



EMPLOYMENT TRIBUNALS

Claimant: Mr A Trapp

Respondents: Reverend P Ashman (1)
The Parochial Parish Council of St John the Baptist Church
Weston Super Mare (2)

Heard at: Bristol (by CVP) **On:** 25th May 2021 and
1st March 2022

Before: Employment Judge A Richardson

Representation

Claimant: in person

Respondents: Mr A Griffiths, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that

1. The First Respondent was not the Claimant's employer and is removed from the proceedings.
2. The Claimant was at all relevant times self employed and was not an employee under S230 Employment Rights Act 1996.
3. The Tribunal has no jurisdiction to hear the claim of unfair dismissal and the claim is dismissed.

REASONS

Issues

1. The issues to be determined are (1) whether the First Respondent should be removed as respondent to the proceedings and (2) what was the Claimant's status – employee, or was he self employed as the Director of Music at St John the Baptist Church Weston Super Mare (St Johns/the Church) over the relevant

period? If the Claimant is self employed that is the end of his claim of unfair dismissal. If he was an employee, his claim would go forward as a claim with associated compensation claims.

Proceedings and evidence

2. I was provided with an agreed bundle of documents comprising 212 pages including witness statements for the Claimant and Reverend Ashman. I heard oral testimony from both witnesses. The case went part heard on 25th May 2021 because of a technical failure of the VHS system which meant that Reverend Ashman had not heard any of the Claimant's cross examination. The case was relisted after an official transcript of the Claimant's cross examination was obtained.

Findings of Fact

3. I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts. I did not have any credibility concerns about either witness although the Claimant had a tendency on occasions to slant his evidence to put the Respondents in a less favourable light.

4. My findings of fact relevant to the issues which have been determined are as follows.

4.1 Reverend Ashman was appointed on 3rd October 2017 as Rector at St Johns 17. He was responsible for worship, the running of St Johns and its mission in the community with the help of church wardens. Decisions concerning the Church were made through the Parochial Church council (the PCC) and the Church Standing Committee (SC). Reverend Ashman was the chairman of both the PCC and the SC. The Church finances were controlled by the PCC which is the legal entity for contractual purposes.

4.2 The Claimant was engaged as Director of Music at St Johns on 24th March 2008 by Reverend Ashman's predecessor, Reverend Richard Tayler (Reverend Tayler), now retired. At the time the Claimant had just started a full time research fellowship at Oxford. He and Reverend Tayler made an oral agreement as to the terms of engagement. Some six months after the Claimant had started in the role of Director of Music, Reverend Tayler provided him with a draft (blank) contract for the provision of his services as Musical Director, inviting the Claimant to let him know what he thought. A copy of this document was provided in the bundle with manuscript annotations on it by the Claimant.

4.3 The document's title page stated that it was an Agreement for the

Appointment of a Director of Music and that it had been issued by the Incorporated Society of Musicians and had been endorsed by the Guild of Church Musicians, Incorporated Association of Organists, Royal College of Organists and the Royal School of Church Music.

4.4 The parties to this standard form 'industry specific' agreement were the Parochial Church Council of St Johns, the Minister or Parish Priest who would have been Reverend Tayler at that time, and the Musician who would have been the Claimant - had the standard format been completed and signed. The Claimant said that after being given a copy of this standard form contract, he heard nothing more about it from Reverend Tayler, from which it must be deduced the Claimant did not raise the subject of concluding his terms of engagement either. The document in any event was not signed. The Claimant's annotations on the blank contract referred only to whether salary would be paid in advance, the date for annual review of fees for providing music at events such as weddings and funerals, an amendment from four to five weeks holiday including 6 paid Sundays in each Calendar year with the PCC defraying costs of five weeks each year. There was also an amendment to the rate of £15, increased to £25, to be paid to a deputy to carry out The Director of Music's duties for services and practices which he could not provide for reasons of illness or holidays. Those annotations suggest what the Claimant had mind at the time and they reflect what actually happened; the Claimant and Reverend Tayler agreed them.

4.5 Reverend Tayler also gave the Claimant a list of key tasks associated with the role of "Organist/Director of Music". The key tasks were:

- To provide congregational, choral, organ and instrumental music in support of the liturgy.
- Encourage the members of the choir to further develop their musical skills and broaden their repertoire.
- Initiate and manage a recruitment and training strategy for choristers of all ages.
- Assist the congregations to sing with confidence.
- Work in close cooperation with the Rector who has ultimate responsibility for all matters relating to the conduct of worship.

4.6 There was also a person specification for the position of Director of Music. Apart from a list of desirable personal attributes, the document refers to the appointment being subject of a satisfactory enhanced criminal record check (now a Disclosure and Barring Service check). It stated that remuneration would be an annual salary within a range which was left blank. The range of salary depended on experience and qualifications. Remuneration would be subject to annual review. References were required and the post was subject to an initial three month probationary period.

4.7 The blank contract made it clear that no part of the agreement was to be

deemed to constitute a contract of employment and that the Director of Music would be responsible for his own income tax and national insurance arrangements. The Claimant does not dispute that he understood himself to be self employed at that time.

4.8 The core terms that were orally agreed and which are not in dispute align broadly with the blank contract given by Reverend Tayler to the Claimant which were that as Director Music the claimant would:

- a. be responsible to the Minister / PCC for the care, control and general oversight of all the music in the Church;
- b. play the organ and direct the choir/instrumental group at all the ordinary Sunday services;
- c. would play the organ and direct the choir/instrumental group at all the Services on the Holy Days of the Church listed in Schedule A attached to this Agreement;
- d. would play the organ and direct the choir/instrumental group at all weddings, funerals and special services not listed in Schedule A whenever music is to be used and shall be entitled to be paid the fees set out in Schedule B;
- e. would from time to time at the request of the Minister attend meetings of the Council and its sub-committees where music and the liturgy are to be discussed;
- f. would devote adequate time to the preparation and planning of music;
- g. would be responsible for the supervision of the care and maintenance of the Church's organ and other musical instruments.

4.9 Schedule A lists the Services on Holy Days of the Church at which the Claimant would play the organ and/or direct the choir/instrumental group in accordance with the contract. It is not disputed that the Claimant performed these tasks. The Claimant however could chose whether he personally played at a wedding or a funeral or other function and if he did so, he was entitled to the standard fee payable. Schedule B being the scale of fees for weddings and funerals, was blank.

4.10 The Claimant added to that list a long list of other duties he performed to demonstrate his integration into the Church Community. Some of it was disputed by Reverend Ashman. A significant proportion of the tasks or duties were inherently part of the job of Director of Music such as liaising with a visiting priest as to the music during a service, and planning a scheme of anthems which is discussed and displayed for the Choir up to 2 months in advance and conducting choir practice. Other services or duties which he performed such as playing for Deanery and Diocesan services, attending planning meetings at Wells as St Johns named representative, were not regular or routine events. The Claimant had organized carol services at care homes. There was not an obligation on him to do so. The Claimant contributed an annual report to the PCC. He occasionally wrote an article about the choir and music at St Johns. The Claimant claimed he was responsible for organizing social occasions for the Choir and having pastoral duty of care for members of the Choir. Reverend

Ashman claimed only he had a pastoral duty towards Choir members.

4.11 Without doubt the Claimant did work beyond just playing the church organ at services and conducting the choir but he was not within hierarchical structure at St Johns whereby he was told by the Rector what to do.

4.12 With regard to remuneration, the Claimant and Reverend Tayler agreed the following which is not disputed by either party:

- (i) that the Claimant would be paid gross £500 per month by bank transfer and that he would be responsible for his own tax and NIC;
- (ii) the Claimant would be entitled to be absent to take five weeks 'holiday' in each calendar year which amounted to 15 (at some unspecified point increased to 16 services) in each calendar year at which the Claimant would not personally provide the music at church services. Instead the Claimant would suggest a suitable replacement organist whose fees would be paid by the PCC;
- (iii) on any other occasion apart from the 15 (later 16 services) when the Claimant was unavailable to provide organ music, he would arrange and personally paid for a replacement organist at a rate of £25 per session.

4.13 The Claimant liaised with the Reverend Tayler and then his successor Reverend Ashman on the hymns chosen for services. Otherwise the Claimant had largely a free hand in deciding what music would be played and what would be sung by the choir within the frame work of Church music.

4.14 The Claimant knew suitable organists who could play during his absences and he proposed names to the Rector. The Claimant arranged the cover organists. The Claimant was contractually obliged to work in cooperation with the Rector and he did so; he liaised with the Rector so that he knew when the Claimant would be away and who would be the replacement organist. There was no time when the Claimant's proposed absence and a substitute organist was refused by the Church.

4.15 The Claimant claimed expenses and submitted self assessment tax returns annually. There was little evidence about the Claimant's other streams of income although reference was made to him having a property portfolio. The Claimant was able to teach the organ to supplement his income. He was able to use the organ at St Johns to do so. His pleadings suggest a figure of £900 claimed but no explanation is given as to what period that sum relates The Claimant was employed one day a week at a local school as a teacher.

4.16 The Church paid for a subscription for the Claimant to the Royal School of Church Musicians (RSCM) which provided a resources for church organists. The Claimant made good use of the materials provided by the RSCM but was not obliged to. He could play other organ music as he wished.

4.17 For weddings and funerals the Claimant could choose whether to personally provide music and if he did, he was in addition to his normal monthly remuneration.

4.18 The Claimant as choir master/conductor wore robes.

4.19 After Reverend Ashman arrived at St Johns in 2017, the Claimant suggested that an increase in the session payment to replacement organists would probably improve the quality of the music. After discussion with the PCC, and the Treasurer, Reverend Ashman increased the sum for cover organists in early 2018 to £40. The Claimant had no issue with the increase as he had suggested it, but he was slighted by the lack of consultation with him before the increase was implemented.

4.20 The Claimant valued his role as Director of Music at St Johns and took pride in making a significant contribution to St Johns' tradition of church and choral music. However, in early June 2018 the Claimant was seriously injured in a road traffic accident (RTA). Not unreasonably, the Claimant's sudden and unavoidable absence was a concern for St Johns and caused Reverend Ashman to make inquiries with one of the Church Wardens about the Claimant's terms of engagement and to ask whether there was a signed contract. The Church Warden searched and apparently found two copies of different contracts, neither of which were signed by the Claimant. Neither contract was included in the bundle of evidence and we can only assume one of them corresponded to the blank contract the Claimant produced.

4.21 Reverend Ashman entered into discussions with the SC about the Claimant's potential long term absence. Informal HR advice was sought from an external source by one of the SC members who reported on 11th June 2018 to Reverend Ashman, the Treasurer and other SC members, that it was important not to inadvertently alter the self employed status of the Claimant during his absence. As the Claimant was contracted to provide organists for the worship of St Johns, where the Claimant could either play himself or provide other suitable organists to play at services, it was recommended that the current arrangement continue with the Claimant continuing to be responsible for finding the additional cover and pay the organists directly for the services once his limit of 15 services per year is reached.

4.22 This suggested course of action was in accordance with the Claimant's own proposal the following day on 12th June 2018 when, in an email to Reverend Ashman and the SC, he provided them with a list of suitable organists to cover for his absence and suggested the following:

"It's early days in terms of talking to my insurance company, but my suggestion would be that for the time I'm ill I cover the expense direct with the organists (£40 per service: £30 per any practice) and claim back from the [insurance] company. That should be good for the church and still leaves me with weeks of leave after

the next couple of months. Anyway food for thought.”

The Claimant's proposal was accepted by Reverend Ashman and the SC. The Claimant knew that ultimately he would not be 'out of pocket' in funding the deputy/substitute organists during his lengthy absence, because he believed that his financial loss as a result of the RTA would eventually be "made good" by insurers.

4.23 The Claimant throughout his absence in June 2018 and until about November 2019 continued to receive £500 per month from the Church and he continued to arrange substitute organists for services and other occasions where organ music was required at the Church. He also continued with such duties as preparing a list of anthems to be played and the weekly choir notices. From the email exchanges in the bundle it is evident during his absence from St Johns that the Claimant maintained and fulfilled his responsibility for the organ rotas and choir notices, maintaining contact with Reverence Ashman, Treasurer and the SC by email.

4.24 By July 2019 the Claimant was in discussion with Reverend Ashman by email about his phased return to the Church to play the organ at services.

4.26 In early August 2019 the relationship between the Claimant and Reverend Ashman started to deteriorate. A new Treasurer had taken over by August 2019. It is possible that there was insufficient 'hand over' from the former Treasurer to the new Treasurer concerning the Claimant's 16 services annually for which the Church paid the replacement organist.

4.27 The Claimant wanted to arrange the 16 services to be paid by the end of 2019 by the Church so that the insurers concerned with the Claimant's RTA claim were not asked to pay for the expense of replacement organists which would normally be paid by the Church during the Claimant's holidays. When one of the cover organists had commented to Reverend Ashman that he had not been paid for two sessions, Reverend Ashman asked the Claimant for clarity on the arrangement. Reverend Ashman said in an email *We need to discuss when we meet, especially as things are so different now. No decisions made I assure you.*

4.28 The Claimant in reply agreed that it would make sense to meet up with Reverend Ashman to discuss. He explained the arrangement had been in place for ten years and the original agreement had been for 15 services annually for which the Church would pay organists direct. The then Treasurer had later "rounded it up" to 16 services annually. The Claimant offered to reduce the number to 15 services annually. The Claimant explained in his email that he had discussed with the former Treasurer direct payments from the Church to cover organists in the Spring of 2019 and had discussed it again with the new Treasurer who he had informed that the Church would have to make payment of fees direct to cover organists with the aim of reaching the required number by the end of the 2019.

It is evident from the email exchange that the Claimant was disconcerted by the implication that there had not been a proper agreement with Reverend Taylor and that the arrangements were muddled. The Claimant believed there had

been a clear agreement with Reverend Tyler which had been operating perfectly well since 2008.

4.29 Later in the month the Claimant wrote again to confirm the payments to be made direct by the Church to the cover organists to make up the 15 services required.

4.30 In September 2019 Reverend Ashman wanted more clarity on the Claimant's terms of engagement. He was also having concerns about maintaining a choir. He invited the Claimant to share his thoughts on what needed to be included in any agreement that they make. This had an unintended effect on the Claimant who had been settling back into his duties as Direct of Music. He now found himself being asked about what should go in a 'new agreement' when the Claimant he had adhered throughout his absence to a perfectly clear and workable agreement made with Reverend Talyer. The Claimant emailed Reverend Ashman, the Treasurer, the former Treasurer, and the SC accordingly as there appeared to him that there was an unwarranted lack of understanding by Reverend Ashman and the Treasurer of the contract/agreement which had been in place since 2008.

4.31 The Claimant confirmed he had continued with the agreement during his absence because of the RTA. The Claimant felt strongly that it was inappropriate timing to raise a discussion about what should be in a new agreement and it appeared to him that the Church was reacting adversely to the contractual requirement that it must pay directly for cover organists for 15/16 services a year. He also expressed concern about the loss of the Church's Choral heritage and the ramifications of such a loss to the Church.

4.32 At this point the Claimant raised for the first time since 2008 a direct question whether he was actually self employed. He felt that the Church was in difficulties in trying to maintain his status as self employed as the "landscape" on self employment had changed since 2008. The Claimant thought that the Church should not be "picking and chosing" [sic] between the Claimant's employed or self employed status when it suited their financial needs. The Claimant did not explain why he thought the Church was picking and choosing.

4.33 Nevertheless, the Claimant asked for confirmation that the Church wanted him to continue making payments to cover organists according to the 2008 agreement.

4.34 Reverend Ashman wrote a conciliatory reply and confirmed that he had no intention of changing any arrangement but only to enshrine it into an agreement that the Claimant was happy with, hence the request about how the Claimant would like it worded. He confirmed that he, too, was anxious to keen to keep the choir. Until the Claimant was ready to talk, Reverend Ashman confirmed it was business as usual.

4.35 By 1st October 2019 the Treasurer had confirmed in writing to the Claimant that payment for all 15 services had been made or were about to be made to the replacement organists.

4.36 On 17th March 2020 all church services nationally were immediately suspended, churches were closed and the country went into lock down on 23rd

March 2020. Suddenly the income of St Johns was severely curtailed. Unsurprisingly, Reverend Ashman and the Treasurer needed to address the question of the monthly payment of £500 to the Claimant.

4.37 On 6th April 2020 Reverend Ashman sent an email to the Claimant which confirmed that as it appeared that the Claimant was a self employed musician, the PCC could not furlough him and that they would have to stop payments to him at the end of the month. Reverend Ashman invited the Claimant's comments.

4.38 The Claimant replied by return confirming that all of his income from St John's is declared but as it was not his main source of income he was unable to make any claim from HMRC.

4.39 On 16th April 2020 the Treasurer wrote to the Claimant to inform him that the Church's income had reduced significantly. He confirmed that the SC had reflected on aspects of expenditure and had reached the conclusion that St Johns could no longer continue to pay self employed staff whilst they are unable to perform their duties at the Church. This decision applied to the cleaner as well as the Claimant.

4.40 The Treasurer confirmed that the Claimant would be paid as normal at the end of March 2020 and he would receive £250 at the end of April 2020. Thereafter there would no further payments due to the pandemic.

4.41 On 30th April 2020 the Claimant wrote to Reverend Ashman and the Treasurer admonishing them for not recognising his employed (rather than self employed) status which, had they recognized him as employed, would have enabled him to be furloughed. He took them to task for not recognising the lengths to which he had tried to help the Church finances by not asking for the annual increase in pay since 2008. He admonished Reverend Ashman for his failure to recognize that there was a clear and legitimate agreement in place since 2008 which did not need to be revisited. He admonished Reverend Ashman for his lack of pastoral care for the Claimant during his 18 months absence following the RTA and stated that he assumed that on the basis of the Treasurer's statement that "things are different now" meant that the long standing agreement with Reverend Tyler would no longer hold. The Claimant was of the view that Reverend Ashman's agenda was to enact changes that he appeared to want in 2019, that is, to get rid of the Claimant.

4.42 On 8th May 2020 Reverend Ashman wrote to the Claimant by email. He confirmed that he understood the Claimant's status to be one of self employment which the Claimant himself had confirmed in September 2019 and which Reverend Tayler had made clear in 2008. He confirmed the Claimant had not been dismissed, rather that it was not possible for him to perform his duties.

4.43 Reverend Ashman confirmed that he had asked the Claimant for a copy of the contract which he had been given by Reverend Tayler. He stated that the Church was obliged to review and restate the relationship with the Claimant in accordance with new guidance in 2017 from the Church of England on the engagement of organists. He wanted the contract with the Claimant to be clear and he wanted to "thrash out the detail". He confirmed that there was no

intention of making significant changes. Reverend Ashman confirmed that he too was very keen for the Claimant to continue at St Johns.

4.44 The Claimant wrote a letter dated 13th May 2020 to the Archdeacon of Bath complaining about the treatment he had received from Reverend Ashman, who, he claimed, was ignoring employment law. Nevertheless the Claimant stated to the Archdeacon that he still hoped to return to St Johns as Director of Music with the Archdeacon's intervention.

4.45 On 18th May 2020 the Claimant responded to Reverend Ashman's email of 8th May 2020 taking issue with most if not all of the points and responses made by Reverend Ashman.

4.46 On 23rd May 2020 the Claimant filed a notification of Early Conciliation with ACAS. The Early Conciliation certificate was issued on 23rd June 2020. The claim form was lodged with the Employment Tribunal on 12th July 2020.

Submissions

5. I heard oral submissions from both parties. I retained the notes of the submissions on the tribunal file and have re-read them prior to reaching any conclusions. The submissions have been taken into account and referred to as appropriate below.

The Law

6. The starting point is S230 Employment Rights Act:

230 Employees, workers etc

(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.

7. I have also had reference to the following cases:

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497;

Express and Echo Publications Ltd v Tanton [1999] IRLR 367.

Hall (Inspector of Taxes) v Lorimer [1944] IRLR 171, [1994 ICE 218 CA

Quashie v Stringfellow Restaurants Ltd [2013] IRLR 99 CA

Conclusions

8. Dealing with the first issue as to whether Reverend Ashman was the Claimant's employer I find that he was not. The Claimant did not suggest that he believed he had been employed by Reverend Tayler. The Claimant said he had never had any interaction with the PCC but that is not strictly true. The Claimant had plenty of contact with the Treasurer and most certainly was in communication with other members of the SC as can be seen from the email exchanges. The Claimant was fully aware of the PCC existence even if he did not meet all of the individual members of it. He knew he was paid by the PCC not the Rector personally. The Rector, or Minister, was the Chairman of the PCC and the SC and it is obvious that his interactions with the Claimant were in exercise of that office. The claim that the Claimant is employed by the Rector personally is spurious.

9. I then turn to the question of employment status. There are conflicting indications of whether the Claimant was employed as Director of Music or self employed in that capacity. There is no settled definition of employment and therefore the decision depends on weighing up the facts which may well, and in this case do, point in different directions. In **Hall (Inspector of Taxes) v Lorimer** in which the Court of Appeal held that it was necessary to consider many different aspects of the person's work activity and that this was not to be done by way of a mechanical exercise of running through items on a check list to see whether they were present in or absence from a given situation. *"The object of the exercise is to paint a picture from the accumulation of detail.... It is a matter of evaluation of the overall effect of the detail which is not necessarily the same as the sum of the individual situation."*

10. Counsel for the Respondent referred to me to the dicta of Denning LJ in **Stevenson Jordan** when he quoted Somervell LJ in **Cassidy v Ministry of Health**: [The essential question is] *"Was his contract a contract of [employment] within the meaning which an ordinary person would give to the words?"* Harvey on Industrial Relations and Employment Law says that this well know dictum could be seen as almost a counsel of despair, the last refuge in a case where the facts split 50/50 – sometimes referred to as the 'elephant test' referring to the adage that you cannot easily describe an elephant, but you know one when you see one.

11. The starting point in the exercise is **Ready Mixed Concrete**:

"a contract of service exists if these three conditions are fulfilled: (i) the servant 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 master. (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".

12. In respect of (i), the Claimant agreed to provide his musical knowledge and skill in the performance of Director of Music at St Johns in return for remuneration of £6,000 per annum.

13. In respect of (ii) and the question of control, the Claimant was hired as Director of Music for his musical professionalism, ability, skill and experience. That included, no doubt, flare and talent for the job – the ability to bring joy to the congregation through skilled musical performance in both playing the organ and the choir he trained and conducted.

14. I read the long list of tasks that the Claimant performed, including the core elements set out in the document given to him by Reverend Tayler at their first meeting. Some of those were inherently part of the core elements of his role and some were highly probably voluntary to a large extent– undertaken because of the Claimant's undoubted desire to be an exceptional Director of Music. Apart from the Claimant being informed by the Rector incumbent at the time, latterly Reverend Ashman, what hymns would be required in the Sunday Services, I find that there was very little control over how the Claimant performed his role. He had largely a free hand in what music he provided. The Claimant equated cooperation with the Rector and discussion on choice of music with Reverend Ashman, to being told or directed what music to play. I do not find that is accurate. There was little evidence of a hierarchical structure in which the Claimant was told what to do, or what to play. The Claimant was an accomplished musician and in particular an accomplished organist and pianist. His task was to fill St Johns with music and he did so with minimal direction from or control by the Rector who was content that the Church was continuing its musical and choral tradition. Whilst the hours the Claimant actually played the organ and conducted the choir were fixed by the days and times of church services, the hours he worked were otherwise largely at his discretion.

15. With regard to (iii) "*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.*" at the commencement of the relationship between the Claimant and St Johns, the Claimant negotiated with Reverend Tayler that he would be entitled to substitute an organist for a number of weeks each year when the Claimant wished to take 'holiday' or had other commitments. The Claimant used the word 'holiday' and indeed in the standard form contract for services provided to the Claimant (in blank) by Reverend Tayler, reference is made to 'holiday' during which time the Church would pay the cost of a

substitute organist (referred to as a “deputy”).

16. For 10 years, 2008 – 2018 this is what happened. The Claimant would arrange for a substitute organist for 15 (or 16) Sunday Services over the course of 5 weeks each year. The substitute organist was paid direct by the Church for deputising for the Claimant during his periods of ‘holiday’. No deduction was made from the monthly sum of £500 paid to the Claimant when he took ‘holiday’.

17. If it was only to the extent of a substitute organist for 15 – 16 services a year, it could be described as an occasional limitation and that might well be consistent with employment: **Pimlico**. At other times when the Claimant was absent, the Claimant was obliged to pay for a substitute organist. Those occasions may not have been frequent but that not diminish or detract from his right to substitute existing: **Tanton**.

18. The Claimant considered his periods of absence when the Church defrayed the cost of a deputy organist as the Church paying for his ‘holiday’. A self employed person does not usually benefit from holiday pay or sick pay from his place of work: so being paid ‘holiday’ suggest an employment relationship.

19. In contradiction, paying, as the Claimant did, from his own income for the substitute deputy organists on all other occasions and also for an extended period from June 2018 when he arranged and paid for a deputy organist to play in his place until about November 2019, suggests self employment.

20. Throughout the extended absence June 2018 – September 2019 and on a part time basis until about November 2019, the Claimant continued to receive remuneration of £500 per month. Reverend Ashman said it was not sick pay. The Claimant did not claim it was sick pay although he was incapacitated by his RTA injuries and unable to work for over a year. Had the Claimant signed the standard form contract provided to him in 2008 by Reverend Taylor, his contractual sick pay entitlement would have been limited to about 8 weeks on full pay.

21. When the Claimant started to return on a phased basis in about September/October 2019 to play at morning services, he paid for the substitute organist for evening services until he recommenced a full musical service personally.

22. The Claimant was paid an annual sum of £6000 which was divided into 12 instalments of £500 per month. There was no evidence as to why it was paid in instalments apart from Reverend Ashman’s comment that it was paid this way for administrative ease. It is not obvious 12 instalments is administratively easier or more convenient than a single bank transfer annually. I think it highly unlikely that the Claimant and Reverend Taylor did not discuss terms of payment; the Claimant did not divulge whether he had asked for 12 instalments or Reverend Taylor had suggested it, and I do not need to speculate, but clearly both parties

agreed to the arrangement and that is what happened for 12 years.

23. A monthly payment of equal instalments is suggestive of a salary and therefore employment status. Yet even the Claimant did not think that this sum of £500 per month was a salary truly intended to remunerate him for the work that he did. It was the Claimant's view that the money he received did not reflect the hours that he put into the role. When asked in cross examination about being in profit in any week where he arranged and paid for a substitute organist, the Claimant said: *"That doesn't resonate with me - I was working with people I love. I was probably paid £5 an hour because of the hours I put in - no one performs the job of Director of Music for money"*.

24. That brings me to whether the Claimant had other sources of income in addition to an annual salary of £6,000. The Claimant was not restricted to working at St Johns as organist /choir master. He was entitled to be paid and was paid separately from his normal remuneration for providing music at weddings and funerals at the Church. There was some evidence that the Claimant's remuneration from St John was not his main source of income – he said so to Reverend Ashman in email exchanges about the furlough scheme in March 2020. The Claimant was also employed as a part time teacher and he had a property portfolio. That is the extent of what we know about his sources of income.

25. Other facts which are suggestive of employment include the Claimant being provided with a subscription to the RSCM. It might have been expected that as a self employed person he would have arranged and claimed the tax free allowance of a professional subscription. The Claimant claimed he wore a 'uniform' at services. I do not find that the wearing of Choir master's robes or other religious vestments on formal occasions are a uniform carries much probative weight. The Claimant relied on an analogy that the Church had provided him with the tools to do his job – the church organ and a grand piano. It is stretching the elastic too far to equate an enormous structure such as church organ which is almost part of the building, or a grand piano which is not easily transportable, as tools of the trade in the same way that a plumber or mechanic has tools of the trade. I do not find it to be a probative point.

26. In summary, there are factors in this case which point both towards and away from employed status. So what was the view of the parties of their relationship?

27. The Claimant readily conceded that he considered himself to have been self employed. The Church thought that the Claimant was self employed. How the parties labelled themselves at the time of the agreement in 2008 is not a conclusive factor although how they conduct themselves may be strong evidence that that is the real relationship.

28. In **Quashie** Elias LJ held: *"it is trite law that the parties cannot by*

agreement fix the status of their relationship: that is an objective matter to be determined by an assessment of all the relevant factors. But it is legitimate for a court to have regard to the way in which the parties have chosen it categorise the relationship, and in a case where the position is uncertain it can be decisive.....”

29. The Claimant submitted an annual tax assessment and claimed expenses as a self employed person. He paid for substitute organists when he was unavailable to play. The Claimant conceded that he considered himself self employed until about 2014. The Claimant said that his opinion changed because his daughter had become a professional organist. There was no evidence of the Claimant’s daughter’s circumstances by way of comparison.

30. Although the Claimant claims he raised the matter of his employment status informally with the Treasurer at St Johns at the time – notably well before Reverend Tayler’s retirement and the arrival of Reverend Ashman, he did not raise the subject in any formal way with either Rector or take any steps to change his status.

31. In about September 2019 in an email exchange with Reverend Ashman and the SC, the Claimant obliquely referred to the possibility that he was not self employed, without giving any clear indication why he thought so.

32. Remarkably, despite any doubts he may have had about his self employed status in 2014, the Claimant nevertheless continued paying personally for substitute organists to play in his absence until about November 2019. The Claimant ensured the Church paid for the 15 services annually in 2019 as they were not costs which could be properly recovered from insurers of the RTA. However in personally paying the replacement organist costs for the rest of his absence following the RTA until his return to full time duties, ie. June 2018 to about November 2019, the Claimant was financially subsidising the Church for an extended period, putting himself out of pocket, until he could obtain reimbursement for his expenditure from the RTA insurers.

33. In so doing the Claimant was representing to the insurers that he was a genuinely self employed person and that the cost of substitute musicians were real expenses which he had an obligation to pay and could therefore reclaim as special damages in the RTA. If the Claimant truly believed at the time he was an employee of the Church, it is arguable that his conduct misrepresented his employment status to obtain compensation from insurers which they would not otherwise have had to meet, for the benefit of the Church and himself. It is inimical to employment status to pay the employer’s costs of a co-worker doing the employee’s work.

34. The Claimant did not clearly challenge his self employed status until his engagement was terminated by the Church in March 2020 because of the Covid 19 pandemic. It is clear from the contemporaneous documents and the Claimant’s evidence that when his remuneration stopped suddenly, he was

deeply wounded by what he perceived as a lack of recognition and appreciation by the Church and in particular, Reverend Ashman, for the sacrifices the Claimant had made over the years for the Church both financially and in sheer effort and time. He felt the Church should have made some effort to enable him to be furloughed and, had the Church recognized him as an employee, it could have furloughed him. He took it very personally that they did not.

35. The facts in this case do not clearly point to employment or self employment. The 'Elephant Test' referred to by Counsel quoting Denning LJ in a 1952 case, in turn quoting Somervell LJ in a 1951 case, which is that although an elephant is hard to describe but you know one when you see one, is not of any assistance in this particular case. The multifactorial test of weighing up all of the various facts, is also not clearly indicative one way or the other initially.

36. I therefore consider further what the parties agreed and how they conducted themselves. The Respondent believed the Claimant was self employed – I saw no evidence of the Church/Reverend Ashman or the SC of "picking and choosing" it way around employment law. The Claimant took full advantage of his aspects of self employed status for the benefit of himself throughout his engagement and latterly for the benefit of the Church. He only changed his mind when he felt he had been peremptorily rejected and treated unfairly by Reverend Ashman.

37. If the Claimant truly believed that he was an employee as far back as 2014 then his conduct did not reflect that belief. The Claimant consciously and deliberately adhered to the terms of his agreement of 2008 with Reverend Tayler when he suggested in an email to Reverend Ashman on 12th June 2018 that he would continue to pay the substitute organists during his absence following the RTA, and then did so for a further 17 – 18 months until he returned to work full time. I find that fatal to a claim that the Claimant was employed. That the parties conducted themselves in accordance with the original terms agreed in 2008 is the deciding factor in weighing the evidence and it points to the Claimant being self employed. Any other conclusion would raise the prospect that the Claimant's insurers had been potentially misled even if unintentionally.

38. The claim is dismissed.

Employment Judge A Richardson
Date 18 March 2022

Judgment sent to parties: 6 April 2022

FOR THE TRIBUNAL OFFICE