

# CASE-LAW ON CHURCHES, RELIGION AND EMPLOYMENT

**(15 August 2016)**

*What follows is intended as a convenient summary of the current case-law and no more than that. It cannot be emphasised too strongly that employment issues are extremely complex and can only be judged case by case, on the facts.*

*The issue of employment in faith schools is beyond the scope of this note: for a recent discussion, see Lucy Vickers: [Religious discrimination against teachers in faith schools](#) on the PublicSpirit website.*

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## CLERGY

1. Historically, the courts have tended to regard clergy (and certainly beneficed clergy of the Church of England and inducted parish ministers of the Church of Scotland) as office-holders rather than as employees; moreover, the status of clergy has traditionally been regulated by the internal canonical regulations of the denomination concerned. The courts have tended to proceed on three principles:
  - that clergy are normally to be regarded as ecclesiastical office-holders whose rights and duties are defined not by an employment contract but by the law relating to the office held, which exists independently of the person occupying that office;
  - that the functions of a minister of religion are vocational and spiritual in nature and therefore incompatible with the existence of a contract – on this view ministerial functions arise by way of a religious act such as ordination, not as the result of a contractual agreement between parties; and
  - that even if there is evidence of some kind of contract, such evidence has to point to it being a contract of *employment*.

### The Church of England

2. In the Church of England certain non-parochial clergy fulfilling specific functions for specific periods (such as clergy employed directly by the Archbishops' Council) are undoubtedly employed under contract – but these are relatively few in number. As to parochial clergy, however, the situation is quite different.
3. In *Diocese of Southwark v Coker* [1998] ICR 140 the Court of Appeal had to decide whether or not an assistant curate in the Church of England was an employee for the purpose of the unfair dismissal legislation. *Coker* has been superseded in relation to the Church of England itself, but Mummery LJ referred to the case law, including in particular *President of the Methodist Conference v Parfitt* [1984] ICR 176 and *Davies v Presbyterian Church of Wales* [1996] ICR 280 – for the details of which see below. He concluded<sup>1</sup> that the essential conclusion of the earlier authorities was that, typically, no contract of employment would arise between a minister of religion and his or her Church because, typically, there was no intention to create contractual relations. Staughton LJ concurred:

‘... in general the duties of a minister of religion are inconsistent with an intention to create contractual relations. There may be some subsidiary contract as to a pension or to the occupation of a house; but there is not a contract that he will serve a terrestrial employer in the performance of his duties.’<sup>2</sup>
4. Since then, Regulation 33 (right to apply to an employment tribunal) of the Ecclesiastical Offices (Terms of Service) Regulations 2009, made pursuant to section 2 of the Ecclesiastical

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<sup>1</sup> At p 147B.

<sup>2</sup> At p 150 F-G.

Offices (Terms of Service) Measure 2009, had applied Part X of the Employment Rights Act 1996 to those who hold office under common tenure; however, the Regulations and the Measure confer rights under the 1996 Act *as if* such clergy were employed, not *because* they are employed. S 9(6) of the Measure makes that explicit:

‘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.’

Therefore, though clergy with common tenure have employment rights under the relevant legislation, *they are not employees but office-holders*.<sup>3</sup>

5. However, neither the Regulation nor the Measure applies to clergy with freehold (who have traditionally been regarded as office-holders rather than as employees) or to non-parochial unbeneficed clergy in administrative roles who have ordinary contracts of employment.

### The Sharpe litigation

6. The Revd Mark Sharpe, Rector (ie an incumbent with freehold tenure) of Teme Valley South, retired on grounds of ill-health. He then sued the Diocesan Board of Finance (DBF) and the Bishop in his corporate capacity, principally alleging constructive and unfair dismissal.
7. In the Employment Tribunal<sup>4</sup> the Employment Judge pointed out that Mr Sharpe's position as a rector with freehold was defined by ecclesiastical law. Issues such as hours of work and holidays were left – non-contractually – to his discretion, subject only to guidelines as to how he exercised that discretion. Though the Diocese issued incumbents with something called the ‘Bishop's Papers’ – a kind of employees' handbook containing details of stipend and other financial matters – it could not be regarded as a contractual document. In his view, there was no basis for finding that there had been a legal relationship between Mr Sharpe and the DBF: the DBF was not party to his appointment, it received no services from him, he carried out none on its behalf, nor did it supervise him. Nor was there a contractual relationship between Mr Sharpe and the Bishop. It was the DBF that paid Mr Sharpe's stipend; the Bishop had no obligation to pay it, nor did he have control of the necessary funds to do so. The Bishop's powers of supervision were limited and were defined by law rather than by any consensual arrangement; moreover, they were mostly exercisable in the course of the Bishop's statutory duties to ensure the proper running of the Diocese. He could not initiate disciplinary procedures of his own motion and, in any case, the statutory disciplinary procedures were concerned primarily with the conduct of clergy *as clergy* rather than specific to their appointments. In short, he found that there was neither a contract of employment nor a contract of service: a general duty to obey the law of the Church was not the same as entering into a contract of service. The claim was therefore dismissed.

<sup>3</sup> HMRC's guidance, [PAYE70230 - PAYE operation: specific employments: clergy and ministers of religion](#) states baldly (though not entirely accurately) that ‘Ministers of the Church of England are office holders’.

<sup>4</sup> [2012] ET 1302291/2008 & 1316848/2009.

8. On appeal, that decision was overturned. In *Sharpe v Worcester Diocesan Board of Finance Ltd & Anor (Jurisdictional Points: Worker, employee or neither)* [2013] UKEAT 0243 12 2811 Mrs Justice Cox, sitting alone, took the view that

‘Following the decisions in both *Percy*<sup>5</sup> and *Preston*<sup>6</sup> it is now abundantly clear that cases concerning the employment status of a minister of religion cannot be determined simply by asking whether the minister is an office holder or is in employment. As the Employment Judge recognised in this case, an individual appointed to work in a particular post may be both the holder of an office and an employee working under a contract of service. Whether there is payment of a salary, whether it is fixed, and whether the worker’s duties are subject to the control of the employer are important matters to be considered in determining this issue’ [146].

She concluded that the ET’s decision that Mr Sharpe was not a ‘worker’ within the meaning of s 230(3)(b) had been arrived at in error. She allowed the appeal and remitted the case to the Employment Tribunal for a fresh hearing ‘in accordance with the legal principles set out in this judgment’ [244].

9. On 30 April 2015, however, in *Sharpe v The Bishop of Worcester* [2015] EWCA Civ 399, the Court of Appeal unanimously reversed the decision of the EAT and restored the ruling of the Employment Judge. The Court held that the office of a freehold incumbent was ‘governed by a regime which is a part of ecclesiastical law. It is not the result of a contractual arrangement’. It also pointed out that the element of control necessary for there to be an employer/employee relationship was not present: ‘the opportunity for the hierarchy of the Church to intervene in the performance of duties [of a freehold incumbent] is reduced in practice to vanishing point or at least to the minimum’.

#### Licences to minister

10. Associated with this is the rather more complex problem of licences to minister and permission to officiate (‘PTO’) and whether or not a diocesan bishop is a ‘qualifications body’ for the purposes of s 53 Equality Act 2010. In *Ganga v Chelmsford Diocesan Board of Finance and the Bishop of Chelmsford in corporate capacity* [2015] ET 3200933/2013, which concerned the revocation of the Revd Mr Ganga’s licence on the grounds that he was so heavily in debt that he could no longer be regarded as a ‘fit and proper’ person to exercise ministry, an Employment Tribunal concluded in a judgment dated 15 January 2015 that the Bishop of Chelmsford *was indeed* a qualifications body for the purposes of s 53 – but dismissed the claim on other grounds.
11. In *Pemberton v Inwood, Acting Bishop of Southwell and Nottingham* [2015] ET 2600962/2014, Canon Jeremy Pemberton married Laurence Cunnington on 12 April 2014. In June 2014 the respondent, at that time Acting Bishop of Southwell and Nottingham, revoked Canon Pemberton’s PTO in the Diocese of Southwell and Nottingham. Sherwood Forest

<sup>5</sup> *Percy v Church of Scotland Board of National Mission* [2005] UKHL 73 – of which more below.

<sup>6</sup> *President of the Methodist Conference v Preston* [2011] EWCA Civ 1581 – of which more below: it was the Court of Appeal’s decision in favour of Mrs Preston subsequently reversed by the Supreme Court.

Hospitals NHS Trust had earlier offered Pemberton the post of Chaplaincy and Bereavement Manager; but in order to take it up he required a licence/authorisation under the Extra-Parochial Ministry Measure 1967 from the Bishop – who refused to grant it on the grounds that, in his view, Canon Pemberton's marriage as contrary to the teachings and law of the Church of England. Sherwood Forest Hospitals NHS Trust then withdrew its offer.

12. It was evidently common ground between the parties that Canon Pemberton was not employed by the Church and that he could not, therefore, bring a claim under s 39 (Employees and applicants) of the Equality Act 2010. Moreover, the Bishop contended that he was not a 'qualifications body' for the purposes of s 53 but that if the Employment Tribunal were to find to the contrary, because the qualification in question was 'for the purposes of employment for the purposes of organised religion', it attracted the saving under Schedule 9 para 2 (Religious requirements relating to sex, marriage etc., sexual orientation). The ET found that, on the facts, a PTO was 'voluntary and not for remuneration'; and because it was not a relevant qualification it could not, therefore, engage s 53.
13. The ET also concluded, however, that the Bishop was indeed a 'qualifying body' for the purposes of the Equality Act. Its reasons for dismissing the claim were that that the present doctrine of the Church was that marriage was between one man and one woman and that until there was a change in that doctrine clergy had to conform to it in their ministry and individual behaviour. Given that Canon Pemberton's position was incompatible with that doctrine, it logically followed that the Bishop's action had been implicitly proportionate. *At the time of writing, judgment was awaited in an appeal.*

### The Church of Scotland

14. As regards the Church of Scotland the traditional view has been that inducted parish ministers are office-holders<sup>7</sup> – though that does not necessarily apply to other clergy.<sup>8</sup>
15. Probably the leading modern case on clergy employment in Scotland is *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 AC 28. In that case, a female assistant minister had been persuaded to demit status<sup>9</sup> after an accusation of adultery. She later regretted her decision and initiated proceedings in an employment tribunal (then known as an industrial tribunal) in 1998, alleging unfair dismissal and unlawful sex discrimination. There were two main issues: whether or not she was 'employed' by the Church for the purposes of section 82(1) of the Sex Discrimination Act 1975 and whether or not her discrimination claim constituted a 'matter spiritual' within the terms of section 3 of the Church of Scotland Act 1921 and, as such, lay within the exclusive cognisance of the courts of the Church.

<sup>7</sup> HMRC's guidance says, somewhat mysteriously, that 'Ministers of the Church of Scotland hold offices. However, they are not in employment'.

<sup>8</sup> See, for example, Lord President Rodger's Opinion in the Inner House in *Percy v Board of National Mission of the Church of Scotland* [2001] ScotCS (IH) 65 at para 18.

<sup>9</sup> Which meant that she could not be reinstated and again undertake duties as a minister except with the express agreement of the General Assembly.

16. On the employment point, the House of Lords concluded that whether or not Ms Percy was 'employed' (and therefore within the scope of Sex Discrimination Act 1975) rested on a false apposition between 'office' and 'employment' and that, in the absence of an express intention to do so, the provisions of the 1975 Act could not be set aside.<sup>10</sup>

### Other denominations

17. Whether or not clergy of other denominations in pastoral charges are 'employed' appears to depend on the ecclesiology and self-understanding of the particular Church in question.
18. In *Brentnall v Free Presbyterian Church of Scotland* 1986 SLT 470, involving the suspension of a minister *sine die* (in effect, his dismissal), the Inner House of the Court of Session held that, in acting as it did, the Church's Synod had exceeded its powers and had failed to observe the rules of natural justice. The court did not even begin to consider whether or not Mr Brentnall was 'employed' by the Church: following *Forbes v Eden*<sup>11</sup> it was simply assumed that if Mr Brentnall had suffered a patrimonial (ie financial) injury as a result of a serious wrongdoing by the Church he must be entitled to reparation.
19. In *President of the Methodist Conference v Parfitt* [1984] ICR 176 the respondent, a Methodist minister, failed in a claim for unfair dismissal both before an Employment Appeal Tribunal and before the High Court. The doctrinal standards of the Methodist Church did not provide for a contractual relationship between the Church and the individual minister; and at page 186F May LJ adopted the *dicta* of Waterhouse J in the earlier Employment Appeal Tribunal (EAT):

'The concept of a minister as a person called by God, a servant of God and the pastor of His [ie, presumably, God's] local church members seems to me to be central to the relationship.'
20. In *Buckley v Cahal Daly* [1990] NIJB 8, where a Roman Catholic priest in Northern Ireland sought a declaration that he had been removed unlawfully from his position, Campbell J held that because the Roman Catholic Church was a voluntary association, its clergy were bound in contract to the provisions of its canon law relating to their status. Applying [Canons 265 to 275](#) (on incardination) of the *Codex Iuris Canonici 1983* he concluded:

'[t]here is no direct power in the courts to decide whether A or B holds a particular station according to the rules of a voluntary association'.
21. In *Davies v Presbyterian Church of Wales* [1996] ICR 280 Lord Templeman reiterated the 'servant of God' approach and concluded:

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<sup>10</sup> The case was remitted to an Employment Tribunal but ultimately settled.

<sup>11</sup> (1865) 4 M 143, in which Lord Cowan declared at 163 that the courts would not review the actings of ecclesiastical judicatories unless '[s]ome civil wrong justifying a demand for redress, or some patrimonial injury entitling the party to claim damages... be alleged and instructed'.

'[t]he 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*. If his manner of serving God is not acceptable to the church, then his pastorate can be brought to an end by the church in accordance with the rules. The law will ensure that a pastor is not deprived of his salaried pastorate save in accordance with the provisions of the book of rules but an industrial tribunal cannot determine whether a reasonable church would sever the link between minister and congregation'.

22. In *New Testament Church of God v Stewart* [2007] EWCA Civ 1004, Mr Stewart had been removed from his pastorate after accusations of financial irregularity. The Court of Appeal held that the original Employment Tribunal had been entitled to conclude on the facts that Mr Stewart had a contract with the Church. However, Pill LJ was 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.'<sup>12</sup>

23. The approach in *Stewart* was followed by the EAT in *Macdonald v Free Presbyterian Church of Scotland* [2010] UKEAT S/0034/09/Bi.<sup>13</sup> In an action for unfair dismissal arising from the suspension of the pursuer *sine die* for breach of discipline by the Synod of the Church, Lady Smith, sitting alone, considered the possibility that a worker who was an office-holder might also be an employee and concluded that the duality of holding an office while at the same time being an employee relationship depended on whether or not the parties had had the intention to create legal relations. She agreed with the Employment Judge at first instance that the understanding on which ministers, elders and deacons of the Free Presbyterian Church were ordained did not include any intention to create an employer-employee relationship. Such an inference would be inconsistent with the Church's declared belief that it was inappropriate that officers such as ministers should be in a legal relationship that was subject to control by the Civil Magistrate.

24. Lady Smith held that there was no general rule either that all ministers of religion were employees or that they were not employees.<sup>14</sup> She noted that, in *Stewart*, Pill LJ had been careful to state that whether or not there was an employer-employee relationship in a particular case depended on an examination of the facts. 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

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<sup>12</sup> At para 55.

<sup>13</sup> The dispute was also the subject of judicial review proceedings: see *Macdonald, Re Application for Judicial Review* [2010] ScotCS CSOH 55 (28 April 2010). In September 2010 the case was settled out of court.

<sup>14</sup> She misstated the law relating to the employment of clergy in the Church of England and that part of her judgment is best ignored.

categorise him as a 'servant' – and the worker would be working in return for a salary rather than on his own account.<sup>15</sup>

### The Methodist litigation

25. The Revd Haley Preston (*née* Moore) was removed from her post as a Superintendent Minister and sued the Methodist Conference. In *Moore v The President of the Methodist Conference* [2010] UKEAT 0219 10 1503 the lower tribunal had regarded itself as bound by *Parfitt* and dismissed Ms Moore's claim. The EAT reversed the lower tribunal's decision, concluding that the lower tribunal had got the law wrong: the EAT did not believe that the reasoning of *Parfitt* could be sustained in the light of *Percy*, even on the same facts.<sup>16</sup> Given that the EAT did not regard itself as bound by *Parfitt*, it chose to follow *Percy* and held, on the facts, that Ms Moore'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. She received regular remuneration, including an entitlement to sick pay. She was given accommodation. She 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. Of course, like any professional she had a great deal of discretion as to how she did her work, but that is in no way inconsistent with a contract of service'.<sup>17</sup>

26. That decision was appealed; and in *President of the Methodist Conference v Preston* [2011] (Ms Moore having married in the interim) the Court of Appeal unanimously upheld the EAT's finding. It was 'abundantly clear' that part of the conclusion in *Percy*, as confirmed by the Court of Appeal in *Stewart*, was that the concept of a rebuttable presumption that there was no intention to create an employer/employee relationship between a Church and its clergy had been abandoned. The effect of *Percy* was that the spiritual role of a minister could not *by itself* justify denying effect to an arrangement which otherwise had the marks of a contract. Moreover, *Percy* had undermined the reasoning in *Parfitt*:

'... although most of the speeches in *Percy* are characterised by a linguistic gentleness in their approach to *Parfitt*, that does not disguise the fact that they caused the tectonic plates to move'.<sup>18</sup>

27. On appeal to the Supreme Court, however, the decision of the Court of Appeal was reversed and the original order of the Employment Tribunal dismissing Ms Preston's claim was

<sup>15</sup> *Ready Mixed Concrete (South East) Limited v Minister of Pensions & National Insurance* [1968] 1 AER 433 and *Lee v Chung and Shun Shing Construction & Engineering Co Ltd* [1990] IRLR 236 followed.

<sup>16</sup> At para 54.

<sup>17</sup> The President, Underhill J, at para 63.

<sup>18</sup> Maurice Kay LJ at para 25.

restored. In *President of the Methodist Conference v Preston* [2013] UKSC 29 the Court held by four votes to one that a Methodist minister was *not*, in fact, an employee. Under the Constitution and Standing Orders of the Methodist Church:

- a minister's engagement was incapable of being analysed in terms of contractual formation - and neither admission to full connexion nor ordination were themselves contractual;
  - a minister's duties were not consensual but depended on the unilateral decisions of the Conference;
  - stipend was paid and a manse provided by virtue only of admission into full connexion or ordination;
  - stipend and manse were not pay for an employed post but 'a method of providing the material support to the minister without which he or she could not serve God';
  - disciplinary rights under the Church's Deed of Union were the same for ordinary members as for ministers; and
  - the relationship between the Church and the minister was terminable only by Conference, its Stationing Committee or by a disciplinary committee and there was no unilateral right to resign, even on notice.
28. Therefore, unless there was some special arrangement with a minister, that minister's rights and duties arose from his or her status under the Church's Constitution rather than from any contract. As to the judgment in *Percy*, while it was accepted in that case that Ms Percy did not have a contract of service, the statutory test of 'employment' for the purposes of sex discrimination claims was broader than the test for unfair dismissal claims.

### The effects of the recent case-law

29. The result of the Supreme Court's judgment in *Preston* has been somewhat to clarify the employment position of Free Church (and, presumably, of Roman Catholic) clergy. Both *Preston* and Lady Smith's judgment in the EAT in *Macdonald* suggest that, in the individual case, whether or not an employer/employee relationship exists will depend on the Court's reading of the specific facts and (presumably to some extent at least) on the ecclesiology and doctrine of ministry of the Church concerned.
30. The approach of the courts in *Macdonald* and *Preston* has been given a degree of support by a recent judgment of the European Court of Human Rights in *Károly Nagy v Hungary* [2015] ECHR 1051. Mr Nagy, a minister in the Hungarian Reformed Church, brought a compensation claim following his dismissal as minister of Gödöllő parish after disciplinary proceedings in the ecclesiastical courts. His attempt to bring proceedings before both the labour courts and the ordinary civil courts failed: both sets of proceedings were ultimately discontinued on the ground that those courts had no jurisdiction and in May 2009 the Supreme Court concluded that his claim had no basis in civil law because there was no

contractual relationship between him and the Church. The Second Section ECtHR dismissed his claim by a majority of 4 to 3, holding that the Supreme Court of Hungary had been within its powers to conclude that, though Mr Nagy could make a claim under ecclesiastical law before the relevant bodies of the Reformed Church, such a claim would not come within the jurisdiction of the secular courts. Moreover, it held that excluding claims based on ecclesiastical law from the jurisdiction of domestic courts did not violate Article 6 §1 ECHR (right to a fair trial).

*At the time of writing the chamber judgment in Károly Nagy had been appealed to the Grand Chamber – presumably judgment will be handed down some time in 2017.*

### The problem of determining the facts

31. *Employment cases are highly sensitive to the facts*; and slightly earlier case that well illustrates the problem of assessing the facts is *Singh v Management Committee of the Bristol Sikh Temple & Ors* [2012] UKEAT 0429 11 1402. The issue was again what constituted 'employment' of church personnel – this time for the purposes of s 54(3)(b) National Minimum Wage Act 1998.
32. *Singh* is a complex case, not least because any baptised Sikh in good standing can act as a *granthi* (temple priest), so it is not entirely clear that a *granthi* is on all fours with an ordained minister in a Christian denomination or, for that matter, with a rabbi who has received *smicha*. The relationship between the parties was based on voluntarism: Mr Singh did not have a formal written agreement with the Management Committee and he and his wife were supported by the voluntary contributions of the congregation and lived rent-free at the *gurdwara*. The original Employment Tribunal had therefore held that Mr Singh was not an employee.
33. The Employment Appeal Tribunal disagreed, concluding that the lower Tribunal had erred on the questions of mutuality and personal performance of services. Though the relationship was indeed based on 'voluntarism and a traditional interpretation and application of the Sikh scriptures' (para 39) there had been no finding that a contractual relationship would be inconsistent with the practice and beliefs of the Bristol Gurdwara. Crucially, moreover, the EAT took the view (para 40) that the true effect of *Percy* had not been fully taken into account by the lower Tribunal – possibly, said the EAT, because of the 'linguistic gentleness' in the approach of the judgments in *Percy* noted (see above) by Maurice Kay LJ in *Preston*. The appeal was allowed and the case remitted to the original Tribunal for reconsideration.
34. There was a somewhat similar outcome in *Chandra v Arya Samaj Vedic Mission (West Midlands)* [2014] Birmingham County Court (unreported). In March 2011 Dr Harish Chandra was employed by the Executive Committee of Arya Samaj Vedic Mission to work at its temple on a twelve-month contract at £500 per month with a one-bedroom apartment and an arrangement that allowed him to receive commission based on those attending his courses. It turned out, however, that he was expected to spend a very large amount of his available time working and was provided only with a small single room. In March 2012, he was awarded a new three-year contract under the same terms and conditions; but in July

2012 the Executive Committee members stood down and were replaced by new members who, shortly afterwards, terminated Dr Chandra's new contract.

35. HHJ Purle QC concluded that since there was no clause in Dr Chandra's contract specifying the number of hours to be worked, his payment was therefore for 'unmeasured work' rather than a salary (and, in fact, he had ended up working a 65-hour week). The Executive Committee had therefore failed to pay him the National Minimum Wage rate, even taking into account the statutory accommodation offset rate of £34.37 per week currently prescribed by the National Minimum Wage Regulations. He was awarded just over £62,500 in damages.

### Discussion

36. Whether *Singh* would have been decided differently if it had been handed down after the decision of the Supreme Court in *Preston* is a very moot point: as various commentators pointed out at the time, if in the view of Maurice Kay LJ, the decision in *Percy* 'caused the tectonic plates to move', in *Preston* Lord Sumption gave them a very firm shove in the opposite direction – and the direction of travel in *Sharpe* was the same.

## LAY EMPLOYEES, VOLUNTEERS, INTERNS AND THE NMW

### Is there a contract of employment?

37. In *Miller v Secretary of State for Home Affairs* [2004] UKEAT 00926 03 0405 a Quaker visiting minister at HM Prison Wymott received hourly pay and expenses. She arranged services and ministered to inmates – not exclusively Quakers – 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. When a vacancy for a part-time Chaplain arose she covered some of those duties, including visiting prisoners in the segregation unit and on suicide watch and interviewing new arrivals – duties which fell on the (Anglican) Chaplain under the terms of the Prison Act 1952. However, the Home Office could not direct her as to how she carried out her work – unlike the position of the full-time Prison Chaplain, who was subject to regular appraisals by the Governor, had targets set for her and was subject to the Home Office's disciplinary and grievance procedures. (It is also perhaps worth mentioning that the office of (Anglican) Chaplain is a statutory one under the 1952 Act: every prison in England and Wales is obliged to have one.)
38. The Employment Appeal Tribunal concluded that there was probably some kind of contract with Ms Miller but that she was not an employee because there was no enforceable obligation imposed on her and the necessary degree of control was absent. The EAT noted that the fact that Ms Miller 'could simply withdraw from running the Alternative to Violence programme without demur by the Governor' [15] was inconsistent with a sufficient degree of control by the Home Office that would imply a contractual employer/employee relationship.
39. Most recently, the Court of Appeal has confirmed the basic rule that *in order to have employment rights, you have to be in an employment relationship*. In a complex case of alleged religious discrimination in employment, *Halawi v WDFG UK Ltd (t/a World Duty Free)* [2014] EWCA Civ 1387, the claimant was a Christian who worked as a beauty consultant at Heathrow Terminal 3. She alleged that she and other Christian staff were victims of systematic harassment by Muslim colleagues and that this had led to her losing her job when WDFG UK Ltd took away her airside pass. She was unsuccessful both before the Employment Tribunal and the Employment Appeal Tribunal, neither of which believed her claim.
40. The Court of Appeal agreed, holding that Mrs Halawi was not a worker or employee for the purpose of discrimination in employment under s 83(2)(a) Equality Act 2010 – which covers 'employment under a contract of employment, a contract of apprenticeship or a contract personally to do work' – because she worked through her own limited company, Nohad Ltd, which invoiced an intermediary agency for her time and services which then, in turn, invoiced WDF.

**Is there an employment relationship even if the employer did not intend to create one?**

41. There have been various recent cases on the employment of church organists. In the Church of England, the position is complicated by the fact that music in church is regulated by [Canon B20](#) (Of the musicians and music of the Church) as well as by secular employment law.
42. In *Sholl v PCC of St Michael & All Angels w St James, Croydon & Anor* [2011] ET 2330072/2010, the claimant was appointed Director of Music for a minimum of five years at an annual stipend of £14,000. The draft contract (which Dr Sholl did not sign) included the provisos in Clause 16 that 'There being no master and servant relationship [and] no part of this Agreement shall be deemed to constitute a contract of employment' and that 'The Director of Music shall be responsible for his own income tax and National Insurance arrangements'. The unsigned draft contract also stated that 'subject to the general direction of the Vicar the Director of Music shall be responsible for the care, control and general oversight of all the music in the Church'. It also stated that the agreement was subject to the provisions of Canon B20. The contract was never signed but the Tribunal concluded that there was a verbal contract between the parties.
43. The Tribunal identified several factors consistent with there being a contract of employment between the claimant and the respondents:
  - Dr Sholl was paid monthly in arrears;
  - the payment to him 'clearly had the character of a contractual remuneration';
  - he had no financial risk;
  - he was not required to provide equipment, materials or premises;
  - he had a package of rights to holiday pay, sick pay and notice and grievance provisions; and
  - the second respondent, the Vicar, had himself described Dr Sholl's status as 'employed'.

The principal factors against the presumption were these:

- Dr Sholl had been informed that he was self-employed;
- he paid his own income tax and National Insurance;
- he delegated work to others outside the terms of the agreement;
- he did not obtain advance authorisation for annual leave; and
- he received a fee for playing at weddings and funerals.

44. The Tribunal 'reminded itself of well-established common law [principle] that the labels parties attach to the arrangement are not determinative of employed status'. On balance, the Tribunal concluded that the factors in favour of employment status outweighed those against. The matter would proceed to a full merits hearing. In the end, however, the case was settled without recourse to the Employment Appeal Tribunal.

### Volunteers

45. One particularly contentious issue has (we hope) been finally laid to rest. In the *Mid Sussex CAB* litigation the appellant, Ms X, had become a volunteer adviser with the Mid Sussex Citizens Advice Bureau. At her interview it was explained that there would be no binding legal contract between her and the Bureau and she signed a volunteer agreement to that effect headed: *This agreement is binding in honour only and is not a contract of employment or legally binding*. When she was told that her services were no longer required she sued, claiming that the actions of the CAB had amounted to discrimination against her on the grounds of disability, contrary to the Disability Discrimination Act 1995 and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the 'Framework Directive'). At an earlier stage in the proceedings it became common ground between the parties that if Ms X was, in fact, protected by the disability discrimination legislation, then volunteers generally could be regarded as having employment rights.
46. The Supreme Court would have none of it. In *X v Mid Sussex Citizens Advice Bureau & Anor* [2012] UKSC 59 Lord Mance, delivering the judgment of the Court, held that – in a nutshell – 'the Framework Directive does not cover voluntary activity' and dismissed the appeal. Moreover, he did not regard it as a case in which a reference to the Court of Justice of the EU 'is either required or appropriate'. And there, for the moment, the matter rests.
47. The key point in relation to volunteers, however, is that *they must be genuine volunteers*, paid no more than their legitimate expenses incurred as a result of volunteering. Once payment goes beyond reimbursing expenses, there is a serious danger than the courts might interpret the resulting relationship as one of employment, *even though there was no intention on the part of the organisation to create such a relationship*.

### The murky world of internships

48. We were recently asked about the employment status and remuneration of a church's youth-worker. Without going into the details of the specific case, the discussion raised several general questions about the status of interns, part-timers, work-experience students and volunteers. Twenty years ago those distinctions were much more clear-cut; but changing patterns of work, the decisions of employment tribunals and the introduction of the National Minimum Wage have all combined to blur the overall picture. Moreover, arbitrary labels are misleading: expressions such as 'internship' or 'work experience placement' have no status in law. So a major part of the problem is that *there is no legal definition of an 'intern'*.

49. Generally, the rights of people at work depend on their [employment status](#): whether someone is an [employee](#), a [worker](#) or an [office holder](#). These categories are not necessarily mutually exclusive *and every case falls to be determined on the facts*. Furthermore, their employment status may be classified differently according to whether the issue is one of tax or employment law: and with regard to the latter, establishing employment status is essential for accessing many employment rights such as protection from unfair dismissal.

### Right to the National Minimum Wage

50. There are various considerations to be borne in mind:
- *An intern with the status of a [worker](#) is entitled to the National Minimum Wage*; and an employer cannot avoid the duty to pay the NMW merely by stating that it does not apply or by concluding a written agreement stating that the person in question is not a worker or that that person is a volunteer.
  - *An intern is classed as a worker and is entitled to the National Minimum Wage if he or she is promised a contract of future work.*
  - Interns are *not* entitled to the National Minimum Wage in the following circumstances:
    - *Student internships*: a student required to undertake an internship for less than one year *as part of a UK-based further or higher education course* is not entitled to the NMW.
    - *School work experience placements*: work experience students *of compulsory school age* (ie under 16) are not entitled to the NMW.
    - *Voluntary workers*: volunteers are not entitled to the NMW if they are *both* working for a charity, a voluntary organisation, an associated fund raising body or a statutory body *and* are not paid except for limited benefits such as reasonable travel or lunch expenses.
    - *Work-shadowing*: the employer does not have to pay an intern the NMW if the internship *only* involves shadowing an employee, the intern is not carrying out any work and he or she is only observing the person being shadowed.
51. So what happens if, for example, a charity says to an employee, 'We can only afford to pay you the NMW for twenty hours a week but you could work the rest of the week as a volunteer'? How might that play before an Employment Tribunal?
52. My suggestion is that, on the principle of looking at the actual situation rather than the written or verbal agreement, an ET would need to be satisfied that any work over and above the contracted twenty hours *was in fact* entirely voluntary and was not merely a device to get round the NMW Regulations. That, in turn, would depend at least in part in the nature of the work. If, for example, a church youth-worker took occasional church services as a lay volunteer or ran part of the church's Sunday-school, an ET might take the view that that was the kind of activity that any committed member of a church might reasonably undertake without reward. If, on the other hand, a claimant did twenty hours of paid work a week followed by fifteen hours of 'more of the same', an ET might take the view that *the reality* was that the claimant was in fact working a 35-hour week for less than

the NMW hourly rate. That suggestion would appear to be supported by *Singh*, as noted above.

### Discussion

53. The employment status of lay church-workers is by no means cut-and-dried; and just because a group of trustees says that it does not intend to 'employ' an organist, a choirmaster, a cleaner or a caretaker does not mean that no employment relationship exists. Furthermore, once one strays outside the traditional pattern of a contract of employment, with tax paid through PAYE and the normal entitlements to such things as holiday pay, and moves into the murky world of internships, voluntary work and expenses, employment law becomes extremely complex and highly fact-specific.
54. In short, *congregations need to take great care when engaging workers, interns and volunteers: both sides need to know exactly where they stand* – not least because of the reputational risk to the organisation of getting it wrong.

## EMPLOYMENT AND THE RELIGIOUS EXCEPTION

### The religious exception

55. [Schedule 9](#) to the Equality Act 2010 provides two exceptions for employment:

- paragraph 2 provides a separate exception from laws prohibiting discrimination on grounds of sex, marriage and sexual orientation; and
- paragraph 3 provides allows employers with an ethos based on religion or belief to discriminate on grounds of religion or belief.

56. Paragraph 2 applies where three criteria are met.

- *The employment must be for the purposes of an organised religion* – and in *R (Amicus MSF Section) v Secretary of State for Trade and Industry* [2004] EWHC 860 Richards J held that term 'organised religion' was narrower than 'religious organisation', suggesting that '... employment as a teacher in a faith school is likely to be 'for purposes of a religious organisation' but not 'for purposes of an organised religion'' (para 116).

The accompanying Explanatory Notes state at para 799 that this is 'intended to cover a very narrow range of employment: ministers of religion and a small number of lay posts, including those that exist to promote and represent religion'. How much reliance can be placed on Explanatory Notes is arguable – they are not part of the Act – but there is always the possibility that they might be cited in case of dispute;

- *The discrimination must be 'so as to comply with the doctrines of the religion'*<sup>19</sup> and the purpose of the discrimination must be 'to avoid conflicting with the strongly held convictions of a significant number of the religion's followers'. In *R (Amicus MSF Section)* Richards J stated that that these requirements imposed 'very real additional limitations' and suggested that both tests were objective.<sup>20</sup> But it is not clear precisely how that objectivity could be brought to bear in any specific case. What is the 'significant number' of followers who have to be offended in order to engage the exception? Ten per cent? A majority? And how do you find out whether or not they are offended? And what is a 'member' anyway? Someone who has been baptised? Someone who has been entered on the electoral or communion roll? Different religious communities have very different interpretations of membership.
- *The employer can discriminate either where the employee does not meet the requirement imposed or where the employer is not satisfied and it is reasonable for him not to be satisfied that that person meets it.*

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<sup>19</sup> Equality Act 2010, Schedule 9 Para 2(5).

<sup>20</sup> At [117].

57. The importance of this reasonableness requirement was stressed in *Reaney v Hereford Diocesan Board of Finance* [2007] Employment Tribunal 1602844/2006. Mr Reaney applied for the job of Diocesan Youth Officer. He had been in a committed same-sex relationship that had ended prior to his application. He was turned down for the post after the Bishop had expressed his concern about Reaney's previous relationship, had asked for further reassurances about Reaney's future lifestyle then refused to accept his assurance that he would remain celibate. The Bishop concluded that Reaney could not promise not to have a same-sex relationship in future and did not, therefore, offer him the post. The Employment Tribunal held that although employment as a Diocesan Youth Officer was 'for the purposes of an organised religion' and the Bishop had been permitted to apply a requirement related to sexual orientation on either of the grounds laid out in the Regulations, the religious exception did not apply because Reaney *did* meet the requirement imposed and it was unreasonable for the Bishop to conclude otherwise.<sup>21</sup>

### The Genuine Occupational Requirement

58. In *Hender & Sheridan v Prospects for People with Learning Disabilities* [2008] Employment Tribunal Cases nos. ET/2902090/2006 (Hender) & 2901366/2006 (Sheridan), Prospects, a company limited by guarantee and a charity which provided housing and day-care for people with learning disabilities, tried to avoid falling foul of the [Employment Equality](#) by telling its staff that all roles except cooking, cleaning, gardening, maintenance and relief staff would be subject to Christian profession as a Genuine Occupational Requirement (GOR) of employment: the reason it gave was that those in post might have to lead prayers or give spiritual guidance. When Hender and Sheridan objected the Tribunal concluded that, for the posts in question, Christian profession was not a GOR: in short, in order to be applied *a Genuine Occupational Requirement has to be genuine*.
59. *But 'genuineness' is decided on the facts*. In *Muhammed v Leprosy Mission International* [2009] Employment Tribunal Cases no.16 ET/2303459/09, in which the Leprosy Mission, a Christian charity, refused an application from a Muslim for a vacancy as a finance administrator, the Tribunal held that the Mission could legitimately refuse applications from non-Christians because Christianity permeated the organisation: for example, each day started with prayers. Employing a non-Christian would have had a significant impact on the ability of the organisation to maintain its ethos, whereas the applicant who had been refused the job would have the chance to work elsewhere.

### What if religious views are in conflict?

60. In *G v P* [2013] Ashford Employment Tribunal (unreported),<sup>22</sup> P worked as a donor processor for a faith-based charity whose fundraising arm produced and broadcast Christian television programmes. The donor processors were required to perform two key functions: to receive calls from the public and discuss the spiritual and theological content of the organisation's

<sup>21</sup> The case being unreported, the contents of this paragraph are based on a note by a colleague at Cardiff Law School, Dr Russell Sandberg.

<sup>22</sup> The Tribunal delivered an oral decision only. This note is based with his permission on an item by Paul Jennings in the Bates Wells & Braithwaite Employment Law Update – Early Spring 2013.

broadcasts and to process donations from viewers and supporters.

61. The organisation took the view that, in order to be able to discuss the content of the broadcasts, the donor processors needed to have a detailed understanding of the specific tenets of its faith as well as a strong grasp of scripture. The job also had a pastoral element: donor processors often had to speak to vulnerable people or those seeking guidance or consolation. The organisation therefore ran structured prayer and training sessions to prepare the donor processors for their role and to ensure that standards were upheld; however, P refused to participate in them, on the grounds that her own beliefs and her own interpretations of scripture derived from her direct relationship with God, and that any attempt to establish a uniform understanding through structured training and prayer constituted an interference with that direct relationship. She was given two opportunities to change her mind, then her contract was terminated on notice.
62. The Employment Tribunal concluded at a pre-hearing review that the organisation had not treated P less favourably because of her (or their) Christian beliefs. Both parties shared precisely the same set of beliefs: P's contract had been terminated because she had refused to participate in the structured training. Her allegation of direct religious discrimination was therefore struck out in advance of the full hearing. At the substantive hearing on the unfair dismissal claim the Tribunal concluded that it had been legitimate and reasonable for the organisation to want uniformity its communication with its supporters, that if donor processors were left to communicate with the public on complex theological issues without any training or control over standards it would expose the organisation to a genuine risk – and that the organisation had acted entirely reasonably in the circumstances. P's unfair dismissal claim was therefore dismissed.

### Laypeople and church discipline

63. Recently, the issue of lay employees<sup>23</sup> and church discipline has come before the European Court of Human Rights in three German cases (all of which, unfortunately, are only available in French) and a Spanish one.
64. In *Obst v Germany* [2010] ECHR (No. 425/03)<sup>24</sup> it was held that the dismissal by the Church of Jesus Christ of Latter-day Saints (LDS) of its Director of Public Relations for Europe on grounds of adultery had not breached Article 8 ECHR (private and family life) since the German labour courts had taken account of all the relevant factors and undertaken a careful and thorough balancing exercise regarding the interests involved. The Court also noted that,

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<sup>23</sup> The issue of the employment position of ordained ministers also came before the Court in *Hanna and Peter Müller v Germany* 12986/04 [2008] ECHR which involved a claim for (in effect) unfair dismissal by two Salvation Army officers who had signed a declaration of commitment by which they expressly consented not to be employed by the Army and not to conclude an employment contract with it. The result, however, is inconclusive. The Court dismissed their claim under Article 9 §2 (thought, conscience and religion), largely because the matter touched on the constitutional autonomy in German law of religious organisations; but it adjourned consideration of their argument under Article 6 § 1 (fair trial) that they had not had the opportunity of a proper hearing of their claim. That second issue remains unresolved.

<sup>24</sup> A joint press release in English for both judgments is available at [this link](#).

having grown up in the Mormon Church, the claimant had been or should have been aware of the importance of marital fidelity for his employer and of the incompatibility of his extramarital relationship with his position in the Church.

65. In *Schüth v Germany* [2010] ECHR (No. 1620/03) a Roman Catholic parish and deanery organist and choirmaster left his wife and settled with a new partner with whom he had a child. He was dismissed on the grounds that his functions were so closely connected to the proclamatory mission of the Church that the parish could not continue employing him without losing credibility. The Court ruled that this had breached his rights under Article 8 ECHR (private and family life): the German labour courts which had considered his original case had paid no regard to his *de facto* family life with his new partner or to the legal protection afforded it, and while Schüth had entered into a duty of loyalty towards the Catholic Church which limited his right to respect for his private life to some degree, his signature on the contract could not be interpreted as an unequivocal commitment to celibacy in the event of separation or divorce.
66. *Obst* and *Schüth* were both decided by the Fifth Section and the judgments were handed down on the same day. What seemed to distinguish the two in the minds of the judges were the relative public profiles of the two men: Obst was a national officer of the LDS while Schüth was an obscure church musician. That distinction now seems to be less likely, however, in the light of two more recent cases.
67. In *Siebenhaar v Germany* [2011] ECHR (No. 18136/02)<sup>25</sup> the applicant, a Roman Catholic, worked as a childcare assistant in a day-nursery run by a Protestant parish in Pforzheim. She was dismissed without notice by the Baden Protestant Church on the grounds of her involvement in a religious community, the 'Church Universal / Brotherhood of Mankind', whose teachings were deemed to be incompatible with those of the Protestant Church. The Fifth Section concluded that there had been no breach of Article 9 (thought, conscience and religion) read in light of Article 11 (assembly and association): partly because Germany had a system of labour courts whose decisions were reviewable by a constitutional court and had therefore complied with its positive obligations under the ECHR – and partly because

'... the complainant was or should have been aware, when signing her employment contract ... that her membership in the Universal Church and her activities in support of it were inconsistent with her commitment to the Protestant Church' (para 46).

68. Most recently, in *Fernández Martínez v Spain* [2014] ECHR 615 the Grand Chamber appeared to tilt the balance further towards the employer.<sup>26</sup> Mr Fernández Martínez had been ordained as a Roman Catholic priest in 1961 but in 1984 applied for a dispensation from celibacy. He then married in a civil ceremony and from 1991 onwards taught Roman Catholic religion and morals in a state high school, his contract being renewed annually by the local bishop. In 1996 a newspaper published a photograph of him attending a meeting of the Movement for Optional Celibacy along with his wife and their five children. In 1997 the Vatican dispensed him from celibacy but stated that anyone so dispensed was barred from

<sup>25</sup> A press release in English is available at [this link](#).

<sup>26</sup> A long analysis of the judgment is available at [this link](#).

- teaching the Catholic religion in public institutions unless the local bishop decided otherwise according to his own criteria and provided that there was no scandal. In September 1997 his bishop decided not to renew his contract for the new school year.
69. The Grand Chamber dismissed his claim. The majority could see 'no reason of principle why the notion of "private life" should be taken to exclude professional activities' [para 110]; and in the case of Mr Martínez 'the interaction between private life *stricto sensu* and professional life is especially striking' because there was a direct link between his conduct in private life and his professional activities [111]. Moreover, though Mr Martínez had never had a permanent contract, he had a reasonable presumption that his contract would be renewed so long as he was professionally-competent and there were no circumstances that might justify its non-renewal under canon law [112]. Article 8 ECHR (respect for private and family life) was therefore applicable
  70. Nevertheless, the GC held by nine votes to eight that there had been no violation and by fourteen votes to three that there was no need separately to examine his other complaints. The Spanish courts had taken sufficient account of all the relevant factors and had weighed the competing interests in a detailed and comprehensive manner, within the limits imposed by the respect that was due to the autonomy of the Roman Catholic Church [151]. The principle of Church autonomy did not seem to have been invoked improperly; and the Bishop's decision did not appear to have been insufficiently-reasoned, arbitrary or incompatible with the exercise of the Church's autonomy as protected under the Convention [151]. The interference with his right to respect for his private life had been within the margin of appreciation accorded to states parties and had not been disproportionate [152].
  71. It is difficult, to say the least, to derive any consistent principle from the four cases. If Ms Siebenhaar should have known that membership of the Universal Church was incompatible with working for a day-nursery run by the *Evangelischen Kirche in Deutschland* (EKD), Mr Obst that the LDS did not look kindly on adultery and Mr Fernández Martínez that the Vatican had firm views about celibacy then, equally, Mr Schüth must have been aware of his Church's disapproval of adulterous relationships. Moreover, the justification in *Siebenhaar* that the German system of labour courts complied with its obligations under the ECHR does not help us, given that exactly the same system of labour courts was in place in the cases of Mr Obst and Mr Schüth.
  72. The differences between *Obst* and *Schüth* on the one hand and *Siebenhaar* on the other seems to be this. The first two cases involved a conflict between the right to private and family life under Article 8 ECHR and the religious autonomy of the two Churches in question. In *Siebenhaar*, however, the issue for *both* parties to the dispute was the right to freedom to manifest one's religious belief under Article 9: the EKD was claiming the right to organise itself in accordance with its own ecclesiology while Ms Siebenhaar was arguing that her dismissal had breached her rights under Article 9.
  73. As to the judgment in *Fernández Martínez*, it is difficult to assess its likely future impact, given that it was a 9/8 split vote – and, in my view, it was wrongly decided. However, it is consistent with the recent tendency of the Grand Chamber, especially, not to want to get

involved in religious disputes and to give states parties a very wide margin of appreciation in matters of religion and religious disputes. (The latest example of this has been the Grand Chamber judgment in *SAS v France* upholding the French ban on covering the face in public, which seems to have attracted [almost universal criticism](#) right across the religious spectrum, from devout Muslims to confirmed secularists.)

74. What all these cases illustrate in their different ways is this: *Churches and other religious organisation, as employers, need to be exceedingly careful about the way in which they deal with lay employees.* The facts of the individual case are absolutely crucial, as is the importance of having in place a fair and transparent disciplinary procedure. Nor is it possible merely to assume that the standards of doctrinal orthodoxy or of personal behaviour that are expected of clergy can simply be imposed on the laity.

### **Laypeople and the right to manifest their religion in (secular) employment**

75. Several recent cases – one European, the others domestic – have highlighted the issue of the extent to which employees generally have a right to manifest their religious beliefs in the workplace and/or to act in accordance with their consciences. Though the cases do not bear directly on the employment of laypeople by religious organisations, members of CLAS should be aware of the current situation.
76. In *Eweida and Others v United Kingdom* [48420/10 36516/10 51671/10 59842/10 \[2013\]](#), the European Court of Human Rights came to different conclusions in four conjoined appeals from the UK courts involving four separate claimants who argued, as committed Christians, that the actions of their employers had violated their rights in various respects to manifest their religion under the terms of the European Convention of Human Rights: Shirley Chaplin (a nursing sister), Nadia Eweida (a check-in clerk with British Airways), Lillian Ladele (a local authority registrar with Islington LBC) and Gary McFarlane (a relationships counsellor with Relate). Nadia Eweida won, the other three lost.
77. In brief, the Court decided:
- (by a majority of five votes to two) that in the case of Ms Eweida the refusal by BA between September 2006 and February 2007 to allow her to remain in her post while visibly wearing a cross with her uniform amounted to an interference with her right to manifest her religion: BA's actions had been disproportionate and the Court of Appeal had not struck the correct balance in its ruling: 'while [BA's] aim was undoubtedly legitimate, the domestic courts accorded it too much weight';
  - (unanimously) that Ms Chaplin's freedom to manifest her religion had been interfered with but that the interference had been legitimate: she had been offered the alternative of wearing her crucifix under a high-necked top under her tunic or attached to the lanyard that held her security pass but had not regarded either as satisfactory – and because the ban was on grounds of health and safety in a hospital ward it was inherently of a greater magnitude than BA's uniform policy, which was about corporate image;

- (by five votes to two) that though the Court agreed with Ms Ladele that the local authority's requirement that all registrars be designated as civil partnership registrars had been particularly detrimental to her because of her religious beliefs, the local authority's policy aimed to secure the rights of others that were also protected under the Convention and had not exceeded the margin of appreciation available to it; and
  - (unanimously) that Mr McFarlane had voluntarily enrolled on Relate's postgraduate training programme in psycho-sexual counselling knowing that Relate operated an Equal Opportunities Policy and he would not be able to refuse psycho-sexual counselling to same-sex couples, that Relate's action was intended to secure the implementation of its policy of providing a service without discrimination and that, in all the circumstances, the margin of appreciation had not been exceeded.
78. [According to Professor Mark Hill QC](#) – one of the leading authorities on ecclesiastical law – the judgment in *Eweida* has various consequences for domestic courts:
- it makes clear that the judiciary in the UK should not assess the legitimacy of religious beliefs or the ways in which those beliefs are expressed: provided the claimed beliefs and their expression attain 'a certain level of cogency, seriousness, cohesion and importance' there should be no examination of their veracity;
  - it is unnecessary for a belief to be doctrinally mandated in order for its manifestation to be protected under Article 9 of the European Convention: hitherto, the law has protected the right of Sikhs to wear the *kara* bangle and the *kirpan* ritual dagger but not the Christian cross; and
  - the judgment '... has made it plain that where an individual complains of a restriction on freedom of religion in the workplace, it is not enough to assert that the possibility of changing job will negate any interference with the right to freedom of religion. Employers will no longer be able to say: we are not stopping any employee practising their religion because he or she can simply resign and move to another job'.
79. How long it will be before the third of these becomes incorporated into domestic practice remains to be seen; and my own suspicion is that it will be rather a slow process. In a recent case, *Begum v Pedagogy Auras UK Ltd (t/a Barley Lane Montessori Day Nursery)* [2015] UKEAT 0309 13 2205, the claimant was refused a job offer as a trainee nursery assistant because her religious belief as an observant Muslim required her to wear a *jilbab* dress/coat reaching from her neck to her ankles but the company had a rule that staff should not wear any garment that might constitute a tripping hazard to themselves or to the children in their care. The Tribunal held that Pedagogy Auras had not discriminated against Ms Begum.
80. It is undoubtedly the case that the previously-rigid application of the 'specific situation' rule has been somewhat blunted. But the 'tick-box' approach to the legitimacy of beliefs is already in process of being abandoned, as the next few cases show.

81. Ms Celestina Mba, a care worker in a local authority children's home, had to work occasional Sundays when, as a practising Christian who took the Fourth Commandment very seriously, she did not wish to do so. In the end, she resigned with regret and claimed unfair dismissal. In *Mba v London Borough of Merton (Religion or Belief Discrimination)* [2012] UKEAT 0332 12 1312 the Tribunal concluded that Merton had not discriminated against her on grounds of religion or belief. On further appeal, the EAT judgment was upheld: see *Mba v London Borough of Merton* [2013] EWCA Civ 1562. Leave to appeal to the Supreme Court was refused.
82. The importance of *Mba* is twofold. First, it revisited the issue of Sunday working for the first time since *Copsey v WBB Devon Clays Ltd* [2005] EWCA Civ 932, in which Mr Copsey lost a claim against his employers that he should be excused Sunday working on grounds of conscience. Secondly – and possibly more important – in line with *Eweida & Ors* the judgment appears to weaken the idea of a simple checklist test of 'core beliefs': just because other devout Christians are happy to work on Sundays does not mean that someone with a principled religious objection to Sunday working is to be regarded as a religious eccentric. Moreover, Elias LJ's reference [at 35] in the Court of Appeal to justification being read compatibly with Article 9 'where that provision is in play' would appear to support that view.
83. Recently, in *Wastenev v East London NHS Foundation Trust* [2015] ET 3200658/2014, an occupational therapist had been given a final written warning (subsequently reduced on appeal to a first written warning) by the Trust for three charges of misconduct – praying with EN, a Muslim colleague of Pakistani heritage, giving her a book about a Muslim woman who converts to Christianity, and inviting her to church events. The Employment Tribunal held that there had been no element of harassment or discrimination in the Trust's response to EN's complaint. Though Article 9 ECHR was engaged, the Convention did not give Ms Wastenev 'a complete and unfettered right to discuss or act on her religious beliefs at work irrespective of the views of others or her employer ...' [67].
84. The decision was upheld on appeal. In *Wastenev v East London NHS Foundation Trust (Religion or Belief Discrimination)* [2016] UKEAT 0157 15 0704 HHJ Eady QC, sitting alone, concluded that Ms Wastenev
- 'had not been subjected to disciplinary process or sanction because she manifested her religious belief in voluntary and consensual exchanges with a colleague but because ... she subjected a subordinate to unwanted and unwelcome conduct, going substantially beyond "religious discussion", without regard to her own influential position. The treatment of which the claimant complained was because of, and related to, those inappropriate actions; not any legitimate manifestation of her belief' [65].
85. But the traffic is not entirely one way. In the recent case of *Holland v Angel Supermarket Ltd & Anor* [2013] Employment Tribunal 3301005-2013 Ms Holland, a follower of Wicca, worked at a convenience store operated by a company owned by the second respondent, Mr Tarloch Singh, a Sikh. In October 2012 she agreed with her manager that she would work a late shift so that she could celebrate Halloween. Next day Mr Singh asked her why she was working a later shift; and she described his reaction to her explanation as 'seeming revolted

- by the idea that she was a Wiccan, or not Christian, and [she] was made to feel that there was something wrong with her' (para 10.2). In due course she was dismissed, ostensibly on the grounds that the company was reducing its workforce and her post was being eliminated, even though a male colleague, Mr Waheed Anwar, was retained (para 10.7). There was the usual dispute as to the facts; but the Employment Tribunal preferred Ms Holland's version and upheld her claim. There is a full note on the case [here](#).
86. In *Mbuyi v Newpark Childcare (Shepherds Bush) Ltd* [2015] ET 3300656/2014 the claimant, Ms Sarah Mbuyi, an Evangelical Christian, was employed at a nursery in Shepherds Bush. Her colleague Laura P was a lesbian in a civil partnership. There were various complaints, most particularly in relation to comments that Ms Mbuyi was alleged to have made to her about her sexual orientation, such as 'Oh my God, are you a lesbian?'. She was dismissed and brought a claim under the Equality Act 2010, alleging that her dismissal was an act of direct or indirect discrimination and/or harassment, relying on the protected characteristic of her religion or belief and, specifically, on her religious belief that homosexuality was a sin (paras 97 & 98).
87. The Employment Tribunal found in her favour. The Tribunal rejected the charge that Ms Mbuyi's belief was 'discriminatory, homophobic and akin to racism' (para 124). There was a difference between, say, a racist expressing hateful views and a person of religious conviction expressing her beliefs, 'however unwelcome', though that was not to suggest that 'the inappropriate expression of religious beliefs that may appear discriminatory would receive special protection under the law' (para 125).
88. Similarly, in *Fhima v Travel Jigsaw Ltd* [2015] Employment Tribunal (unreported) Ms Fhima, an observant Jew, applied for a vacancy with a car rental firm, Travel Jigsaw, which required the successful applicant to work shifts on five out of every seven days. She explained that she could not work during *Shabbat*; but because the company ran a 24/7 operation she offered to work every Sunday and from 5pm to midnight on Saturdays in winter and asked Jigsaw to review its refusal. The Tribunal held that the requirement that Ms Fhima be available to work on Saturdays was not an objective justification for a policy that discriminated against observant Jews. Other staff could have covered the Saturday shifts, with Ms Fhima working on five of the other six days.
89. If there is a moral it is this: *employers (and that includes religious employers) need to be very careful about the religious sensitivities of their employees*. Nor would I rely too strongly on the conclusion in *Mbuyi*.

### Church-workers and trades union membership

90. *Sindicatul Păstorul Cel Bun* (the Union of the Good Shepherd) was set up by clergy and lay employees of the Romanian Orthodox Church. Its aim, as set out in its statutes, was to defend the professional, economic, social and cultural interests of its members, both clerical and lay, in their dealings with the Church hierarchy and the Ministry of Cultural and Religious Affairs. In short, after objections from the Church the Romanian authorities refused to register the union. The union then took its case to Strasbourg, arguing that the domestic

authorities' refusal infringed its trade union rights under Article 11 ECHR (freedom of assembly and association) and that the reasons given by the domestic court to justify the interference by the authorities had been of a purely religious nature: it had not examined the repercussions of the employment contract on the employer-employee relationship, the distinction between members of the clergy and lay employees of the Church or the issue as to whether or not the ecclesiastical rules prohibiting union membership were compatible with the domestic and international regulations giving employees the right to belong to trades unions. The Orthodox Church argued that the matter was one of canon law and claimed the protection of Article 9 (thought, conscience and religion) for its actions. Following *Schüth* (see above) the Third Section concluded that

'... the relationship based on an employment contract cannot be 'clericalised' to the point of escaping any rule of civil law ... [and] that the clergy and, even more so, lay employees of the Church cannot be removed from the scope of Article 11. National authorities may at most impose 'lawful restrictions' in accordance with Article 11§2 of the Convention' (para 65).

So in the absence of a 'pressing social need' or of sufficient reasons for the restriction, the Third Section held by five votes to two that there had indeed been a violation of Article 11: see *Sindicatul Păstorul Cel Bun v Romania* 2330/09 [2012] ECHR: the judgment is available only in French but the Strasbourg Consortium has provided [an unofficial English translation](#).

91. The Romanian Government appealed to the Grand Chamber, which reversed the Third Section, holding by eleven votes to six that there had been no violation of Article 11 of the Convention. While acknowledging their special circumstances, the majority considered that clergy fulfilled their mission in the context of an employment relationship falling within the scope of Article 11. Religious communities 'traditionally and universally exist in the form of organised structures' and that, so far as organisation was at issue, Article 9 (freedom of thought, conscience and religion) had to be interpreted in light of Article 11:

'Seen from this perspective, the right of believers to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords' (para 136).

92. The majority agreed with the parties that the refusal to register the applicant union amounted to interference with its Article 11 rights (para 149) but concluded that that interference was prescribed by law, pursued a legitimate aim and was necessary in a democratic society – and was prepared to grant a wide margin of appreciation:

'Having regard to the lack of a European consensus on this matter ... it considers that the State enjoys a wider margin of appreciation in this sphere, encompassing the right to decide whether or not to recognise trade unions that operate within religious communities and pursue aims that might hinder the exercise of such communities' autonomy (para 171).

## VICARIOUS LIABILITY AND HISTORIC SEXUAL ABUSE

93. In *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] the Court of Appeal held that the Archdiocese was vicariously liable for the activities of a priest whom it had not supervised adequately and who had sexually abused a boy. When Mr Maga was a boy he did not attend the church but he did wash the priest's car and came to parish discos. The Court so held even though:
- the Archdiocese had reserved its position as to whether or not the offending priest was an 'employee'; and
  - Mr Maga was not and had not been an adherent of the Church.
94. Next, in *JGE v The English Province of Our Lady of Charity & Anor* [2011] [EWHC 2871 \(QB\)](#), the claimant alleged that she was raped by one Father Baldwin, a Roman Catholic priest who had since died, when resident at a children's home in Hampshire between 1970 and 1972. The issue before the court was whether the second defendant – the Trustees of the Portsmouth Roman Catholic Diocesan Trust – might be vicariously liable for Baldwin's alleged torts. Following the reasoning in *Maga* and in a Canadian case on very similar facts, *Doe v Bennett & Ors*,<sup>27</sup> the court found for the claimant:
- 'By appointing [*sic*] Father Baldwin as a priest, and thus clothing him with all the powers involved, the defendants created a risk of harm to others, viz the risk that he could abuse or misuse those powers for his own purposes or otherwise'.<sup>28</sup>
95. The Trustees of the Diocese appealed; and in *JGE v The Portsmouth Roman Catholic Diocesan Trust* [2012] [EWCA Civ 938](#) the Court of Appeal upheld the original decision by two to one. Leave to appeal to the Supreme Court was refused – but the refusal was on the grounds that the SC was shortly to hear yet another vicarious liability appeal: *Various Claimants v The Catholic Child Welfare Society and the Institute of Brothers of the Christian Schools & Ors* [2010] [EWCA Civ 1106](#). There is a longer note on *JGE* [here](#). The Trustees of the Diocese announced that they would seek leave to appeal from the Supreme Court itself, on the grounds that if the Court of Appeal judgment in *JGE* were allowed to stand it would have implications not just for the Churches but for the wider charity sector generally – not least in relation to possible vicarious liability for torts committed by charity volunteers.
96. In addition, in *E v English Province of Our Lady of Charity* [2012] [EWCA Civ 938](#) the Court of Appeal had held a diocesan trust (as being in an equivalent position to the diocesan bishop) vicariously liable for sexual abuse committed by a priest when visiting a children's home in the diocese, on the basis that the relationship between the priest and the Roman Catholic Church was akin to employment.
97. The Supreme Court duly heard the appeal from the Court of Appeal judgment in *Various Claimants*. In *Catholic Child Welfare Society & Ors v Various Claimants and The Institute of*

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<sup>27</sup> [2004 SCC 17](#).

<sup>28</sup> At para 39.

*the Brothers of the Christian Schools* [2012] UKSC 56 it addressed the issue of vicarious liability for historic sexual abuse.

98. The Institute, whose members are lay religious, was founded in 1680 to teach children. The question arising in this appeal was whether or not the Institute was vicariously liable for alleged acts of sexual and physical abuse of children by its members between 1952 and 1992 at St William's School – a residential institution at Market Weighton for boys in need of care. The Institute did not own the school, which in 1973 became an assisted community home for children in the care of the local authority, managed by the Middlesbrough Diocesan Rescue Society until 1982, and thereafter by the Catholic Child Welfare Society (Diocese of Middlesbrough). In 1990 the headmaster, Brother James, was expelled from the Institute after it was discovered he was guilty of systematic sexual abuse of boys in his care and in 1993 and 2004 he was convicted of numerous sexual offences against boys over a period of 20 years. The School was closed in 1994.
99. Claims for damages were brought in respect of alleged abuse were brought by 170 men against the managers of the school from 1973 (the 'Middlesbrough Defendants', who had inherited the statutory liabilities of the former managers and entered into contracts of employment with the teachers who were Christian Brothers) and against the Institute itself. The brothers who taught at the school were not bound contractually to the Institute but to the Middlesbrough Defendants. As a preliminary issue, the High Court held – and the Court of Appeal confirmed – that the Institute was not vicariously liable for the tortious acts committed by Christian Brothers at the school. The Middlesbrough Defendants appealed to the Supreme Court, arguing that vicarious liability should be shared between them and the Institute.
100. The Supreme Court allowed the appeal. Delivering the judgment of the Court, Lord Phillips of Worth Matravers PSC enunciated a two-stage test for vicarious liability:

'The test requires a synthesis of two stages: (i) The first stage is to consider the relationship of D1 and D2 to see whether it is one that is capable of giving rise to vicarious liability. (ii) ... What is critical at the second stage is the connection that links the relationship between D1 and D2 and the act or omission of D1' (para 21)

He concluded that:

- the necessary relationship between the brothers and the Institute and the close connection between that relationship and the abuse committed at the school had been made out (para 88);
- the relationship between the brothers and the Institute was much closer to that of employment than the relationship between the priest and the bishop in JGE (para 89);
- the business and mission of the Institute – the provision of a Christian education to boys – was the common business and mission of every brother who was a member of it (paras 89 & 90);

- the relationship between the Institute and the brothers enabled the Institute to place the brothers in teaching positions and, in particular, in the position of headmaster at St William's and there was a very close connection between the relationship between the brothers and the Institute and the employment of the brothers as teachers in the school (para 91);
- the children at the school were vulnerable (para 92); and
- there was a very close connection between the brother teachers' employment and the alleged sexual abuse (para 93).

In short:

'This is not a borderline case. It is one where it is fair, just and reasonable, by reason of the satisfaction of the relevant criteria, for the Institute to share with the Middlesbrough Defendants vicarious liability for the abuse committed by the brothers' (para 84).

101. It should also be remembered that in some circumstances vicarious liability can apply to incidents that occurred so long ago that they have almost been forgotten by the employer – which is one of the principal criticisms of those who feel that the law on vicarious liability has drifted too far in the direction of claimants. In *Raggett v Society of Jesus Trust of 1929 for Roman Catholic Purposes & Anor* [\[2010\] EWCA Civ 1002](#) the Governors of a school accepted vicarious liability for the activities of a Jesuit schoolteacher alleged to have sexually abused a pupil; however, they argued that the case was time-barred under the Limitation Act 1980. The Court of Appeal held that, nevertheless, even though the complaint was time-barred, the judge at first instance had properly exercised her discretion under s 33 of the Limitation Act 1980 in allowing the action to proceed.
102. In *A v Watchtower Bible and Tract Society (Trustees of) & Ors* [\[2015\] EWHC 1722 \(QB\)](#) the Court was prepared to hold the Jehovah's Witnesses liable for sexual assaults on Ms A, now 29, carried out by one Peter Stewart, a 'ministerial assistant', from 1989 to 1994 when she was between about 4 and 9. It did so despite the fact that:
  - the action was out of time under the Limitation Act 1980; and
  - Stewart did not have any employment relationship with the JWs.
103. *Watchtower Bible and Tract Society* is completely in line with recent cases, all of which suggest that judges have become very reluctant to conclude that a survivor of sexual abuse should not be compensated, even if the perpetrator is dead or was not an employee of the organisation that is being sued.
104. More generally, the Supreme Court has handed down two linked judgments: *Mohamud v WM Morrison Supermarkets plc* [\[2016\] UKSC 11](#) and *Cox v Ministry of Justice* [\[2016\] UKSC 10](#). *Mohamud* is about the degree of connection between the defendant and the wrongdoer that is required to make the defendant vicariously liable for the wrongdoer's actions, while *Cox* addresses the degree of connection between the defendant organisation, the

wrongdoer and the impugned act that is necessary for vicarious liability to arise. In short, the decisions in *Mohamud* and *Cox*, taken together, limit even further the degree to which a defendant organisation can argue successfully that a miscreant employee or agent was acting outside its control.

105. On the other hand, it may possibly be that the courts are becoming more reluctant to allow extensions of time in relation to very old allegations. In the recent case of *F And S v TH* [2016] EWHC 1605 (QB) the two claimants sought damages as victims of sexual abuse which, they alleged, was perpetrated by Father M between 1979 and 1986. The defendants were sued as personal representatives of the Bishop then responsible for the diocese in which Father M worked as a priest. Though it was accepted (in effect on behalf of the local Roman Catholic Church) that the Bishop was vicariously liable for such acts of abuse as might be established; but the defendants argued successfully that, because at least 30 years had passed since the last alleged acts of abuse, they could not now be proved to the requisite standard of proof: the balance of probabilities and the passage of time had rendered testimony unreliable and made it difficult fairly to assess such testimony as could be given [2]. The primary limitation period under the Limitation Act 1980 had expired; and Langstaff J refused the application for an extension because:

‘... although it is entirely possible that one or both of the claimants may have been the subject of serious abuse and breach of trust by a priest for whose deeds the defendant is vicariously liable I do not think that a fair trial of these allegations is any longer possible.’ [87].

That said, however, it cannot be emphasised too strongly that *any case involving vicarious liability for sexual abuse is highly sensitive to its facts*: just because Langstaff J refused an extension in *F and S* does not mean that another judge would not allow an extension in a future case.

106. Finally on this point, if (say) an organist or caretaker/verger is regarded as ‘employed’ by a church through its PCC, congregational board or trustees, that church may be vicariously liable for any torts/delicts<sup>29</sup> committed by that person.

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<sup>29</sup> The *Kilbrandon Report* (which though originally published in 1964 was republished by the Scottish Government in 2003) has this to say at Appendix B about vicarious liability in Scots law: ‘... a defender may be vicariously liable for the act of another although he himself has not been in fault at all. Thus the employer of a servant who commits a delict in the course of his employment is liable in damages, although he is not personally involved in the delict and has taken all proper care to choose a competent servant. Vicarious liability, defined in this way, is a comparatively modern development, and was adopted in Scots law only in the nineteenth century...’.

## CONCLUSION

107. If one can come to any conclusion at all it is this: that the situation is in a constant state of flux. On clergy employment, in particular, the law appears to be in transition. It might have been thought that the Supreme Court judgment in *Preston* had halted the tendency to find an employment relationship where none was intended by the Church in question and had to some extent moderated the influence of *Percy*. However, judges have been increasingly reluctant to draw a hard-and-fast distinction between 'employee' and 'office-holder'; and it remains to be seen to what extent *Preston* will change that – though the judgment of the Court of Appeal in *Sharpe* is consistent with the Supreme Court's line in *Preston*.

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In 2013 the Equality and Human Rights Commission published [\*Religion or belief in the workplace: A guide for employers following recent European Court of Human Rights judgments\*](#), which members are urged to read. The EHRC's guidance on religion and belief is currently in course of revision: publication is imminent.