



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: Employment Judge Freer (sitting alone)

BETWEEN: Dr Robert Sholl Claimant

AND

The Parochial Church Council
of the Parish Church of St Michael and All Angels
with St James, Croydon
First Respondent

The Vicar of the Parish Church of
St Michael and all Angels
with St James, Croydon
(Father Donald Minchew)
Second Respondent

ON: 18 January 2011

Appearances:
For the Claimant: Ms Claire Bowsher-Murray, Counsel
For the Respondent : Mr David McIlroy, Counsel

RESERVED JUDGMENT ON A PRE-HEARING REVIEW

UPON the Claimant confirming that his claim is one of unfair dismissal only,

IT IS THE JUDGMENT of the Tribunal that the Claimant was at the material times an employee of the Respondents pursuant to section 230(1) of the Employment Rights Act 1996.

REASONS

1. By claim form presented to the Tribunal on 5 July 2010, the Claimant claimed unfair dismissal, breach of contract and accrued annual leave pay.
2. At this hearing the Claimant confirmed that his claim was of unfair dismissal

only.

3. This is a pre-hearing review to determine whether the Claimant was an employee of either of the Respondents within the meaning of section 230(1) of the Employment Rights Act 1996.
4. The Claimant contends that both Respondents are his employer. The Respondents argue that the "the church" only is the employer.
5. The Claimant gave evidence on his own behalf.
6. The First Respondent gave evidence through Mr Michael James Delmage Thomson, Churchwarden and Vice-Chairman of the Parochial Church Council. The Reverend Donald Patrick Minchew gave evidence on his own behalf. The Tribunal received witness statements from Reverend Colin Dickson, the Assistant Priest at St Michael's Church at the material times and Mr Lewis Anthony Paul Brito-Babapulle, current Organist at the church of St Michael. These witnesses did not appear at the Tribunal Hearing to give evidence and the Tribunal placed weight upon those statements as appropriate.
7. The Tribunal was presented with an agreed bundle of documents comprising 140 pages.

The law

8. An employee is an individual who has entered into or works under (or, where employment has ceased, worked under) a contract of employment. A 'contract of employment' means a contract of service, whether express or implied, and (if it is express) whether oral or in writing (section 230(1)&(2) Employment Rights Act 1996).
9. The well-established case of **Ready-Mixed Concrete (South East) Ltd -v- Minister of Pensions and National Insurance** [1968] 1 All ER 433, HC) provides:

"A contract of service exists if these three conditions are fulfilled:

- (i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master;
 - (ii) he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master;
 - (iii) the other provisions of the contract are consistent with it being a contract of service.
10. In respect of the first two conditions:

"There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill."

11. The first of the three conditions identified in **Ready Mixed Concrete** stipulates that the 'servant' will provide "his own work and skill" in the performance of the service.
12. The obligation to render personal service is therefore of crucial importance in determining whether an individual works under a contract of employment. If a worker is entitled to substitute personal service then that will, in itself, usually be enough to demonstrate that the contract is not a contract of service due to the absence of the 'irreducible minimum of obligation' (See **Express & Echo Publications Limited -v- Tanton** [1999] IRLR 367, CA).
13. However, a lack of personal service is not necessarily conclusive. The Courts have identified that a limited power to appoint substitutes is not inconsistent with an obligation of personal service (See **MacFarlane -v- Glasgow City Council** [2001] IRLR 7, EAT; and **Byrne Bros (Formwork) Ltd -v- Baird** [2002] IRLR 96, EAT). The main issues in these cases were whether the right to delegate was fettered.
14. The question of mutuality of obligation generally poses no difficulties during the period when the individual is actually working. During that period the individual clearly undertakes to work and the employer in turn has provided the work and undertakes to pay for the work done. Unless and until the power to terminate is exercised, these mutual obligations will continue to exist.

"The issue whether the employed person is required to accept work if offered, or whether the employer is obliged to offer work if available is irrelevant to the question whether a contract exists at all during the period when the work is actually being performed" - **Stephenson -v- Delphi Diesel Systems** [2003] ICR 471, EAT *per* Elias J.

15. The Court of Appeal in **Montgomery -v- Johnson Underwood Ltd** [2001] IRLR 269 confirmed that control is a separate factor and is no less important to the creation of a contract of employment than mutuality of obligations.
16. The concept of control is more sophisticated in cases of skilled employees, where it is highly unlikely that an employer could tell that type of employee how to do their day-to-day work. Therefore 'control' means a theoretical right to control. It requires general ultimate authority over an employee in the performance of their work. However, this cannot be reduced simply to the right of an employer to terminate a contract with an individual where that person has failed to achieve the required standards of performance, more direct control is required.
17. Control in itself is not conclusive of the existence of a contract of employment. An independent contractor can agree to submit himself to the same control as

an employee without actually becoming an employee (see **Ready-Mixed Concrete**).

18. If personal service, mutuality of obligations and sufficiency of control are present, then the contract *may* be a contract of employment. The final step of the analysis is to consider whether the other provisions of the contract are consistent with it being a contract of service.
19. This requires an employment tribunal to consider the overall picture. The tribunal should not adopt a 'checklist' approach, but consider all aspects with no single factor being in itself conclusive and each of which may vary in weight and direction (**Hall (Inspector of Taxes) –v- Lorimer** [1994] ICR 218, CA).

The facts and conclusions

20. The Tribunal makes the following findings of fact on a balance of probabilities and reaches the associated conclusions.
21. This matter relates to the Claimant's work for the Respondents as Director of Music.
22. The Claimant answered an advert, attended at interview and was offered the position, which was accepted by him.
23. The Claimant was interviewed by Father Minchew, Father Dixon and Mr Thomson. The decision to appoint the Claimant was taken by Father Minchew and Father Dixon. The Claimant was informed at interview that the appointment would last for a minimum of five years in order to provide continuity.
24. It was the evidence of Father Minchew and Mr Thompson that the Claimant was informed at interview that he was to be self-employed. The Claimant denies this.
25. The offer letter dated 30 June 2008 states:

"After further discussions with Fr Colin and the churchwardens I am writing to offer you the post of Director of Music at St Michael's Croydon. We very much hope that you will be able to take up your duties as discussed on the 1st September, 2008. We have talked informally about the package for this post and have agreed an annual stipend of £14,000. . . . I will be glad to receive a letter from you confirming that you accept this post. As soon as this is received and with your agreement, the news of your appointment can then be released" (see page 35 of the bundle).
26. There was the potential of accommodation, which was not taken up by the Claimant.

27. The Claimant was presented with a draft contract which was based on a pro-forma document from the diocese of Southwark.
28. The Claimant did not sign the contract, certainly on the basis of the annual leave provisions and allegedly on the basis of Clause 16, which states:
 - "(a) There being no master and servant relationship no part of this Agreement shall be deemed to constitute a contract of employment.
 - (b) The Director of Music shall be responsible for his own income tax and National Insurance arrangements".
29. The nature of Clause 16 and whether the Claimant was informed he would have self-employed status is a matter to which the Tribunal will return.
30. A revised contract was provided to the Claimant (see pages 4 to 7 of the Tribunal bundle). The annual leave provision was amended, Clause 16 remained.
31. This revised contract was provided to the Claimant in or around October 2008, signed by Father Minchew. Mr Thompson and Mrs Jackie Brooks, Secretary of the PCC. It was not signed and returned by the Claimant.
32. The Claimant argues that he informed Father Minchew that he had not signed the revised version because of the inclusion of clause 16. The evidence of Father Minchew was that the Claimant had never asked for clause 16 to be removed, he had only requested an amendment regarding the annual leave provisions.
33. No further issue arose relating to the contract by any party until October 2009, but a final version was never signed by all parties.
34. In October 2009 Father Minchew sent an e-mail to the Claimant stating: "Contract should be signed as soon as I can locate it allegedly with Jackie" (see page 47 of the bundle). Father Minchew confirmed in cross-examination that this was a reference to the agreement with the Claimant, therefore demonstrating that discussions on this point were held, but there is no documentary evidence of any request to amend the contract.
35. The remaining factual elements of this case will be referred to in the context of the relevant law.
36. The Tribunal has been taken to the main authorities by the parties and the Tribunal has taken care to remind itself of the established law, as set out above.
37. Determining whether the Claimant is an employee potentially requires an analysis of four principal factors, sufficiency of control; personal service; mutuality of obligations; and other factors consistent, or inconsistent, with a contract of service.

38. It was accepted by the parties that mutuality of obligations is not an issue in this case. The Tribunal considers this is correct. Mutuality of obligations only goes to an analysis of whether a contract is in existence at all, which is not in dispute in the circumstances of this case. There was a contractual relationship in operation where the Claimant provided work in return for pay.
39. Father Minchew agreed that the terms of the revised contract was how it was intended by the Respondents that the contract would operate in practice and that it did, in practice, form the terms of the agreement between them.
40. The Tribunal concludes that, clearly, the contract was an oral contract between the parties. No written contract was ever entered into.
41. Clause 16 aside, it is correct on the evidence before the Tribunal that the oral contract between the parties did operate on a functional day-to-day level following the terms set out in the revised contract, in so far as it is material for determining the issues in this pre-hearing review.
42. There were some occasions when the Claimant did delegate his functions outside the terms of the agreement, but the Tribunal finds that those occasions are not significant.
43. With regard to sufficiency of control, for there to be a contract of service there must be a sufficient degree of control over how the manner of the work is carried out.
44. The Tribunal agrees with the submissions of the Claimant that the degree of control must be commensurate with the Claimant being a professional person who has an expected degree of autonomy.
45. Clause 2(a) of the contract states:

"Subject to clause 12 below and subject to the general direction of the Vicar the Director of Music shall be responsible for the care, control and general oversight of all the music in the church".
46. In addition Clause 15 states:

"This agreement is at all times subject to the provisions of Canon B20 of the Canons of the Church of England".
47. Canon B20 (page 37 of the bundle) provides:

"1. In all churches and chapels, other than in cathedral or collegiate churches or chapels where the matter is governed by or dependent upon the statutes or customs of the same, the functions of appointing any organist, choir master (by whatever name called) or director of music, and of terminating the appointment of any organist, choir master or director of music, shall be exercisable by the minister with the

agreement of the parochial church council, except that if the archdeacon of the archdeaconry with the parish is situated, in the case of termination of an appointment, considers that the circumstances are such that the requirement as to the agreement of the parochial church council should be dispensed with, the archdeacon may direct accordingly. Where the minister is also the archdeacon of the archdeaconry concerned, the function of the archdeacon under this paragraph shall be exercisable by the bishop of the diocese.

2. Where there is an organist, choir master or director of music the minister shall pay due heed to his advice and assistance in the choosing of chants, hymns, anthems, and other settings, and in the ordering of the music of the church; *but at all times the final responsibility and decision in these matters rests with the minister.*

3. It is the duty of the minister to ensure that any such chants, hymns anthems, and other settings are chosen as are appropriate, both the words and the music, to the solemn act of worship and prayer in the House of God as well as to the congregation assembled for that purpose; to banish all irreverence in the practice and performance of the same".

48. The Tribunal considers that the general tenor of Canon B20 provides for control over the Director of Music by the Minister (the second Respondent) and this is explicitly confirmed by the final words of paragraph 2 (italics added).

49. The Tribunal is not making any decision in this case to the effect that the terms of Canon B20 are determinative of employment status or that all contracts subject to Canon B20 are contracts of employment. However, it is a factor to take into account, particularly when expressly referred to as part of the applicable contractual terms, as in this case.

50. The Tribunal also considers that the terms of the documents evidenced at pages 32 to 34 of the Tribunal bundle also demonstrate elements of control. The e-mail on page 32 dated 8 January 2010 states:

"We (the clergy) have been having some discussion as to how we might improve things in church on the musical front in order to best serve the congregation. We have drawn up a programme that we are sure will address current difficulties and ensure that our church continues its outreach to our parish. . . . I wonder if we might meet before the PCC on Wednesday to agree the implementation of this proposal?"

51. Pages 33 to 34, a document entitled "Music Requests" :

"It is hoped that these requests will be put into operation at the earliest possible opportunity and certainly when the new music list is published in February . . .

Paid singers will not be provided for as of September 2010 . . .

The allocated budget is not to be spent entirely on professional singers. At least one third is to be spent on recruitment expenses and other choir expenses. The PCC will determine the music with the 2010 at its next meeting".

52. The "Grievance" elements of the revised contract of employment also demonstrate an element of control.
53. The Tribunal concludes, on balance, that there was sufficient control of the Claimant for the contract to be of service.
54. With regard to personal performance, the Tribunal agrees with the submissions of the Claimant that given the advertisement, interview, job description/job specifications and the preferred a commitment to the post for five years, the Respondents were clearly seeking a personal service element to the arrangement and that the vast majority of the work duties would personally be undertaken by the Claimant.
55. Clauses 2(b) and (c) of the contract provide the Claimant with powers of delegation (see page 4). The Tribunal concludes that terms of the agreement in the instant case can be distinguished from the facts in the case of **Mr Alan Bryant Green –v- St Nicholas Parochial Church Council and another** [2004] UKEAT/0904/04, relied upon by the Respondents. In the **Green** case the Claimant could delegate all responsibilities, as set out expressly in the written agreement between the parties. Paragraphs 41 and 44 of the judgment of the Employment Appeal Tribunal state:

"The central reason why the Tribunal concluded that the contract was not one of service, and why Mr Green was not a "worker", was because they regarded clause 3 as entitling him to delegate to others the performance of all, or a least a very substantial part, of his duties . . . it follows, in our view, the Tribunal were correct to find the effect of clause 3 was that there was no obligation Mr Green to provide his clause 2 services personally: he could delegate all of them to a competent substitute, and indeed could (in theory) profit from such delegation if he engaged the substitute at fees lower than the Council was paying him"
56. However, Dr Sholl in the instant case had a limited power delegation. It was accepted, quite properly, by Mr McIlroy for the Respondent that all the Claimant's duties were not subject to the power of delegation. The Tribunal finds as fact that it could also not be described that very substantial part of his duties were subject to the power of delegation.
57. The majority of the powers delegated by the Claimant in practice were because of two main factors: (i) it was not practicable for the Claimant to be organists and conductor, because of the need to climb stairs to the organ; and

(ii) the requirement for cover when the Claimant is on annual leave.

58. There was a letter by Father Minchew to the Claimant solicitors dated 12 May 2010 (pages 55 and 56 of the bundle) in which he addresses the Claimant's offer to continue in work without remuneration. He states:

"Had we accepted Dr Sholl's very generous offer that would have created an entirely new situation. There could be no demands made upon him we would never have known when he would be present or whether we needed to make alternative arrangements to ensure the music of the church was provided".

59. Accordingly, the Tribunal concludes that the extent of the powers of delegation is a matter that the Tribunal has taken into account in respect of sufficiency of control above and the analysis of factors consistent with an employment relationship.

60. With regard to other factors consistent with a contract of service, as with the above, the Tribunal has considered all the evidence produced to it and refers to the principal points. It should not be taken that those matter not expressly mentioned have been overlooked.

61. In the Tribunal's view the principal factors consistent with a contract of employment are:

- The Claimant was paid monthly in arrears. That payment was initially made by the Parochial Church Council and later by the St Michael's Music Trust, which received funds from the Parochial Church Council. The Claimant was paid by bank transfer and there was no accompanying paperwork;
- Although the payment was described in the offer letter as a "stipend", it has been variously described in the documentation. The advertisement and job description described it as a "salary", the draft agreements describe it as a "fee". The payment clearly had the character of contractual remuneration, as confirmed by Father Minchew describing it in correspondence as a "salary". The Claimant could rely upon the certainty of receiving a fixed sum and his work and pay were obviously dependent upon each other;
- The Claimant had no financial risk;
- The Claimant was not required to provide equipment, materials, or premises;
- There was a package of rights all typical of employee status: holiday pay; sick pay; notice provisions; and grievance provisions;
- The label placed on the relationship by Father Minchew. At page 48 of

the Tribunal bundle there is an e-mail from Father Minchew to the Claimant in which he states:

"I hope to resolve this before Sunday – but remember the following Be sweet ALL the time and do not lose your cool
Smile sweetly and say that your employer is Fr Donald . . . "

Also, in a letter to the Claimant's solicitors dated 12 May 2010 by Father Minchew, the Claimant was described as being made "redundant".

62. The principal factors against there being a contract of service are:
- The Claimant was informed that he was self-employed;
 - Paid his own tax and National Insurance;
 - He delegated work to others outside the terms of the agreement;
 - The Claimant did not obtain authorisation for annual leave in advance (although the Claimant did notify the Respondents as a matter of courtesy);
 - He received a fee for playing at weddings and funerals;
63. Neutral factors are the degree of autonomy enjoyed by the Claimant, such as contained in Clause 10 of the revised contract relating to "Recordings".
64. It was submitted that the Respondents did not ever employ anyone. However this is not accepted by the Tribunal, save that the Respondents may not have *intended* to employ anyone. The Respondents may have employed an individual in law, each case depends on its own facts.
65. The Tribunal has reminded itself of well-established common law that the labels parties attach to the arrangement are not determinative of employment status. Accordingly, the reference to a 'stipend' in the offer letter, the employer-related references by Father Minchew and the terms of Clause 16 (particularly in the absence of a signed agreement) are not determinative of the question, but are matters to which the Tribunal applied weight as appropriate.
66. The Tribunal considers that the three main witnesses seriously undertook the terms of the oath when giving evidence. The Tribunal concludes on balance that the Claimant was told that he was to be self-employed and would pay his own tax and National Insurance. The Tribunal also concludes on the evidence that it was made much clearer to the Claimant that he would be responsible for his own tax and National Insurance than that he was considered to have self-employed status, which may account for differences in recall.

67. Although a difficult balancing exercise, when considering all the relevant factors, the principal ones set out above, the Tribunal concludes that the Claimant did have employee status at the material times.
68. The Tribunal concludes that the factors in favour of employee status outweigh those against.
69. All the relevant circumstances were carefully considered and balanced. The ultimate analysis was balancing the weight of the majority of factors being in favour of employee status against the Claimant entering into the relationship having been told that he was to have self-employed status and would make his own tax and National Insurance payments.
70. The label of self-employment is not determinative, but has weight in this instance, particularly when considered together with the tax and National Insurance point, which is why this was a difficult balance.
71. The Tribunal has fully taken into account the facts and judgments in **Green**, in which delegation of power was "upon which most of the argument turned".
72. With regard to which Respondent is the true employer of the Claimant, the Tribunal concludes that it is both Respondents. The written agreement was to be entered into by both Respondents and specimen agreements produced in evidence had been set out the same way. The appointment is expressed as being "by the Vicar with the agreement of the Council". The First and Second Respondents appear to have an interwoven relationship with regard to the working arrangements with the Claimant. However, the parties may wish to vary this finding by agreement between themselves.
73. Finally, it is the Tribunal's conclusion that as this case is clearly individually fact specific and this decision is not setting any precedent generally, particularly with regard to the impact of the terms of Canon B20.
74. This matter will now proceed to a full merits hearing.



Employment Judge Freer
Date: 30 March 2011

Judgment and reasons sent to the parties and entered in the Register on: 31 | 3 | 2011
MS M Andrews for Secretary of the Tribunals