



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Graham

**First Respondent:** MHD Builders Ltd

**Second Respondent:** Gareth Hyne

## JUDGMENT

**Heard on:** 21 September 2020

**Venue:** by Cloud Video Platform ('CVP')

**Before:** Employment Judge Sweeney

**Representation:**

For the claimant: Mr Mark Graham (Claimant's father)

For the respondents: No appearance

**The Judgment of the Tribunal is as follows:**

- 1. The Claimant's claim of breach of contract is well founded and succeeds.**
- 2. The First Respondent is ordered to pay the sum of £5,408 by way of damages to the Claimant.**
- 3. The Claim of direct age discrimination is well founded and succeeds.**
- 4. The First and Second Respondents are ordered to pay to the Claimant compensation in the sum of £2,500 such award to be on a joint and several basis.**

**JUDGMENT** having been given orally at the hearing on 21 September 2020 and on the basis that the respondents did not attend, the following reasons are provided.

# REASONS

## **The Claimant's claims and case management history**

1. By a Claim Form presented on 30 September 2019, the Claimant brought claims of age discrimination and breach of contract for early termination of apprenticeship against the First Respondent.
2. A first case management preliminary hearing was held in person on 06 December 2019 before Employment Judge Speker. At that hearing, the First Respondent was represented by Mr Michael Clarey, accountant. Orders were made for service of an amended claim and response.
3. On 21 April 2020 the matter came before me for a further case management preliminary hearing by telephone. I made some further orders relating to preparation for the hearing and I directed the Claimant and the First Respondent to answer specific questions relating to the claims and the response respectively.
4. The parties responded to the specific questions but the First Respondent did not comply with the directions regarding disclosure and bundle preparation. A third case management preliminary hearing took place, again before me and by telephone, on 16 June 2020. On this occasion there was no attendance by the First Respondent or its representative. I directed the First Respondent to inform the Tribunal why it had not attended the hearing and to explain why it had not complied with directions.
5. At that preliminary hearing, the Second Respondent, Mr Hynes, was added to the proceedings. The Claim Form was served on him but no response was received.
6. There was then a fourth case management preliminary hearing before me on 10 August 2020. Neither Respondent attended on this occasion. Furthermore, the First Respondent had not responded to the Tribunal correspondence and orders. I struck out its response pursuant to rule 37 of the 2013 Tribunal Rules for non-compliance with orders of the tribunal. I made directions for preparation for a Final Hearing and directed that the Respondents would only be entitled to participate to the extent permitted by the Judge hearing the claim.

## **The Final Hearing**

7. The Final Hearing took place as a remote hearing, using Cloud Video Platform ('CVP') technology. The Claimant was again represented by his father. Mr Graham had sent to the Tribunal a small bundle of documents consisting of 13 pages, which included a witness statement on behalf of the Claimant and an email from Ms Mandy Aspery.
8. The Claimant gave evidence. I asked him a number of questions about his claim and what compensation and/or damages he was seeking.

## The issues

9. The issues had been broadly identified and sent to the parties in the case management summary of the 3<sup>rd</sup> preliminary hearing of 16 June 2020:

### **Breach of contract claim:**

(1) Was there a completed contract?

(2) Was the contract one of apprenticeship not terminable prior to completion?

### **Discrimination claim:**

(3) Was the Claimant discriminated against because of the protected characteristic of age?

10. It was necessary to further define the issues. The essence of the breach of contract claim is as follows:

10.1. the Claimant contended that a contract had been formed and that the nature of that contract was one of training, that it was a contract of apprenticeship.

10.2. He contended that there was an offer, acceptance and consideration and that the essential terms were agreed, namely: duration of contract being 2 years starting in the month of August 2019 on a date to be finalised; a payment of £156 a week; 1 day release at Newcastle College and 4 days a week at MHD Builders premises as an apprentice joiner. The Claimant says that he was offered the role via Newcastle College and that he accepted it.

10.3. He contended that he was eventually told on 24 August 2019 that he was not being taken on. The Claimant contends that, by then, there was a completed contract and that this amounted to a termination of it. Moreover, it being a contract of apprenticeship, he says the Respondent was not entitled to terminate it early.

10.4. The Claimant claimed damages in respect of the 2 year period of the contract.

11. The age discrimination claim is based on a single email sent by the Second Respondent on 27 August 2019. At the preliminary hearing on 16 June 2019 it was identified that this was being pursued as a claim under section 108 Equality Act 2010 (as it had been sent after the 24<sup>th</sup> August 2019, the date on which the Claimant contends the contract was terminated).

12. The Claimant contends that the Second Respondent subjected the Claimant to a detriment by threatening to blacken his name among other prospective employers in the North East; that he did so because (in the sense of being materially influenced by) the Claimant's young age. The Claimant contends that this alleged act of discrimination arose out of and was closely connected to a contractual relationship which had existed between him and the Respondent.

**Findings of fact**

13. Having considered all the evidence before me (written and oral) and the submissions made by Mr Graham, I find the following facts.

14. On **01 May 2019** the Claimant responded to an advert which he found on the government website, Gov.uk and applied for the position of 'apprentice joiner MHD Builders Ltd'. His application was made through a contact at Newcastle College, the institute of further education to which the applicant (if successful) would be released on a weekly basis as part of his apprenticeship.

15. The advert was in the following terms:

*"To do all aspects of joinery work on new builds, extensions, fitting kitchens and garden landscaping.*

**Weekly Wage**

£156

*Wages explained*

*Apprentices are paid for their normal working hours and training that's part of their apprenticeship (usually one day per week).*

**Working Week**

*40 hours per week Monday to Friday 8am until 4pm with 30 mins breaks. May be required to work Saturday*

*Total hours per week: 40*

**Expected duration**

*24 months*

**Possible start date**

*02 September 2019*

*Date posted*

*29 April 2019*

*Apprenticeship level*

*Intermediate*

*Level 2 (GCSE)*

*Positions*

*1 available*

*You will gain experience in all aspects of joinery and carpentry work*

*Duties to include:*

- *Working on extensions*
- *Fitting doors and frame work*
- *Skirting*
- *Kitchen fitting*
- *Roof carpentry and landscaping”*

16. The advert then went on to set out personal requirements under ‘desired skills’ and ‘personal qualities’, ‘desired qualifications’.

17. The advert continued as follows:

*“future prospects*

*To complete the apprenticeship and remain with the company.*

*Things to consider*

*You will attend Newcastle College one day per week for the qualification.  
Must be able to travel easily to place of work for an 8am start*

*About the employer*

*MHD Ltd are a local construction company mainly working on domestic projects which include extensions, kitchen fitting, bathroom fitting, sunrooms, loft conversions structural work and landscaping. We have an experienced passionate team, who can help with every step of your development.*

*Training provider*

*Newcastle College*

*Applications for this apprenticeship are being processed by Newcastle College*

*Contact*

*Mandy Aspery*

*Level 2 Carpentry and Joinery*

*Apprenticeship standard*

*Carpentry and Joinery*

*Level 2 (GCSE)”*

18. On **12 June 2019**, Ms Aspery emailed C to say he had been selected for interview on Friday **21 June 2019** at Newcastle College’s Rye Hill Campus. He was told he would be interviewed by three people one of which was Gareth Hynes (the Second Respondent) described to the Claimant as one of the owners of the company.

19. The Claimant duly attended the interview which went very well. In fact, Mr Hynes was unable to attend the interview due to traffic and the Claimant was interviewed by Mr Steven Morton, a director and one other person whose name he could not recall. He was told about the company and that if offered the apprenticeship they would keep him on; that he would work Monday to Friday and may occasionally be

needed to work Saturdays. He was told of the hours of work and that the pay was £156 a week.

20. Later the same day, Mr Morton called the Claimant and offered him the apprenticeship saying that they would like him to start in August. He accepted it. The Claimant was also contacted by phone and by email by Ms Aspery to the same effect. In her email of 24 June 2019 at 14:03 she said:

*'Hello Callum*

*As per our telephone conversation*

*MYD were very impressed with you on Friday and would like to offer you the apprenticeship in joinery.*

*They are looking to start you in August.*

*Can you please confirm that you are happy to accept the offer of apprenticeship and that I have permission to give them your contact details?*

*Thank you'*

21. The Claimant, having already accepted the offer in conversation with Mr Morton, further confirmed his agreement to Ms Aspery the same day.

22. Having accepted the offer, the Claimant doing what he considered to be the right and honourable thing, turned down other opportunities which came his way. He considered himself bound to the First Respondent. One such opportunity related to BK Maintenance. On 17 July 2019 he was invited by a Mr Skelton of 'trainltd' to attend their construction centre for an induction as they were looking to enrol apprentices for September that year. The Claimant emailed Mr Skelton thanking him for the opportunity saying: *'I have recently just got an apprenticeship doing joinery and starting in August. But thank you anyways'*.

23. Time passed and the Claimant, having turned down other opportunities, became concerned that he had not heard from the First Respondent. He decided to call them. He eventually got in touch with the Second Respondent. Mr Hynes informed the Claimant that the college had to set up a health and safety meeting where everything could be signed. A further month went by and the Claimant received no contact from the First Respondent. He rang Mr Hynes again. On this occasion Mr Hynes told him that the company was losing a contract and that they might not be able to take him on but that he would let him know in a few days.

24. However, Mr Hynes did not call back so the Claimant rang again to find out what was happening. Mr Hynes told him that the company had lost one contract but that he was going to another meeting with regards to another contract and that he would get back to the Claimant after that. Mr Hynes did not call back.

25. The Claimant called Mr Hynes again the following day. Mr Hynes told the Claimant that they could not take him on because they had no work and he would give him a reference. When the Claimant explained how he felt he had been mistreated the Second Respondent told him that he was not important to them.

26. The Claimant contacted ACAS and was advised to email the company, which he did on 27 August 2019 at 12:59 pm [page 4 of the bundle].

27. Mr Hynes responded the same day at 16:56 saying:

*"Hi Callum,*

*Now we are extremely shocked that you have sent this email. We are a very busy company and I did tell you on the phone, which resulted in me missing giving you a call back. Regarding your threat about the employment tribunal and wanting compensation we wish you the best of luck as there was no contract signed. I have spoken to my solicitor. I have to say you have a really bad attitude problem on the phone and in this email. I genuinely tried to say that we have a company with large workforce and it doesn't revolve around getting you a job. We haven't signed any contracts at all or even told you that you have secured a place with us.*

*We are well known in the construction industry around the north east and you will know a lot of the larger companies which we do work with. I will of course have to now inform them of this email with your name and your threat, as I couldn't now recommend you which I had offered in the first place.*

*You have become someone that seems to be impossible to even employ by anyone, my personal opinion is you have a lot of maturing up to do and to also work on your attitude towards potential employers. I will also be forwarding this onto my solicitor who I have just contacted regarding what you have said. He has said there is no contract signed and also he was shocked in the fact you have done this with a large employer in the construction industry."*

28. The Claimant was shocked and upset to receive this email. It has affected his confidence and caused him undue worry about his future job prospects. He was deterred from pursuing his wish to be a skilled joiner in light of the threats contained in the email and was dejected by Mr Hynes's aggressive and threatening response.

29. In April 2019, the Claimant secured part-time employment with a supermarket, earning more than £156, the wage he would have earned during his apprenticeship with the First Respondent. The wages he would have earned from 02 September 2019 to April 2020 amounts to £5,408.

## **Relevant law**

### **Formation of contracts**

30. A contract is a promise, or set of promises, that the law will enforce. The terms of a contract must be sufficiently clear and certain for the courts to be able to give them meaning. There must be an agreement made with the intention of creating legal relations and the agreement must be supported by consideration.

31. There must first be an offer. An offer is an indication of a willingness to be bound by a contract. It need not be in writing, but it must be made with the intention of being legally bound as soon as the offer is accepted. Apparent intention to be bound may be sufficient, if a reasonable person would believe that the offeror intended to be bound by his or her words or conduct. The offer must be sufficiently clear and unequivocal to enable the person to whom it has been made to accept it without further negotiation and to be effective, the offer must be communicated to the person it is addressed to.
32. The offer must be accepted and acceptance communicated to the offeror.
33. In most cases, an agreement, even if it is made with the intention of creating legal relations, will not be binding on the parties unless it is supported by consideration (contracts of apprenticeship are an exception to this requirement). Consideration is something of value which passes between the parties when the contract is performed and can consist of an exchange of promises. The consideration need not have a monetary value, but it must be of benefit to the person who has made the promise (or of detriment to the person who obtains the benefit of the promise).

### **Common law apprenticeships**

34. At common law a contract of apprenticeship remains distinct from a contract of service. Although modern legislation includes contracts for apprenticeships in the definition of contracts of employment and the concept of a 'statutory apprenticeship' has been created, the apprenticeship remains a distinct type of contract at common law. It has traditionally been a feature of apprenticeships that they were for a fixed term and could not be terminated merely by the employer giving notice.
35. Unlike a contract of service, which has as its object the performance of work, the primary purpose of a contract of apprenticeship is training.
36. In the past, an apprenticeship agreement was required to be created by way of deed. That changed with section 2 of The Apprentices Act 1814, which required executory contracts of apprenticeship to be in writing (see **Edmonds v Lawson and others** [2000] I.C.R 567, CA @ para 29). Oral contracts of apprenticeship were valid albeit enforceable only if acted upon. However, the 1814 Act was repealed by Statute Law (Repeals) Act 2004. There is no case law that considers there to be any current requirement for a common law contract of apprenticeship to be in writing. Section 230(2) Employment Rights Act 1996 (which defines 'contract of employment' for the purposes of many statutory employment rights) envisages the possibility of a contract of apprenticeship being oral. It provides that a contract of employment means 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing'.
37. Perhaps the most significant difference between a contract of service and a contract of apprenticeship is the restricted provision for lawful termination in respect of the



latter. It is a feature of contracts of apprenticeship that they cannot usually be terminated earlier except in cases of serious misconduct by the apprentice.

38. In **Wallace v CA Roofing Services Ltd** 1996 IRLR 435, QBD, Mr Justice Sedley (as he then was) had to decide whether an orally agreed contract of apprenticeship included a provision allowing the employer to terminate the apprenticeship in case of a downturn in work — i.e. in a redundancy situation. He held that there was no such agreement on the facts and went on to give the obiter view that such flexibility could not be accommodated in a common law contract of apprenticeship in any event. In **Flett v Matheson** 2006 ICR 673, CA, Lord Justice Pill noted that ‘once a contract has been categorised as one of apprenticeship, with a specific period of training contemplated, the right to dismiss on the ground of redundancy should not readily be implied’.
39. Whereas damages for wrongful dismissal under a contract of service are generally limited to the amount the employee has lost by way of notice pay, damages for wrongful termination of a contract of apprenticeship may give rise to substantial damages for lost earnings during the remainder of the apprenticeship and for the potential diminution of the apprentice’s future prospects: **Dunk v George Waller and Son Ltd** 1970 2 QB 163, CA.

### **Statutory apprenticeships**

40. The Apprenticeships, Skills, Children and Learning Act 2009 (‘ASCLA’) replaced the previous Modern Apprenticeship scheme and introduced a framework for government-funded apprenticeships, called ‘apprenticeship agreements’, in England and Wales. Sections A5 and 35 of the Act state that apprenticeship agreements that meet the statutory criteria are to be treated for all purposes as contracts of service, not contracts of apprenticeship.
41. ASCLA 2009 was changed with effect on 26 May 2015 with the result that a new approved English apprenticeships framework applies in England. The Act sets out certain requirements which such agreements must satisfy.
42. Apprenticeships entered into on or after 26 May 2015, in sectors where there is an approved apprenticeship standard, are covered by the new regime. Apprenticeships entered into on or after that date, in sectors where there is no approved apprenticeship standard and the apprenticeship takes place under an apprenticeship framework, are covered by the old statutory regime. An approved English apprenticeship agreement is to be treated as a contract of service and is specifically not a contract of apprenticeship (section A5, ASCLA 2009).
43. Apprenticeship agreements must satisfy certain conditions and must be in the “prescribed form”. The prescribed form is laid down in the Apprenticeship Agreement Regulations.

## Age Discrimination

44. 'Age' is listed in section 4 Equality Act 2010 as one of the protected characteristics covered by the Act.
45. Section 5(1) Equality Act 2010 states that a reference in the Act to a person who has the protected characteristic of age is 'a reference to a person of a particular age group', and a reference to persons who share that characteristic is 'a reference to persons of the same age group'. An 'age group' is a group of persons defined by reference to age, whether to a particular age or to a range of ages.
46. In stark contrast to all other strands of discrimination, employers can seek to justify direct as well as indirect age discrimination.
47. Section 13(1) Equality Act 2010 provides that 'A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others'.
48. A complainant must show that he received less favourable treatment 'because of a protected characteristic'. In **Nagarajan v London Regional Transport** 1999 ICR 877, HL, a case concerned with the definition of direct discrimination under the RRA (which referred to treatment 'on racial grounds'), Lord Nicholls said 'if racial grounds... had a *significant influence* on the outcome, discrimination is made out'.
49. Section 83(2)(a) Equality Act 2010 provides that 'employment' means: '*employment under a contract of employment or a contract of apprenticeship or a contract personally to do work.*'
50. Section 40 Equality Act 2010 provides for protection from harassment against employees and applicants for employment. Harassment is defined in section 26 Equality Act 2010 as unwanted conduct related to a relevant protected characteristic and which has the purpose or effect described in section 26(1)(b).
51. Section 108 Equality Act 2010 includes a specific provision covering discrimination and harassment occurring after an employment relationship has ended A person must not discriminate against or harass another if:
- 51.1. The discrimination or harassment 'arises out of and is closely connected to a relationship which used to exist between them' – section 108(1)(a) and (2)(a) and
- 51.2. Conduct of a description constituting the discrimination or harassment would, if it occurred during the relationship, contravene the Equality Act – section 108(1)(b) and (2)(a).

## Burden of proof

52. Section 136 Equality Act 2010, otherwise known as the burden of proof provision, lays down a two-stage process for determining whether the burden shifts to the employer. However, it is not obligatory for Employment Tribunals to apply that process. Whether there is a need to resort to the burden of proof provision will vary in every given case. For example, if a tribunal accepts as genuine an explanation for treatment of an individual, which has nothing to do with the particular protected characteristic in question, then that is the end of the matter, even if it amounts to bad treatment of the complainant: **Hewage v Gampian Health Board** [2012] I.C.R. 1054.
53. Where there is room for doubt as to the facts necessary to establish discrimination, the burden of proof provision will have a role to play. However, where the tribunal is in a position to make positive findings on the evidence one way or the other, there is little to be gained by otherwise reverting to the provision.
54. In cases where the tribunal is not in a position to make positive findings, s136(2) means that if there are facts from which the tribunal could properly conclude, in the absence of any other explanation, that A had harassed B, it must so conclude unless A satisfies it otherwise. In considering whether it could properly so conclude, the tribunal must consider all the evidence, not just that adduced by the Claimant but also that of the Respondent. That is the first stage, which is often referred to as the 'prima facie' case. The second stage is only reached if there is a prima facie case. At this stage, it is for A to show that he did not breach the statutory provision in question. Therefore, the Tribunal must carefully consider A's explanation for the conduct or treatment in question: **Madarassy v Nomura International plc** [2007] I.C.R. 867, CA; **Igen Ltd v Wong** [2005] I.C.R. 931, CA.

## Conclusions

### Was there a contract?

55. Was a contract formed between the Claimant and the First Respondent? I conclude that there was:
- 55.1. On 21 June 2019 an offer was made by Mr Steven Morton for the Claimant to start an apprenticeship with the First Respondent on the terms already set out in the advert and as described at the interview with a starting date sometime in August but no later than 02 September 2019 (see above). Those terms were clear. I conclude that in making the offer on behalf of the First Respondent, Mr Morton intended the First Respondent to be bound by them.
- 55.2. The Claimant accepted the offer on the telephone with Mr Morton.
- 55.3. On 24 June 2019 that offer was also repeated via Newcastle College (Mandy Asperly, Learner Engagement Consultant, which was R1's chosen method of communication [page 3];

55.4. On 24 June 2019 the Claimant further communicated his acceptance to Mandy Aspery [page 3]. From my findings as to the arrangements put in place between the First Respondent and Newcastle College, I infer on the balance of probabilities that Mandy Aspery, in the normal course of business, also communicated the Claimant's acceptance to the First Respondent by telephone. However, he had already personally communicated his acceptance to Mr Morton in any event. It is notable that in his email of 27 August 2019, Mr Hynes refers to there being no 'signed' contract in place. He conveniently omits to mention anything about verbal offer and acceptance. His highlighting of the word 'signed' serves to emphasise only the oral nature of the contract between the Claimant and the First Respondent – something to which Mr Hynes was most likely keen to avoid reference.

55.5. The offer and acceptance was accompanied by consideration in an exchange of promises: the Claimant promised to work for and be trained by the First Respondent which in turn promised to train the Claimant over a period of two years and to pay him £156. A good illustration of the consideration provided by the Claimant was his rejection of other apprenticeship opportunities. Having obtained the benefit of the First Respondent's promise, he incurred the detriment of rejecting other opportunities.

55.6. There was an intention to create legal relations as evidenced by the oral description of terms given to the Claimant: duration, weekly wage, hours of work and the need to work occasionally on a Saturday. From the Claimant's perspective, evidence of an intention to create legal relations is found not only in his evidence that he believed he was bound to the Respondent but also in his actions in refusing other opportunities demonstrating that he did consider himself bound to the Respondent.

56. Therefore, as of 24 June 2019, at the latest, there was a completed contract in place. The fact that the Claimant had not taken up employment or training under that contract was not to the point. The contract was in existence.

### **The nature of the contract**

57. The next question is what was the status or nature of that contract? If it was a contract of employment then the Claimant's claim for damages for two years was unsustainable. He could only possibly lay claim to such damages if the contract were a contract of apprenticeship.

58. I was particularly anxious to understand whether the agreement that the parties had intended to enter into might have been an English Approved Apprenticeship Agreement. However, I rule this out. An English Approved Apprenticeship Agreement is to be on a prescribed form. No prescribed form was completed or even mentioned. The only reference is to an 'apprenticeship' in joinery – a skilled trade.

59. I have heard nothing from the Respondent to counter the argument of the Claimant, which was that:

- 59.1. The contract was to train;
  - 59.2. The duration was for a period of 24 months;
  - 59.3. The intention was to take him on as a qualified joiner at the end;
60. In its email of 14 May 2020, in response to the directions of the Tribunal, the First Respondent (while denying that there was a contract in place) accepted that the intention of the First Respondent was to offer to train the Claimant but that it ultimately did not do so because it had lost a contract with a property developer in August 2019.
61. The Claimant's evidence and submissions was that the purpose of the contract was to train him in joinery and not just to recruit an employee on the cheap who would simply acquire a qualification and move on. Given the reference to apprenticeship in the documents and the First Respondent's acceptance that it had intended to train the Claimant as a joiner, I conclude that the verbal contract was indeed a common-law contract of apprenticeship. Its purpose was to train the Claimant as a joiner.
62. The historical requirement for such contracts to be reduced to writing having been abolished, in arriving at my conclusion that the contract amounted to a contract of apprenticeship I have applied general principles on contractual formation, considered and determined the purpose of the contract and ruled out the existence of a statutory apprenticeship in the absence of any forms (prescribed or otherwise) to that effect.

### **Termination of the contract**

63. Having determined the contract to be one of apprenticeship, I turned to consider its termination. It is well established that normal notice provisions do not apply to such contracts. Even if the First Respondent had lost a contract, that was no basis for terminating the Claimant's contract, which had by then come into being.
64. When it told the Claimant that he was not being 'taken on', the First Respondent was in fact terminating the contract and wrongfully terminating it. The contract was not terminable on notice – even allowing for the loss of a contract as alluded to by Mr Hynes (as it would have been had it been a 'mere' contract of employment or an approved English apprenticeship). The Claimant is entitled to damages for the loss of income during the 24 month period (see **Dunk v George** Waller above).
65. His loss of income was £156 a week from September 2019 to the end of April 2019 when he mitigated his loss, being a total of £5,408. This loss is recoverable and I make an award to that effect as damages for breach of contract. I also considered whether the Claimant should be awarded damages in respect of any future loss of career prospects beyond the duration of 2 years, as this is also potentially recoverable (see the above authorities). However, I was not presented with any evidence as to job opportunities for joiners, or the wages which a newly trained joiner would command. I could only make an award based on the evidence of loss before me, which was limited to losses sustained during the period from 02 September 2019 to date. Had there been additional evidence of loss of career prospects and earnings

beyond the two year period, the award may well have been more substantial. As it is, on the evidence the Claimant is entitled to the sum of £5,408.

### Age Discrimination

66. I turn now to consider the complaint of age discrimination. An apprentice is an 'employee' for the purposes of section 39 Equality Act 2010 (see section 83 Equality Act 2010). Working from the premise that there had been a contract of apprenticeship and it was terminated summarily on 24 August 2019, the alleged act of discrimination occurred after the termination of 'employment' (the email having been sent by Mr Hynes on 27 August 2019).
67. The email of 27 August 2019 [page 4 of the bundle] from the Second Respondent is a nasty threat to scupper the Claimant's opportunities by blackening his name among businesses in the industry in which he sought to work.
68. Mr Hynes has not engaged in the litigation. Therefore, I have not heard from him as to what motivated him to send the email. However, the content speaks for itself and is such that I need not resort to the burden of proof provisions as I can make a positive finding on his motivation. Mr Hynes was significantly influenced in the making of his threat by the Claimant's age. This is demonstrated by the implicit reference to the Claimant's age and him having "*a lot of maturing up to do*". I infer that he would not make this particular threat to an older person (whether a job applicant or employee).
69. If I were required to approach the matter by considering 136 Equality Act, that reference to '*maturing*', coupled with references to the Claimant's 'attitude' and then the threat to take advantage of his inexperience by contacting large employers in the industry, constitute facts from which the Tribunal could decide in the absence of any other explanation that Mr Hynes was motivated by the Claimant's youth and inexperience. Given Mr Hynes' non-engagement there is no non-discriminatory explanation advanced.
70. Even though there is no explanation, I must not automatically rush to a conclusion that he was motivated by age. I recognise that it may also be that Mr Hynes was also motivated to issue this threat by the Claimant's reference to tribunal proceedings. I need not be satisfied that age was the only or sole motivating factor. It is enough that age is a significant influence, which I conclude it was in this case, from the language used. Indeed, I am satisfied that in Mr Hynes' case it was the dominant motivating factor. It is clear from the email that Mr Hynes was trying to teach the Claimant a bit of a lesson. He has arrogantly taken umbrage that such a young man, looking to start out in his career should send such an email asserting his rights. He threatened to do him damage by undermining him before his attempts to secure an apprenticeship even got off the ground. Mr Hynes would not have treated an older person in this way. He treated the Claimant less favourably because of his age. In doing so, he subjected him to a detriment – any reasonable worker, employee or job applicant would see the threat to blacken his name and job prospects as a detriment.

71. Given the failure to engage there is no attempted justification for sending the email of 27 August 2020. There can be no legitimate aim that I can conceive of that could be met, proportionately or otherwise, by threatening to blacken the Claimant's name with other employers.
72. This discrimination arises out of and is closely connected to the contractual relationship which existed between the Claimant and the First Respondent. That much is clear from the email itself: it only comes about because of the oral contract which had been entered into. The threat is inextricably intertwined with that relationship in that it relates to the First Respondent's termination of the relationship and the natural consequence of such termination, namely the Claimant's likely attempt to secure employment elsewhere. It is difficult to envisage a scenario less connected with the relationship. Had Mr Hynes sent this email during the relationship it would contravene section 13 and section 26 Equality Act 2010.
73. Had I not concluded that this amounted to an act of direct discrimination I would have concluded that by threatening the Claimant in the email Mr Hynes engaged in unwanted conduct related to age which had the purpose and the effect of creating a hostile and intimidating environment for the Claimant and thereby harassed him within the meaning of section 26 Equality Act 2010.
74. Had I not concluded that the Claimant was an apprentice I would have concluded that he was an employee. Further, were I to be wrong that there was a concluded contract which had been terminated, I would have concluded in the alternative that he was an applicant for employment and that applying section 40(1)(b) he was harassed as such.
75. This email from Mr Hynes had a particularly demoralising effect on the Claimant. It knocked his confidence – to such an extent that he has had second thoughts about pursuing such a career. He did not expect a person in a senior position as Mr Hynes was to behave in such a way and it knocked him back and shook him.
76. I consider the appropriate bracket for injury to feelings to be the lower 'Vento' bracket. An amount of £2,500 reflects the injury to the Claimant's feelings and the damage to his confidence as described by him in evidence and as reflected in his giving up hopes of becoming a joiner and taking employment in a supermarket for now.
77. The award of £2,500 is joint and several meaning that it may be enforced against either the First or the Second Respondent. The award of £5,408 is enforceable against the First Respondent only.

**Employment Judge Sweeney**

14 October 2020