# EMPLOYMENT TRIBUNALS

**Claimant:** Dean Martyn Percy

**Respondent:** The Dean & Chapter of the Cathedral Church of Christ in Oxford of the Foundation of King Henry VIII

**Heard at:** By CVP **On:** 12, 15 &16 October 2020

**Before:** Employment Judge Andrew Clarke QC (sitting alone)

**Appearances**
For the claimant: Ms S Fraser-Butlin, Counsel
For the respondent: Mr P Oldham QC

# JUDGMENT

**1.** At all times material to his claims in these proceedings the claimant was an employee of the respondent pursuant to s.83(2)(a) of the Equality Act, 2010.

**2.** At no time material to these proceedings was the claimant in Crown Employment pursuant to s,83(2)(b) of the 2010 Act.

# REASONS

## Background

1. The claimant brings claims of disability discrimination and of religious discrimination, both under the Equality Act, 2010. The respondent disputes that the claimant has the relevant status to bring such clams.

2. In order to bring such claims, the claimant must show that he is an employee for the purposes of the 2010 Act. He relies upon two limbs of the definition of employment found in that Act. He says that he is an employee under s.83(2)(a), alternatively that he is employed in Crown employment (s.83(2)(b) of

the 2010 Act, which adopts the definition of Crown employment in s.191 of the Employment Rights Act 1996).

3. I will begin by setting out the facts material to this issue, then consider the law and, finally, apply the law to the facts as found. The key disputes between the parties are as to the interpretation of the facts and as to the meaning of the two relevant parts of s.83(2).

4. On this issue I heard evidence from Professor Woudhuysen, the Rector of Lincoln College (as to the role of a Head of House in Oxford), Mr James Lawrie, the Treasurer of the respondent (as to aspects of the Dean's role and remuneration), Professor Watson, the respondent's Censor Theologiae (as to the appointment of the Dean, the roles of the Censors and aspects of the Dean's role) and the claimant himself (as to his appointment and work). Each witness helpfully put some flesh upon the bones of the various documents dealing with the topics they spoke to by describing how things worked in practice.

## The facts

5. It is not in dispute that the Dean worked (and works) on behalf of the respondent, both in relation to the cathedral and the academic institution, carrying out a wide range of tasks, that these activities encompass those that other heads of Oxbridge colleges (mostly full time employees) would be expected to carry out and that before these disputes began he devoted almost all his working time to the carrying out of those tasks. Since the disputes began the situation has changed somewhat, due to periods of complete and partial suspension from duties. Currently, the Dean is not permitted by the respondent to carry out significant parts of what he would otherwise do because of the conflicts of interest which these on-going proceedings are said to give rise to. The relevance of those basic facts is hotly disputed.

6. The post is established and some core functions briefly defined in the respondent's statutes which are made under the Oxford and Cambridge Acts 1877 and 1923 by a process led by Commissioners and set out in the 1923 Act. A somewhat more detailed description of the work expected from the Dean was set out in a Further Particulars document which was prepared at the time of the search for a new Dean and provided to candidates. It describes the collegial nature of the respondent and its governance and how the Dean must work closely with the Censors and requires "a good understanding of the administrative affairs of the college, so as to be able to advise and support its Officers, and to provide leadership, direction and guidance to the deliberations of the Governing Body and its committees". It refers to his role in representing the respondent in the wider University, to his sharing the pastoral work in the college with the chaplain, his responsibility to host and speak at events and in relation to the continuing development of the respondent where his role is described as "central". His role as a Dean of the cathedral of the diocese of

Oxford is also summarised and is clearly an integral part of the role of the Dean. The respondent is a single, indivisible, foundation comprising both college and cathedral. Skills and experience commensurate with those expected duties are said to be required or, in some cases, desirable, for the post holder.

7. The Dean lacks the power to govern by imposing his decisions on the respondent. Matters of any significance must be decided by the Governing Body (or its committees). He chairs all of those bodies, but they operate by consensus. Building a consensus and dealing with the problems associated with those bodies being largely composed of academics used to debate and, in many cases, possessing an adamantine belief in their own views, are essential skills. He does not act as the line manager for other of the senior post-holders (such as the Censors), instead he must work with them.

8. There is no written contract of employment, no grievance procedure and there is no power in the respondent to give notice (although a retirement date is specified). Why there is no grievance procedure is unclear, I accept that when the claimant asked, he was told that this was a matter which needed to be addressed. His appointment is by Letters Patent, but so are the appointments of Canon Professors and the Sub-Dean, all of which have grievance procedures and contracts of employment (in the form of letters containing some terms and conditions). The Dean's salary is not set by statute, it is left to the parties to agree. Exchanges after his appointment show him discussing (in legal terms negotiating) with the respondent regarding other benefits.

9. The provisions (in the Statutes) for removing the Dean (and many other Officers and academics) for "good cause" involve members of the Governing Body putting forward a case, which either of the Governing Body and the Chapter may block from going forward. If not blocked, the charges are considered by an independent person (who may sit alone, or with equal numbers of Governing Body and Chapter members). That person (or body) may find charges to be proved and, if so, must then consider whether to recommend the Dean's removal. If that is recommended, the final decision is for the Censor Theologiae, after consulting others (including the Governing Body).

10. The definition of "good cause" is perhaps not expressed in the terms that an experienced employment lawyer would choose if drafting it today. However, it includes "conduct of an immoral, scandalous or disgraceful nature incompatible with the duties of the office or employment" and "conduct constituting failure or persistent refusal nor neglect or inability to perform the duties or comply with the conditions of office or employment". Mr Oldham QC emphasises that it does not refer to a failure to exercise skill and care, or to a breakdown of trust and confidence. However, I consider that a serious example of the former and behaviour on the part of the Dean which caused the latter would both fit within the definitions.

11. It is right that the Statutes do not refer to the Dean having to undertake his duties personally. On the contrary, provision is made for Censors (for academic matters) and the Sub-dean (for cathedral matters) to carry out those functions. There is said to be a key distinction (stressed by Professor Watson) between the expectation that the Dean would carry out the duties set out (very generally) in the Statutes and (in more detail) in the Further Particulars, but no requirement that he should do so. I note that a failure to do so is a cause for removal.

12. The Dean holds some other posts (eg, as a school governor) ex officio and also holds other posts (often carrying no duties), but they occupy very little of his time.

13. Both when the charges were brought against him and after they were dismissed by the Smith Tribunal, but with these tribunal proceedings remaining extant, the respondent (acting by the senior ex-Censor, as the Statutes provide) suspended the claimant from all, or some, of his duties. The suspension letter of 7 November 2018 was written by Professor Cartwright. That eminent scholar of contract law was then the senior ex-Censor. His letter contains various statements upon which Ms Fraser Butlin lays emphasis. The Professor referred (1) to the Dean's role as being "integral" to all aspects of the operation of the respondent, (2) to his not being required or permitted to carry out his duties as Dean for a period, (3) to his remaining entitled to his "normal contractual benefits", and (4) to his continuing "to be engaged by [the respondent] and bound by [his] continuing duties as fiduciary and trustee…".

14. I do not consider that the language chosen (which is consistent with an employment relationship) is of particular assistance to me. The Professor, from whom I did not hear as a witness, seems unlikely to have had the present status issue in mind when he wrote the letter. I consider that his letter reflects the realities of the situation in practical terms. The Dean's role was integral to the operation of the respondent and, in ordinary circumstances, he would be expected to carry it out, so far as possible performing his duties personally.

15. The procedure for appointing the Dean was largely drawn from that used in the case of his predecessor. As far as possible, the respondent wished to make the appointment itself, but it recognised that there were roles for Downing Street (which would pass the name of the proposed candidate to the Queen) and the Bishop of Oxford. In practice, the Bishop had a veto over any candidate proposed, because Downing Street would be unwilling to put forward any candidate which the Bishop opposed. If the Bishop was content with the person, Downing Street was content to receive only a single nomination, which it would then pass to the Queen.

16. I do not regard the involvement of third parties in this process as of particular significance. The respondent ran the process and selected the candidate to put

forward. As an interested party, the Bishop was consulted in very much the way that a company might sound out its largest customer, or a charity its largest funder, about a proposed new CEO. The Bishop being content, the appointment process was then a matter of form; the sole candidate then put forward would be appointed. The respondent produced its short list, the Governing Body organised what it called scoping interviews and then final interviews and the final choice was made by the Governing Body after a vote.

**The Law**

17. I turn first to the law as regards s.83(2)(a). The claimant must show he was an employee and "employment" is here defined as "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work".

18. There have been a number of cases before the higher courts since 2004 which have considered this provision. I shall review them below. The parties advance diametrically opposed submissions as to the effect of that case law. In summary:

    a. The respondent says that a contract between the alleged employer and the alleged employee must be demonstrated, without it the fact that the alleged employee may perform work for the alleged employee is irrelevant. The respondent says that there is no such contract here.

    b. The claimant says that there is no need to establish any such contract, simply an employment relationship, because the precise legal categorisation of the relationship is irrelevant, but if there is such a need one, can be established here.

    c. The claimant says that that the European definition of worker has to be considered when defining the test in the sub-section. That being so, it is argued that the approach to the analysis of situations of individuals who do work for others is a binary one; the relationship must either be of employment, or of self-employment. The respondent acknowledges the role of European law, but says that the approach is not binary, rather it allows for a third category of case where the relationship is neither employment, nor self-employment. The respondent says that this case falls into that third category, because the claimant is an office holder without a contract with the respondent. The claimant says that when the binary approach is adopted, this is a clear instance of employment.

    d. The respondent stresses that for a relationship to be one of employment, the employee must be subordinate to the employer, meaning that he must be bound to act as directed by the employer. That is absent here, the respondent says. The claimant does not dispute that the issue of subordination is relevant, but sees it as merely one factor to be

considered in the context of the binary approach referred to above and asserts that it is, in any event, sufficiently present here.

19. At the heart of this dispute lies the decision of the Supreme Court in **Ministry of Justice v. O'Brien** [2013] ICR 499, following on from the decision of the CJEU in the same case (Case C-393/10). The claimant says that it clearly establishes the principles contended for, as set out above and that the subsequent cases do not suggest otherwise. The respondent takes the contrary view, it suggests that the case supports its contentions and that, if there was any room for doubt, the subsequent cases make clear that it is right. Both sides find some assistance in certain cases decided before **O'Brien**. Hence, I need to examine, in sequence, all of these cases.

20. The cases to which I was referred in detail are as follows. I set them out below, in the order of their being decided:

**Allonby v. Accrington and Rossendale College** [2004] ICR 1328 (ECJ 13 January 2004)

**Percy v. Board of National Mission of the Church of Scotland** [2006] 2 AC 28 (HL December 2005)

**Jivraj v. Hashwani** [2011] UKSC 40 (SC 27 July 2011)

**O'Brien v. Ministry of Justice** Case C-393/10 (CJEU 1 March 2012)

**CVS Solicitors v. Van der Borgh** UKEAT/0591/11/JOJ (EAT 16 April 2012)

**O'Brien** (SC 6 February 2013)

**Halawi v. WDFG UK Ltd (t/a World Duty Free)** [2015] IRLR 50 (CA 28 October 2014)

21. In **Allonby** the college had originally employed its part-time lecturers on contracts of employment. It terminated these, but re-engaged Ms Allonby through an agency to do the same work, but on less valuable terms to her (especially as to pension). In order to bring a claim in the English courts for equal pay she had to show that she was an employee of the college, under what is now s.83, despite the fact that she was engaged via the agency as being a self-employed person. The right to equal pay (in common with most other rights not to be discriminated against) has its source in EU law, hence the ECJ proceeded on the basis that in domestic law the right must be given to all those who EU law regarded as entitled to it. EU law gave that right to all "workers" and well-established case law had established that the concept of worker should not be interpreted restrictively (para.66).

22. Whilst "independent providers of services not in a relationship of subordination with the person who receives the services" are not workers (para.68) the precise nature of the legal relationship between the worker and the other party to the relationship is of no consequence (para.70). Hence, the fact that under

domestic law Ms Allonby might be regarded as self-employed was of no consequence (para.71) if, when all the factors and circumstances were looked at, she was not to be regarded as a true independent provider of services.

23. Mr Oldham QC submitted that the ECJ had required there to be a contract of some kind between Ms Allonby and the college after she was engaged via the agency. I do not consider that this is correct. The ECJ was concerned to know whether an employment relationship existed; the legal nature of that relationship was not material. I accept that the ECJ suggested that there would need to be "a relationship of subordination", but I do not regard the court as requiring that to be established via a contract between the parties. Indeed, consistent with the statement that the concept of worker should not be interpreted restrictively, I consider the concept of 'subordination' to be a broad one to be considered having regard to the practical realities of the case.

24. **Percy** concerned whether a Church of Scotland minister was in an employment relationship with the Board of National Mission. It was found, by the majority (Lord Hoffman dissenting), that she had entered into a contract personally to do work for the alleged employer. Hence, she was found to be an employee within what is now s.83. Hence, unlike **Allonby**, this was not a case where the extended definition of employee resulting from the application of EU authorities and principles was required. The situation was found to fit into the clear wording of the domestic statute.

25. Mr Oldham QC submits, however, that the way the majority approached the matter, in particular the EU materials, shows the claimant's contentions to be wrong. He says that it is clear that they considered that a contract between the parties was required and, furthermore, that there is no such binary approach as suggested by Ms Fraser Butlin.

26. Ms Percy's case was that she had entered a contract to provide personal services (see Lord Nicholls at para.13). Hence, I consider it unsurprising that their Lordships looked to see whether this was established. She was not asserting that she had an employment relationship without a contract as her primary case. It appears (see the consideration of Lord Hoffman, below) that she may have raised this as an alternative case, but it was not considered save by Lord Hoffman. However, I accept that the way the primary case is considered does she some light upon wider principles.

27. Lord Nicholls (and others in the majority) considered whether the fact she might be described as an office holder precluded the existence of a contract of employment. This was found not to be the case (eg, Lord Nicholls at para.20). What he does not explore is the status of an office holder who lacked a contract (of some sort) with the alleged employer, but I consider his speech consistent with the view that all the circumstances of the case would need to be examined to see whether that individual was in an employment relationship with that

employer. Whether he considered that if this was not the case, then the individual would be regarded as self-employed, or could be seen as being in some other category is not considered.

28. Lord Hope considered in detail what were terms and conditions of the appointment and whether they and the circumstances in which they were entered into gave rise to the contract personally to do work which was contended for (para.113). I do not read that paragraph as requiring a contract to be established in order to satisfy the statutory test read as consistent with EU law. Before turning to what he calls the Jurisdiction Issue (essentially the status issue in this case) he records that he has found there to be a contract between Ms Percy and the respondent Board (para.116).

29. In dealing with that issue Lord Hope referred to the extended definition of worker in European law and to **Allonby** in particular (para.126). He posed the question as to why someone employed to work as an associate minister should be excluded from protection by the relevant Directive (para.129). He noted that the fact that she was an office holder would not exclude this and it was his view that the relevant 1921 Church of Scotland Act had to be interpreted to permit this protection, in so far as it might be argued that it otherwise did not. He did not suggest that a contract had to be found, merely that there was one found in that case.

30. Lord Scott agreed with Lord Nicholls, Lord Hope and Baroness Hale. In doing so, he made clear that he found that Ms Percy had been "contractually employed by the Board to work as an associate minister" (paras. 137-8). Hence, he provides no assistance to Mr Oldham QC.

31. Baroness Hale expressed her agreement with the reasoning of Lord Nicholls (para.140). She also noted that "the familiar concepts of the common law are of limited help in construing modern employment legislation" (para.141), before noting the need for a purposive construction of the term 'worker'. She cited a passage dealing with the status of judges generally from a case in the Northern Ireland CA (para.145), before noting that the passage illustrates "how the essential distinction is … between the employed and the self-employed" (para.146). In paragraphs 147 and 148 she explored the inter-relationship of the concepts of office holding and an engagement to provide services. She agreed with Lord Nicholls that the mere fact of the individual being an office holder cannot be determinative against worker status. Unlike him, she did (as noted above dealing with para.146) refer to the binary approach, but what is not spelled out is whether she saw office holders who could not demonstrate an employment relationship as falling into the self-employed category, or some other category.

32. Mr Oldham QC relies upon these passages as showing that there is no such binary world as Ms Fraser Butlin contends for. He asserts that Baroness Hale recognised that many people will fall outside the scope of that binary approach,

one example of which is statutory office holders. I do not consider this to be correct. As I have noted, she did not deal explicitly with this point. However, in paragraph 146 she stated the essential distinction to be a binary one. I consider that in what follows she was seeking to distinguish between office holders that fall on the employment relationship side of the dividing line and those who fall the other side. In any event, none of the others in the majority deal with the point in a way consistent with Mr Oldham QC's characterisation of Baroness Hale's speech and she states her agreement with Lord Nicholls who dealt with the office holder issue but did not address this point.

33. Lord Hoffman rejected the submission that the Tribunal had found a contract to exist and, anyway, considered such a finding to be wrong in law, because he considered her an office holder (para.64). Unlike Lord Nicholls, he did not consider the jurisprudence on whether office holding and having a contract to perform services are mutually exclusive. He did consider whether a wider interpretation of (what is now) s.83 was required by the ECJ. Without considering the reasoning in **Allonby**, he rejected the submission that as an office holder she could nevertheless be in an employment relationship, both because he did not believe that the domestic provision could properly be construed to encompass the wide definition of worker and because office holding was inconsistent with an employment relationship. Both reasons are inconsistent with the majority view. Furthermore, the suggestion that s.83(2)(a) could not be construed in a way consistent with the EU definition of 'worker' finds no support in subsequent cases, all of which proceed on the basis that it can and must.

34. In summary:

    a. **Percy** dealt with a case where there was a contract personally to provide services.

    b. The majority are clear that labelling someone as an office holder does not preclude the finding of a contract personally to provide services. Nothing explicit is said about whether the same must be true of an employment relationship without a contract, but the approach of Baroness Hale seems to me consistent with this.

    c. There is no finding that a contract is necessary for the s.83(2)(a) test to be satisfied.

    d. The binary approach receives support from Baroness Hale.

35. I now turn to **Hashwani**. Some six years had passed since the HL considered **Percy** and the SC had been created to replace that body. None of those who sat to hear **Percy** sat in this case. Lord Clarke gave a judgment with which Lords Phillips, Walker and Dyson agreed. Lord Mance expressed entire

agreement with Lord Clarke, but added some comments of his own relevant to the particular facts of the case, which concerned the status of arbitrators.

36. This was a case where there was no dispute about the existence of a contract pursuant to which the arbitrator rendered his services (para.23). Lord Clarke noted the wide definition of worker in European authorities and cited extensively from **Allonby**, including the passages I have referred to above (para.26). He summarised the law in paragraph 27. He accepted that the Court of Justice drew a clear distinction between those who are employed and "independent providers of services who are not in a relationship of subordination with the person who receives the services", which he took to refer to those who were genuinely (not just notionally) self-employed. He considered that **Percy** demonstrated the adoption of this approach to the status tests in English domestic discrimination legislation (paras.28 and 34). He cited Baroness Hale's binary approach and her citation of the passage on the status of Judges (paras.30 to 32).

37. It is in relation to what he drew from those citations that the parties here differ. Mr Oldham QC says that Lord Clarke proceeded on the basis that there must be a contract in place. Ms Fraser Butlin contends that the references to a contract are to be understood as doing no more than reflecting the fact that there was no dispute, in that case, that the relationship was governed by a contract.

38. At no point in the relevant paragraphs of his judgment (paras.34 to 39) does Lord Clarke expressly state that a contract, as distinct from an employment relationship without a contract, is required. He deals with issues in relation to cases where there was a contract and neither his case, nor any of those he cited, was a case where there was no contract. However, when formulating what he describes as "the essential questions in each case" (para.34) he cites paragraphs 67 and 68 of **Allonby**, neither of which refers to the need for a contract. He summarises the distinction between those who perform services for and under the direction of another and independent providers of services, without referring to the need for a contract. He simply states that these are "broad questions which depend upon the circumstances of the particular case". He then states that they "depend upon a detailed consideration of the relationship between the parties" and will require "an analysis of the substance of the matter".

39. I consider it important that Lord Clarke there makes no reference to the need for a contract. Against that background, I do not consider that it can be said that in what follows Lord Clarke intended to say that a contract is required for an individual to have employment status.

40. **Hashwani** referred to the existence of the **O'Brien** litigation, but the CJEU had yet to rule and, indeed, the Advocate General's opinion was not published until November 2011, over 3 months after judgment in **Hashwani**. However, the

reference to the CJEU had been made by the SC in July 2010. The judgment of the SC which lead to the reference had been given by Lord Walker (**Hashwani** para.33) and the panel included Lord Clarke and Lord Dyson (who sat in **Hashwani**) as well as Baroness Hale.

41. **O'Brien** concerned the status of part-time judges. In the light of Mr Oldham QC's submissions, it is interesting to note the way the two questions were framed, consequent, no doubt, upon the submissions of the UK government. The government submitted that judges were not employed under a contract and that domestic law does not recognise any category of employment relationship which is distinct from one created by contract (para.39). Both questions posed by the SC were framed in terms of whether judges were workers having "an employment contract or employment relationship" (para.23). In the circumstances, I consider it surprising that if Lord Clarke (and those who agreed with him) in **Hashwani** had intended to state that their understanding of UK law as interpreted consistently with EU law) was that a contract was needed, they did not say so.

42. The guidance from the CJEU to the SC is contained in paragraphs 41 to 43. The CJEU set out the following principles and observations:

    a. That a judge is an office holder does not deprive him of the status necessary to bring the material discrimination claim (para.41).

    b. To fall outside the scope of those with that status the nature of the relationship between the judge and the Ministry had to be substantially different from the relationship between employer and employees falling into the category of worker (para.42).

    c. That is a question for the domestic courts, but the CJEU set out some principles and criteria which the domestic court "must take into account" (para.43).

    d. The question had to be answered "in particular in the light of the differentiation between that category [of workers] and self-employed persons" (para.44).

    e. The domestic court should look at the rules for appointing and removing judges and the way their work is organised (para.45).

    f. The CJEU noted that judges were entitled to sick pay, maternity or paternity pay and similar benefits (para.46).

    g. The fact that a judge is a worker does not undermine the principle of the independence of the judiciary (para.47).

43. The next case, in time, is **CVS Solicitors** in the EAT. It is important to note the time frame. Judgment was given after the CJEU had ruled in **O'Brien**, but it is not referred to. This is, no doubt, because of the impact of the timing of the delivery of the SC decision in **Hashwani** as it impacted upon the reasoning of the ET. That decision was published after submissions before the ET, but before the judgment was delivered. Additional submissions were made and the judge considered them. However, the EAT concluded that this consideration was inadequate, because there was an insufficient consideration of the realities of the relationship between the parties and the case was remitted.

44. I do not find the consideration of **Haswani** in this case to be of assistance. HHJ Serota QC was examining what was said in order to consider whether the facts as found (and consequent reasoning) by and of the judge below was adequate. Furthermore, he did not deal with any of the issues with which I must deal (as to what was meant by key passages in **Hashwani** and **Percy**), there appears to have been no dispute that there was a contract present in that case and he does not consider **O'Brien**.

45. **O'Brien** then returned to the SC, to be considered in the light of the rulings on the reference. The panel was the same as that which made the reference. The judgment of the court was given jointly by Lord Hope and Baroness Hale.

46. The worker, or status, issue was dealt with at paragraphs 29 to 42. This section begins by noting the CJEU decision and, in particular, that it was for national law to determine whether a part-time worker "has a contract of employment, or an employment relationship" (para.29). Mr Oldham QC submits that the reference to "employment relationship" adds nothing to the reference to an employment contract. I disagree. The SC is drawing a distinction found both in the reasoning of the CJEU and in the two questions referred to that court. Furthermore, the UK government had submitted to the CJEU that a contract was necessary and, in my view, it had plainly lost that argument.

47. As I understood his submissions, Mr Oldham QC's fall-back submission was that if there did not need to be a contract of employment, the court was clear that there had to be a contract of some sort in order to establish the employment relationship. Again, I disagree. I have no doubt that in many (if not most) instances of an employment relationship there will be some kind of contract (probably what a common lawyer would call a contract of employment) between the parties. English lawyers are familiar with creating and with analysing relationships in that way. That this was the approach adopted by the SC is clear from paragraph 31. Mr Allen QC (for Mr O'Brien) pragmatically did not press the court to express a view on the existence of a contract of employment, so that the case turned on the existence, or not, of an employment relationship. It was not suggested that this relationship had to by way of a contract. If that was the case, I would have expected the SC to spell this out at some point. It did not do so. In this context, I remind myself of Baroness Hale's

comment in **Percy** that "the familiar concepts of the common law are of limited help in construing modern employment legislation".

48. In the succeeding paragraphs I consider that the SC was looking at what it describes as "the reality of the work that is done by a recorder", as found in various memoranda issued by the Ministry, in order to test whether that judge had an employment relationship with the Ministry, or was a self-employed person, being the binary approach recognised in **Allonby** and **O'Brien** in the CJEU and by (at the least) Baroness Hale in **Percy** and by Lord Clarke in **Hashwani**.

49. The found that even if a judge is an office holder there could be an employment relationship with the Ministry (para.29), a court must then consider the reality and substance of the matter, to decide whether judges are "free agents to work as and when they chose as are self-employed persons", or whether "their office partakes of some of the characteristics of employment" (para.40). In other words, look at all the factors to see which side of the binary divide the case should fall.

50. Given the reliance placed upon the distinction between requirements and expectations in the present case, I note that the SC refers (in para.38) to an expectation that judges will operate in accordance with the terms and conditions set out in the memoranda.

51. The final case relied upon by the respondent is **Halawi**. All of the cases referred to above (with the exception of **CVS Solicitors**) were cited. The claimant was a beauty consultant who worked at a duty-free outlet operated by the respondent at Heathrow airport. The area in which she worked was provided to a cosmetics company by the respondent. That company had an agreement with a management company which staffed the outlet for it. She initially worked through an agency, but latterly she used her own service company which had an agreement with that management company and invoiced it at an agreed hourly rate. The claimant signed the respondent's "business partner guidelines" which set out confidentiality and health and safety policies among other similar matters. The claimant could change shifts and withdraw from shifts, she had the right to provide a substitute for any reason, provided the person was approved and had an airside pass (para.18). The respondent did not supply work to the claimant and she could decline any offered by the management company (para.19).

52. The ET found her to be an employee of neither the respondent, nor the management company. The EAT dismissed an appeal on 4 October 2013 (ie, after **O'Brien** in the SC). She appealed to the CA, solely against the finding in respect of the respondent.

53. The principle judgment was given by Arden LJ, with whom the other judges agreed. Towards the beginning of her judgment Arden LJ summarised the

approach to the status question as required by the authorities. She found (para.4) that "the existence of the relationship of employment does not turn on whether the parties entered into a formal contract which would be recognised in domestic law as constituting employment but on whether it meets the criteria laid down by EU law". She went on to note that those criteria "include a requirement that the putative employee should agree personally to perform services, and a requirement that the putative employee should be subordinate to the employer". That is a summary of those parts of the reasoning in the above case considered material. Arden LJ went on to cite passages from Lord Clarke's judgment in the SC in **Percy**.

54. Langstaff J in the EAT held that the simple answer to the case was that there was no contract of employment, or contract personally to do work (para.31). Mr Oldham QC sets great store by the fact that Arden LJ cites, without adverse comment, Langstaff J's analysis of the law and, in particular, first his acceptance of the submission that "the statute requires there to be a contract personally to do work" and, secondly, his comment that one cannot read the statutory phrase "contract personally to do work" as if either "contract", or "personally" was absent (para.32). I note that between making the first and second points he stated that "an employment relationship under which one party is paid by another, directly or indirectly, will ultimately involve contractual questions if analysed through English eyes".

55. I do not regard the judgment of Arden LJ as endorsing the analysis of the law as summarised by Langstaff J. She simply provides an account of the decision of the EAT and its reasoning.

56. The grounds of appeal are dealt with at paragraphs 35 onwards. The discussion of these begins by dealing with the principal ground of appeal. This was said to be that the judge did not give effect to EU law and the correct approach to it was to find that there was a relationship of employment if the claimant was in a relationship of subordination (meaning one of economic dependency on and economic value to the alleged employer) and that personal service is not required. Whether the reference to the judge was intended to be to the Employment Judge, or to Langstaff J is unclear, but not material.

57. Arden LJ accepted that EU law had its own definition of employment and that domestic law could not displace it (para.36). There is no consideration of the issue of whether a contract must be established as a prerequisite to establishing an employment relationship. The issue was dealt with in **O'Brien** (see above), hence had it been a matter in issue I would have expected to find what is said in **O'Brien** dealt with. This is especially so given the reliance upon **Allonby** and the fact that it made clear that the nature of the legal relationship between the worker and the other party was of no consequence (a point echoed by Baroness Hale in **Percy** in what she said regarding familiar concepts of the common law). The need for a contract is touched upon in paragraph 38. I

read Arden LJ as accepting that an employment relationship can be established without the need to find a contract and that this is what is meant by the reference to EU law at the end of that paragraph.

58. Arden LJ then turned to consider what she regarded as the controversial issues, namely (1) the nature of subordination required and its relationship to the question of economic dependency and (2) whether there is a need for the personal performance of services.

59. As to the first question, she rejected a submission that subordination was no longer required, but noted (para.43) that this was a question of fact for the national court. She also noted that Baroness Hale (in **Bates van Winkelhof v. Clyde & Co LLP** [2014] IRLR 641) had found that in some cases absence of subordination would not mean that there was no relationship of employment. To establish whether such a relationship existed, the court should look at all the factors and that an important one is the degree of integration into the alleged employer's business.

60. As to the second question, she rejected the submission that personal work was not required (para.45) as being contrary to the case law. She then went on to consider a submission that there was a contract in the particular case, but rejected it on the basis of clear and indisputable findings of fact by the ET.

61. In summary, I do not consider that **Halawi** shows any departure from the principles which I have distilled from the earlier cases, or contains any statements to the effect that my conclusions are wrong. Helpfully, it does emphasise that subordination is one of a range of factors to be considered, it need not necessarily be present and a consideration of the degree of integration into the allegedly employing business is an important factor when considering whether an employment relationship (as distinct from self-employment) exists.

62. I now turn to Crown Employment and s.83(2(b). By this sub-section the relevant definition of employment is extended to include Crown employment. By s.83(9) that phrase has the meaning set out in s.191 of the Employment Rights Act 1996, namely (so far as relied upon by the claimant) "employment under or for the purposes of … any officer or body exercising on behalf of the Crown functions conferred by a statutory provision".

***Applying the law to the facts – S.83(2)(a)***

63. I shall first of all proceed on the basis that there is no need to find a contract of any description to exist between the claimant and respondent in order to establish an employment relationship. I consider this to be the law as found in the authorities analysed above.

64. The Dean is well integrated into the respondent's organisation. He is the Head of House, with all the duties that normally entails at an Oxford college. Internally, he is the respondent's leader and he is its figurehead so far as the external world is concerned. He provides leadership, direction and guidance to its committees, all of which (in ordinary times) he chairs. His role is central to the respondent's development activities. The college operates on the basis of consensus, but it is he who must work (with others) to develop that consensus. In this regard, in practical terms, his role is similar to many employed heads of large organisations. He devotes substantially all of his time to the role and, given the heavy workload, would be expected to do so. To suggest (as may theoretically be the case) that the Dean could do nothing, if he so chose, does not accord with the practical realities of the situation. There was an expectation that he would undertake the range of duties in the Further Particulars, in so far as he could and an ability to remove for cause if he did not.

65. He cannot be removed by giving notice, but there is a fixed retirement date. The lack of a notice provision is not inconsistent with an employment relationship (or even a contract of employment, which can be for a purpose, or a fixed term, or until a fixed retirement date). The respondent cannot itself remove him for cause, but the process which can lead to his removal must be triggered by a number of Governing Body members and that body (and the Chapter) can veto the process going forward. The involvement of an independent person in the process is not inconsistent with an employment relationship. It is a requirement of procedural fairness in a disciplinary procedure that the decision to impose disciplinary sanctions should be reserved to someone independent of the matters alleged and uninvolved in their investigation, as far as possible.

66. I do not consider that the fact that the Dean might be regarded as an office holder significant in this context. An office holder can be in an employment relationship with an alleged employer. Nor do I consider the fact that he is appointed by letters patent and that his role is broadly described in a statute to be decisive against the existence of an employment relationship. These are factors for me to consider, but I do not regard them as of importance on the facts of this case. Although appointed by letters patent the procedure for selection was the respondent's procedure and it put forward only one name after a vote by Governing Body. For reasons set out above, I do not consider the involvement of the Bishop to point away from the relationship being one of employment.

67. Mr Oldham QC stressed the lack of subordination. Firstly, I do not regard it as necessary to demonstrate it in every case (see **Halawi**), but if some element of subordination is necessary, I find that it is present here. As with many very senior employees, especially those with professional qualifications and responsibilities, the kind of subordination found in relation to more junior employees is rarely present. However, here one does see elements of subordination. The Dean is bound to carry out the policies established by

Governing Body when performing relevant duties. The respondent, acting by the senior ex-Censor and after consultation, can suspend the Dean from certain (or all) of his duties. Members of the Governing Body can (subject to veto as set out above) seek his removal from office for cause.

68. What of the requirement for personal performance of his duties? I do not see that this is removed, or in any way relevantly impacted, by the express provisions in the statutes that permit the Censor Theologiae and the Sub-Dean to stand in for him. It seems to me a matter of practical common sense that circumstances may arise (illness, a clash of dates, conflicts of interest are examples) where functions specified to be for the Dean to carry out may need to be undertaken by others. I do not regard this as equivalent to the much more general substitution provisions which can render what might otherwise by a contract of employment, some other kind of contract.

69. I consider that the authorities provide that the test is a binary one. If that is right, it is clear to me that this relationship is one of employment, not one of self-employment. The dean is not an independent provider of services. He is integral to the respondent's organisation and is expected to provide a wide range of work on a full-time basis. Even if the test permitted a finding that the relationship was something other than either one of self-employment, or an employment relationship, I would still consider this to be an employment relationship for the reasons given above.

70. Even if it was necessary to find a contract between the parties, I consider there to be one in place here. However, I emphasise that I consider this to be the wrong approach in the light of what is said in **Allonby** and elsewhere (see above) regarding the need to label the legal relationship between the parties and the unhelpfulness of seeking to deal in common law terms. I consider there to be a wage/work bargain in place here. The respondent pays the claimant and in return for that and other benefits he has agreed to carry the duties of Dean. I do not consider it material that the source of the obligation to pay a Dean some (albeit unspecified) amount is found in the statutes. The agreement for what he was to be paid (and as regards the provision of various other benefits, eg book and entertainment allowances) was made with the Dean.

71. Hence, the Dean is an employee for the purposes of s.83(2)(a) of the 2010 Act.

***Applying the law to the facts - Crown Employment***

72. For the claimant to be in Crown employment he has to show that he is employed by a body exercising on behalf of the Crown functions conferred by statute. The body must be the respondent, so the first question is whether it exercises functions conferred by a statutory provision and, secondly, if that is established, whether those functions were exercised on behalf of the Crown.

73. The claimant points to the fact that he was employed under letters patent from the Crown, that he was appointed in accordance with university statutes and that those statutes are in accordance with the Oxford and Cambridge Act, 1923 and that revisions to those university statutes must be approved by the Queen in Council. The respondent does not dispute those basic factual points, but asserts that they take the claimant nowhere. I agree with the respondent, my reasoning appears below.

74. Does the respondent exercise functions conferred by a statutory provision? The statutes of the respondent, in accordance with which the claimant is employed are created by Commissioners appointed in accordance with the Oxford and Cambridge Act. The function conferred by a statutory provision is that of those commissioners to operate the elaborate process found in that Act for the creation of those statutes. In its operation in accordance with its statutes, the respondent is not exercising a function conferred by a statutory provision. The same is true as regards its entering into an employment relationship with the Dean, although I consider that the definition focusses upon its wider functions.

75. Even if the respondent was exercising functions conferred by a statutory provision, are they exercised on behalf of the Crown? They are not. The respondent is not acting in place of, or on behalf of, the Crown, it is acting on its own behalf using the powers contained within and acting within the limits placed upon its operations by its statutes. That the Crown is the visitor, with the powers given to the holder of that office, is not relevant. In its operations the respondent is not exercising the powers of the visitor. The fact that changes to the statutes must be approved by the Queen in Council does not assist the claimant. The Queen has to consent to all primary legislation, but that does not make those exercising functions set out therein Crown employees: these are not acts on behalf of the Crown just because the statute has the royal assent.

76. The fact that the Dean holds letters patent is of no relevance. It says nothing about the functions that the respondent exercises, or on whose behalf.

77. Hence, the Dean is not a Crown employee.

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**Employment Judge Clarke QC**

Date:……22nd October 2020

Sent to the parties on:

……23rd October 2020..

For the Tribunal:

……T Yeo……..