MINISTERS OF RELIGION AND EMPLOYMENT RIGHTS: AN EXAMINATION OF THE ISSUES

PHILIP PETCHEY

Barrister, Deputy Chancellor of the Diocese of Southwark

INTRODUCTION

In 1998 the government published a White Paper entitled *Fairness at Work*. It invited views on whether legislation should be introduced to take the power to extend the coverage of employment protection rights by regulation *to all those who work for another person, not just those employed under a contract of employment*.[1] It would not have been apparent from this that the government was considering extending employment protection rights to ministers of religion. Nor is it likely that many people realised this could be the effect of section 23 of the Employment Rights Act 1999 by which Parliament subsequently enacted the proposal contained in the White Paper. Nonetheless the possibility was recognised as the Bill passed through Parliament. Pressed about the government's view as to the position of ministers of religion, the Minister[2] explained that no policy decision had been taken, but he did say:

> We certainly believe that no-one should be denied the protection of employment rights without good reason.[3]

Thus when in July 2002 the Department of Trade and Industry came to consult about the implementation of section 23, it included the clergy within the scope of the 'atypical' workers to whom it was considering applying the section. The discussion document explained the position of ministers of religion as follows:

> Members of the clergy are usually held to be ecclesiastical office holders. In considering the precise status of the clergy, case law points to the consideration of a number of factors, such as the nature of the position and whether a contract can be identified, although emphasis is placed on the spiritual nature of the office. Generally, the courts have established that the relationship between the church authorities and ministers of religion is not a contractual one at all (essentially on the basis that the ministers of religion owe their allegiance to God rather than to a terrestrial authority), not only in relation to the Church of England but also other religions. This means in effect that ministers of religion are unable to seek redress through the legal system in the event of any dispute over their treatment

[1] *Fairness at Work* (Cmnd 3968), para 3.18.
[2] Mr Michael Wills MP.
[3] Parliamentary Debates (House of Commons), Standing Committee E (2 March 1999), col 238.

> by the church authorities. Members of the clergy may be employees of hospitals, prisons or other organisations in respect of work for these organisations as chaplains.

It did not identify any argument as to why section 23 should not apply to ministers of religion, and seemed to regard their exclusion as a technicality:

> There are concerns that some working people are being excluded from employment rights due to technicalities relating to the type of contract or other arrangement they are engaged under. Examples of these workers might be some agency workers, the clergy or labour-only sub-contractors. These working people may, in practice, do the same type of work as employees, may be subject to similar demands in that they may have equally little autonomy over when and how they do their work in practice and may be economically dependent on a single course of work. There may be a fairness case for giving them the same protection as employees.

Further, following a petition to the European Parliament, on 7 November 2002 the Parliament resolved that it:

> 7. Accepts that there may be good grounds for excepting some categories of working people, such as the genuinely self-employed, from the application of certain directives or from certain provisions within them;
>
> 8. Accepts, in particular, that it may not always be appropriate, for constitutional reasons, to afford certain types of workers—such as the clergy and elected representatives—the same fora for redress as other economically dependent workers;
>
> 9. Believes, nonetheless, that no worker should be disadvantaged in terms of employment rights, including those to due process, unless this can be objectively justified;
>
> 10. Calls upon the Commission to engage in a comprehensive review of its directives in the area of employment, and in particular Directive 91/533/EEC, with a view to ensuring that existing rights are extended to the widest possible range of workers, especially those dependent on a single employer or source of income for their livelihood and to make proposals to this effect;
>
> 11. Calls, also, on the Commission to bring forward a proposal or proposals to give effect to this and, further, to specify clearly the range of workers covered by any future proposals for legislation.

Finally, the whole issue has been kept very much in the public eye by a number of 'high profile' cases involving ministers of religion.[4]

[4] These include *R v Bishop of Stafford, ex parte Owen* (2000) 6 Ecc LJ 83, CA. The fullest report is in Mark Hill, *Ecclesiastical Law* (2nd edn) (Oxford, 2001), p 273. Subsequent proceedings in which the bishop sought possession of the parsonage house were settled: *Bishop of Stafford v Owen* (2002) 7 Ecc LJ 105. It was Mr Owen who petitioned the European Parliament.

It is apparent that the Churches are now 'on the back foot' in this matter: if they are to resist (if they wish to do so) the use of section 23 to extend employment protection rights to their ministers, they will have to produce cogent reasons for doing so.

This article will seek to identify and consider the arguments for and against what is being considered.

It will be helpful to begin with an analysis of the existing position since the reasons the courts have given, as a matter of law, for not applying employment protection rights to ministers of religion provide a good starting point for a consideration of whether, as a matter of policy, those rights should be extended.

THE EXISTING POSITION

Ministers of religion are not covered by employment protection legislation because they are not persons who have entered into a 'contract of service'.[5] The phrase 'contract of service' has its origin in the nineteenth-century law of master and servant. An employer could be liable for the acts of his servant whom he employed under a 'contract of service' but not for an independent contractor whom he employed under a 'contract for services'. When the Workmen's Compensation Acts (which established a 'no-fault' system for compensation for employees in respect of accidents at work) were extended and consolidated in 1906 they covered those who were employed under 'a contract of service'.[6] When compulsory health insurance was introduced in 1911, it covered those employed under 'a contract of service'.[7]

The first cases on whether a minister of religion was employed under a contract of service are a trilogy brought under the National Insurance Act 1911 by way of actions for declarations by the Insurance Commissioners. In all of them argument focused on the pre-existing law of master and servant. The courts had little difficulty in holding that a curate in the Church of England, a minister of the United Methodist Church, a probationary minister of the Wesleyan Methodist Church, an assistant minister of the Church of Scotland and an assistant minister of the United Free Church of Scotland were not employed under a contract of service. Thus in *Re National Insurance Act 1911, Re Employment of Church of England Curates*, Parker J. said:

> It appears to me that there can be no pretence in reality for arguing that the relation between [a curate] and his vicar, or between him and anyone else, is the relation of employer and servant.[8]

[5] See the Employment Rights Act 1999, s 230(2).
[6] See the Workmen's Compensation Act 1906, s 13. Note that the scope of the Workmen's Compensation Act 1897 was narrower.
[7] See the National Insurance Act 1911, Sch 1, Pt I(a).
[8] *Re National Insurance Act 1911, Re Employment of Church of England Curates* [1912] 2 Ch 563 at 569.

However Parker J also gave an additional reason why curates of the Church of England did not have contracts of service. He said:

> ...the position of a curate is the position of a person who holds an ecclesiastical office, and not the position of a person whose duties and rights are defined by contract at all.[9]

The idea is that the position of a curate is the holder of an office in ecclesiastical establishment. (This was, and is, by virtue of section 98 of the Pluralities Act 1838).[10]

Confusingly, in *Scottish Insurance Commissioners v Paul*[11] Lord Kinnear referred to the ministers whose position he was considering as the holders of ecclesiastical office. However, it seems clear that he was using the description in a looser sense because at the outset of his judgment he stated that there was in his view no difference for the relevant purposes between the position of a minister of the established church and a minister of the Free Church. Indeed Lord Johnston expressly contemplated that an assistant minister might enjoy a 'contract for services'.[12]

It should be noted that it was no part of any of the judgments in these cases on the 1911 Act that there was not a contract of service because of the spiritual or religious nature of the duties.[13]

The next relevant case is *Rogers v Booth*,[14] which concerned the position of a Lieutenant in the Salvation Army. In the course of her duties she had fallen over a coal bucket and injured her elbow, and she brought a claim against the General of the Salvation Army under the Workmen's Compensation Act then in force. The Orders and Regulations for Officers of the Salvation Army provided that:

> The officer is pledged to do his duty, with or without pay; he works from love to God and souls, whether he receives little or much.[15]

Further, when she became an officer Lieutenant Rogers had signed a form which contained the following question (which she had answered in the affirmative):

[9] Ibid, at [1912] 2 Ch 568–569.
[10] This does not mean that he has no legal remedy if he is dismissed from office. Thus e.g. in *R v Archbishop of Canterbury, ex parte Poole* (1859) 27 LJQB 154, a curate was able to enforce by judicial review his statutory right of appeal to the Archbishop of Canterbury.
[11] *Scottish Insurance Commissioners v Paul* 1914 SC 16.
[12] Ibid at 27.
[13] The nearest approach was in *Re Employment of Ministers of the United Methodist Church* (1912) 107 LT 143, where counsel argued that the ministry was a vocation rather than an employment in the vulgar sense of the word.
[14] *Rogers v Booth* [1937] 2 All ER 751, CA.
[15] Ibid, at 753G.

> Do you understand and agree that, as an intending officer, you are giving yourself to the work of the Salvation Army, that you are not "employed", that you have no right to any "wages", that there is no contract of service and that whatever your future rank or service may be, your position, so long as you remain in the Army, will be that of a voluntary co-operator in the Army's work for God, without claims to any other reward than the approval of God and the doing of the work itself will bring to you?[16]

It would have been sufficient to dispose of the case to hold, following the cases decided on the National Insurance Act 1911, that Lieutenant Rogers was not employed under a contract of service. In fact although *Re National Insurance Act 1911, Re Employment of Church of England Curates* was cited to the court, it was not referred to in the judgments. By contrast the emphasis was on the spiritual nature of the relationship. Sir Wilfrid Greene MR said that the relationship between Lieutenant Rogers and the Salvation Army:

> is a relationship pre-eminently of a spiritual character. They are united together for the performance of spiritual work and, in order to carry out effectively the ends they have in view, they submit to a very strict discipline and a very strict command. On the face of that, it appears to me that the necessary contractual element which is required before a contract of service can be found is entirely absent. The parties when they enter into a relationship of that kind, are not intending to confer upon one another rights and obligations which are capable of enforcement in a court of law.[17]

The first case concerning the position of ministers of religion under modern employment law was *President of the Methodist Conference v Parfitt*, which concerned a Methodist minister who had been dismissed following disciplinary proceedings. The Court of Appeal held that he was not employed under a contract of service and so could not claim to have been unfairly dismissed. Dillon LJ based his judgment squarely on the basis that, because of the spiritual nature of his functions, there was no intention to create legal relations. He said:

> the spiritual nature of the functions of the minister, the spiritual nature of the act of ordination by the imposition of hands and the doctrinal standards of the Methodist Church which are so fundamental to that church and to the position of every minister in it make it impossible to conclude that any contract, let alone a contract of service, came into being between the newly ordained minister and the Methodist Church when the minister was received into full connection. The nature of the stipend supports this view. In the spiritual sense, the minister sets out to serve God as his master; I do not think that it is right to say that in the legal sense he is at the point of ordination undertaking by contract to serve the church or the conference as his master throughout the years of his ministry.

[16] Ibid. at 754H.
[17] Ibid. at 754A–C.

> Equally I do not think it is right to say that any contract, let alone a contract of service, comes into being between the church and the minister when the minister accepts an invitation from a circuit steward to become a minister on a particular circuit.[18]

May LJ agreed, adding that if he was wrong and there was a contract, it was not a contract of service.

The reference to the nature of the stipend relates to the following account (which was common ground):

> The principle which lies behind our system is this. No minister is paid for his services. He cannot be paid for that which he gives without measure in whole-hearted devotion to Christ and his church but, as he gives himself, leaving no time or energy to provide for the material need of himself and his family, the church undertakes the burden of their support and provides for each man according to his requirements. There is a basic stipend which is committed to his own stewardship ... The church also makes some provision for the maintenance and education of minister's children and for the years of retirement at the end of his ministry, in addition to that which is provided by the state. The spirit that shapes this system is that of the Christian communism of the New Testament—from each according to his ability, to each according to his needs. We should feel that to sell our services or bargain for remuneration would make us guilty of the sin of attempting to buy or sell the gifts of the Spirit and of serving God for personal gain.[19]

The stipend was payable from ordination until retirement and a minister could not unilaterally resign. Thus if the relationship was to be viewed as a contract, it was a contract for life and, as Dillon LJ pointed out, there would have been practical difficulties in drafting such an arrangement in terms that were legally binding that would not be repugnant to law as a contract of servitude.[20]

The further point to note about this case is that Dillon LJ accepted that *Re National Insurance Act 1911, Re Employment of Church of England Curates* was not relevant in so far as it proceeded on the basis that a curate was the holder of an ecclesiastical office.[21]

Parfitt was approved by the House of Lords in *Davies v Presbyterian Church of Wales*.[22] This case concerned a pastor who was dismissed after the disci-

[18] *President of the Methodist Conference v Parfitt* [1984] QB 368 at 375G—378B, [1983] 3 All ER 747 at 752, CA.
[19] Ibid, at [1984] QB 375C—E, [1983] 3 All ER 751. This is a quotation from a pamphlet entitled *The Methodist Ministry*.
[20] Ibid, at [1984] QB 376F, [1983] 3 All ER 752.
[21] Ibid, at [1984] QB 377H, [1983] 3 All ER 753.
[22] *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705, [1986] 1 WLR 323, HL.

plinary procedures provided by the book of rules of the Church had been complied with, but who claimed that he was unfairly dismissed. It should be noted that, following appointment to a church, a pastor could not have his pastorate determined (save for cause), nor could he unilaterally resign. Lord Templeman said:

> it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual. But in the present case the applicant cannot point to any contract between himself and the church. The book of rules does not contain terms of employment capable of being offered and accepted in the course of a religious ceremony. The duties owed by the pastor to the church are not contractual or enforceable. A pastor is called and accepts the call. He does not devote his working life but his whole life to the church and his religion. His duties are defined and his activities are dictated not by contract but by conscience. He is the servant of God. If his manner of serving God is not acceptable to the church, then his pastorate can be brought to an end by the church in accordance with the rules. The law will ensure that a pastor is not deprived of his salaried pastorate save in accordance with the provisions of the book of rules but an industrial tribunal cannot determine whether a reasonable church would sever the link between minister and congregation.
>
> The duties owed by the church to the pastor are not contractual. The law imposes on the church a duty not to deprive a pastor of his office which carries a stipend, save in accordance with the procedures set forth in the book of rules.[23]

Lord Templeman clearly considered that a minister dismissed in a way contrary to the book of rules might have a remedy, and this will be considered later in this article. However, although Lord Templeman does not use the word 'spiritual', this case endorses the line of reasoning from *Rogers v Booth* and *Parfitt* that a minister of religion will not usually have a contract of service with the church of which he is a member because, in this regard, of the absence of intention to create legal relations where the duties are of a religious nature.

In *Santokh Singh v Girn Nanak Gurdwara*[24] the same reasoning was applied by an industrial tribunal to a granthi (priest) of the Sikh religion who held an appointment at the Sikh Temple in Smethwick. There is no ordination to the priesthood in the Sikh religion, nor is there any special qualification.[25] However, the duties were held to be essentially of a spiritual nature 'as part of [the priest's] vocation and religious duty'. The Court of Appeal declined to overturn what appears to have been a well reasoned decision, albeit perhaps on somewhat thin evidence. One may speculate also that the court may also have felt that it would have been generally undesirable to draw a dis-

[23] Ibid. at [1986] 1 All ER 709, [1986] 1 WLR 329A—D.
[24] *Santokh Singh v Girn Nanak Gurdwara* [1990] IRLR 309, CA.
[25] It is, however, necessary for the priest to be able to read the Holy Granth and it is desirable that he should have an interest in music.

tinction between a minister of the Christian religion and a Sikh priest. However, the result is that following this case it became very difficult to argue that any 'spiritual' employment by a religious body involved a contract of service.

Accordingly, Dr Alexander Coker, who was a priest in the Church of England, must have been agreeably surprised when the chairman of an industrial tribunal ruled that the tribunal had jurisdiction to consider his claim for unfair dismissal when his six month curacy at St Philip's, Cheam Common, expired by effluxion of time.[26] However, the Employment Appeal Tribunal and the Court of Appeal both took a different view. Mummery LJ said:

> The critical point in this case is that an assistant curate is an ordained priest. The legal effect of the ordination of a person admitted to the order of priesthood is that he is called to an office, recognized by law and charged with functions designed by law in the Ordinal, as set out in the Book of Common Prayer. The Ordinal governs the form and manner for ordaining priests according to the order of the Church of England. Those functions are also contained in the canons of the Church of England and are discharged by a priest as assistant curate. It is unnecessary for him to enter into a contract for the creation, definition, execution or enforcement of those functions. Those functions embrace spiritual, liturgical and doctrinal matters, as well as matters of ritual and ceremony, which make what might otherwise be regarded as an employment relationship in the secular and civil courts and tribunals more appropriate for the special jurisdiction of ecclesiastical courts.
>
> The legal implications of the appointment of an assistant curate might be considered in the context of that historic and special pre-existing legal framework of a church, of an 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. That intention is not present, either generally on the appointment of an assistant curate, or in the particular case of Dr Coker. I would add that it has never been held, and it is not suggested by Mr Hage in this case, that the incumbent of the parish, holding its church and its benefice, is under a contract with the bishop or with anyone else in respect of his cure of souls in the parish.
>
> It is difficult to see why an ordained priest, licensed by his bishop to assist the incumbent in his cure of souls, is under contract with the bishop, by

[26] See *Coker v Diocese of Southwark* [1995] ICR 563, Industrial Tribunal. The chairman of the tribunal was the distinguished labour lawyer, Professor R W Rideout. He took the view that *Re National Insurance Act 1911, Re Employment of Church of England Curates* [1912] 2 Ch 563 had been impliedly overruled by *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705, [1986] 1 WLR 323, HL, and that it was open to him to conclude that there was an intention that a curate should be employed by way of a contract of service.

> whom he is licensed, or with the incumbent he is assisting, or with anyone else, in the absence of a clear intention to create a contract.[27]

This runs together the argument relating to the spiritual functions of a minister of religion and that relating to the fact that, as a curate in the Church of England, Dr Coker was an ecclesiastical office holder. What by now has entirely disappeared from the argument is the view that a curate cannot be regarded as a 'servant' and for that reason does not have a contract of service (which, it will be recalled, was the focus of Parker J's reasoning in *Re National Insurance Act 1911, Re Employment of Church of England Curates*).

Coker was followed in *Percy v Board of National Mission of the Church of Scotland*,[28] where the Court of Session held that an associate minister of the Church of Scotland was not an employee because there was no intention to create legal relations.[29] Cases concerning the Church of Scotland are complicated by the fact that, by virtue of its Declaratory Articles secured by the Church of Scotland Act 1921, the Church asserts that it has 'the right and power, subject to no civil authority, to legislate and adjudicate finally in all matters of doctrine, worship, government and discipline in the Church.'[30] Lord Rodger held that, despite the formality of the documentation evidencing the terms of the associate minister's appointment, the Declaratory Articles pointed to the fact that there was not an intention to create legal relations:

> ... the formality and indeed solemnity of all these transactions and proceedings does not disclose an intention to create legal relationships under civil law; rather, it reflects the serious way in which the Church regulates the matters falling within the spiritual sphere.[31]

THE RELEVANCE OF THE EXISTING LAW TO ARGUMENTS IN RESPECT OF EXTENDING EXISTING EMPLOYMENT PROTECTION LEGISLATION

It is next necessary to consider whether the reasons which the courts have given for holding that a minister of religion does not have a contract of ser-

[27] *Diocese of Southwark v Coker* [1998] ICR 140 at 147E—148B, CA. The judgment of the Employment Appeal Tribunal is *Diocese of Southwark v Coker* [1996] ICR 896, EAT.

[28] *Percy v Board of National Mission of the Church of Scotland* 2001 SLT 497.

[29] Note that the case was brought under the Sex Discrimination Act 1975 and, accordingly, the question before the court was not whether the minister had a 'contract of service' but a 'contract of service ... or a contract personally to execute any work or labour': see s 82(1) of the 1975 Act.

[30] Church of Scotland Act 1921, s 1, Schedule, Art IV.

[31] *Percy v Board of National Mission of the Church of Scotland* 2001 SLT 497 at 503, para 14. Because the court held that the associate minister was not an employee, it did not have to go on to consider whether, if she had been an employee, the Church of Scotland Act 1921 operated to exclude the Sex Discrimination Act 1975 or had been impliedly amended by it.

vice have any relevance to the question of whether it is appropriate that the Secretary of State should use his powers under section 23 of the Employment Rights Act 1999 to extend employment protection legislation to ministers of religion.

MASTER AND SERVANT LAW

It is submitted that the fact that, analysed in terms of the law of master and servant, a minister of religion cannot be said to have a contract of service but has, if anything, a contract for services is not a reason for not extending employment protection law to ministers of religion. The argument finds an echo in the Church of England response to the DTI Discussion Paper ('In many respects [the position of parochial clergy] is more akin to that of an independent contractor than that of an employee')[32] but it is not there used as an argument against extending coverage. A minister of religion is not self-employed in the ordinary sense of the word.

MINISTER OF RELIGION AS AN OFFICE HOLDER

As we have seen, the argument that a minister of religion is an office holder is one that is only capable of applying to ministers of the established church. Since it was not seemingly relied upon in *Scottish Insurance Commissioners v Paul*, its application is accordingly limited to the Church of England.[33]

In itself it is not an argument for not extending the coverage of employment protection legislation to ministers of either established church. Thus to take the case of another category of person viewed as office holders, namely company directors, there may or may not be arguments for extending coverage to this category, but they relate to the particular circumstances of the case. However, when Mummery LJ referred in *Coker* to the 'special pre-existing legal framework of the Church' he was pointing to a wider argument.

There are two aspects to be considered. First, the employment of priests of the Church of England is governed by public law contained in Acts of Parliament, Measures and the Canons. If it is desired to give priests more, or less, protection, this can be done by the promotion of appropriate ecclesiastical legislation. There is no need for separate regulation via employment

[32] Paragraph 7 of the Response.

[33] In *Percy v Board of National Mission of the Church of Scotland* 2001 SLT 497 at 502, para 9, Lord Rodger said that ministers and assistant ministers were office holders. However, as his judgment makes clear, he did not consider that this relationship created legal relations between a minister and the Church of Scotland. He was using the phrase in a uniquely Scottish sense as a member of an ecclesiastical establishment not subject to the supervision of the civil law. This may be an appropriate place to note the response of the Church of Scotland to the DTI discussion paper. It seeks to maintain its exemption from employment protection legislation, but not on the basis of its Declaratory Articles. Rather it argues that its existing procedures afford its ministers suitable protection: most ministers enjoy freehold, and church legislation is proposed to protect the position of those who do not. Nonetheless one can see that amendment of the law to extend protection would raise a significant constitutional issue.

law. Secondly, more pragmatically, if the Church of England can point to a satisfactory system of 'self-regulation' in regard to employment rights it could be thought unnecessary on that ground to extend employment protection legislation.

The first aspect raises quite an important matter of principle as regards the nature of the establishment, but it is perhaps unlikely to have much weight attached to it. There is, of course, no necessary reason why the state should regard the church's arrangements as satisfactory. Nonetheless by virtue of the Church of England Assembly (Powers) Act 1919 the church was given by the state the power of self-regulation (subject to certain safeguards). For the state to legislate in respect of the employment of its priests represents a breach of the principle underlying that arrangement. Nonetheless it has to be recognised that the Church of England *is* established, and for so long as this remains the position it cannot be said that legislation for the church offends any absolute principle.[34]

As regards the second aspect, the position is mixed. As regards the parochial clergy, some 5,500 have a freehold. This essentially means that save in the case of a grave disciplinary offence, these priests have complete security of tenure. No one suggests that their position is inadequately protected.[35]

There are about 1,500 curates. Their legal position is not entirely clear. By convention curates are generally licensed without any period being attached to their licence, although, as we have seen, Dr Coker's licence was for a period of six months. His case, however, was not a typical one. The position of a curate is one of training and the expectation is, as is well known, that a curate will 'move on' after about three years. If his licence is revoked by the bishop, a curate has a right of appeal to the archbishop. However, with the bishop's consent, his incumbent can give him six months' notice, in which case there is no right of appeal to the archbishop.[36]

More than 2,000 parochial clergy either hold office in a team ministry constituted under section 20 of the Pastoral Measure 1983 or are priests-in-charge.

[34] Hill, *Ecclesiastical Law*, p 10, gives examples of statutes that have been enacted since 1919.

[35] Until recently, the only issue in the Church of England that was live was whether those enjoying the freehold enjoy *too much* security. For a legal analysis, see Bursell, 'The Parson's Freehold' 2 Ecc LJ 259. For a consideration of the policy issues, see Bowlby, 'The Parson's Freehold and Clergy Discipline' 3 Ecc LJ 30.

[36] See the Pluralities Act 1838, s 98. The view is generally taken that section 98 applies to all curates, although this does not seem to be a natural reading of the Act. The authority for this proposition is *Baddely's Case* (1872), referred to in Phillimore, *Ecclesiastical Law* (2nd edn, 1895) but unreported. It is likely that there was no written judgment in this important case, the matter being decided on a preliminary point in an oral hearing before Archbishop Tait (Dr Deane, the Vicar-General, sitting with him as an assessor): see *The Guardian* 18 December 1872. It was by virtue of the general operation of section 98 of the 1838 Act that ParkerJ was able to hold that curates were office holders in *Re National Insurance Act 1911, Re Employment of Church of England Curates* [1912] 2 Ch 563.

Office in a team ministry is often referred to as a leasehold because it is for a fixed term of years. The bishop has power to extend the term of years but there is no right of appeal against the bishop's decision not to extend the term. The Standing Committee of the General Synod has approved in a *Code of Recommended Practice for Team and Group Ministries* a procedure to be adopted in considering whether a term of years should be extended. That procedure was criticised by the Court of Appeal in the *Owen* litigation.

As regards priests-in-charge, it was established in 1869 in *Sedgwick v Bishop of Manchester*[37] that there was no appeal from the decision of a bishop summarily to revoke the licence of a minister to officiate. However, upon the revision of canon law in 1964 a right of appeal to the archbishop was conferred in these circumstances and this led to the enactment of section 10 of the Clergy (Ordination and Miscellaneous Provisions) Measure 1964. The recent appeal to the Archbishop of York in *Brown v Bishop of Carlisle* illustrated the hybrid nature of the jurisdiction: in part appeal, in part the hearing of evidence by way of court of first instance. The case also illustrated the fact that where the bishop summarily revoked a licence, the minister concerned did not enjoy the protection which he might have had under section 16 of the Ecclesiastical Jurisdiction Measure 1983, namely, that the offence has to be committed within three years of the institution of proceedings. On the other hand the archbishop took the view that where there were complaints against a minister, it was inappropriate for the bishop to terminate the licence by notice.[38]

Finally it should be observed that it seems that, as has been noted, judicial review lies (upon cause being shown) in respect of the decisions of bishops in respect of curates and office holders in team ministries.[39] The point was however not decided in the *Owen* case. The position is less clear as regards priest-in-charge. In its response to the government's White Paper, the Church of England made it clear that it did not regard the position of the parochial clergy not enjoying the freehold as satisfactory,[40] and anyone who has examined the position will share this view.

SPIRITUAL OR RELIGIOUS NATURE OF A MINISTER'S DUTIES

It will be seen that, beginning with *Rogers v Booth* in 1937, in all the cases concerning the employment of a minister of religion, the courts have stressed the spiritual or religious nature of the job. This has led them to say that there was not a contract between the minister and the church. In a case like *Rogers v Booth* the force of this argument is apparent. Perhaps it was less obvious is *Parfitt*, but an arrangement whereby, consequent upon ordination, a church undertakes to provide a stipend for life and the minister

[37] *Sedgwick v Bishop of Manchester* (1869) 38 LJ Eccl 30.
[38] This involved considerations of fairness towards the minister, but also the sense of grievance with which complainants would have been left if there had been no adjudication upon the complaints.
[39] See *R v Archbishop of Canterbury, ex parte Poole* (1859) 28 LJ QB 154.
[40] See paras 11 and 15 of its Response.

undertakes indefinitely to accept the directions of the Conference does not look like a contract. In *Diocese of Southwark v Coker* the argument is less convincing because it is in truth hypothetical: a curate does not have a contract because he has an office with duties regulated by ecclesiastical law (which, because of the establishment, is part of the law of England). One does not know what arrangements the Church of England would make if it were not established. In contrast with the Methodist Church there is no obligation upon the Church of England to maintain a priest following his ordination.

However this may be, on the face of it cases like *Rogers v Booth* and *Parfitt* do suggest that where the arrangements are of the kind exemplified in those cases, the government should be slow to extend the scope of employment law to a situation where there is, genuinely, no contract between the minister and his church.

It is against this background that it is appropriate to look again at *Davies v Presbyterian Church of Wales*. The passage quoted above continues:

> The law imposes upon the church a duty to administer its property in accordance with the provisions of the book of rules. In *Forbes v Eden* (1867) LR 1 HL Sc & Div 568, 581; 5M (HL) 36, 50, Lord Cranworth said:
>
> > "There is no authority in the courts either of England or Scotland to take cognisance of the rules of a voluntary society, entered into merely for the regulation of its own affairs, save only so far as it may be necessary that they should do so for the due disposal or administration of property. If funds are settled to be disposed of amongst members of a voluntary association, according to their rules and regulations, then the court must necessarily take cognisance of their rules and regulations, for the purpose of satisfying itself who is entitled to the funds,—so if the rules of a religious association prescribe who shall be entitled to occupy a house, or to have the use of a chapel or other building. This is the principle on which courts have administered funds held in trust for dissenting bodies. There is no direct power in the courts to decide whether A or B holds a particular station, according to the rules of a voluntary association. But if a fund held in trust has to be paid over to the person who, according to the rules of the society, fills that character, then the court must make itself master of the question necessary to enable it to decide whether A or B is the party so entitled."
>
> Until the applicant was deprived of his pastorate in accordance with the procedures laid down in the book of rules, he was entitled to be paid his stipend out of the income of the sustentation fund and to occupy his manse. But the committee of the sustentation fund were not liable to pay the stipend otherwise than out of the income of the fund and the managing trustees of the manse were not liable to discharge the rates and expenses of the manse otherwise than out of voluntary contributions and church funds made available to them for that purpose. There was no con-

> tract of service between the applicant and the church, only obligations on the part of the church to administer church property in accordance with the trusts contained in the book of rules, and an obligation to ensure that no member of the church was unlawfully deprived of a benefit from church property to which that member was entitled under the rules. There is indeed an agreement between all members of the church to perform and observe the provisions of the book of rules, but that agreement will only be enforceable at law in respect of any property rights to which a member is entitled under the terms of the agreement. By no stretch of imagination can such an agreement constitute a contract of service.

What Lord Templeman is doing is going back to an old case on voluntary associations (what we now call unincorporated associations) which was particularly relevant since it concerned a church (the Episcopal Church of Scotland). From it he articulates the idea that as part of the law of property a minister could not be deprived of his job save in accordance with the rules.

The modern law of unincorporated associations usually describes the arrangements between members as a contract and enforceable as such (see *Abbott v Sullivan*,[41] *Lee v Showmen's Guild of Great Britain*,[42] and *Bonsor v Musicians' Union*[43]), and Lord Templeman did not explain how he thought these cases sat with his narrower view expressed in *Davies v Presbyterian Church of Wales*. However, for present purposes it does not matter. Where a church has a constitution or book of rules, the *Davies* case represents the authority of the House of Lords that a minister cannot be dismissed save in accordance with that constitution or book of rules.

It will be seen that this fact represents an argument as regards the extension of employment protection legislation that is capable of cutting both ways.

[41] *Abbott v Sullivan* [1952] 1 KB 189, [1952] 1 All ER 226, CA. In this case Denning LJ relied upon *M'Millan v General Assembly of the Free Church of Scotland* (the 'Cardross' case) (1861) 23 D 1314, in which the Court of Session was prepared to review a decision of the Free Presbytery of Dunbarton to suspend a minister who was alleged to have kissed a married woman while under the influence of drink. The judgment of Lord Deas in particular is interesting in that he stresses (at 1346–1347) the irrelevance of whether the contract being reviewed has a spiritual content:

> '... if the association make a compact with certain of his members that, on condition of the latter going through a long course of study and preparation, and devoting themselves exclusively to the labours of the ministry, they shall be held qualified and inducted ... into the charge of particular congregations, with a right to certain emoluments as a means of livelihood, and on the footing that the qualification thus conferred shall not be taken away except for one or more of certain causes, to be ascertained by certain tribunals, acting in a specified order, then the association, or its members, if they break this compact, may become liable for the consequence, precisely as if the emoluments had been attached to a purely secular qualification and employment'

Denning LJ says that *M'Millan* was approved in *Forbes v Eden* (1867) LR 1 HL Sc & Div 568, 5 M (HL) 36, although it is perhaps fairer to say that it was distinguished without being doubted.

[42] *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329, [1952] 1 All ER 1175, CA.

[43] *Bonsor v Musicians' Union* [1956] AC 104, [1955] 3 All ER 518, HL, [1955] 3 WLR 788, HL.

Once it is perceived that the relations between minister and church are likely to be regulated by law the argument from principle that this is not an area where the law should be operating at all—surely the emphasis of those judges who talk about the spiritual nature of the relationship—falls away.

Conversely, the emphasis by the courts on the spiritual nature of the relationship has served to conceal the fact that the minister will have a legal remedy if he is dismissed in a way not in accordance with the book of rules. Thus the DTI discussion paper is incorrect to state that 'in effect...ministers of religion are unable to seek redress through the legal system in the event of any dispute over their treatment by the church authorities'. Of course the Church of England is not a voluntary association. Nonetheless, as explained, it would appear that its 'rule book' (contained in Acts of Parliament, Measures and the Canons) is also enforceable in the secular courts.

THE RESPONSES OF THE CHURCHES CONSIDERED

Churches other than the Church of England

Save for the Church of England, the response of which will be considered further below, the reaction of the churches has been opposed to the extension of employment protection legislation to ministers of religion. One can guess that one objection—although clearly heartfelt—will receive short shrift from the government. This is that a change in the law will cost money. The Methodist Church calculates an annual cost of £825,000. One might quarrel with the calculation but it is surely illusory to think that changes of this kind are cost free. Nonetheless if the balance of other arguments point to a change one cannot see cost proving decisive.

Otherwise the arguments advanced by the churches are two-fold.

(i) that there is a special relationship between minister and church; and
(ii) that ministers are not subject to arbitrary dismissal.

The first argument is one that has already been considered in the context of the cases. The churches are obviously concerned about the development of an 'employment rights culture' to the detriment of the ideal of self-giving service. Thus the response of the Roman Catholic Church expresses the view that an extension of employment rights would 'undermine the relationship between a priest or deacon and his bishop', and the Salvation Army speaks of 'dangerously undermining the concept of spiritual authority'. The Methodist Church in referring to the possible development of a contract culture identifies another possibility which it puts rather oddly. It points out that the conferring of rights implies responsibilities, which a Methodist minister currently does not have: if the law were changed, ostensibly for his benefit, he would, nonetheless, be worse off than he currently is.

Once again one can recognise these concerns as real ones, but one guesses that expressed in these terms they will not prevail. They are easily met by the

sort of argument that is advanced by AMICUS in its response to the Green Paper:

> In charities and other value-based organisations, a powerful sense of mission and selflessness is common among workers, and the existence of an employment contract has no adverse bearing on it. We believe that in the same way, giving clergy employment rights would not influence their sense of calling or vocation.
>
> On the other hand, many of the problems clergy experience would be more easily overcome if the basic "floor of rights" laid down by statute, were seen to apply to clergy and could, as a final resort, be enforced in tribunals. This would be a beneficial influence on the range of working relationships of clergy within their churches.

Nonetheless, there are profounder issues. The Methodist view of the nature of the stipend has already been set out in the first quotation from the *Parfitt* case above. It is echoed by the standard Church of England view:

> ... The stipends of the clergy have always, we imagine, been rightly regarded not as pay in the sense in which that word is understood in the world of industry today; not as a reward for services rendered, so that the more valuable the service in somebody's judgment or the more hours worked the more should be the pay, but rather as *a maintenance allowance* to enable the priest to live without undue financial worry, to do his work effectively in the sphere to which he is called and if married to maintain his wife and bring up his family in accordance with a standard which might be described as that neither of poverty nor riches.[44]

A theologian might perhaps question the correctness of this analysis and a lawyer might point out that whether the stipend be wages or maintenance allowance, a minister will have the right to sue for it in the event of non-payment. Nonetheless if this analysis is correct it does strongly support the view that employment law should not be used to regulate a relationship which is not one of employment.

This argument is considerably strengthened if the situation is such that upon ordination (or comparable recognition of the minister's call), the church assumes a responsibility to maintain its minister both during active ministry and into retirement. This seems to be the position with, for example, the Roman Catholic Church, the Methodist Church and the Salvation Army. It is not in terms the position of the Church of England but in practice unemployment among clergy who are in good standing is low.[45]

[44] This appears in a Report by the House of Bishops in 1943 and is cited in *Clergy Conditions of Service: a Consultative Paper* (August 1994) (GS 1126). The emphasis is in the original.

[45] At the end of 1993 it was estimated that there were 19 clergy willing and suitable to take stipendiary posts but not presently employed.

Turning to the second limb of the churches' arguments against the extension of employment protection legislation, it is generally true that the churches have disciplinary procedures which provide for appeals and which, at least superficially, may support arguments that a minister has already in fact greater protection than an employee. However, there is of course no necessary requirement for there to be any protection. In its response to the Green Paper, the Methodist Church suggest that this point could be addressed by giving a church exemption from coverage by employment protection legislation only if it can demonstrate satisfactory disciplinary procedures.[46]

The existence of such procedures could not readily address the absence of a right not to be constructively dismissed. Moreover, the existence of a sophisticated disciplinary procedure is not, in itself, a reason for excluding ministers of religion from the scope of employment protection legislation. Such a system exists in respect of civil servants, for example. It can be said that such systems should be encouraged in all large employers as a matter of good practice and that the practical effect of their existence will be that there will be few successful claims for unfair dismissal.

It appears to the writer that the arguments advanced by the churches are good as far as they go and, for his part, he would regard them as conclusive. In particular the argument from principle should be emphasised: the state has no business in regulating the arrangements in respect of religious belief of private individuals without clear evidence of the need to do so. Nonetheless what is not 'spelled out' in the arguments are examples of situations where there could be conflict between 'the faith community' and the state (as represented by an employment tribunal) and where, they could argue, it was inappropriate that the state's view should be the final arbiter.

The Church of England

The position of the Church of England as regards the Consultation Paper is different from that of the other churches. This reflects its circumstances. On the one hand it is criticised by those who say that the position of those who do not enjoy the freehold is unsatisfactory, and on the other it is criticised by those who say that the position of those who *do* enjoy the freehold is unsatisfactory. This suggests a review in which both issues are examined; and one possible outcome could be that the quid pro quo for abolishing the freehold is the conferral of statutory employment rights. Accordingly, a working group has been set up under Professor David McClean to consider the position generally and, as a first task, to examine ways of improving the position of those without freehold.

[46] A precedent exists in the 'ecclesiastical exemption' applying to listed buildings: see the Planning (Listed Buildings and Conservation Areas) Act 1990, s 60, and the Ecclesiastical Exemption (Listed Buildings and Conservation Areas) Order 1994, SI 1994/1771. As has been seen (note 33 above), the Church of Scotland also suggests that exemption should be given in circumstances where ministers enjoy satisfactory protection.

This background forms the context for its statement in its response to the DTI Discussion Paper that it does not have a 'fundamental objection' to the introduction of statutory regulation in this area. Further 'there is no fundamental theological incompatibility between being a minister of religion and having a contract, with access to employment tribunals in the case of dispute'.[47]

In the view of the writer, there is one fundamental issue that the Church of England needs to address. Does it accept that, upon ordination to the stipendiary ministry, it assumes an obligation to maintain a priest until retirement? One may guess that there may be a certain reluctance to accept such an obligation, although in practice the 'square pegs' are often accommodated. If it does not, then a key difference with secular employment disappears and there would be much logic in the employment of clergy being governed by contract and enjoying statutory employment rights.

THE VIEWS OF AMICUS

AMICUS is a trade union representing ministers of religion. At the heart of its position is the view that 'in reality' ministers of religion are employed and that employment law should be changed to reflect that reality, although it does float the idea that legislation could be promoted which, while overruling *Parfitt* and *Coker*, would still allow employment tribunals in appropriate cases to hold that there was no contract of employment. This is unlikely to be a course which would commend itself to anybody.

The most telling part of its submissions are the accounts, delivered from a survey[48] of cases involving or known to its members of unfair treatment. Of course one is only hearing one side, but AMICUS is surely right to seek to emphasise the specific in its representations.

CONCLUSIONS

The position of the Church of England is central to the debate in that one cannot see a situation in which employment rights are extended to the churches other than the Church of England. Whether government is prepared to stay its hand for so long as it takes for that church to sort out its position on freehold remains to be seen. It would be ironic if the church ended up with what it might view as the worst of all worlds, namely the extension of employment protection rights to all its clergy i.e. those with the freehold as well as those without it.

[47] Paragraph 9 of the Response. This statement is ambiguous. It appears to be of general application but it could, alternatively, be limited to ministers of religion with secular employers (e.g. hospital chaplains) whom no one doubts have contracts of employment. Note that the Response subsequently (para 11) talks about the issues arising as having (among other things) theological implications.

[48] AMICUS has about two thousand members who are ministers of religion or church workers. Some of them (e.g. hospital chaplains) will be employees. Of the 873 members surveyed, 25 per cent replied. AMICUS commented that their response was good for a postal survey. To the writer it suggests that the membership as a whole may be somewhat equivocal about pushing for employee status.

In reality the practical consequences of extending employment protection rights could be less than is either hoped or feared. Churches already do have disciplinary procedures designed to ensure a fair hearing, and where these are lacking one may expect, in any event, improved procedures to be put in place.[49]

Against this background, successful claims of unfair dismissal based purely on procedural unfairness would, one would agree, be few in number. Moreover one may expect that the churches will be astute to ensure that a standard 'contract' for a minister of religion will include a 'work anywhere' clause so that the minister cannot object to a move.

It is submitted that what the churches need to emphasise (if they wish to maintain the exemption) are the practical consequences. It is one thing to say that pastoral, spiritual and theological issues are potentially involved and that these issues are inappropriately canvassed before an employment tribunal, but it is another to illustrate what this means in practice. One such example is the position of a minister whose marriage breaks up in circumstances where a third party is involved. Another is the minister who in the eyes of his congregation loses his faith but considers that his position is compatible with orthodoxy. A person who may feel he is being persecuted is likely to pursue a remedy in the employment tribunal even if the prospects of success may be doubtful. There will be other examples. No doubt the employment tribunal could grapple with these problems, but legislators need to ask themselves whether this is an area that employment law should be applied to in the first place.

[49] The Church of England, the Church of Scotland and the Methodist Church all propose improving their current procedures.