



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Wright
Respondent: St John The Evangelist Parochial Church Council
Heard at: East London Hearing Centre
On: 25, 26 January 2018
Before: Employment Judge Moor

Representation

Claimant: Mr D Wynn-Fitzgerald, non-professional friend
Respondent: Mr A Watson, Counsel

JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant was not an employee of the Respondent within the meaning of s230 Employment Rights Act 1996, therefore the Tribunal does not have jurisdiction to hear her claims for unfair and wrongful dismissal and these claims are dismissed.
2. The Claimant was not a worker within the meaning of s230 Employment Rights Act 1996, therefore the Tribunal does not have jurisdiction to hear her claim for accrued holiday pay outstanding upon termination and this claim is dismissed.

REASONS

1. This claim arises as a result of the Claimant doing paid work as a cleaner at the church halls run by the Parochial Church Council of St John the Evangelist Church, Ilford ('the PCC').

Issues

2. The issues were clarified and agreed between the parties at a Preliminary Hearing on 27 October 2017 by EJ Brewer. I refer in summary to his list as I clarified with the parties at the outset and slightly amended in order to deal with all of the legal issues before me:

- 2.1 Was the Claimant an employee (or, for the purposes of the holiday pay claim, a worker) of the Respondent within the meaning of s230 of the Employment Rights Act 1996 ('ERA')?
- 2.2 If the claimant was an employee, was she unfairly dismissed, contrary to s98 ERA?
 - 2.2.1 In its pleadings and at the outset of the hearing, the Respondent alleged a conduct reason for the dismissal, namely claiming pay for hours that the Claimant had not in fact worked.
 - 2.2.2 Did the Respondent genuinely believe the Claimant guilty of the alleged misconduct?
 - 2.2.3 If so, was that a reasonable belief reached after as much investigation as was reasonable in all the circumstances?
 - 2.2.4 Was dismissal a sanction within the range of sanctions open to a reasonable employer?
 - 2.2.5 Overall, was the procedure followed within a band of reasonable procedures?
- 2.3 If there was an unfair dismissal, the Respondent will ask the Tribunal to make reductions in award:
 - 2.3.1 in accordance with the principles in *Polkey*;
 - 2.3.2 because it argues she contributed to the dismissal by her conduct;
 - 2.3.3 by her failure to mitigate her loss by failing to look for alternative, equivalent work.
- 2.4 If there was an unfair dismissal, the Claimant will argue that any compensation should be uplifted because of the Respondent's unreasonable failure to comply with the ACAS Code on Discipline and Grievance ('the Code').
- 2.5 If the Claimant was an employee, was she wrongfully dismissed by the Respondent failing to give her the statutory minimum period of notice of termination of employment? And if so, what is the Claimant's loss. The Respondent argues in this claim, too, the Claimant failed to mitigate her loss.
- 2.6 If the Claimant is an employee or a worker, is the Claimant owed pay for any accrued holiday not taken on the termination of her contract. (The Claimant claims 2 weeks.)

- 2.6.1 What was the holiday year?
- 2.6.2 How much paid holiday had the Claimant already taken in that year?
- 2.6.3 What remained outstanding?

Findings of Fact

3. Having read the witness statements and heard the oral evidence of Rev C Prentis, Mr R Solomon, Mrs M Wright (the Claimant), Mr A Wright, and having read the witness statements of Rev Canon R Enever, Ms M Streeter and Miss S Richards and having read the documents referred to me in the evidence, I make the following findings of fact.
4. Mrs Wright and her family were, for 40 years, churchgoers at St John the Evangelist church, Ilford.
5. The PCC is the legal person that runs the church. It was formed of a committee comprising the current vicar, churchwardens and some church members.
6. In 1990 the church worship area was reduced and the building altered to comprise a number of halls and associated rooms. Various groups paid to use the church halls. They therefore required regular cleaning.
7. The churchwardens made a list of cleaning work and the treasurer set a weekly amount of money to be paid by the PCC for the work. Members of the congregation were asked if they wished to do this work. Rev Canon Enever, who was present at the time, understood that the cleaners' pay was kept below the amount for tax or national insurance to be paid upon it. At this early stage the cleaner was entitled to holidays and sick leave. Equipment was purchased by the Church but sometimes bought by the cleaner who was then reimbursed. There was loose supervision of the cleaner by the vicar or churchwardens who asked when there were specific tasks to be done, but the list of tasks was sufficient to tell the cleaner what work was required. Rev Enever kept in touch with the Church after she left and understood that the Claimant took on the cleaning role under the same kind of regime that had taken place in her time.
8. In 2004 Mrs Wright responded to a request for someone to assist the daytime cleaner of the halls, either early weekday mornings or late evenings after group activities had ended. Churchwardens gave her a job description for the cleaning work (33) but no written contract. The PCC treasurer paid her in cash. She probably had to sign a receipt. Neither party paid NI or tax on that money because it was still below the threshold. Mr Wright checked with the Inland Revenue that this was correct. Mrs Wright saw this role as a job (para 6 of her statement).
9. When the daytime cleaner stood down in about January 2005, Mrs Wright agreed with one of the churchwardens, Mr Keenan, to take over the whole of the cleaning of the halls at night 7 days a week. A member of her family would accompany her,

and, assist with the cleaning: this was Mr Wright, or her son Derek or her brother Brian. The PCC knew that a member of the cleaner's family assisted and did not object. This had always been the case: it avoided the cleaner being a lone worker at night. The job description recorded that '*job sharers are welcome*'.

10. Mrs Wright knew the tasks she had to do from the job description (33). This was originally drafted in 1994 but still applied to her. It sets out in some detail over 2 pages the cleaning tasks to be done on a daily and weekly basis and others for quiet periods. It states '*other jobs as requested by staff or churchwardens*' (34). In practice Mrs Wright took her own initiative if she saw that additional tasks were required, for example cleaning off graffiti from walls. Each day she used her judgment as to which parts of the building required particular attention.
11. The PCC provided the cleaning equipment. It reimbursed Mrs Wright for the cleaning materials she bought. She did not take out any form of insurance.
12. Initially the time allowed for the work was '*nominally*' 8 hours: the first job description records '*the time allowed for the work in the schedules is nominally one hour per day (Monday to Saturday) with an additional hour on Monday to wash the floor in St John's Hall.*'
13. From the beginning Mrs Wright was paid for some holidays she took (the original job description, (33) stated '*there **are** two weeks paid holidays to be taken during the school summer holiday period*' (my emphasis). It also allowed holiday to be taken at other times unpaid. Later this was increased and Mrs Wright was paid the equivalent of the statutory amount of holidays. When he became Treasurer, Mr Solomon did not question this but paid it upon each request. He asserts in his evidence it was a 'goodwill gesture' by the PCC that it paid for holidays. In my view, this assertion does not tally with the original job description, which does not describe holiday pay as discretionary but holidays as something that 'are' paid. I find it likely, against this background and that of the PCC deciding to agree to pay the Living Wage, that the increase in paid holidays was a change to the agreement between the parties rather than merely a matter of goodwill.
14. The job description records that '*the cleaner should inform a churchwarden or a member of staff when they are **unable** to do the cleaning due to holidays, sickness etc so that alternative arrangements can be made.*' (my emphasis) In practice the Church asked Mrs Wright to arrange cover, which she did from trusted members of the congregation. Those individuals were paid directly by the Treasurer for the work they did. For convenience, Mrs Wright put in their pay claims, using the form her husband had had set up on his computer for her.
15. I infer from the requirement to inform the churchwarden if the cleaner was unable to do the cleaning, that the expectation of the parties, and what they agreed is that she was required to do the work unless she was unable. This wasn't a casual arrangement or one requiring the goodwill of the cleaner, it was an agreement whereby she was required to work and the church was required to pay her. I am supported in this conclusion from the Mrs Wright's evidence that she attended to clean every day unless on holiday.

16. In about 2007 the treasurer Mr Gough was concerned about the Claimant being paid in cash and wanted to formalise it. He agreed with the Claimant she would submit a claim for payment every 4 weeks and he then paid her by cheque. Mrs Wright would sometimes save up her claim for wages and send off several at a time. She entitled them 'claim for payment of wages'. When Mr Solomon took over as treasurer, he did not object to this being the description but referred to the claims in his evidence as 'invoices'.
17. In the summer of 2006 a new vinyl floor was laid. It required occasional stripping of the sealer and reapplication. The Church increased Mrs Wright's hours to cover this additional work. In 2012 an additional room was refurbished and made more use of, and her hours increased to cover this. By 2012 the work was regarded as taking an average of 13.5 hours.
18. In about December 2012, while Jonathan Evans was vicar, the PCC decided that Mrs Wright should be paid the 'Living Wage' (97). The Living Wage is the hourly rate set by the Living Wage Foundation, an organisation which campaigns on low pay. The Church of England had campaigned publicly on the issue and therefore the vicar felt it was only right that those working at the church were paid it.
19. In November 2015, Rev Prentis became vicar at St John's. By then, Mrs Wright had been paid for cleaning work in the halls for 11 years and for all of the cleaning work for more than 10 complete years.
20. The Church Profile given to Rev Prentis did not refer to the Claimant as an employee. Previously Rev Prentis had worked in churches that were cleaned by volunteers from the congregation. His written evidence is that he did not think it '*usually necessary or appropriate*' that '*a church cleaner*' was an employee and he states that he therefore took the view that Mrs Wright was self-employed. This disregards that he was not present when Mrs Wright was engaged and did not know personally the terms of the agreement she had entered into with the PCC. She was cleaning the church halls that made the Church an income. When I asked Rev Prentis was unable to give me any kind of sensible answer as to why he thought it 'inappropriate' that the Church employ someone for this work: he first explained that he thought it was a 'conflict of interest' and referred to the idea that someone sitting on the PCC should not be paid. This is illogical: he sat on the PCC and was paid; and a self-employed cleaner who sat on the PCC would also be paid. Nor did any cleaner have to sit on the PCC. He stated it was inappropriate to have an employee as opposed to someone self-employed cleaning because of '*family, people who thought they should be doing particular jobs*' which seemed to be a reference to the Wright's in particular but that doesn't explain his objection to the status of employee in principle. He then said it was '*about advertising and getting the right person for the task.*' But this does not make sense in principle. It may explain why he did not approve of Mrs Wright in particular holding the job but not that an employee should not have held the job. Furthermore, the original job description records that there would be an interview for the job (34). For these reasons, I found Rev Prentis' evidence to me about his view of a church cleaner's employment status in principle, and Mrs Wright's in particular, illogical and self-serving. It is also inconsistent with his actions, when in June 2016, he sent the Claimant a proposed contract entitled '*written terms and*

conditions of employment in which he identified her as 'employee' (116 and 121).

21. After his arrival, Rev Prentis saw the church lacking in some organisation and governance and wanted to take charge and implement more formal structures. As part of this effort, he wrote to Mrs Wright on 16 January 2016 stating that he was going to produce contracts for the church centre users. He went on, '*I know you clean the centre. It is only right that you also have a contract. Can I ask you to put down on paper what areas of the centre you clean and what payments you receive*'.
22. In January 2016 she provided him with a job description (98) based on the job description she had been given. She explained that she was paid every 4 weeks: 2 weeks for 12.5 hours work and 2 weeks for 14.5 hours work, the extra hours for floor maintainer to be applied to the polished floors. Her document also set out the holiday arrangements: '*cleaner entitled to statutory holidays which include bank holidays and should inform a churchwarden or member of staff when they are unable to do the cleaning due to holidays or sickness so that alternative arrangement can be made. Alternatively the cleaner may arrange for an agreed stand-in to attend in their place.*' This echoed the original job description and practice.
23. In around March 2016, Rev Prentis received 2 complaints about the cleanliness of the toilets. On 20 April he instructed Mrs Wright that the toilets must take priority and told her that the toilet floors should be washed every day and all surfaces cleaned every day, which she agreed to do. He referred briefly to one complaint. He mentioned that the way the cleaning was done was going to have to be discussed at the PCC meeting. Rev Prentis recalled in his oral evidence (but not in his written statement) that he told Mrs Wright about his proposal to split up the cleaning role in this discussion. Mrs Wright was clear in her statement that it had not been discussed with her, which was why she was so stunned when she was told after the PCC meeting that cleaning would be split between her and an outside company. I prefer Mrs Wright's recollection here: it is in her written witness statement. Rev Prentis' recollection of their discussion is that it was brief. I find it unlikely that it would have been brief if he had told Mrs Wright his proposal to split the work; she is likely to have wanted to discuss it.
24. Rev Prentis raised the issue of cleaning at a PCC meeting on 16 May 2016.
25. He circulated Mrs Wright's job description. The PCC decided that the job was now too much for Mrs Wright to do alone. They wanted the cleaning standards to improve and after much discussion decided to split the role between Mrs Wright and an external cleaning contractor (103). Mrs Wright was to clean the halls but not the toilets or kitchen. However, the minutes record and Rev Prentis recalls that the PCC did not want to '*financially disadvantage*' Mrs Wright.
26. Thus the PCC made a decision to change Mrs Wright's work without consultation with her.
27. Mrs Wright and her husband privately regarded the decision to reduce her work and hours as tantamount to disciplinary action. On 18 May 2016 Mrs Wright

informed Rev Prentis by letter of her upset and queried the rationale for the change, especially now that the new toilet-cleaning regime was in place, 104. He replied acknowledging her upset and suggested she wait for the new job description and offer. He stated the PCC '*has the right to appoint or advertise any new roles*'.

28. On 26 May 2016 a standing committee of the PCC met to discuss the details of the split of the cleaning work. Rev Prentis had produced a job description for the cleaner based largely on the one Mrs Wright had given him, which was agreed at 12.5 hours a week. (This 12.5 hours subsequently changed to 12 hours by agreement.) After the meeting he sent it to Mrs Wright (110). There was correspondence between them in which Mrs Wright queried the details and amount of hours. Rev Prentis, in his reply said, '*if you do not feel about to work with this new role description we will put this out to advertisement*' and told Mrs Wright the job description '*is very generous in the hours it has given to fulfil the work and allows for flexibility*' (114). On 31 May 2016 Mrs Wright, by email, said she found his further explanations acceptable.
29. In that job description a '*nominal*' breakdown of hours is given as 1.5 hours per night for cleaning on the 6 nights when the floors are not washed and an hour for cleaning on the night the floors are being washed with 1.5 hours a week for floor washing. The job description stated (as had the previous one provided by Mrs Wright) '*These times assume a single person is doing the cleaning and are really man-hours so if a team of two are doing the cleaning the attendance times will be halved.*'
30. Rev Prentis evidence was that, because the PCC did not want to financially disadvantage Mrs Wright, it was agreed that she would be contracted to work 12 hours per week 'which was more than sufficient time to carry out the tasks assigned'. This is undoubtedly correct. Before the change, the hours of work were expected to be 13.5 hours on average. Kitchen and toilet cleaning had been removed. The work that Mrs Wright had lost was bound to have taken more than 1.5 hours per week on average, given the very regular daily use of the halls and the importance of those areas. Rev Prentis explained in his oral evidence that this meant he did not expect the duties each week actually to take 12 hours but, with the extra work of re-stripping the floors in the summer break, which would take longer, overall it would average out to this. This is consistent with his email to her (114) and the Claimant's recollection. She states Rev Prentis and his wife and the churchwardens met with her after the PCC meeting to inform her of the decision. They told her that 12.5 hours (as was then the proposal) was 'very generous'. And there would be no overtime for the summer stripping job, as those hours should cover it.
31. In questions in re-examination, Rev Prentis rowed back from his stated understanding of the new agreement as to hours. He said that he expected Mrs Wright only ever to claim for the hours she actually worked, even if the work took less time. This appears to me to be inconsistent with the agreement recorded and reached in the PCC and explained to Mrs Wright and agreed by her. It was underpinned by the PCC not wanting to disadvantage Mrs Wright financially. On the evidence I have heard, I find the new agreement reached between

Mrs Wright and the PCC at that point was that Mrs Wright was to continue cleaning the halls (but not the toilets and kitchen) and be paid in respect of 12 hours a week regardless of how long actually the work took each week because everyone knew that some weeks would take longer than others.

32. In late May 2016, Rev Prentis sent Mrs Wright a proposed written contract of employment (121ff). This recorded '*the parties to the contract of employment*' and describes the PCC as '*employer*' and Mrs Wright as '*employee*'. The date of commencement of employment was '*4 July 2016*'. It was for a 1-year fixed term and included a '*probationary period*' of 3 months. Rev Prentis was described as '*line manager*'. The rate of pay was £9.40 per hour. Normal hours of work were 12 hours. Overtime was not payable. The holiday year was the calendar year. Holidays accruing on termination were described as owing. A set of disciplinary and grievance procedures were appended that are standard in form and based on the ACAS Code.
33. I find that at the time he was seeking to set down the church's arrangement with Mrs Wright in writing, as part of his effort to improve the organisation of the church and because he had told her 'it is only right you have a contract'. There was no error about his approach. This proposal shows that at the time Rev Prentis had thought she was an employee. It is only now, having taken advice, that the Rev Prentis states in his written evidence that his description of her as an employee was 'in error'.
34. On 3 July 2016 Rev Prentis reminded Mrs Wright to sign the contract if she was happy to proceed (116). On 5 July 2016 Mrs Wright replied saying that she had sought advice from an 'employment solicitor' about the contract who had pointed out 'many flaws' in it. She was to send a list but until then she would carry on working as she had done before except not to clean the toilets, kitchen and lounge. She accepted the reduction in hours to 12 hours per week. She sent Rev Prentis a signed authorisation for Mr Wright to speak on her behalf about employment matters.
35. On 12 July 2016 Mrs Wright wrote to Rev Prentis with a lengthy list of the 'flaws' her solicitor had advised her about in the proposed written contract.
 - 35.1 She stated she had been advised she had 'employment protection' for the 11 years she had worked, which could not be taken away. She said any attempt to do so could lead to an employment tribunal hearing.
 - 35.2 She therefore objected to the commencement date and the imposition of a probationary period.
 - 35.3 She asked about workplace pension scheme, which was coming into operation by law soon.
 - 35.4 She pointed out the holiday of 120 hours appeared too generous (amounting to 10 weeks) and suggested that this error be amended.

- 35.5 She pointed out more minor problems with the numbering.
- 35.6 She also noted her agreement to a number of the clauses.
36. Albeit that Rev Prentis had stood on the PCC's legal rights in writing to her, he did not like the way Mrs Wright had written to him. He thought she was threatening a tribunal. He did not think this was the 'Christian way' to deal with a dispute. Mr Wright had written to him on his wife's behalf. He replied that he was not prepared to discuss the matter with Mr Wright. He told Mr Wright he was disappointed that he had chosen to go to an employment solicitor. He stated that it was *'in my gift ... whether to formally offer the post to Maria and this is not an automatic right'* and it was *'my prerogative to find the most suitable individual for the post'*. He told Mr Wright *'it is perplexing that as a Christian and a member of St John's Church you have chosen to go down this route'*. Mr Wright, understandably, saw this as Rev Prentis criticising him for not being a good Christian.
37. In the meantime, Mrs Wright continued to clean the Church and submit claims for wages for 12 hours per week that Mr Solomon paid.
38. In August 2016, Mrs Wright emailed Rev Prentis to inform him she would like to take 2 weeks' holiday in September. He said that he gathered in the past she had arranged for someone to cover for you and asked her to do so and let him know who that person is. She did (159).
39. The PCC took advice from the HR department of the diocese. On 19 September 2016 it PCC decided that Mrs Wright was self-employed and she be offered to continue cleaning the halls on a self-employed basis (163). Rev Prentis wrote to Mrs Wright on 8 October 2016 informing her that she continue cleaning *'on a self employed contractual basis, as you have in the past.'* And that the PCC did not agree that she was or ever had been an employee. He stated the decision was also based on the *'unfortunate aftermath of the May PCC'*. While he did not accuse Mrs Wright directly, he stated *'the unfortunate behaviour in the week following both PCC's [sic] has raised concerns of entering into an employed contract with you as this has highlighted particular areas of conflict of interest in relation to you, the governance and ministry of St John's.'* (167) I have not heard any evidence about these allegations.
40. In that letter Rev Prentis offered the Claimant the cleaning role on the basis of 12 hours per week. He identified the halls. Required her to submit a monthly invoice 'for the 12 hours worked'. He stated *'The PCC agreed that if you were not happy with the offer, it would look at alternative options for the upkeep of the areas'* and required acceptance by 14 October 2016 (167)
41. Mrs Wright used the HMRC 'Employment Status Indicator Tool' and it suggested she was employed. Mrs Wright replied to Rev Prentis disputing that she had always been self-employed, and pointing out she had no public liability insurance. She informed him that she would carry on working as before, as she had done for last 11 years except in relation to the reduction of tasks and hours that had already been agreed. She wished the PCC to consider the HMRC 'ruling' before

proceeding further. She did not recognise his remarks about '*unfortunate behaviour*' and asked him to explain.

42. Rev Prentis replied referring to '*slandorous behaviour following church meetings. The unfortunate behaviour is constituted by the misinformation and negative talk that has been shared throughout the church over recent weeks*'. I have not heard any evidence about this except that the Rev Prentis was concerned at the division and gossip the dispute had generated. He asked her again to confirm whether she accepted his offer of self-employment (175).
43. At some point, Mr Solomon used the HMRC tool, too. His entry produced a different result because he inputted that Mrs Wright could nominate a substitute to work whereas she had not.
44. On 13 October 2016 Mrs Wright emailed members of the PCC asking them to reconsider, especially as she had not had a chance to put her side of the argument to them. She stated she was willing to accept the terms and conditions with the exception of the employment status of 'self employed' (176). She indicated that if her employment were terminated she would have no choice but to go to an employment tribunal. She referred to the unparticularised allegations of 'slandorous behaviour' and stated she thought Rev Prentis' attitude towards her was intransigent and hostile. She indicated she would be complaining to the Bishop. Rev Prentis was very disappointed that she had written to the PCC in this way and was concerned about a grievance to the Bishop.
45. Mrs Wright copied her email to the Bishop of Barking. He wrote back on 31 October 2016 stating that, as Rev Prentis was an '*office holder*', he, the Bishop, was not his '*line manager*' and therefore could not deal with her complaint. He offered her a route to complain about the Rev '*as your vicar*' (186). She replied that her complaint related to her work and asked '*there must be someone who I can turn to*' (178) The Bishop replied that it was '*legally not possible*' to hear her complaint (188).
46. Mrs Wright continued to work. The dispute about her employment status was not resolved and rumbled on in correspondence.
47. An electronic fob key system was introduced. Each person who used the halls was provided with a numbered fob. In early 2017, Rev Prentis got to grips with the information from the key system. He looked at the records for 9 January 2017 until 12 February 2017. He concluded that for every week Mrs Wright had used her fob key for entry totalling 12 hours. On some days her fob had not been used at all. He concluded, before asking her to explain, that this meant she had cleaned for that number of hours and had not cleaned at all on the days her key had not been used. He set out his conclusions in a table (193). He set out that 'excess hours' of 10.30; 7.47; 8.38; 7.46 were claimed in 4 of the weeks he had considered.
48. On 11 February 2017, Mrs Wright informed Rev Prentis that she still had holiday to take before the end of the financial year (216) and she proposed taking 27 March – 5 March and 2 weeks between 20 March to 3 April to use up her holiday. She also understood that there was one week when further fob work was

to be done and the halls not being used she suggested taking holiday then instead. Rev Prentis replied on 12 February *'thank you for informing me of your decision not to clean the halls this week due to the fob system part 2'*. This was not what Mrs Wright had informed him.

49. Rev Prentis invited the Claimant to attend the PCC on 20 February 2017 in order for the matter of her employment status to be resolved (216ai). Mrs Wright sent Mr Wright to speak on her behalf. He was given an opportunity to do so. There was a wide-ranging discussion about the work, payment and the HMRC tool and what difference it made that Mr Wright helped Mrs Wright with the work. Views were expressed in favour of employed status and against.
50. Towards the end of the meeting Rev Prentis produced the data he had gathered from the key fob including his analysis, which alleged that Mrs Wright had claimed for more hours than actually worked. Rev Prentis queried why 12 hours per week was not being worked. Mr Wright informed him that he also worked and the hours should therefore be doubled. Rev Prentis said *'we all need to stand before God with integrity'*.
51. The conclusion appears from the minutes that Mr Wright said that Mrs Wright would revisit the new contract again (223).
52. Rev Prentis then wrote to Mrs Wright asking her to meet with him and the Area Dean, so that she can *'explain the discrepancy regarding Jan and Feb invoices'*. She knew the detail of the allegations from what had been revealed in the 20 February meeting. She refused on basis she had a live grievance against Rev Prentis. She said she was happy to discuss any discrepancies with a group from the PCC that did not include him (and 3 named others).
53. On 10 March 2017, Mr Wright wrote seeking a decision by the PCC on employment status otherwise Mrs Wright would take tribunal action. He argued that the monitoring of the key fob system was in breach of data protection.
54. Matters came to a head on 20 March 2017, at the next PCC meeting, which decided after a secret ballot vote to terminate Mrs Wright's services as cleaner.
55. At that meeting, Mr Solomon produced a table setting out all the money the Wrights' had earned from the Church in the last few years, nearly £35,000. I accept Mr Solomon's denial that he did not state that was an amount they had fraudulently claimed from the church. He had included other paid work done for the church, such as stewarding and the cleaning work Derek Wright had done and been paid for separately when his mother was on holiday. Mr Solomon also presented the table prepared by Rev Prentis as to hours he alleged she had worked and the days he alleged she had not cleaned. He did this still without having had an explanation from Mrs Wright.
56. The minutes record that Rev Prentis *'explained that Mrs Wright works in a contractual system, as her family assist her to complete her tasks, so Mrs Wright*

was outsourcing her work'. He told the meeting he had tried to meet with her with the Area Dean but she had declined. In his written evidence to me he said he stated to this meeting that Mrs Wright had fraudulently claimed for hours not worked and that went to her honesty. The minutes do not include this statement. In his oral evidence, he explained that he stated to the meeting that 'if employed' Mrs Wright had fraudulently claimed for more hours than worked. He corrected his written statement to this effect.

57. A ballot was taken whether to continue Mrs Wright's services. The PCC voted in favour of such termination. The minutes record the reason for termination as being '*to move on from this situation and work towards the health and unity of the church*'. In his oral evidence Rev Prentis confirmed the reason for dismissal was not an alleged fraudulent wages claim but because there had been no agreement over employment status and the need to move on from it.
58. In his letter of 21 March 2017 terminating her service, Rev Prentis did not give any reason for the termination but thanked her for her service. He stated that Mr Wright's '*confirmation that you have been outsourcing your duties to him makes complete sense in the circumstances and completely explains how you have been able to charge for a certain number of hours even though you are not physically present for the hours. That explanation is accepted.*' (249).
59. I find that the reason for termination was the failure of the parties to resolve the dispute over employment status and the Church's need to move on from that dispute into a more harmonious future. I find specifically that the Church did not dismiss Mrs Wright because of allegations that she had defrauded it of any money.
60. As to the number of hours Mrs Wright worked each week, I do not accept, as Rev Prentis assumed and as Mr Solomon informed the PCC meeting, that the key fob data is the entire story. I have heard Mrs Wright's explanation for how the door lock worked during the week. I accept her evidence for the weeks in question (set out on 193) that she attended the church halls every night to clean. This is because she did not always have to use her key fob to enter the halls: on the occasions where her fob was not used (4 in the first week; 1 in the second week; 2 in the third week; 1 in the fourth week; and 2 in the fifth week), I accept she was let in by those leaving the building after their group activity was over. It is likely that on some occasions as Mrs Wright arrived in the evening some groups were still leaving. I also accept her evidence that sometimes the door was propped open for easy access by groups using the church. I also find that she stayed after the Building Management meeting to clean as she recalls on 7 February 2017. This means that the fob data is not complete for the hours she worked. Nor is the assertion by Rev Prentis on 193 of 'no cleaning done' correct for the days her fob was not used.
61. Mrs Wright did accept on the days the key fob was used that this probably showed accurate entry times and the last time the green button was used on that day would show exit times. It is possible therefore to find that, at least for the weeks beginning 16 January 2017 and 30 January 2017, when there is only 1 day each for which there is no reliable data, the total hours Mrs Wright was in the building

are 4.12 and 4.13. It is unlikely she worked 7 odd hours on the final day. It is therefore a reasonable conclusion to draw, even without all the information, that for those weeks Mrs Wright did not attend for a total of 12 hours.

62. Mr and Mrs Wright explain the hours by referring to Mr Wright's attendance and assistance in the work. They argue, as Mr Wright did at the time, that the total expected hours of attendance should be halved to an average of 6 hours per week.
63. After the change in hours in 2016, Mrs Wright's pay claims were always for 12 hours per week. Mrs Wright did not pay Mr Wright to assist her, nor her brother when he did so. I asked Mr Wright what capacity he saw himself helping her and he said '*as her husband*' to help her out. He had not really thought about his capacity when he was assisting her with the cleaning work. When he heard Mr Solomon's assert at a PCC he was a worker, too, because money from their cleaning efforts was going into the household, he could see the 'fuzzy logic' in that. He referred to doing odd jobs for free for the church like checking the boiler pressure and changing light bulbs.
64. After the termination of her work for the PCC, Mrs Wright has not made any effort to find alternative work. She does not drive and does not think she would find anything easily within walking or a bus journey's distance. She also pointed to her age (62) as being an obstacle to finding work.

Submissions

65. In his intelligent submissions, Mr Watson helpfully took me through the important case law on the question what is an 'employee'. In accordance with the statutory definition, he argued that personal service is a minimum requirement of a contract of employment. Here, he argued, the Claimant did not agree with the Church to undertake the contractual obligations of cleaner personally, because she worked along with her husband. He relied on Premier Groundworks Ltd v Jozsa para 25 (see discussion below) and argued that Mrs Wright had delegated some of those contractual obligations to him or the other member of her family who invariably accompanied her. As such, she was substituting another in her place to do part of the job she had agreed to do and was not, therefore, providing personal service. For the same reason, Mr Watson submitted Mrs Wright was not a worker, the statutory definition also requiring personal service.
66. He pointed to other features of the relationship that were inconsistent with being employed: that she organised her cover for holidays; that she put in claims for payment; that there was little control or supervision; and that she could choose when to work and how to prioritise her tasks.
67. As to the reason for dismissal, he frankly acknowledged the evidence did not support the Respondent's pleaded reason of 'conduct'. On the evidence he encouraged me to find that the dispute over her status had become intractable and had caused an irretrievable breakdown in relationships. This was potentially fair, under s98 ERA, as 'some other substantial reason for dismissal'. While the procedure was not ideal, Mrs Wright had been given an opportunity to have her

say in a meeting with the Dean but had declined. In any event, if a fair procedure had taken place it would have made no difference and I could find that it was likely that Mrs Wright would have been dismissed. Furthermore, if she had been an employee, it was not possible for her to explain the 12-hour wage claims she made each week, when, on her evidence at its highest, there were weeks when she cannot have worked 12 hours. I should find that the agreement was that she only put in wage claims for the actual hours she worked. As such there should be a significant reduction in any award to reflect the likely dismissal for this conduct in any event. Finally, Mrs Wright had failed completely to mitigate her loss by failing to look for alternative work and I should find that it would take no more than 2-3 months to find equivalent, flexible, cleaning work in the Ilford area. He argued that the ACAS Code does not apply to a dismissal which is not for misconduct and therefore it was not open to me to make an uplift of any award.

68. Mr Wynn-Fitzgerald for the Claimant submitted that a number of factors indicated she was an employee. First, the Church controlled her work through the job description given to her at the start and updated and agreed later by Rev Prentis. This set out the tasks she had to do. Furthermore, the Church plainly thought it could control her work, for example when the Rev Prentis instructed the Claimant to carry out a new, daily toilet-cleaning regime. Otherwise cleaning was a straightforward job in which Mrs Wright did not have to be directed on a daily basis. Second, Mrs Wright made a claim described as 'wages'; and the Church decided to pay her the living wage. Third, she was paid for her holidays. Fourth, Mrs Wright was plainly not in business on her own account: she took no financial risk in doing the work and the Church paid for all equipment and materials. Fifth, when he came to formalise relationships, Rev Prentis had offered her a contract of employment. This was evidence that it was understood by all that she was an employee. Mr Wynne-Fitzgerald pointed out that it was only when the Claimant complained about elements of this contract that the Church changed its approach.
69. As to personal service, he submitted that the original job description showed that cleaner had to inform a churchwarden or member staff of absence due to holiday so that alternative arrangements can be made. This was not an unfettered right of substitution. It was over time that the choice of a member of the congregation who was trusted came to be organised directly by Mrs Wright for the convenience of the Church. Those who covered for her holidays were paid directly by the Church. Nor did she pay anyone to work with her. Mr Wright helped with the cleaning as part of his voluntary service to the church. He was not paid by Mrs Wright and not someone to whom she therefore could be said to have delegated the work. The job description (34) made it clear 'job sharers were welcome' and it was in this context that Mr Wright did the work.
70. He argued there was no potentially fair reason for dismissal, an unfair procedure and no opportunity given for appeal. It was reasonable for Mrs Wright not to want to be interviewed by Rev Prentis at a time she had a grievance against him. I should uplift the awards I make for unfair dismissal to reflect that fact that the ACAS Code had not been complied with at all and that this was unreasonable. As to mitigation he submitted I should take judicial notice of the fact that there is a lot of competition for flexible, low paid jobs in Ilford and it would not have been easy for Mrs Wright to find work.

71. The holiday claimed was the two weeks from 20 or 21 March 2017 that Mrs Wright had planned and informed the Church about prior to her dismissal and had accrued to her prior to the end of the financial year.

Law

72. The law is that it is a person's legal status that determines whether she can complain to a Tribunal about how she has been treated at the end of giving paid service to an organisation. Many might consider this unsatisfactory, but there it is: my power only extends to considering the fairness of the termination of Mrs Wright's contract if she is an employee. Likewise my power to decide whether she ought to have been paid for accrued but untaken holiday exists only if she is an employee or 'worker'. Her employment status is the first question I must consider. I will set out the law and my analysis on this first.
73. An employee is defined in s230(1) ERA: as someone who works under a 'contract of employment'. Section 230(2) ERA defines a contract of employment as a '*contract of service ... whether express or implied, and (if it is express) oral or in writing.*'
74. A 'worker' is defined at s230(3) as an individual who has entered into or works under a contract of employment or '*any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform **personally** any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.*' (my emphasis)
75. In Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515C MacKenna J set out three conditions for a contract of employment to exist (my emphasis)¹:
- (i) *The [employee] agrees that, in consideration of a wage or other remuneration, he will provide his **own work** and skill in the performance of some service for his [employer].*
 - (ii) *He agrees, expressly or impliedly, that in the performance of that service he will be **subject to the other's control** in a sufficient degree to make that other master.*
 - (iii) *The other provisions of the contract are consistent with its being a contract of service . . . **Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be ...***
76. It was confirmed by the Court of Appeal in Express & Echo Publications Ltd v Tanton [1999] ICR 693 (699G) that the requirement of personal service was an '*irreducible minimum condition*'. It is not just a factor that I weigh in the balance. If

¹ I have replaced the antiquated language of master/servant with employer/employee

there is no requirement of personal service, there is no contract of employment.

77. A number of other cases have considered the question when there is a contractual term allowing the alleged worker/employee to delegate or nominate a substitute to do the work. The current position was summarised recently by Sir Terrence Etherton MR in the Court of Appeal in Pimlico Plumbers Ltd v Smith [2017] ICR 657 at para 84 (I have inserted sub-paragraphs in the passage for ease of reference):

'In the light of the cases and the language and objects of the relevant legislation, I would summarise as follows the applicable principles as to the requirement for personal performance.

- *Firstly, an unfettered right to substitute another person to do the work or perform the service is inconsistent with an undertaking to do so personally.*
- *Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional.*
- *Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance*
- *Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance.*
- *Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.'*

78. Pimlico Plumbers, relied in part on the EAT decision in Premier Groundworks Ltd v Jozsa UKEAT/0494/08/DM. In that case a groundworks contractor had the right to delegate the performance of service under the agreement on condition that the other party was notified in advance and the delegate was as capable and experienced (para 9). The EAT held:

'In conclusion, we consider that where a party has an unfettered right for any reason not to personally perform the contractual obligations under a contract but can delegate them to someone else, he cannot be a 'worker' ... even though the person actually performing the contractual obligations has to meet certain conditions.'

79. Once personal performance has been identified, the Tribunal considers other factors pointing to whether or not the contract was for employment: the degree of control by the employer being the next most important. The Tribunal recognises that the degree of control depends upon the nature of the job. Other factors point to the individual being in business on her own account: for example if she employs someone; if she supplies her own equipment or materials; if she is not integrated into the organisation; if she invoices for her work; if she is taxed as self-employed; if she is not given paid holidays and so on. The label the parties give a relationship is not conclusive but can assist in considering what they understood their agreement to be.
80. The legal and HR advice the parties received as to their status is not relevant at all to my decision. I must make my own decision. Likewise the indications HMRC give about the relationship are not relevant to my decision, which must be made on the evidence I have read and heard.
81. I must consider what were the terms of the agreement between the parties. In the absence of a written agreement, there may be documents that evidence the agreement. What actually happened can assist in my determination of what I infer that agreement was. The question, however, is what was the agreement not what were the private understandings or expectations of the parties.

Application of facts and law to issue of employment status

82. There was no written contract here. In my judgment there was however an oral contract: Mrs Wright was asked by representatives of the PCC (the churchwardens) to do cleaning work for payment and she agreed.
83. There is no suggestion here that the arrangement was informal or tied up with a sense of religious duty that there was no intention to create legal relations.
84. The original job description is good written evidence of the scope of the work the PCC required to be done (33-34). It sets out a range of very specific cleaning tasks, with suggestions of when, either on a daily or weekly basis, they be carried out. This is not a statement of hope. It is a 'job description', which, in my judgment, evidences the parties' agreement as to nature and extent of the work.
85. Thus there was an oral agreement (i.e. contract) between the parties that Mrs Wright undertook the tasks set out in the job description in exchange for remuneration. That remuneration, from the start, included paid holidays, as the job description evidences. The language of the job description ('there are') allows me to find that the Church agreed to be obliged to pay for holidays not simply pay them as a matter of goodwill.
86. The contract between the parties was expressly amended as time went on. In particular it was amended when the Church agreed to pay Mrs Wright at the level of the Living Wage. On the evidence I have heard, this was a matter of agreement between the parties, not a 'goodwill gesture'. The Church entered into

formal obligation to pay at that level. It would hardly have called it a wage if it were something it felt could be paid at that level one week but not the next according to the quality of its goodwill.

87. In my judgment the PCC had sufficient control over Mrs Wright for the agreement to be consistent with employment. The job description went into some detail as to what cleaning was required and where. It was via the job description that the PCC controlled her work. Furthermore the example of Rev Prentis instructing the Claimant in a different toilet-cleaning regime, shows the PCC had power to instruct her in the work. That there was as a matter of fact little supervision is simply evidence of the level of trust that existed between the parties and the fact that cleaning is a straightforward job. That Mrs Wright chose when to do the work, and what rooms required particular attention, does not undermine the level of control but was simply a feature of different usage of the different rooms at different times.
88. Furthermore, it is plainly not the case that Mrs Wright could be regarded as in business on her own account: she did not pay anyone; she did not provide her own equipment, and she did not pay for materials. She took no financial risk whatsoever.
89. While she submitted pay claims to the PCC that is a neutral factor: many employees submit some paperwork before they are paid.
90. The label the parties put on the relationship points to employment. Mrs Wright entitled her pay claims 'claims for wages'. She understood she had a job. When he sought to formalise matters and give her a written contract, the Rev Prentis called it a 'contract of employment' and referred to her in it as an 'employee' and the PCC 'employer'. I have not accepted that he did this in error. It was the label he chose at the time.
91. But none of these factors is determinative of the question if the agreement did not include the requirement that Mrs Wright provide personal performance. That is a minimum requirement. She is not an employee without it.
92. On the one hand the PCC definitely required Mrs Wright to attend to work. I have found that the agreement obliged her attend to clean except for when she was unable to do so (sickness and holidays). It was agreed she had to inform the PCC when she was unable to attend so that cover could be arranged. That in practice over time Mrs Wright arranged this cover on behalf of the PCC does not undermine the original terms of the agreement. It is simply that in practice she found the cover for the convenience of all. The job description is still good evidence that the agreement was that she was expected to attend unless '*unable*' to do so. The job description is good evidence that she could not nominate a substitute whenever she felt like it. In my judgment, this term falls into the third example in Pimlico Plumbers (following the case of MacFarlane v Glasgow City Council [2001] IRLR 7 -- a substitution clause if '*unable*' to work was consistent with personal performance; rather than the case of Tanton -- a substitution clause if '*unable and unwilling*' to work was inconsistent with personal performance). In my judgment Mrs Wright's right to substitute for herself in this contract was

therefore fettered and consistent with personal performance.

93. To put it another way, I infer from the fact that she had to agree a replacement with the PCC in respect of holidays/sickness that she was required to attend otherwise. In my view there was no express or implied agreement that Mrs Wright could have sent anyone along if she had been unwilling to attend herself. (The fact that she never did is of some evidential value that she felt obliged to attend but my main reason for finding this is the written evidence of the term as to holiday cover in the job description).
94. So far therefore the balance lies in favour of finding that Mrs Wright was employed, but this case raises another question, which is whether the party who is obliged to attend work personally has also personally to perform all of the work tasks. Mrs Wright personally performed cleaning work, as she was obliged to do save for holidays, but did not personally perform **all** of work that she had agreed was required to be done. A member of her family invariably did some of it when he accompanied her. Mrs Wright did not pay this other family member. Nor did the church. The PCC knew of this arrangement, from the start, and did not object.
95. It seems to me that part of the agreement between the parties was that part of the work could be done by a member of Mrs Wright's family. I infer this because the Church knew that this was the arrangement; it did not object to it and it made the contract workable because Mrs Wright would not be a lone worker.
96. I analyse this part of the agreement as follows: Mrs Wright was required to be personally present working but was allowed also to delegate some of the work in her job description to a volunteer family member. Does this undermine the requirement of personal performance or is it a limited right to delegate that is consistent with it? I have not found this an easy question to answer.
97. On the one hand: the authorities on substitution and delegation are focussed on the situation when the contracting party does not attend work personally but it is agreed can send someone else. That is not the agreement here. I have found Mrs Wright was obliged to attend personally. Thus, under the third limb of the passage I have cited in Ready Mixed Concrete, she did not have the freedom of *either* doing the work by her own hands *or* through another: she always had to be there working to some extent unless unable. It could be argued that the situation here was therefore a 'limited power of delegation' anticipated in that third limb, a right of delegation fettered by the obligation to be present personally as well as the delegate.
98. On the other hand, the authorities state that the personal performance is of the 'contractual obligations', see, for example, Jozsa para 25. This does not suggest that personal performance can be of only part of the contractual obligations.
99. Furthermore, payment to Mrs Wright under this contract was for the whole of the work, not part of it. When the parties assessed the contract as taking 8 hours initially, the pay was in respect of those 8 hours. When Mrs Wright prepared and Rev Prentis developed a later job description, it was made clear that the proposed hours of the job were for one person doing it and were to be treated as 'man-

hours' if not.

100. I have tested the matter by considering how I would analyse it in another industry or field of work. If A was engaged as an engineer, would a right to delegate part of A's work to B, a volunteer capable of the work, and only in A's presence, undermine the requirement of personal performance. Probably. A is no longer personally performing all of the work. If A were a typist and was allowed to delegate part of his typing load to B, an experienced volunteer, but A was paid for all of the work, would that undermined the requirement of personal performance. Probably. One only has to think of what happens if the work is done poorly or the work is not done to find problems. Would A or B be disciplined?
101. After balancing these competing arguments, I have reached the conclusion that Mrs Wright was not an employee. This is because I am bound by the decision in Josza that the minimum requirement of personal performance is of all the contractual obligations and here the right to delegate the work was not limited, but up to 50% of the duties. For those reasons, it seems to me there was no agreement between the parties that Mrs Wright had personally to do all the work and that is inconsistent with there being a contract of employment.
102. For the same reasons, Mrs Wright was not a worker because there was no requirement of personal performance.
103. I have considered Mr Wynn-Fitzgerald's alternative argument that the arrangement might properly be regarded as a job share, in effect that there was a contract of employment with both Mr and Mrs Wright. The difficulty with that is that Mr Wright did not always attend and was not paid. There was no agreement with him that he personally did some of the work. Even if there was some kind of an agreement it was not a contract because there was no consideration (pay) for the work done. This was not a team of two employed cleaners.

Reason for Dismissal

104. Given that I have found that Mrs Wright is neither a worker nor an employee. It is therefore not necessary for me to give judgment on the remaining issues. Nevertheless because this case has caused such ructions within the church, I will indicate that had I would have found the reason for dismissal was the failure of the parties to agree on the Claimant's status. I would have found that this was not a potentially fair reason for dismissal because the Respondent had not made reasonable efforts to hear Mrs Wright's grievance about it. It could have only reasonably concluded the dispute was intractable after such efforts.
105. Furthermore, while it was the Respondent's written case that conduct (fraud) was the reason for termination this was not made out on the evidence. In my view, Rev Prentis and Mr Solomon reached too hasty a conclusion about the hours worked from the fob key data. Fraud is a very serious allegation and should only be made, in my view, after a careful investigation, which did not happen here. I have accepted Mrs Wright's evidence that she worked on all days.

106. When it split the cleaning work, the PCC removed a large chunk of cleaning work from Mrs Wright but did not want to 'financially disadvantage' her. It therefore agreed that her work would be valued at 12 hours a week, instead of the previous 13.5 hours. No one could seriously have thought that the removal of weekly toilet and kitchen cleaning work was a removal only of 1.5 hours per week. This was why Mrs Wright was told this was a very generous offer. The agreement thereafter can only have been that Mrs Wright would do the work and charge in respect of 12 hours. It was not that she would only charge for the hours she did – had she done so she would have been financially disadvantaged which was not the PCC's aim. It cannot then lie in the Church's mouth to be shocked that she may not have actually worked 12 hours each week.

Concluding Observations

107. The question whether someone is an employee has been described by the Privy Council as a '*most elusive question*'. Despite this legal uncertainty, both parties have, from the start, appeared to be certain of their 'rights' and taken strong standpoints upon them. There is an obvious risk in doing so. It is unfortunate that from the start of the correspondence that Rev Prentis spoke in terms of the PCC rights and then responded badly to Mrs Wright's assertions of her own as she understood them. Likewise, it was unwise of Mrs Wright to refer to the possibility of an employment tribunal in her first letter, before the parties had had any discussion. It put Rev Prentis on the defensive from the start.
108. I realise I make these observations with the benefit of hindsight and understand the context: Mrs Wright was upset that her long service to the church was being disregarded and Rev Prentis was trying to assert his leadership in a new role – not all members of a parish always welcome a new vicar bringing new ideas.
109. What concerns me most of all in this case is that, regardless of the parties' legal rights, the Church appears not to have listened to Mrs Wright.
- 109.1 Rev Prentis did not want her to put her side of the dispute to the PCC: yet the PCC was the body that contracted with her, she had provided work to the church for a long time and deserved to be listened to whether she was an employee or not.
- 109.2 Likewise, the PCC did not arrange for another group of members of the diocese to hear her appeal against the termination of her contract. It would have been far better for a group removed from the immediate dispute to cast an impartial eye over the decision. (Rev Prentis' oblique accusations of 'unfortunate behaviour' and slander plainly did not make him impartial.)
- 109.3 Similarly, the Bishop to whom Mrs Wright turned to complain about her situation relied on legal form and refused to hear her, rather than attending to the substance of her concerns. St John's made money out of its church halls. Without a cleaner, the church could not have made this income nor community groups used its halls. Regardless of her legal status, it seems to me that, on a human level, Mrs Wright deserved to be

heard and it does the Respondent and the diocese no credit that it did not do so.

Employment Judge Moor

5 February 2018