



**EMPLOYMENT TRIBUNALS**

**Claimant**

**Respondent**

**Mr T M Satiyaraj**

**v**

**Southall Baptist Church**

**Heard at: Watford Employment Tribunal**

**On: 23 and 24 January 2018**

**Before:** Employment Judge George

**Representation**

**For the Claimant:** Mr A Korn, Counsel

**For the Respondent:** Mr T Cordrey, Counsel

**RESERVED JUDGMENT**

1. The claimant was not employed by the respondent within the meaning of section 230 (1) and (2) of the Employment Rights Act 1996 (hereafter the ERA).
2. The claimant was not employed by the respondent within the meaning of section 83 (2) of the Equality Act 2010 (hereafter the EQA).
3. The claimant was not an officeholder of the respondent within the meaning of section 49 of the EQA.
4. The employment tribunal has no jurisdiction to hear the claimant's claims of unfair dismissal and race discrimination. The said claims are dismissed.
5. By his claim presented on the 23 May 2017 the claimant also brought claims for notice pay, holiday pay and arrears of pay. The tribunal has not heard submissions on whether the claimant was an employee within the meaning of article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 or a worker within the meaning of reg.2 of the Working Time Regulations 1998.
  - a. Those claims are stayed for a period of 14 days after the date on which this judgement is sent to the parties.
  - b. If, within that period, no representations are received from the claimant explaining why those claims should not be dismissed as a result of the factual

findings set out below then the said claims for notice pay, holiday pay and arrears of pay shall stand dismissed without further order.

6. The respondent may, if so advised, make written submissions about the appropriate disposal of the claim set out in paragraph 5 of this judgement but any such submissions must be received by the tribunal within 14 days of the date on which this judgement is sent to the parties.
7. Upon receipt of any such submissions judgement will be made about the disposal of those claims without further hearing.

## **REASONS**

1. By the claim form presented on 23 May 2017, the claimant brings complaints of unfair dismissal, race discrimination but also (see section 8.1 of the claim form on page 22 of the bundle prepared for the preliminary hearing, 21 August 2017) for notice pay, holiday pay and arrears of pay. On his case, the claim arises out of the termination of his employment by the Southall Baptist Church (hereafter SBC) when they sent him a P45 and stopped paying him salary with effect from 31 January 2017. The claim was presented following early conciliation which was attempted between 11 May 2017 and 17 May 2017. One issue which was not raised before me that which would become relevant were the claim to continue is whether this claim has been presented in time.
2. The respondent defends the claim and entered a response on 29 June 2017. Their case is that the claimant was not employed by them within the meaning of the Employment Rights Act 1996 or the Equality Act 2010 because first, the claimant was engaged by a different church and they merely carried out the administrative function of processing the payment of his salary, for which they were reimbursed and secondly, as a pastor, the claimant was not in any event an employee. The case was managed by Employment Judge Hyams who listed it for the hearing of preliminary issues to determine employment status.
3. When hearing this two-day preliminary hearing I had available to me the following documents and statements,
  - 3.1. A joint bundle of documents which ran to 49 pages, following insertions made by the respondent at the outset the hearing which were not objected to by the claimant. Page numbers in that bundle are referred to in this judgement as JB pages 1 to 49.
  - 3.2. A skeleton argument prepared on the claimant's behalf by Mr Korn of counsel together with seven authorities or extracts from relevant publications.
  - 3.3. A skeleton argument prepared on behalf of the respondent by Mr Cordrey of counsel and also outline closing submissions.
  - 3.4. Three witness statements signed by the claimant and dated 27 July 2017, 15 December 2017 and 19 January 2018. He confirmed the truth of these in his

oral testimony, they were adopted as his evidence and he was cross-examined upon them.

- 3.5. Witness statements signed by the respondent's witnesses as follows: Prince Oliver, a former trustee of Bethany Faith Ministries (hereafter BFM) dated 3 December 2017; Boyd Williams, a pastor of the respondent dated 1 December 2017 and Christine Streets, church treasurer for the respondent dated 6 December 2017.
4. Reading Mr Korn's skeleton argument, it appeared that the claimant thought that an application had been made at the previous preliminary hearing to join named trustees of the respondent as individual parties. I was directed to paragraph 1.1 of the claimant's agenda for that hearing. He argued that as a registered charity, if the respondent is unincorporated, the claim should be brought against named trustees including Pastor Williams and Ms Streets and believed that that had been agreed on the previous occasion. The respondent's counsel, who had not been present at the preliminary hearing conducted by EJ Hyams, did not concur that it had been agreed that that change should be made.
5. Since this was a matter of whether or not the formal status of the respondent was properly expressed, it was agreed that I should deal with this issue at the end of my decision on the preliminary issues.

#### **The issues**

6. The issues to be determined were agreed between the employment judge and the parties' respective legal representatives at the preliminary hearing conducted by EJ Hyams on 21 August 2017. They are as follows
  - 6.1. What were the administrative arrangements for the payment of the claimant?
  - 6.2. Who made those arrangements?
  - 6.3. Was the claimant engaged under a contract of any sort in relation to his work as a pastor, including ministering at Southall Baptist Church premises? (In this regard, the question of the manner in which the claimant came to be engaged as such pastor will fall to be determined.)
  - 6.4. If so, with which person or persons did the claimant enter into such contract?
  - 6.5. Was that contract a contract of employment within the meaning of section 230 (1) and (2) of the ERA and/or sections 39 and 83 of the EQA?
  - 6.6. If so, by which person or persons was the claimant so employed?
  - 6.7. If the claimant was not employed under a contract employment within the meaning of ss.39 and 83 of the EQA was the claimant office-holder within the meaning of s.49 of that Act?

7. The claimant, through his counsel's skeleton argument, expressed an intention to rely upon s.110(1)(a) of the EQA and to argue that the respondent is liable as an agent. Mr Korn explained that this arose from evidence in Mr Oliver's statement that, in paying the claimant's salary the respondent was acting as an agent.
8. It is not quite clear from that witness statement (see PO paragraph 4) whether, on his account, the respondent was acting as an agent of Bethany Faith Ministries (a registered charity of which Mr Oliver was a trustee and which is referred to hereafter as BFM) or of Bethany Church of God which was the name of the church through which the claimant ministered to the Tamil and Sinhalese congregation in Southall (referred to hereafter as BCG).
9. Mr Korn also made a submission in his skeleton argument that BCG should be added or substituted as a respondent in the present case if Southall Baptist Church (hereafter referred to as SBC) is found not to have been the claimant's employer with meaning of either the ERA or EQA. However, he quite fairly accepted both that there was no existing complaint on the face of the claim form against BCG as employer or against SBC as agent for BCG as employer and that no application to amend the claim had yet been made.
10. I made clear to the parties and their representatives that I would decide the issues listed to be decided at the preliminary hearing on the basis of the claim as presently pleaded. I also made clear that, in my view, an argument that the present respondent is liable as an agent under section 110(1)(a) of the EQA is a different cause of action to those presently pleaded because the basis of the alleged liability is entirely different. It appeared that BFM and BCG had not been warned by the claimant that he alleged that they had unfairly dismissed him and subjected him to race discrimination through the acts of their alleged agent SBC and that early conciliation had not been attempted with those organisations.
11. Mr Korn did not seek to argue that there was an existing claim against the respondent under s.110 EQA. Nor did he seek to argue that there was before me an application to amend the claim to include one or to include a claim against BFM and/or BCG. It was therefore clear that the issues before me were those set out in paragraph 6 above and no others.

### **Findings of Fact relevant to the issues**

12. I make my findings of fact after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by all of those concerned about the relevant factual matters from time to time and the witness evidence, both statement evidence and oral testimony. Where it is has been necessary to resolve disputes about what happened, I have done so on the balance of probabilities taking into account my assessment of the credibility and reliability of the witnesses and the consistency of their accounts with the rest of the evidence including with documentary evidence. I do not set out all of the evidence in these reasons; I set out my principal findings of fact on the evidence before me, those which it was necessary for me to make in order for me to decide the issues which EJ Hyams directed should be decided at the preliminary hearing on 21 August 2017.

13. The claimant who was born on 30 January 1967, came to the UK from Sri Lanka in 1992. He is an ordained minister and began ministering to the Sri Lankan community in Southall. In about 2002, BCG was established although his evidence was that the organisation had previously been known as the Southall Church of God.
14. Mr Oliver's unchallenged evidence (PO paragraph 2) was that BFM is a UK registered charity which acts as an "umbrella" entity to which five organisations are affiliated. Those are BCG (sometimes referred to as Bethany Church), Bethany Sinhalese Church, Bethany Kenton Church, Bethany Norwich Church and Bethany Senior Citizens Fellowship. At the time with which I am concerned each of those churches were managed and run by junior pastors and leaders, and the claimant was the senior pastor with overall responsibility for those churches.
15. It is not absolutely clear to me that it can therefore be said that BCG has a separate identity as a legal person to that of BFM however it was operated as a separate organisation serving the Tamil and Sinhalese congregation in Southall whereas the other organisations affiliated to BFM serve their own communities and congregations. I have not heard evidence about its management structure, beyond the leadership role of the claimant as its senior pastor. No doubt there is an element of mutuality of support but there also seems to have been a sense of independent identity on the part of each organisation that is a constituent part of BFM. For example, the claimant accepted that BCG had purchased the property known as Bethany Church House in approximately 2007 in which they have a first-floor place of worship and he had an office. Indeed, he accepted that he still uses that office although he said that he now does not go there to work. What he did accept was that he had continued to use that office until the events of the last 12 months or so.
16. SBC has operated in Southall for many years. Ms Streets described how she transferred to SBC in the early 1950s and Pastor Boyd has been the pastor there for 39 years. They are affiliated with the Baptist Union and are governed by a constitution (JB page 1). In the constitution there is the following relevant rule which dates from at least 1992,  
  
"Matters relating to the calling of Pastors,... Shall be dealt with at a special Church Meeting. Resolutions thereon shall be carried by two-thirds majority of those voting except for the calling of Pastors and Elders, where a 4/5<sup>th</sup> majority is required (as determined by the total number of ballot papers cast)."
17. Such a special Church Meeting contrasts with a regular Church Meeting which has to be held on the third Wednesday of every month for the transaction of business (see rule 1).
18. The rules in this constitution confirms the evidence given by Pastor Boyd which is that the SBC is a comparatively democratic church where a considerable amount of the power to make decisions about the day-to-day business of the church and who should be employed by the church lies in the hands of the congregation exercised through Church Meeting rather than in the hands of a small group of leaders.
19. In order to reach a decision on the issues listed for hearing I need to reach a conclusion on this factual issue: did BCG continue with a separate identity to that of SBC or did it merge with or get transferred into SBC? This is not determinative of

whether there was a contract between the claimant and respondent, but the former's case was that there was an express oral contract of employment agreed between him and Pastor Boyd of the respondent or, alternatively, that one should be implied by conduct because he was paid by and did work for the respondent. The question of whether the BCG continued with a separate identity is indicative of whether the claimant did work for the respondent or whether he continued to do work for BCG. Although it was suggested to Pastor Boyd that the claimant had done work directly for the respondent, he rejected that. I accept his evidence on this point.

20. One of the sad aspects of this case is that, prior to the events of late 2016 and early 2017, it is apparent from the evidence of both the claimant and Pastor Boyd, and is confirmed from contemporaneous correspondence such as the letter that JB page 2, that these two men developed a mutual respect and liking for one another. This led to a shared vision for how the multi-ethnic communities in Southall could be ministered to. There was sufficient commonality of approach for a merger between the two churches to be proposed.

21. This shared aspiration is evidence in the letter from Pastor Boyd 3 June 2005 (JB page 2), and the exchange of correspondence between the claimant on pages JB 3 to 6 which date from August 2006. The letter from the claimant dated 19 August 2006 on BCG headed notepaper refers to him as Minister and to the church as being a member of the Evangelical Alliance with a registered charity number. In that letter the claimant states that the trustees of the BCG felt positive about the possibility of joining SBC and asked a number of questions. Those are answered by Pastor Boyd on 31 August 2008 where he says this,

“My thinking is that it is good to have a decision in principle that we are working together to become one church but we need one or two years to grow closer to each other and then hopefully formalised things. It's a bit like marriage - courtship-engagement-marriage. I think we're getting closer to the point of engagement in this process.”

22. There was, at that time, consideration of the extent to which the two churches would lose their identity and Pastor Boyd's view was that “with two large fellowships coming together there would be a new church formed”. He also pointed out that because of the Baptist system of government senior leadership would need to be an accredited Baptist pastor and he encouraged the claimant to consider that. It is apparent that the claimant was to do this because of what he says at question 6 on JB page 4. When questioned about this, the claimant said in evidence that he had understood that SBC had rules and that he understood that any decision to appoint him as pastor would have to be a special meeting with a four-fifths majority. He also accepted that he had been told that if he was ever to be a pastor within SBC he would have to be an accredited Baptist pastor. His evidence was that Pastor Boyd said that he would recommend him to the Baptist Union but that had never happened. I therefore reached the conclusion that the claimant knew at all times that he did not have the accreditation required to be appointed as a pastor with SBC and also that his appointment would have to be approved at a special Church Meeting, and that that was never done.

23. The respondent has produced extracts from Church Meeting Minutes at JB pages 48 and 49. They record that the claimant and his wife and Mr Oliver were added to the church roll of SBC on 17 November 2010.

24. The claimant, with reference to the analogy to marriage, said in his oral evidence that the two churches had never reached the stage of marriage. His evidence was that they decided to merge in 2010 and the minutes of 24 March 2010 record SBC deciding in principle to work "towards us combining with Bethany Church of God". This could perhaps be described as the engagement: the decision that the churches would move towards a merger. For example, the claimant says that BCG decided to close down the English Fellowship which led to about 30 or 40 people moving to SBC. The respondent says that the figure was more like three or four. The claimant accepted that all the other congregations remain separate, saying that that was because they conducted services using the languages of the membership. However it is clear that the BCG congregation at about 700 members was, in total, considerably larger than the congregation of the respondent.
25. At some point a sign was put up outside the respondent's church in which it is referred to as the Bethany Baptist Church and the claimant said that the BCG started to be known by that new name as part of a move towards the merger. This name had been agreed on by the respondent on 22 May 2011 as being the new name "when we fully combine with Bethany Fellowship". Ms Streets' evidence was that "we were to work towards one church with all our leaders and finances to come under one umbrella" (CS paragraph 9). My conclusion is that this sign was another step taken towards the merger but not conclusive evidence that the merger took place. Indeed, my conclusion is that the use of the name was premature.
26. I am reinforced in that view by the letter at JB page 13 from Pastor Boyd to the trustees of BCG which outlines some difficulties which have been encountered. Those include, (JB page 13 paragraph 2) the fact that the SBC decision making body are the church members in the church meeting rather than the leadership. This would have reinforced to the claimant, who accepted that he had seen the letter, that if a decision about merger or a decision about his appointment had not been taken by the church meeting then it did not bind SBC. It is further clear that as at January 2013, when the letter was written, the finances of the two churches were separate. Pastor Boyd concludes with a statement that it seems right to halt the process of the two churches becoming one for the time being in order for the churches to have time to pray, reflect and work out the difficulties.
27. In his oral evidence, the claimant was taken to a number of entries in the Church Meeting minutes, all of which confirm the position set out in that January 2013 letter to the trustees of BCG. He was also taken to the discussion document which was to form the basis of a meeting between the trustees of SBC and BCG. However, despite their terms, and in particular the statement on the January 2013 letter that there should be a pause in the merger process, and despite his own acceptance that the marriage had never happened, the claimant reiterated in his evidence that the two churches had become one. I'm afraid that, on the balance of probabilities, the evidence shows that this did not happen.
28. It was accepted by Pastor Boyd in his evidence that part of the advantage which he saw for SBC of a possible merger was that he valued the claimant's qualities as a pastor and saw him as a potential successor. Ultimately, he proposed that at the church meeting on 21 September 2014 (JB page 49). However, this was not accepted by the trustees, leaders or deacons of SBC (see CS paragraph 9). The claimant only preached at SBC once at a Sunday morning service, about 2 or 3 years ago.

29. Other pieces of evidence are consistent with the documentary evidence that, although both parties took some steps towards merger, it never happened: there were no merged finances, no joint services, BCG did not cease to exist, BFM continues to exist as a charity. SBC continued to be known by its name in printed literature (JB page 17 dated October 2014). The claimant sought to draw a distinction between the Sunday afternoon congregation which met at the SBC premises being part of the BFM umbrella and them not being under the BFM umbrella. However that, I find, is a distinction without a difference. It is a situation fundamentally inconsistent with the claimant's alternative factual case which is that the BCG transferred to the respondent.
30. It is against this backdrop that the evidence about the alleged conversation between the claimant and Pastor Boyd, which the claimant relies upon in paragraph 3 of his third witness statement, must be seen. The claimant says in paragraph 2 of his third statement that he was employed by the New Testament Church of God to work as a missionary in Southall. That conflicts with the evidence of Mr Oliver, trustee of BFM from 2002 to 31 January 2017 (PO paragraph 3) which is that the claimant was employed by BFM (something which was denied by the claimant in oral evidence). Indeed the claimant was very clear in evidence that he had never being employed by BFM. Rather he seemed to say that he had been employed by NTCG doing work which benefitted BFM and each of its constituent churches through his leadership role.
31. However, when asked about his employment by NTCG he said that he couldn't remember whether he had a contract with them. At times the claimant's argument seemed to be that his contract of employment simply transferred to SBC. If that was his case, then it is surprising that he did not disclose any documents available to him to show that there was a contract between him and NTCG or the nature of it.
32. On the basis of the evidence I heard, my conclusions about NTCG is that they are an international organisation to which funds are paid by various churches all over the world. The claimant gave no evidence of any conversation between him and a representative of NTCG and no documentary evidence of a contractual relationship between them. In fairness, neither was there documentary evidence of a contract between the claimant and BFM.
33. When it was suggested to the claimant that the trustees of BFM were the ones who decided on the level of his salary, he said that they decided on the amount of money which they wanted to contribute to NTGC but then agreed that, since he mainly was responsible for the Bethany sector the leaders proposed the amount that they should pay towards his wages and maintenance. Mr Oliver's evidence that the claimant had to consult with the trustees regarding decisions relation to the organisations under the BFM umbrella and operational issues involving them was not challenged. This oversight of the claimant by BFM is also consistent with what happened during his sabbatical (see paragraph 37 below). Furthermore, Mr Oliver's evidence that BFM paid pension contributions, travel costs and expenses to the claimant was not challenged.
34. On the other hand, the claimant also stated that he had been an employee of NTCG since 1994 when he arrived in Southall and started knocking on doors. This was before BCG or BFM had been thought of. He was on the payroll of NTCG and this situation continued until he was moved onto the payroll of the respondent. NTCG paid



his wages and, as set out in paragraph 32 above, BFM set out the amount which he should be paid and, apparently, paid it to NTCG.

35. The claimant's oral evidence about the conversation with Pastor Boyd was that it had not addressed details. He said that Pastor Boyd knew exactly what "we" were doing so no discussion about duties was necessary. There had been a discussion which he vaguely remembered about how much would be credited to Bethany Baptist Church inclusive of his salary. He said that Pastor Boyd has asked him to moved from one umbrella organisation to another and nothing had changed. He did not remember a discussion about terms such as holiday or any paperwork being issued.
36. Following 2010 the claimant's evidence was that he had regularly gone to the leadership meetings of SBC held every Wednesday or Thursday. However it is clear that he had continued to minister to the Tamil and Sinhalese congregation which had not, I find, merged with SBC but at all times remained a separate church with a separate identity. He did not, therefore, do work for the respondent.
37. In 2015 the claimant requested to go on sabbatical. All of the evidence on this (from Pastor Boyd, Mr Oliver and the claimant) is that he requested permission from BFM to go, told Pastor Boyd that he was going and that a pastor from BFM (Pastor Justin) covered his duties ministering to the Tamil and Sinhalese congregations while he was away for 9 months.
38. The change which took effect from 1 August 2010, following the alleged conversation between the claimant and Pastor Boyd, was that the claimant ceased being paid by NTCG (JB page 8) and started to be paid by SBC (JB page 9). NTCG and SBC respectively are described to HM Revenue and Customs as the employer. Payments were thereafter made from SBC's bank account to the claimant's bank account (JB page 11). It can be seen that he was to be paid £1,049.24 on 22 August 2010.
39. Ms Streets' unchallenged evidence was that she, as the respondent's treasurer, was told that the claimant was to be on SBC payroll and she assumed that the thinking behind it was to help towards eventually becoming one church. BCG sent £1,400 per calendar month from which she would work out and deduct employer's NIC and from the balance pay him following deductions for personal tax and employee's NIC (CS paragraph 13). She issued him with a payslip. She was very clear that she never paid the claimant until SBC were in cleared funds from BCG (CS paragraph 14 and JB page 47). I can see that the gross sum of £1,400 paid on 18 January (reference TM Sathiyaraj) led to a net payment of £1,156.59 meaning that the sum paid to the claimant has increased, presumably because of the reduction of the marginal tax rate between 2010 and 2017. This is consistent with Ms Streets' evidence which I accept. These were the administrative arrangements for the payment of the claimant and that answers the first issue identified by EJ Hyams. According to Mr Oliver, a separate sum of money was paid each month by BCG to SBC as a contribution towards the use of the facilities.
40. The claimant continued to be paid during his sabbatical with money being transferred from BCG to SBC and paid by SBC to him throughout his nine months' absence. Ms Streets produced a written contract of employment which she said SBC used for employed staff to illustrate the difference in treatment of them compared with the claimant because no such contract was issued to him. However, she was told that the

claimant did not need a contract with SBC and, in any event, they have an appointment for ministers rather than the contract of employment produced at JB page 42.

41. She recalled having a conversation with the claimant soon after 1 August 2010 in which she told him that when the money came from BCG they would return it to him after deduction of NIC and tax. She accepted that SBC was the PAYE employer. She had sought and received confirmation on more than one occasion that the claimant was not paid expenses or benefits in kind by the respondent. This was relevant to her in her position as treasurer because she would have had to fill in a form with their annual return to HMRC. This is consistent with Mr Oliver's evidence that the claimant's expenses were paid by BFM. Her recall of the relevant matters with which she was concerned was precise, as befits her position, and I find it credible that she would have been concerned to be accurate about the figures, to ensure that the respondent was not put to any expense by running the claimant's payroll, and that he should understand that he would be paid on a date which was determined by the receipt of cleared funds from BCG.
42. She referred to the letter by which SBC wrote to the claimant in which (JB page 22) they explained SBC's obligation to pay him a pension. She said that SBC had been obliged to write in that way to everyone on the payroll who was paid over a certain amount. She said that the claimant had not taken up the opportunity and, indeed the staging date for the respondent seems to have been 1 February 2017 so that postdates the date on which SBC stopped paying the claimant. She said that, had the claimant enrolled then BCG would have had to pay the pension contributions. I accept her evidence about the reasons why she wrote that letter, it is consistent with what is generally known about the compulsory workplace pension scheme. I also accept her evidence that she would have ensured that any pension plan was provided at nil cost to SBC because that is consistent with her actions in relation to the employer's national insurance contributions.
43. I should also consider what should properly be inferred from a letter dated 5 May 2015 (JB page 21) which is directed "To whom it may concern" and states that the claimant is employed by SBC. Pastor Boyd's evidence was that he cannot now remember the reason why he wrote this letter. The claimant did not explain it (if, indeed, he knew about it). Pastor Boyd could only say that he now thinks that he had been required by BCG to state if he regarded the claimant as an employee of SBC and, not knowing about the legal requirements for employment status, wrote the letter. However, his evidence to me was he now considers that he was mistaken and that SBC was acting as agent rather than as employer itself (BW paragraph 14).
44. It is very regrettable that a professional man, which Pastor Boyd is, who obviously had great respect for the claimant but also for the traditions of the church in which he ministered, should have paid so little attention to the reasons for and possible consequences of some of his actions. My impression is of a man who is not worldly wise and who saw great potential for the respondent both in the prospective merger with BCG and in the claimant personally. It is likely that he allowed his enthusiasm to override any concerns about the legal niceties. This letter is undoubtedly a piece of evidence which I should weigh carefully when considering the claimant's evidence about the alleged conversation with Pastor Boyd in 2010. Pastor Boyd's evidence about that was exceedingly vague and he could not remember whether he had been

given any reason why the claimant should go onto the payroll of the respondent. He could not remember with any clarity why it was not possible for the claimant to be paid directly by BCG. However, he was clear that he would not have made an appointment of the claimant to the position of pastor within the respondent because it was not within his power to do so unilaterally. He did remember saying to the claimant that he would put him forward to become an accredited Baptist minister.

45. My conclusion about the letter of 5 May 2015 is that it is a piece of evidence to which weight should be given but ultimately it is not determinative of the claimant's position within the respondent church. I accept that Pastor Boyd had no real understanding about what constituted "employment" and may have been saying no more than that the claimant was on the respondent's books. I have concluded that it is consistent with the fact that the claimant was on the respondent's payroll but does not add anything of significance to the evidence from which the true nature of any relationship between the claimant and the respondent may be inferred.
46. Pastor Boyd's evidence was that towards the end of 2016 it became clear that SBC and BCG were led very differently and were at different ends of the spectrum in terms of decision making (BW paragraph 16). This led him to propose in October 2016 that they do not continue with the process of unification, a proposal which was passed by the Church Meeting.
47. I noted particular evidence given by him in cross-examination where he accepted that he had made mistakes in the process and said that some of what he had done had not been acceptable because he had acted as a "maverick without consultation" and the church had not been in favour of these things. Perhaps he is a little hard on himself because the Church Meeting minutes certainly suggest that there was a warmth and enthusiasm on the part of the SBC membership for the proposed merger. However that evidence suggested to me that it is possible that in his conversations with the claimant, in his enthusiasm for the claimant and his gifts as a possible successor, he gave the impression that he could deliver agreement on the part of the SBC wider community when that was over optimistic. The important thing to note for these proceedings is that the claimant was, I find, at all times clear that there were certain formalities which need to take place before the BCG merged with the SBC (namely decisions taken by Church Meeting) and before he could be appointed a pastor of SBC.
48. Pastor Boyd went on, in his statement, to say that the consequences of that October 2016 decision not to continue with the process of unification included that the relationship between the two churches needed to be put on a more formal basis. This led to a letter from Pastor Boyd, signed in his absence by Ms Streets (JB page 23) in which SBC sets out the basis upon which they propose to rent their premises to BFM in the future and asks that the claimant is "no longer classed as an employee of Southall Baptist Church", recommending that BFM make arrangements to pay his salary direct.
49. The claimant stated in evidence that he is a trustee of BFM. It is reasonable to assume that he was aware of this proposed change in the mechanics of paying him. Mr Oliver was not able to help with evidence of the events at BFM at that time because he ceased to be a trustee with effect from 31 January 2017. He said that there were verbal discussions about the letters but no trustee meeting in this period.

Unfortunately, Pastor Boyd was himself unwell in this period, having undergone a quadruple heart by-pass operation in January 2017. Ms Streets said that there was no contact from the claimant or BFM before 31 January 2017 (despite a chasing letter at JB page 24) and therefore she took him off the payroll. He was processed as a leaver (JB page 25) and his P45 (wrongly described as the P60) was forwarded to him by letter dated 3 February 2017 (JB page 27). I do not know when that letter was received.

50. Ms Streets' evidence (CS paragraph 22) of a meeting between her, the claimant and one of the BCG's other leaders was not challenged. In it she told the claimant that there was no requirement for the claimant to be paid through the SBC system and he could be returned to the BCG payroll (presumably forgetting that he had not been on the BCG payroll). There was no response from BCG after that meeting and they continued to transfer funds to cover the claimant's salary for 8 months. On each occasion the funds were returned by electronic transfer without further communication.
51. The claimant sent an email to the leaders and trustees of SBC on 5 April 2017 in which he refers to the Bethany Church becoming "partners" of the Baptist Church. In the first place, this is not the same as the two churches becoming one. In the second place, his oral evidence was contradictory on this point. He asserted that the churches became one, but I find that he also accepted that this never, in reality, took place in the sense of each being joined into a new church which had a separate identity to either of its two previous constituent parts or by one of the constituent parts ceasing to exist.
52. With the benefit of hindsight, a roadmap to merger could have been articulated and all the stages on that journey identified with clarity. For example, there was no timetable set as to when binding decisions should be taken about matters such as the formal adoption of a joint constitution, the merging of the financial function, unity of membership and the transfer of employees. Even at its height, the claimant's evidence did not support an assertion that the merger had taken place. He was clear that there was no marriage and that BCG continued to exist. The other churches within BFM continues to exist. There was no suggestion that those other churches would also merge with the respondent and the claimant continued to provide oversight as senior pastor for those churches. So if BCG had merged with SBC, such that work done by the claimant after August 2010 should be regarded as having been done for SBC (as was argued before me) then some contribution to SBC for the "loan" of their employee would have been expected.
53. What was agreed with effect from August 2010? The agreement between the two churches was that they would continue to move towards merging. I do not understand why the claimant went "on the books" of SBC, rather than of BFM or BCG. None of the witnesses gave evidence which satisfactorily explains this step. What I am clear about is that, although SBC paid the claimant, they did not pay for him and he did not work for them. His attendance at prayer meetings, leadership meetings and being accepted as a member of SBC are all consistent with working towards ever closer union with a view to merger. It is not necessary to an understanding of what happened that there be a contract between the claimant and the respondent. Even the claimant's account of the conversation between him and Pastor Boyd does not speak of words of offer and acceptance or any discussion of terms. There was no reason why Pastor Boyd would have offered, on behalf of the respondent, to enter into

binding legal relations with the claimant as an individual. He knew that he could not, constitutionally, make the appointment. Although the churches were working towards a merger nothing had changed so that it could be said that the work being done by the claimant was benefitting the respondent. They were not taking on any financial responsibility for him. Therefore, so far as it is alleged that there was a conversation between the claimant and Pastor Boyd in 2010 which amounted to an agreement between the claimant and the respondent or which could reasonably be inferred to be one I reject that.

54. Having rejected the claimant's claim that what was said at a meeting in 2010 amounted to an offer to him to come and work for the respondent I go on to consider the second issue identified by EJ Hyams. Unfortunately, no doubt because 7 ½ years have passed since the administrative arrangements for the respondent to pay the claimant started, there is no clear evidence about who made those arrangements. What I am clear about is that the claimant was aware that the respondent was going to be responsible for paying him but that the money to pay for him was coming wholly from BCG as it had done when he was paid by NTCG.

### **The Law relevant to the issues**

55. The relevant definitions are found in the statutes as follows:

s.230 ERA is headed "Employees, workers etc." and provides that:

"(1) In this Act "employee" means an individual who has entered into or who works under (...) a contract of employment.

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

(3) In this Act "worker" (...) means an individual who has entered into or works under (...) –

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

The relevant subsection of s.83 EQA (namely s.83(2)) provides that:

"(2) "Employment" means—

- (a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;"

s.49(2) & (10) EQA provide that:

"(2) A personal office is an office or post –

- (a) To which a person is appointed to discharge a function personally under the direction of another person, and
- (b) In respect of which an appointed person is entitled to remuneration ...

(10) For the purposes of subsection (2)(a), a person is to be regarded as discharging functions personally under the direction of another person if that other person is entitled to direct the person as to when and where to discharge the functions”.

For the purposes of the entitlement to holiday pay, reg.(2) of the Working Time Regulations 1998 defines “worker” in an identical way to the definition in s.230(3) ERA, namely:

“an individual who has entered into or works under (...)–

(a) a contract of employment; or

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

By Arts. 3 & 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 and s.3(2) of the Employment Tribunals Act 1996 the Employment Tribunal has jurisdiction to hear a claim for the recovery of damages for a breach of “a contract of employment or other contract connected with employment” subject to certain exceptions which do not apply in the present case.

56. A necessary precondition of each of the definitions of employment is that there should be a contract between the parties: Muschett v HM Prison Service [2010] I.R.L.R. 451 CA. A personal office within the meaning of s.49 EQA on the other hand, is different but there is a requirement that the office holder should have been appointed to discharge a function personally, should be entitled to receive remuneration for doing so and should be under the direction of another person. Liability under s.49 EQA is imposed upon the person who has the power to make the appointment or who otherwise fulfils the criteria of s.52(6) which varies depending upon the nature of the act complained of. In relation to termination, for example, the potential liability is imposed upon the person who has the power to terminate the appointment.

57. The hallmarks of a contract are that the parties to it have each promised or agreed to do something of value and have consented to enter into binding obligations with each other. A contract may be oral or written, express or implied. It is not to be judged solely by a psychological investigation of the parties at the time of its alleged inception but may be inferred from the parties’ conduct (Chitty of Contract, 32<sup>nd</sup> ed., para. 1-017). Nonetheless, whether based upon findings of fact about the parties’ dealings at the outset or inferred from their conduct over time, each of agreement, consideration and intention to create legal relations must be present in order for a contract to exist (Chitty, para. 1-018).

58. So in Franks v Reuters Ltd. [2003] I.C.R. 1166, Mummery LJ said this at paragraph 19,

“Even if the work relations are documented, the documents do not necessarily present the complete picture. That is why the tribunal in Carmichael's case were held by the House of Lords to have acted correctly in examining not only the correspondence, but also the circumstances surrounding it, the subsequent conduct of the parties, and the way in which the parties operated and understood the situation. Unless and until the tribunal have conducted this exercise and obtained an overall picture of the work relationships between the parties, it is impossible in many

cases for them to reach an informed and sound conclusion on whether there is mutuality of obligation in the form of an express or implied contract of service.”

59. Further on in the judgment, at paragraph 29, he said this,

“Whilst I would agree that a person cannot become an employee simply by reason of the length of time for which he does work for the same person, the tribunal appear to have treated the evidence of length of service as irrelevant to the employment issue. In my judgment, it is not irrelevant evidence in the context of an individual who sought a temporary placement through an employment agency, but was then allowed to stay working in the same place for the same client for over five years, during which period he was redeployed. Dealings between parties over a period of years, as distinct from the weeks or months typical of temporary or casual work, are *capable* of generating an implied contractual relationship.”

60. What is meant from the concept of implying a contractual relationship from the conduct of the parties is that the way they have conducted themselves over the years leads to the inference that they in fact contracted with each other. Tribunals have been advised in a number of cases to consider an accumulation of detail from all available evidence and then evaluate the overall effect of the detail, rather than carry out a mechanical exercise of running through each criterion: Hall (Inspector of Taxes) v Lorimer [1994] I.C.R. 218 CA. In Autoclenz Limited v Belcher [2010] I.R.L.R 70 UKSC the supreme justices advised tribunals to consider first of all is ‘what is the true nature of the agreement between the parties?’ focussing on the actual legal obligations of the parties and examining all relevant evidence including any written terms in the context of the whole agreement, the parties’ conduct in practice and their expectations of each other. What was agreed might be what is written down but it is not necessarily entirely included in written documents.
61. If I reach the point of concluding that there was a contract then the mixed test is a useful starting point for considering whether it amounts to a contract of employment. This was set out in Ready Mixed Concrete South East Limited v The Ministry of Pensions and National Insurance [1968] 1 All ER 4633 QBD and the guidance of the High Court in that case has stood the test of time. Three questions are posed, the answers to which inform the Employment Judge deciding whether there was a contract of employment of the factors pointing for and against such a conclusion.
- 61.1. Did the worker agree to provide his or her own work and skill in return for remuneration?
- 61.2. Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employment?
- 61.3. Were the other provisions of the contract consistent with it being a contract of service? One example of a factor the presence of which is consistent with a contract of service or of employment and the absence of which is inconsistent with such a contract is mutuality of obligation. Personal performance is another factor which has in previous authorities been considered to be such a factor.
62. There are differences between employment under a contract of employment within s.230(1) ERA and the extended definition of employment under s.83(2) EQA. So although the absence of mutuality of obligation is inconsistent with a contract of employment (Carmichael v National Power plc [200] I.R.L.R. 43) it is not necessarily

inconsistent with employment under a contract personally to do work (Secretary of State for Justice v Windle v Arada [2016] I.C.R. 721 CA). If there is a contract to provide personal work for and under the direction of the other party to the contract then that would be within the scope of s.83(2) EQA (Jivraj v Haswani [2011] UKSC 40). However, the requirement to provide personal service is not inconsistent with some rights of substitution (Pimlico Plumbers Ltd v Smith [2017] I.R.L.R. 323 CA).

63. The special situation of ministers of religion was discussed in a number of cases. In Percy v Church of Scotland Board of National Mission [2006] I.R.L.R. 195 HL it was held that a minister was an employee within the meaning of what is now s.83(2) EQA and Lord Nicholls expressed the view that it should not lightly be found that the relationship between a church and its ministers was not intended to be legally binding, despite the spiritual aspect. More recently, it was held that a Methodist minister was not an employee for the purposes of s.230(1) ERA in President of the Methodist Conference v Preston [2013] I.R.L.R. 646 UKSC. Lord Sumption, giving the majority judgment, stated at paragraph 10,

“It is clear from the judgments of the majority in *Percy* that the question whether a minister of religion serves under a contract of employment can no longer be answered simply by classifying the minister's occupation by type: office or employment, spiritual or secular. Nor, in the generality of cases, can it be answered by reference to any presumption against the contractual character of the service of ministers of religion generally:.... The primary considerations are the manner in which the minister was engaged, and the character of the rules or terms governing his or her service. But, as with all exercises in contractual construction, these documents and any other admissible evidence on the parties' intentions fall to be construed against their factual background. Part of that background is the fundamentally spiritual purpose of the functions of a minister of religion.”

And further, at paragraph 26,

“The question whether an arrangement is a legally binding contract depends on the intentions of the parties. 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 the subject of a legally binding agreement between them. The decision in *Percy* is authority for the proposition that the spiritual character of the ministry did not give rise to a presumption against the contractual intention. But the majority did not suggest that the spiritual character of the ministry was irrelevant. It was a significant part of the background against which the overt arrangements governing the service of ministers must be interpreted. Nor did they suggest that the only material which might be relevant for deciding whether the arrangements were contractual were the statements marking the minister's engagement, although it so happened that there was no other significant material in Ms Percy's case. Part of the vice of the earlier authorities was that many of them proceeded by way of abstract categorisation of ministers of religion generally. The correct approach is to examine the rules and practices of the particular church and any special arrangements made with the particular minister.”

### **Discussion and conclusions on the issues**

64. I now set out my conclusion on the issues, applying the law as set out above to the facts which I have found. I do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but I have them all in mind in reaching those conclusions.



65. It is not uncommon in cases involving disputed employment status (particularly when events covering a period of years are under consideration) for there to be factual matters which are unexplained or unclear, even after a hearing with oral evidence and argument. The present case was one in which there was a fluid situation involving non-legally qualified people working through a complex process of trying to bring two disparate organisations together. In cases such as this, it is not easy to use the fixed constructs of contract law as a lens through which to view the facts.
66. Was there a contract of any kind between the claimant and the respondent? The first line of argument by the claimant is, in effect, that he had a contract with NTCG and that that transferred to SBC. At its simplest level, this is based upon the facts that he was on the payroll of NTCG and then moved to the payroll of SBC with the forms that were prepared for the HM Revenue & Customs showing him as having been an employee of the former and then being an employee of the latter. The way that the various parties represented the position to HMRC may be evidence of their relationship but is not determinative of it. By analogy with Autoclenz, my task is to try, from all the available evidence, to make findings about what the arrangement, if any, was between the parties.
67. The claimant also argues that there was an express oral contract created between him and Pastor Boyd on behalf of SBC and the HMRC paperwork evidences that agreement being put into action.
68. Finally, he argues that a contract should be implied by conduct (see paragraph 6 of Mr Korn's written submissions).
69. There is no evidence from the claimant of any conversation or agreement with any representative of NTCG setting out what work he would do for them. My conclusion, based upon the claimant's evidence, is that he was sent by NTCG to work in Southall with a view to setting up a church which would ultimately contribute to the NTCG and, through those contributions, cover the costs of the remuneration paid by NTCG. There was clearly some kind of relationship between NTCG and the claimant.
70. There then reaches a point where the hopes of NTCG and the claimant have been realised and the BCG has come into being, as part of the BFM charitable group. Neither the claimant nor Mr Oliver has adduced relevant documents or evidence of a conversation with anyone representing BFM for whom the claimant acts as senior pastor and for whose churches the claimant has overall responsibility. However, the claimant clearly did work for the benefit of BCG, if a separate legal entity, and/or BFM. Equally clearly, they paid a contribution to NTCG which covered his remuneration and the level of which was set by the trustees of BFM. The claimant's evidence amounted, I find, to an acceptance of that proposition which had the effect that his level of remuneration was effectively set by the trustees of BFM. By this stage, immediately before mid-2010, there was clearly some kind of relationship between BFM and the claimant and/or between BCG and the claimant. By this stage the work that the claimant did wholly benefitted BFM (because some of the work he did was with other church members of BFM), the majority of his time was, I find, spent working in connection with the mission of BCG but he also had leadership responsibility for other church members of BFM.

71. Having concluded that there was clearly some kind of agreement, the details and duration of which are vague, between NTCG and the claimant and between BFM and/or BCG and the claimant I go on to consider whether there was any assumption of responsibility towards the claimant by this respondent or whether a new contract came into existence either expressly or impliedly.
72. What can be inferred from the fact that the claimant was on the respondent's payroll, is described as an employee in the payslips and P45 and in letters and was offered to be auto-enrolled on the state pension? The question here is whether I can conclude that the claimant was put on the books of SBC, for example, because he was engaged under a contract of employment or whether it denotes that SBC regarded themselves as having a legal obligation towards him.
73. The bases on which the claimant claims to have been employed are either that there was a transfer of the BCG or its congregation to SBC (and therefore the contract should be implied from conduct either de novo or having transferred from NTCG) or that there was an oral agreement with Pastor Boyd in which he was offered employment (of which there is a paucity of evidence and which would have been outside Pastor Boyd's authority). The claimant cannot dispute the facts that there was no cost to SBC of him doing his work. Ms Streets was careful to ensure that there was no cost to the respondent and the bank statements show that there were separate banking arrangements for BCG. If there was no financial merger than the merger between the churches was never complete.
74. The lack of a cost to the respondent negates the argument that the claimant's description as an employee in the official paperwork and putting him on the books shows an intention to have legally binding obligations towards him. Furthermore, BCG continued to attempt to pay the claimant via SBC for 8 months despite discussion at the meeting of 17 February 2017 at which the claimant (a trustee of BFM) was present. This might suggest that BCG considered itself to have a legal obligation to pay the claimant which outlived the administrative arrangement to pay via the respondent. I am conscious that I have not heard from that organisation nor from BFM as such and I therefore make no finding that they considered themselves to be under such an obligation.
75. Mr Korn argues that there is no reason in principal why funding should not come from a third party to the contract if it is consideration for work done. That is true. An example might be a parent company supporting their subsidiary. But in the present case I have concluded first, that the third party is a separate entity, next that the third party gets the whole benefit of the work, thirdly that the third party pays the payee the entire cost of paying for the work and finally that they set the amount of the payment. In those circumstances I do not think it right to infer from the change of arrangements from payroll being administered by NTCG to being administered by SBC that there was an assumption by the respondent of any legal liability towards the claimant to make those payments.
76. I should make clear that I do not make a finding about whether the claimant was employed by NTCG prior to 31 July 2010, as he alleges, or by BFM (as Mr Oliver states). The issue of employment, particularly in relation to an ordained minister, is far too factually and legally complex for it to be wise for me to make a determination, even were it necessary for me to do so. I only comment that, although the claimant may

have done work to the benefit of NTCG as such when he first came to Southall in 1995, at the time of the administration of his payroll starting to be undertaken by SBC the evidence before me suggests that it was BFM which had the benefit of his labours.

77. I accept the principle relied upon by Mr Korn from Franks v Reuters Ltd [2003] I.C.R. 1166 CA that “dealings between parties over a period of years, as distinct from the weeks or months typical of temporary or casual work, are capable of generating an implied contractual relationship.” The operative word there is “capable”. The implication of a contract of employment requires more, I find, that the payment of money on behalf of another for work done by the payee for that other over a period of years. That is entirely consistent with the paying party merely agreeing to facilitate payment by that other.
78. Mr Korn also argued that there was no need for the work to be done directly for the respondent because the employee can be lent to someone else or seconded elsewhere. That is also true in principle, for example, in cases where the work is done pursuant to an obligation between the employer and a third party to provide services to that third party and those services are carried out by the claimant. That may be, on the facts, because the employee has an obligation to provide service to the employer. However, if both the work is done to benefit the third party and the third party pays 100% of the cost and there is no agreement between the third party and the putative employer giving rise to an obligation to provide those services or to benefit the putative employer then that leads to an inference that the individual is not working for the putative employer at all but that they are merely a conduit for payment and acting as the registered employer for tax purposes. They do not benefit from the transaction and they don't bear the cost of the transaction and that is what I find was happening in this case.
79. I have already concluded that the churches did not, in fact merge nor did BCG transfer to SBC. Furthermore, BCG continued to pay for the whole of the cost of the claimant and either they or BFM paid his expenses and pension contributions. They continued to have the financial responsibility for 100% of the cost of engaging the claimant and he knew that this reimbursement took place. This negates any suggestion that there was an assumption of responsibility towards the claimant by the respondent, save for the administrative function of paying his net salary to him and the employer's and employee's national insurance contributions and tax to HMRC. Indeed, that could be viewed as benefiting, not the claimant, but BCG (or BFM) who would otherwise have had to set up a payroll administration.
80. The fact that the churches did not merge means that the work done by the claimant was not done for the respondent. It is therefore inconsistent with the implication of a contract between the claimant and the respondent by reason of conduct. It is not necessary to do so to understand what happened. More to the point, the claimant had not assumed any responsibility to do work for the respondent: he was still doing work for BFM or BCG. Nowhere is that more clearly seen than in the arrangements for his sabbatical: he asked permission of BFM not SBC and BFM provided the cover for his role. Furthermore, nothing transferred from BFM or from BCG to the respondent because the merger did not take place.
81. Was a new contract entered into between the claimant and SBC following a conversation with Pastor Boyd? The claimant's evidence goes no further than that it

was suggested that he become a pastor and he knew at all times that there were formalities which needed to be gone through before he could be appointed a pastor of SBC. These were not done. He was not under the misapprehension that Pastor Boyd could, without approval from a Special Church Meeting using a four-fifths majority, appoint him to be a pastor of the SBC and therefore my conclusion is that there was no conversation between Pastor Boyd and the claimant at which a binding offer of employment and acceptance took place. For a reason which has not been explained to me, the claimant did not go on the books of BFM. He was accepted on the books of SBC since at the time it was hoped that the churches would merge and that he would be accepted as a potential successor to Pastor Boyd and not because SBC had a legal obligation to provide him with work and to pay him.

82. In submissions it appeared for the first time that the claimant sought to rely upon the concept of ostensible authority. It was suggested by Mr Korn that Pastor Boyd had the ability to bind the respondent. It is clear from the terms of the constitution that he did not and, given that the claimant knew what the formalities needed to be he did not think that Pastor Boyd alone had the power to make a binding offer of employment on behalf of SBC. Furthermore, the claimant has given no evidence of any change of position to his detriment which he did relying upon a representation that Pastor Boyd had that authority made, not by Pastor Boyd himself, but by SBC and therefore any argument of ostensible authority fails.
83. That answers questions (3) and (4) of the issues set by EJ Hyams to the extent that it is necessary to do so. The claimant was not engaged under a contract of any sort with the respondent in relation to his work as a pastor. He may have been engaged under a contract in relation to his work as a pastor with BFM, BCG or NTCG but those questions did not need to be decided in order to decide whether the employment tribunal had jurisdiction to hear this claim.
84. If I am wrong about my conclusion that there was no contract of any sort between the claimant and the respondent then I go on to consider what kind of contract it was. I refer to my conclusion that there was no concluded merger or marriage between the two churches. At best, some members of the BCG congregation joined SBC and others attended the morning service while, over a period of more than a decade, discussions continued about a possible merger. That being the case, the work done by the claimant continued to be done for BCG, which is still in existence. The claimant was ineligible to perform personal services as a pastor for the respondent, as he accepted. Arrangements were made by BCG to cover the claimant's absence on sabbatical with their own pastor. That cover was not the obligation of SBC and this leads to a conclusion that the valuable work done by the claimant with the Tamil and Sinalhese congregation was not done for SBC. When the claimant attended the respondent's leadership meetings he did not do so as a leader of SBC and he only preached at services once in 6 ½ years or on exceptionally rare occasions.
85. For these reasons I conclude that the claimant did not provide personal pastoral services to SBC.
86. Furthermore, there was no mutuality of obligation between the claimant and the respondent. The claimant was not obliged to seek permission from the respondent when he intended to be absent for 9 months. On the contrary, he sought permission from BFM. SBC did not provide work and did not provide pay. It was providing the

administrative facilities to effect payment. On the other hand, the financial cost was born by BCG and, according to Mr Oliver, BFM paid the claimant's expenses and pension contributions. This suggest that organisations other than the respondent regarded themselves as having legal obligations to pay for the claimant's services.

87. The claimant did do some work out of an office within SBC premises. However, he did more work out of his office within BCG premises. He ministered to the Tamil and Sinhalese Congregation within the SBC building but that was the case both before and after the date on which he says he became an employee of SBC. Furthermore, BCG met in the SBC building in exchange for payment by them for use of that building and therefore I cannot reasonably infer from the fact that the claimant did some of his work in the SBC building that he was integrated into the business of SBC or that he was controlled by their trustees.
88. The claimant gives no example of an occasion when he acted under the control of Pastor Boyd but clearly did recognise the control of BFM since he sought permission for an extended sabbatical. Pastor Boyd's evidence of the information which would have been required by SBC before authorising a sabbatical, as to purpose of the trip and what the benefit would be for his ministry, was plausible and I accept it. Indeed the claimant readily accepted that he informed Pastor Boyd of his intention to go which suggests that he agrees with the statement that it was none of SBC's business whether the claimant went or not.
89. These are all matters which meant that the essential hallmarks of s.230(1) ERA employment are missing from any arrangement between the claimant and the respondent.
90. The lack of any kind of contract is also fatal to the claim that the claimant was an employee within the meaning of section 83(2) EQA. Furthermore, the lack of personal service is also inconsistent with there being a contract for the claimant personally to provide services within the extended meaning of the EQA.
91. I then go on to consider whether the claimant was an office-holder within the meaning of section 49 of the EQA. This section requires that he fills a personal office which is one to which a person is appointed to discharge a function personally under the direction of another person in respect of which they receive remuneration.
92. I have concluded that the claimant was not an office-holder within the meaning of section 49. The claimant did not carry out his function under the direction of anyone at SBC. He gave no evidence of any occasion on which he was given any direction by anyone at SBC and carried out no function for them personally. He was unable to, having not been appointed to the position of Pastor under their constitution and lacking the essential qualification of being a Baptist approved minister.
93. I do not need to go on to consider whether the particular jurisprudence applicable to ministers of religion applies.

## **Disposal**

94. I have concluded that the claimant was not an employee within the meaning of section 230(1) and (2) of the ERA nor was he an employee within the meaning of ss. 39 and 83(2) of the EQA or an office holder within the meaning of s.49 of the EQA.
95. Mr Korn argues that I should not dismiss the claims but should stay them with a direction that they be dismissed within 21 days of the day on which this judgement is sent to the parties if the claimant does not within that time apply to join BFM as a second respondent.
96. The claimant could easily have applied before now to join BFM. The exchange of witness statements took place before Christmas 2017. The claimant himself denies that he was employed by BFM although he may have in mind the statements on the official documents concerning tax and national insurance. Those are not determinative of employment status and while the implicit statement on the P45 at JB page 8 that he had left the employment of NTCG may be evidence of an employment relationship with them it is not conclusive.
97. If the claimant was at any stage employed by BFM under a contract of employment (which would be subject to arguments concerning the position of ministers of religion) then it is not inevitable (on the evidence before me) that any such contract has come to an end. BCG attempted to continue to pay the claimant for 8 months. Mr Korn accepted that the sending of the P45 by itself was not necessarily an indication that any employment relationship was being terminated and neither of the two P45s of which I am aware were sent by BFM.
98. Neither BMF nor BCG were parties before me. They had had no notice of the hearing or of the potential for this application to be made and I consider it not to be in the interests of justice to allow this claim to continue, essentially in limbo when the claimant's representatives accept they have no present instructions to make an application to amend. Mr Korn seeks to protect his client's position but that would only be the case if, in doing so, it resulted in the loss of a potential time limitation defence for a respondent with whom the claimant has not yet conciliated. I take into account the recent decision of the EAT in Galilee v Commissioner of Police for the Metropolis UKEAT/0207/16, in which HHJ Hand QC held that the mere fact that an amendment is allowed after the normal time limit for presenting a claim based upon the act which is the subject of the amendment has expired may not deprive the respondent of the benefit of any argument that the employment tribunal lacks jurisdiction to hear that particular complaint.
99. Similarly, there is no outstanding application to amend the claim against the present respondent in order to allege that they are liable as an agent of BCG or BFM under section 110 for having communicated the dismissal of the claimant from his role with BCG.
100. If the claimant now wishes to bring any kind of claim against BFM or BCG whether in respect of unpaid wages, unfair dismissal or race discrimination then he should do so by presentation of a new claim following the mandatory early conciliation. I shall dismiss the claims under the ERA and EQA.
101. However, no doubt through oversight, the questions of whether the claimant is entitled to bring a claim for breach of contract in respect of failure to pay notice pay or holiday

pay accrued but unpaid on termination of employment were not listed by EJ Hyams to be considered at this preliminary hearing. Regrettably, it is only on preparation of this reserved judgment that it has come to my notice that those claims were clearly included on the claim form. The jurisdiction under the applicable statutes and, in particular, the definition of worker under the WTR, is not exactly identical to the definitions of employment under the ERA or the EQA upon which I have been addressed.

- 102. However both the WTR and the Extension of Jurisdiction Order require there to have been a contractual relationship of some sort between the parties and therefore, given my finding of fact that there was no contract of any sort between the claimant and the respondent it is extremely unlikely that any submission that might be made that the claimant was a worker within the meaning of WTR or entitled to claim wrongful dismissal under the Extension of Jurisdiction Order would succeed. In those circumstances I have decided to stay those claims for a period of 14 days from the date on which this judgment is sent to the parties. If, by that time, the claimant has not written to explain why the claims should not be dismissed then the claims will be dismissed without further order. If such submissions are received, then they will be considered and a judgment made without a further hearing.

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Employment Judge George

11 April 2018

Sent to the parties on:

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For the Secretary to the Tribunals