



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4111321/2021

Preliminary Hearing held by CVP on 24 January 2022

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Employment Judge McFtridge

Ms Kara Thorndike

**Claimant
In person**

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Falmouth University

**Respondent
Represented by
Mr Moore,
Counsel
Instructed by
Messrs Stephens
Scown Solicitors**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the Tribunal does not have jurisdiction to hear the claim. The claim is dismissed.

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REASONS

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1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unlawfully discriminated against on grounds of age and sex. The respondent narrated that on or about 1 June 2021 she had been offered a funded doctoral research traineeship by the respondent and claimed that although the contract between herself and the respondent was labelled a studentship it was in fact a contract of employment and that

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the respondent had indirectly discriminated against her on grounds of age and sex by applying a PCP that employees or workers are required to live on university campuses or be within a commutable distance of the university. The respondent submitted a response in which they denied the claim. They took the preliminary point that the Tribunal had no jurisdiction to hear the claim since the Tribunal only has jurisdiction to hear a claim which falls within Part 5 of the Equality Act and it was denied that the studentship amounted to an offer of employment under section 83(2) of the Act. In their view it was neither a contract of employment nor a contract personally to do work. A preliminary hearing was fixed in order to determine the preliminary issue of whether or not the Tribunal had jurisdiction to hear the claim. At the hearing the claimant gave evidence on her own behalf. Evidence was led on behalf of the respondent from David Prior the respondent's Director of Research. Both witnesses gave their evidence in chief by way of witness statement and were then subject to cross examination. A joint bundle of documents was lodged for the hearing. On the basis of the evidence and the productions I found the following essential facts relating to the specific matter to be determined by the Tribunal to be as follows.

20 **Findings in fact**

2. The respondent are a university based in Falmouth. The respondent operate a programme known as a Falmouth Doctoral Studentship (FDS). This programme was established in 2017. It is based on the model used by the research organisations in receipt of UK Research and Innovation studentship funding (UKRI funding). UKRI are the overarching national public body for research and innovation in the UK sponsored by the government department for business, energy and industrial strategy. The respondent has received doctoral funding from the Arts and Humanities Research Council (AHRC) one of UKRI's constituent councils and the FDS programme was designed to offer a similar studentship model using the university's own funds.
3. It was common ground between the parties that the claimant applied for and was granted a studentship under the FDS in or about June 2021. The claimant's claim of sex discrimination relates to the terms of her

studentship, in particular she claims that these terms are indirectly discriminatory on grounds of age and sex.

4. The terms and conditions of the studentship were lodged (page 85). Section 2 of the FDS terms and conditions is headed "Expectations" and states

"2.1 Falmouth Doctoral Studentships form an essential component for the delivery of the university's 2030 R&I strategy. As such the alignment of funded doctoral projects to the strategy as a whole and to the priorities of R&I themes, programmes and departments is essential. In addition to the successful completion of the funded doctoral programmes students funded through the Falmouth Doctoral Studentship will also be expected to make an active contribution to the university's R&I community. This would normally include but not be limited to

- Co-author research outputs with supervisors appropriate for submission to the research excellence framework
- Contribute to teaching at Falmouth as appropriate usually within the department of the student's Director of Studies
- Engage in preliminary research that could lead to future funding bids
- Participate in knowledge exchange, public engagement, conference organisation etc."

The respondent do not regard any of the matters listed as being in any way essential. The existing 17 or so students who are funded on FDS scholarships vary considerably in their contribution and many do not contribute in these areas. There is absolutely no sanction on any student who does not meet these expectations in terms of co-authoring, contribution to teaching, funding bids or participating in knowledge exchange or public engagement. There is no mechanism by which such things are measured and no procedure for removing funding for any student who does not do any of these things. Of the current 17 students some have co-authored papers with other members of university staff. Some of them do teach but that is subject as mentioned above to there being a separate contract with Falmouth Staffing Limited. So far none

have engaged in preliminary research for funding bids. So far as the university is concerned the key point is that the PhD student is required to engage on their own original research for the grant of their doctorate. They are not in any way under a contractual obligation to do any of these other things. The university's view of the terms and conditions is that the use of the word normally means that these points of aspirations are things which they would normally expect but are in no way contractual requirements

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5. The key features of the studentship model are that the applicant must be accepted to undertake a three-year post-graduate research degree. This is the key task that the applicant is engaged in for the period. The tuition fees for the research degree are waived by the university and the student also receives a quarterly stipend in advance which is to cover their basic living costs while doing the research degree. In the year 2021-22 the stipend was £15,609.
6. As a student the student will have access to extensive services and support from the respondent and collaboration opportunities if they wish to take them. There is however absolutely no obligation on the student to collaborate with others at the university.
7. There is no obligation within the FDS to be offered or undertake teaching or do additional research for others.
8. Many students engaged on PhDs do carry out teaching work however if they do this then that work is subject to a separate contract of employment with a company called Falmouth Staffing Limited. This is something which requires to be specifically agreed separately from the FDS. Whether or not a PhD student is offered work depends on department need and the willingness of the student. There is no obligation on the student to do this. In actual fact the claimant was, prior to being offered her PhD studentship engaged as a tutor by Falmouth Staffing Limited and carried out work under these separate contracts of employment for Falmouth Staffing Limited. Remuneration for such work done for Falmouth Staffing Limited is paid separately to the FDS and terms of the UKR&I guidance may not be taken from the student stipend.

9. The university anticipates that PhD students will be an asset to the university community.
10. Generally speaking, the respondent advertised doctoral briefs which set out areas of research which align with the priorities of the university in terms of research they would wish to have done and also align to the university's capacity to supervise such research i.e. the existence of current staff who would be able to supervise a PhD in the subject. The university does however seek to provide briefs which are deliberately open to interpretation so as to encourage the widest possible range of applicants. They are required to be open enough so that students can interpret the brief in any way they wish. Once a student is accepted and embarked on their study, these briefs will become a point of reference for students.
11. The university has self-funding students as well as students who are funded through the FDS scheme. They also on occasions have PhD students who are funded by their employer or by outside agencies. The university will expect roughly half of its intake of PhD students to be funded through the FDS scheme. They currently have a total of 34 PhD students.

Issues

12. The sole issue to be determined by the Tribunal was whether or not the Tribunal had jurisdiction to hear the case or not. The Tribunal's jurisdiction to hear discrimination cases is set out above. Section 83(2)(a) of the Equality Act 2010 defines employment as meaning employment under a contract of employment, a contract of apprenticeship or a contract personally to do work. The question for the tribunal was whether the contract between the claimant and the university came in to any of these three categories. In her ET1 the claimant had indicated that she was claiming on the basis that she had a contract of employment with the respondent or in the alternative had a contract with the respondent to personally do work. During the course of submissions the claimant made reference to the contract being in fact a contract of apprenticeship. The respondent's representative helpfully indicated that he did not take any pleading point in relation to this and accordingly I felt it appropriate to

consider whether the contract between the parties was either a contract of employment, a contract to do work personally or a contract of apprenticeship.

13. Both parties made full submissions and I would commend the claimant for the succinct way in which she summed up her case.

Respondent's submission

14. Section 39 of the Equality Act 2010 confirms that an employer must not discriminate against a person in the arrangements A makes for deciding to whom to offer employment or as to the terms on which A offers B employment. As noted above employment is defined in section 83(2)(a) as employment under a contract of employment, a contract of apprenticeship or a contract personally to do work. The distinction between a contract of employment or a contract to do work personally is one which is well known in employment law and is often referred to an individual being either a limb A or a limb B worker. As noted above the claimant indicated that in her view the contract was in fact a contract of apprenticeship.

15. The respondent's representative referred to the cases of ***Daley v Allied Suppliers Limited*** [1983] IRLR 14 and ***Varnish v British Cycling Federation*** [2020] IRLR 822. The respondent also referred to the three-part test set out in the well-known case of ***Ready Mixed Concrete (South-East) Limited v Minister of Pensions and National Insurance*** [1968] 1 All ER 433. These three requirements are that the servant agrees to provide the employer their own work in return for a wage, that the servant is subject to control in the performance of their duties and that the other provisions of the contract are consistent with a contract of employment.

16. The respondent's view was that it was quite impossible to 'shoehorn' the arrangement between the university and the claimant into this definition. The key point was that the claimant received a stipend to enable her to do a research doctorate. She was not carrying out work for the university. It was also artificial to say that she was subject to the control of the university. In order to obtain the studentship she was required to research

an area which the university felt chimed with their own capacities and interests. After that there was little or no control.

17. With regard to whether or not the other provisions were consistent the respondent's representative referred to paragraph 49 of the *Varnish* case which quotes heavily from the *Ready Mixed Concrete* case. This makes the point that an obligation to do work subject to the other party's control is a necessary though not always a sufficient condition of a contract of service. If the provisions of the contract as a whole are inconsistent with this being a contract of service it will be some other kind of contract and the person doing the work will not be a servant. The judge's task is to classify the contract (a task like that of distinguishing a contract of sale from one of work and labour). The respondent's position was that whilst in this case the contract did not fulfil either of the first two criteria set out in the *Ready Mixed Concrete* case even if it had then the contract would not be a contract of employment since it would clearly not meet the third test.

18. The respondent's position was that it was clear that the claimant was not a limb B worker either since the key point was not the degree of control but whether or not the contract required the claimant to do work personally for the respondent. There was no such requirement. The claimant was required to work on her own research as a student. This did not make her a limb B worker.

19. With regard to the claimant's pleadings to the effect that she was in fact an apprentice this was not the case where the claimant was working and receiving on the job training. The dominant purpose of the contract was clearly to allow the claimant to be paid a stipend so that she could complete her PhD. She was not an apprentice or trainee academic as she suggested.

Claimant's submission

20. The claimant started her submission by indicating that she now considered that the contract was in fact a contract of apprenticeship. She referred to documents she had lodged setting out what is meant by an apprenticeship. It was her view that the PhD was essentially

apprenticeship whereby someone trained to be an academic. She accepted that it was not written as such but felt that there was a discrepancy in the respondent's case in that they were saying on the one hand that the expectation set out in section 2.1 were not requirements but on the other hand they were insisting that she live within commuting distance of the university so that these expectations could be better met. It was her view that although the contract was not written as such it was in fact a training contract. It said that one had to consider the issue of strategic alignment. She made the point that the students who obtain a FDS are carefully selected to best contribute to the university's goals. She considered that what she would be doing in a PhD would be working alongside staff and learning specific skills and receiving training. She made the point the terms and conditions referred to leave and holidays and this is something which would be referred to in a contract of employment. She stated that if the contract was not a contract for work itself then it was a training or apprenticeship. Her view was that she was required to do something for the university and receive payment in exchange.

Discussion and decision

21. At the end of the day I considered that the key issue in this case was whether the claimant was required to do work personally for the university. The view was that on the basis of the evidence she was not. I accepted that the terms of the contract were as set out in the "terms and conditions" document lodged (p85) I accepted the evidence of the respondent's witness Mr Prior that the matters set out in paragraph 2.1 were expectations and in no way contractual requirements. This is the case on any proper reading of the document. It also accorded with Mr Prior's evidence that there would be absolutely no sanction placed on any student who did not do these things.

22. I considered the claimant's suggestion that what we had here was a contract of apprenticeship carefully. I did not entirely agree with the respondent's suggestion that the contract was one which was a million miles from a contract of apprenticeship. At the end of the day I decided that the contract was not one of apprenticeship for two reasons. Firstly,

as noted above, there was no requirement for the claimant to do work personally for the university. It was clear from the documentation and from the evidence that the requirement was that she work as a student on her PhD. Secondly, and more importantly, I considered that even if I was wrong in considering this I would then require to deal with the question set out in the **Ready Mixed Concrete** case where they discuss limb 3 of the test for a contract of employment. I considered it was my role to look at the contract and decide what the dominant purpose of the contract was. I considered the discussion of those issues in the **Varnish** case to be particularly helpful given that they have clearly reviewed a very substantial number of authorities on the issue. It was clear to me that applying the dominant purpose test the dominant purpose of the contract was to allow the student to carry out her own research so that she might be awarded the degree of PhD and that she be paid living expenses while doing this. There was no requirement for her to do anything else apart from work on her PhD. That was the dominant purpose of the contract. The claimant was neither a limb A nor a limb B worker nor was she an apprentice. She was a PhD student with a studentship which is something entirely different. Given this finding the Tribunal has no jurisdiction to deal with the claimant's claim of discrimination and the claim is therefore dismissed.

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30	Employment Judge:	I McFatridge
	Date of Judgment:	10 February 2022
	Date sent to parties:	11 February 2022