MINISTERS OF RELIGION AND EMPLOYMENT LAW IN THE UNITED KINGDOM: RECENT JUDICIAL DEVELOPMENTS

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1. INTRODUCTION

In recent years there has been a radical increase in the number of cases entertained by the secular courts on the question of whether ministers of religion are employees. The question, which concerns the classification of the status of clergy in secular law, is an important one with profound legal consequences for churches. If ministers of religion are classified as employees then the stands which the State has set in its employment law are applicable to churches in their disciplinary processes governing clergy. The State's law on this subject is found in various Acts of Parliament, notably, the Employment Protection (Consolidation) Act 1978 and the Employment Rights Act 1996. If ma cleric is treated legally as employed, by the State's legislation and judicial decision made under it, a variety of rights arise. These include, *inter alia*: (1) the employee's right of recourse to the State's industrial tribunals in cases of dismissal: (2) the right not to be dismissed unlawfully and unfairly; (3) the right to be given reasons for dismissal; (4) the right to be given an opportunity to put a case to employer against dismissal; (5) the right to compensation (in the form of damages); and (6) the right to be considered for re-instatement [1]. The subject is an important one for a variety of other related reasons. First, there seems to have been in these recent judicial decisions a marked movement away from classical doctrine on the subject. Secondly, the matter raises the issue of the autonomy of churches to operate their own internal systems of discipline and dismissal. Thirdly, therefore, the subject cancers directly the question of the permissible bounds of State intrusion and the applicability of secular standards

[1] See generally J. BOWERS. *Employment Law,* London, 1990, Ch. 10.

to ecclesiastical disciplinary action against clergy. Finally, there is the financial anxiety for churches which may have to increase their own expenditure on insurance to cover dismissal claims in the industrial tribunals.

2. THE CLASSICAL DOCTRINE

The classical doctrine is that ordained ministers do not exercise ministry under a contract of employment -they are not employees. Four basic reasons are given which may for the sake of convenience be described as *the doctrine of incompatibility*. First, there is a fundamental incompatibility between, on the one hand, vocation and the spiritual nature of ministerial functions and, on the other hand, the existence of a contact; a minister of religion cannot *agree* to do things which he is called by God to do. Secondly, ministerial functions arise by way of a religious act (such as ordination), which is treated as a spiritual event and not a contractual transaction. Thirdly, Clergy (specially those of established Church of England) are treated legally as «office-holders» –their functions are not distributed or governed by contract but by ecclesiastical law which is treated as part of the law of the land. Lastly, according to classical doctrine, when ministerial appointments are made, the parties do not intend to enter a contract of the type recognised at common law [2].

3. TERMINOLOGICAL MATTERS

In order to determine whether ministers of religion may be classified legally as employees the courts must apply the relevant legal definitions. They are as follows. By Parliamentary statute, «"employee" means an individual who has entered into or works under ... a contract of employment». Similarly, a «"contract of employment" means a contract of service or of apprenticeship, whether it is express or implied and (if it is express) whether it is oral or in writing». An «"employer" is the person by whom the employee ... is (or.... was) employed» [3]. Various tests have been devised by the courts to supplement these statutory provisions. First, there must be an element of *control* in the relationship: the employer has a power of selection, a right to control what the employee does and the way he does it and a right to suspend and dismiss [4].

Secondly, *integration:* the employee must be fully integrated into the employer's organization (the employee must be «part and parcel» of it) [5]. Thirdly, the *economic reality* test: the agreement, which may be express or implied, must be one to provide service in return for remuneration, which itself is under the employer's

[2] N. DOE, *The legal Framework of the Church of England,* Oxford, 1996, p., 198ff.

[3] Employment Protection (Consolidation) Act. 1978, s. 153, Employment Rights Act 1996, s 230.

[4] *Short v J & Henderson Ltd (946) TLR 427.*

[5] *Beloff v Pressdram Ltd* (1973) 1 A11 ER 241.

control [6]. Provided these requirements are satisfied, the courts will accept that an employer-employee relationship exists.

By way of contrast, classically in law, «office-holders» have been treated as quite distinct from «employees». Those who hold offices have not been treated as employees and the industrial tribunals, therefore, enjoy no jurisdiction over then. According to the common law and office is «a subsisting, permanent, substantive position which has its existence independently from the person who filled it, which went on and was filled in succession by successive holders» [7]. Under the classical doctrine the possession of «orders» (being in holy orders) is treated canonically as being an office. With regard to the Church of England, a bishop, an archdeacon and an incumbent, for example, are all treated as office-holders. This is because the positions the occupy are not the product of agreement but of ecclesiastical law: «offices of this type in the Church of England are the creation of statute or common law», and not the creation of contract. Clergy are either «instituted» into these offices or they are «licensed» to them [8].

4. JUDICIAL DECISIONS

This section is an analysis of a selection of judicial decisions on the employment status of clergy. It explores: (1) the extent to which the secular judges have applied the terms of the classical doctrine: (2) the introduction in recent years of the notion that it *is* legally possible for ministers of religion to be classified as employees; and (3) the underlying confusions and inconsistencies in judicial approaches to this question. What is striking about this cases is the range of *reasons* given by the courts for their decisions.

(1) *Ecclesiastical Jurisdiction and Contract:* The classical doctrine that clergy are not employees was developed originally in relation to the Church of England. The case of *In re Employment of Church of England Curates* (1912) concerned a curate, an ordained clergyman appointed by the bishop on the nomination of the incumbent of a parish to assist that incumbent; the individual was licensed by the bishop to what was described as the office of curate. The High Court decided that a curate was not an employee. Parker J considered that the curate's functions and control over the curate were regulated by ecclesiastical jurisdiction and not by a contract [9].

(2) *Incompatibility between Spirituality and Contract:* In *Rogers v Booth* (1937), the Court of Appeal held than a person who was an officer in the Salvation Army was not an employee. In this case Greene MR used the idea that the rela-

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[6] *Ready Mixed Concrete (SE) Ltd v Minister of Pensions* (1968) 2 QB 497.

[7] *Great Western Railway Co v Bater* (1920) 3 KB 256.

[8] *Legal Opinions Concerning the Church of England,* Legal Advisory Commission, London, 1994, p. 120 (this contains advice on particulars which ought to be included in contracts of employment of clergy working in the sector ministry, that is, ministry outside the traditional parish, such as clergy working for a Diocesan Board of Finance or a Diocesan Board of Education).

[9] (1912) 2 Ch 563.

tionship between the officer and his Salvation Army superior (the general) was spiritual and not contractual. There was no evidence than the parties intended to enter contractual relations and the sum of money that the officer received for his ministry was «a maintenance payment» and not a contractual wage [10].

(3) *The Coexistence of Offices and Contracts*: In the late 1970s the courts embarked on a critical analysis of the question whether an office-holder was capable of being, at the same time, an employee. In *Barthope v Exeter Diocesan Board of Finance* (1979) the Industrial Tribunal considered that a lay reader (a person no ordained but licensed by the bishop to preach) of the Church of England was not an employee; the lay reader, like a curate, was classified as an office-holder. The Employment Appeal Tribunal, on the other hand, considered that a lay reader was an office-holder who potentially could also hold a contract of employment –an office and a contract of employment could co-exist. Barthope had been appointed for one year «subject always to the regulations of the bishop and to any special directions contained in the licence "and" subject to three months notice of termination ... and open for reconsideration for renewal». These provisions were contained in a document headed «Terms of Reference for Employment» which, Barthope explained, was «the best I could get by way of a contract». The case was remitted to the Industrial Tribunal but was settled before determination. The decision of the appeal tribunal is also interesting insofar as Slynn J concluded: (1) that it was difficult to establish precisely who were the contracting parties; (2) that the presence of regulation by ecclesiastical jurisdiction did not preclude the existence of a contract of employment; 3) that an incumbent, a bishop and a cathedral dean were office-holders not capable of being employees: and (4) that a curate was possibly not an office-holder the position lacked continuity [11].

(4) *The Possibility of Clergy Contracts*: Whilst *Barthope* related to a lay reader, the case of *Methodist Conference v Parfitt* (1984) concerned an ordained minister of the non-established Methodist Church. The complaint was for unlawful dismissal and the Industrial Tribunal decided that it possessed jurisdiction under the Employment Protection (Consolidation) Act 1978 as it considered that the minister was an employee. The Court of Appeal, however, considered that Parfitt was not an employee. Dillon LJ decided than the 1912 case was not relevant as a Methodist minister, unlike a Church of England curate, was not an office-holder. Instead the court focussed on the spiritual. Dillon LJ explained that the spiritual nature and functions of the minister arose from a religious act (ordination) and not from a contract. However, importantly, Dillon J also explained than undertaking to perform spiritual work did *not* necessarily preclude the existence of a contract. A contract could be drafted setting out remuneration, holidays and functions (for example, holding church services), but this would be unusual. Such an agreement would have to be supported by documentary evidence. May J had a somewhat different approach: for him the minister was not employed simply because the agreement reached did not satisfy the legal requirements for a contract there was simply

[10] (1937) 2 A11 ER 751.
[11] (1979) ICR 900.

no intent to create a contract; for May J, there was evidently some sort of agreement but it was not contractual [12].

(5) *The influence of Parfitt*: The decision in Parfitt played a crucial role in the later case of *Davies v Presbyterian Church of Wales* (1986) in which the House of Lords held that there was no contract, repeating the principle than the spiritual nature of ministerial functions was incompatible with the existence of a contract of employment, In addition, the House of Lords introduced a number of new ideas: (1) whether there was a contract was a legal not a factual question; (2) ministerial functions are dictated not by contract but by conscience; (3) the minister is a servant of God and not a servant of a contracting party; and (4) the Methodist Church's «Book of Rules» did not contain terms of employment capable of being offered and accepted (as was required by the secular law of contract) in the course of a religious ceremony. At the same time, however, Templeman LJ admitted (as had Dillon LJ in *Parfitt*) that in law it was possible for a contract to be created but that there was no evidence of one on the facts before the court [13].

(6) *The presumption Against a Contract:* In both *Parfitt* and *Davies* we see for the first time the judicial idea that there is a presumption that there is no contract but that this presumption could be rebutted by evidence of a contrary intention. This approach was taken a little further in two cases from 1990 dealing with non-Christian religious organizations. In *Santokh Singh v Guru Nanak Gurwara* (1990) the court had to determine whether there was a contract between a Sikh priest and his temple, it followed *Davies* and *Parfitt*. Whilst the constitution of the temple labelled the priest as an «employee of the temple» this, it was decided, was not sufficient to function as a documentary contract [14]. A similar approach was used in *Guru Nanak Temple v Sharry* (1990) in which a document passed between parties (the priest and the temple) entitled a «contract». The Industrial Tribunal held that this was sufficient evidence of a intent to create legal relations (and therefore a contract). The Employment Appeal Tribunal, however, reversed the decision: the parties had carelessly used language in the document and there was no real evidence of a contractual intent [15]. The implication of this case is that the presumption against there being a contract may be rebutted only by the clearest evidence of an actual contractual intent [16].

(7) *The Presumption Against a Contract is Irrefutable*: The doctrine of a presumption against a contract suffered something of a set-back in *Birmingham Mosque Trust Ltd v Alavi* (1992). In this case the industrial Tribunal considered that there was a contract between the khaleeb and the trust company running the mosque. The contract was based on certainty of terms in letters passing between the parties

[12] (1984) QB 368.

[13] (1986) 1 A11 ER 705.

[14] (1990) ICR 309.

[15] EAT 21/12/90 (145/90).

[16] For two other cases at this time, *Fane v Bishop of Manchester* (1990) and *Turns v Smart, Carey and Bath and Wells Diocesan Board of Finance* (1991), which applied the classical doctrine in relation to the Church of England, see N. DOE, *The Legal Framework of the Church of England*, Oxford, 1996, p. 199, n 131.

which clearly expressed a contractual intent; the agreement defined salary, hours of work and duties. The decision seems to be a clear application of the *Davies* and *Parfitt* idea that it is possible to create a contract. However, on appeal, the Employment Appeal Tribunal held, per Wood J, that: «it seems to us desirable that the same broad brush approach should be taken by all those faced with this issue "where" religious factors are introduced» [17]. In short, this decision tends to the proposition that «the presumption against a contract is irrebuttable», that it cannot be countered by evidence of a contrary intent.

(8) *Coker v Diocese of Southwark* (1995): This case typifies the unsettled nature of judicial responses to the problem of clergy contracts. It concerns a curate of the Church of England. In the Industrial Tribunal it was held that letters passing between the curate and the bishop clearly indicated an agreement; the curate was an employee because there was evidence of service, control and organization; the bishop was a likely contracting party, along with the Diocesan Board of Finance (which paid the curate).

The Tribunal also accepted that there was no incompatibility between an office and a contract. The chairman of the tribunal (Professor Rideout) concluded that the church was an institution which had chosen to use secular models and a visible organisation and therefore could not escape secular standards. He explained, even, that there is a presumption *in favour* of contract and this must be rebutted to oust the jurisdiction of the industrial tribunal. This decision marked a dramatic departure from earlier decisions. However, the decision was overturned on appeal. The Employment Appeal Tribunal decided that the curate was not an employee: endorsing the decision of Parker J in the 1912 case, it held the ministerial functions of the curate were regulated by ecclesiastical jurisdiction and not by contract. Importantly, however, the appeal tribunal applied the *Davies* and *Parfitt* approach and concluded that the evidence was insufficient to rebut the presumption that clergy are not employees. The Employment Appeal Tribunal considered that the chairman of the Industrial had applied «a personal view of what modern policy ought to be» [18].

5. CONCLUSIONS

It is clearly the case that each of these decisions has turned on its own particular facts. And the see-saw nature of exchanges between Industrial Tribunal, which at first instance are sympathetic to the contract notion, and the decisions on appeal which are antagonist to the idea, is quite bewildering. Al the same time, it is possible to draw some reasonably definite conclusions about the law on this subject. First, the classical doctrine has not entirely disappeared. Some judges still cling

[17] (1992) ICR 435.

[18] (1996) EAT37/4/95; see also *Chalcroft v Bishop of Norwich* (1995) 32040/95 (in which it was held that a licenced clergyman of the Church of England, on entering the appointment, had not given any thougth to the question of contract until the date of the dispute which resulted in the revocation by the bishop of the clergiman's licence).

to the idea that as a basic principle ministers of religion are not, as a legal proposition, employees working under a contract of employment. There has been, however, a subtle shift in the terms of the classical doctrine. The judges now admit that it is possible for clergy, at the same time, to be classified as employees provided there is clear evidence of a contract. The fact some clergy (in the Church of England) hold offices is not an obstacle to a contract co-existing. It is not impossible this evidence, but it is difficult to establish it. The operative principle seems to be that is a judicial presumption against the existence of a ministerial contract, but that this presumption may be rebutted if the is factual material showing an agreement between parties which satisfies the requirements for a valid contract under secular law. In short, having the status of a minister of religion is not an obstacle in law to the existence of a ministerial contract of employment.

These developments have been a causa of both concern and criticism amongst observers [19]. Some are worried that there is now a fundamental inconsistency in the law. Ministers of religion pay income tax and National Insurance Contributions and they *are* treated as employees for these purposes; one writer has commented that «Perhaps this is a matter where intuition rather than logic carries the day» [20]. Others are unhappy with the extent to which churches shun the standards of secular society, «especially relationships of economic exchange», and the degree to which the courts have not applied the principle that for most religious groups, which have the status of voluntary associations, the courts treat the internal rules as terms of a contract entered into by the members [21]. The effects of this doctrine have simply not been explored by the courts. Others are alarmed at the lack of clarity, the luch of consistency as between decisions and approaches, the instinctive judicial reluctance to get involved in religious matters, and the judicial failure to distinguish between religions [22]. Whatever the legal future of this subject may hold, it cannot be said at present that the courts of the United Kingdom have categorically denied that ministers of religion may be classified as employees.

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[19] For an observer broadly in agreement with the decisions in *Davies* and *Parfitt*, see A. N. KHAN, «Employment of church minister», *Solicitors Journal*, 131 (1987) p. 38.

[20] S. E. WOOLMAN, «Capitis deminutio», *Law Quarterly Review*, 102 (1986) 356.

[21] D. R. HOWARTH, «Church and state in employment law», *Cambridge law Journal*, 145 (1986) p. 404.

[22] E. BRODIN, «The employment status of ministers of religion», *Industrial Law Journal*, 25 (1996) p. 211.