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COMMENT

Clergy Employment, Judicial Review and the Free Presbyterian Church of Scotland

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THE BACKGROUND

The Revd Allan Macdonald was inducted as Free Presbyterian Minister at Daviot, Tomatin and Stratherrick in 2001. He received neither a written contract of employment nor a statement of terms and conditions. In 2006 he wrote book, *Veritatem Eme*,[2] that was highly critical of some aspects of the life of the Church and was ordered to apologise. He refused to comply, was temporarily suspended in January 2007 and suspended from the ministry sine die – in effect, dismissed – in May 2008.

THE EMPLOYMENT TRIBUNAL PROCEEDINGS

In August 2008 Macdonald presented a claim to an employment tribunal for unfair dismissal. Employment Judge MacKenzie concluded that

> . . . Deacons, Elders and Ministers are ordained to their respective offices within the Free Presbyterian Church and each is an office-holder and that therefore the claimant is an office-holder by virtue of his ordination. His rights and duties are defined by the office he holds and not by any contract. He is not an employee of the respondents.[3]

On that analysis, because Mr Macdonald was not an employee he could not have been dismissed, unfairly or otherwise.

1 I should like to thank The Revd Alexander McGregor, Deputy Legal Adviser, Church of England Legal Office, for his helpful comments on an early draft of this article. For the earlier review cases, see F Cranmer, 'Judicial Review and Church Courts in the Law of Scotland', [1998] *Denning Law Journal* 49–66.
2 *Buy the Truth* – Proverbs 23:23 in the Vulgate version: *veritatem eme et noli vendere sapientiam.*
3 *Macdonald v Free Presbyterian Church of Scotland* [2009] ET S/11071/08 (28 May 2009) at para 81.

The grounds of appeal were that the judgment at first instance was not compliant with the principles in *Meek v City of Birmingham District Council*[4] or the requirements of Rule 30(6) of the Employment Tribunals Rules of Procedure set out in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004, SI 2004/1861, and that the case should be reheard by a freshly-constituted tribunal. In particular, it was contended that the Employment Judge had failed to set out the material findings of fact, the relevant legal principles and the justification for his conclusions.

Lady Smith, sitting alone, dismissed the appeal.[5] Having done so, however, even though it was not at issue in the appeal she turned to 'the substantive law relating to the central issue . . . whether or not the claimant was an employee of the respondents':[6] in short, the possibility that a worker who was an office-holder might nevertheless still be an employee.[7]

The duality of office-holding and an employer-employee relationship depended on the parties having had an intention to create legal relations.[8] Lady Smith noted that, in spite of his conclusion at paragraph 81, Employment Judge MacKenzie had gone on to consider whether or not an office-holder might also be an employee and had concluded that the only indications suggesting that Mr Macdonald had been an employee were the arrangements for his PAYE and the fact that he was described as an employee in the accounts and for pension purposes. Otherwise, there was no suggestion that the respondents controlled his activities.[9] Judge MacKenzie had further taken note of Article 9 of the European Convention on Human Rights (thought, conscience and religion) and had suggested that when determining whether or not there was an intention to create an employer-employee relationship the principles of the individual Church in question had to be taken into account,

4 *Meek v City of Birmingham District Council* [1987] IRLR 250: that although judgments are not required to be '. . . an elaborate formalistic product of refined legal draftsmanship . . .' they should '. . . contain an outline of the story . . . and a summary of the tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts', *per* Bingham LJ at para 9.

5 *Macdonald v Free Presbyterian Church of Scotland* [2010] UKEAT S/0034/09/BI (10 February 2010), available at <http://www.bailii.org/uk/cases/UKEAT/2010/0034_09_1002.html>, accessed 14 March 2010.

6 [2010] UKEAT S/0034/09/BI at 52. The issue of clergy employment also arose recently, though as a side-issue, in *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256 (16 March 2010), in which the Court of Appeal found for a claimant who sought damages for sexual abuse by a priest of the Archdiocese. At first instance Jack J had held that the Archdiocese was not vicariously liable for the abuse. On appeal, counsel for the Archdiocese accepted that the errant priest should be treated as its employee for the purposes of the action while insisting that this should not be taken as a general admission that a priest was, or was in the same position as, an employee – and the appeal proceeded on that basis. The issue of principle as to whether or not a Roman Catholic priest was 'employed' by the Church was not pursued.

7 See Lord Hope in *Percy v Board of National Mission of the Church of Scotland* 2006 SC (HL) 1 at 87.

8 [2010] UKEAT S/0034/09/BI at 55.

9 [2010] UKEAT S/0034/09/BI at 39.

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because the law should not readily impose on the members of a Church a legal relationship that would be contrary to their religious beliefs.[10]

Her Ladyship commented that there were two conclusions to be drawn from the determination of the Employment Tribunal.

> One is that [Judge MacKenzie's] conclusion is consistent with recognition of the principle that, in the case of a church whose foundation and structure shows a belief that it is not appropriate, in the case of important offices including that of Minister, to set up a legal relationship that is subject to control by the Civil Magistrate. The other is that this is not a case where the initial conclusion is that there is a legal relationship requiring a check to be made to see whether, in holding that such a relationship exists, the law is imposing something that conflicts with the essential beliefs of that church. In short, the Article 9 considerations could be briefly and succinctly dealt with, given the facts and circumstances of this case; there was no need to have a concern that they were being breached.[11]

She also noted that there was no general rule either that all ministers of religion were employees or that they were *not* employees. In upholding the conclusion that Mr Stewart was an employee, Pill LJ had been careful in *New Testament Church of God* to add that his conclusion did not 'involve a general finding that ministers of religion are employees. Employment tribunals should carefully analyse the particular facts, which will vary from church to church, and probably from religion to religion, before reaching a conclusion'.[12] There were no hard-and-fast rules about what features a relationship had to have before it amounted to a contract of employment but, apart from a minimum of mutual intention to create a legally enforceable relationship, there would usually be sufficient control over the worker's activities so as to categorise him as a 'servant' and the worker would be working in return for a salary rather than on his own account.[13]

10 Following *New Testament Church of God v Stewart* [2007] EWCA Civ 1004 (19 October 2007): [2008] ICR 282.

11 [2010] UKEAT S/0034/09/BI at 42: *sic*. It may be helpful to clarify the slightly-confusing reference in paragraph 7 of Lady Smith's judgment to the Disruption of 1843 and the fact that the Protest and Deed of Separation of the founders of the Free Church were 'recorded in a document dated 14 August 1893'. The Free Presbyterian Church was the result of a *further* schism in 1893, when The Revd Donald Macfarlane of Raasay and two elders laid a Protest on the Table at the Free Church General Assembly and left it to found the Free Presbyterian Church in the same year. Macfarlane and his colleagues took care formally to record the Protest and Deed of Separation of 1843 in their own founding documents 50 years later because they asserted that it was they who were the 'true' Free Church and that the body which they had left had departed from the theological principles espoused at the Disruption.

12 *New Testament Church of God v Stewart* [2007] EWCA Civ 1004 at 55.

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

THE JUDICIAL REVIEW PROCEEDINGS

Neither Employment Judge MacKenzie nor Lady Smith made any mention of the judgment of the Inner House in *Brentnall v Free Presbyterian Church of Scotland*,[14] which also involved the suspension of a minister sine die. On that occasion the Second Division held that, in acting as it did, the Synod had exceeded its powers and had failed to observe the rules of natural justice. Both Lord Justice Clerk Ross and Lord Brand quoted with approval the dictum of Lord Justice Clerk Aitchison in *McDonald v Burns*[15] that the decisions of the judicatories of religious bodies were reviewable where the tribunal concerned had 'acted clearly and demonstrably beyond its own constitution and in a manner calculated to affect the civil rights and patrimonial interests of any of its members' or where its proceedings had been 'marked by . . . such fundamental irregularity as would, in the case of an ordinary civil tribunal, be sufficient to vitiate the proceedings'.[16] Their Lordships did not even begin to consider whether or not Mr Brentnall was 'employed' by the Church: following *Forbes v Eden*[17] it was simply assumed that if Mr Brentnall had suffered a patrimonial injury as a result of a serious wrongdoing by the Church he must be entitled to reparation.

That omission was slightly surprising, suggesting various possibilities: that there is a disjunction between employment law and judicial review, that though allegedly 'unfair' the actings of Synod had not been so irregular as to engage either of the tests in *McDonald v Burns*, that since *Brentnall* the law has developed in such a different direction that the case is no longer relevant – or possibly that *Brentnall* was simply not brought to the attention of either tribunal.

That confusion was dispelled when Lord Glennie handed down his judgment in *Macdonald, Re Application for Judicial Review*.[18] In addition to his action for unfair dismissal in the Employment Tribunal, Macdonald had petitioned the Court of Session for declarator that the various resolutions deposing him from the ministry were invalid and of no effect, reduction of those resolutions, interdict of the respondents from taking steps to remove him from his manse and damages: that he had been subjected:

14 *Brentnall v Free Presbyterian Church of Scotland* 1986 SLT 470. For a discussion of that case, see F Cranmer, 'Judicial Review and Church Courts in the Law of Scotland', [1998] *Denning Law Journal* 49–66 at 54 ff.

15 *McDonald v Burns* 1940 SC 376.

16 Ibid at 383.

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

18 *McDonald, Re Application for Judicial Review* [2010] ScotCS CSOH 55 (28 April 2010) available at <www.bailii.org/scot/cases/ScotCS/2010/2010CSOH55.html>, accessed 10 May 2010.

> . . . to proceedings which have been conducted irregularly and in an unfair manner and which have ultimately led to his deposition from the ministry of the gospel and the loss of his income (including pension rights) and accommodation. Underlying the complaints there is a suggestion . . . that he has been the victim of a personally motivated campaign . . . and that he has at various stages . . . been denied a proper opportunity of putting his case.[19]

In their first plea-in-law the respondents contended that the petitioner was barred from insisting on the petition by '*mora*, taciturnity and acquiescence': undue delay in bringing the petition, failure to speak out in assertion of his claim and passive assent to what had taken place.[20] It was argued that the petitioner's decision to make a claim for unfair dismissal before an Employment Tribunal rather than immediately to seek judicial review had amounted to an implicit acceptance of the decisions to suspend him. The Lord Ordinary concluded that the argument on *mora* was not made out. He also rejected the contention that in June 2009 the petitioner had 'reached a fork in the road, and opted to pursue the appeal to the EAT and not to follow through his threat of judicial review proceedings'. There was no inherent inconsistency between the two routes or, at any rate, no implied statement by Macdonald that he was pursuing the one at the expense of the other.[21] As a preliminary to a full hearing of the allegations in the petition, his Lordship repelled the respondents' first plea-in-law. Further proceedings are pending.

COMMENT

The importance of Lady Smith's judgment in the Employment Appeal Tribunal for the law on clergy employment is that she confirmed the approach taken in *New Testament Church of God*. In that case, Pill LJ had argued, obiter, that whether or not an employer-employee relationship existed had to be decided on the facts of each case. That is precisely what the Employment Judge did in *Macdonald* and, having done so, he concluded that it followed from the ecclesiology of the Free Presbyterian Church that teaching elders (ie ministers), ruling elders and deacons must all be regarded as office-holders rather than as employees.

It should be noted, however, that the Employment Judge's declaration in paragraph 104 of his determination that '[i]t is accepted the Church of England recognises Ministers are employees' (quoted by Lady Smith at paragraph 41 of her

19 [2010] ScotCS CSOH 55 para 20.
20 Para 4.
21 Para 28.

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judgment without further comment) was simply wrong. That inelegant statement will come as a considerable surprise to the Church of England, whose Review of Clergy Terms of Service concluded unequivocally that parish clergy should continue to be office-holders rather than employees.

> Whilst there are benefits to the integration of the majority of employee rights into the life of the Church, the classification of parochial clergy as employees would entail too significant an alteration to the basis on which ministry is provided. The key feature of an employer/employee relationship is the ability of the employer to direct the work of the employee. The nature of the parochial ministry . . . makes such a relationship impossible without a radical change in how clergy are deployed.[22]

Certain non-parochial clergy fulfilling specific functions for specific periods are undoubtedly employed under contract; as to parochial clergy, however, the situation is quite different. Regulation 33 (right to apply to an employment tribunal) of the Ecclesiastical Offices (Terms of Service) Regulations 2009, SI 2009/2108, made pursuant to section 2 of the Ecclesiastical Offices (Terms of Service) Measure 2009, applies Part X (ss 94–134: Unfair Dismissal) of the Employment Rights Act 1996 to those who hold office under common tenure; however, the Regulations and the Measure confer rights under the 1996 Act *as if* such clergy were employed, not because they *are* employed. Section 9(6) of the Measure makes that explicit: 'Nothing in this Measure shall be taken as creating a relationship of employer and employee between an office holder and any other person or body.' Finally, neither applies to clergy with freehold.

As to the judicial review proceedings, Lord Glennie's judgment underlines the fact that proceedings for unfair dismissal and proceedings for judicial review are not mutually-exclusive alternatives. The alleged facts in *Macdonald* have more than a passing resemblance to those in *Brentnall*: an allegation of procedural irregularities by the courts of the Church and suggestions that the accusations against the petitioner were motivated by personal animosity. The final determination will be important not only for the parties themselves but as part of the wider questions of the extent to which the Court of Session is prepared to review the actings of tribunals of voluntary religious bodies and whether or not the traditional procedure of trial by libel before Presbytery (which the Church of Scotland abolished by Act III 2001) satisfies the requirements of fairness and impartiality of Article 6 ECHR.

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22 'Office holder/employee status', available at <http://cofe.anglican.org/lifeevents/ministry/workofmindiv/dracsc/rctshomepage/faqs/faqs2.htm>, accessed 27 March 2010: emphasis added.