Appeal No. UKEATS/0034/09/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 9 & 10 February 2010

Before

THE HONOURABLE LADY SMITH

(SITTING ALONE)

REVEREND ALLAN J MACDONALD — APPELLANT

FREE PRESBYTERIAN CHURCH OF SCOTLAND — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr A Strain (Solicitor Advocate) Instructed by: Messrs Biggart Baillie No 2 Lochrin Square 96 Fountainbridge Edinburgh EH3 9QA
For the Respondent	Mr I Truscott (One of Her Majesty's counsel) Instructed by: Messrs Brodies LLP Solicitors 15 Atholl Crescent Edinburgh EH3 8HA Mr D Campbell (Advocate) Instructed by: Messrs Brodies LLP Solicitors 15 Atholl Crescent Edinburgh EH3 8HA

SUMMARY

JURISDICTIONAL POINTS

Worker, employee or neither

Employment Tribunal held that a Minister of the Free Presbyterian Church of Scotland was not an employee. He was an office holder. Judgment challenged on appeal as not being "**Meek**" compliant. Appeal refused. The judgment, though economically explained, was adequate. Furthermore, the conclusion was entirely understandable in the light of the facts found and the relevant law. The Employment Appeal Tribunal was not, in particular, satisfied, that evidence which the Claimant sought to have revisited would, even if accepted, have led to the conclusion that the Claimant was an employee.

THE HONOURABLE LADY SMITH

Introduction

1. The Claimant presented a claim to the Employment Tribunal asserting that he was unfairly dismissed by the Respondents. The Respondents' first ground of resistance to his claim was that he was not an employee and therefore had no statutory right not to be unfairly dismissed.

2. This is an appeal from the judgment of an Employment Tribunal sitting at Glasgow, Employment Judge Mr R A Mackenzie, which found:

> **""…the Claimant is not an employee of the Respondents in terms of section 230 of the Employment Rights Act 1996."**

3. The judgment was registered on 28 May 2009 and followed a pre hearing review at which evidence was heard from the claimant and from the respondents' General Treasurer, Mr W Campbell. There was also documentary evidence before the Tribunal documents including the entire "Manual and Practice of the Free Presbyterian Church" ("the Manual"), correspondence between the Claimant and the Respondents, the Formulae signed by him and the call issued to him by the congregation of Farr.

4. I will, for convenience, continue referring to parties as Claimant and Respondents.

5. The Claimant was represented by Mr Strain, solicitor-advocate, before the Employment Tribunal and before me. The Respondents were represented by Mr Truscott QC and Mr Campbell, advocate, before the Tribunal and before me.

Background

The Free Presbyterian Church of Scotland

6. The Respondents can trace their foundation to the Disruption of 1843 when a schism occurred within the established Church of Scotland over the fundamental issue of the church's relationship with the State. There were a series of judicial decisions concerning, for the most part, a system whereby landowners or the Crown presented men to become Minister of a particular parish without consulting the congregation before doing so. That system was in accordance with a statute of the United Kingdom Parliament, the **Church Patronage (Scotland) Act 1711.** That Act was regarded by some as an example of the use by Parliament of its legislative power in breach of one of the guarantees in the **Act of Union of 1707**. Matters had come to a head when litigation arose, in 1834, in connection with the filling of a vacancy in the parish of Auchterarder. The local congregation had rejected the nominee of the lay patron, the court had upheld the right of the patron to nominate the Minister for the parish and, put shortly had, furthermore, ruled that the established church was a creation of the State and was dependent, for its legitimacy, on an Act of Parliament. In 1842, the "Claim" of those who objected to what was referred to as "The Encroachments of the Court of Session" was recorded in the "Claim of Right".

7. On 18 May 1843, the retiring Moderator of the Church of Scotland led the opening of its General Assembly at St Andrew's Church in George Street, Edinburgh, then read out a document containing a detailed protest declaring that he considered there had been an infringement of the liberties of the constitution of the church, following which he and some 200 ministers left the meeting, in a procession that made its way to Tanfield Hall in Canonmills where a further 250 or so Ministers awaited their arrival. They formed the Free Church of Scotland, holding their first meeting, the Disruption Assembly, that day. Their "Protest" and

subsequent separation was recorded in a document dated 14 August 1893. The Claim, Protest and Deed of Separation are incorporated in the respondents' Manual as Appendix 1.

8. The Respondents' governmental structure is Presbyterian. That is, each congregation elects elders and deacons. They require to be ordained. The former form the Kirk Session, which attends to matters spiritual and the latter form the Deacon's Court, which attends to matters temporal. Each congregation selects its own Minister, by means of issuing a "Call" and the Minister is known as a "Teaching Elder". There is a presbytery for each area, comprising the various kirk sessions within it and all the presbyteries together comprise the Synod, which is the respondents' superior court.

9. Before becoming a Minister, it is necessary to be a Probationer. Probationers may be licensed to preach but only after (a) giving satisfactory answers to a series of specific questions contained in Appendix II to the Manual and (b) signing a document called "The Formula". Questions are also put to elders and deacons who require to answer them in the affirmative before they can be ordained. Further, they are put to a person who, after having been a probationer, is called by a congregation to be their Minister, and also to a Minister who has previously been ordained as a Minister and is being admitted to a Pastoral Charge.

10. In each case, whether elders, deacons, Probationers or Ministers, the questions include the following:

> **"Do you believe that the Lord Jesus Christ, as King and Head of the Church, has therein appointed a government in the hands of Church officers, distinct from, and not subordinate to in its own province to, civil government, and that the Civil Magistrate does not possess jurisdiction or authoritative control over the regulation of the affairs of Christ's Church; and do you approve of the general principles embodied in the Claim, Declaration, and Protest, adopted by the General Assembly of the Church of Scotland in 1842 and the Protest of Ministers and Elders, Commissioners from Presbyteries to the General Assembly, read in the presence of the Royal Commissioner on 18th May 1843, as declaring the views which are sanctioned by the Word of God, and the standards of this Church, with respect to the spirituality and freedom of the Church of Christ, and her subjection to Him as her only Head, and to His Word as her only standard?"**

11. Before a Probationer can receive his licence to preach he must, in addition to answering the questions to which I have referred, sign "The Formula". It includes the following terms:

> **"I do hereby declare, that I do sincerely own and believe the whole doctrine contained in the Confession of Faith approved by former General Assemblies of this Church to be the truths of God; and I do own the same as the confession of my faith; as likewise I do own the purity of worship presently authorized and practised in the Free Presbyterian Church of Scotland, and also the Presbyterian government and discipline thereof; which doctrine, worship and Church government, I am persuaded are founded on the Word of God, and agreeable thereto; I also approve of the general principles respecting the jurisdiction of the Church, and her subjection to Christ as her only Head, which are contained in the Claim of Right and in the Protest referred to in the questions already put to me; and I promise that, through the grace of God, I shall firmly and constantly adhere to the same….."**

12. When a Probationer, or an existing Minister, receives a call from a congregation, the Formula requires to be signed again. The Formula is signed only by the Probationer or Minister. It is not signed by the Respondents. It does not bear to be a contractual document.

13. The Manual refers to Ministers as "Pastors" and contains a section entitled "Duties of Pastor" (p.36). It sets out what Pastors are "expected to" do (pray, read the scriptures, preach, teach, exhort and comfort), what their function is (administering the Sacraments, fulfilling what is required for the edification of young or old), that they have a duty to visit the congregation at home, what they are required to do (the work of an evangelist, raising and applying congregational funds etc) and, importantly, that their function is as a spiritual ruler.

14. The Tribunal found that there is a style of worship and pattern or service that is "expected of" a Minister in the Respondents' church, in accordance with their being a conservative and traditional denomination. The finding goes no further than identifying that that is what is "expected of" Ministers.

15. There is no provision in the Manual, nor in any other document stipulating a Minister's hours of work, his leave or whether or not he is to receive sick pay. There was no finding in

fact to the effect that these were matters which were otherwise provided for nor was it suggested by Mr Strain that there had been any evidence to that effect.

16. Ministers are not monitored by the Respondents or by their local presbytery. They are not subject to supervision, unlike Probationers, who are supervised and made subject to the specific direction of a local Presbytery during their probationary period. The Synod decides on an initial period of probation, reviews the Probationer's progress and determines the point at which the Probationer can be considered eligible to receive a call from a congregation.

17. The Manual also sets out the duties and powers of the "Ruling Elders", that is, the elders of the Kirk Session other than the Minister (see. P.17). Whilst it is there stated that each Ruling Elder is allowed to exercise a large measure of discretion in the exercise of his functions, it also sets out a list of duties that are incumbent on such a person.

18. As is evident from the correspondence, salary slips and P60's that were produced, Probationers receive a salary from which tax and national insurance is deducted through the PAYE system and in respect of which the Respondents' pay the employers' national insurance contribution. There were no documents before me or, so far as I can tell, before the Tribunal indicating what the system is whereby Ministers are paid. The Tribunal found (paragraph 46) that they receive a stipend from the Respondents' sustentation fund to which congregations contribute. Otherwise, the Tribunal found (paragraph 51) that, in the case of the Claimant, he was provided with a manse by the Farr congregation, that the congregation paid national insurance contributions, that the congregation gave him an interest free furnishing loan, that they paid his contents insurance premium, that they gave him a car loan and that they paid his council tax.

19. Finally, Chapter IV of the Manual is entitled "Discipline". It begins:

> **"CHURCH DISCIPLINE is held to be of great use and necessity in our ecclesiastical system. It is regarded as belonging to that government which Christ has instituted in the visible order of His kingdom, and which, by His institution, is essentially distinct from the government of civil magistrates."**

20. It refers to discipline being:

> **"…more a privilege than a punishment, as one of the ordinances granted to the professing people of Christ."**

21. Misconduct by Ministers and Probationers may be dealt with in various ways. They include deposition and suspension, the latter possibly being for an indefinite period ("*sine die"*). Provision is also made for the "reponing" of a Minister, "reponed" being defined in the Manual as:

> **" restored to a position or office previously held."**

22. At p.113 of the Manual, it is provided:

> **"It is competent for a Minister to be reponed to his status and for a Probationer to have his license restored, upon professions of repentance which seem to be borne out by a course of consistent conduct."**

The Claimant's History

23. The Claimant became a Probationer in May 1999, having signed the Formula on 19 May 1999. He received a call from the Farr congregation on 4 September 2001, which he accepted. He signed the Formula again, on 28 September 2001 and was inducted to the Farr congregation as their Minister.

24. After having become Minister at Farr, the Claimant was asked by the Synod if he would serve on the committee of a care/rest home for the elderly that was owned by the Respondents and did so. He was asked by the Synod if he would serve, for a period, as the Respondents'

representative on a committee of Highland Council, and did so. He was asked by his presbytery if he would act as interim moderator of a vacant charge in Aberdeen, and did so.

25. The Claimant did not receive a written contract of employment nor did he receive a statement of terms and conditions. By way of contrast, the General Treasurer, Mr Campbell, was issued with a written contract of employment which contains provisions as to the duties of that role, his salary, hours of work, notice, holidays, grievance and disciplinary procedure, pension and sick pay. It was signed by him and by the Clerk of Synod on behalf of the Respondents.

26. A problem arose which concerned, put shortly, a complaint having been made about the conduct of the Claimant which involved him criticising another Minister. In January 2007, he was placed under administrative suspension and in May 2008 he was suspended *sine die.* His pastoral tie with the congregation of Farr was severed.

27. On 13 August 2008, the Claimant presented a claim to the Employment Tribunal in which he alleged that he had been unfairly dismissed.

The Tribunal's Judgment

28. The above summarises what were identified by the Tribunal as being

> **"The essential facts relevant to…" (paragraph 2)**

its judgment.

29. I approach this part of my judgment bearing in mind that, in the end of the day, the only attack on the Tribunal's judgment at the appeal was that it was not **Meek** compliant (i.e. that it did not accord with the principles set out in **Meek v City of Birmingham District Council**

[1987] IRLR 250 or with the requirements of rule 30(6) of the **Employment Tribunals (Constitution and Rules) Regulations 2004)**. Although part of the Notice of Appeal and Mr Strain's written submission was directed towards an argument that, on a proper application of the relevant law, the Claimant was clearly an employee, it was expressly departed from and his motion was that the case should be remitted to the Tribunal, for a rehearing.

30. The Tribunal's reasoning is, it is fair to say, economically stated. It would also have been helpful if the Employment Judge had used subheadings for each section and spelt out some of his reasoning in a little more detail.

31. It is, however, evident that paragraphs 3 to 68 contain the findings in fact. In paragraphs 69, 75-76 and 78, the Employment Judge refers to what he considers to be authorities relevant to the question of whether or not the Claimant's relationship was a contractual one and if not, what was the nature of his position. Discussion then follows.

32. So far as authorities are concerned, the Employment Judge relevantly refers to Harvey on Industrial Relations and Employment Law, Division A paragraph 168 where the learned authors identify (a) that there is a category of worker that is an office holder, and (b) under reference to the case of **Johnson v Ryan** [2000] ICR 236, that there are some workers who are both office holders and employees.

33. The Employment Judge, in the section between paragraphs 69 to 81, makes reference to the particular facts and circumstances of the Claimant's position and concludes that there was no contractual relationship between him and the Respondents. An important matter that weighs with the Employment Judge is that ordination of a Minister, of a deacon and of an elder in the respondents' church constitutes the setting apart of a person to a public church office. What

also evidently weighs with him is that a Minister is, in relation to the Respondents, in a very similar and in some ways, the same, position as deacons and other elders. He has regard to the fact that, unlike the case of deacons and elders, the respondents pay a salary to the Claimant but does not find that matter determinative; a claim for unlawful deduction from wages would not be the only means whereby a Minister could recover unpaid salary since he could claim in respect of a failure to pay a promised sum. Payment of a salary in an amount and with a regularity to which the payer has made a commitment is, of course, often an incident of an office. It does not, of itself, show either that payer and payee intended to enter into a legally enforceable contract or that the payee has the status of employee. Harvey cites the best example of an office holder being a policeman. Another is that of judge. It is within judicial knowledge that both receive what are referred to as salaries in sums to which the public purse commits but neither have the status of employee.

34. The Employment Judge also has regard to the fact that the other matter which distinguishes Ministers from deacons and other elders is that they are provided with a manse but he observes, relevantly, the trust status of such a manse; it is not owned by the Respondents but is held in trust. In the Claimant's case, the trustees for the Farr congregation held the manse. Any questions relating to the Claimant being deprived of would not be resolved by reference to any contract but would be a trust matter.

35. At paragraph 81, the Employment Judge states:

> **"I conclude that Deacons, Elders and Ministers are ordained to their respective offices within the Free Presbyterian Church and each is an office holder and that therefore the Claimant is an office-holder by virtue of his ordination. His rights and duties are defined by the office he holds and not by any contract. He is not an employee of the Respondents."**

36. Though shortly stated, that paragraph can, when read in the context of what has gone before, be seen to answer both of the above questions. That is, the Employment Judge

concludes that the parties did not enter into a contract and also that the nature of the Claimant's position as at May 2008 was that he was an office holder.

37. The Employment Judge then, apparently mindful of the second principle referred to in the reference to Harvey that an office holder could also be an employee, sets out to check whether, as he puts it at paragraph 83:

> **"….there are facts which could lead me to a conclusion that the Claimant could be an employee of the Respondents."**

38. Although the Employment Judge does not specifically articulate that the exercise on which he embarks from paragraph 83 onwards is on the basis of a hypothesis which he has in fact rejected, namely a hypothesis that the parties intended to and did enter into a legally enforceable contract, it appears that that is what he does. That would accord with his earlier conclusion that there was no contract between the parties. That said, it is fair to say that he does also seem to look again at the question of whether or not parties intended to create a legal relationship (see paragraph 83) when considering whether, on the facts, it was possible to conclude that the Claimant was an employee. He does not need to do so, since he has already concluded that there was no such relationship, but the Claimant's position is not thereby prejudiced.

39. In the section between paragraph 83 and 101, the Employment Judge reviews the facts. He does not find that they, overall, point to the Claimant being an employee of the Respondents. He does not detail, fact by fact, what points towards employment and what away from it. What can, however, be said is that on a review of the facts listed, only the PAYE arrangements and his being described as an employee in the accounts and for pension purposes, could be said to point towards him being an employee. Otherwise, the facts referred to by the Employment Judge are those demonstrative of an absence of control of the Claimant by the

Respondents and of the independence from the state and the Civil Magistrate of the Respondents, particularly in matters of discipline over its Ministers.

40. At paragraph 102, he refers to the Respondents' history and its effect on its structure and governance. The fact that the questions put to the Claimant when he was licensed as a probationer and when he was ordained as a Minster include those which seek his affirmation that he acknowledges that the "Civil Magistrate" has no jurisdiction over the regulation of the Respondents' affairs, evidently weighs with the Employment Judge, as does the fact that, under the Formula, the Claimant submitted to the exclusive jurisdiction of the Respondents on matters of discipline, discipline being declared, under the Manual, to be distinct and separate from the government of the Civil Magistrate.

41. At paragraph 104, the Employment Judge, having referred to it being accepted that the Church of England recognises its clergy as being employees, concludes, seemingly by way of contrasting that position with the respondents:

> **"The Free Church of Scotland was formed because a large number of Ministers and members left the Church of Scotland as it was perceived the State was interfering in the internal affairs of the Church. The Respondents as part of their beliefs declare the State does not have jurisdiction over the affairs of the Respondents and the Respondents have exclusive jurisdiction in matters spiritual which include discipline of a Minister. The Claimant accepted the Respondents' position by his answers to the questions put to him at the time of his ordination and by his subscription of the Formula."**

42. Finally, the Tribunal makes a short reference to Article 9 of **ECHR** and the fact that account is to be taken of the principles of an individual church when determining whether or not there was an intention to create a relationship of employer/employee. That is because the law should not readily impose on the members of a church, a legal relationship that would be contrary to their religious beliefs, as discussed in **New Testament Church of God v Stewart** [2008] ICR 282. Whilst the Employment Judge does not spell out what he makes of that principle, when the comments are considered in context, two things become apparent. One is

that his conclusion is consistent with recognition of the principle that, in the case of a church whose foundation and structure shows a belief that it is not appropriate, in the case of important offices including that of Minister, to set up a legal relationship that is subject to control by the Civil Magistrate. The other is that this is not a case where the initial conclusion is that there is a legal relationship requiring a check to be made to see whether, in holding that such a relationship exists, the law is imposing something that conflicts with the essential beliefs of that church. In short, the Article 9 considerations could be briefly and succinctly dealt with, given the facts and circumstances of this case; there was no need to have a concern that they were being breached.

The Appeal

43. As I have already indicated, Mr Strain confined his argument to making submissions in support of a motion that the case be remitted to a freshly constituted Tribunal for a rehearing on the basis that this Tribunal had failed to produce a **Meek** compliant judgment. In particular, he submitted that the Tribunal had failed to set out material findings in fact, had failed to set out the relevant legal principles and had failed to set out reasoning or justification for its conclusions.

44. On being asked what material findings in fact were missing from the judgment, Mr Strain said that there was an absence of findings as to parties' intentions in circumstances where the claimant had given evidence about his interpretation of the Claim of Right and the ability of the "Civil Magistrate" to intervene; he did not agree with the Respondents' interpretation. There was also, he said, a lack of findings regarding the Claimant's probationary period, the Claimant's weekly, daily and monthly duties as a Minister, about how other Ministers were treated regarding sick pay and about the Claimant's incidental work on the care home board and suchlike.

45. Otherwise, Mr Strain submitted that it was not possible to ascertain the Tribunal's reasons for having concluded as it did. In part, his submissions were to the effect that the facts referred to should have led the Tribunal to a different conclusion; he suggested, for instance, that the Manual ought to have been regarded as an employees' handbook.

46. Mr Truscott submitted that the appeal was ill-founded. Whilst the Tribunal's judgment may not have the minute detail that Mr Strain seemed to be looking for that did not matter. It was clear, on a full and proper consideration of the judgment, what the reasoning was. There was no need for any further findings in fact; as regards the nature of the Claimant's beliefs, the Tribunal had made findings about that. They were as stated by him in his answers to the questions put in accordance with the Manual and as stated in the Formula. Mr Truscott also went carefully through the relevant authorities to which reference is made below by way of demonstrating that, on the facts which were, essentially, to be found in the documents, the Tribunal had reached the correct the decision.

Relevant Law

47. Rule 30(6) of the rules appended to the 2004 Regulations provides:

> **"Written reasons for a judgment shall include the following information –**
>
> **(a) the issues which the tribunal or chairman has identified as being relevant to the claim;**
>
> **(b) if some identified issues were not determined what those issues were and why they were not determined;**
>
> **(c) findings of fact relevant to the issues which have been determined;**
>
> **(d) a concise statement of the applicable law;**
>
> **(e) how the relevant findings of fact and applicable law have been applied in order to determine the issues; and**
>
> **(f) where the judgment includes an award of compensation or a determination that one party make a payment to the other, a table showing how the amount or sum has been calculated or a description of the manner in which it has been calculated."**

48. That rule reflects the terms of its predecessor rule and the principles discussed in the case of **Meek**. The passage often quoted from **Meek** is that at paragraph 9 where Lord Justice Bingham stresses that such judgments are not required to be:

> **"….an elaborate formalistic product of refined legal draftmanship …"**

and makes it clear that it is sufficient if they:

> **"…contain an outline of the story ….and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led then to reach the conclusion which they do on those basic facts."**

49. The reference to the requirement being only for a "basic" outline, a "summary" of the "basic" facts and a "statement" of the reasons seems significant. A Tribunal's judgment and reasons are not to be subjected to the same scrutiny as a conveyancing deed. It is enough if an ordinary picture is painted; a "painting by numbers" picture will do even if incomplete so long as it has the main colours and the onlooker can tell what it is a picture of. It does not need to have the detail, subtlety and qualities of, say, Michaelangelo's "Last Judgment". That is not, of course, to say that the bare minimum sanctioned in **Meek** is the best form of judgment. More will, on occasions, be better. But there is a world of difference between the better or best judgment and a judgment which is so flawed when it comes to the basic requirements as to be fatally flawed.

50. It is also worth observing that, in **Meek**, Lord Justice Bingham was careful to stress that nothing he was saying was new. It was consistent with prior authority, including what was said by Lord Justice Eveleigh in the case of **Martin v Glynwed Distribution Ltd** [1983]IRLR 198 at p.202:

> **"The duty of an Industrial Tribunal is to give reasons for its decision. This involves making findings of fact and answering a question or questions of law. So far as the findings of fact are concerned, it is helpful to give some explanation of them, but it is not obligatory. So far as the questions of law are concerned, the reasons should show expressly or by implication what were the questions to which the Industrial Tribunal addressed its mind and why it reached the conclusions which it did, but the way in which it does so is entirely a matter for the Industrial Tribunal."**

51. Lord Justice Eveleigh's stress on the extent to which the Tribunal must be afforded a wide measure of discretion as to the style it adopts in writing its judgment and, significantly, that it should be appreciated that some of what it communicates about its reasoning it may, quite properly, do by implication, is of particular note in the light of the criticisms advanced in the present case. As will be evident from my review of the Tribunal's judgment, other styles are clearer than that which was adopted in this case and some of the Tribunal's reasoning is a matter of implication. According to Lord Justice Eveleigh, however, those factors would not, of themselves put the judgment into the "fatally flawed" category.

52. I turn to the substantive law relating to the central issue in the case, namely that of whether or not the Claimant was an employee of the Respondents. I do so not because it was actually an issue in the appeal but to understand and adjudicate upon the issue that was raised it seems important to consider the judgment's context.

53. Firstly, a person who is an office holder in the proper sense of that term is not, by virtue of holding that office, an employee.

54. Secondly, a worker who is an office holder may also be an employee. That was recognised in the case of **Johnson** and was also referred to by Lord Hope in the case of **Percy v Board of National Mission of the Church of Scotland** 2006 SC(HL) 1 at paragraph 87:

> **"The holding of an office and being an employee are not necessarily inconsistent with each other…….This is because it is possible to conceive of a contract which sets out the duties that are to be performed by the holder of an office which could lead to the conclusion that the office holder was an employee."**

55. The duality of office holding and employer/employee relationship is, however, as Lord Hope recognises, dependent on there having been, between the parties, an intention to create legal relations. That is a question that of necessity, arises before consideration can be

given to the nature of the relationship and whether, for instance, it is one of employer and employee. As Lord Justice Mummery commented in **Diocese of Southwark and others v Coker** [1998] ICR 140 at 146, the

> **"fundamental question"**

where the issue arises, is:

> **"whether there was a contractual relationship at all."**

and that is a question the answer to which must, he said, be arrived at by applying an objective test:

> **"(1) Not every agreement constitutes a binding contract. Offer, acceptance and consideration must be accompanied by an intention to create a contractual relationship giving rise to legally enforceable obligations.**
>
> **(2) That intention is to be objectively ascertained." (p.147C)**

56. That approach was endorsed Lord Nicholls in **Percy** at paragraph 23 and by Lord Hope, also in **Percy** at paragraph 107, where he states:

> **"Senior counsel for the appellant indicated that she wished to lead evidence from the appellant that it was her intention to enter into such a relationship. But the parties' intention when they entered into the agreement can only be established objectively, as Mummery LJ observed in Diocese of Southwark v Coker (p 147C0, by clear indications of a contrary intention in the document, as Dillon LJ said in President of the Methodist Conference v Parfitt (p.376, 377). There is ample authority in Scots law too for the proposition that, as a general rule, extrinsic evidence of the parties' intention as to whether or not they intended to be bound by obligations which they have entered into in writing in inadmissible (Bell, *Commentaries,* vol I, p 457; Stewart v Kennedy, per Lord Watson, p 30)."**

57. As was neatly summarised by Lord Justice Mummery in the **Diocese of Southwark** case, at p.147 A, if there is a lack of the parties' intention to create a legal relationship:

> **"….then it is unnecessary to ask whether the contract is one of service or some other kind of contract."**

58. Such a situation admits of only one answer, namely that the parties are not in a legally enforceable relationship. That being so it is otiose to consider the nature of their (non existent) relationship.

59. This situation can be distinguished from that which arises in "labelling" or "sham contract" cases, such as arose in **Young and Woods Ltd v West** [1980] IRLR 20, **Consistent Group Ltd v Kalwak & Ors** [2008] IRLR 505, **Snook v London and West Riding Investment Ltd** [1967] 2 QB and **Protectacoat Firthglow Ltd v Szilagyi** [2009] IRLR 365 where the issue is not that of whether parties intended to enter into a legally enforceable relationship but what the nature of their relationship is, in circumstances where the fact of their having entered into some sort of contract is not disputed.

60. Before leaving this matter I should add that **Percy** determined that when considering the issue of whether parties intended to create legal relations in the context of church and clergy, a Tribunal ought not to begin with a presumption that there was no intention to create such a relationship. The correct starting point is, rather, a neutral one.

61. Thirdly, there is no rule that Ministers of religion are all employees. Nor is there a rule that they are not employees. In the **New Testament Church of God** case, the Tribunal's conclusion that a pastor was an employee was upheld on appeal but Lord Justice Pill was careful to add:

> **"It will be clear from my earlier statements that upholding the employment tribunal's conclusions and decision in this case does 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."**

62. Fourthly, it may be the case that where a member of the relevant clergy asserts employment status, all the relevant facts will be contained in documents. If that is so, then the

general rule that whether or not a person is employed under a contract of service is a mixed question of fact and law, does not apply. If the identification of the relationship is dependent on the construction of a document or documents then the question is one of law: **Davies v Presbyterian Church of Wales** [1986] IRLR 194; **Lee v Chung and Shun Shing Construction & Engineering Co Ltd** [1990] IRLR 236.

63. Fifthly, and finally, there are no hard and fast rules as to the features that a relationship must have before it amounts to a contract of employment but, apart from the minimum of mutuality in the sense of an intention to create a legally enforceable relationship, there will usually be a sufficient degree of control over the worker so as to categorise him as a servant and the worker will be providing his own work and skill in return for remuneration and not doing so on the basis that he is in business on his own account (**Ready Mixed Concrete (South East) Limited v The Minister of Pensions & National Insurance** [1968] 1 AER 433; **Lee v Chung & ors**).

Discussion

64. Dealing firstly with the **Meek** challenge, I am not persuaded that the judgment is flawed in the manner that is suggested on behalf of the Claimant. It is, as I have said, economically stated. A more explanatory style would have been clearer and some matters are left to implication, but when the judgment is read as a whole and in context, I am satisfied that it meets the minimum requirements as explained in **Meek** and as identified in rule 30(6).

65. Contrary to what was submitted, the Employment Judge has set out, at some length, the facts that he considers that are relevant to his judgment. Furthermore, they can all be seen as relevant to the issue which he had to consider. He has referred to relevant legal principles. He has taken account, in particular, of the need for the Claimant to establish that there *was* a

contract between the parties, something which required him to be satisfied that they intended to create a legal relationship. It is plain that he was not satisfied that the Claimant had overcome that fundamental hurdle. It is also plain that the principles underlying the foundation of the Respondents, the fact that deacons and elders (who were clearly only office bearers and not employees) were largely in the same position as the Claimant, and the fact that the questions to which the Claimant gave affirmation and that two Formulae signed by him expressly excluded the jurisdiction of the "Civil Magistrate" all weighed heavily with him and led him to the conclusion that there was no such intention. That was actually enough for the disposal of the case and it is, perhaps, because the Employment Judge opted thereafter to explain what his view of the facts was on the assumption that he was wrong about that, that some lack of clarity then arose. I do not see that lack of clarity as being fatal though. The thread of his thinking is ascertainable and it is possible to see how and why he decided as he did.

66. Mr Strain relied heavily on what he saw as a gap in the Tribunal's findings in that it pays no regard to what the Claimant said about his interpretation of the Claim of Right and the jurisdiction of the Civil Magistrate, his position being at variance with that of the Respondents. I do not suggest that the Claimant's opinions on these matters are not honestly or firmly held but they are but subjective opinions and not capable of adding to or detracting from the documents on an issue which falls to be tested objectively, as discussed by Lord Justice Mummery in **Diocese of Southwark** and Lord Hope in **Percy**. That is, that evidence was not relevant to the issue which the Tribunal had to decide.

67. As regards the other matters to which Mr Strain referred, the Tribunal did make findings in fact about the Claimant's probationary period. That said, it is evident that his role as a Probationer was different from that of ordained Minister who had answered a call. Apart from anything else he was subject to Presbytery supervision, and the direction of the Synod, features

which were absent from his role once he was ordained as a Minister. Regarding the facts surrounding his daily work as a Minister, the Tribunal, again, did make findings but I do not see that they amount to evidence that at the time he became a Minister, or at any time thereafter, parties intended to create a legal relationship between them. Nor do I see that the facts surrounding his work as a Minister show that he was an employee rather than a person carrying out the duties of his office. The same can be said of his incidental work on the care home board and so on.

68. Further, the Tribunal's conclusion is, on a consideration of the facts found and the relevant law, as summarised above, entirely understandable. I accept Mr Truscott's submission that, essentially, the relevant facts were to be found in the documents. So far as the Claimant's Ministry is concerned, none of those facts, objectively tested, indicate that parties intended to create a legal relationship. The Manual is not nor is it like an employee handbook. Quite apart from anything else, it covers the position of deacons and elders, who are but office holders and also the governance of the whole church, neither of which would be apt for inclusion in an employee handbook. Conversely, through the provisions to which I have referred above, it presents a picture of Ministers being office holders, not persons with whom the Respondents are in contractual relationship. Then there is the matter of the Questions and the Formulae. They do not bear to be contractual documents. Their content is such as to evidence an acceptance and commitment by the Claimant to a system which does not admit of legally enforceable relationships being created between the Respondents and its Ministers nor does it admit of submission to the jurisdiction of the Civil Magistrate. That is an objective that is achievable so far as avoiding the conferring and acquisition of rights that can be vindicated in the civil courts and tribunals, such as the right not to be unfairly dismissed, if Ministers are afforded the status of and treated as office holders rather than employees. Commitment to that

system supports the conclusion that the parties' mutual intention was that Ministers should be office holders.

69. Turning to the Formulae, they are not signed by the Respondents. They are statements of belief signed by the Claimant and, I agree, fall to be interpreted in accordance with the conclusion of the Employment Judge. There are no documents which contradict the impression that something which would be quite contrary to the parties' fundamental beliefs would be to enter into a legal relationship; none of the documents show contractual intention.

70. Even if it is wrong to regard this as a documents only case and account is taken of the findings regarding the Claimant's role on the care home Board etc, those factors do not seem to me to indicate that parties intended to create a legal relationship. Nor, even if there had been such an intention, do they lead to the conclusion that the Claimant was an employee. My primary view is, however, that those factors were not just not relevant to the issue, unlike the oral evidence in the case of **Carmichael and another v National Power plc** [2000] IRLR 43 where the evidence about the way in which the relationship operated between the parties was such as to show that they did not intend the documents to be the exclusive "memorial of their relationship". In this case, it seems to be that the Manual, the Questions and the Claimant's affirmation of them, and the Formulae are, conversely, just such a Memorial.

Disposal

71. In these circumstances I will pronounce an order upholding the judgment of the Employment Tribunal and dismissing the appeal.