



# EMPLOYMENT TRIBUNALS

**BETWEEN**

**Claimant**

**and**

**Respondent**

**Mr M Rahman**

**Ministry of Justice**

## PRELIMINARY HEARING

**HELD AT London South**

**ON 13 January 2017**

**Employment Judge Cheetham**

**Appearances:**

**For Claimant:**

**Mr R Clement (counsel)**

**For First Respondent:**

**Ms L Prince (counsel)**

## **JUDGMENT**

1. The Claimant was not an employee as defined in the Employment Rights Act 1996 s. 230(1) and (2), nor a worker as defined in the Employment Rights Act 1996 s. 230(3).
2. The Claimant was not within the “employment” of the Respondent as defined in the Equality Act 2010 s. 83.
3. The Tribunal lacks jurisdiction to hear the Claimant’s complaints and his claims for discrimination because of race and religion, unfair dismissal and a failure to make payments in respect of notice, sickness and holiday are therefore dismissed.

## **REASONS**

1. This is a claim brought by Mr Mohammed Wahidur Rahman, in which he alleges that he has suffered discrimination because of race and religion, unfair

- dismissal and a failure to make payments in respect of notice, sickness and holiday.
2. However, before any substantive hearing could take place, his claim was listed for this Preliminary Hearing to consider the following:
    - 2.1 whether the claims should be dismissed because the Claimant was not an employee of the Respondent as defined in the Employment Rights Act 1996 s. 230(1) and (2).
    - 2.2 Whether the claims should be dismissed because the Claimant was not a worker of the Respondent as defined in the Employment Rights Act 1996 s. 230(3).
    - 2.3 Whether the claims should be dismissed because the Claimant was not within the “employment” of the Respondent as defined in the Equality Act 2010 s. 83.
  3. At this hearing, the Tribunal heard evidence from Mr Rahman and – for the Respondent – from Michael Kavanagh (Chaplain General, Head of Chaplaincy and Faith Services) and Mohamed Yusuf Ahmed (Managing Chaplain at HMP Brixton).
  4. It is worth noting that this was a case where each of the witnesses was plainly seeking to assist the Tribunal by providing helpful and truthful evidence, even where that did not assist their case. The Tribunal was also assisted by counsel for both parties; in particular, it is grateful to Mr Clement, who was acting at short notice, but nevertheless said everything that could be said on the Claimant’s behalf.

## The Law

5. Under the Employment Rights Act 1996 s.230:
  - (1) *In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked 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” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked 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;*

*and any reference to a worker's contract shall be construed accordingly.*

6. Under the Equality Act 2010 s.83(2):

*“Employment” means—*

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

7. The Tribunal was referred to the well-established guidance in *Ready Mixed Concrete v Minister of Pension and National Insurance* [1968] 2 QB 497, as well as *Jivraj v Haswani* [2011] IRLR 827, *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 and *Bates van Winkelhof v Clyde & Co LLP* [2012] IRLR 553 (the EAT decision). The Claimant’s witness statement referred to a number of additional authorities, which it is not necessary to list.

### **Findings of fact**

8. The Chaplaincy team in prisons is made up of a mix of employed chaplains and what are termed “sessional” chaplains. There is a four-stage selection process for employed chaplains, with appointment through “fair and open competition”. If selected and employed, their terms and conditions of employment provide them with the usual benefits of sick pay, holiday pay, notice and so on. They are also enrolled into the Civil Service pension scheme.
9. Sessional chaplains are appointed under the Prisons Act 1952 s.10 on an ad hoc basis depending on the needs of a particular prison. Their hours may vary (but equally, they might work regular hours) and they do not receive benefits such as holiday or sick pay. They are paid an hourly rate, although their tax and National insurance are deducted at source. Sessional chaplains are not subject to attendance, performance or conduct procedures.
10. Mr Kavanagh’s evidence, which the Tribunal accepted, was that a sessional chaplain could not become an employed chaplain other than by going through the selection process.
11. Employed chaplains have a number of “statutory duties”, such as dealing with newly received prisoners, dealing with vulnerable prisoners and those who are segregated. Sessional chaplains might assist with these duties, but would generally be working fewer hours and engaged to cover specific classes or duties.
12. The Claimant is a Muslim chaplain. In 2006, he started work as a sessional chaplain at HMP Wormwood Scrubs, moving to HMP Brixton in 2010. He

started work as a result of a personal referral, so never went through any appointment process. In fact, HMP Wormwood Scrubs was the Claimant's first job following his graduation from a religious institution.

13. The Claimant did not have a written contract, although the Tribunal was shown an unsigned example of a contract for sessional chaplains, which emphasised the lack of mutual obligations. He placed great reliance in this hearing on documents such as his pay slips and P60, which referred to him as an employee and to the National Offender Management Service as his employee. His hours were originally 40 per week, but these were reduced to 30 hours per week in 2010 and then reduced to nearer 20 hours. He worked three days per week and was paid by the hour. The Claimant had regular classes to attend and carried out the same duties each week, although the pay slips did suggest some variation in hours and therefore pay.
14. Given that all chaplains were working in a controlled environment, sessional chaplains had to observe the same rules and security requirements as employed chaplains.
15. The Claimant said in evidence that, in 2010, he was promised that he would be made a permanent employee. He was told that, if he were an employee, he would receive holiday pay. However, there was no change to his working pattern and he was not given a contract or any contractual benefits.
16. The Tribunal heard some evidence about the provision of a substitute. As is usually the case in preliminary hearings dealing with employment status, the Respondent emphasised the Claimant's ability to provide a substitute and – again as is usually the case – the reality was more limited, because any substitute would not only have to be a Muslim chaplain, but also have the necessary clearance.
17. The Claimant had some daily contact with Mr Ahmed and, for example, they would often eat together during the day. As colleagues sharing the same faith, they obviously had much in common.
18. The Claimant was dismissed with effect from 11 November 2015, but the Tribunal does not need to make any findings about that termination at this hearing, save to note that there was no notice period.

## **Conclusions**

19. The Claimant's case is that, at some undefined point, his status changed from a sessional chaplain to an employed chaplain.
20. Before dealing with that, it is sensible to consider the status of sessional chaplains. On the evidence (including from the Claimant himself), there is an absence of any mutual obligation in the engagement of sessional chaplains. They are engaged on an ad hoc basis to cover sessions, without either a guarantee from the Respondent of further work or any commitment from the

- chaplain to provide that. They are not subject to conduct or capability procedures, do not receive holiday pay or pay if they are absent through sickness and they are not obliged to cover any of the statutory duties.
21. The labelling of documents such as pay slips with the word “employee” or “employer” is no more than that: labels on documents used across the service. One can see how they might encourage someone to think that was an accurate label, but they cannot be determinative.
  22. The reality of providing substitutes is limited by the very small group of those who could act as substitutes, but nevertheless the Claimant did say that he could get a friend in NOMS to cover for him.
  23. The Tribunal’s conclusion is that sessional workers are not employees within the statutory definitions, as there is no mutuality of obligation and the sessional chaplain does not work under a contract of employment. A sessional chaplain is an independent provider of the particular services and is able to choose what he or she does or does not do, without sanction (apart from termination). There is an absence of control in the relationship, as opposed to necessary management and the application of rules common to all those who work in a prison. In the circumstances, a sessional chaplain is not a worker either.
  24. Therefore, if it is accepted that the Claimant was a sessional chaplain when he was first engaged, the question then becomes whether his status ever changed.
  25. The Claimant, who – as noted above – was completely open and honest in his evidence, told the Tribunal that he wanted to become an employed chaplain, but nothing changed. He is right. Whilst it is completely understandable that time and familiarity with his role would encourage him to think in terms of permanence, the legal reality was that his status did not change and he remained a sessional chaplain until his engagement was terminated.
  26. As a footnote, the mere fact that a competitive process is followed in employing chaplains does not mean that, in law, a chaplain who is not recruited through that process could not be an employee. It was submitted by the Respondent that, if it was found that the Claimant was an employee, then by virtue of that status having been attained without following the requirements of the Civil Service Order in Council 1995 (now revoked by the Constitutional Reform and Governance Act 2010), his appointment would be ultra vires and illegal. Whether that is right or not, it is not an issue that the Tribunal needed to decide.
  27. The Claimant was a sessional chaplain from his engagement in 2006 until the termination of his engagement in 2015. As such he was neither an employee, nor a worker within the various statutory definitions and it follows that the Tribunal does not have jurisdiction to hear his complaints, which are therefore dismissed.
  28. The Claimant will certainly think that is a harsh decision and it is probably of

no comfort to him to know that it is a conclusion based on an analysis of the evidence and the application of legal tests. It is not in any way a judgment on his abilities and the valuable service he has provided.

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Employment Judge Cheetham

Judgment sent to the parties and entered in the Register on: 13<sup>th</sup> February 2017