[2023] FWC 1650 [Note: An appeal pursuant to s.604 (C2023/4482) was lodged against this decision- refer to Full Bench decision dated 18 September 2023 [[2023] FWCFB 167] for result of appeal.]

DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Rev. Hedley Wycliff Atunaisa Fihaki
v
Uniting Church In Australia, Qld Synod
(U2022/10263)

COMMISSIONER SPENCER BRISBANE, 7 JULY 2023

Application for an unfair dismissal remedy – minister of religion – jurisdictional objection - not an employee – novel category of 'minister' – no intention to create legal relations – no written contract – no oral contract – alternate examination – provisional assessment of valid reason – jurisdictional objection upheld – application dismissed.

INTRODUCTION

[1] Dr Reverend Hedley Wycliff Atunasia Fihaki (the Applicant/ Reverend Fihaki) made an application for an unfair dismissal remedy pursuant to s 394 of the *Fair Work Act 2009* (the Act). The Uniting Church of Australia, Queensland Synod (UCA/the Church/the Respondent) made a jurisdictional objection to the application on the basis that the Applicant was not an employee under section 382 of the Act and therefore it was submitted that the Applicant was not protected from unfair dismissal. This decision relates to the jurisdictional objection.

[2] It is in dispute whether Reverend Fihaki is an 'employee' for the purposes of section 382(a) of the Act. The Respondent stated that the Applicant held a covenantal and spiritual position as a Minister of the Word, rather than an employment relationship with the Church, and therefore is not eligible as a person protected from unfair dismissal. The Applicant argued that he was an employee and was unfairly dismissed from his employment as a Minister with the Respondent.

[3] The traditional dichotomy usually considered is whether the arrangement is one of employee/employer or an independent contractor. Neither party argued that the Applicant was an independent contractor. Therefore, the comparison and assessment is whether the Applicant was an employee or a minister by his acceptance of the spiritual calling with UCA. The initial examination is the case authorities that have considered the position of a minister, including most relevantly, the case of *Ermogenous v Greek Orthodox Community of SA Inc*[1] *('Ermogenous')*. This case was remitted from the High Court back to the South Australian Supreme Court for a redetermination.[2] That decision, whilst dealing with the specific circumstances of *Ermogenous*, determined that each of these 'minister' cases turns on its own

facts.Adopting that approach, the facts and circumstances of Reverend Fihaki and the UCA are considered against , the recent case law regarding whether there was any intention to create legal relations and (if present) the nature of the contract.

[4] The Applicant submitted that his Letter of Call represented an employment contract.[3] the dual judgements of *ZG Operations Australia Pty Ltd v Jamsek*[4] (‘*Jamsek’*) and *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*[5] (‘*Personnel Contracting*’) are applied for this assessment.In addition in similar matters, where an employment contract may not be able to be conclusively determined, tthe alternate approach in *Muller v Timbecon Pty Ltd*[6] (‘*Timbecon*’) is relied on, for irregular or complex matters, which set out that both of the multifactorial test can be applied (to determine if the relationship is one of employment), and a preliminary assessment of the merits (section 387(a) of the unfair dismissal application) should be made.

[5] *Ermogenous* set out that the specific circumstances of those “matters of the church structure and governance may very well differ [between religious institutions].”[7] The structure of the organisation (that the Applicant submitted as his employer); theUniting Church has a structure comprised of two separate arms. One arm comprises the ‘churches’ being a series of unincorporated associations, the other arm was established as the commercial arm undertaking all business transactions called *‘the Uniting Church in Australia Property Trust(Q.)’*:

> *“…the church is…at a national level - an unincorporated association. It consists of quite a number of councils. Each state did enact, as Dr Fihaki correctly pointed out, an Act of Parliament back in 1977 which basically empowered three churches back then to unite to form the Uniting Church in Australia, but, for secular reasons, each jurisdiction created a body corporate normally styled the Uniting Church in Australia Property Trust and then the name of the respective jurisdiction - in Queensland that was obviously just a Q – and…it was necessary because, whilst the church is made up of perhaps thousands of unincorporated associations, those entities cannot conduct commercial business and activities in the secular environment, hence the need to create a statutory body corporate to…enable the church and its various unincorporated associations to conduct business in the secular world.”*[8]

(emphasis added)

[6] The Applicant sought that the UCA ‘acknowledge that they have not followed due process in terminating his employment and that natural justice has been denied due to conflict of interest.’ The Applicant sought 12 months wages to be paid as a remedy, due to the disciplinary processes used.

PROGRAMMING OF MATTER

[7] Directions were set for the filing of submissions and evidence in relation to the jurisdictional objection. A Jurisdictional Hearing was conducted via Microsoft Teams where the Applicant represented himself, and Mr Malcolm Hinton, General Counsel, and Mr Grant Weaver, Executive Director, People, Culture and Learning appeared for the Respondent. In addition to the material filed, both parties made submissions during the Hearing. Following the Hearing, stages of further written submissions in relation to additional case authorities were

filed. Whilst this decision may not refer to all of the submissions, all of the material has been considered, including these additional submissions.

RELEVANT LEGISLATION

[8] The following sections of the Act relevantly provide as follows:

> **12 The Dictionary**
> ***employee*** is defined in the first Division of each Part (other than Part 1-1) in which the term appears.
>
> Note 1: The definition in the Part will define ***employee*** either as a national system employee or as having its ordinary meaning. However, there may be particular provisions in the Part where a different meaning for the term is specified.
>
> **380 Meanings of employee and employer**
>
> In this Part, ***employee*** means a national system employee, and ***employer*** means a national system employer.
>
> **382 When a person is protected from unfair dismissal**
>
> A person is ***protected from unfair dismissal*** at a time if, at that time:
> (a) the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and
> (b) one or more of the following apply:
> (i) a modern award covers the person;
> (ii) an enterprise agreement applies to the person in relation to the employment;
> (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

(Emphasis added)

> **385 What is an unfair dismissal**
>
> A person has been unfairly dismissed if the FWC is satisfied that:
> (a) the person has been dismissed; and
> (b) the dismissal was harsh, unjust or unreasonable; and
> (c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and
> (d) the dismissal was not a case of genuine redundancy.
>
> Note: For the definition of consistent with the Small Business Fair Dismissal Code: see section 388."
>
> **386 Meaning of dismissed**
>
> (1) A person has been dismissed if:
> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or

(b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.

(2) However, a person has not been dismissed if:

(a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or

(b) the person was an employee:

(i) to whom a training arrangement applied; and

(ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement; and the employment has terminated at the end of the training arrangement; or

(c) the person was demoted in employment but:

(i) the demotion does not involve a significant reduction in his or her remuneration or duties; and

(ii) he or she remains employed with the employer that effected the demotion.

(3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part."

(Emphasis added)

[9] No Award or Enterprise Agreement was raised or determined that covered the Applicant. However, it is noted that the entitlements in the Letter of Call generally reflect the National Employment Standards. Those entitlements being the congregation's responsibility, rather than the Church Committees or the UCA Property Trust having an employment obligation to the Applicant.

SUMMARY OF RESPONDENT'S SUBMISSIONS AND EVIDENCE

[10] The Respondent raised the jurisdictional objection that the Applicant was not an employee in Question 2.1 of their Form F3 – Response to Unfair Dismissal Application. They outlined their basis for the objection in Question 2.2 as:

"a) The Applicant was ordained as a Minister of the Word.

b) The Applicant was not an employee of the Church in his role as a Minister at Mooloolaba Christian Church (MCC).

c) The ministry role within the Church creates a covenantal or spiritual relationship between the Church and the Minister. It is not an employment relationship.

d) As there is no employment relationship, either existing or prospective, the Applicant cannot be considered an employee or prospective employee and as such is not entitled to make Application pursuant to the unfair dismissal provisions of the Fair Work Act 2009 (Cth)"

[11] The Respondent explained the role of a Ministry Agent of the Church, as being considered for 'placement' by the Joint Nominating Committee, being issued a 'call' (if considered suitable, referring to Regulations 2.6.5, 2.6.6, and 2.6.7 as the relevant Uniting Church in Australia Regulations for the Ministry Placement procedure). The Joint Nominating Committee then recommends to the Placement Committee if a particular Ministry Agent should be called to a position.[9]

[12] The Respondent provided their basis for the submission that the role of a Minister in the Uniting Church is a covenantal relationship as follows:

> *"Although ministry agents may describe the Uniting Church, or their congregation or other responsible body, as their 'employer', their ministry is not a form of employment. It is grounded in a call from God to ministry, confirmed by the church. Although in a general sense ministry agents serve their congregation, or the particular group or community of people to whom they minister, and are responsive to it, they are not 'paid' or 'remunerated' for particular services to the congregation or other group involved. There is always a broader vision and a broader range of needs to be considered, and their calling makes them responsible to God and the whole church for their choices. They are ministers of the gospel of Jesus Christ serving God's reign not simply carrying out prescribed responsibilities."*[10]

[13] The Respondent also referred to the payment of a stipend as evidence of the covenantal relationship. The Respondent explained the stipend to be a 'living allowance paid to the minister as they exercise their needs rather than a salary'.[11]

[14] The Respondent's submissions Internal Legal Advice provided by the Queensland Synod's Legal Counsel dated 1 June 2020 set out the nature of the relationship between a Minister and the Uniting Church in Australia. This legal advice contained a number of cases which considered cases of other ministers, which will be considered later.

[15] The Respondent submitted that the Applicant accepted a call to the placement as a Minister on 16 May 2013, which commenced on 1 July 2013. The Respondent referred to the Regulations of the Church which 'provide for a congregational placement to be agreed to by the Presbytery, Minister and Congregation'. The Respondent submitted the Applicant's 'Letter of Call' and 'Terms of Placement and Acceptance' represented the terms of his engagement. The Respondent specifically pointed to Regulation 2.6.3(c) of the terms under which the 'call to a placement gives effect to the perceived will of God as expressed by a decision of a council or councils of the Church and by the response of the Minister concerned'.[12]

[16] The Letter of Call, being the document, the Applicant considered as his contract, set out as follows:

> ***Letter of Call for Congregational Placement***
>
> *Dear Hedley*
>
> *The Congregation for the placement of Mooloolaba Uniting Church extends to you a call to become a Minister of this Congregation. This placement has been affirmed by*

the Congregational Meeting, and approved by the Presbytery and the Advisory Committee on Ministerial Placements.

The church values your gifts and graces and recognises your call to ministry. The Congregation assures you of its prayerful support, and should you accept this call and all requirements are met, looks forward to sharing in a ministry of mutual encouragement and co-operation.

In issuing this call, the Congregation is acting under the Constitution and Regulations of the Uniting Church in Australia which provide that a "call to a placement gives effect to the perceived will of God as expressed by a decision of a council or councils of the Church and by the response of the Minister concerned" (Reg. 2.6.3(c)). It is an invitation into a covenant between God, the congregation(s) and the Minister.

If you accept this call, it is the Presbytery which will induct you into this ministry, and you will be responsible to the Presbytery for the exercise of your ministry. (Constitution para. 15) The terms and conditions of placement included with this letter of call are those approved by the Presbytery and cannot be altered without the authority of the Presbytery.

Please reply in writing to the Chairperson of the Church Council with copies to the Secretary of Presbytery and the Secretary of Placements Committee within 14 days of receiving this letter. We pray that God will guide you as you consider God's will for your future ministry.

Yours sincerely

Chairperson, Church Council
Presbytery Minister/Chairperson
Secretary, Placement Committee

THE UNITING CHURCH IN AUSTRALIA
Queensland Synod

ADVISORY COMMITTEE ON MINISTERIAL PLACEMENTS
MOW/DEACON PLACEMENT
TERMS AND CONDITIONS

Placement in the Congregation of Mooloolaba Uniting Church

Name of Minister: Rev Dr Hedley Fihaki

A call to a placement gives effect to the perceived will of God as expressed by a decision of a council or councils of the Church and by the response of the Minister concerned. It is an invitation into a covenant between God, the congregation and the Minister. These placement arrangements are those approved by the Presbytery and cannot be altered without the authority of the Presbytery.

1. Proposed Commencement Date of Placement
1 July 2013 to 30 June 2015 subject to review in February 2015 for an extension of time

2. Placement Percentage
Full or Part-time… 100%

3. Working with Children Check
This placement is conditional upon the Minister obtaining a Working with Children Check, or carrying a current Working with Children Check card.

4. Stipend
The minimum stipend approved by the Synod is $[redacted] per annum from 1 January 2013. The Congregation(s) shall remit the stipend to the Synod Office in 12 equal amounts by the 15th day of each month. The Synod Office shall remit the net amount after deductions, to the minister by the 20th day of each month.

5. Manse
There are three alternatives to providing housing for a minister:

- *(a) A manse will be provided and a floor plan of the manse is attached, or*
- *(b) Where the minister has received Presbytery approval to live elsewhere, an allowance in lieu of a manse will be paid at the rate approved by the Synod. As from 1 January 2013 the rate is $[redacted] per annum), or*
- *(c) Where there is no manse available and where the minister does not wish to purchase his/her own home, it is the responsibility of the Placement to rent or buy suitable housing for the minister*

It is noted that your address will be _____

Note: By-Law Q3.5.1 states it shall be the responsibility of the congregation or other body concerned to provide a suitable residence for each minister called or appointed thereto; provided that in circumstances approved by the presbytery or other responsible body, and with the consent of the minister concerned, a housing allowance determined by the Ministerial Support Funds Committee may be made towards the cost of purchasing a minister's housing.

6. Travelling Allowance
[a table was provided which set out a monetary allowance by kilometre.]

7. Beneficiary Fund

- *(a) The Uniting Church Beneficiary Fund is the current superannuation scheme for ministers of the Uniting Church.*
- *(b) The Minister's contribution to the Beneficiary Fund will be deducted from the Minister's stipend each month by the Department for Financial and Property Services. The congregation will pay contributions to the Beneficiary Fund each month at the rate required by the Church.*

8. Sickness and Accident Assistance Plan
Payments as required by the Synod shall be made by the congregation to this Fund.

> ***9. Continuing Education for Ministry and Study Leave***
> *The congregation shall make the appropriate payments of $960 per annum for Continuing Education for Ministry. It is an expectation that ministers are engaged in continuous learning and will avail themselves regularly of CEM and other education opportunities.*
>
> *Study Leave shall be two weeks per year, taken in accordance with the MEC Guidelines (see Qld Synod Handbook for Ministerial Stipend & Benefits).*
>
> ***10. Annual Leave***
> *Annual Leave shall be four weeks, including four Sundays, taken in consultation with the Church Council. No more than 8 weeks shall be accumulated at any one time without the authorisation of Presbytery. Annual leave accrued within this placement shall be taken within this placement unless otherwise negotiated. No lump sum payment will be made at the conclusion of the placement.*
>
> ***11. Long Service Leave***
> *The congregation makes contributions to the Long Service Leave Fund for the minister through the Synod's Mission & Service Fund. See By-Laws Q3.4.1-3.4.13. Long Service Leave shall be taken in accordance with current By-Laws. Ministers are encouraged to take long service leave as it falls due and must be taken prior to retirement.*
>
> ***12. Zone Allowance and other remote area allowances (if applicable)***
>
> ***13. This document represents the placement arrangement approved by the Presbytery and is not an employment relationship.***[13]

(Emphasis added)

[17] The Respondent referred to the 'Terms of Placement' as proof of the Applicant undertaking a covenantal relationship, specifically highlighting the following quotes:

> *'A call to a placement gives effect to the perceived will of God as expressed by a decision of a council or councils of the Church and by the response of the Minister concerned. It is an invitation into a covenant between God, the congregation and the Minister.'*[14]
>
> *'This document represents the placement arrangement approved by the Presbytery and is not an employment relationship'.*[15]

[18] A range of indicia are examined in assessing the matter, as the Applicant raised several examples that he relied on to assert that he was an employee, and that the Letter of Call was his contract of employment. These indicia are set out later. The Respondent with reference to the indicia, argued that it is not an employment relationship.

SUMMARY OF APPLICANT'S SUBMISSIONS AND EVIDENCE

[19] The Applicant submitted an attachment to his application titled 'Why Ministers are Employees,' with a number of reasons summarised below. The reasons predominantly relied

on a multi factorial assessment. Whilst this approach does not have currency in some circumstances, the analysis is undertaken later.

- Ministers of religion are paid a yearly taxable income like other 'employees'
- Ministers submit tax returns and receive a Notice of Assessment each year
- The Applicant was given a 'monthly pay slip', not a 'stipend slip'. The payslip states clearly the number of hours they are being paid.
- On the payslip it states the 'employer is 'The Uniting Church in Australia – Qld Synod ABN 25548385225'.
- The legal and incorporated name of the Church is "THE UNITING CHURCH IN AUSTRALIA PROPERTY TRUST (Q.)". The 'Property Trust' is an 'incorporated body', a 'registered businesses with an ABN, not an unincorporated association.
- The Applicant rejected that a 'stipend' is not a wage. In the alternative, the stipend is only one component of a minister's overall salary package, with a housing allowance, travel allowance, continuing education, and superannuation contribution also being included.
- The Church contributes to the Applicant's superannuation. The Applicant submits that the ATO states 'Superannuation, or 'super', is money put aside by your employer over your working life for you to live on when you retire from work. If Ministers are [not] employees, I should not be paid superannuation.'
- Money is being exchanged for a service in the payment of a stipend to the Applicant. Money is used by all of society, rather than just the religious community.
- The Respondent's argument that the services being provided are 'religious and spiritual', meaning that the Applicant is not an employee is illogical. It suggests that a ministers 'calling' is lived out and exercised in the 'spiritual' or 'heavenly' realm but not in real practical terms on earth.
- The Applicant further rejects the Respondent's submission that Ministers are 'ministers of the gospel of Jesus Christ serving God's reign not simply carrying out prescribed responsibilities.' The Applicant states that if this was true, Ministers could do absolutely whatever they like based on what God has personally placed in their 'hearts' or in their 'souls'.
- The Applicant highlights Regulation 2.2.1 as the 'job description for ministers' and outlines the requirement of ministers to work within the Constitution and Regulation of the UCA.
- The Applicant states that in 2020, the Australian Government declared 'religious practitioners as employees' for the purposes of receiving the JobKeeper COVID-19 payment. The Applicant additionally contends that on the 28 April 2020, the Respondent accepted this ruling and stated that 'The Queensland Synod' to be the 'employer' for 'religious practitioners', not congregations.

[20] These submissions by the Applicant were accompanied with a number of documents, including Letters, Payslips, JobKeeper forms, and submissions in response to the Respondent's jurisdictional objection. As this decision concerns the jurisdictional objection, only those that pertain to the Applicant's argument that he was an employee are considered.

[21] The Applicant asserted in a response to the Respondent's jurisdictional objection submissions, as follows:

> "In terms of the jurisdictional issue, the ideological arguments put forth by the Synod legal team does not detract from the facts:
> a) I am given a monthly 'payslip' not a 'stipend slip'.
> b) My pay slip clearly identifies the 'The UCA in Australia – Qld Synod ABN 25548385225' as the 'Employer'.
> c) I am also identified as an 'Employee' FF12042.
> d) I am paid for 182 hours of work at a 'rate' of $28.32 per hour.
> e) I pay taxes and submit a tax return each year
> f) My employer pays into my superfund
> g) I have other allowances as part of my salary package other than a 'stipend'. My housing allowance and car allowance are not labelled as part of my 'stipend', i.e. living allowance. (See attachment 3).
> h) In 2020 the Government declared 'religious practitioners' as 'employees' for the purpose of receiving jobkeeper (sic). On the 28th April 2020, UCA Qld Synod accepted this ruling and stated that 'The Queensland Synod' to be the 'employer' for 'religious practitioners', not congregations (See attachment 4).
> i) The Synod is pointing to a 'media statement' (point 15 page 4 of their submission letter) as evidence to say that "many religious practitioners are not employees of their religious institutions". However, media statements cannot be relied on as factual statements. Even if you could use a media statement rather than an actual policy statement, which I reject, the statement makes a generalized statement only pointing to "many', not ALL. Noting the UCA is NOT specifically mentioned as part of the 'many'. You cannot make the assumption by this 'media statement' that this automatically includes the Uniting Church in Australia Qld Synod Property Trust Q in the 'many' and that this somehow settles the matter that ministers in the UCA are not employees."

[22] Attachments 3and 4 of the document refer to the Payslips and JobKeeper forms submitted by the Applicant.

[23] The Applicant additionally argued that he was an employee as follows:

> "Thirdly, the ideological argument that Ministers in the UCA are not employees is significantly flawed.
>
> a) The Church is wanting the Court to "determine the true nature of the relationship between a Minister and the Church is one of a covenantal or spiritual nature, not that of employer and employee."
>
> b) However, as already stated in *JGE v The Portsmouth Roman Catholic Diocesan* case, "it does not follow that the holder of an ecclesiastical office cannot be employed under a contract of service" and that "each case must be judged on its own particular facts".
>
> c) Again, the 'facts' are above, i.e. I am paid $28.32 per hour for a total of 180 hours etc. How the church interprets the facts in ideological terms, i.e. a stipend or a 'calling' etc., does not change the fact that I am paid $28.32 per hour for a 'service'.

> d) The service is 'covenantal' or 'spiritual' ONLY in an 'internal' sense in terms of a persons 'motivation' or 'drive' for why they do what they do. Our inner 'faith' interpreted as 'covenantal' and 'spiritual' in nature, is always lived out in real and practical terms, i.e. visitations, pastoral care, counselling, teaching, preaching, cleaning, serving in the op shop etc., etc. The Service that I am employed for is always 'practical' in nature, though the motivation is 'internal'. Noting, every Christian believes they work for God and His Kingdom and that they are 'called' by God regardless of what field they work in…"[16]

CONSIDERATION

[24] In addition to the later material submitted by the parties, summarising the indicia, a range of case authorities were referred to by the parties, regarding the assessment of whether the Applicant is a minister of the UCA, and classified as an 'employee'. A number of these cases are considered below. It is noted these cases are relevant, due to dealing with ministers in the religious setting, however, the majority are not within the hierarchy of the Australian courts providing binding case authorities on the Commission and are therefore merely persuasive. The most significant case as referred to, is that of *Ermogenous*[17], which was determined by the High Court of Australia. That case is examined later.

[25] Further, more recent cases on contractual construction were provided to the parties on the issue of determining whether an employment relationship exists, with the opportunity to make submissions as to their relevance. These cases were provided due to the Applicant's assertion that an employment relationship existed, without reference to a specific document or meeting from which the terms of an employment contract could be taken. However, in the Applicant's most recent additional submissions, he clarified he believed his 'contract of employment' was the Letter of Call.[18] Therefore this document and the regular 'indicia' that are 'given voice' within this, have been examined. These additional cases were not canvassed in the Respondent's legal advice that they relied at the Hearing (which was obtained in 2020), as they were determined after that time. However, both parties addressed these cases in additional submissions. It was also necessary in terms of the structure of the UCA, to consider the limitations of forming an employment contract with unincorporated entities, of the Church.

Cases that examine the position of a minister

[26] In addition to the material submitted by the parties summarised above, a range of case authorities were referred to by the parties regarding the assessment of whether the Applicant as a Minister of the UCA is classified as an 'employee'.

The President of the Methodist Conference v Preston

[27] Firstly, the cases specifically considering Ministers are addressed. The case of *The President of the Methodist Conference v Preston*[19] ('*Preston'*) concerns an Appeal in the United Kingdom Supreme Court of Ms Haley Anne Preston, a Minister in the Redruth Circuit of the Methodist Church until 2009. Ms Preston wished to apply for an unfair dismissal claim in an English employment tribunal, however, was ineligible due to not being an employee.

[28] In this decision, the Court considered the circumstances of Ms Preston's appointment. It was outlined that Methodist ministers do not have an express written contract of employment. They are governed by the Constitution of the Methodist Church, which is contained in a Deed of Union, the standing orders of the Methodist Conference, and by specific arrangements as made with a particular Minister. This led the court to consider 'whether the incidents of the relationship described in those documents, properly analysed, are characteristic of a contract and, if so, whether it is a contract of employment'.[20]

[29] It was determined that "*the mere fact that the arrangement includes the payment of a stipend, the provision of accommodation and recognised duties to be performed by the minister, does not without more resolve the issue. The question is whether the parties intended these benefits and burdens of the ministry to be subject of a legally binding agreement between them.*"[21]

[30] That decision further stated that the correct approach in assessing whether an employment relationship exists is to 'examine the rules and practices of the particular church and any special arrangements made with the particular minister.' That decision considers the above-mentioned regulations of the Methodist Church.

[31] In circumstances analogous to the current Respondent (the UCA), the decision also considers the use of 'stationing', being outlined in a Methodist context to be the 'formal act by which a minister is assigned to a particular area and duties. This is regulated by the 'Conference,' the governing body of the Methodist church. The 'Conference' make decisions on stationing based on recommendations received from the Circuit Invitation Committee, and later, the Stationing Committee of the Circuit.[22]

[32] The decision additionally considers similar circumstances to the current matter, in that the 'lifelong character of the ministry', specifically referring to Standing Order 700(1) which outlined that 'ministers are ordained to a life-long presbyteral ministry of word, sacrament and pastoral responsibility in the Church of God which they fulfil in various capacities and to a varying extent throughout their lives.'[23] The decision also outlines that a minister can only cease to be in full connexion through sending a notice of resignation, which must be accepted by the President and a special committee, or through a disciplinary charge being brought where a disciplinary committee exercises its power under Standing Order 1134. It is determined that apart from no appointment being able to be found, or permission to retire on age, ill-health, or compassionate grounds, only that a Minister must be stationed.[24]

[33] Similar to those circumstances, in the current matter, ministers in the Methodist church are entitled to a stipend through their ministry in accordance with Standing Order 801. Further, through Standing Order 803, ministers are also entitled to a 'manse' to be used as a home and base for their ministry. The stipend, manse and other entitlements are not seen as a form of consideration, but 'as a method of providing the material support to the minister without which he or she could not serve God'.[25] The provision of a stipend and manse for Reverend Fihaki is similarly considered in more detail below, as being indicative of a ministerial appointment and not an employment relationship.

[34] In line with this, it was determined in that decision that three points were 'cumulatively decisive'. The first point involved is how the 'manner in which a minister is engaged is

incapable of being analysed in terms of contractual formation. Neither the admission of a minister to full connexion nor his or her ordination are themselves contracts. Thereafter, the minister's duties depend on the initial unilateral decisions of the Conference,' and the acceptance of the calling by the Minister.

[35] The second point regarded as 'cumulatively decisive' in the *Preston* decision, was in regard to the further examination of the stipend and manse awarded to the minister, and how that the stipend and the manse are due to the minister by virtue only of his or her admission into full connexion and ordination. The third point regarded as 'cumulatively decisive' concerned how the relationship between the minister and the Church cannot be ended unless the Conference, its Stationing Committee, or a disciplinary committee choose to end it. It is noted that 'there is no unilateral right to resign, even on notice. The ministry described in these instruments is a vocation, by which candidates submit themselves to the discipline of the Church for life.'[26]

[36] The analysis of the minister's relationship with the Methodist church in regard to the that governance structure and payment of a stipend, makes the case relevant to the current circumstances, as the decision found that the provision of the stipend and accommodation, and discharge of the Minister's duties, did not characterise an employment relationship. The case concluded that there was no employment relationship, due to a lack of intention to create legal relations but instead reflects a minister's appointment.[27]

JGE v the Trustees of the Portsmouth Roman Catholic Diocesan Trust

[37] Another decision considering the position of a priest, the case of *JGE v the Trustees of the Portsmouth Roman Catholic Diocesan Trust*[28] ('*JGE'*) from the England and Wales Court of Appeal concerned potential 'vicarious liability' against the Trustees of the Portsmouth Roman Catholic Diocesan Trust, requiring an analysis of the relationship between the 'employer' and 'employee,' in regard to Father Wilfred Baldwin and the Roman Catholic Diocese of Portsmouth.

[38] Drawing on case law, Lord Justice Ward outlined the following approach for determining a minister's relationship with the church and whether it is akin to employment:

> (1) "Each case must be judged on its own particular facts;
> (2) There is no general presumption of a lack of intent to create legal relations between the clergy and their church;
> (3) A factor in determining whether the parties must be taken to have intended to enter into a legally binding contract will be whether there is a religious belief held by the church that there is no enforceable contractual relationship;
> (4) It does not follow that the holder of an ecclesiastical office cannot be employed under a contract of service."[29]

[39] Applying these principles, *JGE* found that there was no contract of service as the appointment of Father Baldwin by Bishop Warlock was made without 'any intention to create any legal relationship between them'.[30] It was found that 'pursuant to their religious beliefs, their relationship was governed by the canon law, not the civil law', and that the 'appointment to the office of parish priest was truly an appointment to an ecclesiastical office and no more'.[31]

[40] Whilst these factors are noted, due to the *JGE* case arising from a separate legal jurisdiction, the decision is considered to be persuasive, but not precedent. However, it is noted that there was a failure to establish a contract of employment or relationship akin to employment due to a lack of intention to create legal relations. A further analysis of whether there was an intention to create legal relations is undertaken with Reverend Fihaki later.

Reverend Howard Ian Knowles and The Anglican Property Trust, Diocese of Bathurst

[41] The further case of *Reverend Howard Ian Knowles and The Anglican Property Trust, Diocese of Bathurst*[32]*('Knowles')* concerned Reverend Howard Ian Knowles, Minister of the Anglican Church who filed an application to the New South Wales Industrial Relations Commission after being dismissed, that his dismissal was "grossly harsh, unfair unreasonable and unjust within the meaning of the Industrial Relations Act".

[42] In response to this application, the Anglican Property Trust, Diocese of Bathurst stated that Reverend Knowles did not have standing to make the application as 'First, the applicant was an ordained priest, who served God, and the people committed to his charge, but he did not serve an employer. Secondly, there could be no employment without a contract, and the applicant was not a party to any relevant contract, let alone a contract of employment'. The UCA's arguments were similar to these circumstances.

[43] After considering all the evidence provided, the New South Wales Industrial Relations Commission found that it had no jurisdiction to determine Reverend Knowles' unfair dismissal claim. It was concluded by Wright J that there was no basis that the Applicant's situation was different 'from any other Anglican clergy'. Wright J then went on to determine that:

> *"The materials clearly show that the relationship was a religious one; to paraphrase the words of Priestley JA in Scandrett, a consensual compact to which the parties were bound by their shared faith based on spiritual and religious ideas - not based on a common law contract."*[33]

The Respondent similarly argued this case authority in relation to Reverend Fihaki.

[44] Additionally, the New South Wales Industrial Relations Commission in that case considered the word 'employment' to not be a significant indicia to prove an employment relationship, stating that in the context used, it was synonymous with 'appointment'. Ultimately, it was found that:

> *"When one considers the exchange of correspondence on 18 and 19 April 1995 and accepting that the language of contract is apparently used, it is nevertheless also the language of pastoral and parish responsibility in relation to discussions between the Bishop and the applicant concerning a renewal or extension of his licence. I do not accept that this conduct can be considered to be conduct leading to the formation of a contract or conduct with the intention of concluding arrangements which were intended to be enforceable at law. This conclusion not only derives from the object of the arrangements (the obtaining of a non-contractual licence specifically in the context of the normal approach of the church in granting licences to the clergy), but is also to be*

seen in terms of a difference of view between the Bishop and the applicant as to the appropriateness of the clergy undertaking lengthy chaplaincy appointments"[34]

[45] The *Knowles* decision is applicable to the circumstances of the current case of Reverend Fihaki, in that it found the Applicant was engaged in a spiritual capacity without a contract of employment.[35] Similar circumstances were argued by the Respondent in the current matter. The alternative to a written contract was raised by Reverend Fihaki, and whether an oral contract of employment existed between the current parties, as examined below.

President of the Methodist Conference v Parfitt

[46] The final case that examined the specific circumstances of a minister is *President of the Methodist Conference v Parfitt*[36]*('Parfitt')* which concerned a Minister appointed on the Jersey (Channel Islands) Circuit, who had lodged an unfair dismissal claim in a British industrial tribunal. The tribunal initially held that the detailed arrangements between the Minister and the church set out in the Constitution of the Methodist Church and the degree of control held over the Minister by the Church, indicated a contract of employment. This decision was appealed by the President of Methodist Conference and eventually overturned; finding that no contract of service existed between the parties.

[47] It was held that 'a correct appreciation of the spiritual nature of the relationship between a minister and the Methodist Church showed that the arrangements between the minister and the church in relation to his 'stationing' throughout his ministry, and the spiritual discipline which the church was entitled to exercise over the minister, in relation to his career were non-contractual; that, therefore the applicant was not employed by the church under a contract of service'.[37]

[48] Analogous to the present case, it was found that the tribunal initially erred in not considering that 'the applicant was called to the ministry by God and was ordained in the office of minister by Conference, and accordingly there was no contract between the parties.' Similarly, it was found that the tribunal erred in 'confusing a wage or remuneration (which was a reward for work/or skill) with a minister's stipend (which was an allowance paid to enable a minister to follow his vocation)'. Further it was found that compulsory superannuation and income tax payments on a stipend were 'based on convenience and compromise and do not represent any binding decision in principle on the status of ministers.'[38]

[49] It was additionally determined that the type of control considered in the initial decision was incorrectly applied, being that 'of a master over his servant',[39] rather than 'the exercise of professional or spiritual disciplinary function which self-employed professional people or ecclesiastical functionaries might submit to'.[40] This case found no contract of employment between the parties existed.[41] This decision considered a range of matters that also translate to the circumstances of Reverend Fihaki, such as the spiritual call, rather than control, stipend, taxation payments and the provisions in the Letter of Call, which were not considered to be representative of an employment relationship.

[50] To summarise the above cases examining Ministers, all found that there was no contract of employment between the parties. At the core of these cases, was a finding that there was a lack of intention to create legal relations. The courts also determined that matters such as

payment of a stipend, superannuation, income tax and provision of housing were not conclusive to demonstrate the need or existence of a contractual relationship, in the form of a written or oral employment contract.

Ermogenous v Greek Orthodox Community of SA Inc

[51] The case of *Ermogenous v Greek Orthodox Community of SA Inc*[42] *('Ermogenous')* is the most applicable of these 'Minister' cases to the current circumstances. This case concerned an Archbishop of the Greek Orthodox religion who sought payment of his accrued annual and long service leave. The case also considered the intention to create legal relations, especially with unincorporated associations, in addition to considering some 'indicia' of the relationship. In this regard, the Applicant relied on the Letter of Call provided as a basis for his contract and duties, as a Minister with the UCA.

[52] The Respondent highlighted *Ermogenous* in their submissions, referring to the starting point; that the proposition that an intention to create a contractual relationship about the remuneration, maintenance and support of a minister of religion, is not to be presumed.

[53] *Ermogenous* was appealed to the High Court from the Full Court of the Supreme Court of South Australia. The High Court upheld the appeal and confirmed that presumptions about intention, should not be used and that in each case, intention must be proved using an objective test. The High Court held that the Full Court erred in finding that there was no intention to create legal relations, based on the nature of the employment contract, without taking full consideration of the circumstances that surrounded this particular contract, but ultimately upheld that there was no intention to create legal relations in this case.

[54] The intention to create contractual relations is further outlined in *Ermogenous* as an assessment taking account of the 'subject-matter of the agreement, the status of the parties to it, their relationship to each other, and other surrounding circumstances'.[43] The intention to create contractual relations is further defined as 'what would objectively be conveyed by what has been said or done, having regard to the circumstances in which those statements and actions happened.'[44] The decision considers that there are aspects of a spiritual relationship that may give rise to legally enforceable rights and duties. It is outlined that 'to say that a minister of religion serves God and those to whom he or she ministers may be right, but that is a description of the minister's spiritual duties. It leaves open the possibility that the minister has been engaged to do this under a contract of employment'.[45] It is further noted that the existence of a religious character in a relationship, does not create any presumption against an intention to create legal relations.

[55] It is outlined that a Minister may hold their authority through an office being created through the laws of the Church rather than a contractual relationship being negotiated. This requires 'consideration of the structures of the organisation in which the office is to exist',[46] meaning the UCA Regulations, Constitution, and Synod By-Laws in determining the Applicant's relationship with the Respondent.

Structure of the Church – unincorporated association

[56] Further, the decision considers the difficulty of ascertaining the 'employer' if a contract of employment was to exist, and the difficulty enforcing a contract created with an 'unincorporated body'.[47] This is done by reference to the case of *Diocese of Southwark v Coker*[48] where a Bishop, the Board of Finance that paid the stipend to the Curate, and the Church Commissioner were all added as respondents to an unfair dismissal claim, (with the Vicar who offered the contract of employment not being named as a party).

[57] The UCA also submitted that the Church is also an 'unincorporated association':

> *"…the property trust exists because it has to operate within the commercial world. Any search of the ABN registry will identify that the Uniting Church Property Trust appears repeatedly against multiple ABNs because of the entities that the church operates throughout Queensland. That ABN represents the Uniting Church in Australia Property Trust (Q.) trading as the Queensland Synod."*[49]
>
> *"…the Property Trust does employ employees and a number of those employees are, … employed at what we call the synod office. It's the administration arm of the church."*[50]

(Emphasis added)

[58] Reverend Fihaki submitted that the Church is a 'incorporated body', and a 'registered business with an ABN.' The evidence was that the registered business under the ABN was not the Church, but instead the Property Trust through which the Church conducted its 'commercial' business.

[59] I accept the Respondent's submissions that the Church arm of the UCA is comprised of unincorporated entities and as such unable to enter into contracts. In accordance with *Ermogenous*, it is noted that no unincorporated entity can be identified in the process of the minister's placement, as the 'putative employer.' In the current circumstances, this weighs against an employment contract being created between these parties and gives further support of the earlier conclusion that one does not exist. There was also no evidence (apart from the generation of the payslip and its limited terms, discussed later) of any connection between the Property Trust and Reverend Fihaki. The Letter of Call was issued by the Church, not the Property Trust. Whilst the Applicant's response to the submissions on the Church being made up of unincorporated entities unable to contract with him is taken into account, no evidence of any contract between the Applicant and the unincorporated associations of the Church and/or the Property Trust supports this argument of an employment relationship.

Intention to create legal relations

[60] If the Applicant is arguing a contract of employment was formed with the Church, the case of *Ermogenous* outlines the 'difficulties that arise if action is brought to enforce a contract said to have been made with an unincorporated body' (such as the Church in the current circumstances). This again weighs against the formation of an employment relationship between the current parties.

[61] In the current matter of Reverend Fihaki, argued that the Letter of Call was his contract of employment and there were some matters and entitlements referred to in the Church's Regulations which were set out in the Letter of Call. The Letter is signed by the Secretary of

the 'Placement Committee' (rather than as a representative of the Property Trust). There is no other evidence of an intention to create legal relations in a negotiated employment contract between the Applicant and the Church. In fact, the Letter of Call specifically states that it is not an employment relationship. The Property Trust has standing to engage in the commercial matters and as such performs the function of paying the stipend to Ministers, but there is no other evidence of any contract between those parties.

[62] The Respondent set out that there was no intention to create legal relations, and the Letter of Call outlined how the spiritual calling would function, but did not represent an employment contract, as assessed above.

Application of Recent Cases – Contract of Employment

[63] Due to the lack of certainty to be found in the Minister cases in application to this case, consideration is undertaken of the construction of a contract, if one exists. The recent cases of *ZG Operations Australia Pty Ltd v Jamsek*[51] ('*Jamsek'*) and *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*[52] ('*Personnel Contracting*') changed the tests for considering whether an employment relationship existed between parties where the parties committed the relationship to a written document.

[64] A useful analysis of *Personnel Contracting* and *Jamsek* was applied in the Commission decision of *Waring v Hage Retail Group Pty Ltd*[53] ('*Hage'*):

> *"[54] The High Court, via the combination of judgements in both Jamsek and Personnel Contracting, has largely rejected an approach whereby the relationship between parties across its life span is examined (including how the relationship operates in practice). The Court has stated that contractual terms and not performance, where those terms can be ascertained and where the contract is not a sham, will determine the true nature of the relationship. However, the Court has observed that the manner in which the relationship is worked in practice may be relevant for certain limited purposes, such as to find contractual terms where they cannot otherwise be ascertained or to determine the nature of any variation to agreed terms.*
>
> *[55] Indicia (such as those identified in earlier cases in the Court) may be relevant but only insofar as the terms of the contract give voice to them. One approach, to be used as a guide, is to look at whether, under the contract, the worker is engaged to work in the business of another, though this may not necessarily be useful in all cases. The extent of a contractual right to control, as evident from the terms of the contract itself, remains a major signifier of an employment relationship. That an arrangement was brought about by the superior bargaining power of one party has no bearing on the meaning and effect of the contract.*
>
> *[56] Amongst the caveats expressed by the Court, is that a mere label acting as a subterfuge to the true nature of the contractual relationship will not determine the status of the parties. In this respect at least, the law remains unchanged by these recent decisions."*

(emphasis added)

Identification of a contract

[65] In the current matter the written contract is not immediately set out. However, the Applicant clarified his reliance on the Letter of Call as the written document dictating the terms of his 'employment' at a later date in his submissions.[54] The indicia that may be relevant to a contract of employment are considered below, as to whether the Letter of Call 'gave voice' to them as terms of a contract.

[66] An application of the ministerial cases showed that such documents did not indicate nor were they conclusive of an intention to create legal relations and were therefore not considered to be contracts of employment, but instead evidence of a spiritual appointment. The existence of an oral contract is also considered below, due to the Applicant's initial submissions being silent as to the form of his contract. However, it is noted that no evidence has been put as to when the terms of an oral contract may have been agreed to by the parties.

[67] The Commission case of *Zahab v Al-Hilkma College Ltd*[55] ('*Zahab*') discussed the difference between an 'employee' and a 'volunteer,' and Commissioner Ryan in his decision referred to *Ermogenous*[56] in its finding that an objective assessment of the state of affairs between the parties' must be undertaken and what is 'objectively conveyed by what is said or done' must be considered. The Commissioner outlined several factors/indicia, which influenced his decision that there was an intention to create legal relations rather than a volunteer relationship. These were consistent with the indica considered in the employee/independent contractor dichotomy, and the Commissioner found the Applicant was not free to come and go as the Respondent had submitted.[57]

[68] Though *Zahab* does not concern a ministerial relationship, it does discuss the application of *Ermogenous* in considering an intention to create legal relations in a volunteer relationship, (which is outside of the duality of 'employee' and 'independent contractor') and indicated that the indicia and intention to create legal relations are relevant to multiple types of relationships, not just that of employee or independent contractor.

[69] An oral contract was considered in the case of *Church of Ubuntu v Chait*[58] *('Ubuntu').* This case concerned an appeal by the Church of Ubuntu, to a finding at first instance that there was a contract between Ms Chait (who was not a Minister) and the Church, and that she was an employee rather than an independent contractor, under an oral contract. In the originating decision, the application of *Personnel Contracting* and *Jamsek* was examined and it was determined, that where there is no comprehensive written contract between the parties, the multifactorial approach should then be used to 'ascertain the proper characterisation of the relationship.'[59] The Full Bench in the appeal, upheld the original analysis of the multifactorial test and determined that there was no error of law in this approach, or the finding that the Applicant was an employee.[60] However, in that matter, due to the agreed existence of a contract, the matter turned on the question of whether it was 'employment' or an 'independent contractor' relationship. *Ubuntu* can be distinguished from the present case, in that the question is whether there is a contract at all. In Reverend Fihaki's case, due to falling outside of the usual dichotomy, not all indicia were present (or 'given voice' to in the Letter of Call) or able to be assessed.

[70] The Federal Court case of *Secretary Attorney-General's Department v O'Dwyer*[61] ('*O'Dwyer*') concerned an appeal from the Administrative Appeals Tribunal as to whether the Applicant was an employee for the purposes of the Corporations Act and was therefore entitled to certain exclusions from bankruptcy proceedings. This case considered the lack of a written contract, and in determining if an oral contract existed, whether the alternate application of the multifactorial approach was correct. Goodman J considered both *Personnel Contracting* and *Jamsek* and found that the approach in those cases should also be applied to oral contracts, or partly written and partly oral contracts.[62] The decision noted that where the contract is wholly oral, it is possible that all the relevant terms will not be spelled out in full at the time the oral agreement is formed.

[71] In *O'Dwyer*, Goodman J stated that it must be considered "whether the rights and obligations created by [an] oral contract gave rise to an employment relationship."[63] For there to be legal rights and obligations for the court to enforce, there must be a determined employment contract. In the current case, Reverend Fihaki has not put forth compelling evidence to confirm a contract in oral, written or a combination format. However, the closest document he argued as a contract of employment was the Letter of Call. Similar documents to the Letter of Call have been considered, with reference to the ministerial case law, and were found not to be indicative of an employment contract.

[72] However, to discharge the full scope of the tests, it is relevant to assess the Letter of Call against the indicia. In the matter of *Muller v Timbecon Pty Ltd*[64] ('*Timbecon*'), on appeal the Full Bench addressed whether a photographer was an employee or an independent contractor. The approach in the first instance decision (whilst it examined the usual dichotomy), is useful to the current circumstances in assessing the terms of the Letter of Call and deciding whether the Applicant was an 'employee' or a separate category of 'Minister.' The case addressed the relevance of the wholly oral contract as the point of distinction from *Personnel Contracting*. It was noted that where a contract is not wholly in writing, it is necessary on commencement to identity the terms of the contract, the parties to it, when it was formed, and that some recourse may be had to external events.[65] Deputy President Bell in *Timbecon* at first instance stepped through the series of established indicia, including ownership of the business, the right to contract, use of labels and post contractual conduct, and emphasised the 'totality' of the relationship in terms of the characterisation of the rights and duties established between the parties.[66]

[73] In the current circumstances of Reverend Fihaki, the closest reference by the Applicant to an employment contract with the Church, is the application of those Church documents of his calling, specifically the Letter of Call. In the current matter, the Applicant in the final stages of the matter argued that a contract was formed when he was offered the Letter of Call. The Respondent argued that this Letter of Call to the Ministry did not represent an employment contract, and nor was there an oral contract.

[74] If the Letter of Call was considered to be a contract of employment, as per *Personnel Contracting* and *Jamsek*, the multifactorial approach is not applicable to determine the terms of the relationship except where the contract gives voice to them. It is noted however, that the Letter of Call specifically states at paragraph 13 "*this document represents the placement arrangement approved by the Presbytery and is not an employment relationship*." The task of contractual construction in accordance with *Personnel Contracting* and *Jamsek*, the intention

of the parties should only be derived from letter of Call ;the contents of a document, not how the relationship has played out in practice.[67] As such, there could not be a finding to support a contract, based on the actual terms of agreement between the parties, or based on the case authorities, as set out. The clear intention on the face of that document is that it is not an employment contract.

Post contractual conduct

[75] The Applicant argued, in terms of post contractual conduct, that the later payment of the JobKeeper benefit, which was not contemplated in the Letter of Call, was conduct which affirmed an employment relationship and formed part of the 'employment' relationship. The Applicant's argument was that if the Letter of Call and the indicia are examined including how the relationship had played out, that a conclusion that he was an employee is able to be formed. An examination of the indicia is set out below.

[76] The reasons of Gordon J in *Personnel Contracting* [68] speak of the potential "need for recourse to conduct" to identify "contractual terms that were agreed." There is therefore greater scope in the case of oral contracts for subsequent events to be considered as part of the process of identification of the terms. Expansion of terms from a written contract is what the High Court in *Personnel Contracting* and *Jamsek* were attempting to guard against.

[77] The Respondent's submissions emphasised the structure of the organisation, and that the Church (as opposed to the Property Trust) is represented by a range of unincorporated associations,[69] and therefore there could not be a contract, oral or otherwise, formed with these entities which can be taken into account.

Applicable principles – Employee, contractor or Minister

[78] The Full Bench of *Timbecon*[70] affirmed Deputy President Bell's approach of identifying the terms of the contract and applying the relevant indicia:

> ***"****[15] After setting out the background and factual findings, the Deputy President turned to consider the applicable legal principles to determine whether the Appellant was an employee or an independent contractor. The Deputy President began by pointing to the relevance of CFMMEU v Personnel Contracting Pty Ltd [2022] HCA 1 (Personnel Contracting) and ZG Operations Australia Pty Ltd v Jamsek [2022] HCA 2 (Jamsek), both of which were addressed by the parties in their submissions.*
>
> *[16] Given the contract between the Appellant and Respondent was wholly oral, and noting that this was a key point of distinction from Personnel Contracting, the Deputy President addressed additional matters concerning post-formation conduct and variation. To this end, the Deputy President observed that where a contract is not wholly in writing, it is necessary at the threshold level to identify the terms of the contract, the parties to it and when it was formed because, as the Deputy President noted, inevitably some of these aspects will be in dispute. The Deputy President then provided the relevant principles to identify express and implied terms in an oral agreement, and noted that like written contracts, recourse may be had to external events where appropriate.*

> *[17] The Deputy President subsequently considered the characterisation of traditional indicia, including the existence of a right to control and the "own business/employer's business" dichotomy. On this point, the Deputy President noted that Personnel Contracting confirmed that while the elements of control and the own/employer's business dichotomy are significant matters, it remained appropriate to consider the "totality" of the relationship between the parties albeit as framed by the rights and duties established by the parties' contract.*
>
> *[18] Next, he turned to the use of "labels" as the Respondent placed some importance on the fact that the parties had called the relationship a contracting relationship, whereas the Appellant submitted that "the High Court has held that the label ascribed by the parties to the engagement is of no consequence." The Deputy President did not accept that the High Court had made such a definitive statement, although he did accept that the parties' own descriptions cannot be determinative.*
>
> *[19] Finally, the Deputy President considered how conduct which occurs after the formation of the contract should be characterised. The Deputy President considered the judgments of Kiefel CJ, Keane and Edelman JJ at [45], and Gordon J (Steward J concurring) at [176], which clarified that such conduct cannot, as a general rule, be admitted for the purpose of construing the contract. He noted that while there are exceptions to this general rule, as discussed below, they are confined."*

(emphasis added)

Letter of Call - indicia

[79] The assessment in this case is a novel departure from the usual dichotomy in consideration of employment or an independent contracting relationship. In assessing whether there is an employment relationship, the indicia[71] are utilised.

[80] In this case, Reverend Fihaki put forth evidence on a confined set of indicia which he relied on to propose the existence of a contract of employment arising from the Letter of Call which are 'given voice' or the relationship in practice. Not all indicia are able to be assessed for want of evidence or submissions on a number, however those indicia that can be assessed are considered below.

[81] In summary, the Applicant accepted a call to service on 16 May 2013. This call to religious service was governed by the Letter to Call with some Terms and Conditions of the Call, and the relevant UCA Constitution and Regulations, as well as the Queensland Synod By-Laws.

[82] A reading of the UCA Constitution finds that it defined the term 'minister', outlines the authority of ministers, the Assembly, and the Synod, as well as governing Ordination, and the placement of ministers. Similarly, the UCA Regulations refer to the duties, recognition, termination, accountability, and the stipend paid to ministers. The Queensland Synod By-Laws cover inter-synod transfers of ministers, a minister's entitlement to leave, and the provision of a residence 'manse' for a minister. It is undisputed that this is the only documentation of any rights or entitlements in relation to Reverend Fihaki's role as a Minister. It is also set out that the congregation (not an employer) is responsible for the payment of a range of entitlements.

Indicia – labels use of 'employee' on payslip

[83] The Applicant placed significant reliance on the use of the word 'employee' on his payslips and that his 'employer' was identified as "T*he Uniting Church in Australia – Qld Synod ABN 25548385225*" which he argued was different to the Property Trust, which was called "*The Uniting Church in Australia Property Trust (Q.)*"[72] The Respondent in response, submitted that the term or label 'employee' was used not to denote the correct characterisation of a Minister as an employee, but was due to their use of a generic template payslip which relied on the regular terms and limited categories of the outsourced payroll system of the payroll provider.[73]

[84] As set out previously, the UCA outlined their two-arm structure, with the Property Trust as the commercial arm and the congregations being unincorporated associations, forming the other arm as the 'Church' and that neither could be the Applicant's employer. The Respondent emphasised that the Property Trust whilst administering some payments to ministers, does not employ any ministers. The Respondent further referred to the history and formation of the Church in support of this. In examining the position of ministers, reference was made to the foundational document of the Basis of Union to outline that the Church is a 'series of inter-related councils', including the Assembly, state and territory Synods, regional Presbyteries, and local Congregations.

[85] The Applicant contended that the ABN was not attached to the Property Trust, but to the Church due to how it appeared on his payslip,[74] however he provided no further evidence other than this to support his assertion on this point of how it indicated an employment relationship. The Respondent's submission that the use of the ABN and the Property Trust is demonstrated that it was to 'allow the church and its various unincorporated associations to conduct business in a secular world' and that the use of terms labels such as 'employee' and 'employer' on the generic payslip are not conclusive of such a relationship. I also accept the Respondent's submission that the Property Trust holds the ABN and operates as the commercial arm of the Church through which payment of the stipend etc is made. No employment relationship can be found between the Property Trust and the Applicant purely based on these payments or the labels on the payslips.

Indicia – payment of Jobkeeper – not conclusive of employee

[86] Further, I refer to the Applicant's assertion that the payment of JobKeeper payments was indicative of an employment relationship, as the Applicant argued the JobKeeper payment was only available to 'employees.'

[87] The Respondent submitted that although the JobKeeper program initially applied to employees only, the payments were only later provided to the Applicant. The payments were made following the Australian Government's passing of the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020*, this extended the payment to religious practitioners. The Respondent submitted a Media Release from then Treasurer, the Honourable Josh Frydenberg MP on 24 April 2020, which demonstrated this expansion to ministers, highlighting his statement that:

> "*Changes will allow JobKeeper Payments to be made to religious institutions in respect of religious practitioners (with the exception of those that are students only), recognising that many religious practitioners are not 'employees' of their religious institutions*".[75]

(Emphasis added)

[88] I reject the Applicant's assertion, noting the relevant Government Media Release. As a result of this expanded category, JobKeeper payments were then made by the Respondent to Ministers, but not on the basis of them being characterised as employees.

Indicia – labels and assumptions

[89] The Applicant referred to several cases provided to the parties and submitted that a label chosen by parties is not determinative of the relationship and should rarely be relied upon to correctly characterise such.[76] He went on to conclude however, 'if it looks like an employment contract and it smells like an employment contract, then it probably is an employment contract.'[77] His submission was that the Respondent's label of a 'spiritual' or 'covenantal' relationship was incorrect, and that the label of 'employee' was correct. The Applicant's submission on this point was confused, in that the labels that appeared on documents he referred to, were of 'employee' but his assertion of the case law suggested that this should not be relied on as indicative of the status of the relationship.

[90] In the Full Bench case of *Timbecon*,[78] ground 11 of the appeal, considered 'labels' in a relationship, and found that the first instance decision correctly applied caution in not ascribing weight to the mere use of the label 'contractor.'[79] This caution is relevant to Reverend Fihaki's circumstances whereby he argued that he was an 'employee' due to the receipt of the payslip, using the labels of 'employee' and 'employer' and that he received payment of the Job Keeper benefit. However, the use of these labels and payment of that benefit were persuasively dealt with by the Respondent (as set out above) to substantiate they were not indicative of an employment relationship. The entire factual matrix of the circumstances of the parties was determinative of a spiritual relationship and calling, not the creation of legal rights or obligations.

[91] *Timbecon* also examined the assumptions of the parties in relation to their relationship that the relationship was one of a contractual nature.[80] The current circumstances can be distinguished from that case, given that in the case of Reverend Fihaki, there is no finding that the Applicant was an employee, that there was no contract (oral or written) and that any of the regular labels associated with an 'employee' or 'independent contractor' did not align with the nature of this ministerial relationship. There is no evidence of the basic requirements of a contract of employment or service, and no rights and obligations are set out in evidence. All that the evidence gives rise to is that the Applicant accepted a calling in the capacity of a minister with some entitlements consistent with the provision for allowing the Minister to conduct the spiritual teachings, however there was no specific evidence that supported an employment relationship.

[92] The finding in *Knowles*, as referred to, was that in the case of ministers, the use of the word 'employment' is often used interchangeably with 'appointment' but is not conclusive that an employment relationship exists between the parties.[81] Therefore, in all the circumstances, I

accept the Respondent's submission as to the use of the label 'employee' over the Applicant's assertions and find that it is not conclusive of an employment relationship.

Indicia – payment of stipend vs wages

[93] The Applicant also relied on the payment of a 'stipend'. The Applicant submitted that he was paid with a 'payslip not a stipend slip.' He argued this was evidence that he was paid a wage, and in the alternative, that the stipend is only a single component of his overall salary package, with superannuation and allowances being, he also stated, evidence of the employment relationship between the parties.[82]

[94] The Respondent stated that the stipend is not a wage or a salary, but rather a living allowance paid to the Minister, so he is able to cover his needs while exercising his call to God and his ministry across the life of the community.[83] In making these payments, the church stated it has several legislative obligations, such as taxation and superannuation, compliance to which do not constitute an employment relationship.'[84] Further, the payments do not represent remuneration in the regular manner of an employment relationship.

[95] The Respondent submitted that the payment of a stipend is governed by Regulation 2.7.1 of the UCA Regulations:

> *"The stipend amount is reviewed annually and it's reviewed by another committee of the church called the remuneration and nomination committee. They consider what is the appropriate stipend for ministers and they make that decision annually. There is no negotiation, there is no review of contracts, there is no involvement of ministers other than any other ministers who might sit on that remuneration nomination committee. They make a determination using some external benchmarks, but they are free to make that decision."*[85]

[96] As outlined by the Respondent, the stipend is set by a Church Community. I accept the Respondent's submission that the stipend paid to Reverend Fihaki was a creation of the canon law and did not form a 'salary' or 'wages' paid to the Applicant. I accept that though the Applicant's payslip refers to an 'hourly rate' and a nominal indication of 'hours worked' in that month, I find that these are products of the payroll software and are not representative of how the stipend amount is actually reached or paid. It is also set out in the Letter of Call that the stipend amount is an annual amount which is paid monthly, not based on a number of hours worked.[86]

[97] Additionally, I agree with the reasoning in *Preston* that a stipend does not 'form consideration for its ministers, rather a method of providing material support for the Minister to serve God',[87] and that it is conditional upon the 'admission into full connexion and ordination'[88] of the Minister.

Indicia – superannuation and tax

[98] With regard to superannuation and income tax, the Respondent referred to their 'legislative obligations' that stem from the payment of a stipend and allowances to the

Applicant. This included their obligation under the *Income Tax Assessment Act 1997* (Cth) to withhold and remit tax, as well as their obligation to report payments via single touch payroll.

[99] With regard to tax being deducted, the Respondent submitted:

> *"The church is obligated under the Tax Assessment Act to withhold tax and remit tax to the ATO, as well as report payments to the ATO via single touch payroll. These obligations are fulfilled using a payroll software system. In making these payments, the church must identify the relevant ABN of the entity under which the payments are made. The ABN is identified on the payslip generated by the payroll software system and on the payment summary available from the ATO. In using a payroll application to process payments, the church must work within the configuration restrictions of the system, such as using a unit for payment (ie a nominal number of hours per month) and the production of a 'payslip' which is issued to the minister."*[89]

[100] Further, the Respondent set out the structure of the UCA, with the Church as one arm and the Property Trust as the other arm. The Respondent conceded that the Applicant was paid via the legal entity of 'The Uniting Church in Australia Property Trust (Q.)' which is a body corporate pursuant to section 12(a) of the *Uniting Church in Australia Act 1977 (Qld).*[90] They submitted that the Uniting Church in Australia is made up of several unincorporated entities , and therefore these expanded definitions in the *Superannuation Guarantee (Administration) Act 1992* (Cth) ('SGA'), meant that a body corporate (such as the Property Trust) was required to make superannuation contributions on behalf of ministers, as employees under that 'body corporate' definition.[91] Section 12 of the SGA sets out, for the purposes of the SGA:

> **12 Interpretation: employee, employer**
>
> (1) Subject to this section, in this Act, **employee** and **employer** have their ordinary meaning. However, for the purposes of this Act, subsections (2) to (11):
>
> (a) expand the meaning of those terms; and
>
> (b) make particular provision to avoid doubt as to the status of certain persons.
>
> (2) A person who is entitled to payment for the performance of duties as a member of the executive body (whether described as the board of directors or otherwise) of a body corporate is, in relation to those duties, an employee of the body corporate.
>
> …

(Emphasis added)

[101] I reject the Applicant's assertion that the payment of superannuation and taxation of the stipend are evidence of a negotiated 'salary package', and therefore indicative of an employment relationship.

[102] The Letter of Call refers to the 'Uniting Church Beneficiary Fund' as the current superannuation scheme in place for ministers of the Uniting Church and states that this fund is made up contributions from the 'congregation.'[92] Further, I note that the *Superannuation Guarantee Administration Act* provides an expanded definition of 'employee' to apply to 'members of an executive body' of a body corporate[93] which the UCA Property Trust is,[94] and which the Respondent states payment must be made under. No employment relationship is able

to be inferred in either case, firstly due to the payment being made by the unincorporated entity of the 'congregation' and secondly due to the expanded definition of 'employee.'

[103] I accept that tax is a legislative obligation on the Property Trust generated by the payments. I additionally adopt the reasoning in *Parfitt*, where Dillon L J stated that compulsory superannuation and income tax payments of stipends were "based on convenience and compromise and do not represent any binding decision in principle on the status of ministers."[95]

Indicia – control – direction of duties

[104] With regard to the level of control the Respondent had over the Applicant, it is noted that there was no position description, duties, regulated weekly hours or span of hours set out in the Letter of Call. Instead, the Applicant has a large degree of control over when and how he discharged his ministry and spiritual calling in line with Church teachings. The Respondent outlined that the Applicant, as part of the calling would 'be responsible to the Presbytery for the exercise of [his] ministry'[96] and that his placement was governed by the 'Code of Ethics and Ministry Practice for Ministers in the Uniting Church in Australia.' These matters are relevant to the issues over which the Applicant states he was dismissed.

[105] Relevantly, the further ministerial case, cited as VT87/3438[97] determined that the minister in question in that case was not an employee, referencing the lack of control as a factor in this determination:

> *"[the Church] asserted that the effect of the Constitution and Regulations of the Church was that a Minister settled in a Parish was not an employee of the Church, the Parish or any of the other bodies established by the Constitution for the government and administration of the Church's affairs. Although his stipend was provided by the parish in which he was settled, the Parish could not direct him as to the work which he was to perform or how he was to perform his work in the Parish. The Church as such did not pay him; nor did any other body established by the Constitution other than the Parish. His duties derived from the Regulations made by the Assembly under the authority of the Constitution. [the Appellant] did not present any argument that the taxpayer as a Minister settled in a Parish was in the employment of the Parish or of any other person or body. I find that he was not."*[98]

(Emphasis added)

[106] In the case of Reverend Fihaki, it is noted that the circumstances are analogous to the above case in that the Respondent submits that the Applicant must comply with the relevant regulations, but had limited control over how, when and where the Applicant performed those duties. The Applicant submitted that the Regulations were his 'job description' and that if he acted outside of 'simply carrying out prescribed responsibilities' then Ministers could do absolutely whatever they like based on what God had personally placed in their hearts.[99] I accept the Respondent's submission on this point that there was little control by the Church over the Applicant's day to day duties above and beyond those widely prescribed by the Regulations.

Indicia – control – requirement for blue card

[107] The Applicant also made reference to the requirement for him to hold a blue card for his Ministry as being indicative of a direction of the Respondent as his 'employer.'[100] The Respondent submitted that the Applicant was required to hold a blue card under the *Working with Children (Risk Management and Screening) Act* 2000 (Qld) (*the WwC Act*). The Respondent referred to section 9 of *WwC Act* which defined a 'religious representative' as a person:

> "(a) who is a member of—
> (i) an organised religion; or
> (ii) a religious group even if the group is not part of, or does not consider itself to be part of, an organized religion; and
> (b) who, because of the way the organised religion or religious group operates—
> (i) holds a position in the religion or group that is supported by the religion or group, including financial support, in a way that allows the person—
> (A) to devote himself or herself to promoting the religion's or group's objects or values; and
> (B) to hold himself or herself out as a representative of the religion or group; or
> (ii) is training to hold a position mentioned in subparagraph (i)"

[108] The Respondent submitted that the Queensland Government provides direction in relation to religious representatives, specifically:[101]

a. "You will need a blue card if you are a religious representative and your work includes providing services to children as a religious representative or conducting activities with children as a religious representative. For example, if you are a religious leader such as a priest, chaplain, minister or rabbi whose role includes (or may include) providing religious instruction to children or conducting activities as a religious representative"[102]
b. "A person who represents their church or other religious entity as a religious representative may apply for a blue card as a business operator instead of as an employee".[103]

[109] The Respondent submitted that[104] references in the WwC Act such as *"employment is regulated employment if … the employee is a religious representative"*[105] should not be taken as an indication of an employment relationship. Such references are used to establish a statutory framework for working with children. A broad definition of "employment" is taken by the Act to cover instances where a person has an agreement with another person to carry out work.[106]

[110] I accept the Respondent's submission that the direction given to the Applicant was not a direction of the Church, but in order to be in compliance with legislative requirements and as such is not indicative of 'control' over the Applicant. Further, I accept the reasoning outlined in VT87/3438 which held that where duties were prescribed by regulations and there was no direction over which work or how work was to be undertaken, this weighs against a finding that a Minister is an employee. As set out in the Letter of Call, the Applicant's duties were found in the relevant regulations, which also provided for his benefits. Further, though the Applicant was expected to be in compliance with the Code of Ethics, there was no conclusive evidence provided by the parties to suggest a degree control over the discharge of his spiritual calling, to

such an extent as to weigh in favour of an employment relationship, rather than the minister in his calling tending to his congregation with his teachings.

Indicia – payment of and entitlement to leave

[111] The Applicant was provided with several types of leave during his appointment. With regard to sick leave, the Applicant was able to access this, however the payment of such was funded by the congregation, paid to the Property Trust, to be distributed to the Applicant.[107] The Applicant was also entitled to annual leave.[108] Payment of such was not set out in the Letter of Call, however it was set out that the Applicant was entitled to 4 weeks, to be taken in consultation with the Church Council. With regard to long service leave, the Letter of Call set out that this was again funded by the congregation rather than the Respondent, though paid via the Property Trust.

[112] Specifically in relation to Long Service Leave, the Respondent, in their legal advice, referred to the definition of "employee" under the *Industrial Relations Act 1990* (Qld) (*IR Act*) (and the superseding Act) which provided for a 'person in any calling whether on wages or piecework rates.' They noted that the word "employ" was not defined in the *IR Act*.[109] The Respondent also made reference to the By Laws which provide for Long Service Leave for Ministers.[110] Though not expressly stated, the Respondent's contention appeared to be that in either case, the provision for and payment of Long Service Leave was not conclusive of an employment relationship as it was either a legislative obligation or a benefit (funded by the congregation) distributed by the Trust to Ministers, to enable them to discharge their ministry during their placements.

[113] As the Respondent has set out in their submissions, the Church is made up of many unincorporated associations, including individual congregations who are unable to contract with or make direct payment to the Applicant due to their legal status. As such the Property Trust makes those payments, when the funds are received, on their behalf. Further, I accept the Respondent's submission that the leave entitlements were a product of the Church Regulations and By Laws and/or the legislative obligations and were part of the material support provided by the congregation to the Minister to serve God,[111] and to exercise his ministry across the life of the community.[112]

[114] With regard to the other 'allowances' the Applicant referred to as part of his 'salary package,' including housing allowance, travel allowance and continuing education allowance. These were also provided to support the Applicant's exercise of his ministry were comparable to reimbursement for expenses than renumeration, and therefore not conclusive of an employment relationship.

[115] As set out above, the aggregate of the indicia when compared to the case law, do not support a finding that there is an employment relationship, nor that of an independent contractor.

Provisional assessment of merits – section 387(a)

[116] In consideration of the complexity of the matter before Deputy President Bell in *Timbecon*, he subsequently took the approach of providing a consideration of whether the

Applicant's unfair dismissal application would have been successful had he been deemed an employee:

> *"With some element of self-interest, I would briefly echo the observations of Logan J in Fair Work Ombudsman v Avert Logistics Pty Ltd [2022] FCA 84118, which were to the effect that the matter before me was a harder one than the matter in Jamsek (or Personnel Contracting) appeared to be. With that observation and having regard to the time and effort by the parties in litigating the matter to date, I would state my conclusions briefly in the event that I am wrong in relation to my primary conclusion above."*[113]

(emphasis added)

[117] Similarly, if I am incorrect about the categorisation of Reverend Fihaki as not being an employee but a minister, I take a similar approach and consider the reason for termination as per section 387(a) of the Act.

[118] Section 387 of the Act provides that, in considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, the Commission must take into account whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees).

[119] In terms of the parties' reference to the circumstances of the finalisation of the Applicant's ministry, there was debate between the parties about the congregational complaint over the Applicant's alleged departure (based on espousing his publicly articulated views) from the UCA's base and scripture. In summary form, the facts in agreement between the parties were: as recorded in the decision of the Synod:

- *This matter was placed before the SCD on the complaint of the General Secretary of the Queensland Synod of the Uniting Church in Australia Reverend [redacted]*
- *at the direction of the Synod Standing Committee (SSC). (The Respondent submits that the involvement of Reverend's [redacted] and [redacted] in that decision was improper.)*
- *The Respondent is a Minister within the Uniting Church in Australia and the Queensland Synod.*
- *The Respondent was inducted as Minister of the Word into the Mooloolaba Uniting Church Congregation on 1 July 2013.*
- *The Respondent holds the position of National Chair of an organisation that identifies as the Assembly of Confessing Congregations of the Uniting Church in Australia (ACC).*
- *The ACC is not a recognised council within the Regulations of the Uniting Church in Australia, and has not been otherwise adopted by any council of the Church.*
- *In his capacity as Chairman and Media Spokesperson for the ACC and personally, the Respondent made a number of statements to and on both mainstream and social media between 13 January 2019 and 15 August 2021.*
- *One of these media interviews occurred in Tonga.*

- *On 13 July 2018, at the 15th National Assembly of the UCA a resolution was passed to change the definition of marriage to two separate definitions. One of these definitions had the effect of making the marriage of same gender couples permissible within the UCA under certain circumstances (the Assembly Decision).*
- *That on the 11th of January 2021, a letter of complaint was sent to the General Secretary of the Queensland Synod by the Sunnybank Uniting Church Council complaining about the conduct of at a Sunnybank Uniting Church Council meeting on the 22nd of December 2020.*[114]

[120] In consideration of the evidence before the Commission, in the alternative, if it is that Reverend Fihaki is found to be an employee, then I find that there was a valid reason for the dismissal based on the repudiation of the employment relationship. This is as the Applicant, on the material, publicly departed from and significantly recanted the teachings of the UCA in his statements to the media. On this basis, multiple complaints were made by his congregation (his putative employer) to the UCA Synod Committees regarding this[115] and 23 breaches of the UCA Code of Ethics and Ministry Practice were made out.[116] The Applicant did not refute that he made those statements as part of the disciplinary investigation undertaken by the UCA.

CONCLUSION

[121] Taking into account, all of the facts and circumstances against the case authorities, the Applicant did not intend to be bound by the Letter of Call as an employee, but as a Minister of the Word in a spiritual and covenantal relationship with the congregation he served. The Respondent similarly had no intention for the Letter of Call to form an employment contract, as set out explicitly in paragraph 13 of the document. As such neither party formed the intention to create legal relations.

[122] The Letter of Call cannot be construed as an employment contract. Even if, in the alternative it was deemed to be a contract, which cannot be made out, on the current circumstances and a contractual construction approach is taken as in *Timbecon*, it leads to conclusion that the Letter of Call cannot be considered an employment contract, due to its explicit wording. As such, no contractual relationship is made out and the same conclusion is reached that the Applicant is not an employee of the Church, or of the Property Trust.

[123] The structure of the Church has been clearly set out, with the Property Trust undertaking all commercial and administrative activities, to support the functioning of the Church, being the unincorporated associations. The Letter of Call states the relationship is between Reverend Fihaki and the Congregation (an unincorporated association) he was appointed to but is signed by the Secretary of the 'Placement Committee,' rather than as a representative of the Property Trust. There is no evidence of a relationship between the Property Trust and the Applicant other than the administrative payments made.

[124] Whilst the Applicant pointed to certain elements of his position of minister, which he believed evidenced an employment relationship, as set out, none of the approaches to assessing such, including on the traditional indicia, were conclusive of such a relationship existing. In applying the default multifactorial approach, it is noted that several factors relevant to the indicia of the label of 'employee' were heavily relied on by the Applicant. However, this could

be disregarded as they were due to the expanded definition of 'employee' (superannuation and JobKeeper payments) in circumstances where the label of 'employee' was not conclusive of any actual employment relationship that existed.

[125] In all of the argued facts and circumstances of the Ministerial relationship, the totality of the relationship that existed between Reverend Fihaki and the Church, indicates that the relationship is characterised by the Letter of Call, which establishes the Applicant as a Minister of the Word. The Letter of Call sets out that the Church would pay the stipend to Reverend Fihaki, not as 'consideration' in a contractual sense or remuneration in relation to wages, but instead as a living allowance. The remainder of the entitlements to leave and allowances were all to be funded by the Congregation (an unincorporated association). These matters do not represent evidence of an intention to create legal relations. I find that Reverend Fihaki is not an employee or an independent contractor and is in a separate category of spiritual or covenantal relationship, in line with the ministerial cases and *Ermogenous.*[117] The cases of *O'Dwyer*[118] and *Timbecon*[119] as assessed, also inform this approach.

[126] Therefore, I find that Reverend Fihaki was not an employee for the purposes of section 382, and the Commission does not have jurisdiction to deal with his section 394 application as he is not protected from unfair dismissal. In the alternative, if the Applicant is determined to have been an employee, a valid reason pursuant to section 387(a) existed for the dismissal.

[127] Given that the application is jurisdictionally barred, pursuant to section 382(a), the application made pursuant to section 394 is dismissed.

[128] I Order accordingly.

COMMISSIONER

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[1] (2001) 209 CLR 95; [2002] HCA 8.

[2] [2002] SASC 384.

[3] Applicant Further Submissions at page 1.

[4] [2022] HCA 2.

[5] [2022] HCA 1.

[6] [2023] FWCFB 42.

[7] (2001) 209 CLR 95; [2002] HCA 8 at [31].

[8] PN101.

[9] Form F3 – Employer Response Question 2.2 at [3].

[10] Form F3 – Employer Response Question 2.2 at [5].

[11] Form F3 – Employer Response Question 2.2 at [6].

[12] Respondent's Outline of Submissions at [7].

[13] Respondent's Outline of Submissions, Attachment 2: 'Letter of Call'.

[14] Respondent's Outline of Submissions at [9].

[15] Respondent's Outline of Submissions at [10].

[16] Applicant's submissions, Attachment 7: Response to Respondent's Submissions dated 12 December 2022.

[17] (2001) 209 CLR 95; [2002] HCA 8.

[18] Applicant Further Submissions at page 1.

[19] [2013] UKSC 29.

[20] [2013] UKSC 29 at [20] and [23].

[21] [2013] UKSC 29 at [26].

[22] [2013] UKSC 29 at [16].

[23] [2013] UKSC 29 at [17].

[24] [2013] UKSC 29 at [17].

[25] [2013] UKSC 29 at [19].

[26] [2013] UKSC 29 at [20].

[27][2013] UKSC 29 at [26].

[28] [2012] EWCA Civ 938.

[29] [2012] EWCA Civ 938 at [29].

[30] [2012] EWCA Civ 938 at [30].

[31] [2012] EWCA Civ 938 at [30].

[32] [1999] NSW IR Comm 157.

[33] [1999] NSW IR Comm 157, page 71.

[34] [1999] NSW IR Comm 157, page 74.

[35] [1999] NSW IR Comm 157, page 75.

[36] [1983] 3 All ER 747.

[37] [1983] 3 All ER 747, 752.

[38] [1983] 3 All ER 747, 753.

[39] [1983] 3 All ER 747, 753.

[40] [1983] 3 All ER 747, 754.

[41] [1983] 3 All ER 747, 753.

[42] (2001) 209 CLR 95; [2002] HCA 8.

[43] [2002] HCA 8 at [25].

[44] [2002] HCA 8 at [25].

[45] [2002] HCA 8 at [38].

[46] [2002] HCA 8 at [31].

[47] [2002] HCA 8 at [33].

[48] [1998] ICR 140.

[49] PN372.

[50] PN158.

[51] [2022] HCA 2.

[52] [2022] HCA 1.

[53] [2022] FWC 540.

[54] Applicant Further Submissions at page 1

[55] [2022] FWC 616.

[56] (2001) 209 CLR 95; [2002] HCA 8.

[57] [2022] FWC 616 at [55].

[58] [2023] FWCFB 20.

[59] *Church of Ubuntu v Chait* [2022] FWC 2947 at [74]-[76].

[60] *Church of Ubuntu v Chait* [2023] FWCFB 20 at [39].

[61] [2022] FCA 1183.

[62] [2022] FCA 1183 at [29].

[63] [2022] FCA 1183 at [33]-[34].

[64] [2023] FWCFB 42.

[65] *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1at [175].

[66] *Muller v Timbecon Pty Ltd* [2022] FWC 1685 at [91].

[67] *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 at [61] (Kiefel CJ, Keane and Edelman JJ).

[68] *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 at [190].

[69] PN385.

[70] [2023] FWCFB 42 at [15]-[19].

[71] As set out in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

[72] Applicant's Outline of Submissions at [4]-[5].

[73] PN316, Respondent's Outline of Submissions at [12].

[74] Applicant's Outline of Submissions at [4]-[5].

[75] Media statement of the Hon Josh Frydenberg MP on 24 April 2020.

[76] Applicant Further Submissions at page 2 referring to *Personnel Contracting* at [63]-[66] *Secretary, Attorney-General's Department v O'Dwyer* [2022] FCA 1183 10 (Kiefel CJ, Keane and Edelman JJ); [127] (Gageler and Gleeson JJ); [184] (Gordon J).

[77] Applicant Further Submissions at page 2.

[78] [2023] FWCFB 42.

[79] [2023] FWCFB 42 at [55]-[57].

[80] [2023] FWCFB 42 at [58]-[59].

[81] [1999] NSW IR Comm 157, page 74.

[82] Applicant's Outline of Submissions at [6].

[83] Respondent's Outline of Submissions at [16].

[84] Respondent's Outline of Submissions at [16].

[85] PN290.

[86] Respondent's Outline of Submissions, Attachment 2: 'Letter of Call' at [4].

[87] [2013] UKSC 29 at [19].

[88] [2013] UKSC 29 at [20].

[89] Respondent's Outline of Submissions at [12].

[90] Respondent's Outline of Submissions at [13].

[91] Respondent's Outline of Submissions at [14].

[92] Respondent's Outline of Submissions, Attachment 2: 'Letter of Call' at [7].

[93] *Superannuation Guarantee Administration Act* section 12.

[94] Respondent's Outline of Submissions at [13].

[95] [1983] 3 All ER 747 at [377].

[96] Respondent's Outline of Submissions, Attachment 2: 'Letter of Call' cover letter.

[97] VT87/3439, Administrative Appeals Tribunal – Taxation Appeals Division, 14 April 1989.

[98] Ibid at [16].

[99] Applicant Submission dated 9 November 2022 titled 'Why Ministers are Employees' at [10]-[11].

[100] PN193.

[101] Respondent's Submissions dated 19 January 2023, at [21].

[102] Publicly available at: https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/regulated-industries-and-licensing/blue-card/required/individuals

[103] Publicly available at: https://www.qld.gov.au/law/laws-regulated-industries-and-accountability/queensland-laws-and-regulations/regulated-industries-and-licensing/blue-card/required/individuals

[104] Respondent's Submissions dated 19 January 2023, at [25].

[105] Section 10, Schedule 1 *Working with Children (Risk Management and Screening) Act 2000* (Qld).

[106] Section 10(1) *Working with Children (Risk Management and Screening) Act 2000* (Qld).

[107] Respondent's Outline of Submissions, Attachment 2: 'Letter of Call' at [8].

[108] Respondent's Outline of Submissions, Attachment 2: 'Letter of Call' at [10].

[109] Respondent's Legal Advice dated 1 June 2020, page 7.

[110] By-law Q5.3.

[111] *President of the Methodist Conference v Preston* [2013] UKSC 29 at [19].

[112] Respondent's Outline of Submissions at [16].

[113] [2022] FWC 1685 at [158].

[114] Respondent Outline of Submissions, Attachment 6: Decision Concerning complaint against Reverend Doctor Hedley Fihaki, dated 31 August 2022.

[115] Form F3 – Employer Response Question 3.1 at [2].

[116] Form F3 – Employer Response, Question 3.2 at [3].

[117] [2023] FWCFB 42.

[118] [2022] FCA 1183.

[119] (2001) 209 CLR 95; [2002] HCA 8.