



## EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Lynn Fowkes  
**Respondent:** The East Midlands Synod of the United Reform Church  
**Heard at:** Nottingham Employment Tribunal  
**On:** 22 September 2022  
**Before:** Employment Judge Rachel Broughton sitting alone.

### Representatives

**Claimant:** In Person  
**Respondent:** Mr Morgan KC – counsel

## RESERVED JUDGMENT ON PRELIMINARY ISSUES WITH REASONS

The judgment of the Tribunal is that:

1. The Claimant **was not** an employee of the Respondent pursuant to section 230 Employment Rights Act 2010. The claim of unfair dismissal therefore has no reasonable prospect of success and is struck out under Rule 37.
2. The Claimant **was** an employee of the Respondent pursuant to section 83 Equality Act 2010 from, at the latest 29 June 2002 until 31 July 2021. The Tribunal therefore has jurisdiction to determine the claim of age discrimination and this claim will proceed to a hearing.
3. The application for a deposit order under Rule 39 is refused.

## THE REASONS

### Background

1. The Claimant was a Minister of Word and Sacrament (Minister) of the United Reformed Church (**URC**) and complains that she was unfairly dismissed and subject to age discrimination. Her employment status is a matter of dispute between the parties.
2. The claim form was presented to the Tribunal on 24 December 2021 following a period of early conciliation that started on 17 October 2021 and ended on 27 November 2021.

3. In essence the claimant complains of a decision by the Respondent not to extend her ministry beyond the age of 68 therefore forcing her to retire at the age of 68.

### **Preliminary hearing**

4. There was an Open Preliminary Hearing before Employment Judge Ayre on 18 May 2022 where it was clarified that the age discrimination claim was a complaint of direct age discrimination. Her comparators were identified as Reverend E Kemp who was given a six month extension of her ministry when she reached the age of 68 and Reverend D Hopkins who was aged over 68 and given a further extension of his ministry. Employment Judge Ayre had noted the difficulty of succeeding in a claim of direct discrimination where her chosen comparators are of the same or very similar age to her.
5. Employment Judge Ayre listed the case for today's Preliminary Hearing to determine the following issues:
  - 5.1 Decide who the correct respondent is to this claim. The Respondent's position being that the correct respondent is the East Midlands Synod. The Claimant's position is that it is the East Midlands United Reform Church.
  - 5.2 Decide whether the Claimant was an employee of the correct respondent within the meaning of section 230 of the ERA and if so, when did her employment with the respondent start and finish.
  - 5.3 Decide whether the Claimant was an employee of the correct respondent within the meaning of section 83 of the EqA 2010.
  - 5.4 Consider any application for a Deposit Order made.
  - 5.5 Make Case Management Orders to prepare the case for final hearing.
  - 5.6 Discuss the length and dates for the final hearing, which remains listed at present for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> October 2023.

### **The Proper Respondent to the claim**

6. The claim was presented against East Midlands United Reformed Church. The Respondent contends that the correct respondent is the decision making body exercising the ministry in St Stephen's, which is The East Midlands Synod and that decisions about the viability and sustainability of Pastorate structures are matters determined within the local rather than national structures and bodies. The URC only issuing the policies and procedures to assist the local pastorates when making local decisions.
7. At the outset of today's hearing, I discussed the issues with the parties. On the issue of who the correct respondent is, the Respondent confirmed its position that the correct respondent is East Midlands Synod. The Claimant expressed the view that it was the East Midlands Synod of the URC. The Respondent was prepared to accept the Claimant's suggestion regarding the correct name of the Respondent. The parties informed me that they were in agreement regarding the correct respondent, and thus this was no longer an issue to be determined by this tribunal.
8. The name of the Respondent was amended under rule 29 by agreement. It is important to record that the Claimant during the cross examination of Reverend Dr Bradbury, appeared however to be putting to him that the East Midlands Synod of the URC (Respondent) had signed a document (see below) called a Settlement

Agreement which set out key terms including the stipend to be paid and benefits to be paid to the Claimant, not as the Claimant's employer but only with respect to confirming Concurrence and that the Settlement Agreement was between the Claimant and the local church (St Stephens). The implication of that being that it was St Stephens and not the Respondent who she appeared to be asserting must be the putative employer, or it was St Stephens and the Respondent in partnership. The Respondent objected on the basis that Counsel had not pursued this issue in the cross examination of the Claimant because the Claimant had confirmed that it was no longer disputed who the correct respondent to the claim was. I asked the Claimant whether she wanted to revisit the issue of who the correct putative employer was however she informed me that she did not want to do so and that it appears that the "*East Midlands Synod moved to acting as the employer*". I was concerned that the Claimant may need time to reflect before we continued and thus, we had a short adjournment for the Claimant to consider her position further before we proceeded.

9. Following the adjournment, the Claimant did not want to revisit the issue of who the correct respondent is and in her submissions stated that she was "*very happy*" to agree it was the Respondent "*because this is where the decision making lies*".

### **Evidence**

10. There is an agreed bundle of 338 pages. All references to page numbers are to that bundle.
11. The Claimant had prepared a witness statement, gave a solemn Affirmation and was cross examined. She had also produced a statement from Mr Tiplady, Church Secretary of St Stephen's URC. Mr Tiplady did not attend the hearing. The Respondent did not object to his statement being admitted into evidence however, the Claimant was made aware that less weight would be attached to his evidence because Mr Tiplady was not attending to give evidence under oath and to allow the Respondent to challenge his evidence under cross examination.
12. The Respondent produced witness statements for Dr John Bradbury, an ordained Minister of Word and Sacraments and General Secretary of the URC and Reverend Camilla Veitch, an ordained stipendiary Minister of Word and Sacraments of the URC and Synod Clerk of the URC East Midlands Synod.. Those witnesses gave evidence under Oath and were cross examined by the Claimant.
13. Counsel for the Respondent and the Claimant made Submissions.

### **Findings of fact**

14. All findings of fact are based on a balance of probabilities. All the evidence has been considered however, this Judgment only deals with the evidence which the Tribunal considers relevant to the determination of the issues.

### **URC**

15. The URC was formed as a result of the passing of uniting declarations by the Presbyterian Church of England and the majority of Churches in the Congregational Church in England and Wales, adopting the Scheme of Union. The URC later unified with the Reformed Association of the Churches of Christ in 1981 and the Congregational Union of Scotland in 2000.

### **Governance Structure**

16. The URC is a faith community, organised in accordance with its foundation and constitutional documents known collectively as the Scheme of Union. It is a non-established Christian denomination incorporated pursuant to statute and governed by its own written constitutions and policy.
17. The Scheme of Union was approved by the General Assemblies of the Congregation and Presbyterian Churches on 11 May 1971 and resulted in the formation of the URC.
18. The Scheme of Union includes;
  - 18.1 The Basis of Union (p.60 – 80).
  - 18.2 The Structure (p.81- 99).
  - 18.3 The Rules of Procedure.
19. The Basis of Union provides that the URC testifies to its faith and orders its life according to the Basis of Union (**Basis**). The Basis describes the purposes of the Church, its faith and ministry. The Basis deals with the standing and rights of a Minister.

### **The Structure of the URC**

20. The Claimant confirmed under cross examination that she agreed with the evidence provided by the Respondent's witnesses; Reverend Dr John Bradbury and Reverend Camilla Veitch, about the constitutional position of the URC and how it works.
21. The Councils of the United Reformed Church are: (a) the Church Meeting and the Elders' meeting of each Local Church; (b) the Council of each District to be known as a District Council and of each area of ecumenical cooperation to be known as an area meeting; (c) the Respondent of Province or nation to be known as a Provincial or National Respondent; and (d) the General Assembly of the United Reformed Church (p.82)
22. Local churches have an Elders' Meeting, where the Ministers and Elders share pastoral and spiritual oversight and leadership.
23. There are also Church Meetings, for members to discuss the life and work of the local church.
24. Together the Elders meetings and local church exercise the governance functions of the local churches.
25. The URC has 13 Synods (its Council or Governing Body) which provide oversight over the local churches and Ministers (p.87 and 88) and is led by a Synod Moderator.
26. The General Assembly is the ultimate decision-making body. It meets annually where it makes decisions about the life and work of the URC. The General Assembly has a number of committees
27. St Stephens is part of a wider pastorate that includes 5 churches.

### **The Role of a Minister of Word and Sacrament**

28. If a pastorate wants a Minister, a Pastorate Profile summary is completed. The Claimant gave evidence in chief that Ministers do not have job descriptions. The Ministers are informed about any particular missionary projects that are ongoing or the aspirations of the pastorate within the Pastorate Profile document (**Profile**).
29. I accept the Claimant's undisputed evidence that a summary of the Profile is sometimes produced by the Respondent to give 'candidates' an idea of the vacancy. A fuller Profile is then prepared by the local church and this is provided to those interested in the Ministry at that local church. The Respondent decides on the 'scoping' of the Ministry which is also set out in the Profile.
30. The pastorate is wider than the immediate congregation of the local church, it is the local unity and whatever 'gathering' that may be.
31. The Profile sets out the amount of time the Respondent assesses will be required to attend to the needs of the Pastorate. The extent of the ministry is called 'scoping' and is described in percentage terms. It is not in dispute that the Claimant had no input into the Profile. The Profile for St Stephens was created by the Respondent and St Stephens in what is described in the document as a;  
*"newly formed partnership between Church and [Respondent]"* (p. 192).
32. The Profile for St Stephen's in 2009 (p.192) sets out the priorities of that pastorate which is;  
*"To provide spiritual guidance and pastoral care for the membership of the church whilst encouraging growth in membership"*.
33. It also sets out the 'scoping' ; *"...strong support of the Elders ( 55%), chaplaincy to the Leicester Universities and sixth form colleges (20%) ...and Mission Enabling with other colleagues within the Synod (25%)..."*
34. The Claimant described some confusion about exactly what was involved in the 20% Leicester University and 6<sup>th</sup> form College services, however this was resolved with the help of the Synod Moderator.
35. The Profile also includes a "Personal Specification for the Prospective Minister" and provides that it includes:  
*" One who will through thoughtful prayer and teaching, bring breadth and depth to our worship , our understanding of the gospel and our mission in the world; who will actively support our mission and is able to respond to people's needs and concerns."*
36. The Person Specification and the Profile set out in broad and spiritual terms, what is required and hoped to be achieved for the Pastorate. The final version of the Profile however was not included within the bundle and neither party gave evidence about what this additionally included. Counsel for the Respondent submitted that whether the Profile was in summary or detailed, how it was delivered remained in the judgment of the Officer Holder/ Minister.
37. The header to the summary Profile states;  
*"This Pastorate has been given permission to seek a Minister who is eligible to be called to service within the united Reformed Church . Initial Enquires for up to date information on the possibility of being introduced to the Pastorate should be directed to the Moderator of the [Respondent] in which you currently reside."* (p. 192).

38. A person interested in being introduced to a Pastorate must therefore direct their enquiries to the Moderator of the Respondent.
39. It is not disputed that the Respondent deals with the enquiries about vacancies and the Plan for Partnership provides that it is the Respondent who then deploys Ministers to where they are needed.

#### **Control : How the work of the Ministry is performed**

40. How to deliver what the local church want to achieve, as set out in the summary and full Profile, is the Claimant accepted, down to the Minister in consultation with the Elders and the local church.
41. It is common between the parties that a Minister has a fair degree of autonomy in how to achieve the stated aspirations/aims of the Pastorate.
42. The Elders, the Claimant accepted were not her managers although they act as a management group in certain circumstances.
43. The Claimant described that in terms of how she organised her activities and that "a lot of it" was set out in the Terms of Settlement. She carried on the same pattern of work/services of the Chaplaincy which was in place before she took on the Ministry of St Stephens and which had 'evolved over the years'. As the Claimant described it, she: *"got on with doing the job – the Elders and the Church knew what I was doing and were involved – I was not working in isolation in any way."*
44. The undisputed evidence of Reverend Vietch is that the Claimant as a Minister of St Stephens was; a member of Respondent, under the oversight of the Respondent, presided at meetings of St Stephens and was a member of Elders meetings.

#### **The Claim Form Documents**

45. The Claimant within her claim form (which she had completed herself after taking legal advice on her claim), states;  
  
*"Although not an employee, I believe I have been treated unfairly as an employee by the East Midlands Synod and being forced to retire because I reached the age of 68".(p.10)*
46. The Claimant's position as to her status, is therefore on the face of it contradictory .In cross examination she accepted that as a Minister she was not an employee and referred to her role as office holder when in pastoral charge, however, in her claim form refers to understanding her position to be that of a service provider but believes that the Respondent treated her as an employee (p.17).
47. The Claimant was also taken to a statement accompanying her ET1 in which she describes her understanding as follows (p.17);  
  
*"As a Minister and member of the Clergy, I am an Office Holder not an employee. I have been given to understand by a legal professional that my status for employment purposes is as a Service Provider. However, I believe that I have been considered an employee by the East Midland Synod."*
48. The Claimant went on to explain that she felt that the way the Respondent (or those acting as the Respondent), considered her, was as their employee. The Claimant appeared to be complaining that the role of Minister should not attract employment status but that the actions of the Respondent were more consistent with an employment relationship in that the Respondent was not letting her exercise the

freedom of an office holder. She described it thus: *“the entitlement of a member of clergy holding office is specifically that we always look to answer the question: “where is God in this ?” – it appears the balance has gone over towards a management approach and certainly further across the line than the usual expectation that a Minister may have of how the Respondent or members of it, would look to how they would actually approach or deal with a Minister”.*

49. The Claimant admitted to being unclear about her status.

### **The Process of Appointment of a Minister**

50. The Local Church Meeting receives the name of a potential Minister through the national meeting of the Respondent Moderators. The Minister is then ‘Called’ (where God is calling for the person to devote their life to serving their local church or Ministry) . The function and competence of Calling a Minister resides with the Local Church Meeting. Any Call is given approval (**Concurrence**) by the Respondent (p.83 and 87). The Claimant’s undisputed evidence is that Concurrence was by the District, but it is now by the Respondent, acting as the District. This is supported by the documents which relate to her Induction in 2002 The Claimant described Concurrence as a very practical matter, a ‘*signing off*’ by the Respondent.
51. **Ordination** is the acknowledgement by the URC of an individual’s vocational Calling to serve God in their particular Ministry with *permanent intent* (p.64).
52. **Induction** is the recitation of a Minister’s Call to serve a particular local Church.
53. It is not in dispute that the Minister’s relationship is primarily with their local church although subject to oversight by the Respondent.
54. After the Respondent has given Concurrence after a Calling, a person can then be Ordained and Inducted to the Pastorate during a service of Ordination and Induction, whereby the person makes **Affirmations** as set out in the Basis of Union. The Claimant described (and this is not in dispute) the liturgical service where the Affirmations are made and Induction takes place as the point at which the Minister becomes what she described in cross examination as an “*Office Holder*”. During the first part of the service, the person is an Ordinant, at that point he/she is not yet a Minister. Later in the service, the Ordinant is Ordained and gives the promises/Affirmations and then it moves onto the Induction part of the service. The Induction is the means by which the person accepts the appointment publicly.

### **Affirmations and Induction**

55. Schedule C of the Basis deals with the Affirmations made by Ministers at Ordination and Induction (p.70 and 76). The Affirmations (p.70) include;
- “Q7 Do you promise to fulfil your duties of your charge faithfully. To lead the Church in worship, to preach the Word and administer the Sacraments, to exercise Pastoral care and oversight, to take your part in the Councils of the Church, and to give leadership to the Church in its mission to the world”*
56. The Basis describes the categories of Ministry within the URC (paragraphs.19-25).
57. Paragraph 21 refers to the Ministry of Word and Sacraments;

*“After approved preparation and training, they may be called to be Ministers of local Churches, or Missionaries overseas, or to some special and approved Ministry, and are then Ordained and Inducted to their office. The Ordination and Induction of Ministers shall be in accordance with Schedules C and D. **They are commissioned to conduct public worship, to preach the Word and to administer the Sacraments, to exercise Pastoral care and oversight and to give leadership to the Church in its mission to the world.** Their service may be stipendiary or non – stipendiary and in the latter case their service is given within the area of a Respondent and in a context it has approved.”* Tribunal stress

58. The evidence of Reverend Camilla Veitch is that an Ordained Stipendiary Minister of Word and Sacrament means that a Minister who has covenanted rather than entered into a legal relationship, with the denomination in accordance with its foundational documents, beliefs and the promises which are made at Ordination and subsequent Induction.
59. The Basis provides that those Ministers shall conduct their Ministry according to the criteria set out in Schedule E (footnote page 64). Schedule E of the Basis (p.76) sets out how the Ministers must conduct themselves, it provides that;

*“Paragraph 2: Ministers must conduct themselves and exercise all aspects of their Ministries in a manner which is compatible with the unity and peace of the URC and the Affirmations made by Ministers on Ordination and Induction (Schedule C) and the Statement concerning the Nature, Faith and Order of the URC (Schedule D) in accordance with which Ministers undertake to exercise their ministry.*

*Paragraph 3; ... the Councils of the Church have authority in certain circumstances (without prejudice to a Ministers' conditions under the Plan for Partnership in Ministerial Remuneration) to suspend a Minister which involves a temporary ban on the exercise of Ministry by the Minister concerned but not his /her removal from the Roll of Ministers.*

*Paragraph 4: A Minister under suspension, whether in Pastoral charge or not, shall not present him/herself as Minister and shall not preside at Communion. The Minister shall refrain from all activity which may lead others to believe that he/she is acting as a Minister of Religion. Suspension also means that the Minister may not exercise the ministerial rights of membership of any Council of the Church. Suspension does not remove any of the rights accorded by the process of determining the matter which had led to the suspension.*

*Paragraph 5: A person whose name has been deleted from the Roll of Ministers of the URC and who remains a member of the URC has the privilege and responsibilities of that membership, but not those of a Minister of Word and Sacraments and should refrain from all activity which may lead others to believe that he/she is acting as a Minister of Religion...”*

#### **June 2002 - the Call – Minister**

60. The Claimant's induction as a Minister took place at Brentwood and Ingatestone on **29 June 2002** (p.181). The Southend District Council gave Concurrence to that appointment (p.179).
61. Her name was then added to the Roll of Ministers of the URC (p.64).

#### **Induction: 2010 – the Call - Minister of Word and Sacrament: 5 September 2010**



62. The Claimant was Called to the Ministry of St Stephens and the Respondent gave Concurrence to the appointment.

**The Settlement Agreement : dated 5 September 2010**

63. The Claimant signed a Settlement Agreement. This is a formal agreement of partnership showing the service to be provided. It is a specific agreement for each Minister entered into by the Minister, Pastorate and the Respondent confirming the scoping. Most but not all of its terms are standard, taken from a template document.
64. This document was signed by the Claimant, the Church Secretary of St Stephen's and the Moderator of the Respondent.
65. The Settlement Agreement (p.207 - 208) includes provisions about the scope of the Pastorate, Sstipendiary, housing and other allowances and includes the following provisions;

**“ 1. Scope**

*The pastorate has been declared to be 75% scope St Stephens incorporating 20% University chaplaincy and 25% Respondent Mission Enabler.*

**2. Stipend**

*The Minister will receive the stipend appropriate for a full time Minister from the National Maintenance of the Ministry Payroll Office.*

**3. Housing**

*The Minister will live in the manse provided at ... The Pastorate will pay the Council Tax, water rates and any other taxes on the manse in full; will ensure the building and accepts responsibility for the maintenance and decoration of the manse.*

**4. Travel**

*The Pastorate will reimburse the Minister for using her own car in accordance with the recommendations of the URC Central Committee and for costs of public transport upon submission of a written clam (as agreed) and subject to annual review in light of recommendations from URC Respondent and/or Finance Department....*

**5. Administration, Telephones and Computer**

*The Pastorate will reimburse the Minister for all administrative expenses including stationery and postage, upon submission of a written claim. A telephone package including broadband will be provided by the Pastorate. The Minister will be expected to reimburse the Pastorate for private telephone calls. A computer hardware allowance of up to £450 will be spread over 4 years.*

**6. Education for Ministry**

*The Pastorate will support the Minister in undertaking Education for Ministry ...and includes 2 weeks plus one Sunday annual study leave.*

*The Pastorate will encourage the Minister to take Sabbatical leave as recommended in the Plan for Partnership and to attend one annual Respondent Summer School, for which the Pastorate will pay...the Pastorate will offer a book allowance of £250 to be offset against the purchase of books, computer ...*

### **7. Holidays and regular days off**

*The Pastorate will honour recommendations for regular weekly days off and will follow recommendations regarding holidays in the Plan for Partnership ... five full weeks holiday per year (including five Sundays) plus one additional holiday Sunday, one day each week will be used for personal study, devotion and refreshment.*

### **8. General**

*The pastorate accepts the URC policy to grant maternity pay and parental/adoption leave and will honour the declaration of Equal Opportunities contained in the URC Employment Practice report accepted by the General Assembly 1990.*

### **9. Re- negotiation and Review**

*The pastorate and minister are willing to re-negotiate these terms of settlement during the course of a ministry at the request of the Synod ....*

*The terms of this agreement will be reviewed after the first two years and when changes are made to Synod and General Assembly Guidelines.*

...

### **11. Generally**

*Both minister and pastorate will be bound by the Plan for partnership and the provisions of the Basis of Union and be aware of the Guidelines on Conduct and behaviour for ministers and elders”.*

## **Concurrence**

66. On taking up the Ministry at St Stephens, the document confirming Concurrence from the Respondent includes the following passage (p.193);

*“Concurrence needs to be given to the call of Lynn Fowke’s. There are issues – there is no specific **job description** and there is a question as to whether the minister will live in the manse presently available for the Church. It is necessary that they do so for tax purposes”. Tribunal own stress.*

67. No evidence was presented to the Tribunal about the tax situation regarding the manse by either party.
68. The undated document confirms the Concurrence was given to the Claimant’s Call by the Respondent.

## **The Role of the Synod**

69. The Manual Schedule B sets out the composition and functions of the Councils of the URC. Those of the Synod are set out (p.87 – 89) and includes the exercise of

Concurrence and to exercise oversight of all Ministers within the categories 2.(4)(a) (which would include the Claimant).

**Induction : 5 September 2010**

70. The Claimant went through an Induction service for the Position on **5 September 2010** and made the necessary Oaths and Affirmations in a public service .

**Stipend**

71. Ministers of Word and Sacrament are provided with a stipend, access to accommodation and other assistance . This financial support and housing removes the need for the Ministers to find other work to support themselves.
72. The amount of the support is set out in the Plan for Partnership. This provides that the object is;
- “ To provide a unified scheme for the remuneration of Stipendiary Ministers of the word and sacrament... in the service of the Kingdom of God within the [URC]” (P.110- 120).*
73. The ‘scope’ of the Ministry determines the percentage of the full Stipend the Minister receives for the Pastorate the Minister serves. Where the scoping is reduced, arrangements are made through the Respondent for additional ministerial service to bring the scope (and thus Stipend) back to 100%.
74. The Claimant was Called and Inducted to the Pastorate of St Stephens which incorporates Leicester University Chaplaincy and as a Respondent Mission Enabler on 5 September 2010.
75. St Stephen’s is regulated and managed by its Elders (for operational and pastoral purposes). It is supported by the Respondent (or local governing body) and assembly decision making bodies.

**The Plan for Partnership In Ministerial Remuneration**

76. The Plan for Partnership (p.100- 110) is a general scheme for the remuneration of all Stipendiary Ministers of the URC.
77. It was put to the Claimant in cross examination that the Plan for Partnership is not negotiated at local level between the Respondent and the Office Holder, it is part of the national constitution of the URC. The Claimant did not entirely accept that, she referred to it as a policy which allows some variations with some local churches paying more stipend to a Minister than others however she accepted in cross examination that the stipend is not determined by the ‘Office Holder’
78. The Plan for Partnership includes the following provisions;
1. *Objects of the plan*  
  
*To provide a unified scheme for the remuneration of Stipendiary Ministers of the Word and Sacraments (Ministers) and Church Related Community **Workers** (CRCWs) in the service of the Kingdom of God within the URC. (Tribunal stress)*
  2. *Principles of the plan*

2.1 *The whole Ministry of the URC is to be made available to the whole of the Church and the financial responsibility for this Ministry is to be shared throughout the whole of the Church*

2.2 *The General Assembly has agreed that the Ministers and CRCWs of the Church **should be deployed by synods** in ways that respond to the many different mission opportunities in different places... (Tribunal stress)*

2.3 *...The contributions of local churches will be paid into the Ministry and Mission Fund from which the stipend of Ministers and CRCWs and other payments detailed in the Plan will be drawn.*

2.4 *...the General Assembly discourages the payment of local Stipend supplements.*

79. The wording at paragraph 2.4 supports the Claimant's evidence that local churches could pay more to a Minister, however, clearly the plan for Partnership while it does not prohibit it, discourages it.

80. Paragraph 6.1.2. (page 103) also refers to the need to pay any supplemental stipend through the central payroll system to ensure compliance with Income Tax and National Insurance Regulations:

*"In order to comply with Income Tax and National Insurance regulations any additional emoluments must be paid through the central payroll system, the costs (including **employer's National Insurance contributions**) being recovered monthly **from the local church** by direct debit. Such emoluments include:*

*6.2.1.1 Housing allowance paid to a minister/CRCW who does not occupy a church owned manse*

*6.2.1.2 Stipend supplements...*

*6.2.1.3 Fixed car allowances..." (Tribunal stress)*

81. I therefore accept the Claimant's evidence that local churches can choose to make additional stipend payments if they wish to a Minister and paragraph 6.1.2 indicates that stipend supplements are taxed under the PAYE system hence the reference to *employers* NI. If the supplements are subject to PAYE then it may be reasonably concluded (no evidence being presented by the Respondent to the contrary) that the stipend is treated in the same way.

82. The Plan for Partnership also includes the following provisions;

*6.1.2 Payment during sickness: Stipend shall be paid during periods of sickness in such sums as shall be determined from time to time by the MoM Sub-Committee and will take into account **the regulations and benefit schemes of the Department for Work and Pensions (DWP).***

*6.1.2.1 Ministers/CRWs who are unable to work because of sickness or accident shall be paid full Stipend (less any Employment Support Allowance or **Industrial Injuries Disablement Benefit** received) for a period of six months. ...*

*Ministers/CRWs who are unable to work for more than three days because of sickness must advise the MoM Office as soon as possible to ensure that the necessary records can be maintained. The first seven days of sickness may be self-certificated (by letter, email or telephone) but after that all continuing sickness must be covered by a doctors certificate, ensuring that the date of*

*return to work is advised. If a period of sickness extends for more than twenty eight weeks Ministers/ CRWs will be able to claim Employment Support Allowance from the DWP...”*

*6.1.3 Maternity/Action/Paternity provisions: Ministers/CRWs are entitled to statutory pay and leave ...*

*6.1.4 Jury Service; Ministers who are called for Jury Service should inform the MoM as soon as possible to enable the loss of earnings declaration to be completed in advance....*

*6.1.6 Pension Fund: Ministers CRCWs inducted to Stipendiary Service under the Plan may in the URC Ministers Pension Fund (URCMPF).*

*6.1.6.1 The General Assembly has agreed that from September 2013 all eligible Ministers/CRCWs will be Auto-Enrolled into the URCMPF...*

## **6.2 Amounts paid through the Central Payroll System to be recovered from the local Churches**

...

*6.3.2 Manse Accommodation: for the purposes of the Plan a manse means a home for the Minister/CRCW and their immediate family...owned or leased by the church, provided and maintained in good repair and decoration , free of rent, ground rent, Council Tax, all rates ...water/sewages charges and property insurance...*

...

## **7 Ministerial Working Week**

*The 2020 General Assembly resolved that there should be more clarity in defining working hours and recommended that the Ministerial working week, translated into hours in a four week period, should be not less than 160 hours and not more than 192 hours.*

## **8 Holiday Entitlement**

...

*8.2 If a Minister/CRCW resigns/retires from a Pastorate or post Stipend **should be paid for any outstanding holiday entitlement** untaken at the date of resignation/ retirement...*

## **9. Additional Paid Work**

*...Where this work , in the view of the Synod, can be performed without detriment to the Pastoral case of Church, Congregation and local Church witness, the additional remuneration may be retained by the Minister/CRCW involved, provided the work does not exceed the equivalent of one working day per week. Where more than one day per week is involved , the appropriate Committee of the Respondent or the Synod Moderator should consult with RHEA MoM Sub- Committee who may decide to reduce the Stipend by an appropriate amount...”*

Tribunal stress

83. The Plan of Partnership (p.106) specifically distinguishes between entitlements and discretionary elements of the terms which apply to Ministers as I have set out above in my findings.:

*“clause 10.4.1 ...in the case of a husband and wife being ministers/CRCW’s, their combined entitlement to a resettlement grant and retirement removal grant **shall not** exceed that of one full time minister/ CRCW.*

*Clause 10.4.2 in any situation other than those outlined above the MoM Subcommittee **shall have discretion** to make available, in full or in part, a resettlement grant, ordination/commissioning loan and retirement removal grant.*

Tribunal stress

### **Standards of behaviour - The Ministerial Disciplinary Process**

84. It is not in dispute that Ministers are required to comply with standards of behaviour set out in the Basis of Union document. (p.114).
85. The bundle includes an extract headed: “*The Ministerial Disciplinary Process*”. This section is part of the Manual which provides guidance on the implementation of the Basis of Union. The Basis of Union regulates relationships in the URC. Counsel for the Respondent likened the Basis of Union to an Act and the Manual (p.81) to the implementing regulations.

86. It is not in dispute that the disciplinary process (p.114) has developed to regulate the office of Minister of the Word and Sacrament;

*“...From time to time they err and require discipline to remind them of the standards they have espoused, to correct them and bring them into renewed commitment” (p.114)” and*

*“Both pastoral concern and the law of the land require the observance of natural justice in disciplinary procedures. Those who are accused must know of what they are being accused and have the opportunity to offer a defence...” (p. 115)*

87. It goes on to provide at para A.A.1 (P.116);

*“ A.1.1 Under the provisions of this Disciplinary Process an Assembly Commission and an Appeals Commission (both expressions being defined in Paragraph A.5) shall operate under the authority of the General Assembly for the purpose of deciding ( in cases properly referred to it) the questions as to whether a Minister or a Church related community worker...has committed a breach of discipline and if the **Assembly Commission** or, in the event of an appeal, the **Appeals Commission** should so decide, **whether on that account his/her name should be deleted from the Roll of Ministers or CRCWs as the case may be or alternatively whether a written warning should be issued to him/her...**”*

And;

*“A.1.2 Subject only to paragraph E.5.3 once the disciplinary case of any Minister or CRCW is being dealt with under the Disciplinary Process, it shall be conducted and concluded entirely in accordance with that Process and not through any procedure of process of the Church”.*

Tribunal stress.

88. The disciplinary policy (p.76) provides that the Minister must: “*conduct themselves and exercise all aspects of their ministries in a manner which is compatible with*

*the unity and peace of the URC and the affirmation made by Ministers at ordination and induction ( Schedule C) and the Statement concerning the Nature, Faith and Order of the URC..”*

89. The disciplinary process beyond caution stage, is dealt with not at Synod level but national level within the URC and it is the same process which applies to church workers.
90. The caution stage (p.125) provides a mechanism whereby *“an enquiry can be set up to examine matters of concern involving Ministers which fall short of Gross Misconduct, leading if appropriate, to an Initial Caution and final Caution....”* The process provides that each Synod shall appoint two persons to conduct an enquiry. It provides that the Synod Appointees will have discretion as to the manner in which they conduct their enquiry (AA.4.1) but sets out as a general rule the steps to be taken, which involves meeting with the Minister, meeting with witnesses etc and then consider how to deal with the situation, whether to take no action issue a caution or take it out of the caution stage and refer it to the disciplinary stage (p.129).
91. This process therefore involves the Respondent and in cases of more serious conduct issues, the Commissions under the authority of the General Assembly. The local church is not directly involved in the implementation of the disciplinary policy. Neither the Respondent nor the local church are able to remove a Minister from the Roll.
92. The Claimant herself in 2016 received an Initial Caution imposed by the Synod Appointees (p.251). The issue related to allegations around the Claimant's behaviours; *“Your relationships within the teams in which you work have become strained. This has resulted in an inability within those teams to function as they wish...”*
93. The Caution (p.253) states that failure to demonstrate that the Claimant has addressed the matters set out, could result in the imposition of a Final Caution or recommendation to the Synod Moderator as to the Calling in of a Mandated Group and progression to the next stage of the Disciplinary process which could result in the Claimant's name being deleted from the Roll of Ministers. The Claimant was given the right of appeal to the Synod Moderator.
94. While the Claimant disputes the allegations, she accepted in cross examination that those who signed it on behalf of the Respondent were exercising oversight over her.
95. There is also a separate capability process.(p.87) however neither party gave evidence about that process and a copy of the relevant documents were not included within the bundle and thus I have not been able to consider those as part of the determination of the issues before me.

**Since 2016.**

96. On 19 April 2016 the Claimant asserts that she received a letter from the Synod Clerk, Convenor of the Pastoral Group and the Training and Development Officer employed by the Synod, informing the Claimant that her role had been merged with another to create a new Mission Enabler role which had been given to another Minister and thus her Stipend was reduced to 75%. The Respondent asserts that it attempted through the offer of alternative duties to retain the Claimant on 100% scoping but that she did not engage with those attempts. That attempts were made does not appear to be in dispute. It is common between the parties that the Synod takes such steps where the scoping is reduced but there is no obligation on a Minister to accept alternative duties.

97. From 2016 the Claimant had been receiving a 75% Stipend and referred to as 'part time'. The Claimant gave evidence, not disputed and which I therefore accept, that it was acknowledged by the Clerk to the Respondent that the correct process of consultation had not been followed, however, it took until 2018 for the Respondent to address the issue of the new terms which would apply to her Ministry.

#### Revised Settlement Agreement : 2018

98. The Respondent's Personnel Officer drew up a Settlement Agreement to reflect the change in terms. This was done in December 2018.
99. The document was signed by the Claimant and the Church Secretary in December 2018. It was signed by the Moderator of the Respondent in January 2019.
100. The scoping was amended to 75% with 20% assigned to the role of Chaplain to the University of Leicester.

#### Autonomy/Control

101. The provisions set out in the 2018 Settlement Agreement, include that the scoping would include leading worship on at least 36 Sundays per annum, including quarterly Communion services; "*Other Worship and Leadership activities will be as defined for all URC Ministers with a particular focus on those who are engaged in Higher and Further Education in the city.*"
102. The Claimant's evidence which was not disputed and which I accept, is that activities in this context were "**defined**" within the Induction Service, defined by the Minister himself/herself, the local church (in this case, St Stephens) and the Elders and that a significant number of the activities to be carried out by the Minister at St Stephens are as set out in the local church calendar which "rolls" from year to year, in addition to the standard Sunday worship activities. The local church calendar has not changed for years at St Stephens, it covers activities at Christmas, Easter, Harvest Festival and those activities are usually decided by the Elders who select the best dates for them to take place. St Stephens "moves very much" with the academic year for the University. The University and St Stephens plan the services for the year together. I attempted to ascertain, because this was not set out in any of the witness statements, what other activities she performs in her Ministry. The Claimant gave unchallenged evidence which I accept, that she is responsible for other duties and the examples she provided were limited but included some administrative duties such as responding to the deaths of those in the church membership (she did not have a secretary) and providing additional pastoral support.
103. The Claimant described having a "*certain amount of autonomy*" and that it is up to the Minister to organise their time in order to perform the activities and services required.
104. Reverend Dr Bradbury gave evidence that the "*rhythm*" of Sunday worship defines the week to an extent and the liturgical year but that a Minister has a "*significant degree of autonomy*" because no one is directing a Minister, Ministers have to manage competing expectations and negotiate their own diaries. The Minister is accountable to the Elders in general, but his evidence is that the Elders never ask a Minister "*to account for their hours*". The Claimant did not dispute this evidence which I accept as a fair reflection of the day to day control exercised over a Minister.
105. In terms of whether the Claimant is restricted from accepting other work while a Minister, clause 9 of the Plan for Partnership provides that :



*“Stipends and other allowances paid to full time Ministers/ CRCWs shall normally be on the basis that these represent the main earned remuneration . It is recognised that a Minister/CRCW will from time to time accept other paid work ( e.g. hospital chaplaincies or teaching). Where this work, in the view of the Synod can be performed without detriment to the Pastoral care of Church congregation and local Church witness, the additional remuneration may be retained by the Minister/CRCW involved, provided the work does not exceed the equivalent of one working day per week. Where more than one day per week is involved, the appropriate Committee of the Synod and the Synod Moderator should consult with the MoM Sub-Committee who may decide to reduce the Stipend by an appropriate amount”. (p. 105)*

106. The Claimant's undisputed evidence is that although this provision about other work, relates only to the impact on the payment of Stipend, she referred to it being difficult in practice to do another role and fitting in the work of a Minister. Reverend Dr Bradbury gave evidence that it is now *“pretty rare”* for Ministers to accept other Chaplaincy roles around their Minister role and in practice this is done in negotiation with the Synod and in his view, it is impossible to take on other work for more than one day per week and perform the work/services of a Minister.
107. The Settlement Agreement records that the Claimant has chosen to live in her own property and an *“agreed housing allowance will be paid”*. It further provides that the sum and frequency of a review must be agreed with the Synod Officers before it can be paid and will be paid through the URC central payroll.
108. The Settlement Agreement also provides for payment of mileage when using her own car to be paid by the Pastorate, with the rates set by the URC in the Plan for Partnership.
109. There is also provision in the Settlement Agreement for payment of administration, telephone and computers by the pastorate to include stationery and postage if on church business. A contribution of £450 is made by the Pastorate toward the Claimant for providing her own computer and printer etc.
110. The Settlement Agreement also provides that the pastorate will encourage the Minister to attend the Ministers Summer School and take 3 months sabbatical leave every ten years. Training is also to be provided.
111. There is also the following provisions around hours and holidays;

*“7. The Ministerial Working week: Hours of work will be in line with the agreed resolution of General Assembly in 2010. **There are defined for a four week period during which the hours worked should be not less than 160 hours and not more than 192 hours for a full time Minister...**”*

*8. Holidays and regular days off: The Pastorate will honour the holiday entitlement contained in the Plan for Partnership. These are expressed as five weeks holiday in each calendar year including five Sundays, plus one additional Sunday away from the Pastorate... **The pattern of work has been agreed between the Ministers and Elders ...Monday will be taken as the regular day off each week and Friday has been designated as a study day. The ‘core’ days are Tuesday , Wednesday and Thursday. Synod Meetings and other events which impact on the designated day off may be taken as time in lieu. Although this defines the basic pattern of working it is recognised by all parties that flexibility is the key to ensuring smooth working arrangements with the needs of the Minister and the Pastorate.***

13: *Guidelines on Conduct and behaviour for Ministers and Elders: Both Minister and Elders accept the Guidelines of Conduct and Behaviour as agreed in resolution 12 at General Assembly.*

14 *General Obligations of the Ministry and Pastorate: Both Minister and the Pastorate **will be bound** by the Plan for Partnership and the provisions of the Basis of Union”*

*Tribunal stress*

112. Clause 14, it is agreed between the parties, is a standard clause. The use of the word ‘bound’; nonetheless I find, indicates an intention to commit or comply with the Plan for Partnership indicative of an agreed mutual obligation.
113. The Claimant’s undisputed evidence which I accept, is that clause 5 was not wholly standard in that in her case it was adapted to include that a mobile telephone would be provided by the pastorate.

### **Holidays and Cover**

114. In terms of holidays, the claimant’s undisputed evidence which I accept, is that holidays had to be organised by the church Elders. She had to let them know the holidays she wanted and would have to arrange cover for the Minister to be away. That cover is not arranged by the Minister. It is organised through the pulpit supply secretary. The Minister may make suggestions and work with the Elders to plan for her absence but I find based on the Claimant’s undisputed evidence that ultimately the pulpit secretary is responsible for arranging cover, not the Minister.
115. Reverend Dr Bradbury gave evidence that he has to plan his holiday well in advance, over 12 months in advance because of the constraints of the position. He cannot be away over Easter and there are preaching rotas thus the Elders need to know well in advance if he intends to take holiday, to fit it around their planning.

### **Resignation/ Notice**

116. If a Minister wants to leave a church, the Claimant gave evidence in response to a question I asked and which was not challenged, that if the Minister feels it is time to move to another Pastorate, they must approach the Synod Moderator and let them know. The Minister’s personal profile and CV is updated and these are taken to the Synod Moderators meeting and vacancies are looked at and considered alongside the Ministers who it is considered may be suitable. If the Minister wants to relinquish the Pastorate, they must she believes normally give 3 months’ notice to the Elders and inform the Synod Moderator . The Claimant was not aware whether this was written down but gave evidence that this was the normal practice .
117. Reverend Dr Bradbury gave evidence that removal from the role can happen in various ways. If there has been a disciplinary process, removal would be instant. He gave evidence that it was possible to “*resign*” as a Minister . If the Minister was resigning because of a loss of faith, then the resignation should take effect immediately . If it is to move to take up a career (e.g. prison chaplaincy) the local church would normally ask that 3 months’ notice is given. He believes the giving of notice in this situation is “*custom and practice*” but not set out in writing.

### **Retirement**

118. The URC Church Retirement Policy provides;

*“ The URC consider that age diversity is beneficial to the Denomination and for the purposes of the retirement of Ministers in Stipendiary source and, as good practice adopts the provisions of the Equality Act 2010 in respect of age provisions and retirement...”*

119. The Respondent asserts that in April 2020 the General Assembly approved or adopted a procedure for determining the applications for extensions to Ministry beyond what the URC has adopted as the normal retirement age . This involves application to the Synod, consultation between the Synod Committee, Synod Moderator and Elders of the local church where the Minister is Pastor. An assessment is made of their request having regard to all the circumstances. A decision is made by the relevant Synod and communication of the decision is made to the Ministries Office of the URC.
120. The Claimant did not make an application under the policy but did ask to continue her Ministry of St Stephens for up to 2 years.
121. There is a note of a meeting on 14 December 2020 (p.336). This recorded that the purpose of the meeting was for the local church of St Stephen’s to discuss whether they would wish the Synod and the Ordained Ministry and Churches group to grant the extension. There was discussion that the scoping of the Ministry at St Stephens would be significantly lower than 75% and the “need for there to be a clear purpose for an extension of Ministry was also explained”. The minutes of that meeting record that everyone present wanted an extension to be offered, half wanted 2 years and half said 6 months or a year. The Claimant however received email confirmation on 11 February 2021 by the Convenor of the Synod Ordained Ministers and Churches Group that the Group had met and decided that she must retire at the age of 68, this being held by the URC as the normal retirement age for Ministers in Pastoral charge.
122. The Claimant was informed by the Synod Clerk that her Ministry would come to a conclusion on 31 July 2021, when she reached her 68th birthday.

### **Appeal**

123. The claimant appealed the decision in March 2021.
124. A hearing took place on 15 July 2021.
125. An Assembly Commission was convened to determine the appeal. On the 15 July 2021 it dismissed the appeal on the grounds that it decided there was no justification to extend the Claimant’s Ministry.
126. The Claimant it appeared from today’s hearing, believes there to be a difference in treatment of those who are full time and those who are part time Ministers however, her claim as pleaded is based not on The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 SI 2000/1551, but on direct age discrimination. If the Claimant wants to amend her claim, she needs to make a formal application to amend, setting out in writing what the amendment is which she wishes to make and in doing so address in her application the guidance in : ***Selkent Bus Co Ltd v Moore [1996] ICR 386.***

### **Tax**

127. Neither party gave evidence about the tax position other than the Claimant mentioned in submissions that she had been told that she was treated as self - employed. The Claimant was clearly unclear on what the tax situation was. Counsel for the Respondent submitted that as the Claimant had not produced evidence to

show she was paid net through PAYE and as she had expressed the belief that she was treated as self-employed, she had failed to discharge the burden of proof. No evidence was given or produced by the Respondent regarding how it administers the payroll.

128. I was not satisfied that the Claimant understood her tax position, she was uncertain and vague about it. The Respondent did not positively assert that the Claimant was treated as self-employed and paid gross, relying on the Claimant's failure to provide evidence that this was not the case. No P45 or 'payslips' or equivalent were produced by either party. It is reasonable to draw an inference from the Respondent unwillingness or failure to assert a positive case that the Claimant was paid gross and not net through the PAYE system.
129. However, the language in the documents dealing with the payment and processing of various entitlements, as I find, consistent with a situation where the Claimant is treated as an employee. In the Plan for Partnership, there is reference to sick pay taking into account the regulations and benefit schemes of the DWP (p.102 para 6.1.2) and the offsetting of Industrial Injuries Disablement Benefit (paragraph 6.1.2.1). The provisions also require Ministers to inform the MoM for the loss of earnings declaration to be completed in advance. A declaration would be completed by an employer in an employment situation and the wording of this provision would appear to indicate that the MoM would complete the declaration.
130. Further and specifically with regard to tax, I have regard to the provisions of paragraph 6.2 of the Plan for Partnership (p.103) and the express reference to Employer's National Insurance contributions and the need to comply with Income Tax and NI Regulations.
131. There is no mention whatsoever within the documents (and the Respondent did not put forward any evidence that this is the case), that the Claimant was responsible for the payment of her own tax and that she was treated as self-employed for tax purposes. Instead I find that the documents support a finding that the Respondent paid the Claimant net through PAYE in accordance with its standard practice of how it also paid its church workers.

## **Submissions**

### **Respondent's Submission**

132. The Respondent provided written submissions and augmented this with oral submissions. I have considered the Respondent's submissions in full and set them out below in summary.
133. It is submitted that the Respondent had oversight of the Claimant as a Minister and the decisions the Claimant complains about emanated from the supervisory jurisdiction of the Respondent. It is the Respondent who deploys Ministers as set out in the Plan for Partnership (p. 101). It was the Respondent who made and communicated the decision that her office would terminate in July 2021 when she attained 68. The parties to the Settlement Agreement (p.207/286) include the Respondent. The Initial Disciplinary Caution was imposed by the Respondent (p.251). It is submitted that the correct Respondent, must therefore be the Respondent and not any other body within the URC structure.
134. Counsel refers to the claim form, where the Claimant denies she was an employee although suggests that she was considered to be one (p.40). There is a tension it is submitted, in the Claimant's position in that she seems to rely upon a '*deemed*' employment relationship it is submitted as referable to the processing of payments via payroll.

135. Counsel submits that the declarations the Claimant made, gave rise to a *covenantal relationship* and not a legal one. He refers to the induction documents (p.181), the declarations made on Induction (p.186), the Pastorate Profile (p. 192/194), the Respondent's communications regarding scoping and financial support (p. 202/263), the Plan for Partnership obligations (p.205) and Terms of settlement (p.207/259) and renegotiation at the request of the Respondent (p.206).
136. As an ordained Minister, it is submitted that she was provided with forms of support only to facilitate her Ministry.
137. Counsel referred me to the case authorities of: **Ready Mixed Concrete: Autoclenze Ltd v Belcher [2012] UKSC4 and National Power Limited [ 2000] IRLR 43** and submits that they attest to the need to identify a **contractual relationship** and only thereafter consider to what extent the relationship is consistent with the status contended. It is submitted that if and to the extent that the Tribunal is satisfied that the relationship is not in the nature of a contract and /or is not by means of a profession, the inquiry as to worker status can proceed no further.
138. Counsel also referred to the words of Lord Hope in **Wisely v John Futton ( Plumbers) Ltd Wadey v Surrey County Council [ 2000] 1 All ER 545 at 545....** "*an accurate appreciation of the relevant common law principles is nevertheless part of the exercise of construing the statute.*" The importation of common law concept renders the statute dependant upon common law principles for its legitimate application.
139. Counsel referred to : **Sharpe v Bishop of Worcester [ 2015] EWCA Civ 399:** where it was held that there must be a contractual relationship of some kind as between the putative worker and the putative respondent and in this case it was held that the position of *curate* was not regulated by contract at all.
140. Counsel also referred to the authorities of **Allonby v Accrington and Rossendale College [2004] IRLR 224. O'Brien v Ministry of Justice [ 2013] UKSC 6 [2013] IRLR 315, Hashwani v Jivraj [2011] UKSC 40 [2012] 1 ALL ER 629:** "*...The essential question ...whether, on the one hand the person concerns performs services for and under the direction of another person in return for which he or she receives remuneration, or, on the other hand , he or she is an independent provider of services which is not in a position of subordination...*"
141. In oral submissions, in summary, Counsel referred to the Claimant having accepted the constitutional framework as set out in the Respondent's witness statements and in the documents in the bundle. Counsel submits that the Claimant has indicated during the course of this hearing, that the proper respondent to her claim may not be the Respondent however, he submits that even if the Claimant were to maintain that in her submissions, the Respondent was the body with overarching stewardship and oversight of her as Minister. The Respondent signed the Terms of Settlement which set out standard non-negotiable terms .
142. It is submitted that the Claimant complains that she was not given the amount of independence she felt she should have as Office Holder however it is submitted that her day to day activities, even on her own evidence shows that she enjoyed a high level of autonomy.
143. It is submitted that the Claimant gave an Affirmation as a requirement of an Office Holder but thereafter how she performed her duties was a matter for her.
144. Counsel submits that the URC put in place documents to regulate the health and welfare of those in service to the URC however, the standards of behaviour it

sets, is not sufficient to establish that the Claimant was more than an Office Holder.

145. The 'scoping' is an operational decision to justify appointments and whether there is sufficient work for the Ministry.
146. The Claimant it is submitted received a Stipend which was sufficient to enable her to live and facilitate the Ministry. Where there was a drop in the scoping and she was offered alternative duties, she was under no obligation to accept them. If she was an employee, it is submitted that the employer would be under an obligation to offer her other work and she would be obliged to accept it.
147. In terms of the EqA and the extended definition of an employee, Counsel submits ***the core issue is contractual construction and the question is whether there was a contract and intention to create legal relations?*** If so, it is one of employment in the extended definition sense.
148. Counsel argues there was no intention to create legal relations and that the Claimant cross examined Dr Bradbury and referred to 'scripture'. The Claimant complains she was entitled to expect more from the URC and did not get it.
149. The Respondent seeks to rely upon the finding in the **Sharpe case** and that similarly it argues that there was no intention to create legal relations in this case.

#### **Claimant's submissions**

150. The Claimant in her submissions stated that she remained 'happy' to accept the Respondent as the correct Respondent to her claims.
151. The Claimant submits that there is a 'boundary' which has been moved which has turned a Minister into an employee or being considered to be an employee by the Respondent and treated as such.
152. The Claimant referred at having autonomy as a Minister which is "*what would BE expected of various professions*" but it is autonomy only to a certain extent. The Claimant submitted that she does not act alone, she is Ordained and Inducted into the Ministry and within that structure are the Elders, the Church meetings and that over the last 20 years there has been a move away from self-employed status to becoming part of an organisation.
153. The Claimant referred to decisions being taken and the lack of consultation about her situation around the retirement issue and that "*once a group in a room is making all the decisions, talking about it but not with them [the Minister], the question must be asked ; ' where is the God in all this?'*".
154. The Claimant submitted that she was Ordained but she becomes an Office Holder ONLY when she is serving a particular local church, it is not from the moment a Minister is Ordained. She is only remunerated by payment of a Stipend when she is deployed to a local church. Ministers often stay in a pastorate for life but that has been "lost", it is no longer the case.
155. The Claimant submits that Ministers are now 'line managed' and when that happens the Minister becomes an employee.
156. The Claimant then submitted that the URC Trust and payroll department deal with all payments and that it is the URC Trust therefore who is the employer. However, when I asked the Claimant whether she was now asserting that the correct putative employer and thus respondent to the claims, was the URC Trust, the Claimant

informed me that she saw no point in “going through that again” and that she agrees that “it has to be the East Midlands Synod of the United Reform Church”.

### Legal Principles

#### Employment Status

(a) Was the claimant an employee or worker of the Respondent within the meaning of section 230 ERA ?

(b) Was the claimant an employee of the Respondent within the meaning of section 83 of the Equality Act 2010?

#### **Employee as defined by section 230 ERA**

157. Section 230(3) of the Employment Rights Act 1996 (ERA) defines an employee and worker as follows:

*“In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.*

*(2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*

*(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*

*(a) a contract of employment, or*

*(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or **perform personally** any work or services for another party to the contract whose status is not by virtue of the contract that of **a client or customer of any profession or business undertaking carried on by the individual;***

*and any reference to a worker’s contract shall be construed accordingly.*

*Tribunal stress”*

158. A worker as defined under section 230, often referred to as a limb (b) worker is essentially the same as an employee under the extended definition in section 83 of the EqA.

#### **An employee within the meaning of section 83 of the Equality Act 2010**

159. Section 83 of the EqA provides that:

*(1) This section applies for the purposes of this Part.*

*(2) “Employment” means—*

*(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work...*

Tribunal stress

## Judicial Guidance

### Irreducible minimum – Employee status – section 203 ERA

160. Mr Justice MacKenna in **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD** in his Judgment stated as follows:

*'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's **control in a sufficient degree to make that other master**. (iii) The other provisions of the contract are consistent with its being a contract of service.'*

161. Lord Clarke, Supreme Court in **Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC**, referred to the *'the classic description of a contract of employment'* which he reduced down to three questions:

(1) did the worker agree to provide his or her own work and skill in return for remuneration?

(2) did the worker agree expressly or impliedly to be subject to a **sufficient degree of control** for the relationship to be one of employer and employee?

(3) were the other provisions of the contract consistent with its being a contract of service?

162. In the Judgment of Lord Justice Stephenson in **Nethermere (St Neots) Ltd v Gardiner and anor**: *'there must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service'*. He doubted this could be reduced any lower than Mackenna J's test set out in **Ready Mixed Concrete**: *'There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill'*.

163. Lord Irvine in **Carmichael and anor v National Power plc 1999 ICR 1226, HL**: a lack of obligations on one party to provide work and the other to accept work would result in *'an absence of that irreducible minimum of mutual obligation necessary to create a contract of service'*.

164. **Kickabout Productions Ltd v Revenue and Customs Commissioners 2022 EWCA Civ 502, CA**: existence of the necessary pre-conditions of mutuality of obligation and control creates a prima facie presumption that a contract of employment exists. The court's task to examine all relevant factors, both consistent and inconsistent with employment, and determine, as a matter of overall assessment, whether an employment relationship exists.

165. **Hall (Inspector of Taxes) v Lorimer 1994 ICR 218, CA**: The Court of Appeal cautioned against using a checklist approach.



166. **Clark v Oxfordshire Health Authority 1998 IRLR 125, CA:** In the majority of cases, the determination of an individual's employment status would depend not only on written documentation but also on an investigation and evaluation of the factual circumstances in which the work was performed.
167. In **Vaux Breweries Ltd v Rainford EAT 627/80** the payment of a small, weekly 'honorarium' to a publican's wife who helped run the pub was held to be one of the factors pointing towards employment status.

### Contractual situation

168. Originally courts held that Ministers of Religion could not be employees because of the spiritual nature of the functions of the Minister in the absence of clear indications to the contrary: **President of the Methodist Conference v Parfitt [1984] QB 368.**
169. The House of Lords made it clear in **Davies v Presbyterian Church of Wales 1986 ICR 280, HL:** that it was possible for purely spiritual duties to constitute a contract of employment, but in order to do so it would be necessary for the parties to have clearly expressed the intention that such a contract should exist. In that case, the Minister was held not to be an employee
170. **Singh v Guru Nanak Gurdwara 1990 ICR 309, CA,** The Court of Appeal held that a Priest at a Sikh temple was not an employee.
171. The House of Lords in **Percy v Church of Scotland Board of National Mission 2006 ICR 134, HL.** That case concerned an Ordained Minister . The House of Lords, held that the offer and acceptance of a Church post for a specific period, with specific provision for the claimant's duties, remuneration, holiday and accommodation, was capable of creating a contractual relationship between the Minister and the Church. Accordingly, the Tribunal had jurisdiction to hear her claim.
172. Percy concerned the application of the extended definition of employment in the SDA .Therefore, the House of Lords did not rule definitively on the question of whether the clergy can hold 'employee' status in the traditional sense. They made the following observations about Office Holders:

*"20. ...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.*

173. And on the intention to create legal relations:

*23...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...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.*

174. *And generally:*

*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.*

175. The House of Lords also addressed the problem of fragmentation:

***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.***

176. ***New Testament Church v Stewart 2008 ICR 282, CA***, The Court of Appeal upheld an Employment Judge's finding that the Claimant Minister was an employee under the ERA and therefore eligible to bring an unfair dismissal claim. The Court held that the House of Lords' decision in *Percy* established that there is no longer a presumption that the duties of a Minister of Religion are inconsistent with the existence of a contract of employment.

177. In each case, Tribunals must analyse the particular facts to establish whether the parties intended their relationship to be governed by a legally binding contract and

whether that contract has the necessary constituents of a contract of employment.

178. The Court of Appeal summarised the principles established by these cases in ***E v English Province of Our Lady of Charity and anor 2012 IRLR 846, CA***. There, Lord Justice Ward derived the following propositions from the authorities cited above:

- each case must be judged on its own particular facts.
- there is no general presumption of a lack of intent to create legal relations between the clergy and their Church.
- a factor in determining whether the parties must be taken to have intended to enter into a legally binding contract will be whether there is a religious belief held by the Church that there is no enforceable contractual relationship, and
- it does not follow that the holder of an ecclesiastical office cannot be employed under a contract of service.

179. **Preston (formerly) Moore v President of the Methodist Conference 2013 ICR 833 SC**. The majority of the Supreme Court (Lady Hale dissenting) concluded that there was no evidence that P and the Methodist Conference had entered into a legally binding contract. Her Ordination and entry into life-long 'full connexion' with the Conference were *covenantal*, not contractual. She could not unilaterally resign; she was entitled to a Stipend and accommodation to enable her to exercise her Ministry, not as consideration for particular services; the disciplinary scheme that applied to her was the same for Stipendiary and Lay Ministers alike; and even though she was appointed to serve in a particular five-year post, the Conference could, unilaterally, move her on at any time. Although her acceptance of her circuit's invitation to take up the post was documented, it did not amount to an offer and acceptance because the circuit had no power to make an appointment only to recommend her to the Conference. Lady Hale dissenting made the following observations:

*49. Everything about this arrangement looks contractual, as did everything about the relationship in the Percy case. It was a very specific arrangement for a particular post, at a particular time, with a particular manse and a particular stipend, and with a particular set of responsibilities. It was an arrangement negotiated at local level but made at national level.*

## **Worker Status/ Extended Definition of Employee**

### **Mutuality of Obligation**

180. In ***Byrne Brothers (Formwork) Ltd v Baird and ors 2002 ICR 667, EAT***, the EAT expressed the obiter view that 'mutuality of obligation' was also a necessary element of a limb (b) worker contract.

181. ***Cotswold Developments Construction Ltd v Williams 2006 IRLR 181, EAT***, The EAT thought that the comments in *Byrne Brothers* about the need for mutuality of obligation were not made in the context of deciding whether it was a contract of employment or a contract falling within the broader definition of 'worker' but deciding whether there is sufficient mutuality of obligation to establish that there is a contract in existence at all. The real question in deciding whether a claimant is a worker, therefore, is whether there is some minimum amount of work that he or she is

obliged to perform *personally*.

182. In ***Singh v Members of the Management Committee of the Bristol Sikh Temple and ors EAT 0429/11***. The claimant was a Priest at a Sikh Temple. The claimant and his spouse were provided with free food and accommodation by the respondents, and he received cash payments 'made up from voluntary donations from the congregation' which varied but were 'around £50 on a weekly basis'. He paid no tax or national insurance on these payments. The claimant also took extended holidays, and he was not paid during these periods. During his absence arrangements were made by him or the Management Committee for replacement services at the Temple. The ET ruled that he was not a worker. There was not sufficient mutuality of obligation as the claimant did not offer services in return for any certain remuneration, due to the voluntary nature of donations and the evidence was not suggestive of any intention between the parties to create legal relations such as exist between employer and employee, particularly in view of the spiritual nature of the services the claimant performed. This case was different to that of *Moore v President of the Methodist Conference* where the Minister in question had accepted a specific posting of specified length with clarity as to terms of the appointment. The Claimant appealed.
183. The EAT concluded that the Tribunal had erred by failing to distinguish the test of mutuality of obligation required for a worker's contract from that required for a contract of employment. It held that the test under S.54(3)(b) is whether there is the 'irreducible minimum of obligation' to found a contract at all; a less stringent test than that for a contract of employment, where there must be an obligation to provide or pay for work on the one hand, and an obligation to perform that work on the other.
184. In ***Windle and anor v Secretary of State for Justice 2016 ICR 721, CA***, Lord Justice Underhill considered that the factors relevant in assessing whether a claimant is employed under a contract of service are not essentially different from those relevant in assessing whether he or she is an employee in the extended sense of S.83(2), albeit in the case of the latter the boundary is pushed further in favour of the putative worker.
185. The question in *Windle* was whether the Claimants worked 'a contract personally to do work' in S.83(2) EqA, however Underhill LJ considered that the best explanation of that phrase was to be found in the judgment of Lady Hale in *Bates van Winkelhof v Clyde & Co LLP and anor (Public Concern at Work intervening) 2014 ICR 730, SC*, a case considering the scope of S.230(3)(b) ERA. Lady Hale gave the following guidance drew a distinction as follows:
- "32. In Allonby v Accrington and Rossendale College (Case C-256/01) [2004] ICR 1328, the European Court of Justice was concerned with whether a college lecturer who was ostensibly self-employed could nevertheless be a "worker" for the purpose of an equal pay claim. The Court held, following Lawrie-Blum v Land Baden-Wurttemberg (Case C-66/85) [1987] ICR 483 that "there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration" (para 67). However, such people were to be distinguished from "independent providers of services who are not in a relationship of subordination with the person who receives the services" (para 68). The concept of subordination was there introduced in order to distinguish the intermediate category from people who were dealing with clients or customers on their own account. It was used for the same purpose in the discrimination case of Jivraj v Hashwani "*
186. ***Nursing and Midwifery Council v Somerville 2022 ICR 755, CA***. The Court of Appeal held that the statutory definition of 'worker' did not indicate that there must be some distinct, superadded obligation to provide services independent from the

provision of the services on a particular occasion. Furthermore, the fact that the parties are not obliged to offer, or accept, any future work is irrelevant.

187. **Uber BV and ors v Aslam and ors 2021 ICR 657, SC.** The Supreme Court was not suggesting that, even where a person is working or providing services personally under a contract, there must be some superadded, distinct obligation on a putative employer to provide work or an individual to accept work before that individual can fall within the definition of ‘worker’.
188. In **Sejpal v Rodericks Dental Ltd 2022 EAT 91** the EAT stressed that the concept of ‘mutuality of obligation’ goes principally to the issue of whether there is a relevant contract; if there is no mutuality of obligation, there is no contract at all.

### Control

189. Control requires that ultimate authority over the purported employee in the performance of his or her work rests with the employer. The right to terminate the contract if the worker fails to meet the required standards of skill, integrity and reliability, is not by itself sufficient. It is a question of degree whether the individual is subject to sufficient degree of control to support a finding of an employment situation.

### Control and Definition of Employee : Section 203 Employment Rights Act 1996

190. The ‘control test’ is an essential part of the ‘multiple test’ approach: **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD.**
191. In **Montgomery v Johnson Underwood Ltd 2001 ICR 819, CA,** The Court of Appeal held that control is a separate factor, no less vital to the creation of an employment relationship than mutuality of obligation.
192. **UPVC Designs Ltd t/a Croston Conservatories v Latimer and anor EAT 0431/07** The company could not control the Claimant in important respects and thus the Tribunal’s decision could not stand.
193. I have also considered the guidance in : **Catholic Child Welfare Society and ors v Various Claimants and Institute of the Brothers of the Christian Schools and ors 2013 IRLR 219, SC:** the Court gave the following guidance on the significance of control:

*“The significance of control .*

*In days gone by, when the relationship of employer and employee was correctly portrayed by the phrase “master and servant”, the employer was often entitled to direct not merely what the employee should do but the manner in which he should do it. Indeed, this right was taken as the test for differentiating between a contract of employment and a contract for the services of an independent contractor. Today it is not realistic to look for a right to direct how an employee should perform his duties as a necessary element in the relationship between employer and employee. Many employees apply a skill or expertise that is not susceptible to direction by anyone else in the company that employs them. Thus the significance of control today is that the employer can direct what the employee does, not how he does it.”*

### Control and Extended Definition of Employee : Section 83 EqA 2010

194. **Uber BV and ors v Aslam and ors 2021 ICR 657, SC,** dismissing Uber’s appeal

against an Employment Tribunal's decision that Uber drivers are 'workers' under S.230(3)(b) ERA and the Working Time Regulations 1998 SI 1998/1833 and the National Minimum Wage Act 1998.

195. The Supreme Court pointed out that Lord Clarke's Judgment in *Autoclenz* makes clear that whether a contract is a 'worker' contract is not to be determined by applying ordinary principles of contract law. It pointed out that it was critical to understand that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the Tribunal was primarily one of statutory interpretation, not contractual interpretation. Furthermore, that interpretation should give effect to the purpose of the legislation, which is to give protection to vulnerable individuals who have little or no say over their pay and working conditions because they are in a subordinate and dependent position in relation to a person or organisation who exercises control over their work. In the Court's view, it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a 'worker'. To do so would reinstate the mischief which the legislation was enacted to prevent.
196. It was held that drivers are therefore in a position of subordination and dependency in relation to Uber such that they have little or no ability to improve their economic position through professional or entrepreneurial skill.
197. The key question in such cases should now be whether the relationship is one of subordination and dependence, having regard to the legislative purpose of protecting those who have little or no influence on the terms under which they work.

#### **Personal performance of work or services**

#### **Personal Performance and Definition of employee : section 203 ERA**

198. As an obligation of personal performance is also a necessary constituent of a contract of employment.
199. An obligation of personal service is common to the three types of contract that confer this employee status : a contract of service, a contract of apprenticeship and a contract personally to do work.
200. An employee must have agreed to provide his or her own work and skill in exchange for a wage or other remuneration: *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD*,

#### **Personal Performance and Extended Definition of employee : section 83 EqA**

201. To fall within definition of extended employee under section 83 EqA (or limb (b) of S.230(3) ERA) an individual must undertake 'to do or perform *personally* any work or services for another party to the contract'.
202. ***Inland Revenue Commissioners and ors v Post Office Ltd 2003 ICR 546, EAT:*** the EAT held that sub-postmasters and -mistresses were not 'workers' for the purposes of S.230(b) ERA, the Working Time Regulations or the National Minimum Wage Act 1998. The contracts explicitly stated that the sub-postmasters and -mistresses were not required to render personal service. The dominant purpose of the contract was the efficient carrying out of Post Office services, which were not required to be performed personally but could be, and frequently were, delegated completely to another person.

203. A line of case law on the 'contract personally to do work' test under S.83 EqA has focused on the question of whether the *dominant purpose* of the contract is the provision of personal services ; In *James v Redcats (Brands) Ltd 2007 ICR 1006, EAT*, Mr Justice Elias, then President of the EAT, held that it was appropriate to use the dominant purpose test in the context of limb (b) worker status as it attempts to identify whether a contract should be located in the field of dependent work relationships or whether it is in essence a contract between two independent business undertakings. He suggested that an alternative way of phrasing the test may be to ask whether the *dominant feature* of the contractual arrangement is the obligation to personally perform work, in which case the contract would sit in the employment field and the individual concerned will be either a worker or an employee. If, however, the dominant feature is a particular outcome or objective and the obligation to provide personal service is an incidental or secondary consideration, it will lie in the business field.
204. It is unclear whether the extent of the obligation of personal service is identical for employees and limb (b) workers.
205. ***Windle and anor v Secretary of State for Justice 2016 ICR 721, CA*** (Lord Justice Underhill stated: '*The factors relevant in assessing whether a Claimant is employed under a contract of service are not essentially different from those relevant in assessing whether he or she is an employee in the extended sense, ...in considering the latter question the boundary is pushed further in the putative employee's favour — or, to put it another way, the pass mark is lower*').

#### Other Factors

##### Tax and national insurance.

206. Deductions at source point to employment while gross payments suggest self-employment. However, the opinion of HM Revenue and Customs on a worker's employment status for tax purposes will never be conclusive as to his or her status for employment law purposes: ***Enfield Technical Services Ltd v Payne; BF Components Ltd v Grace 2008 ICR 1423, CA*** and ***O'Kelly and ors v Trusthouse Forte plc 1983 ICR 728, CA***.
207. ***Hall (Inspector of Taxes) v Lorimer 1994 ICR 218, CA*** : Lord Justice Nolan suggested that, in such cases, the extent to which the individual is dependent upon or independent of a particular paymaster for the financial exploitation of his or her talents may well be significant.

##### Disciplinary and Grievance Process.

208. That the claimant was subject to the employer's disciplinary and grievance procedure was a factor pointing towards employee status in ***Motorola Ltd v (1) Davidson (2) Melville Craig Group Ltd 2001 IRLR 4, EAT*** however, it may only **indicate** that the employer is affording the individual a fundamental right of natural justice rather than indicative of the true nature of the relationship ***St Ives Plymouth Ltd v Haggerty EAT 0107/08***.

##### Intentions of Parties

209. The parties' stated intention as to the status of their working relationship in law may be a relevant factor but the courts will always look to the substance of the matter, even if the parties expressly agree on a label with the approval of HMRC : ***Young and Woods Ltd v West 1980 IRLR 201, CA***. For example, in ***Basil Wyatt and Sons Ltd v (1) McCarthy (2) McCarthy EAT 104/93***.

210. **Massey v Crown Life Insurance Co 1978 ICR 590, CA:** Lord Denning MR stated that;

*‘when it is a situation which is in doubt or which is ambiguous, so that it can be brought under one relationship or the other, it is open to the parties by agreement to stipulate what the legal situation between them shall be’.*

#### **Custom and practice.**

211. The customs or practices in the particular trade or industry may be a relevant factor : **Winfield v London Philharmonic Orchestra Ltd 1979 ICR 726, EAT, and Addison and ors v London Philharmonic Orchestra Ltd 1981 ICR 261, EAT.**
212. If Court or Tribunal is satisfied that the written contract is not the start and end of the bargain struck by the parties, then it will look to the surrounding factual matrix, : **Carmichael and anor v National Power plc.**

#### **Conclusion and Analysis**

##### **Intention to create legal relations/ mutuality of obligations**

213. The fragmentation of functions within the URC structure make it difficult to identify who the putative employer should be.
214. The 2018 Settlement Agreement, provides that all payment of stipend and housing allowance is paid through the URC payroll department (P.202), that is the organisation’s payroll department utilised by the Respondent and the local church.
215. The Plan for Partnership (p.103) provides that there are amounts paid through central payroll and recovered by the local church, this includes employers national insurance liabilities, housing allowance and stipend supplements must be paid centrally along with a fixed car allowance.
216. Who is the putative ‘employer’ and thus the correct respondent is an issue which the parties reached agreement on and therefore this was no longer a live issue for me to determine. It must be observed however that after listening to all the evidence and been taken through the documents, it became apparent that who the putative employer is, is not obvious. The local church, the Respondent, the various committees, are all in a broad and real sense part of the URC.
217. There may well have been an argument that the structure gives rise to a joint employment situation. The Plan for Partnership recognises what is referred to as “*shared posts*” and the Personal Profile refers to a “*newly formed partnership between Church and Respondent*”... ( p.192).
218. The URC delegates responsibilities to the Respondent and the local churches. The Respondent advertised the Ministries, arranged the process and deployed the individuals to the Pastorates where there were vacancies. Although it had no involvement in the Call, the Respondent had to approve this decision before Ordination and Induction. The Respondent than set the salary with reference to the Plan of Partnership and in partnership with the local church devised the full profile for the Ministry with the Respondent determined the scoping and thus in turn the level of stipend. The Respondent through it delegated function from the General Assembly, dictated the terms which the local church and Claimant would enter into . The Respondent carried out the administration of the service, such as arranging the deployments, dealing with disciplinary problems at least at caution stage and deciding on termination and whether extensions to retirement would be granted.



219. It was the Respondent who imposed a disciplinary caution in February 2016 on the claimant (p.251).
220. It was the Respondent who terminated the post of Respondent Mission Enabler in March 2016 ( p.263)
221. It was the Respondent who delegated authority to the OMCG (P. 256) to not support the continuation of the Claimant's ministry past the default retirement age
222. It was the Respondent who made the decision to terminate the Claimant's Position (p. 209).
223. While the fragmentation of the responsibilities makes the picture of who the putative employer is a less than straight forward exercise, I am of the view however, that the Respondent was chiefly in control operationally. Given the structure of the URC, the Respondent was exercising its delegated functions and had overall control over scoping, deployment and oversight over the way the Ministries were administered. It delegated certain day to day management functions to the local church and the Elders. That the Respondent is the corrective putative employer is of course in any event, the agreed position of the parties.

**Was there a contract?**

224. I turn now to the question of whether there was an intention to create legal relations as between the Claimant and the Respondent.
225. Counsel for the Respondent argues that there was no intention to create legal relations and that the documentation attests to the negation of such intention. The argument as put by the Respondent is in essence, that there was an absence of an intention to create legal relations given the ecclesiastical/spiritual nature of the relationship. This is really at the core of the Respondent's case; that the Claimant was entering into religious covenants not legal promises.
226. The Claimant had identified the role of Minister as not one of employment in her claim form. Throughout her evidence and submissions she referred to understanding that her position however was that of service provider but also that the relationship had moved to one of employment. The Claimant, however, was clear that she did not understand what her status was and is inviting the Tribunal to clarify the situation. The Claimant did not consider a Minister should be an employee, however she considered that this is how the Respondent had taken to treating Ministers because she had been line managed.
227. Nowhere within the documents which have been presented does it assert that the parties did not intend to create legal relations.
228. It would have been a straight forward matter for the documents to have included some wording to reflect such an understanding. They do not do so. The URC has the support of an HR function and yet the documents, do not directly address employment status.
229. The documents (the Plan for Partnership and Settlement Agreements) which set out the Ministers terms and entitlements in some detail regarding stipend/pay and benefits do not stipulate that those terms are not intended to be legally enforceable.
230. The Plan of Partnership (p.106) specifically distinguishes between entitlements and discretionary elements of the terms which apply to Ministers as set out above in my

findings. The identification of discretionary terms of course begs the question, if the whole document is not intended not to create legal relations, why with respect to certain entitlements, is the discretion not to provide them expressly reserved?

231. The wording in the Settlement Agreement is equally unequivocal. It does not refer to the Respondent retaining any discretion over payments;

(p.207)

*“ The Minister **will** receive the Stipend...”*

*“The Minister **will** live in the manse..”*

*The terms of this **agreement will** be reviewed after the first two years..”*

*“ Both minister and Pastorate **will be bound** by the Plan for Partnership...” (P.208)*

232. And in the 2018 Settlement Agreement:

*“The scoping... **will** include leading worship on at least 36 Sundays...(p.202)*

*Hours of **will** be in line with the agreed resolution of the General assembly in 2010. These are **defined** for a four week period during which the hours worked should be not less than 160 hours...”*

233. The agreement reached as to terms involved some, albeit limited negotiation. The Claimant did not want to live in the manse provided and after discussion, she received a housing allowance. She also requested and was provided with a mobile telephone.

234. Counsel for the Respondent submits that the Claimant's position as Minister was not regulated by contract at all, as in the case of **Sharpe v Bishop of Worcester**. I have therefore considered carefully the Sharpe decision. The facts in brief in that case are that Reverend Sharpe was the Rector of a Parish, he claimed that he was a whistle-blower and unfairly dismissed and suffered detriments. The appeal concerned findings as to his status of both employee and worker. He was the holder of a freehold office which meant he could occupy his office for life, until the recent introduction of an age limit. The EAT referred out in this case to the essence of the concept of “office” which has no statutory definition and the words of Lord Atkin in *McMillan v Guest* [ 1942] AC 561;

*“Without adopting the sentence as a complete definition one may treat the following expression of Rowlatt. J in *Great Western Ry. Co v Bater* adopted by Lord Atkinson, as a generally sufficient statement of the meaning of the word: “an office or employment which was a subsisting, permanent, substantive position which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders”*

235. The primary focus of the Sharpe appeal was whether there was a contract at all and if so whether it was a contract which met the definition under section 230 and 43(K) ERA. The patrons of the parish had the right to nominate a member of the clergy to this living but a person could not be nominated without the Bishop's approval. The Bishop completed a ceremony of Installation. While neither Ms Fowke's nor counsel for the Respondent addressed in any detail the similarities in the case, it appears to be that the process was analogous to the process Ms Fowke's went through namely of being Called, Concurrence by the Respondent and then the Ordination and Induction service.

236. Reverend Sharpe on 'installation' then received a set of papers called "the Bishops Papers", these were assembled into a book which dealt with issues such as when holidays should be taken.
237. The parties in the Sharpe case had not however entered into a written document which was said to record the whole of their legal relationship. The Office of Rector carried with it the freehold interest in the parsonage and may be removed following disciplinary proceedings. The deed of institution imposed no requirements but invested Reverend Sharpe with the 'rights and duties' of the benefice and committed to him the "cure of souls". He was paid a stipend. A Rector could be suspended by a Bishop (analogous I find, to suspension by the Respondent) and removed from office on disciplinary grounds which requires a process before a Court or Tribunal (similar to the disciplinary process required to remove Ms Fowkes).
238. The Employment Judge found on the facts that the arrangements were regarded as giving to clergy: "*a high measure of independence and security of tenure, the corollary being that there was no effective framework of accountability*"
239. The terms of office, analogous with Ms Fowke's case, were not individually negotiated. All incumbents had the same terms including housing and stipend. While I appreciate in the case of Ms Fowke's there was some limited negotiation and the ability for the local church to augment the stipend, Ms Fowke's does not contend that this was applied in her case and it is clear as set out in my findings, that such a practice while not prohibited was actively discouraged.
240. Reverend Sharpe with the exception of the celebration of Holy Communion, was free to delegate duties to whomsoever he considered appropriate including members of the laity (members not part of the clergy). This is not the case with Ms Fowkes. There is no suggestion that she was able to or in practice did, delegate her duties as Minister. This is an important distinction.
241. It was found by the Employment Judge that it was a matter for the incumbent alone which duties to perform, how to perform them and with the exception of Sunday services, when to perform them. The Court of Appeal (para 26) Judgment refers to the delegation being relevant to any requirement to do work personally.
242. The stipend was paid as a fixed flat rate, the rate is set by the Diocesan Resources Board, incumbents also receive various statutory fees (for example for weddings and funerals). The Church Commissioners are responsible for the payment of the stipend and national insurance contributions. The Church of England Pensions Board is responsible for the payment of pensions. Rectors are entitled to a car loan.
243. The Bishops Papers contain guidelines on how much holiday should be taken but it is for the incumbent to decide for which they do not need permission and no check is made. There is provision for statutory sick pay and payment of stipend for 24 weeks after SSP has expired at half rate. There is no formal grievance process.
244. There was no sanction for disobeying a bishop or oath of canonical obedience albeit Reverend Sharpe considered the Bishop and Archdeacon to be in a position of supervisory authority over him but the Employment Judge found there to be no degree of compulsion or instruction in the correspondence nor minutes of meetings and it was found that; "...the freedom of rectors to go about their cure of souls in the way they see fit accordingly to their own judgment and conscience is a very real one" (para 36 of EAT decision). This gives rise to another important distinction, in that in the case of Ms Fowkes, the Synod had oversight and the right to reprimand her if they considered her behaviour did not accord with the URC rules around conduct. The Elders also had a role to play in organising the church calendar and services to be provided, working with the University to agree dates. The Claimant

did not have a totally 'free hand' in how she delivered her Ministry and met the needs of the Pastorate in the same way it seems as Reverend Sharpe.

245. The Employment Judge found in that case that; “ *...in a broad sense Mr Sharpe did have a legal relationship with the Church but it was of a kind imposed by the law itself, by reason of and consequent upon his appointment to office and not by reference to any intentions on his part or on the part of anyone on behalf of the church. They had no ability to detract from the terms on which they were bound. Although they had a freedom to contract over and above those terms, Mr Sharpe confirmed to me himself that that did not happen expressly.*” It was held in this case that what bound the parties were the “creature of the church” rather than the law.
246. This case was decided prior to the Supreme Court decision in Preston (formerly Moore) presidential for the Methodist Conference [2013] 2AC 163 .
247. There are similarities between the Sharpe case and that Ms Fowkes however, there are important factors which distinguish it not least the nature of the detailed and comprehensive written terms Ms Fowkes entered into, the absence of any right or practice of delegation, the oversight of the Synod and its ability to regulate her behaviour through reprimands/cautions and the day to day role of the Elders.
248. Considering the relationship in broader terms; the Claimant does not allege that she needed approval to take annual leave only that she needed to give notice of her intention to do so. She is limited however in how much annual leave she may take. The Settlement Agreement and Plan for Partnership provides that she may take five weeks holiday per year. The Settlement Agreement also sets out a pattern of **work** which has been agreed between the Claimant and the Elders and core days which she will work albeit outside of that basis pattern there is flexibility in the working arrangements. Her hours of work are also set out in line what has been agreed at national level namely a minimum commitment of 160 hours. The Claimant hours of work are also subject to a maximum of 192 hours although the Elders did not require the Claimant to account to them for her hours. She was not required to prove the hours she had worked or record them.
249. The Claimant was required to perform certain services and could be subject to disciplinary sanction if she did not carry out her Ministry in accordance with the standards of behaviour set out in the Basis of Union document. (p.114).
250. The Claimant's duties were defined by reference to the Induction Service, the local church, the Elders and she herself defined her activities. She had a degree of autonomy in how she performed the role and she had to organise her own time.
251. The Claimant applied for the Ministry and was offered and accepted it subject to approval of the Respondent. It was not for a specific period, it was to be a lifelong position subject to a retirement age. The Claimant could however resign at will and the custom was to provide notice of 3 months. There was specific provision for remuneration and significant benefits including travelling expenses and holidays and accommodation in exchange for the Claimant carrying out the Ministry.
252. The Minister is not referred to as an Office Holder in the Settlement Agreements. The 2018 Settlement Agreement also describes the 20% part of her duties as the “*role*” of Chaplain but also with respect to her position as Minister, the correspondence of 24 November 2015 (p. 281) from Reverend Clarke , Deputy Moderator (p.281) states; “ *The closest answer to the **role description of the minister** can be found on page 8 of the Pastorate Profile*”.

253. In my view there was an agreement between the Claimant and the Respondent that she should carry out the work of a Minister which involves both duties of a spiritual nature but also included some administrative duties. The Claimant had the flexibility regarding how to perform the work, she was required to carry this out in accordance with how it was Defined, not only by her but by the Induction Service (which she was not responsible for devising), and the local church and Elders. She arranged her work in accordance with the local church calendar which had not changed for years. There was therefore in place a practice and custom she followed in discussion with the Elders. It was the Elders who selected the dates for certain important services to take place in discussion with the University.
254. The Claimant was subject to oversight, that is accepted. The Claimant was in a position of subordination to a degree, to the Respondent and operationally subject to a degree of control by the local church and Elders.
255. The Claimant received significant pay and benefits in order to enable her to carry out her Ministry and there was in practice a restriction on her taking up other work. Her pay would be reduced if it was considered that she was not leaving enough time to effectively carry out her Ministry. Under the terms of that contract she was required to honour the content of the Pastorate Profile and the Minister's Personal Profile which were a pivotal part of the Ministerial Call process. There was therefore a link between the provision of pay and the amount of work she performed.
256. I am of the view that there was mutuality of obligation, there was an intention to create legal relations between the parties, an obligation to provide and pay for work on the one hand, and an obligation to perform that work on the other. There was I conclude an intention to create a legal relationship. If there was less work to do, the Respondent could reduce the work to part time and it necessarily followed that the payment the Claimant received would be reduced pro rata. The Respondent was under an obligation it considered to look for other work for the Claimant, she was not obliged accept it but then would suffer a reduction in pay if she did not.
257. Taking all the circumstances into account, I am of the view that there was a connection between the parties which amounted to a legal agreement. The Respondent could regulate her behaviour and reprimand her and ultimately recommend a disciplinary process be invoked which could lead to her removal, albeit not by the Respondent but at national level.

### **Personal Service**

258. I am satisfied that this was a contract under which the Claimant undertook personally to execute work. The Claimant to become a Minister had to be Called and Ordained, Inducted and the Respondent provide Concurrence. It is not asserted that she was able to delegate her work in the Pastorate or chaplaincy
259. The Respondent does not assert that the Claimant was not required to personally carry out the role of Minister for the pastorate and the activities which were "Defined" for that role.
260. The dominant purpose of the contract she entered into (which included the terms of the Settlement Agreement and Plan for Partnership), on 5 September 2108, was to secure her appointment to the Ministry so that she could perform those duties personally in the Pastorate.

## Control

261. Having determined that there was an intention to create legal relations as between the Respondent and the Claimant, I must now consider what type of contract this gave rise to.
262. There was a degree of control over the Claimant's activities, in that the contractual terms specified the hours she was to work, specified certain activities which must be carried out such as Sunday services and she was subject to guidance on conduct and potentially disciplinary proceedings.
263. In terms of day to day control over how she organised her Ministry, the Claimant accepted she had a degree of autonomy, but as set out in the findings she had to plan services in consultation with the Elders and in accordance with the liturgical calendar.
264. The Respondent was entitled to direct what the Claimant should do (i.e. carry out the role as Defined) but she had significant autonomy in the manner in which she could do it. Important elements of her role including for example, pastoral care, was not susceptible to direction by anyone else.
265. The Claimant had a significant degree of autonomy but in a number of other respects was treated in a way which was suggestive of an employment relationship.

## Benefits/ Risk.

266. The Claimant was provided with significant benefits and had no financial risk. She was not required to provide any equipment to perform her Ministry or otherwise commit any financial investment. The Claimant was wholly dependent upon the respondent for the financial ability to practice her Ministry: **Hall (Inspector of Taxes) v Lorimer 1994 ICR 218, CA**. She negotiated some terms but most of the benefits and the amount of stipend was agreed at General Assembly level, she therefore had limited ability to negotiate her terms. In practice the Claimant really had little control or influence over her remuneration package and allowance. She did not fix the payment she received. While the church had some discretion to pay an additional stipend, this was discouraged. Her remuneration was not dependant on completing any particular task. The stipend was not a nominal amount. It was set at an annual payment which it was intended would mean that the Minister would not need to be required to seek other paid employment, but focus on their Ministry. The fact that the annual payment was called a stipend therefore carries little weight: **Vaux Breweries Ltd v Rainford EAT 627/80**

## Tax

267. As set out in my findings, on balance I find that the claimant was treated as an employee for PAYE purposes, however while a relevant factor it is not conclusive as to her status: **Enfield Technical Services Ltd v Payne; BF Components Ltd v Grace 2008 ICR 1423, CA** and **O'Kelly and ors v Trusthouse Forte plc 1983 ICR 728, CA**.

## Disciplinary and grievance process.

268. While cautious of the degree to which this is relevant, the Claimant was subject to a disciplinary policy **Motorola Ltd v (1) Davidson (2) Melville Craig Group Ltd 2001 IRLR 4, EAT** and **St Ives Plymouth Ltd v Haggerty EAT 0107/08**.

## Conclusion

269. I have reminded myself that this is not a mechanical exercise but that the object of the exercise is to paint a picture from the accumulation of all the details. It is a matter of evaluation of the overall effect of the detail. Not all details are of equal weight or importance in any given situation.
270. There was an intention I have found to create legal relations, there was mutuality of obligations and a requirement for personal service.
271. The Claimant had a wide brief in terms of how she delivered her pastoral duties, however, she was constrained by the expectations of the local church, of its customary activities and events which she was required to be involved with and plan for. Her ability to accept other work was also restricted, there was no right to delegate or have a substitute.
272. The benefits she received were significant including, the provision of housing and pension and a generous stipend which was not conditional on performance or completion of any particular task.
273. The degree of control however, which is fundamental, is not clear cut. I remind myself of the guidance in ***Catholic Child Welfare Society and ors v Various Claimants and Institute of the Brothers of the Christian Schools and ors 2013 IRLR 219, SC***:
274. I am persuaded on balance, that the relationship between the Claimant and the Respondent, involved sufficient oversight and control over the Claimant's day to day activities, taken with the other factors (including the absence of any financial risk or investment, the significant financial benefits, the absence of a right of delegation/substitution and the ability to reprimand her if her conduct/ behaviour did not meet the rules of the URC) that the relationship can be characterised as a relationship giving rise to a contract personally to do work pursuant to section 83 EqA.

**The Claimant was an employee within the extended meaning under section 83 EqA and the Tribunal therefore has jurisdiction to determine the claim of age discrimination.**

275. I must now consider whether the contract meets the higher threshold of an employment contract under section 230 ERA.
276. There are many factors which favour a finding that she is an employee as defined by the ERA however, it is the level of control over which she performed her services as a Minister which I consider indicates a status potentially of something other than that of an employee.
277. On balance I am not persuaded that the degree of subordination and control exercised over how the Claimant carried out her Ministry taking into account the broad and spiritual objectives of a significant part of her role (e.g. to "*exercise Pastoral care and oversight*" and "*to give leadership to the Church in its mission to the world*") is consistent with an employment relationship.
278. There was control in the sense that the Respondent could change the scoping and administer a reprimand and in doing so regulate her behaviour and conduct, but not in the sense of managing any perceived failure to meet the broader, looser, more spiritual objectives of her role.

279. On balance I am not persuaded that the role of Minister is consistent with an employment relationship in the more restricted sense of the ERA taking into account the spiritual nature of the role which gives rise to the need for interpretation by the Minister around how to deliver significant elements of the Ministry and the extent of the autonomy she enjoyed over how to fulfil the needs of the pastorate.

**The Claimant was not an employee as defined by the ERA and the claim of unfair dismissal therefore is struck out. The Tribunal has no jurisdiction to hear this claim.**

280. While giving rise to an employment relationship in the extended sense under section 83 of the EqA, I am not persuaded despite all the other factors which are suggestive of employment status, that the arrangement involved control over the delivery of her role which was significant enough to bring her into the more restricted definition of an “employee” under section 230 the ERA. The Claimant herself expressed the view that the role of a Minister should not be that of an employee.
281. In terms of when the employment for the purposes of the EqA commenced, the parties did not address this in submissions. The latest date must be I conclude when the Claimant was Inducted to the Ministry at St Stephens on 5 September 2010. However, she was deployed by the Respondent into other Ministries from 2002. The parties did not address whether there was any ‘gaps’ between Ministries and whether the applicable date is a date prior to 5 September 2010. The parties should be given the chance to address this in further submissions if there is any dispute. That issue can be addressed further at the final hearing because it is not relevant to jurisdiction.

### **Deposit order**

282. The Respondent made an application for a deposit order under Rule 39.

### **The Application**

283. The Respondent’s primary case is that there was no employment situation and thus no dismissal but even if there were, the dismissal was for Some Other Substantial Reason and the evidence in support of that is ‘overwhelming’. However, given the conclusion that there is no employment status within the definition under the ERA, I have not gone on to determine this part of the application
284. With respect to the claim of age discrimination, Counsel submits that the retirement policy was applied to Ministers automatically at age 68 unless application for an extension is made. The Claimant did not make an application under the policy for an extension (p.271). However, as clear from the appeal, the Claimant expressed a wish to have an extension but it was not sustained on organisation grounds.
285. The Claimant’s duties had contracted, a wider review was undertaken with regards to the Pastorate looking at sustainability of the arrangements and this led to an amalgamation which included St Stephens. It is submitted that detailed reasons for the decision were given and the Claimant does not challenge their authenticity but simply disagrees with the conclusions reached. Even if the extension had been granted, the Respondent submits that it could not have been maintained at 75 % scoping.
286. The Respondent submits that there was no decision to dismiss on the grounds of age, the dismissal arose from the automatic application of a policy which could be



extended and all of the evidence it is submitted, establishes that the Respondent granted extensions in appropriate circumstances where the Pastorate was sustainable.

287. Further, it is submitted that the Claimant's chosen comparators are of the same age or older than the Claimant and therefore she cannot, in reliance on those comparators, show less favourable treatment.

### **Claimant's submission**

288. The Claimant made brief submissions as to the merits of the claims and submits that there were funds according to the Synod reports to cover the cost of the Claimant remaining in the Ministry and thus the Respondent did not have to terminate her Ministry. Those providing the funds and the Claimant providing the 'service' were in agreement about extending her Ministry. She would have been prepared to re-negotiate the terms of her Ministry but there was no engagement with her.

### **Financial means**

289. I explained to the claimant that if I decide to make a deposit order, the limit I can order her to pay is £1,000 per complaint or allegation but I will take into account her financial means if she is willing to give evidence about them. The Claimant declined to give evidence about her means. Counsel for the Respondent in those circumstances invites me to make an award of not less than £500 per claim.

### **Legal Principles**

#### **Deposit Orders – Rule 39 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013**

290. Rule 39 provides as follows:

*“(1) Where at a Preliminary Hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

*“(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.”*

291. Thus, a Tribunal may make a Deposit Order where a claim or part of it has little reasonable prospect of succeeding. However, this is not a mandatory requirement and whether to make such an Order, even where there is little reasonable prospect of success, remains at the discretion of the Tribunal to determine whether or not such should be made.

292. Direct discrimination : section 13 EqA:

*(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

*(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.*

293. The Employment Equality (Repeal of Retirement Age Provisions) Regulations 2011 SI 2011/1069, which came into force on 6 April 2011 removed the specific exception that applied to the default retirement age. As a result, requiring an employee to retire at a fixed retirement age will amount to direct age discrimination under S.13(1) of the Equality Act 2010 (EqA) unless the employer can justify that requirement under S.13(2).

### Judicial Guidance

294. I have considered the guidance of Mrs Justice Simler (President) **Ms A Hemdan v Ms Ishmail and Mr H Al-Megraby: UKEAT/0021/16/DM** and in particular paragraph 12 of the judgment.: “12. ... *there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence...*” and even then the making of a deposit order is a matter of discretion and does not follow automatically (para 15).
295. The leading case on the question of objective justification relating to retirement ages is the decision of the Supreme Court in **Seldon v Clarkson Wright and Jakes (A Partnership) 2012 ICR 716, SC**, It is clear from this decision that the focus should be on the justification of the retirement age itself, not on its application to the claimant.

### Conclusion and Analysis

296. The documents appear to provide support for the Respondent position that the Claimant did not make an application for an extension (p.271 and 216) pursuant to the process under the policy however, it is not in dispute that she was forced to retire due to her age and that she did request an extension and appealed the decision (p.256) not to support an extension to her Ministry.
297. What the Claimant appears to be doing in identifying others of the same age or similar age who have been retained, is to point to the difference in treatment which will be relevant potentially to an assessment of the justification argument, rather than identifying comparators.
298. Even if the Respondent can show a legitimate aim, it must of course persuade the Tribunal that the retirement age selected was a proportionate means of achieving it.
299. I note that in the retirement policy document (p.294) (although not taken to this document in the course of the Respondent’s submissions), it sets out what the aims of the fixed retirement age are, which include the promotion of intergenerational fairness and dignity and the management of the number of serving Ministers in a shrinking denomination.
300. I heard no evidence or arguments however about how and why the particular retirement age was chosen.
301. There are material issues of facts both as regards the legitimate aim and whether the chosen age was a proportionate means of addressing that aim, which can only be determined by an Employment Tribunal when all the facts and evidence has been fully ventilated at a final hearing.
302. I am not persuaded on the material before me that the claim has little prospect of success and the application for a deposit order is therefore refused.

303. Separate case management orders will follow.

Employment Judge Broughton

Date: 20 December 2022