Case No: 2602145/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Callum Maclean	**-v-**	(1) Meadowbrook Garage Limited (2) Mr Peter Nibloe

Heard at: Leicester **On:** 25 to 28 February 2019

Before: Employment Judge Evans, Ms Mcleod and Mr Robbins

Representation
For the Claimant: Mr Robert Maclean (uncle of the Claimant)
For the Respondent: Mr Small (Counsel)

JUDGMENT

1. The Claimant was not dismissed in breach of contract. His claim for breach of contract fails and is dismissed.

2. The Respondent did not harass the Claimant. His claim of harassment fails and is dismissed.

3. The Respondent did not discriminate against the Claimant by treating him unfavourably because of something arising in consequence of his disability when such treatment was not a proportionate means of achieving a legitimate aim. His claim of disability discrimination fails and is dismissed.

4. The Claimant was ordered to pay a deposit of £1000.00 following a preliminary hearing held on 3 September 2018. The Order was sent to the Claimant on 29 October 2018.The Claimant failed to pay this deposit. Allegations 2, 3, 4 and 5 contained in the further and better particulars dated 5 July 2018 were therefore struck out under rule 39(4) of the Employment Tribunals Rules of Procedure 2013 on 25 February 2019 at the beginning of the final hearing of the claims.

REASONS

Preamble

1. Following the termination of the Claimant's employment with the Respondent he presented claims for unfair dismissal, disability discrimination, notice pay and breach of a common law apprenticeship on 14 December 2017.

2. Those complaints came before the Employment Tribunal at a hearing in Leicester between 25 and 28 February 2019 ("the Hearing"). The parties were represented at the Hearing as set out above. Before the Hearing the parties had agreed a bundle of documents comprising two volumes. The first ran to 298 pages. The second ran to 391 pages. All references to page numbers in these reasons are to pages in volume 1 unless otherwise stated.

3. The Claimant provided a witness statement for himself and gave oral evidence. Mr R Maclean also gave evidence on the Claimant's behalf. The Respondent provided witness statements for the following individuals who also all gave oral evidence (with the exception of Mr Michael Greenwood): Mr Peter Nibloe (owner of the Respondent), Mrs Karen Nibloe (a director of the Respondent), Mr Richard Hajo (a mechanic employed by the Respondent), Mr Greenwood (a mechanic employed by the Respondent), Mrs Helen Bott (an accounts clerk employed by the Respondent), Mr Mark Bishop (a mechanic employed by the Respondent), Mr David Meredith (a freelance MOT tester), and Mr Corey Vernon (the owner of a garage where the Claimant had worked briefly following the termination of his employment with the Respondent).

4. Following submissions on 27 February 2019 the Tribunal reserved its judgment. It deliberated and reached this decision which is unanimous on 28 February 2019.

Preliminary matters

The strike out issue

5. Mr R Maclean had prepared a strikeout application prior to the beginning of the Hearing and this was included in his skeleton argument. In summary, the Claimant argued in that application that the Response should be struck out because:

    5.1. there was evidence in the bundle in the form of a police log covering the period 4 to 17 October 2017 ("the Police Log") which demonstrated beyond all doubt that the Respondent had dismissed the Claimant and that therefore the Respondent's witnesses were lying in their witness statements when they said otherwise. Consequently the Response was "scandalous, vexatious and had no reasonable prospect of success";

    5.2. the Respondent had conducted itself vexatiously by failing to obtain and disclose the Police Log;

    5.3. the Respondent had not complied with case management orders by the dates specified when they were made on 3 September 2018.

6. The Tribunal expressed the provisional view that the Police Log did not demonstrate beyond all doubt that the Respondent had dismissed the Claimant – rather it was simply evidence supporting the Claimant's contention that he had been dismissed. So far as the other two matters were concerned, the Tribunal noted that the case was now ready for hearing and the Claimant had not put forward any argument to the effect that a fair hearing was no longer possible. The Tribunal noted that although applications to strike out the Response at the beginning of a hearing because of matters such as those raised by the Claimant were not uncommon, such applications were rarely successful.

7. The Tribunal noted that the case had been listed for a five-day hearing but it had been necessary to reduce that to four because no judge had been available for all five days. The Tribunal told Mr R Maclean that it would hear argument in relation to the application and decide it if he wished but that that was going to eat into the available time.

8. Mr R Maclean said that in light of the Tribunal's comments he did not wish to pursue the application. It was therefore treated as withdrawn.

Paragraph 51 of the Claimant's skeleton argument

9. The Tribunal noted that in paragraph 51 of the Claimant's skeleton argument he put forward alternative reasons for the Claimant being dismissed on 4 October 2017 (although of course the Respondent denies that the Claimant was dismissed at all). Paragraph 51 suggested that the Claimant's case was that the Respondent had dismissed the Claimant because otherwise it would have had to pay him a higher rate of the National Minimum Wage because he had just turned 19.

10. The Tribunal noted that this argument had not previously been part of the Claimant's pleaded case and, potentially, gave rise to an argument that the Claimant had been automatically unfairly dismissed for reasons falling within section 104A of the Employment Rights Act 1996. The Tribunal told Mr R Maclean that the Claimant could not pursue this argument unless he applied for, and obtained, leave to amend his claim. Mr R Maclean indicated that the Claimant did not wish to make any such application.

The procedural history and the deposit order

11. Preliminary Hearings had been held on 20 March 2018, 11 June 2018 20 August 2018, and 3 September 2018:

    11.1. **20 March 2018**: the claims were identified as unfair dismissal, wrongful dismissal, harassment and direct disability discrimination.

    11.2. **11 June 2018**: an order was made that there should be a preliminary hearing to determine whether the Claimant had sufficient service to pursue an "ordinary" unfair dismissal claim. The same preliminary hearing was to consider whether the claims should be struck out because of alleged unreasonable conduct by the Claimant. The Employment Judge conducting this hearing also queried whether the Claimant might wish to amend so that the direct disability discrimination claim became a section 15 claim. The Claimant was ordered to provide further and better particulars.

    11.3. **20 August 2018:** there was clarification of the matters to be considered at the preliminary hearing ordered on 11 June 2018. In addition, it was ordered that at that hearing the Tribunal would consider whether the Claimant should be ordered to pay a deposit.

    11.4. **3 September 2018:** the claim of unfair dismissal was struck out because the Claimant did not have the necessary qualifying service. The claims of disability discrimination and wrongful dismissal were not struck out. However, the Claimant was ordered to pay a deposit as a condition of pursuing allegations 2, 3, 4 and 5 set out in the further and better particulars dated 5 July 2018 (page 27). Further case management orders were made and the final hearing was relisted to 25 February 2019 to 1 March 2019. The Claimant did not pay the deposit.

12. It was agreed at the beginning of the Hearing that, although the deposit had not been paid, the relevant allegations had never been struck out. Those allegations were therefore struck out.

The second volume of the bundle

13. The Respondent's representatives had failed to paginate the second volume of the bundle prior to the beginning of the Hearing. Further, it became apparent that they had also failed to provide copies of the second volume which were all identical in their contents. The Tribunal initially took the view that it could manage to get through to the end of the first day of the Hearing with the second volume of the bundle in this unsatisfactory state because the Tribunal formed the view that the Claimant was unlikely to refer to it much in his evidence (it was a copy of papers obtained from his college).

14. However, once the Claimant began to give evidence, it became apparent that in fact references to volume 2 were going to be frequent. The Tribunal had no choice therefore but to adjourn the hearing mid-afternoon on the first day so that the Respondent's representatives could remedy their failings in relation to the second volume of the bundle overnight.

Adjustments for the Claimant

15. At the beginning of the Hearing, the Tribunal raised with Mr R Maclean and the Claimant the issue of what reasonable adjustments might be necessary in order to enable the Claimant to participate fully in the hearing. The Tribunal raised this issue because the Claimant has dyslexia.

16. The Claimant said that he might need more time to read documents and would like to be able to ask what particular words meant if he did not understand them. The Tribunal indicated that the Claimant could have as much time as he required to read documents when he was giving evidence and that he should indeed ask if there were any words which he did not understand. Consequently, when the Claimant was giving evidence, the Tribunal took care to ensure that he had sufficient time to read any document in relation to which he was being asked questions. The Tribunal also offered the Claimant breaks every 30 minutes when he was giving evidence but he did not always wish to take them.

The discussion at the beginning of the Hearing and the issues

17. Despite the various preliminary hearings which had been held, the issues to be determined by the Tribunal at the Hearing had not been decided at a preliminary hearing or agreed between the parties.

18. The Tribunal noted at the beginning of the Hearing that, despite the hints given by the Employment Judge at the preliminary hearing in June 2018, the Claimant had not applied to substitute his claim of direct disability discrimination with a section 15 claim i.e. with a claim that he had been discriminated against because of something arising in consequence of his disability.

19. The Tribunal raised this with Mr R Maclean. The Tribunal explained how a comparator is constructed in a direct disability discrimination claim (i.e. that there must be no material difference between the circumstances of the Claimant and the comparator, and that those circumstances included a person's abilities). The Tribunal said that it seemed to it that what the Claimant was arguing in his direct discrimination claim was that the Respondent had treated him less favourably not because he was dyslexic but because of the difficulties he had with reading and writing as a result of his dyslexia. If that was the case then, realistically, the claim was one of section 15 discrimination. That was because the Claimant was not arguing that he was being treated less favourably than someone else who was not disabled but who had similar difficulties with reading and writing would be treated.

20. Mr R Maclean indicated that the Tribunal's analysis of the Claimant's arguments was correct. The claim of direct discrimination was therefore re-formulated as a claim of section 15 discrimination as set out below in the list of agreed issues and the Claimant made an application to amend accordingly.

21. Mr Small for the Respondent, after some discussion, indicated that the Respondent did not object to the Claimant's application provided that the Claimant was not arguing that his failure (in the Respondent's view) to adequately complete the task which he had been given on 4 October 2017 was in some way related to his disability. The Claimant confirmed that he was not. Indeed he did not accept that it had been completely inadequately at all. He had done the task well. The Claimant was therefore given leave to amend his claim so that the claim of direct discrimination was replaced by one of section 15 discrimination.

22. There was then a more general discussion about the issues which the Tribunal would need to decide in order to determine the claims. These were agreed to be as set out below.

Breach of contract (a common law contract of apprenticeship)

1) The parties agree that the Claimant was employed under a contract of apprenticeship.

2) The Respondent contends that the contract was one of modern apprenticeship and so a contract of service. It was for a fixed term expiring on 31 December 2017 but was also terminable on notice prior to that date. The notice required was statutory (one week).

3) The Claimant contends that he worked under a common law apprenticeship. This was for an indefinite term and could be terminated on notice, but notice could not be given to expire prior the Claimant obtaining his NVQ level 2 qualification.

4) **Issues**

   a) Was the Claimant dismissed by the Respondent or did he resign? The Claimant contends that he was expressly dismissed. He does not contend in the alternative that he was constructively dismissed.

   b) If the Claimant was dismissed by the Respondent, was he dismissed in breach of contract?

Disability discrimination

5) The Respondent accepts that the Claimant was at all relevant times a person with a disability for the purpose of the Equality Act 2010 ("the 2010 Act") because he has dyslexia. The Respondent concedes it was aware that the Claimant had dyslexia from when his employment began.

Issues – preliminary

6) Were all of the Claimant's claims presented within the time limits set out in section 123 of the 2010 Act? (Dealing with this issue may involve consideration of subsidiary issues including: whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc). The Respondent contends that claims arising from the incidents which allegedly took place in January 2016 and July 2017 are out of time.

Issues – harassment (section 26, 2010 Act)

7) Did the Respondent engage in conduct:

   a) As set out under heading "July 2017" at page 29 of the bundle?
   b) As set out under heading "My final day: 4th October 2017" at page 13 of the bundle?

8) If so was that conduct unwanted? The Respondent accepts that, if the conduct had occurred as described (which it denies), such conduct would be unwanted.

9) If so did it relate to the protected characteristic of disability?

10) If so, did the conduct have the purpose or (taking into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Issues – discrimination arising from disability – January 2016 incident (section 15, 2010 Act)

11) Did the following thing(s) arise in consequence of the Claimant's disability: the Claimant's poor handwriting and poor letter formation, and in particular the fact that he wrote Us and Vs in a similar way?

12) Did the Respondent treat the Claimant unfavourably as follows: by treating him in the way set out in the paragraph below the heading "January 2016" at page 27 of the bundle?

13) Did the Respondent treat the Claimant unfavourably in that way because of the Claimant's poor handwriting and poor letter formation as set out above?

14) If so, the Respondent accepts that such unfavourable treatment was not a proportionate means of achieving a legitimate aim.

Issues – discrimination arising from disability – dismissal (section 15, 2010 Act)

15) Did the following thing(s) arise in consequence of the Claimant's disability: Mr Nibloe generally being unreasonably and unjustifiably critical of the Claimant's performance at work (as a result of the difficulties the Claimant had with reading and writing).

16) Did the Respondent treat the Claimant unfavourably as follows: by deliberately provoking him by unfairly criticising his work on 4 October 2017 and then by dismissing him when he responded to that provocation?

17) Did the Respondent treat the Claimant unfavourably in that way because he was generally unreasonably and unjustifiably critical of the Claimant's performance at work (as a result of the difficulties the Claimant had with reading and writing).

18) If so, the Respondent accepts that such unfavourable treatment was not a proportionate means of achieving a legitimate aim.

The Law

Disability discrimination

23. Section 4(1) of the 2010 Act provides that disability is a protected characteristic.

24. Section 15 of the 2010 Act provides that an employer discriminates against a disabled person if it treats him less favourably because of something arising in consequence of his disability and it cannot show that the treatment is a proportionate means of achieving a legitimate aim.

25. Section 26 of the 2010 Act provides that one person harasses another if he engages in unwanted conduct related to a protected characteristic and the conduct has the purpose or effect of violating that other person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

26. Section 39(2) of the 2010 Act provides that an employer must not discriminate against an employee by dismissing him or by subjecting him to a detriment. Section 40 prohibits the harassment of employees.

27. Pursuant to section 136 of the 2010 Act*,* it is for the Claimant who complains of discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful. If the Claimant does not prove such facts, he will fail.

28. Where the Claimant has proved such facts then the burden of proof moves to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of a protected characteristic, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

29. Turning to time limits for claims under the 2010 Act, section 123 provides that complaints may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. However conduct extending over a period is to be treated as done at the end of the period and a failure to do something is to be treated as occurring when the person in question decided on it. In the absence of evidence to the contrary, a person is to be taken to decide on a failure to do something when they do an act inconsistent with doing it, or if they do no inconsistent act, on the expiry of the period in which they might reasonably have been expected to do it.

Apprenticeships

30. The primary purpose of a contract of apprenticeship is training. The most significant difference between a contract of service and a contract of apprenticeship is the restricted ability of the employer to lawfully terminate a contract of apprenticeship.

31. In the normal course of events, a contract of apprenticeship is fixed term in nature and will terminate on the date, or at the end of the period, specified in the contract. It is a feature of contracts of apprenticeship that they cannot usually be terminated earlier except in cases of serious misconduct by the apprentice.

32. The parties agreed that the relevant statutory framework for the contract of apprenticeship in this case was the Apprenticeship, Skills, Children and Learning Act 2009 ("the 2009 Act"). Section 35 of the 2009 Act provides that an apprenticeship which complies with the formalities listed in its section 32 and with other regulations will be a contract of service. The Respondent accepted in this case that such formalities had not been complied with but argued nevertheless that the contract of

apprenticeship was in fact a modern apprenticeship and so a contract of service and not a common law contract of apprenticeship.

Submissions

33. Both the Claimant and the Respondent provided written skeleton arguments. Copies of those are on the Tribunal's file. In addition, the representatives made oral submissions.

34. The oral submissions of Mr Small for the Respondent may reasonably be summarised as follows:

    34.1. The weight of the evidence suggested that the Claimant had not been dismissed on 4 October 2017. Rather he had walked out and never returned. This was resignation by conduct.

    34.2. The Tribunal did not need to concern itself with the reason why the Claimant had resigned (because he advanced no constructive dismissal claim). However the fact was that he had walked into a new apprenticeship more or less straightaway (although that had not lasted).

    34.3. Although the apprenticeship was not a contract of service by virtue of the 2009 Act, the documentation which was produced at the time showed that the intention of the parties was that it would be a contract of service under the regime established by the 2009 Act.

    34.4. If the Tribunal concluded that the Claimant had been dismissed (rather than having resigned), this had been in circumstances in which the Respondent was entitled to terminate his contract without notice by virtue of his conduct even if the contract was one of common law apprenticeship.

    34.5. So far as the disability discrimination claim was concerned, the termination of the Claimant's employment had nothing to do with his dyslexia. He had not even mentioned this when complaining to the police. The underlying factual reason for the incident on 4 October 2017 was the Claimant's failure to carry out a task given to him by Mr Nibloe and the Claimant's subsequent loss of temper.

    34.6. All the incidents of disability discrimination of which the Claimant complained apart from his alleged dismissal were very considerably out of time and it would not be just and equitable to extend the time limit.

35. The oral submissions of Mr R Maclean for the Claimant may reasonably be summarised as follows:

    35.1. The defence of the Respondent was a pure fabrication, with one lie stacked on top of another. The Police Log proved definitively that the Claimant had been dismissed.

    35.2. The Respondent's witnesses were mainly its employees and their evidence reflected that.

    35.3. The contract under which the Claimant was engaged was quite clearly a common law contract of apprenticeship and as such not terminable prior to the completion of the Claimant's training.

    35.4. The Claimant was quite clearly singled out, belittled and treated differently because of his dyslexia. The fact that the records of the Claimant's College did not reflect this was down to the laziness in particular of Mr Eaddie who chose

not to accurately record the Claimant's complaints to him because this would have necessitated him taking action about them.

Findings of Fact

36. We are bound to be selective in our references to the evidence when explaining the reasons for our findings. However, we wish to emphasise that we considered all the evidence in the round when reaching our conclusions.

General background findings

37. The Claimant was born on 1 October 1998. He worked as an apprentice for the Respondent from 9 November 2015 until his employment ended on or around 10 October 2017.

38. The Respondent is a small garage business. It employs just a few mechanics and a small office team. Mr Nibloe is its owner and he works full-time in the business.

39. The apprenticeship of the Claimant was a tripartite arrangement between the Claimant, the Respondent and Brooksby Melton College ("the College"), which the Claimant attended on day release throughout his employment with the Respondent. The only documentation setting out the terms of the apprenticeship was an individual learning plan/learning agreement at page 86 of the bundle.

40. The Claimant was studying for a level 2 NVQ. It was hoped that he would complete this towards the end of 2017. However, there was an incident on 4 October 2017 (to which we return in detail below) which resulted in the employment of the Claimant terminating.

Findings relevant to credibility and to the weight to be attributed to the evidence of the various witnesses

41. This is a case in which the credibility of the witnesses is of very considerable importance because the assessment of the main events said to give rise to the claims boils down, to a considerable extent, to the question of whom the Tribunal should believe. We therefore make these general findings in relation to the credibility of the witnesses, and the weight that should be given to their evidence, which we then take into account when making our findings of fact in relation to the main events.

42. **The Claimant:** the Tribunal finds that there are various matters which damage the credibility of the Claimant as a witness. These include:

    42.1. Although he said that he had raised problems which he was experiencing in the course of his employment with the College on a number of occasions, there is very little evidence indeed of this in his college file (largely contained in volume 2) and the Claimant has not provided a reasonable explanation for this;

    42.2. The Claimant's case by the date of the Hearing was that he had been dismissed because of something arising in consequence of the dyslexia from which he suffered. However, the Police Log had not referred in any way to dyslexia. Rather it suggested that at the time what the Claimant had told the police was that he believed he had been dismissed because the National Minimum Wage rates to which he was entitled had recently increased. The Claimant has not provided a reasonable explanation for this discrepancy given that his case depended to a significant extent on the Police Log being highly accurate;

42.3. The Claimant said that he had talked to his parents about abuse which he was receiving at work as a result of his dyslexia. Given the alleged extent of such abuse, and the reaction of his uncle and parents following the incident on 4 October 2017, the Tribunal finds that it was not plausible that his parents would not have raised the matter contemporaneously with either the Respondent or the College. The Tribunal noted in this respect that neither of the Claimant's parents gave evidence. The Claimant has not provided a reasonable explanation for these matters;

42.4. The Claimant had briefly worked for Corey Vernon following the termination of his employment with the Respondent. The evidence of Mr Vernon was that during the course of his brief period of employment the Claimant had crashed a customer's car, accidentally polluted a large barrel of clean oil by pouring used oil into it, and had referred to the car of a customer in the presence of the customer as "crap". The Tribunal took the view that Mr Vernon had no axe to grind in these proceedings. The Tribunal also took the view (for the reasons set out below) that Mr Vernon was a credible witness. Consequently, the fact that the Claimant point-blank denied when cross-examined either polluting the large barrel of clean oil or referring to a customer's car as "crap", whilst not providing any explanation for why Mr Vernon might invent such matters, was a matter which the Tribunal finds damages the Claimant's credibility.

43. **Mr Nibloe:** the Tribunal finds that the fact that Mr Nibloe's account of what happened on 4 October 2017 is inconsistent with what the Police Log records is a matter which damages his credibility to some extent. However, generally, the Tribunal found Mr Nibloe to be a credible witness because the evidence he gave was generally consistent with the contemporaneous documents (for example, his view that the Claimant had resigned was consistent with the email sent by the Respondent to the College on 10 October 2017 (page 107)). Equally, his evidence did not have the appearance of being tailored to suit the legal case being put forward on his behalf. For example, when asked whether the employment of the Claimant would have continued after his NVQ 2 had finished, he indicated that the Claimant's overall level of performance was such that he would have been content to take him on for a further period so that he could study for his NVQ 3 qualification. He did not seek to do down the Claimant's general performance as an apprentice in his evidence and suggest that his employment would have ended in December 2017 even if the incident of 4 October 2017 had not happened and the Claimant's uncle had not become involved in the matter.

44. **Mr R Maclean:** the extent of Mr R Maclean's evidence was limited because he only became involved after the incident on 4 October 2017. However, the Tribunal found that Mr R Maclean's credibility as a witness was damaged by an unusually high level of partisan prejudice. Perhaps because he was acting as his nephew's advocate, the Tribunal finds that Mr R Maclean found it exceptionally difficult to see relevant events objectively (taking full account of the fact that this is something which affects more or less every witness to some extent). His starting point in his evidence was that anyone whose recollections differed from his own was "a liar". In the experience of the Tribunal it is often the case that differing recollections are just that.

45. **Mr Vernon:** the Tribunal found Mr Vernon to be a credible witness for the following reasons. First, he was not involved directly in the dispute between the Claimant and the Respondent and had no prior connection with the Respondent. He had no axe to grind. Secondly, he gave his evidence in a very straight forward manner. He did not seek to evade questions. For example, when it was put to him that on viewing a video of the Claimant crashing a customer's car he had said "twat!" he freely admitted that he had, explaining that that was simply a spontaneous reaction to what the video revealed.

46. **Mr Bishop, Mr Hajo, Mr Greenwood, Mr Meredith**: the extent of the evidence of these witnesses was limited. The Tribunal finds that there was nothing in their evidence which undermined their credibility to any significant extent but at the same time the Tribunal accepts that there is some merit in the Mr R Maclean's point that they would not wish to "upset the boss" (i.e. Mr Nibloe) and the Tribunal has taken this into account when deciding how much weight to give their evidence. Little weight was given to Mr Greenwood's witness statement because he had not attended to give oral evidence.

47. **Mrs Bott:** the Tribunal found Mrs Bott to be a generally credible witness. She was careful not to comment on matters which were outside her knowledge and her answers did not seem to be calibrated to suit the Respondent's case. For example, she was asked whether Mr Eaddie of the College had said anything specific about the Claimant returning to work (or not) at a meeting they had had on Friday, 6 October 2017. She said that he had not (and it would have suited the Respondent's case for Mr Eaddie to have said that the Claimant had told him that he did not intend to return to work for the Respondent because he had resigned). However the Tribunal has taken into account the fact that she would not have wished to "upset the boss" when deciding how much weight to give her evidence.

48. **Mrs Nibloe:** the extent of the evidence of Mrs Nibloe was limited. The Tribunal found that there was nothing in it which undermined her credibility but the Tribunal has taken into account the fact that she is the wife of Mr Nibloe, against whom all the Claimant's allegations have been levelled, when deciding how much weight to give to it.

Reasons for presenting some of the claims out of time

49. The Claimant's employment ended between 6 and 10 October 2017 and the Claim Form was presented on 14 December 2017. Accordingly anything which happened before 15 September 2017 was potentially out of time.

50. As well as complaining about the events of 4 October 2017 the Claimant also complains of events taking place in January 2016 and July 2017. The Claimant alleges that in January 2016 he was abused repeatedly by Mr Nibloe because of the way in which he had completed a job card and that this abuse related to his dyslexia ("the January 2016 Incident"). The Claimant alleges that in July 2017 he was subjected to abuse by Mr Nibloe on the grounds that he had not completed college work and this abuse again related to his dyslexia ("the July 2017 Incident").

51. The Tribunal invited Mr R Maclean to ask the Claimant supplemental questions to establish why he had not pursued these matters earlier, i.e. why he had not presented a claim in relation to them within the primary three month limitation period. The Tribunal explained that this was because it would need to make findings in relation to this issue in order to determine whether it was just and equitable to extend time.

52. Mr R Maclean did ask the Claimant about this but all he said was that he had hoped that the January 2016 incident was simply a bad day work and would not be repeated.

July 2017 Incident

53. The Claimant's allegation in relation to the July 2017 Incident was set out in full at page 29 of the bundle. We do not repeat it in full here. However, in summary, the further and better particulars at page 27 allege that, after receiving a phone call from the College, Mr Nibloe abused the Claimant by calling him a "thick c***" asking him "what the f*** are you doing all day at college?" twice and accusing him of "sitting around with your finger up your arse all day".

54. The Claimant did not deal with this issue in his witness statement other than obliquely. In his oral evidence, in answer to supplementary questions, he said he had spoken to the College about it but they "did not raise it" with the Respondent. By contrast, in cross examination he said that in fact he had not told the College about that particular incident although he had complained about his treatment more generally. He said that he had told his parents about the incident but accepted that they had not spoken to Mr Nibloe or anyone else at the Respondent about it. He said that his mother had raised the incident in a meeting at the College in July 2017.

55. Mr Nibloe's oral evidence reflected the evidence contained in paragraphs 33 and 34 of his witness statement. He provided a little further detail in cross-examination. He said that it was Mrs Bott, not he, who had spoken to the college. Mr Nibloe had been given to understand that the Claimant was behind with his work. He said that as soon as he approached the Claimant about the matter "he flew up in the air and blamed it on the effing computers at college". Mr Nibloe said in his witness statement of the Claimant would often "fly off the handle". Mr Nibloe denied having spoken to the Claimant as alleged.

56. Mrs Bott had a recollection of the incident which was very similar but not identical to that of Mr Nibloe. In her witness statement (paragraph 8) she recalled the Claimant flying off the handle when Mr Nibloe had raised the question of the Claimant being behind with his work with him.

57. The Tribunal prefers the evidence of Mr Nibloe and of Mrs Bott to that of the Claimant. The Tribunal therefore finds that the Claimant became angry and used foul language when the matter was raised with him rather than explaining that there was an issue with his practical work (which was in fact the case). The Tribunal finds that Mr Nibloe did not speak to the Claimant as the Claimant alleges. The reasons for the Tribunal preferring the evidence of Mr Nibloe to that of the Claimant in relation to the July 2017 Incident include the following:

    57.1. Mr Nibloe's account of the incident is supported to a significant extent by that of Mrs Bott.

    57.2. For the reasons set out above, the Tribunal found Mr Nibloe and Mrs Bott to generally be more credible witnesses than the Claimant.

    57.3. The Claimant was unusually emotional (even taking into account his age) when giving evidence in the Tribunal. By contrast, Mr Nibloe was unusually calm and composed throughout the whole of his evidence and, indeed, throughout the whole of the Tribunal hearing lasting three days. In light of these matters, the Tribunal found it more likely that the Claimant would react in an emotional way to being asked about his work as Mr Nibloe alleged, than that Mr Nibloe would direct a foulmouthed rant at the Claimant as the Claimant alleged.

    57.4. Further, there was evidence before the Tribunal which the Claimant did not dispute which demonstrated hot headed and foolish behaviour. Mr Greenwood referred in his written statement to the Claimant having stubbed a lit cigarette on the top of his lip at Christmas party which caused the lip to be burnt. Mr Hajo's statement corroborated this incident.

    57.5. The allegation made in relation to the July 2017 Incident was a serious one. The Tribunal considers that if it were true then it is likely that the matter would have been raised formally by the Claimant or by his parents with the College. However, in cross-examination the Claimant contradicted his earlier evidence and said that he had not in fact raised it specifically with the College. Further, the Tribunal does not accept that his mother raised it specifically with the College. It is clear that the meeting which his mother attended at the College

in July 2017 to which the Claimant referred was in fact a long standing meeting arranged before the beginning of July (for example see the emails at page 166 of volume 2 which refer to an Annual Review arranged in June for 4 July 2017 and, indeed, the Claimant's own oral evidence).

57.6. The evidence of the other witnesses pointed to the Claimant behaving in a "temperamental" or "stroppy" way (Mrs Nibloe paragraph 5), swearing a lot (Mr Hajo paragraph 5, Mr Greenwood paragraph 6), being very cocky (Mrs Bott paragraph 5), "flying off the handle" at the slightest criticism (Mrs Bott paragraph 6), always knowing better (Mr Bishop paragraph 5). This is all evidence of behaviour consistent with the reaction of the Claimant which Mr Nibloe described when the issue of work not having been done was raised with him.

58. It is appropriate at this point for the Tribunal to make the following general findings in relation to the way that the Claimant interacted at work with Mr Nibloe and his colleagues and the attitude of Mr Nibloe to the Claimant's dyslexia.

59. The Tribunal finds that the Claimant generally got on well with his colleagues and was not unhappy at work. In making this finding the Tribunal takes into account:

59.1. the fact that the Claimant had attended social events outside working hours with his colleagues;

59.2. the fact that after his employment had ended he had sent a text message to Mr Bishop saying that he was "missing the Meadowbrook crew";

59.3. The attitude of his fellow mechanics towards him. The Tribunal's overall impression was the mechanics felt that he was cocky and a "know it all" but that there was nevertheless some affection for him.

60. So far as Mr Nibloe's attitude towards the Claimant's dyslexia is concerned, the Tribunal finds that Mr Nibloe was keen that the Claimant's written English should improve so that he could correctly record registration numbers and chassis numbers but that the working environment generally was not one in which literacy was particularly prized:

60.1. Mr Nibloe made clear in his written and oral evidence that reading and writing skills were not the most important thing for him. He accepted that neither he nor the other mechanics were "academic" types. This made sense to the Tribunal: it is self-evidently the case that practical skills would be far more likely to be of interest to a small garage owner than reading and writing skills;

60.2. This was indirectly confirmed by Mr Vernon. In his own evidence he explained that he was dyslexic, and yet this has quite clearly not prevented him from owning and running a garage of his own.

61. Taking the evidence in the round, the Tribunal finds that Mr Nibloe was not unduly concerned about the fact that the Claimant was dyslexic. It was not something which would prevent him from becoming a good mechanic. It was something that Mr Nibloe was aware about when he employed the Claimant.

The 4 October 2017 incident

62. The Claimant's account as set out in his claim form and oral evidence of the incident on 4 October 2017 was as follows (his witness statement did not deal with it). The Claimant alleged that on 4 October 2017 Mr Nibloe had unreasonably taken issue with a piece of work which the Claimant had done (shaping a piece of metal for Mr Nibloe to weld onto a car). The Claimant contended that Mr Nibloe had done this deliberately in order to provoke him to behave in a way which would give Mr Nibloe a

pretext for dismissing him. He said that he had shaped the piece of metal in accordance with Mr Nibloe's instructions.

63. The Claimant alleged that Mr Nibloe had called him useless, called him thick and stupid, and had asked him whether he wanted to die. The Claimant said that under severe provocation he had told Mr Nibloe to "fuck off" and let him get on with his work. The Claimant said that Mr Nibloe had asked him whether he had told him to "fuck off" and, when the Claimant had confirmed that he had, had grabbed him by the clothes at the back of his neck, bared his teeth, clenched his fist, shaken him, and asked whether he wanted to end up in hospital. He then said "that is it, you are done, pack your box and get out". The Claimant said he had therefore understood that he had been dismissed. The Police Log also recorded that the Claimant had told the police that "Nibloe has then grabbed IP by the scruff of his clothes and dragged him to the door before ejecting him". In his oral evidence the Claimant said that in fact he had not been ejected but rather dragged briefly towards the gate.

64. The account of Mr Nibloe was different. He said that the Claimant had ignored the instructions which he had given him in relation to shaping a piece of metal. He had realised that the piece of metal could not be welded and had asked the Claimant why he had not followed his instructions. The Claimant had replied "that's how you fucking told me to do it". The Claimant had then picked up the piece of metal, thrown it on the floor and said "fuck off". Mr Nibloe said that he had said "what did you say" to the Claimant, expecting him to say something like "nothing", but instead the Claimant had come right up close to his face and said "fuck off" again. Mr Nibloe said that he had then told the Claimant that the best thing he could do was to take his lunch, sit in his car and calm down. Mr Nibloe denied using foul language towards the Claimant, physically manhandling him, or using words which the Claimant could reasonably have understood to be words of dismissal.

65. The Tribunal finds that the Claimant did say "that's how you fucking told me to do it" when Mr Nibloe said that the metal had not been shaped correctly (and indeed the Claimant accepted this in his oral evidence), and threw the piece of metal onto the floor. The Tribunal finds that Claimant did then tell Mr Nibloe to "fuck off" twice, and on one occasion got close to his face before saying this.

66. The Tribunal finds Mr Nibloe did then tell him to have his lunch and calm down. The Tribunal finds that Mr Nibloe did not tell the Claimant that he was done or that he should pack his box and get out. The Tribunal also finds that Mr Nibloe did not physically manhandle the Claimant.

67. The Tribunal also finds that Mr Nibloe did not manufacture the situation in order to provoke the Claimant so that Mr Nibloe would have an excuse for dismissing him.

68. In making these findings the Tribunal has preferred the evidence of Mr Nibloe to that of the Claimant for the following reasons:

    68.1. The Tribunal found the suggestion that Mr Nibloe had manufactured the whole situation so as to have an excuse to dismiss the Claimant was far-fetched. It was accepted by the parties that the Claimant would have been likely to have completed his NVQ level 2 qualification towards the end of 2017. It would not have been difficult at that point for Mr Nibloe to have treated the Claimant's contract as at an end as the individual learning plan suggested that that was when it was intended to end (i.e. when all the framework components were complete). Indeed in his oral evidence the Claimant accepted that this was the case – he said it would have been up to Mr Nibloe to decide whether to offer him a further contract whilst he worked towards the NVQ level 3 qualification. Further, Mr Nibloe would not have known exactly how the Claimant would react to being told to redo a job. The reaction, even as described by the Claimant, is surprising. Finally, the Tribunal finds that the criticism made of the Claimant was

reasonable because it accepts that Mr Nibloe's professional judgment in light of 30 years' experience was that the Claimant had not completed the task adequately. Mr Nibloe gave a coherent explanation of why he had rejected the piece of metal cut by the Claimant by reference to the photographs in the bundle.

68.2. The Tribunal found Mr Nibloe to be a more credible witness than the Claimant for the reasons set out above.

68.3. No-one saw and heard the whole of the actual incident except for the Claimant and Mr Nibloe. However, the evidence of the majority of the other witnesses about what had happened on the day supported Mr Nibloe's contention that the Claimant was not dismissed:

68.3.1. Mr Hajo had overheard the incident from where he was sitting but had not seen it. He had heard the Claimant tell Mr Nibloe to "fuck off". He had not heard what Mr Nibloe had said. His impression from what he had heard was that Mr Nibloe had not laid hands on the Claimant (because he had not heard the Claimant say anything which suggested to Mr Hajo that he had). The Claimant had shaken hands with him before leaving. He had not expressly said that he had resigned or that he had been dismissed but Mr Hajo's impression, taking into account how the Claimant had told Mr Nibloe to "fuck off", was that he had "had enough" – the Claimant would quite often say he was behind with work at college. He thought the Claimant's attitude was that he could not "be bothered to put effort in any more".

68.3.2. Mrs Bott had not seen the incident. However Mr Nibloe had spoken to her soon after the incident. He had told her that the Claimant had "come up to his face and shouted "F*** off" to him". In her oral evidence she said that he had not told her that he had dismissed the Claimant. She had expected the Claimant to return. That was why she had called Mr Eaddie at the College on the following day when he had not returned. She said she had told Mr Eaddie that there had been an altercation the previous day and the Claimant had left and not returned to work.

68.3.3. Mrs Nibloe had not seen the incident. However Mr Nibloe had spoken to her that afternoon He had told her that the Claimant had told him to "fuck off" twice and that Mr Nibloe had said that he had told the Claimant to go and calm down.

68.3.4. (The evidence of Mr Bishop who had not been on site during the incident (he had been taking his lunch break) did not really assist the Tribunal one way or the other. He had seen the Claimant when he returned to work. The Claimant had said to him that he had had a disagreement and was leaving. He had not said either that he had been dismissed or that he had resigned. The evidence of Mr Greenwood also did not assist the Tribunal – his witness statement made clear that he had not been on site during the incident and he did not attend the Hearing to give oral evidence having left the Respondent's employment.)

68.4. The evidence of Mr Corey supported Mr Nibloe's version of events. He said that the Claimant had said that "he had a bullying boss and that he had had an argument about welding and that he had walked out". In his oral evidence he said that the Claimant had said that "he did a job wrong and he walked out". (The Tribunal in attributing weight to Mr Corey's evidence in this respect has taken into account the fact that he made it clear that he had not been terribly interested in why the Claimant's employment with the Respondent had ended and so he had not paid a great deal of attention to what he had said about it.)

68.5. The evidence of all the witnesses (apart from the Claimant and Mr R Maclean) was consistent with Mr Nibloe being a calm and mild-mannered man who did not generally behave in the way the Claimant alleged he had behaved on 4 October 2017. The way that Mr Nibloe behaved throughout his evidence in the Tribunal was also calm. Very little of the evidence available to the Tribunal suggested that he is a man who behaves as the Claimant alleges. By contrast, a considerable amount of the evidence before the Tribunal suggested that the Claimant would quickly become angry and could also become emotional. The Claimant having such characteristics was, the Tribunal concluded, consistent with him having behaved as Mr Nibloe described and then having walked out rather than trying to resolve the matter later that day (for example, by apologising).

68.6. There was no dispute that after the incident the Claimant had remained on site for about an hour. He said that this was because his car was blocked in by a customer's car and he did not wish to move the customer's car having just been dismissed. He was waiting for Mr Greenwood to return from his lunch break. However, the Tribunal concluded that he could have, for example, asked Mr Hajo to move the car. The Tribunal concluded that if Mr Nibloe had behaved as the Claimant had alleged – grabbed hold of him by the scruff of the neck, briefly dragged him towards the gate, and dismissed him summarily – he would not have tolerated the Claimant then remaining on site for an hour. The Claimant remaining on site for an hour is more consistent with the account of Mr Nibloe.

68.7. The account of Mr Nibloe and Mrs Bott of the meeting with Mr Eaddie on Friday 6 October was more consistent with the account of Mr Nibloe than that of the Claimant as was the fact that, although the Claimant had been in touch with the College about the events of 4 October 2017, Mr Eaddie had recorded on the form at page 100 "left employment at Meadowbrook garage due to clash of personalities". Although the words "left employment" could refer to a dismissal, the Tribunal concluded that they were more likely to refer to the Claimant having walked out and having decided not to return.

69. The Tribunal reached these conclusions on the balance of probabilities after carefully considering what weight to be given to the Police Log and the evidence of Mr R Maclean. It did not attribute much weight to the evidence of Mr R Maclean about what had happened for the reasons set out in paragraph 44 above and because he was dependent on the Claimant for his knowledge of what had happened on 4 October.

70. So far as the Police Log is concerned, this recorded entries made by the police into their systems following the Claimant making a complaint to the police on 4 October and subsequently on 16 October 2017 when an officer visited the Respondent's premises.

71. The initial entry on 4 October 2017 records:

IP is an apprentice at local garage, had had an argument with his boss which has resulted in boss firing him and forcibly removing him from the premises along with threats of violence

It then goes on to state:

IP has come to CK FEO to report an assault by his boss Pete Nibloe of MEADOWBROOK GARAGE… IP has been completing a task given to him by NIBLOE., NIBLOE has said that the work wasn't completed to his satisfaction so has told the IP to re do it. NIBLOE has then followed IP and "hovered over my shoulder" while he redid the work. IP has apparently got frustrated with this and to "fuck off and let me work", to which NIBLOE has replied "the last person who

told me to fuck off ended up in hospital, do you want to go to hospital too?" He has then said "I'v [sic] had enough of your shit, fuck off and get out, get your shit and go" NIBLOE has then grabbed IP by the scruff of his clothes and dragged him to the door before ejecting him. IP believes this stems from the fact that he has recently turned 19 and so his apprenticeship wage has risen., NIBLOE apparently has a history of firing staff at this point according to IP, IP is an apprentice from BROOKSBY MELTON COLLEGE 1 day a week, he has reported issues to the College who advised he report to POLICE.

72. The subsequent entry for 16 October 2017 records:

> *I have spoken with NIBLOE, PETE and informed him an allegation has been made that he had assaulted MACLEAN, CALLUM STUART and made a threat towards him. He denies this happened. He told me that MACLEAN had made a number of mistakes and that he challenged him on it.* ***He states MACLEAN was verbally abusive towards him and as such he sacked him. He told him to leave in no uncertain terms but did not lay hands on him or threaten him…***[Emphasis added]

73. The Tribunal recognised that the text with emphasis added was evidence quite clearly supporting the Claimant's allegation that he had been dismissed. There could be no sensible suggestion that the police officer making the entry had created a false entry to support the Claimant's case. Consequently the text either recorded what Mr Nibloe had said or the police officer made a mistake. The Tribunal concludes on the balance of probabilities that the police officer made a mistake. The Tribunal so concludes for the reasons including the following:

    73.1. It did not have the benefit of hearing oral evidence from the police officer and so has nothing to go on but the document itself;

    73.2. The Police Log is not a contemporaneous note of what Mr Nibloe said. The Tribunal did not have a copy of the police officer's note book and Mr Nibloe said that when the police officer was speaking to him he did not make notes. It is therefore most probably the police officer's recollection of what Mr Nibloe said when he returned to the police station;

    73.3. The focus of the police officer's interest was not whether Mr Nibloe had dismissed the Claimant but whether he had assaulted him. This increases the possibility of an error having been made in relation to the question of dismissal;

    73.4. There is a question mark over the accuracy of the Police Log in other respects. For example, the initial entry on 4 October 2017 records that the Claimant alleged that Mr Nibloe had physically thrown him out of the premises but in his oral evidence the Claimant made clear that he did not allege that he had been physically thrown out of the premises;

    73.5. The weight of the other evidence as set out above.

74. Taking the evidence in the round, the Tribunal finds that the Claimant as well as being young at the time of the incident (just 19) was also immature and emotional. The Tribunal finds that the Claimant in effect had a temper tantrum when Mr Nibloe told him to redo the metal shaping exercise. The Tribunal finds that the Claimant felt humiliated by what had occurred and gave both his family and the College an account of it which was not accurate and which included that Mr Nibloe had made physical contact with him. The Tribunal finds (in accordance with the Claimant's evidence) that the College told him he needed to report the matter to the police and that, if he did not, the College would. This put the Claimant in a position where he had little choice but to report the matter to the police. The Tribunal finds that the Claimant will have been upset by the incident on 4 October 2017 and that it is highly

likely that he did not have an accurate recollection of it when he spoke to others about it subsequently.

75. The Tribunal finds that if the Claimant had attended work with one of his parents (or indeed alone) later on 4 October or later that same week to discuss what had happened and to express remorse for his behaviour on 4 October 2017, then it is likely that his employment would have continued. However, what in fact happened was that Mr R Maclean became involved. The Tribunal finds that Mr R Maclean entered the fray in a highly combative mode (because he believed the Claimant's account of events) and that his threats to sue the Respondent when he spoke to Mr Nibloe on 5 October 2017 resulted in a situation in which it was very difficult for the Claimant to return to work and to eat humble pie. This is despite the fact that the Tribunal finds that Mr Nibloe made clear during the course of that conversation that he had not dismissed the Claimant. Consequently the Claimant decided not to return to work. He then managed to arrange what was in effect a continuation of his apprenticeship with Mr Vernon within a week or so.

76. The Tribunal prefers the evidence of Mr Nibloe to that of Mr R Maclean in relation to their phone call on 5 October 2017 as a result of its findings in relation to matters damaging credibility and the weight to be given to their respective evidence as set out above.

77. The Tribunal finds that following the meeting when Mr Eaddie met with Mr Nibloe and Mrs Bott on Friday, 6 October 2017, Mr Nibloe and Mrs Bott believed that, in light of what had occurred on Wednesday 4 October 2017, the Claimant would not return to work. Consequently, when he had still not returned by Tuesday 10 October 2017, the Respondent concluded that the Claimant had decided not to return, and so had by his conduct resigned. That resulted in the Respondent sending the College the email at page 107 which stated that the Claimant "has now left our employment".

Conclusions

Breach of contract (a common law contract of apprenticeship)

Was the Claimant dismissed by the Respondent or did he resign? The Claimant contends that he was expressly dismissed. He does not contend in the alternative that he was constructively dismissed.

78. In light of its findings of fact above, the Tribunal concludes that the Claimant was not dismissed by the Respondent. Rather, he walked out of work on 4 October 2017. Given his failure to return to work or make contact with the Respondent after that date, the Respondent was entitled to conclude that he had resigned by 10 October 2017 when it wrote to the College.

79. Because the Claimant resigned and was not dismissed (that is to say it was he not the Respondent who terminated the contract between them), his claim that he was dismissed in breach of contract (whether that contract was a contract of service or a common law contract of apprenticeship) fails and is dismissed.

80. However the Tribunal notes that it is relatively unusual that resignation will be the appropriate inference to draw from an employee's conduct and therefore records here its conclusions in case it is wrong about the question of resignation and the Claimant was dismissed by the Respondent on 10 October 2017 (or later) following his non-reappearance at work.

81. The Tribunal would have concluded that the failure of the Claimant to return to work on 4, 5, 6, 9 or 10 October 2017 and his failure to provide any explanation for his absence amounted to a repudiatory breach of contract by the Claimant (whether the

contract was one of service or was a common law contract of apprenticeship) and that the Respondent was entitled to accept that repudiatory breach by dismissing the Claimant. In these circumstances there would have been no breach of contract by the Respondent.

82. The Tribunal also records what its conclusions would have been if it had concluded that Mr Nibloe had dismissed the Claimant on 4 October 2017. These conclusions are reached on the basis that there is no dispute that the Claimant (1) said to Mr Nibloe "that's how you fucking told me to do it", when Mr Nibloe had told him that the metal shaping had been done incorrectly; (2) told Mr Nibloe to "fuck off"; (3) maintained at the time and subsequently that he had done the metal shaping correctly and that it was Mr Nibloe and not he who was wrong about this. There is no dispute about these matters because that was the gist of the Claimant's evidence at the Hearing. These conclusions are also reached in light of the findings of fact made at paragraph 65 above.

83. The Tribunal would have first had to consider whether the Claimant was employed under a contract of service or a contract of apprenticeship. The Tribunal would have reached the following conclusions.

    83.1. In Flett v Matheson [2006] ICR 673 the Court of Appeal made plain that a "modern apprenticeship" could be a contract of apprenticeship and not a contract of service;

    83.2. The question, therefore, given the Respondent's concession that it could not take advantage of section 35 of the 2009 Act which deem a modern apprenticeship to be a contract of service, was whether the arrangement under which the Claimant was employed had the essential features of an apprenticeship as set out in Dunk v George Waller & Son Ltd [1970] 2 QB 163 or whether in fact the intention of the parties was to enter into a contract of employment;

    83.3. In Dunk, Widgery LJ observed:

> *A contract of apprenticeship is significantly different from an ordinary contract of service if one has to consider damages for breach of the contract by an employer. A contract of apprenticeship secures three things for the apprentice: it secures him, first, a money payment during the period of apprenticeship; secondly, that he shall be instructed and trained and thus acquire skills which will be of value to him for the rest of his life; and, thirdly, it gives him status, because the evidence in this case made it quite clear that once a young man, as here, completes his apprenticeship and can show by certificate that he has completed his time with a well-known employer, this gets him off to a good start in the labour market and gives him a status the loss of which may be of considerable damage to him.*

    83.4. The only document containing the arrangements between the parties in this case was the Individual Learning Plan/Learning Agreement ("ILP") at page 89. This indicated a Learning Start Date of 30 November 2015 but included no end date. Rather the Respondent agreed (amongst other things) to:

- *Employ for the full length of the Apprenticeship duration (with a written contract of employment and Apprenticeship Agreement as set out in the ACSL Act 2009) and pay the learner/apprentice in accordance with agreed terms and conditions and taking into account relevant legislation (National Minimum Wages etc)…*

- *Allow the learner reasonable time within their contracted working hours to undertake any training that is required as part of the qualification both in the employer premises or at another, agreed location (i.e. College premises)…*

- *Provide, as far as is reasonably practical the experience, facilities and training necessary to achieve the training objectives as specified in the individual Learning Plan, without loss of wages and to treat the learner/apprentice fairly and reasonably as with the rest of the workforce and not discriminate or act unfairly against learners/apprentices.*

- *Attempt to provide, with the assistance of relevant organisations, employment for the apprentice with another company, in the event of redundancy and for the duration of the apprenticeship (Apprenticeships Only)…*

83.5. The Claimant agreed, (amongst other things) to:

- *Attend all scheduled sessions for the delivery of training towards the achievement of the qualification/Apprenticeship Framework;*
- *Work in a safe manner at all times by complying with all legislation and regulations as is required of you under employment law.*
- *Support your employer's involvement in your Learning and Development Program by ensuring that you…*

83.6. Having regard to the evidence of both the Claimant and Mr Nibloe, the understanding that they both had was that the contract would continue until the Claimant had completed the various Framework Components set out in the ILP. There was no fixed end date and no agreement that the contract could be terminated on notice prior to such completion;

83.7. If it had been necessary to consider this issue the Tribunal would have concluded in light of the evidence as set out above that the intention of the parties had been to enter into a contract of apprenticeship which was not terminable on notice and which would have ended when the various Framework Components (and so the "Apprenticeship") had been completed (albeit a further separate contract, possibly of apprenticeship, would in light of the evidence of the parties probably then have been entered into for the Claimant to work and study towards the NVQ level 3). The intention of the parties was not to enter into a contract of services. The only reference to a "contract of employment" in the ILP was in the context of the provisions of the 2009 Act. This would have been for the following reasons:

83.7.1. The purpose of the contract was first and foremost for the Claimant to be trained and to achieve a given level of skill recognised by the attainment of a recognised qualification. This is reflected in the terms of the ILP which focus largely on training without dealing at all, for instance, with matters such as holiday pay, hours of work, duties etc;

83.7.2. The contract does not set out any circumstances in which the contract may be terminated on notice or give any date on which it will in any event terminate and makes clear that even in the event of redundancy the ILP requires the Respondent to try to find the Claimant employment with another employer. This, the Tribunal finds, is a half-way house: the Respondent is not free simply to make the Claimant redundant as it would be with an employee; but equally, there is no absolute prohibition on redundancy. Nevertheless, the Tribunal finds that such a provision

(particularly as drafted in this case) is more consistent with the existence of a contract of apprenticeship than with one of service;

83.7.3. The contract repeatedly refers to "Apprenticeship";

83.7.4. Overall, the contract did in principle secure for the Claimant the three items identified by Widgery J: (1) pay during the apprenticeship; (2) instruction and training which would be of value to him for the rest of his life; (3) status as a trained man (albeit he would have needed to complete further training before becoming a fully qualified apprentice).

84. The Tribunal would then have had to go on and consider whether the Claimant's conduct was such as to justify dismissal. The kind of conduct which may well justify the dismissal of an employee will often not justify the dismissal of an apprentice. Mr R Maclean referred us to Shortland v Chantrill [1975] IRLR 208 in this respect but we found it be of only limited assistance because the question for the Tribunal in that case was whether the dismissal was fair. It should also be noted in so far as the Claimant relied on the factual similarity that in that case the employee having said "You couldn't have done any fucking better" had not gone on to twice tell the manager to "fuck off".

85. The Tribunal would have concluded that the misconduct of the Claimant in this case was gross misconduct. It was very serious and so of the kind which would warrant the dismissal even of an apprentice because:

85.1. It involved extremely abusive behaviour with the Claimant directing particularly foul language three times towards the most senior manager of the Respondent;

85.2. Further and separately, the context for the behaviour made it all the more serious, particularly in light of the Claimant's past behaviour, because it went to the Claimant's ability and willingness to be trained (the primary purpose of the contract). The Tribunal would have reached this conclusion because the origin of the behaviour was the Claimant failing to follow instructions and then, rather than apologizing and saying he would try again when this was pointed out to him, responding with a foul mouthed tirade ("that's how you fucking told me to do it") and petulant and juvenile behaviour (throwing the metal on the floor). The Claimant then in effect "doubled-down" on his initial reaction by telling Mr Nibloe to "fuck off" twice.

86. Consequently, if the Tribunal had concluded that the Claimant had in fact been dismissed, although it would have found that the contract was one of apprenticeship (and so the circumstances in which it could be terminated by reason of his misconduct were extremely limited), the Tribunal would have nevertheless concluded that his misconduct fell within those circumstances. Consequently the Tribunal would have concluded that the Claimant was not dismissed in breach of contract.

Disability discrimination

Issues – were all of the Claimant's claims presented within the time limits set out in section 123 of the 2010 Act?

87. The claims relating to the January 2016 and July 2017 Incidents were presented more than three months after those incidents had occurred. The Tribunal concludes that the Claimant has failed to show that one or both of these incidents comprised when taken together with other matters conduct extending over a period of time. Consequently, the question is whether it is just and equitable to extend time and hear the claims.

88. The Tribunal has concluded that it is not just and equitable to extend time in relation to the claim arising from the January 2016 Incident. This is for the following reasons:

    88.1. The length of the delay in presenting the claim is considerable. It was more than 18 months out of time;

    88.2. The Claimant has really provided no good reason for the delay - his explanation was in essence that he did not wish to pursue the matter at the time;

    88.3. The Claimant knew of the facts giving rise to the cause of action immediately (because if his account was true they were obvious) and yet he did not act for more than 18 months. He did not even raise a grievance;

    88.4. The Claimant, the Tribunal finds, did not take such steps as he might have taken to obtain legal advice;

    88.5. The Tribunal finds that the cogency of the evidence would be substantially affected by the delay because the relevant evidence comprised only witness evidence. There were no documents to which the Tribunal could usefully refer.

89. However the Tribunal has concluded that it would be just and equitable to extend time in relation to the claim arising from the July 2017 Incident. Although the Claimant has provided no good reason for the delay and did not take advice at the time, the delay was relatively short (the claim was only around two months out of time) and the Tribunal finds that consequently the cogency of the evidence will not have been significantly affected by the delay.

Issues – harassment (section 26 2010 Act): Did the Respondent engage in conduct as set out under (1) the heading "July 2017" at page 29 of the bundle; and (2) the heading "My final day: 4th October 2017" at page 13 of the bundle?

90. In light of its findings of fact set out above, the Tribunal concludes that the Respondent did not engage in such conduct. Accordingly, it has not been necessary for the Tribunal to decide issues 8), 9) and 10) above and the Claimant's claims of harassment fail and are dismissed.

Issues – discrimination arising from disability – the January 2016 Incident (section 15 Equality Act 2010)

91. This claim was out of time and the Tribunal has concluded that it would not be just and equitable to extend time to consider it. It has therefore not been necessary for the Tribunal to decide issues 11) to 14) above. The claim relating to the January 2016 Incident is dismissed.

Issues – discrimination arising from disability – the dismissal (section 15 Equality Act 2010)

Did the Respondent treat the Claimant unfavourably as follows: by deliberately provoking him by unfairly criticising his work on 4 October 2017 and then by dismissing him when he responded to that provocation?

92. In light of its findings of fact set out above, the Tribunal concludes that Mr Nibloe did not deliberately provoke the Claimant by unfairly criticising his work on 4 October 2017. The Tribunal concludes that the criticisms made by Mr Nibloe reflected an honest and reasonable appraisal of the way in which the Claimant had carried out the task in hand. The Tribunal concludes that there was absolutely no intention on the part of Mr Nibloe to provoke the Claimant.

93. The Tribunal further concludes in light of its findings of fact above that in any event Mr Nibloe did not dismiss the Claimant on 4 October 2017. Rather the Claimant left work of his own accord after losing his temper with Mr Nibloe.

Did the Respondent treat the Claimant unfavourably in that way because he was generally unreasonably and unjustifiably critical of the Claimant's performance at work (as a result of the difficulties the Claimant had with reading and writing).

94. The Tribunal has concluded that Mr Nibloe did not treat the Claimant unfavourably as alleged. Further, the Tribunal has concluded that Mr Nibloe was not generally unreasonably and unjustifiably critical of the Claimant's performance at work (as a result of the difficulties the Claimant had with reading and writing). The Claimant's claim that he was dismissed and that this was unfavourable treatment because of something arising in consequence of his disability therefore fails and is dismissed.

95. The Tribunal also records here what its conclusion would have been if it had concluded that the Respondent had dismissed the Claimant. In these circumstances the Tribunal would have concluded that the Respondent dismissed the Claimant because of the way he behaved on 4 October 2017 and that such behaviour and/or the reasons for such behaviour were not something arising in consequence of the Claimant's disability.

96. Because the Tribunal has been able to make clear findings about what was said and done and why by the Respondent, it has not found it necessary to consider the discrimination claims by reference to the shifting burden of proof provisions. The Tribunal was, overall, satisfied that the Respondent had proved on the balance of probabilities that its treatment of the Claimant was in no sense whatsoever related to the fact the he has dyslexia.

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Employment Judge Evans

Date: 26 March 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS