



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

Mr S Mayoh-Smith

v

The Ministry of Defence

## RECORD OF A PRELIMINARY HEARING ON JURISDICTION

**Heard at:** Bury St Edmunds

**On:** 30 April 2019

**Before:** Employment Judge Cassel

### Appearances

**For the Claimant:** Mr S Hoyle, Lay Representative.

**For the Respondent:** Mr J Burns, Counsel.

## JUDGMENT

The claimant was not an employee and the Tribunal has no jurisdiction to hear his complaint of unfair dismissal which is dismissed.

## RESERVED REASONS

1. In his claim to the Employment Tribunal the claimant, Mr S Mayoh-Smith, complains of unfair dismissal and has described his job as Flight Lieutenant, RAF VR(T).
2. The respondent is The Ministry of Defence, and in its response it is averred that the claimant was not an employee and unfair dismissal was thus denied.
3. A preliminary hearing was ordered for today, 30 April 2019, to consider whether or not the claimant was an employee, and if so, to make orders for the disposal of the substantive claim.

### **Preliminary matters**

4. Although this was described as a preliminary matter, an application was made by Mr Hoyle, who appeared for the claimant and described himself as a lay representative, for disclosure of certain documents. The application was made during cross examination of Commander Haines and related to documentation that Mr Hoyle submitted gave an insight into the reasoning of a decision to change the terms of appointment (that term is used loosely) of the claimant on or around 27 June 2016. The application related to a document produced at page 52 of the bundle giving a background to the reasoning behind the change.
5. Mr Burns opposed the application pointing to the completion of the bundle of documentation in November 2018, that there had been ample time to apply for such a disclosure before and that it in effect was nothing more than a fishing expedition and likely to involve documentation that was protected by legal privilege in any event. In refusing the application the Tribunal accepted that there had been ample time to make such an application well before the evidence given by Commander Haines and that in considering the overriding objective in the Rules of Procedure such an application would have caused delay which was incompatible with the proper consideration of the issues before the Tribunal, and that in any event, sufficient time had been set aside today to hear evidence and submission on the preliminary issue and that the date for the hearing had been fixed as long ago as 13 January 2019.

### **The proceedings**

6. Evidence was given by the claimant, Steven Mayoh-Smith, and by Commander Paul Haines both of whom had prepared written statements. Reference was also made to a bundle of documents comprising approximately 250 pages and a skeleton argument produced by Mr Burns outlining the issues. The single issue for consideration was whether the claimant was an employee at the time of his dismissal. There was some confusion as to the date of termination and various dates were given. However, given the circumstances of this hearing the Tribunal did not consider the precise date to be a material particular as the issue to determine was the status of the claimant at the time of termination. The respondent's position is quite clear. The respondent avers that the claimant was not an employee on termination because he was simply an un-commissioned volunteer who had been suspended. In the alternative he was a commissioned officer under the (new) Cadet CAP Forces Commission which came into effect on 2 December 2017.
7. The claimant's position, appears to be that although there was some confusion, he was an employee and the conditions of appointment which were undated, but which were exhibited at page 216 onwards were the conditions under which he was employed and that revised conditions, which were produced at page 35 onwards did not apply to him for two reasons. First that he had never seen or signed them, and second that

prior to the implementation of the new conditions he had been suspended. His case is that the earlier document had to be seen in the light of a course of conduct that he was regularly paid, that he was subject to a power of dismissal and there was a mutuality of obligation between the parties.

### Findings of fact

8. The Tribunal makes the following findings of fact based on the balance of probabilities having considered those documents to which attention had been drawn.

8.1 The claimant was a member of a volunteer branch of the RAF Reserve. He attained the rank of flight lieutenant and referred to himself as being a member of the volunteer reserve (training) branch. He was issued with a uniform which was identical to that of a regular or reserve officer. The conditions of appointment, service and training of adult staff were issued. These were exhibited at page 216(2) and in section 301 of that document is the following:

**“Voluntary service.** Service with the ATC either as a RAFVR(T) officer, ..... is voluntary and part-time. It is normally local, at a place within easy reach of the individual’s home and/or livelihood. .... Service is unpaid, except for attendance by officers, ..... at annual camps, authorised exercises and courses of instruction, and as otherwise specifically approved by Comdt ACO where payment may be made at the rate currently in force. However, there is no automatic entitlement to remuneration for any specific ATC activity. ....”

There were other requirements including a requirement to ensure attendance of not less than 12 hours in any one calendar month to the official and semi-official activities of this squadron.

8.2 In regard to the requirement to attend, the Tribunal accepts the evidence of Commander Haines that this was nothing more than an expectation of attendance which he characterised as a moral obligation rather than a contractual one, and a failure to attend as required would lead to an enquiry as to the reasons behind the non-attendance rather than action for a breach of any contractual obligations.

8.3 Payment was arranged in a way that irrespective of the number of hours in attendance on “official” business, payment would only be made if the appropriate form were completed and served and in any event no more than 12 hours pay calculated according to rank would be made. The claimant stated, and again the Tribunal accepts, that he might spend anything up to 60 hours per month on “official” business but would receive pay for no more than 12 hours.

8.4 Commander Haines was appointed to a team based in Whitehall working for The Ministry of Defence. He was the chief of staff for the MoD youth and cadets team. He explained that there were cadets in a number of services and that his department looked after policy. It was a full-time job that he had had for four years, although he had spent forty-two and a half years in the navy. There was concern as to the various terms of service in the different provision of volunteers and there was a desire to harmonise the terms. A proposal document was prepared for 27 June 2016 seeking permission to change and this is exhibited at page 52 onwards. Commander Haines gave evidence that he was a party to the production of this document and strongly resisted, in giving evidence today, any suggestion that its creation was to protect the respondent from claims in Employment Tribunals, and he was adamant that it was principally to harmonise those terms in the various cadet forces.

8.5 New conditions of appointment were created and these are exhibited at page 35 onwards. They show considerable similarity with the earlier conditions of appointment. At paragraph 3 is the following comment:

“Service with the ATC as a CFC officer is voluntary and part-time.”

At paragraph 4 is the following:

“CFC service is unpaid. However officers can be remunerated for attendance at annual camps, authorised exercises, courses of instruction and as otherwise specifically approved by Comdt RAFAC. There is no automatic entitlement to remuneration for any specific ATC activity.”

At paragraph 7 is the following comment:

“CFC officers are expected to attend for not fewer than 12 hours in any one calendar month on authorised activities related to their primary role.”

8.6 A document produced at page 40 and referred to as a “RAF Air Cadets – Adult Volunteer Agreement” was issued. The claimant gave evidence, and it was accepted, that he never signed the Volunteer Agreement.

8.7 On 26 September 2017 a letter was prepared and sent to each of the volunteers within the service. The claimant gave evidence that he accepts that he knew of the existence of the letter, but he could not recall whether he had actually received it. He gave further evidence and stated that his wife is also a volunteer officer and to the best of his recollection he believes that one or other of them received that letter. Within that letter was the following:

“..... the Defence Council has directed that your current Commission in the Training Branch of the Volunteer Reserve (VR(T)) will be relinquished at 2359 hrs on 31 October 2017.”

As will be explained later that date was postponed until 2 December 2017.

Also within that letter was the following:

“You will be issued with a new commissioning scroll and notification of your new commission will be published in the London Gazette in due course.”

8.8 Attached to that letter were five pages of what were described as “frequently asked questions”. At page 86 of the bundle, which is the fourth page of the frequently asked questions is the following:

“What if I don’t what to move to the new Cadet Forces Commission?”

- All commissioned CFAVs in the Cadet Forces will move to the new Cadet Forces Commission ..... and there will be no facility for them to retain their RAF Volunteer Reserve (Training) commission. If you chose not to accept the new commission, you will not be able to continue as a commissioned volunteer but could be considered for non-commissioned, CI or Civ Comm service should you wish.”

8.9 The royal warrant was duly published on 19 February 2018, as exhibited at page 149 onwards and the new regime came into effect thereafter.

8.10 A complaint was received about the behaviour of the claimant on 8 September 2017 and an investigation commenced on 12 September 2017. On 30 November 2017 he was suspended from all duty. There was a subsequent disciplinary hearing and the appointment of the claimant was terminated. He subsequently appealed and the appeal was unsuccessful. For the purposes of this decision, it is relevant to note that following his suspension from duty on 30 November 2017 he performed no further tasks for the respondent and at the time of the termination of his commissioned officer status, on 2 December 2017, delayed for all of those affected, as noted at paragraph 8.7 above, he had ceased to perform any service for the respondent.

## **Submissions**

9. On behalf of the respondent, Mr Burns submitted a skeleton argument on which he relied in his oral submissions, and for which the Tribunal is grateful. He referred to two decided cases, Breakell v Shropshire Army Cadet Force, UKEAT/0372/10/RN and to Bray v The Ministry of Defence, which was a case heard in the Employment Tribunal. As far as the Breakell appeal is concerned, Mr Burns submitted that this was based on

similar facts and is binding on this Tribunal, and that there was no mutuality of obligation, the claimant was paid only for the days that he worked and that subject to limitation to 12 hours maximum per month. There was no provision for sickness, holiday pay, notice pay or indeed for a National Minimum Wage and that all of the essential ingredients of an employment contract were absent and it was not necessary in all the circumstances to imply a contract of employment.

10. Mr Hoyle submitted that the earlier conditions of service were relevant but these had to be seen against that which actually happened in the relationship and all the elements of employment were in fact present. The Breakell case was not similar. It involved a civilian instructor. He submitted that the new arrangements did not in fact apply but that the rules were changed in a manner to avoid potential Employment Tribunal claims being made against the respondent.
11. At the end of the submissions I announced that the claimant was not an employee and that the Tribunal had no jurisdiction to hear the complaint of unfair dismissal which was dismissed. The reasons were reserved which are given herewith.

## Conclusions

12. Under s.230 of the Employment Rights Act 1996, employee is defined as:
  - “(1) In this Act “employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
  - (2) In this Act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.”
13. The claimant’s case is that the conditions of appointment applied throughout. Having been suspended in November 2017 and not having signed the volunteer agreement, this agreement did not apply to him.
14. Assuming for a moment that this is correct, the written provisions of the earlier agreement were clear and unambiguous. The respondent was under no obligation to provide work and equally the claimant was under no obligation to do any of the work that was provided. There was an expectation that he would undertake certain work but there was no contractual requirement for him to do so. It was submitted on his behalf that there was a course of conduct over the many years under which he performed those services and somehow, it was said, had all the hallmarks of employment. The Tribunal did not find that to be the case. Although the claimant showed that he was conscientious in the performance of those tasks there was no requirement on him to do so.
15. It is also part of the claimant’s case that he was a member of the Armed Forces but if that were the case, there are two considerations. First, that

status ended on 2 December 2017 by operation of the Air CAP Forces CAP Board Order which was produced at page 124 which, as a secondary consideration, as submitted by Mr Burns, in effect prevented him from claiming unfair dismissal under the provisions of s.192 of the Employment Rights Act 1996 prior to that date. That appears to be something of a red herring as both parties are agreed that if there was a dismissal it only took effect at a date in 2018.

16. There was evidence and submission that from 2 December 2017 his status changed. The claimant has given evidence that he did not accept the new conditions of appointment and again, both parties agree that there is no documentation showing that he did so. On this issue the Tribunal accepts the claimant's evidence and submission and concludes that from 2 December 2017 until the termination of his appointment he was simply an un-commissioned volunteer whose service had been suspended since 30 November 2017.
17. In submission the Tribunal was referred to Ready Mix Concrete v Ministry of Pensions [1968] 1AER433. The Tribunal was reminded that to find the relationship of employment, there had to be mutuality of obligation, there had to be control or direction by his master over the work performed and that other factors do not contra-indicate. Having considered the facts and conclusions in Breakell, the Tribunal does find that there is considerable similarity in the factual matrix. This Tribunal reaches the same conclusions as the EAT did in Breakell that the claimant was a volunteer, and prior to his suspension he was not entitled to, nor did he receive holiday pay, sick pay, notice pay or pension. The minimum wage provisions did not apply and any remuneration that he received was not linked to the particular hours that he worked. The claimant produced payslips and a P60 but as was pointed out to him during the proceedings these are not determinative in themselves. They do not create an employment relationship and are principally documents produced for or by HMRC under relevant revenue provisions.
18. For all these reasons the claimant is not an employee and the Tribunal has no jurisdiction to hear his complaint of unfair dismissal.

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Employment Judge Cassel

Date: 28.5.2019

Sent to the parties on: ..31.05.2019....

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For the Tribunal Office