Case Number 1302291/2008
And 1316848/2009

DJT

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr M. Sharpe	**AND**	1) The Worcester Diocesan Board of Finance Limited 2) Bishop of Worcester (in his Corporate capacity)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(On a Pre-hearing review)

HELD AT Birmingham **ON** 21- 25 November 2011

EMPLOYMENT JUDGE McCarry

JUDGMENT

The judgment of the Tribunal is that:

1. I grant leave to the respondents to withdraw its previous concession that the claimant was a "worker."
2. The claimant was not an employee of either of the respondents.
3. The claimant was not a "worker" within the meaning of S.230 of the Employment Rights Act 1996, even as extended by Section 43K of the Act.
4. These claims consequently fail and they are dismissed.

REASONS

Background

1. The claimant has presented two complaints to this tribunal:

1.1. The first was received at the tribunal office on 18 April 2008. It named as the respondent "Church of England" (to which I shall refer as "the Church"). At that time, the claimant was

serving within the Church as rector in the benefice of Teme Valley South in the Diocese of Worcester. His claim was that he had suffered detriments as a result of having made protected public interest disclosures.

1.2. The second claim was received at the tribunal office on 4 December 2009. By that time, the claimant had resigned from his benefice with effect from 7 September 2009. The named respondents were the two respondents now listed in the title of these proceedings. This second claim alleged continuing detriments as a result of the claimant's having made protected public interest disclosures. Further, mostly because of the alleged detriments, Mr Sharpe claimed that he had been constructively and unfairly dismissed.

2. There have been a number of case management discussions, during which the two claims were ordered to be combined for hearing. The named respondents for both claims have been identified as those named in the title above. If it ever was correctly joined, the Church is no longer a party to the proceedings.

3. At a case management discussion concerning the first claim, held on 5 September 2008 (page 37 of the Pleadings bundle of documents), the respondents conceded that the claimant was a "worker" for the purpose of Part IVA of the Employment Rights Act 1996 ("the Act"). Following the submission of the second claim, however, the respondents sought to deny that there was any form of contract at all between the claimant and either of the respondents, such that he had neither the status of employee nor that of worker. The respondents sought to withdraw the concession previously made. That question remained undecided. The claimant opposed the application.

4. This pre-hearing review was consequently appointed to resolve the following issues:

4.1. Did the claimant enter into a contract with the respondents or either of them?

4.2. If so, was it a contract of service?

4.3. If not, should the respondents be permitted to withdraw the concession previously made in the first complaint that the claimant was a worker? And,

4.4. If the respondents are so permitted, was the claimant indeed a 'worker' for the purpose of S.230 and S.43K of the Act enabling him to pursue his claim about public interest disclosures?

5. Although potentially a preliminary point, it was agreed between the parties that the issue in relation to the withdrawal of the respondents' concession would be best dealt with in the course of arguments, after I had heard the evidence. I was content to adopt that approach.

6. At the hearing, the claimant was represented by Mr J Benson, one of Her Majesty's Counsel, who called his client to give evidence. The respondents were represented by Mr Tattersall, one of Her Majesty's Counsel and also by Mr M Sheridan, of Counsel. The respondents called in evidence Professor J McClean, Archdeacon Trethewey and Reverend R. Higham. In addition to the oral evidence, I was referred to a large bundle of documents, previous authorities and references to the ecclesiastical and Canon Law of the Church of England.

7. Both parties helpfully provided me with skeleton arguments. In addition, in the course of oral submissions at the end of the hearing, points were raised about:

7.1. The relevance (if any) of the litigation in which the Supreme Court has made a reference to the Court of Justice of the European Union, O'Brien -v- Ministry of Justice [2010] IRLR 883 ("*O'Brien*");

7.2. The relevance (if any) of the decisions of the Employment Appeal Tribunal in Community Dental Centres Ltd -v- Sultan-Darmon [2010] IRLR 1024 ("*Sultan-Darmon*") and Ministry of Defence HQ Defence Dental Service -v- Dr E Kettle EAT/0308/06/LA ("*Kettle*").

7.3. The fact that the decision of the Employment Appeal Tribunal in President of the Methodist Conference -v- Moore) UKEAT/219/10 ("*Moore,*" by which title I will also refer to the decision of the Court of Appeal, although the claimant's name had changed to Preston) was then under appeal to the Court of Appeal. The hearing had taken place on 16 November 2011 and it was anticipated that it was possible that the Court of Appeal's decision would be handed down before I was in a position to issue this reserved judgment.

8. In relation to the first two cases, it was agreed that the parties should have time to make written submissions. This was duly done by both parties within the time limits allowed and I have taken into account those representations. Unfortunately, however, this led to an accusation by the respondents that the claimant had impermissibly taken the opportunity of making further submissions about the evidence and the remarks did not reflect the respondent's note of the evidence. I have relied upon my own note of the passage of evidence in question.

9. The Court of Appeal decision in *Moore* was handed down on 20 December and the parties were invited to make further submissions. Again this was done but it led to a similar complaint from the respondents about the claimant's submissions. Indeed the new submissions did stray beyond what was called for, particularly in making suggestions about the comparison of the rules of the Church and the Methodist Conference, about which no evidence had been adduced before me. I have confined myself to the evidence I heard and the facts of *Moore* as set out in the reports of that case.

Findings of Material Fact

Conflicts of Evidence

10. Professor McClean is a Professor of Law at the University of Sheffield. He has held numerous positions within the Church and was a member of the Church's General Synod between 1970 and 2005. Between 2002 and 2005 he chaired a committee that was charged with reviewing, amongst other things, the terms under which the clergy of the Church hold office and the position of the clergy in relation to statutory employment rights. The review ultimately led to the enactment of the Ecclesiastical Officers (Terms of Service) Measure 2009 and the Ecclesiastical Offices Terms of Service Regulations 2009, both of which came into force on 31 January 2011, that is after the period of time with which I am concerned. It is abundantly clear to me that the professor is an acknowledged expert in the field of ecclesiastical law. I am indebted to him for his detailed explanation of the way in which the Church operated at both national and diocesan levels at the relevant time, during Mr Sharp's incumbency at Teme Valley South.

11. However, Mr Sharpe was not always in agreement with Professor McClean. Further, and not without some justification, he did not accept that Professor McClean was unbiased in his evidence having chaired the Committee that found clergy had no employment status and recommended

against a change to the current position. Mr Benson drew attention to CPR 35 and Practice Direction 35. I accept Professor McClean did not always confine himself to straightforward facts. I commented at the hearing that when he moved on in his evidence to the organisation of the Church prior to the 2011 legislation and his Committee's review (paragraph 114 et seq.), such evidence contained a good deal of opinion that effectively amounted to submissions about the claimant's relationship with his Church being other than one based in contract. As one might expect, such opinion was given from the viewpoint of someone who had made a study and was justifying the conclusion he had reached. To that extent, I have treated his evidence with caution and been careful to separate fact from advocacy because the professor's opinions did seek at times to answer the very questions I have to determine myself. Mr Benson was right to advise me to avoid consideration of the "disastrous consequences" the professor warned would follow from a decision in the claimant's favour and I have followed that advice.

12. It is also necessary to commence with two preliminary observations about Mr Sharpe's evidence:

12.1. In his first statement, and also in his first claim form, the claimant alleged that his employment with the Church began in 1999, that is from the date of his ordination. However, that was not pursued in the second claim form, submitted by solicitors, where the employment is stated to have begun in January 2005, the date of his appointment as the incumbent at Teme Valley South. That has to be correct because I do not understand how the two respondents could possibly have been parties to a contract with Mr Sharpe prior to that date and certainly not on his ordination when he had no connection with the Worcester diocese at all. Mr Benson's submissions were confined to the contractual status or otherwise of the parties arising out of the claimant's appointment at Teme Valley South. Accordingly, I have given little relevance to the paragraphs in the claimant's statement as to circumstances prior to his appointment to that parish.

12.2. Unfortunately, the claimant's initial statement on this point was continued in his prepared witness statement and it has to be said is indicative of a tendency to overstatement by generalisations that are not wholly accurate. I do not suggest anything deliberate or deceptive in that. Mr Sharpe is not a lawyer and it appears to me that his errors arise from trying to make facts fit his limited knowledge of the legal concepts involved in this case. More encouragingly, Mr Sharpe did adopt a less assertive approach to his evidence in cross-examination, in which he substantially qualified a number of the overstatements and unsupportable conclusions made in his written evidence. Much of his oral evidence then accorded with that given by the respondent's witnesses and in reality, there was relatively little difference between them as to the material facts save, notably, in the question of degree of his relationship with the two respondents and the extent of their control over him.

13. It is no disrespect to the claimant that I say that so far as the facts related to the legal status of particular aspects of the Church and the clergy's duties, rights and responsibilities are concerned, Professor McClean's knowledge does appear to me far more extensive than that of the claimant. Indeed, Mr Sharpe himself acknowledged that to be so when faced with some questions from Mr Tattersall. Consequently, where there is dispute as to fact rather than conclusion, I have generally found that I prefer Professor McClean's evidence. Nevertheless, it was mostly in the conclusions I

was asked to draw from the facts that the parties diverged significantly. On the conclusions, I have formed my own view.

The Structure of the Church

14. As the established Church, the Church of England has occupied a central position in English society for several hundred years. Despite that, it has no legal personality. It cannot sue or be sued. The evidence conveyed to me the impression that rather than being one body with a centralised structure of administrative authority, function, control and direction, the title "Church of England" denotes an amalgam of what sometimes seemed an infinite number of bodies with no precise or clear picture to an observer such as myself (as opposed to an expert like Professor McClean) of how the various jigsaw parts interact and fit together. That situation has come about, I believe, because of the piecemeal approach of legislation over the years amending a diverse range of ancient traditions. The ultimate authority to restructure lies with the Church's parliament, the General Synod, subject to the approval of the Westminster Parliament.

15. The Church and its officers are governed by canon law (alternatively called ecclesiastical law and I understand the two terms to be synonymous). Canon law is derived from a number of sources. The set of written "Canons of the Church of England" ("the Canons") are pre-reformation in origin. They are reproduced behind tab 15 of the bundle of authorities (and page references to Canons are to pages within that tab). They are periodically reviewed, the last wholesale revision having taken place in the 1960s. Since 1920, a major source of canon law has been the Measures passed by the Church Assembly (1920-1970) and the General Synod, which replaced the Church Assembly in 1970. The Measures were also helpfully reproduced for me in the bundles of documents marked "Authorities."

16. Canon law is part of the law of the Land. Measures receive the Royal Assent after approval by the Westminster Parliament. The Church is therefore in the special position that its internal rules, as set out in the Canons and Measures, have the same force of law as any civil rule of law. Although ecclesiastical in origin, a Measure can and does impact on secular legislation.

17. The Church consists of a number of geographical dioceses, each headed by a Bishop. In the Worcester diocese, there is also a suffragan or assistant Bishop, the Bishop of Dudley. No point was taken before me that some of Mr Sharpe's dealings were directly with the second respondent and others with the Bishop of Dudley and I speak of the claimant's relationship with "the Bishop" as including both. The diocese has two Archdeacons, also of Worcester and Dudley respectively. Within each diocese there are a number of parishes, each under the care of a rector or vicar (there being no significance in the distinction between those titles; both are often referred to as the 'incumbent' of the Parish). Parishes are grouped into deaneries, of which the Dudley Archdeaconry has seven, each with a Rural Dean.

18. The Teme Valley South benefice is within the Dudley Archdeaconry. It is now an amalgamation of three separate parishes (historically six) and consequently retains three separate Parochial Church Councils (the "PCC").

19. Priests of the Church cannot minister within any diocese without the permission of the Bishop of that diocese.

20. Professor McClean was keen to point out that from one Christian denomination to another, the relationship of individual ministers to various bodies within his church varies. The structure of the Church as outlined distinguishes it from other major churches in England (apart from the Roman Catholic Church), which have no Bishops. Authority in those churches lies either with a national body (for example, the Methodist Conference) or with a local Presbytery (the traditional feature of Presbyterian Churches), or with the individual local congregations (as in the Baptist and Congregational traditions). The entirety of the rector's relationships within the Church, said professor McClean, is confined to his diocese, the only relationships being between the rector and the parish and between the rector and his Bishop. There is no broader relationship with any person or body outside the Diocese. No other church operates within the context of Canon Law.

21. The purpose of this evidence was undoubtedly to urge caution upon me that case law decided in relation to the employment status of ministers of other denominations was based on different facts and is not necessarily determinative or binding upon me. I agree. This is apparently the first case concerning the employment status of ministers of the Church since the Court of Appeal's decision in Diocese of Southwark v Coker [1998] ICR 140 ("*Coker*"), the rationale of which has subsequently been criticised by the House of Lords in Percy v Church of Scotland National Mission [2006] 195 ("*Percy*") and the status of individual priests in the Church is again open to debate. The question in relation to Mr Sharpe must be decided within the specific factual context, although I was not told that his position was different in any material aspect from that of any other incumbent rector.

22. Understanding the legal basis of the relationship between the incumbent of a benefice and the Church requires an understanding of the concept of the benefice as an ancient office and the accoutrements that traditionally accompanied the office. Primarily, the right to the benefice carried with it the right to the freehold of the parsonage house and the rector could not be removed from it during his lifetime. Consequently, by extension, the rector was considered to have a freehold right to his office and is still often referred to as a freehold office holder or freehold incumbent. Professor McClean was keen to stress that the underlying principle of the freehold status of their office and the autonomy which goes with it is very much valued by rectors. Parochial clergy have always been aware and understood that they are not employees and that general employment law does not apply to them. The professor told me that when his Committee began to sit to review the statutory employment rights of priests in the Church, there was initially a general feeling amongst members of the Committee that all the Church's priests should be afforded full employment status. In the course of their deliberations, however, they were persuaded by the fear of the clergy themselves that such status would undermine rather than safeguard the valued freehold status and autonomy which went with it. Rightly or wrongly, incumbents harboured a fear that the imposition of an employer's authority may result in Bishops imposing their own wishes, resulting in what the professor termed a "monochrome" diocese rather than the broad church that is countenanced by the flexibility of practice that currently obtains. For their part, the hierarchy did not wish to disturb or alter current arrangements or take on a responsibility of line management that might not sit comfortably with the notion of a shared mission with the clergy. Mostly for those twin reasons, but partly also for the reason of the difficulty in identifying who the employer should be, a difficulty upon which I will comment later, the Committee recommended the granting of specific employment rights (which were termed "S.23 rights") to priests but fell short of recommending employment status. I note that the Terms of Service Measure expressly confirms (Section 9(6)) that parochial clergy are office

holders and nothing in the Measure is to be taken as creating the relationship of employer and employee between the office holder and any person or body. That provision, of course, postdates and is irrelevant to Mr Sharpe's incumbency. Nor does it preclude the finding of such a relationship in an appropriate case.

23. Before moving on, this is a convenient place to mention a phrase I heard a good deal of, "the cure of souls." This might conveniently, I hope not too simplistically, be described as the Church's mission statement. In addition to its duties of worship, the cure of souls is the Church's ultimate duty, aim and purpose towards its adherents. It is the responsibility of the rector in his parish and it is the responsibility of the Bishop in his diocese, exercised in a sense of joint responsibility with individual rectors in their parishes in the phrase that was obviously well-known to the respondents' witnesses and the claimant alike, "Your cure and mine."

Ordination and Appointment to a Benefice

24. The ordination of a priest is documented by a "letter of orders." Significantly in relation to the claimant's suggestion that a contractual relationship with the Church began then, the claimant's letters of orders were issued in the Archdiocese of York. They are copied in the bundle of documents at pages 277 as Deacon and at page 302 as Priest. Ordination does not in itself confer a right to any appointment. Subsequently, Mr Sharpe served for a period of time as a chaplain to the Navy.

25. The appointment of a priest as rector to a vacant benefice is now governed by the Patronage (Benefices) Measure 1986. It involves various processes: nomination, institution and induction in accordance with the Canons. The right to nominate or present a priest for appointment to the position of rector still lies in the hands of the "Patron" of the Parish. The right to nominate is still regarded as a piece of property, an "advowson". In the case of Teme Valley South, this right lay with a Mr and Mrs Miles. By Measure, the patron must consult the parish and, before making an offer to a particular priest, obtain the consent of two elected representatives of the PCC and of the Bishop. Although patrons can, and some do retain the right to present without interview, in practice there is usually a tripartite interview panel, consisting of the patron, the Bishop's representative and representatives of the PCC, each one of those represented having a right of veto to the appointment.

26. Mr Sharpe's appointment process began when the parish of Teme Valley South became vacant in May 2004. As Diocesan Secretary, Reverend Higham served notice of the vacancy (page 404) on the patron and upon each of the three PCCs in order that a requirement of the Measure, a "Statement of Needs" could be compiled. The patron consulted with the Bishop and the PCC of each of the three parishes, each separately entitled to representation, to agree the process of appointment. The contents of a "Parish Profile" (which incorporated the statutory statement of needs) were agreed (pages 428-443). Mr Sharpe likened this document to a job description but it is hardly that. It contains a description of the parishes and its churches, the people within the parish and their activities. In addition, there is an expression of the expectations and desires of the parishioners, something closer to a person specification than a job description. The vacancy was advertised in the Church Times. Mr Sharpe submitted an application (pages 444 – 451). A shortlist of candidates was prepared and interviewed by a panel consisting of Mrs Miles, the Bishop of Dudley and two

representatives from each of the three PCCs. Had all represented not unanimously agreed the appointment, it could not have been made and the vacancy would have been re-advertised.

27. At the interview, there was no discussion of the terms and conditions of the appointment in relation to such practical matters as the stipend, provision of housing etc. That was because the common terms applicable to all rectors would have been well known to all present. Mr Sharpe expressly confirmed this to me in his evidence. He was asked in cross-examination whether any terms and conditions had been negotiated at the time of his interview or appointment. He replied 'No' because there was an established set of terms and conditions that were a "known quantity" in terms of pay, where he would live and the job he was taking on.

28. It is the patron who 'presents' the new rector. Mrs Miles 'presented' Mr Sharpe to the Bishop by a formal document (page 458). It was also she who offered the appointment to Mr Sharpe by letter dated 26 October 2004 (page 457). The claimant's letter of acceptance is at page 459. By Measure, however, the appointment is not finalised when a candidate accepts the offer but only if and when they are 'instituted' and 'inducted'. Only when all the ceremonies are complete does the appointment become effective in ecclesiastical law. Also by Measure, a Bishop cannot countermand an offer after it has been made or refuse to institute a priest, save in cases of incapacity.

29. Before being admitted to office, the priest must:

    29.1. Make a Declaration of Assent to the faith of the Church (Canon C15, page 99 of tab 15), "to which the historic formularies of the Church of England bear witness." These formularies are the 39 Articles of Religion originating from Elizabethan times, the Book of Common Prayer and the Ordinal.

    29.2. Take the Oath of Allegiance to the Sovereign (Canon C13, page 97) and

    29.3. An Oath of Canonical Obedience to the Bishop (Canon C14(3), page 98). This latter oath involves promising to "pay true and canonical obedience to the Lord Bishop of .... and his successors in all things lawful and honest." Although the reference in the Canon is to taking the oath on ordination, it is required to be repeated when taking up any new office.

30. In accordance with the invitation from the Bishop in the letter we have seen at page 464, Mr Sharpe was duly instituted on 8 January 2005. In instituting the rector, the Bishop delivers a written instrument to the priest. The claimant's deed of institution is at page 600-601. It imposed no requirements but invested the claimant with the "rights and duties" of the benefice and committed to him the 'cure of souls' of parishioners in the parish. It saves to the Bishop and his successors "our Episcopal Rights" but what they were was not explained to me. Pursuant to Canon C11 (page 94), institution was followed immediately by "induction." This process is not recorded in writing and outwardly is largely ceremonial, usually being effected by placing the priest's hand on the key of the Church door whilst the words of induction are spoken (Canon C11(2)). The claimant was then "installed," the claimant literally being led to the stall of the priest.

31. The claimant was asked whether he considered he was entering into a contract or knew, in accordance with the traditional view and the debate taking place in the Church at that time (because of the issues in which Professor McClean's committee were then involved), that the law regarded him as an office holder without a contract of employment. Frankly, it was difficult to accept that Mr

Sharpe remained as ignorant of that debate as some of his answers might at first sight appear to suggest. He did, however, admit to some "vague knowledge" of a debate, of which he did not take full notice. He was 'not moved' by the debate and did not fully appreciate the implications of the difference between the status of office holder and employee. I believe that what he was telling me was that he did not have a settled view on it but he did make it clear that he did not give the question any active consideration at the time of accepting his appointment. I find it likely that all concerned concentrated at the time on the requirements of ecclesiastical law in connection with the appointment to the office of rector of Teme Valley South rather than any possible effect upon the parties' status, responsibilities and/or obligations in civil contract law.

32. Shortly after his appointment, Mr Sharpe received what are known as "the Bishop's Papers" (pages 10-11 and 16-244, a full index of which appears on page 16). Mr Benson likened them to an employees' handbook and they certainly contain information and advice on matters both spiritual and temporal. Section F (of A-G) contained details of stipend and other financial matters. The papers are specific to the Worcester diocese and were first drawn up in the mid-1990s. Parts have since been revised and others rendered redundant by changes in practice or legislation and there was a grey area in the evidence as to whether the version sent to Mr Sharpe was entirely up to date and if not, which parts were inaccurate.

The Nature and Duties of the Rector's Office

33. The incumbent is still regarded as having the right to the benefice for life, although in more recent times that has been diluted by Measures that I shall record below in relation to the ways in which tenure of the office may be terminated. The concept of the benefice as described by Professor McClean is an unusual one. It is an office which exists independently of the person who fills it and which continues to subsist after the incumbent has left it. If the incumbent chooses to move on or his/her holding of the office is otherwise terminated, the office will continue to exist and (this is the unusual bit) retain its own freehold but it will remain vacant.

34. The duties of parochial clergy are enshrined in ecclesiastical legislation, especially the Canons and the Ordinal (tab 18 in the 'Authorities bundle of documents). Consequently, the respondents are correct that they are duties of the rector's office, imposed by law irrespective of any contract the parties might make either contrary to or in addition to their requirements. The duties embrace spiritual, liturgical and doctrinal matters but it is not surprising that day-to-day activities are not dictated.

35. I set out below the principal examples of the duties of ministers of the Church as set out in the Canons to which I was referred but, before I do so, I should say a word about the applicability of the Canons in general. It appears that some are more honoured and observed than others. Professor McClean explained that they were often aspirational rather than mandatory, although there was no doubt that some were more important than others and were to be regarded as obligatory. There would be differences in their observance from parish to parish. He suggested that many priests would not remember all of them. Indeed, Mr Sharpe confessed to familiarity only with the Canons rather than any detailed knowledge such as that displayed by the professor. Bearing that in mind, the examples are:

35.1. Canon B22(4) (page 43) – not to refuse or delay the baptism of any infant within their cure that is brought to their church to be baptised;

35.2. Canon B30 (page 51) – to present for marriage two persons who apply to them to be married in the church where they minister. Similarly, there is a duty to advise those approaching matrimony. As to marriages, I was told that the House of Bishops had issued further advice concerning the marriage in church of divorced persons but it was common ground, accepted by Mr Sharpe in cross-examination, that the final decision in such cases lies within the discretion and conscience of the individual priest.

35.3. Under Canon B37 (page 58) – to minister to the sick;

35.4. Canon B38 (page 59) – to bury, according to the requirements of civil law, the corpse of any deceased person within their cure or who is on the Church electoral role of their Parish. Mr Sharpe agreed that funeral services may be delegated to an approved lay person;

35.5. Canon C24 (page 110) is an important general provision headed "Of Priests having a Cure of Souls." To distinguish between the arguments of the parties on the question of personal service by incumbents and their powers to delegate, I have included italics to denote those matters which do not require the incumbent's personal performance:

35.5.1. To *provide that* morning and evening prayer is said daily in the Church, or one of the churches, of which they are the Minister. I was told, in practice, that the requirement to say the prayers in Church is one of those requirements which has fallen into disuse and clergy decide for themselves how and when they are said. They are routinely said in private and no one in the hierarchy or the parish polices the requirement.

35.5.2. To celebrate, *or cause to be* celebrated the Holy Communion on all Sundays and other great feast days and diligently to administer the sacraments and other rites of the Church;

35.5.3. Preach *or cause to be* preached a sermon at least once every Sunday;

35.5.4. Instruct parishioners *or cause them to be instructed* in the Christian faith and use such opportunities to teach or visit schools in the Parish as are open to them;

35.5.5. Prepare people *or cause them to be prepared* for confirmation;

35.5.6. Visit parishioners, especially the sick and infirm, provide opportunities for those who seek spiritual advice;

35.5.7. To consult the PCC on matters of general concern and importance to the Parish.

35.5.8. Finally on the question of delegation, Canon C24(8) (page 110) provides that if at any time a priest is unable to discharge his duties "whether from non-residence or some other cause, [they] shall provide for [their] cure to be supplied by a priest licensed or otherwise approved by the Bishop of the Diocese". As we shall see, the Bishop does not have the right to license another priest to exercise his priestly function in the benefice without the rector's permission. I relate below what happened when Mr Sharpe was unable to perform his duties by reason of long-term illness.

36. Professor McClean emphasised that rectors can and, in his experience regularly do delegate a number of their duties. Certain work, of course, for example the celebration of Holy Communion, can only be carried out by someone who has been ordained priest but, subject to that limitation, incumbents are free to delegate duties to whomsoever they consider appropriate, including members of the laity, who can be invited to give a sermon and even conduct funerals (although in both cases only by lay persons so authorised by the Bishop).

37. Archdeacon Trethewey told me that the ability to delegate is well understood and, to varying degrees, regularly exercised by rectors. He believes the ability to delegate has, in recent years, had increasing importance as the number of clergy falls and the laity become more involved, particularly in rural multiple parishes such as Teme Valley South. He cited as examples, arranging for funeral services to be conducted by an authorised Reader, a marriage to be conducted by a retired priest or delegating the office of chair of the PCC to a lay vice-chair. Lay people are involved in the preparation of candidates for baptism, confirmation and marriage and instruction in the faith of the Church. Specific instances of delegation are not recorded, so Archdeacon Trethewey was unable to tell me the extent to which the claimant had delegated, save to point to page 895 when someone else took the Sunday service for Mr Sharpe on 29 January 2006. Although Mr Sharpe agreed in cross-examination that he did not seek to deny the flexibility the Canons gave a rector, he had not personally taken advantage of it to the extent described by the Archdeacon as possible. When it was put to him that he could delegate for any reason he liked, be it holiday or simply that he was unwilling to do something for whatever reason, he replied to the effect that he complied with his duty if he ensured it (whatever the particular duty was) was done. He agreed that the reasons for not doing it himself could be many and varied. There would only be a problem if he failed to cause 'it' to be done.

38. Canon 25 (page 111) requires the rector to 'keep residence on his benefice' and to live in the parsonage, not being absent for more than three months without the licence of the Bishop. It was common ground that save for agreed sabbaticals, a rector is unlikely to request the Bishop's licence and certainly Mr Sharpe did not do so.

39. It was a central part of the respondents' case that a rector's daily activities were entirely a matter for the individual's discretion and conscience. For instance, Professor McClean said that each individual decides how to allocate their time and which claims on that time are to have priority at any particular time. It is the incumbent and only the incumbent who decides which duties to perform, how to perform them and with the exception of Sunday Services, when to perform them. These are not matters over which the Bishop or any other Officer of the Diocese can exercise control. Mr Sharpe did not seek to challenge much of that, although he did consider that the Bishop or Archdeacon presented him with requirements on occasions that I will examine later. He also pointed out, and I accept because this happens with all conscientious professionals, that there were often demands upon his time, and the timing of them, about which he had no real choice.

40. Similarly, incumbents exercise a good deal of choice in how they choose to pursue the cure of souls in ways beyond those laid down by the Canons. They may, for instance, serve in charitable, administrative, social and educational ways. Rectors will often be ex-officio members of local Trusts or Governors of voluntary aided Church of England schools. They will often be engaged in

local fetes and festivals, such as a harvest festival or the annual summer garden fetes that traditionally take place in many parishes.

The Benefits and Terms and Conditions associated with the Tenure of the office of Rector.

The Stipend

41. Rectors receive a "stipend." According to the traditional view of the Church, the aim of the stipend, as quoted from the 2009 Annual Report of the Central Stipends Authority (pages 1668-1690), is to enable ministers to "discharge their duties without undue financial anxiety." On the claimant's case, the stipend amounts to a salary and is the wage for the job by a different name. I agree that the Church's terminology may be descriptive of former times and the general public would probably recognise the claimant's more modern and realistic view but the question I have to decide, whatever terminology is used, is whether the amount and payment of the stipend is a contractual obligation. Professor McClean's evidence, hotly disputed by Mr Benson on behalf of the claimant, was that it was his understanding that until the 2011 legislation came into force, an incumbent had no legal right to any payment by way of stipend and therefore no remedy if none was received. There is a surprising lack of case law on that particular point, although probably, as Professor McClean surmised, that is because, in practice, incumbents always receive their stipends.

42. The stipend is paid under statutory authority but there is no provision for determining any particular sum. In practice, it is paid as a fixed, flat rate amount, usually fixed by the individual diocese in the light of recommendations from the Central Stipends Authority (a purely advisory body with no actual power). Each diocese has a discretion to fix the sum paid. In Worcester, the rate is set by the Diocesan Resources Board, a body established by the Diocesan Synod and the respondent Diocesan Board of Finance ("DBF"). I was not told how membership of the Board is made up. There is statutory power to unilaterally reduce the stipend in the event of a shortage of funds. Archdeacons receive a higher stipend than rectors and Bishops more than Archdeacons. An example of the differentials for one particular year can be seen on page 1668 of the bundle of documents. Professor McClean said there had been an uneasy debate within the Church as to whether that state of affairs was compatible with the philosophy of flat rate avoidance of hardship but he was obliged to agree with Mr Benson's suggestion that the current system rewards more responsibility with more money.

43. Recent experience is that Worcester pays a little in excess of the minimum national recommendation, although the payment is always at a flat rate. There is no opportunity for an individual to negotiate the level of his stipend. There is no scale rising with experience, service or size of parish. Although the Bishop's Papers (particularly page 149) referred to the possibility of variation based on seniority or responsibility, incremental payments in the Worcester Diocese were discontinued in about 2005 and the flat rate principle has since applied. However, if a priest works part-time in a remunerated post (such as a prison chaplain for example), then the stipend is reduced by the sum earned rather than *pro rata* according to the number of days in a week the priest is engaged on the other work.

44. Historically, stipends were originally funded from the endowments of each parish and/or taxes such as tithes. As acknowledged at the hearing, it is common knowledge to readers of Anthony Trollope that some "livings" were more generously endowed than others. Now, by Measure, these historic endowments have been pooled in order that priests may be more equally treated in relation to

stipends. Each diocese has a Stipends Fund administered by the DBF, mostly consisting of monies raised from the parishes. Poorer dioceses receive 'top up' grants from the Church Commissioners' investment income.

45. Incumbents also receive various statutory fees, for example for weddings and funerals. As was the case with Mr Sharpe, these fees are commonly assigned to the diocese and effectively "set off" against the stipend received by the incumbent in order that the incumbent receives the same amount by way of stipend irrespective of any statutory fee revenue. This is because, if they not assigned, then an assumption is made that the rector will receive the same fee income as the previous year and deductions will be made from the stipend accordingly. Mr Sharpe's deed of assignment can be found at page 599 of the bundle of documents.

46. Although the DBF supplies the funds from the Diocesan Stipends Fund, actual payments are made through a clergy payroll run by the Church Commissioners. Each year, the DBF informs the Church Commissioners of the stipend level for the diocese. Tax and national insurance are deducted through the payroll PAYE system, although that is neutral in this case because the Church's and Inland Revenue's accepted treatment of the incumbent for income tax is that of an office holder who, for national insurance purposes is also "an employed earner." The Church Commissioners are the designated body responsible for the "employer's" secondary Class 1 national insurance contributions and not the DBF, although the payments will be re-charged to the DBF. The rector receives an itemised pay statement each month. The DBF provides the amount of funds that the Church Commissioners advises are required.

47. Similarly, the DBF provides funds to the pension fund administered centrally by the Church of England Pensions Board. The DBF has no other involvement in pension arrangements. The application which the claimant made for ill-health retirement was made to the Pensions Board.

48. In addition to the stipend, incumbents receive the benefit of their parsonage house. As noted above, they are required by canon law to live there. Their right to do so remains throughout the period of their tenure of office and the property cannot be sold without their agreement, which they can withhold without restriction. By Measure, the parsonage house or rectory is vested in the incumbent by virtue of their induction, as are the church and churchyard, although title is limited and more analogous to that of a tenant for life than a freehold owner. As established by measure in 1972, parsonages, churches and churchyards are maintained by the Diocesan Parsonages Board and the incumbent is no longer under an obligation to meet the costs of repairing and maintaining the property.

49. Rectors also receive the additional benefits of payment of council tax, water charges, rectory maintenance and insurance costs, membership of the non-contributory pension scheme and, in certain circumstances, removal or re-settlement grants. Rectors are entitled to apply for a low interest car loan from the Church Commissioners.

50. Working expenses, including travel expenses, are normally reimbursed in full by the PCC, as indeed they were in Mr Sharpe's case. Reverend Higham emphasised that "under no circumstances" does the DBF have a responsibility to reimburse parochial expenses to a rector. If the PCC does not have the funds to meet the reimbursement, that appears to be the end of the matter.

51. There is no formal regulation of hours of work, although parochial clergy are encouraged by Bishops to take each week a regular day off that is known to the parishioners. Mr Sharpe's statement that he was 'required' to work 6 days a week does appear to overstate the effect of this advice and, incidentally but not importantly, does not take account of that part of the Bishop's Papers (A8, paragraph 2(a) on page 43 of the bundle of documents) that a second day off should be organised by way of taking a second morning, afternoon and evening off each week (not all on the same day).

52. The Bishops' Papers (pages 42-43) also contain guidelines as to the amount of holiday rectors should consider taking each year but this seems to be a flexible matter at the option of the individual incumbent, for which they do not need permission and, for that reason, no one keeps a record or checks on what is taken. On the other hand, somewhat contrarily, it is stated that untaken holidays cannot be carried forward. In the absence of records, one can only surmise that this is left to the individual on an honour basis.

53. On pages 177 and 178, the Bishop's Papers set out advice to incumbents on procedures to follow for the recording of statutory sick pay. From 2006, because it is considered that the DBF, a registered charity limited by guarantee, should not use its charitable funds to relieve the obligation of the state, the DBF has reduced the stipend by the amount of statutory sick pay paid in the first 28 weeks of illness. Thus the rector's income is maintained at the level of his stipend for that period. Mr Sharpe considered it was part of the diocesan control of him that he was required to provide sick notes but the respondents correctly pointed out that the 'employer' for national insurance purposes is obliged to maintain records. After expiry of the statutory sick pay period, a further 24 weeks are paid at half the stipend rate. No further payments are made after that time. Mr Sharpe became ill on 4 April 2006. His stipend reduced to one half with effect from 23 October 2006 (page 1048) and ceased altogether with effect from 9 April 2007 (page 1092). The reduction and cessation of sick pay suggested to Mr Sharpe a formal relationship between him and the DBF and exploded the myth that the stipend was about maintaining the rector. It is not difficult to understand his view that the stipend stopped when the job was not being done.

54. Until recently, no formal grievance procedure existed within the Church as a whole, although some dioceses had their own procedures. I was referred to page 618 of the bundle but that procedure was never adopted in Worcester. There was no such policy in the Bishop's Papers and Mr Sharpe agreed that he was not aware of any procedure for him to raise a grievance about the hierarchy.

55. Prior to the introduction of the Terms of Service legislation, there was no formal or informal appraisal system for parochial clergy, although the Bishop's Papers (A2, page 24) did use that term in relation to the system of pastoral reviews prior to 2001. That document was included in the papers sent to Mr Sharpe in error. From 2002, a new arrangement for the "Pastoral Review of Ministry" had become the term used (pages 277A to 227C) and it remained current until the Terms of Service Review in 2009. This was an informal ministerial or pastoral review, involvement in which was not compulsory, although there was an expectation that clergy would give it 'high priority'. In practice, almost everyone did participate but I was told that there were examples of priests who declined the invitation to do so, with no possible sanction applying. In its submissions to Professor McClean's Committee, the diocese described the system as "a conversation around the share of the cure of souls." In that sense it was a qualitative review but I accept that it has never been a performance

review as such. The frequency with which such reviews were offered or undertaken varies from diocese to diocese but, owing to the short duration of his appointment, no such review meetings were proposed to or held with the claimant.

56. Disciplinary matters can be addressed pursuant to Measure but I shall deal with those later when I examine the ways in which the rector's tenure of office might come to an end.

The Rector's Relationships with others in the Diocese.

The Bishop

57. It was in this area of the evidence that I encountered the greatest divergence between the parties. An incumbent's relationship with their Bishop is governed by the Ordinal and the Canons. The essential point for the respondents was the joint responsibility of a shared mission, "your cure and mine". The Ordinal, the respondents' witnesses said, denotes a pastoral rather than managerial role in the concept of a shared vocation of priest and Bishop in the spiritual mission. The Bishop's role was described as essentially that of a counsellor. To Mr Sharpe, for the purposes of the hearing before me at any rate, the importance of his relationship with the Bishop lay in the latter's authority over him. The following are extracts from the Canons concerning the Bishop's authority and powers:

58. The Oath of Canonical Obedience (see above). According to Professor McClean, the promise is largely symbolic and in practice has little, if any, real effect. It is an oath related to canonical matters and no more than a promise to obey the canon law. To that extent, there was 'no value added' if the Bishop were to give an instruction that was already in the canon law. At best, in the professor's view, the oath could only be interpreted as an acceptance of the Bishop's interpretation of the canon law if the priest was in error. But such an instruction carried no additional sanction beyond what could result from not observing the Canon. In answer to Mr Benson's suggestion that disobedience might be "conduct unbecoming" a priest leading to disciplinary action under the appropriate Measure, Professor McClean was quite adamant that could not be the case. There were precedents on the definition of what was 'conduct unbecoming' and they did not include disobeying a Bishop. Indeed, he was dismissive of the suggestion that a Bishop would seek to issue an instruction other than one of the very few instances of canon law authority given to him about Services and the use of churches (see below). The Church avoided the word "must" and he further denied the suggestion that "expect" had a meaning to that effect in Church language. I accept that evidence was given from the professor's long experience and contact with Bishops and accurately reflects practice within the Church.

59. According to Canon C18(4) (page 104) every Bishop has within his diocese the right to conduct, order, control and authorise all services in Churches, Churchyards and consecrated burial grounds and to hold formal "visitations." Visitations involve the submission of answers to articles of enquiry addressed to churchwardens so as to acquire a knowledge of the state, sufficiency (in numbers) and ability of the clergy. In practice, they are now conducted by the Archdeacon and very rarely by the Bishop. At the end of the process, the Bishop may deliver a "charge" (i.e. an address stating his findings and making recommendations as to the future) but even this is not binding upon the rector.

60. Canon B14A(4) (page 32) provides that a Bishop may direct what services shall and shall not be required to be held in any Church in his diocese which is not a Parish Church.

61. Under Canon C18(7) (page 104) every Bishop has the power to correct and punish the disobedient or criminal within his diocese but that no longer has any meaning outside the statutory disciplinary procedure which I examine below.

62. Canon C28 (page 114) prohibits ministers with an ecclesiastical office from engaging in any trade or occupation which would affect the performance of their office without a licence to do so from the Bishop, which he has the power to grant or refuse after consultation with the PCC. So long as other business activities do not impinge on the performance of their duties of office, the incumbent is at liberty to undertake them without licence from the Bishop. In the absence of defined working hours, this gives incumbents considerable freedom in theory, although most incumbents regard their ministry as full-time, as indeed did Mr Sharpe. The provision is relevant to a growing number of non-stipend clergy but that is not Mr Sharpe's case. What is relevant is that Mr Sharpe established a business, International Faith Solutions during a period when he was unable to discharge his duties by reason of ill health. The Bishop commented (page 1140) that such an activity might not accord with the medical advice that he should "refrain from work" but he also reminded Mr Sharpe of the requirements of Canon C28. Mr Sharpe referred to page 1142 to his disputing the level of dialogue with the Bishop about this organisation but more detail will not assist me when deciding the question before me.

63. Canon C22(4) (page 108) charges an Archdeacon to "see that all such as hold any ecclesiastical office within the [archdeaconry] perform their duties with diligence, and shall bring to the Bishop's attention what calls for correction or merits praise". I am satisfied that this provision denotes spiritual and pastoral care rather than the exercise of managerial control, not least because 'correction' could only be achieved by offering advice.

64. Mr Sharpe gave evidence of what he saw as directions and requirements of him imposed by the Church; the powers of the Bishop, his authority and how this manifested itself during the course of his ministry at Teme Valley South. In paragraph 3 of his prepared witness statement, Mr Sharpe stated that he had "direct responsibility to ...the local diocesan Bishop" for the cure of souls in his parish and, in paragraph 23, that he was responsible for the cure "on behalf of the diocesan Bishop." Both Professor McClean and Archdeacon Trethewey protested the delegation or agency implied in that statement. The cure of souls, they said, is expressly stated by the Bishop during the service of Institution to be both "yours and mine" and that accurately describes the approach in practice, a joint responsibility. Whilst Mr Sharpe acknowledged in cross-examination the joint concept of "your cure and mine" with the Bishop, he saw this as a legally binding arrangement in the nature of a contract, sanctioned both spiritually and temporally by Parliament's assent. That again did not accord with Professor McClean's evidence. He rejected the notion of the subsidiarity of the rector and the implication that the senior could or did in practice dictate to the junior. The joint cure was a partnership, with no precedent for directions by the Bishop. Mr Sharpe did not refer to any instruction he had received concerning pastoral matters and I find I am obliged to prefer Professor McClean's evidence that Mr Sharpe has, however unintentionally, either misunderstood or misstated the position.

65. As a minister of the Church, said Mr Sharpe, you cannot "just go off on a tangent and preach as you wish". Certainly, Professor McClean agreed that a rector is expected to adhere to the main doctrines

and tenets of the Church and that persistent teaching contrary to them would be likely to result in disciplinary action under the statutory provisions.

66. Mr Sharpe pointed to clear guidance rules relating to biblical text to be used on particular weeks. It is agreed that guidance does, as one might expect, follow the structure of the Christian year but Professor McClean qualified this with the observation that actual readings may be selected from a number of lectionaries, each approved by the General Synod.

67. Certain authorised services are compulsory, as is the text of Common Prayer and Common Worship. Professor McClean contested the extent of this assertion by Mr Sharpe. Departure from the lectionaries, for instance, would not incur any disciplinary sanction. Common Worship is not an approved statutory document.

68. A priest must not teach outside of the 39 Articles of the Church of England and to do so would be a disciplinary issue. Again, Professor McClean denied the accuracy of this statement from the claimant. The Articles contain historic theological statements rather than defined doctrine. Unlike the claimant's assertion, they have not received parliamentary assent.

69. Mr Sharpe saw the existence latterly of a grievance procedure and the disciplinary procedure as both pointing towards employment. That is a matter for me to take into account and Professor McClean was not asked to comment.

70. Rules are prescribed relating to marriage, such as the reading out of banns of marriage and the marrying of divorced people in Church. If the priest did not comply with the established rules, marriages could be declared invalid. That, of course, is as much a reference to the priest's duties under civil law as a registrar of marriages as it is to his responsibilities under canon law.

71. The responsibility for managing PCCs was placed upon the rector. The claimant was required to be the chairman of the PCC meetings. Professor McClean agreed that the rector was the *ex officio* chair of the PCC. Reverend Higham felt the claimant had understated the autonomy of the PCC and over-emphasised any managerial role on his part. For instance, he is not required to chair every meeting. Rectors can and do delegate that to vice-chairs. Mr Sharpe agreed with that observation. The appropriate Measure gives a right to elect an *ad hoc* chair in the absence of the rector and vice-chair. A meeting of the PCC is given the power to resolve that the chairman should vacate the chair for particular business. Any resolution of the PCC is by majority vote and cannot be vetoed by the rector.

72. In his individual case, Mr Sharpe referred to the following matters specific to his incumbency:

    72.1. He was required to be a Trustee of three local Trusts, including managing a fund for distressed members of one of the parishes within the Teme Valley South group of parishes, the others being essentially Housing Trusts. His appointment as a Trustee came ex-officio with his appointment as rector. He had no option but to be involved in these Trusts. In cross-examination however, he softened that evidence to "very strongly obliged by local tradition and expectation."

    72.2. He had compulsory responsibility for the management of the church building, the Church's relationship with the oversight of English Heritage and legal obligations arising out of the operation of the faculty system. He could not just opt in or out of such responsibilities

according to his own will. This statement was not challenged but neither party described to me in any detail the extent of the rector's duties, which appear to be imposed by canon law.

72.3. In addition, he had civil law responsibility for general health and safety matters in Church buildings, including Church halls, which meant that he was concerned about the presence of asbestos, disabled access, sewage discharge and digging up graves. Professor McClean said such matters were the concern of the PCC generally and if any statutory notice were to be served by the authorities, it would likely be upon the parish secretary, although he did concede that it might be addressed to the incumbent if he had taken it upon himself to correspond with them personally.

72.4. The requirement of the job to occupy the rectory meant, in effect, that he was always available to parishioners and always on duty.

72.5. He was responsible to the Church in the role of a teacher. On a weekly basis, he organised teaching events and projects such as weekly Tuesday evening sessions at the rectory. Such sessions might include preparations for baptism or marriage.

72.6. In paragraph 26 of his prepared witness statement, Mr Sharpe referred to the collection of the "parish share" towards the diocesan funds to pay the stipends. He suggested there were sanctions if the money was not raised and services might be withdrawn and he referred to it as 'his responsibility' to ensure the finance was administered. Professor McClean, whose evidence I again find I prefer, disagreed. Certainly, a rector will be concerned in the finances of his parish but, by Measure, legal responsibility for the parish finances lies with the PCC and primarily with the treasurer or, in default of a treasurer, with the churchwardens. There were treasurers in office in each of the three parishes in Teme Valley South during the period of the claimant's incumbency. Reverend Higham denied the suggestion of sanctions or 'withdrawal of services' and did not know what it was that Mr Sharpe might be referring to, save that he did say that continued non-payment might bring into question the viability of the parish and consideration of its amalgamation with others under the Measure that permits re-organisation. There is certainly no link between the continued payment of the rector's stipend and timely payment of the parish share.

72.7. The Canons and local custom and practice dictate a mode of dress that is akin to a uniform code, denoting his assimilation into the overall structure of the Church. I note that Canon B8 (page 24) does provide for certain vestments when presiding at Holy Communion. Otherwise, vestments should be a matter of agreement between the rector and the PCC, with a reference to the Bishop to settle any disagreement. Outside of services, C27 (page 113) requires a priest's dress to be "suitable to his office." Professor McClean knew of no precedent for disciplinary proceedings against a priest under these provisions even though some priests often do not wear even the 'compulsory' robes. Mr Sharpe also suggested there was a code concerning the wearing of beards but professor McClean assured me there is no such thing and Mr Sharpe withdrew the suggestion of a 'rule,' stating that what he had been referring to was criticism by a lay member of his parish when he grew one. On the other hand, Bishops have beards (and may I take judicial notice of the example worn by the Primate of all England himself?).

73. Mr Sharpe gave some examples of the requirements and instructions he said were given to him by the Bishop or the Archdeacon, who he saw to be in a similar position of supervisory authority over him:

73.1. The Bishop had instructed him to use all the Churches in his combined parish. This instruction was consistent with the requirement of the Canons that Holy Communion be held in all parish Churches on a Sunday (Canon B14, page 28) and the Bishop's power to direct which churches that are not parish churches shall have what services (Canon B14).

73.2. Shortly after his appointment, he had attended a meeting with Archdeacon Trethewey who had told him that two of the parishes in Teme Valley South that had been legally combined had been allowed by his predecessor to continue to operate separately with, for example, two sets of parish accounts. He was told to "sort it out." The Archdeacon's memory of the meeting was vague but it was clear to me that the meeting was in the nature of a briefing about Teme Valley South generally and current issues in the parish. There was further discussion about whether, when Mr Sharpe had greater familiarity with the parish, they should consider moving to a formal amalgamation of the remaining three parishes into one. Obviously, it was to be Mr Sharpe's responsibility to rectify what was strictly an illegal situation and, given the claimant's tendency to overstatement, I find it unlikely that anything said by Archdeacon Trethewey in the context of that briefing meeting was in the nature of a direct instruction from a line manager.

73.3. Also not long after his appointment, Mr Sharpe said he received an 'absolute requirement' to attend the annual service for the licensing of churchwardens. He referred to the letter at page 603, sent to all clergy in the Archdeaconry of Dudley in January 2005. Although the wording is in the form of an "expectation" to support the service (an expectation with which Mr Sharpe had no problem and he was quite happy to attend), the letter does inform the clergy that there will be an attendance register for them to sign. Professor McClean agreed that denoted a very high level of expectation, indeed he found it unusually strongly worded and "as close to an instruction as the Church can get" in his experience, albeit he insisted nothing could arise from failure to attend beyond incurring the hierarchy's displeasure. Archdeacon Trethewey told me the attendance register was dropped from invitations 3 to 5 years ago but he agreed with Mr Benson that he would "take a dim view" of an individual's failure to attend and would certainly want to discuss it with him.

73.4. In his first prepared statement, Mr Sharpe spoke of other "absolute requirements" to attend certain events, such as the biennial Diocesan Conference and Chapter meetings. Professor McClean agrees that the rector is automatically a member of the deanery Chapter and would be expected to and normally want to attend its meetings but in neither case did he accept the word 'compulsory.'

73.5. Mr Sharpe referred to a time when the Bishop rang him about events at a funeral or memorial service that I gather are the subject of great dispute in the merits of Mr Sharpe's claims so I shall not dwell on them. Suffice it to say that the Bishop spoke to Mr Sharpe in a way that he described as "a jolly good roasting."

74. Mr Sharpe considered there were other events that demonstrated a high degree of discussion about him and management of him by the Bishop and his Archdeacon. For example;

74.1. The exchange of e-mails and correspondence concerning suggestions that he move out of the parish. He relied on correspondence in April 2007 (pages 1112-3) from the Bishop of Worcester to the Bishop of Dudley and the two Archdeacons,

74.2. Concerning moving Prebendary Thomas into his parish. A brief explanation is necessary. As mentioned above, save for limited exceptions that do not concern me here, no minister may exercise his priestly functions in a benefice without the consent of the incumbent (Canon C8(4) page 89). An incumbent is free to give or withhold consent to another clergyman working in his parish without the control of the Bishop. This provision was observed by the Bishop when Mr Sharpe became unable through illness to discharge his ministry. The Bishop sought his consent to two different priests in succession being authorised to carry out pastoral care in the parish. The first occasion, the Bishop's request concerning a Reverend Lewis is documented in a letter 16 December 2006 (page 1071) and Mr Sharpe's reply is on page 1080. The second occasion occurred when the Reverend Lewis retired. This second request, concerning a Prebendary Thomas, was made on 6 May 2008 (page 1341) at a time when Mr Sharpe had been absent from his duties for a considerable period of time and everyone knew it was unlikely that he would return to them. Mr Sharpe denied being consulted about this second appointment, considering that he had been presented with a *fait accompli.* It seems the diocese had adopted the temporary expedient of the Bishop's licensing Prebendary Thomas to the Deaconry and asking him to undertake cover services in Teme Valley South but, for the likely continuance of Mr Sharpe's long-term absence, licensing Prebendary Thomas direct to the parish was the preferred solution. It is not relevant to my decision that that issue was never satisfactorily resolved.

74.3. In September 2006, when the claimant was off sick, a newspaper reporter became interested in the 'parish situation' (see, principally, pages 1025A to 137).

74.4. The meeting of himself and his trade union representative with the Bishop on 5 October 2007 (see page 1180).

75. In relation to the above matters, I find myself unable to detect any degree of compulsion or instruction in the correspondence, nor in the minutes of the meeting. The correspondence is couched in consultative tones. The Bishop set out the limits of his powers at the start of the meeting with the trade union representative. It is apparent that he was unable to make any decision on his own authority. What I do accept that I see in the correspondence and the minutes is an attempt by the Bishop to manage problems in his diocese but it was patently clear that any solutions he could propose required Mr Sharpe's consent and the Bishop knew he was not in a position to impose anything without that.

76. The conclusions drawn by the parties from their evidence about the rector's relationship with his Bishop generally, and the claimant's experiences specifically, differed in this way. Mr Sharpe accepted that the Bishop's role in the joint of cure of souls was one of leadership but he considered that gave the Bishop an authority that was 'very real' and that of the Archdeacons very similar. Despite some limited flexibility, the Bishop's authority, when combined with all the requirements of

the canon law meant, said Mr Sharpe, that his work was mapped out for him and the idea that he had a choice was an illusion.

77. Professor McClean disagreed. He described the apparent powers of the Bishop in the Canons to be, in effect, "toothless provisions." Indeed, he graphically described his experience of Bishops being "reduced to weeping" because they are unable to interfere in situations not to their liking or to issue binding directions. On Professor McClean's evidence, supported by that of Archdeacon Trethewey, all the Bishop had to rely on was the hope that his advice and the deferential respect due to his office would prevail but he observed that the clergy were jealous of their independence and it was often his experience that what the Bishop wanted and what he got was by no means always the same. There was nothing available to him between that hope and the ultimate sanction of seeking the rector's removal under the Incumbents (Vacation of Benefices) Measure 1977, which, as we shall see, deals with situations where there has been a breakdown in relationships between the priest and the parish.

78. From all the evidence I have heard, I accept that the Bishop is not in the practice of issuing instructions and the reason for that is because it is known to both him and the priests of his diocese that he has no right to do so in the sense of an employer or a line manager issuing an instruction that the subordinate is contractually obliged to obey. I appreciate that rectors may on occasions defer to their Bishops, accept their greater experience and/or wisdom or simply not wish to create tension by going against their wishes but there is no obligation upon them to do so. If rectors feel so inclined, there is no sanction against their taking their own line. So long as they stay within the confines of the doctrines of the Church and obey lawful instructions on the very limited issues recognised by the Canons in relation to services and do not overstep the boundaries of personal misconduct in their priestly office, it seems to me that the freedom of rectors to go about their cure of souls in the way they see fit according to their own judgment and conscience is a very real one.

The Diocesan Board of Finance

79. Professor McClean asserted that there is no legal relationship between the DBF and the rectors of the diocese. He described such relationship as exists to be an indirect one arising out of the DBF's responsibility for the collection of sufficient monies from parishioners towards an elaborate national system of pooling to ensure that the payroll department of the Church Commissioners (acting as an administrative middle-man by administering the payroll) could pay Mr Sharpe's stipend.

80. Although in its First Review Report (pages 303-397) Professor McClean's committee referred to the DBF as a possible employer of priests were it deemed appropriate to give them employment status, this was, he said, a pragmatic approach because the DBF is one of the only diocesan bodies that has assets in the event of a successful claim against it. Bishops may be 'corporations sole' in law but they have and hold no assets as such. For this reason, it was the DBF that was charged with legal liability for the quasi-employment rights given in the new legislation but that was not the case during Mr Sharpe's incumbency. Mr Tattersall's argument, of course, is that it was necessary for legislation to subsequently bring about the position the claimant contends obtained at that time.

81. Reverend Higham has been the Diocesan Secretary of the Worcester Diocese since 1999. That position is recognised by Measure as being the Chief Administrative Officer of the diocese. His duties are statutorily defined and he holds many positions on many Committees and bodies within the Diocese. He is also the company secretary of the DBF. As he holds no parochial responsibilities

(save that he is licensed as a volunteer assistant in his own parish), he is employed and salaried by the DBF in accordance with a written contract of employment and he is responsible for the day-to-day running of the DBF. The Company has been in existence since the Diocesan Boards of Finance Measure 1925. Its aims and objects generally are to assist the Church in the furtherance of its objectives in the Worcester Diocese. More specifically, it is charged with the maintenance of clergy, including "increasing the remuneration of stipendiary clergy" and the provision of pensions for ministers amongst others.

82. The DBF has never exercised any form of control over the performance of a rector's duties or been involved in any of the various statutory machineries for terminating a rector's office. The rector provides no service or services to the DBF.

83. Some interaction does occur between the rector and the DBF. For example, the DBF delivers a range of training activities, including an annual Clergy Day but clergy are free to participate or not at their discretion. Typically, I am told, all priests would be invited to attend what is organised and something between 30% and 50% would generally be in attendance. The reference to "obligation" on page 32 refers to post ordination training in the first three years following ordination only and it did not apply to Mr Sharpe. Compulsory attendance at continuing professional development courses was not a feature until the 2009 legislation. The DBF will provide advice on worldly matters such as child protection or statutory requirements the rector may be concerned about. I heard of some interaction of that kind between Mr Sharpe and Reverend Higham concerning the asbestos problems faced by Teme Valley South. There will be contact in connection with the DBF's statutory duties as custodian trustee for the PCCs in relation to the ownership of some parish property and its obligations in relation to the parsonage. Mr Sharpe was correct when pointing out that it was the DBF's responsibility to maintain his parsonage.

The Parochial Church Council and Churchwardens

84. The PCC has a constitutional role, set out in the Synodical Government Measure 1969, whereas the office of churchwarden is governed by the Churchwarden's Measure 2001. The PCC consists of the priest and the churchwardens, together with a number of representatives of the laity elected at an annual parochial Church meeting. As already noted, the rector is chairman of the PCC, which has amongst its responsibilities the insurance and maintenance of Church buildings and the control of parish finances. In addition, consultation is required between the rector and the PCC who are to jointly determine policy issues such as patterns and forms of worship, the remarriage of divorced persons, churchyard rules and generally to determine practical issues arising. The PCC is charged to 'co-operate' with the incumbent but that does not always mean 'agree with.' Indeed, I gained the impression that with three PCCs not all pulling in the same direction as himself, or even in the same direction as each other, difficulties with the PCCs contributed to a significant extent to the problems Mr Sharpe faced at Teme Valley South, although it is no part of my remit to comment upon that in detail. Suffice it to record that it was Professor McClean's evidence that the rector, the churchwardens and the PCC each have statutory responsibilities but none are in a position to control or dictate to any of the others. He described the impasse reached by refusal of the PCC at Teme Valley South to pay for an asbestos survey which the claimant, in accordance with advice from the diocese, had advised was required by law to be undertaken.

Termination of the Rector's office

85. Canon C1(2) (page 79) provides that "No person who has ever been admitted to the order of bishop, priest or deacon can ever be divested of the character of his order." In relation to his benefice, the concept of the "freehold" nature of the rector's office as a property right is reflected in the fact that it too cannot easily be taken away. On all the evidence I have heard, I am obliged to reject the evidence of Mr Sharpe, challenged by Reverend Higham, that following the mere involvement of the Bishop in the case of a Mr R...., the latter was "forced to resign." The source of Mr Sharpe's belief was not explained to me, nor how the Bishop might have brought about that state of affairs. Reverend Higham would have had much closer, first hand knowledge and I accept that Mr R...'s fixed-term appointment came to a natural end after 10 years, the maximum period allowed to him under the statutory terms governing the initiative in which he worked.

86. Both the Archbishop's Council and Professor McClean's Review Committee noted that it is generally recognised within the Church that the arrangements that were then current and applied to Mr Sharpe gave to freehold clergy a high measure of independence and security of tenure, the corollary being that there was no effective framework of accountability. Termination of the office on other than voluntary grounds is possible only in pursuance of various complex pieces of ecclesiastical law relating to:

    86.1. Disciplinary reasons under the Ecclesiastical Jurisdiction Measure 1963 ("EJM") or the Clergy Discipline Measure 2003 ("CDM");

    86.2. The incumbent becomes subject to mental or physical incapacity. The relevant legislation is the Incumbents (Vacation of Benefices) Measure 1977;

    86.3. Pastoral breakdown, dealt with under the same Measure;

    86.4. Pastoral re-organisation under the Pastoral Measure 1983.

    86.5. The incumbent reaches the mandatory retirement age of 70 established by the Ecclesiastical Offices (Age Limit) Measure 1975.

Disciplinary Process

87. Removal from office on disciplinary grounds requires in every case a process before a court or tribunal. There is no possibility of immediate or summary dismissal, whatever the misconduct and any attempt to do so could be challenged on judicial review. An incumbent may, however, be suspended by a Bishop from the exercise of his office pending disciplinary proceedings. The EJM established a Bishop's Disciplinary Tribunal in each diocese. The relevant procedure is either the EJM (now confined to doctrinal cases) or in personal misconduct cases the CDM. The CDM came into being on 1 January 2006. Under the EJM, a person wishing to make a complaint against a priest had to do so in writing to the Registrar of the diocese. Under the CDM, the written complaint must be to the Bishop. In either case, the complaint must include written particulars of the alleged misconduct and include written evidence in support of the complaint. Although procedures have changed, the definition of what constitutes misconduct remains much the same. For my purposes, there is no practical difference between the two regimes on the question of definitions and what may be brought before the Tribunal.

88. According to Professor McClean, the procedure under the EJM, involving matters of doctrine, ritual or ceremonial is cumbersome and has been invoked only in rare and exceptional cases. The most recent one had begun in the diocese of Ely in 2004, after being initiated by the PCC rather than the Bishop. The Archdeacon investigated and reported, recommended a referral to tribunal, which took place in December 2007 and involved a 5-day hearing. There had been no use of it since the CDM was enacted. Consequently, I shall confine myself to consideration of the CDM. The grounds for instituting disciplinary proceedings under the CDM are where the complaint relates to:

88.1. Doing any act in contravention of ecclesiastical law;

88.2. The failure to do any act required by ecclesiastical law;

88.3. The neglect or inefficiency in the performance of the duties of office; or

88.4. Conduct unbecoming or inappropriate to the office and work of a clerk in Holy Orders.

89. It will be seen that the definition of misconduct is generic. No specific examples of impropriety are provided for. Probably for this reason, proceedings are normally undertaken only in the clearest of circumstances, such as cases involving adultery with parishioners, child abuse or child pornography and dishonesty involving Parish funds. For example, Professor McClean told me that in his long connection with the Church and its legal structures, he had never encountered a tribunal case concerned only with breach of the Canons. In relation to the neglect or inefficiency in performance of duties, the Professor's Review Group recognised there would need to be an element of wilful or deliberate refusal to accept advice for the improvement of deficiencies for matters to merit disciplinary action. The Bishop does not have the power to initiate action under the CDM. This must come from a person "with a proper interest", who makes a complaint of his/her own initiative, usually a Churchwarden or member of the PCC. Archdeacon Trethewey recalled a 'handful' of cases under the CDM in the Worcester diocese. He had himself instituted only one case. That involved serious dishonesty in the handling of parish funds.

90. Under the CDM, the Bishop refers the complaint in the first instance to the Diocesan Registrar (his legal advisor), who decides whether there is sufficient substance in the complaint to justify proceedings under the CDM. The Registrar will notify the incumbent of the complaint and within a period of 28 days of receiving the complaint will send a written report to the Bishop as to whether the complaint should be dealt with under the CDM and referred to the Bishop's Tribunal. The Tribunal is composed of two clergy members, two lay persons and a legally qualified chairman. If on the receipt of the Registrar's report the Bishop decides not to dismiss the complaint he may:

90.1. With the incumbent's consent, direct that the matter remain on a record maintained by the Diocesan Registrar for a period to be determined by the Bishop (not exceeding 5 years);

90.2. Attempt to bring about a conciliation through an independent conciliator. If conciliation is unsuccessful, the matter is referred back to the Bishop who may consider any other option open to him.

90.3. With the incumbent's consent, impose a penalty; and

90.4. Refer it to a designated officer for investigation. After investigation, the designated officer refers the matter to the President of Tribunals of the Bishop's Disciplinary Tribunals

(currently Lord Justice Mummery). If he decides there is a case to answer, then the matter goes for a hearing before the Bishop's Disciplinary Tribunal.

91. The Bishop's Tribunal can impose a penalty or defer one. The Bishop may be invited to express his opinion about the penalty to be imposed (although it is not usual for it to do so). Possible penalties are similar to those under the EJM and involve:

91.1. Removal from office;

91.2. Disqualification from exercising the function of the priest's order for a specified period or without a time limit;

91.3. Suspension;

91.4. Injunction to do or refrain from doing a specified act; or

91.5. Rebuke.

92. I was told of higher Courts than the Bishop's Tribunal, which have appellate jurisdiction over the Tribunal as well as first instance jurisdiction in relation to the hierarchy and other matters. It is not necessary to relate their structure.

93. In practice, I was told, the most common course of dealing with complaints is for priests to accept from the Bishop a penalty by consent and, throughout the Church, no more than six complaints against priests and deacons have been referred to a Bishop's Disciplinary Tribunal each year since the CDM came into force, although the incidence of complaints dealt with in other ways is rather higher. I was referred to more detailed statistics in the annexes to the annual reports of the Clergy Disciplinary Commission (pages 1124 onwards). As one might hope, the volume of complaints is proportionately small in relation to the 9,000 or so clergy who fall within the jurisdiction of the CDM but the possibility and power of enforcement is certainly present and it is used.

Ill Health and Pastoral Breakdown

94. The provisions for removal on grounds of ill-health were first enacted by Measure in 1945. Such eventualities, together with breakdowns in pastoral relationship between rector and parishioners, are now dealt with under the Incumbents (Vacation of Benefices) Measure 1977 (as amended), a Measure that is only applicable to freehold clergy such as Mr Sharpe. Removal is possible where the relationship between the incumbent and parishioners impedes the promotion of the Church's "pastoral, evangelistic, social and ecumenical mission in the parish." That can apply where there is no suggestion that the rector has done anything wrong or where the incumbent is simply unable by reason of infirmity to discharge adequately the duties attaching to his benefice. The procedure is cumbersome and expensive and used only rarely in practice. Archdeacon Trethewey confirmed that it had not been used in the Worcester diocese in the time of his own ministry there, which dates from 2001.

Pastoral Re-organisation

95. The office of an incumbent may be abolished as a result of pastoral reorganisation, most usually on the merger of parishes under the procedures in the Pastoral Measure 1983. This, to all intents and purposes, is a redundancy situation, although compensation is rather better than under the 1996 Act.

Full compensation for loss of office, stipend and housing is payable until retirement age if the priest is not appointed to another office, unless he unreasonably refuses to accept another appointment. A similar provision applies to those deprived of their benefice on the ground of pastoral breakdown. The Bishop has the power of removal under these provisions but he does not have the corresponding power to appoint to another post because the Patron and/or the parish representatives would have the right of veto.

Age Disqualification

96. A compulsory retirement age of 70 for freehold office holders was introduced by the Ecclesiastical Offices (Age Limit) Measure 1975.

Resignation

97. A rector can voluntarily resign his/her benefice, although there are provisions requiring notice to the Bishop in a prescribed form. Ecclesiastical law requires three months notice from the rector. Such resignation does not affect the rector's status as a priest. That can only be achieved by a Deed enrolled in the High Court relinquishing the priest's exercise of his order. The technicality of this can be seen at pages 1646-1649. When Mr Sharpe took ill-health retirement and resigned, he submitted two incorrect forms of resignation before the third (page 1650), in the prescribed form could be accepted.

The Law

98. There is relatively little authority on the question of an employment tribunal's undoubted discretion to allow the withdrawal of a previously made concession. The most recent is Nowicka-Price v Chief Constable of Gwent Constabulary EAT/0268/09 ("*Nowicka-Price*") in which HHJ McMullen Q.C drew on the CPR and Braybrook v Basildon & Thurrock University NHS Trust [2004] EWHC 3236 ("*Braybrook*") when enunciating the following principles:

> "(1) In exercising its discretion, the court will consider all the circumstances of the case and seek to give effect to the overriding objective;
>
> (2) Amongst the matters to be considered will be:
>
> (a) the reasons and justification for the application which must be made in good faith;
>
> (b) the balance of prejudice to the parties;
>
> (c) whether any party has been the author of any prejudice they may suffer;
>
> (d) the prospects of success of any issue arising from the withdrawal of any admission;
>
> (e) the public interest, in avoiding where possible satellite litigation, disproportionate use of court resources and the impact of any strategic manoeuvring.
>
> (3) The nearer any application is to the final hearing the less chance of success it will have even if the party making the application can establish clear prejudice. This may be decisive if the application is shortly before the hearing."

99. HHJ McMullen also relied upon the following passage in Cobbold v London Borough of Greenwich [1999] EWCA Civ 2074 ("*Cobbold*"):

> "The overriding objective [of the CPR] is that the court should deal with cases justly. That includes, so far as practicable, ensuring that each case is dealt with not only expeditiously, but also fairly. Amendments in general ought to be allowed so that the real dispute can be adjudicated upon provided that the prejudice to any party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed."

100. Moving on to the law governing the substantive questions I must resolve, S.230 Employment Rights Act 1996 provides (where relevant):

> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
>
> and any reference to a worker's contract shall be construed accordingly.
>
> (4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
>
> (5) In this Act "employment"—
>
> (a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
>
> (b) in relation to a worker, means employment under his contract;
>
> and "employed" shall be construed accordingly.
>
> (6) This section has effect subject to sections 43K and 47B(3); and for the purposes of Part XIII so far as relating to Part IVA or section 47B, "worker", "worker's contract" and, in relation to a worker, "employer", "employment" and "employed" have the extended meaning given by section 43K."

101. S.43K of the Act provides:

(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who—

(a) works or worked for a person in circumstances in which—

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for "personally" in that provision there were substituted "(whether personally or otherwise)",

(2) For the purposes of this Part "employer" includes—

(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged,

and any reference to a worker's contract, to employment or to a worker being "employed" shall be construed accordingly.

Case Law concerning the Nature of an Ordained Minister's Spiritual Duties

102. It is helpful to set out the history of the main decisions of the Courts in relation to the employment status of ministers of religion to which I have been referred by the parties. The earliest case was In re National Insurance Act, 1911. In re Employment of Church of England Curates [1912] 2 Ch. 563. The Chancery Division of the High Court held that clergy in the Church of England were not in a contractual relationship for national insurance purposes. They held ecclesiastical office and were not in the position of a person whose duties and rights are defined by contract.

103. That has remained the position to the present day but it is now suggested that view no longer reflects modern employment law as expressed in more recent cases. In the meantime, there have been a number of cases involving ministers of religion of various denominations. In The President of the Methodist Conference v. Parfitt [1984] IRLR 141 ("*Parfitt*"), there was alleged to be a contract of employment between the minister and the church from the date of ordination. The Court of Appeal held 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. No contract came into being on ordination or when the minister accepted an invitation to become a minister on a particular circuit. In *obiter* comments, Dillon L.J. noted the possibility of contractual entitlement to "ancillary matters" such as salary and the like.

104. In Davies v. Presbyterian Church Of Wales [1986] IRLR 194 ("*Davies*"), the House of Lords reached a similar conclusion. The duties owed by a pastor to the church and his activities were dictated, not by contract but by conscience. Although Lord Templeman had recognised that it was possible for an office holder also to be employed under a contract of service, he found that not to be the case there and on the question of control by disciplinary procedures said:

> "If his manner of serving God is not acceptable to the church, then his pastorate can be brought to an end by the church in accordance with the rules. The law will ensure that a pastor is not deprived of his salaried pastorate save in accordance with the provisions of the book of rules but an industrial tribunal cannot determine whether a reasonable church would sever the link between minister and congregation."

105. Despite some criticism of it by the House of Lords in *Percy* below, the case on which the respondents place the greatest reliance, because it concerned a curate in the Church of England, is the Court of Appeal's decision in Coker v Diocese of Southwark and others [1998] ICR 140. A Chairman of an industrial tribunal had found that a contract of employment was created by the oral acceptance of a letter of offer of appointment of Dr Coker to a curate's position. The Court of Appeal upheld the decision of the Employment Appeal Tribunal reversing the Chairman's decision. In doing so, it rejected many of the arguments pursued by Mr Benson before me, notably those suggesting that the Church's position on the question of contracts of employment was out of date and indefensible. But, in delivering the lead judgment of the Court of Appeal, Mummery L.J had commented that the main reason why there was no contract was because the parties had no intention of creating a legal relationship. In that part of the judgment later adversely commented upon in *Percy*, he stated that, contrary to an ordinary commercial contract where there is a presumption of such an intention, the position with a curate of the Church was different and the presumption was to the contrary unless the curate could show that such an intention existed. The essence of the judgment was contained in the following two paragraphs:

> "The legal effect of the ordination of a person admitted to the order of priesthood is that he is called to an office, recognised by law and charged with functions designated by law in the Ordinal, as set out in the Book of Common Prayer. The Ordinal governs the form and manner for ordaining priests according to the Order of the Church of England. Those functions are also contained in the Canons of the Church of England and are discharged by a priest as assistant curate. It is unnecessary for him to enter into a contract for the creation, definition, execution or enforcement of those functions. Those functions embrace spiritual, liturgical and doctrinal matters, as well as matters of ritual and ceremony, which make what might otherwise be regarded as an employment relationship in the secular and civil courts and tribunals as more appropriate for the special jurisdiction of ecclesiastical courts.
>
> The legal implications of the appointment of an assistant curate must be considered in the context of that historic and special pre-existing legal framework of a church, and an ecclesiastical hierarchy established by law, of spiritual duties defined by public law rather than by private contract, and of ecclesiastical courts with jurisdiction over the discipline of clergy. In that context, the law requires clear evidence of an intention to create a contractual relationship in addition to the pre-existing legal framework. That intention is not present, either generally on the appointment of an assistant curate, or in the particular case of Dr Coker. I would add that it has never been held, and it is not suggested ... in this case, that the incumbent of the parish, holding its church and its benefice, is under a contract with the Bishop or with anyone else in respect of his cure of souls in the parish."

106. What has led to the challenge of the long-held principle that a holder of a freehold benefice in the Church is not an employee is the decision of the House of Lords in Percy v Church of Scotland

Board of National Mission [2006] IRLR 195. The nature of the case was rather different to the present one in that a contract of employment was not alleged but what was central was the extended definition of employment in the Sex Discrimination Act 1975. The House of Lords considered that the fact that the appellant's status as an associate minister might readily be described as an ecclesiastical office led nowhere. Holding an office and being an employee are not inconsistent. A person may hold an "office" on the terms of, and pursuant to, a contract of employment. In that case, the appellant's rights and duties were defined by her contract, not by the "office" to which she was appointed. Had the employment tribunal directed itself correctly, it would have concluded that, notwithstanding the religious nature of the services, the appellant was employed by the respondents under a contract personally to execute work within the meaning of s.82(1) of the Sex Discrimination Act 1975.

107. Per Lady Hale:

> "The essential distinction is between the employed and the self-employed. The fact that the worker has very considerable freedom and independence in how she performs the duty of her office does not take her outside the definition."

108. Per Lord Nicholls:

> "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."

109. Lord Nicholls reflected on the nature of an office and agreed with the words of Lord Atkin in McMillan v Guest [1942] AC 561 ("*McMillan*") to the effect that the concept of "office" implies a "subsisting, permanent, substantive position having an existence independent of the person who fills it, and which goes on and is filled in succession by successive holders." Lord Nicholls recognised that "A benefice in the Church of England is regarded as a freehold office belonging to the incumbent for the time being."

110. Two further paragraphs of Lord Nicholl's judgment are potentially important:

> "A further strand in the authorities, most notably in the judgment of Mummery LJ in [*Coker*] concerns the absence of an intention to create legal relations. 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. The matters relied upon by Mr Parfitt in [*Parfitt*] are a good example of this. The nature of the lifelong relationship between the Methodist Church and a minister, the fact that he could not unilaterally resign from the ministry, the nature of his stipend, and so forth, all these matters made it impossible to suppose that any legally-binding contract came into being between a newly-ordained minister and the Methodist Church when he was received into full connection. Similarly with the church's book of rules relied on by the Reverend Colin Davies in [*Davies*]. Then the rebuttable presumption enunciated by the Lord President in the present case, following Mummery LJ's statements of principle in [*Coker*] may have a place. Without more, the nature of the mutual obligations, their breadth and looseness, and the circumstances in which they were undertaken, point away from a legally-binding relationship. 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.

"The final point calling for comment is the need to identify the parties to any alleged contract of service or for services. It goes without saying that before a tribunal can find that a contract of this nature was concluded it must be able to identify the employer with whom the claimant made the contract. As can be seen from the above summary of the authorities, this can be a source of real difficulty with a nationwide church whose complex affairs are conducted through a multiplicity of boards and committees. There may be one body responsible for finance, allocating precious resources between competing demands, all of which are eminently worthy. There may be another body responsible for making payments. There may be a third body charged with selecting the candidate best suited to this or that appointment, a yet further body may formally make the appointment, and have power of dismissal; and so on. These different bodies are, in a broad but real sense, all part of 'the church' in question. But the 'church' may not be an entity capable of making a contract or of suing or being sued. This is so with the Church of England. It is equally so with a diocese of the Anglican church, for the reason given in [*Coker*]. This is also true of the Church of Scotland. Then the fragmentation of functions within such an 'umbrella' organisation may make it difficult to pin the role of employer on any particular board or committee. But this internal fragmentation ought not to stand in the way of otherwise well-founded claims."

111. Lord Nicholls then reviewed the factual context of Ms Percy's appointment and the existence of documents surrounding an offer and acceptance. The secretary of the board of national mission had invited the claimant to accept the appointment and he sent her an amplified copy of the terms and conditions advertised. That board would be responsible for payment of the minimum stipend stipulated in the offer. There were terms and conditions about payment for services outside the parish. The appointment would be for a term of five years. Referring to the documents in the case, Lord Nicholls observed:

"These documents on their face seem to me to show that Ms Percy entered into a contract with the board to provide services to the church on the agreed terms and conditions."

"The fact that Ms Percy's status as an associate minister might readily be described as an ecclesiastical office leads nowhere. The post to which she was appointed had no content other than that given by the terms and conditions agreed ad hoc between the parties. Her rights and duties were defined by her contract, not by the 'office' to which she was appointed.

112. Referring to the problem of identifying contracting parties, Lord Nicholls found the Church to be the correct respondent:

"The Church has delegated to the respondents, the board of national mission, with their constituent committees the responsibility for planning and coordinating the church's strategy and provision for the fulfilment of its mission as the National Church. It was in the discharge of that remit that the respondents assumed the responsibility for the recruitment and appointment of the appellant as an associate minister to assist the minister of the linked

charge. It was with the respondents that her contract was entered into. In my opinion it is to the actings of the respondents in the performance of that contract that her complaint of discrimination must be directed."

113. Lord Hope too referred to the problem. Having reviewed the multitude of bodies and different ways of suing the Church of Scotland, he observed:

> "In each case, whether it be in the name of the General Assembly, or kirk sessions or presbyteries, it is the bodies in whose name the matter at issue has been conducted that determines the body that is to sue or be sued in respect of it."

He then concluded that the delegation of this matter had been to the board who had conducted the events that had led to the agreement between the parties.

114. Baroness Hale did not see Ms Percy's position as a classic example of an office. She was not a person whose rights and duties were defined by the office she held, rather she was someone whose duties were defined by nothing except the agreement the parties made, agreed with the committee of the respondent board. She nevertheless drew no distinction between statutory and non-statutory office holders and did not regard even statutory office holders such as judges as necessarily exercising their office outside a contract (Perceval-Price v Department of Economic Development [2000] IRLR 380. However, in that case there was a European Law context that has not been argued before me in relation to the domestic law issues of unfair dismissal and public interest disclosures. Her Ladyship further observed that for an employer simply to label a post as an 'office' cannot be enough to take it out of the (Sex Discrimination)Act.

115. There have been subsequent decisions of the higher Courts which have thrown further light upon the decision in Percy and its legal effect. In New Testament Church Of God v. Stewart [2008] IRLR 134 ("Stewart"), the Court of Appeal resisted the argument that *Percy* was a "sea-change" (although in Moore below, Kay L.J did acknowledge that "they caused the tectonic plates to move") The House of Lords had not overruled earlier cases, but simply found in that case an intention to create a legally binding relationship. *Percy* had established 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. A spiritual motivation in working for a church does not necessarily preclude an intention to create legal relations. The case recognised the difference between seeking to establish a contract by the fact of ordination and appointment to a specific pastorate. Again, on the facts of the case, it was found that the relationship rested on the formation of a contract, which in the circumstances was a contract of employment.

116. There was an argument in that case concerning the possible impact of Human Rights legislation. No argument was put before me that a finding of a contract would infringe the beliefs of the Church.

117. The most recent litigation on the point was Moore v President of the Methodist Conference EAT UKEAT/219/10. The President of the Employment Appeal Tribunal, Underhill J. explained the situation in this way:

> "The conclusion of Dillon and May LJJ in *Parfitt*, and of Waterhouse J. whose reasoning they endorsed, was based essentially on the spiritual nature of a minister's role: such other specific points as they made (e.g. in relation to the nature of a minister's stipend) were

> merely supportive of that general point. But the spiritual nature of a minister's role is the basis also of the presumption against intention to create legal relations which was disapproved in *Percy*. If it is illegitimate to rely on the spiritual nature of the role as the basis of a general presumption, it must equally, it seems to us, be illegitimate to rely on it *without more* as the basis of a specific finding..... It seems to us clear that Lord Nicholls and Lady Hale meant to hold that the spiritual role of a minister could not by itself justify denying contractual effect to an arrangement which otherwise had the necessary indicia of a contract: thus *Percy* has not simply disapproved the erection of any general principle on the basis of *Parfitt* but has undermined its actual reasoning, at least as regards whether stationing – as opposed simply to ordination – gives rise to a contract."

118. The result had to be that the spiritual nature of the minister's duties was irrelevant. They created no presumption for or against an intention to create legal relations. Whether there is a contract or not is to be determined in accordance with the usual criteria required to show that one existed and the spiritual nature of the duties are not determinative, although *Percy* does recognise that they are a factor to be taken into account by the fact finding tribunal. When the EAT went on to consider the facts of the case in the light of the removal of any presumption, they found there was a contract.

119. *Moore* recently came before the Court of Appeal [2011] EWCA Civ 1581. I have already noted that Kay L.J noted that the speeches in Percy had caused the tectonic plates to move but that seems to relate to the fact that they removed the obstacle that had hitherto virtually prohibited a finding that any arrangement by which a minister performed no more than the spiritual duties imposed upon by his church was contractual. Kay L.J then contented himself with fulsome praise for Underhill J's judgment in the EAT which he agreed with and did not feel the need to add to.

120. In the light of Percy, it will not be correct to view cases related to ministers as the only authorities shedding light on the question of the employment status of office holders. Ministers arrangements with their churches are no longer to be regarded as different to any other office holder/potential employee. I have accordingly had regard to the cases to which I was referred by the parties and to *O'Brien*. However, there are important matters relating to European Law that have been raised by the Supreme Court that have not been argued before me. The decision of the Court of Appeal, under the name O'Brien v Department for Constitututional Affairs [2008] EWCA Civ 1448 was that there was copious authority to the effect that judges are statutory office holders who are not employed under any sort of contract. That, observed Kay L.J is because a judge does not undertake to serve or to do or perform personally work or services for another party to the contract.

121. Mr Sharpe did not have a written contract. It is therefore necessary to enquire whether there was an oral one or, as Mr Benson argued, whether one can be implied from the parties' dealings and custom and practice. In that respect, Mr Tattersall drew my attention to the recent Court of Appeal decision in Tilson v Alstom Transport [2011] IRLR 169 ("*Tilson*"). The required elements to show that a contract should be implied were said to be well established. First, the onus is upon the claimant to show that a contract should be implied. Second, a contract can only be implied if it is necessary to do so. The Court quoted, with agreement, the following passage from the judgment of Mummery L.J in James v Greenwich L.B.C [2008] ICR 545:

> "..... in order to imply a contract to give business reality to what was happening, the question was whether it was *necessary* to imply a contract of service between the worker and the end user, the test being that laid down by Bingham LJ in *The Aramis* [1989] 1 Lloyd's Rep 213, 224:
>
> "... necessary ... in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist.
>
> "As Bingham LJ went on to point out in the same case it was insufficient to imply a contract that the conduct of the parties was more consistent with an intention to contract than with an intention not to contract. It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract."

The Nature of Any Contract

A. A Contract of Employment?

122. The question of whether a contract is one of service, for services or neither has given rise to a good deal of litigation over the years. Many of the authorities deal with the distinction between an employee, a worker and an independent contractor. I have gained little assistance from analogies with the commercial world. On any analysis, Mr Sharpe was not in business for himself, although I am aware of the respondents' argument that he alone had the responsibility for the performance of his office. The lead case, and still a very good starting point for identifying a contract of employment, especially perhaps in this non-commercial case, remains Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497 ("*Ready Mixed*":

> "A contract of service exists if these three conditions are fulfilled:
>
> (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
>
> (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
>
> (iii) The other provisions of the contract are consistent with its being a contract of service...
>
> ...The servant must be obliged to provide his own work or skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be."

123. I am aware that it is an error to concentrate on the so-called "control test" alone and, as the authorities supplied by the parties make clear, I must have regard to all the circumstances of the case.

B. A Contract for Services and whether the claimant was a "Worker"

124. The final analysis of this part of the claim may depend upon whether I accept Mr Benson's proposition that S.43K(1)(a) does not call for the protected worker to be in a contractual relationship at all but merely has to work in the circumstances envisaged by the subsection. There appears to be no decided case on that issue. I was, however, referred by Mr Tattersall to the publication

"Whistleblowing, Law and Practice" by four learned authors with acknowledged employment law experience. They make the statement (at paragraph 6.24) that "there must still be a contractual relationship" but it is a statement made without analysis or explanation and, from the context, designed to show that volunteers are excluded from protection. I cannot say that I found the publication altogether helpful on this particular point.

125. Save for the exception in S.43K(1)(b) the status of "worker" is not accorded to someone who is not obliged to provide his services "personally." In Parkes v Yorkshire Window Company Ltd [2010] All E.R (D) 108, UKEAT/0484/09 ("*Parkes*") it was observed that the right or obligation to employ a substitute would not necessarily mean that there was no obligation on the part of the 'contractor' to perform personal services unless that right to employ a substitute was unfettered. Also, in cases where the 'contractor' was unable as opposed to unwilling to carry out specified services, and had accepted an obligation to perform those services but was unable to do so, and where he himself did not bear the costs of employing a substitute, a limited or occasional power of delegation might not be inconsistent with a contract to provide personal services.

126. The latest case, on which the parties submitted their written submissions at my invitation is Community Dental Services Ltd v Sultan-Darmon [2010] IRLR1024 ("*Sultan-Darmon*"), where 'worker' status was not accorded to a dentist because he had an unfettered right to use a locum. An important element of the decision, that the tribunal had found there was no mutuality of obligation and thus no contract, is not relevant in Mr Sharpe's case. However, the Employment Appeal Tribunal observed that the decision in *Parkes* supported the view that where the right to appoint a substitute was unfettered, then there was no undertaking to do the work personally. The Employment Appeal Tribunal also expressly disapproved the idea, first raised in Redrow Homes (Yorkshire) Ltd v Buckborough [2009] IRLR 34 that the obligation to supply or arrange someone else's labour was in itself the supply of personal service. The claimant has argued that *Sultan-Darmon* is inconsistent with *Kettle* but that was a decision based on the tribunal's finding that the true terms of the parties' agreement was that, contrary to what was contained in the written contract, the orthodontist concerned would never supply a locum. Thus the terms were not those set out in the written contract and did indeed include an undertaking for personal service.

The Parties Submissions

A. The Claimant

127. Dealing first with the preliminary point, the respondents' application to withdraw the concession that the claimant was a worker, I take the opportunity to set out the relevant chronology:

127.1. No point was taken in the Response to the first claim, filed 31 July 2008, that the claimant was not a worker;

127.2. An express concession on the point was made at the case management discussion held on 5 September 2008, albeit for the purposes of that claim only ('Pleadings' bundle of documents page 37). I note that there was no identification of whether that concession was made under S.203 or the S.43K extension, nor with whom any necessary contract was entered into;

127.3. Although there had been some correspondence in the meantime about the possibility of a withdrawal of the concession, at a further case management discussion held on 19 March

2009, the concession was repeated, again with the clarification that it was limited to one made "for the purpose of this case alone."

127.4. The second claim was filed on 4 December 2009. In its Response, the respondents challenged only that the claimant was an employee and did not take the opportunity to deny worker status. The implication must be, said Mr Benson, that it was not then intended to dispute it and thus the concession was impliedly extended to the second claim, although Mr Benson acknowledged that it had never been expressly repeated in the second claim. I do not find that an unreasonable assumption on behalf of the claimant. A party can normally expect a challenged point to be expressly pleaded.

127.5. Subsequently, several months later, in October 2010 (some two years after the concession was first made), the respondents' current solicitors were appointed to take over conduct of the case from the firm that had entered the previous Responses. Soon after, the newly appointed solicitors gave notice of the application to withdraw the concession. Thereafter, the first effective date for consideration of the application by the tribunal was this pre-hearing review.

128. Mr Benson adopted the arguments of his instructing solicitors in their letters dated 9 and 17 December 2010 to the employment tribunal, (pages 84 and 94, bundle of inter-partes correspondence) and concentrated on the following points:

128.1. There was nothing preventing my retaining the concession in the first claim even if I were to decide in the second claim that it was wrongly made.

128.2. There was nothing in the respondents' submission that the agreement of the parties on worker status was an attempt to give the tribunal jurisdiction it did not otherwise have.

128.3. The claimant would suffer prejudice by withdrawal of the concession at so late a date. It was not unreasonable to think that a pre-hearing review would have decided that point much earlier, certainly before the second claim was issued. Further, the claimant has been suffering from chronic fatigue syndrome and the stress of the litigation process has contributed to his worries.

129. Mr Benson referred me to guidance given in Gale v Superdrug Stores plc 1996 3 All E.R 468 ("*Gale*") (a case decided before the introduction of the CPR and, in Mr Benson's opinion, consequently to be viewed with caution), *Braybrook* and, in an employment law context, *Nowicka-Price*. Extracting the relevant principles, Mr Benson submitted:

129.1. The reasons and justification for the respondents' application were not compelling. Concessions are often made for reasons of 'strategic manoeuvring'. If that turns out to be a bad idea, that is not sufficient reason to allow the party concerned to resile from it;

129.2. The balance of prejudice was in favour of not allowing the withdrawal and the claimant was not the author of the prejudice he will suffer;

129.3. The prospects of success on the issue of the claimant's status as a 'worker' were in the claimant's favour.

Whether there was a contract between the parties

130. Turning to the substantive questions I am required to resolve, Mr Benson acknowledged that the structure and procedures of the Church were arcane and archaic, such that if taken too literally they did not fit comfortably into what would be familiar in the role of an employer. He acknowledged too that *Coker* and Professor McClean's Review did not support his case. What he asked me to do was strip away the veneer and mystique in the light of the modern approach in *Percy* and subsequent cases. I would then find underneath the essential ingredients of a) contract and b) service. It was the claimant's position that where an office is performed for reward, there is also a contract, provided always that some essential ingredient of a contract is not missing or prevents the finding of a contract.

131. Mr Benson referred to the following as the "crucial underlay" to the claimant's case:

131.1. Describing the role of the claimant as spiritual could no longer be regarded as being inconsistent with a legal contract between him and the Church (represented by the first and second respondents);

131.2. The holding of the office of incumbent is not inconsistent with the existence of a contract of employment;

131.3. The contract I should find could only properly be seen as one of service;

131.4. This position was admittedly inconsistent with past case law and the established views of many within the Church but all that must be seen to have been altered in *Percy*.

132. The process of advertisement, application, interview and offer was familiar. It was immaterial that the offer letter did not identify specific terms. That was because everyone knew, from custom and practice, what they were. There was, in the form of the Bishop's Papers, the equivalent of a staff handbook (now on a website), setting out terms and conditions that were not statutory adjuncts to the office of rector.

133. The sole rationale for excluding a contractual relationship, a lack of intention to create legal relations, had been comprehensively rejected in *Percy*. In that case too, Lord Nicholls had addressed the problem of identifying the parties to the contract. He had noted that where the complex affairs of the Church are conducted through a multiplicity of boards and Committees, such internal fragmentation ought not to stand in the way of otherwise well-founded claims. The DBF was the paymaster and it did not matter that the supervisory role of employer was conducted through the Bishop and/or Archdeacon. Either or both respondents could be regarded as the contracting party.

The Nature of the Contract

134. As to the nature of the contract, it was my duty to concentrate on substance rather than form and carry out an objective analysis of the facts, having regard to reality in "this day and age". In *Moore*, on very similar facts, the Employment Appeal Tribunal had recently found a Methodist minister to be an employee.

135. The 'control test' of employment had lost ground over recent years and could not be determinative. Nevertheless, the idea that the claimant could do what he wanted and when he wanted or simply disappear into his study and do nothing, without any control mechanism from the Bishop or diocese

was unreal and did not stand up to scrutiny. If terms such as 'must' or 'required' were not in common use, the entreaties to do something were in reality mandatory to someone like the claimant within the ethos promoted by the Church. Mr Sharpe had been required to enter into an oath of obedience to the Bishop, an oath he took seriously. A disciplinary machinery exists to sanction a priest accused of misconduct. Even short of that, the sanction that he would incur a 'black mark' or suffer a "good roasting" from the Bishop showed a sufficient degree of control.

136. It was an astonishing proposition to Mr Benson that a cleric who accepted an appointment to a benefice in the belief he would receive a certain sum of money each month had no legal redress if, for no good reason, that money was not paid to him. The implication of a contract was a business necessity to give the receiver the enforceable right that is today's expectation. The treatment of the sum "so as to enable an incumbent to fulfil his spiritual duties was not borne out by close analysis. For example, payment is at a flat rate without means testing and payment reduces and then ceases when work ceases because of illness. Mr Benson relied upon the other terms and conditions relating to the parsonage, pension entitlement etc.

137. Turning to the alternative argument that Mr Sharpe was a worker, Mr Benson addressed separately the definition in S.230 of the Act and the extension contained in S.43K. He submitted that the claimant qualified under either provision. So far as S.230 was concerned:

137.1. The claimant did undertake to personally do or perform work or services.

137.2. His contract to do so was with the first and/or second respondent.

137.3. The status of the first and second respondents was not that of a client or customer of any profession or business carried on by the claimant.

137.4. On the question of personal service, Canon C24(8) provided only for delegation "at any time he shall be unable to discharge his duties." That was not the unfettered right that is required to defeat the notion of personal service. Nor was the occasional power of delegation necessarily inconsistent with a contract to provide personal services (*Parkes*).

138. The following supplemental submissions were made in relation to S.43K:

138.1. In contra-distinction to subsection (1)(b), subsection (1)(a) does not refer to any contractual relationship between the worker and employer.

138.2. The first and second respondents, as well as the parishioners and PCCs were 'persons' for whom the claimant worked.

138.3. The claimant was introduced to do the work by the respondents, specifically the Bishop through the process of ordination, institution and induction.

138.4. The terms on which the claimant was engaged to do the work were not determined by him but by the respondents and/or the parishioners and/or the PCC.

138.5. Alternatively, for the purposes of S.43K(1)(b) Mr Sharpe's work was contracted to be done within the benefice, consisting of places not under the control or management of the respondents.

B. The Respondents

139. In relation to his clients' application to withdraw the concession made as to the status of the claimant as a 'worker,' Mr Tattersall explained that because they considered they had a good case to resist the first claim on the facts and its merits, they did not wish to enter into the expense of a protracted argument that might lead also to an appeal and give rise to a precedent with implications for the wider Church. For that reason alone, the concession had been made, entirely restricted to the first claim.

140. When the second claim was issued, the question of the claimant's employment status could no longer be avoided. The tribunal would realise that it is a question that has profound consequences for the whole Church and there would be serious prejudice to the respondents if they are not allowed to withdrew a concession that involves the recognition of a contract made in 'radically different' circumstances to those which now obtain.

141. In *Gale,* the idea of 'prejudice' is concerned with whether the claimant would find it more difficult to pursue his claim than if the concession had been made at all but in this case, he would not. The claimant would merely be returned to the position in which he was before the concession.

142. The claimant could not argue that he had insufficient notice. The application had been made a year ago and evidence in support of the claimant's contentions was still required in the second claim. Public interest strongly favoured allowing all the issues to be decided at the one time.

143. The relevant legal principles were those identified in *Nowicka* from the judgment in *Braybrook* and the CPR but also referring to *Cobbold,* which emphasised the overriding objective and the need to ensure cases are dealt with expeditiously but fairly. In general, amendments should be allowed so that the real dispute can be adjudicated upon. The respondents could not be said to be the authors of the prejudice that would result nor did it arise from any 'tactical manoeuvring' going wrong. The concession was a sensible one when made but the second set of proceedings substantially altered the respondents' legitimate standpoint.

144. It was obvious from the existing state of the authorities that the respondents had good prospects of success. *Coker* has not been expressly overruled.

145. Further, Mr Tattersall argued that the concession relates to the tribunal's jurisdiction, which should be considered by the tribunal if it considers the issue is a live one.

Whether there was a contract between the parties

146. I was asked to bear in mind the special ecclesiastical context of incumbent parochial clergy in the Church, a position governed by ecclesiastical law in a way that is quite unique and has no parallels in other churches. Decisions concerning other churches should not be simply read across to the Church of England. Historically, clergy have always known they were not employees.

147. The finding that there was a contractual employment relationship would have strange consequences. The claimant would be subject to two conflicting regimes, potentially giving rise to double recovery if made redundant, once under the Employment Rights Act 1996 and once under canon law. That could not have been Parliament's intention when passing both enactments.

148. Mr Tattersall reviewed the evidence concerning a rector's relationship with the various bodies and personnel who make up the Church in a manner I do not find it necessary to record here.

149. The respondents took issue on the claimant's submission that it was not necessary to show a contract for the purpose of the extended definition of S.43K. It was necessary to show a contract as the starting point for establishing the status of either a) employment or b) worker. Contracts are something which are freely negotiated. Here, there was a comprehensive statutory scheme which prescribed the terms of the relationship between the parties and it had not been open to the parties to negotiate the terms of their relationship. Consequently, there was no private law contract.

150. It was unnecessary, and therefore wrong as a matter of law, to attempt to imply a contract. In *Tilson*, the Court of Appeal had underlined that it was correct to imply a contract only where there was a necessity to give business reality to what was happening and it was fatal to such a suggestion that the parties would or might have acted in precisely the same way as they did even in the absence of a contract.

151. Mr Tattersall referred to a number of authorities which I do not intend to set out here *in extenso* but to which I had access in the bundle of authorities. Suffice it say that a number of the authorities referred to foster carers who are paid an allowance and expenses subject to P.A.Y.E deduction of tax and national insurance but the courts have regularly resisted the suggestion that any kind of contract existed between them and the Local Authority. In particular, in W v Essex County Council [1998] 3 WLR 534 the Court of Appeal observed that a contract is an agreement freely entered into on terms freely negotiated. If there is a statutory obligation to enter into a form of agreement, the terms of which are laid down, there is no contract. In following that decision in Bullock v Norfolk County Council UKEAT/0230/10, Slade J stated that there is no reason why all workers should be treated as if they work pursuant to a contract.

152. There was a section of the decision in *Coker* that was not related to any intention to create legal relations but was related to the special facts of the structure of the Church. It had not been called into question by *Percy*. There were two significant differences in Percy, in that the terms of appointment were a) susceptible to negotiation and b) were not prescribed by any ecclesiastical enactments of the Church of Scotland. Lord Nicholls observed that "the post to which [Ms Percy] had been appointed had no content other than that given by the terms and conditions agreed ad hoc between the parties. Her rights and duties were defined by her contract, not by the "office" to which she was appointed."

153. Further in *Percy*, the House of Lords had merely been critical of the suggestion in *Coker* that there was a presumption of no intention to create legal relations. It did not preclude such a finding being made without such a presumption. This was expressly recognised by the Court of Appeal in *Stewart*. In *Stewart*, Pill J. also recognised that the spiritual nature of the work and spiritual discipline under which it is performed must be relevant considerations in deciding whether there exists a contractual relationship.

154. The decisions in *Percy*, *Stewart* and *Moore* had all been decided on specific facts that recognised contractual terms tailored to the individual priest. Mr Sharpe was appointed to an office that existed independently of the current holder on terms and conditions that were not set by any parties to an

agreement or contract. On an objective basis, the parties did not intend to enter into contractual relations because there was nothing to contract about.

155. Despite the comments of Lord Nicholls in *Percy*, the claimant faced a very real difficulty in establishing the identity of who it was he alleged he had contracted with. The DBF had no part in the appointment process at all and exercised none of the duties normally associated with being an employer. The Bishop had only a right of veto in the appointment process, something that was inconsistent with his being a principal. Nor did he have any meaningful right of control of 'employer' after the appointment.

The Nature of any Contract

156. S.43K required a contractual relationship. Whilst true that subsection (1)(a) does not expressly mention "contract," the reference to "the terms on which he is or was engaged to do the work" presupposed the existence of a contract. This was the view of commentators such as the authors of "Whistleblowing: Law and Practice" and there was some judicial authority in Astbury v Gist Ltd UKEAT/0619/06, in which the Employment Appeal Tribunal noted that the purpose of the section was the protection of some *contract* workers. Volunteers might be "introduced" by a third party but it would be very odd if Parliament had intended their protection.

157. If a contract was not required, neither of the respondents, nor any other person, "in practice substantially determined" the terms on which the work was done. They were determined by statute. The DBF was not involved at all. The Bishop did not 'introduce' the claimant.

158. As for subsection (1)(b) it was an extraordinary argument by the claimant that the Bishop had no control over the benefice when his whole argument in favour of employment status was to the contrary and that the Bishop did indeed have power to determine what happened there.

159. For the status of employment, *Ready Mix* set "irreducible minimum" requirements of a) mutuality of obligations; b) sufficient control and c) personal performance. As to a), there had been no negotiations about obligations and the obligations of the parties' were purely statutory. As to control, incumbent clergy had such a degree of autonomy in the performance of their duties that it caused dismay to many a "weeping Bishop." The DBF had no control at all, statutory or otherwise. The Bishop had persuasive authority and no more. Even in the case of other trades or occupations, Canon C28 only required the Bishop's authority if they would affect the performance of his duties.

160. The claimant had made a clear admission in cross-examination that incumbents are at liberty to delegate their duties if unwilling (as opposed merely to unable) to perform them. Some duties can be and are delegated even to members of the laity.

Conclusions

The Concession

161. In truth, this preliminary point did not trouble me for long. I believe that proper consideration of the factors in *Nowicka-Price* could lead me to only one conclusion, that the respondents' application should be granted. I am satisfied that the concession was originally made in good faith and the application to withdraw it in the light of the claimant's second claim was also made in good faith.

The second claim did indeed present the respondents with a significantly different situation. Neither the concession or the application to withdraw it involved any "strategic manoeuvring."

162. In considering the question of prejudice, it can always be said that a litigant suffers some prejudice when an admission is made but later withdrawn. However, if that alone is to be sufficient prejudice, then I do not see how an application to withdraw could ever be granted. I understand the question of prejudice to involve something more, something that would place the claimant in a worse position in relation to the prosecution of his claim than if the concession had never been made at all. No such prejudice to the claimant was brought to my attention. The only prejudice the claimant was said to have suffered was the delays that had occurred and the possible effect on the parties' relationship if the issue had been determined before the second claim. On the other hand, I accept the prejudice to the respondent of being unable to litigate the question of the claimant's status in one claim when the very same question is at large in another. If it is said that the respondents are the authors of their own prejudice by making the admission, that again can always be said against a party seeking to withdraw a concession. The prejudice was not caused by the concession itself. It was caused by the changed circumstances brought about by the second claim, something which was not of the respondents' making.

163. If I am to take into account the prospects of success of the respondents' argument on the point conceded, I am in the unusual but favourable position of determining the argument at the same time as the application to withdraw the concession, something which I have had to do in relation to the second claim in any event. The degree of the respondents' prospects of success are apparent from the fact that I have determined the argument in favour of the respondents.

164. Another factor is the public interest. I accept that the need to determine the issue of the claimant's employment status in the second claim means that 'satellite' litigation cannot be avoided but there is another point. I consider that it would be a legal nonsense, tending to bring the administration of justice into disrepute if I were to say to Mr Sharpe that he is free to pursue the first claim on the basis of a status I have declared he did not have. I do not necessarily agree with the suggestion that the concession was one which conferred jurisdiction, something that can only be decided by the tribunal itself. Parties are free to reach agreement about the state of their affairs, which a tribunal will accept and proceed upon accordingly. Only where there is an obvious lack of jurisdiction on plain facts, for example if the parties sought, by agreement or concession, to waive a time point would there be cause for the tribunal to intervene. Nevertheless, I do regard it as a point relevant to the exercise of my discretion that I have decided the claimant does not have the status to pursue either claim.

165. From the starting point of *Cobbold* that amendments in general should be allowed so that the real dispute between the parties can be adjudicated upon, and in the light of the factors above and the overriding objective to ensure disputes are dealt with fairly, I can see no reason to depart from what would be the natural outcome of applying that principle. Mr Benson's main argument was the delays that had occurred. Mr Sharpe had been in the position for some two years of thinking that his status as a 'worker' was not in dispute. When the application to withdraw the concession was made, it was ten months after the appointment of new solicitors. The main prejudices to the claimant were said to be a) the failure to determine the issue had resulted in lost opportunities that might have affected the parties' relationship before Mr Sharpe felt constrained to resign and b) the claimant suffered from

chronic fatigue syndrome. The drawn out process of litigation and the shock of the application to withdraw the concession had only served to compound his distress. Those delays are indeed unfortunate but delay of itself, if no prejudice is caused, has never alone been enough to dictate the way in which discretion should be exercised. I am not at all convinced by the suggestion that things would have been materially different if the concession had not been made. The first case had been set down for a final hearing when the second claim was issued. The parties agreed that it was sensible to vacate the hearing date and combine the two claims, proceeding first to a pre-hearing review to determine whether or not Mr Sharpe had been an employee. Delay in the process was inevitable. I do not consider that the claimant's shock on learning of the application to withdraw the concession outweighs the overall question of fairness of approach to this litigation. Litigation is often a stressful process. The application was not made shortly before the hearing so that the claimant had no opportunity of preparing for it. He has had twelve months in which to prepare for this hearing.

166. A minor point not mentioned by the parties is that I have also taken into account that the concession did not cover the question of which statutory provision was in question or the identity of any contracting party. I would still have had to consider those questions in combination with the employment status alleged to underpin the second claim.

Was there a Contract between the Parties?

167. There can be no doubt that the position of rector of a benefice in the Church is an office. It manifestly satisfies the definition of Lord Atkin in *McMillan* and that was recognised by Lord Nicholls in *Percy*. In making that observation, however, I am aware that holding an office has never prevented the office holder from also entering into a contract about the terms of his service in the office and, in the light of *Percy* and *Moore*, the spiritual nature of the office is but a factor to be taken into account rather than determinative of whether a contract has indeed been entered into. I agree with Mr Benson's observation that the House of Lords saw the exclusion of ministers of religion from the protection of employment legislation as somewhat anachronistic and recommended a modern approach to the situation.

168. There was certainly no written contract between Mr Sharpe and either of the respondents. Mr Benson relied partly upon the offer from Mrs Miles of the claimant's appointment to the Teme Valley South group of parishes and the claimant's acceptance of that offer. That, he said, was a sufficient offer and acceptance on terms that were incorporated by custom and practice and/or were known to the parties and expressly incorporated. I cannot accept that argument. For one thing, the appointment did not take effect as a matter of law until due ceremony was observed, so any contract did not depend upon the will of the parties alone. More importantly, Mrs Miles may have been party to an agreement that Mr Sharpe be appointed to the office of rector at Teme Valley South but it does not follow that she entered into a contract governing the terms and conditions on which Mr Sharpe was to undertake his duties there. No one suggested she had that intention and, unsurprisingly, she has not been joined to these proceedings. She is not said to be a contracting party. So if her actions were to have constituted a legally binding contract, on whose behalf did she issue the offer? Not the DBF because it had no part to play in the appointment process. Any involvement of the DBF with Mr Sharpe began only after and was consequent upon his selection and appointment to his office in the benefice. Such involvement did not depend upon any will of its own. Nor could the offer of

appointment have been made as agent on behalf of the Bishop. Mrs Miles had the right of presentation of the rector and the right of veto. I do not see that she could have been in the position of the Bishop's agent if she had the right to refuse his choice. The PCC representatives also had the right of veto. The Bishop was in a minority on the interview panel. In truth, Mrs Miles was acting as her own principal in exercise of the right given to her by ecclesiastical law to appoint to an office. She was concerned with no more than the appointment and an intention to create legal relations about terms and conditions on which the office should be performed really cannot be attributed to her.

169. Is a contract to be implied from the parties' dealings? Mr Benson urged me, more than once, to take account of the 'custom and practice' that surrounded the office of rector and the well-known terms and conditions of service in that office. Also, he protested vigorously against the suggestion that an incumbent has no right of action to recover his stipend if not paid for no good reason. That could not have been the intention of the parties, he said, and business necessity required the implication of a contractual right to payment. I accept, indeed it was common ground that the terms and conditions were well-known but that only caused the respondents to say they are inherent in and arise out of the office itself and are not the subject of any negotiation or contract between any parties. Mr Sharpe certainly confirmed in cross-examination the lack of negotiation, discussion or agreement about any specific terms that would apply to him. He agreed that was not necessary. So which is the right interpretation on those facts?

170. I felt during the course of argument that the effect of *Percy* and subsequent cases had been misunderstood and too much read into them by the claimant and Mr Benson. The misunderstanding, I believe, is implicit in Mr Benson's argument that wherever there is a remunerated office, there also is a contract of employment. The effect of *Percy*, as I understand it, is no more than that I must disregard the suggestion in *Coker* that unless the contrary be clearly shown, a minister of religion should not be taken to have intended to create legal relations with his church because such an intention is not consistent with the spiritual nature of his duties. In my judgment, the effect of *Percy* is simply the removal of one barrier that hitherto existed in the path of a minister seeking to establish that he had entered into a contractual relationship. The error which I believe permeated the claimant's case was the mistaken perception that *Percy* had a positive element to it, one that effectively meant a contractual relationship was always to be implied between the minister and his church if the terms and conditions of his service were sufficiently certain and there was no other impediment to there being a contract. That may be the eventual outcome in many cases now that the impediment has been removed but I believe it to be a step too far to say that the House of Lords replaced one presumption with another or stated that the terms and conditions of service in a statutory office were to be automatically incorporated into a contract of some kind. Their Lordships' judgment was that ministers of religion are in no special position, better or worse, because of the spiritual nature of their duties. They must still establish that there is a consensual, contractual element in the relationship with his church represented, in Mr Sharpe's case, by the respondents he has joined to his claim. The burden of proof is upon he who asserts but I do take the point, mentioned by Mummery L.J in *Coker* in relation to commercial contracts at least, that parties who negotiate terms are usually to be taken to expect that they thereby create a legally enforceable relationship between themselves.

171. To take what I believe is a fallacy to its extremes, the claimant's argument would mean that all office holders who have known and certain terms and conditions of service would be employees. I do not believe the House of Lords had that in mind or went that far when criticising the rationale of the decision in *Coker*, although it might be possible to infer that from some of the *dicta* of Lady Hale. In particular, the House refrained from saying that *Coker* was wrong on its facts. There are passages in Lord Nicholls speech which recognise the differences between the position of the assistant minister claimant and a minister appointed to a charge. Nor did their Lordships suggest that Mummery L.J's judgment was wrong when he observed that (a) that the incumbent's relationship with the Church was explained by the duties and obligations of his office rather than a contract and (b) that it had never been suggested that an incumbent was in a contractual relationship with the Church. Their Lordships' sole criticism was the Court of Appeal's reliance upon a presumption against an intention to create legal relations. Certainly, in later decisions concerning office holders other than ministers of religion, the Courts have not acted in the manner of assuming a contract where there is a remunerated office. Obvious examples are police officers, judges, company directors, foster carers and the other examples referred to by Mr Tattersall in his skeleton argument and closing submissions. Receipt of a remuneration package is not determinative. Agreement about something more than the discharge of the office is required. The reasons for the lack of a contract may vary. Foster carers are not in a position to negotiate any terms other than those prescribed by law, so there is no freely negotiated bargain. In *O'Brien*, the Court of Appeal, albeit recognising that many attributes of service in an office are concomitant with those in a contractual situation, still considered that judges and police officers served by reason of their office only, not by reason of any contract, whether it be for service or for services. The reason, applicable in my judgment to Mr Sharpe also, was expressed by Kay L.J in that judges do not undertake to serve or perform personally work or services to another party to a contract. I explain below why I have not found in Mr Sharpe's case any of the necessary elements of (a) service, (b) undertaking to perform work personally or (c) identification of contracting parties.

172. In *Percy*, *Stewart* and *Moore*, the courts plainly recognised that individual cases depended upon their own facts. They each focused on the special facts of the case before them to state why it was that there was a contract in addition to the minister's office. For example:

172.1. In *Percy*, the terms and conditions of the proposed appointment, including the exact amount of the stipend and the limited term of 5 years, were made known by an information sheet published in advance of interview. Specific reference was made to the manse and the payment of travelling expenses. The duties of an assistant under the direction of a senior minister were specified, including service as chaplain to a nearby prison. After her successful interview, the secretary to the national board (which was also to be responsible for payment of the stipend) sent with the offer of appointment, an amplified note of the precise terms and conditions applicable to the claimant's appointment as assistant minister. Lord Nicholls expressly noted:

> "The post to which [Ms Percy] was appointed had no content other than that given by the terms and conditions agreed ad hoc between the parties. Her rights and duties were defined by her contract, not by the 'office' to which she was appointed.

The implication is that a very different decision may well have been reached if Ms Percy's rights and duties were defined by the office, such as a minister appointed to a charge or, in Mr Sharpe's case, to a benefice in the Church where the 'content' of the appointment was defined by the office.

172.2. In *Stewart*, the church was a registered charity and company limited by guarantee, an important distinction in my view in identifying a contracting party. An oral agreement between the parties had apparently defined the claimant's administrative tasks and spiritual duties. It is not precisely clear from the law report whether and to what extent those duties were specific to the claimant or simply those expected of all the church's ministers. I will assume the latter as the comparison is then more favourable to Mr Sharpe's case. The claimant's appointment was offered by the Church and he was directly accountable to the church in disciplinary matters. It is clear from the report that the relationship between the church and the claimant was governed by an extensive document that not only set out the church's rules applicable to its adherents and pastors but also set out the terms and conditions appertaining to the minister's post. Similar to *Percy*, there could have been no relationship between the parties other than contained in a contract implied from those documents and the parties' discussions and actions. The only question was whether the parties intended them to create legal relations. The Court of Appeal ruled that the chairman of the employment tribunal had been entitled to find such an intention but it does not follow that they would necessarily have reversed his decision had he come to the opposite conclusion.

172.3. In *Moore*, after ordination, the claimant was appointed for a 5-year term to a group of congregations. Her claim was against a single person, the President of the Methodist conference who is a person designated by statute as the person to defend all claims against the Methodist Church. The Church revises and publishes a document known as its Constitutional Practice and Discipline ("CPD"). The parties understood that the claimant's service would be governed by that document, which contains a section headed "Terms of Service." It includes terms as to stipend and disciplinary matters. Underhill J. noted that the issue of the claimant's being an office holder did not arise. Thus again, there could have been no relationship between the parties recognised by law other than through a contract between them. The only question once more was whether the parties intended their relationship, limited to a specific 5-year term and principally defined in the CPD, as one that created legal relations between them. On this occasion, the EAT held the employment judge had erred in law in finding the tribunal bound by *Parfitt* on the question of the parties' intention and concluded that if the employment tribunal had properly directed itself, it would have found the existence of a contract.

173. Thus there are some, in my judgment important differences in the facts of the instant case from those of the cases above. I identify the following in particular:

173.1. In each of those cases, the claimants' relationships with their Churches depended upon negotiated terms whereas, save for the remuneration package, 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. In hindsight, I realise that no

one asked Mr Sharpe whether he knew the exact amount of the stipend in Worcester or simply that he knew the Central Stipend Authority's minimum recommendation but, in my opinion, it makes little difference. Either way, it was not a freely negotiated sum that played any part in the interview and appointment process. It was something Mr Sharpe accepted went with his office. In my judgment, there are very real difficulties in Mr Benson's attempt to show that the Bishops' Papers were incorporated into a contract. They were not within the contemplation of the parties at the time and they could not pass the "officious bystander" test that they were obviously part of any agreement. They mostly concerned spiritual matters that could not, objectively speaking, be taken to be sufficiently certain to be contractually binding, nor is it likely that they were intended to be. The terms of service section was but one of seven sections and substantial parts of it were guidelines only, lacking in contractual precision. I am not sure it is correct to describe a series of *ad hoc* policy documents, the applicability of some of which at least was in doubt, as a "Handbook." The further step of finding that it was one that had been incorporated into a contract of employment in the way terms and conditions were expressly incorporated in the three cases referred to above is one I am not prepared to take on the evidence before me in Mr Sharpe's case. In my judgment, the Bishop's Papers cannot be taken to be contractual documents. On the other hand, all principal terms concerning what Mr Sharpe brought to the relationship concerning his duties, responsibilities and relationships with others in the Church, together with his discipline and machinery for termination of his office were defined by law. Leaving aside for the moment the question of the two named respondents individually, in a broad sense Mr Sharpe did have a legal relationship with the Church but it was of a kind imposed by the law itself, by reason of and consequent upon his appointment to office and not by reference to any intentions on his part or on the part of anyone on behalf of the Church. They had no ability to detract from the terms on which they were bound. Although they had a freedom to contract over and above those terms, Mr Sharpe confirmed to me himself that that did not happen expressly.

173.2. In each of the cases above, the terms that bound the parties were the creature of the church concerned rather than the law. In *Percy* and *Moore*, there were specific terms, such as the 5-year appointment. The inference of the manner in which the terms and conditions were brought to the attention of the would-be appointees, particularly the offer accompanied by full details of the terms of appointment in *Percy*, is that those terms and conditions, which would have no other existence than by incorporation into the parties' relationship, were indeed intended by them to govern their relationship. Lord Nicholls' observation that Ms *Percy's* post had no content other than that given to it by the terms and conditions agreed ad hoc between the parties was applicable to all three cases but it is not applicable to Mr Sharpe's case.

173.3. In each of the other cases, there was a readily identifiable person or body with whom the contract was made. I will return below to the claimant's difficulty in that respect.

174. Mr Tattersall's primary argument was that the first paragraph quoted above from *Coker* in relation to its being unnecessary for an incumbent to enter into a contract remains good law. I exercise some caution in relation to that submission. Although both *Percy* and *Stewart* confirm that the spiritual

nature of duties may remain a factor, one gets the impression from the last sentence of his paragraph that, because of his view that the lack of intention to enter into legal relations arises out of the spiritual nature of the duties, Mummery L.J may have placed more reliance on that nature than their Lordships in *Percy* would countenance. Nevertheless, I believe Mr Tattersall is correct that what remains unscathed is the observation that Dr Coker's office, and consequently the claimant's, and their relationships with the Church were defined by law and there was consequently no need or room for the implication of a contract between them. Mr Tattersall referred to *Tilson* and suggested that it was fatal to the claimant's case that all concerned would have acted exactly as they did in the absence of a contract. That it would have been so, I have no doubt. I prefer those arguments to the one that suggests automatic incorporation of the terms of office, however defined into a consensual contractual relationship, an argument which I have rejected for the reasons given above.

175. Does the lack of a statutory remuneration package defined by law alter that and business necessity require the implication of a contract? In my judgment, it does not. The payment of money for the discharge of an office does not automatically imply a contract between the parties. That was recognised by the judgment of the Court of Appeal in *O'Brien*, currently binding on me and I do not see that I can or should ignore it because the decision has been referred by the Supreme Court to the Court of Justice of the European Union on a point of European law that was not argued before me. Judges are remunerated but do not work under a contract; police officers are remunerated but specific statutory enactments have had to be passed to provide them with the protection of employment legislation where that was Parliament's intention. The remuneration package was an important part of the relationship between the claimant and the Church but it was by no means the whole of the relationship that could alone make up a contract, unless it be one of the 'ancillary contracts' contemplated by Dillon L.J in *Parfitt*.

176. The conclusion I draw from my analysis as set out above is that I do not regard this case as being one where the intention to create legal relations or the lack of such intention is paramount. It is a case where there was no agreement freely negotiated between two parties. I am unable to identify the content of any agreement (other than the bare fact of Mr Sharpe's appointment to office) that was reached by two (or more) identifiable parties whose minds could be said to be *ad idem* on matters that require me to suppose they had an intention to create legal relations. Nevertheless, dealing with the point, the respondents patently had no such intention and if asked would have answered in the negative. Mr Sharpe's mind was not active on the point but he was aware, however vaguely, of the debate within the Church and the traditional view that he would not be an employee. In those circumstances, I find he was content to rely upon the traditional arrangements and could have had no expectation of, nor therefore an intention to create, a legal relationship that was specific to him.

177. This leads me to another matter that I consider to be an insurmountable barrier to the claimant's being able to establish the existence of a contract. Any doubts that I may be wrong on the first point and *Percy* and subsequent cases do indeed permit the wholesale incorporation of the terms and conditions of Mr Sharpe's service in office into a contract that I should recognise are dispelled when I consider the identification of any party by Mr Sharpe with whom he can be said to have contracted. On the arguments put before me, I can see no basis for a finding of a legal relationship between Mr Sharpe and the DBF at all. The DBF was not party to his appointment, it received no service or

services from him, he carried out none on its behalf and it has no part to play in any possible supervision of the claimant's duties or disciplinary action that may be considered. In short, there is no connection between them at all, save that the DBF acts as a conduit for the money by which his stipend is paid. The DBF also has a statutory right to unilaterally reduce the amount of the stipend, which is a contrary indication to the parties being able to govern their own affairs by contract. I did agree at the hearing that I had some sympathy with Mr Benson's remarks that the apparent lack of a legal remedy if the stipend was not paid was not something that is attractive to the modern employment lawyer and I have not changed my opinion on that. The DBF is certainly expected to pay the stipend as long as the office holder holds his office (save for the cessation in cases of long-term absence through sickness). I have considered whether it is possible that merely holding the office could be sufficient consideration to imply a contractual obligation on the DBF's part that it should pay. That may be one of the possible 'ancillary contracts' that Dillon J and others have referred to in the course of the decided cases. But that is speculation on my part. It was not raised by either party in argument before me and I will consequently not express an opinion on it, not least because it could not assist the claimant in any event. Such an ancillary contract would not involve the provision of any service or services to the DBF and could not satisfy the definitions required to establish a contract of employment or 'worker' status.

178. I do not find there could be a contractual relationship between Mr Sharpe and the Bishop. The power to pay a stipend is a statutory one and it lies with the DBF. The Bishop has undertaken no obligation to pay it and does not have control of the necessary funds to make good any such obligation. Whilst he may have some limited powers to instruct or supervise Mr Sharpe, of which I say more below, they are not extensive and again, they are defined by law. They do not arise from any consensual arrangement. They are mostly exercisable by the Bishop in the course of his own statutory duties to ensure the proper use of churches and the holding of services. The Bishop cannot instigate disciplinary procedures, which are statutory and concerned primarily with the minister's conduct as a minister rather than specific to his appointment at Teme Valley South.

179. I am mindful of Lord Nicholls' dicta in *Percy* when he addressed the problem of identifying the contracting parties in a national church with a multiplicity of bodies and committees. He was of the opinion that such an obstacle should not stand in the way of otherwise well-founded claims. But I do not take him to say there that it is permissible to cast around for any convenient peg on which to hang the suggested contract. The problem was not nearly as acute in *Percy* as it is in the present case. The national board of the church made the offer of appointment to Ms Percy and set out the terms and conditions that would apply. The board assumed the position of a contracting party and Lord Nicholl's remarks seemed to be primarily concerned with the finding that the delegation of disciplinary matters to another body within the church was not incompatible with the national board's being the contracting party. There is no person or body in so close a relationship with Mr Sharpe of whom it can be said in Lord Hope's terms that they were the body in whose name the matter at issue has been conducted," or who has in any way assumed contractual responsibility for the range of respective duties and responsibilities that were inherent in Mr Sharpe's position as rector.

180. Mr Benson submitted that either or both of the respondents could be held to have been the claimant's employer. With respect to him, for it was obvious he understood this to be a difficult part

of his case, that submission did smack of casting around for a convenient peg. I have dealt with the respondents individually. I confess to not being entirely sure what Mr Benson meant by the word 'both.' I did not understand him to mean that Mr Sharpe had two separate contracts of employment, one with each of the respondents. I must then assume that he envisaged some kind of joint responsibility, where the part relationship each respondent had with the claimant added up to the assumption of the whole of an employment relationship on behalf of the Church or diocese. If so, the argument was not developed before me and I was not referred to, nor do I know of any precedent for an argument of that kind. The liability would presumably be joint and several and I simply do not see how the Bishop or the DBF could or ought to be fixed with liability for matters that they otherwise had no part in or assumed responsibility for, even within the context of their being constituent parts of the same diocese.

181. Taking account of all I have heard, I do not see that within the complex statutory structure of the Church it is possible to imply that any relationship between a freehold rector in the Church such as Mr Sharpe and any identifiable person or body which could be said to be consensual and contractual. Certainly, Mr Sharpe has failed to demonstrate to my satisfaction that such a relationship existed with either of the respondents.

182. The only remaining issue I am called upon to decide is the argument that the claimant is a 'worker' within the extended definition of that phrase in S.43K(1)(a) Employment Rights Act 1996 because it does not require a contract to exist between the (as defined) worker and employer. I therefore propose to deal with that issue before saying a few words about what I would have decided if I had found there to have been a contract between the claimant and either or both of the respondents. I propose to do that for the sake of completeness and out of deference to the parties' arguments, knowing there is a likelihood this case will go to a higher authority.

183. As envisaged above, to succeed in his argument on S.43K(1)(a), the claimant would have to persuade me that the definition does not require him to show that he had a contract. However, before I consider that as yet undecided point of law, there are two other points on the facts of the case where I find the claimant cannot sustain an argument under the subsection. First, when I look at paragraph (i) of the subsection, I am not at all convinced that the claimant was "introduced or supplied" to do his work by a third person. Beginning at paragraph 19 on page 14 of his skeleton argument, Mr Benson argued that the persons for whom Mr Sharpe worked were the first and second respondent, the PCC and the parishioners and that he was introduced do that work by the Bishop through the process of ordination, institution and induction. Notably, he did not suggest the third party was Mrs Miles when she presented the claimant to his office of rector. In view of my previous comments about her involvement, I think that is correct. But it is clear from the words of the subsection that the introduction has to be made by a third party who is someone other than the person the worker works for. Yet, according to the claimant's argument, he works for the Bishop. Accordingly, the Bishop cannot be the third party unless I understand the argument to be that when the claimant works for the DBF (which I have found he never does) or the PCC or the parishioners, then the introducing third party is the Bishop. I do not think it right that the claimant's duties can be fragmented and dealt with in that piecemeal fashion. I believe one has to look at his work as rector in the round, which is the cure of souls in Teme Valley South. The reality must surely be that by

answering Mrs Miles' advertisement and successfully applying for the appointment to the vacant benefice, Mr Sharpe introduced himself to whoever it can be said he worked for.

184. My second factual objection, even if I am wrong in deciding that the terms and conditions of the claimant's office set by law have not been incorporated into a contract of employment, I still cannot see that it can be said that the terms and conditions were 'substantially determined' by either of the respondents or some hypothetical third party introducer/supplier who I am still struggling to identify even in theory. It is a fact, even if the terms and conditions were incorporated into a contract, that neither respondent, nor any mythical introducer third party played any part in determining them.

185. I am afraid I see the attempt to introduce a third party into the equation as an attempt to circumvent the requirement for a contract by relying upon the omission of that word from any part of subsection (1)(a), but I do not consider that it would avail the claimant in any event if I had accepted Mr Benson's submissions on the question of the third party. I find that the words in subsection (1)(a)(ii), "the terms on which he is engaged to do the work" envisage terms that are capable of legal enforcement and imply the existence of a contract. It is common ground that the purpose of introducing the subsection was to protect agency or contract workers. That does not mean that if the words cover other workers they will not be entitled to protection but it is difficult to think, for example, that Parliament meant to protect people who work on voluntary or expense only terms. It would be a significant departure from existing law to enact a definition of a worker that was to apply in the absence of a contract between the worker and someone. That is outside the normal remit of "employment" legislation. I am persuaded that if that was Parliament's intention then it would have been spelt out more clearly than it has been and certainly not by leaving a contrary implication in the words I have referred to. In my judgment, to qualify under S.43K(1)(a) a worker must have a contract with at least one of either the supplier/introducer or the end user of his services.

186. It is convenient to consider here the other limb of S.43K, subsection (1)(b). I heard a good deal of evidence and argument about whether the claimant came within the more general definition of 'worker' contained within S.230 of the 1996 Act. In order to do so, the claimant must show that he had contracted to provide his services personally. The occasional ability to delegate is not inconsistent with personal service but an unfettered right to do so is. The devil lies in deciding in any given case where the line is to be drawn between those two opposite poles and this is not an easy or obvious case. Ultimately, it would not have needed to have been decided if the claimant qualified under S.43K(1)(b). This is an area of the case where Mr Tattersall offered the least resistance, simply noting that the lack of any 'employer's' control of the work place was the antithesis of the claimant's main argument. I believe he realised that worked both ways. He was not in a position on his own argument to suggest that either of the respondents did control the workplace.

187. Subsection (1)(b) does, of course, call for a contractual relationship. If I had found a contract between the claimant and either of the respondents, I do not consider the requirement that it should be "for the purposes of that person's business" would have been a barrier to the claimant. In my judgment that phrase would embrace the parties' activities in the cure of souls. The place in which Mr Sharpe's work was to be performed must be regarded as the benefice of Teme Valley South, for he was not licensed to work anywhere else. It follows from my findings below about the Bishop's lack of control and supervision over him and the parish and Mr Sharpe's general autonomy

(provided only that he remained within the rules of ecclesiastical law), that Teme Valley South was not "within the control or management" of any person with whom the claimant might have contracted. Ultimately, there were legal powers to abolish the workplace but I think the phrase envisages something more in the nature of day-to-day management than that ultimate sanction, somewhere where the worker is left to his own devices in performing the work he is hired to do. If I had found that the claimant had entered into a contract with either of the respondents, then I would have found that he was a 'worker' within this definition and qualified to pursue his claims that he had suffered detriments as a result of having made public interest disclosures.

188. There remain two matters upon which to comment, both based on the hypothesis that I had found in the claimant's favour that he had entered into a contractual relationship. They are:

188.1. Whether I would have regarded the contract as one of employment or, if not, and

188.2. Assuming S43K(b) did not apply, whether I would have regarded the contract to be for the provision of services personally by Mr Sharpe, thereby qualifying him under S.230 of the Act.

189. I would not have found any contract to be a contract of employment. Very briefly, there are three principal reasons for this. The first is what I find to be a lack of supervision and control. "Employment" requires personal service. Mr Sharpe served the DBF and the Bishop only in the general sense that he assisted the Church, of which I accept the respondents were important parties in the diocese of Worcester, in the furtherance of the Church's mission. But he provided no direct service to either respondent in the sense of identifiable work done for them at their behest and under their control. I have accepted the evidence of the respondents' witnesses that Mr Sharpe was free to perform his office at the dictate of his own discretion and conscience. In my judgment, Mr Sharpe was appointed to his office. It was the office which defined what it was he had to do. No one in the diocese could require him to do more or had power to direct how he performed what the office required of him. No one supervised his performance in any meaningful way. I do not detect the degree of supervision and control that is inherent in a contract of service where, ultimately, there is an obligation to obey the lawful instruction of the employer. In the master and servant terms of *Ready Mixed*, the claimant had no master. Mr Sharpe did not suggest the DBF was able to direct him and he ultimately accepted that the Bishop had issued no instruction to him. That, I have accepted, is because the Bishop is not in a position to do so. Such authority as he has is, I find, a persuasive one derived from respect for his position and known by the clergy not to be binding upon them in the sense that an employee must obey his employer. I have considered Mr Benson's argument that such authority in the ethos of the Church is sufficient but, even taking into account the other elements of the Canons and the disciplinary processes, I find the relationship too loose to show a contract of service. Mr Sharpe regarded the Canons and canon law generally as the Church's 'control mechanism' but I cannot find that a duty to obey the law is the same as entering into a contract of service. I do not regard the rudimentary visitations or the (non-compulsory) appraisal system to be in that category. I have had regard to the remarks of Lady Hale in *Percy* about the width of discretion modern professional people enjoy but Mr Sharpe's situation went beyond that of Ms Percy, who was under the direction of her senior in the parish and subject to contractual disciplinary procedures. Of course, once there is a statutory office, it is necessary for there to be powers of removal from office but in Mr Sharpe's case they were not contractual. There was no right of

summary dismissal, whatever the offence, nor a right to determine the post on notice. Indeed, termination at all was possible only in exceptional circumstances. The claimant himself could not unilaterally resign. Indeed, those matters are further pointers to the lack of a contract at all. The disciplinary powers were not capable of being commenced by either of the respondents. The DBF had no involvement at all. If the Bishop had power to impose a sanction, it could only have been with Mr Sharpe's consent, otherwise disciplinary sanctions were effectively out of his hands.

190. Secondly, because of the degree of power to delegate that I mention in more detail below in relation to the claimant's alleged status as a 'worker,' I find I am bound by the previous decisions of the appellate tribunal I mention there to find that Mr Sharpe did not enter into a contract of personal service.

191. Thirdly, in seeking to establish that there was a contract of employment, Mr Benson urged me to have regard to custom and practice. If I had found a contract, I do not believe he could have had it both ways. I would have been bound to have regard to the traditional practice and the traditional relationship between the incumbent of a benefice and the Church. I say nothing of curates, whose position I understand to be rather different but about whom I have heard no detailed evidence. There is, however, ample evidence that it has traditionally been recognised that rectors are not employees. I am aware that the label parties themselves place on their relationship is not determinative and that I must look at the reality. However, if the parties do give consideration to the situation and choose to order their affairs in a particular way so that the label and reality coincide, then I consider that it would rarely be right for a tribunal to interfere. In Massey v Crown Life [1978] 1 WLR 676, Lord Denning put it this way:

> "The law, as I see it, is this: If the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it...On the other hand, if their relationship is ambiguous and is capable of being one or the other, then the parties can remove that ambiguity, by the very agreement itself which they make with one another. The agreement itself then becomes the best material from which to gather the true relationship between them."

192. Although Mr Sharpe made no particular agreement and there was no "change in status" for rectors, I still gain guidance from that statement when considering the custom and practice of the traditional arrangement. The traditional view, the result of custom and practice, was under great debate at the time of Mr Sharpe's appointment but Professor McClean has made it clear to me that both clergy and hierarchy wanted the status quo to remain. The freedom from control and interference I have mentioned above was so highly valued on the one side and respected on the other that neither wanted to change. The Committee, the General Synod and the Westminster Parliament all accepted the nature and effect of the tradition and approved the wish that it should not be changed. In my judgment, no evidence has been put before me that would allow me to conclude they were all wrong.

193. Finally, would the claimant have qualified as a 'worker' under the definition of S.230 of the 1996 Act? This would have depended upon the words 'undertakes to do or *perform personally* any work or services" (my italics). I do not believe I would have spent a great deal of time on this point in view of the rather easier decision that the claimant came within the wider definition of S.43K(1)(b).

If pressed, I would have been inclined to ignore the Canons' permission for lay readers and lay preachers to carry out certain functions. It seems to me those provisions are concerned not so much with a right of delegation of the rector's whole function as it is with defining who may do what. In my opinion, my focus should be on the whole function. Also, I have great sympathy with Mr Sharpe's view that the service of a rector to his parishioners is a personal one that is not altered by occasional delegation of specific or even all functions. Nevertheless, Mr Sharpe did confirm that he had the right to delegate the functions of his office to a suitably qualified person, at any time and for any reason. That is an unfettered right, very similar to the one in *Sultan-Darmon* and the line of authorities referred to in that case going back to Express and Echo Publications Ltd v Tanton [1999] IRLR 3767. There were two slight differences in Mr Sharpe's case. The first was the requirement that absence from the benefice for more than three months required the Bishop's consent and the second, that Mr Sharpe would not be expected to pay the substitute himself, no doubt at least in part because being appropriately qualified, the substitute would himself be in receipt of a stipend or whatever a curate's alternative arrangement may be. I do not regard those differences as significantly altering the right to introduce a substitute at any time for any reason. It was not relevant in *Sultan-Darmon* that the right was not exercised. I consider that I would have been bound by the latest authority of that decision. In taking up and performing his office, Mr Sharpe did not undertake always to carry it out personally.

Signed by _____ on 13 February 2012
Employment Judge

Judgment sent to Parties on
15 February 2012
SJBell