



# DECISION

*Fair Work Act 2009*  
s.365—General protections

**Rev. Paul Anthony O’Donnell**

v

**The Trustees Of The Roman Catholic Church For The Diocese Of  
Wilcannia-Forbes**  
(C2023/6208)

DEPUTY PRESIDENT EASTON

SYDNEY, 9 MAY 2024

*Application to deal with contraventions involving dismissal – jurisdictional objection – is the applicant a person who has been dismissed – applicant is a retired priest receiving an ongoing stipend – no evidence of contractual relationship – application dismissed.*

## Overview

[1] Reverend Dr Paul Anthony O’Donnell is a retired catholic priest. Dr O’Donnell has received in his retirement a stipend from the Catholic Diocese of Wilcannia-Forbes. In 2023 his stipend was significantly reduced. On 10 October 2023 Dr O’Donnell made an application to the Fair Work Commission under s.365 of the *Fair Work Act 2009* (Cth), alleging that he had been dismissed from employment and that the dismissal contravened the general protection provisions of the Act.

[2] Dr O’Donnell was ordained as a priest of the Catholic Church on 3 December 1980 and held various positions within and outside of the Diocese of Wilcannia-Forbes (**the Diocese**) over a period of approximately 33 years. Dr O’Donnell retired in 2013 and specific arrangements were made by the then-Bishop regarding his sustenance in retirement. In 2014 Dr O’Donnell completed a Doctorate in Heritage Conservation and has published numerous articles on religious cultural heritage in national and international journals.

[3] Dr O’Donnell alleges that in 2023 in his retirement he was an employee of the Trustees of the Roman Catholic Church for the Diocese of Wilcannia-Forbes (**the Trustees**) and that in September 2023 he was unlawfully dismissed from his employment in contravention of the general protection provisions of the *Fair Work Act 2009* (**the Act**). Dr O’Donnell claims to have exercised a “workplace right” in 2023 when he filed a complaint regarding an alleged privacy breach. The dismissal was said to arise from the Trustees’ decision to significantly reduce the monthly retirement stipend paid to Dr O’Donnell once he was eligible for a Commonwealth aged care pension.

[4] The Trustees contended that Dr O’Donnell was not an employee in 2023 or at any earlier time, and that its relationship with Dr O’Donnell was “covenantal and spiritual [and] incapable of recognition as one of temporal ‘employment’.”

[5] Both parties were given permission to be represented by lawyers. Mr Phillips SC appeared for Dr O'Donnell and Mr Darams SC appeared for the Trustees instructed by Ms Nocka and Ms Leeds of Dentons.

### **The Commission's Jurisdiction**

[6] The Fair Work Commission can deal with applications under s.365 of the Act by way of conciliation or mediation under s.368. If the Commission is satisfied that all reasonable attempts to resolve the dispute have been or are likely to be unsuccessful it can issue a certificate under s.368(3). Section 370 imposes a substantial restriction upon applicants by preventing the making of general protections court applications unless the Commission has issued a certificate under s.368(3)(a).

[7] The Full Court in *Coles Supply Chain v Milford* [2020] FCAFC 152, (2020) 300 IR 146 (**Milford**) made the following relevant observations about the Commission's capacity to deal with applications under s.365 and antecedent disputes about dismissal:

- (a) The Commission's non-determinative powers to deal with a dispute under s.368 are only enlivened if an application is properly made under s.365. The proper making of an application under s.365 is an essential precondition to the Commission's authority to perform its functions under s.368 (at [51]);
- (b) a dispute about whether a person has been dismissed raises an antecedent issue going to the existence of the Commission's authority to compel an employer to participate in its conciliation processes (at [65]);
- (c) it is open for a respondent to assert that there has been no dismissal, which gives rise to a dispute on that question that falls to be determined under s.365 (at [67]);
- (d) that dispute must be resolved before the Commission's powers under s.368 can be exercised at all (at [67]);
- (e) the Commission is entitled to determine the limits of its authority to deal with a dispute under s.368, although it has no authority to conclusively determine those limits (at [43]);
- (f) in so determining the limits of its authority the Commission may determine matters of fact (at [71]);
- (g) the Federal Court or the Federal Circuit Court has the power to judicially determine whether a person is entitled to make an application to the Commission (at [74]). The Act establishes alternative pathways for an applicant and prospective litigant and a court might decline to recognise an "application" or resulting certificate is valid when determining an objection to competency of a legal proceeding under s.370 of the Act (at [75]); and
- (h) the determination by the Commission is not authoritative in the sense of being final. If the Commission errs in determining a question upon which its authority depends, it will commit jurisdictional error by wrongfully denying that it has the authority to "deal with the dispute" under s.368 of the Act (at [79]).

[8] Dr O'Donnell only has standing to make a claim if he is "a person who has been dismissed" (per s.365(a)). "Dismissed" is defined in s.12 of the Act by reference to s.386 and applies only to employees.

[9] The primary contest in these proceedings was whether Dr O'Donnell was an employee of the Trustees in September 2023. If he was not an employee at this time, then he was not dismissed as alleged, and his general protections claim must fail.

[10] Secondary contests in these proceedings included whether Dr O'Donnell was an employee of the Trustees from September 2013 onwards in his retirement, and whether Dr O'Donnell was an employee of the Trustees from 2011 until 2013 when he "worked" as a parish priest in the Diocese.

#### **The Evidence: Dr O'Donnell's history in the Diocese**

[11] Neither party particularly challenged the correctness of the evidence led by the other. That said, neither party particularly accepted the relevance or significance of the evidence led by the other.

[12] Dr O'Donnell was born in Parkes in 1953 and grew up in western New South Wales. In the early 1970s he accepted a scholarship from the Diocese of Wilcannia Forbes to train as a secondary school teacher. He said that the arrangement involved a "bonded future service" to the Diocese. When undergoing his training as a teacher he applied and was accepted to study for the priesthood, which he said negated the bond.

[13] Dr O'Donnell studied at a seminary in Adelaide and his studies were funded to some degree by the Diocese. Dr O'Donnell was ordained as a priest for the Diocese in 1980 at Parkes NSW. Dr O'Donnell was ordained as a secular/diocesan priest (that is, not in a religious order). From ordination he was an incardinated priest, which he said traditionally meant that he was attached to a diocesan church headed by the diocesan Bishop. This means, he said, that there were no vows taken as might be commonly understood.

[14] Dr O'Donnell commenced work as an assistant priest in Broken Hill and Cobar. Dr O'Donnell was at Broken Hill for three years (1981 to 1984) and was then moved to Forbes (1984 to 1987) where he continued to receive a stipend, but his income was supplemented by family and friends. From 1987 until 1990, Dr O'Donnell held the role of priest in the parish of Barham, a town on the Murray River, and then in Burke (1990 to 1995).

[15] For reasons that will become apparent, I do not need to determine whether Dr O'Donnell was an employee in the 1970s, 1980s or 1990s.

[16] In 1997 Dr O'Donnell was granted "leave" for further studies in the Sydney Diocese. In 1997 Dr O'Donnell was appointed to the position of Dean and Vice-Rector of St John's College within the University of Sydney. Dr O'Donnell received remuneration, full board and accommodation from the St John's College Council. Dr O'Donnell remained at St John's College until 2001.

[17] Dr O'Donnell did return to the Diocese during 2000 as an Acting Rector but resigned from this position towards the end of 2000. Dr O'Donnell said that he remained incardinated to the Bishop of the Diocese of Wilcannia-Forbes while working at St John's College and that he returned to the Diocese from time to time for meetings, retreats and other gatherings including masses, confessions and funerals. Dr O'Donnell was paid a small amount by the Trustees for doing so and was given accommodation and food.

[18] Between 2000 and 2011 Dr O'Donnell held various remunerated positions and roles in Sydney, including National Director of the Catholic Enquiry Centre and Priest in Charge of the Haymarket parish. Dr O'Donnell also undertook extensive study including a master's degree in Architectural Heritage Conservation, and then the Doctor of Philosophy program through the faculty of architecture at the University of Sydney.

[19] Dr O'Donnell also worked as a Senior Heritage Consultant and worked extensively in heritage conservation during the Building the Education Revolution program following the global financial crisis.

[20] After more than a decade of pursuing these other interests and avenues outside of the Diocese, Dr O'Donnell returned to the Diocese in 2011 to work as a parish administrator in Narromine. The term "Parish Administrator" does not reflect the nature of the role. Parish Administrators essentially perform the same role as parish priests but are appointed for shorter periods.

[21] Dr O'Donnell was brief in his evidence about how this appointment arose:

"The parish priest of Narromine retired in early 2011. At the time [the Diocese] was in a state of flux. Narromine was a parish serving a considerable area of [the Diocese]. Following discussion with the temporary administrator of [the Diocese] (Bishop Kevin Manning), Bishop Manning contacted me and ask me to accept the role of administrator for the parish of Narromine which role I accepted.

Discussions and correspondence ensued between Me and Bishop Manning. I attach two letters from me to Bishop Manning one dated 29th July 2011 and the other 17th September 2011 both of which confirmed the matters which we had discussed ...

I returned to [the Diocese] in late 2011 to take on the care of three of the parishes - Narromine, Peak Hill and Trangie - in an administrative capacity, while awaiting the outcome of the future of diocese (either its suppression, amalgamation with another diocese, or the appointment of a new bishop).

Once I arrived at Narromine parish the remuneration commenced immediately and was paid to me by [the Diocese]. The remuneration for that role was fixed at the then rate for a parish administrator - that is \$1,500 per calendar month, as well as \$2,000 per quarter as car and travel allowance, and fuel for [Diocesan] work."

[22] The letter of 29 July 2011 referred to above included the following:

"As discussed with you, I am hoping to complete my current academic round by end 2012, and as noted that may not combine easily with a larger parish operative.

In recent days however I have been thinking about the gap in coverage of the Narromine, Peak Hill Trangie area with the retirement of Father Peter Unwin.

I am wondering if it may be of some assistance to your planning if we were able to come to an arrangement that was able to fulfil at least the sacramental and basic pastoral operations of those communities into the immediately foreseeable future. And perhaps even to make some contribution to structures for their ongoing pastoral sustainability.

Given the relative proximity to Sydney it may also work out OK for the fulfilment of some ongoing commitments here at the University and at St John's College.”

[23] Dr O’Donnell provided no other evidence of any ‘pre-contractual’ dealings, representations or the like.

**The Evidence: September 2011 “Memorandum of Understanding”**

[24] The letter of 17 September 2011 included the following:

“MEMORANDUM OF UNDERSTANDING

Dear Bishop Manning,

Thank you for our conversation of 16 September at your office in Johnston Street, Forbes. It was a good opportunity to discuss the practical aspects of the ongoing care of the parish communities of Narromine, Peak Hill and Trangie. I am pleased to offer to fulfil that role as agreed.

As outlined to you, in making substantial changes, my chief concern in the current uncertainties of the Diocese is that I do not wish to be caught in canonical misunderstandings or disadvantage. As noted, I have exercised priestly ministry in the Archdiocese of Sydney for the past 14 years and have my principal domicile in Sydney. I understand that Canons 268 (automatic incardination) and 373 (erection of a new diocese) have a bearing on that situation. Thus my preference in our discussions was to offer this role as that of administrator for the agreed term. Therefore, presuming future good will, the following points have been agreed between us, and also in discussion with the Diocesan Financial Administrator, Mr Peter Hade:

1. The pastoral position at Narromine, Trangie and Peak Hill is to be that of Parish Administrator, for a period of two years.
2. The commencement date for that tenure is the first weekend of October 2011 ...
3. I will begin residence in the Narromine presbytery for the weekend of 5/6 November.
4. There will be some periodic visits to Sydney for my current round of studies, involvement with the University of Sydney and with St John's College (University of Sydney).
5. Removal expenses between Sydney and Narromine at the commencement and conclusion of this term are to be met by the Diocese within which Narromine is located.
6. At the discretion of the Apostolic Administrator, the income for the position of Parish Administrator will be the pastoral income for the parish.
7. The Diocesan Financial Administrator has suggested a superannuation arrangement would be in order. I will roll my current superannuation into the applicable diocesan industry scheme.

8. The Diocesan Financial Administrator has suggested that the various accounts of the three parish communities should be appraised for better consolidation under the Diocesan CDF
9. The provision of a car, or car expenses is subject to further discussion with the Diocesan Financial Administrator viz either:
  - Reimbursement of my current vehicle at the standard ATO rate (75c km) from the relevant parish church account/s or,
  - Reimbursement at an unbundled rate (less fuel) and with the provision of a fuel card, (which does not attract GST) or,
  - The provision of a vehicle from the Diocesan Pool on standard arrangements
10. The Narromine Parish Council or Finance Committee, or delegated person/s are to undertake an inventory of the presbytery. Perhaps this should extend also to the dwelling at Peak Hill in view of the personnel change there.
11. It is likely that some expenditure will be required at the Narromine presbytery  
...”

[25] In 2011 the Diocese was in significant difficulty. The Diocese did not have a Bishop and the authority and functions of the bishop vested in the Apostolic Administrator. Bishop Manning was the Apostolic Administrator and was also the bishop of the neighbouring diocese of Armidale. The convention within the Catholic Church is that an Apostolic Administrator does not make long-term arrangements, commitments or appointments on behalf of the Diocese.

[26] In 2011 Dr O’Donnell could have claimed a stipend from the Sydney Diocese under Canon (internal church) laws because he had domiciled in that different diocese for more than five years.

[27] Dr O’Donnell gave evidence of his concerns at the time that the Diocese might be subsumed into the Armidale diocese. As such Dr O’Donnell took at least two precautionary steps before agreeing to the appointment at Narromine: Dr O’Donnell made enquiries with the former parish priest to find out whether the parish was financially viable, and he also documented his discussions with the Apostolic Administrator by way of the second letter cited above, which he entitled “Memorandum of Understanding”.

[28] The Memorandum of Understanding looks very similar to a letter of appointment or a contract of employment insofar as it states the context in which the document was created and records certain matters that Dr O’Donnell thought were important to record in case circumstances changed.

[29] Dr O’Donnell’s intention is clear from the first two paragraphs – to avoid being “caught in canonical misunderstandings or disadvantage [to him].” In cross-examination Dr O’Donnell explained the significance of the matters referred to in his letter. The “canonical misunderstanding and disadvantage” from which he sought to protect himself concerned the possibility that if he accepted the two-year tenure at Narromine he might lose the option of automatic incardination to the Archbishop of Sydney and the Sydney Diocese that was available to him. He did not want to lose this opportunity because he had exercised priestly ministry in the Archdiocese of Sydney for the previous fourteen years and had his principal domicile in Sydney. The misunderstanding he feared was “canonical” in the sense that Dr O’Donnell did

not want to be disadvantaged in the application of canon law (vis a vis his entitlement to a stipend from the Sydney diocese) if he moved out of the Sydney diocese for two years to work in Narromine. The Sydney diocese was in better financial shape than the Forbes-Wilcannia diocese and the Armidale diocese. Dr O'Donnell also said in cross-examination that he did not want to risk becoming part of the Armidale diocese.

**The Evidence: 2013 Retirement**

[30] In March 2013 Dr O'Donnell met with Bishop Michael Kennedy, who was the new Apostolic Administrator of the Diocese. Several matters were discussed, including Dr O'Donnell's retirement. Dr O'Donnell's notes from the meeting include the following:

“In the first instance [Dr O'Donnell] wished to flag with the bishop a permission to retire upon his 60<sup>th</sup> birthday, later that year. However, as discussed in detail he needed to set in place a financial arrangement that reflected 40 years of association with the diocese. Bishop Kennedy advised that some of the bishops ... had begun to look at such considerations and were generous in assisting people if they wished to leave the public exercise of ministry.

...

Bishop Kennedy also pointed out that there were some clergy working in his own diocese engaged in specific and limited forms of ministry and I may wish to consider that option.”

[31] On 5 September 2013 Dr O'Donnell wrote to the parishes of Narromine, Peak Hill and Trangie announcing his decision to “effect [his] retirement” in the following terms:

“Dear Parishioners and Friends,

The uncertainty of the past months has been regrettable, during which time I have been attending to health, professional and academic issues. As you are aware, I had offered to pastorally care for your parish communities from September 2011, for a period of 18 months to two years, during a time of decision-making for the future of the Diocese. This was prior to my proposed retirement from public ministry in October 2013, at age 60. Having taken advice about the nature of continued work in the western areas, and following discussions with the Bishop, I have decided to effect my retirement. I thank you for your kindness over the past two years. I also thank Father Laurie Whiting for his care of the parish communities over these past months. I have indicated that I would appreciate celebrating the masses on the weekend of 21/22 September as an expression of thanks.”

[32] On 20 September 2013 Bishop Kennedy wrote to Dr O'Donnell in the following terms:

“Dear Father Paul

I am writing to confirm our discussion about the financial arrangements for your retirement from active ministry in the Diocese.

These arrangements, which commence with your retirement on 14 October 2013, are provisional and will continue until we are in a position to make more permanent arrangements.

- You will receive a stipend payment of \$1,500 per month.
- You will have use of a fuel card.
- The Diocese will reimburse your other motor vehicle expenses through a payment to you of \$2,000 each quarter

Should you require further assistance for matters over the next couple of months please let me know.”

#### **The Evidence: After retirement**

[33] Dr O'Donnell led evidence of various communications between himself and officers and members of the Diocese. As a retired priest Dr O'Donnell was on various mailing lists, and received communications about news in the Diocese, administration matters and ministry matters. Dr O'Donnell was listed in the Official Directory of the Catholic Church in Australia as a “retired clergy” in the Diocese.

[34] In 2016 Most Rev. Columba Macbeth-Green, Bishop of Wilcannia-Forbes, issued a decree under a church canon that removed all faculties (or authority) of Dr O'Donnell to undertake “any public celebration of sacraments or other ministry associated with the presbyterate”. Dr O'Donnell claims that he was not afforded any procedural fairness or natural justice in relation to the issuing of this decree. The decree was in the following terms:

“I, Columba Macbeth-Green, OSPPE, DD, Bishop of Wilcannia-Forbes, having undertaken, by delegate, Father Peter Frederick Schultz, of the Diocese of Toowoomba, the investigation in accord with canon 1717 CIC-1983, and heard the recommendations of the delegate hereby remove all faculties, whether *ipso iure*, habitual, or special from Father Paul Anthony O'Donnell of this Diocese.

Fr O'Donnell may celebrate mass in private and, in accord with the law, the sacraments of penance and anointing of the sick in danger of death but may not undertake any public celebration of sacraments or other ministry associated with the presbyterate.

My reasons for this action are:

1. Protection minors and vulnerable adults, which is a primary duty of all who minister in the Church.
2. For Fr O'Donnell's own well-being. These circumstances have placed a great strain on him and need to be resolved by proper canonical process.



3. That there is a risk of public scandal (canon 1395) if Fr O'Donnell continues to minister publically.

This decree takes effect immediately on it being communicated to Fr O'Donnell.”

[35] Relevantly, there is no evidence of Dr O'Donnell undertaking any ministry associated with the presbyterate (meaning any ministry work associated with the office of a priest) in the Diocese since at least 2016.

[36] In retirement Dr O'Donnell also received some communications from the Bishop, or the Bishop's representatives, about certain church matters, including matters involving the Professional Standards Unit of the Sydney diocese. There were references in emails to some kind of supervision plan and adherence to certain living conditions.

[37] Dr O'Donnell made submissions, without specificity, that he was subject to directions from the Bishop, but provided no evidence of any direction by a bishop related to work.

#### **The Evidence: Stipends**

[38] By operation of either internal church canons or by well-established custom, the Trustees provided certain benefits or remuneration or support to Dr O'Donnell and to other priests in the Diocese. In 2002 taxation laws changed and payments made to priests were treated as income for PAYG purposes.

[39] Prior to this time the arrangement or custom was that two collections would be taken during ordinary church services. Monies received in the first collection was for the priest and his staff, and then monies received in the second collection were for the benefit of the church. When the tax laws changed, the arrangement for payments to priests also changed. Since around 2002 priest have been paid from a central fund maintained by the Diocese, and paid a regular sum as opposed to being paid amounts that vary according to the first collection each week. Since 2002 or so stipends paid to priests have been recorded in Diocesan payroll systems and the records that are maintained and issued to priests have the appearance of ordinary payroll records for employees.

[40] Mr Michael Moore, a former senior administrator and manager of the financial affairs of the Catholic Church in New South Wales, gave evidence and said the following about these arrangements:

“Priests of the Church receive financial support to meet their material needs such as food, clothing etc while focusing on their spiritual duties and responsibilities.

The regular payments serving priests receive are known universally within the Church as a 'stipend'. Payments of the stipend are administered by the respective diocese, or Archdiocese as the case may be.

In most of the 28 Catholic geographical dioceses in Australia, including Wilcannia-Forbes, the diocese maintains a 'Priests' Remuneration Fund' out of which stipends are paid for priests participating in active ministry. These funds or entities are each administered by a committee of priests who determine the stipend amounts or, at a

minimum, recommend the stipend amounts to the diocesan Bishop for his approval. To do so, they take account principally of what the priests need for their living expenses (which can vary considerably between dioceses) and how much the fund can afford to pay out. As such, there are no national or state-based Church guidelines or rules about stipend amounts.”

[41] Mr Moore also gave evidence about the financial arrangements for retired priests:

“An established practice prevails in connection with the retirement of priests from service to their Diocese. At age 75, priests are to submit a resignation to their Bishop, who has discretion to accept or defer it if it is their wish that the priest continue to serve.

In my experience, and regardless of whether this process is followed strictly, the age of seventy-five is regarded as a standard and presumptive age at which a priest will cease regular spiritual duties.

Depending on the circumstances of the relevant Diocese, a retired priest may remain involved i.e. assume a supporting role to a priest newly appointed to their Parish.

The Bishop is obliged to provide 'support and housing' for a retired pastor (aka priest). That obligation is only recognised as formally applicable, however, where retirement has taken place upon the priest reaching 75 years of age.

Further, the obligation for a diocesan Bishop to provide accommodation to a retired priest is, typically, in Church-owned accommodation located within diocesan territorial boundaries or nearby locations.

The Diocese of Wilcannia-Forbes, for example, owns a number of units in the town of Forbes for the housing of retired priests.”

...

Many retired priests in Australian dioceses choose to live in their own properties. The Applicant was one such retired priest.

There are no universal or established rules or norms in relation to support for priests who have ‘retired’ before reaching 75 years of age.

Those situations tend to be considered on a 'case by case' basis, and will depend on the circumstances and the resources at the disposal of the relevant Diocese or that can otherwise be availed.

There is a clear, well-established expectation that priests access as much state support as is available to them to minimise the financial burden on Church assets.”

[42] Mr Moore’s evidence was very generalised about these arrangements; however Dr O’Donnell’s evidence did not contradict Mr Moore’s evidence.

### **The Evidence: Unilateral reduction in stipend benefits**

[43] In July 2023 the Diocese wrote to Dr O’Donnell to advise him that the monthly ongoing benefits paid by the Diocese would be significantly reduced. The letter of 19 July 2023 included the following:

“... I note that you have now reached an age where you are eligible for the Commonwealth Aged Care Pension. You will be aware that, in accordance with Diocesan custom and practice there is an expectation that retired Diocesan priests, will avail themselves of pensions and other eligible financial support from Governments and their own personal goods. The obligation of retired priests to avail themselves of pensions and other financial support from governments and their own personal goods is consistent with Canons 281 and 1274§1 and the 29 April 2000 Pontifical Decree on the Priests' Remuneration Fund.

I know that you are aware of the difficult financial circumstances of the Diocese.

In the light of the foregoing, please be informed Bishop Columba Macbeth-Green DD OSPPE has accepted advice for the Diocese to cease payment of your current stipend payment (\$1,500 per month), fuel card and quarterly reimbursement (\$2,000 contribution) effective from the end of the current quarter (30 September 2023).

As a retired member of the Diocesan clergy, effective from 1 October 2023, you are eligible to receive from the Diocesan Priests' Remuneration Fund a reimbursement contribution, currently up to a maximum of \$6,900 per annum, towards your living expenses, upon furnishing supporting documentation to the Chancery eg strata levy notices, rate notices, car registration etc. Your living expense reimbursement claims should be sent to the Diocesan Chancery.”

### **The Submissions: The Trustees**

[44] The Trustees’ submissions can be summarised as follows:

- (a) Dr O’Donnell was not an employee during the periods of active ministry;
- (b) in determining disputes about the legal status of individuals undertaking religious, spiritual and/or clerical functions the following foundational propositions apply:
  - 1) it is for the party alleging that a contract exists (be it one of employment or otherwise) to demonstrate that such was or is the case (*Ermogenous v Greek Orthodox Community* (2002) 209 CLR 95 at 106, [2002] HCA 8 at [26]);
  - 2) there is no presumption (or assumption) to be made that a minister of religion engaged regularly in the religious or pastoral affairs of a religious institution cannot or does not do so on an enforceable, contractual basis (*Ermogenous* at 106-7 [28] and 121 [74], and *Evans v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2012] FCAFC 81 at [12]-[13]);
  - 3) the key question of intention to create legal relations depends always on the circumstances of the matter under consideration; and
  - 4) notwithstanding the move away from ‘presumptions,’ the nature of the parties’ relationship and the circumstances in which the arrangements in question were made or emerged remain relevant to the objective question of whether a contract exists (*Ashton v Pratt* (2015) 88 NSWLR 281 at [73]);

- (c) other decisions in the Fair Work Commission have recognised the covenantal and spiritual position of some ministers of religion and rejected claims of employment (see *Fihaki v Uniting Church in Australia, Qld Synod* [2023] FWC 1650, *Woldeyohannes v Zion Church* [2020] FWC 4194 and *Threadgill v Corporation of the Synod of the Diocese of Brisbane* [2014] FWC 6277);
- (d) in other circumstances ministers primarily engaged to perform services of a non-religious nature have been found to be employees (see *Bellia v Assisi Centre Inc* [2010] FWA 2904, *Eisenmenger v Lutheran Church of Australia, Queensland District* [2005] QIRComm 32 and *Knowles v Anglican Church Property Trust, Diocese of Bathurst* (1999) 89 IR 47);
- (e) Dr O'Donnell's period of ministry had an endpoint that was definite, clear and unambiguous, as evidenced by Dr O'Donnell's letter to the parishes and the Bishop's letter confirming the retirement arrangements;
- (f) Dr O'Donnell retired from ministry in 2013;
- (g) Dr O'Donnell was not an employee during his period of ministry or at any time;
- (h) whatever the correct legal characterisation of the relationship during his active ministry, that relationship ceased upon the retirement;
- (i) after his retirement, the nature of Dr O'Donnell's association with the Diocese subsisted entirely and only due to the residual pastoral relationship between ordained retired priests of the Diocese and the Diocese itself, and specific arrangements personal to Dr O'Donnell that the then-Bishop put in place in 2013 towards Dr O'Donnell's sustenance in retirement;
- (j) Dr O'Donnell had no role whatsoever in the life of the Diocese after the retirement, neither residing within its geographical bounds nor playing any part in its affairs;
- (k) Dr O'Donnell was neither expected nor required to provide spiritual or temporal services thereafter and did not do so. After 2016, Dr O'Donnell was not authorised or otherwise entitled to do so because of the decree issued by Bishop Macbeth-Green;
- (l) in this period Dr O'Donnell was not an employee, independent contractor, volunteer, or anything else;
- (m) ultimately it is for Dr O'Donnell to establish that he was an employee of the Trustees in September 2023;
- (n) the association between the parties in retirement and as of 30 September 2023, was a residual and limited one, being principally pastoral in nature;
- (o) the Trustees' decision to cease paying the stipend from 30 September 2023 could not give effect to a dismissal enabling an application under s.365;
- (p) Dr O'Donnell received regular stipend payments for the duration of his active ministry, regardless of the activities he was undertaking and the location in which he was undertaking them;
- (q) the stipend was received together with accommodation, mobile phone expenses, motor vehicle expenses and other benefits;
- (r) Dr O'Donnell was under no duty to perform any tasks or provide any services (be they spiritual or temporal) after he retired in 2013 and he did not do so;
- (s) Dr O'Donnell was neither obliged nor expected to maintain readiness or willingness to perform any services and it was not a condition of ongoing provision of the retirement benefits that he did so;
- (t) at no time after the retirement did the parties discuss and/or reach agreement as to any new or ongoing arrangement by which Dr O'Donnell could perform, or maintain readiness to perform, any spiritual or temporal services;

- (u) the relevant indicators of an employment relationship were absent, in particular the ‘work-wages bargain’ (per *Kaseris v Rasier Pacific V.O.F* [\[2017\] FWC 6610](#) at [48]); and
- (v) the Application is misconceived and should be dismissed on jurisdictional grounds.

### **Submissions: Dr O’Donnell**

[45] Dr O’Donnell’s submissions can be summarised as follows:

- (a) Dr O’Donnell’s letter to the Apostolic Administrator dated 17 September 2011 recorded the terms of Dr O’Donnell’s employment (see paragraph [24] above);
- (b) upon his retirement the terms of Dr O’Donnell’s employment were varied by the letter from the Apostolic Administrator dated 20 September 2013 (see paragraph [32] above);
- (c) as an incardinated priest Dr O’Donnell was and still remains under the control and direction of the Bishop and he is still obliged to obey all lawful orders of the Bishop;
- (d) the letters referred to above have the look and feel of a contract of employment, with the obligations and rights, important terms expressed in writing, and that the two letters record “a settled arrangement based upon offer and acceptance with consideration”;
- (e) the fact that Dr O’Donnell is a priest does not preclude him from entering into a contract with the Trustees or indeed a contract of employment;
- (f) the search for an “intention to create legal relations” requires an objective assessment of the state of affairs between the parties (per *Ermogenous* at 105 [24]);
- (g) Courts will be hesitant to enforce purely spiritual or theological rules but will not hesitate to enforce arrangements intended to have contractual or binding force such as arrangements for the necessities of life for a priest or minister of religion (per *Ermogenous* at 119 [66]);
- (h) once it is accepted that contractual relations existed between Dr O’Donnell and the Trustees at least since 2011, then the nature of the contract must be that of employment;
- (i) it could not be said that Dr O’Donnell was conducting his own independent business as an independent contractor. Therefore Dr O’Donnell must have been an employee;
- (j) applying the orthodox tests to distinguish between a contract of service and a contract for services, the only available conclusion is that Dr O’Donnell was an employee;
- (k) since 2013 Dr O’Donnell has been “nominally available to continue or otherwise undertake spiritual activities within the diocese”;
- (l) the decree issued in 2016 was done without a charge or particulars of an alleged offence and was issued contrary to Canon Law and the rules of natural justice. The Trustees cannot rely upon its own flawed decision to suggest that Dr O’Donnell was forbidden to perform certain duties and therefore could not be employed;
- (m) Dr O’Donnell is still receiving correspondence, communiqués and directions from the Trustees and after September 2013 continued to provide heritage conservation advice to parishes within the Diocese;
- (n) Dr O’Donnell is still a priest and he exercises his priestly functions as permitted. “In the words of Sir Owen Dixon in *Automatic Fire Sprinklers v Watson* (1946) 72 CLR 435 at 466: They also serve who stand and wait”; and
- (o) the removal of the monthly stipend was a repudiation of the contract of employment and therefore a dismissal.

### **Consideration**

[46] There are only two matters that require determination: (1) whether Dr O'Donnell was an employee of the Trustees in September 2023 as alleged, and if so (2) whether he was dismissed from his employment in September 2023 when his stipend was unilaterally and significantly reduced.

[47] There is no presumption or assumption to be made that as a priest Dr O'Donnell was or was not an employee. Dr O'Donnell alleges that his relationship with the Diocese in 2023 was contractual and he carries the burden of providing a proper evidentiary basis for his claim (per *Ermogenous* at 106 [26]). Dr O'Donnell has failed to do so.

[48] Dr O'Donnell argued that he was an employee from at least 2011 when he took a parish priest position in the Diocese after more than 10 years of living and working in Sydney. Dr O'Donnell argued that when he retired and move away again two years later his employment continued and the terms of his contract of employment were varied. None of these arguments are strong and strictly speaking I do not need to make findings about them. However Dr O'Donnell's case was presented in such a way that each proposition was superficially interdependent, or at least interconnected, with the other – which has made it difficult to resolve the primary question without resolving the ancillary questions.

[49] Ultimately I do not accept any of the propositions advanced by Dr O'Donnell. In my view:

- (a) the parties did not have any intention to create legal relations in 2011 when Dr O'Donnell returned to work in a parish in the Diocese;
- (b) Dr O'Donnell was therefore not an employee of the Trustees when he was a parish priest between 2011 and 2013;
- (c) when Dr O'Donnell retired in 2013 and stopped working in and for the Diocese, any possible employment relationship between the parties was terminated;
- (d) when Dr O'Donnell sought and was granted permission to retire 15 years earlier than convention required, no legal contract was made or varied at this time, let alone an employment contract;
- (e) after he retired Dr O'Donnell was not contractually obliged to stand and wait for directions to perform work, nor was the Trustees obliged to provide work for Dr O'Donnell to perform or pay him; and
- (f) when the Trustees and/or the Diocese unilaterally reduced Dr O'Donnell's retirement stipend in 2023 it did not repudiate any contract it had with Dr O'Donnell or otherwise dismiss Dr O'Donnell from employment.

#### *Dr O'Donnell was not employed by the Trustees in 2011*

[50] There is no doubt on the authorities that it is possible for a parish priest and a Bishop/diocese to make a binding contract. As the plurality said in *Ermogenous* at [25]:

“... Because the search for the "intention to create contractual relations" requires an objective assessment of the state of affairs between the parties (as distinct from the identification of any uncommunicated subjective reservation or intention that either may harbour) the circumstances which might properly be taken into account in deciding whether there was the relevant intention are so varied as to preclude the formation of

any prescriptive rules. Although the word "intention" is used in this context, it is used in the same sense as it is used in other contractual contexts. It describes what it is that would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened. It is not a search for the uncommunicated subjective motives or intentions of the parties".

[Footnotes omitted]

**[51]** In 2011 Dr O'Donnell was living and working in Sydney. He was incardinated as a priest in the Forbes-Wilcannia diocese but had, in his words, "exercised priestly ministry in the Archdiocese of Sydney for the past 14 years." In 2011 the Forbes Wilcannia diocese was under significant financial strain and there was a distinct possibility that the Diocese would be subsumed into a neighbouring diocese. Through the operation of an internal church Canon there was a possibility that Dr O'Donnell could have asked to be incardinated to the Archdiocese of Sydney, which did not have the same financial strains.

**[52]** Dr O'Donnell was approached to fill the vacant office of parish priest upon the retirement of the previous incumbent. Dr O'Donnell made an agreement with the Apostolic Administrator for the Diocese that certain steps would be taken if he agreed to take on the parish. The Diocese did not have a Bishop at this time and the authority and functions of the Bishop vested in the Apostolic Administrator. Bishop Manning was the Apostolic Administrator and was also the Bishop of the neighbouring diocese of Armidale. In this context Dr O'Donnell's letter to Bishop Manning was a prudent step for Dr O'Donnell in order to avoid problems if the agreement with the Bishop was not adhered to. Although the letter contains terms that are similar to terms found in employment contracts, such as provision of a vehicle or payment of a car allowance, the commencement date and duration of the appointment to the parish and so on, in my view these terms are merely administrative arrangements to facilitate the appointment of Dr O'Donnell as a priest/administrator to the particular parish.

**[53]** Even though an agreement was reached, an objective assessment of the state of affairs between the parties compels a finding that the agreement reached was not a legal contract, let alone an employment contract, because the parties did not have an intention to create contractual relations.

**[54]** Nothing in the Memorandum of Understanding reveals an intention that the agreed terms would be binding on the parties as a legal contract. In fact the contrary intention is readily apparent. Dr O'Donnell prepared his Memorandum of Understanding to avoid any "canonical misunderstanding", which is indicative of the parties agreeing to operate within the Canon laws and conventions of the church rather than a voluntary assumption of a legally enforceable duty. Dr O'Donnell did not want to be disadvantaged in the application of canon law (vis a vis his entitlement to a stipend from the Sydney Diocese) if he moved out of the Sydney Diocese for two years to work in Narromine. The terms of the Memorandum do not reveal any intention to replace, displace or vary any canons or conventions that might otherwise apply to Dr O'Donnell's appointment as a parish priest. Rather, Dr O'Donnell decided to make a written record of the agreement reached so that applicable canons could not be applied to his disadvantage.

[55] The work performed was simply that of parish priest. Dr O'Donnell was not primarily engaged to perform services of a non-religious nature (cf *Bellia v Assisi Centre Inc* [2010] FWA 2904, *Eisenmenger v Lutheran Church of Australia, Queensland District* [2005] QIRComm 32 and *Knowles v Anglican Church Property Trust, Diocese of Bathurst* (1999) 89 IR 47). To the contrary the relationship was prima facie covenantal and spiritual (see *Fihaki v Uniting Church in Australia, Qld Synod* [2023] FWC 1650, *Woldeyohannes v Zion Church* [2020] FWC 4194 and *Threadgill v Corporation of the Synod of the Diocese of Brisbane* [2014] FWC 6277).

*Dr O'Donnell's retirement concluded any possible contract of employment*

[56] As submitted by the Trustees, the arrangements made at the time of Dr O'Donnell's retirement marked the end of the period in which Dr O'Donnell worked in the Diocese and lived in the Diocese.

[57] As the term suggested, Dr O'Donnell "retired" from working in the Diocese in 2013. When he retired he stopped making himself available to work. I reject the rather silly notion that Dr O'Donnell was ready, willing and able to work at any after he retired. Dr O'Donnell has not established by way of any evidence at all that a term of this contract, either being a new contract made in 2013 or a variation to the contract made in 2011, included any requirement for Dr O'Donnell to perform work any requirement for Dr O'Donnell to be available to perform work. There was evidence of retired priests performing incidental functions on an ad hoc basis for additional payment. However, the submission that retired priests who remain open to occasional ad hoc work are standing and waiting (and therefore serving) in the way considered by the High Court in *Automatic Fire Sprinklers v Watson* is categorically rejected.

[58] There is no basis in fact or in law to find that the alleged employment relationship continued under a varied contract of employment when Dr O'Donnell retired from active ministry in 2013, left his parish, left his role as parish priest and resumed his residency in Sydney on a permanent basis.

[59] Dr O'Donnell maintained a connection to the Diocese but this connection was not related to work that Dr O'Donnell performed, or even that he could have been called upon to perform. Quite obviously the ongoing connection to the Diocese during Dr O'Donnell's retirement was the product of Dr O'Donnell's history in the Diocese and Dr O'Donnell's shared faith with others in the Diocese. He received emails from time to time as part of being on various mailing lists, none of which required him to do any work that could be objectively understood to be paid work in employment.

[60] If there was an employment contract between Dr O'Donnell and the Trustees in the terms of the 2011 Memorandum of Understanding, that contract finished in 2013 according to its express terms. Dr O'Donnell submitted that the terms of the 2011 contract could be varied by agreement between the parties. Dr O'Donnell's evidence was that in March 2013 he met with the Bishop and asked for permission to retire. As the Trustees submitted, this very request is inconsistent with the notion of employment because no employee needs permission from their employer to end their employment at the conclusion of a fixed term contract. In other words, if the 2011 letter was in fact a contract, Dr O'Donnell did not need the permission of the Bishop to finish work at the end of the fixed term of the contract. The fact that Dr O'Donnell sought permission to retire does not prove, and is not consistent with, a variation of the contract because the un-varied contract finished according to its own terms.



[61] For reasons not explored in any length at the hearing, Dr O'Donnell was 60 years old when he sought permission to retire. The usual retirement age for catholic priests is 75. On one view, the agreement made in September 2013 (that the Diocese would pay a retirement stipend) was an agreement that Dr O'Donnell does not perform any more work for the Diocese. Depending on one's perspective, it was an agreement by the Diocese to release Dr O'Donnell from any expectation or obligation that he be available to work in the Diocese, and/or it was an agreement by Dr O'Donnell that he does not insist that the Diocese provide him with work (to the extent that he might otherwise have insisted). These agreed terms are antithetical to the making or varying of an employment contract.

*The agreement reached upon Dr O'Donnell's retirement in 2013 did not make or vary a contract/stipend not contractual*

[62] The letter dated 20 September 2013 from Bishop Kennedy to Dr O'Donnell (see [32] above) did not make or vary any contract between Dr O'Donnell and the Trustees.

[63] The letter confirmed certain financial arrangements agreed between the Bishop and Dr O'Donnell that were said to "commence with [Dr O'Donnell's] retirement on 14 October 2013."

[64] For the same reasons as above, the fact that the arrangements commenced upon the cessation of Dr O'Donnell's work means that those arrangements cannot be understood to be an agreement for ongoing employment (even if Dr O'Donnell had been employed under a contract immediately prior to his retirement).

[65] The Trustees have paid Dr O'Donnell a stipend for more than 10 years since his retirement, but that stipend was not part of any ongoing employment contract or any ongoing wages – work bargain between Dr O'Donnell and the Trustees. In this regard the letter dated 20 September 2013 did not create or make a new contract of employment.

[66] There is no evidence of any intention to create (or maintain) legal relations in 2013. The provision of a stipend and other benefits to Dr O'Donnell as a retired priest were consistent with church convention and canons under which the church provides support and housing for retired priests.

[67] There was no suggestion in the evidence that individual priests have capacity to negotiate different stipend arrangements, let alone any individual retired priests. There was certainly no evidence that Dr O'Donnell had made arrangements that differed from the arrangements applicable to priests generally in the Diocese.

[68] In any event, if a contract had been made in 2013 by this letter, the terms of the letter allowed the Trustees to unilaterally determine the amount of the stipend. The quantum was not itself a contractual term and the amount stated in the 2013 was expressed to be subject to review.

*Dr O'Donnell did no relevant work for the Trustees after 2013*

[69] Dr O'Donnell relied on a practice adopted by some dioceses of calling upon retired priests to fill temporary gaps from time to time. Dr O'Donnell said that he remained ready willing and able to perform such work, which fulfilled the "work" part of the work-wages

bargain. In reliance on *Watson v Automatic Fire Sprinklers* (1946) 72 CLR 435 at 466, Dr O'Donnell said that "they also serve who stand and wait".

[70] The difficulty with this argument is that there is no evidence that is consistent with the notion that Dr O'Donnell was available to work as directed, if directed, after he retired. It is an easy assertion for Dr O'Donnell to make however there is no evidence of Dr O'Donnell declaring himself available to work at any time after he retired.

[71] The 2013 letter outlines the retirement benefits the Trustees said it would confer upon Dr O'Donnell. If those "retirement" benefits were conditional upon Dr O'Donnell remaining available to perform work when called, then one would expect there to be evidence of the Trustees expressing or imposing such a requirement. Dr O'Donnell did not identify any representation, statement, Canon or other indication from the Trustees consistent with this supposed requirement that he stand ready.

[72] Dr O'Donnell also received communications from the Bishop, or the Bishop's representatives, about certain church matters, including matters involving the Professional Standards Unit of the Sydney diocese. There were references in emails to some kind of supervision plan and adherence to certain living conditions. Dr O'Donnell made submissions, without specifics, that he was subject to directions from the Bishop but provided no evidence of any direction by a bishop related to work.

[73] In fact the evidence was directly contrary to the case advanced by Dr O'Donnell. In 2016 the Bishop of the Diocese issued a decree prohibiting Dr O'Donnell from undertaking any public celebration of sacraments or other ministry associated with the Presbyterate, save for minor and private exceptions. That is, from 2016 onwards Dr O'Donnell was prohibited from performing most priestly duties. Dr O'Donnell said that the decree was issued without procedural fairness and natural justice and is therefore unlawful and void ab initio. I do not need to decide the lawfulness of the decree. The evidence before the Commission was that Dr O'Donnell was not called upon by the Diocese to perform work as a priest from at least 2016 onwards.

[74] I am very satisfied that Dr O'Donnell had a good working knowledge of church laws and conventions – most obviously evidenced by the Memorandum of Association letter he sent to avoid canonical misunderstandings that might disadvantage him. Dr O'Donnell undoubtedly knew the effect of the decree issued in 2016 and knew that he would not be asked again to perform priestly duties in the Diocese. The notion that in 2023 he was counting flowers on the wall and standing ready to work is nonsense.

*Not an employee for life*

[75] Dr O'Donnell argued that because he was incardinated as a priest to the Bishop of the Diocese he was a priest for life unless he resigned from the priesthood or he was defrocked. This may be correct under Canon law but does not evidence an ongoing contractual relationship nor an ongoing status as an employee. This argument relies on Dr O'Donnell's status as an incardinated priest rather than any work he performed or said he stood ready to perform.

[76] There is no evidence consistent with the suggestion that an employment contract was made when Dr O'Donnell was ordained as a priest in 1980. There is certainly no evidence to suggest that when Dr O'Donnell was incardinated as a priest for life that he was engaged as an employee for life.

There was no contract between the parties in 2023

[77] In contract terms there is no evidence of any “irreducible minimum of mutual obligation necessary to create a contract of service” in 2023 (per *Forstaff v Chief Commissioner of State Revenue* [2004] NSWSC 573 at [79]-[91], (2004) 144 IR 1 at 18-21 and the cases cited therein). That is, in 2023 there was no contract that required Dr O'Donnell to perform work, or to stand ready to perform work, nor was there any contract that required the Trustees to provide work or pay.

[78] In retirement Dr O'Donnell maintained a relationship with the Diocese. That relationship was personal and spiritual but was not contractual. The Trustees were not required under contract to pay a retirement stipend to Dr O'Donnell. The payments to Dr O'Donnell were made pursuant to internal church laws and conventions. Those laws and conventions allow the Trustees to set and amend stipends amounts from time to time.

[79] The conduct that was said to constitute a dismissal was the significant reduction of an ongoing stipend that the Trustees had paid to Dr O'Donnell for the previous 10 years. Senior Counsel for Dr O'Donnell did not make any submission as to whether the alleged employment relationship ended at this time, no doubt because of the fact that the Trustees continues to pay Dr O'Donnell a car allowance.

[80] For these reasons, I am not satisfied that there was a contract of employment in 2023 and I am not satisfied that Dr O'Donnell was an employee who was dismissed in September 2023 as claimed.

[81] I have separately made an order dismissing Dr O'Donnell's application ([PR774708](#)).



DEPUTY PRESIDENT

[2024] FWC 1223

*Appearances:*

*J Phillips* SC for the Applicant

*J Darams* SC instructed by *J Leeds* and *R Nocka* of Dentons for the Respondent

*Hearing details:*

2024.

Sydney

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