EMPLOYMENT TRIBUNALS

Claimant: **Mr N M Fryers**

Respondent: **East Coast Creels Limited**

Heard at: **Nottingham** **On:** **Monday 21 December 2020**

Before: **Employment Judge Blackwell (sitting alone)**

Representatives

Claimant: **Did not attend**
Respondent: **Did not attend**

JUDGMENT

The Employment Tribunal Judge gave judgment as follows:-

1. The claim of unfair dismissal is dismissed because the Claimant does not have sufficient continuity of employment to bring such a claim.

2. The claim of wrongful dismissal succeeds and the Respondents are ordered to pay to the Claimant the sum of £336.61.

3. The claim for unlawful deduction from wages in respect of holiday pay succeeds and the Respondents are ordered to pay to the Claimant the sum of £855.19.

4. Therefore the Respondents are ordered to pay to the Claimant the sum of £1,191.80.

REASONS

Introduction

1. This is an unusual case which has been determined with the agreement of the parties entirely on the papers. I have taken into account both the claim form, the response to it and written submissions from both parties.

Issues

2. The first issue is whether or not there was a contract of employment between the Claimant and the Respondent.

It is well established law that there are 3 principle requirements:-

2.1 Did the worker agree to provide his or her own work and skill in return for remuneration?

2.2 Did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of master and servant?

2.3 Were the other provisions of the contract consistent with it being a contract of employment?

3. The statutory provision is section 230 of the Employment Rights Act 1996 but it is of little practical use in determining whether Mr Fryers was an employee of the Respondent's.

4. As to the first requirement the Respondents say there was no mutuality of obligation.

5. As to the second requirement set out above it is common ground that there was sufficient control.

6. As to the third requirement there was no written contract. The Respondents submit as follows:-

"The Respondent was not obligated to offer work and the Claimant was not obligated to accept work offered.

As such the Claimant worked a varied number of hours each week as offered and accepted from time to time.

The Claimant and the Respondent entered into a tripartite agreement verbally with HMP North Sea Camp.

Following a successful workshop inside the prison making lobster and crab pots the Claimant was granted temporary release licence to work outside the prison and contracted verbally with the Respondent to consider hours offered and performed work when the Claimant accepted work assignments carrying out the same work he had completed inside.

The Claimant was remunerated at the national minimum wage for all accepted and completed hours of work he carried out personally on the ROTL.

The Respondent submits that there was no mutuality of obligation in that the Claimant could choose when he wanted to work and was not obligated to accept hours offered.

It is submitted that mutuality of obligation is relevant in this case as put beyond doubt in ***Windle v Secretary of State for Justice*** *[2016] EWCA civ 459. The Respondent submits the Claimant was a worker and not employed by the Respondent."*

7. The Claimant submits that the Respondent's response accepts that he was an employee. He further submits that he paid tax and national insurance and was sent a P45. Further he was enrolled into a pension scheme by virtue of a letter from the Respondents of 18 April 2019.

8. It is clear from the P45 that during his period of employment he worked for approximately 862 hours at the national minimum wage of £8.21 which equates to around 29 hours per week in the period during which the Respondents say he worked.

9. Turning to the principle of mutuality of obligation I accept that this normally means that there must be an obligation on the employer to provide work and a corresponding obligation on the employee to accept and perform the work offered.

10. There is no real evidence before me on this point save for the fact that Mr Fryers for a period of some 6 months worked on average 29 hours per week and was remunerated accordingly.

11. In my view this is enough to establish mutuality of obligation. I conclude therefore that Mr Fryers was an employee for the purposes of the Employment Rights Act 1996.

12. The Respondents then submit that the contract was frustrated because Mr Fryers temporary licence was withdrawn by the prison authority and further some 6 weeks later he was transferred from HMP North Sea Camp to another prison some 150 miles away.

13. The Respondents submit as follows:

> *"A contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfil the contract."*

14. The Respondent submits that the revocation of the Claimant's release on temporary licence and his subsequent move to HMP Wynmott did exactly this.

15. The imprisonment of an employee has been held to be a frustrating event in a number of cases. However there are general principles in respect of the doctrine of discharge by frustration one of which is *"the essence of frustration is that it should not be due to the act or election of the party seeking to rely in it".*

16. In Mr Medley's witness statement which was submitted in conjunction with the Respondent's written submissions he says as follows:

> *"In August/September 2019 the Claimant was asking myself if his solicitor could visit the site for a meeting. At this point I was made aware by another member of staff on ROTL that this was strictly forbidden. I uncomfortable with what he had asked me and spoke to our main day to day contact at the prison, Dave Panton who confirmed what I had been asked was forbidden."*

17. Thus it is clear that it was the Respondents by contacting the prison service and making them aware that the Claimant had asked for a site meeting with his solicitor that led to the temporary licence being revoked. Thus there is a clear causal link between the Respondent's action and thus in my view the Respondents cannot rely on the doctrine of frustration because it was their act that led to the frustrating event.

18. Thus I conclude that there was a contract of employment that was ended by the withdrawal of the temporary licence but that the Respondents cannot rely on the doctrine of frustration.

19. Turning then to the Claimant's claims I can see that in relation to unfair dismissal Mr Fryers was sent a strike out warning on 10 February 2020. There does not appear to be any reply to it nor was any action taken because Mr Fryer did not respond. Nonetheless it is plain that Mr Fryer does not have the requisite service pursuant to section 108 of the Employment Rights Act to bring a claim of unfair dismissal and it is therefore dismissed for want of jurisdiction.

20. Turning now to the claim of wrongful dismissal ie a failure to pay a week's notice. The Respondent's only submissions in that regard namely that Mr Fryer was not an employee and/or in the alternative the contract was frustrated have failed. Therefore it follows that Mr Fryers is entitled to his notice pay of £336.61.

21. Turning finally to the question of holiday pay it is common ground that Mr Fryer pursuant to Regulation 14 of the Working Time Regulations 1998 Mr Fryers is entitled to compensation for the proportion of leave he is entitled to when his employment is terminated. Again the Respondent's only defence is the doctrine of frustration and I have found that that fails.

22. It therefore follows that as the Respondents concede Mr Fryers is entitled to the sum of £855.19 in respect of holiday which was not taken during his period of employment.

23. In total therefore the Respondent is ordered to pay to the Claimant the sum of £1,191.80.

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Employment Judge Blackwell

Date: 08 January 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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