EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
J	**v**	K1
		K2

Heard at: **Southampton** **On:** **21-24 September 2020**

Before: **Employment Judge Rayner**

Appearances
For the Claimant: Ms M Tether, Counsel
For the Respondent: Mr E kemp, Counsel

Reserved Judgment
On Preliminary Issue of Jurisdiction
Amended on 21 January 2021with additional reasons

1. **The Correct respondent is the Bishop of W, K1, and the second respondent is dismissed as a respondent to these proceedings.**
2. **The Claimant is not a personal office holder within the meaning of section 49 (1) Equality Act 2010.**
3. **The claimant is not a worker or employee within the meaning of EU law and is not therefore within scope of either the frame work directive in respect of Age, or the ECHR.**
4. **The claimant has no freestanding right to claim age discrimination under EU law provisions or the European Convention of Human Rights.**
5. **The claimants claim of Age discrimination is therefore dismissed.**

Reasons

1. This was an in person preliminary hearing, with evidence being given by Professor McClean over a video link.

2. Further to the claimant's letter of 5 January 2021, requesting written reasons for the decision that the claimant has no freestanding right to claim discrimination contrary to the European Convention of Human Rights, I provide the additional reasons at paragraphs 305-343 below of the reasons. The paragraphs are underlined for ease of reference.

Background to the claim

3. The claimant was a priest in the Church of England, and since the 24 September 1987 had been vicar of a city church.

4. On 8 May 2019 the claimant turned 70.

5. Section 1(3) and 3A of the Ecclesiastical Offices (Age Limit) Measure 1975 provides that all office holders, such as the claimant, will have a retirement age of 70.

6. Under regulation 29A of the Ecclesiastical Offices Terms Of Service Regulations 2009, the term of office can be extended by the Bishop giving a direction to extend the office beyond the age of 70 for a fixed period, but not beyond the age of 75.

7. The claimant asked the Bishop to exercise the discretion, the Bishop declined to do so, and the claimant retired at 70.

8. By a claim dated 21 August 2019 the claimant alleges that his forced retirement at 70 is discrimination on grounds of age and that he is covered by the provisions prohibiting age discrimination except where justified, within the Equality Act 2010

(EqA), because he is a personal office holder within the meaning of section 49(2) of EqA.

9. At paragraph 6 of his ET1, the claimant asserts that the legislative provisions for compulsory retirement of clergy at 70 are incompatible with section 13 EqA 2010, and are further incompatible with the EU Equal Treatment Framework Directive, 2000/78/EC.

10. The claimant states that the respondents have not established that there is a genuine occupational requirement for retirement at 70 or 75 years of age.

11. Following permission being granted to amend his claim to include a claim of victimisation the claimant further asserts that he was victimised by the respondent.

12. By an ET3 in response the respondents resist the claim

13. At paragraph 10 of the ET3 the respondent states that the claimant was not the holder of the personal office because
    a. he held the freehold of the benefice, which was a form of tenure which could not be terminated, except in the limited circumstances set out;
    b. he was not appointed to discharge his functions personally under the direction of another person;
    c. the presiding Bishop was not entitled to direct the claimant as to when and where to discharge the functions of his office.

14. The respondent further relies on paragraph 1(1) schedule 22 EqA and asserts that the termination of the claimant's office was pursuant to a requirement of an enactment and is therefore not a contravention of the EqA.

15. In this case the respondent submits that this would mean that the respondent does not contravene the provisions of the EqA in respect of work and occupation on grounds of the protected characteristic of age, if the enactment relied upon results in the Bishop doing something which he or she must do pursuant to that enactment.

16. The respondent asserts a defence to the claim of age discrimination by way of a compulsory retirement age, because the retirement at 70 was required by an enactment, unless the Bishop exercised his discretion in accordance with the provisions of regulation 29A(11).

17. The respondent sets out a substantive response to the claimant's primary claim of age discrimination by direct discrimination contrary to section 13 and by victimisation contrary to section 27 EqA 2010, but those matters will only require determination if the preliminary question of jurisdiction is determined in the claimant's favour. The question before me is whether or not the ET has any jurisdiction to hear the claimants claim of age discrimination at all.

18. The claimant accepts that he had not have a contract with the respondent.

19. a personal office is an office or post to which a person
    19.1. is appointed to *discharge the function personally under the direction of another person. (*Section 49(2)a);
    19.2. in respect of which an appointed person is entitled to remuneration. (Section 49(2)b).

20. There is no dispute in this case that there was an entitlement to remuneration and respondent accepts that the claimant was an *officeholder*, but disputes he satisfies the definition of a personal office holder within 49(2)a.

The issues in the case

21. At a case management hearing on 4 March 2020 before Employment Judge Fowell, the matter was listed for consideration of the preliminary issues for 4 days starting on the 21 September 2020. The issues for consideration at the preliminary hearing were agreed as follows:

    21.1. Who is the correct respondent to the claim?

21.2. Was the claimant an employee within the meaning of section 83(2)a EqA?

21.3. was the claimant a personal officeholder within the meaning of section 49 (2) EqA?

21.4. if so, was the termination of his office something which the respondent was required to do by reason of an enactment, such that his claim falls within the terms of the exemption in paragraph 1(1) of schedule 22 EqA?

22. In addition, a list of issues for the final hearing was determined and case management orders made in respect of the preliminary hearing.

23. Prior to hearing. I have been provided with the following documents:

23.1. An agreed bundle of 34 statutory provisions and UK and CJEU case law authorities;

23.2. An agreed bundle of documents of 429 pages;

23.3. A copy of the Canons of the Church of England of 230 pages;

23.4. A witness statement from the claimant, J on his own behalf, and witness statements on behalf of the respondents, from Professor John David McClean; the first respondent K1, and the Rev Phipps, who is chaplain to K-1;

23.5. A glossary of ecclesiastical legal terms from the respondent;

23.6. A short chronology and cast list drafted by the respondent;

23.7. An opening skeleton argument from the respondent;

23.8. An opening skeleton argument from the claimant;

24. As well as receiving witness statements, I heard live evidence from all 4 witnesses, with Professor McClean giving his evidence over a video link.

25. Following the close of evidence, Ms Tether, counsel for the claimant and Mr Kemp counsel for the respondent provided further written submissions which they supplemented with oral submissions.

26. Following the hearing, on 25 September 2020 and 2 October 2020 respectively, Ms Tether for the claimant and Mr Kemp for the respondent provided further short supplementary written submissions which provided clarification of the scope of the issues between them and some additional submissions in respect of case law.

27. My thanks are due to both counsel for their focused and articulate submissions and their helpful summaries of the issues and relevant case law.

28. From the submissions received before, at the end of hearing and after the hearing the full list of the legal and factual questions which arise for my determination are as follows:

    28.1. Is the claimant a personal officeholder within the meaning of section 49 EqA?

        28.1.1. did the claimant carry out the duties and functions of the office personally under the direction of another person?

        28.1.2. did the other person direct the claimant as to where and when he should carry out those functions?

    28.2. If the Claimant was an officeholder within section 49 EqA, was the decision in respect of retirement one which falls within schedule 22 EqA so that the claim is excluded?

        28.2.1. What was the statutory measure which the respondent relies upon for the purposes of Schedule 22?

        28.2.2. did that statutory provision require the respondent to dismiss the claimant by reason of retirement? (for the avoidance of doubt, the respondent accepts that the claimant's claim of victimisation is not caught by schedule 22 EqA);

    28.3. If the claimants claim is excluded by schedule 22 EqA, is schedule 22 incompatible with the provisions of European law in respect of age discrimination in that it denies the court the opportunity of determining whether or not what would otherwise be prima facie discrimination on grounds of age has been justified?

    28.4. If so, is the respondent correct that the claim would have to be adjourned part heard to allow the Secretary of State to file a defence, since the

statutory measure would require justification by the government and not by the respondent?

28.5. Was the claimant a person covered by the provisions aimed at preventing age discrimination within the treaty for the European Union (framework directive) read with the relevant directive in respect of discrimination on the grounds of age?

28.6. Is the claimant a worker or other person so covered and is the correct test of who is within scope the test set out in *Allonby v Accrington and Rossendale* as applied in *Jivraj*?

28.7. Does the claimant have a freestanding right to claim age discrimination because of the horizontal effect of the European treaty provisions?

28.8. does the claimant have a freestanding right, derived from the charter and convention of human rights, derived from of article 8 read with article 14?

28.9. if the claimant is protected by a freestanding right not to be discriminated against on grounds of age, derived from the law of the European Union, will that right continue to be enforceable after implementation of the Treaty For Withdrawal From The European Union and following Brexit?

29. The parties supplemental submission were to the following effect;

29.1. The claimant has a domestic cause of action of victimisaton which is derived from EU law. (See Court of Appeal in ***Rowstock Ltd and another v Jessemey*** [2014] ICR 550). The respondent withdrew their submission to the contrary.

29.2. The Claimant accepts that he cannot rely on the general principle of non-discrimination under EU law and his directly enforceable rights under the Charter if, contrary to his primary contention, he is not within the intended scope of the Framework Directive. ***(see decision of CJEU judgment in Dansk Industri, acting on behalf of Ajos A/S v Estate of Rasmussen*** (Case C-441/14) [2016] IRLR 552 – see §§21-37, and in particular §24)

29.3. The claimants submissions on Article 3 frame work directive.

29.4. The claimant maintains that if he is not within the definition of worker, he is within the scope of Article 3 of the Framework directive.

Preliminary Matters

Anonymity

30. In advance of hearing the claimant made an application under regulation 50 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 for a private hearing in respect of parts of the evidence and for an anonymity order in respect of the parties names.

31. Both counsel addressed me on the applications and following discussion it was agreed that the concerns in respect of privacy could be addressed by counsel agreeing to the redaction of certain documents within the bundle. They agreed to do this overnight, and did so, and therefore by consent the application in respect of a private hearing was not pursued.

32. The respondent did not object to the application for anonymity, and having heard the claimant's application and read the written submissions provided I determined that it was in the interests of justice for an interim anonymity order to be made. I have therefore made an order for anonymity of the parties names which will remain in place for 28 days following promulgation of my judgement. If at that stage, the claimant considers that there is a continuing need for anonymity because of concerns arising from any reference to past allegations of misconduct, then a further application for an extension of anonymity will need to be made to the employment tribunal.

33. The claimant is therefore referred to as J throughout and the respondents as K1 and K2. No application for anonymity was made in respect of any other individual. When writing this judgment , it appeared to me that by identifying by name some of the witnesses in this case, or by referring to the diocese or the church by name, it may be possible to identify the claimant and I have therefore referred to parties by initial only where necessary, or by title and have not referred either to the particular church or the Diocese by name .

Approach to the Evidence

34. Two issues arise in respect of the evidence in this case, because of the judgment of the Court of Appeal in (*Sharpe v Worcester Diocesan Board of Finance and another* [2015] ICR 1241, [2015] IRLR 663)).

35. The first concerns Professor McClean who the Respondents have called as a witness of fact. His witness statement also contains comment and opinion. The claimant does not raise any objection to his evidence being admitted but referred me to the comments of Arden LJ (as she then was) in *Sharpe*, in respect of the nature and admissibility of apparently similar evidence given by Professor McClean and urged the same level of caution.

36. The ET in *Sharpe* had been entitled to admit and consider the Professor's evidence but the employment judge had correctly treated Professor McClean's evidence with caution insofar as his opinions sought to answer questions the employment judge had to answer himself (*Sharpe* At paragraph 117-122 per Arden LJ (as she then was)).

37. I was invited to exercise the same caution in this case. I agree and have borne this in mind when considering the evidence and making findings of fact.

38. The second issue was in respect of the relevance and effect of the Canons on the relationship between the freehold incumbent and the church on the one hand and between the freehold incumbent and the Bishop on the other.

39. This question was considered in detail in *Sharpe* in particular by Lewison LJ. My conclusions as set out below, is that I am bound to follow the reasoning and conclusions of the Court of Appeal in respect of the legal effect of the Canons, measures and statutory provisions on a freehold incumbent, such as the claimant. The fact that a different legal test was being considered in that case (Sec 230 ERA 1996) to this one (sec 49 EqA 2010) does not matter in that respect. I am not bound to any particular conclusion however, on their application for the purposes of section 49 EqA.

Findings of Fact

40. This is a case where there is little disagreement on the chronology of events or basic factual background. The disagreement between the parties is as to the interpretation of the responsibilities and powers of the parties and the consequent employment status of the Claimant.

41. The claimant has been an ordained priest of the Church of England since 26 June 1983.

42. From 24 September 1987 until his retirement at age 70 on 8 May 2019 he was the vicar of a parish in the diocese of Southampton.

43. The claimant was ordained as a deacon on the 26 June 1983, and was ordained as a priest on 3 July 1984. At his ordination service, the claimant recognised his calling to serve God in his ministry and he received his letters of orders.

44. The claimant was a freehold incumbent. This is the historic form of tenure for a priest. The Church of England reformed the clergy terms of service in 2009, with the introduction of the *Ecclesiastical Offices (Terms of Service) Measure and Regulations 2009*, which introduced Common Tenure terms. This was available to the Claimant, but he chose to remain as a free hold incumbent, choosing in his words, to remain with the status quo.

45. On the 12 May 1987 the claimant was invited by his Bishop to formally accept the invitation to become the vicar of a particular parish in the diocese. The invitation refers to some of the pastoral and liturgical needs of the parish and says: *to which I am sure you will be very sensitive.* Reference is also made to a ministry to be exercised among handicapped children and it states that the deanery would welcome the possibility of this being followed up elsewhere in the deanery.

46. The language is that of information about the work that has been done, and hope that work will continue to be done in these areas, not of obligation or direction. There are no terms and conditions set out and no directions as to where or when

the claimant should carry out the priestly functions. There is no proposed starting date.

47. The claimant was asked to give an indication of when he would like the announcement of his appointment to be made and when he might be free to move to the Parsonage, so that date could be arranged for his institution.

48. In the letter accepting his appointment, the claimant states that he intends to take some leave prior to taking up his new duties and makes some suggestions for dates for the announcement both in respect of the new post and in respect of his existing position.

49. The next stage of the process of was the claimant's collation followed by his induction. An announcement was made and the church wardens published a notice under the Benefices Act 1898.

50. The parties agree that the parochial church council had rights to object to or veto the appointment, but they did not do so in this case and the claimant made his declaration and oaths prior to collation, swearing an oath of allegiance to the Queen and an oath of canonical obedience.

51. The claimant was collated by his Bishop on the 24 September 1987. The claimant's deed of collation, which was produced during the course of this hearing, invests him with all the rights and duties of the benefice and commits him to the cure of souls of the parishioners thereof.

52. There is nothing in the deed of collation, other than the commitment to him of the cure of souls of his parishioners, setting out the scope of the nature of the role that he is taking on.

53. The claimants' induction then took place, at which the Archdeacon placed his hand on the church building and spoke the words of induction, before handing the temporalities of the benefice to the claimant. The claimant is inducted into the real

and corporeal possession of the said benefice, which include the title to the church, the churchyard, the parsonage house and office of vicar.

54. The oath of canonical obedience is as follows: *I [J] do swear by Almighty God that I will pay true and canonical obedience to the Bishop of Winchester and his successors in all things lawful and honest.*

55. The oath of canonical obedience is a spiritual oath. Canon 1(2) provides that once a person is admitted to the order of Bishop, priest or deacon they cannot be divested of the character of their order. The priest may voluntarily relinquish the exercise of his orders by following a legal process or may, following a legal and canonical process, be deprived of the exercise of his orders or deposed from them.

56. The effect of this is that once admitted to the order of priest, the individual remains bound by oath of canonical obedience to the Bishop in all things lawful and honest even after they cease to occupy the office. The claimant accepted that the oath continues to bind him even after the ending of the office.

57. This showed a vocation of the Bishop and the priest in a spiritual mission valued by the clergy is captured by the words" your cure and mine". It is a shared mission that in practice it is one that each of them undertakes largely independently of each other.

58. The claimant did not receive any job description or list of duties. His responsibilities came from his vocation to serve God and they are discharged within the ecclesiastical framework of the canons.

59. In addition, the claimant received an annual stipend administered by the second respondent; he was entitled to sick pay and benefited from a non-contributory pension fund. He also had occupation of the parsonage house.

60. As a full-time member of the clergy in receipt of a stipend the claimant was not permitted to engage in any commercial or professional activity on his own account or undertake any continuing work for another employer.

61. The claimant's diocese published and distributed a handbook, which is also available online. The online version, *information*, is a compendium of the policies and processes particular to the claimants' Diocese. Neither contains contractual or other enforceable rights.

62. In respect of annual leave, there is guidance within the handbook as to the amount of leave that may be taken by a priest. The claimant was *permitted* to take 4 weeks leave, including four Sundays per year, which changed to 36 days per year. More recently, holiday could be taken on major festivals, but only with the agreement of Bishop for relief cover to be provided by other priests.

63. The language is of recommendation and not of entitlement and there is no obligation on a priest to take the amount recommended, or any leave at all or to limit the amount of leave taken.

64. In his evidence the claimant accepted that the amount of holiday and the taking of it was a recommendation. The claimant had taken very little leave some years, and I find that this was because he chose not to take annual leave, and did not consider it as an entitlement, but as a choice.

65. The claimant was entitled to various payments for out-of-pocket expenses and payments in respect of sick pay, for example.

The role and Functions of the Claimant

66. The claimant gave evidence in his witness statement and in oral evidence of the various functions that he carried out in his role as vicar.

67. He stated that his main duties were the pastoral care of the parish; the day-to-day care of the church; acting as chairman of the parochial church council; magazine editor, and printer and compiler in the early years.

68. He carried out daily services celebrating the sacraments of the new covenant; the daily offices; daily and Sunday Eucharist; baptisms, marriages and funerals; bereavement care; home communions for the sick and housebound and daily involvement with parish affairs, including the Ladies Guild and weekly lunches for the elderly.

69. From 1990 until 2015 the claimant was a member of the General Synod of the Church of England, and a Proctor in Convocation in Canterbury province. From 1990 to 1995 he was a member of the Central Board of Finance of the Church of England. From 1996 to 2015 he was a member of the Governing body of the Southern Theological Education Training Scheme at Sarum college responsible for education candidates for ministry in the church of England, the Methodist and United Reformed Churches.

70. He has also been, over the years, a member of the Winchester Diocesan Board of Finance, of the Winchester diocesan Synod and Southampton Deanery Synod.

71. He had been involved as a Master the Winchester and Portsmouth dioceses Guild of church bell ringers.

72. He was *Forward in Faith* Regional Dean for East Wessex for 15 years. He had been involved in the *Forward in Faith* Council, had been the *Forward In Faith* diocese chairman as well as a member of the Council of the Guildhall Souls and a member of the Society of the Holy Cross.

73. In addition, he has been a Unite the Union accredited representative for many years.

74. The wide range of functions and activities reflect the claimant's own choices and the direction of his ministry was of his own choosing, reflecting his personal calling and vocation. The claimant does not suggest at any point that the choice or direction of his ministry was directed by his Bishop or anyone else, nor does he suggest that the manner in which he exercised these functions, or how and when

he carried them out, was subject in any way to the direction of his Bishop or anyone else.

75. It is apparent from the evidence I have heard that the claimant had a very wide degree of choice in respect of how, when and where he exercised the functions of his office. He valued this freedom to decide how and when he carried out his calling and exercised it throughout his time as a priest.

76. He states for example, in respect of training that *various courses are organised by the Diocese on a pick and choose basis, many of which I have attended over 36 years I was in the diocese. Additional external qualification or training is a matter for each individual and in some circumstances grants were available from the Diocesan training budget. I made a decision to undertake further study at king Alfred's college Winchester for a masters degree in religion, validated by the university of Southampton, which I completed within a year gaining a distinction.*

77. The claimant received some financial support from the diocese, some from the parish and paid the remainder himself.

The Disciplinary issue

Allegations of Misconduct and the Clergy Disciplinary Measure

78. In April 2009 a complaint was made against the claimant. The ET in this case is concerned only with the process followed in dealing with the complaint and not the subject matter of that complaint.

79. Subsequently, allegations of misconduct were made by the officer of the dioceses using the Clergy Disciplinary Measure 2003 (CDM). The complaint was made to the Bishop.

80. The CDM is a Measure passed by the General Synod of the church of England. It is the disciplinary process used by the Church of England. If an allegation of misconduct is upheld, it is possible for a priest to be dismissed.

81. The measure was considered by Lewison LJ in *Sharpe* (see above) and the particular powers are set out at paragraph 161-163 of the judgment. I do not repeat in full the description of the powers except to note that the Bishop's role is limited to considering what to do with a complaint once it is made, to the extent that he or she can determine
    a. to take no further action;
    b. direct the matter remains on the record conditionally or
    c. to direct that an attempt at an attempt at conciliation;
    d. to impose penalty, but only with consent or
    e. to direct a formal investigation.

82. If the Bishop directs a formal investigation, then the matter is passed to a designated officer to investigate, and the president of the tribunals decide whether or not there is a case to answer.

The essential point is that the disciplinary proceedings are neither initiated by the Bishop nor decided by him. Nor does the diocesan board of finance have any part to play. The Bishop has the powers (and only the powers) conferred on him by legislation. (para 164 per Lewison LJ Sharpe ibid).

83. In the claimants' case, the Bishop made a decision not to dismiss the complaint and instead wrote to the claimant on April 15 2009, with a copy of the report made into misconduct, inviting the claimant to provide a written answer to the complaint within 21 days, using a particular form. The letter states *as I am now in a position under the Measure of having responsibility for determining the course of action to be pursued I shall want to discuss with you (when you meet next week) how I can best make provision for your ongoing Pastoral care*.

84. The claimant did not meet with the Bishop and nor did he provide a response to the complaint within the 21-day period. He says that this was because he was signed off sick at the time.

85. On 22 April 2009 the Bishop wrote again to the claimant, and stated, *as everything I said in my letter of 15 April inviting you to see me today still remains the case I judge that we should meet and so I invite you to Wolvesey on 1 May at 10.0am.*

86. He stated that the meeting would be around the questions of the claimants' suspension, his pastoral care and that of the parish.

87. The claimant did not attend and the chair of the Unite faith workers section replied on 30 April 2009 on his behalf to the Bishop stating *since he is signed off sick with stress quite properly, he will be unable to come to of any sort of meeting with you until he is deemed fit to return to work by the proper authorities and thus deemed fit to deal with such serious matters.*

88. He also stated that the claimant refuted the allegations.

89. The claimant was refusing to attend at meetings, but not, he says because he considered that he could not be obliged to attend, but because he was unable to do so, due to his ill health.

90. Following this exchange of letters, the Bishop decided to suspend the claimant, and on 1 May 2009 he wrote to Unite faith workers stating that this was his decision. The letter of suspension in accordance with the CDM section 36(1) a was sent to him on 6 May 2009. The claimant appealed against the decision to suspend him and this was referred to the Right Honourable Lord Justice Mummery. The claimant remained suspended, with a series of extensions until the complaints procedure was completed.

91. During the course of the investigation and for the duration of the suspension, the claimant was not allowed to perform his duties as a vicar.

92. On 6 September the Bishop wrote again to the claimant who was still signed off sick. He noted that the last sick note had expired; asked if the claimant was now well enough to see him, as he wanted to bring the matter to a conclusion and

offered various dates for meeting the claimant. In response the claimant sent in further sick notes signing him off for further periods of time.

93. On 30 September 2009 the Bishop wrote to the claimant to inform him that *since you judge that you have been unable to make a full response as required under the measure and to come and see me, I now consider that I have no alternative, for everyone's sake, but to refer the complaint to the designated officer under section 17 of the CDM, for formal investigation.*

94. Following this the Bishop took no further role in the investigation of the complaint.

95. The complaint was referred to the Right Honourable Lord Justice Mummery who determined the matter. His role was set out in his letter of determination and states as follows

> *now that all the procedures which inevitably take time in a case like this have been completed, I should briefly explain my legal role as President of Tribunals. I am not responsible for the discipline of clergy in the Dioceses of W. That is the responsibility of the Bishop. Nor is it my function to decide disputed questions of fact or law relating to the alleged misconduct; that is the responsibility of the Bishop's disciplinary tribunal should this matter be referred to it. My function at this stage is to form an impartial opinion as to whether, on the basis of all the available information, there is a case of misconduct within the meaning of the Measure which ought to be referred to a disciplinary tribunal for the respondent to answer.*

96. He decided that, on the evidence available to him there was no case to answer and the matters would not be referred to a disciplinary tribunal.

97. Lord Justice Mummery then wrote to the Bishop on 28 June 2010 stating that there was no case for the respondent (the claimant in this case) to answer and the complaint would not be referred to the Bishops' disciplinary tribunal. This effectively brought the process to an end.

98. Following this process, the Bishop wrote again to the claimant on 12 July 2010 telling the claimant that he would receive a letter concerning the complaint and stating that it was important that they meet as soon as possible to discuss the contents and implications of the letter. The conversation was to be a Pastoral discussion and not disciplinary in nature. The Bishop gave a date and time and place of the meeting and asked the claimant to confirm that he could make the appointment.

99. The claimant's suspension also came to an end. The claimant remained signed of sick.

100. After initially agreeing to meet, with his union representative present, the claimant declined to meet with the Bishop. His representative from Unite faith workers stated, in a letter, that *on the understanding that this really is a pastoral meeting and we are there to discuss parish care and I assume your care of your priest, I will endeavour to persuade [the claimant] that he has nothing to fear from such a meeting and get him to come and meet with you.* Whether he did or not, he was unsuccessful and no meeting took place.

101. Shortly after this, the Bishop and the claimant both attended the New Forest show, and bumped into one another. The Bishop told the claimant that it was essential that they now meet to talk about the parish and its present and its future. The claimant told the Bishop that he did not think it would be good for his health to meet and he would find it too stressful and that it may be another 26 weeks before he was well enough to meet.

102. At this point the Bishop had concerns that the claimant was not cooperating either with the Bishop's request for a meeting or in carrying out the functions of office. Nonetheless, there is no correspondence with the claimant raising any concern or issuing any direction that he must attend the meeting or that he must carry out any functions of his office or that failing to do so would lead further consequences.

103. The Bishop sought advice from Human resources. Advice was provided by Susan Beckett. She stated in her letter of 18 August 2010 that they needed more detailed advice about what the claimant should be able to do and engaging to ensure that the dioceses met their duty of care towards him. The claimant at this point was stating that his doctor wanted him to avoid stressful situations. She suggests that they would need to ask the claimant to attend a meeting with an occupational health adviser, which they would set up once there had been such a meeting it would be easier to review his progress and not allow matters to drift. She then said *it is normal in the circumstances for an employer to seek additional professional help to ensure that they are doing the best they can to support the individual and not hinder the recovery period. I can't see why this should be any different for officeholders. However, we can't insist that he attends a meeting with OH, although I believe he should do what is reasonably asked of him by the Bishop.*

104. By October 2010 the Bishop was losing patience. He was clearly frustrated with the claimant and on the 21 October 2010, the Bishop had a conversation with somebody referred to as AJ, recorded in a file note. The file note states

1. *refusing to meet its self. Surely conduct unbecoming, but precedents?*
2. *? canonical obedience but question that read just what is lawful-so slippery difficult*
3. *pastoral breakdown one(VB)M but time-consuming and expensive*
4. *Visitation of the parish via, sorry-for which articles of dissertation he could not simply sit tight and refuse to take any notice.*

AJ will write up. Check out why because it's both a scandal and widely demoralising.

105. On 29 November 2010. Mr Barlow wrote on behalf of the claimant in respect of the requests to meet. He sought further details of the meeting and stated *your continual requests to come to [the claimant's parish church] 3 this year in a diocese of 304 parishes seems a little overenthusiastic at the least, or may appear to be close on to harassment of a priest and parish who have requested alternative episcopal oversight anyway. Perhaps you would let us know the basic purpose of these visits.*

106. The Bishop responded on 9 December 2010 stating among other things, *the suggestion that it is in any way inappropriate for me to wish to visit a parish -and more than once- which in the slightest observation raises questions over its effective function- Whatever the causes -is wholly wrong. It is my duty to look into the matters that cause me concern and I am very surprised that you do not seem to understand that I must do all that I can carry out the duty.*

107. No meeting took place and by February 2011 the Bishop requested the drafting of articles of enquiry to be served under the Canons, which required a letter to the claimant and a letter to the Archdeacon in order to move matters forward.

108. The process was supposed to enable the Bishop to visit the claimant's parish under a formal visitation. The words proposed by the Bishop were *the duty to respond to this properly summoned visitation is a canonical duty. The Archdeacon will propose dates on which he wishes to attend to pursue his enquiries whilst you will be entitled to identify the most convenient the date of that it will not be acceptable to delay this matter until a perfectly convenient date is found.*

109. The clear intention of the Bishop was to require and insist that the claimant accept visitation and meet with the Bishop. It is implicit from the correspondence I have been referred to that one of the reasons why the Bishop wanted to pursue the visitation was a concern about when and where and indeed how frequently various of the functions of the office were being carried out.

110. The letters were duly sent out but the meeting did not take place. The claimant declined to cooperate.

111. On 30 August 2011 the claimant sent a provisional visitation response to Patrick Evans, who had been enlisted to assist the Bishop.

112. The claimant asserted that there was no basis under the Canons for such a visitation and suggested that the Bishop was in the wrong for pursuing visitation following the dismissal of the allegations of misconduct against the claimant. The claimant did however provide some responses to questions asked about the

parish, in respect of the electoral statistics, the parish characteristics; church activities; occasional offices; assets and finances. The letter then goes on to challenge the basis of the visitation.

113. At paragraph 7 on the 3rd page of the letter, the claimant writes as follows

as a freehold incumbent the vicar is not subject to review or appraisal and as a way of life 24 7 with no set hours to justify or quantify, a time and motion study is not appropriate and the Bishop initiating this visit is not entitled to answers in this matter. The dioceses and registrar stated that this visitation is not about the incumbent personally or in role, and therefore questions about time spent on various activities which can vary widely from day to day in the course of his ministry…, the churchwardens estimate that they each spend up to 15 hours a week church and general responsibilities, whereas the time commitment of other members of the PCC varies but is limited.

114. This was a rejection by the claimant of what is described elsewhere as a right of visitation by the Bishop.

115. In the event the visitations did not take place. The reason why this did not happen was because the claimant declined to cooperate and refused to allow the Bishop to exercise the right of visitation in order to question how, when and where the claimant was carrying out the day-to-day functions of his office. He declined to be directed by the Bishop at any stage, and the Bishop in practice, on these facts did not have any power to force cooperation.

116. I find that the claimants actions and his behaviour at that time, indicate that he did not consider that he had any obligation to comply with the Bishops request to even question him about how he was carrying out his functions.

117. I conclude that he did not consider that the Bishop had the right, or the power to direct how he carried out his functions, or whether he carried out his functions.

118. I find that the Bishop did not consider that he had the power to insist on the visit. I make this finding on the basis of the exchange of correspondence. It is implicit from the correspondence that if the then Bishop had had the power, he would have taken steps to oblige the claimant to do as he was asking, and meet with him to discuss how, when and where he carried out his functions.

119. Following these events, no further attempts were made to force the issue and matters moved on and after some time a new Bishop was appointed.

120. The claimants and the Bishop did not share the same theological views on matters of central importance to the claimant and the church. These included theological differences on the ordination of women. The legislation came into force in 1994, the parochial church council at the claimant's church past necessary resolutions against a woman minister celebrating or presiding at holy Communion or pronouncing absolution.

121. The incumbent Bishop told me in his evidence and I accept that a priest could only refuse the Pastoral care of his or her Bishop for reasons of deeply held theological difference, and that the decision of the priest to be provided with oversight from a flying Bishop would always be an exception to the general expectation that the Bishop of the Diocese would provide the pastoral care and oversight.

122. The accommodations made by the Church of England to priests who do not accept the ordination of women for theological reasons, are to provide such priests with a choice. They may decide that as a matter of conscience, they require a flying Bishop, but they may as a matter of conscience decide that they do not. This is not a matter over which Bishop may direct them. The obligation upon the priest remains that they receive some form of oversight from somebody, but it is for the individual to determine where that oversight comes from.

123. On 16 May 1994, the claimant wrote to the Bishop requesting that the appropriate Episcopal duties in the parish be carried out by Bishop who did not ordain women.

124. The claimant was therefore provided with a flying Bishop. The Episcopal duties amount to confirmation and in some cases, consideration of potential candidates for ordination in the parish. However, a flying Bishop will undertake much of the pastoral care of the priests on behalf of the diocesan Bishop. It is for this reason that the Bishop dealing with the disciplinary issue sought the help and support of the claimant's flying Bishop in trying to achieve cooperation with J in the statutory process.

125. On 26 September 2018 the claimant was informed by Susan Beckett, then head of HR that all clergy must retire at the age of 70. The claimant asserts that this was the first occasion on which he had received a formal notification of this practice, although he accepted that he had probably been aware of the requirement to retire at 70 before then.

126. The claimant did not want to retire at 70, and asked the Bishop to exercise discretion to extend his term beyond age 70.

127. As a result of the Ecclesiastical Offices (Age Limit) Measure 1975, the Bishop was only empowered to extend the claimant's office in limited circumstances. These were if the Pastoral needs of the parish of the dioceses made it desirable.

128. The Bishop did not exercise his discretion. He took into account the limited power he had to extend the office and also took into account a number of factors in deciding that the pastoral needs of the parish of the diocese did not make it desirable to extend the claimant's office. These included the following

128.1. the claimant had occupied the office since 1987 and it was desirable for the parish to begin the process of adjusting to change in its Pastoral provision;

128.2. the church community had not shown signs of missional growth, and a change of incumbent would favour realisation of its missional potential;

128.3. the church community was small, but enjoyed a level of pastoral provision greatly disproportionate to its size and its contribution to mission the parish deanery and dioceses

128.4. other factors suggested Pastoral reorganisation should be considered

128.5. spoken with the Bishop of rich brown the Bishop could not identify any plan for the future of the parish which would have benefited from extending the tenure of the claimant.

129. The Bishop declined to exercise his discretion and the claimant was therefore retired at 70.

The Applicable Legal Principles

Who is protected by the Equality Act?

130. The Equality Act 2010 provides protection from discrimination to a list of specified individuals. In the context of work and occupation those who are within scope of the protections are set out in chapter 1, part 5 of the act and include at section 49 Equality Act 2010, individuals who are personal office holders. This is a distinct category separate from those who are public office holders defined in section 50.

131. The question of whether or not ministers of religion are protected from discrimination by the Equality Act 2010 depends on the status of the individual. The claimant in this case alleges he is a personal office holder.

A personal office is an office or post

(a) to which a person is appointed to discharge a function personally under the direction of another person, and

(b) in respect of which appointed person is entitled to remuneration. (Section 49 EqA.)

132. Sec 49(6) EqA provides that a person who is the relevant person in relation to a personal office must not discriminate against the office holder by terminating the appointment.

133. A relevant person, for the purposes of termination of the office is the person who has the power to terminate the appointment.

134. In this case the claimant sues both the Bishop of the Diocese and the Diocesan board of finance for the relevant diocese.

135. The question is, if he is a personal office holder, did the Bishop have the power to dismiss him, or did the diocesan board of finance have the power to dismiss?

136. Schedule 22 of the EqA provides a specific exception to the protections set out in the EqA, where the act complained of as being discriminatory is done pursuant to a statutory provision. The schedule applies to the protected characteristic of age, and means that anything done by a person, which must be done by them, including the termination of the office, as a result of a requirement of an enactment will not be unlawful discrimination.

137. Paragraph 1(3) states that a reference to an enactment includes a reference to
(a) a measure of the General Synod of the Church of England and
(c) an enactment passed or made on or after the date on which this act is passed.

138. The *Ecclesiastical Offices (Age Limit) Measure 1975 (1975 No 2)*, sets an age limit of 70 for appointment to certain offices and a compulsory retirement age for those holding the offices listed. At regulation 3 the Measure says

(3) *Subject to the following provisions of this Measure, a person who holds an office listed in the Schedule to this Measure shall vacate that office on the day on which he attains the age of seventy years.*
[(3A) Neither subsection (1) nor subsection (3) shall apply to an appointment made or continued in reliance on regulation 29A of the Ecclesiastical Offices

(Terms of Service) Regulations 2009 (cases where person may hold office after attaining the age of 70).]

[(3B) Neither subsection (1) nor subsection (3) shall apply to an office held under a contract of employment.]

139. The Schedule to that Measure includes a freehold Incumbent of a benefice such as the claimant.

140. The Ecclesiastical Offices (Terms of Service) Regulations 2009 (SI 2009/2108) Part VI provide that an appointment that would otherwise be terminated once the incumbent reaches 70, may be extended for a period of time, enabling a priest (or other) to continue to hold office after the age of 70.

141. In respect of an incumbent of a benefice it provides

(5*) A diocesan Bishop may give a direction for a person who has attained the age of 70 years to hold or to continue to hold the office of incumbent of a benefice in the diocese, or to hold or to continue to hold an office in the diocese under a licence granted by the Bishop, for the period specified in the direction (including in a case where the person was holding the office immediately before attaining that age).*

142. The power to give such a direction is limited to a period of time ending no later than the 75th birthday of the person, and is qualified as follows;

(9) An Archbishop or diocesan Bishop may not give a direction under this regulation unless he or she considers that the person in question will be capable of performing the duties of the office throughout the period for which the person is to hold the office.

(10) A diocesan Bishop may not give a direction under paragraph (5) in the case of a person holding the office of incumbent or priest in charge of, or vicar in a team ministry for, a benefice in the diocese or the office of assistant curate in the diocese unless the Bishop—

(a) considers that the pastoral needs of the parish or parishes concerned or of the diocese make it desirable to give the direction, and

(b) has obtained the consent of the parochial church council of the parish or each of the parishes concerned.

(11) In deciding whether to give a direction under this regulation, an Archbishop or diocesan Bishop shall have regard to any guidance issued by the Archbishops' Council.

(12) A direction given under this regulation must be in writing.]

143. I have been referred to case law considering whether or not individuals, including ministers of religion, are employees or workers. Although that is not in issue in this case, and the judgments are fact specific, they provide guidance on wider questions of status and application of the discrimination principles and the test to be applied for the purposes of the EU law provisions which the claimant relies upon.

144. In ***Percy v Board of National Mission of the Church of Scotland 2006 2 AC 28,*** the House of Lords considered whether a ministers' relationship with the church was one of employment or not, in the context of a complaint of sex discrimination claim arising from disciplinary proceedings.

145. The House of Lords determined that the agreement which existed between the Minister and the church in that case displayed both an intention to create legal obligations which was enforceable in the event of the breach, and that the terms and conditions of the applicant's appointment and the services she was required to provide in return for her salary and other benefits constituted a contract personally to execute work, which fell within the definition of employment in section 82(1) of the Sex Discrimination Act 1975. (now section 83(20 EqA.)

146. The case before me concerns an officeholder and it is conceded that there was no contract between the claimant and the respondent. The claim that the claimant was an employee or worker is not pursued before me.

147. The holding of an office and the existence of a contract of employment are not mutually exclusive. (See *Percy*, per lord Nicholls at para18).

148. Sometimes the existence of an office may be clear and maybe of ancient common law a written origin, whilst some offices were regarded by the common law as incorporeal hereditaments belonging to the current officeholder. A benefice in the Church of England is regarded as a freehold office belonging to the incumbent for the time being. (Per Lord Nicholls, *Percy*)

149. The term office implies a subsisting permanent substantive position having an existence independent of the person who fills it and which goes on and is filled in succession by successive holders. (see Lord Atkin *Macmillan v Guest* 1942 AC 561 at page 564.) The term is wide enough to embrace cases where the relationship is essentially contractual. (Lord Nicholls of Birkenhead, para 18 *Percy*)

150. The distinction at common law in respect of a public office has been important, because a public office holder could not be dismissed at will in the same way that a servant could be dismissed. (*Percy*)

151. This definition does not assist in determining the central question in this case of whether or not the functions of a personal office are *carried out personally under the direction of another person*.

152. In *Perceval Price v Department of Economic Development and others* [2000] 2AC 28, IRLR 380 the NICA determined that the Judges, who were office holders, were not in employment but were workers within the meaning of community law so that they could bring claims for equal pay and sex discrimination, as they benefited from the anti-discrimination protections in the Sex Discrimination Act 1970. The court had considered how the term worker had been interpreted by the ECJ, (in a case dealing with free movement of workers) in which the ECJ said

…the term worker is capable of bearing a different meaning in different parts of the Treaty and in other Community legislation we do not see any compelling reason, however, why it should have a narrower meaning in the context of equality of pay and opportunity than that which it bears in the context of free movement of workers. …the object of Article 119 and the directives is to give

protection against inequality and discrimination to those who may be vulnerable to exploitation. The term workers should be construed purposively.

"the essential feature of an employment relationship, however is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration." (My emphasis)
(Lawrie-Blum v Land Baden-Wurttemberg, 1986 ECR 2121 2144 Para 17,)

153. The NICA concluded that Judges were workers, despite enjoying independence of decision without direction from any source.

All judges at whatever level share certain common characteristics. They all must enjoy independent decision without direction from any source which the respondents quite rightly defended as an essential part of the work. They all need some organisation of their sittings, whether it be prescribed by the President of the industrial tribunal's order court service, or more loosely arranged in a collegiate fashion between the judges of a particular court. They are all expected to work during defined times and periods, whether they be rigidly laid down or managed by the judges themselves with a greater degree of flexibility. They are not free agents to work as and when they choose as our self-employed persons. Their office accordingly partakes some of the characteristics of employment, as servants of the state even though they do not come within the definition of employment within domestic legislation. (per Carswell LCJ in *Perceval Price* § 26)

154. In *Percy*, the minister was not a freehold incumbent of a benefice, and the question being considered was whether or not she was a worker.

155. One question was whether or not the definition of worker and the definition of employee are different for the purposes of the Sex Discrimination Act. This required consideration of the nature of professional duties.

The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. The fact that the worker has very considerable freedom and independence in how she performs the duties of the

office does not take her outside the definition. (Baroness Hale, as she then was at paragraph 145)

156. An example was Judges who are servants of the law in the sense that the law governs all that they do and decide, just as clergy are servants of God in the sense that God's word is interpreted the doctrines of their faith governs all that they practice preach and teach. This does not mean that they cannot be workers or in the employment of those who decide how the ministry should be put to the church. ((See *Percy* per Lady Justice Hale)

157. This was not a consideration of whether a person who was an officeholder would be covered by the discrimination legislation, but rather whether, an officeholder could also be an employee and therefore covered by the legislation in respect of unfair dismissal.

158. It has not been suggested in any of the reported cases I have been referred to that in order to come within the EqA, it was NOT necessary to prove that an officeholder was also a worker and/or an employee, and I conclude that the presumption in the case was that it was. None of the cases have considered whether the status of officeholder (within the meaning of the common law or otherwise) would, by itself be sufficient to bring the claimant within the legislative measures.

159. The correct approach to the question of whether a minister of the Methodist Church was or was not an employee of that church within the meaning of section 230 of the Employment Rights Act 1996, so that she was entitled to claim unfair dismissal, was to consider, firstly and primarily the manner in which the Minister was engaged and of the rules or terms governing his or her service.

160. The documents and other admissible evidence of the parties intentions must be construed against factual background. Part of that background is the fundamentally spiritual purpose of the functions of the Minister religion. The question is whether the relationship described in the documents properly analysed, shows characteristics of a contract, and if so whether or not that is a contract of

employment. (*The President Of The Methodist Conference v Preston* 2013 UK 2AC 28 Lady Hale dissenting) .

161. In determining that the various documents in *Preston* did not amount to a contractual relationship between the minister and the church, the Supreme Court placed reliance on 3 points which in combination, were decisive.

162. First, the manner in which a minister was engaged was incapable of being analysed in terms of a contractual formulation. In that factual context, the Supreme Court judged that neither the admission of the Minister to full connection, nor his ordination were contractual. The ministers' duties that followed were not consensual, but depended upon, in the case of the Methodist Church, the decisions of the conference.

163. The second consideration was the stipend and amounts which were due to the Minister by virtue only of his or her admission into full connection and ordination, whilst they remained in full connection in the active life. The benefits continued even in the event of sickness or injury.

164. Thirdly, the relationship between the minister and the church was not determinable except by the decision of the conference with committee. There was no unilateral right to resign even on notice.

165. The Supreme Court concluded that the ministry described in the instruments was a vocation by which candidates submitted themselves to the discipline of the church for life, unless special arrangement was made with a particular minister. The duties of ministers arose entirely from their status in the constitution of the church and not from any contract.

166. The Court of Appeal considered the question of status of ministers of religion in 2015. In *Sharpe v Worcester Diocesan Board of Finance and another* [2015] ICR 1241, [2015] IRLR 663. In that case the claimant held the office of priest as a freehold incumbent and was therefore in the same position as the claimant in the case before me.

167. The issue in *Sharpe* was whether the claimant was either an employee or a worker within the meaning of section 230 Employment Rights Act 1996, so that he was entitled to the protection of section 43 Employment Rights Act 1996 as a whistle blower.

168. The test for the purposes of section 230 required consideration of whether or not there was a contract between the claimant and the Bishop. The Court of Appeal determined that there was not. In doing so, they considered the process by which a priest was appointed and the various documentation and measures which bound him in the exercise of the functions of his office.

169. In determining that the claimant was not an employee or a worker, the Court of Appeal considered the nature of the appointment and the nature of the work that was done by the rector.

170. Whilst the question being considered by the Court of Appeal in *Sharpe* is therefore not the same question that I must consider in this case, the judgement of the Court of Appeal in respect of the nature and effect of a number of aspects of the relationship between a rector and the church are of direct relevance to this claim.

171. I have identified the following principles from *Sharpe*, which are relevant in the case of J v K. The appointment of the claimant to the office was carried out by the patron in exercise the right of patronage which was a property right. There was no obligation on the part of the Bishop to pay a stipend to the vicar; there was no negotiation between the parties about the terms of service; the Bishop had no power to terminate the appointment and the Bishop had negligible disciplinary powers over the vicar.

172. From the judgement of Lord Justice Lewison, the following legal principles will apply.

172.1. Measures passed by the General Synod and approved by Parliament passed into the law of the land. The Canons ecclesiastical are form of primary legislation whose application is specific to the Church of England, which be made and promulgated by the General Synod only with the Royal assent licence.

172.2. The jurisdiction of ecclesiastical courts which continue to this day is defined by the Ecclesiastical Jurisdiction Measure 1963.

172.3. C 24 sets out the duties of the incumbent in 8 sections. These duties do not require personal performance by the benefits cleric. He complies with his duties by causing celebration of holy Communion, causing some to be preached on Sundays, causing the instruction parishioners and causing the preparation of those who desire to be confirmed. Whilst on the face of it, we have a personal obligation to visit the sick, the additional power of delegation in C 24 (8) gives a general power of delegation. Whilst there is an obligation of residence in the benefice imposed upon the benefice priest by canon C 25 (one) the Bishop may grant a licence of absence.

172.4. The sanction for a failure to comply with an order or in the event of non-compliance by the vicar is sequestration of the benefice not a dismissal of the incumbent .

172.5. The Bishops authority over incumbent derives from the law of the land and not from some private agreement between him and the incumbent

172.6. The Bishop has no power to dismiss benefice clergyman as made clear by Canon C1 (2), which states no person who has been admitted to the order of Bishop, priest or deacon can ever be divested of the character of this order, but a minister may either by legal process, voluntarily relinquished the exercise of these orders and using self as a layman, or may by legal and canonical process be deprived of the exercise of his orders or deposed therefrom .

172.7. The powers contained within the Incumbents (Vacation Benefices) Measure 1977 are limited. They arise in the case of breakdown in relations between incumbent and his parishioners and in case of incapacity. In either case, the tribunal, chaired by the Chancellor of the dioceses investigate the matter and makes a report and recommendation to the Bishop .

172.8. At paragraph 161 and 162-163 of the judgement in *Sharpe*, Lewison LJ set out the detail of the Clergy Disciplinary Measure 2003 and how it operates

in practice. They are not repeated here but in paragraph 164 Lord Justice Lewison said,

The essential point is that disciplinary proceedings are neither initiated by the Bishop not decided by him, nor does the diocesan board of Finance of any part to play. The Bishop has the powers and only the powers conferred on him by legislation .

173. When considering the status of a freehold incumbent minister of the church of England, the judgement of Lord Justice Lewison provides a clear statement of the status and effect of certain aspects of church law and the agreement of the freehold incumbent has in respect of the duties of his office. There is no decided case law which determines whether or not the office of a freehold incumbent is one falling within section 49 of the EqA.

174. Whilst the decided case law and in particular the judgement of Lewison LJ and Arden LJ in *Sharpe* do provide clear statements that the functions of the office are not carried out personally, because of the ability to delegate them, the cases referred to do not determine whether or not any functions of the office are carried out under the direction of another person, as required by regulation 49 EqA.

The Claimants Status Under Community Law

175. Protection from discrimination is a fundamental principle of EU law and international human rights law.

176. Article 10 of the Treaty on the functioning of the economic union(TFEU), required the EU in defining and implementing policies and activities to aim to combat discrimination based on….. Age.

177. The relevant provisions of the framework directive are as follows:

Article 1

Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual

orientation as regards employment and occupation, with a view to putting into effect in the member states the principle of equal treatment.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in article 1.

Article 3

Scope

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals and pay;

(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

The EU principle of effectiveness and equivalence

178. National procedural rules should not make it impossible in practice, or even excessively difficult to exercise the rights guaranteed by EU law. (effectiveness)

179. Domestic rules of procedure that the exercise of EU rights must not be less favourable than those governing similar domestic actions. (equivalence).

180. Member states must adhere to the principle of equality when implementing law, meaning that similar situations should not be treated differently unless the differentiation is objectively justified and does not infringe the substance of the rights pursuant.

The test for an officeholder within the EqA and community law

181. There is no single definition of worker within the community law: it varies according to the area in which the definition is to be applied. The term worker within the meaning of article 141(1) EC is not expressly defined in the EC Treaty, and it is therefore necessary to apply the generally recognised principles of interpretation, having regard to the context and objectives of the treaty.

182. The test of who is a worker within the meaning of article 141EC was considered by the European Court of Justice in *Allonby v Accrington and Rossendale College [2004] ICR 1328* . The ECJ determined that the term worker has a community meaning which is not defined by reference to domestic legislation or interpreted respectively. This means that a person who for a certain period of time perform services for and under the direction of another person in return for remuneration would be a worker for those purposes. Whilst the term worker does not include a provider of services who is not in a relationship of subordination the person who received the services a person who was formerly classified as self-employed under national law could still be a worker within article 141 if his independence was merely notional and disguised what was in reality an employment relationship.

183. The term worker within the meaning of art 141 (1) EC is not expressly defined in the EC treaty. It is therefore necessary in order to determine its meaning, to apply the generally recognised principles of interpretation, having regard to its context and to the objectives of the treaty.

184. In *Allonby v Accrington and Rossendale College and others* case C-256/01) [2004] ICR the task was to promote equality between men and women, and article 141 EC constitutes a specific expression. The principle of equality for men and women forms part of the fundamental principles protected by the community legal order, in that case being the principle of equal pay. Therefore, the term cannot be defined by reference to the legislation of the member states and it cannot be interpreted restrictively.

185. A person will be considered to be a worker for the purposes of the provisions if for a certain period of time they perform services for and under the direction of

another person in return for which they receive remuneration. (Judgement of ECJ, Allonby para 66).

186. Within article 141 (2) pay means the ordinary, basic or minimum wage or salary and any other consideration, whether in cash or kind which the worker receives directly or indirectly in respect of his employment from his employer. This makes it clear that the authors of the treaty did not intend that the term worker within the meaning of article 141(1) of EC should include independent providers of services who are not in a relation of subordination with the person who receives services. (para 68 ECJ *Allonby*).

187. Further, the question of whether such a relationship exists must be answered in each particular case, having regard to all the factors and circumstances by which the relationship between the parties is characterised.

188. Provided that a person is a worker within the meaning of article 141 EC the nature of his legal relationship with the other party to the employment relationship is of no consequence in regards to the application of that article.

189. The formal classification of self employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of article 141(10 EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article.

190. The existence of the relationship of employer and employee, does not turn on whether or not the parties entered into a formal contract which would be recognised in domestic law as constituting a contract of employment, but whether it met the criteria laid down by EU law. That required a consideration of whether or not person agreed personally to perform services and the requirement that the putative employee should be subordinate to the employer, meaning generally be bound to act on the employer's instructions. (see *Halawi v WDFG UK Ltd (t/a World Duty Free*) 2015 IRLR 50, in which the Court of Appeal considered whether or not Mrs Halawi had been an employee of WTF for the purposes of section 83(2) of the EqA 2010)

191. In *Pimlico Plumbers* the Supreme Court confirmed that the definition of a worker in section 230(3)(b) of the ERA can be equated with the definition of employment in s. 83 of the EqA. The observations of Lady Hale observations *Bates van Winkelhof* (see para 39 of her judgment) on subordination apply in both contexts.

192. Whether there is subordination in any particular case will be a question of fact for the national courts to determine. In the case of *Danosa v LKB Lizings* SIA C232/09[2010]ECR I-11405 CJEU there had been a question as to whether or not the requirement for subordination was fulfilled. That was a question of fact for determination by the national court. Per Lady Justice Arden at paragraph 39, *Halawi*)

193. Whilst the application of the test as to whether or not an individual comes within the European law definition of worker may lead to a situation where on the facts in a particular case an individual is deprived of the right not to be discriminated against, of itself, such a situation does not mean that the principles of effectiveness would require a remedy to be given. The Principle of effectiveness can only apply where there is a breach of the right which is conferred by the law against another person. Where a claimant was not a worker within the meaning of European law, the protection from discrimination was not conferred upon her, and therefore she could not rely on the principle of effectiveness in respect of remedy. (see lady Justice Arden paragraph 55 *Halawi* for example) .

194. Whilst the UK courts must give effect to the jurisprudence of the Court of Justice on the charter, the charter does not itself alter the meaning of the of the term *worker* in EU law. Therefore, the general jurisprudence of CJEU will not assist where the claimant is not a person covered by European law.

195. In *Hashwani v Jivraj London court of international arbitrators and others intervening)*[2011] UK SC, 40, the Supreme Court considered whether or not the role of an arbitrator was that of an independent provider of services who was therefore not in a relationship of sort subordination with the parties, who received his services. In considering the application of discrimination provisions in force at

the time in relation to religion and belief, the court determined that the jurisprudence of the court of justice distinguished clearly between those who were in substance employed and those who were independent providers of service and not in a relationship of subordination with the person who received those services. The arbitrator's role in that case was that of an independent provider of services and there was no contract of employment personally to do work within the meaning of the regulations.

196. In order to bring himself within the directive the claimant must therefore be able to show that the acts he relies on as being discriminatory, arise in the context of employment or occupation. It is that which has been considered by the European courts and applied by the Court of Appeal and the Supreme Court.

Law relating to the UK withdrawal from the UK.

197. I have been referred to the European Union (withdrawal) Act 2018. This provides at paragraph 5(2) of chapter 16 that

The principle of supremacy of EU law continues to apply on or after exit day so far as relevant to the interpretation. Disapplication or quashing of any enactment or rule of law, passed or made before exit day , If the application of the principle is consistent with the intention of the modification

198. In schedule 1 to the act, it states at paragraph 3(1) that

there is no right of action in domestic law on or after IP completion date based on a failure to comply with any of the general principles of EU law.

(2) No court or tribunal or other public authority may, on or after IP completion date. This supply or quash any enactment or other rule of law or quash any conduct or otherwise decide that it is unlawful because it is incompatible with any of the general principles of EU law.

199. Paragraph 2 provides that *no general principle of EU law is part of domestic law on or after IP completion date if it was not recognised as a general principle of EU law by the European court in a case decided before IP completion day whether or not as an essential part of the decision in the case*.

200. The respondent asserts that this means that the court or tribunal will have no jurisdiction to deal with the claimants argument, Insofar as it arises from the application of the general principle of European law after completion date, regardless of the fact that the claim and the acts to which it relates, arose before that date. The claimant's response in summary is that this argument is misconceived and that the claimant's rights, having accrued will remain enforceable

The ECHR provisions in relation to age discrimination

201. Article 21 (one) of the Charter provides that any discrimination based on any ground such as age shall be prohibited

202. Article 47 of the Charter provides for the right to an effective remedy, and to a fair trial, stating, everyone whose rights and freedoms guaranteed by the law of the union are violated has the right to an effective remedy for tribunal, in compliance with the conditions laid down in this article, everyone is entitled to a fair and public hearing than a reasonable time by an independent tribunal previously established by the law.

The Canons

203. The dioceses guidance states that all clergy are subject to the provisions contained within the Canons; the clergy disciplinary measure; the current law related to patronage and the appointments procedure and antidiscrimination legislation, apart from exemptions granted.

204. I have been referred to the canons of the church of England specifically in respect of the nature duties of the office in respect of spiritual matter and observance of religious practice (holding regular services, the duty of daily prayer and Sunday worship) as well as more generally.

205. The canons are part of Canon Law of the Church of England and the government both the church itself and its officers.

206. The claimant does not dispute that there is a power of delegation in respect of many functions.

207. The claimant asserts that, when carried out by the priest, they are personal in nature. This is correct but it does not assist, because the power to delegate will deprive the function of being one which is of necessity to be carried out personally.

208. I have been referred to a number of the Canons which do not, on their face require the priest to discharge them personally, since they can be delegated.

209. The claimant recognised the right to delegate his duties in many instances , but asserts that there is no power to delegate in respect of the following, which he relies upon as being personal and not subject to delegation:

Canon C24- of priests having the Cure of Souls.

(C24(1),*every priest having the cure of souls shall provide that in the absence of reasonable hindrance, morning and evening prayer daily, and on appointed days the Litany, shall be said in the church or on one the churches of which he is the minister ;*

C24(2) every priest….shall…celebrate or cause to be celebrated, the celebration of holy communion on a Sunday; and other named feast days;

C 24(3) every priest…shall…preach or cause to be preached… a sermon in the church…. at least once on a Sunday;

C24(6) which states *he shall be diligent in visiting the parishioners of the benefice, particularly those who are sick and infirm and he shall provide opportunities whereby any of such parishioners may result on to him, or spiritual counsel and advice*.

210. The language in Canon 24, except for 24(6) and 24(8) in respect of the priest and the parochial church council consulting together, is that the priest *shall* carry out the function, or *cause it* to be carried out.

211. C 24 (8) states if at any time, he shall be unable to discharge his duties, whether from non residence or some other cause shall provide for his cure to be supplied by priest licensed or otherwise approved by the Bishop of the diocese.

212. **Canon 30 (3), Of Safeguarding**. The claimant relies on the power given to the House of Bishops to make provisions about Diocese safeguarding advisors, and under c30 2(2) the following:

> *The Bishop of a Diocese may in a case where the Bishop is satisfied that it is justified in all the circumstances to do so, direct a priest or deacon who has authority to officiate in the diocese in accordance with canon C8 to undergo a risk assessment*.
>
> A person subject to the direction may ask for a review by the President of Tribunals. A failure to comply with the direction without reasonable excuse is regarded as a failure to do an act required by the laws ecclesiastical, within the Clergy Disciplinary Measures. This means that whilst the Bishop can issue a direction, the Bishop himself has no power to force a priest to comply. Instead, the matter is subject to the CDM, which is carried out under statutory measures and not the direction of the Bishop.

213. **Canon B30 in respect of Holy Matrimony** states *it shall be the duty of the Minister, when application is made to him for matrimony to be solemnised in the church of which he is the Minister, to explain to the two persons who desire to be married the church's doctrine of marriage as herein set forth, and the need of God's grace in order that they may discharge aright their obligation as married persons*.

214. The language of this Canon is the language of a personal obligation to discharge the function. There is no suggestion within the canon that this may be delegated.

215. **Canon B 37 in respect of Ministry to The Sick**. This states that *the Minister shall use his best endeavours to ensure that he be speedily informed when any*

person is sick or in danger of death in the parish, and shall as soon as possible resort unto him to exhort, instruct, and comfort him in his distress in such manner as he shall think most needful and convenient. This provision, and the following provisions B37(2) and (3) are written in the language of personal discharge and do not in themselves contain any power of delegation.

216. This is also true of Canon B 38 in respect of the burial of the dead and in respect of the functions required by Canon 22 in relation to baptism. The duties are expressed in personal terms.

217. At paragraph 150 -153 of *Sharpe,* Lewison LJ sets out the duties at: C 24 , the wording of which provides for example that every priest having cure of souls shall provide that in the absence of reasonable hindrance morning and evening prayer daily add-on appointed day me shall be said in the church or one of the churches which he is minister .

218. C 24 (3) states that every priest having cure of souls shall, except for some reasonable cause approved by the Bishop of the dioceses breach or cause to be preached the sermon in the church or churches of which is the minister at least once each Sunday .

219. These duties do not, Lewison LJ says require personal performance by the beneficed cleric. He complies with his duty by *causing* the celebration of holy Communion, *causing* a sermon to be preached on Sunday; *causing* the instruction of parishioners and causing the preparation of those who desire to be confirmed. Whilst there is on the face of it a personal obligation to visit the sick, this is qualified by a general power of delegation in Canon 24 (8).

220. In practical terms this means that the incumbent may exercises function by delegating to another person or by causing in some other way functions are carried out. The words themselves, at least insofar as the Canons are concerned indicate that personal service is not a requirement.

Discussion and Conclusions on law and fact.

221. The primary dispute between the parties is whether or not the claimant discharged the function of his office personally; and secondly, whether or not he discharged the function of the office under the direction of another person. He must satisfy the tribunal that he did both in order to fall within 49 (2) b.

222. If I find that the claimant was an office holder within the meaning of section 49 (2) EqA, the respondent submits that the claimant is still not covered by the Equality Act because of the exemption contained in Schedule 22 EqA. The respondent submits that in that case, the ET therefore has no jurisdiction to hear the claim.

Conclusions on section 49 EqA

223. It is conceded by the claimant that there was no contract between him and either of the respondents.

224. The role of the 2nd respondent was simply to administer the stipend. The claimant stated in his evidence that he had nothing against the DBF . On this basis, I conclude that the 2nd respondent is not the correct respondent to this claim and should be dismissed from these proceedings.

Was the claimant appointed to discharge his Functions personally under the direction of the respondent?

1. **Conclusions on the effect of the Canons and of *Sharpe***

225. The respondents rely upon the judgement of the Court of Appeal and of Lewison LJ in particular in the case of ***Sharp v Bishop of Worcester***. The respondent submits that the judgement of Lewison LJ and in particular paragraphs 150-185 bind the employment tribunal, with the consequence that I must make findings of fact in accordance with the analysis set out there in respect of the effect of the Canons and the effect of various measures, including measures in respect of disciplinary action.

226. Ms Tether for the claimant submits to the contrary, that I am not bound by these matters because the focus of the enquiry of the Court of Appeal in *Sharp* was directed towards the question of whether or not there was a contract between the claimant and the respondent, in order to determine whether or not the claimant had a right to claim unfair dismissal in the context of whistleblowing . She asserts that the difference between the focus of enquiry in that case and in this case, where the question is about age discrimination means that I can reach a different conclusion as to the effect of those same provisions on the claimant.

227. The conclusions reached by Lord Justice Lewison and the CA in Sharpe were not concerned with the test set out under the EQA in section 49. They were concerned with questions of whether the claimant was within the meaning of section 230 of the Employment Rights Act 1996., and the question that I must consider is whether or not the functions of the office were *discharged personally under the direction of another person*. The statutory words are different.

228. I agree with the claimant that the source of the powers is not a determinative factor in this case. Just because the powers of Bishop derived from statute does not mean that they do not allow him to direct a priest. Put another way, the question of whether or not the functions of the office are discharged under the direction of the Bishop is determined by considering whether the Bishop has any powers and if so, what, to direct a party such as the claimant and not where those powers come from.

229. In this case the claimant was a freehold incumbent. He was in the same position as the claimant in *Sharp*. The claimant was offered, but refused to convert to, the more recent iteration of the relationship called common tenure. He therefore chose to retain the status of a freehold incumbent.

230. The Court of Appeal in *Sharp* was considering the effect of the various Measures and Canons in the context of the question, was there a contract between the claimant and the respondent? I accept that that is not the question in this case.

231. However I find it very difficult to see how an analysis of the impact and effect of a common set of needs provisions Measures and Canons carefully analysed by a Lord Justice in the Court of Appeal is not at least highly persuasive in this case and at most binding upon me.

232. I have nonetheless considered the Canons and other statutory measures in some detail, looking both at the language of them and the way that they applied in practice in the case of the claimant in this case.

233. I conclude that I am bound by the conclusions in *Sharp* insofar as they are conclusions in respect of the legal effect of the Canons and measures including the Clergy disciplinary measure, because they are the same provisions, and because they were being considered by the Court of Appeal, in order to determine their effect on the status of a freehold incumbent. The Court of Appeal did not determine whether the claimant in *Sharp* was appointed to carry out *functions personally under the direction of another* but they did consider the question of delegation of functions and the nature of the Bishops formal relationship with the priest. Those conclusions are binding upon me.

234. However, even if I had not come to that conclusion, I would have concluded on the basis of the evidence that I have heard that there is no obligation placed on the claimant to carry out the functions of his office personally and I would have concluded this because of the power of delegation contained within the canons, and because to the nature of the provisions such as the CDM, and their application in practice in this case.

To Discharge personally under direction of another

235. From the evidence about the nature and process of the claimant's appointment; the canons and the measures as interpreted by the CA in *Sharpe*; the evidence from the claimant and others as to how the Canons were observed in practice by the claimant in following his calling, I conclude that the claimant was not appointed to discharge functions personally under the direction of another.

236. He was appointed to the freehold benefice to discharge his calling to serve God as set out in the ordinal and the letters orders.

237. The deed of collation gave the Bishop no power to direct the claimant as to when or where to discharge his priestly functions and this is supported by what happened in practice when the former Bishop attempted to impose some sort of direction as to the carrying out of functions on the claimant. I have found that he was unable to do so, in part because the claimant declined to cooperate with him than in part because the Bishop had no real power when it came to enforcing his directions.

238. Once the claimant was in office, he had autonomy to decide what he wanted to do when he wanted to do it, and also whether or not he wished to delegate any or all of his functions.

239. The disciplinary measures as analysed in *Sharpe* per Lewison LJ (see 161-164 of judgement) do not give the Bishop power to remove or discipline the incumbent. That requires, in every case, a process before a court or tribunal. The power of the Bishop is limited to suspending the incumbent but he or she has no power to initiate the proceedings; to decide any disciplinary proceedings or to impose any penalty without the consent of the incumbent .

240. On the basis of the facts found in respect of the attempt by the former Bishop to direct the claimant in respect of the discharge of his functions, I conclude that there was no power to direct in respect of the carrying out of the functions set out in the canons or elsewhere. If he chose not to carry out the functions of the office the Bishop was powerless to direct him, or insist upon anything being done differently or at all.

241. The power of the Bishop to extend the incumbent's office beyond 70 is not a power to direct when or where the claimant discharges his function.

242. Was the claimant permitted to delegate his function in part or in whole to another, and if so, and to the extent that any delegation was permitted, does this means that he was not discharging the functions of his office personally?

243. Ms Tether submits that the claimant could not delegate his office in its entirety and drew a distinction between his position and the position of somebody who could subcontract. Whilst it is right that there is such a distinction as a matter of law, the requirement to discharge a function personally is negated not simply by the ability to delegate wholesale but also by an ability to delegate the primary functions of the post on an occasional basis.

244. However, the entirety of the duties and functions set out can be delegated under canon 24(8) which states *where the priest is unable to discharge his duties from non residence or some other cause.*

245. There is no suggestion that the *some other cause* is limited, or that the right to delegate is in respect of only some of the functions set out in the canons. As a matter of logic, the priest must be able to delegate the entirety of his function, if he is absent, which must include preparation for marriage, visiting the sick and ensuring that the daily and weekly services and prayers are held and said. The Vicar is able to delegate this and indeed the entirety of his functions to another licensed priest.

246. The canons set out in clear terms the expectation that the priest will *cause to be done* a range of tasks, both spiritual and practical.

247. The language of the Canons is not prescriptive, on the whole, either as to what work must be done, or how it should be done, or by whom. Whilst there is guidance there are very few aspects of the work which are required of any one, and where there are requirements to do particular task, such as ensure that daily and Sunday worship takes place, the Canons contain powers of delegation.

248. The language of the Canons is not, the language of personal service.

249. A priest may delegate to others much of the work to be done and can pick and choose which functions of the office he or she carries out themselves, and which is delegated and to whom.

250. The power to delegate the functions in the canons is fettered only to the extent that the person delegated the functions must be qualified in that he or she is licenced or otherwise approved by the Bishop. The choice and decision of whether to delegate and if so what and to whom rests with the freehold incumbent.

251. The claimant told the ET that it was difficult for him to find someone to delegate his functions to, because he needed to find someone with the same views as himself.

252. He chose not to delegate his functions to another priest who did not share his own views. It is implicit that he could have delegated the functions freely, and without restriction had he chosen to do so.

253. Professor McClean gave evidence at paragraph 21 and 22 of his WS, that it was the intention that the Canons would provide a broad framework and that the incumbent would enjoy a considerable degree of autonomy. This is relevant both in considering the extent to which the functions were carried out personally, and the extent to which if at all, they are carried out under the direction of another person.

254. The Canons set out the rules and expectations applicable to a vicar such as the claimant. They have been described by Prof Maclean as toothless, and I understand him to mean that they are not enforceable against a vicar who chooses not to abide by them, and that the reason that they are not enforceable is because of the very limited power that exists to remove a priest from office.

255. From the Canons which I have been referred to and from the evidence that I have heard from the claimant about how he carried out his functions, as well as what happened when there was concern from his Bishop that he was not carrying out his functions, I find that this is a fair reflection of the way in which the Canons are written, the intentions behind them and the practical effect of them in this case.

256. **In respect of the question of direction**.

257. This raises the question of what is meant by *direction* within section 49 of the Equality Act.

258. I have been referred to well-known cases concerning definitions of employment status where the question is whether or not somebody is an employee or worker and I have also been referred to cases who is a worker within European law.

259. I have not been referred to any decided case as to the meaning of this order within section 49(2) meaning therefore of the words under the direction of another.

260. The natural meaning of the words suggests subordination, in that the person directed has an obligation to comply rather than a choice of whether or not to comply which is enforceable. Under the direction of another suggests an obligation, whether the direction is to whether the act is done at all, whether it is done at a particular time, or in a particular way, or in a particular place.

261. Under the direction of another is distinguishable from guidance for example. An office holder may well be given guidance, but if the office holder is free to decide to act as they choose, contrary to that guidance, are they acting under the direction of another? I conclude that they are not.

262. In this case, having determined that the Canons are not directive, in line with *Sharpe*, the question is whether or not any other function is discharged personally under the Bishops direction, which the claimant is required to comply with and which can lead to sanctions for non compliance, including removal from office?

263. The question is, can a person be an office holder of within section 49 EqA at all if there is in reality no possibility of removing an individual from office for a refusal or failure to comply with a direction?

264. Could the claimant be obliged by the Bishop to carry out any particular function at all, and if so did the Bishop have any power to direct either where a function would be carried out, or when the function would be carried out, or indeed the manner in which function might be carried out?

265. I conclude that the power to direct must necessarily carry with it the power to sanction if an individual fails or refuses to act as directed. The Bishop did not have that power, because statutory measures vest it elsewhere.

266. The claimant relies on the following matters as evidence that the functions were carried out under the direction of the Bishop:

266.1. The agreement at ordination that the claimant will accept the discipline of the church and give due respect to those in authority

266.2. The oath of canonical obedience

266.3. The power of the Bishop to instruct the claimant to meet him, as evidenced by the claimant's relationship with his former Bishop ;

266.4. The responsibility of the Bishop for the discipline of clergy in the dioceses, which included the power to suspend;

266.5. the clergy disciplinary measure, by deciding whether or not a disciplinary complaint should be referred for oral investigation

266.6. Canon 30 (3), which provides that a Bishop may direct a priest who has authority to officiate in the dioceses to undergo a risk assessment;

266.7. The power of the Bishop to remove a priest who is unable by reason of age or ill health carry out his duties contained in the *Incumbents (vacation of benefices) Measure 1977;*

266.8. power of the Bishop to instruct the Secretary of the diocese and Synod to institute an enquiry as to whether the incumbent benefice is unable to discharge his duties adequately by reason of age or infirmity of mind as contained in section 6 of 1977 Measure.

267. The respondents assert that the factual background of this case provides supportive evidence of central proposition that the Bishop does not in any practical sense direct the priests within his or her dioceses as to when or where or how to carry out the functions of their office.

268. Whilst there are disciplinary measures in place they are not ones which are directed by the Bishop in the sense that Bishop does not decide either whether to pursue disciplinary measures or, if disciplinary measures are pursued and there is found to be misconduct, whether a sanction should be imposed and if so what that sanction should be. Those decisions are made by others.

269. The nature and extent of the Bishops powers to direct the beneficed incumbent in respect of dismissal of a member of the clergy under canon C1(20; under the incumbents (Vacation of Benefices) Measure 1977, to declare a benefice vacant, in which case the Bishop does not act on his own initiative but on the recommendation of the tribunal; The clergy discipline measure, which under which neither the Bishop, nor the diocesan board of finance initiate or decide disciplinary proceedings are set out in paragraphs 158-164 of the judgment of Lewison LJ in *Sharpe.*

270. In terms of a process for clergy discipline, the Disciplinary Measures give the power of discipline to other bodies, and not the Bishop, as explained by Mummery LJ in his letter to the claimant.

271. In respect of the scope of the priest's ministry, there is a wide measure of choice over the direction of the ministry, and the focus of his or her time.

272. In his evidence the claimant accepted that the freehold did provide a measure of freedom of movement. He also stated that as a freehold incumbent the vicar was not subject to review or appraisal. He referred to it as a way of life, 24/7, with no set hours to justify or quantify.

273. The Canons provide a framework within which the ministry should be pursued and set out certain requirements in terms of daily prayer and daily worship. For example. If the priest is themselves carrying out these functions, I have seen nothing to suggest that the role of the Bishop is other than advisory was spiritual. The direction as to how things are done or when they are done comes from the

Canons and not from Bishop or in cases of conscience such as the ordination of women, for example, from the individual priest's own conscience.

274. The Church of England is a hierarchical organisation and the Bishop holds a position in the hierarchy, of oversight of the priests within his or her dioceses. That brings with it certain functions and responsibilities. From the evidence that I have heard, and from the documentation I have been referred to and taking into account the guidance I have drawn from the judgements in the case of *Sharpe*, I conclude that the relationship operates on the basis of mutual cooperation and mutual respect. If a priest declines to accept oversight guidance, assistance or intervention, I have seen no evidence that the Bishop has any real power to force the matter.

The Power to Extend the office beyond age 70

275. The claimant relies on one the final matter and that is the requirement that all priests retire at 70 except in a case where the Bishop grants an extension which he or she may do until the age to the age of 75.

276. I consider the provisions in relation to this in greater detail below, but suffice to say at this point that it is not the Bishop that directs the claimant to retire at 70, but a statutory measure. Nor does the Bishop direct any individual priests to remain post after the age of 70. There is no such power.

277. An extension to the office beyond 70 can only take place with the consent of the incumbent, and in certain defined situations.

278. It is right to say that it is for the relevant Bishop to consider and determine whether there is a case for an extension of the office. It is not right to say that the Bishop direct the incumbent in this respect.

279. My conclusion on the basis of these matters is that the claimant is not carrying out the functions of his office under the direction of another person, the person being Bishop. I conclude that he was carrying out the functions of his office under

the auspices of the canonical law; the measures in place; the spiritual and pastoral Guidance of his Bishop and in accordance with his own conscience.

280. I conclude that the claimant is not therefore a personal officeholder within the meaning of section 49 EqA.

Is the Claimant within scope of EU anti discrimination provisions?

281. If the claimant is not an office holder within the meaning of sec 49 EqA, the claimant relies upon the EU framework directive, as providing a remedy, if the claimant fell within the class of persons who are protected from discrimination on grounds of age by Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (**Framework Directive**). If he is within the scope of those provisions, the EqA must be interpreted so as to give effect to his rights under that Directive, even if this requires the disapplication of provisions which purport to preclude the effective judicial protection of those rights.

282. The respondent submits that the claimant is not within the definition of a worker or any other status covered by the directives relied upon, and is therefore out with the European law protections.

What is the correct test for a person within scope of EU anti discrimination provisions?

283. I have been referred to the decision of the CJEU in *Allonby v Accrington & Rossendale College* (ECJ) [2004] ICR. At paragraph 66-71 of the judgement of the CJEU , the court said as follows:

Accordingly, the term "worker" used in article 141(1) EC cannot be defined by reference to the legislation of the member states but has a Community meaning. Moreover, it cannot be interpreted restrictively.

67. For the purposes of that provision, 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: see, in relation to free movement of workers, in particular Lawrie-Blum v Land Baden-Württemberg (Case 66/85) [1987] ICR 483 , 488, para 17, and Martínez Sala , para 32.

70. Provided that a person is a worker within the meaning of article 141(1) EC, the nature of his legal relationship with the other party to the employment relationship is of no consequence in regard to the application of that article: see, in the context of free movement of workers, Bettray v Staatssecretaris van Justitie (Case 344/87) [1989] ECR 1621 , 1645, para 16, and Raulin v Minister van Onderwijs en Wetenschappen (Case C-357/89) [1992] ECR I-1027 , 1059, para 10.

71. The formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of article 141(1) EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article.

284. I conclude that the correct test when considering whether or not an individual is covered by the framework directive is that set out in *Allonby* as quoted in *Lawrie - Blum* by the CJEU, that a worker is 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* .

285. In this case, the claimant may well perform services, but based on the findings of fact I have made about how he carried out his functions; about the effect of the Canons on him and his relationship with the Bishop; and the effect of the measures and other statutory provision relevant to his office, I conclude that he does not do so under the direction of another.

286. The test under EU law differs only in that the element of personal discharge required by section 49 EqA is missing. I conclude that the word “direction” used by the CJEU and approved by domestic courts, in *Allonby*, and the word as used in section 49 EqA have the same legal meaning.

287. I conclude that neither Bates nor Pimlico Plumbers depart from the Supreme Court’s decision in *Jivraj.* If I conclude, as I do, that the Claimant is outside the

scope of s.49 / s.83(2) of the EqA on an ordinary construction, the question is then whether he can satisfy the autonomous definition of employment for the purposes of Article 3 of Directive 2000/78/EC, namely whether he has agreed to perform services for and under the direction of either Respondent. I find that he does not.

288. I agree with the respondent that what Lady Hale was saying is that subordination is not a universal characteristic of workers, but that it might assist (see Arden LJ in *Halawi* (paragraphs 42-44, Hale LJ in *Bates* at end of paragraph 39 and in *Pimlico* end of paragraph 14) as to recognising the need to fine tune the requirement of subordination. This reasoning is not called into question or doubted in any way by the Supreme Court *in Pimlico*.

289. In circumstances where: (a) the Claimant was not subject to either Respondent's control in the way that he carried out his work for all the reasons previously submitted and as per Lewison LJ in Sharpe and; (b) it cannot sensibly be said that the Claimant was "integrated" into either of the Respondent's "business", it is not necessary to qualify the requirement for subordination. The lack of subordination is consistent with the lack of integration into either Respondent's "business". Bates does not make any difference to the result.

Does the claimant have any further rights under the charter?

290. The claimant also argues that there is a further charter right, and relies upon the claimants article 8 rights read with his article 14 rights, not to be discriminated against on grounds of age in the exercise of a profession. It is submitted that retirement of its self will always engage article 8 and that retirement on grounds of age will also always be a breach of those rights. The claimant submits that the charter therefore provides a freestanding right not to be discriminated against, enforceable in the UK courts.

291. For the respondent it is argued that the claimant cannot be covered by the charter, if he is not within the definitions of work, to which the directives apply. It is not accepted that there is a general and freestanding right not to be discriminated against on grounds of age, derived from the European charter, and that the rights are only available to those who are already covered by the substantive directives.

292. I agree with the respondent. The claimant has no further free standing rights under EU charter, because he is not within scope of the EU anti discrimination provisions.

Is The Claimant Within The General Framework For Equal Treatment Under EU Law?

293. The claimant asserts that he falls within the class of persons who are protected from discrimination on grounds of age, by Council directive 2000/78/EEC which establishes a general framework for equal treatment in employment and occupation.

294. Ms Tether submits on the claimant's behalf that the EqA must therefore be interpreted so as to give effect to the claimant's rights under that directive.

295. She further submits that his case falls within the ambit of article 14 read the article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is submitted that if the Tribunal holds that the claimant is not otherwise entitled to complain of discrimination under EqA, the act should be read so as to give effect to his rights under the convention.

296. The framework directive sets out in article 1 that its purpose is to lay down general framework for combating discrimination on a variety of grounds which include age as regards employment and occupation.

297. The scope of directive is contained in article 3 which provides that it shall apply to all persons as regards both public and private sectors including public bodies and that this is in relation to a variety of matters including conditions for access to employment, self-employment or occupation, whatever branch of activity and at all levels of professional hierarchy and employment working conditions.

298. Article 3 (4) specifically allows for a derogation by exclusion of the Armed Forces from application framework directive in respect of discrimination on grounds of disability and age.

299. Otherwise states are not permitted to exclude any other branch of activity from the protection of the directive.

300. Article 42 provides an exception in the context of occupation requirement on grounds of religion and belief and refers to a specific section where, by reason of the nature of the activities, and he context in which they carried out, the person's religion or belief constitute a genuine, legitimate and justified occupational requirement. That is not this case.

301. The article further says that provisions within this directive shall not prejudice the rights of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws to require individuals working for them to act in good faith and loyalty to that ethos. The article is clearly aimed at those who work for churches or organisations rather than the organisation of the church. It covers a teacher in a church school, and not the priest of the church for example.

302. Whilst the employment status of ministers of religion has being considered in the domestic courts, it is striking that neither Counsel in this case have been able to identify any case law of the CJEU which considers whether ministers of religion would be within the scope of the framework directive or the treatment directive, whether as workers or otherwise.

303. There is therefore no guidance on the question of whether or not a person in the claimant's situation can be said to be within the scope of the EU Anti age discrimination measures. I have therefore considered the principles set out in the case law of the CJEU, which I have been referred to by oth counsel, which addresses questions of whether or not a person is covered by reason of their occupation. In applying those principles to this case, I have looked at the purpose of the legislative measures.

304. I conclude that the claimant is not covered within the scope of EU frame work directive or any other legislative measures of the European Union. This includes the EU charter of Human Rights.

Does the claimant have a freestanding right to claim discrimination contrary to the European Convention of Human Rights?

305. First, I note that the question of whether or not the claimant had a freestanding right to claim age discrimination contrary to the European Convention of Human Rights was raised for the first time at the hearing of this matter. It had not previously been identified as an issue at the case management hearing. The respondent did not object to the matter being considered and I therefore accepted that it was an issue before the Employment Tribunal.

306. The claimant's submissions in respect of the issue were set out at paragraphs 65 - 84 of the claimant's opening skeleton argument prepared for the preliminary hearing of 21 September 2020 and were addressed briefly in the closing oral submissions.

307. The claimant relies on article 8 of the convention, the right to respect for private and family life, and article 14 of the Convention in respect of the prohibition of discrimination.

308. Article 8 states that (1) everyone has the right to respect for his private and family life, his home and his correspondence and (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

309. Article 14 states that the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex,

race, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. (My emphasis.)

310. Article 14 must be read to include a wide range of factors which include personal characteristics and other factors which are not specifically identified within article 14. Employment status can be a protected status within the meaning of Article 14, as can age.

311. An individual does not have a freestanding right to claim protection from discrimination by reason of article 14 alone, because Article 14 does not provide a free-standing cause of action. Rather, the prohibition only applies in respect of the enjoyment of other ECHR rights. Some signatory states to the ECHR have adopted Protocol 12, which extends the broad prohibition on discrimination found in Article 14 to the enjoyment of 'any right set forth by law' and the exercise of public authority. However, the UK has not signed up to the Protocol.

312. The claimant has referred me to the case of **Gilham v Ministry of Justice** (protect intervening) [2019]ICR 1665. In that case the claimant, who was a District Judge, argued that the failure to extend the provisions of the whistleblowing protections of the Employment Rights Act 1996 to judicial office holders was a violation of her article 14 rights read with article 10.

313. Lady Hale observed at paragraph 28 of her judgement that where the contention is that there has been a breach of article 14, there are 4 questions to be considered as follows

313.1. do the facts fall within the ambit of one of the convention rights;

313.2. has the claimant been treated less favourably than others in an analogous situation;

313.3. is the reason for that less favourable treatment. One of the listed grounds or some other status;

313.4. is that difference without reasonable justification?

314. Applying the first two questions in this case, the claimant must first establish that his article 8 rights have been infringed, and secondly must establish that the manner of the infringement is a breach of article 14.

315. The claimant relies upon article 8 rights read with article 14 rights, not to be discriminated against on grounds of age in the exercise of a profession. He relies upon his age and also his status as a minister of religion. Ms Tether, counsel for the claimant, asserts that the right he has is not to be subject to age discrimination in the context of the imposition of a common retirement age.

316. Ms Tether submits that retirement of its self will engage article 8 and that retirement on grounds of age will be a breach of those rights. The claimant submits that the charter therefore provides a freestanding right not to be discriminated against, enforceable in the UK courts.

317. In her opening submissions Ms Tether states as follows, having regard to the case law of the ECHR summarised above, it is submitted that the facts of the claimant's case plainly fall within the ambit of a convention right, this the right to respect for private life under article 8.

318. She goes on to submit that if the tribunal were to conclude, as I have concluded, that the claimant cannot otherwise bring a complaint of age discrimination under the Equality Act 2010 , then he will have been denied the protection available to those who are employees, workers and office holders who suffer discrimination because of the protected characteristic, including the possibility of bringing proceedings before an Employment Tribunal.

319. Mr Kemp, counsel for the respondent disagrees, and submits that the Strasbourg cases make it clear than the engagement of article 8 will always be context relative. He does not concede that article 8 is necessarily engaged in this case and points to the lack of evidence about the end of his office on his personal life.

320. He states that the idea that termination by retirement is enough to engage article 8 is ridiculous, as for example, some people may be happy to retire.

321. The claimant submits that the dismissal has been held being capable of being a violation of article 8 because the concept of private life may include activities of a professional nature. I accept that article 8 has been held, in some case to be engaged by aspects of professional life, however I do not accept that the courts have ever gone as far as to say or suggest that therefore any dismissal or termination of an office by way of retirement or otherwise, would necessarily fall within article 8.

322. In considering the first question, of whether or not article 8 is engaged, I have considered the cases I have been referred to by the parties.

323. ***Schuth V Germany***, (1620/03) 23 September 2010,concerns the dismissal of a catholic priest for adultery.

324. In ***Volkov v Ukraine*** (21722/11) 9 April 2013 the dismissal of an applicant from the post of Judge for the breach of the judicial oath suggested that his professional reputation had been affected. The court also found that the loss of the job has an impact on his inner circle and tangible consequences for the material well-being of the applicant and his family.

325. In the case of ***Fernandes Martinez V Spain***,(56030/07) 12 June 2014 the nonrenewal of the contract of a priest followed the priest having publicly displayed his commitment to a movement opposing church doctrine. Article 8 was applicable in that case because, as the court said, the requirements for this kind of specific employment were not only technical skills but also the ability to be outstanding in true doctrine, the witness of.. Christian life and teaching ability, thus establishing a direct link between the person's conduct in private life and his or her professional activities.

326. I have also been referred to ***Boyraz v Turkey*** (6196/08) IRLR 164.

327. The cases that I have been referred to each turn on their particular sets of facts, and in each case, the termination of the work involved a proven interference with the private life of the individual on the basis of those facts.

Conclusion

328. Whilst retirement inevitably brings to an end an aspect of working life, it does not necessarily of itself interfere with the right to respect for private and family life. Indeed, for many people, although not all, it must be right to say that retirement is a welcome stage of working life.

329. I agree with Mr Kemp that the difficulty here is that retirement is not necessarily something which is objectionable and indeed is welcomed by many in society.

330. In my judgement, the imposition of a universal retirement age is materially different to termination of work for a reason related to specific activities, actions, beliefs or steps taken by the individual involved. The priest in this case was not dismissed because of anything that he had done. His contract was terminated because he reached the age of retirement.

331. The claimant takes issue with the fact that he was forced to retire at all, and that his retirement took place at age 70, not some later age of his own choosing.

332. This is an obvious claim of age discrimination and there is no free standing right to claim age discrimination within the Convention.

333. I accept that J did not want to retire at 70 and I accept that insisting that he did so was a decision based on his age. The age of retirement of priests of the church of England is universal subject only to some limited exceptions. It is set out in statute.

334. The reason for that decision was nothing to do with his personal circumstances or anything that he had done in the course of his work. The only reason his office was terminated, was that he had reached the retirement age set out in the statutory measures relevant to the office of a priest in the Church of England.

335. There are two key difficulties. First, there is no obvious reason why the imposition of a retirement age, determined by government, and legislated for in the case of someone of the claimant's status, in circumstances where his status is a matter of choice, and where the retirement age is known and applicable to all, can as a factual matrix engage article 8 at all. Secondly, the primary thrust of the claim is one of discrimination and the government of the UK has declined to enact article 14 , with the result that individuals have no right to rely upon it.

336. Whilst the issue in Gilham appears similar on first reading, in that case, despite finding that the claimant was not a worker, the reason why the convention rights were engaged was that Ms Gillhams right to freedom of expression under article 10 was found to be engaged on the facts. This was because she claimed to be a whistle-blower who had been subject to detriments for raising her concerns about bullying and harassment in the work place. She was able to claim that in enforcement of those established rights, she was discriminated against on ground of status, because her status was the barrier to her seeking the protection of article 10. This is a factually different set of circumstances in both form and substance, to those relied on by J, the claimant in the case before me.

337. I can see that the argument that a person should be able to challenge discrimination which arises in a context which is akin to work, and should not be prevented from doing so because of status is an attractive argument. I accept that the convention is a living statute and that there may be an interpretation which allows J to gain protection under these provisions but that case is not made out before me.

338. I have had the advantage of full and well-reasoned arguments from both counsel, supported by reported case law and am satisfied that if there were any direct authority of assistance that either counsel would have referred me to it. I have been referred to no authority which equate a termination by retirement with a breach of article 8. The case law I have been referred to does not support this in any direct or indirect way and I reject the submission of Ms Tether that it is self-evident that retirement of its self engages article 8.

339. I conclude that the fact of retirement does not engage article 8 rights of its self. It will only engage them if the termination is connected with, or caused by something otherwise protected by article 8, such as the right to family life. I conclude that the claimant has not proved that article 8 is engaged in his case.

340. I accept that if the claimant's rights were within article 8 and if I am wrong about that, that the reason why he cannot protect his rights is because he is specifically excluded from the relevant sections of the Equality Act 2010 and that the exclusion is because of his status.

341. Therefore, if I am wrong about the first question, and if the claimant's article 8 rights are engaged, I accept that the claimant has been treated less favourably than others in an analogous situation, those others being other people who are subject to a retirement age and seeks to challenge the retirement age on grounds of age discrimination.

342. The 3rd question would therefore also be answered positively leaving the final question of whether or not there were reasonable justification.

343. Insofar as the evidence before me as addressed that question the justification for the retirement of priests at 70 is a result of the statutory provision is for a legitimate aim and is proportionate. I draw this conclusion on the basis that I am considering the statutory provision itself and not the decision made in the case of the claimant.

The EU withdrawal Act

344. The respondent submits, that there is a cut off point after which the claimant cannot rely upon any rights which are found to exist as a result of European directives, because the effect of the UK withdrawal agreement, read with the acts governing the application of EU law post implementation day, mean that there will be no right to rely upon a right derived from EU law in this particular way.

345. The claimants response to this is short: It is an unsupportable argument, and if rights are found to exist and vest in the claimant at the point that his claim was issued, the rights would have accrued at that point, and they cannot be taken away from him retrospectively, just because of the timing of his claim, and the date of implementation.

346. I agree. I conclude that the claimants rights of actions have accrued already, and that he therefore remains entitled to pursue them , relying on EU law provisions so far as he is able. Whilst my decision means that the point is a moot one, the if he were a worker within the meaning of EU law, his rights would be enforceable, subject to the enforceability and applicability of the provisions of schedule 22 EqA.

Does Schedule 22 EqA exclude the claimant from protection of EqA ?

347. The claimant raises two arguments in respect of the applicability of schedule 22. First, the claimant submits that schedule 22 cannot apply in this case because there is no requirement on the respondent to discriminate against the claimant. This is considered below.

348. Second, the claimant submits that in any event, Schedule 22 , if applied in this case, must be contrary to the provisions of EU law, because it would deprive the claimant of a potential remedy that he would otherwise have, in respect of discrimination. And deprive the ET of the opportunity of hearing and determining a prima facie claim of discrimination which would otherwise require justification.

349. Given my conclusions on section 49, I do not need to consider whether or not the termination of the claimant's office by his compulsory retirement at the age of 70 falls within the exception contained within schedule 22 EqA .

350. However, if I am wrong about either personal discharge of functions or the meaning and effect of the words *direction of another person*, I would have found

that in this case that the claim would be within schedule 22 so as to exempt the claimant from bringing a claim of age discrimination under EqA.

351. I agree with Ms Tether that the framework directive and the directives dealing with work and occupation require that any exception or derogation in national law must be construed strictly and narrowly and that the provisions of EqA must at the time of writing, be read so as to comply strictly with European law.

352. In this case the age provisions relevant to the retirement of a priest include an express exception to what would otherwise be a requirement. The claimant would be required to retire at 70 unless the Bishop exercised his discretion to extend the office for a further period of time, up until the 75th birthday of the incumbent.

353. Schedule 22 EqA provides that a person does not contravene the provisions specified ,so far as relating to the protected characteristics , in this case age, if he does anything he must do pursuant to the requirements specified in the schedule.

***Must do* pursuant to a requirement**

354. The respondent relies on the statutory authority set out in paragraph 3(2) of the Ecclesiastical Offices (Age Limit) Measure 1975 and regulation 29 (a) of the Ecclesiastical Offices (Terms of Service) Regulations 2009. These are the provision which impose an automatic retirement age for all priests at 70, whilst reserving to the Bishop discretion to extend an incumbency in certain defined circumstances.

355. The respondent asserts that these are measures which fall within the scope of paragraph 1(1) schedule 22 EqA and the claimant disagrees.

356. The claimant submits that the effect of the provisions read together is to give the Bishop the ability to direct whether or not the claimant remains as an incumbent priest, because they retain a discretion over whether to extend the office or not. Therefore the particular provisions relied upon are not capable of falling within the

scope of schedule 22, says the claimant, because the regulations do not *require* the termination of the relationship at age 70.

The relevant legal principles

357. I have been referred by the claimant to *Heron v Sefton Metropolitan Borough Council* UK EAT*/0566/12/SM* in which the claimant raised an age discrimination claim because her redundancy payment had been limited following the application of a limitation which had been set out in the civil service compensation scheme. A version of this had been was laid before Parliament on 22 December 2010 and applied to the claimant.

358. The ET determined that the compensation scheme was subsidiary legislation as defined by the relevant section, and was therefore an enactment within paragraph 1(1) Sch 22 EqA.

359. The EAT disagreed, on the basis that the authority was not required by an enactment to discriminate in the amount of redundancy payment.

360. The Judge considered the wording of the enactment in issue and determined that *it provides for the difference in treatment between employees dismissed by reason of redundancy who are over and under 60 at the date of dismissal, but it does not require that difference to be respected. A requirement is something that means that the person subject to it cannot do otherwise. Hence words of paragraph 1, (1) if schedule 22, anything P must do pursuant to a requirement.*

361. The claimant in this case asserts that I must draw the same conclusion in respect of the regulations relied on here by R, because of the discretion allowed to the Bishop.

362. The only exception to the requirement to ensure the retirement of the priest at 70 arises if firstly, the priest applies for an extension of their tenure and secondly, the Bishop considers whether or not to exercise their discretion and thirdly, exercises that discretion.

363. The Bishops' discretion is strictly defined and can only be exercised in specified circumstances. The discretion is not an open-ended discretion to decide whether or not an individual member of the clergy should or should not retire at 70, but operates to enable a request to be made and granted for continuation of the office only in specific and defined circumstances.

364. In practice, the discretion is rarely exercised. I accept that when it is exercised it is exercised by the Bishop alone.

365. Once a decision is taken not to exercise the discretion to extend, the priest must retire because the statutory provision says he or she must. Neither the Bishop not the claimant can do otherwise. The default position remains that all priests will retire at 70.

366. I conclude that schedule 22 does apply to the claimant's case because the statutory provisions, properly construed do mean that the Bishop is required to give effect to the statutory provision to retire the incumbent.

Is schedule 22 contrary to EU Law?

367. In this case, I have found that the claimant was not either a personal office holder or a person covered by the various EU directives or the charter. He therefore has no rights to protections under EqA or wider EU law.

368. If I am wrong, and he would have had rights but for the application of schedule 22, I would have concluded that Schedule 22 is not compatible with EU law, because it would deprive a person who would otherwise have the right to claim age discrimination and seek justification of what would be prima facie discrimination. I conclude that the provisions are not within the derogations allowed to a member state.

369. It would be for the state to justify the provisions.

Section 49 (10) Equality Act

370. I have also been referred by the respondent to section 49 (10) of the EqA.

371. This states that a person is to be regarded as discharging functions personally, under the direction of another person if that other person is entitled to direct the person as to when and where to discharge the functions.

372. The respondent submits that the wording of subsection 10 means that the tribunal is restricted to considering whether or not the other person is entitled to direct as to *where and when* only. Put another way, unless the claimant demonstrates that the Bishop could direct him as to when he carried out the functions of his office, and where he was to discharge them , he cannot succeed.

373. The claimant submits that this is incorrect and that the correct reading of subsection 10 is that if the claimant is able to demonstrate they are directed as to when and where then that will be sufficient to satisfy the test; but that this is not the only way as a test may be satisfied because it is not intended to be an exhaustive list. For example, the claimant may be directed as to the manner in which they must carry out functions at their office in circumstances where the place or the time at which the functions are carried out is not directed. The claimant submits that such a case would still fall within subsection 10.

374. I agree with the claimant that the list in subsection 10 is a non exhaustive list. It gives examples of the type of directions that may point to functions being carried out under the direction of another, but they are not the only types of direction. If there is evidence that a direction may be given as to where a task is to be carried out or when it is to be carried out, that would indicate that the person is covered by section 49, but the fact that they do not exist, but other forms of direction do exist cannot have been intended to deprive an individual of protection section 49.

Employment Judge Rayner
Date: 20 November 2020
Amended: 21 January 2021

Sent to the parties: 01 February 2021

ON BEHALF OF THE TRIBUNAL OFFICE

Notes

Note: online publication of judgments and reasons

The ET is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: https://www.gov.uk/employment-tribunal-decisions.

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness