



EMPLOYMENT TRIBUNALS

Claimant: Mr Martin Bell

Respondent: St Catherine's Parochial Church Council

Heard at: At Cardiff by CVP

On: 23 & 24 February 2022

Before: Judge MM Thomas

Representation

Claimant: Mr M Bell, Litigant in Person

Respondent: Mr M Williams, Counsel

JUDGMENT FOLLOWING PRELIMINARY HEARING

1. Reverend Adrian Morgan has been wrongly named as the Respondent in the claim. He is removed as Respondent.
2. The correct Respondent is St Catherine's Parochial Church Council. The name of the Respondent is substituted to St Catherine's Parochial Church Council.
3. The Respondent's application to strike out the claim on the grounds that the Claimant has named the wrong Respondent is refused.
4. The Claimant was an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996.

Preliminary issue one

1. An application was made for the claim to be struck out in accordance with Rule 37 of the Employment Tribunal Regulations as it had been issued against the wrong Respondent and as such, the Tribunal had no jurisdiction.

2. An oral judgment was delivered in relation to preliminary issue one which is reflected in the judgment at paragraphs one, two and three above.
3. Following the judgment in regard preliminary issue one, I went on to determine preliminary issue two. At the end of the hearing, I reserved my decision.

Preliminary issue two

4. The issue for determination is the employment status of the Claimant that is, whether the Claimant was an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996.

Documents and witnesses

5. I heard oral evidence from the Claimant and on behalf of the Respondent, from Reverend Adrian Morgan ('Reverend Morgan'). Both witnesses amplified upon the contents of their statements in evidence.
6. The Respondent provided a bundle of documents which ran to 283 pages. Both the Claimant and Reverend Morgan provided their statements separately. In addition, in the course of the hearing, there was submitted by the Claimant copies of St Catherine's Church vision magazines dated April 2020 and June 2021, and by the Respondent, a copy of St Catherine's Church Annual Report 2005.

The Law

7. Section 230(1) of the ERA 1996 defines an 'employee' as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment'. S.230(2) provides that a contract of employment means 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.
8. In **Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance 1968 1 All ER 433**, to which both parties refer, it was stated that the matter should be approached by looking at whether there was work for financial benefit, the degree of control, and the terms generally being consistent with employment rather than self-employment.
9. In short, control, mutuality of obligation and personal performance, before consideration of other factors may, depending on the circumstances, point towards, or away from a contract of employment.
10. In **Hall (Inspector of Taxes) v Lorrimer 1994 ICR 218** the CA advised against adding up the positive elements and scoring them against the negatives. What a court has to do is step back, and look at the reality of the relationship.

11. In **Carmichael and Another v National Power PLC 2000 IRLR 43**, it held that it is impossible to provide an exhaustive list of factors but some will almost always, be present in a contract of employment
12. In **Montgomery v Johnson Underwood Ltd (2001)** the CA referred to both **Ready Mix Concrete** and **Carmichael**. In **Montgomery** the court made it clear that two factors should be treated as being the “irreducible minima” by way of legal requirements for a contract of employment to exist, mutuality of obligation and control. However, a wide range of other factors may also be taken into account, and these can serve to displace the presumption of employee status that arises when the irreducible minimum is present.
13. In **Firthglow Ltd v Szilagyi (2009) EWCA Civ98, (2009) IRLR 365** and **Autoclenz v Belcher [2011] UKSC 41** the Court emphasised the need of the tribunal to investigate the true intentions of the parties when entering into the contract, and as to whether the words of the written contract, represented those intentions. The Court further stated that what has happened through the course of the contract was very important as the parties may have varied (either expressly or impliedly) the agreement.
14. In summary, no single factor is in itself conclusive, the tribunal should consider all aspects and it is the overall impression that is important (**Hall**).

Background

15. I do not propose to set out in full the Claimant’s account as this can be found in his statement. However, the essence of his account is as follows.
16. The Claimant was appointed as Director of Music at St Catherine’s Church, Gorseinon effective from 5 February 2006. His predecessor, Mr Vivian Thomas, retired on grounds of ill health.
17. At that time, the incumbent was Reverend Canon Huw Mosford, who was then followed by Reverend Martin Cox in 2010, until the then appointment of Reverend Morgan in 2017, the current incumbent.
18. The Claimant was the principal church organist, in charge of the church choir, and responsible for all of St Catherine’s Church music.
19. His role required him to play the organ at the morning and evening services on a Sunday, and to take the church choir. The church choir would practise sometimes after service on the Sunday evening and/ or, on a Tuesday evening. The Claimant was paid in return the sum of £396 a month in arrears.

20. In addition, there were 'additional services' which he was required to undertake and for which he was paid a separate fee, this included 'weddings, funerals, and carol services for non church organisations etc' ('additional services').
21. The Claimant was entitled to eight Sundays paid holiday a year. The Claimant was responsible for his own tax.

The Submissions

22. I do not intend to recite every point made in submissions therefore, albeit I may not refer directly to any further points made by either party in their oral or written submissions to those set out below, I have considered all the evidence in the round.
23. It is not in issue that there was a contract in existence, the sole issue is whether it was one 'for services', or one, 'of service'.
24. The Respondent contends that the Claimant was not an employee. I am referred to the definition of employee in section 230 of the ERA 1996 and the relevant test as outlined in **Ready Mix Concrete** (as set out above – paragraphs 7 and 8).
25. To summarise, in regard control, mutuality of obligation and personal performance the submission is, the Claimant controlled what music was played in the church. The Respondent did not control what the Claimant played; the Claimant played what he wanted to do. If he was not available, he made arrangements for his deputy or someone else to play, and only then, would inform Reverend Morgan. It is asserted that he would deputise/substitute on a regular basis. As to holidays and sickness, he took whatever leave he wished to take without reference to Reverend Morgan. Further, he was not subject to disciplinary procedures or performance reviews. In the time that he was Director of Music he never requested a review of his fees, or any contribution towards training. He paid his own tax. His main job was as an organist at the crematorium. As to his availability for weddings and funerals, he had a choice as to whether he wished to perform or not at the service, and was able to make that choice.
26. In summary, the Claimant was self-employed, he was paid a fee to play the organ on a Sunday and to take the choir. In relation to the additional services, he knew he could accept or reject work and arrange a substitute. In addition, there was a financial incentive for him to be available for the additional services as he was paid, for example, for a funeral at St Catherine's Church more than three times the amount he was paid by the crematorium. Further, in regard the additional services, he dictated his own fee, the Respondent had no control of this. In support of the same, the Respondent relies upon a number of text messages throughout 2017 to 2020. I was referred to **Green v St Nicholas Parochial Church Council and Another UKEAT/0904/04/TM**, a copy of which was emailed to me.

27. On the contrary, the Claimant accepts that he determined the music played at the church services however, stated that the reason he did so was because that was his expertise and he had always done so, in short, that was why he was the Director of Music. He spent time in oral evidence explaining how he would consider the lectionary for the week and then choose music in keeping with it. In regard the Respondent's submission pertaining to his 'flexibility' and his ability to be able to substitute another organist when it did not suit him to play, this was vehemently refuted. The Claimant's evidence was that other than the eight weeks paid holiday he had in a year, he played at the Sunday, Holy week, and Christmas services, and oversaw the choir. Further, as the Director of Music he considered that it was required of him to be the organist at weddings and funerals at St Catherine's Church and therefore, weddings and funerals there were given priority over any work that he had at the crematorium or from anyone else. He accepted there were occasions when this had not been possible and a substitute had to be arranged, however, that was for the additional services, further, it did not happen on a regular basis. The Claimant relied upon the unreported case of **Sholl v PCC of St Michael's with St James, Croydon [2011] ET/2330072/2010**.

Evidence and my findings of fact

28. My starting point has been to consider the intention of the parties at the time that the Claimant was appointed as Director of Music.
29. Each party presented a different version of events as to how the appointment occurred. The Respondent stated that the post was not advertised, there was no interview, in short, there was no formal appointment process. The Claimant stated the contrary.
30. The Respondent in support of its submission relied upon what was set out in St Catherine's Church Annual Report 2005. The assertion was that what was set out therein demonstrated that there was no intention to enter into a contract of employment with the Claimant, in short, the Claimant was 'engaged casually' as Director of Music and had 'simply continued' on that basis (paragraph 35 Reverend Morgan's statement).
31. On the contrary, the Claimant stated he was appointed through a formal appointment process. He stated that his appointment was that of employment as a Director of Music. He accepted that there was no formal document/letter setting out that position at the time however, in the alternative, he relied upon a letter dated 26 May 2021 which he obtained from Reverend Canon Mosford, who was responsible for his appointment, appendix 1 to his statement.
32. In his letter Reverend Canon Mosford outlines details of the Claimant's appointment as an organist and choirmaster at Saint Catherine's Church in February 2006. The letter is self explanatory. Within it Reverend Canon Mosford states that the Claimant was required to play for all Sunday services. That there was an annual 'salary' review on 1 January of each year, and the salary was paid from church funds. It states that the Claimant was responsible for all 'Choir practices, Holyweek and Christmas services' and

was entitled to eight days paid holiday a year. In respect of 'weddings, funerals, and Carol services for non-church organisations etc' he advised that 'an additional cost' was charged for these additional services. In addition, he indicated that training courses undertaken were to be supported by a contribution paid from the Vicar's discretionary fund. Finally, the Claimant was liable for his own tax.

33. I attach significant weight to what is set out within this letter. In summary, when the appointment was made, it was by Reverend Canon Mosford therefore, only he would know what was agreed at that time. Reverend Morgan was not appointed until 2017. The letter clearly refers to a salary being paid to the Claimant, not a fee or a stipend. Further, it outlines what the Claimant's role was, and in particular, his responsibilities in that role. In addition, that the additional services would attract a separate fee. There is nothing within the letter to suggest that the Claimant needed to liaise with the Respondent in regard what was paid by the recipients for these additional services. Further, it was agreed that the Claimant could have up to eight Sundays paid leave a year.
34. In summary, despite the assertion that this was no more than a casual arrangement, Reverend Canon Mosford's letter identifies that this was clearly not the case.
35. When Reverend Morgan became incumbent for St Catherine's Church the Claimant had been Director of Music for 11 years. What the evidence has clearly identified is that in those 11 years particular practices have evolved in regard to the Claimant's role. The Claimant's oral evidence indicates a clearly established practice pertaining to his absolute charge of all matters in regard to the music for St Catherine's Church. That the Claimant would do this was, on the basis of the evidence, because this was the practice that had been established between the Claimant and Reverend Morgan's two predecessors. Therefore, when Reverend Morgan became incumbent, that pattern continued. In short, the Claimant determined the music played each Sunday for the services, which was then approved/agreed by the incumbent, latterly Reverend Morgan. I therefore attach little weight to the submission that the Claimant's determination of the music points towards his self-employed status when this was what the Claimant had always done, was expected to do, and at no point, had anyone objected to him doing so.
36. Turning now to the submission pertaining to the Claimant's 'flexibility', and his ability to appoint a substitute if he was unavailable first, for the Sunday, Holy week, and Christmas services service, or secondly, for the additional services. In summary, the Claimant's evidence is that if he knew he was going to be away on a Sunday, he contacted his deputy, Julie Dobbins to cover, and would then inform the incumbent, latterly Reverend Morgan. The Claimant does not identify that any issue was raised by either of Reverend Morgan's predecessors in relation to this approach being adopted by him. The fact that the Claimant would not always be available was clearly envisaged by the Respondent as there was a deputy organist paid on a monthly basis to deputise. The deputy organist

was not a person who was chosen by the Claimant, she, like the Claimant, had been appointed by the Respondent.

37. In the course of cross examination, the Claimant was taken through 234 pages of text messages which had passed between himself and Reverend Morgan from 2017. In every instance identified in regard a date where the Claimant had indicated his unavailability or alternatively, where he was not prepared to provide his services or could not, the Claimant provided a cogent explanation for his absence at the time. In short, on each occasion the Claimant was able to explain the reason for his unavailability, be that because he had booked a holiday, because of personal circumstances, or short notice of a service/event.
38. Considering the **Ready Mixed Concrete** test, and first, mutuality of obligation. The latter has not been raised to be an issue, as previously stated it is not in contention that there was a contract between the parties, and in return for his services that the Claimant would be paid. The assertion is that what was lacking from that contract/agreement for the relationship to be one of employment was control and personal performance.
39. The Respondent in support of its assertion that it had no control over the Claimant relies upon the fact that it had no control or knowledge of how many days holiday the Claimant took. In short, it did not know if it was eight days a year. If it did not have this knowledge, I find that no fault lies with the Claimant. I have no reason to question the truth of the Claimant's evidence that he never exceeded his holiday entitlement. Further, despite the Respondent's assertion that the Claimant may potentially have taken days beyond his entitlement, the Respondent has no details of what days/dates those were, and even if it did hold such a view, nevertheless, still continued to pay the Claimant. I do not find this consistent.
40. Similarly, in regard the additional services, I have no reason to doubt the truth of the Claimant's evidence that he always prioritised the services in St Catherine's Church to that of any other work he was offered. The Respondent has relied upon the previously referenced messages in particular, in relation to the additional services however, what has become clear, is that the Claimant's key role as Director of Music was to play at the Sunday, Holy week and Christmas services and take the choir. The additional services were something which he could choose to accept or reject however, because he was the Director of Music, he nevertheless considered the work at St Catherine's Church should take priority over any other work, and therefore, prioritised those additional services.
41. In respect of the submission made concerning the Claimant's role as organist in the crematorium. When I sought some clarification of this evidence what was established was that the Claimant was not at the time under consideration employed by the crematorium. Since June 2021 he has subsequently become employed however, prior

to that, he was not. Therefore, I have attached little weight to the submissions made pertaining to this being his main job.

Conclusion

42. I do not intend to recite any further of the evidence that has led me to my conclusion. In regard to control, I find that the Claimant was committed to providing to the Respondent the music for the services on a Sunday, in Holy week and at Christmas other than on eight Sundays a year. He was also responsible for overseeing the church choir. This was his main role for the Respondent. In addition, there were additional services available to him, and for which he would be paid a separate fee nevertheless, for his main role he was paid the sum of £396. In summary, in respect of control, I find the Respondent controlled the work that the Claimant undertook and when he did it, and in return, he was paid a salary in arrears, not a fee or a remittance, a salary as stated by Reverend Canon Mosford in his letter. Further, he received his salary whether he worked, or did not work.
43. In regard to personal performance, the Claimant was required to play at St Catherine's Church services every Sunday except the eight identified as his leave entitlement. On those eight Sundays the deputy organist would play. The deputy organist was appointed by the Respondent. In short, there was a right of substitution. Further, I find the practice in place was that the Claimant would in the first instance organise cover if he was to be absent, and then advise the appropriate incumbent of his absence, and the arrangements for cover during his absence. In short, the fact that the deputy organist would play in the Claimant's absence was an accepted practice and I find on the basis of the facts, was not inconsistent with an obligation to perform services personally (**Pimlico Plumbers and anor v Smith 2018 ICR 1511, SC**).
44. In conclusion, that the Respondent did not consider the contractual relationship between the Claimant and the Respondent to be one of employment is not a determinative factor. My finding is that the factors in favour of employment status significantly outweigh those against it. The Claimant has never asserted that he was required to work for the Respondent full time. In the ET1 the Claimant recorded his commitment to the Respondent being approximately sixteen hours a week. When I sought some clarification on this, he explained that nine hours were related to the performance of his duties, that is the playing at services, and the taking of the choir, and the other seven hours he attributed to the preparation time to undertake those duties. Therefore, the fact that he had other commitments or appointments in the time that he was not employed by the Respondent, I do not consider to be intrinsically inconsistent with it being a contract of employment, or in this instance, signifying self employment.
45. In summary, I find that the Respondent had control over the Claimant's day(s) and hours of work, the work that he carried out, and the place of work. The Claimant was integral to the church, he was part of the 'team'. He had an entitlement to holiday leave and was paid if he was sick, the latter was not challenged. He provided nothing by way of

equipment himself to perform his job. I accept, that on the contrary, as contended by the Respondent, the Claimant was not subject to any disciplinary or grievance procedure, nor did he have a church email address nevertheless, I do not consider that these factors outweigh the overall impression, which is that of an employment relationship.

46. I therefore find that then Claimant was an employee of the Respondent within the meaning of section 230 of the Employment Rights Act 1996.

Further matters

47. At the end of the hearing there was a short discussion as to the way forward should the above finding be made. On the basis of a finding that the Claimant was an employee the Respondent relies upon redundancy. Therefore, the Respondent requests a short period of time to explore whether a settlement can be reached. It was agreed a month.
48. The Claimant has set out at page 275 of the bundle what he identifies as his 'financial claim'. I also note that the Claimant seeks to be reinstated. It is clearly not for the Tribunal to advise the Claimant on what compensation he could seek however, the Claimant would be advised to seek advice in relation to this aspect of his claim.

Judge MM Thomas

Date 1 March 2022

JUDGMENT SENT TO THE PARTIES ON
2 March 2022

FOR THE TRIBUNAL OFFICE Mr N Roche