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THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms F Gabe **v The United Reform Church**

Heard at: London Central **On**: 14 & 15 September 2017

Before: Employment Judge Segal QC

Representation:

Claimant: Mr E Sheppard, Counsel
Respondents: Dr E Morgan, Counsel

JUDGMENT

The Judgment of the Tribunal is as follows:

1. The Claimant was employed by the Respondent within the meaning of Section 230(1) of the Employment Rights Act 1996.

2. The Claimant was in employment within the meaning of Section 83(2) of the Equality Act 2010.

REASONS

1. The Claimant was represented by Mr Sheppard of Counsel acting on a pro bono basis; the Tribunal is particularly grateful for his representation on that basis. The Respondent was represented by Dr Morgan of Counsel. The Tribunal is grateful to both of them for their expert and helpful assistance throughout this matter.

Evidence

2. The Tribunal heard evidence from the Claimant; and from Ms Fiona Thomas for the Respondent. The Tribunal had a bundle of documents of some 600 or more pages.

Issues

3. This hearing was convened pursuant to an order of Employment Judge Snelson on 20 April 2017 to determine whether the Claimant was employed by the Respondent within the meaning of the Employment Rights Act 1996, Section 230(1) and (2) and whether the Claimant was employed by the Respondent under a contract personally to do work within the meaning of the Equality Act 2010, Section 83(2)(a). The hearing was also listed to determine whether the Claimant was a worker within the meaning of Section 230(3) of the Employment Rights Act 1996; however it became clear that I did not need to determine that issue and have not done so.

The Facts

4. The material facts for the purposes of the present hearing are largely not in dispute.

5. By 2008 the Claimant had a very wide academic training and practical experience as a Protestant Theologian. The Claimant was referred to the relevant bodies of the Respondent in late 2008 for consideration by its Assessment Board to determine if she was a suitable candidate for Ministry. The Assessment Board did so consider her and referred her case to its Education and Learning Board.

6. At page 1 of the bundle there is an Education and Learning Board recommendation following the assessment conference in November 2008. I quote from it: "The Education and Learning Board recommends that Felicitas should complete a 2 year programme of training comprising the following:-

    1. Completion of the United Reform Church introductory course … from 3rd to 5th July 2009 …

    2. 2 years of full time study towards the MA in Pastoral Theology at Westminster College, alongside an internship year and other significant placements. The Panel recognised that Felicitas already had more than the necessary academic requirements for Ministry … the reason for recommending the MA is therefore less to do with gaining the qualification and much more about providing Felicitas with a solid grounding and reflection on the practices of the United Reform Church from within a learning community."

    The course of training is known as Education for Ministry Phase 1 or "EM1".

7. In September 2009 the Claimant started a supervised internship now known as a Living Ministry Programme ("LMP") at Clapton Park United Reform Church under the supervision of Elizabeth Welch, and under the training auspices of (and with weekly sessions at) the Westminster College Cambridge.

8. The Westminster College Cambridge is an independent registered charity, largely if not entirely owned by the Respondent and used by it as a Resource Centre for Learning ("RCL"). The Respondent pays most of the staff at the College, pays all of the fees (including the Claimant's fees) of study for those candidates that it places there.

9. The Respondent also gave the Claimant a grant and allowances amounting to some £11,000 a year.

10. As to the interrelationship between Westminster College and the Respondent, I was much assisted by a document at page 129 of Section 2 of the bundle from which I quote: The document is headed "The United Reform Church Oversight and Care of Candidates for Ministry". It states "At every step of the journey both Church and Candidate are engaged in testing a call and at every stage it may become apparent that a different path is the next step … Those who oversee candidates for ministry (Assembly Committees Synod Officers College Tutors etc) are also expected to care for those candidates. Discussions about oversight are inseparable from those about care, nonetheless the two issues are distinct. Oversight reflects the Church's responsibility to ensure so far as it can that those who enter its ministry are ready and suited to serve. Care aims to help those who have offered for ministerial training to sustain and draw strength from their relationships – with God, Family, Friends, Neighbours, Church and Self. Occasionally the two responsibilities must be dealt with quite separately."

11. Then, under the heading "Entry to EM1": "It is important to distinguish four separate issues, WHETHER SOMEONE SHOULD TRAIN FOR MINISTRY … This decision will be taken by the Assessment Board acting on behalf of the United Reform Church … THROUGH WHICH RCL SOMEONE SHOULD TRAIN FOR MINISTRY, this is a decision of the Education and Learning Board … WHEN SOMEONE SHOULD TRAIN FOR MINISTRY … this decision lies with the Assembly's Education and Learning Committee.

12. Then under a different heading "EM1 Contact between Assessment Board Synod and Resource Centre for Learning". "**The Assessment Board has an oversight duty towards those who have been recommended for training**. This needs to be exercised in close cooperation and consultation with the Assembly Officers, the Synod and the RCL … Throughout training **the Assessment Board will delegate routine oversight responsibility to the RCL which should have regular contact with the Synod in relation to each student** … the Secretary for Education and Learning attends or is eligible to attend key meetings of the RCL and thereby he participates in deliberations about students' progress. It is primarily **through the RCL that**

the Assessment Board is represented in the training process …" (emphasis added)…. There may be some cases in which issues of discipline or performance begin to develop to a point at which formal procedures are initiated, it will then become necessary to separate the roles of Pastoral care (Synod) and oversight (Assessment Board)". There is provision for annual reports to be provided from the College to the Respondent and for a role to be played by Moderators, there being one Moderator within each Synod.

13. Further in the document, there is reference to the "penultimate year report which will inform the Assessment Board's decision on a student's progress towards ordination …" In the Claimant's case the oversight of the Respondent was (for various reasons that I do not need to go into at the moment) very real.

14. In advance of the internship starting, the Claimant and Westminster College were to agree a Learning Agreement; I have a blank of the Learning Agreement at page 209 of Section 2 of the bundle. It has headings including "honing my abilities for interpreting texts … situations and relationships in church and world … nurturing dispositions and habits to sustain my ministry as a vocation … heightening my awareness of context in church and world … responding passionately and creatively to context in response to God's mission and call … experiencing and appropriating for myself the roles of URC Ministers in congregations and society … exploring how I will be involved in collaboration and leadership admits change in church and society … developing as a preacher worship leader and participant in shared worship … sharing in pastoral care and exploring its possibilities and boundaries". There are three others that I do not need to quote.

15. That was filled in and versions of it exchanged between the Claimant and the Director of Studies at Westminster College. There is one such version at page 214 dating to about September 2009, in which the Director of Studies comments on the then content as it was sent to him. I deal with one part of that under the heading "hours". The Claimant wrote "at the beginning of the last supervision I had asked Elizabeth [Welch] if we could look at the blank pages together … Elizabeth is suggesting that these are as follows, Sundays … attending admin leading: 6 attending meetings in committees type groups 5 meeting people outside of these groups 5 admin 8 preparation (of worship, prayers, living ministry etc) 8". To which the Director of Studies wrote: "My comment is that it looks to me as if the combined total for committees, admin and worship prep comes to around 21 hours; that leaves 11 hours for worship and meeting people outside worship, that strikes me as a lot of time in meetings and on admin and very little left for simply being around pastoral visiting, getting to be part of the neighboured etc. I would ask if that is the right balance? It may be, but it feels weighted in favour of church administration rather than being with people". There is a later version, but still not one that was signed off as finalised, at page 7 of the bundle.

16. As a matter of fact, whilst on the LMP the Claimant worked rather more than 32 hours a week; and she says about 90% of her tasks were directed by

Elizabeth Welch, many of them being rather mundane. It is agreed that the Claimant was required in all events to conduct at least some Sunday morning services which would be supervised and assessed by Ms Welch. As to what was – objectively and as a matter of fact – the purpose of the LMP, I was much assisted by the evidence of Ms Thomas, all of whose evidence I found to be both balanced, clear and frank. At paragraph 14 of her statement, she stated as follows:-

"Regular supervision was provided by the Minister of the Church, this would entail discussing the students' performance and making suggestions for improvement and development. The purpose of an LMP is to enable a student to obtain experience of the daily life of a local church of the URC, this involves attending meetings and committees, meeting people outside of the groups, general admin, preparing for worship and attending and when appropriate leading worship."

17. To that she added orally, "the experience of being a Minister and the experience of conducting Pastoral care". She further said in oral evidence that "later you will fly solo, this is the opportunity to learn in a setting which is close to being a Minister in one's own right … The objective is to prepare a good Minister for the Church." In relation to the grant she said this "It is specifically to enable the student to concentrate on their studies and to complete the EM1 programme."

18. At the successful conclusion of the EM1 (which unfortunately did not arise in the Claimant's case) the trainee minister would receive something that has been referred to as a "leaving certificate" from the College which would generally but not inevitably lead to the Assessment Board, when it reviewed matters, determining that the candidate was fit for ordination. At that point the candidate would have in a sense a "virtual" time-expiring certificate of ordination, in that they would not then receive the certificate but had up to 3 years to be accepted for ordination by a Pastorate of the Respondent (or as it may be of another church). Ms Thomas told me that individual Pastorates or Synods had blank certificates of ordination which they would fill in if and when the position of minster was agreed between themselves and the candidate at which point they would be formally ordained.

Law

19. Section 230 of the 1996 Act reads materially as follows: "(1) In this Act "employee" means an individual who was entered into or 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".

20. Section 83 of the Equality Act 2010 provides materially as follows: "(1) This section applies for the purposes of this Part. (2) "employment" means (a)

employment under a contract of employment, a contract of apprenticeship or a contract personally to do work."

21. The characteristics of a contract of apprenticeship differ from a contract of service, which has as its object the performance of work, whereas the primary purpose of the contract of apprenticeship is training. There is no need for the mutual obligations of work and pay that characterise a contract of service. In *Dunk v George Waller & Son Limited* [1972] QB 163, Widgery LJ said "A contract of apprenticeship secures three things for the apprentice: it secures him first a money payment during the period of apprenticeship, secondly that he should be instructed and trained and acquire skills which would be of value to him for the rest of his life, and thirdly it gives him status because the evidence … made it clear that once a young man as he completes his apprenticeship can show a certificate that he has completed his time with a well known employer, this gets him off to a good start in the labour market, and gives him a status the loss of which may be of considerable damage to him."

22. The label the parties put on the arrangement is of course not determinative. In the case of *Flett v Matheson* [2006] ICR 673, the Court of Appeal held that a Government funded Modern Apprenticeship was subject to the common law rules on apprenticeship. There the apprentice entered into a tripartite "individual learning plan" under the Electrical Industries Scheme and was held to have been engaged under a traditional contract of apprenticeship. The tripartite nature of the agreement between the apprentice, the employer and a Government sponsored training provider did not deprive the relationship between the employer and the apprentice of the necessary character of apprenticeship. Although the employer did not provide the academic part of the training it was required to give the Claimant time off to obtain it and to fund the cost of attendance at classes.

23. The case of *Edmonds v Lawson & Others* [2002] 2 WLR 1091 concerned an unpaid pupil barrister in the year 1998. The Court of Appeal noted that during her second six months of pupilage, the Claimant there spent a significant amount of time working on her own account for which she was paid privately or by the Legal Aid Board. The Court noted that there was very little specific regulatory requirement placed on a pupil, at least at that time, it being limited effectively to the pupil "applying himself full time to his pupilage … and preserving the confidentiality of every client's affairs" …

24. In that case the Court found that there was a contract which was supported by consideration; they noted that the offer of pupilage by the defendant chambers came at the end of what was for the Claimant a long and time consuming process, but was also of great long term consequence to chambers, since it was, they noted, of benefit that "chambers as a whole consist of talented and hard working members and the defendants like other chambers recruit most of their tenants from the pool of those recruited as pupils". They noted that "when as the culmination of a long process of applications short listing an interview an offer is formally made and formally

accepted, it would in our judgment be surprising to infer that the parties intended to bind themselves in honour only". They noted that the pupil was not entitled to pay by the chambers and that counsel for the chambers had suggested that the offer of pupillage was therefore a voluntary and gratuitous offer. However, the Court of Appeal did not find that submission persuasive, they said "it is true that the content of the arrangement was educational, but as already pointed out the practical implications of the arrangement for both parties were potentially very significant … to our mind this arrangement had all the characteristics of a binding contract."

25. On the issue of consideration, the Court noted that the pupil "no longer pays any fee and does not in our view undertake to do anything beyond that which is conducive to his or her education and training … if the pupil produces any work of real value whether to the pupil master or any other member of the bar, the beneficiary is under a professional duty to remunerate the pupil … there is in our view no obligation or duty on the pupil to do anything to the pupil master which is not conducive to his own professional development." I am bound to say with the utmost respect that that does not reflect my own experience of pupilage, either as a pupil or as a pupil supervisor, in its totality at least. However, the Court did conclude that on balance "pupils such as the Claimant provide consideration for the offer made by chambers, such as the defendant, by agreeing to enter into the close, important and potentially very productive relationship which pupilage involves.

26. The Court then turned to the question whether the contract was a contact of employment and in particular a contract of apprenticeship. They noted that in an earlier case, an attorney's clerk articled by indenture was held to be an apprentice. They said that a contract of apprenticeship was one in which "the master undertakes to educate and train the apprentice (or pupil) in the practicable and other skills needed to practice a skilled trade (or learned profession) and the apprentice (or pupil) binds himself to serve and work for the master and comply with all reasonable directions". They quoted several authorities for those propositions.

27. They noted that by contrast with the Law Society form of contract for contracts between solicitors and trainee solicitors, which includes the clause "the trainee solicitor will carry out duties given by partners or employees of [the training establishment] faithfully and diligently and follow all reasonable instructions …", in their view they could "find no trace of any duty or obligation binding on the pupil to do anything not conducive to the pupil's own training and development". They in the end made that the determining factor in rejecting the proposition that there was in that case a contract of apprenticeship, though they noted two other significant factors pointing the same direction.

28. The first was that the pupil was not paid and they noted the words of Lord Justice Wiggery that I have cited above, that one of the criteria of the contract of apprenticeship involves a money payment. The second was the ability of the pupil in that case to do work for her own benefit in her second

six, which they said would be "highly anomalous if there were anything approaching an orthodox employment or apprenticeship relationship."

29. On the issue of employment within the Equality Act, the starting point is the case of *Allonby* [2004] ICR 1328; for convenience however I will recite from the Court of Appeal case of *Secretary of State for Justice v Windle* [2016] EWCA Civ 459, which quotes from *Allonby* inter alia. I pay particular attention to paragraphs 8 to 11 and to the citation from *Allonby* that "there must be considered as a worker, a person who for a certain period of time performs services for and under the direction of another person, in return for which he receives remuneration." They explored the distinction between a self employed person who is a worker and one who provides services to clients, although that is not relevant in this case.

30. Finally, I was referred to the case of *Hugh-Jones v St John's College Cambridge* [1979] ICR 848, I quote from 852H the following: "It is said that a Research Ffellow [the appointment sought by the claimant in that case] is not really paid a salary or engaged to do work, he is given a maintenance grant or a prize. He is the beneficiary of the College's patronage rather than someone who has a contract to execute any work, moreover it is said that the work to be done is for himself not for the College, he has the copyright in it, the College derives no direct benefit, at most the enhancement of the College's reputation … he is, it is said, in the same position as a scholar who receives an award of money to enable him to study. The words "the contract to execute any work or labour" [the relevant statutory words at the time] are very wide. They have to be read in the context of "employment at an establishment" and there has to be employment under a contract "to execute any work", that seems to involve the concept that one person … engages with a man or a woman that the latter will execute work personally at an establishment … Is the doing of research "the execution of work"? We think that it is, it does not seem to us to prevent it being execution of work that the research is that of the researcher himself and it is not done on behalf of the College, it is still work which he has agreed to do, nor does it seem to us to matter what the remuneration was called if it is in fact consideration for doing the work, a research fellow may spend some or in theory all of his time following a course of study as a preparation for research, studying for example for a degree we think is not executing work within the meaning of the Act … the course of study is appropriation for research … is so clearly linked to research but we think it capable of being "work"".

Submissions and Discussion

31. The Claimant only relies on that part of Section 230(1), relating to a contract of apprenticeship; under Section 83 of the Equality Act 2010 the Claimant relies either on there having been a contract of apprenticeship or a contract personally to do work.

32. The Claimant suggests that in order to demonstrate a contract of apprenticeship the following needed to be shown:-

1. Some sort of contract.

2. Training for a learned profession.

3. That the Respondent undertook to train the Claimant, including by way of delegation to the Westminster College.

4. That the Claimant was bound to serve and comply with instructions of the Respondent through delegation or directly.

5. That the Claimant was moving towards a qualification, the point of the training.

And that it was, if not necessary, certainly of assistance that the Claimant be paid.

33. The first point, that there was a contract, is formally not conceded, although it is not seriously disputed. The Respondent's position is that in so far as there is a contract it is a contract "of sponsorship". I find no difficulty in saying that there was a contract between the parties in this case, as and for much the same reasons as the Court of Appeal in *Edmunds* did so.

34. As to the remaining criteria they are all fairly clearly met, save for the Claimant being bound to serve and comply with instructions of the Respondent – which is disputed. As to that, the Claimant's submission was that the obligation to serve and comply with instructions can be seen most clearly by examination of the draft Learning Agreements and that the analysis of what actually happened is of some probative value in informing the analysis of what it was envisaged would happen.

35. The Respondent submitted that an apprentice enters into a contract to work which has an educational element to it. The Claimant is, it submitted, in the reverse situation: she entered into (if there was a contract at all) a contract to be educated, which had a "work element to it". One must look, the Respondent submitted, at the dominant purpose of any contract from the perspective of an objective third party.

36. The Respondent was insistent that one must judge that dominant purpose at the moment of formation of the contract, in this case it said in November 2008; that was the time at which one had to determine the legal character of the agreement and it warned that one must be astute not to obscure the objective of the relationship tested in that way by consideration of what in fact happened thereafter.

37. The Respondent pointed to the fact that there was an academic component in the programme as it was outlined in November 2008, which was never formally removed; though without going into detail it is right to say that the

documents made clear that had the EM1 proceeded to completion, it looked likely that it would be removed in the Claimant's case.

38. The Respondent pointed to the fact that the payment of the grant and allowances was not for consideration of a service and was not intended and was not susceptible to Tax and National Insurance. The Respondent pointed to an analogy with a person undertaking a Post-Graduate Certificate of Education. I found the analogy not entirely helpful, largely due to my own ignorance of the detail of the arrangements involved in that; and as the Claimant pointed out in reply, if one were to derive any assistance from the analogy one might have to amend the factual circumstances of what I at least understand does happen.

39. As to the analogy or comparison with pupilage, the Respondent's position was that even a fully funded pupil who was not required to or indeed perhaps permitted to work on their own account in their second six, would still not be working under a contract of apprenticeship. I asked what the difference between such a contract and a trainee solicitor contract would be and at the end, again, it was submitted it turned on whether or not there was that obligation on the pupil to serve and comply with instructions.

40. As to Section 83 of the Equality Act, the Respondent noted that the only specified activity was Sunday morning services and not all of those, but their fundamental submission was that the Claimant was not remunerated in consideration for that or any other work that she was supposed to or ended up doing to the benefit of the Clapton Park URC.

41. In the end, the Respondent very fairly expressed its position as being that one starts with the contract as made orally and evidenced in writing in November 2008 and one looked to see what can properly be identified as in the words of Dr Morgan the "out-working" of that initial contractual arrangement and disregard matters that cannot be so characterised. Broadly speaking I agree.

42. In reply when pressed on the point of how one should infer an obligation for the Claimant to serve and comply with instructions from the Respondent, the Claimant made the point that as well as the admitted obligation to do a certain number of Sunday services, one could also draw further inferences from the documents which were created (initially at least) before and at the time of the LMP beginning in September 2009, which set out not only the Claimant's but also to some extent the Respondent's understanding of what should happen. I have already quoted from one of the pages of the September 2009 document at page 214. I agree with the Claimant that it is possible to infer from that and other documents and the evidence in particular of Ms Thomas, that the out-working of the November 2008 contract was along the lines set out in that draft document in September 2009. I do not see the fact that in November 2008, knowing that a Learning Agreement had to be put in place in advance preferably of the placement beginning, the

absence of more specific obligations set out in November 2008 as being inconsistent with the existence of a contract of apprenticeship.

Conclusions

43. For the reasons given above – although not without some hesitation, but in the end fairly clearly in my own mind – I do find that there was a contract of apprenticeship. The Claimant did meet the various criteria (that I agree are the correct criteria, as I think the Respondent does) as set out in the Claimant's submissions that I have quoted, including the most controversial of them on the facts of this case, the obligation to serve and comply with instructions to at least the necessary minimum extent. I do think that that was very much foreseen in November 2008 and what followed was the out-working of that foreseen programme.

44. In case I am wrong about the issue of apprenticeship, I now turn to the other relevant part of the definition in Section 83(2), whether there was a contract personally to perform work. I have actually found this question more difficult. The requirement is that the Claimant be employed under a contract of employment in the extended sense and in particular that she performed services for the Respondent in return for which she received remuneration. The Claimant did perform services for the Respondent; and she was as I have found obliged to some extent perform those services as part of the LMP; but that is not the consideration in return for which she was paid the grant and allowances, or at least not the consideration in return for which she primarily was paid the grant and allowances. Like most apprentices, including the ones described in *Edmunds*, that is not the reason why the apprentice master or chambers/pupil supervisor or solicitor's firm or carpenter pays the apprentice. The benefit for the chambers or the firm or the carpenter are more generalised and more long term as described in *Edmunds*, I therefore find that the Claimant does not satisfy this part of the test in Section 83(2).

Employment Judge Segal on 24 November 2017