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Citation for final published version:

Sandberg, Russell 2018. The employment status of ministers: a judicial retcon? Religion and Human Rights 13 (1) , pp. 27-48. 10.1163/18710328-13011152

Publishers page: <http://dx.doi.org/10.1163/18710328-13011152>

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## The Employment Status of Ministers: A Judicial Retcon?

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### Abstract

*“Retroactive continuity”, often abbreviated as “retcon”, is a literary device used to describe the way in which new information is retrospectively added which re-sets the established continuity of a fictional work. Today, the term “retcon” is often used in literary criticism and particularly in relation to science fiction to describe the altering of a previously established historical continuity within a fictional work. To date, however, the concept has not been used in relation to law. Legal judgments often refer to history and include historical accounts of how the law has developed. Such judgments invariably include judicial interpretations of history. On occasions, they may even include a “retconned” interpretation of legal history – a “judicial retcon” – that misrepresents the past and rewrites history to fit the “story” of the law that the judge wants to give. This article explores the usefulness of a concept of a “judicial retcon” by means of a detailed case study. It takes a close textual reading of the UK case law concerning whether ministers of religion are employees. It contends that the twenty-first century decisions provide evidence of a “judicial retcon” in that accounts of history in the judgments re-set and re-interpret the twentieth century case law to overstate the boldness of the twenty-first century cases.*

**Keywords:** *Employment status; ministers of religion; employment law; legal reasoning; legal history; retroactive continuity; judicial retcon; interdisciplinarity.*

### Conflicts between the Autonomy of Religious Groups and Individual “Secular” Legal Rights

In the aftermath of September 11<sup>th</sup>, questions concerning the relationship between religion and society have rarely been far from the gaze of the media. Long-standing assumptions about secularisation have been questioned.<sup>2</sup> A plethora of new laws regulating religion have been enacted in the United Kingdom resulting in prolific case laws. Moreover, older laws and

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<sup>2</sup> See, further, R Sandberg, *Religion, Law and Society* (Cambridge University Press, 2014).

older assumptions have often been revisited. This is especially true of the issue of whether ministers of religion are employees, which has been the subject of two Supreme Court and two Court of Appeal judgments within a decade.<sup>3</sup> At first glance, this lack of attention seems appropriate. The question of whether ministers of religion are to be understood legally to be employees appears to be a dry, technical question of interest only to the parties affected and their ecclesiastical communities.

However, this first impression is misguided. This question actually raises the same basic tension found in newer topics that have excited Law and Religion academics. These include the ‘minorities within minorities’ debate about sharia law and the operation of religious tribunals as well as the cases concerning the clash of freedom of religion with other rights such as freedom of expression and the need not to discriminate on grounds of sexual orientation.<sup>4</sup> Like these controversies, the question about the employment status of ministers boils down to a conflict between “secular” individual rights against the desire to preserve the autonomy of religious groups. This is perhaps most clearly articulated in the leading US decision on the matter. In *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*<sup>5</sup> the US Supreme Court held that “the interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission”. The Supreme Court endorsed the so-called “ministerial exception”, holding that to treat ministers of religion as employees “interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs”.

By contrast to *Hosanna-Tabor*, the UK case law on this topic has come to place more weight on the “secular” individual right for ministers of religion to enforce employment rights rather than upon the autonomy of religious groups to determine their own internal governance. It is commonly thought that this has been the collective effect of the four twenty-first century senior court decisions. This article, however, will argue that the novelty and importance of

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<sup>3</sup>*Percy v Church of Scotland Board of National Mission* [2005] UKHL 73; *New Testament Church of God v Stewart* [2007] EWCA Civ 1004; *President of the Methodist Conference v Preston* [2013] UKSC 29; *Sharpe v Bishop of Worcester* [2015] EWCA Civ 399.

<sup>4</sup> On which see, e.g., R Sandberg and S Thompson, ‘Relational Autonomy and Religious Tribunals’ (2017) *Oxford Journal of Law and Religion* 237 and R Sandberg, ‘The Right to Discriminate’ (2011) 13 *Ecclesiastical Law Journal* 157.

<sup>5</sup>(2012) 132 S.Ct 694.

these cases has been overplayed and that they do not represent a change in the law. The legal position remains the same as it has been since the mid-twentieth century. It is the facts of the claims that have changed as a result of wider social change. It will be argued that the twenty-first century judgments have misrepresented the twentieth century decisions in order to suggest that the legal position has been modernised. The article will begin by summarising the twentieth century case law before then looking at the four twenty-first century decisions. In the final part of this article, the concept of a “judicial retcon” will be introduced and examined for the first time. It will be asked whether the twenty-first century case law’s treatment of the earlier decisions represents a “judicial retcon” and it will be tentatively explored whether this concept can be used in order to shed further light upon judicial reasoning in a whole host of contexts. However, before reaching that point, it is necessary to substantiate the claim that the twenty-first century case law misrepresents the earlier history.

### **The Twentieth Century Case Law: The Contract Conundrum**

The judgments in the twenty-first century cases make three general propositions that are false. The first was that it was formerly accepted that ministers of religion were not employees.<sup>6</sup>The second was that there was a presumption *against* there being an intention to create legal relations.<sup>7</sup>And the third was that the first twenty-first century case, *Percy*,<sup>8</sup> provided a “sea change” in terms of changing and modernising the legal position.<sup>9</sup> The first proposition was true only of the case law before the mid-twentieth century. In the early twentieth century, there is ample evidence of judges holding that clergy of the Church of England were not governed by the law of contract at all but were subject to ecclesiastical law.<sup>10</sup>Judges recognised that ministers of other faiths entered into a relationship which was pre-eminently of a religious character.<sup>11</sup>Judges began to articulate this by saying that the parties were “not intending to confer upon one another rights and obligations which are

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<sup>6</sup> See, e.g., *President of the Methodist Conference v Preston* [2013] UKSC 29 para 2; *Sharpe v Bishop of Worcester* [2015] EWCA Civ 399 para 60.

<sup>7</sup> See, e.g., *New Testament Church of God v Stewart* [2007] EWCA Civ 1004 para 35; *President of the Methodist Conference v Preston* [2013] UKSC 29 para 10 and 26; *Sharpe v Bishop of Worcester* [2015] EWCA Civ 399 para 62.

<sup>8</sup>*Percy v Church of Scotland Board of National Mission* [2005] UKHL 73.

<sup>9</sup> See, e.g., *New Testament Church of God v Stewart* [2007] EWCA Civ 1004 para 3; *President of the Methodist Conference v Preston* [2013] UKSC 29 para 26.

<sup>10</sup>*Re Employment of Church of England Curates* [1912] 2 Ch 563 at 568-569: “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”.

<sup>11</sup>*Rogers v Booth*[1937] 2 All ER 751.

capable of enforcement in a court of law”.<sup>12</sup>This dictum, however, ushered in the language of contract law and subtly undermined the notion that such relationships could not as a point of principle be contractual.

By the mid-twentieth century, the legal position has been altered so that the question was now *whether* such relationships were contractual. In *Barthorpe v Exeter Diocesan Board of Finance*<sup>13</sup> it was held that the Church of England Reader was not an employee but it was significant that the court added that it did “not follow, merely because there are some office holders in the Church of England, that everyone who plays a part in the ministry of the church is necessarily an office holder who is not employed under a contract of service”.<sup>14</sup>A few years later, the Court of Appeal in *The President of the Methodist Conference v Parfitt*<sup>15</sup> held that a Methodist Church minister was not an employee. However, although the judgment spoke of the spiritual nature of the relationship between a minister and his church, attention was afforded to the facts of the agreement with emphasis being placed upon the fact that no wage was paid to ministers and that a minister cannot unilaterally resign from his ministry. The legal rule had now become re-crafted in a way that opened the door to the possibility that ministers could be regarded as being employees. Dillon LJ stated that:

“the relationship between a church and a minister of religion is not apt, in the absence of clear indications of a contrary intention in the document, to be regulated by a contract of service”.<sup>16</sup>

Subsequent cases made it clear that it was possible on the facts for a minister of religion to be an employee. However, on the facts of the cases before them, courts consistently held that no such contractual intention could be found. For instance, in *Davies v Presbyterian Church of Wales*<sup>17</sup>: it was stated that:

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<sup>12</sup> Ibid 752-754.

<sup>13</sup> (1979) ICR 900.

<sup>14</sup> At 905.

<sup>15</sup> [1984] QB 368.

<sup>16</sup> At 376-377.

<sup>17</sup> [1986] 1 WLR 323.

“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”.<sup>18</sup>

However, although the elucidation of the legal rule in such decisions made it clear that the existence of a contract was a question of fact, dicta in these cases gave the impression that the religious nature of the minister’s role was a factor that made it unlikely that he would be considered to be an employee. In *Davies*, for example, it was stated that the minister’s “duties are defined and his activities are dictated not by contract but by conscience. He is the servant of God”. Such statements, however, can be seen as *obiter* assertions, simplified summaries of the evidence considered by the courts, rather than a statement of law. The case law was clear that it was now possible for relations between a minister and his church to be contractual; the very question being considered was whether or not the facts supported such a conclusion.

A question mark remained, however, as to whether the religious nature of the minister’s work made it less likely that a minister would be an employee. Dillon LJ’s rule in *Parfitt* stated that “clear indications” of an intention “to be regulated by a contract of service” was required.<sup>19</sup> This could be interpreted as evidence of the second proposition espoused in the twenty-first century case law there was a presumption against there being an intention to create legal relations in the case of ministers of religion. However, any talk of presumptions was absent from the case law until the late twentieth century. And, even then when judges framed the issue of the employment status of ministers in terms of the need for an intention to create legal relations, there was no talk of a presumption *against* such an intention. Those judicial utterances focused on the issue of whether there was a presumption for such an intention rather than saying that there was a presumption against.

The most important, and perhaps most widely misunderstood, case on this point was the last decision in the twentieth century case law, *Coker v Diocese of Southwark*<sup>20</sup>. The Court of Appeal stated again the general rule as first formulated by Dillon LJ in *Parfitt*: ministers of

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<sup>18</sup> At 329.

<sup>19</sup> [1984] QB 368 at 376-377.

<sup>20</sup>[1998] ICR 140.

religion were not to be seen as employees in the absence of a clear intention to create a contract. As Mummery LJ put it:

“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 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”.<sup>21</sup>

The word “difficult” lives up to its definition here: on my reading, Mummery LJ was saying that it is difficult for a minister to be regarded as being under a contract in the absence of a clear intention to be bound in that way. His Lordship was not saying that it would be difficult to hold that a minister is under a contract of employment per se. My reading is supported by the criticism made by the Court of Appeal of the original Industrial Tribunal. Mummery LJ held that the Industrial Tribunal:

“started from the position ...that an assumption should be made that there was a contractually enforceable agreement, in the absence of evidence to the contrary. That is certainly true in the case of “ordinary commercial transactions”. It is not, however, the case in the relationship between a church and a minister of religion”.<sup>22</sup>

This is a reference to the rule that it is presumed that there is an intention to create legal relations in relation to commercial agreements<sup>23</sup> but there is no such presumption in domestic or social agreements given that “each house is a domain into which the King’s writ does not seek to run”.<sup>24</sup> As Mummery LJ noted:

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<sup>21</sup> At 148.

<sup>22</sup> At 146.

<sup>23</sup> *Rose & Frank Co. v J. R. Crompton & Bros Ltd* [1923] 2 KB 261, 288 per Scrutton LJ; *Edwards v Skyways Ltd* [1964] 1 WLR 349; *Esso Petroleum v Customs & Excise Commissioners* [1976] 1 WLR 1 (especially judgment of Lord Simon).

<sup>24</sup> *Balfour v Balfour* [1919] 2 KB 571; cf. *J Evans & Son (Portsmouth) Ltd v Andrea Merzario* [1976] 2 All ER 930. For a recent articulation and application of the rule see *Blue v Ashley* [2017] EWHC 1928 (Comm), especially at paras 55-57 and 80 et seq. This distinction between commercial and domestic / social agreements is not, however, clear-cut. See, e.g., *Petit v Petit* [1970] AC 777 and *Merritt v Merritt* [1970] 2 All ER 760. This is underscored by prenuptial agreements which are now given effect provided that they are “freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement” (*Radmacher v Granatino* [2010] UKSC 42). In *Radmacher* it was held that question of whether prenuptial agreements have contractual status was a “red herring” (para 63) and as Thompson has argued, “prenups differ hugely from agreements between business partners’ but’ prenups are not exactly family law agreements either”: S Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Hart, 2015) 105.

“In some cases, however, there is no contract, unless it is positively established by the person contending for a contract that there was an intention to create a binding contractual relationship. This is such a case.”<sup>25</sup>

*Coker*, therefore, is authority for the proposition that there is no presumption *for* there being an intention to create legal relations in agreements between a minister and a religious body. It does not say that there is a presumption *against* there being an intention to create legal relations. The Court of Appeal simply said that an intention to create legal relations needs be proven before a contract will be recognised. There is no presumption either way. Yet, as we will see, the twenty-first century case law assumed that this was the law.

### ***Percy: A Diluted Sea Change***

On the surface, it would appear that the four senior court decisions on the employment status of ministers in the twenty-first century represent a changed and modernised legal approach that represents a shift towards the more common recognition of employment rights of ministers of religion.<sup>26</sup> Indeed, this is the impression that the judgments themselves perpetuate. Such a conclusion is also supported by the fact that ministers of religion have been successful in their claims in some (but by no means all) of these cases. However, these surface level impressions, though commonly held, are questionable. The fact that some ministers have been successful has invariably coloured the way in which the judgments are read and the way in which the cases are remembered and understood. The success of some claims in the twenty-first century has created an impression that the law has changed.

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<sup>25</sup> [1998] ICR 140 at 147.

<sup>26</sup>The question of the employment status of ministers has also been further affected by a series of recent cases concerning the vicarious liability of religious groups for torts committed by those who work for them. While in some cases it has been conceded that ministers of religion should be treated as if they were employees for the purpose of vicarious liability (e.g., *Maga v. Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 25), in other cases it has been contended that the religious organization could not be vicariously liable for the actions of ministers of religion since ministers were not employees. This argument has not found favour with the courts (e.g., *JGE v. The Trustees of Portsmouth Roman Catholic Diocesan Trust* [2012] EWCA Civ 938). This article does not focus on this case law. It also does not focus upon developments in religious law which have moved towards granting ministers rights as if they were employees, most notably the Ecclesiastical Offices (Terms of Service) Measure 2009 which permits a Church of England office holder who is dismissed under capability procedure to make a claim in an Employment Tribunal.



Reference to the judgments themselves, however, point to a different conclusion. The legal rules applied have not changed. Some claims are being successful now because the facts have changed. It is now more likely that a minister of religion will put their relationship with their religious body on a more formal written footing and that this can therefore be seen as being contractual. In other words, it is now more likely that there will be an intention to create legal relations. It is true that this is attributable in part to a changing legal context: an increase in the amount and reach of employment law provisions and a general juridification of aspects of social life which were previously considered to be private and outside the scope of the law.<sup>27</sup> However, the question of law that courts and tribunals apply to such cases has not changed. The test is still Dillon LJ's rule in *Parfitt* that "clear indications" of an intention "to be regulated by a contract of service" is required.

The first, and perhaps most influential, twenty-first century judgment was that of *Percy v Church of Scotland Board of National Mission*<sup>28</sup>. This concerned a sex discrimination claim brought against the Church of Scotland by a former minister of the Church. The two main issues were whether Ms Percy's relationship with the Church constituted employment for the purposes of the Sex Discrimination Act 1975 and whether the claim constituted a "spiritual matter" under the Church of Scotland Act 1921 meaning that it was within the exclusive cognizance of the Church of Scotland and its own courts.<sup>29</sup> The relevant law differed in this case from the twentieth century decisions discussed above because before the House of Lords the claimant did not pursue her claim for wrongful dismissal, accepting that she had not entered into a contract of service. The claim was under discrimination law. Her case was that she was employed under a contract personally to execute certain work, that is, a contract for services as distinct from a contract of service. In the discrimination law context it has been understood that the contract for services is to be interpreted as being broader in meaning than the contract of service required to bring a claim for unfair dismissal. The House of Lords held that Percy as a minister of the Church of Scotland was an employee for the purposes of sex discrimination. In so doing, their Lordships clarified a point of law that had been of tangential importance in the earlier case law on employment ministers of religion and had been resolved

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<sup>27</sup> For discussion of juridification, see e.g., G Teubner, 'Juridification – Concepts, Aspects, Limits, Solutions' in G Teubner (ed), *Juridification of Social Spheres* (Berlin:Walter de Gruyter, 1987) 3 and L C Blicher and A Molander, 'Mapping Juridification' (2008) 14(1) *European Law Journal* 36. For discussion of its application to religion see R Sandberg, *Law and Religion* (Cambridge University Press, 2011) chapter 10 and R Sandberg, *Religion, Law and Society* (Cambridge University Press, 2014) chapter 1.

<sup>28</sup> [2005] UKHL 73.

<sup>29</sup> On which see R Sandberg, *Law and Religion* (Cambridge University Press, 2011) 70-72.

in case law extending employment rights in other contexts. Lord Nicholls held that “holding an office and being an employee” was “not inconsistent”: “A person may hold an “office” on the terms of, and pursuant to, a contract of employment”.<sup>30</sup>

This was not, however, the focus of the *Percy* judgment. As with the late twentieth century case law, the focus was on whether there was an intention to create legal relations. Oddly, however, Lord Nicholls in his discussion of the case law presented this as being “a further strand” rather than being definitive.<sup>31</sup> He introduced it as an innovation made by Mummery LJ in *Coker* but then later on stated that the earlier decision in *Parfitt* was a “good example of this”.<sup>32</sup> Curiously, his Lordship expressed the rule in *Coker* as stating that “special features surrounding the appointment and removal of a Church of England priest as an assistant curate, and surrounding the source and scope of his duties, preclude the creation of a contract “unless a clear intention to the contrary is expressed”.<sup>33</sup> Lord Nicholls then focused entirely upon Mummery LJ’s consideration of who the employer could have been. Lord Nicholls did not mention how Mummery LJ corrected the industrial tribunal’s presumption that there was an intention to create legal relations.

This is particularly curious given that the lower courts in *Percy* had relied a great deal on the presumption point. Indeed, the lower courts had suggested that there was a presumption against an intention to create legal relations in these cases. In the First Division decision Lord Rodger had dismissed *Percy*’s appeal on the basis of a “rebuttable presumption” that “where the appointment was being made to a recognised form of ministry within the Church and where the duties of that ministry would be essentially spiritual, there would be no intention that the arrangements made with the minister would give rise to obligations enforceable in the civil law”.<sup>34</sup> In the House of Lords, Lord Nicholls simply accepted that this was the law. Referring to *Coker*, he stated that:

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<sup>30</sup> Para 20.

<sup>31</sup> Para 23.

<sup>32</sup> *Ibid.* Contrast para 11: “Mummery LJ analysed the reason underlying the absence of a contract between a church and a minister of religion in these cases as lack of intention to create a contractual relationship”.

<sup>33</sup> Para 10.

<sup>34</sup> [2001] SC 757 at 765, para 13.

“There are indeed many arrangements or happenings in church matters where, viewed objectively on ordinary principles, the parties cannot be taken to have intended to enter into a legally-binding contract”.<sup>35</sup>

This is unobjectionable. However, there was then a leap in his Lordship’s reasoning. Lord Nicholls added, without explanation, that “then the rebuttable presumption enunciated by the Lord President in the present case, following Mummery LJ’s statements of principle in *Southwark v Coker*... may have a place”.<sup>36</sup> Lord Nicholls, therefore, did not consider the correctness of Lord Rodger’s identification of a “rebuttable presumption” against an intention to create legal relations. Yet, Lord Rodger’s interpretation is questionable: *Coker* is authority for the proposition that there is no presumption *for* an intention to create legal relations in the minister-religion relationship; it is not authority of a presumption *against* an intention to create legal relations. Yet, Lord Nicholls implicitly accepted that this interpretation of *Coker* before rejecting (or at least limiting) it. He stated:

“But this principle 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.”<sup>37</sup>

This is presented as a (partial) change in the legal position, the softening of a principle whereby it was presumed that there was no intention to create legal relations. However, not only is it questionable that such a presumption against ever existed, it is also true that the alleged softening of the principle is not itself new. The idea that “legally binding obligations” would exist if these facts were in place had been accepted since (at least) the late twentieth century case law. This is simply a re-articulation of Dillon LJ’s rule in *Parfitt* that “clear indications” of an intention “to be regulated by a contract of service” was required. Late twentieth century judges had found that there was no intention to create legal relations but only because the kind of factual features mentioned by Lord Nicholls had not been present in

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<sup>35</sup>[2005] UKHL 73 at para 23.

<sup>36</sup> *Ibid.*

<sup>37</sup> Para 24.

those cases. At no point had any judge suggested that ministers of religion were not to be considered to be employees even if there was evidence of offer and acceptance and provision was made for duties, remuneration, expenses, holiday pay etc. Yet, in *Percy* Lord Nicholls suggested that his judgment was ushering in a new progressive approach, stating that:

“The context in which these issues normally arise today is statutory protection for employees. Given this context, in my view it is time to recognise that employment arrangements between a church and its ministers should not lightly be taken as intended to have no legal effect and, in consequence, its ministers denied this protection”.<sup>38</sup>

It is true that there has been an increase in the quantity and reach of employment law and that this might mean that it is more likely that arrangements will be put on a contractual and therefore legal footing. And that this has meant that there are probably higher expectations now that employment provisions will apply to a wider range of workers. However, the fact remains that Lord Nicholl’s speech in *Percy* did not actually alter the legal rule. The question remains whether there is an intention to create legal relations. Ironically, Lord Nicholls’ judgment actually moves the law slightly away from the recognition of employment rights since, unlike the twentieth century cases, he stated that the presumption against intention to create legal relations “may have a place”. The same point can be made of his further comment that the presumption against “should not be carried too far”. Lord Nicholl’s speech suggested that in some cases there will be a rebuttable presumption against an intention to create legal relations but that this should not be often applied. This is likely at the very least to complicate and confuse the matter. Indeed, this can be seen in Baroness Hale’s judgment where she held that:

“I too find it impossible to conclude that there was no intent to enter into legal relations. ... I have difficulty in understanding why there should be any presumption against such an intention”.<sup>39</sup>

The reason for Baroness Hale’s difficulty is that there was never any such presumption against such an intention! *Percy* also undermined earlier *obiter* comments about

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<sup>38</sup> Para26.

<sup>39</sup> Para 148.

characteristics of religious ministry that make it unlikely that there is an intention to create legal relations. Most notably, Lord Hoffmann held that to say “that a priest is “the servant of God’ is true for a believer but superfluous metaphor for a lawyer”.<sup>40</sup> The *Percy* judgment as a whole underscored that the question of whether a minister of religion was to be an employee depended on the facts and whether those facts provided the evidence for such a contract. However, this was not a novel approach. This had been the position from at least the late twentieth century cases onwards. The decision in *Percy* (that she was an employee for the purpose of sex discrimination) and its move away from some of the expressions used at the end of the twentieth century was novel. However, the *dicta* on the intention to create legal relations were not new and were in part retrogressive. And the fact that the claim concerned the wider definition of contract for services under sex discrimination law rather than the narrower contract of service required to bring a claim for unfair dismissal led to confusion as to how much weight should be given to the decision anyway in terms of precedent. The lack of clarity provided by the House of Lords judgment led to a further three senior court decisions in quick succession all of which perpetuated the myth that there had previously been a presumption against an intention to create legal relations and that *Percy* represented a significant legal change.

### ***Stewart, Preston and Sharpe: Blurring the Lines***

The Court of Appeal in *New Testament Church of God v Stewart*<sup>41</sup> held that a minister of religion was an employee under unfair dismissal law, confirming and applying *Percy*. However, the judgment perpetuated a number of representations about the twentieth century cases and about *Percy* which were suspect. Pill LJ held that, whilst courts had previously “been reluctant to find that a contract of employment exists”, it had been argued before the Court of Appeal that *Percy* “involves a sea change and resolves the issue in the claimant’s favour”.<sup>42</sup> The Court of Appeal accepted this submission. In its brief elucidation of the twentieth century case law it discussed *Coker* in the same way as Lord Nicholls had in *Percy*<sup>43</sup>. Pill LJ then quoted the points of principle laid forward in *Percy* and stated that while *Percy* had not overruled the previous cases, it did:

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<sup>40</sup> Para 61.

<sup>41</sup> [2007] EWCA Civ 1004.

<sup>42</sup> Para 3.

<sup>43</sup> Para 25.

“establish that the fact-finding tribunal is no longer required to approach its consideration of the nature of the relationship between a minister and his church with the presumption that there was no intention to create legal relations”.<sup>44</sup>

However, the reason why *Percy* did not overrule the previous cases is because the statement of the legal rule in *Percy* was not only compatible with the earlier case law, it was identical to it. It is questionable whether *Percy* confirmed that there was no presumption against (given Lord Nicholls’ stated that the rebuttable presumption “may have a place”) but on my reading there was never any such presumption anyway. For Pill LJ:

“strong statements in *Percy*’s case leave it open to employment tribunals to find, provided of course a careful and conscientious scrutiny of the evidence justifies such a finding, that there is an intention to create legal relations between a church and one of its ministers”.<sup>45</sup>

This is not new or properly attributable to *Percy*. Rather, it reflects Dillon LJ’s rule in *Parfitt* that “clear indications” of an intention “to be regulated by a contract of service” was required. *Stewart*, therefore, confirmed *Percy*’s applicability to the context of unfair dismissal but underscored the uncertainty as to what the effect of *Percy* was.<sup>46</sup>

It was therefore unsurprising that further litigation followed with the case of *President of the Methodist Conference v Preston*<sup>47</sup> going all the way to the Supreme Court.<sup>48</sup> The case concerned a minister in the Methodist Church who wished to prosecute a claim against the Church in an employment tribunal for unfair dismissal. The original Employment Tribunal in *Preston*<sup>49</sup> had held that a minister of the Methodist Church could not be an employee because it was bound by the Court of Appeal’s decision in *The President of the Methodist Conference*

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<sup>44</sup> Para35.

<sup>45</sup> Para 36.

<sup>46</sup> The case was also important since the Church appealed citing their rights under Article 9 ECHR (which had not been argued in *Percy*). Pill LJ held that Article 9 requires that respect be given to the faith and doctrine of the particular church, which may run counter to there being a relationship enforceable at law between the priest, curate or minister and the Church. The law should not readily impose a legal relationship on members of a religious community which would be contrary to their religious beliefs. 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 (para 55).

<sup>47</sup>[2013] UKSC 29.

<sup>48</sup>Apart from its location and name, the new Supreme Court does not differ substantially from the Appellate Committee of the House of Lords, the body which it replaced.

<sup>49</sup> The claimant’s surname was Moore when proceedings began, she subsequently married.

*v Parfitt*.<sup>50</sup> This was reversed by the Employment Appeal Tribunal<sup>51</sup> whose decision was upheld by Court of Appeal.<sup>52</sup> These courts had both held that Preston had served under a contract of employment. The Supreme Court reversed the decision of the Employment Tribunal and the Court of Appeal and declared that that the claimant was not an employee. However, although the Supreme Court ultimately agreed with the Employment Tribunal that Preston was not an employee, it was also made clear that the reasoning of *Parfitt* was no longer good law. Again, the judgments perpetuated the myth that *Percy* had changed the law. Lord Sumption held that:

“There is now a substantial body of authority on the point, much of it 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. Until recently, ministers of religion were generally held not to be employees.”<sup>53</sup>

No explanation was put forward by his Lordship for why the tests were “relatively inflexible”. Indeed, the tests as applied in *Percy* and *Stewart* were exactly the same as had been applied in the late twentieth century cases. They were necessarily “tests borne of social instincts” since the question before judges and employment chairs was, and is, a question of fact. The question is whether there was an intention to create legal relations and evidence to support the claim that the agreement between the minister and the religious body constituted a contract of employment.

Lord Sumption held that: “Two recurrent themes can be found in the case law”.<sup>54</sup> The first was “the distinction between an office and an employment” while the second “theme is a tendency to regard the spiritual nature of a minister of religion's calling as making it unnecessary and inappropriate to characterise the relationship with the church as giving rise to legal relations at all”.<sup>55</sup> Curiously, Lord Sumption then conflated these two themes. In his discussion of the distinction between an office and an employment he asserted that *Coker* held that the minister's “duties were derived from his priestly status and not from any

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<sup>50</sup> (1983) 3 All ER 747.

<sup>51</sup> [2010] UKEAT 0219101503.

<sup>52</sup> [2011] EWCA Civ 1581.

<sup>53</sup> [2013] UKSC 29, para 2.

<sup>54</sup> Para 3.

<sup>55</sup> Para 4-5.

contract. Both Mummery LJ ... and Staughton LJ, ... considered that there was a presumption that ministers of religion were office-holders who did not serve under a contract of employment”.<sup>56</sup> Yet, as discussed above, Mummery LJ did not mention the prospect of there being a presumption against an intention to create legal relations. The closest Staughton LJ came to saying this was his statement that “in general the duties of a minister of religion are inconsistent with an intention to create contractual relations”.<sup>57</sup> Not only did Staughton LJ precede this by saying that he agreed with the analysis of Mummery LJ, but like Mummery LJ, Staughton LJ neither talked of a presumption against there being an intention to create legal relations nor saw the minister’s status as an officeholder as the rationale for any such presumption.

Lord Sumption muddied the waters further in his discussion of the second theme. After a rather selective review of the authorities paying more attention to the early rather than late twentieth century cases, his Lordship introduced *Percy* as the “leading modern case in this area”<sup>58</sup> and concluded that:

“It is clear from the judgments of the majority in *Percy*’s case that the question whether a minister of religion serves under a contract of employment can no longer be answered simply by classifying the minister’s occupation by type: office or employment, spiritual or secular. Nor, in the generality of cases, can it be answered by reference to any presumption against the contractual character of the service of ministers of religion generally. ... The primary considerations are the manner in which the minister was engaged, and the character of the rules or terms governing his or her service. But, as with all exercises in contractual construction, these documents and any other admissible evidence on the parties’ intentions fall to be construed against their factual background. Part of that background is the fundamentally spiritual purpose of the functions of a minister of religion”.<sup>59</sup>

This is an accurate statement of the law but everything stated by his Lordship also reflects the law prior to *Percy*. Lord Sumption was correct to say that the “question whether an

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<sup>56</sup> Para 4.

<sup>57</sup> [1998] ICR 140, para150.

<sup>58</sup> Para 7

<sup>59</sup> Para 10.



arrangement is a legally binding contract depends on the intentions of the parties”.<sup>60</sup> However, this had been the question ever since the focus had been on whether there was an intention to create legal relations. Lord Sumption’s depiction of the earlier case law perpetuated a representation of *Percy* as constituting a sea change. His Lordship stated that: “Part of the vice of the earlier authorities was that many of them proceeded by way of abstract categorisation of ministers of religion generally”.<sup>61</sup> This, however, was not true of the cases from at least the mid twentieth century onwards. They all took what Lord Sumption referred to as the “correct approach” which “is to examine the rules and practices of the particular church and any special arrangements made with the particular minister”.<sup>62</sup> Moreover, Lord Sumption’s speech raised further questions about how progressive the *Percy* judgment was. He held that:

“The decision in *Percy* is authority for the proposition that the spiritual character of the ministry did not give rise to a presumption against the contractual intention. But the majority did not suggest that the spiritual character of the ministry was irrelevant”.

*Percy* may well be authority for that proposition but that proposition is meaningless if there was never any such presumption against an intention to create legal relations. Moreover, as Lord Sumption noted, *Percy* had not created a presumption for an intention to create legal relations. Indeed questions remained as to the extent to which the “spiritual character of ministry”. This sowed the seeds for further confusion and even more litigation leading to another Court of Appeal decision on the same point of law, the decision in *Sharpe v Bishop of Worcester*<sup>63</sup>. The Court of Appeal decision in *Sharpe* perpetuated the same perceptions as the other twenty-first century decisions. Arden LJ held that:

“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

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<sup>60</sup> Para 26.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> [2015] EWCA Civ 399.

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. 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.”<sup>64</sup>

It is difficult to know where to begin in terms of correcting this interpretation. The existence of the case law suggests that the idea that ministers of religion could be employees has been “entertained” for a great deal of time. Arden LJ was correct to approve submissions that it would not be determinative that ministers have a spiritual function, are office-holders or are governed by ecclesiastical law.<sup>65</sup> However, all of these submissions were by no means new. At times the Court of Appeal was simply stating that the law was not as it had been a century before. That the Court of Appeal deemed it necessary to state principles that had already been articulated in recent years by three senior court decisions is troubling. The Court of Appeal was also correct to state that the cases concerning ministers of religion would be fact specific. However, again, it has long been the case that the “facts must be looked at in the individual case and in the round”.<sup>66</sup>

Despite the way in which the twenty-first judgments themselves present the case law, it is questionable whether these four decisions on points of law before senior courts have actually resulted in any changes to the interpretation of those points of law. Dillon LJ’s rule in *Parfitt*, that “clear indications” of an intention “to be regulated by a contract of service” was required, remains good law. The question of whether ministers of religion are employees remains a question of fact. In *Sharpe* Arden LJ held that: “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”.<sup>67</sup> Ironically, however, in *Sharpe* and the other twenty-first century cases, it was the court that was obscuring the picture, misusing and

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<sup>64</sup> Para 60.

<sup>65</sup> Paras 67-68.

<sup>66</sup> Para 92.

<sup>67</sup> Para 108.

misrepresenting the history in order to perpetuate a particular story which conflated and exaggerated the extent of legal change.

### **Conclusion: A Judicial Retcon?**

The turning point, perhaps, was Lord Rodger's judgment in the First Division decision in *Percy* in which he spoke of a "rebuttable presumption" deriving from *Coker* that "there would be no intention that the arrangements made with the minister would give rise to obligations enforceable in the civil law".<sup>68</sup> From then on, *Coker* was understood as authority that there was a presumption against an intention to create legal relations (rather than that there was no presumption for such an intention). It would be possible, therefore, to understand the twenty-first century cases as simply correcting a mistaken interpretation of *Coker*. The twenty-first century cases could therefore be seen as bringing the law back in line albeit within a different social context where it would be more likely as a question of fact that an intention to create legal relations would have existed.

However, this understanding of the twenty-first century judgments is too charitable. The selective way in which the twentieth century cases are presented, the way in which those judgments are caricatured as antiquated, inflexible and erroneous, undermines any attempt to regard their misinterpretation as a mere mistake.<sup>69</sup> Rather, the presentation of the twentieth century case law in the twenty-first century judgments must be seen as a deliberate attempt to explain the difference in outcome by contrasting it with the earlier case law. Rather than just accepting that these claims were factually different (and that the changed facts may be in part attributable generally to a changed legal environment), judges in the twenty-first century cases spoke of a "sea change". They spoke of a move away from a presumption against an intention to create legal relations (which had never existed) and claimed that they were bringing about a change in the interpretation of the law to reflect changing social norms. It may be that this case law is not exceptional and that these habits, these rhetorical devices, are commonplace in judicial decisions. The emphasis of originality, the sharp distinction between the present and the historical practice and the faint but noticeable aroma of progress may well be techniques that are subconsciously part of the toolkit of adjudicators.

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<sup>68</sup> [2001] SC 757 at 765, para 13.

<sup>69</sup> See, e.g., *Preston* [2013] UKSC 29, paras 2 and 26.

For this reason, it may be helpful to label and identify the judicial technique utilised in this case law. The term “Judicial Retcon” may prove to be a useful label to capture such misuse of history by judges. Historical illiteracy on the part of judges is not surprising. It is part of a wider trend towards “presentism”.<sup>70</sup> This is reflected in the Law School curriculum. The study of Legal History in UK Law Schools has dwindled over the last century.<sup>71</sup> It is difficult to disagree with Siemens that “one gets the impression that legal history is slowly and inevitably dying—or that it has been in a coma for the last 30 years, at least”.<sup>72</sup> The study of history in Law Schools is frequently reserved to optional modules devoted to Legal History or aspects of Legal History and those modules are increasingly selective in their focus. Works in Legal History are invariably inaccessible to all except legal historians and historical methods are not part of the wider methodological toolkit of the legal academic or student. In part, this decline is the result of divisions that exist between (most) Legal Historians. The divide can be crudely drawn between the old / internal / textual Legal History (concerned with the intellectual history of Law, exploring the development of legal ideas, concepts and institutions) and the new / external / contextual Legal History (concerned with the social history of Law, exploring how Law exists as one of many social institutions and how Law is shaped by (and shapes) other social institutions and society as a whole).<sup>73</sup> These literatures have not only developed separately but have formed divided camps which are hostile to one another.<sup>74</sup> This impasse can and should be overcome by recognising the strengths of each approach and their reciprocity.<sup>75</sup> In that regard, the division between old and new legal historians can be seen as a microcosm of the wider debate within legal studies between doctrinal and socio-legal approaches to law.

Moreover, the need for a historical approach to legal studies comes from another reason why historical method has been neglected. Historical approaches to law have been sidelined in

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<sup>70</sup> Clarke defines presentism as “a privileging of the present” and writes that “presentism in popular culture involves the reversion to a more restricted mental world” whereby the phrase “that’s old” no longer means “that originated some time ago” but means “that is vexatious” and “that’s history no longer means that is important because it has made us what we are” but means “that is laughably irrelevant to us”: J Clark, *Our Shadowed Present* (Atlantic Books, 2003) 2, 7.

<sup>71</sup> See, further, R Sandberg and N Doe, ‘Textual and Contextual Legal History’ in N Doe and R Sandberg, *Law and History – Critical Concepts in Law* (Routledge, 2017) 1.

<sup>72</sup> D Siemens, ‘Towards a New Cultural History of Law’ (2012) 2 *InterDisciplines* 18, 19.

<sup>73</sup> R Sandberg and N Doe, ‘Textual and Contextual Legal History’ in N Doe and R Sandberg, *Law and History – Critical Concepts in Law* (Routledge, 2017) 1, 4.

<sup>74</sup> While Old Legal History focuses on the early development of the common law, focusing on property law and the law of obligations, New Legal History focuses on the early modern period and statute law in particular paying particular attention to the history of crime: *ibid*.

<sup>75</sup> *Ibid*: 13.

Law Schools because of its inherently subversive nature. Legal History shows that the law and legal institutions are not fixed, that every line drawn in the law and everything the law holds as sacred is arbitrary and that the environment that students are socialised into is a historical construct. This subversive nature of Legal History was recognised in a letter by Maitland recognising that a historical approach to law teaches “the lesson that each generation has an enormous power of shaping its own law” and that the study of Legal History “would free them from superstitions and teach them that they have free hands”.<sup>76</sup> The concept of a “Judicial Retcon” is offered, therefore, not only as a means of critiquing (and correcting) the historical illiteracy of judges (as part of a wider critique of “presentism”) but also as an example of a tool that can form part of a subversive Legal History. This would use the past not only to understand but also to critique the present, to undermine what is taken for granted and to suggest different approaches including those which are not contaminated evolutionary assumptions of progress.

The term “retcon” is an abbreviation of the phrase “retroactive continuity”, used to describe a literary device whereby new information is retrospectively added which re-sets the established continuity of a fictional work. The term is thought to have been first used by Frank Tupper in his translation and discussion of the work of Wolfhart Pannenberg.<sup>77</sup> The term is used there to translate Pannenberg’s notion that it is later events that prescribe and dictate the canon of history. As Tupper puts it, this means that the “continuity of events is actually visible only in retrospect. Pannenberg’s conception of retroactive continuity ultimately means that history flows fundamentally from the future into the past”.<sup>78</sup> Moreover:

“The continuity of history, therefore, does not exist primarily as evolution but must be established retroactively. So the contingency of events which redefines the succession of events converges with a “retroactive continuity””.<sup>79</sup>

This notion that the continuity has been retroactively reconstructed is now the accepted meaning of the term “retcon”. Today, “retcon” is often used in literary criticism and particularly in relation to science fiction to describe the altering of a previously established

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<sup>76</sup> FW Maitland, ‘Maitland to AV Dicey, c. July 1896’ quoted in C H S Ffoot, *Frederic William Maitland* (Harvard University Press, 1971) 143.

<sup>77</sup> E F Tupper, *The Theology of Wolfhart Pannenberg* (SCM press, 1974).

<sup>78</sup> Ibid 100.

<sup>79</sup> Ibid 221.

history within a fictional work. It is a form of “rewriting history” in the Orwellian sense of the term; a way in which the present controls the past, resetting it to fit its own agenda.<sup>80</sup> The device seems particularly appropriate and necessary in the “post truth” age of “fake news” and “alternative facts”. To date, however, talk of a “retcon” has not been used in relation to law. There is considerable scope for such an application if law is understood as literature and if judicial decisions are seen as creative interpretative actions which reflect not only the culture of the legal system (or parts thereof) but also the identity of the author. Historical summaries are common place in legal judgments, though they are not often identified as so. Every summary of the facts and every summary of the case law is a historical interpretation. And such accounts do not occur in a vacuum. They are shaped by the judge’s understanding of the world and also the needs (both explicit and implicit) of the legal system. Judgments may therefore on occasion feature a “retconned” interpretation of history – a “judicial retcon” – that misrepresents the past and rewrites history to fit the “story” of the law that the judge wants to give.

Identifying judicial retcons where they occur can be valuable but the more important question is to ask why such a retcon has been made; what functions the retcon serves. Historical analysis is concerned with the complex relationship between continuity and change. A judicial retcon can be used either to stress continuity – by suggesting an imagined precursor for an actual innovation – or to emphasise change– by over-stating the novelty of a development and either forgetting about precedents or presenting them as being of limited value. The retcons identified above in the examination of the case law on the employment status of ministers of religion fall into this second category. To explain the change in outcome, twenty-first century judges have misrepresented and simplified the judgments of their twentieth century predecessors. This has resulted in bad history and confusion as shown by the sheer number of senior court decisions. This may be seen as symptomatic of a wider ill-ease which has characterised the manner in which domestic judges have dealt with the twenty-first century expansion of religious rights.<sup>81</sup> As in that wider context, judicial manoeuvring has shifted the focus to be on technical legal issues rather than broader more controversial social and political issues. The basic issue raised by these cases, the tension

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<sup>80</sup> Orwell explored this in *Nineteen Eighty-Four*: “if all others accepted the lie which the Party imposed – if all records told the same tale – then the lie passed into history and became truth. “Who controls the past”, ran the Party slogan, “controls the future: who controls the present controls the past”. ... All that was needed was an unending series of victories over your own memory. “Reality control”, they called it”: G Orwell, *Nineteen Eighty-Four* (Penguin, 2000 [1949]) 40.

<sup>81</sup> On which see R Sandberg, *Religion, Law and Society* (Cambridge University Press, 2014).

between enforcing “secular” individual rights against the desire to protect the autonomy of religious groups, has been sidestepped.

By their nature, the senior court judgments have focused on articulating points of law. This has been less than helpful given that these points of law have been re-articulated rather than articulated and also, more importantly, because this is an area which is very fact-specific. In other contexts concerning contractual rights that have a social rather than commercial contexts,<sup>82</sup> the benefits of relational contract theory has been explored.<sup>83</sup> Perhaps such an approach, which has already been shown to overcome the binary distinction between individual and group autonomy in the context of religious tribunals,<sup>84</sup> could provide a way forward in this context. Despite the number of senior court decisions, it is clear that a number of issues concerning the employment status of ministers remain unresolved. The judicial retconning has increased the confusion and paralysis found in this case law. Identifying this, critiquing it and correcting it represents a step forward but for the next step, rather than seeking clarity on the questions of law, it would be wiser to pay closer attention to questions of fact.

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<sup>82</sup>See Thompson’s work on prenuptial agreements: S Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Hart 2015).

<sup>83</sup>See, e.g., I R Macneil, ‘Relational Contract: What we do and do not Know’ (1985) *Wisconsin Law Review* 484; I R Macneil, ‘The New Social Contract: An Inquiry into Modern Contractual Relations’ (1996) 15(1) *Journal of Public Policy & Marketing* 157, the essays in D Campbell (ed.) *The Relational Theory of Contract: Selected Works of Ian Macneil* (Sweet & Maxwell, 2001) and the essays in D Campbell, L Mulcahy and S Wheeler (eds.), *Changing Concepts of Contract: Essays in Honour of Ian Macneil* (Palgrave Macmillan, 2013).

<sup>84</sup>R Sandberg and S Thompson, ‘Relational Autonomy and Religious Tribunals’ (2017) *Oxford Journal of Law and Religion* 237.