EMPLOYMENT TRIBUNALS

Claimant: **Mr C Wooler**

Respondent: **The Parochial Church Council of the Parish Church of St James and St Basil**

HELD at Newcastle **ON: 28 October and 15 December 2022**

BEFORE: **Employment Judge Aspden**

REPRESENTATION:

Claimant: **Mr S Wooler, the claimant's father**
Respondent: **Mr Ratledge, counsel**

RESERVED JUDGMENT

The Judgment of the Tribunal is as follows:

1. The claimant was continuously employed by the respondent for a period of less than two years ending with the effective date of termination.
2. Therefore:
    a. Section 94 of the Employment Rights Act 1996 did not apply to the dismissal of the claimant and the claimant did not have the right not to be unfairly dismissed by the respondent.
    b. The claimant's claim of unfair dismissal is dismissed as the Tribunal does not have jurisdiction to consider it.

REASONS

Issues for determination

1. By a claim form received at the Tribunal on 24 February 2022 the claimant presented a complaint to the Tribunal that the respondent unfairly dismissed him.

2. Subject to certain exceptions (none of which apply to this case) an employee only has the right not to be unfairly dismissed if they have been continuously employed for a period of not less than two years ending with the effective date of termination.

3. The respondent's position is that the claimant did not have the requisite two years' continuous employment at the time of the effective date of termination. On the respondent's case, the claimant's period of continuous employment began on 1 December 2019 and his effective date of termination was 28 November 2021.

4. The claimant disagrees. His case is that:

   4.1. his period of continuous employment began before 1 December 2019;

   4.2. in any event, his effective date of date of termination was 30 November 2021, and so even if the claimant's period of continuous employment did not begin until 1 December 2019, he had the required two years' service to qualify for the right not to be unfairly dismissed.

5. At a preliminary hearing on 6 July 2022 Employment Judge Arullendran decided that there should be a preliminary hearing to determine whether the claimant had sufficient continuity of employment to qualify for the right to bring a claim of unfair dismissal.

6. The case management orders from the hearing before Judge Arullendran suggest that another issue before me today was whether the claimant was a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996 prior to 1 December 2019. That issue appears to have been included in error. There is no doubt, and it was agreed at the hearing before Employment Judge Arullendran, that the only claim being made by the claimant is one of ordinary unfair dismissal.

Legal framework

7. Under section 94 of the Employment Rights Act 1996 (ERA) an employee has the right not to be unfairly dismissed by his employer.

8. The right not to be unfairly dismissed is qualified, however. In general, the right does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination. That is provided for by section 108. There are exceptions but none apply here.

Effective date of termination

9. The meaning of the 'effective date of termination' is set out in ERA section 97. The parts of that section that are relevant to this claim provide as follows:

   97 Effective date of termination.

   (1) Subject to the following provisions of this section, in this Part "the effective date of termination"—

   (a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

10. Once notice has been given, a party cannot withdraw it except with the other party's consent. Nor can a party unilaterally extend the notice period. The notice period can, however, be extended if both parties reach an agreement to that effect: Mowlem Northern Ltd v Watson [1990] IRLR 500, [1990] ICR 751.

Continuous employment

11. The concept of continuous employment is addressed in Chapter 1 of part 14 of ERA. The relevant provisions provide as follows:

210 Introductory.

(1) References in any provision of this Act to a period of continuous employment are (unless provision is expressly made to the contrary) to a period computed in accordance with this Chapter.

(2) In any provision of this Act which refers to a period of continuous employment expressed in months or years—

(a)a month means a calendar month, and

(b)a year means a year of twelve calendar months.

(3) In computing an employee's period of continuous employment for the purposes of any provision of this Act, any question—

(a)whether the employee's employment is of a kind counting towards a period of continuous employment, or

(b)whether periods (consecutive or otherwise) are to be treated as forming a single period of continuous employment

shall be determined week by week; but where it is necessary to compute the length of an employee's period of employment it shall be computed in months and years of twelve months in accordance with section 211.

(4)Subject to sections 215 to 217, a week which does not count in computing the length of a period of continuous employment breaks continuity of employment.

(5)A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous.

***211 Period of continuous employment**.*

(1) An employee's period of continuous employment for the purposes of any provision of this Act—

(a) (subject to subsection (3)) begins with the day on which the employee starts work, and

(b) ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision.

212 Weeks counting in computing period.

(1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.

(2). . .

(3) Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is—

(a) incapable of work in consequence of sickness or injury,

(b) absent from work on account of a temporary cessation of work, or

(c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose,

counts in computing the employee's period of employment.

(4) Not more than twenty-six weeks count under subsection (3)(a). . . between any periods falling under subsection (1).

(a)

235 Other definitions.

(1)In this Act, except in so far as the context otherwise requires—

"week"—

(a) in Chapter I of this Part means a week ending with Saturday, and

Meaning of 'employment', 'employee' and 'contract of employment'

12. The concept of continuous employment is defined by reference to the terms 'employment', 'employee' and 'contract of employment'. Those terms have the specific meanings set out in ERA section 230, as follows.

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.

…

(5) In this Act "employment"—

(a)in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b)in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly.

13. In this case I am concerned with the question of whether the claimant entered into or worked under a contract of service, rather than a contract of apprenticeship.

14. It is clear from the statutory definition that, for an individual to have the status of 'employee' there must be a contract between them and the putative employer. The question of whether a contract has been created is decided by applying normal common law principles. There must be: an agreement on essentials with sufficient certainty to be enforced; an intention to create legal relations; and consideration.

15. Assuming a contractual relationship exists, the next question is whether that contract is one of service (or in some cases, though not this one, apprenticeship). In answering that question, it is often necessary to consider a claimant's position on two bases, namely:

15.1. whether or not the general arrangement under which the individual worked constituted a continuing overarching or umbrella contract which amounted to a contract of service;

15.2. if not, whether or not separate assignments gave rise to a contract of service between the parties.

16. Case-law, and in particular that deriving from the judgments of MacKenna J in Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance [1968] 2 QB 497 (as endorsed by the Supreme Court in Autoclenz v Belcher [2011] UKSC 41, [2011] ICR 1157) and Stephenson LJ in Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, CA, has established that the necessary components of a contract of service are as follows:

    16.1. There must be mutuality of obligation within that contract.

    16.2. The employee must be obliged to perform work personally for the employer.

    16.3. The employee must be subject to at least some degree of control by the employer.

17. If a contract satisfies those requirements then it is capable of being a contract of service. The next stage in identifying whether the contract is in fact a contract of service involves looking at the contract as a whole and weighing all the relevant factors. In analysing the terms of the contract, the question in every case is 'what was the true agreement between the parties?': Autoclenz Ltd v Belcher [2011] ICR 1157; Uber v Aslam [2021] UKSC 5; [2021] ICR 657.

Mutuality of obligation

18. As was explained by the EAT in Drake v. Ipsos Mori Ltd [2012] IRLR 973, and again in Varnish v British Cycling Federation (t/a British Cycling) [2020] IRLR 822, the concept of 'mutuality of obligation' arises in case law in two ways. Firstly, it is used with reference to the question whether there is a contract between the parties at all. A lack of mutual obligations signifies an absence of consideration: Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471. Assuming consideration does exist, it is clear from many of the reported cases that 'mutuality of obligation' is also used in a different (or, as Richardson J put it in Drake, secondary) sense that denotes something more than the mere existence of consideration: it is the nature of the consideration that the courts are interested in: Cotswold Developments Construction Ltd v Williams [2006] IRLR 181; Varnish v British Cycling Federation (t/a British Cycling) [2020] IRLR 822.

19. As far as the obligation on the employee is concerned, it is settled law that for there to be a contract of service the employee must be under an obligation to perform some minimum of work for the employer. It follows that an overarching agreement that allows a worker to elect not to take on any work will not be a contract of service (although it may still be the case that when the worker actually performs work, they do so under a separate contract of service).

20. As for the nature of the employer's obligation, there are conflicting dicta on the question of whether there must be an obligation on the employer to provide work in order for a contract to be classified as one of service. For example, in the case of Nethermere (St Neots) Ltd referred to above, Dillon LJ said 'there is one sine qua non which can firmly be identified as an essential of the existence of a contract of service and that is that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer.' Yet in that same case Stephenson LJ held that 'the normal rule is that a contract of employment does not oblige the master to provide the servant with work in addition to wages.' Kerr LJ declined to express a concluded view on the matter. In the later case of Clark v Oxfordshire Health Authority [1998] IRLR 125 CA, Sir Christopher Slade (giving the judgment of the Court of Appeal) said : '... the mutual obligations required to found a global contract of employment need not necessarily and in every case consists of obligations to provide and perform the work.' In Younis v Trans Global Projects Ltd UKEAT/0504/05 the EAT considered it sufficient to found a contract

of service that the employer provided the Claimant with 'an open opportunity to work.' And in Cotswold Developments (Construction) Ltd Langstaff J (as he then was) held that 'it is unnecessary, ..., to approach the definition of the obligation which is required on the employer's side upon too narrow a basis...'. The issue was revisited by Langstaff J in the case of Dakin v Brighton Marina Residential Management Company Ltd UKEAT/0380/12/SM, who, after reviewing the authorities, held that the obligation on the part of the employer must be something 'which relate[s] sufficiently to employment.' Most recently, however, the Court of Appeal held in Revenue and Customs Commissioners v Atholl House Productions Ltd [2022] IRLR 698 that:

'It is now established that, while a single engagement can give rise to a contract of employment if work which has in fact been offered is in fact done for payment, an overarching or umbrella contract lacks the mutuality of obligation required to be a contract of employment if the putative employer is under no obligation to offer work: see Nethermere (St Neots) Ltd v Gardiner, Carmichael v National Power plc [1999] 1 WLR 2042 at 2047A-B per Lord Irvine of Lairg LC, Usetech Ltd v Young [2004] EWHC 2248 (Ch) at [55]-[65], Professional Game Match Officials Ltd v HMRC [2021] EWCA Civ 1370; [2021] STC 1956 at [120]-[124].'

21. It may be possible, in some circumstances, for an overarching contract of employment to grow up over time. In Nethermere, Stephenson LJ said he could see 'no reason in law why well-founded expectations of continuing … work should not be hardened or refined into enforceable contracts by regular giving and taking of work over periods of a year or more, and why outworkers should not thereby become employees under contracts of service…' In the same case Dillon LJ was also of the view that the existence of a contract of service could be inferred from a course of dealing continued between the parties 'over several years'. Other examples can be found in: Airfix Footwear Ltd v Cope [1978] IRLR 396, EAT (a home-worker who had worked for the employer over a period of seven years, generally five days a week); and Haggerty v St Ives Plymouth Ltd (2008) UKEAT/0107/08. In other cases, however, the appeal courts have rejected arguments that contracts of service could be inferred from a long course of dealing, often making the point that the existence of a contract will only be implied where it is necessary to do so. For example: Cable & Wireless v Muscat [2006] EWCA Civ 220; Carmichael & Anor v National Power [1999] ICR 1226, HL; James v Greenwich Council [2008] EWCA Civ 430; and Tilson v Alstom Transport [2010] EWCA Civ 1308; [2011] IRLR 169.

22. When it comes to considering the terms of an individual, self-contained, engagement, rather than an overarching contract, the fact that the parties are not obliged in future to offer - or to accept - another engagement does not prevent the contract being one of service: McMeechan v Secretary of State for Employment [1997] IRLR 353, CA, Cornwall County Council v Prater [2006] EWCA Civ 102; Uber v Aslam [2021] UKSC 5; [2021] ICR 657.

Control

23. As noted above, another precondition for the existence of a contract of service is that the contract gives the employer some degree of control over the individual.

24. The extent of control that must be present if this condition is to be satisfied was addressed in the case of Montgomery v Johnson Underwood Ltd [2001] IRLR 269, CA, where Buckley J said what is needed is 'some sufficient framework of control'. Buckley J cited Humberstone v Northern Mills [1949] 79 CLR 389 in which it was said that the question is not whether in practice the work was in fact done subject to a direction and control

exercised by any actual supervision or whether any actual supervision was possible but whether ultimate authority over the worker in the performance of work resided with the employer so that he was subject to the latter's orders and directions. As the President of the EAT said in Dakin, 'it is the power to control which is essential; the demonstrated exercise of control is not, though it may be evidence that there is the power of control and without it there may be some suggestion that there is no such power.' And in Troutbeck SA v White & Todd [2013] IRLR 286, the EAT held that the question is whether there is, to a sufficient degree, a contractual right of control over the worker; it is not whether, in practice, the worker has day to day control of his own work. That decision was subsequently upheld by the Court of Appeal: Troutbeck SA v White & Todd [2013] EWCA Civ 1171, [2013] IRLR 949.

Other terms/factors

25. If a contract satisfies the requirements of mutuality of obligation, control and personal service then, as noted above, it is capable of being a contract of service. The next stage in establishing whether the contract is in fact a contract of service involves looking at the contract as a whole and weighing all the relevant factors.

26. In Hall (H M Inspector of Taxes) v Lorimer [1994] IRLR 171 the Court of Appeal approved the following dictum of Mummery J at first instance:-

'In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check-list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.'

27. Although MacKenna J, in Ready Mixed Concrete suggested that, at this stage, what is being considered is whether 'the other provisions of the contract are consistent with its being a contract of service', the Court of Appeal has made it clear that this stage requires the identification and overall assessment of all the relevant factors present in the particular case and is not confined to a consideration of the express and implied terms of the contract: Revenue and Customs Commissioners v Atholl House Productions Ltd [2022] IRLR 698. In that case the Court of Appeal held:

'The relationship of employment is created by the employer and employee through the contract made by them. The question for the court or tribunal is whether, judged objectively, the parties intended when reaching their agreement to create a relationship of employment. That intention is to be judged by the contract and the circumstances in which it was made. To be relevant to that issue any circumstance must be one which is known, or could reasonably be supposed to be known, to both parties.'

28. If a person is supplying work on an 'assignment-by-assignment basis', a factor that may be considered at this stage is the nature of arrangements between periods of work. As the Court of Appeal said in Windle v Secretary of State for Justice [2016] EWCA Civ 459; [2016] ICR 721, the ultimate question 'must be the nature of the relationship during the period when the work is being done', however 'the nature of arrangements between periods of work, and in particular the presence or absence of mutuality of obligation can

shed light on the character of the relationship when the work is being done'. As the Court of Appeal said, if a person is only supplying work on an 'assignment-by-assignment basis' that might 'tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status, even in the extended sense [in the Equality Act 2010]….Its relevance will depend on the particular facts…it is necessary to consider all the circumstances' (paragraph 23, per Underhill LJ). That reasoning was approved by Lord Leggatt JSC in Uber v Aslam.

29. Along similar lines, in Revenue and Customs Commissioners v Atholl House Productions Ltd [2022] IRLR 698, the Court of Appeal agreed with Kerr J in Augustine v Econnect Cars Ltd (2019) UKEAT/0231/18 (20 December 2019) at [66] who said:

'I see no reason why it was not open to the tribunal to decide that, while the degree of the employer's control was sufficient for a contract of service at stage two of the enquiry, the worker's degree of autonomy in deciding whether to subject himself to that degree of control, how often and when, was a factor pointing away from a contract of service at stage three of the enquiry.'

Starts work

30. The definition of 'employee' in section 230(1) includes an individual who 'has entered into' a contract of employment, even if he or she has not actually started performing the appropriate duties. That was recognised by the EAT in the case of Sarker v South Tees Acute Hospitals NHS Trust [1997] IRLR 328, [1997] ICR 673.

31. However, section 230 recognises that there is a distinction between entering into and working under the contract of employment and, as set out above, the period of continuous employment does not begin until the employee 'starts work'.

32. In General of the Salvation Army v Dewsbury [1984] IRLR 222, [1984] ICR 498 the EAT held that the phrase 'starts work' in s 211(1) does not refer to the undertaking of the full duties of the employment, but to the beginning of the employee's employment under the relevant contract of employment. In that case the EAT held that the tribunal had not erred in holding that the claimant teacher's period of continuous employment began on the date the parties had expressly agreed her employment would commence, notwithstanding that that day was a Saturday and non-working day and it was not until three days later that the claimant first undertook her duties.

33. The issue to be determined is when the employee started work under the contract of employment relied upon; work outside that contract of employment, though it might have some relationship to it, cannot count: Koenig v The Mind Gym UKEAT/0201/12 (8 March 2013, unreported).

<u>Canons of the Church of England</u>

34. I was referred to the Canons of the Church of England. Of particular relevance are the following provisions:

B 20 Of the musicians and music of the Church

1. In all churches and chapels, other than in cathedral or collegiate churches or chapels where the matter is governed by or dependent upon the statutes or customs of the same, the functions of appointing any organist, choirmaster (by whatever name called) or director of music, and of terminating the appointment of any organist, choirmaster or director of music, shall be exercisable by the minister with the agreement of the parochial church council, except that if the archdeacon of the archdeaconry in which

the parish is situated, in the case of termination of an appointment, considers that the circumstances are such that the requirement as to the agreement of the parochial church council should be dispensed with, the archdeacon may direct accordingly. Where the minister is also the archdeacon of the archdeaconry concerned, the function of the archdeacon under this paragraph shall be exercisable by the bishop of the diocese.

2. Where there is an organist, choirmaster or director of music the minister shall pay due heed to his advice and assistance in the choosing of chants, hymns, anthems, and other settings, and in the ordering of the music of the church; but at all times the final responsibility and decision in these matters rests with the minister.

3. It is the duty of the minister to ensure that only such chants, hymns, anthems, and other settings are chosen as are appropriate, both the words and the music, to the solemn act of worship and prayer in the House of God as well as to the congregation assembled for that purpose; and to banish all irreverence in the practice and in the performance of the same.

Evidence and facts

35. I heard evidence from Mr Wooler, the claimant. For the respondent I heard evidence from Mr Fidler, director of music at the respondent's church, Reverend McGowan, vicar at the church, and Mr Bradbury, treasurer at the church. I was referred to a number of documents.

36. Some elements of this case were dependent on evidence based on people's recollection of events that happened some considerable time ago. In assessing that evidence I bear in mind the guidance given in the case of Gestmin SGPS -v- Credit Suisse (UK) Ltd [2013] EWHC 3560. In that case Mr Justice Leggatt observed that is well established, through a century of psychological research, that human memories are fallible. They are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. Mr Justice Leggatt described how memories are fluid and changeable: they are constantly re-written. Memories can change over passage of time. Furthermore, external information can intrude into a witness' memory as can their own thoughts and beliefs. People's perceptions of events differ. This means that people can sometimes recall things as memories which did not actually happen at all. In addition, the process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to parties. It was said in Gestmin: 'Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.' In light of those matters, inferences drawn from the documentary evidence and known or probable facts tend to be a more reliable guide to what happened than witnesses' recollections.

37. The claimant's main career (as he put it in his CV) is as a chemistry teacher. At the material times he was employed in that capacity at a high school. In addition, the claimant had, in the past, been assistant director of music and director of music at churches in Newcastle and Sunderland.

38. As director of music for the church, Mr Fidler was an employee of the parochial church council. He was not a member of the parochial church council. Mr Fidler was appointed to his post after the respondent received a substantial grant to carry out repairs to the organ. The respondent had wanted to appoint someone to a proposed new post of organist and director of music. However, none of the applicants for the post at the time were both organists and musical directors. Accordingly, the respondent decided to split the proposed position into two separate roles: a director of music and an organist. Mr Fidler was appointed as director of music. Before anyone could be appointed to the post of organist, however, the then vicar made it known that he would be retiring with effect from 1 October 2017. In the absence of an incumbent, and in view of Canon Law (B20), the respondent put on hold the plans to make an appointment to the position of organist. In the meantime, Mr Fidler, as director of music, was responsible for arranging for somebody to play the organ at church services.

39. The claimant first started playing the organ for the church in August 2017, after Mr Fidler contacted the claimant to ask if he might play for them. On 17 July 2017 Mr Fidler messaged the claimant saying, 'I wondered if you would be available to do some playing for us on Sunday mornings over the summer?' Mr Fidler went on to say that he needed somebody on 30 July, 6 and 13 August and 3 and 10 September. He told the claimant in this message 'it would be £40 per service' and asked the claimant to let him know if he was available for any of the dates. The claimant replied 'certainly! and it's lovely to be asked.' He told Mr Fidler he could not do 30 July or 6 August but the other dates would be 'fine.'

40. On 13 September 2017 Mr Fidler messaged the claimant again saying, 'could you give me any Sundays between Oct 8 and Christmas?!' He also asked the claimant about Christmas Eve and Christmas Day. Mr Fidler then messaged the claimant asking him if there was 'any chance of doing Oct 1?' He explained to the claimant that the person he had booked to play the organ on that date did not know the piece the vicar wanted him to play and did not have time to practice. The claimant agreed to play the organ on that date. The claimant also asked Mr Fidler if he still had any other gaps in October. Mr Fidler responded by asking if the claimant could do other October dates and the claimant said he could do the 1st, 8th and 22nd October (but not the 15th or 29th October). Mr Fidler thanked the claimant and went on to ask about November and December. The claimant then corrected himself and said he could do 29th October but not the 22nd and it was agreed that he would play the organ on 1st, 8th and 29th October.

41. By 2018 the claimant was one of a pool of six regular organists who played for the church. Mr Fidler would prepare a rota identifying which of the regular organists had agreed to play on which Sunday (or other day on which there was a service). It was his usual practice to try to complete the rota at least a month in advance of service dates. Messages between Mr Fidler and the claimant demonstrate that he sometimes prepared the rota for a particular month several months ahead of time. For example, in April 2018 Mr Fidler asked the claimant if he could check the claimant's availability for Sundays in September. The claimant's reply was 'you're the first to ask thus far so fire away.'

42. The claimant accepted in cross-examination that from August 2017 and throughout the first half of 2018 Mr Fidler would contact him to ask him if he was available to play on certain dates and he (the claimant), could pick and choose the days when he played. That is clearly evident from the messages between the claimant and Mr Fidler to which I was referred in evidence.

43. The claimant played the organ for the church on one of the four Sundays in February 2018 (surgery on his foot limited his playing ability at this time); two of the six Sundays/holy days in March 2018; two of the five of Sundays in April 2018; three of the four Sundays in May 2018; two of four Sundays in June 2018; and two of five Sundays in July 2018.

44. It remained the case that the claimant was entitled to be paid a fee of a fixed amount per service, although the church decided to increase the fee per service to £50 in early 2018.

45. At the end of April 2018 the claimant was involved in some conversations about concerns he had about the organ. Mr Fidler asked the claimant if he could 'put his concerns down in an email' and said they would then get in touch with the company that had carried out a restoration a few years earlier to 'arrange a visit that is mutually convenient to you both, so that you can have a conversation'. The claimant replied a couple of weeks later setting out what he described as a 'list of faults'. He ended the email by saying 'let me know if you need any more information. You suggested, I think, that I met with Woods if they came to the church. … if anything could be arranged in half term, then I could definitely be around …'

46. A meeting was arranged with the company that had carried out with the restoration on 4 July 2018 and the claimant attended. Following that meeting the claimant took on responsibility for liaising with the company that had carried out the restoration about resolving the outstanding problems and also with regard to routine tuning. The claimant expended a considerable amount of time and effort in dealing with these issues. For his part, Mr Fidler was glad to have somebody with the claimant's expertise dealing with these matters. The claimant was not paid any additional sums for the time he spent dealing with these matters.

47. In the second half of 2018, the claimant played the organ for the respondent more frequently than he had in the first half. The claimant played the organ for the church on three of the four Sundays in August 2018; all five Sundays in September; on three of the four Sundays in October; on three of the four Sundays in November; and at five of the seven services in December.

48. On 13 August 2018 Mr Fidler emailed the claimant saying 'I'm just looking at the organ schedule. I currently have you down for the first two Sundays of September but nothing after that. Are you able to give me any more dates in September/October … November/December?!' Mr Fidler also referred to a concert he was planning for 15 December and asked the claimant if he would be 'available/willing to play.' The claimant replied 'I can do all of the September Sundays and no one elsewhere has asked me about October (although I'm away 28 October), November and December. I'm happy to do any Sundays you need up to half term as I can't foresee any plans to be away. I'm also likely to be pretty flexible up to Christmas but are you happy to firm up November/December in a few weeks when a few family things and recital visits become clearer? I'm happy to commit to 4/11 and 3/11 now for the quartet though. Christmas is a little trickier – I probably can't do Christmas midnight nor Christmas morning, but it's likely I could do the Christmas Eve nine lessons.' He also said he would be 'happy to play' at the concert on 15 December.

49. I infer from the messages between the claimant and Mr Fidler that I was referred to that neither the claimant nor Mr Fuller believed that the church was under any obligation to ask the claimant to play at any services or that the claimant was under any obligation to agree to play when he was asked if he was 'available/willing' to play.

50. It was put to the claimant on cross-examination that he was also playing the organ elsewhere as well as at the respondent's church at this time. The claimant replied that he was not sure that he was. I infer from the claimant's responses to Mr Fidler in April ('you're the first to ask thus far so fire away') and October ('no-one elsewhere has asked me about October') that it is more likely than not that he did play the organ elsewhere.

51. Before the claimant became involved with the respondent's church, the respondent had been thinking about having a church choir. However, the congregation was so small that it was difficult to raise a choir from those who attended Sunday services. Mr Fidler was aware that the claimant occasionally assembled choirs to sing services in other venues. On 3 September 2018 he messaged the claimant saying 'So your choir … we're wondering if they might come and sing in the service on the 16th?! …' The claimant said that he would ask the choir and check availability. Mr Fidler then asked the claimant if he could liaise with one of the wardens about what was going to happen. The claimant subsequently arranged for a choir to sing at the service on 16 September 2018.

52. Subsequently the claimant began gathering a choir more regularly. The claimant trained the choir in practices that he arranged before a service at which they were due to sing. The claimant was not paid any additional sums for the time he spent training the choir or in practice with the choir nor for any of the time he spent dealing with any organisational or administrative matters relating to the choir.

53. As well as developing a choir and dealing with matters concerning the organ, the respondent (via Mr Fidler and church wardens) frequently sought the claimant's advice and input on the music to be played. The form and content of a service was determined by the church. It was, for the main part, for Mr Fidler, as director of music, to decide what music would be played. However, the claimant was able to decide what to play at certain parts of the service.

54. It remained the case that the only payment the parties had agreed would be made was the £50 fixed fee per service. The arrangement for payment was that the claimant would email Mr Bradbury, the treasurer, with details of the dates he had played the organ and Mr Bradbury would then arrange for payment to be made. On 21 October 2018 the claimant emailed Mr Bradbury with details of services he'd played at in the nine months between 25 February 2018 and 21 October that year and Mr Bradbury arranged for payment. Mr Wooler next sent a request for payment to Mr Bradbury in July 2019 ie over eight months later. The request for payment covered dates played between November 2018 and June 2019.

55. The pattern of regular organ playing continued into 2019. In January 2019 the claimant played on three of the four Sundays; in February on all four Sundays; in March on three of the four Sundays; in April three of the four Sundays; in May all four Sundays; in June at least four of the five Sundays and all of the Sundays in in July, August, September, October and November (including on Sunday 24 November 2019).

56. On 3 January 2019 Mr Fidler asked the claimant if he could book him for choral evensong on 10 March. The claimant agreed and then asked Mr Fidler 'where are we in terms of Sunday mornings?' Mr Wooler went on to say that he was 'free all until 28 April (save for March 31st) so simply tell me what you need'. Mr Fidler's response was that he had the claimant in for 6th, 20th and 27th January and 3rd February. On 8 January 2019 Mr Fidler messaged the claimant telling him that the only remaining organist who had been on the rota did not want to play regularly anymore. Mr Fidler said to the claimant 'so you can

have as many services as you like.' The claimant replied 'That's excellent news. Thank you. Shall we go through the diary next time I'm in the Sunday after next?'

57. Although the claimant's evidence was that he was now 'expected to play every week', I do not accept that was the case in light of that message from Mr Fidler: it remained the case that the claimant could choose not to play at a particular service or event if he did not wish to do so, for any reason. Furthermore, the claimant accepted on cross-examination that, as at early 2019, it would have been open to Mr Fidler to appoint or find another organist to play Sunday services and the claimant could not have insisted on playing Sunday services himself. In practice, the claimant did play at nearly all of the Sunday services.

58. In February 2019 Reverend McGowan became the vicar at the church.

59. On 15 March 2019 Reverend McGowan emailed the claimant asking if he was free to play the organ at a memorial service the following day. The claimant agreed to play.

60. On 20 March 2019 Reverend McGowan sent an email to the claimant. In that email Reverend McGowan said: '… if you have some time to catch up it would be good to hear about your thoughts for music, development at Js&Bs together with working out some practicalities (like making sure the method for fee payment is clear amongst other things). Following the last [parochial church council meeting] I also understand that you don't really [have] any sort of working agreement (informal or otherwise) – as this is considered, it would be good to know your thoughts on this.'

61. On 22 March Reverend McGowan emailed the claimant and asked him to review an order of service he had prepared. He said to the claimant 'would you mind checking it for typos?' He also said he was happy to add to the order of service if the claimant wanted to include other matters. The claimant replied with information about his suggested voluntaries.

62. On 25 April 2019 Reverend McGowan contacted the claimant to ask about a funeral that was to take place the following month. Reverend McGowan said '… I assume you'll be in school [a reference to the claimant's teaching job]. So are you happy for me to contact Robin or would you recommend someone else?' Reverend McGowan's evidence was that the reason he asked the claimant this was that, being new to the post, he (Reverend McGowan) did not have an up to date contact list of organists at that stage and was 'still finding out the local custom.'

63. On 22 July 2019 Reverend McGowan emailed Mr Fidler and the claimant and two of the wardens asking if they could meet up in early August to 'check through things for the Autumn, Advent and Christmas season' and discuss a number of things including to 'see if there is a way that Charles' choir might fit in a little more regularly (if they would like to) – perhaps once a month/every six weeks …' On 27 August Reverend McGowan emailed the claimant saying 'I wanted to name your choir so that it didn't look like they were the "also-rans" … I realise that a long term name might need a little more thought (I've called them the Sanctuary Voices) – let me know if you've another idea or other thoughts.' In a document attached to that email Reverend McGowan described 'Sanctuary Voices' as 'Our "house" Sunday choir".'

64. The claimant attended meetings with Reverend McGowan and Mr Fidler on 7 August and 11 September 2019 at which the choir was discussed. In September it was agreed that the claimant would set up a separate email account for the choir. The choir first sung under the name of Sanctuary Voices on 15 September 2019.

65. I have no doubt that the claimant's work with the choir took up a significant amount of his time and that the respondent benefited from the claimant's efforts and expertise. That was

also the case with regard to the time spent by the claimant dealing with matters concerning the maintenance and tuning of the organ. I have no hesitation in finding that the respondent, Reverend McGowan, Mr Fidler and the church wardens hoped that the claimant would continue his work with the choir and ensuring the organ was in good order. There is no suggestion that the claimant had said or done anything to suggest that he would not do so and, that being the case, they had no reason to doubt that the claimant would do so. There was, however, no agreement that the claimant would be paid any extra for the time he spent on these matters.

66. Reverend McGowan also continued to seek the claimant's advice and input on the music to be played at services, and the claimant continued to provide it, as well as wording for service sheets. The respondent benefited from the claimant's expertise, his extensive repertoire, and the time he was willing to expend in preparing and practicing for services.

67. Once Reverend McGowan had settled into his role, the respondent decided to appoint a permanent organist, as had been the intention before the retirement of Reverend McGowan's predecessor.

68. On 16 August 2019 Reverend McGowan sent an email to the claimant. He said he had found a 'draft contract/working agreement' that he had adapted to include details of life at the respondent's church. He told the claimant he had shared the draft with two of the church wardens, saying 'I'm just waiting for them to comment or agree and then I'll send it on to you for review and comment in order that we might present it to the PCC as something that all parties are happy with and they can then simply agree the appointment, (or rather agree to fund the appointment).…'

69. On 13 September 2019 Reverend McGowan emailed the claimant letting him know that the PCC would like to invite expressions of interest from anyone who might wish to be appointed as the permanent organist. In that email Reverend McGowan said 'it is our hope that you will be the only person to make enquiries (!) – however to comply with CoE Safer Recruiting Policy and to ensure that we comply with employment law we need to advertise.' Reverend McGowan told the claimant that there was no intention to advertise beyond putting a notice in the weekly sheet for two Sundays and they were not planning on publicising the position more widely. He said the claimant should 'feel free to collect [the weekly sheets] in after the service'.

70. At some point Reverend McGowan produced a document described as a 'timeline of events'. In that document he noted that, prior to February 2019, the claimant was 'already present as the "resident" organist …' In relation to the advertisement of the position of organist Reverend McGowan noted 'it is hoped that [the claimant] will apply and be appointed – this is not a move to replace him, but after the new vicar had been in post for six months, this was seen as part of the process of normalising some informal arrangements that had been established during the vacancy. [Reverend McGowan] was aware of gossip and rumours about [the claimant's] time at St John's, Grainger Street and St Oswald's, Durham. However, these were not substantiated with any evidence.'

71. I infer from the 16 August email that Reverend McGowan had initially had in mind simply offering the position of permanent organist to the claimant without advertising the vacancy and without the claimant having to formally apply for the post. The appointment needed to be agreed by the parochial church council, however, under Canon B20 and because the PCC needed to agree the payment of a salary. By 13 September, the PCC decided that a more formal process should be adopted than had originally been envisaged by Reverend McGowan. It is clear, however, that the message Reverend McGowan wished to convey

to the claimant was that he had no wish for anybody other than the claimant to apply for the position.

72. The claimant applied for the post by letter of 4 October 2019 accompanied by a copy of his CV. The claimant's letter of application began 'In response to the advertisement recently placed in the church pew seat, I wish to apply for the post of organist at the Church of St James and St Basil Fenham.' The claimant went on to explain, in detail, why he considered he was suitable for the role. He did not suggest in that letter that he had already been performing the role in practice. The claimant included in his CV a section entitled 'employment history'. The claimant did not mention his organ playing for the respondent in that part (or any other part) of his CV.

73. The claimant gave the names of two referees when he applied for the post. Reverend McGowan contacted at least one of those two referees on 23 October 2019, although it appears Reverend McGowan sent the request to an incorrect email address. It is not clear when, but at some point Reverend McGowan also contacted the second referee for a reference.

74. On 27 October 2019 the claimant was interviewed for the post of organist by Reverend McGowan and Mrs Walter (churchwarden). Later that day Reverend McGowan sent the claimant a letter in which he said 'on behalf of the Parochial Church Council, I am pleased to be able to invite you to take the appointment of Organist in the Parish (subject to receipt of references and a DBS check).' The letter went on to say 'this is an appointment that we are particularly pleased to be able to make following many months of your committed work as our 'locum' organist. During this time, you have shown real commitment to re-establishing a choral tradition at Js&Bs alongside Mr Simon Fidler, …' In the letter Reverend McGowan said 'We recognise that our current offer of remuneration for this post represents a starting point for the minimum service as laid out in the enclosed working agreement.' He said he would be in touch 'with details of steps to be taken to carry out the formalities

75. Enclosed with that letter was a document headed 'St James and St Basil, Fenham EMPLOYMENT CONTRACT – [Charles Wooler].' I make the following observations about that document:

    75.1. It began with an introduction saying: 'Following the Minister's decision (with the approval of the PCC) that the employee should be appointed to the role described in Clause 1 below and appropriate safeguarding checks having been carried in respect of the employee, the parties enter into this contract to set out the terms of the employee's employment by the PCC.'

    75.2. It included a space for the 'date employment commenced' to be added. No date was included in that space in the contract sent to the claimant at this time.

    75.3. It described the employee's job title as 'organist'.

    75.4. It set out the 'current salary' as £3200 per annum with fees for occasional services 'to be confirmed'. It provided that the salary would be paid 'at monthly intervals on or about the [XX] day of every calendar month.'

    75.5. It contained a section headed 'general duties' which were said to be 'more particularly described in the job description contained in the schedule to this agreement.' The section went on to set out certain obligations of the employee including (amongst others) the following:

75.5.1. devoting such time to his work for the church as may be necessary for the full and prompt performance of his duties under the contract;

75.5.2. diligently exercising such powers and perform such duties as may from time to time be assigned to the employee;

75.5.3. using best endeavours to support the work of the Minister, the PCC and the church;

75.5.4. complying with all reasonable and lawful instructions given by the Minister and the PCC and any rules, policies and procedures notified to the employee by the Minister and the PCC from time to time;

75.5.5. promptly giving to the Minister and the PCC all such reasonable information, explanations, reports and assistance as they may reasonably require in connection with the employee's work for the church;

75.5.6. undertaking safeguarding training at periodic intervals, when reasonably required;

75.5.7. at all times fully complying with the security arrangements in relation to the church and taking all reasonable steps to avoid theft of or damage to church property; and

75.5.8. immediately disclosing to the Minister any criminal convictions, cautions, court orders, reprimands and warnings which may affect the employee's suitability to work with children.

75.6. Under a section headed 'hours of work', it stated 'the employee shall work such hours as are reasonably necessary for the proper performance of his duties, including for the preparation and planning of the church's music; attending meetings concerning music and the liturgy; and rehearsing, playing and directing music in services.'

75.7. It included a section headed 'occasional services'. That section included the following clauses:

75.7.1. 'Recognising that the employee works full time during term time, the employee shall use all reasonable efforts to make himself… available to play at weddings, funerals and other occasional services taking place at the church, where organ music is required and the employee shall make time available to discuss with the family involved the music they wished to be played.'

75.7.2. 'The Employee shall be paid for weddings, funerals and other occasional services at the rates from time to time specified by the PCC…'

75.7.3. 'If the employee is unable to play at any occasional service then the employee should notify the Minister as soon as possible and use the employee's reasonable endeavours to find a suitable substitute to play instead…'

75.8. Under the heading 'holiday entitlement', the contract document said 'the employee is entitled to six weeks' holiday each year, the leave year between 1 January to 31 December.' It also said 'the employee is responsible for helping the Minister to find a suitable substitute who is able and willing to cover the employee's work when the employee wishes to be away on holiday'.

75.9. It provided for the first six months of the employee's employment to be 'probationary' and said that the employee's employment may be terminated by either party giving the other not less than one week's notice in writing during that period

75.10. It said that, after the end of the probationary period, either party could terminate the employment by giving to the other one month's written notice or one week's written notice per complete year of service a term maximum of 12 weeks, whichever was the greater. It went on to provide that termination of the employee's employment by the Minister would require the approval of the PCC except in certain specific circumstances.

75.11. The contract had sections addressing disciplinary rules, grievances and confidential information.

75.12. A schedule to the contract document incorporated a job description which was described as 'non-contractual'. The schedule included the following as part of the job description:

1. *To play the organ at the 10am morning (and evening services when held) each Sunday.*
2. *To play the organ at services at the principal festivals (as defined in Clause 2 of this contract).*
3. *To play the organ at other public services when reasonably requested to do so by the Minister.*
4. *To prepare music lists for approval by the Minister.*
5. *To train the choir and to arrange and conduct suitable practices.*
6. *When requested to do so by the Minister, to attend meetings of the PCC and its sub-committees.*
7. *To be responsible for the supervision of the care and maintenance of the church's organ.*

76. The offer of appointment and contract document was sent to the claimant under cover of an email. In that email Reverend McGowan said to the claimant 'Thank you for taking the time to complete the formalities; I realise that this did feel a little false given the circumstance, but I am pleased we were able to complete the process and keep you!' Reverend McGowan went on to refer to the requirement for a DBS check and said he was looking into whether an existing DBS check would suffice. Reverend McGowan said 'we will wait to hear back about this … before we make any announcement. (Though I think we'd be happy to make an announcement 'subject to DBS checks' once you're happy).'

77. In that email Reverend McGowan said he was attaching 'an initial draft of the [job description] and [working agreement]'. He said there were a number of details to confirm in the documents, including a figure for funeral and wedding fees. He asked the claimant to let him know what he thought.

78. The claimant replied to Reverend McGowan the following day, 28 October, saying 'I'm content with all of this. Shall we meet for coffee to dot these Is and cross the Ts?' The claimant's evidence at this hearing was that in saying that he was referring to the need to 'eliminate several typos and gaps in the draft contract rather than the querying of any contractual terms.' I find that the claimant did, however, query the job title of 'organist'. The claimant wanted the job title to be changed to 'assistant director of music and organist' and put this to Reverend McGowan who said he would put it to the PCC. In the meantime, the claimant did not sign the contract document.

79. Reverend McGowan made enquiries about the claimant's DBS status, as he told the claimant he would. By 6 November the claimant's DBS checks had been completed satisfactorily and Reverend McGowan told the claimant they had been.

80. By 27 November 2019 the respondent had not yet received references from either of the two referees the claimant had named. In one case, Reverend McGowan had sent the request to an incorrect email address, as noted above. On 27 November, Reverend McGowan emailed that individual again, this time using the correct email address. The referee responded that same day with a positive reference.

81. The following day, Reverend McGowan said in an email to the churchwardens forwarding the reference that had been received and explaining that the other was 'still pending'. He said 'Charles is still keen that, if possible, the 1st Dec is the start of the appointment … so we wait and see if the second reference arrives in time.' A reference from the second referee was received on 30 November 2019. The following day, 1 December, was a Sunday and the claimant played the organ for the respondent on that day.

82. There is a dispute between the parties as to what was discussed about the claimant's start date. In this regard:

    82.1. Reverend McGowan's evidence was that it was verbally agreed that the claimant was employed from Sunday 1 December 2019.

    82.2. The claimant's evidence was that 1 December was the date by which it was hoped his appointment would be announced and the payroll arrangements changed and that he personally believed he was already working under the terms of the contract sent to him by email by 28 October 2019 (the date the claimant had respondent to Reverend McGowan's emailed letter offering the organist role). The claimant's evidence was that Reverend McGowan's reference, in the email of 28 November, to the claimant being keen that 1 December was the start of his appointment did not reflect what they had discussed.

    82.3. I note that the minutes of a PCC meeting that took place on 22 January 2020 recorded Reverend McGowan reporting that 'after receiving satisfactory references Charles Wooler was appointed organist from 1 December 2019.'

    82.4. Furthermore, on 26 February the claimant sent an email to Mr Bradbury in which he said he had been 'appointed Organist with effect from 1st December' (which email I refer to below).

    82.5. In addition, Reverend McGowan referred to the start date for the contract being 1 December in an email on 3 August 2020. In that email Reverend McGowan said the reason, or one of the reasons, why it had not been signed was that the claimant had wanted to change the job title to 'assistant director of music and organist'. Reverend McGowan said they were waiting for the PCC to agree to that change when lockdown began (for Covid-19). In that email Reverend McGowan said 'having said that, and to be fair to [the claimant] we [the wardens and I, with the knowledge and agreement of the PCC] intended that this was in effect from Advent Sunday last year (1 December 2019), we have verbally said as much to [the claimant] on a number of occasions and he has been paid with effect from this in line with what is stated. We are therefore treating this as signed and in place and I suspect it would be seen as such under employment law given the time that has passed.'

83. Looking at the evidence as a whole, I find that Reverend McGowan and the claimant agreed, orally, that the claimant's employment under the contract would begin on 1 December 2019, provided a DBS check and references were received by that date.

84. Although the contract document provided for regular monthly payments, the first monthly payments did not begin until April 2020. Mr Wooler emailed Mr Bradbury on 26 February 2020 with details of services he had played at since July 2019 and requested payment. In that email the claimant included services he had played at on and after 1 December 2019. He said 'I'm unsure as to how I am to be paid since I was appointed organist with effect from 1 December. Under the "old regime" this would have been 39 services at £50 = £1950 …' Mr Bradbury said in evidence that the reason for the delay in setting up the monthly pay arrangement detailed in the contract document was that they were waiting for the claimant to sign his contract of employment. The claimant had not signed the contract because the PCC had not said whether it agreed to the job title being changed to 'assistant director of music and organist.'

85. On 20 October 2021 the respondent decided to terminate the claimant's employment by giving one calendar month's notice. On 28 October 2021 a church warden called at the claimant's house and handed him a letter dated that date from Reverend McGowan, writing as chair of the PCC and for and on behalf of the PCC. That letter began 'I am writing to confirm that the Parochial Church Council of the Ecclesiastical Parish of St James and St Basil Fenham … has decided to terminate your employment.' The letter went on to set out reasons for the termination of employment before saying 'under Clause 19.2 of your contract of employment you are entitled to one month's notice. Your employment will therefore terminate on 28 November 2021. As of the date of this letter you are on gardening leave and are no longer required to attend work unless specifically requested to do so. …'

86. In that letter the claimant was told he had the right to appeal his dismissal and the claimant did so by a letter dated 2 November. On 9 November 2021 Reverend McGowan sent a letter to the claimant in which he said 'The PCC have fully considered your letter of appeal and feel that it brings no new, relevant information which would enable the PCC to change their decision. The PCC uphold their decision of 20th October to terminate your contract effective from November 30th 2021.'

87. During the course of these proceedings the claimant has been provided with a copy of another version of the letter dated 9 November 2021. Although that letter also appears to have been signed by Reverend McGowan, I accept that it was not received by the claimant. The claimant points out, however, that that letter also refers to the termination of his contract being effective from November 30th 2021. The claimant was also provided with what appears to be a draft of a letter, bearing the date 5 November 2021. That document was never finalised and was not sent to the claimant. It is not clear who drafted it.

88. The claimant did not contact anybody at the respondent to ask why the letter referred to termination being on 30 November rather than 28 November as stated in the letter of termination.

89. Reverend McGowan's explanation in evidence for the reference, in his letter of 9 November, to 30 November as the termination date was that he had been confused, having recently been unwell, had emergency treatment and been sedated.

90. I accept Reverend McGowan's evidence that when he suggested in his letter of 9 November 2021 that the termination of the claimant's employment was effective from 30

November 2021 he simply made an error. He was not intending to suggest that the respondent was willing to or offering to extend the claimant's employment beyond 28 November 2021, the date on which it was due to terminate.

Conclusions

91. As recorded at the outset of this judgment, it is common ground that:

    91.1. the claimant's period of continuous employment with the respondent began no later than 1 December 2019 (the claimant's case is it began sooner); and

    91.2. the effective date of termination, and therefore the date when the claimant's period of continuous employment ended, was no sooner than 28 November 2021 (the claimant's case is that it was later ie 30 November 2021).

92. At this hearing, Mr Ratledge accepted that, on the occasions that the claimant played the organ for the respondent before 1 December 2019, he did so pursuant to a contract between himself and the respondent. The respondent's case is that:

    92.1. there was no overarching contract between the claimant and the respondent before 1 December 2019; and

    92.2. such contracts that arose when the claimant agreed to play the organ were not contracts of service.

93. As Mr Ratledge accepted at the hearing, it is in fact unnecessary for the claimant to establish that there existed an overarching contract of employment between himself and the respondent before 1 December 2019. That is because it was not disputed that the claimant had played the organ for the respondent on Sunday 24 November 2019 and, even on the respondent's case, the claimant had started work under a contract of employment on the following Sunday, 1 December 2019. It followed that if I accepted that, when the claimant played the organ on 24 November 2019, he did so under a contract of employment, the whole of that week would count in computing the claimant's period of employment by virtue of ERA section 212. Therefore, even if the effective date of termination was 28 November 2021 (as contended for by the respondent) the claimant would have the required two years' service as an employee to qualify for the right not to be unfairly dismissed.

94. Nevertheless, the claimant's position is that he was employed under an ongoing contract of employment for some considerable time before 24 November 2019 and I have, therefore, considered the case on that basis.

When did the claimant enter into a contract of service with the respondent?

95. I have found that, from August 2017 when the claimant first started playing for the respondent, and throughout the first half of 2018, Mr Fidler would contact the claimant to ask him if he was available to play the organ on certain dates and the claimant could pick and choose the dates when he played. There was no obligation on the claimant to agree to work on any dates when asked if he was available and there was no obligation on the respondent to invite the claimant to play. The only obligations that existed arose, I find, as and when the claimant and Mr Fidler agreed that the claimant would play the organ on one or more specific dates. At that point, the claimant was obliged to play on the agreed dates and the respondent was obliged to pay the claimant the agreed fee for each date he played.

96. The absence of any ongoing obligations to offer or accept engagements signified an absence of ongoing consideration. Consequently, I find that there was not an overarching,

or umbrella, contractual relationship between the parties in that period. Rather, on each occasion that the claimant and Mr Fidler agreed that the claimant would play the organ on one or more specific dates, the parties entered into a discrete contract under which the claimant was obliged to play on the dates that had been agreed and the respondent was obliged to pay the claimant a fixed fee for each date he played. Thus, there was a sequence of separate, often overlapping, contracts between the claimant and respondent.

97. Those contracts contained an obligation on the part of the claimant to play the organ on the agreed dates and an obligation on the respondent to pay the claimant a fixed fee for doing so. I find that the obligations on the respondent also extended to allowing the claimant to play the organ on the agreed dates so that he could earn his fee. As such, the mutuality of obligation that is a necessary component of a contract of service was present.

98. Also present, I find, was an obligation on the claimant to do the work (ie play the organ) personally. When Mr Fidler agreed with the claimant that the claimant would play the organ, he doubtless did so on the understanding that it would be the claimant (and not somebody else) who turned up on the day to play. The claimant was not free to delegate his obligations to somebody else.

99. The respondent also had the power to direct when, during a service (or other event, such as a concert) the claimant played and what music the claimant played. The claimant could not simply turn up at a service or event and play any music of his choice. The form and content of a service was determined by the church and it was, for the main part, for Mr Fidler, as director of music, to decide what music would be played. Although the claimant was able to decide what to play at certain parts of the service, I find that the ultimate authority over music choice remained with the respondent. That is underpinned by paragraph B20 of the Canons of the Church of England, which makes it clear that there is a duty to ensure that 'only such chants, hymns, anthems, and other settings are chosen as are appropriate, both the words and the music, to the solemn act of worship and prayer in the House of God as well as to the congregation assembled for that purpose; and to banish all irreverence in the practice and in the performance of the same..' Whilst there was no evidence before me to suggest the respondent supervised how the claimant played the organ, I am satisfied that the respondent had a contractual right of control over the claimant to a sufficient degree that the contracts were capable of being contracts of service.

100. If follows from the above that each of the discrete contracts the claimant and respondent entered into was capable of being a contract of service. Whether those contracts were in fact contracts of service depends on an assessment of all the relevant factors to determine whether, judged objectively, the parties intended when reaching their agreement to create a relationship of employment.

101. In performing this exercise, I have found it instructive to compare the nature of the arrangements that existed during this period with the arrangements that were set out in the contractual documents that were agreed by the parties in late 2019, and which the parties agree constituted a contract of employment. In contrast to the arrangements that were ultimately agreed between the parties, the arrangements that existed from July 2017 had the following features.

101.1. The claimant was not required to play the organ at all Sunday services and principal festivals. Nor was he obliged to play at any other public services when requested. Nor was there any obligation on the claimant to 'use all reasonable efforts to make himself… available to play at weddings, funerals and other occasional

services taking place at the church, where organ music is required' nor to find a suitable substitute to play if he was unavailable or make time available to discuss with the family involved the music they wished to be played. The claimant was only obliged to play at services he had expressly agreed to play at. Once he had done so, the claimant had no further obligation to play at any further services (unless he had entered into a separate contract to do so) and the respondent was not obliged to invite the claimant to do so.

101.2. The claimant was paid a fee per service (determined by the respondent), rather than a salary.

101.3. There had been no agreement between the claimant and the respondent (whether through Mr Fidler or anyone else) that the claimant would be obliged to: train a choir and arrange and conduct suitable choir practices; attend meetings of the PCC and its sub-committees or meetings concerning music and the liturgy; use his best endeavours to support the work of the minister, the PCC and the church; give to the minister (or in the absence of the minister, Mr Fidler) or the PCC all such reasonable information, explanations, reports and assistance as they may reasonably require in connection with the employee's work for the church; undertake safeguarding training at periodic intervals, when reasonably required.

101.4. There had been no discussion of disciplinary rules and grievance procedures.

101.5. The claimant's appointment was not expressly approved by the PCC and he had not been required to provide any references.

102. The express terms of the contract that were ultimately agreed by the parties obliged the claimant to take responsibility for the supervision of the care and maintenance of the church's organ. At the end of April 2018 Mr Fidler asked the claimant to put some concerns he had about the organ in an email and suggested the claimant meet with representatives of the company that had carried out a restoration a few years earlier. The claimant agreed to do so. I do not infer from those facts the existence of an obligation on the claimant to take responsibility for the organ, still less a contractual obligation to do so. There was simply a request for help by Mr Fidler which the claimant agreed to.

103. Stepping back and looking at the picture as a whole, I find that the relationship during the periods when work was being done was characterised by a significant degree of independence and lack of subordination on the part of the claimant. That is not to say the relationship was devoid of control on the part of the respondent: it was not and I have set out above that there was sufficient control for the contract to at least be capable of being one of service. However, the claimant was subject to few contractual obligations and the fact that he was able to pick and choose how frequently he played meant that he had autonomy in deciding whether to subject himself to that degree of control, how often and when. I conclude that the contracts that existed in the first year of the claimant's working relationship with the respondent were not contracts of service.

104. Over the following 12 months there were a number of relevant developments.

105. From mid-2018, the claimant took on responsibility for liaising with the company that had carried out the restoration of the organ about resolving the outstanding problems and also with regard to routine tuning. From the Autumn of 2018, the claimant also developed a choir to sing at church services and ran practice sessions at which he trained the choir. In addition, the respondent (via Mr Fidler, the church wardens and, after he took up his post, Reverend McGowan) frequently sought the claimant's advice and input on the music to be played. The claimant was not paid any additional sums for the considerable time and

effort he expended on these matters. It remained the case that the only payment the parties had agreed would be made was the fixed fee per service that the claimant played at. I have found that the respondent, Reverend McGowan (after he took up his post), Mr Fidler and the church wardens hoped that the claimant would continue to do these things. They also probably assumed he would do so given that the claimant had not said or done anything to suggest that he would not. The claimant was not, however under any obligation to do these additional things. He did so, I find, on an entirely voluntary basis. I find that there was no contractual obligation on the claimant to undertake these additional activities. There was no consideration moving from the respondent and the evidence does not support a finding that the parties intended the claimant to be contractually bound to do these things.

106. From mid-2108, the claimant played the organ for the respondent more frequently than he had done previously and by early 2019 he was the respondent's only remaining regular organist. By the second half of 2019 he was playing at virtually all Sunday services. Although the respondent was now more reliant on the claimant, in my judgement it remained the case that the claimant could choose not to play at a particular service or event if he did not wish to do so, for any reason; similarly, it would have been open to the respondent to appoint or find another organist to play at services.

107. Mr Wooler submitted that emails exchanged between the claimant and Reverend McGowan in the spring of 2019 were evidence that the claimant was obliged to use all reasonable efforts to make himself available to play at occasional services. I disagree. The communications between the claimant and Reverend McGowan indicate the opposite, in my view ie that the claimant was entirely free to decline requests or invitations to play at will and for any reason. became the vicar at the church.

108. I find that it remained the case throughout 2018 and 2019 (up until the point that the claimant started working under the terms of the contract that was sent to him at the end of October 2019, which I address below) that, on each occasion that the claimant and Mr Fidler or Reverend McGowan agreed that the claimant would play the organ on one or more specific dates, the parties entered into a discrete contract under which the claimant was obliged to play on those dates that had been agreed and the respondent was obliged to pay the claimant a fixed fee for each date he played. Those contracts contained an obligation on the part of the claimant to play the organ on the agreed dates and an obligation on the respondent to pay the claimant a fixed fee for doing so (and obligations on the respondent to allowing the claimant to play the organ on the agreed dates so that he could earn his fee). They did not contain any obligation on the claimant to take responsibility for the supervision of the care and maintenance of the church's organ; to provide, develop or train a choir; to attend meetings; or to provide advice and input on the music to be played.

109. Mr Wooler submitted that, as the relationship between the claimant and the respondent developed, the claimant assumed all of the duties described in the job description contained in the schedule to the agreement that was sent to the claimant in October 2019. However, there is an important difference between the arrangement that existed after those terms were expressly agreed and the arrangements that existed before then. That is that, until the claimant and the respondent agreed to be bound by those terms the claimant was not under any legally binding obligation to do any of the following things referred to in the job description:

109.1. Play the organ at all Sunday services and principal festivals and at any other public services when requested. The claimant could choose which Sunday services he wished to play at.

109.2. Train a choir and arrange and conduct suitable choir practices.

109.3. Attend meetings of the PCC and its sub-committees.

109.4. Be responsible for the supervision of the care and maintenance of the church's organ.

110. Notwithstanding the developments I have outlined above, I find that it remained the case that the relationship was characterised by a significant degree of independence and lack of subordination on the part of the claimant. I accept that the claimant had become more integrated in the church by virtue of the additional responsibilities he voluntarily assumed and the fact that he was, by 2019, the only regular organist, playing virtually every week. However, the claimant was still subject to few contractual obligations and was still able to pick and choose how frequently he played and still had autonomy in deciding whether to subject himself to the respondent's control, how often and when. The fact that the respondent had become more reliant on the claimant and the claimant had voluntarily assumed additional responsibilities does not change that fact.

111. Looking at the relationship between the claimant and the respondent in the round, I conclude that none of the contracts that existed after the first 12 months of the claimant's working relationship with the respondent were contracts of service, until the claimant and the respondent entered into a contract of employment on the terms that were set out in the contract document that was emailed to the claimant after his interview in October 2019.

When did the claimant start work under the contract of employment?

112. It is common ground that the claimant did enter into a contract of employment with the respondent, the terms of which were set out in the contract document that was emailed to the claimant after his interview in October 2019.

113. The respondent's offer to employ the claimant on those terms was communicated to the claimant by letter which was emailed to the claimant on 27 October 2019. The offer to employ the claimant was conditional on the respondent receiving references and a DBS check. I am satisfied that those conditions were genuine requirements given the terms in which they were explicitly set out in the offer letter; the fact that the need for a DBS check was repeated in the covering email; the fact that Reverend McGowan made enquiries as to what was required with regard to the DBS check; the fact that Reverend McGowan contacted the claimant's referees seeking references; and Reverend McGowan's email to the church wardens of 28 November 2019 in which he referred to waiting to see if the second reference 'arrives in time' for the claimant's appointment to start on 1 December.

114. I find that the claimant accepted the conditional offer by his email of 28 October 2019, notwithstanding that he was not entirely content with the job title of 'organist' and the start date in the contract document remained blank. The claimant and Reverend McGowan (on behalf of the respondent) subsequently agreed that the claimant's employment under the contract would begin on 1 December 2019, provided a DBS check and references were received by that date.

115. At that stage the claimant had entered into a contract with the respondent. The performance of contractual promises contained in that contract were, however, conditional. The liability of the respondent to employ the claimant and perform the promises contained in the contract depended upon it receiving a DBS check and

references from the claimant's nominated referees (arguably, the condition went further than that and depended (implicitly) on the respondent receiving a DBS check and references that were satisfactory to it, but nothing turns on that). Until those conditions were all satisfied on 30 November 2019, the respondent's obligations under the contract were suspended.

116. The respondent accepts that the contract the parties entered into was a contract of service (or was such a contract once the conditions precedent had been satisfied). Although the respondent's obligation to employ the claimant was suspended until the conditions precedent were satisfied, I find that the existence of those conditions did not prevent the contract being a contract of service from the time at which it was entered into by the parties. I do not find it only became a contract of employment on 30 November 2019, immediately after the conditions were satisfied.

117. The claimant was, therefore, an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996 prior to 1 December 2019: he became an employee of the respondent on or after 28 October 2019, when he and Reverend McGowan agreed that he would start work on 1 December 2019 under the agreed written terms, provided the respondent had received the DBS check and references by that date.

118. Mr Wooler submitted that the claimant's period of continuous employment under that contract began as soon as he entered into that contract. I reject that submission. Applying ERA section 211, the start of a period of continuous employment is not triggered by merely entering into a contract of employment: it begins when the employee starts work under that contract.

119. Mr Wooler submitted that, even if the claimant's period of continuous employment did not begin upon entering into the contract, it began much sooner than 1 December 2019 because the claimant worked on all Sundays in November 2019 and was doing so under the agreed contract. Mr Ratledge's submission was that the claimant's period of continuous employment did not begin until 1 December 2019.

120. I find that the respondent's position is the correct one. The claimant did indeed work for the respondent during every week in November 2019. However, I do not accept that, when he worked in November 2019, he was doing so under the contract of employment relied upon, notwithstanding that that contract had come into existence. I say that for two reasons.

120.1. Firstly, the offer of employment and the respondent's obligations under the contract were conditional upon the respondent receiving a DBS check and references. Those conditions were not waived by the respondent and were not satisfied in full until 30 November. Only then was the respondent bound by the obligations in the contract.

120.2. Secondly, and in any event, the claimant and Reverend McGowan had agreed that the claimant's employment under the contract would start on 1 December 2019 (provided the conditions were satisfied by that date).

121. I find that the work done by the claimant before 1 December 2019 was done under the pre-existing arrangements that existed between the parties (which, I have found, did not give rise to an employment relationship) and not under the contract of employment that came into existence on or after 28 October 2019. That work does not count towards the claimant's period of continuous employment.

122. I find that the claimant started work under the contract of employment on 1 December 2019. That was the date the parties had agreed the claimant's employment under the

contract would begin, provided the DBS check had been completed and references received by that date (conditions which were in fact satisfied in full on 30 November 2019).

Effective date of termination

123. The claimant's fall-back position is that his effective date of termination was 30 November 2021.

124. It is clear, however, that when the respondent gave the claimant written notice to terminate his employment, the notice was unambiguously due to expire on 28 November 2021. That is what the respondent said in its letter to the claimant dated 27 October 2021, which was received by the claimant on 28 October 2021.

125. That notice period was not extended by the letter Reverend McGowan subsequently sent to the claimant dated 9 November 2021 in which he said 'The PCC uphold their decision to terminate your contract effective from November 30th 2021.' I do not accept that the respondent wished to extend the termination date when Reverend McGowan sent that letter or that Reverend McGowan was offering, or purporting, to do so. I accept that the reference to 30th November was simply an error on Reverend McGowan's part.

126. In any event, it was not possible for the respondent to unilaterally extend the notice period without the claimant's agreement, even if it had wished to do so. I do not accept that the respondent, by sending that letter, was seeking the claimant's agreement to an extension of his employment or that the letter constituted an offer to the claimant to extend the date: the letter cannot reasonably have been interpreted in that way, especially as there is nothing in the letter indicating that Reverend McGowan was inviting or expecting a response from the claimant. In any event, the claimant's silence in response would not have been sufficient to constitute an acceptance of any such offer.

127. As the parties had not reached an agreement to extend the notice period, it remained the case that notice expired on 28 November 2021. That was the effective date of termination and the date on which the claimant's period of continuous employment ended for the purposes of ERA section 108.

Conclusion

128. It follows that the claimant was continuously employed by the respondent from 1 December 2019 to 28 November 2021. That is a period of less than two years.

129. Therefore, section 94 of the Employment Rights Act 1996 did not apply to the dismissal of the claimant and the claimant did not have the right not to be unfairly dismissed by the respondent.

Employment Judge Aspden

Date: 8 March 2023