# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| **Mr Daniel Oaten** | **v** | **The Westerfield Railway Ltd** |

**Heard at**: Watford **On**: 14.07.2022

**Before:** Employment Judge Freshwater

**Appearances**

**For the Claimant:** Mr Raffel
**For the Respondent:** Unrepresented

## JUDGMENT

1. The Claimant's claim for unfair dismissal against the respondent is not well founded and is dismissed.

## REASONS

**The claim and issues**

1. The effective date of termination was in dispute, as was the way in which the contract of employment between the Claimant and the Respondent had come to an end.

2. The Claimant claimed that he had been unfairly dismissed by the Respondent and that the dismissal was procedurally unfair. It was said that the Respondent had terminated the Claimant's contract of employment by way of letter on 12 May 2021.

3. The Respondent denied that the Claimant had been unfairly dismissed. It was submitted that the Claimant was no longer working under the contract of employment because it had been agreed between them that the Claimant was to be a "relief chef" and was no longer a permanent employee.

## Procedure, documents and evidence heard

4. The case was heard remotely by way of CVP. An agreed bundle of evidence was filed electronically (507 pages long in the PDF version). In addition, I read witness statements from Daniel Oaten, Peter Stone and Jonathan Pearson.

5. At the start of the hearing, it was agreed with the parties that the issues for consideration were liability and remedy.

6. I heard from the following witnesses on behalf of the Respondent: Peter Stone and Jonathan Pearson. The Claimant gave evidence on his own behalf.

7. An updated schedule of loss was submitted during the course of the hearing to correct errors in the version contained in the agreed bundle which had been identified by the Claimant's representative. Unfortunately, that updated version also contained errors. The Claimant's representative corrected the errors orally and I ordered that the correct version was to be filed and served within 7 days.

8. The evidence and submissions took place over 1 day, and judgment was reserved.

9. There was a regrettable delay in the promulgation of this reserved judgment. In the main this was due to the fact I was unable to access the electronic links to the bundle after the hearing and twice had to seek fresh links because the links expired after a very short time of use. The delay was not the fault of either of the parties: unfortunately, there was a delay in my first request for fresh links reaching the Claimant's legal representatives who were quick to provide the link when they, in turn, received the requests.

## Findings of fact

10. The Respondent is a company that that runs a restaurant. The Director of the company is Mr Peter Stone. The Claimant was employed by the Respondent on 14 December 2017 as a chef. His contract of employment was for 20 hours a week. He worked variable shifts each week. Shortly before the Covid-19 pandemic began in 2020, he worked 2-3 shifts a week. At the relevant times, the Claimant's line manager was Mr Jonathan Pearson.

11. During all three national lockdowns, the Claimant was placed on furlough by the Respondent. During the third lockdown, the Claimant undertook self-employed work which was separate to his employment as a chef.

12. The Respondent planned to re-open on 13 April 2021, and in preparation contacted staff to complete a return-to-work questionnaire. The Claimant's questionnaire is at page 41 in the bundle. In that document, it is recorded that the Claimant was unsure if he would continue with his other work. It also records in the notes section that "20 hours is too much – done less pre lockdown".

13. On 16 March 2021, the Claimant informed his line manager on that he had accepted a job in Bulgaria from 11- 18 April 2021 and that he would not be able to return to work until 28 April due to the requirement to self-isolate for 10 days on return to the United Kingdom.

14. On 13 April 2021, the Respondent reopened for business.

15. On 16 April 2021, the Claimant informed his line manager that he would be working in Hungary from 13 May for 7 days.

16. On 26 April 2021, the Claimant agreed with his line manager that he would work shifts on 1, 4 and 7 May 2021.

17. On 27 April 2021, the Claimant informed his line manager that he would be working in Hungary from 11 May – 16 May 2021 and expected to have a 10 day quarantine period afterwards.

18. On 29 April 2021, the Claimant informed his line manager that he wanted to be treated as a relief chef. This can be seen in the text message found at page 57 of the bundle. The Claimant said that he would struggle to do three shifts a week, and that new hires could have his hours. He was asked to "see out" the shifts already allocated to him, which he agreed to do.

19. Subsequently on 29 April 2021, the Claimant injured his Archille's tendon and attended hospital. He was signed off work for 9 weeks as he was unable to walk.

20. The Claimant requested statutory sick pay from the Respondent. On 6 May 2021, Mr Stone telephoned the Claimant and informed him that he was not entitled to sick pay because he was not a permanent employee.

21. The Claimant submitted a letter setting out a grievance on 7 May 2021 stating that he believed he was entitled to statutory sick pay, and that he had not breached his contract of employment because he had been booked for shifts in May and had agreed his working pattern with his line manager.

22. The Respondent sent a letter to the Claimant on 12 May 2021 informing the Claimant that he would not be paid statutory sick pay. The reason for this was

said to be because his employment had ceased when he had not made himself available for work on the week commencing 10 May 2021. I accept Mr Stone's evidence that the date in the letter was an error, and that he meant the week commencing 10 April 2021.

23. On 28 May 2021, Mr Stone emailed the Claimant to say that he would pay the Claimant the sum of £549.78 which was 3 weeks' pay in lieu of notice and holiday pay.

## The Law

24. Section 95 of the Employment Rights Act 1986 says that an employee is dismissed by his employer if:

> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
>
> (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

25. Section 230 of the Employment Rights Act 1986 says as follows:

> (a) In this Act *"employee"* means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (b) In this Act *"contract of employment" means* a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (c) 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)—
>
> (i) a contract of employment, or
>
> (ii) 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.

26. In the case of *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD* it was said that:

> 'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.'

27. In *Carmichael and anor v National Power plc 1999 ICR 1226, HL*, Lord Irvine said that a lack of obligations on one party to provide work and the other to accept work would result in 'an absence of that irreducible minimum of mutual obligation necessary to create a contract of service'.

## Conclusions

28. It was submitted to me that the Claimant had agreed leave with his line manager and that was why he was not available for work. I do not accept this submission. In my view, he was not seeking to use paid annual leave, or unpaid leave, when he wanted to carry out his other work. If he had, then I would have expected his text messages to say that he wanted unpaid time off or annual leave. Instead, he clearly expected that accommodation would be made for his alternative work and that he would simply choose which days he would work for the Respondent. He did not ask for time off, rather he set out when he would be available, which fell far short of what was expected under the contract of employment.

29. I do not accept that the Claimant said to treat him as a "relief chef" for any other reason than that he did not want to be bound by his commitments under the contract of employment. This is because the Claimant gave no convincing evidence as to what he meant, other than to say it was taken out of context. Additionally, he had already been working irregular shifts which he agreed with his line manager, setting out lengthy periods of time when he was unavailable.

30. I find that the Claimant terminated his contract of employment by requesting that he be treated as a "relief chef". This was accepted by the Respondent, who continued to allocate the Claimant work on that basis. There was no intention at that point, by either the Claimant or the Respondent, to act under

the original contract of employment. The Claimant did not want to work the required number of hours that had been set out in his contract of employment, instead, he wanted the flexibility to pursue his alternative work until he became injured and wanted to receive statutory sick pay. As such, I find that the Respondent was entitled to treat him as a "relief chef" and not as a permanent employee. Specifically, I find that the Claimant's contract of employment ended on 29 April 2021, and a casual worker relationship started on that date.

31. I found Mr Stone's evidence to be credible in respect of his explanation for the payment of 3 weeks' notice to the Claimant. This was done because he wanted to try and protect the Respondent from a dispute with the Claimant down the line. Mr Stone accepted that in hindsight he would have handled the situation differently. In my view there may well have been a better way of doing so, for example by setting out in writing what had been agreed, but I do not find that the actions of paying an amount of money in lieu of notice meant that the contract had not already been terminated by agreement.

32. There were no submissions on the point, but I have gone on to consider the status of the Claimant given that I have found he was not working under the original, permanent, contract of employment. There were no terms agreed in writing, and so I considered the correspondence at the time to decide what, if any, terms were agreed. In my view, once the original contract had ended, there was not the minimum, mutual, obligation necessary to create another contract of service based on reduced hours of employment. There was no obligation on the Respondent to offer any work to the Claimant as a relief chef, and there was no obligation on the Claimant to accept work. I have taken into account the following other factors: that the Respondent paid the Claimant money in lieu of notice; and that the Respondent did not consider the Claimant eligible for statutory sick pay; that the Claimant would be working in service of the Respondent. However, in my view the overriding factor in this case is the lack of obligation to offer or accept work.

33. I therefore find that the Claimant was not unfairly dismissed by the Respondent, and the claim is dismissed.

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Employment Judge Freshwater

Date: 16 September 2022

Sent to the parties on:

7 October 2022

For the Tribunal Office