Case Number: 2304101/19/V

EMPLOYMENT TRIBUNALS

Claimant	Mr Paul Song
Represented by	Mr R Smith (legal representative)
Respondents	Secretary of State for Justice
Represented by	Mr R Purchase (counsel)
Before:	**Employment Judge Cheetham QC**

Open Preliminary Hearing held on 18 August 2020 at London South Employment Tribunal by Cloud Video Platform

JUDGMENT

1. The Claimant was not appointed to a public office within the meaning of the Equality Act 2010 s.50.

2. The claim is dismissed, as the employment tribunal lacks jurisdiction.

REASONS

1. By an Order dated 1 April 2020, Employment Judge Truscott QC gave directions for this Preliminary Hearing to determine whether the Claimant was appointed to a 'public office' within the meaning of the Equality Act 2010 s.50 at the material times.

2. In this hearing, which was conducted through the Cloud Video Platform, I have heard evidence from the Claimant and, for the Respondent, from the Reverend Phil Chadder (Her Majesty's Prison and Probation Service) and Mr Adrian Smith, now retired but formerly Deputy Director of Custody.

The Law

3. The relevant part of the Equality Act 2010 s.50(2) reads:

> *A public office is –*
> *(a) an office or post, appointment to which is made by a member of the executive;*
> *(b) an office or post, appointment to which is made on the recommendation of, or subject to the approval of, a member of the executive;*
> *…*

4. There are therefore 3 elements that need to be established: whether there was an office or post, whether there was appointment to that post and whether it was made by a member of the executive or on the recommendation of or subject to approval of a member of the executive.

5. Mr Purchase referred me to authorities that establish what is understood by the term "office", which is a term that is not defined in the Equality Act 2020. It is someone who holds:

> '*a subsisting, permanent, substantive position, which had an existence independent of the person who filled it, and which went on and was filled in succession by successive office holders.'*

6. That is a formulation approved by the Privy Council in *Great Western Railway Co v Bater* [1920] 3 KB 266 and referenced in the more recent case of *Percy v Board of National Mission of the Church of Scotland* [2006] 2 AC 28, where Lady Hale described it as, "*the classic common law definition of an office*" (at para. 148). In the same paragraph, she referred to another formulation, namely a person whose rights and duties are defined by the office they hold, rather than any contract. In *Preston v President of the Methodist Conference* [2013] 2 AC 163, Lord Sumption referred (at para. 4) to:

> *"the distinction between an office and an employment. Broadly speaking, the difference is that an office is a position of a public nature, filled by successive incumbents, whose duties were defined not by agreement but by law or by the rules of the institution."*

7. A "*member of the executive*" is defined in section 212(7) of the 2010 Act and includes a Minister of the Crown and a government department.

8. Mr Smith referred also to the Equality Act 2010 s.109, which he relied upon in his submissions, namely the liability of principals and agents.

> *(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*
> *(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal*

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

9. Mr Smith submitted - in terms - that it was relevant to the definition of an office holder in s.50, because of the reference to "*made by a member of the executive*" in that section; in other words, if the person who appointed the Claimant was an employee of the member of the executive, then s.109 would deem that appointment to be made by the employer.

10. However, s.109 is concerned with liability. It is ancillary to that part of the Act which sets out what amounts to prohibited conduct and, within that context, it treats acts done by employees or agents as if they were done by their employers or principals. It does not seem to me that it is relevant to the determination of whether or not someone comes within the Equality Act in the first place.

11. Finally, under section 7 of the Prison Act 1952 ('the 1952 Act'), a prison "*shall have a governor, a chaplain … and such other officers as may be necessary*" and may also have an "*assistant chaplain"*.

Facts

12. The facts material to this issue are (mostly) not in dispute. The Claimant first attended HMP Brixton in 1998 as part of a team presenting the Alpha Course, which is a course based around a series of Bible studies. He was free to decide when and whether he attended and, by 2016 and 2017, it was about 16 or 17 times a year, for about an hour at a time. It is not in dispute that, in due course, he became a key holder at HMP Brixton. It is also not in dispute that he underwent a security vetting process, as would be expected in that environment. He remained at HMP Brixton until his suspension in 2017.

13. The only slightly contentious point was whether, as part of the process of approval to be a key holder, the Claimant was interviewed by the Governor of the prison. In his witness statement, the Claimant said that he had to be interviewed by the Governor, but he was less sure when giving evidence and it was difficult to see why the Governor would need to be involved with that decision. However, little turns upon the point, as this was approval of being a key holder and not appointment to any role.

14. The Claimant has made clear at this hearing that he was a Chaplaincy Volunteer. What this means is as follows. First, there are Chaplains. These can be (i) full or part-time employees, (ii) working in a sessional fee-paid basis or (iii) they can be Volunteer Chaplains. There is a recruitment and appointment process, which is set out at s.6 of the Chaplaincy Handbook, and a key criterion is that their appointment as a Chaplain on whichever basis must be endorsed by a Faith Adviser. In addition, there are job descriptions, an interview panel and terms and conditions of their engagement.

15. Chaplains carry out the statutory duties, described by Rev. Chadder as:

> *"a. Visiting each prisoner received into the establishment within 24 hours of their reception;*
> *b. Visiting each prisoner held in the Segregation Unit each day;*
> *c. Visiting each prisoner held in the Healthcare Unit each day*."

16. Secondly, there are Chaplaincy Volunteers, such as the Claimant, who come to assist in prisons on a much more informal basis. They do not follow a recruitment and appointment process and they do not require endorsement from a Faith Adviser. There may be hundreds of Chaplaincy Volunteers helping out at an establishment at any one time. As in the Claimant's case, they will need differing levels of security vetting and some may be key holders. In emergency circumstances, they might have to help with statutory duties, but they are not recruited to undertake those duties, in contrast to Chaplains.

17. It is common ground that Chaplaincy Volunteers play a very important and much valued role in prisons. Their absence would create a huge gap and place great pressure on the Chaplains. Some – like the Claimant – will volunteer regularly and over a long period. I accept that, at times, there may also be similarities between what a Volunteer Chaplain does "on the ground" and what a Chaplaincy Volunteer does. There may also be some understandable confusion over the terminology, given the similarity in titles. However, they are distinct roles.

Discussion and conclusions

18. Mr Smith and Mr Purchase provided very helpful written and oral submissions, which I need not set out, as they form the basis of this discussion and these conclusions.

19. The first question is whether the post of Chaplaincy Volunteer falls within the definition of an office. Mr Purchase, by reference to the authorities cited, says that the evidence clearly shows that this was not a defined position with a separate existence independent of the person who filled it, rather it was a fluid and flexible arrangement whereby well-meaning individuals, such as the Claimant, could help out with faith-based activities at prisons.

20. I am bound to agree with him. The Claimant's involvement with the prison service came about through an informal invitation to participate in a team presenting the Alpha Course and subsequently he helped out with such activities as bible reading. The level of security vetting and the fact he was a key holder did not alter the nature of what he was doing, nor did they restrict his freedom to choose when and whether he did any volunteering.

21. On his own description of his volunteering, he could not be described as holding a subsisting, permanent, substantive position. I disagree with Mr Smith when he points to the undisputed fact that, at the time he was suspended, the Claimant was carrying out his volunteer role and therefore

it was subsisting and had sufficient content to be substantive. What those words mean in this context is that the office or post must have – as Mr Purchase put it – "a life of its own".

22. The point can be made in this way. Under the Prison Act 1952 s.7, a prison must have a chaplain, which is a position with defined duties and which will be filled by successive incumbents (to paraphrase Lord Sumption). There may be lots of Chaplaincy Volunteers and they may carry out important and enduring work, but the role of Chaplaincy Volunteer is not a defined role to which duties attach and which must be filled.

23. Despite reaching that conclusion, I have gone on to consider the second question, namely, whether there was an appointment. Clearly, there was no appointment process measurable to the appointment process for Chaplains (including, therefore, Volunteer Chaplains), in particular because there was no endorsement by a Faith Adviser. In fact, on the evidence before me, there was no selection and recruitment process at all for Chaplaincy Volunteers. Rather, there was an informal process of approval which allowed the Claimant and other such volunteers to help out at the prison with faith-related activities. The requirement for security vetting does not constitute an appointment process, but was simply a requirement of carrying out those activities in a prison.

24. The third question – whether the Claimant was appointed by a member of the executive – is therefore academic, because there was no appointment to an office or post. I would only add, for the sake of completion, that there was no evidence before me that a member of the executive was involved in the process that led the Claimant to be a Chaplaincy Volunteer. I have already said that I do not find s.109 to be of relevance here.

25. In those circumstances, I do not find that the Claimant was an office holder within the Equality Act 2010 s.50 and it follows that the tribunal does not have jurisdiction to hear this claim

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Employment Judge S Cheetham QC
Dated 18 August 2020