

Reserved Judgment



THE EMPLOYMENT TRIBUNALS

Claimant

Rev T Harii

Heard at: London Central

Before: Employment Judge Pearl

Respondent

(1) Tasso Baptist Church (2) London Baptist Association

On: 6 & 7 December 2016

Representation:

Claimant: Mr M Hurst (Solicitor)

Respondent: Mr O Hyams (Counsel)

JUDGMENT

The Judgment of the Tribunal is that there is no jurisdiction to entertain the claims.

REASONS

1 There are various claims brought by the Claimant and they include breach of contract, for the national minimum wage, dismissal and detriment under the public interest disclosures legislation, race discrimination and unfair dismissal contrary to section 104(1)(b) ERA 1996. The case management hearing on 26 September 2016 determined that a preliminary issue to be decided at a two day hearing was whether the Claimant was an employee or worker, or otherwise. At the outset of the hearing this was further refined and it was agreed that the issue to be decided was as follows: whether, in light of the relevant findings of fact and Preston, the arrangement between these parties amounted to a contract and whether, in particular, there was an intention to create legal relations. Mr Hurst in final submissions has reformulated the issue and also added as a second potential question whether the Claimant was an employee or worker. He has, to that extent, departed from the clear agreement about the scope of this hearing that I noted at the outset, a point made by Mr Hyams in reply, correctly in my view.

2 In resolving the issue, I heard evidence from the Claimant, Rev Wood, Rev Porter and Rev Barnard. I saw a statement from Rev Andrews. I studied a bundle running to 305 pages.

Facts

3 The Baptist Union of Great Britain (“BUGB”) has constituent Churches, Associations and Colleges. Each Respondent is a member of BUGB. I accept the evidence of Rev Barnard, Regional Minister, Team Leader of the Second Respondent, that: “A Baptist church is a gathered community of Christian believers, covenanting together in fellowship to be a local congregation of Baptist Christians. This gathered community is fully competent to be a church, and does not need a bishop or overseer to fully be a church, and is able to discern the will of God for itself in all matters of faith and practice through the gathering of that community in Church Meeting.”

4 It is for the local church to take the decision to call a minister. The decision is taken under the principle of congregational governance and, as Rev Barnard states, “the authority of the church meeting is for Baptists a doctrinal position ... For Baptists, Christ is head of the church and the people of God gather together to discern his will.”

5 The BUGB has Recommended Terms of Appointment to the office of part-time Minister: pages 86 to 94 of the bundle. The Introduction states that they are a possible basis for appropriate Terms of Appointment, although each church is free “... to appoint a part-time minister as they think appropriate. However, careful thought should be given to such a part-time appointment and nothing should be done to call into question the minister’s status as the holder of an office. Employment legislation would apply to any secular employment engaged in by the minister without prejudicing the holding of a ministerial office ...”

6 Tasso Baptist Church, Fulham, has a Constitution. Section 22 deals with the appointment and removal of ministers. Either appointment or removal requires a resolution of the Members at a Special Church Members’ Meeting. In making an appointment the Church “will normally ... follow, so far as practicable, the Baptist Union’s procedures and recommended terms for the settlement of Ministers.” Further: “the Church and the Minister shall normally agree ‘terms and conditions of appointment’ including termination procedures based on the standard terms of appointment published by the [BUGB]”

7 Clause 22.3 refers to the procedure for considering the “dismissal” of a Minister. I will return to this in the Conclusions.

8 As to the BUGB’s procedures, aside from the Recommended Terms referred to above, Rev Barnard deposed that “it is the long held belief of BUGB, along with other denominations that its ministers are office holders.” I accept this as I also accept his further evidence that Ministers called to a local church are not under the control of the church; “management/control of a minister has never been a feature of the relationship between the church and minister.” Ministers are not issued with contracts of employment or job descriptions and this is because the

parties do not envisage an employment relationship. In this instance he expresses the opinion that Tasso never intended to create an employment relationship with the Claimant. He also states that a stipend that does not feature in this case, is not given in respect of services rendered, but to enable the minister to be free to undertake the ministry. Rev Wood gave similar evidence to Rev Barnard.

9 Tasso Church has a small congregation of around 12 to 15 people. Rev Wood is a semi-retired Minister and for some 12 years he has served the Second Respondent as a District Minister supporting 33 churches in South London. For much of that time he has known the Claimant. Rev Porter was minister at Tasso from 1977 to 1985. He is the Moderator at Tasso and first met the Claimant in January 2015, having been introduced (by 20 September 2014) by Rev Andrews in an email. Rev Porter told the Claimant he could offer him the possibility of appointment and that this would come with the Manse; and that a loft extension could be built for him to accommodate his family. Additionally, limited expenses could be offered, unlikely to cover more than postage and petrol. There could be no stipend. The appointment would be part-time. Rev Wood has the same understanding of what was on offer. I found that the evidence given by both these witnesses was secure and accurate.

10 Rev Porter, in particular, provided detail in his answers in cross examination that explained and confirmed his witness statement. The Claimant knew this was a non-stipendiary post. When challenged that he was looking to employ the Claimant 'on the cheap', he replied: "Personally, the Claimant was not in my opinion being invited as an employee – he was being asked to accept the call as a non-stipendiary Minister." He said it was a great privilege to serve the Lord and "we were asking the Claimant to serve without stipend and this was so clear, nobody would misunderstand." Subsequent to the Induction in early May, the Claimant and Tasso fell into major disagreement.

11 Rev Andrews's letter is not sworn evidence and he did not attend, but I note that it deals with something the Claimant says in his statement, which is that he expected Tasso to apply for a Home Mission Grant. Rev Andrews is clear that there was to be no stipend, but he hoped that "as the work developed" an agreement could be struck about a stipend, possibly with grant support. The Claimant raised with him being paid a proportion of the offering but Rev Andrews told him that churches did not operate in this way. I find this all to be credible, not least because it matches some of what the Claimant told me. The essential point, as I find, is that there could be no doubt that the parties understood that the appointment did not come with a stipend; and that any subsequent change was for the future. The documents support this finding.

12 On 14 November 2014 Rev Andrews wrote to Rev Porter and asked whether Tasso had a Manse. The response from Rev Porter was that there was a Manse and it would be possible to have it available for someone "helping with ministry". Rev Andrews mentioned the Claimant in response; and Rev Porter in replying asked whether it would be possible to know what else would be required in addition to accommodation. On 17 November Rev Andrews told the Claimant

that he was in contact with a small church in Fulham who were looking for ministry and that there was “a possibility of accommodation” with the role.

13 The parties then came together and the next relevant document is a profile of the Church that was given to the Claimant. It states (page 178) under the title ‘Finance’ that “the church has limited funds... The church is not able to offer a pastor accommodation but is able to pay the usual expenses related to the pastor’s ministry.” It appears that the Manse was being rented out at that time. Next, on 10 December the Claimant wrote to Rev Porter and picked up on that citation in the profile. He pointed out that the emails up to this point suggested that accommodation was available. The response from Rev Porter included this: “... is it only accommodation and expenses that you require or would you expect some kind of salary.” The Claimant responded “accommodation and expenses would be nice, but we come with no expectations. The only expectation we have is that, if the Lord will bring us to Tasso Baptist Church, he will work in us, through us and amongst us. We can discuss about finances but we are flexible on all finance matters. I can assure you that we will not be a burden on the Church. If we expect the Lord to work, we will also expect Him to provide.”

14 On 11 December he stated that, with the Lord’s guidance “... we will discuss the various options available for accommodation.” This was in reply to Rev Porter writing about the accommodation and including a possible proposal to extend the Manse. He wrote again on 21 December to the Claimant and said that the Church now needed someone who is willing to give as much time as possible over a period of years.

15 On 19 January 2015 the Claimant asked when a final decision would be taken and he wanted to know about the start date. There is no possibility of the parties’ understanding up to this point including anything about paying a stipend. All of the correspondence indicates that only accommodation and possibly some expenses were possible. At the end of this email the Claimant again said he came with no financial expectations but “... If available, we would be happy to accept some financial help to cover accommodation expenses. Anything else could be dealt with at a later stage, but one thing is certain: we will not be a financial burden for the Church.” Again, on 22 January he sought and was provided with confirmation that: “from your earlier emails I got the impression that the Church is looking for a part-time Pastor but cannot afford to pay salary, yet it will provide a Manse. Is that the case?” Therefore, the state of the written evidence leaves no room for doubt, in my view, and the position concerning a stipend was crystal clear.

16 On 22 January Rev Porter wrote to the membership of the Church. He referred to the possibility of extending the Manse and then added this paragraph: “to employ a minister on the recommended Baptist Union salary would cost us much more, so if Teofil is willing to come and return only for accommodation and some personal expenses - this could be an answer to the problem.”

17 On 22 February the Church members at a meeting voted to call the Claimant to be their Pastor. On 25 February 2015 there was the first meeting between the Church and the Claimant at which the Claimant asked whether he

might start at the ministry before the Induction “and everyone agreed to this.” On 6 March Rev Porter wrote to him and said that he was pleased that he had been making contact with the leaders and the members. “In love, can I also remind you that although you have been called to be Pastor, your official appointment does not come into being until the day of the Induction so please be careful that you do not cause any unhappiness by going forward too fast.”

18 Within a short time the Claimant was discussing the question of finances in a meeting with Rev Andrews and this was a meeting that he chose to record secretly. The transcript prepared by Mr Hyams shows that Rev Andrews said he thought that there were some financial questions that need to be addressed. “... On what basis have they employed you? Financially what did they say so far?” The answer to this was “nothing”. He then volunteered that during discussions he had been asked by Rev Porter whether he expected any kind of salary and he had answered no but we will discuss matters at a later stage. “But when I said I will not expect a salary, and is true I do not come with an expectation to say yes don’t pay me. I agree to start without a salary but we need to put in place something that will give us some provisions.” Rev Andrew suggested something akin to a preaching fee for Sunday preaching. He also said that the church needed to be “angling towards creating some kind of stipend for you.” He then asked about the Claimant’s current position in regard to the churches with which he had been associated, including one in Brixton. The Claimant asked if he could become self-employed. There was considerable discussion of the tax position. Rev Andrews then suggested that the church needed to think about giving him some kind of stipend. He suggested that funds for evangelism might release an amount from the offerings and the Claimant said: “well, if we said that, then it wouldn’t be in line with my promise that I will not demand a salary or come with an expectation.” At a later point Rev Andrews said that the church needed to be looking to grow and pay a decent stipend. “They need to be getting to a point where they can pay you a stipend or look to Home Mission to give you a grant to enable you to have a stipend.”

19 On 26 March the Claimant wrote to Rev Porter and said that as we all have a responsibility for each other, maybe it was time to discuss how the Church would fulfil its responsibility towards him and his family. He said that he knew that there was no money available and that he would stick with his promise of not asking for a stipend but wanted to find creative ways of providing for him. He also referred Rev Porter to the recommended terms of appointment to the office of Minister of the Baptist Church. These are in the bundle and clearly refer to full-time appointment: see page 241B. Notwithstanding, it is stated that: “the recommended Terms of Appointment do not bring about a ‘contract of service’ or in any way affect the minister’s status as the ‘holder of an office’ ... A minister is classified as an ‘employed person’ for national insurance purposes only, though subject to income tax under the PAYE system as the holder of an office.” This last sentence is set out in bold. Rev Porter responded the same day and said that the leadership wanted to inform the Claimant that no further commitments could be met until they knew the full cost of the work on the Manse. He also said that the recommended terms applied to full time paid ministers and not part-time ministers who work without stipend. In his response on the next day the Claimant seems to

accept this. He said "... if I am only required for a part-time ministry, then all that you said in your email makes sense ..."

20 The date of the Induction was 2 May 2015. The order of service shows that there was a laying on of hands. The officiant asked the Church Family, "Do you recognise God's call upon Teofil to serve in ministry?" "Yes we do." "Following the practice of the early Church we affirm Teofil with the laying on of hands ...". The Induction continued and included the text set out at page 233. This included the statement that those called by God to servant leadership can only be called into ministry by the Lord. "Today we are together as the Church of God to recognise Teofil's calling and to seek God's blessing."

21 The subsequent events and the serious disagreements that developed are not relevant for my decision. I note Rev Porter's email to the Claimant of 30 April 2015 which, inter alia, enquired about the Claimant's income at another church and the Claimant's long email of 12 May. He referred to some mistrust and added: "... I would have expected you to value more the pastoral office ... I am, the one giving Tasso a great favour, by investing my life, my money and my family in the church. So far Tasso given me nothing ...". Rev Porter in an email to Rev Andrews of 18 May 2015 referred to Servant leadership and I will touch on this below. There is also some reference in the evidence to a trust fund which the Claimant believes should have been used to pay a salary, as far as I understand his case. This is linked with the submission that he was falsely told that there were no funds available. The short reply to this from the Respondents is that there is a fund, the Gladys Brown Trust Fund, and that Rev Porter is one of three trustees who are obliged to observe the terms of the trust.

Submissions

22 There are two sets of written submissions from each party for which I am most grateful. I shall refer to some of the arguments below and also deal with the law in my conclusions.

Conclusions

23 It is agreed that Preston v President of the Methodist Conference [2013] 2 AC 163 is central. To cite the headnote: "the primary considerations in deciding whether a minister of religion served under a contract of employment were the manner in which the minister was engaged and the character of the rules or terms governing the minister's service; that the question whether an arrangement was a legally binding contract depended on the intentions of the parties, and the mere fact that the arrangement included the payment of a stipend, the provision of accommodation and the performance of recognised duties did not without more resolve the issue."

24 Lord Sumption JSC gave the leader judgement for the four Justices in the majority and one of those Justices, Lord Hope, gave a short judgement to which I will later refer. The question in Preston was whether the respondent to the appeal was an employee so as to be able to bring an unfair dismissal claim. Lord Sumption drew attention to recurring themes in case law. (1) The distinction

between an office and employment; and (2) A tendency to regard the spiritual nature the of a minister of religion's calling as making it unnecessary and inappropriate to characterise the relationship with the church as giving rise to legal relations at all. The current leading case had been Percy, decided by the House of Lords in 2006 at 2 AC 28. The first point to be taken, said Lord Sumption, was that office holding is an unsatisfactory criterion on its own for deciding whether a person was employed. It is one factor in a judgement that depended on all the circumstances. The second point was that the spiritual character of a minister's calling could not be conclusive. The principle cannot be carried into arrangements which on their face are to be expected to give right to legally binding obligations. Further, in these days it is possible for someone to be employed as a servant or as an independent contractor to carry out duties that are exclusively spiritual. Therefore, in the modern context it is time to recognise that employment arrangements between the church and its ministers should not lightly be taken as intended to have no legal effect so that ministers are denied legal protection in employment law. These propositions are all taken from the speech of Lord Nicholls.

25 It is worth noting that in Percy a committee of the Church of Scotland had invited applications. It had referred to the duties, terms of service and remuneration associated with the job. Ms Percy had been offered the job and sent a full copy of the terms. She then formally accepted them. The circumstances suggested the contractual relationship and such a relationship was not inconsistent with the terms that she had accepted. In that case Lord Hope had also pointed out that the appointment of an associate minister (the post Ms Percy held) was significantly different from the induction of a minister to a charge.

26 Lord Sumption, in paragraph 10 of Preston summarised the position after Percy as follows:

“it is clear from the judgements of the majority in Percy's case that the question whether a minister of religion serves under a contract of employment can no longer be answered simply by classifying the minister's occupation by type: office or employment, spiritual or secular. Nor, in the generality of cases, can it be answered by reference to any presumption against the contractual character of the service of ministers of religion generally... The primary considerations are the manner in which the minister was engaged, and the character of the rules or terms governing his or her service. But, as with all exercises in contractual construction, these documents and any other admissible evidence on the parties' intentions fall to be construed against their factual background. Part of that background is the fundamentally spiritual purpose of the functions of a minister of religion.”

27 In paragraph 26 Lord Sumption, in turning to the facts of the instant case, said as follows:

“The question whether an arrangement is a legally binding contract depends on the intention of the parties. The mere fact that the arrangement includes the payment of a stipend, the provision of accommodation and recognised duties to be performed by the minister, does not without more resolve the issue. The question is whether the parties intended these benefits and burdens of the ministry to be the subject of a legally binding agreement between them. The decision in Percy is authority for the proposition that the spiritual character of the ministry did not give rise to a presumption against the contractual intention. But the majority did not suggest that the spiritual character of the ministry was

irrelevant. It was a significant part of the background against which the overt arrangements governing the service of ministers must be interpreted. Nor did they suggest that the only material which might be relevant for deciding whether the arrangements were contractual were the statements marking the minister's engagement, although it so happened that there was no other significant material in Ms Percy's case. Part of the vice of the earlier authorities was that many of them proceeded by way of abstract categorisation of ministers of religion generally. The correct approach is to examine the rules and practices of the particular church and any special arrangements made with the particular minister. What Lord Nicholls was saying was that the arrangements, properly examined, might well prove to be inconsistent with contractual intention, even though there was no presumption to that effect."

28 Mr Hurst submits that an express contract can be constructed from an accumulation of detail. The Claimant "agreed to work for the First Respondent" and the consideration was the Manse or other accommodation, payment of £40 a week, payment of expenses and some associated promises about the Manse. Mr Hurst places emphasis on the negotiations over these matters. He refers to the Claimant asking when he could start. He says that he "sought immediate formality" on 23 February in the form of a written contract. (What he said in the email was that 'we need to think about drawing up a contract.' I can see no response to this in the papers from Rev Porter, or any follow up by the Claimant.)

29 It seems to me that these are rather thin and unconvincing grounds to find an express contract in these arrangements, when placed in the context of all relevant facts. There are two conclusions that I consider emerge from the facts: (1) A contract of employment was never envisaged; (2) there was, in reality, no intention to enter into legal relations and this means there was no enforceable contract at all. These two conclusions overlap and I conclude that they work together to provide the key answer in this case.

No contract of employment

30 I have decided to set out my decision on this aspect, even though it is outside the narrower scope of the agreed issue, because Mr Hurst has addressed it at length and also because it is tied to the main issue. In my view, it is an inescapable conclusion, when one steps back and looks at matters objectively, that there was no contract of employment, even assuming a contract of any sort. The Baptist churches within the BUGB have not employed ministers, they treat them as office holders and the Recommended Terms, for both part-time and full-time ministers, make this clear. As significant, there are no pointers to an employment relationship in the facts. The absence of any of the usual 'control' rules out an employment relationship. The Claimant in his statement says he did not have absolute conduct of the affairs of the Church and also points out how he was accountable. But such absolute conduct is not required for him to fail on the employment question. There is no significance in a provision in the Tasso Constitution that refers to his 'dismissal'. The term is used as a synonym for removal. Perhaps in recognition of the reality, Mr Hurst makes the alternative submission that the employment relationship can be implied. This is an impossible contention and it is neither reasonable nor necessary to imply any such contract.

No intention to create legal relations

31 I have to examine the arrangements and ask if the benefits and burdens of the ministry were intended to be the subject of a legally binding agreement between the parties. The Claimant seeks to distinguish Preston, both factually and in terms of legal effect. I agree that the organisation of the Methodist and Baptist movements are different, but this is not a good reason to conclude that the legal result should be an intention to create legal relations. As Mr Hyams suggests, the more closely regulated position in Preston could be said to support a contract in that case. I do not find a comparison of the constitutional differences between the two Churches to be of assistance.

32 Starting with the manner of appointment, I am satisfied that in this Church appointment requires Induction. Rev Wood says this formalised the relationship between Church and Minister. Rev Porter agreed and firmly rejected the suggestion that Induction was simply a public affirmation of an earlier appointment. He referred to the mutual confessions of faith at the Induction. Rev Barnard called it the key part of the process and referred to the mutual promises between congregation and minister that cemented the process. I next accept Mr Hyams's submissions to the effect that the date of appointment is unaffected by any pastoral work undertaken before Induction. Induction has spiritual and theological importance and is fundamental to the appointment, in my view.

33 Mr Hurst places some emphasis on the fact that the parties negotiated before appointment. I do not regard this as a significant factor, because too much, in my view, has been made of the 'negotiation'. There was no stipend to be negotiated. The £40 preaching fee seems to have stood alone and expenses were limited. The Manse was always on offer and the practical questions were concerned with the date it could be made available and when and how it was to be extended. None of this suggests to me that the parties intended to enter into legal relations.

34 Thus, by the date of Induction the parties had entered into an arrangement that was cloaked in expressly spiritual terms. That is also the language of their emails. No written contract had been drawn up and Recommended Terms were not being used. The relationship was also characterised by a loose agreement as to how and when the Claimant would minister to the Church. The Claimant accepted the absence of a stipend and I have concluded that he accepted the absence of written terms because he expected the position to change over time. Looking at the arrangements overall, and with the guidance of Preston, I conclude that the parties did not intend that the "benefits and burdens" of the ministry were to be the subject of a legal relationship, ie a contractually binding agreement between them. Nor do I come to this conclusion by a narrow margin having balanced various competing factors. Virtually the entirety of the relationship, when examined in detail, strikes me as being only consistent with this conclusion.

35 I would finally refer to a few of the points that have arisen in the closing reply submissions. These do not decisively give the conclusion, but they illustrate why on some of the detailed submissions I have found against the Claimant.

(a) Mr Hurst relies on a passage in the taped transcript at 08'48". I consider this to bear no significance when read against the fuller transcript. The two ministers were talking about the possibility of the Claimant becoming self-employed and also against the background of a future stipend being created. This element of futurity is to be found in the passage immediately before self-employment was raised; and it is also recognised in the citation relied on: "...they need to pay you for services rendered ...so if you are working ... at other times [than Sunday] ... they need to come up with some figure ..."

(b) Mr Hurst says that the Claimant's witness statement at paragraphs 103 to 105 "is only consistent with an intention to create legal relations and a contract of employment." I have not set out these emails (eg 9 May, 9 & 23 September, 2015) because the terms of the disagreement and the events that led to the Claimant's removal (on 28 February 2016) are not relevant. What seems to be relied on here, and in his Reply submission, is the reference to "Servant" and "Servant leadership." In my view, the terms are used theologically: see paragraph 20 above and, for example, page 294. There is no implication of a contract of service.

(c) Mr Hyams says I should ignore any pre-existing contract between the Claimant and Brixton Tabernacle Church because (i) that church is outside BUGB and (ii) the role was pastoral assistant. I agree.

(d) He contends, and I agree, that reference in the taped discussion to pension schemes and employment are irrelevant.

(e) He submits that section 43K(1)(a) of the ERA 1996 does not fit these facts. I again agree. There is an extended definition of worker here if the individual, who is not a worker as defined, "worked for a person in circumstances in which – (i) he ... was introduced or supplied to do that work by a third person and (ii) the terms on which he ... was engaged to do the work ... were in practice substantially determined not by him but by the person for whom he ... worked by the third person or by both of them." The case law Mr Hurst cites is, in the two cases, based on facts a long way from this case, namely a claimant who was director of his personal service company which contracted with an employment business to supply his services to a client; and a similar tripartite relationship in Keppel. Mr Hurst does not analyse section 43K, but merely says that no contract at all is required. The reason I regard the section as inapplicable is because Rev Andrews did not introduce the Claimant "to do that work". He effected an initial introduction to Tasso who, as he says in his letter, "needed someone with evangelistic skills." The best evidence is contained in Rev Porter's statement. He first contacted the Claimant after Rev Andrews sent him an email and I infer this included the Claimant's contact details. An introduction of this sort is not an introduction to do that work, especially where the scope of the work is at that stage undefined. Mr Hyams says simply that the wording and intent of subsection (a) do not fit this case and I agree.

36 For all the reasons I have set out I conclude there is no jurisdiction to entertain any of the claims. I would end by noting Lord Hope's shorter judgment in

Preston. He said In paragraph 34 that the question was whether there were any arrangements of an employment nature at all.

“One cannot simply ignore the church’s doctrinal reasons for regarding such arrangements as unnecessary. On the contrary, they provide an essential part of the factual background. They explain why the situation in which Ms Preston found herself was as it was. In finding that there was no contract, the court is not ignoring the modern approach to these matters. What it cannot ignore is the fact that, because of the way the church organises its own affairs, the basis for Ms Preston’s rights and duties is to be found in the constitutional provisions of the church and not in any arrangement of the kind that could be said to amount to a contract.”

37 I regard these observations as being relevant here. In my judgment they apply to the factual situation that I have. Those facts, which include the statements the parties made to each other at the time, are to be analysed against the practices and procedures of the Church and the Constitution of Tasso, taken with what is said in the Recommended Terms. Looking at matters overall, these parties did not intend to create legal relations.

Employment Judge Pearl
17 February 2017