



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr M Camilleri

v

Eastern Marine Limited

Heard at: Norwich

On: 28 March 2019

Before: Employment Judge Postle

Appearances

For the Claimant: In person

For the Respondent: Mr Varnam, Counsel

PRELIMINARY HEARING JUDGMENT

1. The claimant was not an employee of the respondent but a self-employed contractor.

REASONS

1. This is a preliminary hearing to determine whether the claimant is an employee of the respondents or a self-employed contractor. Over the years there has been an extensive list of authorities setting down the principles as to how to determine whether a person is an employee or a self-employed contractor.
2. The legal framework is set out in Section 230 of the Employment Rights Act 1996, that provides the following definition of an employee and an employer for the purposes of the Employment Rights Act 1996 and basically says,

‘an employee means an individual who has entered into or works under, (or, where the employment has ceased, worked under) a contract of employment.’

3. That does not really help Tribunals determine the exact nature of the definition of employee. We have to look at the totality of the evidence before us and what the reality of the situation is and not what the label the parties put on their relationship, or indeed anybody else.
4. In this case the claimant was engaged by the respondents as a Marine Engineer originally through an agency. The claimant was then engaged on a daily basis in July 2016 at a rate that was agreed of £150 per day. It does not appear that, that sum was subject to any deductions for tax and national insurance and that rate was based on the days the claimant actually worked. Sometime during the course of the engagement that increased to a rate of £220 per day regardless, it appears, of the number of hours worked during the course of the day.
5. The purpose of the claimant's engagement was to repair the engines, to a full repair, on a vessel that the respondents had purchased known as EMS Boxer.
6. To put the whole thing in context, the respondent is in a business providing charter vessels to the Marine Industry from its base in Lowestoft. It is clearly a volatile industry and the demands for the respondent's services clearly vary throughout the year. The services they are providing are towage, cargo, personal transfers, transfers to wind farms and survey vessels. It is clear that the respondents only employ two staff, one being the sole Director of the respondents and the other a welder. They are directly employed by the respondents.
7. It is clear on the facts the claimant had no set hours, he had little control or supervision over the work he did on a daily basis and he decided, largely, what needed to be done each day to the vessels' engine. It is important to note he is a resident of Malta and he chose, clearly, when he wished to work and that is borne out by the periods of employment the claimant worked. Particularly, he worked from 1 December 2016 to 29 December 2016 – a period of 29 days, he then returned to Malta and came back to work from 16 January 2017 to 29 January 2017 – a period of 14 days. He then went back to Malta and returned on 10 February 2017, working until 14 March 2017 – a period of 33 days. He then returned to Malta and came back to work on 24 April 2017 and worked until 26 May 2017 – a period of 33 days. He then returned to Malta and did not return to work until 3 July 2017 and continued to work until 3 September 2017 – a period of 62 days. On 5 October 2017, he returned from Malta and continued to work until 23 October – a period of 18 days. He then worked from 24 November 2017 to 2 December 2017 – a period of 9 days and then returned to Malta.
8. It is to be noted that the amount of time the claimant spends in Malta is not consistent, in my view, with an employment relationship equivalent to an employee. Particularly one notes, from 3 September 2017 to 12 February 2018, a period of five and a half months, the claimant only worked for the

respondents for 27 days. That is clearly not consistent with an employee employer relationship. He was clearly not paid for the days he did not work. There were no complaints by the claimant about the lack of work. He did not receive holiday pay. It is clear, from the table of when he worked and when he returned to Malta, that he could choose when he worked. There was no contract of employment and at the end of each working period, the claimant was paid in a lump sum for the full period without deduction of tax or national insurance. All of which appeared to suit the claimant. Again, he was not paid on a weekly or monthly basis, he was paid in lump sums at the end of each period of work. This is not consistent with being an employee. He was, clearly, in the periods away from the respondents, free if he chose to do so, to work for other organisations and indeed he could choose not to return to the respondents after periods in Malta. There was quite simply, no mutuality of obligations and clearly there was no obligation on the respondents to offer work to the claimant and no obligation on the claimant to accept it. He was free to offer his services where and when he wished to do so. He was also free, when working on the vessel, to choose the days and hours he worked and I repeat he was paid on a daily rate, not an hourly rate and paid, as I previously said, lump sums at the end of each engagement.

9. There appears to have been little supervision of how the claimant performed his role. He was, to a large extent, free to choose what task to perform each day and the next set of repairs. I of course accept there would have been times when certain priorities were given to the claimant regarding the work to be carried out, but that in itself does not point to an employee employer relationship.
10. The claimant, to sum up, had no salary. He received lump sums, a daily rate for a daily charge, he was free to undertake work with other companies, he was responsible for arranging his own tax and he could come and go as he pleased, which is clearly borne out by the amount of times he returns to Malta.
11. I would also add, the Tribunal decides the issues, repeating where I started, on the totality of the evidence and all the facts. The label the parties put on the contractual relationship is not determinative or evidence confirming the position. Furthermore, what is said in the Crown Court by a Judge dealing with a criminal trial, particularly in this case when the claimant was found not guilty of theft from the respondents, where it was suggested by the Crown Court Judge that the parties' employment relationship what was that of the employee. Clearly, the Crown Court was not there to determine the issue of the employment status and would not have been in possession of the full facts. The fact that a letter was sent to a bank by the respondents regarding the payment of monies due to the claimant refers to him as the employee, again, is not determinative of the fact, it is the reality of the situation.

12. It is the totality of all the evidence and the surrounding facts and for those reasons I find that the claimant was a self-employed contractor and not an employee of the respondents.

Employment Judge Postle

Date: 18 / 4 / 2019

Sent to the parties on: 18 / 4 / 2019

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For the Tribunal Office