# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J. Pusey

**Respondents:** Felixstowe Dock and Railway Company

**Heard at:** Watford (by CVP) **On:** 17 March 2021

**Before:** Employment Judge McNeill QC

**Appearances**
For the Claimant: In person
For the Respondent: Ms K. Annand, Counsel

# OPEN PRELIMINARY HEARING

# JUDGMENT

1. The Claimant's claim was brought within the statutory time limit set out in section 111(2)(a) of the Employment Rights Act 1996.

2. At the time the Respondent terminated its contract with the Claimant, the Claimant was not an employee of the Respondent within the meaning of section 230(1) of the Employment Rights Act 1996. His claim for unfair dismissal is therefore dismissed.

# REASONS

**Background**

1. The Claimant worked for the Respondent as a Tug Driver at the Port of Felixstowe. He contends that he was an employee of the Respondent within the meaning of s230(1) of the Employment Rights Act 1996. The Respondent denies this, claiming that he was a casual worker.

2. In a letter dated 7 May 2020, the Respondent informed the Claimant that he was being removed from the Respondent's bank of casual workers with immediate effect. The Claimant has brought a claim to the Tribunal for unfair dismissal.

**Evidence**

3. The Claimant's evidence to the Tribunal was contained in a witness statement and a "counter response" to the Respondent's grounds of resistance. The Respondent relied on the evidence of a senior manager, Mr Allerton. Both the Claimant and Mr Allerton gave evidence to the Tribunal and were cross-examined. The Tribunal was referred to documents in a bundle produced to the Tribunal which was agreed, save for one dispute which I refer to below.

**Preliminary Issues**

4. By a Notice of Preliminary Hearing dated 22 November 2020, Employment Judge Laidler directed that two preliminary issues should be determined, in summary:

   (i) Whether the claim for unfair dismissal was brought within the statutory time limits set out in s111(2)(a) of the Employment Rights Act 1996 (ERA); and
   (ii) Whether the claim should be dismissed because the Claimant was not an employee of the Respondent as defined by s230(1) of the ERA.

**Preliminary matter**

5. At the start of the hearing, the Claimant raised an objection to my reading documents at pages 231 to 256 of a bundle that was otherwise agreed. These documents had been disclosed late by the Respondent. They should have been disclosed by 21 December 2020. The majority of these late documents were disclosed on 27 January 2021 and the final documents were disclosed on 11 March 2021.

6. The Claimant said that he had not read these documents before the hearing. A break was taken so that he could read the documents and advance his objections. When he had done so, he put forward his arguments as why I should not admit these additional documents. He argued that the documents added further complexities and should not be accepted because they were so late. He could not point to any specific prejudice to him if these documents were admitted.

7. It was unhelpful that the documents had been provided late, which appeared to be attributable to oversight by the Respondent. I rejected the Claimant's application that I should simply exclude these documents. I said that I would read these documents as and when they were referred to in cross-examination. If there were any question of the Claimant being at a disadvantage in relation to the late disclosure of the documents, further arguments could be advanced.

8. As the case progressed, it became clear that some of the documents at pages 236 to 251 were emails passing between the Claimant and the Respondent which should have been disclosed by both sides in the ordinary disclosure process as they were of significant relevance to the case. I therefore took these documents into account where relevant to the issues I was required to determine.

**First issue**

9. The first of the preliminary issues directed by Employment Judge Laidler can be dealt with shortly. In its Response, the Respondent contended that the effective date of termination of the Claimant's contract was 7 May 2020. The Claimant's claim was not notified to Acas until 7 August 2020 and, the Respondent contended, the claim was therefore out of time. The Respondent did not develop this argument in submissions nor, when asked about the matter, did it withdraw the contention in the Response. The Respondent submitted that this was a jurisdictional matter for the Tribunal which the Tribunal was required to determine.

10. It is well-established that a dismissal does not take effect until the employee knows that they are being dismissed. At the earliest, that would have been on 8 May 2020 if the letter arrived the day after posting by first class post. In fact, the Claimant did not receive the letter in the post. He did not see the letter terminating his contract until it was emailed to him on 14 May 2020.

11. The Claimant's claim was notified to Acas on 7 August 2020, before the end of the three month primary limitation period. The early conciliation certificate was issued on 14 August 2020 and the Claimant had one month from that date in order to present his claim.

12. It was unclear why the Respondent, having put this point in issue, neither advanced any arguments in support of the contention in its Response nor withdrew the point. The claim was presented to the Tribunal on 17 August 2020 and was therefore brought in time. Even if the letter posted to the Claimant had been received on 8 May 2020, the claim would have been brought in time.

**Second issue**

Findings of Fact

13. The Claimant was employed by the Respondent at the Port of Felixstowe from 2007 to 2009, when he left his employment under a voluntary termination scheme, following a reduction in work at the port as a result of the financial crisis.

14. At all relevant times, the Respondent employed a category of employees who are referred to in these Reasons as "Port Operatives". Port Operatives were employed under standard terms and conditions governed by collective agreements negotiated with the recognised trade union, Unite, and were subject to particular policies relevant to their employment.

15. In 2011, the Respondent needed to increase its labour resources. It decided to engage a number of Tug Drivers, not as Port Operatives, but on a "casual" basis. The Respondent wanted to form a "bank" of such drivers who could be called on as and when needed by the Respondent. The terms and conditions of drivers in the "bank" would not be subject to the collective agreements applying to Port Operatives.

16. The Respondent believed this arrangement was one that might suit some ex-employees, including those who had recently retired from a Tug Driver role, held or had recently held a Tug licence, and wanted to work more flexibly. Tug driving does not require the high level of training required for other jobs at the port such as crane-driving.

17. In practice, the "bank" never took off. While seven individuals were engaged to work on the "bank" in 2011, the numbers dwindled and, by the middle of 2017 and until his contract was terminated in May 2020, the Claimant was the only Tug Driver who the Respondent treated as being a bank worker.

18. An additional difficulty in relation to the "bank" was that Unite was opposed to the bank worker contracts, which were "zero hours" contracts.

19. The Claimant was contacted in 2011 about "holiday cover" work on a casual basis. He undertook a refresher training course but no work was offered at this time and he was removed from the bank.

20. In May 2013, the Claimant undertook another refresher training course. On 9 July 2013 he signed a document headed "Statement of Terms and Conditions for Casual Workers". Insofar as relevant to the Claimant's case, the Statement of Terms and Conditions contained the following provisions:

"**The status of this agreement**

This contract governs your engagement from time to time by the Felixstowe Dock and Railway Company ("the Company") as a casual worker engaged in tug driving. Your name will be kept on the Company's staff bank of casual workers from 1 May 2013 until the Company decides to remove you from the Company's bank of casual workers, following which your name will be removed from the bank. During this period, there is no obligation on either the Company or you to offer or accept any work. This is **not** an employment contract and does not confer any employment rights on you (other than those to which workers are entitled).

**Company's discretion as to work offered**

By entering into this contract you confirm your understanding that the Company makes no promise or guarantee of a minimum level of work to you and you will work on a flexible, "as required" basis. It is the intention of both you and the Company that there is no mutuality of obligation between the parties at any time when you are not performing an assignment.

**Work**

Each offer of work by the Company which you accept shall be treated as an entirely separate and severable engagement (an assignment). The terms of this contract shall apply to each assignment but there shall be no relationship between the parties after the end of one assignment and before the start of any subsequent assignment. The fact that the company has offered you work, or offers you work more than once, shall not confer any legal rights on you and, in particular, should not be regarded as establishing an entitlement to regular work. There is no continuity of employment or service between one casual contract and another or from a permanent to a casual contract (or vice versa).

**Hours of Work**

You may be called for duty at any time with reasonable notice, although the option to work, or not, is at your discretion. However, once you have committed yourself to work on any occasion, you will be required to fulfil that obligation in full. Your basic hours of work, when called for duty, will be as agreed with the Container Division Resource Office."

21. The Statement went on to cover pay (*"you will only be paid for the hours that you work"*) and holidays. Then, under the heading "Company rules and procedures", it was provided that:

"During each assignment you are required at all times to comply with the relevant Company rules, policies and procedures in force from time to time. Regular reports on your performance, conduct and capability will be made and if you should fail to meet the appropriate standard and criteria, the Company may terminate this contract immediately by giving notice in writing."

22. Under a heading "Trade Union membership", it was stated that the Company's collective agreements and policies for the permanently-employed workforce were not applicable to the Claimant's role, save that the Claimant should adhere to the Company's Working Time Policy.

23. At around the same time as he signed the Statement of Terms and Conditions in 2013, the Claimant was sent a document headed "Overview of 'Support Tug Driver' Contract" in which it was stated that the contract period was up to 31 December 2013. The contract was a "*zero hours*" contract and the individual would only be paid when they actually worked. There were *"no obligations on either party – the Company is not committed to provide work and you do not have to accept any work offered"*.

24. During 2013, the Claimant was offered very little work.

25. By a letter dated 28 November 2013, the Claimant was told that his contract could be extended. He was sent a new Statement of Terms and Conditions that was identical to that signed in July 2013, save that the date 1 January 2014 was substituted for 1 May 2013. The Claimant signed those terms, together with a confidentiality undertaking and Data Protection Act Consent Form on 14 December 2013.

26. The undertaking and consent form were generic employee documents, as were other documents such as an HR checklist and a Pass Form in which the Claimant was described as an *"employee"*. The Claimant had an Employee App, which gave access to the Respondent's Labour Management System (LMS) and recorded individuals' personal details. Vacancies and training opportunities were advertised on the App. He received general correspondence and communications in the same way as others on the Respondent's payroll, which routinely used the word *"employee"* in relation to those to whom the communications were addressed. He was treated the same in this respect as all Port Operatives.

27. During 2014, the amount of work done by the Claimant gradually increased.

28. In relation to the year from 1 January 2015, a fresh set of Terms and Conditions was provided, with the date 14 January 2015 inserted as the date from when the Claimant would be *"kept on the Company's staff bank of casual workers"*. The provision as to pay in the Terms and Conditions was varied so as standardise the methodology in relation to the Claimant's pay and to bring that methodology into line with that applied to Port Operatives. Otherwise, the contract was in the same terms as the 2014 contract.

29. Up until 2015, the Claimant had undertaken some part-time work for a friend while also working for the Respondent. In 2015, the amount of work offered by the Respondent increased to the point that the Claimant was able to stop his other part-time work. The Claimant was offered as many shifts as he wanted and this continued through until the effects of the coronavirus pandemic started to impact on the Respondent's business in early 2020. He became wholly dependent for his income on his work for the Respondent.

30. The Claimant did not receive any further statements of terms and conditions from the Respondent after 2015. From that time and although he was not covered by the collective agreement applying to Port Operatives, the methodology for calculating his pay was aligned with the methodology applying to Port Operatives so that he received the same pay award as Port Operatives every year from 2015 until the termination of his contract.

31. The manner in which work was assigned to the Claimant was that he would notify the Respondent's resource office of his availability for work and the office would confirm his shifts. Normally, he would work four night shifts a week, Tuesday to Friday, but sometimes he worked three or five shifts. If there were particular days or weeks when the Claimant did not wish to work, he would notify the Respondent that he was unavailable. The Respondent did not expect the Claimant to work at the times that the Claimant said that he was unavailable. The Claimant's pay for each shift was manually keyed into the payroll system after each shift worked, in contrast to Port Operatives and other permanent employees who had a contractual weekly or monthly pay rate based on a guaranteed number of hours.

32. There were times when the Claimant chose not to work for a number of consecutive weeks: for example he told the Respondent that he would be unavailable to work between 10 July 2018 and 11 September 2018, 29 March and 1 May 2019 and 2 July 2019 and 6 September 2019. There was no requirement for the Claimant to give any particular period of notice if he was going to be away. For example, on 9 April 2018 the Claimant notified the Respondent that he would be away until 22 May 2018. On one occasion referred to in the evidence (19 June 2019), the Claimant had made an error with his dates and cancelled a night shift with less than a day's notice. However, this was exceptional. Once the Claimant had offered to work certain shifts, he was committed to carrying out those shifts.

33. The times when the Claimant notified the Respondent that he was unavailable were not treated as holiday. He was paid for accrued but untaken holiday, based on days worked, as a lump sum in January of each year.

34. Port Operatives were only allowed to take two weeks' holiday at any one time. Holiday had to be agreed with the Respondent and was allocated on a "first come first served" basis with a maximum of 15% off at any one time.

35. The Claimant was committed to a high standard of work and acted with integrity and a strong work ethic. While many did not reach their performance targets, the Claimant consistently achieved above his 100% performance targets. He had no time off sick. Although he was not prevented from taking alternative work, in practice, from 2015 he could work as many shifts as he wanted with the Respondent and he did not work for anyone else.

36. On occasions, the Claimant was "knocked off" a shift, for example if there was bad weather. The same happened to Port Operatives. The difference was that Port Operatives could be moved to another shift and would not lose any pay as a result of the cancelled work while the Claimant would only be paid if he was given less than four hours' notice of cancellation of a shift. Even then, he would only be paid half his shift pay.

37. The Claimant used the same mess room as Port Operatives, even though the relevant collective agreement stated that only company employees could use the allocated mess rooms. The Claimant was incorporated into the same working gangs and was subject to the same break patterns and other working conditions as Port Operatives. Others who were not recognised as employees, such as agency workers and sub-contractors, had different working arrangements and a different mess.

38. In many other respects also, the Claimant was treated the same as Port Operatives. He was subject to the same company medicals every three years; he wore the same company PPE; he was sent all company correspondence addressed to *"all employees"*; he had the same security pass, in contrast to agency workers who had a *"contractor security pass"*; he was invited to all company meetings to which *"employees"* were invited; he was entitled to the same company pension; and he was regarded by the supervisors and workforce as a member of the team.

39. Some individuals, who the Respondent recognised as employees, worked part-time or flexibly under arrangements reached with the Respondent. There was no evidence before the Tribunal in relation to any specific arrangements with any individuals so that a comparison could be drawn with the situation of those individuals and the situation of the Claimant.

40. On 10 November 2016, the Claimant was told by Mr Allerton that the Respondent would be advertising Port Operative contracts from 11 November 2016. The Claimant had previously applied for a Port Operative job in 2013 but

had been unsuccessful. He explained to Mr Allerton that he had since made the *"zero hours"* contract work for him by *"cramming in"* four night shifts a week and then taking time away on his yacht in Greece. He planned to work for 32 weeks in 2017.

41. Mr Allerton responded on 11 November with some options for the Claimant. He stated that the Claimant's performance was 113%. At the end of his email he said: *"If you are happy on your current contract then fine. If not, let's review the Port Op option".*

42. In response on 23 November 2016, the Claimant said that he had made plans for 2017 which tied him in to remaining *"under the current scheme the POF [Port of Felixstowe] provides…",* which he said worked well. He said that in the future he would *"certainly entertain re-joining full-time as a 'port op'"* if there were availability, in the short-term and with a view to a supervisory role. He said he would focus on realising his potential and skills during the latter part of 2017. He thanked Mr Allerton for his time and understanding and said that *"for the foreseeable it would be much appreciated to continue 'as is'".*

43. Following that correspondence, the Claimant continued to work as before in the arrangement which suited both the Claimant and the Respondent. There is no doubt that the Respondent had extremely good value from the Claimant, who was highly productive and was paid significantly less than a Port Operative carrying out the same work. The Claimant also benefitted from the arrangement which enabled him to take lengthy periods of absence away from work when he wanted to.

44. In 2018, when Unite were expressing opposition to zero hours contracts at the port, Mr Allerton contacted the Claimant again. Mr Allerton told the Claimant that Unite were saying that the Claimant's contract should be scrapped and he should either transfer to one of the Tug subcontractors, become a Port Operative or stop working on the Port. Following a meeting between the Claimant and Mr Allerton, the Claimant stated that he wanted to continue with his *"existing Support Tug Worker Contract"*. He said that this was a mutually beneficial contract that *"continue[d] to work perfectly for the business and [him]".* He said that there was: *"absolutely no wish from either party to disrupt this arrangement".*

45. On 27 February 2020, the Claimant carried out his last shift with the Respondent. Earlier that week, he had been told by his supervisor, Mr Rod Doctor, that further to an employee wide notice that week concerning ship cancellations and low volumes that would impact the port as a whole and as a direct result of the impact of Covid on Chinese manufacturing, he would not be required for the foreseeable future.

46. During March and April, the Claimant contacted the Respondent on a number of occasions in an attempt to clarify the position in relation to work at the port. He was sent copies of letters providing general information on the implications of the Covid crisis, signed by the Chief Executive Officer, Clemence Cheng, which were sent to all employees and which he could also read on the Employee App.

47. In due course, the Respondent decided to terminate the Claimant's contract. The decision was delivered by Mr Allerton but it was a decision made *"collectively"*. Mr Allerton's evidence as to the identity of the other parties to the decision was unclear. What was clear was that Unite had been opposed for some time to zero hours contracts. While Mr Allerton had fought the Claimant's case hard in 2018, by May 2020 the Respondent had decided to dispense with the type of arrangement that applied to the Claimant. Mr Allerton did not wish to retain the Claimant on a contract that would not be utilised more widely.

48. Although there was nothing to prevent the Respondent taking advantage of the furlough scheme for the Claimant's benefit, termination of his contract was seen as a means of bringing to an end the last of a type of contract that created an industrial relations problem, against a background of a severe downturn in work caused by the pandemic.

49. In his letter dated 7 May 2020, Mr Allerton referred to the reduction in work at the port and the Respondent's assessment that this would continue into 2021. As stated above, the Claimant was told that the Respondent *"will therefore now be removing you from our bank of casual workers with immediate effect".*

50. The Claimant was very distressed by the decision to terminate his contract. He questioned the Respondent's decision not to take advantage of the furlough scheme in relation to him. He had given a very high standard of work to the Respondent over a period of many years and felt that the Respondent's treatment of him was appalling. At a time of national crisis, when so many communities were pulling together, he was placed in a position where he lost his income (which could have been preserved in significant part by the use of the furlough scheme) and sustained significant damage to his psychological health and relationship breakdown.

Law

51. The right not to be unfairly dismissed in the ERA only applies to an *"employee"*. An employee is defined in s230(1) of the ERA as *"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment"*.

52. A contract of employment is defined in s230(2) of the ERA as a *"contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing".*

53. The proper approach to the determination of employment status under the ERA was recently considered by the Supreme Court in **Uber BV and others v Aslam and others** [2021] UKSC 5. As the Respondent submitted, although the issues in **Uber** related to the meaning of "worker", the approach set out by the Supreme Court would apply in the same way to the meaning of "employee".

54. The proper approach to interpretation involves not just looking at any written agreement or other documents evidencing the arrangement between a claimant and respondent but also the practical realities, including the conduct of the parties and the parties' understanding of the relationship: **Autoclenz Ltd v Belcher** [2011] ICR 1157; **Carmichael and anor v National Power plc** [1996] ICR 1226. The *"true agreement"* should be considered taking a *"purposive approach to the problem"*: **Autoclenz**. These authorities were referred to in **Uber** and the above principles approved.

55. In **Uber,** paragraph 85, it was held that: "*the conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other. But there is no legal presumption that a contractual document contains the whole of the parties' agreement and no absolute rule that terms set out in a contractual document represent the parties' true agreement just because an individual has signed it"*.

56. The facts of a case have to be analysed in the light of the statutory provisions being applied. Given that the ERA is there to protect workers, terms of a written contract which characterise the relationship between two parties in such a way that statutory protection is limited or removed will be void: **Uber**.

57. In considering whether a relationship is governed by a contract of employment there is an *"irreducible minimum"* of mutual obligation: Lord Irvine in **Carmichael** citing with approval the decision of the Court of Appeal in **Nethermere St Neots Ltd v Gardiner and another** [1984] ICR 612, in which it was held that *"if such mutuality is not present, there can be no contract of service"*. A requirement for personal performance is also key to whether there is a contract of employment but that issue does not arise in the current case. Control may also be an important factor.

58. In certain circumstances where there is a break between different assignments undertaken by an individual but where it can be inferred that mutual legal obligations subsisted between assignments, mutuality of obligation may arise

because of a "global" or "umbrella" contract which governs the relationship: **Hellyer Brothers Ltd v McLeod and ors; Boston Deep Sea Fisheries Ltd v Wilson and anor** [1987] ICR 526, CA.

Discussion

59. In summary, the Claimant argues that his contracts in 2013, 2014 and 2015 were annual contracts. He does not contend that he was employed under a contract of employment in 2013 and 2014 but says that over the years from 2015 to 2020 a mutual obligation came into existence between him and the Respondent. He relies on the emails evidencing the arrangement of his shifts and the fact that he was obliged to work any shifts that he had agreed to undertake. He also relies on the very many ways in which he was treated in exactly the same way as Port Operatives.

60. Although the Claimant had the ability to determine when he worked within the framework of his flexible arrangement with the Respondent, he paid for this by being paid 30% less than the basic hourly rate. The Respondent accepted this flexibility because the of the Claimant's productivity, which was at least as high as that of Port Operatives, and because he was so cost-effective. The Claimant contended that he worked more hours than some who were employed under different types of shift arrangement.

61. The Claimant did not contest the Respondent's evidence in relation to the contractual arrangements for holiday for Port Operatives but referred to the fact that such workers could accrue up to 100 days' leave without financial penalty.

62. In short, the Claimant submitted that the facts demonstrated that there was mutuality of obligation. He also rebutted arguments advanced by the Respondent in relation to control, which were largely based on the fact that the collective agreements applying to Port Operatives did not apply to the Claimant.

63. The Respondent provided two separate sets of submissions. One entitled "Written Submissions on the Law" and one entitled "Written Submissions on the Facts". The Respondent's Counsel developed her written submissions in oral submissions, including making further reference to the **Uber** case.

64. In summary, the key conclusion that the Respondent invited the Tribunal to draw was that there was no mutuality of obligation as between the Claimant and the Respondent and that the Claimant was therefore not an employee within the meaning of s230(1) of the ERA.

65. The Respondent relied on the written terms of the Statement of Terms and Conditions for Casual Workers; the practical reality and the fact that the

Claimant was not obliged to work for the Respondent at any particular times and on occasions did not do so for lengthy periods; and on the parties' common understanding that the arrangement set out in the written Statements of Terms and Conditions continued to apply. The Respondent submitted that the practical reality mirrored the contractual terms. There was no mutuality of obligation.

66. Further, there were no facts from which it could be inferred in the current case that any mutual obligations continued in periods when the Claimant was not working. In order for there to be a global or umbrella contract, there must be some obligation to provide and perform work during non-working periods in relation to work that might arise.

67. In relation to control, in reliance on **UPVC Designs Ltd t/a Croston Conservatories v Latimer and another** EAT 0431/07, the Respondent submitted that the fact that the Respondent could not require the Claimant to work at particular times or to come into work to help at peak periods meant that the Respondent could not control the Claimant in important respects.

68. Further matters relied on by the Respondent included the fact that the Claimant could work for others; that he was paid only for hours worked rather than being paid a salary; that he was not covered by the collective agreements; and that there was requirement that he should give notice of termination of his contract.

Conclusions

69. The most recent Statement of Terms and Conditions provided to the Claimant was signed by him on 19 January 2015. It was specifically stated in those terms and conditions that the contract was not an employment contract; that there was no mutuality of obligation between the parties; that there was no relationship between the parties between assignments; and no continuity of service or employment between one casual contract and another. In relation to those provisions, following **Uber,** I find that they are of no effect. The Claimant's employment status, as defined by statute, and the proper legal analysis of the relevant circumstances cannot be determined by reference to labels put on arrangements in written terms and conditions.

70. In the Statement of Terms and Condtions, it was further stated as follows: *"Your name will be kept on the Company's staff bank of casual workers from 14 January 2015 until the Company decides to remove you from the Company's bank of causal workers, following which your name will be removed from the bank".*

71. I rejected the Claimant's submission that the 2015 contract was an annual contract that expired at the end of 2015. Nowhere in the contract was it stated that the contract would come to an end at the end of the year. On the contrary, it was made clear that the contract would continue until the Respondent removed the Claimant from the bank of casual workers. The fact that there had been contracts signed by the Claimant in 2013 and 2014 did not override this clear statement. The 2013 contract was, by virtue of the "Overview" document sent to the Claimant, expressed to be for one year only, but the 2014 contract had no such limitation. The only reason the 2015 contract was issued was to include the new provision as to the methodology to be applied in respect of pay. Other provisions in the 2015 contract were the same as those in the 2014 contract.

72. In any event and irrespective of whether the 2015 contract did or did not come to an end after a year, the practical reality was that the arrangements for offering and providing work as between the Claimant and the Respondent after 2015 mirrored the practice during 2015. The Claimant could decide when he wished to make himself available to work for the Respondent and when he did not wish to make himself available for work for the Respondent. The Respondent, in turn, was free to decide whether or not to offer work to the Claimant.

73. The fact that the Respondent did, in practice, offer shifts whenever the Claimant requested to work over the period from 2015 to the end of February 2020 reflected the Respondent's business need for labour and not any contractual obligation. During the significant periods when the Claimant told the Respondent that he was not available for work, particularly in 2017, 2018 and 2019, there was no obligation on the Claimant in relation to work over those periods or in relation to future work and no corresponding commitment from the Respondent.

74. When the Claimant was informed of the opportunity of applying for a Port Operative role in 2016, his response was that he preferred to continue *"as is".* When Unite's opposition to his contract was explained to him in 2018, he made it clear that he wished to continue under his *"existing"* contract which was *"mutually beneficial"* and *"continued to work perfectly"* both for him and for the business. Whether the Claimant intended to refer to the written document or simply the very well-established arrangements between himself and the Respondent is immaterial.

75. The *"existing"* contract was the arrangement originally set out in the 2015 terms and conditions under which the Claimant was not obliged work any particular shifts, or at all, and under which the Respondent was not obliged to provide the Claimant with work. This arrangement had continued to apply right through to

February 2020. It cannot be inferred from the facts that the Respondent had at any time either expressly or impliedly agreed to provide the Claimant with any level of work or indeed any work at all. The contemporaneous evidence demonstrates that the parties had the same understanding as to their respective obligations, which were limited to the periods when the Claimant was actually working and not to any periods outside those times.

76. The clear understanding between the Claimant and the Respondent was that the arrangement was a flexible and mutually beneficial arrangement. The Claimant could choose when he offered to undertake shifts and the Respondent would offer work when work was available. If the Claimant chose not to offer any availability over a period of many weeks, as was the case in 2017, 2018 and 2019, that was his prerogative.

77. The Respondent was under no obligation to continue to provide the Claimant with work at times when he had said that he was unavailable for work or after the Claimant returned from a period of absence. In practice, it did provide the Claimant with work when he said he was available but that was because there was a business need for his services and he was an excellent worker, loyal and reliable, with high levels of productivity.

78. The Tribunal accepted that the Respondent employed some individuals, recognised as employees, under flexible arrangements, for example working only a few or maybe only one shift a week. However, such arrangements generally involve mutuality of obligation, where an employee is, for example, required to work on a permanent basis one shift a week or at specific limited times and the Respondent is obliged to pay the individual for that work. The Tribunal was provided with no evidence of any arrangement similar to the Claimant's, where the individual was free to offer to work only when they chose to work and where there was no obligation on the Respondent to provide work, where the Respondent had recognised the individual's statutory status as an employee.

79. Taking into account all these factors, I concluded that the contract between the Claimant and the Respondent lacked the mutuality of obligation necessary to a *"contract of service"* within the meaning of s230(2) of the ERA and the Claimant was therefore not an employee within the meaning of s230(1) of the ERA.

80. In relation to other factors potentially relevant to the Claimant's status such as a requirement for personal performance and control, those factors mainly, and with the exception of the arrangements relating to holiday, pointed in the direction of the Claimant being an employee. The fact that the Claimant was not subject to collective agreements applying to Port Operatives was of little relevance given the very many ways in which the Claimant was under the

control of the Respondent: for example, in the way he was paid (through payroll), performed his duties, enjoyed the mess facilities and was communicated with through the Employee App.

81. However, without the mutuality of obligation essential to a contract of employment and therefore to the statutory status of *"employee"*, the Claimant did not have a right not to be unfairly dismissed. His claim must therefore fail.

82. The Respondent's decision to terminate its arrangement with the Claimant demonstrated little, if any consideration of the impact that the decision would have, at such a difficult time, on a worker who had delivered excellent service to the Respondent. However, the manner of termination and its severe impact on the Claimant cannot alter the outcome of the case.

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**Employment Judge McNeill QC**

Dated: 29 March 2021

Sent to the parties on:

…….31/03/2021…….

For the Tribunal:

……..