HOUSE OF LORDS SESSION 2005–06
[2005] UKHL 73

on appeal from: 2001 SC 757

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Percy (AP) (Appellant)
v.
Church of Scotland Board of National Mission (Respondent) (Scotland)

Appellate Committee

Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Hope of Craighead
Lord Scott of Foscote
Baroness Hale of Richmond

Counsel

Appellants:
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Respondents:
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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. These proceedings concern a sex discrimination claim brought against the Church of Scotland by a former minister of the church, Ms Helen Percy. The question is whether, as a matter of law, such a claim lies on the facts of this case. This raises two main issues. The first is whether Ms Percy's relationship with the church constitutes 'employment' as defined in section 82(1) of the Sex Discrimination Act 1975. The second issue is whether Ms Percy's discrimination claim constitutes a spiritual matter within section 3 of the Church of Scotland Act 1921 and, as such, it is within the exclusive cognisance of the Church of Scotland and its own courts.

2. Ms Percy, a single woman, was ordained a minister of the Church of Scotland on 12 December 1991. In June 1994 she was appointed to the position of associate minister in a Church of Scotland parish in Angus. In June 1997 an allegation of misconduct was made against her. She was said to have had an affair with a married elder in the parish. The presbytery of Angus set up a committee of enquiry to investigate the allegation. Ms Percy was suspended from her duties. The committee found there was a case to answer, and the presbytery began making preparations for holding a trial by libel, that is, trying a formal disciplinary charge against Ms Percy. At a mediation meeting arranged by the church Ms Percy was counselled to resign and demit status as a minister. In December 1997 she demitted status, that is, she resigned as an ordained minister of the church. The presbytery accepted this. Necessarily that brought to an end her appointment as associate minister.

The proceedings

3. Ms Percy initiated these proceedings in an employment tribunal, then known as an industrial tribunal, in February 1998. She named as respondent the Church of Scotland. She alleged unfair dismissal and unlawful sex discrimination. The essence of her discrimination claim was that in similar circumstances the church had not taken similar action against male ministers known to have had extra-marital sexual relationships. Notice of appearance was given by the 'Church of Scotland Board of National Mission'.

4. In December 1998 the employment tribunal dismissed Ms Percy's application for want of jurisdiction. Both complaints comprised 'matters spiritual' and fell within the exclusive jurisdiction of the courts of the Church of Scotland as provided by the Church of Scotland Act 1921. The employment tribunal added that, although there was a contract in existence, having regard to the essentially religious nature of Ms Percy's duties it was not a contract of employment as defined in the unfair dismissal legislation or as defined in section 82(1) of the Sex Discrimination Act 1975.

5. Ms Percy appealed against that decision so far as it related to her claim for sex discrimination. The Employment Appeal Tribunal, presided over by Lord Johnston, dismissed the appeal in March 1999. The appeal tribunal held that the case concerned the disciplining of a minister with regard to her living and that was a matter spiritual governed by article IV in the Schedule to the 1921 Act. On matters spiritual Parliament has allowed the Church of Scotland an exclusive jurisdiction. The appeal tribunal added that 'with some hesitation' it had concluded that the arrangement between Ms Percy and the National Board of Mission was not a contract for work and labour within section 82(1) of the 1975 Act.

6. Ms Percy appealed again. In March 2001 the First Division of the Court of Session, comprising the Lord President, Lord Cameron of Lochbroom and Lord Caplan, dismissed the appeal: 2001 SC 757. The leading judgment was given by the Lord President, Lord Rodger of Earlsferry. He considered first whether Ms Percy was employed by the Board of National Mission in terms of a 'contract personally to execute any work or labour'. After reviewing the authorities the Lord President enunciated a principle that where an appointment was made to a recognised form of ministry within the Church of Scotland, and where

the duties of that ministry were essentially spiritual, it was to be presumed there was no intention that the arrangements made with the minister would give rise to obligations enforceable in the civil law. The presumption was rebuttable. In the present case the Lord President was not persuaded the parties intended to create relations enforceable in the civil courts.

Contracts of service and the clergy

7. The existence of a contract of service between a minister of religion and his church is a question courts have considered on several occasions. In *Re Employment of Church of England Curates* [1912] 2 Ch 563, 568, 569, Parker J held that a curate in the Church of England was not employed under a 'contract of service' within Part I (a) of the First Schedule to the National Insurance Act 1911: 'the position of a curate is the position of a person who holds an ecclesiastical office, and not the position of a person whose rights and duties are defined by contract at all'. Thus Parker J contrasted the position of an office holder and a person whose functions are defined by contract.

8. In *Scottish Insurance Commissioners v Church of Scotland* 1914 SC 16 the Court of Session reached the same conclusion regarding assistants to ministers, not to be confused with associate ministers, of the Church of Scotland. Applying the 'control' test used in identifying a contract of employment, an assistant to a minister was not subject to the control and direction of any particular master. An assistant holds an ecclesiastical office and performs his duties subject to the laws of the church: Lord Kinnear, at page 23. Lord Kinnear added that in any event there was difficulty in identifying exactly who was the assistant's employer. Lord Johnstone noted that employment must be under a contract of service. A contract of service assumes an employer and a servant. It assumes the power of appointment and dismissal in the employer, the right of control over the servant in the employer, and the duty of service to the employer in the servant. There was no one who occupied that position. The contract in which the assistant was engaged was more a contract for services than a contract of service: pages 26-27.

9. The Court of Appeal decision in *President of the Methodist Conference v Parfitt* [1984] ICR 176 concerned an unfair dismissal claim brought by a Methodist minister. The issue was whether the parties had entered into a contract of service. The court held that having regard to all the circumstances it was impossible to conclude that any

contract, let alone a contract of service, came into being between a newly ordained minister and the Methodist Church when the minister was received into full connection.

10. The same question arose for decision by your Lordships' House in *Davies v Presbyterian Church of Wales* [1986] ICR 280. The case concerned an unfair dismissal claim by a minister of the Presbyterian Church of Wales who had been inducted pastor of a united pastorate in Wales. Lord Templeman delivered the leading speech. He held that the claimant could not point to any contract between himself and the church. The book of rules did not contain terms of employment capable of being offered and accepted in the course of a religious ceremony.

11. The same issue arose again in *Diocese of Southwark v Coker* [1998] ICR 140, this time in the context of an unfair dismissal claim by an assistant curate of the Church of England. Again the claimant failed. Mummery LJ analysed the reason underlying the absence of a contract between a church and a minister of religion in these cases as lack of intention to create a contractual relationship. He said that special features surrounding the appointment and removal of a Church of England priest as an assistant curate, and surrounding the source and scope of his duties, preclude the creation of a contract 'unless a clear intention to the contrary is expressed': page 147. Mummery LJ noted that under the employment protection legislation the relevant right of an employee is not to be dismissed by his employer. He then considered and rejected one by one the possible candidates for the role of employer in that case. The Diocese of Southwark was not a legal person with whom a contract could be concluded. The Church Commissioners paid Dr Coker's stipend and the Diocesan Board of Finance made the necessary arrangements for the payment. But neither of them appointed him, removed him or had power to control the performance of his services. It was not contended that either of Dr Coker's vicars had a contract with him. That left only the bishop of the diocese. The bishop had legal responsibility for licensing the appointment of assistant curates and the termination of their appointments. But that relationship was 'governed by the law of the established church, which is part of the public law of England, and not by a negotiated, contractual arrangement': page 148.

A contract for services

12. As will be apparent from this brief summary, there are several different strands in the reasoning of these leading authorities. Some of them call for comment before turning to the facts of the instant case. But it should be noted at the outset that in each of these cases the issue was whether a contract of service existed. In particular, in the unfair dismissal cases a statutory prerequisite is that the claimant is an employee. An employee is an individual who has entered into or works under a contract of employment, that is, a 'contract of service': see now sections 94 and 230 of the Employment Rights Act 1996.

13. That is not the issue in the present case. Ms Percy's claim is based on sex discrimination. The statutory prerequisite for a sex discrimination claim is expressed in wider terms. The Sex Discrimination Act 1975 prohibits discrimination as defined in section 1 'in relation to employment' in the respects set out in section 6. Employment means employment under a contract of service or 'a contract personally to execute any work or labour': section 82(1). Ms Percy accepts she did not enter into a contract of service. That is why she did not pursue her claim for wrongful dismissal by way of appeal from the adverse decision of the industrial tribunal. Her case is that she was employed under a contract personally to execute certain work, that is, a contract for services as distinct from a contract of service. Thus in her case questions about the degree of control exercised over her work by her employer are of little, if any, relevance.

Office holders and employees

14. The first point to note about the authorities arises perhaps most distinctly from the insurance case of *Re Employment of Church of England Curates* [1912] 2 Ch 563. In that case one element in the court's reasoning was that the claimant was appointed to an ecclesiastical office as distinct from entering into a contract of service. This contrast is capable of misleading. It needs to be handled with care in the present context.

15. The distinction between holding an office and being an employee is well established in English law. An important part of the background to this distinction is that in the past an employer could dismiss a servant without notice, leaving the servant with any claim he might have for

damages for breach of contract. Speaking in the 1960s, Lord Reid famously declared that a master could terminate the contract with his servant at any time and for any reason or for none: *Ridge v Baldwin* [1964] AC 40, 65-68. By way of contrast, some office holders could be dismissed only for good cause. Thereby they were insulated against improper pressures. So the focus in master and servant cases was often on the question whether, to adopt the words of Lord Wilberforce, there was an element of public employment or service, or anything in the nature of an office or status capable of protection: *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578, 1595.

16. In 1971 this focus was changed by the Industrial Relations Act 1971. Employees acquired a right not to be dismissed unfairly. In *102 Social Club and Institute Ltd v Bickerton* [1977] ICR 911, 917, Phillips J drew attention to one of the practical consequences of this radical change in the law:

> 'Before 1971 there was perhaps a tendency to find in contracts of employment elements of a public character which would enable the court to extend to the employee the protection flowing from "the right to be heard" enjoyed by the holders of an office. Since the fundamental change of the law brought about by the Industrial Relations Act 1971, which for the first time created the right of an employee not to be unfairly dismissed, the problem has arisen, which previously was not of much importance, of defining the circumstances in which an office-holder was said to be employed. Previously, it was a case of defendants seeking to deny an office-holder a right of complaint on the ground that he was party to a "pure contract of service"; now it is a question of defendants seeking to deny employees the right not to be unfairly dismissed on the ground that in reality they are not employees but "pure office-holders".'

17. So the purpose for which the distinction is relevant has changed. There is a further complication. The distinction between holding an office and being an employee has long suffered from the major weakness that the concept of an 'office' is of uncertain ambit. The criteria to be applied when distinguishing those who hold an office from those who do not are imprecise. In *McMillan v Guest* [1942] AC 561, 566, Lord Wright observed that the word 'office' is of indefinite content. Lord Atkin suggested, at page 564, that '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. As Lord Atkin indicated, this is a generally sufficient statement of the meaning of the word. It is useful as a broad description of the ingredients normally present with any office.

18. I am sure Lord Atkin would have been the first to recognise that a difficulty with this general description is that it is wide enough to embrace cases where the relationship between the parties is essentially contractual. In the *McMillan* case the context was liability to tax under Schedule E in respect of a public 'office'. The issue was whether a taxpayer held a (public) office. So the question whether the taxpayer was also an employee was not directly in point. In the present case the nature of the issue is quite different. The question is not whether Ms Percy held an office. The issue is whether she had entered into a contract under which she agreed to provide defined services. Holding an office, even an ecclesiastical office, and the existence of a contract to provide services are not necessarily mutually exclusive.

19. This requires elaboration. Sometimes the existence of an office is clear. An office may be of ancient common law origin, such as the office of constable. Indeed some offices were regarded by the common law as incorporeal hereditaments, belonging to the current office holder. A benefice in the Church of England is regarded as a freehold office belonging to the incumbent for the time being. Or an office may be created by statute, with attendant statutory functions. A superintendent registrar of births, deaths and marriages is an example: *Miles v Wakefield Metropolitan District Council* [1987] AC 539.

20. Less clear cut are cases where an organisation, ranging from the local golf club to a huge multi-national conglomerate, makes provision in its constitution for particular posts or appointments such as chairman or vice-president. In a broad sense these appointments may well be regarded as 'offices'. But caution needs to be exercised here, lest the use of this term in this context lead to a false dichotomy: a person either holds an office or is an employee. He cannot be both at the same time. This is not so. If 'office' is given a broad meaning, 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. Or like a director of a company, a person may hold an office and concurrently have a service contract. Whether there is a contract in a particular case, and if so what is its nature and what are its terms, depends upon an application of familiar general principles. That the

appointment in question is or may be described as an 'office' is a matter to be taken into account. The weight of this feature will depend upon all the circumstances. But this feature does not of itself pre-empt the answer to the question whether the holder of the 'office' is an employee. This feature does not necessarily preclude the existence of a parallel contract for carrying out the duties of the office even where they are statutory: cf. Lord Oliver of Aylmerton in *Miles v Wakefield Metropolitan District Council* [1987] AC 539, 567.

21. This approach is sound in principle. It has been adopted in practice in reported decisions. For instance, in *Barthope v Exeter Diocesan Board of Finance* [1979] ICR 900, an unfair dismissal case, the Employment Appeal Tribunal considered whether a stipendiary lay reader was employed under a contract of service. Slynn J, giving the judgment of the tribunal, rejected a submission that the claimant was an office holder and, as such, it followed he was not employed under a contract of service. He said, at page 904:

> 'Merely to say that someone holds an office does not seem to us to decide the question which has to be decided under [the Trade Union and Labour Relations Act 1974]. Some office holders may well not be employed under a contract of service. It does not follow that an office holder cannot be employed under a contract of service. The question … is whether the office he holds is one the appointment to which is made by, or is co-existent with, a contract of service. If it is, then he is entitled to the protection of the Act of 1974.'

I agree. Slynn J added, at page 906:

> 'It may be difficult to establish who is the other contracting party, but we are not satisfied that clergy when working within the framework of the Church cannot be engaged under a contract. It may well be that the contract, if it exists, is for services rather than of service.'

22. Another instance, also a decision of the Employment Appeal Tribunal, is *Johnson v Ryan* [2000] ICR 236. There the question was whether a rent officer, appointed pursuant to statutory authority, was an employee within the meaning of the unfair dismissal legislation. The

local authority contended that holding that statutory office was not consistent with a contract of employment. The Employment Appeal Tribunal rejected this submission. Morison J said, at page 243:

> 'The question that the [employment] tribunal should have asked itself was whether [the applicant] was an employee, on the basis that she was also an office holder. It was an error to concentrate solely on whether the applicant was an office holder. On the basis of the facts, she was in the position of being both an office holder and an employee of the local authority.'

Intention to create legal relations

23. A further strand in the authorities, most notably in the judgment of Mummery LJ in *Diocese of Southwark v Coker* [1998] ICR 140, 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 *President of the Methodist Conference v Parfitt* [1984] ICR 176 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 v Presbyterian Church of Wales* [1986] ICR 280. Then the rebuttable presumption enunciated by the Lord President in the present case, following Mummery LJ's statements of principle in *Diocese of Southwark v Coker* [1998] ICR 140, 147, 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.

24. 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.

25. Further, in this regard there seems to be no cogent reason today to draw a distinction between a post whose duties are primarily religious and a post within the church where this is not so. In *President of the Methodist Conference v Parfitt* [1984] ICR 176, 183, Dillon LJ noted that a binding contract of service can be made between a minister and his church. This was echoed by Lord Templeman in your Lordships' House in *Davies v Presbyterian Church of Wales* [1986] ICR 280, 289. Lord Templeman said it is possible for a man to be employed as a servant or as an independent contractor to carry out duties which are exclusively spiritual.

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

The parties to the contract

27. 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.

28. 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 *Diocese of Southwark v Coker* [1998] ICR 140, 148. 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.

Ms Percy's appointment

29. I can now turn to apply these principles to the present case. The detailed chronology of Ms Percy's appointment is set out in the speech of my noble and learned friend Lord Hope of Craighead. In short, in 1993 the presbytery of Angus asked the parish reappraisal committee of the Church of Scotland to approve the appointment of an associate minister for the proposed linked charge of Airlie, Ruthven and Kingoldrum with Glenisla linked with Kilry linked with Lintrathen. The parish reappraisal committee is a committee of the Board of National Mission. Part of the remit of this committee is to deal with proposals for the staffing needs of parishes in respect of ministers. The Board of National Mission was set up by the General Assembly of the Church of Scotland. The constitution of the Board expresses its policy, together with that of its constituent committees, in broad terms: to plan and co-ordinate the church's strategy and provision for fulfilment of its mission as the national church.

30. The parish reappraisal committee approved the appointment sought by the presbytery. The committee's published information sheet, inviting applications for this new post, referred succinctly to the duties of the associate minister. It stated also, by way of 'terms and conditions', that the appointment would be for five years, the salary would be at the level of the minimum stipend, a manse would be provided and travelling expenses met. The associate minister would also serve as chaplain to HM Prison Noranside, but nothing turns on this additional responsibility.

31. Ms Percy responded to the advertisement. She was interviewed and her application was successful. The general secretary of the Board of National Mission, the Reverend Douglas Nicol, invited her to accept the appointment. He sent her a copy of the terms and conditions. These were an amplified form of the terms and conditions already mentioned. They included a term that the associate minister, like any other minister, would be responsible to the presbytery in matters affecting life, doctrine and discipline. Ms Percy wrote to Mr Nicol formally accepting the offer. The presbytery ratified the appointment. In due course she was introduced as associate minister at a service at Kilry church.

32. Subsequently, when the unhappy events leading to Ms Percy's demission occurred, she initially offered her resignation and then changed her mind and asked to withdraw her resignation. On 1 July 1997 Mr Nicol wrote in response, on behalf of the National Board of Mission, to 'your request to withdraw your letter of resignation from employment by the Department of National Mission'. He said that 'we', meaning the Board, agreed 'to reinstate your employment' from 17 June. He added that until further notice 'you are suspended on full pay'. Subsequently the suspension was confirmed by the presbytery.

33. 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 House has been shown and told nothing to displace this prima facie impression. Whether the contract was a contract of service or only a contract for services is not material in this case.

34. 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.

35. Likewise, the fact that, as it seems, power of dismissal rested with the presbytery and not with the Board of National Mission also leads nowhere in this case. Ms Percy's contract with the Board expressly provided for the supervisory and disciplinary role of the presbytery. That was one of the terms of the contract. This allocation of supervisory and disciplinary responsibility to the presbytery in accordance with the constitutional structure of the church does not of itself preclude the Board from being Ms Percy's employer.

36. In my view the industrial tribunal misdirected itself in this case. Having regard to dicta in some of the authorities this is not surprising. The tribunal's view was that a contract existed. The only reason given for holding this did not amount to employment as defined in the 1975 Act was the religious nature of Ms Percy's duties. Accordingly, had the tribunal directed itself correctly on this point it would have concluded that, notwithstanding the religious nature of the services Ms Percy was engaged to provide, the contract was a contract of employment within the definition in section 82(1) of the 1975 Act. I would so hold. In the

circumstances it is not necessary to remit the matter to the employment tribunal for further consideration on this point.

The Church of Scotland Act 1921

37. The second issue raised by the respondent Board is that, even if Ms Percy was employed under a contract personally to execute work within section 82(1) of the 1975 Act, the jurisdiction of the employment tribunal is excluded by the Church of Scotland Act 1921.

38. This statute was concerned to declare the lawfulness of certain articles declaratory of the constitution of the Church of Scotland 'in matters spiritual' prepared by the General Assembly of the church. The title of the Act so stated. Section 1 so declared. Section 3 preserved the jurisdiction of civil courts 'in relation to any matter of a civil nature', subject to the recognition of the matters dealt with in the Declaratory Articles as matters spiritual.

39. The declaratory articles are set out in the Schedule to the Act. The relevant article is article IV:

> 'This Church, as part of the Universal Church wherein the Lord Jesus Christ has appointed a government in the hands of Church office-bearers, receives from Him, its Divine King and Head, and from Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning membership and office in the Church …. Recognition by civil authority of the separate and independent government and jurisdiction of this Church in matters spiritual …does not in any way … give to the civil authority any right of interference with the proceedings or judgments of the Church within the sphere of its spiritual government and jurisdiction.'

40. The theme running through these provisions is that in matters spiritual the Church and its courts have exclusive jurisdiction. The expression 'matters spiritual' is not defined. But, on any ordinary

understanding of this expression, if the church authorities enter into a contract of employment with one of its ministers, the exercise of statutory rights attached to the contract would not be regarded as a spiritual matter. A sex discrimination claim would not be regarded as a spiritual matter even though it is based on the way the church authorities are alleged to have exercised their disciplinary jurisdiction. The reason why a sex discrimination claim would not be so regarded is that the foundation of the claim is a contract which, viewed objectively, the parties intended should create a legally-binding relationship. The rights and obligations created by such a contract are, of their nature, not spiritual matters. They are matters of a civil nature as envisaged by section 3. In respect of such matters the jurisdiction of the civil courts remains untouched.

41. This is not to usurp the Church's exclusive jurisdiction in the exercise of its disciplinary powers, a jurisdiction upheld by the Outer House in *Logan v Presbytery of Dumbarton* 1995 SLT 1228. Rather it is to recognise, to adopt the words of the Lord President in the present case, that by entering into a contract of employment binding under the civil law the parties have deliberately left the sphere of matters spiritual in which the church courts have jurisdiction and have put themselves within the jurisdiction of the civil courts: 2001 SC 757, 769, para 24.

42. For these reasons I would allow this appeal. I would hold that Ms Percy was employed by the Board of National Mission under a contract personally to execute work within the meaning of section 82(1) of the 1975 Act, and that the employment tribunal's jurisdiction was not excluded by the 1921 Act. The proceedings should be remitted to an employment tribunal to proceed with the claim accordingly. In these circumstances it is not necessary to deal with further, wide-ranging arguments advanced on behalf of Ms Percy based on Community law.

LORD HOFFMANN

My Lords,

43. In 1994 six congregations of the Church of Scotland within the presbytery of Angus agreed to unite or be linked for the purpose of worship. It was agreed that the minister of three of these parishes, which were already linked, would become minister of the new charge. But the presbytery considered that the expanded congregation would require the

services of another minister. The Parish Reappraisal Committee approved the appointment of an Associate Minister on the footing that the congregation would provide a manse and £1,000 a year towards his or her salary. It was also expected that the Associate Minister would obtain an appointment as chaplain at HM Prison, Noranside.

44. The Board of National Mission, with representation from the presbytery, is responsible for interviewing and choosing ministers. It advertised the appointment in the newspapers. Applicants were sent a sheet of paper with the following information:

> "Aims and Duties
>
> The Associate Minister will be expected to work in the following areas of service:
>
> (i) Assisting the Minister of the parish
>
> The Associate Minister would be expected to conduct worship every Sunday and working with the Parish Minister would be expected to assist in increasing the involvement and participation of all members in the united charge.
>
> (ii) As Chaplain to HM Prison, Noranside
>
> This is a 9 hour commitment per week to chaplaincy responsibilities within the prison.
>
> Terms and Conditions
>
> The appointment is for a five year period, the salary at the level of the minimum stipend, a manse will be supplied and travelling expenses will be met."

45. The appellant Miss Helen Percy, who had been ordained in 1991, applied for the appointment. Since 1968, women have been eligible for ordination and induction into charges on the same terms as men. On 22 April 1994 the Rev Douglas Nicol, General Secretary of the Board, wrote to Miss Percy inviting her to accept that appointment. He enclosed Terms and Conditions of Appointment. These enlarged slightly on the matters which had been sent to her as an applicant. For example:

> "Duration of appointment. The appointment shall be for a period of five years.

> Salary. Minimum Stipend shall be paid centrally from the resources of the Board of National Mission…A manse will be supplied.
>
> Supervision. The Associate Minister shall, as any other Minister, be responsible to the Presbytery in matters affecting life, doctrine or discipline, and shall have a seat in the Presbytery. The Associate Minister will be expected to take due part in the affairs of the Presbytery in terms of Act II (1970).

46. On 26 April 1994 Miss Percy wrote to the Rev Nicol formally accepting the appointment. On 19 June 1994 she was duly inducted into the charge by the Presbytery at a service held in accordance with the statutes of the Church.

47. In 1997 scandal broke. It was alleged by members of the congregation that Miss Percy had been having an affair with a married Elder in the parish. On 17 June 1997 she offered to resign but withdrew her resignation a week later. The Presbytery decided that there was a case to answer and commenced the procedure for a trial by libel to determine the truth of the allegations. On 1 July 1997 the Rev Nicol wrote to her saying that until further notice she was suspended from duty on full salary. But no trial was held because on 2 December 1997 Miss Percy agreed to demit her charge and her status as a minister.

48. In February 1998 Miss Percy made a complaint to an employment tribunal against "the Church of Scotland", alleging that the Church had discriminated against her on grounds of sex, contrary to section 6 of the Sex Discrimination Act 1975. The basis for this complaint was an allegation that the Church had not taken "similar action" (presumably, initiation of a trial by libel and suspension) against male ministers who had extra-marital sexual relationships.

49. Before the employment tribunal the title of the proceedings was amended to designate the respondent as "Church of Scotland Board of National Mission". The Board objected to the jurisdiction of the tribunal on two main grounds. The first was that Article IV of the Articles Declaratory scheduled to the Church of Scotland Act 1921 gave the church courts exclusive jurisdiction over questions of discipline. I shall return to this point later. The second was that Miss Percy was not an employee. She had no contract of employment. She held the office of a Minister of the Church of Scotland.

50. The tribunal disclaimed jurisdiction on the first ground and said that it did not have to deal with the second. It nevertheless expressed the opinion that there was no contract of employment and that Miss Percy was not an employee as defined in the 1975 Act. He referred in support to the cases of *President of the Methodist Conference v Parfitt* [1984] ICR 176; *Davies v Presbyterian Church of Wales* [1986] ICR 280 and *Diocese of Southwark v Coker* [1998] ICR 140, to which I shall have to return in more detail. The chairman of the tribunal ended this part of his discussion by saying:

> "While there was a contract in existence, I was of the view that the contract was not one of service having regard to the religious nature of the applicant's duties."

This obiter opinion that there was a contract of some unspecified nature is heavily relied upon by counsel for Miss Percy.

51. The Employment Appeal Tribunal upheld the decision of the tribunal on the ground that the church courts had exclusive jurisdiction. It expressed "with some hesitation" the opinion that the tribunal had been right to say that Miss Percy was not in employment within the meaning of the 1975 Act.

52. On further appeal to the First Division, the Lord President (Rodger) dismissed the appeal on the ground that Miss Percy was not in employment: 2001 SC 757. He said, at p 765, that there was a rebuttable presumption that ?

> "where the appointment was being made to a recognised form of ministry within the Church and where the duties of that ministry would be essentially spiritual, there would be no intention that the arrangements made with the minister would give rise to obligations enforceable in the civil law."

53. In the present case, he said, there was nothing to rebut this presumption. The documents setting out terms and conditions and the offer and acceptance of the appointment were no more than might be expected in connection with any appointment to an office, whether

under the Crown or in the church. They did not point to a contract of service or for services.

54. The distinction in law between an employee, who enters into a contract with an employer, and an office-holder, who has no employer but holds his position subject to rules dealing with such matters as his duties, the term of his office, the circumstances in which he may be removed and his entitlement to remuneration, is well established and understood. One of the oldest offices known to the law is that of constable. It is notorious that a constable has no employer. It required special provision in section 17 of the 1975 Act to bring the office of constable within the terms of the Act and to deem the Chief Constable to be his employer. But there are many other examples of offices; public, ecclesiastical and private. In *Dale v Inland Revenue Commissioners* [1954] AC 11, 26 Lord Normand said that a trustee held an office. The term was apt to describe "any position in which services are due by the holder and in which the holder has no employer." A director of a company does not, as such, have a contract with the company and is not an employee. He is an officer of the company. His duties and remuneration as a director are determined by the law and pursuant to the company's constitution. He may in addition have a service contract, but that is a separate relationship. And there are, of course, many offices held under the Crown. They would also not come within the 1975 Act if it were not for section 85(2):

> "Parts II and IV apply to?
>
> (a) service for purposes of a Minister of the Crown or government department, other than service of a person holding a statutory office, or
>
> (b) service on behalf of the Crown for the purpose of a person holding a statutory office or purposes of a statutory body…
>
> as they apply to employment by a private person, and shall so apply as if references to a contract of employment included references to the terms of service."

55. Pursuant to these provisions, in *Department of the Environment v Fox* [1980] 1 All ER 58, Slynn J held that a rent officer, although holding a statutory office and not in employment, came within section 85(2)(b) because she performed services on behalf of the Crown for the purposes of a statutory body, namely a rent assessment committee.

56. The proposition that a minister of a church has no employer but holds an office, subject to rules which impose upon him certain rights and entitle him to a salary, stipend and other benefits, has been stated so often and for so long that I would not have thought that it was open to question. In *Hastie v McMurtrie* (1889) 16 R 715, 732 the Lord President (Inglis) said "Holders of benefices in the church are public officers, and these offices are munera publica." In *Scottish Insurance Commissioners v Church of Scotland* 1914 SC16, 23 Lord Kinnear said:

> "I think that the position of an assistant minister in these Churches is not that of a person who undertakes work defined by contract but of a person who holds an ecclesiastical office, and who performs the duties of that office subject to the laws of the Church to which he belongs and not subject to the control and direction of any particular master."

57. Lord Mackenzie likewise said, at p 27, that an assistant minister was?

> "really the case of one who is discharging the duties of an office, and whatever authority is exercised over him is in virtue of an ecclesiastical jurisdiction, and is not in virtue of rights which arise out of a contract of service."

58. The same conclusion had already been reached by Parker J in respect of curates in the Church of England: *Re National Insurance Act 1911: re Employment of Church of England Curates* [1912] 2 Ch 563. He said (at p. 568):

> "The position of a curate is the position of a person who holds an ecclesiastical office, and not the position of a person whose rights and duties are defined by contract at all. It appears to me that there can be no pretence in reality for arguing that the relation between him and his vicar, or between him and his bishop, or between him and anyone else, is the relation of employer and servant."

59. For this reason, the Court of Appeal in *Diocese of Southwark v Coker* [1998] ICR 140 decided that an assistant curate in the Church of

England could not bring proceedings for unfair dismissal. The same was held of a minister of the Methodist Church in *President of the Methodist Conference v Parfitt* [1984] ICR 176 and a minister of the Presbyterian Church of Wales in *Davies v Presbyterian Church of Wales* [1986] ICR 280.

60. In the face of these authorities, the proposition that an ordinary minister of the Church of Scotland held an office and was not employed by the Board of Mission, the Presbytery, the Kirk-session or anyone else was not contested, at any rate until the argument before your Lordships' House. In the First Division a distinction was sought to be drawn between a minister and an associate minister. But that distinction was, in my opinion, rightly rejected by the Lord President. It is contrary to the decision in *Scottish Insurance Commissioners v Church of Scotland* 1914 SC 16, which dealt with assistant ministers. What makes an associate minister the holder of an office is that she is a minister. As associate minister she may have an ecclesiastical superior (compare what Parker J said of a curate in the *National Insurance Act* case at pp 569-570) but not an employer.

61. I think that difficulty has been caused by some of the reasons given in recent cases for saying that a priest or minister is not an employed person. To say, as Lord Templeman did in *Davies v Presbyterian Church of Wales* [1986] ICR 280, that a priest is "the servant of God" is true for a believer but superfluous metaphor for a lawyer. As Laplace told Napoleon, there is no need for such a hypothesis. It would be no more (or less) illuminating to say that a constable was the servant of the law. The fact is that he holds an office, a well understood legal concept which creates rights and duties but does not involve a contract of employment.

62. Nor do I think it very helpful to say, as Mummery LJ said in *Diocese of Southwark v Coker* [1998] ICR 140, that a priest is not employed because her appointment was not accompanied by an intention to create legal relations. That, together with the proposition that the priest is the servant of God, gives the impression that she operates entirely outside the legal system, looking to God to provide for her. It is not surprising that the appellant's counsel pointed to the prosaic documents issued by the Board of Mission: the advertisement of the appointment, the written terms and conditions, the letter of offer and formal letter of acceptance. In the face of these documents, how can it be said that there was no intention to create legal relations? That submission seems to me unanswerable. There was plainly an intention to

create legal relations. But those legal relations were not a contract of employment. They were an appointment to a well-recognised office, imposing legal duties and conferring legal rights. The nature of an office inevitably means that the procedures for appointment will closely resemble those attending the engagement of an employee. No doubt similar documentation could be found concerning the appointment of, among many others, judges, rent officers and superintendent registrars of births, deaths and marriages (see *Miles v Wakefield Metropolitan District Council* [1987] AC 539.) But that does not mean that their appointment to these offices created contractual relations.

63. I would therefore not accept, at any rate without considerable qualification and explanation, the Lord President's statement that there was a rebuttable presumption that the appointment of a minister was not intended to "give rise to obligations enforceable in the civil law". Subject to any question of jurisdiction under the Church of Scotland Act 1921, appointment to an office does give rise to obligations enforceable in civil law. So the question is not whether the appointed was intended to create legal relations but rather what legal relations it was intended to create. A ministry in the Church of Scotland is either an office recognised by law or it is not. If it is, then appointment to that office does not involve a contract of service or for services. It is, I suppose, possible that in addition to holding her office, a minister might enter into a contract of service with someone: for example, to act as chaplain to a prison or a nobleman. Miss Percy's arrangements with HM Prison, Noranside may have been of such a character. But those arrangements are not relevant to these proceedings. It is concerned with her demission of her charge and her status as minister.

64. Miss Percy, as I have mentioned earlier, relies upon the statement by the Tribunal that there was a contract of some kind. That, she says, is a finding of fact. It did not however form part of the Tribunal's findings of fact, expressly set out at the beginning of their reasons. It was simply an obiter remark and I think it was wrong in law because the evidence showed beyond doubt that Miss Percy was appointed to the office of associate minister.

65. The next question is whether Miss Percy, as she claims, came within the scope of Part II of the 1975 Act. That is concerned with discrimination "in the employment field." "Employment" is defined in section 82(1) as:

> "employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour".

66. Miss Percy plainly does not fall within this definition. She had no relevant contract of service and the work or labour which she executed were not pursuant to any contract. My noble and learned friend Lord Hope of Craighead, whose opinion I have had the advantage of reading in draft, accepts that Miss Percy had no contract of service but says that she had contracted personally to execute work and labour. But that cannot with all respect be right. The words "a contract personally to execute any work or labour" were intended to bring within the definition of employment a contract which is not of service but is for the provision of services. But that was not the case here. If the ministry had not been an office and the relationship between Miss Percy and the body who appointed her had been contractual, it would plainly have been a contract of service. It would have had all the characteristics of a contract of service. The reason why it is not a contract of service is because Miss Percy's duties were not contractual at all. They were the duties of her office.

67. Counsel urged your Lordships to give the language a broad construction. But I do not see how performance of the duties of an office which does not involve any contractual relationship can be said to be employment under a contract. Furthermore, it is clear from provisions such as section 17 (dealing with constables) and section 85(2) (dealing with public offices) that Parliament was well familiar with the distinction between employment as defined in section 82 and holding an office. In the cases of those office-holders intended to be brought within the terms of the Act, special provision was made. There is no such provision for clergymen.

68. Counsel for Miss Percy referred to section 19 of the Act, which in certain circumstances exempts from Part II "employment for the purposes of an organised religion" (subsection (1)) and "an authorisation or qualification… for the purposes of an organised religion" (subsection (2)). These exemptions are framed in terms which would not apply to the present case and counsel submits that Parliament must have inferentially intended that Part II would apply to ministers of religion, whether or not they were employed and whether or not the matter concerned an authorisation or qualification. In my opinion this is giving section 19 a meaning which it cannot possibly bear.

69. Mr Napier QC, on behalf of Miss Percy, called in the aid of European law. He said, correctly, that the 1975 Act was regarded as constituting the United Kingdom's compliance with the Equal Treatment Directive (Council Directive 76/207/EEC). Under the interpretative principle stated in *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135, 4146, para 8, the Scottish court should?

> "having regard to the usual methods of interpretation in its legal system, give precedence to the method which enables it to construe the national provision concerned in a manner consistent with the directive."

70. Mr Napier went on to submit that upon its true construction the Directive required the priests and ministers, though not employed by anyone, to enjoy the protection of the Directive.

71. I would reject this submission for two reasons. First, there is no way consistent with the usual methods of interpretation applied in Scotland by which section 82 can be construed as applying to someone who has not contracted either to serve or provide work and labour. Secondly, I do not think that the Directive requires it.

72. The Directive recites that?

> "community action to achieve the principle of equal treatment for men and women in respect of access to employment and vocational training and promotion and in respect of other working conditions…appears to be necessary; [and] whereas equal treatment for male and female workers constitutes one of the objectives of the community…"

73. The recitals thus regard the Community competence exercised by the Directive as relating to equal treatment for "male and female workers". Article 2 defines the principle of equal treatment ("no discrimination whatsoever on grounds of sex") but without prejudice to the right of Member States to exclude occupational activities where "the sex of the worker constitutes a determining factor." The Directive is thus concerned with equal treatment of "workers", a term of art in

Community law which was defined by the Court of Justice in *Lawrie-Blum v Land Baden-Wurttemberg* [1986] ECR 2121, 2144, at para 17:

> "That concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."

74. In my opinion the office held by Miss Percy did not constitute an employment relationship and she was therefore not a worker. In arguing that the Directive applies to her, Mr Napier relied upon article 5, which requires equal treatment in "working conditions". These, he says, include the operation of procedures for dismissal. But "working conditions" are in my view the conditions under which workers work. The article cannot apply to Miss Percy if she was not a worker.

75. Since the events of this case, the scope of the 1975 Act has been enlarged and it may be that a minister of the church would come within it. By the Treaty of Amsterdam in 1999, article 119 of the Treaty, which required that men and women receive equal pay, was amended and renumbered 141. The new matter included paragraph 3 (emphasis added):

> "The Council…shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment *and occupation*, including the principle of equal pay for equal work or work of equal value."

76. Pursuant to this article, the Equal Treatment Directive was amended by Directive 2002/73/EC. Article 5 was deleted and a new article 3 substituted which referred to access to "employment, self-employment or to occupation" as well as working conditions. The United Kingdom gave effect to the amending Directive by the Employment Equality (Sex Discrimination) Regulations 2005 SI 2005 No. 2467, made under the European Communities Act 1972, which substantially amended the 1975 Act with effect from 1 October 2005. In

particular, it added section 10B which made it unlawful to discriminate in a number of ways against various office holders, including the termination of an appointment: section 10B(3)(c). The office-holders to whom the new section applied were defined by section 10A and included an office in which "persons are appointed to discharge functions personally under the direction of another person". I do not propose to construe the new legislation, which has its difficulties, but it must be arguable that Miss Percy would today be an office-holder within the protection of the Act. But that was not the law at the relevant time.

77. For these reasons I do not think that Miss Percy came within the terms of the 1975 Act. That means that, like the Lord President, I do not have to consider whether the Church of Scotland Act 1921 would have excluded jurisdiction. I would only observe that if the 1975 Act now, upon its true construction, applies to ministers of the church, I would think it unlikely that it was not intended to apply to ministers of the Church of Scotland.

78. I would dismiss the appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

79. This case raises some fundamental issues of law about the governance of the Church of Scotland. So I should like to set the scene for my discussion of them with these words of introduction.

80. Article III of the Articles Declaratory of the Constitution of the Church of Scotland in Matters Spiritual which are set forth in the Schedule to the Church of Scotland Act 1921 ("the 1921 Act") states that, as a national church representative of the Christian Faith of the Scottish people, the Church of Scotland ("the Church") acknowledges its distinctive call and duty to bring the ordinances of religion to the people in every parish of Scotland through a territorial ministry. The ministry is the principal instrument of the Church for discharging that obligation. Responsibility for planning and co-ordinating the Church's strategy and provision for the fulfilment of its mission as the national

church is vested in the Board of National Mission of the Church of Scotland, who are the respondents to this appeal.

81. The sphere of pastoral duty to which a minister is inducted is known as a charge. The induction of a minister to a charge is a function of the presbytery of the geographical area within which the charge is situated. Induction is the process by which a new minister is recognised as a member of the presbytery in his capacity as minister to the charge to which he has been presented or by which he has been elected. The geographical bounds of each presbytery within Scotland are defined by the General Assembly. The General Assembly is the legislature, the highest administrative body and the supreme court of the Church. The presbytery ranks above the kirk session of each parish within its area in the Church's judicial hierarchy. Supervision of the life, doctrine and discipline of all ministers appointed to charges in its area is the responsibility of the presbytery.

82. Discharging its obligation to bring the ordinances of religion to the people of Scotland today through the ministry has become increasingly burdensome. As church attendances fall and the financial resources of the Church become ever more stretched various measures have had to be resorted to in order to reduce costs. Among other measures, congregations are being readjusted or united with a view to reducing the number of charges that need to be filled in the area. This is resorted to most frequently, but by no means exclusively, in rural areas. The process may be assisted by enlarging the ministerial team. This is done by the appointment as of a part-time, non-stipendiary auxiliary minister or by the induction into the charge as an associate of a full-time salaried assistant minister. Assistant ministers are, as regards their lives and doctrine, subject to the supervision and discipline of the presbytery in the same way as any other minister.

83. Nowadays, unlike ministers whose ordination and induction to a charge are exclusively functions of the presbytery, auxiliary ministers and assistant ministers are appointed by the Parish Re-appraisal Committee, one of the constituent committees of the Board of National Mission, on terms and conditions that are defined in writing by the Committee after consultation with the presbytery of the relevant area. To be eligible for appointment as an associate minister persons must, as in the case of those seeking appointment to a charge as its minister, first be licensed by a presbytery. Licences are obtained at the conclusion of their course of theological study, the object being to enable the

presbytery to ensure that the applicant is a fit and proper person to proceed to the ministry.

84. It is important then, in the context of this case, to appreciate that the method of appointing a person who has been licensed to a charge as an associate minister differs from that which applies in the case of the settlement in a parochial charge of a minister. The right to elect and call a minister belongs to the congregation whenever there is a vacancy which the presbytery decides should be filled. If it is not exercised within six months the right to call the minister to the charge passes to the presbytery. The Parish Re-appraisal Committee has to agree that the vacancy should be filled, but it plays no part in that selection process. The role that it plays in the selection and appointment of associate ministers is quite different. These matters are handled centrally by the Committee through the offices of the Board of National Mission in Edinburgh.

85. That, in brief, is the background to the issues raised by this appeal. A more complete description is to be found in the title on Churches and other Religious Bodies in the *Stair Memorial Encyclopaedia*, vol 3 (1994): see especially paras 1506-1573.

86. One other point must be mentioned. In *Scottish Insurance Commissioners v Church of Scotland*, 1914 SC 16, it was held that assistant ministers were not employed persons within the meaning of Part I of the National Insurance Act 1911 because they were persons holding an ecclesiastical office who performed the duties of that office subject to the laws of the church to which they belonged and were not subject to the control and direction of any particular master. So they did not satisfy the conditions of Part I of the First Schedule to the Act as they were not employed under "any contract of service": see section 1(2) and Part I (a) of the First Schedule. Their position was contrasted with that of lay missionaries, who enjoyed no ecclesiastical status, had no relation to the presbytery and were under the control of the minister. As Lord Kinnear explained at pp 23-24:

> "The probationers who are appointed to the position of assistant ministers are students of divinity who have obtained a licence to preach from the presbytery… Now, we are told in this case what the terms of the licence are. The licence bears that the presbytery licences the person named to preach the Gospel of Christ and to exercise his

> gifts as a probationer for the holy ministry. When a person so licensed is appointed to be assistant to a minister, I think that his authority to perform the duties that belong to that office does not arise from any contract between himself and the minister, or himself and the kirk-session or anybody else, but arises from the licence given to him by the presbytery to exercise his gifts. He is, therefore, in my opinion a person who is no sense performing duties fixed and defined by a contract of service."

87. The holding of an office and being an employee are not necessarily inconsistent with each other, as my noble and learned friend Lord Nicholls of Birkenhead has explained. This is because it is possible to conceive of the existence of a contract which sets out the duties that are to be performed by the holder of an office which could lead to the conclusion that the office-holder was an employee. But the reasoning which led to the decision in *Scottish Insurance Commissions v Church of Scotland*, 1914 SC 16, was not called into question during the hearing before your Lordships. The argument proceeded on the basis that the decision in that case was well-founded and that it would have to be distinguished if the appellant was to succeed in her appeal.

The issues

88. As I have just said, Miss O'Brien QC for the appellant did not seek to question Lord Kinnear's analysis. She accepted that the appellant could not claim compensation for unfair dismissal because there was no contract of service or apprenticeship in her case within the meaning of section 230(2) of the Employment Rights Act 1996. Her case however is that the position in discrimination cases is different, and that the First Division of the Court of Session (the Lord President (Rodger), Lord Cameron of Lochbroom and Lord Caplan) were wrong to affirm the decision of the Employment Appeal Tribunal that her claim for unlawful sex discrimination fell outside the jurisdiction given to the employment tribunal by section 63(1) of the Sex Discrimination Act 1975 ("the 1975 Act").

89. Section 63(1) of the 1975 Act confers jurisdiction on an employment tribunal to hear and dispose of a complaint that a person has committed an act of discrimination against the complainant which is unlawful by virtue of Part II of the Act, which deals with discrimination

in the field of employment. Section 82(1) provides that "employment" for the purposes of the Act means "employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour, and related expressions shall be construed accordingly." Miss O'Brien contended that in this case there was a contract between the appellant and the Board of Mission under which she had contracted personally to execute work or labour as an associate minister.

90. She accepted however that there was a further point that had to be addressed, namely whether the jurisdiction of the employment tribunal was excluded by section 3 of the 1921 Act on the ground that the issue which the appellant wished to raise was within the sphere of the Church's spiritual government and jurisdiction in terms of article IV of the Declaratory Articles. Section 3 provides that nothing in that Act shall affect or prejudice the jurisdiction of the civil courts in relation to a matter of a civil nature, subject however to the recognition of the matters dealt with in the Declaratory Articles as matters spiritual.

91. Article IV can be divided for convenience into two parts. The first part contains a declaration of the right of the Church to adjudicate finally in all matters of doctrine, worship, government and discipline. It provides:

> "This Church, as part of the Universal Church wherein the Lord Jesus Christ has appointed a government in the hands of Church office-bearers, receives from Him, its Divine King and Head, and from Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning the membership and office in the Church, the constitution and membership of its Courts, and the mode of election of its office-bearers, and to define the boundaries of the spheres of labour of its ministers and other office-bearers."

The second part contains an assertion that the civil authority has no right of interference in the proceedings and judgments of the Church within the sphere of its spiritual government and jurisdiction. It provides:

> "Recognition by civil authority of the separate and independent government and jurisdiction of this Church in matters spiritual, in whatever manner such recognition be expressed, does not in any way affect the character of this government and jurisdiction as derived from the Divine Head of the Church alone, or give to the civil authority any right of interference with the proceedings or judgments of the Church within the sphere of its spiritual government and jurisdiction."

92. The question that has to be addressed with reference to the 1921 Act therefore is whether the claim which the appellant wishes to present to the employment tribunal is a claim of a civil nature or falls within the sphere of the Church's spiritual government.

The facts

93. It is time now to set out the facts which have given rise to the issues raised by this appeal. They have already been referred to by my noble and learned friend Lord Hoffmann, but I have the misfortune to differ from him as to how the appeal should be disposed of. So I should like to set out the facts that I consider to be relevant in my own way.

94. In 1993 a vacancy arose in the charge of Airlie linked with Kingoldrum linked with Ruthven. A meeting took place between the office-bearers of those congregations and those of the neighbouring charge of Glenisla linked with Kilry linked with Lintrathen. It was proposed that Airlie, Ruthven and Kingoldrum should unite and that the united congregation should be linked to Glenisla linked with Kilry linked with Lintrathen. This proposal was referred to the Presbytery of Angus, which in its turn asked the respondent's Parish Re-appraisal Committee to approve of the appointment of an associate minister to the linked charge to assist the minister of the parish for a five year period. On 21 September 1993 the Parish Re-Appraisal Committee agreed to this appointment. On 9 February 1994 the Committee approved the basis of union of the congregations of Airlie, Ruthven and Kingoldrum and the basis of linking of the charges of Airlie, Ruthven and Kingoldrum and Glenisla linked with Kilry linked with Lintrathen. The basis of linking provided among other things for the appointment of an associate minister to assist the minister and to act as chaplain at HM Prison Noranside, subject to the approval of the Joint Prison Chaplaincy Board.

95. Meantime steps were being put in hand for the appointment of the associate minister. On 11 January 1994 the Rev Douglas Nicol, the Department of Mission's General Secretary, sent drafts of an information sheet and a document setting out the terms and conditions of the appointment to the minister of the parish, the Rev Robert Ramsay, for his approval. He told the minister that he was arranging to have the appointment advertised at a later date in certain newspapers and that the Parish Re-appraisal Committee had decided to adhere to the custom of inviting the parish minister and a representative of the presbytery to serve on the appointments committee. On 18 January 1994 the Rev Ramsay wrote back saying that he had no comments to make on the drafts. On 1 February 1994 the Presbytery of Angus appointed its depute clerk to represent the presbytery on the appointments committee. The advertisements which were placed on 24 February 1994 in the newspapers asked for expressions of interest from ministers and probationers to be addressed to the Department of National Mission's General Secretary.

96. The appellant, who was ordained in 1991 and had already served for three years in the ministry, responded to the advertisement. On 20 April 1994 the Rev Nicol spoke to her on the telephone. He invited her to accept the appointment of associate minister. On 22 April 1994 he wrote to her confirming this invitation and enclosing for her information a copy of the terms and conditions of the appointment. On 26 April 1994 the appellant wrote to the Rev Nicol to give formal acceptance of the offer that he had made to her. On 17 May 1994 the Joint Prison Chaplaincies Board agreed to recommend her appointment to serve as chaplain to the prison at Noranside with effect from 20 June 1994. She was introduced as associate minister at the service of linking of Airlie, Ruthven and Kingoldrum with Glenisla linked with Kilry linked with Lintrathen which was held at Kilry Church on 19 June 1994.

97. Among the terms and conditions of appointment, which stated that the appointment was to be for a period of five years, were the following:

> "3. Salary. Minimum stipend shall be paid centrally from the resources of the Board of National Mission. For the purposes of National Insurance and Retirement Pension and related payments including travelling expenses the appointment shall be considered the equivalent of a charge and these costs shall be paid from the same source. A manse will be supplied.

4. Supervision. The Associate Minister shall, as any other Minister, be responsible to the Presbytery in matters affecting life, doctrine or discipline, and shall have a seat in Presbytery. The Associate Minister will be expected to take due part in the affairs of the Presbytery in terms of Act II (1970). The Presbytery shall appoint a Support Committee to consult with the Parish Minister and Associate regularly, and to assist in the appointment.

…

6. Aims and Duties.

The Associate Minister will be expected to work in the following areas of service:

(i) Assisting the Minister of the parish

The Associate Minister would be expected to conduct worship every Sunday and working with the Parish Minister would be expected to assist in increasing the involvement and participation of all members in the united charge.

(ii) As Chaplain to HM Prison, Noranside

This is a 9 hour commitment per week to chaplaincy responsibilities within the prison.

…

8. Pulpit Supply: The Associate shall not without the prior consent of the Parish Minister agree to conduct public worship outwith the charge. Any fees arising from such occasional supply shall be set against the cost of funding the Associateship and shall not be deemed income for tax purposes.

9. Chaplaincy Payments: Any payments made by virtue of Chaplaincy work shall be set against the cost of funding, excepting payments made during the six weeks of the Associate Minister's holiday entitlement. Such payments shall be made to whoever provides holiday cover for Chaplaincy work for the Associate Minister."

98. In June 1997 an allegation of improper conduct was made against the appellant. The facts have yet to be determined, and I prefer not to say anything about the circumstances that gave rise to it. On 16 June 1997 the appellant wrote to the Rev Nicol at the Department of National Mission asking him to accept her resignation from her associateship. Her resignation was accepted by the Committee on Parish Re-appraisal of the Board of National Mission on 17 June 1997. On 20 June 1997 the Rev Nicol wrote to the appellant on the committee's behalf enclosing an ex gratia payment which had been made to her by the committee for the period after the date of its acceptance of her resignation. On 23 June

1997 the appellant wrote to the Rev Nicol telling him that she had had time to seek legal advice, that her solicitor had withdrawn her resignation form the presbytery and that he had told her to withdraw her resignation from employment by the Department of National Mission.

99. On 1 July 1997 the Rev Nicol replied to the appellant's letter of 23 June 1997 in these terms:

> "I write further to my letter of 25 June 1997 to respond to your request to withdraw your letter of resignation from employment by the Department of National Mission. In doing so I also acknowledge receipt of your letter with the returned cheque and medical line which arrived at our office on 30 June 1997.
>
> While not accepting that there is any legal obligation on the Board to permit you to withdraw your resignation we have noted the advice that you had been given that you had been 'over hasty' in submitting the letter. In the light of that we agree to reinstate your employment from 17 June 1997.
>
> In view of the fact, however, that the Presbytery of Angus has appointed a Committee on Enquiry to investigate claims made against you I have to intimate that from 25 June 1997 until further notice you are suspended from duty on full salary. This means that you cannot perform duties as Associate Minister nor as Chaplain to Noranside Prison."

On 2 December 1997 the Presbytery of Angus accepted an offer by the appellant to demit her status to seek appropriate counselling. It decided to conclude its investigation into the allegations that had been made against her.

100. On 17 February 1998 the appellant applied to an employment tribunal complaining of unfair dismissal and discrimination under the 1975 Act. Her complaint of discrimination was in these terms:

> … the respondents have discriminated against the applicant in terms of section 6 of the Sex Discrimination Act 1975. The allegations made against the applicant are

> similar to allegations of misconduct which have been brought to the attention of the respondent in respect of a number of other employees of theirs. The respondents have not taken similar action against male ministers who are known to have had/are still having extra marital sexual relationships. In the circumstances the applicant has been treated differently from male colleagues on the basis of her gender and has been unlawfully discriminated against. If the applicant had been treated on a similar basis to her male colleagues she would still be in employment with the respondents.

On 16 March 1998 the respondents entered a notice of appearance in response to her complaint in which they submitted that the matters raised by the applicant fell outside the jurisdiction of the civil courts and that the application was incompetent. They also denied that the applicant was an employee of theirs or that there was any intention to enter into such a contract, as her appointment was as the holder of an office and it had been made by the Parish Re-appraisal Committee in pursuance of the Church's exclusive jurisdiction in terms of article IV of the Declaratory Articles.

The starting point

101. Miss O'Brien accepted, as I have said, that the appellant did not have a contract of employment within the meaning of section 230(2) of the Employment rights Act 1996 as her contract was not one of service or apprenticeship. Her argument was that she had a contract of "employment" within the meaning of section 82(1) of the 1975 Act because she had entered into a contract personally with the respondents to execute work and labour in the parish as an associate minister. In the Court of Session the Lord President acknowledged at 2001 SC 757, 763B that there were differences between the offices of a parish minister and an associate minister, perhaps the starkest of which lay in the way in which a minister enters into the two offices. At p 763D-E he said that it should not too readily be assumed that the two positions fell to be treated in the same way for present purposes:

> "More particularly, the fact that a parish minister holds a public office and is not 'employed' by anyone does not necessarily justify the conclusion that an associate minister

> is likewise not 'employed' by the respondents who appoint her."

102. Rejecting the argument that the agreement between the appellant and the respondents comprised a contract of employment for the purposes of the 1975 Act, however, the Lord President said at p 763H that properly construed the agreement was one for the appellant to perform the duties of a minister of the Church along with the parish minister in the new charge. Such duties were, in their very essence, spiritual. It was entirely possible for someone who was employed as a servant or as an independent contractor to carry out spiritual duties. But he would, as he explained at p 765A:

> "start from the presumption – rebuttable, of course – that, where the appointment was being made to a recognised form of ministry within the Church and where the duties of that ministry would be essentially spiritual, there would be no intention that the arrangements made with minister would give rise to obligations enforceable in civil law."

103. It will be appreciated at once that this approach was strongly influenced by the Lord President's appreciation of the context in which the agreement was entered into. As he went on to say at p 765C-H, in another context the formality of the documents might readily support the inference that the appellant sought to draw from them. The procedures of the Church courts were replete with terminology which was familiar to practitioners of Scots law. None the less, despite their appearance, the laws of the Church operated only within the Church and the formality of the documents did not disclose an intention to create relationships under the civil law which would be enforceable in the civil courts. The Lord President also drew upon the way in which similar questions had been dealt with in the English authorities.

104. In *In re National Insurance Act 1911* [1912] 2 Ch 563, 568-569 Parker J said that the position of an assistant curate was not in the position of a person whose rights and duties were defined by contract at all. In *President of the Methodist Conference v Parfitt* [1984] ICR 176, 183 Dillon LJ said that he had no hesitation in concluding that the relationship between a church and a minister of religion was not apt, in the absence of clear indications to the contrary in the document, to be regulated by a contract of service. In *Davies v Presbyterian Church of Wales* [1986] ICR 280, 290C-E Lord Templeman said that duties owed

by the church to the pastor were not contractual. In *Diocese of Southwark v Coker* [1998] ICR 140, 147A-D Mummery LJ summarised the position in this way:

> "Although not explicitly analysed in these terms in the authorities, the simple reason, in my view, for the absence of a contract between the church and a minister of religion is the lack of an intention to create a contractual relationship. If that is so, then it is unnecessary to ask whether the contract is one of service or some other kind of contract… In my judgment, the legal position is as follows.
>
> (1) Not every agreement constitutes a binding contract. Offer, acceptance and consideration must be accompanied by an intention to create a contractual relationship giving rise to legally enforceable obligations.
>
> (2) That intention is to be objectively ascertained. In the case of an ordinary commercial transaction, it will be for the person who contends that there was no contract to establish that the intention to create a contract binding contract has been negatived.
>
> (3) In some cases, however, there is no contract, unless it is positively established by the person contending for a contract that there was an intention to create a binding contractual relationship. This is such a case. Special features of the appointment and the removal of a Church of England priest as an assistant curate and the source and scope of his duties preclude the creation of a contract, unless a clear intention to the contrary is expressed."

105. In *Diocese of Southwark v Coke* the applicant held a stipendiary position as an assistant curate. His complaint was that he had been unfairly dismissed. Mummery LJ said that the legal implications of the appointment of an assistant curate had to be considered in the context of the pre-existing legal framework of a church, an ecclesiastical hierarchy established by law, of spiritual duties defined by public law rather than by public contract and of ecclesiastical courts with jurisdiction over discipline of the clergy. In that context, the law required clear evidence of an intention to create a contractual relationship in addition to the pre-existing framework. The Lord President based himself on these observations when he said at p 765A that he would start with the

presumption – rebuttable, of course – that, where the appointment was to a recognised form of ministry within the Church and where the duties of that ministry were essentially spiritual, there would be no intention that the arrangements with the minister would give rise to obligations enforceable in civil law.

106. This case, however, is not a case about unfair dismissal. It is a case about discrimination on the ground of sex. It is a fundamental rule of sex discrimination law that it is not possible to contract out of it. This rule finds its expression in section 77 of the 1975 Act: see also section 72 of the Race Relations Act 1976. Section 77(1)(c) of the 1975 Act provides that a term of a contract is void where it provides for the doing of an act which would be rendered unlawful by that Act. Section 77(3) states that a term in a contract which purports to exclude or limit any provision of the Act is unenforceable by any person in whose favour the terms would operate apart from that subsection. Section 6(2)(b) of the Act provides that it is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her by dismissing her, or subjecting her to any other detriment. The terms and conditions of the appellant's appointment did not, of course, contain a provision stating in so many words that the provisions of the 1975 Act did not apply to her appointment. But if it had done, the provision would have been unenforceable by the respondents.

107. By invoking the proposition that it must be positively established that there was an intention to create a binding contractual relationship enforceable in civil law – that there is a presumption that there was no such intention, in other words – the respondents are seeking to achieve the same result by another route. Miss O'Brien indicated that she wished to lead evidence from the appellant that it was her intention to enter into such a relationship. But the parties' intention when they entered into the agreement can only be established objectively, as Mummery LJ observed in *Coker* at p 147C – by clear indications of a contrary indication in the document, as Dillon LJ said in *Parfitt* at p 183. There is ample authority in Scots law too for the proposition that, as a general rule, extrinsic evidence of the parties' intention as to whether or not they intended to be bound by obligations which they have entered into in writing is inadmissible: Bell, *Commentaries*, vol I, p 457; *Stewart v Kennedy* (1890) 17 R (HL) 25, per Lord Watson at p 30. The only way the presumption could have been rebutted therefore, according to this argument, would have been by including an express term in the agreement that it was intended to give rise to obligations enforceable in civil law.

108. This would, in effect, be placing the onus on the appellant to ask for the inclusion of a term in the agreement that the provisions about discrimination in the employment field in Part II of the 1975 Act were to apply to it. Since both sides would have to agree to its inclusion, the respondents would be in the position of having a veto in response to her request. This is so contrary to the approach that must be taken to the effect of contracts in the field of employment in discrimination cases that a fresh approach to the problems raised by this case seems to me to be unavoidable. In my opinion it is necessary to treat the question whether this is a case of "employment" within the meaning of section 82(1) of the 1975 Act ("the contract issue") as a separate issue from the question whether, assuming that this is a case of "employment" as so defined, the appellant's complaint is excluded from the jurisdiction of the civil courts because it is a matter spiritual within the meaning of article IV of the Declaratory Articles ("the jurisdiction issue").

The contract issue

109. According to Stair's classification, the law of contract belongs to the law of obligations. An obligation is a legal tie, whereby the debtor may be obliged to pay or perform something by his own consent and engagement: Stair, *Institutions of the Law of Scotland*, I, 1, 22. As Gloag on *Contract* (2nd ed), p 8 puts it, a contract is an agreement constituted by an offer and an acceptance which creates, or is intended to create, a legal obligation between the parties to it. The agreement must, as Gloag accepts later on the same page, be concerned with matters of which the courts will take cognisance. An agreement for purely social purposes is not capable of being enforced by any legal process. As a general rule, where the agreement is with a voluntary association such as a church, some patrimonial interest must be involved before a court will accept that it has jurisdiction to enforce it. Where there is such an interest, the court will provide a legal remedy. Two cases mentioned by Gloag at pp 9-10, illustrate this distinction.

110. In *McMillan v Free Church of Scotland* (1861) 23 D 1314, a clergyman complained of the loss of his benefice. It was held that a patrimonial interest was involved and that the court would protect it. Lord President McNeill said at p 1329 that, while the court might not have the power to restore the pursuer to the ministry, it did not follow that he was unable to prosecute his civil rights and interests, whatever they might be. In *Forbes v Eden* (1865) 4 M 143, affd (1867) 5 M (HL) 36, on the other hand the contrary view was taken where clergyman's complaint was merely of a change in the doctrinal standards of the

church and not that he had been deprived of his status as a minister. But Lord Justice-Clerk Inglis's observation (1865) 4 M at p 157 that the possession of a particular status, meaning by that term the capacity to perform certain functions or to hold certain offices, is a thing which the law recognises as a patrimonial interest, and that no one could be deprived of its possession by the unlawful act of another without having a legal remedy was approved by Lord Chancellor Chelmsford in the House of Lords (1867) 5 M (HL) at p 47.

111. It is worth noting, too, Lord McLaren's observation in *Skerret v Oliver* (1896) 23 R 468, 491, that it is indisputable that the governing bodies of voluntary churches or religious associations are responsible for non-fulfilment of their obligations towards their members in the same degree as the directors of associations constituted on a secular basis are responsible. His use of the word "voluntary" was no doubt chosen to distinguish the situation in that case, which arose from the suspension of the pursuer from his office as a licentiate of the United Presbyterian Church (for having met privately and walked with a member of his congregation who was a young lady), from that of the Church of Scotland, the established church, whose position is regulated by statute. But the point that he was making is relevant to this part of the appellant's argument. In the same case Lord President Robertson at p 490 repeated the point made in the earlier cases that courts of law take no concern with the resolutions of voluntary associations except in so far as they affect civil rights, but that if there is a claim for an invasion of patrimonial rights the court will provide a remedy.

112. I turn then to the agreement which the appellant and the respondents entered into, taking that background as my starting point. That there was an agreement there is no doubt. The respondents made an offer to the appellant of appointment as an associate minister on the terms and conditions which had been sent to her on 22 April 1994, and by her letter of 26 April 1994 she accepted it. There can be no doubt either that a patrimonial interest was involved in this case. The appointment was to a position which would entitle the appellant to a salary, to reimbursement of her travelling expenses and to a manse for her to occupy: see condition 3. She was to be entitled to the status of an associate minister, with a seat on the presbytery: see condition 4. Payments made to her for conducting worship outwith the charge and for her Chaplaincy work were to be set against the cost to the respondents of funding the Associateship: see conditions 8 and 9. I leave aside for the moment all questions as to whether, having regard to its subject matter, the agreement was so exclusively concerned with matters spiritual that it would be contrary to section 3 of the 1921 Act

for the civil courts to seek to exercise jurisdiction over it. Looking for the moment only at the agreement, it seems to me that it has all the ingredients that would be needed for it to be treated by the courts as intended to create legal obligations between the parties and enforceable in the event of a breach of it so as to provide, in the words of Lord Justice-Clerk Inglis in *Forbes v Eden* (1865) 4 M 143, 157, a legal remedy.

113. Then there is the question whether the position which the appellant was to enjoy under it was "employment" within the meaning of section 82(1) of the 1975 Act. This is, of course, a different question than that which has to be answered in unfair dismissal cases. We are not looking to see whether there was a contract of service here, but whether this was a contract under which the appellant undertook personally to execute any work or labour. To fall within this definition there first needs to be a contract of some sort. The agreement must be looked at as a whole and, if the contract is not one of service, the obligation by a contracting party must be an obligation personally to carry out work or labour. And the personal obligation to execute work or labour must be the dominant purpose of the contract: *Mirror Group Newspapers Ltd v Gunning* [1986] 1 WLR 546, paras 13, 36, per Oliver LJ; *Patterson v Legal Services Commission* [2003] EWCA Civ 1558, [2004] ICR 312, para 21, per Clarke LJ; *Mingeley v Pennock and Ivory, t/a Amber Cars* [2004] EWCA Civ 328, [2004] ICR 727.

114. Here too the terms and conditions seem to me to provide what is needed for this definition to be satisfied. Under the heading "Aims and Duties", condition 6 states that areas of service in which the Associate Minister was to be expected to work were assisting the Minister of the parish and as Chaplain to the Prison at Noranside. This was what the appellant was to do in return for the payment of her salary and the other benefits which were to go with her status as an Associate Minister. By accepting this offer she undertook by her contract to work as an Associate Minister on the terms and conditions on which the post had been offered to her. Of course it can be said, as Lord Hoffmann points out, that the duties which she was to perform were the duties of an office. But they were duties which she was bound by her contract with respondents to perform. In order to perform them she required to execute work and labour. The dominant purpose of the contract was to secure her appointment to the office so that she could perform those duties personally in the parish as its Associate Minister. In return the contract gave her a right to enforce the respondents' undertaking to provide her, with her salary and the other benefits.

115. I would hold, in agreement with Lord Nicholls, that these aspects of the agreement were sufficient to bring it within the scope of the protection that the 1975 Act gives to those whose work is in the field of employment. The respondents' response in their letter of 1 July 1997 to the appellant request on 16 June 1997 to withdraw her letter of resignation, when they agreed to reinstate "your employment" is entirely consistent with this analysis.

116. Before I leave this part of the case however I wish to make it clear that in my opinion the contract which the appellant entered into was a contract with the respondents, the Church of Scotland Board of National Mission, and not with the Angus Presbytery. The distinction between these two emanations of the Church is a vitally important one for present purposes. Miss O'Brien said several times that the appellant's complaint was directed at the Church as a whole, not at any particular part of it. That indeed is how the complaint was presented in her application on Form IT1, where the name of the employer as given as "The Church of Scotland". But I do not think that this broad approach can be right.

117. The Church is not a body that has been incorporated by statute. It has, of course, its own distinctive identity and its own Constitution, the lawfulness of which was declared by the 1921 Act. But its status in law is that of a voluntary association, of which its adherents, whether they be elders, communicants or baptised persons, are all members. As such, it does not have the capacity in its own name to own any property, whether heritable or moveable, or to enter into contracts in its own name. It conducts its operations through a variety of other means. Its properties and endowments are vested in the Church of Scotland General Trustees, which were incorporated as a body corporate by the Church of Scotland (General Trustees) Order Confirmation Act 1921. In matters spiritual it handles its affairs in the manner set forth in the Declaratory Articles. But it also has to deal with matters which are within the jurisdiction of the civil courts. How it chooses to do this is, of course, a matter for the Church itself to decide. The practice has always been for the court to give effect to the choice that a voluntary association makes as to the body in whose name it enters into agreements: see *Maclaren, Court of Session Practice*, p 253 and the many authorities there cited. Examples of how the Church of Scotland may sue and be sued are given at p 251. 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.

118. The Church has delegated to the respondents, the Board of National Mission, with their constituent committees the responsibility for planning and co-ordinating 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.

The jurisdiction issue

119. As the Lord President recognised at p 768H, the 1975 Act contains no section which specifically disapplies it in the case of the Church of Scotland, nor is it disapplied in the case of churches generally. On the contrary, section 19(1) provides that nothing in Part II of the Act applies to employment for purposes of an organised religion where the employment is limited to one sex so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of a significant number of its followers. I respectfully agree with his conclusion at p 769I that this provision shows that the relevant provisions of the Act do indeed apply to a religious body such as the Church of Scotland, which has no such limitation on employment to one sex. The Act anent Admission of Women to the Ministry of 22 May 1968 provides that women are eligible for ordination to the ministry on the same terms and conditions as are applicable to men. In any event contracts of employment are entered into on behalf of the Church with many people outside the ministry, in whose case it will without doubt be bound by the 1975 Act. In *Hastie v McMurtrie* (1889) 16 R 715, for example, the pursuer had been appointed a foreign missionary of the Church of Scotland in India. He was held that he had not been appointed to an office in the church but had an ordinary contract of service which was terminable by notice in the usual way.

120. The Lord President said at p 769B-C that in reality the respondents' argument was not so much concerned with the application of the 1975 Act as with the interplay between that Act and the 1921 Act. That too seems to me to be so. It is right too to note his observation at p 769I-770 that, without deciding the point, he saw force in the argument that, if the appellant and the respondents had indeed entered into a contract of employment binding under the civil law, then they would have deliberately left the sphere of matters spiritual in which the

courts of the Church had jurisdiction and would have put themselves within the jurisdiction of the civil courts. This demonstrates, in view of the conclusion that I have already reached on the contract issue, how narrow this issue has now become.

121. The Lord President's observation was, of course, made against the background of the view that he had already expressed at p 765A that there was a presumption that, where the appointment was made to a recognised form of ministry within the Church and where the duties of that ministry were essentially spiritual, there was no intention that the arrangements made with the minister would give rise to obligations enforceable in the civil law. For the reasons already given, however, I do not share the view that there is such a presumption. If anything, I would hold that, especially in the sex discrimination field where contracting out is not permitted, the presumption is the other way. But I would rather not proceed on the basis that the issue can be solved by the application of a presumption which assumes that if the parties had thought about it at the time they were entering into their contract they would have dealt with the issue expressly in their contract. As the Lord President said at p 769B, it is the interplay between the 1975 Act and the 1921 Act that lies at the heart of the question.

122. This brings me to the Equal Treatment Directive (Directive 76/207/EC) of 9 February 1976 which, although it was adopted after the 1975 Act, sets out the Community principle of equal treatment and the way it is to be put into effect in the Member States which the 1975 Act is taken as having implemented. The 1975 Act is, as it was put in *Alabaster v Barclays Bank plc* [2005] ICR 1246, 1259, para 36, Parliament's chosen vehicle for remedying unfairness in terms and conditions of employment on grounds of sex. Article 1.1 of the Directive states:

> "The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and, on the conditions referred to in paragraph 2, social security. This principle is hereinafter referred to as 'the principle of equal treatment'."

Article 5.1 provides:

> "Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex."

Article 6 provides:

> "Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities."

123. In the Report of the Committee on Commissions (Bills and Overtures) to the General Assembly of May 2002, in which the instruction of the General Assembly was sought to transmit the appellant's complaint of discrimination to a Special Commission to determine the issues raised by it, it was stated:

> "The Church being committed to gender equality and the protection of its ministers from discrimination on grounds of sex, the Special Commission should give due consideration to the principles contained in the Sex Discrimination Act 1975, whilst recognising that because of the exclusive jurisdiction of the courts of the Church to legislate and adjudicate finally in all matters of doctrine, worship, government and discipline in the Church, the Act does not form part of the law of the Church."

The Church's position could not have been more bluntly. There is, as one would expect, an unequivocal commitment to the principle of equal treatment. But there is an assertion that the 1975 Act does not form part of the law of the Church, as it claims exclusive jurisdiction in all matters of doctrine, worship, government and – as is especially important in this

case – discipline. It is not difficult to see the potential for conflict between this position and article 6 of the Directive which provides that the Member States shall introduce into their national legal systems such measures as are necessary to enable persons who consider themselves wronged by a failure to comply with the principle to pursue their claims by judicial process.

124. The Directive cannot, of course, be relied on directly against the respondents. It does not have direct effect: *Marshall v Southampton and South-West Hampshire Area Health Authority Case 152/84* [1986] ICR 335, para 48. But the court, when it is called upon to interpret national law, "is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 98 of the Treaty [now Article 249 EC]": *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135, para 8. The important and difficult question is whether section 3 of the 1921 Act together with article IV of the Declaratory Articles must now be read in accordance with the *Marleasing* principle as permitting an employment tribunal to exercise the jurisdiction that has been given to it by section 63(1) of the 1975 Act in the appellant's case. The Lord President said at p 770F-G that he found it unnecessary to determine this question. On my approach to this case there is no escape from it. But it is first necessary, as Mr Napier QC who developed this part of the appellant's case recognised, to address the question whether the Equal Treatment Directive applies to the appellant's complaint.

125. Mr Napier submitted that the principle of equal treatment in terms of article 5 of the Equal Treatment Directive extended to the "working conditions" which are available to men and women generally, and that it was not restricted to any particular kind of contractual relationship. The essence of his argument is to be found in Cox J's observation in *Fletcher v NHS Pensions Agency*, UKEAT/0424/04/RN, para 56 where she said:

> "The Directive, like so many EU instruments, is broadly drafted and is to be broadly interpreted, having regard to its central purpose of ensuring equal treatment for men and women as regards their working conditions."

126. In *Lawrie-Blum v Land Baden-Wurttemberg* [1986] ECR 2121, the court said in para 15 that the criterion for the application of article 48

of the Treaty as to the free movement of persons (now article 39 EC) was the existence of an employment relationship. In para 17 it said that the concept of "worker" for the purposes of that article must be defined in accordance with the objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned, and that the essential feature of an employment relationship was that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. The same approach to the meaning of this word in Community law has been taken in the context of equal pay cases under article 141(1) EC: see *Allonby v Accrington & Rossendale College* (Case C-256/01) [2004] ECR I-00873, para 43.

127. Mr Napier submitted that a broader approach was being taken in cases under the Equal Treatment Directive than had been done in the cases about equal pay. I do not find it difficult to apply that definition of the expression "worker" for the purposes of equal pay to the appellant's case. It is true that she was not being asked to work for or under the direction of the respondents. She was being asked to work for and under the direction of the parish minister, her duties in this regard being essentially spiritual ones. But this was a requirement of her contract with the respondents in return for which she was entitled to receive from them her salary and other benefits. I do accept Mr Napier's point however that the context of the Equal Treatment Directive a broad view is taken and that the issue is not resolved by making distinctions which are purely technical. In *Coote v Granada Hospitality Ltd* (Case C-185/95) [1998] ECR I-5199 the protection of the Directive was extended to a refusal by an employer to provide references after the end of the employment relationship, on the ground that fear that discriminatory measures might be taken against them against which no legal remedy was available would be liable seriously to jeopardise implementation of the aim pursued by the Directive: para 24. In *Wippel v Peek & Cloppenburg GmbH & Co KG* (Case C313/02) [2005] IRLR 211 the Court held that the Directive applied to a worker whose hours of working and the organisation of whose work were dependent upon the quantity of available work and were determined only on a case-by-case basis by agreement between the parties.

128. The most significant feature of the Equal Treatment Directive for present purposes, however, is the absence of any indication that it was the intention to exclude from its protection any class or category of worker by reference to the occupation or profession on which they were engaged. Article 2.2 provides that the Directive is without prejudice to the right of Member States to exclude from its field of application those

occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor. Section 19(2) of the 1975 Act provides an example of a situation in the case of religious bodies where it was appropriate to exclude the application of the Directive. For the rest, the wording of the Directive indicates that the principle of equal treatment with regard to working conditions is of general application, to all men and to all women. The court should not be astute to look for a qualification on this generality which the Directive itself does not provide for. A derogation from article 2.4, for example, must be interpreted strictly: *Kalanke v Freie Hansestadt Bremen* (Case C-450/93) [1995] ECR I-3051, para 21.

129. Why then should a person who is employed to work as an associate minister be excluded from the scope of the Directive? The position which she occupied can of course be said to be that of an ecclesiastical office-holder: *Scottish Insurance Commissioners v Church of Scotland*, 1914 SC 16, per Lord Kinnear at p 23-24; *In re National Insurance Act 1911* [1912] 2 Ch 563, 568, per Parker J. But, as Slynn J said in *Hugh-Jones v St John's College, Cambridge* [1979] ICR 848, 852H, an office holder can agree to execute work or labour. It is not the fact that the appellant held an ecclesiastical office that is determinative for present purposes. It is the fact that she undertook to perform services for another in return for remuneration that brings her within the description of a "worker", with the result that the conditions under which she agreed to do so were "working conditions", that brings her within the scope of the Directive.

130. Given then that she is within its scope, how are the 1975 Act and the 1921 Act to be reconciled? It should be noted that, as Lord Keith of Kinkel pointed out in *Webb v EMO Air Cargo (UK) Ltd* [1993] ICR 175, 186, the *Marleasing* principle applies whether the domestic legislation came after or preceded the Directive: see *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135, para 8. So the fact that the 1921 Act was enacted long before the adoption of the Equal Treatment Directive does not relieve the court from its obligation to construe that Act as far as possible in order to achieve the result pursued by the Directive. It is worth noting too that the 1921 Act was enacted long before it was recognised that women had a fundamental right not to be discriminated against on grounds of sex.

131. Great care must, of course, be taken to respect the Church's right to exclusive jurisdiction in all matters spiritual as defined in article IV of the Declaratory Articles. The principle of subsidiarity which is enshrined in article 5 EC encourages respect for the constitutional and religious traditions of Member States. Religious traditions are part of the cultural heritage of Europe, and it can be taken to be a principle of EC law that action to intrude upon those traditions will only be taken at Community level where the aims to be pursued cannot be achieved at the level of Member States. The principle of equality which lies at the heart of the Equal Treatment Directive is of general application, however. The only concession that it makes to the need to restrict its application is that stated in article 2.2, where the sex of the worker constitutes a determining factor in the occupational activity. The Church of Scotland does not need to invoke that restriction, as the rule since 1968 has been that women are eligible to ordination on the same terms and conditions as are applicable to men.

132. The critical words in article IV are those where it refers to "all matters of doctrine, worship, government and discipline in the Church" and to all questions concerning membership and office in the Church". A claim of unlawful discrimination in the employment field has nothing to do with matters of doctrine, worship or government or with membership in the Church. But it may have something to do with the way that discipline is exercised, and it may also have something to do with the way a person is deprived of an office in the Church. As the Report of the Committee on Commissions (Bills and Overtures) to the General Assembly of May 2002 shows, the Church accepts the principle of equal treatment but claims exclusive jurisdiction to deal with the appellant's claim that she has been wronged by the respondent's failure to apply that principle to her. I do not think that this claim goes far enough. The solution that it offers falls short of what article 6 of the Directive requires – the introduction into the domestic system of such measures as are necessary to enable such persons to pursue their claims by judicial process after possible recourse to other competent authorities.

133. Article IV of the Declaratory Articles is sufficiently broadly worded for it to be possible, without prejudice in any way to its generality, to say on which side of the dividing line between matters civil and matters spiritual this case lies. In my opinion the provision of a remedy for unlawful discrimination is a civil matter, not a spiritual one. So the exercise of the exclusive jurisdiction of the Church in spiritual matters does not extend to a claim by persons "employed" by the respondents within the meaning of section 82(1) of the 1975 Act that

they have been unlawfully discriminated against. In such cases it is for the civil courts whose jurisdiction in civil matters is expressly preserved by section 3 of the 1921 Act, and to whom jurisdiction in these cases has been given by section 63(1) of the 1975 Act, to provide the appropriate remedy.

134. I would hold therefore that it is not open to the Church to claim exclusive jurisdiction under section 3 of the 1921 Act where it is alleged that a person whom the respondents have "employed" as an associate minister has been unlawfully discriminated against in regard to her conditions of working, including those governing her dismissal. The appellant is entitled to the determination of her claim by an employment tribunal in the exercise of the jurisdiction that has been given to it by section 63(1) of the 1975 Act.

Article 234 EC

135. Miss Dunlop QC for the respondents said that the conclusion that the appellant was entitled to the protection of the Equal Treatment Directive would have wide ramifications and she sought a reference to the European Court of Justice under article 234 EC for a preliminary ruling on the question whether she was entitled to that protection. But the fact that your Lordships' decision may have wide ramifications is not the test. We have to consider whether there is a real issue which needs to be determined by that court, having regard to the guidance that it has already given on the application of the Directive. I would hold that the matter at issue in this case is *acte claire* and that a reference would be inappropriate.

Conclusion

136. For these reasons I would hold that the employment tribunal has jurisdiction to determine the appellant's claim that she had been unlawfully discriminated against. I would allow the appeal, recall the interlocutor of the First Division of the Court of Session and remit the appellant's discrimination claim for determination by an employment tribunal under section 63(1) of the Sex Discrimination Act 1975.

LORD SCOTT OF FOSCOTE

My Lords,

137. I have had the advantage of reading in advance the opinions prepared by my noble and learned friends Lord Nicholls of Birkenhead, Lord Hope of Craighead and Baroness Hale of Richmond and agree that, for the reasons they give this appeal should be allowed. I wish, in particular, to express my agreement that the agreement between the appellant and the Church of Scotland Board of National Mission, whereunder in return for salary, accommodation and other benefits the appellant undertook to perform the duties of an associate minister, was an agreement which created legal obligations between the parties. If the Board had withheld or reduced her salary the civil courts would surely have had jurisdiction to entertain an action for payment. If the reason for non-payment had been that she had declined to perform the duties of her office, the civil courts would have had jurisdiction to decide whether that circumstance justified the withholding of salary. The fact that her duties were duties of an office would have made no difference whatsoever (c/f *Miles v Wakefield Metropolitan District Council* [1987] AC 539). It seems to me clear that the agreement was one which created a legally binding relationship between the parties to it.

138. Since the appellant was a person who had been contractually employed by the Board to work as an associate minister I can see no reason why she, or others who have been similarly engaged, should be excluded from the scope of the Equal Treatment Directive or regarded as falling outside the statutory jurisdiction given to the employment tribunal (see section 63(1) of the Sex Discrimination Act 1975). The exclusive jurisdiction reserved to the Church of Scotland by Article IV of the Declaratory Articles applies to "matters of doctrine, worship, government and discipline in the Church". Notwithstanding that the appellant's complaints of unlawful discrimination arise out of the disciplinary proceedings instituted against her by the Presbytery of Angus they do not themselves constitute "matters of … discipline" so as to be within the Church's exclusive jurisdiction. If in their conduct of disciplinary proceedings the Church authorities have committed some form of unlawful discrimination, they cannot, in my opinion, rely on section 3 of the Church of Scotland Act 1921 as immunising them from the jurisdiction of the civil courts and tribunals to deal with such matters or from the remedies that the civil law makes available to the victim.

139. I would, for the reasons given by my noble and learned friends, allow this appeal and make the order Lord Hope has proposed.

BARONESS HALE OF RICHMOND

My Lords,

140. I agree, for essentially the same reasons as those given by my noble and learned friend, Lord Nicholls of Birkenhead, that this appeal should be allowed. The principal question before us is whether the arrangements made between the appellant and the relevant authorities in the Church of Scotland constituted "employment" within the meaning of section 82(1) of the Sex Discrimination Act 1975:

> "'employment' means employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour . . ."

I am in no doubt that those arrangements do fall within that definition.

141. The familiar concepts of the common law are of limited help in construing modern employment legislation. As the learned authors of *Harvey on Industrial Relations and Employment Law* point out, at para A.1.2,

> "At common law the expressions 'employer' and 'employee' have no precise meaning in law apart from their context. The common law understands the expression 'master and servant' and 'employer and employee' is frequently used as a modern translation thereof. . . However, whereas 'master and servant' has a precise connotation, 'employee' may be – and often is – used in a sense wider than that of 'servant', and 'employer', than that of 'master'."

Hence careful attention has to be paid to the definition section of the relevant statute, because these draw some quite deliberate distinctions.

The definition of "employment" with which we are concerned is, of course, wider than that covered by a contract of service between master and servant, because it encompasses "any contract personally to execute any work or labour." So the authorities on what did or did not fall within the common law's understanding of a master-servant relationship will not give us much help. In Harvey, the view is taken, at para A.1.4, that "the distinction is between those who work for themselves and those who work for others, regardless of the nature of the contract under which they are employed."

142. Similarly, the common law's distinction between a servant and an office-holder is not of much help. Before the days of modern employment legislation, it was often in the interests of a person deprived of his occupation to assert that he was an office-holder rather than a servant. A servant could be dismissed at will, provided that the terms of his contract of service were observed. The same applied to some office-holders. But where there was a public element to the office, for example of constable, there was a long line of authority requiring that the office-holder be given a right to be heard before being deprived of his office: see *Ridge v Baldwin* [1964] AC 40, 65, per Lord Reid; *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578, 1595, per Lord Wilberforce. But once the Industrial Relations Act 1971 introduced the right not to be unfairly dismissed, the question arose of when an office-holder might also be said to be employed for that purpose: see *102 Social Club and Institute Ltd v Bickerton* [1977] ICR 911, 918, EAT, per Phillips J. The EAT in that case set out a number of factors to be considered in deciding whether the secretary of a members' club might also be an employee. There are clear cases where, for example, a company director also has a written contract of service, but this may also be implied, for example where the director is required to work full time for the company in return for a salary: see *Trussed Steel Concrete Co Ltd v Green* [1946] Ch 115, Cohen J.

143. There is powerful authority for the proposition that, even before the new sections 10A and 10B introduced by the Employment Equality (Sex Discrimination) Regulations 2005, SI 2005/2467, an office-holder might fall within the wider definition of "employment" for the purposes of the Sex Discrimination Act 1975. In *Perceval-Price v Department of Economic Development* [2000] IRLR 380. the Northern Ireland Court of Appeal was concerned with whether a full-time chairman of industrial tribunals, a full time chairman of social security appeal tribunals, and a social security commissioner were covered by the Equal Pay Act (Northern Ireland) 1970 or the Sex Discrimination (Northern Ireland) Order 1976. It was common ground, uncontroversial one might think,

that they were statutory office-holders. Section 1(9) of the 1970 Act dealt with people in the public service who at common law were not regarded as employed under a contract of service:

> "This section shall apply to –
>
> (a) service for the purposes of a Minister of the Crown or government department, other than service of a person holding a statutory office, or
>
> (b) service on behalf of the Crown for purposes of a person holding a statutory office or purposes of a statutory body
>
> as it applies to employment by a private person, and shall so apply as if references to a contract of employment included references to the terms of service."

The identical provision appears in section 1(8) of the Equal Pay Act 1970 and in section 85(2) of the Sex Discrimination Act 1975 dealing with the application of that Act to the Crown. Thus while civil servants were included, statutory office-holders were expressly excluded. However, the Northern Ireland Court of Appeal held that that express exclusion had to be disregarded, because it was inconsistent with the terms of the 1976 Equal Treatment Directive (Directive 76/207/EC). It was also common ground that the Directive had direct effect and that the Departments responsible were emanations of the State. Hence the women concerned had directly enforceable claims if the Directive had been infringed.

144. There was no appeal to this House against that decision. There were two necessary ingredients in the decision which are directly relevant to the case before us. The first was that, without the express exclusion, these office-holders would have been covered by the definition of "employed" in section 1(7) of the 1970 Act:

> " … 'employed' means employed under a contract of service or apprenticeship or a contract personally to execute any work or labour."

This, of course, is the equivalent of the definition of "employment" in the 1975 Act. Thus the Court regarded these judicial officer-holders as employed under a "contract personally to execute any work or labour".

145. The second necessary ingredient was that these officers were "workers" and thus entitled to the same working conditions as men under Article 5 of the 1976 Directive. The Court applied the test in *Lawrie-Blum v Land Baden-Wurttemberg* [1986] ECR 2121, para 17:

> "The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration."

The Lord Chief Justice, Sir Robert Carswell, giving the judgment of the Court, pointed out that the object of Article 119 of the Treaty of Rome and the Equal Pay and Equal Treatment Directives was to give protection against inequality and discrimination to those who might be vulnerable to exploitation. The concept of a worker should be construed purposively by reference to this objective. The Court went on:

> "All judges, at whatever level, share certain common characteristics. They all must enjoy independence of decision without direction from any source, which the respondents quite rightly defended as an essential part of their work. They all need some organisation of their sittings, whether it be prescribed by the president of the industrial tribunals or the Court Service, or more loosely arranged in collegiate fashion between the judges of a particular court. They are all expected to work during defined times and periods, whether they be rigidly laid down or managed by the judges themselves with a greater degree of flexibility. They are not free agents to work as and when they choose, as are self-employed persons. Their office accordingly partakes of some of the characteristics of employment . . . "

146. I have quoted those words at length because they illustrate how the essential distinction is, as Harvey says, between the employed and the self-employed. The fact that the worker has very considerable freedom and independence in how she performs the duties of her office does not take her outside the definition. Judges are servants of the law, in the sense that the law governs all that they do and decide, just as clergy are servants of God, in the sense that God's word, as interpreted in the doctrines of their faith, governs all that they practise, preach and teach. This does not mean that they cannot be "workers" or in the

"employment" of those who decide how their Ministry should be put to the service of the Church.

147. The *Perceval-Price* case was not concerned with non-statutory office-holders. But it would be inconsistent with its reasoning if non-statutory office-holders were in a worse position, simply because they are said to hold an "office", when otherwise their work fell within the definition in the Act or under the Directive. As my noble and learned friend, Lord Hope of Craighead, has said, section 77 of the Sex Discrimination Act 1975 prohibits contracting-out. For an employer simply to label a post as an "office" cannot be enough to take it out of the Act.

148. In any event, Miss Percy was clearly not a statutory office-holder and I also doubt whether her particular post fell within the classic common law definition of an office, for example in *Great Western Railway Co v Bater* [1920] 3 KB 266, 274:

> "a subsisting, permanent, substantive position, which had an existence independently of the person who filled it, and which went on and was filled in succession by successive holders."

Nor, as Harvey puts it at para A.1.168, was she a person whose "rights and duties are defined by the office she holds" rather than by any contract. Her rights and duties were defined by the terms she had agreed with the Parish Reappraisal Committee of the Board of National Mission. As Lord Nicholls and Lord Hope have demonstrated, these bore all the hallmarks of a contract. For the reasons they have given, I too find it impossible to conclude that there was no intent to enter into legal relations. With the greatest respect to the Court of Appeal in *Diocese of Southwark v Coker* [1998] ICR 140 and to the Lord President in this case, I have difficulty in understanding why there should be any presumption against such an intention. Staughton LJ accepted in *Coker*, at p 150, that there might a "subsidiary contract, as to a pension, or the occupation of a house". Miss Percy would clearly have been able to bring legal proceedings had her salary not been duly paid or had she been wrongly deprived of the occupation of her manse. The consideration for these benefits must have been the performance of the duties she had undertaken. In this day and age, the notion that her "salary", modest though it was, was simply to meet her basic subsistence needs while she devoted herself to her religious and pastoral

duties is unrealistic. As the *Perceval-Price* case demonstrates, the fact that she had considerable discretion and independence in the way in which she carried out those duties did not mean that she was not a "worker" or a person who had contracted "personally to execute work or labour". That was exactly what she was.

149. I would have reached that conclusion on the wording of the 1975 Act alone without resort to the 1976 Equal Treatment Directive. However, the Directive reinforces the conclusion. The Court in *Perceval-Price* felt unable to employ the interpretative technique required by *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135 because of the express exclusion of statutory office-holders. Removing that exclusion would be amendment, not interpretation. The Court had therefore to rely upon the duty to disapply a provision in order to safeguard enforceable community rights: see *Marshall v Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723. That technique would not be available to us, because the Church of Scotland, by common consent, is not an emanation of the State. But the interpretation problem does not arise, because there is no express exclusion. There is simply the definition which can readily be read so as to cover this case.

150. The fact that there was an express exclusion, the effect of which has now been limited by the provisions relating to public office-holders in the 2005 Regulations, merely reinforces my view that there was nothing in the earlier version of the Act to exclude this case. This view is further reinforced by the specific and limited exception (inapplicable in this case) contained in section 19 of the 1975 Act of employment for the purposes of an organised religion. Although this obviously includes people other than Ministers of that religion, one cannot close one's eyes completely to the heading of section 19, which clearly indicates that, should they otherwise qualify, Ministers of religion would also be included. I note with deep sadness that when my own Church caught up with the Church of Scotland in admitting women to the priesthood, and was thus no longer exempted by section 19, they were nonetheless expressly permitted to continue to discriminate against women in various respects by the (now-repealed) Priests (Ordination of Women) Measure 1993, s 6. The fact that statutory exemption was then deemed necessary further supports the conclusion that otherwise such discrimination would have been unlawful under the 1975 Act.

151. We were taken to three cases where clergymen had complained of unfair dismissal: *President of the Methodist Conference v Parfitt*

[1984] ICR 176, CA, *Davies v Presbyterian Church of Wales* [1986] ICR 280, HL, and *Diocese of Southwark v Coker* [1998] ICR 140, CA. The definition of "employee" for the purposes of the law of unfair dismissal is different from, and narrower than, the definition of "employment" in the Sex Discrimination Act. It is confined to "an individual who has entered into or works under… a contract of employment"; and a "contract of employment" means "a contract of service or apprenticeship": see Employment Rights Act 1996, section 230(1) and (2). That in itself is sufficient to distinguish those authorities. In any event, all of these cases depend upon their own particular facts. But insofar as those authorities may be explained by a presumed lack of intent to create legal relations between the clergy and their Church, I cannot accept that there is any general presumption to that effect. The nature of many professionals' duties these days is such that they must serve higher principles and values than those determined by their employers. But usually there is no conflict between them, because their employers have engaged them in order that they should serve those very principles and values. I find it difficult to discern any difference in principle between the duties of the clergy appointed to minister to our spiritual needs, of the doctors appointed to minister to our bodily needs, and of the judges appointed to administer the law, in this respect.

152. Nor would I see the requirement of the civil law that the Church of Scotland refrain from discriminating between its male and female clergy in the matters covered by the 1975 Act as trespassing upon the spiritual matters which remain the exclusive domain of the Church by virtue of section 3 of the Church of Scotland Act 1921. The Church is free to decide what its members should believe, how they should manifest their belief in worship and in teaching, how it should organise its internal government, and the qualifications for membership and office. But the processes whereby they make decisions about membership and office may be subject to the ordinary laws of the land. It will all depend upon what that law says and means. It would be surprising indeed if Parliament, when enacting a law in 1975 to combat defined acts of discrimination in defined areas of activity which were, as already seen, capable of encompassing employment for the purposes of an organised religion, including the established Church, contemplated that, alone of all such organised religions, the Church of Scotland should be immune. This would be even more surprising given that, at the time the 1975 Act was passed, the Church of Scotland had already decided to admit women to the Ministry on the same terms and conditions as men. The Church has, quite rightly, disavowed any desire or intention to discriminate in any way which would fall foul of the 1975 Act and the 1976 Directive. No doubt it wholeheartedly accepts the fundamental values of equal dignity and equal respect for all its members and clergy,

irrespective of their sex, which the Act and the Directive represent. It now accepts that it does not provide internal remedies which meet the requirements of the Act and the Directive. The civil law must therefore do so.

153. I would, however, express the fervent hope that the parties might be enabled to reach some settlement acceptable to them both. I have no means of knowing whether, after all that has happened, such an agreement would be possible, even with the help of a skilled and independent mediator. In hoping that it might be, I have in mind that mediation is a process to which each party comes on equal terms, in which the mediator is able to detect and redress any imbalance in their bargaining powers, and through which they are assisted and enabled to reach a real agreement with which each is comfortable. A process in which one party is able unilaterally to change the terms in which any agreement is reported to the media, in a case which has attracted a good deal of media attention, would obviously not fulfil those criteria.

154. For these reasons, and in agreement with the majority of your lordships, I too would allow this appeal and remit the case for consideration by the employment tribunal.