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Methodist Ministers: Employees or Office-holders?

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The issue of whether or not a minister of religion is an employee or an office-holder came before the Supreme Court in an action for unfair constructive dismissal against the Methodist Church. The Court held by a majority of four to one that, on the basis of the Church's Deed of Union and Standing Orders, the terms of engagement of ministers were not contractual for the purposes of employment law and that a minister's duties were not consensual. The judgment moderates somewhat the impact of the earlier judgment of the House of Lords in Percy v Board of National Mission of the Church of Scotland – *and makes the employment status of ministers even more sensitive to the facts of the individual case than it was before.*[1]

Keywords: clergy, contract, doctrine, ecclesiology, employment

INTRODUCTION

The Revd Haley Preston (née Moore) was ordained in 2003 and in 2006 was appointed Superintendent Minister in Redruth Circuit. Under the terms of her appointment she was provided with a manse and a pension and received a stipend from which income tax and National Insurance contributions were deducted. She had an employee reference number, she was given a P60 at the end of each tax year and had to sign a confirmation for tax purposes of the benefits that she had received, and she was entitled to holiday and sick pay and was required to obtain sick notes and to claim statutory sick pay. In addition, the Circuit Stewards were required to inform her of any concerns as to her performance, any such concerns could be raised at Circuit meetings and she was required to have at least one accompanied self-appraisal each year.[2]

Over the course of the first half of 2009 Mrs Preston felt under unfair pressure to resign and in early June was told that the procedure was being set in train to 'curtail' her appointment.[3] On 10 June 2009 she submitted her resignation and in September brought proceedings in an Employment Tribunal (ET)

1 I am indebted to Prof Lucy Vickers of Oxford Brookes University and to Dr Russell Sandberg, my colleague at Cardiff Law School, for their very helpful comments on this article in draft. Any remaining infelicities are mine.
2 *Moore v President of the Methodist Conference (Jurisdictional Points: worker, employee or neither)* [2011] UKEAT 0219 10 1503 at 16.
3 Ibid at 1.

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alleging unfair constructive dismissal – which raised the preliminary issue of whether or not she was an 'employee' with a contract of employment for the purposes of Section 230 of the Employment Rights Act 1996.

At first instance the ET dismissed her claim. The Employment Appeal Tribunal (EAT) reversed the ET; and the Court of Appeal (Maurice Kay and Longmore LJJ and Sir David Keene) upheld the EAT's conclusion and found for Mrs Preston (*Preston I*).[4] On a further appeal, however, the Supreme Court (Lord Hope DPSC and Lords Wilson, Sumption and Carnwath JJSC: Lady Hale JSC dissenting) restored the judgment of the ET (*Preston II*).[5]

THE ISSUE

In 1984 the Court of Appeal had held in *Parfitt*[6] that, because of the spiritual nature of the relationship between a minister and the Methodist Church, the Revd Mr Parfitt was not employed under a contract of service – and that being so, an industrial tribunal had no jurisdiction to consider his claim of unfair dismissal. Dillon LJ considered the spiritual character of the Methodist ministry to be fundamental to the Constitution and Standing Orders of the Methodist Church and reached his conclusion by an analysis of their terms:

> . . . 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 connexion. The nature of the stipend supports this view.[7]

Further, May LJ concluded that the spiritual character of the Methodist ministry was *in itself* inconsistent with the existence of a contractual relationship.

The ET in Mrs Preston's case had considered that her claim could not be distinguished from *Parfitt* on the facts and that she was not, therefore, an employee. Both before the EAT and the Court of Appeal she argued – successfully – that *Parfitt* was no longer binding because, although not expressly overruled by the more recent decision of the House of Lords in *Percy*, [8] it could not be

4 *President of the Methodist Conference v Preston* [2011] EWCA Civ 1581 (hereafter *Preston I*).
5 *President of the Methodist Conference v Preston* [2013] UKSC 29 (hereafter *Preston II*).
6 *President of the Methodist Conference v Parfitt* [1984] ICR 176.
7 Ibid at 184E.
8 *Percy v Board of National Mission of the Church of Scotland* [2006] 2 AC 28. The case involved a claim against the Church for discrimination, contrary to the Sex Discrimination Act 1975, by a woman

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reconciled with it,[9] and that the facts of her situation pointed to an employer–employee relationship.

The Methodist Church disputed this. It founded its position on its understanding of its relationship with its ministers as one of mutual obligation and responsibility. In support, it cited Standing Order 700 (Presbyteral Ministry):

> (1) Ministers are ordained to a life-long presbyteral ministry of word, sacrament and pastoral responsibility in the Church of God which they fulfil in various capacities and to a varying extent throughout their lives.
> (2) By receiving persons into full connexion as Methodist ministers the Conference enters into a covenant relationship with them in which they are held accountable by the Church in respect of their ministry and Christian discipleship, and are accounted for by the Church in respect of their deployment and the support they require for their ministry . . .[10]

PRESTON IN THE COURT OF APPEAL

In the Court of Appeal, Maurice Kay LJ proceeded from the assumption that although the relationship between a minister and the Church had changed since the time of *Parfitt* it was still 'substantially similar'.[11] Some of the earlier cases had assumed that clergy were appointed on the basis of a rebuttable presumption that, viewed objectively, there was an absence of an intention to create legal relations. That position

> had been expressed most clearly by Dillon LJ in *Parfitt* itself . . . I say 'at the very least' because some judgments expressed the proposition virtually as a rule of law. The judgment of Waterhouse J in the EAT in *Parfitt* is an example.[12]

In *Percy*, Lord Nicholls had pointed out that there were many circumstances in church affairs in which, viewed objectively on ordinary principles, the parties could not be taken to have intended to enter into an enforceable

associate minister who had been persuaded to demit her ministerial status after an allegation of an adulterous relationship with a member of her kirk session.

9 *Young v Bristol Aeroplane Co* [1944] KB 718 at 729: 'The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords' (*per* Lord Greene MR).

10 The Standing Orders constitute Book III of *The Constitutional Practice and Discipline of the Methodist Church* (Peterborough, 2012), available at <http://www.methodist.org.uk/media/633296/cpd-vol-2-0912.pdf>, accessed 20 June 2013; the quotation is from p 530.

11 *Preston I* at 2.

12 *Preston I* at 21.

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contract – and that the facts in *Parfitt* had come under that head.[13] Crucially, however, he had also declared that the rebuttable presumption

> . . . should not be carried too far. *It cannot be carried into arrangements which on their face are to be expected to give rise to legally binding obligations*. The offer and acceptance of a Church post for a specific period, with specific provision for the appointee's duties and remuneration and travelling expenses and holidays and accommodation, seems to me to fall firmly within this latter category. Further, . . . there seems to be no cogent reason today to draw a distinction between a post whose duties are primarily religious and a post within the Church where this is not so.[14]

Furthermore, said Lord Nicholls:

> 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.[15]

Maurice Kay LJ thought it 'abundantly clear' that part of the ratio of *Percy*, as confirmed by the Court of Appeal in *Stewart*, [16] was that that rebuttable presumption of an absence of intention to create legal relations had now been abandoned.[17] He agreed with Underhill J in the EAT that the effect of *Percy* was that the spiritual role of a minister could not of itself justify refusal to give effect to an arrangement which otherwise had the marks of a contract. *Percy* had undermined the reasoning in *Parfitt* and 'although most of the speeches in *Percy* are characterised by a linguistic gentleness in their approach to *Parfitt*, that does not disguise the fact that they caused the tectonic plates to move'.[18] In his view, the EAT had concluded – correctly – that once it was accepted that Mrs Preston's spiritual role was consistent with her being an employee and once the question whether or not there was anything special about the nature of her remuneration had been decided, all the indications were that she had a contract of service.[19]

13 *Percy* at 23, citing Mummery LJ in *Diocese of Southwark v Coker* [1998] ICR 140 at 147.
14 *Percy* at 24–25 (emphasis added).
15 Ibid at 26 (emphasis added).
16 *New Testament Church of God v Stewart* [2007] EWCA Civ 1004, in which it was held that the Revd Mr Stewart had an employment relationship with the Church for the purposes of a claim for unfair dismissal.
17 *Preston I* at 21.
18 Ibid at 25.
19 Ibid at 27–28.

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Lord Justice Kay noted that Lord Templeton had conceded in *Davies*[20] that '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'.[21] In Lord Justice Kay's opinion, it therefore followed that a minister of religion might be an employee and might sue for unfair dismissal and it was for the ET to decide, on the facts, whether or not the statutory criteria of unfairness were satisfied in any individual case.[22]

He also gave short shrift to the Church's argument that a finding of an employer–employee relationship would infringe its rights under Article 9 of the European Convention on Human Rights.[23] In his view, the potential role of Article 9 in such cases was 'very modest', and to contend that accountability before an employment tribunal and the associated costs might interfere with the Methodists' right to manifest their religious beliefs 'only serves to emphasise the unattractiveness and moral poverty of the attempted invocation of Article 9 in this case'.[24]

PRESTON IN THE SUPREME COURT: THE MAJORITY

Mark Hill notes that the Church's case 'was substantially reformulated when it came to be argued in the Supreme Court'.[25] In a surprisingly short leading judgment in the Supreme Court, Lord Sumption noted that disputes about the employment status of ministers of religion had been coming before the courts ever since the introduction of National Insurance in 1911 and that many of the authorities had been 'influenced by relatively inflexible tests borne of social instincts which came more readily to judges of an earlier generation than they do in the more secular and regulated context of today'.[26] He discerned two themes in the earlier case law: a distinction between 'office' and 'employment' and a tendency 'to regard the spiritual nature of a minister of religion's calling as making it unnecessary and inappropriate to characterise the

20 *Davies v Presbyterian Church of Wales* [1986] ICR 280, an unfair dismissal claim by a minister in which Lord Templeman, delivering the leading speech, held that there could be no contract of employment between Mr Davies and the Church because the Church's book of rules did not contain any terms of employment capable of being offered and accepted in the course of a religious ceremony.

21 Ibid at 289C.

22 *Preston I* at 37.

23 The Article 9 point had been raised previously in *Stewart*, where Pill LJ had stated (at para 47) that 'The religious beliefs of a community may be such that their manifestation does not involve the creation of a relationship enforceable at law between members of the religious community and one of their number appointed to minister to the others … The law should not readily impose a legal relationship on members of a religious community which would be contrary to their religious beliefs'.

24 *Preston I* at 34.

25 M Hill, 'Terms of service', *New Law Journal*, 7 June 2013.

26 *Preston II* at para 2.

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relationship with the church as giving rise to legal relations at all'.[27] He described the general position after *Percy* like this:

> . . . 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.[28]

As to the nature of the Methodist ministry, it was an amalgam of various features: the definition in Standing Order 700, the system of annual 'stationing' of ministers in their charges by Conference and the fact that a minister could cease to be in full connexion only in limited circumstances. Under Standing Order 760, though a minister might submit notice of resignation to the President of Conference it was for the President, advised by a special committee, to accept or reject it. Otherwise, a minister could be removed from the ministry by a Disciplinary Committee under Standing Order 1134.[29] Moreover:

> Even supernumerary ministers are required under standing order 792 to continue to exercise their ministry 'as he or she is able'. All ministers in full connexion who are not permitted to be without appointment . . . are defined by section 1 of the Deed of Union as being 'in the active work'.[30]

Finally, the Church did not regard the stipend and the manse as the consideration for the services of its ministers; rather, they were a method of providing the material support to the minister without which he or she could not serve God: 'In the Church's view, the sale of a minister's services in a labour market would be objectionable, as being incompatible with the spiritual character of their ministry.'[31]

27 Ibid at paras 3–5.
28 Ibid at para 10 (emphasis added).
29 Ibid at para 17.
30 Ibid at para 18.
31 Ibid at para 19.

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Lord Sumption concluded that, on the basis of the relationship as described in Standing Orders:

i. The manner in which a minister was engaged was incapable of being analysed in terms of contractual formation. Both ordination and admission to full connexion were not contractual and the subsequent duties were not consensual;
ii. Ministers received a stipend and a manse by virtue only of their admission into full connexion and ordination – and the procedural rights derived from the disciplinary scheme of the Deed of Union and the Standing Orders was the same for all members of the Church, whether ordained or lay;
iii. The relationship between a minister and the Church was not terminable except by the decision of the Conference or its Stationing Committee or a disciplinary committee and there was no unilateral right to resign, even on notice.

On that basis, the Methodist ministry was a vocation and Mrs Preston's claim failed. Candidates submitted themselves to the discipline of the Church for life and, in general, the rights and duties of ministers arose from their status under the Constitution of the Church rather than from any contract.[32]

PRESTON: LADY HALE'S DISSENT

As we have seen, Lady Hale dissented: in her view, 'Everything about this arrangement [looked] contractual, as did everything about the relationship in the *Percy* case.'[33] *Percy* had demonstrated that the temporal relationship between a minister and the Church was not to be confused with the spiritual relationship between that minister and God; moreover, there was nothing intrinsic to religious ministry inconsistent with a contract between the minister and the religious organisation in question. Rabbis, for example, were employed by individual synagogues.[34] The matter had been clouded by the fact that many posts held by ministers were offices in the sense that the post had a permanent existence irrespective of whether or not there was a current incumbent.[35]

On her reading of the Church's Standing Orders, various points arose. First, 'it would be very odd indeed if a minister who was not paid her stipend or was threatened with summary eviction from her manse could not rely upon the terms of her appointment either to enforce the payment or to resist a possession

32 Ibid at para 20.
33 Ibid at para 49.
34 Ibid at para 36.
35 Ibid at para 37.

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action' – and the controlling body responsible for remuneration and accommodation is Conference.[36] She also drew a distinction between 'being in full connexion' and being assigned to a particular appointment:

> The assignment is to a particular post, with a particular set of duties and expectations, a particular manse and a stipend which depends (at the very least) on the level of responsibility entailed, and for a defined period of time. In any other context, that would involve a contract of employment in that post.[37]

In her view, the spiritual nature of some of the duties did not necessarily mean that there was no contract: 'I do not think that a prior commitment to go where you are sent negates a mutual contractual relationship when you are sent and agree to go to a particular place.'[38]

DISCUSSION

Prior to the proceedings in *Preston/Moore*, Lady Smith had held in *Macdonald*[39] that the pursuer, a minister, was an office-holder rather than an employee. She based her conclusion at least in part on two propositions: that the office of minister of Word and Sacrament in the Free Presbyterian Church (FPC) was regarded as no different in kind from that of ruling elder or deacon; and that the ecclesiology of the FPC as manifested in the questions put to *all* candidates for ordination – whether as ministers, elders or deacons – maintained that 'the Civil Magistrate [ie the secular state] does not possess jurisdiction or authoritative control over the regulation of the affairs of Christ's Church'. Citing Lord Hope in *Percy* to the effect that 'the parties' intention when they entered into the agreement can only be established objectively',[40] she concluded that, so far as the FPC was concerned, 'the parties are not in a legally enforceable relationship. That being so, it is otiose to consider the nature of their (non-existent) relationship.'[41] It is very difficult to square that judgment with the Court of Appeal's finding in *Preston I* but very easy to reconcile it with *Preston*

36 Ibid at para 45.
37 Ibid at para 48.
38 Ibid at para 47.
39 *Macdonald v Free Presbyterian Church of Scotland* [2010] UKEAT 0034 09 1002. The associated proceedings in the Outer House in *Macdonald, Re Application for Judicial Review* [2010] ScotCS CSOH 55 were ultimately settled. Thus *Brentnall v Free Presbyterian Church of Scotland* 1986 SLT 470 remains the most recent authority for the proposition that the Court of Session will intervene in a matter involving a patrimonial interest and review the actings of a tribunal of a voluntary religious body. See also F Cranmer, 'Clergy employment, judicial review and the Free Presbyterian Church of Scotland' (2010) 12 Ecc LJ 355–360.
40 *Percy* at 107.
41 *Macdonald* at 58.

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II. The majority carried out an analysis of the Methodist Church's Standing Orders analogous to Lady Smith's in relation to the FPC and came to a very similar conclusion: that the relationship between the Church and its ministers was one of mutual obligations and responsibilities.

So has the judgment in *Preston II*, in effect, set aside *Percy*? I would suggest that it has not – or, at any rate, that it has not done so entirely. Prior to *Preston II* the Supreme Court had undertaken a similar analysis of an alleged employer–employee relationship in *Autoclenz*.[42] In that case the claimants, who valeted cars on behalf of Autoclenz, had all signed statements declaring unequivocally that they were self-employed; and they were taxed on that basis rather than under PAYE. Nevertheless, they sought a declaration in an ET that they were, in fact, workers and that they were entitled to holiday pay and the National Minimum Wage under the Working Time Regulations 1998 and the National Minimum Wage Regulations 1999. It was common ground between the parties that if the terms of the written declaration were valid then, as a matter of law, the claimants could not be workers within the meaning of either set of Regulations. The Supreme Court held unanimously that valeters *had*, in fact, been working under contracts of employment and that the ET had been 'entitled to hold that the documents did not reflect the true agreement between the parties … [and] to disregard the terms of the written documents, in so far as they were inconsistent with them'.[43] Delivering the sole judgment, Lord Clarke agreed with Aikens LJ's conclusion in the Court of Appeal that the correct approach was to discover the actual legal obligations of the parties:[44] 'This may be described as a purposive approach to the problem. If so, I am content with that description.'[45]

In *Preston II*, Lord Hope began from the position that the facts should be approached 'with an open mind and without the distractions of a presumption either one way or the other';[46] but he did not take that to mean that the court could simply ignore the Church's doctrinal reasons for regarding an employment arrangement as unnecessary. Nevertheless:

> In finding that there was no contract, the court is not ignoring the modern approach to these matters. What it cannot ignore is the fact that, because of the way the Church organises its own affairs, the basis for the respondent's rights and duties is to be found in the constitutional provisions of the Church and not in any arrangement of the kind that could be said to amount to a contract.[47]

42 *Autoclenz Ltd v Belcher & Ors* [2011] UKSC 41.
43 Ibid at 38 *per* Lord Clarke JSC.
44 *Autoclenz Ltd v Belcher & Ors* [2009] EWCA Civ 1046 at para 91.
45 *Autoclenz Ltd v Belcher & Ors* [2011] UKSC 41 at para 35.
46 *Preston II* at para 30.
47 Ibid at para 34.

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Lady Hale, having also approached the issue without any presumption either one way or the other, came down on the side of a contractual relationship – which merely goes to show how finely balanced were the arguments in *Preston II*.

Possibly the majority and Lady Hale were approaching the facts from different perspectives: the majority was answering the question 'Does a Methodist minister have an employment relationship with the Church?', while Lady Hale was asking herself 'Does a Methodist minister have an enforceable right to her stipend and manse if the Church defaults?' A negative answer to the first might not *necessarily* imply a negative answer to the second.

In short – and in line with the purposive approach outlined by the Supreme Court in *Autoclenz* and implied by Lord Hope – whether or not there is an employer–employee relationship between a particular cleric and a particular religious organisation will depend entirely on the factual situation. Hill suggests that this will mean that, in future, employment tribunals will have to conduct 'a microscopic examination of the constitutional documents of religious communities, to the extent that these express their doctrine and ecclesiology'.[48]

As to whether or not a minister of religion is an employee, the answer is clearly 'no' in the case of a minister of the Methodist Church or the Free Presbyterian Church of Scotland, 'maybe' in the case of a minister of an independent Evangelical Church whose individual congregations call their ministers and are solely responsible for their financial support and almost certainly 'yes' in the case of a rabbi contracted to serve a particular synagogue. If a particular denomination is in any doubt about its position it should look very carefully at its terms of appointment and set out its understanding of the nature of the relationship with its ministers as clearly as possible. But what the Supreme Court has certainly *not* concluded is that 'God is above the law'.[49]

48 Hill, 'Terms of service'.
49 'Supreme Court rules that God is above the law', *Daily Telegraph*, 15 May 2013.

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