Not a *Sharpe* Turn

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The most recent in a very long line of cases concerning the employment status of ministers of religion is an extremely erudite judgment from the Court of Appeal which refers to *Magna Carta*, the Constitutions of Clarendon 1164 and even *Pride and Prejudice*. On first sight the decision in *Sharpe v Bishop of Worcester* [2015] EWCA Civ 399 seems to be ground-breaking, reinstating the original decision of the Employment Tribunal that Sharpe was not an employee. However, closer examination shows that the judgment does not question the general trajectory of the case law on this topic.

The original Employment Tribunal ([2012] ET 1302291/2008 & 1316848/2009) had held that held that the claimant was not an employee. In doing so, the Tribunal took into account the House of Lords judgment in *Percy v Church of Scotland Board of National Mission* [2005] UKHL 73. The Tribunal acknowledged that 'the spiritual nature of the office is all but a factor to be taken into account rather than determinative of whether a contract has been entered into' (para 167); and that *Percy* had removed the barrier that presumed that there was no intention to create legal relations but it did not create any presumption that there would be such an intention (para 170). For the Tribunal, the effect of *Percy* was that 'ministers of religion are in no special position, better or worse, because of the spiritual nature of their duties'. It was now 'plainly recognised that individual cases depended upon their own facts' (para 172). The Tribunal held that on the facts there was no contract of employment because unlike in cases like Percy where 'the claimants' relationships with their Churches depended upon negotiated terms', on the facts of the current case 'Mr Sharpe's relationship was defined by ecclesiastical law or, like hours of work and holidays, left, non-contractually, to Mr Sharpe's discretion with guidelines only as to its exercise' (para 173).

Following the Employment Tribunal, the Supreme Court delivered its judgment in *President of the Methodist Conference v Preston* [2013] UKSC 29. The speeches delivered were very much in line with the reading of *Percy* by the Employment Tribunal in *Sharpe*. Lord

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Sumption held that *Percy* meant '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' (para 26). Answering that question depended purely on the facts; it was an exercise in 'contractual construction' (para 10).

Following *Preston*, the Employment Appeal Tribunal (EAT) considered the claim in Sharpe ([2013] UKEAT 0243 12 2811). They found that *Preston* had clarified the law and that it was 'now unnecessary to refer to all of the earlier cases' (para 112). It was 'now abundantly clear that cases concerning the employment status of a minister of religion cannot be determined simply by asking whether the minister is an office holder or in employment' and 'there is no presumption against ordained ministers being engaged under contracts' (para 146-147). Rather, each case must always be determined on its own particular facts' and 'each case will always be fact specific, and probably Church specific' (para 148, 151).

However, the EAT concluded that this meant that the Employment Tribunal had erred because it had failed 'to carry out the full analysis that *Preston* now establishes is required' (para 181). Rather than concluding that therelationship was not contractual because it was defined by ecclesiastical law, 'the focus should have been on whether there was an express contract between the Claimant and the Bishop, having regard to the rules and practices of the Church and the particular arrangements made with the Claimant' (para 179). In particular, reference should have been paid to Bishop's Papers and the judge should 'have conducted a careful analysis of the rules and practices of the Church, the manner in which the Claimant was engaged and the particular arrangements made with him, as revealed by all the relevant documentation, … in order to determine whether, properly analysed, they were characteristic of a contract and, if so, whether it was a contract of employment' (para 179). The EAT therefore set aside the Employment Tribunal decision and remitted the matter to the Employment Tribunal for further findings.

This decision was appealed successfully to the Court of Appeal ([2015] EWCA Civ 399). Arden LJ reinstated the decision of the Employment Tribunal: Sharpe is not an employee. However, the Court of Appeal's judgment is firmly in line with the reading of *Percy* and *Preston* by both the Employment Tribunal and the EAT in *Sharpe*. It is not disputed that the question of whether a minister of religion is an employee is entirely fact-specific. The only

difference of opinion between the EAT and the Court of Appeal in *Sharpe* concerned the way in which the original Employment Tribunal decided that on the facts there was no contract of employment. The Court of Appeal held that the approach taken by the Employment Tribunal had not been wrong. Arden LJ held that 'the conclusion of the employment judge that there was no contract, or no contract of employment, between the parties was the result of a detailed examination of the facts and the law' (para 38).

In reaching this conclusion, Arden LJ explored the recent appellate case law surrounding the employment status of ministers of religion. Her account is entirely in line with that presented in the case law following *Percy*. It begins by stating that historically ministers of religion were not seen as employees before explaining that many of the reasons no longer:

> 'Not long ago, no one entertained the idea that, at least in a church where individual churches are subject to an overarching organisation, a minister of religion could be an employee of the religious organisation for which he worked. Several reasons were given for this: that the duties of office were spiritual or that the minister held an office (and that holding of an office was exclusive of employment) or that there was a presumption that the parties did not intend to create legal relations or that the duties were prescribed by the special institutional framework of religious law. Slowly but surely, as a brief description of the major cases that follows will show, some of these reasons have been displaced. The law has developed and changed because it was difficult to justify the exclusion of ministers of religion from the benefit of modern employment protection legislation' (para 60).

It may be disputed whether the caricature of the older position is entirely correct in that, although twentieth century cases spoke of a need to prove an intention to create a legal relations in cases concerning clerics, they did not clearly articulate a presumption *against* there being such an intention. However, that is now a historical curiosity. The main point is that Arden LJ accepted (like the Supreme Court in *Preston* and both lower tribunals in *Sharpe*) that there are now no special rules governing the employment status of ministers of religion. In her judgement she stated that: 'I would go so far as to say that there is now no rule which applies only to ministers which does not also apply to other persons who claim to be employees although of course the facts to which the law has to be applied are very different. It is the same principles which have to be applied' (para 60).

Arden LJ also approved the submissions made that 'the question of employment status cannot be answered simply by discerning whether a minister is an office holder or in employment'; 'there is no presumption against contractual intent; the presumption at the heart of *Coker* is no longer good law; and 'the spiritual nature of a ministry does not in any way prevent a contract of employment arising' (para 67). In other words, she recognised that cases concerning ministers of religion will be fact specific: 'The facts must be looked at in the individual case and in the round' (para 92). It will not be determinative that ministers have a spiritual function, are office-holders or are governed by ecclesiastical law. The judgment clearly states yet again that 'the fact that a person is an office holder does not mean that he cannot be an employee' (para 91). Arden LJ stressed that 'it would be wrong for the employment judge to suggest that canon law might preclude or prevent an employment contract' but that this could be considered as being 'contra-indicative of an employment contract' (para 93).

This is the heart of the issue: it is now clear (and arguably has been clear since *Percy* if not long before) that all the old reasons why a minister could not be an employee are now simply part of the facts that need to be examined in their entirety in a case by case basis to determine whether this specific post in this particular context was contractual and if so, whether that contract took the form of a contract of employment. For instance, the fact that 'the office of rector is governed by a regime which is a part of ecclesiastical law' and 'not the result of a contractual arrangement' (para 108) is a factor to be taken into account but is no longer determinative. This may lead to the impression that we have simply arrived at the same conclusion but by a different means. However, this may be too cynical a conclusion. Twenty-first century cases have shown that ministers of religion *can* be employees: it all depends on the facts. This means that the traditional placing of ministers of religion on a list in Employment Law textbooks of those offices which are not usually regarded as employees is now questionable. Ministers of religion are now in the same position as all anyone else who wants to prove their employment status: they need to point to a contract of employment and, since at least *Percy*, it has been clear that the simple facts that they are employed by God or hold an ecclesiastical office would not on their own mean that they are not found to be employees.

The Court of Appeal found no reason to set aside the findings of the Employment Tribunal judge that 'as a matter of fact that there was no contract, express or implied, between Reverend Sharpe and the Bishop' (para 80). However, this does not mean that the Court of Appeal did not provide any assistance to Employment Tribunals considering these issues in the future. It is clear that ministers of religion are not always employees but *may* be employees – and that whether they are or not depends solely on whether there is a contract. Moreover in determining whether there is a contract of employment Arden LJ's judgment shows us that that question is to be determined 'by reference to the indicia set out in the well-known case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497' (para 82). The Court of Appeal judgment also makes a number of other important points, such as in relation to when the EAT should question the findings of fact by an Employment Tribunal. On the specific point of the Bishop's Papers, Arden LJ held that the employment judge 'made clear findings' on this and that the EAT's point 'that the matter could have been investigated more thoroughly' would be to entitle Sharpe 'to a second bite of the cherry on this' (para 103).

Two other points are worth stressing. The first is the mention of *Magna Carta*. Given the 800th anniversary of the events of Runnymede, some cynicism could be attached to the invocation of the Charter in this case, not least given Arden LJ's admission that she took 'no account of that point in forming my judgment as the appellant took no point on it' (para 110). However, the citation of the first clause of *Magna Carta* (that the English Church be free) may prove significant for future cases in Religion Law because Arden LJ linked this not only to the autonomy of the Church but also of the autonomy of individual ministers: 'The value placed on freedom by the institution is obvious. That would, I think, include freedom of thought and conscience for individual incumbents, free from interference by parishioners or the Church's hierarchy' (para 110).

The second point is that the common law situation as regards the employment status of ministers of the Church of England has now been superseded by development in ecclesiastical law. As Arden LJ recognised, the facts of Sharpe occurred before the Ecclesiastical Offices (Terms of Service) Measure 2009 and the Ecclesiastical Offices (Terms of Service) Regulations 2009 came into force on 31 January 2011 (para 9). That decision by the Church clerics on common tenure the right not to be unfairly dismissed from office on the grounds of capability and for this to be enforceable in Employment Tribunals looks

increasingly generous in light of the subsequent common law case law. However, the terms of the Regulations and the Measurestate in terms that such clergy are not employees: they 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.'

Therefore, although clergy with common tenure have employment rights under the relevant legislation, they are not employees but office-holders. (And it should be noted in passing that HMRC's guidance, *PAYE70230 - PAYE Operation: Specific Employments: Clergy and Ministers of Religion* states baldly – though not entirely accurately – that 'Ministers of the Church of England are office holders'). All this adds weight to the presumption that if clergy on common tenure are not employees or workers, *a fortiori*, clergy in freehold offices (ie *without* common tenure) cannot be so either – and it is slightly surprising that the court did not appear to take that point.

Overall, *Sharpe v Bishop of Worcester* is unlikely to make a significant impact in an area of law which has been the subject of a plethora of appellate decisions. Nothing in the articulation or application of the law in this judgment questions the law as it stands in *Preston*; the main advance is the application of the usual approach found in *Ready Mixed Concrete* to this area of law which provides a practical way forward for those advising on this issue. Although the twenty-first century judgments show a clear warming to the notion of ministers of religion being entitled to employment law rights, this has not meant that courts will imply a contractual relationship. *It all depends whether, on the facts, there is a contract of employment*. As Arden LJ noted, 'In a situation where the shadows of history and tradition are as long as they are here, the court has to be sure that the form does not obscure the present day substance. But, as *Preston* shows, the need to look at the realities cannot require one to disregard the legal arrangements and what they objectively convey' (para 108). The 'shadows of history and tradition' have meant that the employment status of ministers of religion has been seen as a special topic in Employment Law texts and as a topic worthy of study by Law and Religion academics. The logical conclusion of the emphasis on the facts as found in the recent cases would seem to question this: separate treatment of this topic seems odd if 'there is now no rule which applies only to ministers' (para 60). Yet, the distinctive

nature of the facts in disputes concerning clerics would seem to indicate that we have not reached that point yet. Experts in Employment Law and Religion Law will continue to grapple with this issue for some time to come.