

# THE EMPLOYMENT STATUS OF CLERGY REVISITED: *SHARPE v BISHOP OF WORCESTER*

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## 1. INTRODUCTION

In *Sharpe v Bishop of Worcester*, the Court of Appeal has had another opportunity to consider the vexed question of the employment status of ministers of religion, specifically in this case a ‘rector’ with a freehold office in the Church of England.<sup>1</sup> The case highlights the fact that while Church of England clergy with this type of employment relationship enjoy a considerable degree of security of tenure, gaps remain in their legal protection that the Court of Appeal was unwilling to fill by a finding that they were employees. These gaps have not been solved by recent reforms to the employment regime for Church of England clergy. Moreover, although the legal context of *Sharpe* is highly unusual, the problems facing the claimant in the Court of Appeal have depressingly familiar resonances with problems elsewhere in the labour market.

## 2. FACTS AND DECISION

Mr Sharpe was appointed Rector of the Benefice of Teme Valley South in the Diocese of Worcester in 2005. He resigned in 2009. He brought proceedings alleging that he had suffered detrimental treatment as a result of making a protected disclosure (a ‘whistleblowing’ claim) under s. 43K Employment Rights Act 1996 (ERA), for which he needed to prove ‘worker’ status, and a claim for constructive unfair dismissal, for which he needed to prove that he had a contract of employment. The Employment Judge held that there was no jurisdiction to hear the substance of Sharpe’s claims because he was neither an employee nor a worker.

The EAT (Cox J) held that the Employment Judge had fallen into a number of errors.<sup>2</sup> Cox J criticised the Employment Judge’s finding that an employment relationship governed by church law could not also be the subject of a contractual relationship. She considered that this had led the Employment Judge to focus solely on whether it was ‘necessary’ to imply a contract and that he had not given proper consideration to the possible presence of an express contract between Sharpe and the Bishop. The Employment Judge had failed to conduct the full factual analysis required by *President of the Methodist Conference v Preston* (formerly

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<sup>1</sup> [2015] EWCA Civ 399.

<sup>2</sup> [2014] ICR D9. There was a further issue about the use of expert evidence in the case which will not be discussed here.

*Moore*), a case decided by the Supreme Court after the Employment Judge had reached his decision.<sup>3</sup> Moreover, Cox J held that Sharpe could be regarded as a 'worker' for the purposes of the whistleblowing claim because the definition of worker did not require the presence of a contract of any kind. Cox J remitted the claim to a freshly-constituted Employment Tribunal.

The Court of Appeal found against Sharpe on all points. It held that the Employment Judge had not erred in law in concluding that Sharpe did not have a contract and, that even if he did, it was not one of employment. Because he did not have a contract, he could not be regarded as a worker either. Before examining the Court of Appeal's reasoning on these points, it is helpful to assess the previous authorities and to give some background on the nature of freehold appointments.

### *The authorities*

Historically, the courts tended to reject claims that ministers of religion had contracts of employment. They accepted that it would be possible in principle to find that such relationships were contractual, but rarely did so in practice.<sup>4</sup> The reasoning for this was variously and not particularly clearly expressed: that the internal rules and other documents governing the relationship were not contractual in nature, or that there was too great a spiritual element to the relationship.<sup>5</sup> In *President of the Methodist Conference v Parfitt*, the Court of Appeal went so far as to lay down a presumption that the relationship would not be contractual because of its spiritual dimensions:

the relationship between a church and a minister of religion is not apt, in the absence of clear indications of a contrary intention in the document, to be regulated by a contract of service.<sup>6</sup>

In *Diocese of Southwark v Coker*, Mummery LJ expressed the same point in more orthodox contractual terms by identifying the absence of an intention to create a contractual relationship.<sup>7</sup> In ordinary commercial transactions, he explained, it was for the party contending that there was no contract to prove the absence of such an intention, whereas in relation to ministers of religion, the opposite was the case, in the light of the decision in *Parfitt*. Mummery LJ placed considerable emphasis on the fact that the claimant in *Coker* (who was a curate in the Church of England) was an office-holder under church law, so this explained his relationship with the church, rendering a contract unnecessary:

The legal implications of the appointment of an assistant curate must be considered in the context of that historic and special pre-existing legal framework of a church, of an

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<sup>3</sup> [2013] UKSC 29, [2013] 2 AC 163.

<sup>4</sup> *Davies v Presbyterian Church of Wales* [1986] ICR 280 (HL), 289 (Lord Templeman).

<sup>5</sup> *ibid.*

<sup>6</sup> *President of the Methodist Conference v Parfitt* [1984] QB 368, 376-7 (Dillon LJ), and see *Singh v Guru Nanak Gurdwara* [1990] ICR 309 (CA).

<sup>7</sup> *Diocese of Southwark v Coker* [1998] ICR 140 (CA), 146-9.

ecclesiastical hierarchy established by law, of spiritual duties defined by public law rather than by private contract, and of ecclesiastical courts with jurisdiction over the discipline of clergy. In that context, the law requires clear evidence of an intention to create a contractual relationship in addition to the pre-existing legal framework.<sup>8</sup>

The position seemed to have changed with the decision in *Percy*, in which a minister in the Church of Scotland alleged that the Church's handling of disciplinary proceedings against her constituted sex discrimination.<sup>9</sup> This required her merely to prove the existence of a 'contract personally to execute work' rather than a contract of employment, and the House of Lords was clearly influenced by the importance of ensuring a broad scope of application of equality law both domestically and because of the influence of EU law. In finding that she did have a contractual relationship with the Church of Scotland, Lord Nicholls made some important comments about the reasoning in the previous authorities. First, he addressed the question of 'office-holder' status. He held that being an office-holder was not inherently incompatible with having a contractual relationship in parallel, noting that the definition of an 'office' was vague and the more broadly it was defined, the more likely it was to include people who were also in contractual relationships.<sup>10</sup> Second, he reviewed the issue of intention to create contractual relations raised by Mummery LJ in *Coker*. Here, he favoured reversing the policy of previous cases:

The context in which these issues normally arise today is statutory protection for employees. Given this context, in my view it is time to recognise that employment arrangements between a church and its ministers should not lightly be taken as intended to have no legal effect and, in consequence, its ministers denied this protection.<sup>11</sup>

Third, he considered the problem of identifying the employer in a complex organisation such as the Church of Scotland, but held that 'this internal fragmentation ought not to stand in the way of otherwise well-founded claims'.<sup>12</sup>

The effect of *Percy* was considered in *New Testament Church of God v Stewart*.<sup>13</sup> The claimant in that case argued that *Percy* had brought about a 'sea change' in the courts' approach. However, this was difficult to sustain given that *Percy* had not explicitly overruled any of the previous case-law. Pill LJ attempted the following reconciliation:

What *Percy's* case does, however, is establish that the fact-finding tribunal is no longer required to approach its consideration of the nature of the relationship between a minister and his church with the presumption that there was no intention to create legal relations. The earlier cases, as explained, do not exclude that possibility; strong

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<sup>8</sup> *ibid* 147.

<sup>9</sup> *Percy v Church of Scotland Board of National Mission* [2005] UKHL 73, [2006] 2 AC 28.

<sup>10</sup> *ibid* [14]-[22].

<sup>11</sup> *ibid* [26].

<sup>12</sup> *ibid* [28].

<sup>13</sup> *New Testament Church of God v Stewart* [2007] EWCA Civ 1004, [2008] ICR 282.

statements in *Percy's* case leave it open to employment tribunals to find, provided of course a careful and conscientious scrutiny of the evidence justifies such a finding, that there is an intention to create legal relations between a church and one of its ministers.<sup>14</sup>

In *Stewart* itself, the tribunal had undertaken a 'careful and conscientious' scrutiny of the facts and the Court of Appeal found no basis to interfere in its decision that the claimant in that case did have a contract of employment with the church. There was some obiter discussion of whether it would be contrary to Article 9 ECHR for the court to impose a contractual relationship where this would infringe the tenets of the religion, but Pill LJ and Arden LJ regarded this as no more than a factor to consider in the contractual analysis, and Lawrence Collins LJ was unpersuaded.<sup>15</sup>

The most recent authority prior to *Sharpe* was the decision of the Supreme Court in *Preston*.<sup>16</sup> Lord Sumption (with whom the majority agreed) stated the general principles to be applied in the following terms:

It is clear from the judgments of the majority in *Percy's* case that the question whether a minister of religion serves under a contract of employment can no longer be answered simply by classifying the minister's occupation by type: office or employment, spiritual or secular. Nor, in the generality of cases, can it be answered by reference to any presumption against the contractual character of the service of ministers of religion generally... The primary considerations are the manner in which the minister was engaged, and the character of the rules or terms governing his or her service. But, as with all exercises in contractual construction, these documents and any other admissible evidence on the parties' intentions fall to be construed against their factual background. Part of that background is the fundamentally spiritual purpose of the functions of a minister of religion.<sup>17</sup>

Two points are apparent from this decision. First, there is no presumption against finding that a minister of religion has a contract of employment, either because he or she might also be an office-holder or because his or her duties are spiritual in nature. Second, each case falls to be determined on its own facts, so the relationship may be different for Sikhs compared with Christians, or for different types of Christian denomination, or for different roles within a particular denomination. This suggests that the task of the judge at first instance is to reach a decision after careful consideration of all the facts and circumstances, a task which is in principle no different to that in any other employment case.<sup>18</sup> However, despite the removal of the presumption and the insistence that cases should be subject to careful factual scrutiny, the 'spiritual purpose' remains relevant when considering the relevant facts. This continues to present significant obstacles to claimants. This was

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<sup>14</sup> *ibid* [35].

<sup>15</sup> *ibid* [36]-[47] (Pill LJ); [58]-[62] (Arden LJ); [66] (Lawrence Collins LJ).

<sup>16</sup> Above n 3.

<sup>17</sup> *ibid* [10].

<sup>18</sup> See Russell Sandberg, 'Not a *Sharpe* Turn' (2 May 2015), available at SSRN: <http://ssrn.com/abstract=2611901>.

borne out in *Preston* itself, in which the majority held that the claimant's relationship with the Methodist Church was a 'vocation' laid down by church rules and was incapable of analysis in contractual terms.

What is not clearly articulated in any of the leading employment cases is the reason for the courts' general reluctance to adjudicate on disputes involving ministers of religion. It is submitted that this emerges much more clearly in a different setting from the decision of Simon Brown J (as he then was) rejecting an attempt by a rabbi who was the subject of disciplinary proceedings to seek judicial review of the Chief Rabbi's investigation into his conduct:

... the court is hardly in a position to regulate what is essentially a religious function — the determination whether someone is morally and religiously fit to carry out the spiritual and pastoral duties of his office. The court must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognised divide between church (*sic*) and state.<sup>19</sup>

The concern to protect the autonomy of faith groups to determine their own beliefs and consequently rules is, of course, a legitimate one, and may nowadays be protected by Article 9 ECHR, as noted above.<sup>20</sup> However, what is less clear is whether this should serve to deny ministers of religion any remedies at all in the event of unfair treatment in an employment setting, even where the issues in dispute (as is usually the case in practice) do not involve controversies about matters of faith.

### *The employment arrangements of a Rector in the Church of England*

Since the case-law has placed so much emphasis on the facts of individual cases, it was necessary to examine Sharpe's employment arrangements in some detail. The Court of Appeal was particularly concerned with the process of appointing him, the nature of his appointment, and provisions for discipline and dismissal.<sup>21</sup>

Because the Church of England is an established church, it is governed by rules (known as Measures) which form part of English law. They are enacted by the governing body of the church, the General Synod, but must be approved by Parliament and receive the Royal Assent before becoming law. Importantly, the Church of England does not have legal personality. It is organised into dioceses each headed by a bishop. Since Sharpe's appointment was in the Diocese of Worcester, the defendant in the case - and the alleged employer - was the Bishop of Worcester.

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<sup>19</sup> *R v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth* [1992] 1 WLR 1036, 1042-3.

<sup>20</sup> The Privy Council's decision in *Gorham v Bishop of Exeter* (8 March 1850) was regarded by many at the time as an example of inappropriate state interference in church affairs, though as Jordan explains, the criticism is 'wide of the mark': Andrew Jordan, 'George Cornelius Gorham, Clerk v Henry Phillpotts, Bishop of Exeter' (1998) 5 *Ecc LJ* 104, 110.

<sup>21</sup> See, generally, above n 1, [12]-[37] (Arden LJ); [134]-[164] (Lewison LJ).

The process by which Sharpe had been appointed to his position was a complex one. Historically, the right to present a candidate for appointment to a particular benefice was a valuable property right known as an 'advowson'. It was valuable because the candidate would obtain an income from the 'glebe' land belonging to the benefice. The advowson generally attached to the manor on which the church was built. Nowadays, the right to present a candidate is no longer a right attaching to land. Nor is it of any significant financial value, since any income from glebe land belongs to the Diocese. However, it remains possible for there to be in existence a person - the patron (or 'lay rector') - with the power to nominate a person for appointment. In the case of Teme Valley South, the patron was a Mrs Miles. The patron must obtain the consent of two members of the Parochial Church Council (PCC) and the bishop before proceeding to an appointment, and in practice, an interview process generally takes place.<sup>22</sup> There is a right of appeal for the patron against a refusal by the PCC members or the bishop to accept his or her candidate. In the case of Sharpe, all parties accepted his appointment and the bishop duly 'instituted' and 'installed' him in his position. These formalities involve the swearing of an oath of allegiance to the bishop.

Sharpe's appointment was as rector of the benefice.<sup>23</sup> This is regarded in law as a 'freehold' office. Historically, it would have given the rector a freehold interest in the church building itself, the glebe, and the rectory, with no realistic possibility of being removed from office. Nowadays, the rector acquires a freehold interest in the church building and the rectory, and is subject to a retirement age of 70.<sup>24</sup> There are provisions for removing an individual from the office of rector in three situations - doctrinal cases,<sup>25</sup> personal misconduct<sup>26</sup> and ill-health<sup>27</sup> - but in each situation the bishop acts in response to a complaint and cannot institute proceedings of his or her own motion. Nor does the bishop have the power to terminate the office: the complaint sets in train a complex chain of procedures involving an internal tribunal hearing. These procedures are designed to give the relevant office-holders a substantial degree of security of tenure and to protect them against the whims of the bishop.

The duties of an incumbent<sup>28</sup> are laid down by church law, particularly the Canons. Canon C24 gives the incumbent overarching responsibility for the provision of church services and pastoral care in the benefice, but imposes few personal responsibilities. For example, Canon C24(2) requires the priest to 'celebrate, or cause to be celebrated, the Holy Communion on all Sundays...', which clearly allows a substitute to be used. However, this is a matter of practical necessity for many clergy, especially in rural areas, who are commonly responsible for a number of

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<sup>22</sup> Patronage (Benefices) Measure 1986.

<sup>23</sup> There is no material difference between this title and the title 'vicar' in this instance.

<sup>24</sup> Ecclesiastical Offices (Age Limit) Measure 1975.

<sup>25</sup> Ecclesiastical Jurisdiction Measure 1963.

<sup>26</sup> Clergy Discipline Measure 2003.

<sup>27</sup> Incumbents (Vacation of Benefices) Measure 1977.

<sup>28</sup> This is another term for the person responsible for a particular benefice.

churches and may not be able to attend all of them on a Sunday. Canon C24(8) contains a broadly-framed power of substitution:

If at any time he shall be unable to discharge his duties whether from non-residence or some other cause, he shall provide for his cure to be supplied by a priest licensed or otherwise approved by the bishop of the diocese.

Finally, it is worth noting that the payment arrangements for clergy are complex. Their wages (known in the jargon as 'stipends') are funded by the relevant diocese but paid by the Church Commissioners. There is a nationally-determined minimum, though it is possible for a diocese to specify a higher amount. There is no opportunity for individual negotiation over stipends.

*Was there a contract of employment?*

For Sharpe to be able to pursue his constructive dismissal claim, it was of course necessary to find that these arrangements gave rise to a contract of employment. This required consideration of two questions: was there a contract at all, and if so, was it one of employment?

The 'contract' question is typically answered by assessing whether there is an express contract between the parties (written or oral) or whether a contract can be implied. This set of enquiries was particularly problematic in *Sharpe* because most details of the claimant's role were set out in church law. Because there was no obvious agreement between the parties, it was difficult to find an express contract, and because the parties' conduct could be explained by reference to church law, the 'necessity' test for implying a contract would not be met.<sup>29</sup> The effect of approaching the 'contract' question in the traditional way would be to make it impossible to find that Church of England clergy (or any other ministers employed against a background of church law) are employees. In *Preston*, Lord Sumption was clearly alive to this difficulty and proposed a subtly different approach:

... whatever the legal classification of a Methodist minister's relationship with his Church, it is not sensible to regard it as implied. It is documented in great detail... The question is whether the incidents of the relationship described in those documents, properly analysed, are characteristic of a contract and, if so, whether it is a contract of employment. Necessity does not come into it.<sup>30</sup>

On this view, the focus should be on a close reading of the church law and factual background to determine whether a contract can be found. In *Sharpe*, Lewison LJ appears to have adopted this approach, albeit in a brief discussion of the issues,<sup>31</sup> whereas Arden LJ, giving the leading judgment, did not.

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<sup>29</sup> See, for example, *James v Greenwich LBC* [2008] EWCA Civ 35, [2008] ICR 545.

<sup>30</sup> Above n 3, [12].

<sup>31</sup> Above n 1, [177]-[184].

Arden LJ first addressed herself to the Employment Judge's findings on the question of whether there was an express contract between Sharpe and the Bishop of Worcester.<sup>32</sup> The Employment Judge rejected that argument largely on the basis that the terms and conditions governing Sharpe's appointment – on matters such as duties, pay, and disciplinary procedures – were set out in church law which was binding on both 'parties'. They were not the subject of negotiation or contractual agreement. In the Court of Appeal, it was argued for Sharpe that various documents, such as the letters exchanged with the Bishop prior to his appointment, could be regarded as contractual, but Arden LJ found no error in the Employment Judge's reasoning on this point. These issues were dealt with quite briefly without the close reading envisaged by Lord Sumption in *Preston*. Importantly, no consideration was given to the point (which was argued) that the vast majority of employees have little opportunity to negotiate their terms and conditions of employment and are instead expected to sign a standard form contract on a 'take it or leave it' basis. It is not clear why acceptance of the position on the terms offered could not be sufficient to constitute a contract in *Sharpe* as it would be in many other situations.

An important aspect of the argument for the claimant was that the 'Bishop's Papers', the documents sent to him on appointment, could be regarded as contractual or as a kind of 'works handbook' that might be incorporated into a contract of employment.<sup>33</sup> Confusingly, Arden LJ dealt with this as an aspect of whether the contract was one of employment, under the 'terms inconsistent' test from *Ready Mixed Concrete*,<sup>34</sup> but it is more logical to regard it as going to the question of whether there was a contract at all. The significance of the claim relating to the Bishop's Papers was that it offered a way of overcoming the obstacle that so many details of Sharpe's appointment were addressed in church law, by identifying additional issues that were (arguably) the subject of agreement between him and the bishop. This argument failed primarily because it had not been pursued very strongly before the Employment Judge, with the result that Arden LJ treated it as a 'second bite of the cherry'.<sup>35</sup> The Court of Appeal also noted that the documents in question were, in some cases at least, formulated as guidelines.<sup>36</sup> Both of these factors were thought to point against the documents being in the nature of a contract.

Attention then turned to the issue of an implied contract. Arden LJ rejected the claimant's argument that *Preston* had laid down a different approach, and instead upheld the Employment Judge's finding that there was no 'space' to imply a contract because the parties' relationship could

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<sup>32</sup> Above n 1, [70]-[74] (Arden LJ).

<sup>33</sup> *ibid* [95]-[103].

<sup>34</sup> *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497.

<sup>35</sup> Above n 1, [103] (Arden LJ).

<sup>36</sup> *ibid* [102] (Arden LJ); [183] (Lewison LJ).

be explained by the provisions of church law.<sup>37</sup> With respect, this application of the ordinary ‘necessity’ test is wholly to misunderstand the effect of *Preston*.

Arden LJ then engaged in the inevitably somewhat artificial exercise of considering whether – if she was wrong about the existence of a contract – that contract could be regarded as one of ‘employment’.<sup>38</sup> This involved consideration of the various familiar indicators of an employment relationship from the *Ready Mixed Concrete* case and other cases. The claimant’s arguments here were largely defeated by the fact that the most plausible candidate for ‘employer’ – the Bishop of Worcester – did not have several of the key characteristics of an employer.

The first problem facing the claimant was that he had been appointed by the patron, not the bishop.<sup>39</sup> Although the bishop had the power to refuse to agree to the appointment, this was subject to a right of appeal for the patron. An ingenious argument that the patron might have acted as an agent for the bishop (like an employment agency providing staff) could not be pursued because it had been rejected at first instance.<sup>40</sup>

A second problem was that he received his pay from the Church Commissioners, not from the bishop.<sup>41</sup> As *Quashie* illustrates, the courts are reluctant to find an employment relationship where the alleged employer is not directly responsible for payment.<sup>42</sup> However, in this case, there was no acknowledgment of the fact that clergy stipends are funded by the relevant diocese. Arden LJ did acknowledge the potential difficulty of ‘fragmentation’: the concern that genuine claims might be defeated by complex legal and organisational structures adopted by employers.<sup>43</sup> Familiar examples of this include the problems faced by agency workers and the possibility of ‘hiving off’ employment functions to a specific company (usually one with no assets) in a complex corporate structure. However, the Court of Appeal seemed to take the view that it could only address this issue if it was deliberate, as opposed to the Church of England which happens to have no legal personality for historical reasons. As Arden LJ put it: ‘even if all the constituent parts of the Church of England were merged together, Reverend Sharpe would still be unable to deal with the point... that there was no one legal person with whom there was an exchange of promises to do work in exchange for a wage’.<sup>44</sup> However, with respect, this blurs the question of the presence of a contract with the question of the identity of the employer.

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<sup>37</sup> Above n 1, [77] (Arden LJ). The approach of Lewison LJ, briefly expressed at [177], appears to be preferable.

<sup>38</sup> *ibid* [81]-[111].

<sup>39</sup> *ibid* [179] (Lewison LJ).

<sup>40</sup> *ibid* [73] (Arden LJ).

<sup>41</sup> *ibid* [83]-[84] (Arden LJ); [183] (Lewison LJ).

<sup>42</sup> *Quashie v Stringfellow Restaurants Ltd* [2012] EWCA Civ 1735, [2013] IRLR 99.

<sup>43</sup> *ibid* [104]-[106].

<sup>44</sup> *ibid* [105].

The latter question *would* be solved if the Church of England were less fragmented.

A third obstacle was the absence of any right on the part of the bishop to control the claimant's activities, control being a key indicator of the presence of an employment relationship. The claimant based his argument on this point on the oath of canonical obedience and on the various responsibilities of the diocesan bishop within church disciplinary procedures.<sup>45</sup> The argument derived some support from recent case-law, notably *Bates van Winkelhof*, in which the Supreme Court acknowledged that in professional occupations, the level of control exercised by an employer might be limited or 'residual' in nature.<sup>46</sup> However, the Court of Appeal rejected this argument on the basis of the Employment Judge's finding that - given that church law does not allow bishops to *initiate* disciplinary procedures - the bishop did not have any direct control over the claimant's work.<sup>47</sup> A question left unanswered here is whether the legal position in fact corresponds with the practical position. While an incumbent who falls out with the diocesan bishop may not be at great risk of dismissal, because church law is designed to protect against this, there may be significant practical consequences. For example, without the bishop's support, it would be difficult to move to another job.

Despite these various points of detail, it is clear that the overwhelming argument in the case - for the Court of Appeal as well as for the Employment Judge - was the claimant's occupation of an office the incidents of which were defined in church law.<sup>48</sup> Although Arden LJ made the point that holding an office is not inherently incompatible with being an employee, it is clear that she could not discern any 'secular legal space' for a contract of employment.<sup>49</sup> The difficulty with this analysis is that it appears to reintroduce the old assumption (albeit in an attenuated form) that a minister of religion could not also be a party to an employment relationship. This concern becomes clear from the following statement:

... by accepting office as rector he or she agrees to follow their calling. They do not enter into an agreement to do work for the purposes and benefit of the Church as a commercial transaction.<sup>50</sup>

This ignores the alternative view, neatly put by Lord Sumption in *Preston*:

... in modern conditions, against the background of the broad schemes of statutory protection of employees, it should not readily be assumed that those who are engaged

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<sup>45</sup> For example, above n 26, ss 12 and 19.

<sup>46</sup> *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, [2014] ICR 730.

<sup>47</sup> Above n 1, [85]-[88] (Arden LJ); [181] (Lewison LJ).

<sup>48</sup> *ibid* [90]; [108]-[109] (Arden LJ).

<sup>49</sup> *ibid* [90]-[91].

<sup>50</sup> *ibid* [108].

to perform work and receive remuneration intend to forgo the benefits of that protection.<sup>51</sup>

It is difficult to avoid the conclusion that the courts' more encouraging rhetoric has not been matched by a significant change in the outcomes of cases.

### *Was the claimant a worker?*

Attention then turned to the claimant's whistleblowing claim, which required 'worker' rather than 'employee' status. ERA 1996, s 43K, contains various extensions to the ordinary definition of worker which are clearly designed to enable whistleblowing claims to be made as widely available as possible. However, various creative attempts to bring the claimant within that extended definition all failed because of the finding that he did not have a contract of any description with the Bishop.

Under s. 43K(1)(b), a worker is a person who:

contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)"...

This extension was clearly intended to protect homeworkers, who do not work at the employer's premises and whose claims to protection may sometimes be defeated by the presence of a substitution clause. However, from the perspective of the present case, it had the potential to overcome two of the problems confronting the claimant: the Bishop's lack of control over his activities (including his place of work) and his power to delegate much of his work. However, the phrase 'contracts... with' proved to be an insuperable obstacle for the claimant.<sup>52</sup>

Under s. 43K(1)(a), worker includes someone who:

(a) works or worked for a person in circumstances in which—

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them...

This extension is clearly intended to cover agency workers. An argument that Sharpe could be regarded as an agency worker, in the sense that he had been supplied to the Bishop by the patron, had already failed because of a clear factual finding to the contrary by the Employment Judge.<sup>53</sup> However, the argument under s. 43K(1)(a) focused on the use of 'terms' rather than 'contract'. On a literal reading, this would have

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<sup>51</sup> Above n 3, [12].

<sup>52</sup> Above n 1, [113] (Arden LJ).

<sup>53</sup> Above n 40.

offered a way of bringing him within the extended 'worker' concept even though he did not have a contract with the Bishop. However, this argument also failed in the Court of Appeal, Arden LJ holding that 'it must inevitably follow' from the reference to 'terms' that 'there must be a contract'.<sup>54</sup>

This highlights the important - though by no means new - point that (despite efforts by Parliament to broaden the scope of protection) the courts are unshakeable in their view that contract marks the outer boundary of permissible employment claims.<sup>55</sup>

### 3. IMPLICATIONS FOR MINISTERS OF RELIGION

Having examined the decision in some detail, we are now in a position to consider the broader issues it raises for the employment rights of ministers of religion.

One of the more positive consequences of the courts' tendency to confine cases involving ministers of religion to their own facts is that *Sharpe* may not have much consequence beyond the Church of England. Two of the determining factors in the case are unlikely to be present in other contexts: the complex legal structure of the Church of England itself, and the definition of clergy responsibilities in church law, which is part of the law of the land. The first of these two factors made it difficult for the claimant in *Sharpe* to point to any particular entity within the Church of England as his employer. As the *New Testament Church of God* case illustrates, other churches or religious organisations may have more straightforward structures with an obvious candidate for the role of 'employer'.<sup>56</sup> The second factor raises quite fundamental issues of remedies, as Lewison LJ explained.<sup>57</sup> Since both church law and employment law form part of the law of the land, it is necessary to reconcile the two systems in a sensible way. Concern was expressed about the possibility of an Employment Tribunal reaching a different conclusion - on the same facts - to properly-constituted church proceedings.<sup>58</sup> In other settings, the Employment Tribunal would clearly override any 'internal' proceedings conducted by an employer (even a religious one), but this argument is less readily available in the Church of England context because of the special legal status of the church. On this view, the courts' more encouraging rhetoric towards ministers of religion may make it easier for those in at least some faiths and denominations to establish that they are employees.

Even in the Church of England context, matters have moved on since the facts of *Sharpe* arose. The Ecclesiastical Offices (Terms of Service)

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<sup>54</sup> Above n 1, [115].

<sup>55</sup> For example, *X v Mid Sussex Citizens Advice Bureau* [2012] UKSC 59, [2013] ICR 249.

<sup>56</sup> Above n 13.

<sup>57</sup> Above n 1, [184].

<sup>58</sup> Above nn 25-27.

Measure 2009 and the Ecclesiastical Offices (Terms of Service) Regulations 2009,<sup>59</sup> which entered into force in 2011, have created a status known as 'common tenure'. This applies to all appointments after 2011, and to any individual with a freehold appointed prior to 2011 who chooses to transfer to common tenure. For present purposes, one of the key features of common tenure is that it carries with it a right to bring a claim before an Employment Tribunal if the holder is removed from his or her office after a 'capability procedure'.<sup>60</sup> This covers matters of competence and health. However, it is important to note that other routes (albeit highly complex ones) exist for the removal of a Church of England minister from office, for example, in disciplinary cases (a rough equivalent of misconduct in the secular world) which continue to be dealt with through church law and church proceedings.<sup>61</sup> It is important to resist the sense given in some parts of the judgments in *Sharpe* that all problems relating to Church of England ministerial employment have been solved by the common tenure reforms. Indeed, an individual in Sharpe's situation, but under common tenure, would have had access to a grievance procedure but would not have had any means of bringing a claim for constructive dismissal or 'whistleblowing' protection. This leaves the individual with the unenviable choice of either remaining in post in a situation in which relationships have broken down so that he or she is unable to work effectively, or resigning without any possibility of vindication.

Of course, an important objection to the view that ministers of religion should have access to the same rights and remedies as ordinary employees is that this might draw the courts into disputes about particular tenets of faith, disputes that they are ill-qualified to judge. Indeed, there may be some autonomy to determine these matters inherent in Article 9 ECHR. But in any employment case, the courts would show deference to the employer's judgment on detailed questions of how best to run its business. In unfair dismissal law, this is given effect through the strong focus on procedural, rather than substantive, questions of fairness, and through the 'band of reasonable responses' test.<sup>62</sup> In a case involving a minister of religion, the courts might not be able to judge whether the minister had breached a particularly important doctrinal requirement, but they would be able to evaluate the employer's procedures for hearing the case. Moreover, although the courts seem to assume that most religious dismissals are about matters of faith, this assumption may not be justified in practice. The reported cases reveal that disputes tend to arise for less esoteric reasons such as personality clashes or behaviour in breach of conduct rules. To use a public law analogy, the courts seem to have opted for 'spatial deference' - refusing to consider cases at all - when a more appropriate option would be 'due

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<sup>59</sup> SI 2009/2108.

<sup>60</sup> *ibid* r. 33.

<sup>61</sup> Above n 26.

<sup>62</sup> *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 (EAT).

deference', which would involve considering the case but respecting the expertise of the primary decision-maker where relevant.<sup>63</sup>

#### 4. CONCLUSION

The ruling in *Sharpe* is encouraging to the extent that it reaffirms the proposition that there is no longer any inherent objection of principle to the idea that ministers of religion might have contracts of employment. Each case turns on its own facts and on the application of the usual tests to determine the presence of a contract of employment or a worker's contract. Ministers of religion rely on their jobs for all the same reasons other employees would give - money, social contact, and an opportunity to exercise their skills - and indeed perhaps more so, since they may be dependent on their jobs for accommodation and may have a particularly strong identity as the leader of the local faith community. It is therefore just as important to protect them against unfair treatment by their employers. The fact that religions tend to have strong moral codes is unfortunately no guarantee against poor employment practices.

However, for Church of England clergy, *Sharpe* serves to maintain the position that they are office-holders under church legislation but not employees under a contract of employment. Of course, there are many benefits to the current position, not least in respect of the strong protection it affords against dismissal. While it is hard to argue that the well-protected need more protection, the *Sharpe* situation serves to highlight a gap: tenure is not a particularly useful safeguard against constructive dismissal.

Welcoming the ruling, a Church of England spokesperson presented a stark policy choice between tenure and employment rights:

Clergy are office holders, not employees of the bishop, the diocese or anyone else. Discussions and decisions at General Synod following a major consultation with clergy, have shown that on the whole clergy do not wish to change this status. To become employees, clergy would lose the freedoms which are at the heart of the Church's ministry and the vast majority have said that this is not something that they wish to give up.<sup>64</sup>

This may be accurate as a matter of internal politics, but is it accurate as a matter of law? It is well-established that office-holders may also be employees. In principle, there is no reason why clergy should not enjoy the rights of employees whilst the church voluntarily limits its rights as employer in order to ensure that its employees continue to enjoy tenure. Of course, the courts might disrupt this - they have been notoriously reluctant to accept the idea that employers might agree to contractually-binding disciplinary processes that displace their right to dismiss with

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<sup>63</sup> M. Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of 'Due Deference'', in N. Bamforth and P. Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart, Oxford 2003).

<sup>64</sup> Press release, Diocese of Worcester, 'Statement on Court of Appeal Hearing' (11 February 2015).

notice - but the Church of England has the advantage of the ability to make its position very clear through legislation.<sup>65</sup>

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<sup>65</sup> For example, *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2011] UKSC 58, [2012] 2 AC 22.