because the structures within which they work can be idiosyncratic and complex. In this feature, we examine how the courts and tribunals have wrestled with the application of employment law to a sphere traditionally perceived as being outside its remit.

Resistance by religious bodies to employment tribunal claims brought by ministers of religion is sometimes fuelled by a concern as to whether the civil courts may trespass upon the authority of the relevant religious body to conduct its own affairs. But, as Baroness Hale indicated in **Percy v Board of National Mission of the Church of Scotland** 2006 ICR 134, HL (Brief 798), while a church may be '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', its decision-making processes for membership and office may well be subject to 'the ordinary laws of the land'. Church law and procedures, and the authority and doctrines of faith groups, are outside the scope of this article. What we are concerned with is the extent to which ministers of religion, from any religion or denomination, may rely upon those 'ordinary laws' to which Baroness Hale referred.

Identifying a contract

The first hurdle for many ministers of religion seeking to bring an employment-related legal claim is to establish that they are engaged under a contract at all. There must be an agreement made between two or more people with capacity to contract, made with the intention of creating legal relations, and which is supported by consideration passing from each of the parties to the other. The question of whether the parties hold the necessary contractual intention has been the primary sticking point in claims brought by ministers of religion. However, the fact (where relevant) that the minister is an office holder, the identity of the contracting parties, and the question of whether or not consideration has been provided are also frequently at issue, as we discuss below.

Holding office

In many cases, ministers of religion have been and continue to be considered office holders. Traditionally, office holders were not generally regarded as being employed, the distinction between the two statuses lying in the fact that while an employee's rights and duties are defined by the employment contract, the rights and duties of an office holder are defined by the office held and exist independently of the person who fills it. In **Re National Insurance Act 1911 (also known as Re Employment of Church of England Curates)** 1912 2 Ch 563, Mr Justice Parker held 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 rights and duties are defined by contract at all'.

However, the courts have subsequently taken the view that the two positions are not incompatible. While an office holder is not, simply by virtue of holding that office, an employee, it is possible for someone who is an office holder also to be an employee. According to Lord Nicholls in Percy, whether an appointment is or may be described as an 'office' is a matter to be taken into account in determining the existence and/or nature of a contract, and its weight will depend on all the circumstances. Baroness Hale held that the rights and duties of the claimant in that case were defined by contract, and not by any office she held. In **Barthorpe v Exeter Diocesan Board of Finance** 1979 ICR 900 the EAT overturned a tribunal's conclusion that a stipendiary lay reader could not be employed under a contract of service for the purpose of an unfair dismissal claim and remitted the case to the tribunal to consider whether the claimant had a contract. By contrast, in **Sharpe v Worcester Diocesan Board of Finance Ltd and anor** ET Case Nos.1302291/08 and another a tribunal found that S was appointed to his office, and 'it was the office that defined what it was he had to do'.

In determining whether or not an office holder is appointed by contract, the key is to remember that 'the essential distinction' is not between office holder and employee but 'between the employed and the self-employed', as Baroness Hale indicated in Percy. In other words, the question is whether the office holder performs services for and under the direction of another person in return for remuneration, or whether he or she is an independent provider of services.

It is worth noting that under the Equality Act 2010 office holders have rights independently of employees. However, they do not currently have rights to pursue other statutory claims, such as for unfair dismissal.

Intention to create legal relations

A further, repeatedly articulated rationale for not treating ministers of religion as engaged on a contract used to be that the nature of the role being essentially

Discrimination claims by office holders

Ministers of religion who hold office but who are unable to establish, for the purpose of a discrimination claim, that they are employed 'under a contract of employment, a contract of apprenticeship or a contract personally to do work' – S.83(2) EqA – may take comfort from the fact that Ss.49–52 EqA specifically include protection against discrimination, harassment and victimisation for those who hold or seek appointment to an office. As indicated below, there are two kinds of office for the purposes of the EqA – personal and public.

Personal: a remunerated office or post to which a person is appointed 'to discharge a function personally under the direction of another person' – S.49(2)(a). A person is regarded as discharging functions personally under the direction of another person 'if that other person is entitled to direct the person as to when and where to discharge the functions' – S.49(10)

Public: an office or post to which a person is appointed by a member of the executive branch of Government, such as a Government minister, or on the recommendation of, or with the approval of, a member of the executive or Parliament (including devolved parliamentary bodies) – S.50(2) EqA.

As for public office, few ministers are likely to fall within the S.50 EqA definition, with the exception of Church of England Bishops and Archbishops. Where a vacancy to a bishopric arises, the Prime Minister chooses his or her preferred candidate from a shortlist of two names, and then 'recommends' that person to the Queen for appointment.

spiritual gave rise to a rebuttable presumption that his or her appointment could not have been intended to be legally binding.

In **Percy v Board of National Mission of the Church of Scotland** (above), however, the House of Lords finally put paid to this presumption. The Court of Session had rejected a sex discrimination claim brought by an associate minister in the Church of Scotland on the ground that there was a rebuttable presumption that appointment to a recognised form of ministry within the Church, where the attached duties were essentially spiritual, would not give rise to obligations enforceable under the civil law, and that this presumption had not in that case been displaced. However, the House of Lords, by a four-to-one majority, allowed P's appeal. Lord Nicholls stated that, on their face, the documents relating to P's appointment showed that she had entered into a contract with the Church to provide services to it on agreed terms and conditions. Notwithstanding the religious nature of those services, the contract was a contract 'personally to execute work' within the definition of S.82(1) of the Sex Discrimination Act 1975 (since superseded by the EqA).

The full impact of their Lordships' decision in Percy was arguably not felt, however, until the EAT had to decide whether or not a Methodist minister was an employee within the more restricted meaning of S.230 of the Employment Rights Act 1996 to allow a claim of unfair dismissal, in **Moore v President of the Methodist Conference** 2011 ICR 819, EAT (Brief 926). An employment tribunal had dismissed M's claim on the basis that it was indistinguishable from **President of the Methodist Conference v Parfitt** 1984 ICR 176, CA, in which the Court of Appeal had held that another Methodist minister could not bring proceedings for unfair dismissal, because it was impossible to conclude, given the spiritual nature of his role, that there was any intention to create legal relations. The House of Lords in Percy had neither overturned Parfitt nor expressly approved it.

The EAT noted that, in Percy, Baroness Hale explicitly stated that there should be no presumption of a lack of intention to create legal relations between members of the clergy and their church based on the essentially spiritual nature of the duties of ministry. Although Lord Nicholls said that a 'rebuttable presumption' against an intention to create legal relations 'may have a place', citing Parfitt as an example of that presumption being appropriately applied, the EAT considered that his opinion otherwise pointed 'firmly in the opposite direction'.

The EAT's reasoning was wholly endorsed on appeal to the Court of Appeal in **President of the Methodist Conference v Preston (formerly Moore)** 2012 ICR 432, CA (Brief 946). The Court recognised that Lord Nicholls' speech in Percy contained 'a degree of ambivalence'. However, the Court considered that Lord Nicholls' language evinced an awareness of the need for legal change, concluding that it was 'time to recognise' that employment arrangements between a church and its ministers should not lightly be taken as intended to have no legal effect. It was clear from the judgment in Percy that it was with this part of Lord Nicholls' reasoning that Baroness Hale and Lords Scott and Hope agreed. The Court in Preston approved Lady Justice Arden's observation in **New Testament Church of God v Stewart** 2008 ICR 282, CA (Brief 842), that Percy exemplified the courts' 'time-honoured role of updating the common law and making it more suitable for modern circumstances'. On this basis, the Court concluded that the EAT had been correct to find that the tribunal should not have followed Parfitt, and that the relationship between P and the Church was contractual.

As a consequence of this line of decisions, there is no presumption that the existence of spiritual duties excludes any intention to create legal relations. The situation is merely neutral: the circumstances may indicate such an intention, or they may not – as, for

example, in **MacDonald v Free Presbyterian Church of Scotland** EATS 0034/09, in which the EAT affirmed a tribunal's decision that there were 'no documents which contradict the impression that something which would be quite contrary to the parties' fundamental beliefs would be to enter into a legal relationship' (though the appeal was on a separate point). If there is no legal intention, then no contract will exist, whether of employment or of any other sort.

One matter that remains debatable is what weight, if any, the spiritual nature of the duties attached to a role may have in establishing whether or not a contract exists. In Stewart, the Court of Appeal maintained that the existence of spiritual duties is a matter to be taken into account in determining whether there is an intention to enter into contractual relations, and that the weight to be given to it 'must depend on the overall assessment of the evidence'. The EAT considered in Moore that the effect of the ratio in Percy is that the spiritual aspect of a role may not, *by itself*, determine that a relationship is non-contractual. The EAT saw 'nothing in the claimant's spiritual role which is inconsistent with her being an employee'. But what might there be in a minister's spiritual role that *would* be inconsistent with contractual status, in combination with other factors?

In Stewart, Lady Arden considered that what was needed was a finding that a contract or contract of employment would offend a religious belief – a situation she described as 'exceptional'. In **Roberts v Major Read on behalf of the Salvation Army and anor** ET Case No.1304316/08 (Brief 888) (also discussed below under 'Freedom of thought, conscience and religion'), for example, a tribunal found that a clause excluding an intention to create legal relations in a contract between a religious officer and the Salvation Army was valid as its purpose was to reflect the Salvation Army's faith and doctrine, and to give effect to the spiritual nature of the working arrangement.

The EAT grappled with the same question in **Singh v Members of the Management Committee of the Bristol Sikh Temple and ors** EAT 0429/11 (Brief 945), in the context of a Sikh priest's claim for the national minimum wage. The EAT considered the relevant question to be whether the imposition of a legally enforceable relationship would be inconsistent with the beliefs of the members of the Bristol Sikh Temple. On the tribunal's findings, there were 'two schools of thought within the Sikh religion' as to whether the religious beliefs of the parties were such that they could not be said to have intended to enter into legal relations with each other. It noted that it was a 'fairly recent development' for the relationships between priests and temples to be governed by contracts of employment, and that the temple in question had adopted a traditional approach with a fairly strict interpretation of the scriptures and 'a culture of voluntarism'. On this basis, the tribunal concluded that there was no intention to create legal relations, and that S was not a worker within the meaning of S.54(3)(b) of the National Minimum Wage Act 1998. However, the EAT noted that the tribunal had made no specific finding that a contractual relationship would be inconsistent with any of the relevant texts or with the practice and beliefs at the Bristol temple, and so remitted the case to the tribunal for reconsideration.

The EAT in Singh commented that it was clear from Percy that arrangements between a church and its ministers should not lightly be taken as intended to have no legal effect. With this in mind, it is worth noting that, as Lord Justice Collins indicated in Stewart, a religious belief that there is no enforceable contractual relationship, even if found, is only 'a factor' in determining whether the parties intended to enter into a legally binding contract.

Freedom of thought, conscience and religion

An associated basis on which churches have attempted to argue that an employment contract cannot be imposed on them is Article 9 of the European Convention on Human Rights (see box). S.13(1) of the Human Rights Act 1998 provides that if a court's determination of any question arising under that Act might affect the exercise by a religious organisation (itself or its members collectively) of the Article 9 right, it must have particular regard to its importance.

The key case on the application of Article 9 to the question of a minister's contractual status is Stewart (see above). The Church in that case resisted S's claim of unfair dismissal partly on the basis that it was contrary to the tenets of the Church that its pastors should be regarded as employees of the Church, and thus any finding to the contrary would be in breach of Article 9.

Although the Court of Appeal rejected the Church's appeal, it agreed that Article 9 could potentially be engaged in such circumstances. Lord Justice Pill considered that Article 9 requires the tribunal 'to adopt a different approach to the evidence from that in a context in which religious practices and observances are not present'. He held that the faith and doctrine of a particular church may run counter to there being a legally enforceable relationship between a minister and that church, adding that the law should not readily impose a legal relationship in these circumstances. He thought that the contents of a church's 'book of rules' might throw light on whether there was an intention to create legal relations and whether the relationship was capable of formulation in terms of a contract between identifiable parties. In S's case, however, there was no

Article 9 – Freedom of thought, conscience and religion

- 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.
- Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

indication that it would be contrary to the Church's religious tenets for ministers to have employee status.

Lady Justice Arden agreed. She thought that the fact that a party to an employment dispute is a religious body or a minister would not, of itself, engage Article 9. On the other hand, it need not be an express tenet of the religion that no contract is formed between the minister and the religious body or some part of it, but there must be religious beliefs that are contrary to or inconsistent with the implication of a contract or contract of employment. She suggested that Article 9 could be engaged if one of the beliefs of the religious organisation 'is that, for instance, all adherents are equal and participate in the church's affairs as such, provided that this belief is in the context of all the factual background inconsistent with the implication of an employment relationship'.

Lawrence Collins LJ, while agreeing with the other two judges that religious beliefs may throw light on the relationship between a religious institution and its ministers, doubted whether it would amount to a limitation on or interference with an Article 9 right if, contrary to one party's belief that there should be no contract, a court gave the other party a statutory or contractual remedy.

As it has turned out, this argument appears to have succeeded on only one occasion. In **Roberts v Major Read on behalf of the Salvation Army and anor** (above) a religious officer of the Salvation Army brought claims of age discrimination and unfair constructive dismissal despite the existence of a clause in his contract excluding an intention to create legal relations. An employment tribunal found that R's claims could not proceed because he was not an employee for the purpose of the unfair dismissal claim nor an office holder for the purpose of the age discrimination claim; the exclusion clause was valid as its purpose was not to avoid obligations imposed by employment legislation, but to reflect the Salvation Army's faith and doctrine. The tribunal found that R's right not to be discriminated against had to be balanced against the freedom of religious association granted under Article 9. To require the Salvation Army and its members to have a contractual relationship would run counter to the Army's faith and doctrine and interfere with the individual's freedom to manifest his or her religion.

The Roberts case should be treated with caution, however – both because it is a first instance decision, and also because the Court of Appeal has since sought to downplay the applicability of Article 9 in employment disputes between a minister and his or her church. In Preston (see above), the Court of Appeal took the view that Pill LJ's conclusion in Stewart that Article 9 could apply to a consideration of the relationship between a church and its ministers and whether it was enforceable was not part of the ratio of that case, and approved Collins LJ's qualifications.

The Court of Appeal accepted that the Methodist Deed of Union, upon which the Church in Preston sought to rely, reflected the doctrinal principle of the 'priesthood of all believers', and not just those called to be ordained as ministers, but reasoned that this surely did not embrace a doctrinal belief that a minister who is treated with unfairness or discrimination should be denied legal redress. In its view, the 'unattractiveness and moral poverty' of the Church's attempt to invoke Article 9 in that case was underlined by the fact that the only 'interferences' it could adduce with the right of Methodists to manifest their religious belief caused by the existence of a contract of employment with the minister were accountability in a tribunal and financial cost. This was not a case where the evidence established that the existence of a contract of employment between the Church and a minister was contrary to its tenets.

Thus, it would appear that the potential engagement of Article 9 is limited.

Identifying the contractual parties

Before a tribunal can find a contract, it must be able to identify the person or persons with whom the claimant made the contract. Though trite, this can be a problem for many ministers of religion. Some churches and religious bodies may be independent and appoint and pay their own minister on a local level, but many exist on regional, national and even international levels as well, and the identification of the precise employer in such circumstances is not always straightforward. According to Lord Nicholls in Percy: 'This can be a source of real difficulty with a nationwide church whose complex affairs are conducted through a multiplicity of boards and committees. There may be one body responsible for finance… another body responsible for making payments. There may be a third body charged with selecting the candidate best suited to this or that appointment, a yet further body may formally make

the appointment, and have power of dismissal; and so on. These different bodies are, in a broad but real sense, all part of "the church" in question. 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… This is also true of the Church of Scotland. 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.'

As Lord Nicholls indicated, many churches are themselves voluntary associations, capable of neither suing nor being sued. Lord Hope threw some light on how such organisations deal with matters within the jurisdiction of the civil courts. According to His Lordship, the practice has always been for the court to give effect to the choice that a voluntary association makes as to the body in whose name it enters into agreements. In each case, it is the body in whose name the matter at issue has been conducted that determines who is to sue or be sued in respect of it. On the facts in Percy, the Church of Scotland delegated to the Board of National Mission responsibility for planning and co-ordinating the Church's mission. It was in the discharge of that remit that the Board assumed the responsibility for the recruitment and appointment of P as an Associate Minister, and it was with the Board that her contract was entered into.

In Lord Nicholls' view, internal fragmentation ought not to stand in the way of otherwise well-founded claims. It may not be a problem that different bodies undertake different responsibilities in relation to a claimant: in Percy itself, the fact that power of dismissal appeared to rest with the presbytery of Kilry Church and not with the Board did not of itself preclude the Board from being P's employer. Her contract with the Board expressly provided for the supervisory and disciplinary role of the presbytery, in accordance with the constitutional structure of the Church.

However, in other cases the complexity of arrangements may prohibit a clear finding as to the identity of the contracting parties. In **Diocese of Southwark v Coker** 1998 ICR 140, CA, Lord Justice Mummery rejected an unfair dismissal claim by an assistant curate in the Church of England, in part on the basis that there was no possible candidate for the role of employer. The Diocese of Southwark was not a legal person with whom a contract could be concluded. The Church Commissioners paid C's stipend and the Diocesan Board of Finance made arrangements for payment. But neither of them appointed him, removed him or had power to control the performance of his services. It was not contended that either of C's vicars had a contract with him. That left only the Bishop of the diocese. He had legal responsibility for licensing the appointment of assistant curates and the termination of their appointments. But that relationship was found to be governed by Church law, and not by a negotiated, contractual arrangement.

The identity of a possible employer also proved to be an 'insurmountable barrier' for the claimant in the first instance decision of **Sharpe v Worcester Diocesan Board of Finance Ltd and anor** (above). The employment tribunal found that the Diocesan Board of Finance was not a party to S's appointment; it received no service or services from him; he carried out none on its behalf; and in the tribunal's judgment, it had no part to play in any possible supervision of the claimant's duties or disciplinary action that could be considered. The only connection between them was that the Board acted as a conduit for the money by which his stipend was paid. Nor could the tribunal find a contractual relationship between S and the Bishop of Worcester, the second respondent. The Bishop undertook no obligation to pay the stipend and did not have control of the necessary funds to make good any such obligation. While he had some limited powers to instruct or supervise S, these were not extensive, and arose not from a consensual arrangement but were defined by statute. The Bishop could not instigate disciplinary procedures. The tribunal contrasted S's position with that of the claimant in Percy, and observed that Lord Nicholls cannot have intended that it is permissible 'to cast around for any convenient peg on which to hang the suggested contract'.

It would seem, therefore, that where a minister is appointed by an identifiable legal body on defined terms, the identity of the contracting parties should be readily ascertainable even if certain elements of the contract, such as supervision and power to discipline or dismiss, are effectively delegated. However, it may be more difficult to ascertain the contracting parties in cases such as freehold incumbency in the Church of England, where the appointment process is more complex.

Consideration

As noted above, the exchange of consideration is a vital element of a contractual arrangement. Whether or not a minister of religion is remunerated for his or her services, and the nature of such remuneration, is relevant when determining if he or she is in a contractual relationship.

Churches sometimes characterise ministers' salaries as 'stipends' intended to free them from basic financial concerns so as to enable them to carry out their ministry. However, as the EAT noted in Moore, this intention is not inconsistent with the payment having the character of remuneration. The stipend in that case was paid only for 'active work'. Baroness Hale in Percy expressed the view that 'in this day and

age, the notion that [P's] "salary", modest though it was, was simply to meet her basic subsistence needs while she devoted herself to her religious and pastoral duties is unrealistic'.

Even where the level of salary is not assured and depends on collections taken from the local religious body, it may still amount to contractual consideration. In Stewart the Court of Appeal considered the nature of the salary paid to some of the ordained ministers in the New Testament Church of God. These were paid through the Church's national office and funded by collections taken at local churches. Members of the congregation were expected to make substantial contributions. If the local church did not raise sufficient funds, the Church might cover the minister's salary for one month but payment was then suspended. The Church argued that there was no intention to create legal relations, citing, among other matters, the fact that the level of S's salary was not assured and depended on collections taken at the local church. However, the Court of Appeal considered that the fact that S's salary depended on local collections, in the context of a prosperous local church such as Harrow, did not negate the existence of a contract of employment. Accordingly, the tribunal chairman had been entitled to conclude that the contract was one of employment and the Church's appeal was dismissed.

In Singh (above) a Sikh priest brought claims for, inter alia, the national minimum wage. Although he received no salary, the cashier paid him about £50 a week out of voluntary congregational donations, in addition to donations he received directly from members of the congregation for specific services, and he was provided with free accommodation. The tribunal found that S was not a worker, but the EAT overturned this decision, holding that on its own findings the tribunal was wrong that S received no 'certain remuneration' as he was regularly paid about £50 a week. Although these payments were derived from voluntary donations, this was not inconsistent with an obligation on the management committee to pay S such sums as were collected. The tribunal did not consider whether the temple or its cashier was free to refuse to pay S.

Note that ministers are sometimes appointed on a non-stipendiary basis, meaning that they receive no payment other than expenses. While such arrangements would appear to be purely voluntary, care should be taken: in some such cases accommodation may be provided, which could well amount to consideration, as the EAT in Singh commented.

Employment status

Assuming that a minister is able to demonstrate the existence of a contract, his or her next hurdle will be to establish that that contract is of such a nature as to entitle him or her to bring the desired claim. For example, for national minimum wage, whistleblowing or working time claims, he or she will need to demonstrate worker status as defined, for example, by S.230(3) ERA; for discrimination claims, that he or she is an employee within the meaning of S.83(2) EqA; and for unfair dismissal claims, that he or she is an employee within the more limited meaning of S.230(1) ERA (see the box on page 18 for more details of these provisions).

It is worth noting, first, that ministers of religion and lay people may carry out work with a spiritual remit in settings other than churches and places of worship. Some, for example, may be employed in theological education; others may be employed as chaplains in colleges, schools, hospitals, prisons, or even in airports. In many of these cases a clear written contract of employment will be in place, though there are exceptions (examples of which are discussed below). The effect of this difference in treatment can seem absurd, as the 'faith workers branch' of the trade union Unite points out in its briefing paper, 'The campaign for employment rights for faith workers' (January 2007): 'A hospital chaplain could be ministering to a patient in a hospital bed one day and fully enjoy full employment protection, whereas the next day a parish priest could identically be ministering to the same patient in their bed at home, and yet have no employment protection at all.'

Whether or not a contract is one of employment depends on a number of factors, although the courts have referred to personal service, sufficient control, and sufficient mutuality of obligations as 'irreducible minima', without which a contract of employment cannot exist. A full analysis of the definitions is outside the scope of this article: the employment status of a particular minister of religion will depend entirely on the circumstances and terms relevant to his or her appointment. Here, we briefly review how the courts and tribunals have approached the question of employment status in cases brought by ministers of religion.

Two examples of cases in which ministers of religion were found to be employees within the meaning of S.230(1) ERA, after all relevant factors were considered and balanced:

- **New Testament Church of God v Stewart** 2008 ICR 282, CA (Brief 842): the Court of Appeal noted that S's duties as a pastor at Harrow were substantial; that S was subject to various standards and guidelines appended to the minutes of the 2004 General Assembly; that he was under an obligation to report regularly to the national

office, which paid his salary; and that the Church described him as an employee on its pay advice slips and deducted income tax and national insurance contributions from his salary. The fact that this salary depended on local collections, in the context of a prosperous local church such as Harrow, did not negate the existence of a contract of employment. Accordingly, the tribunal chairman had been entitled to conclude that the contract was one of employment

- **President of the Methodist Conference v Preston (formerly Moore)** 2012 ICR 432, CA (Brief 946): the Court of Appeal was satisfied that the EAT had carefully considered all relevant matters. It had adverted to the spiritual role of the minister and considered a point made on behalf of the Church that the stipend was not remunerative but existed to free ministers from basic financial concerns which might otherwise interfere with the performance of their spiritual duties. Nevertheless, the EAT had found that P received regular remuneration, including an entitlement to sick pay; was given accommodation; was required to engage in an appraisal process; was subject to at least a degree of supervision from the Church; and was liable to a disciplinary procedure. Although she did not have to work set hours, there was a clear concept of working time, when she was at the disposal of the Church, and holiday, when she was not. The EAT had noted that P had discretion as to how she did her work, but that this was not inconsistent with a contract of service.

Control

Although factors such as mutuality of obligation and personal service are equally important, whether ministers of religion are subject to sufficient control is perhaps most frequently at issue in cases determining their employment status. This is because in many cases they have considerable autonomy in carrying out their functions.

In each of the following examples, there was clearly insufficient control for the visiting chaplains in question to be employees:

- **Sermoun v HM Prison Service** ET Case No.2302504/02: S worked as a visiting imam at HM Prison Belmarsh. The tribunal found that S was required to carry out a specific role in return for which he was paid at a prescribed rate. However, it found insufficient control for there to be a contract of employment entitling him to bring a claim of unfair dismissal. The tribunal distinguished between S's personal commitment to his work and a legal requirement to perform any duties in a particular way. The fact that he felt he ought to work a certain number of hours was very different from there being an enforceable obligation on him to do so. He had complete discretion, subject to security considerations, as to how to minister to the inmates. Although he attended chaplaincy meetings, he was not instructed to do so. In addition, the usual incidents of an employment relationship such as holiday pay, sick pay, pension, appraisals, grievance or disciplinary procedures were all absent
- **Miller v Secretary of State for Home Affairs** EAT 0926/03: M was a visiting Quaker minister at HM Prison Wymott, for which she received hourly pay and expenses. She arranged services and ministered to inmates suffering emotional stress; attended team meetings of the Chaplaincy team; organised an Alternatives to Violence Programme for inmates; and sat on a number of prison committees, but the respondent could not direct her in the way in which she carried out her pastoral spiritual work. By contrast, the full-time Chaplain was subject to regular appraisals by the Governor, had targets set for her, and was subject to the disciplinary and grievance procedures operated by the respondent. A tribunal concluded that there was probably a contract with M, but that she was not an employee because there was no enforceable obligation on her and the necessary degree of control was absent. The EAT upheld this decision, noting that the fact that M could withdraw from running the Alternatives to Violence Programme without demur by the Governor was inconsistent with a sufficient degree of control by the respondent.

Likewise, in Sharpe (above), the tribunal found that S, who was appointed to serve in a place of worship, was free to perform his office 'at the dictate of his own discretion and conscience… No one in the diocese could require him to do more or had power to direct how he performed what the office required of him.' Nor was he subject to any meaningful supervision. The tribunal found that the Bishop's authority over S was merely 'persuasive', 'derived from respect for his position and known by the clergy not to be binding upon them in the sense that an employee must obey his employer'. S's post could be terminated only in very exceptional circumstances. Accordingly, he was not an employee.

Notwithstanding these examples, however, there is clear authority to the effect that the fact that a person is a professional with a considerable degree of autonomy in how he or she goes about his or her work is not necessarily contraindicative of worker or employee status. In Percy, Baroness Hale said: 'The fact that the worker has very considerable freedom

Employment status – statutory definitions

Employees – Employment Rights Act 1996

An 'employee' is defined in S.230(1) ERA as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'.

'Contract of employment' is in turn defined as a 'contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing' – S.230(2).

Workers – Employment Rights Act 1996

A 'worker' is defined in S.230(3) ERA as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) – (a) a contract of employment; or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, 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.

Employment – Equality Act 2010

'Employment' means 'employment under a contract of employment, a contract of apprenticeship or a contract personally to do work' – S.83(2) EqA.

and independence in how she performs the duties of her office does not take her outside the definition… clergy are servants of God, in the sense that God's word, as interpreted in the doctrines of their faith, governs all that they practise, preach and teach. This does not mean that they cannot be "workers" or in the "employment" of those who decide how their ministry should be put to the service of the Church… the fact that [P] had considerable discretion and independence in the way she carried out [her religious and pastoral duties] did not mean that she was not a "worker" or a person who had contracted "personally to execute work or labour". That was exactly what she was.'

Common tenure

While relevant only to the Church of England, it is worth mentioning the terms of service applicable to ecclesiastical office holders subject to 'common tenure', which has applied to new appointments in the Church of England since 31 January 2011. While the Ecclesiastical Offices (Terms of Service) Regulations 2009 SI 2009/2108 do not deem priests on common tenure to be employees – in fact, they do not apply in respect of offices held in pursuance of a contract of employment – Reg 2(3) – they provide a package of terms which in many ways replicate employment rights. Priests covered by common tenure are, for example, entitled to a written statement of particulars of office; an uninterrupted weekly rest period of not less than 24 hours; annual leave; family-related leave and to request time off for dependants (fleshed out in the Ecclesiastical Offices (Terms of Service) Directions 2010 SI 2010/1923); time off for public duties; and sick leave. They have access to a grievance procedure, and participate in ministerial development reviews and continuing ministerial education.

Importantly for our purposes, while remedies for breach are generally through internal channels, the Regulations provide that priests subject to common tenure may complain to an employment tribunal of a failure to provide a written statement of particulars, and to claim unfair dismissal under the ERA if removed from office on the ground of capability – which means that in respect of those claims, at least, such priests do not need to demonstrate employment status (and, furthermore, S.108 ERA is disapplied so no minimum period of service is required to bring a claim of unfair dismissal). For the purpose of an unfair dismissal claim the relevant Diocesan Board of Finance is deemed to be the employer (or, where the office is held in a cathedral, the cathedral Chapter).

Note, however, that none of the above provisions will apply to those priests who became incumbents on 'freehold' before 31 January 2011 and did not opt in to common tenure. They continue to have to show that they are employees in order to bring a claim of unfair dismissal, and, like the claimant in Sharpe v Worcester Diocesan Board of Finance Ltd and anor (above), may well find it difficult to do so. In addition, there is no provision for an office holder on common tenure to bring a tribunal claim if dissatisfied at the outcome of a grievance or disciplinary procedure, where, for example, a parish fails to pay his or her expenses; nor is there any right to resign and claim constructive unfair dismissal, unless the office holder can establish that he or she was after all employed under a contract.