EMPLOYMENT TRIBUNALS

Claimant **Respondents**

Mr M Pimm **v** **1. Sodexo Justice Services Limited**
2. Secretary of State for Justice (Intervener)

Heard at: Watford by CVP **On**: 5 February 2021

Before: Employment Judge R Lewis

Appearances

For the Claimant: **In person**
For the First Respondent: **Mr D Northall, Counsel**
For the Second Respondent: **Mr T Kirk, Counsel**

RESERVED JUDGMENT

1. The claimant's claims have no reasonable prospect of success, and are struck out.

REASONS

Procedural history

1. This was a preliminary hearing in public. The claim has a slightly complex procedural history, which I summarise so far as material.

2. The claimant has at all time acted in person. He has also at all times been a convicted serving prisoner, such that he does not have access to the correspondence facilities, email, internet or photocopying of a claimant in person who is at liberty.

3. This claim was presented in about March 2019. It was initially not accepted because there appeared to be uncertainty as to whether the claimant had completed early conciliation. It was originally brought against Sodexo only.

4. The claim was served, and in accordance with usual practice at the time, listed for a preliminary hearing for case management. That was to be on 17 January 2020.

5. In the course of 2019 correspondence from the claimant led the then Regional Employment Judge to make arrangements for the January 2020 hearing to be conducted by video, and for the Governor of the prison to which the claimant had then transferred to make arrangements for the claimant to have video access.

6. On 8 January 2020 the first respondent's solicitors made an application for strike out, which was the precursor of the application which I have heard and determined.

7. A first preliminary hearing took place before Employment Judge Smail on 17 January 2020. The claimant took part by telephone and Mr Northall by video. Judge Smail's order was sent on 31 January. Judge Smail listed the strike out application to take place by video on 3 August 2020.

8. Judge Smail made a number of practical directions, which, shortly after the hearing, it was realised could not be carried out by the First Respondent, because the claimant had transferred to a non-Sodexo privately-managed prison.

9. On 2nd March 2020 the Secretary of State applied under Rule 35 for permission to intervene, setting out the interest of the Secretary of State in any issue relating to the apparent employment law rights (including rights to payments) of a prisoner. The Secretary of State was joined and served as a Second Respondent (in my respectful view not necessarily correctly, as the application was to participate under Rule 35, not to be joined under Rule 34, although nothing in practice turns on the point).

10. The hearing listed for August 2020 was vacated and postponed to what became the present hearing. By letter of 21 July Judge Smail set out a case management timetable.

11. Judge Smail also sought to address the practical issue which the claimant and First Respondent had raised in correspondence. In the absence of access to email or print facilities, the claimant cannot and could not comply with Rules 30 or 92. He had been in sometimes lengthy correspondence with the tribunal, exclusively by handwriting, attaching documents, on the understanding that the tribunal staff would be responsible for copying them to the other parties. Unfortunately, it appears that tribunal staff were not made aware that this was expected of them. Accordingly, Judge Smail's letter of 21 July provided that the respondents "are to ensure that the claimant has access to photocopying facilities" to provide documents. No doubt the burdens of lockdown and then pandemic did not assist matters, but it appeared that this may not have happened.

Procedure at this hearing

12. In the event, the claimant participated in this hearing from HMP Erlestoke and explained that staff there had made special arrangements for him to have use of a room with CVP. I record the gratitude of the tribunal to those who assisted the claimant in this respect.

13. The tribunal had a bundle of documents (208 pages), notably skeleton arguments/submissions from each respondent, and a witness statement from Mr Wayne Peters. The respondents had also provided an extensive bundle of authorities.

14. The claimant agreed that he had the material which the respondents had submitted. In the course of preliminaries, he asserted that he had sent a witness statement and documents to the tribunal, submitting his only hard copies, but it appeared that they had not been copied to the respondents as the claimant had requested, and were not in the bundle.

15. I was concerned not to lose the listed day, which had taken a great deal of delay and work to arrange. Equally I was concerned that the parties should have the material submitted by the claimant. I adjourned, and staff at the Watford Tribunal office located the claimant's letter of 23 January 2021, which was a witness statement, to which were attached about 20 pages of documents. Staff at Watford scanned these items and emailed them to the respondents (and to me, working remotely). They were the material that the claimant wanted the tribunal to have today, although as they appeared to focus on the offender management aspects of the claimant's relationship with Sodexo, it was not clear how far they took matters forward.

16. The other point to clarify at the start of the day was the precise formulation of the issue to be decided. Judge Smail had formulated the issue as broadly one of whether the claimant was, in respect of any of his claims, a "worker" within the material definition. Disputes about employment status are not unusual in the tribunal, and are usually regarded as requiring a factual enquiry. I was inclined, after a first reading of the papers, to approach this hearing as an application under rule 37, namely that the claim had no reasonable prospect of success. I was however concerned that while all parties well understood the ambit of the day's work, precise notice of that issue may not have been given in accordance with rules 54 and 56.

17. During the morning adjournment, counsel agreed, and Mr Kirk submitted, that the appropriate question for this tribunal, which would not require evidence, was an application under rule 37 that the claim be struck out on the grounds that the claim has no reasonable prospect of success because the claimant at all material times was, as agreed, a prisoner; the respondents therefore submitted that he was not a worker. Mr Kirk submitted that that was a matter of pure law. The claimant agreed to proceed on that formulation, with the consequence that there was by consent no need to call evidence. The claimant's witness statement was not relied on, and Mr Peters was not called.

18. I heard submissions of about 35 minutes each from Mr Northall and then Mr Kirk. Mr Kirk's submission finished at around 12:40, and I adjourned until 2pm, enabling the claimant to have time to finalise his reply. The claimant replied for about 40 to 45 minutes. Counsel answered briefly on points of detail. I hoped to adjourn shortly before 3pm and give judgment, or an indication of how matters would go forward, to the parties at about 3:45 pm. The claimant explained that the room where he was working would no longer be available, and I therefore reserved judgment.

Second claim

19. For completeness I add that on about 11 August 2020 the claimant presented a second separate claim (3312438/2020). The named respondent was HMP Highpoint. The claim was initially rejected. On 12 January 2021 I directed that it should be accepted, but not served, and stayed pending determination of the present preliminary hearing. At the end of this hearing, I told the parties that if this claim were not struck out, the second claim would be served; but that if the present claim were struck out, the claimant might be required in writing to show cause why the second claim should not also be struck out. In the circumstances, that will be done by separate letter or Order.

Factual background

20. The agreed factual basis of this claim can be shortly stated. In 2017 the claimant was sentenced to a term of imprisonment, from which he has an expected release date in 2025. For a period in 2017 and 2018 he was a prisoner at HMP Peterborough. The first respondent operates HMP Peterborough on behalf of the second respondent. Between 1 September 2017 and 28 November 2018, the claimant had a role as a Learning and Skills Coach (LSC). In accordance with the regulatory framework to which I refer below, the claimant was paid a modest sum per shift for performing this role.

21. The bundle contained at pages 62 to 65 two documents issued by the first respondent, a one-page Peer Support Worker General Compact and a three page "Job Description – Learning and Skills Champion". The claimant asserted that these were not the "true" copies. He explained that he had signed at the foot of the originals and the bundle contained the text which he agreed was identical to what he had signed, but was not a copy of the very page which he had signed. I did not think that that point invalidated the documents in the bundle.

22. The Compact set out the structure for the claimant's membership of the Peer Team. The job description set out the LSC role, essentially that of providing support to less well-educated prisoners, to assist them in obtaining/ improving educational skills. The job description provided for the claimant to undertake three sessions per day Monday to Friday and two per day Saturday and Sunday, a maximum of 19 sessions per week, at pay of £1.70 per session.

23. The two documents should be read together, in full. The Compact states, in its entirety:

> "As a member of the Peer Support team we will be placing you in a position of trust and responsibility and it is important that your behaviour reflects this at all times. Your role will cover giving information and advice, collecting information and being part of Peterborough's support network.
>
> You will be provided with a Peer Workers uniform which you should wear at all times whilst on duty. It is your responsibility to maintain the uniform and upon release you are expected to return the uniform in a good and clean condition.
>
> **RESPECT**
> You are expected to treat people with respect, dignity and decency at all times, and in particular remember the prison's policies on Diversity and Equal Opportunities.
>
> **CONFIDENTIALITY**

Gathering of confidential information will play a large part of your role. You will be expected to discuss this only with other Peer Workers and staff within the Peer Support Network Team.

DISCIPLINE
Certain types of misconduct will result in immediate removal from the Peer Support position:
- Proven adjudications
- Any findings of guilt for offences involving violence, drugs or racially aggravated issues
- Being placed on any stage of our antisocial behaviour policy
- A downgrade of IEP status
- Any breach of trust
- Non-compliance with the Peer Workers job description
- Articles taken without consent
- Abuse of Peer Workers position for personal gain

Remember you are representing yourself, the Peer Support Network and HMP & YOI Peterborough."

24. While the documents can be read as having some analogies with workplace documents, and make use of the language of the conventional workplace, the differences from workplace norms are more striking than any similarities. The 'Discipline' section above in particular makes no reference to the conventional workplace stages of warning or dismissal, and is structured entirely around the disciplinary framework applied by the prison authorities to prisoners.

25. I accept that the claimant's work activity did not directly generate commercial profit for either respondent. I accept that it was work that was provided to the claimant, and by the claimant to other prisoners, for purposes which the respondents regard as largely rehabilitative.

26. It was not in dispute that in respect of the above activity neither respondent has enrolled the claimant in a pension scheme, issued a pay slip, or allowed annual leave, or made payment in lieu of annual leave. It was also agreed that there was no prisoner who worked full time for the first respondent; and that the first respondent's full time employees at liberty enjoy more favourable terms of employment than did the claimant, or any other prisoner.

The claims

27. In this claim the claimant ticked boxes on the ET1 for notice pay, holiday pay and arrears of pay and wrote the following narrative:

"1. At no time was any kind of works pension available to me; and

2. At no time was I given an itemised payslip; and

3. I am claiming a pay adjustment under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, and

4. I was never given any annual leave…

I do not know how much exactly full-time administrative employees are paid. However, it must be at least the current legal minimum level".

28. I asked the claimant to clarify his claims at the start of the hearing. He confirmed that he brings no claim under the Pensions Act 2008. He explained, and repeated the point, that in fact the claim is brought entirely under the Part Time Worker Regulations 2000 ('PTWR'), and that all other claims which he referenced on the ET1 are dependent on that claim. He made a straightforward point: if for example he had been treated equally with a full-time comparator, he would have been issued with payslips, just as that person was. His complaint about payslips was not brought under s.11 Employment Rights Act 1996, but only under PTWR.

29. The first respondent's response set out at length its denial that the claimant was a worker, or an employee, or a part-time worker. It submitted (paragraph 21) that there was no full-time comparator. These points were echoed in the second respondent's initial submissions.

30. In the course of this hearing I raised the absence of a full-time comparator in slightly different format from that used by Mr Northall in the first respondent's grounds of resistance (see below). The claimant in closing repeated on a number of occasions that the denial of a comparator had not been pleaded. I was in error in agreeing with him at the time. It was pleaded, albeit briefly, and not specifically on the points of detail under regulations 2 and 5, to which I refer below. The absence of detailed pleading does not, and did not, in my view preclude either respondent from taking the point or the tribunal from doing so of its own initiative, as the existence of a true comparator is an essential element of a claim.

Legal framework

31. I was referred to three areas of framework: the prison setting; statutory employment rights; and the tribunal rules. I was also referred to authorities.

The prison setting

32. Section 47 of the Prison Act 1952 is a broad enabling provision which provides that the Secretary of State may,

> "make rules for the regulation and management of prisons… and for the … employment … of persons required to be detained."

33. The applicable rules are set out at 1999 SI 728, the Prison Rules 1999, of which Rule 31 is headed Work. Rule 31(1) provides:

> "A convicted prisoner shall be required to do useful work for not more than 10 hours a day…"

34. Rule 31(6) provides that:

> "Prisoners may be paid for their work at rates approved by the Secretary of State."

35. HM Prison Service, which I understand to be an Executive Agency of the Ministry of Justice, has issued Prison Service Order 4460 which sets out in detail prison service policy on prisoners' pay and applies to both public and private sector managed prisons.

36. A prisoner is subject to the structure and discipline of the 1952 Act and the delegated rules and orders made under it. Free employees of either respondent are not. Rule 31(1) provides that convicted prisoners are required to work. Rule 31(6) creates a discretionary structure for their payment, but the discretion is not arbitrary, and detailed guidance is given as to its exercise.

Employment rights

37. I turn to the relevant statutory employment rights. The claims brought by the claimant, whether dependent on the PTWR, or otherwise, may be brought by a person who is a worker. At paragraphs 9 to 13 of his submissions Mr Kirk set out the relevant provisions with commentary, which are respectfully adopted as follows:

> **"Relevant Law**
>
> **Worker status generally**
>
> 9. The obligations in relation to providing itemised pay statements under section 8 of the ERA 1998 only apply to *"workers"*. Section 230(3 provides the following definition of *"worker":*
>
> *(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)*
>
> *(a) a contract of employment, or*
>
> *(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*
>
> *and any reference to a worker's contract shall be construed accordingly.*
>
> 10. The right to paid annual leave under regulations 13 and 13A of the WTR 1998 is similarly only afforded to *"workers"*. Regulation 2(1) of the WTR 1998 provides an almost identical definition of the concept of *"worker"* to that applied under the ERA 1996 (see above):
>
> *"worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
> *(a) a contract of employment; or*

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly;

11. The right not to be treated less favourably than a comparable full-time worker only applies to *"part-time workers"*. Again, the relevant definition of *"worker"* under regulation 1(2) is almost identical to that applied in the two jurisdictions above:

"worker" means an individual who has entered into or works under or (except where a provision of these Regulations otherwise requires) where the employment has ceased, worked under—

(a) a contract of employment; or
(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

12. The provisions in the PA 2008 on automatic enrolment only apply to *"jobholders"* (see section 3). Section 1(1) of the PA 2008 provides the following (emphasis added):

(1) For the purposes of this Part a jobholder is a worker-

a. who is working or ordinarily works in Great Britain under the worker's contract,

b. who is aged at least 16 and under 75, and

c. to whom qualifying earnings are payable by the employer in the relevant pay reference period (see sections 13 and 15).

13. Section 88 of the PA 2008 provides the following very similar definition of the term *"worker":*

(3) "Worker" means an individual who has entered into or works under—

a. a contract of employment, or

> *b. any other contract by which the individual undertakes to do work or perform services personally for another party to the contract.*
>
> *(4) But a contract is not within subsection (3)(b) if the status of the other party is by virtue of the contract that of a client or customer of a profession or business undertaking carried on by the individual concerned.*
>
> *(5) For the purposes of subsection (3)(b), it does not matter whether the contract is express or implied or (if it is express) whether it is oral or in writing.*

14. The common feature of all of these provisions is that they require the Claimant to prove (and the burden is firmly on him to do so) that he was either an "employee" of the Respondent because he worked under a contract of employment with them or, alternatively, that he was a "limb b worker" in the sense that he nonetheless worked under a contract by which he undertook to do work personally for the Respondent and the Respondent was not a client or customer of his."

38. I noted other provisions of PTWR which are relevant to the claimant's need (for the purposes of this claim) to compare himself with full time staff employed by the first respondent. PTWR 5 (1) provides:

> "A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker".

PTWR 5(2) provides that that right applies,

> 'only if -- (a) the treatment is on the ground that the worker is a part-time worker ..'

39. PTWR 2(4) provides:

> "A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place –
>
> (a) both workers are –
>
> (1) employed by the same employer under the same type of contract and
>
> (2) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience…."

40. PTWR 2(3) states:

> "For the purposes of paragraphs 2 .. (4), the following hall be regarded as being employed under different types of contract .. © workers who are not employees;"

Rule 37

41. In circumstances referred to at #16-17 above, I heard this application under Rule 37, which provides:

> "At any stage of the proceedings, either on its own initiative or on the application of a party, a tribunal may strike out all or part of the claim or response on any of the following grounds –
>
> (a) That it… has no reasonable prospect of success"

42. I repeat, so that the claimant is in no doubt about it, confirmation that the claimant could only bring the claims or any of them if he were a worker. If he were not a worker, he could not bring the claims and they therefore have no reasonable prospect of success.

Authorities

43. Counsel referred me to a number of authorities. The claimant's submission that the authorities largely pre-dated the PTWR and therefore should be disregarded seemed to me wrong. I accepted that none was directly in point on the PTWR, but I agree with counsel that I may draw principles from those which were relevant. Although Mr Kirk referred to two old authorities, Pullin v The Prison Commissioners [1957] 1 WLR 1186 and Keatings v Secretary of State for Scotland [1961] SLT 63, I was wary of authority which pre-dates the modern statutory framework of employment rights. The brief discussion in Green v HM Prison Service EAT/1095/95 included the blunt comment that any man in the street would regard the assertion that a prisoner works under a contract of employment with the prison service as nonsense. I could not, with respect, find that formulation helpful.

44. The authorities to which I was referred which seemed to me of the greatest assistance were R v Secretary of State for the Home Department ex parte Davis [25 April 1994 unreported] and Cox v Ministry of Justice [2016] AC 660 (emphases added throughout). In Davis the claimant sought through judicial review proceedings to recover sums which had been deducted from prison pay and paid into a general welfare fund. Neill LJ said:

> "It seems to me that the crucial point in this case – and one upon which I am afraid Mr Davis has not been able to satisfy me – is his entitlement to this money.
>
> It was conceded below by counsel on his behalf – though we must look at the matter ourselves again – that Mr Davis had no statutory right to this money, nor any rights in contract. It seems to me quite clear that there is no right under any statute to any sum. The question in: is Mr Davis correct in saying that he was contractually entitled to receive the monies set out from time to time in the pay rate scale, which is put up on the notice board for all the inmates of the prison?
>
> It seems to me that, as a matter of law, is wrong, there is no contractual right of payment. There is a requirement in the Prison Rules (to which I have already referred) for prisoners to work. If they do carry out the work, then they are paid

> in accordance with the rates set out in the documents, but that does not, in my judgment, mean that they have a contractual right to the sums specified. The right which they have is a proprietary right to the money, whether it is credited to their account – that is the net sum paid in – or handed to them in cash. Once the money is received, either into the account or in cash, and someone then tried to interfere with that money, then it seems to me that the prisoner would be entitled to claim. But until the net sum reaches his hands, it does not seem to me that he has any right in contract. The proprietary right arises only when the money actually reaches his hands, either in his account or as cash.
>
> Accordingly, it seems to me that the insuperable difficulty that Mr Davis faces is that there is no contractual right to the three pence (or whatever from time to time was in fact deducted from his earnings) or any other right which would entitle him to make a claim against the Secretary of State. Accordingly, for the reason that he had no contractual or other right to the sum claimed, I would dismiss this appeal."

45. In Cox v Ministry of Justice the Supreme Court found the defendant vicariously liable for a personal injury suffered by a prison officer as a result of the negligence of a prisoner. I was referred to and I respectfully adopt, the litigation history set out by Lord Reed, at paragraphs 13 and 14, which I accept was not departed from or disputed before the Supreme Court,

> '13. The claim was heard by His Honour Judge Keyser QC in the Swansea County Court. In a judgment given on 3 May 2013, he found that the accident occurred because Mr Inder had failed to take reasonable care for Mrs Cox's safety, but dismissed the claim on the basis that the prison service was not vicariously liable for Mr Inder's negligence. On the basis of a careful review of the law on vicarious liability, as stated in particular at paras 35 and 47 of Lord Phillips's judgment in the Christian Brothers case, he focused on the question whether the relationship between the prison service and Mr Inder was akin to that between an employer and an employee. He concluded that it was not. Although he accepted that there were some respects in which the prison service's relationship with Mr Inder resembled employment, he considered that there was a crucial difference. Employment was a voluntary relationship, in which each party acted for its own advantage. The employer employed the employee as the means by which the employer's undertaking or enterprise was carried on and furthered. The position regarding prisoners at work was quite different. The prison authorities were legally required to offer work to prisoners. They were required, by the policy set out in the Prison Service Order, to make payment for that work. Those requirements were not a matter of voluntary enterprise but of penal policy. The provision of work was a matter of prison discipline, of prisoners' rehabilitation, and possibly of discharging the prisoners' obligations to the community. Although the work done by prisoners might contribute to the efficient and economical operation of the prison, the situation was not one in which prisoners were furthering the business undertaking of the prison service.
>
> 14. An appeal against that decision was allowed by the Court of Appeal: [2014] EWCA Civ 132; [2015] QB 107. McCombe LJ, giving a judgment with which Beatson and Sharp LJJ agreed, focused like the judge on paras 35 and 47 of the Christian Brothers case, and in particular on the five features listed by Lord Phillips in para 35. He observed that the work performed by prisoners in the kitchen was essential to the functioning of the prison, and if not done by prisoners would have to be done by someone else. It was therefore done on behalf of the prison service and for its benefit. It was part of the enterprise or business of the prison service in running the prison. In short, the prison service took the benefit of this work, and there was no reason why it should not take its burdens. Although the relationship differed from a normal employment relationship in that the prisoners were bound to the prison service not by contract but by their sentences, and also in that the

> prisoners' wages were nominal, those differences rendered the relationship if anything closer than one of employment: it was founded not on mutuality but on compulsion'.

46. Those two paragraphs are part of the foundation on which the Supreme Court went on to find that even though the circumstances in that case were not vicarious liability for the actions of an employee, there was nevertheless liability to the injured claimant. I accept the submission that the above passages formed an essential part of the reasoning of the Court and were authority binding on this tribunal.

Counsels' submissions

47. I summarise the submissions advanced on behalf of the respondents. In doing so, I apologise for the simplification which I have found useful in writing this judgment.

48. I agree with counsel that there is no contract between the parties. The claimant was required to work for the first respondent as a matter of statutory compulsion. There was no agreement between them. I reject the claimant's submission that an agreement was created by the General Compact document. It was a document which set out the framework within which the relationship founded on compulsion would operate in practice.

49. I agree that there was no contractual mutuality of obligation. The first respondent was under an obligation to the second to provide work to be done by prisoners. The claimant could not be physically coerced to work, but he was subject to prison discipline if he refused. I agree that there was no mutuality in the conventional employment sense of a contractual bargain with a duty on one side to provide work, and a duty on the other to undertake the work.

50. I agree that there was not a free wage for work bargain. That point seems to stand to reason, given the overall circumstances of prison labour, and the rate of pay offered for it. The absence of a free wage for work bargain does of course follow from the absence of bargaining power on the part of a prisoner.

51. The purpose of the work was rehabilitative, not commercial. I accept that that is written in the policies of the respondents. I accept also that in Cox (para 13 above) that was a material factor in the Supreme Court, and therefore binding on this tribunal. I am cautious about this element, as intent and motivation may be difficult factors in many employment relationships.

52. If it were necessary or helpful for me to add my own gloss to the claimant's activity in prison, I would endorse the wording of the National Minimum Wage Act 1998 set out below: the claimant's work as LSC was activity undertaken in pursuance of the prison rules, within a wider structure of offender management.

53. Counsel submitted that it would be contrary to public policy to grant prisoners employment law rights. I can see the force of those arguments. I am not confident that it is for an Employment Judge to attach weight to the possible public policy issues in offender management, and I am reluctant to do so in terms. I do however accept that the policy objectives set out in the Working Time Directive, which underpin the Working Time Regulations, refer at length to protection of the workforce, and sections of the workforce, without any reference to the rights of lawfully detained prisoners. I

accept furthermore that it would appear at least counter-intuitive that a claimant who has been lawfully deprived of his liberty through the criminal justice system should, while serving his sentence, accrue rights in respect of untaken holiday.

54. In my judgment, the claimant cannot demonstrate the existence of any contractual relationship with the first respondent. He undertook work as a matter of compulsion in accordance with the statutory framework for the management of prisons and offenders. The underlined portions of Davis and Cox, quoted above, are binding authority to the same effect. That being so, he cannot bring himself within any of the relevant definitions of 'worker'.

55. Strictly it is not necessary for me to express a further view on the claim under PTWR. That question was not specifically identified as an issue in the notice of hearing for today. I have however had the benefit of the submissions and it is right that I record that if the matter were before me, I would strike out the claim under PTWR under the powers in rule 37. The claimant has in my judgment no prospect whatsoever of showing that for the purposes of PTWR he is entitled to compare himself with a full-time employee of the first respondent who is at liberty and carrying out an administrative role. It seems to me unarguable that a prisoner is not 'employed under the same type of contract' as a member of prison staff, or 'engaged in the same or broadly similar work.' I note that PTWR expressly provides that 'workers who are not employees' .. shall for the purposes of the comparison be regarded as being employed under different types of contract.' I add that my comment at #53 above notwithstanding, I can see a strong policy argument in favour of maintaining clear distinctions in status between a convicted prisoner and a free employee of the prison service, and no policy argument to the contarry.

The claimant's approach

56. I do not underestimate the difficulties which the claimant has encountered in pursuing this claim. I recognise that the difficulties of any litigant in person are compounded for a claimant who is in prison. That said, the claimant brought to this case an understanding of the law which fell far short of what was necessary to do justice to himself. I do not say that to criticise or embarrass him, but to assist him in an understanding of why he has lost this case.

57. The tribunal file contains references to other legal disputes between the claimant and either respondent. None of these assisted me. Issues of offender management are not a matter for the Employment Tribunal. I noted the following points, which are neither exhaustive nor in list of priority.

58. The absence of express discussion or pleading of PTWR 2 and 5 does not prevent the tribunal from addressing the issue, or counsel from doing so. The reason is that the points which arise are matters of law, which cannot be overlooked.

59. The presence in the bundle of a document which the claimant agreed was the correct item, but was not a copy bearing signatures, was not invalidated by the absence of the signatures, the parties having agreed that both claimant and Sodexo signed the document.

60. The claimant's attempts in argument to equate his status as a convicted prisoner with protected characteristics under the Equality Act was wholly misplaced. One reason was that the claimant failed to see or analyse the concept of like with like comparison which is at the heart both of the Equality Act (see s.23) and the PTWR. The fundamental reason however is that there is nothing in law or policy which extends the protections of discrimination law to the status which follows from a criminal conviction and custodial sentence.

61. The claimant appeared to believe that the PTWR supersede and displace any chronologically earlier legislation. I do not agree that that is a correct statement of principle, or necessarily of relevance. In discussion of PTWR 2(4) the claimant focussed purely on the phrase "same or broadly similar work." His point was that if say he and a member of Sodexo staff were working together on the same clerical task, PTWR then applied to them. The quoted words cannot be taken out of context as the claimant took them, and must be read with the preceding phrase, which speaks of both the part timer and full timer having been 'employed under the same type of contract'. The claimant did not accept that there are inescapable fundamental differences between the contractual position of an employee and a prisoner.

62. A further essential element in a PTWR claim is causation: it must be shown that part time status is the ground for the disparity in treatment. I heard no evidence, but it stands to reason that the reason for any distinction in treatment of the claimant when compared with the full-time employees of the first respondent was one which I put to the claimant, namely that he was a serving convicted prisoner and they were not; while the claimant accepted that that was factually accurate, he did not agree that it was valid or relevant for the purpose of this claim.

63. I was referred to s45 of the National Minimum Wage Act 1998, which provides:

> "A prisoner does not qualify for the National Minimum Wage in respect of any work which he does in pursuance of prison rules… [which] means… rules made under section 47 or 47A of the Prison Act 1952"

64. I understood the claimant to make the point that as Parliament had in the context of NMW created an express exemption for prisoners, it cannot have been Parliament's intention to exempt prisoners from any other protective legislation, because if it had been, Parliament would have said so.

65. That was the closest which the claimant came to an ingenious argument, but while ingenious, it seems to me wrong. Sections 43-47 of the NMW Act set out a number of statutory exclusions from the application of the statute. There is no reason to apply or disapply the exclusion any further than the specific context of NMW. However, I gratefully adopt the phraseology of the Act. Parliament has described what the claimant did at HMP Peterborough as 'work which he does in pursuance of prison rules.' That seems to me a subtle and entirely accurate formulation.

Afternote

66. I add that while drafting this judgment I read the judgment of the Supreme Court in Uber BV v Aslan 2021 UKSC 5 (given 19 February). Having heard the claimant's submissions, I can well imagine that he might think that it has a bearing on his case,

especially if he has access only to press reports, and not to the full judgment. I have asked tribunal staff to send him a copy of the full Uber judgment with this one. My initial views are that it does not assist him, or make a difference to this case, at least (1) because the Uber judgment concerned interpretations of contracts, and I have found that no contract exists in the present case; and (2) because I do not accept that the protective employment legislative framework applies to a claimant working in pursuance of prison rules.

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Employment Judge R Lewis

Date: ……03/03/2021……..

Sent to the parties on: .05/03/2021.....

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For the Tribunal Office