

Working for God: Contract or Calling?

Ann Buckingham*

This paper discusses whether ministers are employees of their church or stand in some other relationship to it. As employees they would be entitled to common law and statutory employment protections. Traditionally at common law ministers are not employees and merely have limited rights as members of a voluntary unincorporated association. This paper examines and analyses the appropriate legal position in light of developments in employment law, other disciplines, the Bill of Rights and judicial review.

I INTRODUCTION

A minister¹ of religion has access to basic employment protections only if the minister is considered in law to be employed by the church. Without an employment relationship, the minister merely has the rights of a member of a voluntary unincorporated association.

Traditionally at common law ministers are not considered to be employed by the church. An employee at common law is a person working under the control and direction of an employer in return for a wage or salary. The relationship is based on contract, a consensual bargain consisting of an exchange of values.² A minister, however, is called of God, and the question is whether that spiritual relationship precludes temporal contractual elements.

This paper will discuss the application of common law and statutory employment protections to ministers in New Zealand. This entails an analysis of the employment status of ministers, with reference both to current legal developments and to perspectives from other disciplines.

II ELIGIBILITY FOR EMPLOYMENT PROTECTIONS

Obviously, the common law will only protect the relationship between minister and church if the minister is an employee at common law. New Zealand also has a comprehensive web of legislation regulating the terms and conditions of employment. Eligibility for statutory protections depends on their defined scope. The definitions in

* Submitted for the LLB (Honours) Degree at the Victoria University of Wellington 1 September 1993

1 "Minister" is used as a generic term to describe all those performing religious duties in places of worship.

2 *Mazengarb's Industrial Relations and Industrial Law in New Zealand* (4 ed, vol 1, Butterworths, Wellington, 1993) 2.

the Income Tax Act 1976 and the Accident Rehabilitation and Compensation Insurance Act 1992 appear to encompass the relationship between minister and church.³ However, the applicability of most employment legislation in New Zealand depends upon the existence of a common law employment contract.⁴

III EMPLOYMENT CONTRACT

A Common Law

Traditionally, at common law there is no contract of service between minister and church. There is no New Zealand authority directly on point, although the Common Law in the United Kingdom was endorsed by the High Court in *Gregory v Bishop of Waiapu*.⁵ However, in *Neonakis*,⁶ the Employment Tribunal found a prima facie case

3 Section 2 of the Income Tax Act 1976 defines an employee as a "person who receives or is entitled to receive a source deduction payment". A source deduction payment under s 6 means a payment by way of salary or wages, and "salary or wages" in s 2 includes "remuneration of any kind, in respect of or in relation to the employment of that person". The sole criterion in this broad, albeit circular, definition appears to be the receipt of remuneration. In *Salvation Army, Canada East v Ontario (A-G)* (1992) 88 DLR (4th) 238, Henry J applied the Pension Benefits Act 1987 (Ont, Canada), which defined "employee" in terms of receipt of remuneration, to officers of the Salvation Army. In the Accident Rehabilitation and Compensation Insurance Act 1992, "employee" means any person receiving remuneration for tax purposes within the definitions of the Income Tax Act. However, "employment" is defined as "work engaged in or carried out for the purposes of pecuniary gain or profit". It is arguable this excludes purely voluntary, non-profit, charitable institutions such as churches. However, the Court in *Salvation Army v Canterbury Hotel Employees Union* [1985] 2 NZLR 366 adopted a wide interpretation of the phrase: non-profit motives of the employer were irrelevant, and it was not necessary to show an overall profit. It was enough that services were performed and the employer intended to acquire gain from the services. Fees from patients were received by the Army and contributed to the expenses of the home. It is arguable that the work of ministers, which results in donations and collections which help finance the work and operation of the church, is work carried out for pecuniary gain or profit.

4 The definition of "employee" in s 2 of the Employment Contracts Act 1991 (the "ECA") connotes the existence of an employment contract. This definition is incorporated into the Equal Pay Act 1972, the Holidays Act 1981 and the Parental Leave and Employment Protection Act 1987. The Minimum Wage Act 1983 and the Wages Protection Act 1983 define employment as work for payment or reward, without reference to contracts of service. However, the word "employed" may be presumed to connote a contract of service. Section 2 of the Human Rights Act 1993 adopts a wide definition of employment extending beyond the common law contract of service to include independent contractors, contract workers and unpaid workers. However, ministers are neither independent contractors nor contract workers, and are paid for services rendered. To be entitled to human rights protections, they must fall within the core meaning of contract of service.

5 *Gregory v Bishop of Waiapu* [1975] 1 NZLR 705, 715.

6 *Neonakis v Greek Orthodox Community of Wellington and Suburbs (Inc)* [1992] 2 ERNZ 494.

that for the purposes of personal grievance proceedings, a priest was employed by the Greek Orthodox Church.⁷ Under a document similar to an employment contract, the priest received a stipend, accommodation and other benefits - incidents regarded as consistent with the existence of an employment relationship.

In the United Kingdom, courts consistently have found no contract of employment between minister and church. In 1912, the case of *Re National Insurance Act*⁸ established that a curate in the Church of England held an ecclesiastical office and was not an employee, and therefore was not entitled to compulsory insurance benefits under the Act. Twenty five years later, in *Rogers v Booth*,⁹ the Court of Appeal heard a claim by a Salvation Army Officer for personal injury compensation.¹⁰ The Court of Appeal determined the relationship by reference to Army orders and regulations. Officers' salaries were not guaranteed: they pledged to do their duty with or without pay. Paid allowances recognised their inability to otherwise earn a living. The Court concluded the relationship was spiritual in character and without contractual elements; neither party intended to confer rights and obligations enforceable at law.

More recent cases have confirmed this approach. *Parfitt*¹¹ and *Davies*¹² were applications by ministers for personal grievance hearings¹³ for unfair dismissal. The lay members of the Industrial Tribunal in *Parfitt* found a contract of service giving jurisdiction to consider the claim. The minister intended to become a servant of the church: he agreed to provide his work and skill and abide by conditions in return for a stipend. Terms of the contract (based on the standing orders of the church) consistent with a contract of service were: the deductions of income tax and national insurance contributions, a compulsory superannuation scheme, holiday entitlements and a high degree of control over activities. The legally qualified chairperson dissented on contractual grounds. The applicant minister reportedly said after the tribunal decision, "Hallelujah, the majority decision is in accord with reason and justice. It will give ministers the kind of security in their work and homes afforded to those in other occupations under a contract of service".¹⁴

In the Court of Appeal,¹⁵ it was argued that the spiritual nature of the employment did not necessarily exclude a contractual relationship - it was possible to be both a spiritual servant of God and secular servant of a church. The minister had non-spiritual as well as spiritual duties and the church provided a house and pension, matters more

7 The substantive issue was the admission of a claim after the 90 day limitation period.
 8 *Re National Insurance Act, 1911, Re Employment of Church of England Curates* [1912] 2 Ch 563.
 9 [1937] 2 All ER 751.
 10 Granted under the Workmen's Compensation Act 1925 (UK) to all those under a common law contract of service.
 11 *President of the Methodist Conference v Parfitt* [1983] 3 All ER 747.
 12 *Davies v Presbyterian Church of Wales* [1986] 1 All ER 705.
 13 Under the Employment Protection (Consolidation) Act 1978 (UK).
 14 AN Khan "Who is Employed?" (1983) 127 SJ 416.
 15 Above n 11.

appropriately covered by a contract of employment. The Court, however, found no intention to create legal relations, relying on the fundamental Methodist belief that a minister is called of God. The spiritual nature of duties excluded a temporal, contractual relationship between parties. Dillon LJ rejected arguments based on modern economic conditions, employment protection and social security; the church merely undertook the burden of supporting the minister.

Following the *Parfitt* decision, *Davies*¹⁶ was appealed to the House of Lords. Lord Templeman, endorsing *Parfitt*, reiterated that the concept of calling involved duties to God, not the church, and held there was no contract.

*Santokh*¹⁷ and *Alavi*¹⁸ were subsequent applications for unfair dismissal involving religious institutions based on different theological and cultural premises. Both Sikhism and Islam have no centralised authority: each temple or mosque is autonomous. Priests require no formal ordination or special qualification. Santokh was a Sikh priest. The temple's constitution referred to his status as "employee", and prescribed his conditions of service, including secular duties. He was taxed at source and his activities were under the substantial control of the temple. The Employment Appeal Tribunal found no contract. The Court of Appeal was loath to disturb its findings, citing the fact that Santokh saw himself as a minister of religion to justify exclusion of contractual relations.

Alavi was an academic, appointed director of a mosque to perform religious, social, educational and administrative functions. He took responsibility for the day-to-day management of the Birmingham Mosque Trust, a limited company and charitable trust without rules or constitution. Alavi did not consider himself a priest, but an academic undertaking priestly duties and merely working a 40 hour week. The terms and conditions of the agreement indicated a desire to create a legally binding relationship. The Employment Appeal Tribunal, however, emphasised that the mosque and its management committee had no basis for existence without the foundation of Islam. Alavi's functions stemmed from and were connected to religion. It indicated that the broad approach of *Parfitt* and *Davies*, precluding temporal contractual relations in spiritual service, was appropriate.

Arguably, each religion should be treated on its merits. Dillon LJ did not profess to lay down an immutable rule in *Parfitt*; he simply stated that in the absence of clear indications of a contrary intention, the relationship of minister and church is ill-suited to contractual regulation.¹⁹ However, the ability of parties to draft a legally binding offer and acceptance seems under threat given the reluctance in *Santokh* and *Alavi* to recognise the formal character of relations. Employment protections are vital where a religious institution has no governing procedural rules, and should be treated differently

16 Above n 12.

17 *Santokh Singh v Guru Nanak Gurdwara* [1990] ICR 309.

18 *Birmingham Mosque Trust Ltd v Alavi* [1992] ICR 435.

19 Above n 11, 753.

from, for example, an established church like the Church of England.²⁰ To exclude contractual elements because work derives from or is connected to religious functions overlooks the fact that secular employees within churches also perform work connected to religion. Dillon LJ acknowledged the possibility, even in mainstream churches, of ancillary contracts between a church and its ministers on such matters as compulsory insurance.²¹ Even the traditional common law position itself is controversial: critics have condemned the denial of statutory employment protection to a segment of the labour force through application of stereotypic conceptions of master, servant and control.²²

B *The Existence of a Contract*

In the absence of direct New Zealand authority, it is appropriate to assess the status of ministers using first principles before following the Common Law of the United Kingdom.

The first question is whether there is a contract between minister and church. Generally, there is clear evidence of an offer and acceptance: the church offers the position of minister on a circuit, which the minister accepts. The offer specifies the consideration (the performance of duties in return for a stipend), and its details provide sufficient contractual certainty.

However, United Kingdom courts confine the relationship to the realm of the spiritual by relying on the concept of divine calling to find a lack of intention to enter legal relations. Once the plaintiff is identified as a minister, the concept of calling is presumed to apply. This approach differs from that applied in most contract cases, which evaluate the actual intention of parties, objectively measured. There is no rationale for why calling should have general application in all cases. Under the normal approach, the arrangement between each particular church and minister would be evaluated to determine if the parties intended to exchange legal relations.

The Salvation Army expressly provides in its *Orders and Regulations* that the relationship creates no legal rights.²³ Although the expressed intention is not determinative, it is apparent the Army and its Officers intend a voluntary relationship. Conversely, both the Moslem and the Sikh temples appeared to evince an intention to

20 "Established" in this context means a church given a legal position by the State with civil sanctions for its decrees; its ecclesiastical courts have equal status with secular courts. Thus, ministers of this Church are protected by and have access to formal judicial processes. See *Cripps on Church and Clergy* (8 ed, Sweet & Maxwell, London, 1937).

21 Above n 11, 752.

22 See DR Howarth "Church and State in Employment Law" (1986) 45 CLJ 404; AN Khan "Employment of a Church Minister" (1987) 131 SJ 38 and SC Woolman "Capitis Deminutio" (1986) 102 LQR 356.

23 *Orders and Regulations for Officers of the Salvation Army* (2 ed, 1987) vol 2, pt 7, ch 1, s 1 and Appendix "Undertakings Entered into by an Officer of the Salvation Army".

create legal relations.²⁴ Other churches are silent on this point, and therefore it is appropriate to assess their theological and sociological foundations to determine the existence of an intention to create legal relations. The nature of the relationship should be determined by contemporary evidence.

C *Multi-Disciplinary Perspectives*

1 *Theological perspectives: calling*

From a theological perspective, the clerical profession is a vocation, a calling from God.²⁵ The concept of calling has four elements:²⁶ the call to be a Christian, the inner call (or summons from God), the providential call (being equipped with the "divine" talents to be a minister), and the ecclesiastical call (the influence of the clergy or religious institution). Different religions place different emphases and importance on the different types of calling. It is arguable a providential or ecclesiastical call is no different from the influences facing any person in choosing a career. Therefore, the fact a minister is called of God may be insufficient to exclude contractual relations.

Towler and Coxon look at vocation from a sociological perspective using occupational choice theory. They view the decision to become a minister as a decision taking place in an institutional and cultural framework, influenced by social factors. Choice of occupation is a process rather than a unique event. Their studies show parents and other clergy, not some concept of calling, were most influential in the decision to join the clergy.²⁷

2 *Historical perspectives*

The relationship between minister and church has not always been purely spiritual. In the Middle Ages, clergy performed a range of functions: law, physic, education, civil service. Any area requiring learning was filled by a cleric, however secular. Clergy were immune from civil law, but were answerable to their religious superiors through the ecclesiastical courts.²⁸

The reformation saw a secularising revolution. Henry VIII dissolved monasteries and appropriated the wealth of the church. Learning became more general and social posts were filled by lay people. Ministers began to be regarded as persons set apart who should devote their time to sacred matters.²⁹ From the eighteenth century, improvements in agriculture and increases in land values caused a corresponding increase in the wealth of the church. The clergy emerged with a clear place in social class

24 Above n 17 and n 18.

25 Interview with the Archbishop, Anglican Church of New Zealand, 11 March 1993.

26 R Towler and A Coxon *The Fate of the Anglican Clergy* (MacMillan, London, 1979), 58.

27 Above n 26, 60.

28 Above n 26, 48-49.

29 Above n 26, 192.

structure as members of the leisure class, gentlemen not servants, with minimal duties.³⁰

With industrialisation came a shift in power and influence from land to commerce and manufacturing, causing dwindling clerical incomes derived from land. The clergy became anxious to be seen as a professional body with specific functions and duties. Emphasis was placed on the spiritual and consecrated nature of the clergyman's role, especially with the growth of new professions³¹ specialising in secular areas now beyond the competence of the clergy.³² Thus, the common law excluded contractual relations between minister and church at a time when the relationship was regarded as special and purely spiritual. The question is whether this classification is still appropriate in light of the developments of the last century.

3 *Sociological perspectives: the shift from spiritual to secular, marginalisation and public perception*

The marginalisation of religion to the periphery of society and secularisation of clerical roles suggest clergy are no longer regarded as sacred and separate, and therefore should not be denied the basic employment rights of other members of the community.

During the twentieth century, the role of clergy has contracted and become increasingly secular. Functions such as teacher of the Christian faith, organiser of church affairs, administrator of the parish and preacher are all increasingly undertaken by lay people.³³ The growth of the welfare state has diminished the role of the clergy as pastors of the people, although arguably this role is reviving with contemporary benefit cuts. The modern emphasis, however, is increasingly on the collective responsibility of church members rather than the individual minister. The only area dominated by clergy is the core spiritual role of priest: clergy now spend more time administering the sacraments and leading public worship. Arguably, this supports classification of services as purely spiritual, and their consequent exclusion from employment law. However, public attitude suggests mere spirituality should not warrant exclusion. In a sense, spiritual services are services like any other. There is high consumer demand for appropriate "rites of passage" such as marriage and burial, which are increasingly performed in a routinised fashion with ritualised statements, questions and responses.³⁴ Further, spiritual service of ministers inherently includes temporal aspects. In the Anglican Church, clergy are appointed deacon: a spiritual title giving religious authority to perform certain functions. They are simultaneously ordained to a title indicating temporal service, such as curate to a parish. The spiritual role is that of the invisible body of the church represented by the minister.³⁵ The temporal title indicates the source

30 A Russell *The Clerical Profession* (SPCK, London, 1980) 234.

31 Teaching, law, medicine.

32 Above n 30, 233.

33 Above n 26, 34-35.

34 Bryan "The Paul Report Examined" (1965) 68 *Theology* 89 at 98.

35 *Cripps*, above n 29, 94.

and scale of income. Clergy must be ordained to a particular job which provides work and support.³⁶

The marginalisation of religion is visible in falling rates of baptism and confirmation, the decline of religious belief and practice in incidence and significance, falling numbers of clergy and their increasing average age, the contraction of their functions, the decline in their education and income and the increasing irrelevancy of religion to society, culture and thinking.³⁷ The decline of religion is compounded by the diversity of other leisure pursuits, and the increasing privatisation of the social experience.

Increasing numbers of clergy are opting out of parochial ministry to serve in teaching posts or welfare services, to posts with a more clearly defined context and role. *Davies*³⁸ indicates that even exclusively spiritual positions performed for secular organisations will still be classed as contracts of service. Woolman regards it as odd that a person can move in and out of the mantle of protective legislation even though the duties and nature of the work undertaken are ostensibly similar.³⁹

Towler and Coxon argue the role of ministers has become ambiguous, superfluous and perhaps no longer appropriate to modern society.⁴⁰ They are a part of the paternalistic, agrarian past; anachronistic in a pluralist secular society.⁴¹ Society no longer focuses on the community or collective, and the majority of the population have no or only tenuous connection to formal religious institutions. Bryan highlights the loss of clerical status, the loss of functions to other professions and the lack of social relevance of specialist religious knowledge.⁴² However, he emphasises the limitations of a sociological perspective as it takes values, ritual and doctrine as data, not dogma.⁴³

4 *Industrial relations perspectives: appropriateness of employment protections*

Ministers perform services for the benefit of the church. Yet ministers at common law are only entitled to the protection of the rules of the church constitution. Churches in New Zealand are voluntary associations. The constitution of a voluntary association is a contractual document; parties are free to negotiate its terms. Principles of contract assume parties are equal. However, church constitutions are generally drafted by a central synod or assembly, often outside New Zealand. An individual minister has virtually no bargaining power to create or influence its terms. A minister is no different from any other worker: generally both are dependent on their work for income, and are in a weak bargaining position to protect their rights.

36 Above n 26, 170.
 37 Above n 26, 30-31; n 30, 4-6.
 38 Above n 12, 752.
 39 Above n 22.
 40 Above n 26, 39.
 41 Above n 30, 262.
 42 Above n 34, 99.
 43 Above n 34, 90.

If a church has procedural rules, dismissal or discipline under those rules can be judicially reviewed to ensure procedural fairness,⁴⁴ but courts cannot adjudicate on substantive claims of unjustified dismissal. Woolman argues that intuitively all ministers should have the right to have their claims, like those of any other employee, adjudicated by an independent tribunal. Among the clergy is a small, but vocal, group which believes clergy are grossly exploited, and should be entitled to the rights of an employee.⁴⁵

Howarth questions whether churches should be able to shun secular laws in relationships which are based on an economic exchange.⁴⁶ Henry J in *Salvation Army, Canada East*⁴⁷ commented that the Army created an expectation Officers would be paid an allowance. It was unrealistic to say payment was not guaranteed, because if it was not forthcoming, the Officer would be forced to resign. Their free will was reduced by lack of financial security.

5 Conclusion: division of temporal and spiritual

It is misleading to suggest the relationship between minister and church is purely spiritual: it has characteristics which are clearly temporal and secular. Although a priest performs spiritual functions, it is possible to separate the spiritual service of God from the temporal relationship between minister and church. Thus although a minister is called of God and is in spiritual service, this does not necessarily preclude an intention to form legal relations with the church. Where such an intention is evident from the relationship, the existence of a contract should be recognised.

D The Existence of an Employment Contract

Once a contract has been established, the second question is whether that contract is one of employment. Although May LJ expressed doubts,⁴⁸ there are sound reasons to conclude that once a contract is found, the elements of a contract of service are present.

Possible tests to determine the existence of a contract of service are: whether the employer has ultimate authority to exercise control over the worker (the control test),⁴⁹ whether the worker is "part and parcel" of the organisation (the integration test), whether

44 Below, Part VI.

45 Above n 30, 268-269. In New Zealand, the Service Workers Union has begun recruiting clergy into its ranks; see "Clergy may come under union's wing" *The Evening Post*, Wellington, New Zealand, 9 October 1992, 18; "Service Workers Union looks to nuns for membership" *Sunday Times*, New Zealand, 20 November 1992, 1. Rev Don Borrie in *The Evening Post* said this "should provide an opportunity for clergy to work collectively to deal with matters relating to their conditions of employment".

46 Howarth, above n 22.

47 Above n 9, 272-279.

48 Above n 11, 755.

49 "Worker" is used to connote a person who works, regardless of status, as opposed to an "employee" within the meaning of the ECA.

the worker is engaged to perform these services or is in business on his or her own account (the fundamental test), or whether in all the circumstances common sense dictates an employment relationship (the multiple test).

The relationship between church and minister, analysed on conventional tests, suggests the existence of an employment relationship. The Anglican Church has a rigid hierarchy. Bishops have disciplinary and controlling powers, and can grant or revoke licences to officiate.⁵⁰ On appointment, ministers are required by the Code of Canons to take a declaration of obedience. However, the degree of control should not be overly significant: churches are multi-national organisations, and for consistency require central supervisory control.⁵¹

Clergy are an integral part of church structure. The fundamental test has limited relevance to churches: as non-profit organisations, risk of loss and profit is not allocated. However, the independence of clergy while running their parish is analogous to running a business on one's own account. Other indicators of an employment relationship are entitlements to leave and central control of stipend payments.⁵²

In the Salvation Army, there is a strict hierarchical structure, similar to a secular army, which asserts rigid control over Officers. The General has control over all Officers and work done.⁵³ Officers are an integral part of the Army. Without the work of Officers, the Army could not function. Incidents of the relationship indicative of an employment relationship are the provisions relating to monetary payments,⁵⁴ training and promotion,⁵⁵ retirement and pensions,⁵⁶ holidays,⁵⁷ sick leave,⁵⁸ leave of absence,⁵⁹ and stringent discipline.⁶⁰ However, the express intention of parties that the relationship is voluntary with no attached legal rights or obligations or employment relationship,⁶¹ is unlikely to be displaced by these factors.

-
- 50 *Cripps*, above n 29, 117; see also *Gregory v Bishop of Waiapu*, above n 5, 708-709.
- 51 See *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681, where the importance of the control test was downplayed as the degree of control present on the facts was inevitable for the efficient running of the business. The fundamental test was regarded as the most appropriate in the circumstances.
- 52 Parish collections are paid into the diocesan office, which controls distribution of stipends.
- 53 Above n 23, vol 2, pt 1, ch IV, s 4.
- 54 Above n 23, vol 2, pt 7, ch I, s 5.
- 55 Above n 23, vol 2, pt 7, ch I, ss 2-3.
- 56 Above n 23, vol 2, pt 7, ch III.
- 57 Above n 23, vol 2, pt 10, ch II.
- 58 Above n 57.
- 59 Above n 23, vol 2, pt 10, ch III.
- 60 Above n 23, vol 2, pt 7, ch V.
- 61 Above n 23, vol 2, pt 7, ch I, s 1; and Appendix: "Undertakings Entered into by an Officer of the Salvation Army".

An alternative test of "economic reality" has been suggested by academics,⁶² and was approved by Bisson J in the Court of Appeal.⁶³ Collins argues that over the last decade there has been a trend of marginalisation of the workforce through sub-contracting, franchising and outsourcing. By moving workers outside the paradigm of employment, they lose their entitlement to employment protection rights. However, social subordination and economic dependence mean workers need such rights. Collins argues the conventional tests defining the boundaries of the paradigm are dysfunctional:⁶⁴ they are both under- and over-inclusive, and fail to establish a consistent and coherent approach. Their application to factual situations produces results which seem to defeat the purposes of employment law regulation and fail to meet workers' needs.

An employment contract should be defined by reference to social and economic criteria, and from the standpoint of entitlement to a socially-sanctioned and legislatively created benefit or protection.⁶⁵ The purpose of protective legislation is to shield workers from harsh and oppressive conditions and to provide minimum standards. It cannot be effective unless it applies to all appropriate relationships. Parties' express wishes are largely ignored as business owners have strong incentives to contract outside the employment paradigm. Employment rights are conferred instead by public policy. Merritt argues that the predominate social policy today is to extend the benefits of protective and welfare legislation. An economic reality test would recognise the reliance of a minister on the church for income and the ongoing and interdependent nature of the relationship.

The economic reality test received short shrift in the Court of Appeal in *TNT*.⁶⁶ The Employment Tribunal⁶⁷ and Employment Court⁶⁸ had used a test of "the totality of the picture", and found an employment relationship between the courier company and owner-driver. The test applied seemed to accord more with the multiple test than the broad multi-disciplinary approach of the economic reality test. However, although not going to the lengths propounded by Collins and Merritt, passages in the judgments suggested a leaning towards a policy approach to extend the scope of employment protections.⁶⁹

On appeal, Cooke P stated the decisions could have been reached only by developing the present law along the lines of the Collins article. Such a development would be justified if the common law proved unsatisfactory in principle and the development was

62 See A Merritt "'Control' v 'Economic Reality': Defining the Contract of Employment" (1982) 10 Aust Bus Rev 105; and H Collins "Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Law" (1990) 10 Oxford J Legal Stud 353.

63 *Challenge Realty Ltd v CIR* [1990] 3 NZLR 42, 65.

64 Above n 62, 369, 371.

65 Merritt, above n 62, 118, 131; Collins, above n 62, 377.

66 *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681.

67 *Cunningham v TNT Express Worldwide (NZ) Ltd* [1992] 1 ERNZ 956.

68 *Cunningham v TNT Express Worldwide (NZ) Ltd* [1992] 3 ERNZ 1030.

69 Above n 66, per Cooke P at 685.

not contrary to legislative policy, but neither criterion was satisfied. Section 2 of the Employments Contracts Act 1991 indicated the legislature wished to preserve existing principles: the definition of "employment contract" is tied to the common law contract of service. The inclusion of homeworkers in the definition was the only legislative concession extending the benefits of employment protection under the Act, militating against further broadening of the definition.⁷⁰ This contrasts with the Health and Safety in Employment Act 1992 which expressly extends coverage to independent contractors.

Implicitly, the Court of Appeal endorsed the principles of freedom of contract, and the right of parties to choose their own form of relationship. A purposive and aggressive approach to employment protection was expressly rejected. Cooke P emphasised the case should not be limited to its facts, but should be seen as an inappropriate attempt to change the established status in the transport industry.⁷¹ The established common law status of a minister is that of spiritual servant of God. Although *TNT* therefore militates against broad application of protective legislation to ministers, the established common law position is based on the supposition that the concept of the calling to serve God excludes legal relations. If this is not supported by contemporary evidence, then contractual intentions should be upheld. Any such contract is likely to be viewed as an employment contract.

IV APPLICATION OF EMPLOYMENT LAW

Arrangements between minister and church may not necessarily infringe employment law. The Minimum Wage Act 1983 and the Holidays Act 1981 are generally complied with in conditions of service in the more organised churches.⁷² Parental leave may be provided depending on the church and its local rules. However, discrimination and lack of personal grievance procedures will commonly be in breach of the Human Rights Act 1993 and the Employment Contracts Act 1991.

Section 21 of the Human Rights Act 1993 states that discrimination is prohibited by reason of sex,⁷³ marital status, religious or ethical belief, colour, race, ethnic or national origin, disability, age, political opinion, employment or family status, and sexual orientation. Section 22 prohibits such discrimination by an employer. An exception is provided in section 28 for the purposes of religion: different treatment in employment based on religious belief is lawful for work substantially the same as that of a priest.⁷⁴ Section 28(1) provides:

70 Above n 66, per Cooke P at 689; per Casey J at 694.

71 Above n 66, per Cooke P at 689.

72 For example, the Salvation Army provides for holiday, sick and other leave and provides an allowance for officers; see above n 23, vol 2, pt 10, ch II and ch III.

73 Gender discrimination in employment is also unlawful in s 2A of the Equal Pay Act 1972, and the Employment Tribunal is given jurisdiction to amend contravening employment contracts under s 10(2).

74 Human Rights Act 1993, s 28(2).

Nothing in section 22 of this Act shall prevent different treatment based on sex where the position is for the purposes of an organised religion and is limited to one sex so as to comply with the doctrines or rules or established customs of the religion.

Some churches refuse to admit women priests;⁷⁵ many others ban ordination of homosexuals.⁷⁶ The Salvation Army discriminates by reason of sex and marital status. Women have an earlier retirement age,⁷⁷ are given their husbands' rank,⁷⁸ and perform different tasks (for example, they are expected to perform domestic duties).⁷⁹ In the event of divorce or separation, the couple cease to be Officers, and must apply after a period of time for reinstatement.⁸⁰

To fall within the exception in section 28(1), the onus is on the church to show discrimination is based on doctrines or rules or customs of the religion. This will probably be interpreted strictly; for example, a church like the Salvation Army which is grounded on equality between men and women may have a difficulties using this section to protect discriminatory rules in its *Orders and Regulations*.

Section 32 of the ECA requires employment contracts to have effective personal grievance procedures consistent with Part III of the Act. Section 27 specifies five categories of personal grievance: unjustified dismissal, unjustifiably disadvantageous conduct, discrimination, sexual harassment, and duress in relation to union membership. Where there is no consistent or effective grievance procedure, employees may utilise the procedure in the Act, which includes the mediation and adjudication services of the Employment Tribunal. Church constitutional procedures are unlikely to cover all five categories.

V BILL OF RIGHTS

Even if a minister is engaged under a contract of service, the New Zealand Bill of Rights Act 1990 (the "Bill of Rights") guarantee of freedom of religion may exempt churches from compliance with statutory employment protections.

Section 3(a) of the Bill of Rights states it applies to acts done by the legislative branch, which would include Acts of Parliament.

75 For example, the Catholic Church and Exclusive Brethren. See D Welch, "Shopping for God: A Consumer's Guide to Religion" *Listener* 31 July 1993, 33.

76 For example, the Baptist Union, the Lutheran Church and the Salvation Army. See Welch, above n 75.

77 Above n 23, vol 2, pt 7, ch III, s 2.

78 Above n 23, vol 2, pt 5, s 3.

79 Above n 78.

80 Above n 23, vol 2, pt 5, s 5.

Section 6 states:

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

The Bill of Rights declares certain rights to be fundamental, and therefore implicit in legislation. Parliament is presumed to have legislated consistently with the Bill of Rights; this presumption will not be displaced without good reason.⁸¹ If Parliament intended to infringe the Bill of Rights, section 4 applies, allowing the inconsistent statute to prevail. Otherwise, section 6 operates to construe an ambiguity consistently with the Bill of Rights. Even if there is no apparent ambiguity, section 6 can be used to read down legislation, to imply limitations into the statute that do not impede or frustrate the statutory purpose.⁸² Employment statutes are general provisions, and arguably can be read down to apply only to the extent they do not infringe the Bill of Rights.

Section 13 protects freedom of thought, conscience, religion and belief. This is rarely breached in practice. Section 15 provides that:

Every person has the right to manifest that person's religion or belief in worship, observance, practice or teaching, either individually or in public or private.

It is necessary to establish, first, whether the right is prima facie infringed by application of employment law, and secondly, whether the infringement is a reasonable limit prescribed by law, which is demonstrably justified in a free and democratic society. If the infringement is so reasonable, section 5 provides that the Bill of Rights has not been breached. The Bill of Rights is closely based on the Canadian Charter of Rights and Freedoms, and it is therefore helpful to draw upon Canadian jurisprudence.

In *Salvation Army, Canada East*,⁸³ the Salvation Army argued that freedom of religion, as guaranteed by section 2(c) of the Canadian Charter, prevented interference with their pension plan. The effect of the Pension Benefits Act allegedly infringed a Charter-protected right or freedom. The Court affirmed that freedom of religion only related to fundamental tenets, practices and beliefs. In order to attract the protection of the guarantee, the conduct affected must be integral to the practice of the religion; a distinction was drawn between an article or tenet of faith and the policy position of the church on a secular issue.⁸⁴

81 P Rishworth and D Paciocco, *Essays on the Bill of Rights* (New Zealand Legal Research Foundation, Publication 32, Auckland, 1992).

82 P Rishworth "Potential of the Bill of Rights" [1990] NZLJ 68.

83 Above n 3.

84 Above n 3, 256, 266. Conversely, Laycock argues that any interference with discriminatory church practices is an unreasonable or excessive impairment of the right to manifest one's religious beliefs. State interference with church selection of employees will affect the character of the church and the right of its adherents to practise its beliefs. See D Laycock "Towards a General Theory of the Religious

The Salvation Army was unable to show on the balance of probabilities that the provision of retirement allowances was a practice or belief integral to the tenets of their religion. Although historically the relationship was entirely voluntary with no legal rights, the Court found that service without guaranteed remuneration has never been a tenet or a practice deriving from the scriptures or Deed of Constitution.⁸⁵ The Court held that the voluntary dedication of body and soul to religious life as reflected in the tenets cannot be affected by the question of whether retirement income is legally or contractually guaranteed. Paying an allowance is simply an administrative practice to support ministers, and is not a deeply held conviction of faith. Likewise, gender discrimination in the Salvation Army pension plan had to be removed - one of the pillars of the association was equality between male and female Officers.

These arguments would apply to most potential applications of labour legislation: the temporal aspects of the minister's upkeep tend to be administrative rather than integral beliefs, although discrimination may be permissible where a fundamental belief of the religion is gender or racial inequality.

Even if the Bill of Rights had been prima facie infringed, employment legislation involves a legitimate government objective: it provides minimum employment standards. Application to religious institutions minimally impairs freedom of religion, and such legislation is common in Western democratic societies. Section 5 would therefore probably operate to allow the application of employment law.

VI JUDICIAL REVIEW

Even if a minister is not an employee at common law, and therefore beyond the purview of current employment legislation, a minister still has limited rights.

*Ridge v Baldwin*⁸⁶ originally recognised three classes requiring natural justice: dismissal from office, forfeiture of property rights and expulsion from clubs. Historically, a minister was an office holder, and could not be lawfully dismissed without being informed of the grounds and being given a fair opportunity of being heard.⁸⁷ The application and scope of natural justice in the succeeding thirty years have expanded immeasurably.

Churches in New Zealand are voluntary unincorporated associations. At common law, such bodies are subject to judicial review.⁸⁸ The operation of judicial review is best

Clauses: *The Case of Church Labor Relations and the Right to Church Autonomy*" (1981) 81 Columbia LR 1373, 1391-1398.

85 Above n 3, 286.

86 [1964] AC 40.

87 Above n 86, 66: Lord Reid cites *Rex v Gaskin* (1799) 8 Term Rep 209; *Reg v Smith* (1844) 5 QB 614.

88 The Judicature Amendment Act 1972 provides a right of review over statutory powers and constitutional powers of incorporated bodies. However, this statutory right of review exists alongside and does not abrogate common law rights of review.

explained under a contract model: a voluntary unincorporated association is a free association of persons who contractually agree to be bound by certain common rules. Part of the "contract" of the organisation is that the organisation (and its officers) will adhere to its rules in dealing with members and those who voluntarily bring themselves within its jurisdiction.

Courts will intervene for error of law in interpreting the rules, breach of rules and breach of principles implied by the rules (such as natural justice).⁸⁹ Although the principles of natural justice have been extended to regulate decisions by private bodies, the discretion to grant remedies will not be exercised lightly.⁹⁰ De Smith notes that in the mid-nineteenth century courts frequently intervened for breaches of natural justice, but now courts are generally reluctant to require that ecclesiastical investigations conform to judicial standards.⁹¹ However, they will intervene as a matter of course if the action is unlawful. In *McCaw*,⁹² Galligan JA stated:

...civil courts are properly reluctant to interfere with the internal affairs of a church, but they will do so to ensure that a member of a church is not treated unfairly.

Similarly, Beattie J stated in *Gregory*:⁹³

[The] courts...must acknowledge that they will be chary of intervening in church matters unless there are valid and strong reasons for doing so.

The plaintiff in *Gregory*⁹⁴ was an Anglican priest, licensed to officiate as vicar of a parochial district by the Archbishop on the terms and conditions set out in the Code of Canons. The plaintiff's licence was revoked and he applied for certiorari, claiming the Bishop's decision to revoke was ultra vires and a breach of natural justice.

An organisation must exercise its powers and rights within its rules. On the facts, the Bishop's actions were ultra vires. Natural justice was refused as the plaintiff fell within the category of "office holder at pleasure" in *Ridge v Baldwin*. This is no longer good law.⁹⁵ Although Beattie J recognised that the practical effect of revocation was to terminate Gregory's right to preach, it was not regarded as an interference with his right

89 G Taylor *Judicial Review: A New Zealand Perspective* (Butterworths, Wellington, 1991) 14.

90 Above n 89, 272; *Stininato v Auckland Boxing Association* [1978] 1 NZLR 1, 29.

91 J Evans *De Smith's Judicial Review of Administrative Action* (4 ed, Stevens & Sons Ltd, London, 1980) 160.

92 *McCaw v United Church of Canada* (1991) 82 DLR (4th) 289, 296.

93 Above n 5, 708.

94 Above n 5.

95 Above n 86. Only the holders of an office who could not be removed without satisfying certain criteria were entitled to natural justice. Holders of offices at pleasure and employees were not. This is no longer a valid distinction as natural justice now applies even to the termination of private law employment contracts: see *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372; *Martinborough Harbour Board v Goulden* [1985] 2 NZLR 378.

to work: the vicar of a parochial district, unlike a parish, does not enjoy temporalities or security of tenure.⁹⁶ Where revocation took away a priest's livelihood, Beattie J approved⁹⁷ of the approach of Lord Denning MR in *Edwards*.⁹⁸

I do not think this trade union, or any other trade union, can give itself by its rules an unfettered discretion to expel a man or to withdraw his membership. The reason lies in the man's right to work.

Judicial review of private law organisations is at a lower standard than review of governmental or public law bodies. However, the principles of natural justice are applied with particular vigour if the decision of a private law organisation deprives or restricts the rights of an individual to earn a living.⁹⁹ A public law standard of decision-making is required.¹⁰⁰ Such a power cannot be exercised arbitrarily, capriciously or with unfair discrimination.¹⁰¹

In *McCaw*,¹⁰² the removal of the minister from the roll was devastating to his vocation as spiritual leader in the church. On the temporal plane, it destroyed his capacity to earn his living as a United Church minister. Consequently, this was a "matter of utmost gravity, which required strict adherence to the law of the church". By declaring the conduct of the church unlawful, the Court was not interfering unduly in church matters.

In the Anglican Church, ordained clergy cannot perform services in any church, chapel or place of public worship unless approved and licensed by the Bishop.¹⁰³ The refusal or revocation of a licence may amount to a restraint of trade in the circumstances. In the Salvation Army, termination of Officer status would have a similar effect. Where churches are without disciplinary codes or adequate procedure, judicial review may be useful to ensure a right to be heard before dismissal.

In New Zealand, relief in common law judicial review proceedings is discretionary, and limited to orders of certiorari, prohibition and mandamus. In other jurisdictions, courts have jurisdiction to grant damages for loss suffered. In *McCaw*,¹⁰⁴ the church did not comply with its internal rules in removing the minister from the roll of the Presbytery. Galligan JA in the Ontario Court of Appeal granted a declaration that the removal was ultra vires and stated:¹⁰⁵

96 Above n 5, 712.

97 Above n 5, 715.

98 *Edwards v Society of Graphical and Allied Trades* [1971] Ch 354, 376.

99 *Stininato*, above n 90;

100 Above n 89, 15.

101 Above n 91, 161.

102 Above n 92, 292, 296.

103 *Cripps*, above n 20, 101.

104 Above n 92.

105 Above n 92, 295.

...the Church, through Presbytery and Conference action, has control over a minister's eligibility to earn his living as a minister within the Church. If [this] is unlawfully taken away, it is obvious that the unlawful action will cause pecuniary loss to the minister...a person who wrongfully interferes with the status of a person to earn his living is answerable in damages if financial injury results from that interference.

Damages were granted for financial harm arising from unlawful conduct of the church; however, the analogy to redress for unjustified dismissal was expressly rejected. Such relief would not be available under judicial review proceedings in New Zealand.

Judicial review is limited to procedural fairness. It only provides limited employment security, whereas substantive fairness is required for dismissal of an employee under the ECA. The Employment Tribunal has wide remedial powers, including damages and reinstatement. In judicial review proceedings, a church would simply be required to review the dismissal decision having regard to procedural fairness.

VII CONCLUSION

Consider a hypothetical case before the New Zealand courts of a claim by a minister under employment legislation for unjustified dismissal.

The Employment Tribunal has jurisdiction over all disputes relating to employment contracts.¹⁰⁶ There would be a preliminary question of jurisdiction as to whether there was an employment contract. This is a question of law, which should be referred by the Tribunal to the Employment Court for determination.¹⁰⁷ This should be appealed to the Court of Appeal,¹⁰⁸ advisable given the persuasive weight of contrary House of Lords authority. Although the burden of proof is on the plaintiff to establish jurisdiction, the construction of the contract is a matter of evaluation for the judge, and does not involve burden of proof.¹⁰⁹

There are two stages in determining the nature of the relationship: first, whether there is a contract; and secondly, whether it is a contract of employment. The rigid approach of decisions such as *Santokh*¹¹⁰ and *Alavi*,¹¹¹ where the mere connection of duties to religion sufficed to exclude contractual relations, should not be followed. Dillon LJ in *Parfitt*¹¹² merely stated the weight of authority suggested the relationship is not founded on contract. Whether parties intend to enter into legal relations should depend on a more detailed consideration of the beliefs and practice of the religion

106 ECA, s 79.

107 ECA, ss 93 and 104(1)(c). *Davies* was cited in *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374, 384 as an example of an exceptional relationship, where the construction of the contract was solely a question of law, not mixed law and fact.

108 ECA, s 135.

109 Above n 66, per Cooke P at 689.

110 Above n 17.

111 Above n 18.

112 Above n 11, 753.

concerned. Unless parties clearly intend their relationship to be voluntary and without legal consequences (for example, the Salvation Army), a temporal contractual relationship may exist with the church alongside the spiritual relationship with God. A liberal purposive approach to protective legislation¹¹³ and a more detailed consideration of an individual religion and expectations of parties, could well lead to the finding that there is a contract.

The Employment Court has an equitable and good conscience jurisdiction.¹¹⁴ This suggests the Court will be more amenable to a broad social policy approach, and is not limited to strict legal reasoning. However, a broad and purposive approach to employment has been expressly rejected by the Court of Appeal in *TNT*.¹¹⁵ It indicates courts will be loath to alter established categories. If this approach is taken, the established category should be confined to established and highly organised churches, and require non-traditional or less formal churches to be treated on their merits.

Once a contractual relationship has been established, the contract should be readily classified as a contract of employment. Traditional tests of control and integration and incidents of the relationship are all indicative of an employment relationship. Consequently, the minister would be classed as an employee, and would have the right to pursue a claim of unjustified dismissal against the church before the Employment Tribunal.

In conclusion, there is ample scope on a broad substantive analysis for the relationship between minister and church to be brought within the employment paradigm. Unless parties clearly express an intention in the rules or constitution of the church that the relationship is purely spiritual and voluntary, ministers should be entitled to the protection of statutory minima and have access to dispute resolution forums under the ECA. Where the relationship is purely voluntary, judicial review will still provide a minister with limited (and expensive) redress.

113 As prescribed by s 5(j) of the Acts Interpretation Act 1924.

114 ECA, s 104(3).

115 Above n 66.