



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106835/2019

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Held in Glasgow on 11 September 2019

Employment Judge M Sangster

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Mrs CE Marsland

Claimant

St Augustine's Episcopal Church

Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant was an employee of Food for Thought, a Scottish Charitable Incorporated Organisation, operating under charity number SC047239 and whose address is St Augustine's Community Hall, St Mary's Way, Dumbarton, G82 1LL. They are substituted as respondent in the proceedings.

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REASONS

Introduction

1. A preliminary hearing took place on 11 September 2019 to determine the identity of the respondent(s) and the employment status of the claimant.
- 25 2. The claimant was represented by Mr Pace and Ms Morrison, of the Strathclyde Law Clinic. Mr Pace spoke on behalf of the claimant throughout the hearing. The respondent was represented by Mr Grant, solicitor.
3. The respondent maintained that the claimant was not engaged by them and the correct respondent should be Food for Thought, a Scottish Charitable Incorporated Organisation, operating under charity number SC047239 (**FFT SCIO**).
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4. The respondent also maintained that the claimant was a self employed contractor, rather than an employee.
5. The claimant gave evidence on her own behalf.
6. The respondent led evidence from John Dyer (**JD**), a member of the respondent's church, Reverend Kenneth McAuley (**KM**), Rector of the respondent until May 2019 and Reverend Liz O'Ryan (**LO'R**), Associate Rector of the respondent until February 2019.
7. It is noted that each of the witnesses were also involved with FFT SCIO in the following respects:
 - 10 (i) KM was chair the committee of FFT SCIO until 11 November 2018;
 - (ii) JD volunteered with FFT SCIO during 2017 & 2018 and is the current chair of the committee of FFT SCIO, having been appointed on 11 November 2018; and
 - (iii) LO was a committee member of FFT SCIO until February 2019.
- 15 8. During the course of the hearing, the respondent indicated that it was no longer disputing that the claimant was an employee, albeit that their position was that the claimant was an employee of FFT SCIO, rather than the respondent.

Findings in fact

- 20 9. The Tribunal made the following findings in fact, relevant to the issues to be determined.
10. The claimant previously worked for Circle Scotland. Circle Scotland rented office space from the respondent, and the claimant shared an office with KM. During that time she also, on an ad hoc basis, helped the respondent with minor tasks. That role was made redundant in July 2015. Around that time, KM was developing an idea for a concept which he called Food For Thought (FFT).
25 The mission of FFT was to provide food for the hungry. Given the claimant's skills, KM asked if she would like to become involved in setting up and running

that project. The claimant agreed and she started in the role of Coordinator for FFT on 10 July 2015.

11. The role involved setting up a bank account for the project, arranging for the project to be set up as an unincorporated charity and registered with OSCR, arranging for the provision of emergency food aid, building a volunteer base and supervising those volunteers. Another key part of the claimant's role was to secure funding for the provision of the food and the cost of her role, to ensure the project was self-funding. Without that funding, it was clear that the claimant would not be able to continue in the role beyond an initial period of 9 months.
12. The costs for the project, including the claimant's salary, were covered for the first 9 months by a grant of £15,000 from the Diocese. This was authorised by the Bishop who placed the following conditions on the payment of the grant:
- (i) That a contract for services, rather than an employment contract, was entered into with the Coordinator;
 - (ii) It should be set up as an independent charity, albeit remaining missionally connected to the respondent; and
 - (iii) An update on how the money had been utilised and progress in relation to future grant funding should be provided after 6 months.
13. The grant was paid into the separate bank account which the claimant set up for FFT.
14. FFT was registered with OSCR on 16 October 2015, under charity number SC046053. It was linked with the respondent, who were stated to be the parent charity.
15. For the first 9 months, the claimant submitted an invoice for her agreed fee of £1,550 per month and was paid by cheque from the FFT account.
16. The claimant was responsible for the day to day running of FFT. She reported to and took direction from the FFT committee, or the chair of that committee, KM. She worked regular hours, which were agreed with the FFT committee. She continued to work from the respondent's premises and FFT paid rent to

the respondent in respect of this. She provided formal reports the FFT committee on a monthly basis and for the AGM.

17. The claimant also carried out adhoc duties for the respondent, such as answering the phone and taking messages (there was only one phone line into the premises and the majority of calls (around 95%) were for FFT, rather than the respondent), as well as assisting with administrative tasks. She had also done so during her employment with Circle Scotland.
18. The claimant was successful in securing grant funding in the name of FFT and this was paid into the FFT bank account. In the applications for funding which she completed, in the name of FFT, she indicated, for example, that *'funding is required to pay/help to pay for a vital full time worker who currently coordinates the project, trains the volunteers, liaises with outside agencies, applies for other funding, deals with publicity and supports the brief, intermediate and long term caseload. The wage for our coordinator is £23,000. Without the full time worker the project will not be able to operate.'*
19. In March 2016, towards the end of the initial 9 month period, the viability of the claimant's position was reviewed to ascertain if it was viable going forwards. The FFT committee agreed that, as a result of the grant funding which the claimant secured for FFT, her role could continue. It was discussed and agreed with the FFT committee that the claimant would be paid a salary of £24,000, which was the amount she was paid in her previous role with Circle Scotland. From that point onwards the claimant was paid monthly, in arrears, without the need to submit invoices. The claimant arranged for the payment of her own salary, from the FFT bank account.
20. The claimant was entitled to paid annual leave and was paid when off sick.
21. At the start of 2017, as a condition to secure grant funding from the Scottish Government, the claimant arranged for the creation of Scottish Charitable Incorporated Organisation (SCIO) in the name Food for Thought. FFT SCIO was created on 15 March 2017. The respondent was again stated to be the parent charity. FFT SCIO was intended to replace FFT. The assets and

liabilities of FFT were transferred to FFT SCIO on its creation. There was no change however to how the charity operated on a day to day basis.

22. In October 2018, the claimant prepared a Coordinator's Report to be presented at the AGM of FFT SCIO. This was sent in advance to the Committee of FFT SCIO and the AGM took place on 11 November 2018. In her report the claimant stated, *'I would like to finish off by saying that it has been a privilege to hold this position for the past 12 months, within the most worthy wee charity in the shire and I am incredibly proud to be involved. I will be moving on in the next financial year to a new challenge and wish Food for Thought continued success.'*
23. RD became the new chair of FFT SCIO at the AGM on 11 November 2018. The claimant was off work due to illness at that time and he met with her during her absence, in his capacity as chair of FFT SCIO, to discuss the potential of her returning to work. They agreed that he would meet with the claimant on a monthly basis going forward. The claimant did return to work prior to Christmas and co-ordinated the charity's operations over the Christmas period very successfully. RD held a return to work interview with the claimant on her return. The first monthly meeting between RD and the claimant took place in December 2018, as agreed.
24. In line with her stated desire to resign from her employment, the claimant prepared a letter of resignation, which the Tribunal was referred to. She intended to submit this when she secured an alternative role, but never did so. It detailed her notice period, last working day, annual leave entitlement and requested her final wage be paid to her. The letter was addressed to the committee of FFT SCIO.
25. At a committee meeting on 4 January 2019, FFT SCIO determined that they could no longer sustain the role of full time co-ordinator, as there were insufficient funds to cover the claimant's salary and the organisation's running costs and there was no funding in the pipeline. RD and LO'R met with the claimant on 7 January 2019 to inform her of this. They provided her with a letter, signed by RD, as chair of FFT SCIO, confirming this.

26. The claimant submitted a letter of appeal dated 14 January 2019. Within that letter she stated that she was not employed by FFT SCIO, but was instead employed by the respondent.
27. The claimant stated in evidence in chief on two occasions that *'there was no contract for the first 9 months'* and that that she was paid by the grant from the Diocese. The Tribunal was however referred to a *'Freelance Agreement'* dated 10 July 2015, between the claimant and the respondent. This expressly stated that it would terminate on 31 March 2016, or earlier if either party gave 7 days' notice. It provided for the claimant to receive £1,555 per month.
28. The Freelance Agreement stated that *'The role of the Freelancer will be to work in cooperation with the clergy and pastoral team to facilitate the mission of the Church by:*
- *Managing the daily running of Food For Thought*
 - *Achieving charitable status under OSCR for Food For Thought, if deemed appropriate, within three months*
 - *Applying for grants for ongoing funding of the project*
 - *Applying for future funding for the post so it can continue past April 2016*
 - *Continuing to co-ordinate and expand an effective team of volunteers*
 - *Providing training for volunteers*
 - *Building up and expanding on relationships and networks already formed with other organisations and charities*
 - *Setting up and facilitating a group work programme to include basic life skills eg healthy eating, cooking, parenting and budgeting*
 - *Consolidating and continuing the initiative to the next stage of its development including education, mentoring and advocacy of service users*

- *Developing the social media profile of St Augustine's Food For Thought programme'*

29. The Tribunal was referred to a further Freelancer Agreement dated 1 April 2017 between the respondent and the claimant. It stated that it would terminate on 31 March 2018, or earlier if either party gave 7 days' notice. The terms of this Agreement, other than the dates and monthly rate (which was increased to £2,000 per month), were exactly the same as the previous Agreement. The claimant prepared this, in a rush, as a potential funder required evidence of the contractual arrangements in place. KM signed this Agreement without paying much attention to the terms. He stated this was an error and the Agreement should not have been between the claimant and the respondent, but between the claimant and FFT SCIO.

Respondent's submissions

30. The respondent reiterated that they were no longer disputing that the claimant was an employee. They submitted however that the claimant was employed by FFT SCIO, rather than the respondent. They submitted that all the evidence, other than one factor (the terms of the contract), pointed to that.

Claimant's submissions

31. The claimant's representatives produced a detailed written submission, arguing that the claimant was an employee of the respondent, with reference to the principles derived from the relevant legislative provisions and case law. They requested that, if it was found that the claimant was an employee of FFT SCIO, they be conjoined to the proceedings.

Relevant law

32. Section 230(1) of the Employment Rights Act 1996 (**ERA**) defines "employee" as "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment."

33. Section 230(2) ERA states that a contract of employment means ‘*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.*’

34. The issue of the status of a person as employee, worker or neither of those terms has been the subject of much case law. The essential test for employment status was set out in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*** [1968] All ER 433, which referred to the need for an irreducible minimum of personal service, mutuality of obligation and control. In ***Autoclenz v Belcher and others*** [2011] UKSC 41 the Supreme Court considered whether the terms of a written contract were conclusive evidence of the parties’ relationship. They held that Tribunals should examine the working relationship between the parties, how that operated and what was the reality of the situation. Contractual terms which are inconsistent with the reality of the situation may be set aside.

15 **Decision**

Employment Status

35. Part way through the hearing, the respondent indicated that they no longer disputed, given the evidence, that the claimant’s status was that of an employee. The Tribunal agreed with that concession and found that the claimant was an employee, for the following reasons:

- (i) It was clear that the claimant was required to provide a personal service.
- (ii) There was mutuality of obligation - the claimant had fixed working hours and there was an obligation that she be provided with work, and that she undertake that work, during those hours.
- (iii) There was control over what the claimant did - the claimant required to report to and take direction from the FFT SCIO committee; her hours were set by the FFT SCIO committee and she was line managed by the chair of the committee.

- (iv) Other factors – the claimant also received a fixed salary, so took no financial risk; she continued to be paid while she was holiday or unable to work due to sickness.

Identity of employer

5 36. Having determined that the claimant was an employee, the Tribunal then considered who the claimant was employed by, the respondent or FFT SCIO. Whilst it is clear that the claimant was initially engaged by the respondent (as neither FFT nor FFT SCIO were in existence on 10 July 2015, when the claimant commenced her role as Coordinator for FFT), the Tribunal find that
10 from 1 April 2016, when the initial Freelancer Agreement terminated, the claimant became an employee of FFT (or perhaps more properly the committee of FFT). Her employment then transferred to FFT SCIO when it was created on 15 March 2017. The Tribunal concluded that the claimant was employed by FFT SCIO (or its predecessor) for the following reasons:

- 15 (i) The claimant's role was Coordinator for FFT SCIO and she was responsible for the day to day running of that organisation.
- (ii) The claimant reported to and took direction from the FFT/FFT SCIO committee, or the chair of the committee (KM initially and thereafter RD).
- 20 (iii) The claimant's hours and salary were set by the FFT/FFT SCIO committee.
- (iv) The claimant was paid from the FFT SCIO bank account.
- (v) The funding for the claimant's salary came from grant funding which the claimant applied for in the name of FFT SCIO and which was
25 awarded to FFT SCIO and paid into their bank account.
- (vi) The office space the claimant worked from was rented from the respondent by FFT SCIO.
- (vii) The claimant intimated her intention to step down from her role as Coordinator at the FFT SCIO AGM.

5 (viii) RD met with the claimant during her absence in from work due to illness in November 2018, held a return to work meeting with her, and arranged monthly management meetings thereafter. These meetings were held in his capacity as the new chair of FFT SCIO. He had no employed role with the respondent, he was simply a member of the respondent's church. There would be no basis upon which RD would be meeting with the claimant if she were, in fact, an employee of the respondent.

10 (ix) The claimant prepared a letter of resignation addressed to the FFT SCIO committee.

(x) FFT SCIO took the decision to terminate the claimant's employment.

(xi) RD and LO'R met with the claimant to inform her of that decision and provided her with a letter from FFT SCIO confirming this.

15 37. There was accordingly no link to the respondent other than the terms of the Freelancer Agreements. The Tribunal accepted that the terms of the second Freelancer Agreement contained an error in referencing the respondent, not FFT SCIO. The reality of the situation was that, by the date of the second Freelancer Agreement, which was prepared on 1 April 2017, the claimant was an employee of FFT SCIO. The terms of the Freelancer Agreement are
20 entirely inconsistent with the reality of the situation.

38. In accordance with Rule 34 of the Employment Tribunals Rules of Procedure, FFT SCIO is substituted as respondent in the proceedings. The claim will be served on, and proceed against, FFT SCIO only.

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M Sangster
Employment Judge

02 October 2019
Date of Judgment

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Date sent to parties

07 October 2019