Case No: 3333829/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss N Hoenes	v	Mrs V Fowkes T/A Stonewell Cottage Day Nursery

Heard at: Cambridge County Court **On:** 30 September 2019

Before: Employment Judge Foxwell

Appearances:
For the Claimant: Mrs S Hoenes (Claimant's mother)
For the Respondent: Mr R Aireton (Solicitor)

JUDGMENT having been sent to the parties on 23 October 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is a claim brought by Miss Naomi Hoenes against Mrs Vicky Fowkes who trades as the Stonewell Cottage Day Nursery from premises in Moulton in Northamptonshire. Miss Hoenes worked at the nursery between 14 May 2018 and 17 August 2018. Having gone through early conciliation, on 3 October 2018 she presented claims to the Tribunal of unfair dismissal, for holiday pay and what she described as 'other payments'. From the grounds of claim attached to the claim form it was clear that the context of her claim was the alleged early termination of a contract of apprenticeship.

2. The claim was served by the Tribunal in the ordinary way under cover of a letter dated 31 October 2018. In accordance with its usual practice it gave a date for a final hearing; 21 February 2019. Mrs Fowkes did not enter a response to the claim but in early February 2019 Peninsula Business Services Limited, consultants instructed on her behalf, submitted a draft response and an application for an extension of time for its presentation. The original due date had been 28 November 2018 and, therefore, the response was significantly late. Because of this development the final hearing was postponed; additionally, Mrs Fowkes was undergoing medical treatment and was unavailable for the hearing date. Nevertheless, there was a preliminary hearing by telephone on 21 February 2019, which came

before me, in which I identified the issues in the case. These were as follows:

2.1 What was the nature of Miss Hoenes' contract?

2.2 If it was a contract of apprenticeship, did Mrs Fowkes have a right to terminate the contract before the end of the period of the apprenticeship?

2.3 If it was not a contract of apprenticeship, was Miss Hoenes paid the National Minimum Wage?

2.4 Did Miss Hoenes receive her entitlement to paid annual leave or was she paid in lieu of this upon dismissal?

2.5 Was Miss Hoenes' dismissal in breach of contract, and if so, what is the period of loss?

2.6 What was the reason or principal reason for dismissal?

2.7 Was that reason an automatically unfair one under s.104 of the Employment Rights Act 1996?

3. A final hearing was listed in Bury St Edmunds in July 2019 but, unfortunately, the Tribunal had to postpone this because of a lack of judicial resources. I can only apologise to the parties for the inconvenience that must have caused. The matter has come on again today for final hearing. For some inexplicable reason the notice of hearing describes it as a preliminary hearing, but both parties have come prepared for a final hearing and that is what I have dealt with.

4. The first question that I considered was whether Mrs Fowkes should have an extension of time for the presentation of her response. Miss Hoenes, who is represented by her mother Mrs Hoenes, took a pragmatic view it seemed to me. She was understandably unhappy about the fact that the response was late but, in light of Mrs Fowkes' explanation set out in a witness statement verified by a statement of truth and given the general desirability that cases are tried on their merits rather than by default, she did not vigorously oppose an extension of time. I thought that it was in the interests of justice to allow Mrs Fowkes a proper opportunity to respond to this claim. I accepted her explanation for the delay: occasionally it happens that mail inexplicably goes astray and is then found. In those circumstances, therefore, I granted an extension of time for the presentation of a response to the 5 February 2019 and accepted the response. Mrs Fowkes has therefore been able to participate fully in these proceedings.

5. To decide the issues, I heard evidence from Miss Hoenes and from Mrs Fowkes. Neither party called any other witnesses. Carla Roberts, the nursery manager, was present in the hearing but she had not prepared a witness statement (or been asked to prepare a witness statement it seems) and did not give evidence. Miss Hoenes' witness statement had

been drafted for her by her mother, although she adopted and confirmed it. Mrs Hoenes did not give evidence.

6. In addition to the evidence of these witnesses I considered the documents to which I was taken in an agreed bundle, comprising 149 pages. I also considered written submissions prepared by Mr Aireton and both he and Mrs Hoenes had an opportunity to summarise their cases for me at the end of the evidence.

Findings of fact

7. I make the following findings of fact on the balance of probabilities.

8. I start by saying that my impression is that both witnesses did their best to give me honest evidence from their perspective of events. I appreciate these differed, but that does not mean that either was seeking to mislead me in their evidence, differences simply reflected what they thought and recalled.

9. Mrs Fowkes operates a nursery and for a number of years has recruited apprentices from providers such as the YMCA. Apprentices are given on-the-job training at the nursery under the supervision of qualified practitioners. Every so often, and by arrangement, an assessor attends from the provider to assess the apprentice's progress and to set tasks for her (I am making an assumption that this is a predominantly female profession). Some external training is also provided to apprentices: I heard evidence that a pediatric first-aid course had been booked for Miss Hoenes. This was a one-day course which would have taken place in September 2018 had she still been at the nursery at that time. In closing submissions Mr Aireton also mentioned safeguarding and child focused training, but there was no evidence adduced of the proportion of time spent on these external courses.

10. Mrs Fowkes told me that apprenticeships typically lasted between 9 and 12 months and led to the apprentice achieving a Level 2 NVQ.

11. Mrs Fowkes pays apprentices in accordance with the National Minimum Wage at the apprentice rate. This is £3.70 per hour for apprentices aged under 19 or in the first 12 months of their apprenticeship.

12. Miss Hoenes was put forward as a potential apprentice by the YMCA and attended an interview in about May 2018. She was seen by Mrs Fowkes and Carla Roberts. They were sufficiently satisfied and impressed to offer Miss Hoenes a position as an apprentice. Miss Hoenes' recollection was that her apprenticeship was to last for 12 months. Mrs Fowkes said that it is more likely that she said 9 to 12 months as this accorded with her usual practice and I accept Mrs Fowkes' evidence on this point.

13. The only documentary evidence of the agreement is an undated offer letter at page 33, it said as follows:

> *"Dear Naomi,*
>
> *Thank you for coming to the interview for the position of early years apprentice. We are delighted to inform you that we would like to offer you the position with a 3 month probationary period. The position is full time and the hours are 9am-6pm every week day although these may be adjusted to suit the needs of the children and the nursery as was have to adhere to strict ratios. The pay for the above position has been agreed at £3.70 per hour as standard for level 2 apprenticeship role. Start date 14 May 2018. The offer of employment is subject to a suitable DBS check being completed and the satisfactory completion of a 3 month induction and probation period."*

14. Mrs Fowkes ended Miss Hoenes' contract on 17 August 2018 for alleged poor or unreliable performance.

The claims in more detail

15. Miss Hoenes has insufficient service to claim ordinary unfair dismissal and at an early stage in the proceedings Mrs Hoenes withdrew the claim of automatic unfair dismissal on her daughter's behalf. It seemed to me that this was entirely appropriate; the evidence did not show that Miss Hoenes had raised an issue about her rate of pay which then led to her dismissal.

16. Miss Hoenes' claim for unpaid wages is presented on the basis that, while engaged as an apprentice, in reality her apprenticeship had not begun and she ought, therefore, not to have been paid at the apprentice rate but at the full National Minimum Wage rate for her.

17. Her claim for holiday pay relates to two weeks' leave taken in July 2018 which she said was without pay.

18. The claim for breach of contract arises as the remedy for alleged wrongful early termination of a contract of apprenticeship and that aspect requires a little more explanation.

The legal framework

19. Historically the circumstances in which an apprenticeship could be terminated early were limited as, by definition, a contract of apprenticeship is a fixed-term contract and must be allowed to run for the full period of the fixed-term in most circumstances (see, for example, Wallace v CA Roofing Services Ltd [1996] IRLR 435). Accordingly, an employer can be liable in damages at common law for loss of earnings for the remainder of an apprenticeship period where the apprenticeship has wrongfully been ended early.

20. Apprenticeships at common law have largely been superseded by ones governed by statute. In fact, the statutory regulation of apprenticeships goes back to the 19th century. "Modern apprenticeships" were introduced by legislation in 1994 and these became known simply as "apprenticeships" in 2004. Case law soon established, however, that these statutory apprenticeships carried the same potential contractual consequences for an employer where there was early termination as common law ones (see the Court of Appeal's decision in Flett v Matheson [2006] ICR 673). Parliament intervened again in 2009 when it passed the Apprenticeship, Skills, Children and Learning Act 2009 (ASCLA). Amendments made to ASCLA in 2015 led to the creation of "Approved English Apprenticeships".

21. One of the features of an Approved English Apprenticeship is that it is treated as a contract of service rather than one of apprenticeship (see section 35(2) of the 2009 Act as amended). This means that it is treated like any other contract of employment in that it can be terminated by the employer giving express contractual or implied reasonable notice (provided it is at least the statutory minimum). So, in the case of most Approved English Apprenticeships that would be a one or, possibly, two week notice period.

22. Under section A1(3) of the 2009 Act, an Approved English Apprenticeship must satisfy three conditions. The first condition is that the apprenticeship should relate to a sector where there is an approved apprenticeship standard. This was not a matter dealt with in the evidence but in closing submissions Mr Aireton told me that there is a relevant standard, "Early Years Practitioner Level 2". I am prepared to accept that as it appears likely that this is regulated sector given Mrs Fowkes' experience of engaging apprentices in the past.

23. The second condition is that the apprenticeship agreement should provide for training to achieve that standard.

24. The third requirement is that the agreement must satisfy other conditions imposed by regulations issued by the relevant Secretary of State. The relevant regulations are the Apprenticeship (Miscellaneous Provisions) Regulations 2017. Under regulation 3 there is a requirement for an element of 'off-site' training. Under regulations 4 and 5 further requirements are that there is a practical period of not less than 12 months.

25. There is no express requirement for contracts of apprenticeship to be in writing, but it is difficult to see how any employer could meet the regulatory requirements of Approved English Apprenticeships without committing the key terms to writing.

26. I should add that in closing submissions Mr Aireton quite properly drew my attention to guidance issued by the Department of Education, which suggests that the requirement for off-site training should be approximately 20% of an apprentice's time; that would equate to one day a week for a

full-time worker.

27. I have reminded myself that the label parties attach to an agreement is helpful in deciding what that agreement may be, but is not decisive. It is the task of the Tribunal to consider the evidence to decide what the true nature of the agreement is; a contract describing itself as one of employment may in fact be a contract of apprenticeship and *vice versa* (see for example Chassis & Cab Specialists Ltd v Leigh UKEAT/0268/10).

Conclusions

28. Miss Hoenes' claim for unpaid wages is predicated on her not being an apprentice but an employee to which the higher National Minimum Wage rate would apply. So, I start with the question 'Was this a contract of apprenticeship?' There are factors which point in both directions in this regard:

    28.1 A factor which suggests that it was a contract of apprenticeship is the parties' label. Miss Hoenes was offered a position as *'an early years apprentice'*. It was put to her in evidence that she knew that it was an apprenticeship and she agreed. Miss Hoenes was introduced as a potential apprentice through an apprenticeship scheme. She was paid at the apprentice rate, which is considerably less than the standard rate for National Minimum Wage, and she did not complain about this at the time because it seemed consistent with her status. The objective of the agreement was for her to obtain experience and a qualification, an NVQ Level 2. So, all these factors are consistent with the agreement being a contract of apprenticeship.

    28.2 A countervailing factor is the existence of a probationary period; this is inimical to a contract of apprenticeship which should be for a fixed-term. Another factor is the absence of any or any clearly stated fixed term. There is nothing in the offer letter about the length of the apprenticeship but the parties' evidence helped me on this; Miss Hoenes recalled a 12 month term and Mrs Fowkes said she was likely to have mentioned a 9 to 12 month period depending on satisfactory completion.

29. Balancing these factors, I find that this was a contract of apprenticeship rather than a contract of employment. While one could conclude that Miss Hoenes' time at the nursery was a period of employment pending the commencement of an apprenticeship in light of the email from Linda Ludlow to the nursery dated 10 July 2018 (page 51), I find that the reality is that she attended the nursery on 14 May 2018 believing she was an apprentice about to start an apprenticeship; I also find that Mrs Fowkes thought that her new apprentice, the latest in a succession provided through an apprenticeship scheme, had arrived.

30. The next question is whether this was an Approved English Apprenticeship within the current statutory scheme? I am satisfied that it was not an Approved English Apprenticeship because it simply did not meet the requirements of the Regulations: there was no evidence of off-site training apart from the one day health and safety course; in fact, there was no evidence about the proportion of time spent on off-site training rather Mrs Fowkes' evidence was that the apprenticeship was based on on-site training with assessors coming in to assess on-site training. This was in flat contradiction to the requirement in regulation 3 of the 2017 Regulations.

31. The duration of the arrangement also appears to have been less than 12 months, or potentially less than 12 months. The requirements under regulations 4 and 5 is that the contract of apprenticeship must last for not less than 12 months. That was the outer limit of Mrs Fowkes' assessment of its likely length.

32. I find, therefore, that the exception to the ordinary rules relating to contracts of apprenticeship applying to Approved English Apprenticeships under section 35 of the 2009 Act does not apply here.

33. I am required therefore to consider whether, nevertheless, there is some basis upon which this contract of apprenticeship could have been terminated early. There is, of course, the express term providing for a probationary period, but, as I indicated earlier, such a term is at odds with a contract of apprenticeship, particularly where the ground for reviewing probation is alleged poor performance. The bargain which underlies apprenticeship envisages an employer making efforts to develop and encourage apprentices, including the poor performers and slow starters, over the course of the apprenticeship. In my judgment, despite the probation period clause, Mrs Fowkes did not have a contractual right to terminate Miss Hoenes' apprenticeship early.

34. This finding begs the question, what does 'early' mean?' In other words, was the term of the apprenticeship 9 months or 12 months or somewhere in between? I find that, given Miss Hoenes' difficult start to her apprenticeship, it was likely to be on the longer rather than the shorter side.

35. The case law is clear that contracts of apprenticeship cannot be ended early at common law absent the most serious of circumstances. There was insufficient evidence of this so I find that termination of this contract on 17 August 2018 for failing probation was wrongful and in breach of contract.

Pay claims

36. Other issues which arises in this case relate to the rate of pay that Miss Hoenes received during the course of her engagement and whether she has received her full entitlement to holiday pay. For the reasons given above, I am satisfied that Miss Hoenes was correctly paid at the

apprenticeship rate so no claim for unpaid wages arises on that basis. This leaves the question of holiday pay.

37. The parties have put forward their calculations of the pay which they say Miss Hoenes should have received. I found the explanations contained in witness statements and elucidated by cross examination unhelpful, but the statement of hours prepared by Mrs Fowkes at pages 102-106 was helpful. I accept that this is an accurate statement of the hours that Miss Hoenes was contracted to work.

38. Having gone through that schedule I arrived at a total of 374.5 hours as being those which Miss Hoenes worked (after deductions for late arrivals on some occasions). 374.5 hours would come to £1,385.65 at the apprentices' rate. I also calculated that Miss Hoenes was entitled to 4.8 days' accrued holiday during the currency of her employment. We cannot have 0.8 of a day, so it comes to 5 days, entitling her to £148 in respect of holiday pay. She had two weeks off unpaid but one of those weeks would have been without pay because of the length of time she worked. So, adding that to the hours actually worked, I came to a total of £1,533.65 which I find ought to have been paid to her.

39. None of that is to suggest that nothing was paid to her, far from it. Miss Hoenes' final pay slip at page 143 shows that she was paid a total of £1,497.26. So, I find that there is a shortfall of £36.39 and that is consistent with Miss Hoenes receiving most, if not all, of her holiday pay.

Damages for breach of contract

40. I turn then to damages for breach of contract. By the time of Miss Hoenes' dismissal she had, by agreement, reduced her hours to 30 hours per week (30 hours at £3.70). I find that her apprenticeship would have ended on or about 14 May 2019 on the balance of probabilities, which is 9 months after the actual termination date. I calculate the loss of earnings in this period to be 30 x £3.70 x 39 = £4,329.00.

41. Had Miss Hoenes worked her full apprenticeship she would also have been entitled to pay for the remainder of the two weeks leave that she took in July 2018 which is a further £148. I calculate therefore that damages for breach of contract come to £4,477.

42. I have had regard to the fact that Miss Hoenes became pregnant in September 2018 and her son Jack was born on 30 May 2019. I have considered whether it is appropriate to reduce the amount of damages to reflect any unpaid period prior to the birth of her son, but that was not a matter put to her in evidence so it is not a matter that I should take into account.

43. I do not accept Mr Aireton's submission that damages for breach of contract can be reduced for contributory fault. That is a statutory concept that applies to claims of unfair dismissal.

44. Accordingly, I find that there should be judgment for Miss Hoenes in the sum of £36.39 for unauthorised deductions from wages (unpaid holiday pay) and £4,477 in respect of damages for breach of contract.

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Employment Judge Foxwell

Date: 19 November 2019

Judgment sent to the parties on

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For the Tribunal office