



EMPLOYMENT TRIBUNALS

Claimant Mr P Hart

Respondent Steve Hoskin Construction Limited

Heard at: Exeter (by video hearing)

On: 7,8 & 9 February 2022

Before:

Employment Judge Goraj

Members Mrs V Blake

Mr G Jones

Representation

The Claimant: in person

The Respondent – Mr T Challacombe, Counsel

A SUMMARY JUDGMENT having been sent to the parties and written reasons having been requested in accordance with Rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided: -

REASONS

BACKGROUND

1. By a claim form presented on 4 October 2020, which is at pages 1-12 of the hearing bundle ("the bundle") the claimant, who stated that he was employed by the respondent from 1 October 2018 to 7 July 2020, brought claims for unfair dismissal, age discrimination and breach of contract. The claimant contended that he was employed as an Apprentice Bricklayer for a fixed term of 2 years and 6 months. The claimant further contended that he was selected for redundancy because of his age when other younger apprentices were not made redundant or were offered alternative employment with the respondent and allowed to continue with their apprenticeship. The claimant's date

of birth is 15 May 1971. The claimant was therefore aged 49 at the date of his dismissal by the respondent.

2. The claimant's allegations were denied by the respondent in its response which is at pages 7 -26 of the bundle. The respondent's grounds of defence are at pages 23 -26 of the bundle. In summary, the respondent accepted that the claimant was employed as an Apprentice Bricklayer and further that the agreement with the City College Plymouth included a planned end date of 31 March 2021. The respondent however denied that the claimant was engaged for a fixed term period and contended that it was entitled to terminate the claimant's employment on notice. The respondent further contended that the claimant was dismissed by reason of redundancy, that the claimant was selected because of his disciplinary, capability and attendance record and that the employees who were made redundant were a range of ages (pages 25 – 26 of the bundle).
3. The claimant's complaint of unfair dismissal was subsequently struck out by a Judgment which was send to the parties on 28 June 2021(page 40 of the bundle) on the grounds that the claimant had insufficient qualifying service to bring such a complaint.
4. Following the instruction of solicitors, the claimant's complaints were subsequently clarified by the further and better particulars at pages 41 – 50 of the bundle. The claimant identified in the particulars that he compared himself with the remaining Apprentice Bricklayers (as he was the only Apprentice Bricklayer who was dismissed by reason of redundancy) but named in particular three comparators (on whom he continues to rely) for the purposes of his direct age discrimination claim namely, Declan Williams, Tom Rudge and Tyler Pope whom he stated were in their late teens/ early twenties.
5. The claimant attached to the particulars the contractual documentation upon which he relied in support of his breach of contract claim namely the Apprenticeship Employer Agreement Form 2017/2018 (pages 52- 53 of the bundle), dated 8/9 October 2018, the Contract of Services – Employer Agreement dated 8/ 9 October 2018– (pages 54 – 56 of the bundle) and the Apprenticeship Contract form 2017/2018 dated 8/9 October 2018 (pages 57-58 of the bundle).

The Case Management Order dated 14 July 2021

6. The matter was the subject of a case management preliminary hearing on 14 July 2021 at which both parties were represented by solicitors. The associated Case management order also dated 14 July 2021 ("the Order") is at page 59- 67 of the bundle. The background and issues

(subject to the respondent's amended response and the further clarification referred to below) are set out at paragraphs 65 - 67 of that Order.

7. The respondent's amended response is at pages 68 – 73 of the bundle.

THE BUNDLE OF DOCUMENTS

8. The Tribunal was provided with an agreed bundle of documents (albeit that it contains in separate sections documents provided by the claimant and the respondent) ("the bundle").

WITNESS STATEMENTS

9. The Tribunal received witness statements and heard oral evidence from :- (a) the claimant and (b) on behalf of the respondent, from Mr N Hoskin, Managing Director and Mr S Gilbert, Production Manager/ Senior Contracts manager.

THE CLAIMANT'S ACAS CERTIFICATE

10. The claimant's ACAS Conciliation Certificate records that the claimant's EC notification was received on 12 August 2020 and that the EC Certificate was issued on 27 August 2020.

THE ISSUES

11. The Issues were further clarified as follows: -

Age discrimination

- 11.1 Direct age discrimination (paragraph 57 1, 1.1 of the Order (page 65 – 67 of the bundle). The claimant was aged 49 at the date of his dismissal by the respondent (date of birth 15 May 1971). The claimant confirmed that:- (a) the "age group" to which he belonged for the purposes of section 5 of the Equality Act 2010 ("the 2010 Act") is "late 40s" and (b) that he compared himself with the remaining younger Apprentice Bricklayers who belonged to the "late teens/ early 20s" age group. The respondent confirmed that the dates of birth of the 3 named comparators are as follows: - (a) Declan Williams -25 November 1999 (b) Tom Rudge – 2 November 1992 and (c) Tyler Pope – 6 July 2002. The respondent denies any less favourable treatment because of age and says that reason for the claimant's dismissal was the application of the respondent's redundancy selection criteria which were not related to age.

- 11.2 Indirect age discrimination (paragraph 57.2, of the Order). It was agreed that the provision criterion or practice (“PCP”) identified at paragraph 2.1 of the Order was not appropriate and further that it is apparent from the pleadings that the PCP relied upon the claimant is that “the respondent selected/ dismissed for redundancy the highest paid Apprentice Bricklayers”. The claimant further contended that this placed him, and any other Apprentice Bricklayers in the late 40s age group (of which there were none at the relevant time), at a particular disadvantage as they were paid at higher rate because of his/ their age. The respondent did not object to the amendment of the PCP and further accepted that if it was applied (which was denied) that it could potentially have placed the claimant and any others in the late 40s age group at a particular disadvantage compared to those in the late teens / early twenties age group by reason of pay rates. The respondent’s position however continues to be that the claimant was selected / dismissed for redundancy by reason of the application of its redundancy selection procedure which was not related to age or levels of pay.
- 11.3 Breach of contract claim (paragraph 57.2 of the Order) – after discussion with the parties it was agreed that the contractual issues which the Tribunal is required to determine are :- (a) whether the claimant was employed on a statutory Approved English Apprenticeship (b) if not, was the claimant engaged on a common law contract of apprenticeship (c) was the contract, in any event, for a fixed term or was it terminable on notice and (d) if on notice what period of notice (an agreed period or, in the absence of an agreed period of notice, what would have been a reasonable period of notice in all the circumstances?). In summary, the claimant contended that he was engaged on a common law contract of apprenticeship for a fixed period of 2 years and 6 months. In summary, the respondent contended that the claimant was employed on an Approved English Apprenticeship which was terminable on 1 weeks’ notice (for which the claimant was paid). The respondent however confirmed that in the event that the Tribunal found that claimant was not employed on an Approved English Apprenticeship it accepted that he was engaged on a common law apprenticeship (which it contends that it was nevertheless entitled to terminate by reason of serious concerns relating to the claimant’s capability/ conduct).
- 11.4 Remedy (paragraph 57.4 of the Order) – it was agreed that the Tribunal would deal first with liability (save for any submissions relating to section 38 of the Employment Act 2002).

THE FACTS

Background

12. The respondent is a construction company which employed approximately 300 employees at the relevant time. The respondent has an HR manager. The respondent's workforce included 9 apprentices 8 of which were "Apprentice Bricklayers", (including the claimant) at the relevant time. The claimant's date of birth is 15 May 1971. The remaining Apprentices are in their late teens / twenties. The dates of birth of the three named comparators are recorded at paragraph 11.1 above.
13. Prior to his engagement with the respondent, the claimant ran his own windscreen business and decided to train as a Bricklayer following a taster course at college.

The contracts

14. The respondent entered into a series of contracts relating to the claimant's engagement as an Apprentice Bricklayer as referred to below. The contractual arrangements were dealt with on behalf of the respondent by Mr Vout SHEQ Manager of the respondent who is no longer in their employment.
15. On 8 October 2018, the respondent entered into what is described as an Apprenticeship Employer Agreement form 2017/2018 ("the Agreement") with the City College Plymouth ("the College") for the engagement of the claimant as an Apprentice Bricklayer on a standard apprenticeship. This document is at pages 52 – 53 of the bundle. In the section entitled Apprenticeship information the Agreement states that the start date of the apprenticeship is 9 October 2018 and that the planned end date is 31 March 2021. The Agreement also contained a number of eligibility criteria including that the Apprentice must be in paid employment for a least 30 hours per week unless otherwise agreed with the College. The Agreement further stated that the claimant was contracted for 40 hours per week which included 8 hours per week off the job training. The Agreement also provided for the respondent to be responsible for the claimant's course fees and stated that the responsibilities of the respondent included the engagement of the Apprentice and that the employer must provide the Apprentice Agreement at the start of the Apprenticeship which must be in place and cover the entire length of the Apprenticeship in order that a completion certificate could be issued. In the definition of terms the

Employer is defined as the organisation that has a contract of employment with the Apprentice.

16. The respondent also entered into a Contract of Services – Employer Agreement dated 8 October 2018 with the College which is at pages 54 – 56 of the bundle. The Tribunal has noted in particular, the responsibilities of the respondent at paragraph 1.1, 1.2 1.3. 1.6, 1.7 1.8 1.9 and 1.10 and 1.21 relating to contractual and training matters. These included the requirement to employ and pay the Apprentice in accordance with agreed employment terms and conditions including, subject to earlier termination, for at least the period set out in the Apprenticeship Framework or Standard, to provide the Apprentice with an Apprenticeship Agreement which must be in place for the entire duration of the apprenticeship and to provide the Apprentice with on and off the job training including paid time to attend off the job training.
17. The parties and the College also entered into a tripartite agreement entitled Contract Form 2017/ 2018 which is at pages 57 – 58 of the bundle which was signed by the parties on 8 and 9 October 2018. The Tribunal has noted in particular the obligations of the respondent and the claimant including the obligations of the respondent to employ and pay the claimant in accordance with the agreed employment terms and provide the claimant with a contract of employment within 13 weeks of start date and commitments to on and off the job training.

The letter of appointment

18. The respondent contended that its HR manager wrote to the claimant by a letter dated 10 October 2018 (which is stated to have been delivered by hand) to detail the agreement of the claimant's apprenticeship with the claimant. This letter is at page 74 of the bundle. The letter states that following a meeting with Mr Vout, the claimant had been offered a placement with the respondent in the post of an Apprentice Bricklayer at a salary of £6. 50 per hour commencing on 1 October 2018. The letter also set out what it described as the main terms and conditions of employment which included that the claimant would be hourly paid, paid fortnightly and that his employment was subject to the successful completion of a 12-week probationary period. There is no reference in the letter to any fixed period of employment or to any provisions for termination. Further there is no reference in the letter to the issue of any separate contract/ statement of terms and conditions of employment. This letter is unsigned and the slip at the bottom of the letter, whereby the claimant is required to sign to signify his acceptance of the offer, is not completed.

19. The respondent further contended that the claimant was also issued with the contract of employment which is at pages 75 – 82 of the bundle. This contract is unsigned and undated. This contract contains detailed provisions including, at paragraph 21, for the termination of the claimant's employment on 1 weeks' notice after more than 1 month but less than 2 years' service. (page 80 of the bundle).
20. It was agreed between the parties that there was an oral agreement between the claimant and Mr Vout whereby the claimant would be paid at £6.50 per hour in recognition of the fact that he was an older Apprentice and also that the claimant would be paid fortnightly. The claimant however denied having received the letter of offer dated 10 October 2018 and /or the contract of employment referred to above and contended that as far as he was concerned his terms of engagement were regulated by the Agreements referred to at paragraphs 15 -17 above.
21. Having given the matter careful consideration, the Tribunal is not satisfied, on the balance of probabilities, that the claimant received the written letter of offer and /or the contract of employment referred to above. When reaching such conclusions the Tribunal has taken into account in particular that:- (a) the claimant, whom it considers to be an overall reliable witness, denied any such receipt (b) neither document is signed by the respondent (c) there is no signed acknowledgment from the claimant confirming receipt of the letter dated 10 October 2018 (d) that the contract of employment is undated and unsigned and further that there is no accompanying letter or reference to the proposed issue of a contract in the respondent's letter dated 10 October 2018 and (e) the Tribunal has not received any evidence from the respondent (including from the HR officer who is still in the employment of the respondent and was in attendance at the hearing) confirming the issue of such documents to the claimant.

The claimant's work / training / associated matters

22. The claimant was assigned to Mr T Rennie, who was his mentor throughout the claimant's engagement with the respondent. The claimant also attended off the job paid training at the College in accordance with the Agreements referred to above. The claimant focused on bricklaying and stonework with Mr Rennie but also undertook general labouring work as and when required.
23. The claimant does not contend that he received any less favourable treatment from the respondent prior to the events relating to his redundancy because of his age

24. At the date of his dismissal, the claimant was paid an hourly rate of £8.72 per hour. Two of the claimant's named comparators were on a lower hourly rate of pay of £4.50- £5.90 however Mr Rudge was on the same hourly rate as the claimant.
25. The claimant's work was subject to review as part of his training arrangements with the College from time to time (pages 127, 128, 130 – 131 132-5 138, 141- 151 and 163 – 164 of the bundle). Overall, the claimant received positive feedback regarding his work. Concerns were however raised about the fact that the claimant found it difficult working in wet weather combined with the length of the working week (the notes dated 6 January 2020 at page 164 of the bundle). It was also acknowledged by the claimant in his discussions with Mr Rennie that the claimant worked at a slower pace than his colleagues.
26. In the period prior to the redundancy exercise, Mr Gilbert received a complaint from a site manager regarding the standard of the claimant's work. Mr Gilbert raised this with Mr Rennie but was not aware of whether Mr Rennie had raised it with the claimant.

Written warning

27. The claimant received, as did a number of apprentices, a final written warning dated 11 February 2020 (page 229 of the bundle) concerning the inaccurate completion and submission of time sheets which was considered as fraudulent by the respondent. The claimant accepted that he had completed the timesheets incorrectly but contended that this was an accidental error which should have been picked up by his supervisor. The claimant raised the matter with his supervisor who advised him that it would be unwise to pursue it further. The claimant did not appeal the warning.

Absence

28. Although this was disputed by the claimant (who believed that he had had 9 / 11 days absence) the Tribunal is satisfied, having regard to pages 136, 137 139, 140 and 165 of the bundle, that the claimant had 15 days of absence (9 days absence for sickness and 6 absence for other reasons). The absences were for a variety of reasons and there is no evidence that they related to any underlying health conditions.

The impact of the coronavirus

29. The respondent was affected, in common with other employers, by the impact of the coronavirus pandemic. The respondent issued a memorandum to all employees dated 20 March 2020 regarding the impact of the pandemic. The memorandum explained the seriousness

of the situation including that the respondent was unable to guarantee that there would not be job losses in the future.

30. By a further memorandum to staff dated 25 March 2020 (pages 230 – 232 of the bundle), the respondent advised staff of the decision to close their sites together with the proposal to place staff on furlough. The respondent wrote to the claimant by letter dated 1 April 2020 (which is at page 233 – 234 of the bundle) in which it informed the claimant that it proposed to place him on furlough which was accepted by the claimant (page 235 of the bundle).
31. On 26 May 2020, the respondent wrote to furloughed employees advising them of the proposal to bring staff back on a phased return to work. Employees were advised that the respondent would be withdrawing from the furlough scheme from June 2020. Staff were also advised that the respondent was unable to guarantee that there would not be job losses in the future (pages 236 – 239 of the bundle).

Redundancy analysis process

32. The respondent decided, in the light of the continuing uncertainty regarding the economic situation and work, that it was necessary to consider making redundancies. To such end, Mr Hoskin and Mr Gilbert created an alphabetical listing of all employees in the respondent covering all job roles including apprentices, totalling 292 employees (page 246 of the bundle). Each manager took around half of the names and spoke to the managers and supervisors of the employees to establish a view of their current performance and levels of capability, skills and experience. The managers also received hard data of disciplinary records and Bradford absence scores from HR to add to their overview of each employee. The managers took notes of their individual conversations which they then reviewed together. They recorded the outcome of their discussions on the spreadsheet of names by colour coding each employee. Their focus was on retaining multi skilled employees and these were colour coded green. Other employees were put into a category of potential first wave redundancies (red) or potential second wave redundancies (amber).
33. Of the 28 employees initially placed into the pool of first wave (red) potential redundancies, 25 were then further analysed on a 1 (poor) to 5 (excellent) scoring system against four criteria – attendance, disciplinary record, capability and skills, qualifications & experience. These were the employees considered at risk in the first wave of redundancies (pages 247 and 248 of the bundle). Of these at-risk employees, 10 (including the claimant) were made redundant (page 25 of the bundle).

34. There were 5 apprentices (including the claimant) who were placed at risk of redundancy as identified at page 247 of the bundle. These included 2 of the named comparators Mr Declan Williams (date of birth 25 November 1999 and hourly rate of pay £5.90 per hour) and Mr T Pope (date of birth 16 July 2002 and hourly rate of pay of £4.55 per hour). Mr Williams and Mr Pope both however achieved overall higher scores than the claimant (page 247 of the bundle) and were not made redundant. Mr Williams had a higher Bradford score than the claimant however this was due to a known underlying health issue which was taken into account by the respondent.

The selection of the claimant

35. Mr Gilbert spoke to the claimant's mentor Mr Rennie as part of the process to ascertain his views of the claimant. Mr Rennie raised concerns with Mr Gilbert regarding the claimant's work rate and motivation.

36. Having given careful consideration to the oral evidence of Mr Gilbert concerning his discussions with Mr Rennie together with the associated documentary evidence contained in the bundle regarding the claimant's absences and disciplinary records, the Tribunal is satisfied that the scores relating to the claimant as recorded at page 247 of the bundle reflected Mr Hoskin's / Mr Gilbert's assessment of the claimant's attendance, disciplinary, capability and skills and experience.

37. The Tribunal is also satisfied having regard to the redundancy selection criteria adopted by the respondent and the associated scorings at pages 246- 248 of the bundle, that there is no evidence that a person's age or rate of pay played any part in the criteria for selection for redundancy and /or in the decision to select/ dismiss for redundancy. When reaching this conclusion, the Tribunal has further taken into account that one of the claimant's comparators Mr T Rudge (date of birth 2 November 1992), who was retained by the respondent, was on the same rate of pay as the claimant (£8.72 per hour).

38. Further the Tribunal accepts the evidence given by Mr Hoskin/ Mr Gilbert as to why the remaining Apprentice Bricklayers were not included in the list of at risk employees and/ or why they received higher scores than the claimant and therefore retained by the respondent, including that they were considered to work at a faster pace and/or considered to be more experienced/ versatile particularly

with regard to their ability/ willingness to work in other areas including on groundworks when required.

The claimant's letter of termination

39. The claimant was notified of his dismissal by a letter dated 30 June 2020. This letter is at pages 239 of the bundle. The claimant received no prior warning of his redundancy which came as a great shock to him. The claimant was advised in the letter that having reviewed the workforce and the requirements for the business in the future they required fewer people as the work would be undertaken by multi – skilled operatives. The claimant was also advised that his role was no longer required and that his job was therefore redundant. The claimant was told that his employment would end on 7 July 2020 and that he was being paid a week's pay in lieu of returning to work. The claimant was advised of his right of appeal. The claimant did not exercise such right of appeal as he considered that there was no point in doing so as no-one had consulted with him prior to his dismissal.

Closing submissions

40. The Tribunal has had regard to the closing submissions of the parties. The Tribunal has also had regard to the respondent's Note on Apprenticeships (including the authorities relating to common law apprenticeships referred to therein) and the Employment Tribunal case of **Mr D Kinnear v Marley Eternit Ltd trading as Marley Contract Services (S/4105271/16)** supplied by the claimant.

The Law

41. The Tribunal has had regard in particular to the following statutory provisions: -

Age Discrimination

41.1 Sections 5, 13, 19, 39 and 136 of the Equality Act 2010 (the 2010 Act).

Contractual claim

41.2 The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("The 1994 Order")- Articles 3-5 and 10.

41.3 Sections 1 and 230 of the Employment Rights Act 1996 ("the 1996 Act").

41.4 The Apprenticeships, Skills, Children and Learnings Act 2009 ("the 2009") and in particular – Sections A1 (3), 5 and 32.

41.5 The Deregulation Act 2015 – section 3.

41.6 The Apprenticeships (Form of Apprenticeship Agreement) Regulations 2012.

41.7 The Apprenticeship (Miscellaneous Provisions) Regulations 2017 (SI 2017/1310) (“the 2017 Regulations”) and in particular Regulations 3, 4 and 5.

Other

41.8 Section 38 of the Employment Act 2002.

CONCLUSIONS

Age discrimination

42. The Tribunal has considered first the claimant’s complaints of age discrimination (direct and indirect).

The claimant’s complaint of direct age discrimination (sections 5, 13 and 39 of the 2010 Act)

43. As stated above:- (a) the claimant describes himself as being in the age group of “the late 40s” and compares himself with other Apprentice Bricklayers in the age group (“late teens / early twenties”) (b) says that he has been unlawfully dismissed against because of his age compared to the remaining Apprentice Bricklayers who all belong to the younger age group (including in particular his named comparators – Declan Williams, Tyler Pope and Thomas Rudge) in respect of his selection for redundancy and subsequent dismissal. The alleged discriminators are Mr Hoskin/ Mr Gilbert of the respondent.

44. The Tribunal has considered whether the claimant has established facts from which the Tribunal could conclude, in the absence of any other explanation, that the claimant has been treated less favourably because of his age such as to engage the shifting of the burden of proof pursuant to section 136 of the 2010 Act.

45. The claimant has established on the facts that:- (a) he was the only Apprentice Bricklayer in the age group of “the late 40s” (b) the remaining Apprentice Bricklayers were all in the age group of (“late teens/ early twenties”) and (c) that he was the only Apprentice Bricklayer selected for and dismissed by reason of redundancy.

46. The Tribunal has therefore gone on to consider the reasons for such treatment and whether there is any evidence that such treatment was because of age.
47. Having given the matter careful consideration, the Tribunal is not satisfied that claimant has established prima facie evidence that his selection and dismissal was because of his age/ that he has been treated less favourably than the remaining Apprentice Bricklayers because of his age.
48. When reaching this conclusion, the Tribunal is satisfied on the facts that: -
- 48.1 There was a genuine redundancy situation and redundancy selection process during which the respondent reviewed staff skills and versatility and sought feedback from managers and mentors regarding such matters as collated at page 246 of the bundle (paragraphs 32 and 33 above). Further there is no evidence that age (or rates of pay) played any part in such selection criteria/ process.
- 48.2 The respondent applied the selection criteria, as set out at page 247 of the bundle, to those employees who were identified at risk of redundancy including 5 apprentices (page 247 of the bundle). This included the claimant and two of the claimant's Apprentice Bricklayer comparators (Mr Williams and Mr Pope) (paragraph 34 above).
- 48.3 The remaining Apprentice Bricklayers (including the named comparators) were however, considered more versatile/ quicker than claimant/ scored more highly than the claimant on the selection criteria (page 247 of the bundle and paragraph 34 above).
- 48.4 Further, the scores awarded to claimant were in accordance with the documentary evidence / views expressed by Mr Rennie (paragraphs 25 -28 and 35 – 37 above) and there was no evidence that age played any part in the claimant's selection for redundancy.
49. In all the circumstances, the claimant's complaint of direct age discrimination is therefore dismissed.

The claimant's complaint of indirect age discrimination (sections 5, 19 and 39 of the 2010 Act.

50. As stated above the respondent relies on an alleged PCP that, "the respondent selected / dismissed for redundancy the highest paid

Apprentice Bricklayers together with the associated disadvantage identified at paragraph 11.2 above.

51. The claimant has established on the facts that he was on a higher rate of pay than his Apprentice Bricklayer save for Mr Rudge who was on the same rate of £8.72 per hour.
52. However, as already considered above, the claimant has failed to establish that pay rates played any part in the respondent's criteria for selection for redundancy or in the/ his selection / dismissal (paragraphs 32, 33, 34 and 37 above).
53. The claimant has therefore failed to establish any facts from which the Tribunal could conclude, in the absence of another explanation, that the respondent applied any such PCP / caused the claimant any disadvantage by reason thereof related to his age.
54. The claimant's complaint of indirect age discrimination is therefore also dismissed.

The contractual claim (the 1994 Order)

55. As indicated previously, the claimant contends that he was employed by the respondent on a fixed term contract of apprenticeship from 9 October 2018 until 31 March 2020. The respondent however denies this and contends that the claimant was employed on an Approved English Apprenticeship which was terminable on one week's notice.
56. After giving the matter careful consideration, the Tribunal is satisfied that the claimant was employed on an Approved English Apprenticeship. When reaching such conclusion, the Tribunal has had regard to the facts together with the provisions of the 2009 Act and the 2017 Regulations. The Tribunal is satisfied that the contractual documents (paragraphs 15- 17 above) meet the requirements of the 2009 Act (section A1 (3)) including that the contractual documentation :- (a) provided for the claimant to work for the respondent for reward in a sector for which a "standard" had been published (bricklaying) and (b) provided for the claimant to receive training in order to assist him to achieve the apprenticeship standard in the work undertaken in the agreement. The Tribunal is further satisfied that the contractual document complied with the requirements of the 2017 Regulations (regulations 3,4 and 5) regarding :- (a) specified time spent on off the job training and (b) the agreement of a Practical Period of not less than 12 months (9 October 2018 to 31 March 2020) Further the position is not affected by the fact the Tribunal is not

satisfied that the respondent issued the claimant with written terms and conditions of employment (paragraph 21 above) as this is not a statutory requirement under the 2017 Regulations.

57. The claimant was therefore employed as an Approved English Apprentice on a contract of employment and was not engaged on a common law contract of apprenticeship.
58. The Tribunal has therefore gone on to consider whether the claimant was employed on a fixed term contract until 31 March 2021 as contended by the claimant. The Tribunal is not satisfied on the facts that the contract was a fixed term contract. A fixed term contract has to have a defined start and expiry date which is not the position in this case. On the facts, there was no defined expiry date agreed between the claimant and the respondent (whether oral or in writing). Further the contractual apprenticeship documentation (pages 52-56 of the bundle) refers to a "Planned End Date" and "Estimated completion of Learning date".
59. In the absence of any agreement between the parties as to notice/ any proven gross misconduct, the Tribunal is required to determine what would be a reasonable period of notice to terminate the claimant's employment in the circumstances of the this case (which shall be not less than the statutory notice of one week).
60. Having given the matter careful consideration, the Tribunal is satisfied that, in all the circumstances of this case, a reasonable period of notice for the termination of the claimant's employment by the respondent, absent any gross misconduct, would be one month. When reaching this conclusion, the Tribunal has taken into account on the one hand that the claimant was paid fortnightly and the respondent's standard terms and conditions provide for the termination of the employment of hourly paid staff with more than one month and less than two years' service on one week's notice in accordance with the statutory minimum. The Tribunal has also however also taken into account that the claimant was employed as an Apprentice Bricklayer on a training contract who would need, in the event that his contract was terminated, to seek to arrange a new placement in order to preserve his training/ complete his contract as provided for in the 2017 Regulations.

Section 38 of the Employment Act 2002

61. Finally, section 38 of the Employment Act 2002 bites in this case in the light of the findings of the Tribunal that the respondent had breached

the claimant's contractual right to a reasonable period of notice in breach of the 1994 Order and had failed to provide the claimant with written particulars of employment as required by section 1 of the 1996 Act.

62. Having given the matter careful consideration, the Tribunal is satisfied that it is appropriate to make an award pursuant to section 38 of the Employment Act 2002 including that it is just and equitable in this case to award the higher amount of 4 weeks' gross pay. When reaching this conclusion the Tribunal has taken into account in particular, that the contractual dispute between the parties has arisen in this case because the respondent failed to provide the claimant with the required written particulars of employment (including with regard to notice) notwithstanding that the respondent agreed under the terms of the contractual apprenticeship agreements to issue such particulars (page 57 – paragraph 2.1).

Remedy

63. Following the announcement of the above judgments at the hearing, the parties agreed a remedy settlement of the successful claims. The Tribunal therefore awarded/ordered by agreement / the consent of the parties:- (a) that the respondent pay the claimant agreed damages for breach of contract for notice in the sum of £745.58 plus (b) an award pursuant to section 38 of the Employment Act 2002 in the sum of £1,401.68. The total award which the respondent is ordered, by agreement, to pay to the claimant is therefore £2,147.26.

Employment Judge Goraj
Date: 7 March 2022

Written reasons sent to parties: 16 March 2022

FOR THE OFFICE OF THE TRIBUNALS

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