EMPLOYMENT TRIBUNALS

Claimant: Mr D Simpson

Respondent: Westcott Refrigeration & Air Conditioning Limited

Heard at: Birmingham (via CVP) **On:** 9 July 2021

Before: Employment Judge Edmonds

Representation
Claimant: Mrs S Simpson (mother)
Respondent: Mrs K Swanson (director)

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was V (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

RESERVED LIABILITY JUDGMENT

1. The name of the respondent is amended by consent to Westcott Refrigeration & Air Conditioning Limited.

2. The claimant was employed as a common law apprentice and his claim for breach of contract succeeds.

3. The claimant's claim for accrued but untaken holiday pay succeeds.

4. The parties shall seek to agree the amount of compensation payable to the claimant on or before 14 September 2021, failing which a separate remedy hearing will be listed.

REASONS

Introduction

1. The claimant was a trainee engineer employed by the respondent. He was dismissed in January 2021 by reason of redundancy and claims that this was a breach of contract due to him being employed as a common law apprentice, and also claims that there has been a failure to pay him the holiday pay that he was owed. ACAS pre-claim conciliation commenced on 6 January 2021 and ended on 16 February 2021. The ET1 was presented on 19 February 2021.

Claims and Issues

2. The claimant has brought claims for breach of contract and holiday pay. The issues were agreed at the start of the hearing as follows:

Breach of contract

a. Was the claimant employed under a common law contract of apprenticeship?

b. If so, what was the duration of the contract of apprenticeship?

c. If the claimant was employed under a common law contract of apprenticeship, was the respondent entitled to terminate the apprenticeship prior to the expiry of the fixed term?

d. What is the appropriate award of damages?

Holiday pay

a. What was the holiday year? It was accepted that the holiday year ran from 1 May to 30 April in each year, and therefore that the claimant's period of employment all fell within the same holiday year. There are therefore no issues of carry-over to consider.

b. How much holiday had the claimant accrued by the termination of his employment?

c. How much holiday had the claimant taken by the termination of his employment?

d. Was there any accrued but untaken holiday at the end of employment?

e. If so, did the claimant receive payment in lieu of some/all of this?

f. What is the rate of holiday pay?

g. What payment (if any) is owed to the claimant?

It was accepted that:

a. the claimant had been paid a week's pay in lieu of notice;

b. the claimant did not have two years' service and therefore could not bring an ordinary unfair dismissal claim; and

c. the claimant's contract of employment was not a statutory apprenticeship agreement under the government's apprenticeship scheme set out in the Apprenticeships, Skills, Children and Learning Act 2009, and no government funding had been applied for under that scheme.

Procedure, documents and evidence heard

3. I was initially presented with eleven attachments to an email from the respondent by way of a Bundle, and no witness statements from either party. However, at the outset of the hearing it became apparent that the claimant had prepared another Bundle and a witness statement, which had been hand delivered to the Tribunal. After some technical issues, and with the assistance of both parties, the relevant documents and the claimant's witness statement were ultimately sent by email before evidence was heard.

4. One of the documents in the respondent's bundle related to private discussions between the parties and ACAS. I therefore confirmed to the parties at the outset that I would be disregarding this document due to its "without prejudice" nature, meaning that it formed part of a genuine attempt to resolve the dispute prior to hearing and was therefore confidential between the parties.

5. The tribunal heard evidence from the claimant and his mother, Mrs Simpson, and from Mrs Swanson and Mr Mistry on behalf of the respondent. We agreed to use the claimant's claim form and the respondent's response form as containing the evidence in chief of Mrs Simpson, Mrs Swanson and Mr Mistry respectively.

6. The claimant has slow process dyslexia and therefore his mother assisted him during the hearing. It was ensured that the claimant was offered sufficient time to consider the questions put to him and that questions were asked as simply as possible.

7. It was agreed that the name of the Respondent should be amended to Westcott Refrigeration & Air Conditioning Limited as per the respondent's ET3 and I gave an order to that effect.

Findings of Fact

8. The claimant was employed under a contract of employment stating him to be a "trainee engineer" within the respondent, a refrigeration and air conditioning company, from 3 August 2020 to 4 January 2021. His role involved the maintenance and assisting in the installation of air conditioning and refrigeration units.

9. Prior to commencing employment with the respondent, the claimant had been studying for a Level 2 qualification at college in electrical installation. By the time he took the role with the respondent, he had virtually completed the Level 2

qualification and just needed to finalise a few things before being signed off as complete. Whilst working at the respondent, he took a half a day's holiday to complete this.

10. Had he not taken on the role with the respondent, I find that he would have remained at the college and progressed to Level 3, which would have automatically started in the autumn of 2020 had the claimant not withdrawn from that course. I particularly note that, having been dismissed, the claimant has now signed up to do just that, which will start in the autumn of 2021.

11. The claimant became aware from another employee that the respondent was looking to take on an apprentice in July 2020 and provided a copy of his CV. There was no advertised vacancy. He went into the office and met with Mrs Swanson and Mr Mistry of the respondent before being offered the role. It was a new role (and not replacing any other employee).

12. Mrs Swanson emailed the claimant on 13 July 2020 to offer him the role. In this email she referred to the position being "an apprenticeship", to start on 3 August 2020. The email went onto say that the "apprenticeship starting rate" would be £4.15 per hour, and that further employment details would be provided once the claimant started work. It is worth noting at this point that £4.15 was the statutory minimum apprenticeship rate of pay at that time, and would have been below the national minimum wage if the claimant was not an apprentice. The respondent's position on this is that they made an error, and they should have paid the claimant the higher national minimum wage rate based on his age (at that time £4.55 per hour). I find that this was not an error, and that the respondent deliberately used the apprenticeship rate of pay, believing this to be the correct rate for his role.

13. The claimant also stated in evidence that verbal discussions used the word "apprentice", whereas the respondent submits it used the word "trainee". I find that, even if the word "trainee" was used sometimes, on balance the word "apprentice" was also used, given that this was consistent with the email dated 13 July 2020 and with the rate of pay on offer. In reality, I do not believe that the respondent thought it significant which term was applied, and probably used them interchangeably.

14. On commencing employment, the claimant was then provided with an offer letter which said, amongst other things, that:

    a. He was to be a "Trainee Engineer";

    b. His hourly pay was £4.15 per hour (£166 per 44 hour week) with overtime at £6.22 per hour;

    c. He was to have a two month probationary trial period;

    d. His holiday entitlement was to be 20 days per annum plus bank and public holidays;

    e. The holiday year commences on 1 May and ends on 30 April in any year; and

f. 3 days' of the 20 days' holiday must be used over the Christmas shut down.

The claimant confirmed his acceptance of these terms on 6 August 2020.

15. This was then supplemented by a formal contract of employment dated and signed by the claimant on 21 October 2020. Amongst other things, it provided that:

a. The claimant was a “Trainee Engineer”;

b. He was being offered a "further twelve months employment to run from 3rd October 2020 to 3rd October 2021, this being reviewed again in October 2021";

c. His job description was "installation, maintenance and service of air conditioning units";

d. His rate of pay was £4.15 per hour with additional rates for overtime, Sundays and Bank Holidays;

e. He was employed on a full time basis, with normal working hours of 40 hours per week, with fixed lunch breaks;

f. The holiday provisions outlined in the offer letter were repeated;

g. He was entitled to attend day release at college to attain the required qualifications for his employment, with the respondent paying the claimant for attending the college as well as course fees including transport costs. In the event the claimant left the respondent of his own accord within two years of completing the course he was required to repay the college fees in full;

h. Either party was permitted to terminate the employment on 1 weeks' notice up to two years' service (rising thereafter), and within this clause the employment was described as “permanent”; and

i. Detailed disciplinary provisions were included.

16. Although the claimant’s contract of employment provided for him to attend day release at college to attain qualifications, in reality he did not do so as he did not have any active college course at that time. However, he worked on a supervised basis with other engineers, and would watch what other engineers did to learn from them and help them with their work. He did not work alone, because he was a trainee, and the respondent accepted that his role was more about assisting and learning than significant productive work at least initially. Ultimately, he believed that his role would lead to a formal qualification in heating and ventilation (known as H-Vac), and as part of this in the future he would attend college alongside work. The respondent said that this was possible, and that the idea was to work for a year or so first and see how things went whilst “learning the basics” before considering moving to the next stage (i.e. college alongside work). There was no set date on which this would have commenced, this was

dependent on how quickly the claimant picked up the necessary skills and when the respondent felt he was ready. Whilst not at college, the respondent confirmed that the claimant would have been learning with the respondent every day and I agree that this was the case.

17. Although the claimant hoped to ultimately attend college whilst working for the respondent, his contract of employment was for a fixed period to end in October 2021. I find, based on the evidence of both parties, that both parties understood that it could end in October 2021, and it was only if both parties wanted the arrangement to continue that a further fixed term would be offered, and at that point the claimant might have been ready to start the college course.

18. On 17 December 2020 the claimant felt unwell and subsequently arranged to have a COVID-19 test. This came back positive and the claimant was therefore required to isolate. He notified his employer of this, and the end of the isolation period coincided with the respondent's Christmas shut down (requiring him to use 3 days' of his annual leave entitlement) therefore he was not due back to work until 4 January 2021. The claimant had also taken another day's holiday in December 2020 to attend an appointment.

19. The claimant returned to work on 4 January 2021 and was asked to attend the respondent's office, where he was told by Mr Mistry that he was being made redundant due to the pandemic and reduction in workload. This was to take place with immediate effect, with a payment in lieu of notice being made to him. There has been some confusion about the termination date: I find that, whilst the claimant was entitled to a week's notice, because this was made as a payment in lieu (rather than him working his notice period), the termination date was 4 January 2021. No other employees were made redundant at that time.

20. The claimant submits that the respondent could and should have furloughed him, and/or that the dismissal was motivated by ill feeling towards the claimant due to him having tested positive for COVID-19. Mr Mistry gave evidence that the reason for dismissal was purely due to the pandemic: he spoke honestly and transparently about the claimant and his role, and I therefore accept his evidence in that regard.

21. The claimant has now re-enrolled at college for the Level 3 electrical installation course, but has to wait until the autumn of 2021 to start that course as it was already underway for the current academic year at the time of his dismissal. The claimant says that he was unable to find any other suitable apprenticeships on the national apprenticeship webpage based on his working criteria and I accept that to be the case. The claimant has not received any benefits since leaving the respondent, and has not applied for any roles as he asserts there were none available to apply for, and he had not taken on any temporary work.

Law

Breach of contract / apprenticeship status

22. There are two types of apprenticeship:

a. a statutory apprenticeship within the government framework;

b. a "common law" or traditional apprenticeship, also known as a "contract of apprenticeship".

A key difference between the two types is that employment can be terminated in the usual way with statutory apprenticeships, but special rules apply to common law apprenticeships. As it is accepted in this case that there was no statutory apprenticeship, I do not set out the law in relation to those.

23. The key difference between a normal employment contract and a contract of apprenticeship is that a normal employment contract is about doing work, whereas a contract of apprenticeship is about training. As stated by the Court of Appeal in *Dunk v George Waller and Son Ltd 1970 2 QB 163*:

> *"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 would 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."*

24. A contract of apprenticeship can exist whether or not the employee is labelled as an "apprentice": *Chassis and Cab Specialists Ltd v Lee UKEAT 0268/10*, and it is recognised by the Law Society that "trainee solicitors" are nevertheless common law apprentices. However, the label given to the relationship by the parties can still be relevant: *Commissioners for HM Revenue and Customs v Jones and ors (Trading as Holmescales Riding Centre) 2014 ICR D 43 EAT*.

25. The following factors should be considered (*Chassis*, above, and *Flett v Matheson [2006] ICR 673*):

a. Whether training is the principal purpose of the contract

b. The duration of the training

c. The level of qualifications to be gained

d. The contractual intention of the parties

e. The labels and language applied to the relationship.

Incidental training may not point towards an apprenticeship. In *Gillies v Invincible Security Ltd ET Case No. S/4101700/17*) it was found that an individual was not an apprentice despite being labelled as one, because he had only a few days of in-house training, whereas an apprentice would usually have both off and on the job training, the contract was not for any particular duration and it provided for termination on one month's notice after the probationary period.

26. Contracts of apprenticeship will be for a fixed term and a clause allowing for earlier termination is generally inconsistent with a contract of apprenticeship (*Commissioners for HM Revenue and Customs v Jones and ors (Trading as Holmescales Riding Centre) 2014 ICR D 43 EAT*).

27. It is not usually possible to terminate a contract of apprenticeship before the expiry of the fixed term, except in very rare circumstances. Redundancy is not normally a sufficient reason for termination, and for it to be a sufficient reason there would need to be clear wording enabling that to happen. In *Wallace v CA Roofing Services Ltd 1996 IRLR 435*, where a contract contained a standard provision for early termination on notice, this was insufficient to enable early termination for redundancy. As Mr Justice Sedley said in that case:

> *"Although modern legislation has assimilated apprenticeships to contracts of employment, the contract of apprenticeship remains a distinct entity at common law. Its first purpose is training; the execution of work for the employer is secondary. In such a relationship, the ordinary law as to dismissal does not apply. The contract is for a fixed term and is not terminable at will as a contract of employment is at common law."*

28. Damages for breach of contract should seek to put the claimant back in the position they would have been in had the contract not been breached. The claimant must seek to mitigate (i.e. reduce) their loss (for example by seeking alternative employment), but can claim for diminution in future prospects (*Dunk*, above).

Holiday Pay

29. Regulation 13 of the Working Time Regulations 1998 provides for a minimum of four weeks' leave in any leave year. In addition, Regulation 13A provides for an additional minimum 1.6 weeks' leave in any leave year, making the total minimum statutory leave 5.6 weeks' leave. This is inclusive of bank and public holidays.

30. The leave year begins on such date as may be provided for in a relevant agreement: Regulation 13(3).

31. Regulation 15(2) of the Working Time Regulations 1998 enables an employer to require an employee to take leave at a particular time, by giving notice specifying the days on which leave is to be taken, providing minimum notice requirements are complied with.

32. Regulation 14 provides that, where employment ends and, at the termination date, the worker has taken less holiday than that which was due to them, the employer is obliged to make a payment in lieu of accrued but untaken leave.

Conclusions

Breach of contract / apprenticeship status

Was the claimant employed under a contract of apprenticeship?

33. First, I consider whether training was the principal purpose of the contract. I find that it was. Whilst the claimant did not attend off site training (other than the half day to complete his level 2, which was taken as holiday because it related to the course he was on before starting at the respondent), which is unusual and which points against a contract of apprenticeship, I have had regard to the following:

    a. Both the claimant and respondent were clear that the focus of the claimant's role was to learn. This was not incidental training. He was there to learn the basics and essentially ensure that he was up to the challenge of the occupation (both from his perspective and from his employer's), before enrolling at college. The college course in question was a difficult one and the respondent felt it was best for trainees to spend some time in the role first, to understand it better, which would make their college course easier once they got to it – and to ensure that they were capable of it before being enrolled. Therefore, the time spent at work prior to starting college was a core part of the training.

    b. His contract of employment envisaged that he would be entitled to attend college. Whilst this is not determinative, it does indicate that the respondent envisaged the role as being one where college work may be relevant and where the role was different to that of a normal employee; and

    c. The claimant did not work alone but instead worked alongside more experienced employees and they led on the tasks with the claimant assisting. The respondent freely accepted that the work done by the claimant would not have been productive initially.

34. I next turn to the duration of the training. The contract was for a clear fixed term ending on 3 October 2021, albeit that there was potential for renewal at that point. I have considered whether in reality the duration of the contract should be the entirety of the period until the claimant would have completed his college course, but I do not believe that to be the case: the contractual term was clearly set out and both parties understood that the employment would end at that point unless the contract was renewed. There was also no clear point at which the college course would commence and/or finish as this was dependent on when the respondent felt the claimant was ready to start it, and therefore I conclude that it cannot be said that the duration was anything longer than until 3 October 2021.

35. In relation to the level of qualifications to be gained, no specific formal qualification would be gained during the fixed term period of this contract, which points away from a contract of apprenticeship. However, if the claimant then progressed to complete the future college course and remained at the respondent, he would then have gained a qualification (the H-Vac), and the fixed term to October 2021 would have been part and parcel of the work leading to that. The claimant certainly believed that he was on the way towards that. In addition, because the claimant would not be permitted by the respondent to progress to the college course until such time as he was sufficiently skilled at the respondent, there was an informal qualification to be gained, namely competence to do the college course, and in wider terms he was certainly gaining relevant skills towards becoming an engineer.

36. As to the contractual intention of the parties, I conclude that the intention of the parties was in effect to create a two-stage apprenticeship: the first being the fixed term until October 2021 whereby the claimant would train “on the job”. There was then the possibility of the contract being renewed to allow for the claimant to sign up to a college course alongside work which would then lead to the formal qualification. Both parties anticipated that the claimant could eventually qualify through this route and it was on that basis that he was offered employment.

37. I have also had regard to the fact that some features of the claimant’s contract point away from a contract of apprenticeship – notably there was a probationary period, a termination clause enabling both parties to terminate the contract early, and disciplinary provisions which included provision for termination. In addition, the termination clause states “this employment is permanent” which is inconsistent with the previous provision setting out a clear fixed term. I conclude that what happened was that the respondent utilised standard wording here (both in relation to the termination clause and the disciplinary provisions) and that the termination clause was not intended to convey any permanence in reality, given that both parties were clear that there was a fixed term to October 2021. I conclude that the respondent did think that it could have dismissed the claimant at any time on the appropriate amount of notice and/or dismissed the claimant during the probationary period, however this was because the respondent had understandably not appreciated that special rules apply to apprentices in this regard, rather than because the respondent did not think of the claimant as an apprentice.

38. In relation to the labels and language applied by the parties, the sequence of events was as follows:

    a. the claimant heard that the respondent was looking for an “apprentice” and reached out to it in that context;

    b. the claimant was verbally offered an apprentice position;

    c. the claimant was sent an email offering him a role as an “apprentice” on 13 July 2020

    d. on starting work the claimant was presented with an offer letter saying that he was a “trainee engineer”;

    e. he signed a contract of employment on 21 October 2020 which again described him as a “trainee engineer”;

    f. throughout his employment he was paid at the apprenticeship rate, not the national minimum wage rate applicable to normal employees of his age.

    Everything here is consistent with a contract of apprenticeship. He was paid at the apprenticeship rate, and the early discussions about the role described him as an apprentice. Even though the later contractual documentation referred to him as a trainee, by then the contract had already been formed through the offer and acceptance of the apprenticeship

position, and in addition the word “trainee” is not inconsistent with an apprentice in any case (in the same way as trainee solicitors are employed under contracts of apprenticeship). Whichever term is used, it is apparent that the focus is on the claimant’s learning, not just him doing a job.

39. Finally, I have considered whether in reality what was happening was a year of “normal” employment, followed by an apprenticeship once the employee attends college, however on balance I find that it was an apprenticeship from the outset. Were the type of employment intended to be different, the contract of employment would have been drafted differently, without the provision about college, and I also conclude that the amount of training that was involved in the initial period was sufficient to render it an apprenticeship in any event. In reality, training was still the principal purpose of the contract despite their being no off the job training course, and the on the job training was the pre-cursor to the college training that would follow if both parties felt the claimant was ready for that next step: in essence the role was to train him up to be ready for the off the job training that might follow.

40. Overall, I therefore conclude that the claimant was employed under a contract of apprenticeship.

What was the duration of the contract of apprenticeship?

41. The duration was until 3 October 2021. As outlined above, I have considered whether the duration was a longer period, until such time as the college qualification had been gained but on balance find that it was not.

Was the respondent entitled to terminate the claimant’s employment before the expiry of the fixed term?

42. It is not normally open to an employer to terminate a common law apprentice’s employment before the expiry of a fixed term. In this case the reason for termination was redundancy, which is not ordinarily sufficient reason for dismissal. The claimant was the only employee made redundant, and therefore this is not a case where the business was entirely insolvent. Whilst the contract contained a general provision for early termination, it did not contain any specific provision for termination in the case of redundancy.

43. I therefore conclude that it was not open to the respondent to terminate the claimant’s employment on these grounds, and therefore that the claimant was dismissed in breach of contract.

What is the appropriate award of damages?

44. Whilst it was agreed that the fixed term would have expired on 3 October 2021, and I conclude that this is the relevant date to be considered for the purposes of assessing damages, there were no submissions from either party as to whether there should be any reduction to compensation for any failure to mitigate losses (i.e. failure to take sufficient steps to find new employment following termination). Given both parties were unrepresented, it is not appropriate to determine the level of compensation without the parties having the opportunity to consider that

aspect, along with the amount of compensation they say should be paid more generally.

45. I therefore invite the parties to seek to agree the amount of compensation payable between themselves, taking into account my conclusions above. The parties must write to the Tribunal on or before 14 September 2021 to confirm whether they have been able to do so. If the parties are unable to reach agreement, a separate remedy hearing shall be listed to consider this.

Holiday Pay

46. The holiday year ran from 1 May to 30 April in each year. The claimant's employment commenced on 3 August 2020 and ended on 4 January 2020, therefore he had worked for 5 complete months at the time of his dismissal.

47. The claimant's contract entitled him to 20 days' holiday per year, plus bank holidays: this complies with the statutory minimum period of holiday. The claimant would have taken four bank holidays during his employment (August bank holiday, Christmas Day, Boxing Day and New Year's Day).

48. Excluding bank holidays, this means that holiday would accrue at the rate of 1.67 days' per month, resulting in him having accrued 8.35 days' holiday. At the hearing Mrs Simpson explained that the government self-calculator estimated that he had a higher amount of holiday, however this would have included bank holidays which had in fact been accounted for separately by the respondent.

49. The claimant took 4.5 days' holiday during his employment. This left the claimant with 3.85 days' holiday accrued but untaken when his employment ended.

50. Given that compensation has not yet been determined in relation to the breach of contract claim, likewise the parties are invited to seek to agree the appropriate figure for holiday pay based on the above and based on the claimant's rate of pay of £4.15 per hour. The parties should confirm to the Tribunal on or before 14 September 2021 whether the figure has been agreed, and if not this shall again be considered at a remedy hearing.

Employment Judge Edmonds
1 August 2021