EMPLOYMENT TRIBUNALS

Claimant Mr E Parr- Byrne

Respondent Mr Kevin Mason t/a Kevin Mason Roofing Services

Heard at: Plymouth (by video hearing) **On:** 28 February, 1 and 2 March 2022

Before:
Employment Judge Goraj
Members Mr P Bompas
Mr D Stewart

Representation
The claimant: Ms E Vuitton- lay representative (the claimant's mother)
The respondent – Ms L Taylor, Counsel

RESERVED JUDGMENT

THE UNANIMOUS JUDGMENT OF THE TRIBUNAL IS THAT: -

1. The claimant's complaint of direct age discrimination pursuant to sections 5,13 and 39 of the Equality Act 2010 is dismissed.

2. The claimant's complaint of unfair dismissal pursuant to section100(1)(c) of the Employment Rights Act 1996 is dismissed.

3. The claimant's claim of breach of contract for wrongful dimissal is dismissed.

REASONS

BACKGROUND

1. By a claim form which was presented to the Tribunals on 8 November 2020 (pages 2 – 15 of the hearing bundle ("the bundle")), the claimant, who was employed by the respondent as an "Apprentice Roofer" from 21 October 2019 until 17 August 2020, brought complaints of age and disability discrimination, breach of contract and unfair dismissal for raising public interest disclosures /health and safety concerns. The claimant's claims are set out in more detail in the attachment to his claim form which is at pages 14-15 of the bundle. The claimant stated in the attachment that he had received a diagnosis of Asperger's syndrome and dyspraxia. The claimant's date of birth is 14 November 2002.

2. The claimant's ACAS certificate records that the claimant's EC notification was received by ACAS on 24 August 2020 and that the claimant's EC certificate was issued by ACAS on 25 August 2020.

3. The respondent's response form and subsequent amended response are at pages 16 – 31 of the bundle. The respondent denies the allegations (save that the respondent accepts that the claimant was not issued with written particulars of employment). The respondent's position is set out at pages 27 – 29 of the bundle.

The case management order dated 12 August 2021

4. The matter was the subject of Case Management Order dated 12 August 2021 ("the Order") which is at pages 42 – 51 of the bundle. The agreed List of Issues are at page 49 (paragraph 57 of the Order) onwards of the bundle. The claimant's claims of disability discrimination and unfair dismissal for allegedly making public interest disclosures were dismissed at that time by the Tribunal upon withdrawal by the claimant.

The bundle of documents

5. The Tribunal was provided with an agreed bundle of documents apart from one disputed document (an email from a former customer dated 29 November 2021 at pages 140 – 141 of the bundle). After discussion with the parties however, the claimant no longer objected to its inclusion in the hearing bundle ("the bundle").

The witnesses

6. The Tribunal received witness statements and heard oral evidence from the claimant, his mother Ms E Vuitton and from the respondent, Mr Kevin Mason. The Tribunal enquired whether the claimant required

any adjustments to the conduct of the hearing in the light of the claimant's stated diagnosis of autism but was informed that they were not necessary.

THE ISSUES

7. The Issues were confirmed / clarified with the parties (by reference to paragraph 57 of the Order) as follows: -

8. **The wrongful dismissal claim - (paragraph 57 (1) of the Order)** – In summary, the claimant clarified at the hearing (in response to the respondent's clarification of its case, that the claimant was employed on a statutory Approved English Apprenticeship terminable on one week's notice) as follows:- (a) the claimant was engaged by the respondent as an apprentice roofer pursuant to which he was enrolled at the South Devon College on a roofing "framework agreement" (b) notwithstanding the introduction of the Apprenticeship (Miscellaneous Provisions) Regulations 2017 ("the 2017 Regulations") the claimant's "framework agreement" continued, by virtue of the transitional arrangements, to be regulated by the Apprenticeship (Form of Apprenticeship Agreement) Regulations 2012 (" the 2012 Regulations") (c) that the respondent however failed to comply with the legal requirements of the 2012 Regulations as required to create a "statutory apprenticeship" (including in particular by reason of the accepted failure to issue written particulars of employment pursuant to section 1 of the Employment Rights Act 1996 ("the 1996 Act")) and (d) that the claimant was therefore, by default, engaged by the respondent on a two year common law apprenticeship from 25 November 2019 to 31 October 2021 and which accordingly entitled him to damages for breach of contract for the outstanding period and associated losses less mitigation.

9. In summary, the respondent however contended (including by way of clarification of its position during the hearing) that :- (a) the claimant was employed on an Approved English Apprenticeship (pursuant to the Apprenticeship, Skills, Children and Learning Act 2009 ("the 2009 Act") as amended by section 3 of the Deregulation Act 2015 and as further regulated by the 2017 Regulations (SI 2017/1310) ("the 2017 Regulations") (b) the claimant was therefore employed on a contract of service which was lawfully terminated by the respondent on one week's notice (which period of notice was orally agreed by the respondent with the claimant at the time that he joined the respondent) and (c) disputed that the 2012 Regulations continued to apply by virtue of any transitional arrangements as, in brief summary, a relevant roofing standard was in place at the material time which meant that the

claimant's agreement was regulated by the 2017 Regulations with which it had complied making it an Approved English Apprenticeship. The respondent further contends that if the Tribunal is not satisfied that the claimant was employed on an Approved English Apprenticeship he was engaged on a contract of service terminable on one week's notice (which has been paid) rather than on a common law apprenticeship/ the respondent was, in any event, entitled to terminate the arrangement in light of the claimant's fundamental lack of capability for the role / his conduct.

10. **The claimant's health and safety unfair dismissal claim pursuant to section 100 (1) (c) of the Employment Rights Act 1996 ("the 1996 Act")- paragraph 57.2 of the Order.** The Tribunal clarified the alleged health and safety concerns upon which the claimant relies for such purposes (by reference to paragraph 2.2 of the Order as follows: -

    10.1 **Paragraph 2.2 (iii) – in or around May/ June 2020 –** refusing to undertake / raising concerns with the foreman on site / the respondent about being asked to brush / clean an area because of the claimant's allergies (paragraph 8 of the claimant's statement).

    10.2 **Paragraph 2.2 (ii)** – in or around July 2020 – (before Joseph Blight started) – Market Hall – Kingsbridge (paragraphs 11 of the claimant's statement) the claimant contends that he put his foot through an unsafe roof which the respondent found extremely funny stating that it was the nature of the job.

    10.3 **Paragraph 2.2 (i)** – in or around July 2020 (during the last month of the claimant's employment) the claimant contends that he raised concerns with the respondent that the scaffolding at the Dover road site was unsafe (paragraph 15 of the claimant's witness statement). During the course of the hearing the claimant further contended that he had made an additional (earlier in July 2020) alleged health and safety disclosure to the respondent concerning an incident at the Dover Road site when the claimant put his foot through the roof felt and damaged the ceiling at the property.

11. **The claimant's complaint of direct age discrimination- – Paragraph 57.3 of the Order.** In summary, the claimant clarified his claims in respect of his dismissal as follows :- (a) that he was replaced by another apprentice roofer (comparator - Joseph Blight) who was in a younger age group of under 18 in order for the respondent to avoid paying a higher rate of pay to the claimant as this would have increased under the Minimum Wage Regulations when the

claimant reached his 18th birthday on 14 November 2020 and/or that (b) that the respondent dismissed the claimant because he could obtain greater funding by employing a new younger apprentice and /or (c) that the respondent , in any event, operated a pattern of age discrimination whereby he only kept (younger) apprentices for the first year.

12. The respondent denies the allegations including that :- (a) there was any financial advantage to the respondent in replacing the claimant with Joseph Blight/ with an apprentice roofer who was aged under 18 (including that the respondent would have had to pay a higher rate of pay to the claimant under the minimum wage legislation when the claimant turned 18) (b) the respondent would have received / was, any event, aware of any increase in funding for employing a younger apprentice and/or (c) the respondent operated a policy of keeping employees for one year and replacing them with a younger/ cheaper apprentice and/or (d) that the claimant's dismissal was related in any way to the claimant's age (the respondent says that the claimant's dismissal was by reason of capability/ conduct).

13. **Remedy -** It was agreed with the parties that the Tribunal would deal with liability first, deferring any consideration of remedy, save that the Tribunal would, if the claimant succeeded in any of his claims, also consider – (a) the claimant's complaint pursuant to section 38 of the Employment Act 2002 (in respect of the respondent's accepted failure to issue written particulars of employment as required pursuant to the 1996 Act) and (b) and whether there had been any actionable breaches of the ACAS Code on Disciplinary and Grievance Procedures.

14. It was confirmed with the parties that the claimant's complaints of disability discrimination and unfair dismissal for allegedly making public interest disclosures had previously been dismissed upon withdrawal by the claimant as formally recorded in an earlier Judgment.

FACTS

Background

15. The claimant's date of birth is 14 November 2002. The claimant was employed by the respondent from 21 October 2019 until 17 August 2020. The claimant describes himself as having received a diagnosis of high functioning autism (also referred to in his claim form as Asperger's syndrome) in 2015 (the claimant's disability impact statement at page 120 of the bundle). The claimant also describes himself as having allergies for which dust and pollen act as catalysts which could result in an anaphylactic reaction. The Tribunal accepts,

strictly for the purposes of this case, the claimant's evidence regarding such medical conditions albeit strictly on the basis that the claimant accepted during his evidence that he did not at any time during his period of employment disclose to the respondent his diagnosis of autism or the effect/ extent of any allergies.

The respondent

16. The respondent is a sole roofing trader who trades in the name of Kevin Mason Roofing Services. The respondent has no HR/ administrative support other than from a bookkeeper who deals with wages and associated matters on behalf of the respondent.

17. The respondent has, from time to time, engaged a number of "apprentices"/ other staff to assist him in his business. The relevant persons, in addition to the claimant, are as follows: -

17.1 Brent Harris – who worked for the respondent prior to the engagement of the claimant. The Tribunal has not been provided with full details regarding Mr Harris. The Tribunal however accepts on the available evidence that he was aged 16/17 at the relevant time, engaged as apprentice roofer / labourer, and worked for the respondent for about 6 months before leaving to join his friends on a higher rate of pay at another roofing company.

17.2 Jacob Blight -date of birth 9 April 2004. Mr Blight is the claimant's named comparator in respect of his age discrimination claim. Mr Blight started his employment with the respondent on or around 20 July 2020. Mr Blight was engaged as an apprentice roofer/ labourer. Mr Blight was taken on by the respondent after he approached the respondent for work whilst building a wall on a neighbouring family property. Mr Blight was paid £4.50 per hour during an initial trial period thereafter rising to £5 per hour and is currently on £7 per hour. Mr Blight is engaged on an Apprenticeship agreement with the respondent and South Devon College.

17.3 Jack Hardy – date of birth 23 April 2002. Mr Hardy was engaged by the respondent on 7 September 2020 and left on 25 September 2020. It was envisaged by the respondent that Mr Hardy would be employed as an apprentice/ labourer. Mr Hardy however informed the respondent that he did not like the work and left the respondent's employment.

17.4 The respondent's son – date of birth 2 January 1998. The respondent's son was engaged by the respondent in February 2021 as a roofer / labourer and is currently under notice. The claimant's

son was initially taken on by the respondent at a rate of £8.50 per hour which subsequently increased to £10 per hour.

The claimant's engagement with the respondent

18. The claimant was employed by the respondent as an apprentice roofer with effect from 21 October 2019 in response to a posting on face book advertising an opportunity with the respondent. The claimant attended an interview with the respondent on or before 21 October 2019. It is agreed between the parties that it was agreed during the interview that :- (a) the claimant would be on a month's trial during which he would be paid £4.40 per hour (b) if successful, the claimant's salary would then rise to £5 per hour (c) the claimant would be entitled to 28 days' holiday per year and (c) that the claimant would be entitled to one week's notice of termination during the first two years of his employment. It was accepted by the respondent that he did not subsequently confirm the agreed terms of employment in writing.

The Apprenticeship Agreement

19. The parties subsequently entered into a one-page document. which is described as an "Apprenticeship Agreement" under the auspices of South Devon College. The Apprenticeship Agreement, which is at page 57 of the bundle, states as follows: -

"Apprenticeship Agreement

"Further to the Apprenticeships (Form of Apprenticeship Agreement) Regulations which came into force on 6 April 2012, an Apprenticeship Agreement is required at the commencement of an Apprenticeship for all new apprentices who start on or after that date.

The purpose of the Apprenticeship Agreement is to :-

- identify the skill, trade or occupation for which the apprentice is being trained; and
- confirm the qualifying Apprenticeship Framework/ Standard that the apprentice is following.
- confirm required amount of Off – the- job hours.

The Apprenticeship Agreement is incorporated into and does not replace the written statement of particulars issued to the individual in accordance with the requirements of the Employment Rights Act 1996.

The Apprenticeship is to be treated as being a contract of service not a contract of Apprenticeship.

Apprenticeship Particulars

Apprentice name	- Elliot Par – Byrne
Skill, trade or occupation for which the apprentice is being trained	- Roofing
Relevant Apprenticeship framework/ Standard and level	- Framework
Amount of Off the job hours required	- 742
Start date	- 25 November 2019
Estimated completion of learning date	- 31 October 2021"

20. The Apprenticeship Agreement was subsequently signed by the claimant and the respondent on or after 25 November 2019. In the footer to the Apprenticeship Agreement the document is described as Version 3 – May 19 and defines the Regulations referred to in the body of the Apprenticeship Agreement as "the Apprenticeship (Form of Apprenticeship Agreement) Regulations 2012" (also page 57 of the bundle).

21. The Tribunal has also been provided with South Devon College document entitled "Combined Commitment Statement & ILP" (at pages 58 – 63 of the bundle) which is stated to be made between the Apprentice, South Devon College and the Employer . This document, which appears to have been completed by South Devon College, sets out further details of the arrangements including that the claimant was engaged on a Framework Roofing for a period of two years starting on 25 November 2019 and ending on 31 October 2021 together with further details for requirements for off the job training of 742 hours and associated matters (including a requirement that the claimant be issued with a statement of terms and conditions). These documents were not however signed by any of the parties. Further, both parties stated in their evidence to the Tribunal, and which is accepted by the Tribunal, that this document was not agreed with/ issued to them at any time during the claimant's employment with the respondent.

Receipt of government grants

22. The respondent received/ receives financial assistance by way of government grants from the CITB in respect of his engagement of apprentices. The respondent received an initial grant of £2,500 and a further top up grant of £1,000 in respect of his engagement of the claimant. This grant was repaid by the respondent on a pro – rata basis following the termination of the claimant's employment. The respondent received similar grants during Mr Blight's first year of employment and is due to receive a further payment (the amount of which was at the time of the hearing unknown) during Mr Blight's second year of

employment. It is the claimant's case that the respondent's decision to take on Mr Blight/ to retain him in preference to the claimant was prompted by an increase in government funding for new apprentices which was announced by the government in or around July 2020. This is denied by the respondent who says that he was unaware of any alleged increases in government funding for apprentices and that he took Mr Blight on as an additional apprentice roofer because of additional work following covid and in the circumstances referred to above. Having weighed the evidence, the Tribunal is satisfied, on the balance of probabilities, that Mr Blight was taken on by the respondent as an additional apprentice following his approach to the respondent and in the light of an increase in work following covid and further that the respondent was unaware of any changes to government funding at that time. When reaching such conclusions, the Tribunal has taken into account in particular its findings at paragraph 17.2 regarding the circumstances of Mr Blight's engagement and that there is no evidence that the respondent received any enhanced funding for Mr Blight.

The nature of the claimant's employment with the respondent and associated issues

23. It is the claimant's case that the respondent did not treat him as an apprentice/ a person who was learning a new skill. The claimant says that he was used by the respondent as an unskilled labourer who was used to carry heavy items and clean up after jobs were complete and further that he was only allowed to use slate during the last month of his employment. The claimant further says that when work was slow he was required to undertake unrelated work for the respondent and his family such as gardening. The respondent says that the claimant undertook general roofing and labouring under his supervision. The Tribunal is satisfied on the evidence, that the claimant's role was to act as a "roofers mate" providing general unskilled support to the respondent together with labouring and cleaning and that the claimant received minimal on the job training.

The claimant's involvement with South Devon College and associated matters

24. The Tribunal is satisfied in the light of the additional information which the claimant provided during the course of the hearing from the South Devon College/ relating to relevant Government Guidance on apprenticeships that :- (a) the claimant was enrolled with the College on a roofing Framework Agreement (L2 Roofing Agreement) (b) although the claimant did not enter into the relevant Apprenticeship Agreement/ join the course until 25 November 2019 (page 57 of the bundle) he was enrolled on the L2 Roofing Framework course which had already commenced in early September 2019 and which thereafter continued notwithstanding the introduction of any industry

standard on roofing and (c) the Framework and Standard roofing courses are different including in respect of the nature of the modules/ assessment. The claimant attended 3 x 5-day training sessions at South Devon College during his period of employment with the respondent.

Issues during the claimant's period of employment with the respondent

25. There were issues relating to the claimant's timekeeping during his employment with the respondent. When the claimant first started work with the respondent, he had to use his moped to get to work as there was no suitable public transport. It is accepted by the claimant that he was late for work on a number of occasions during this initial period because of difficulties with traffic/ driving conditions (and this is supported by the entry in the pastoral log at page 113 of the bundle). It is also agreed between the parties that in the following period when the claimant was accompanied by his mother by car (whilst he was learning to drive) the claimant was on time / there were no significant timekeeping issues. There is, however, a dispute between the parties regarding the occasions when the claimant subsequently attended for work by motorbike and /or was collected by the respondent in his van. The respondent contends that the claimant was late / not ready for collection on a number of occasions. The claimant denies any significant lateness / says that when he arrived at the respondent's premises he sometimes had to wait for the respondent. The Tribunal is satisfied, on the balance of probabilities, that there were a number of occasions when the claimant was late / not ready for work. The Tribunal is not however satisfied that this was considered as a serious issue by the respondent as there is no reference to such further concerns in the claimant's pastoral log.

26. The Tribunal also accepts, on the balance of probabilities, that there were a number of further issues/ incidents during the claimant's employment including that :- (a) there were a number of occasions when the claimant had completed his allocated work and sat in the works van waiting to go home when other people were continuing to work and (b) there was an incident in or around February 2020 when the claimant belched in front of a client, failed to apologise to the client and thereby made a bad impression (page 140 of the bundle). The claimant however, subsequently apologised to the respondent for his conduct when the respondent raised the incident with the claimant following the meeting.

27. The Tribunal is also satisfied that the parties had at times a strained relationship including that the claimant found the respondent to be

difficult to interact with at times because of his changeable moods and also that the respondent was frustrated at times by what he considered to be the claimant's excessive use of his mobile phone and what he perceived to be the claimant's inability to follow basic instructions.

Furlough

28. The claimant was placed on furlough leave between 30 March 2020 – 11 May 2020 as a result of the covid pandemic.

The PPE incident (Issue 2.2 (iii)).

29. Shortly after the claimant's return from furlough in or around May 2020, the claimant was working on a housing / construction site. It was near the end of the day and the respondent had left site leaving the claimant to clean up under the supervision of the site foreman. The claimant was instructed to brush/ clean up a dusty area containing various materials. The claimant explained to the site foreman that he had allergies and requested a face mask for protection which was declined. The claimant therefore declined to undertake the work without a mask and went home. The Tribunal accepts that the claimant refused to undertake the cleaning up without face protection as he was concerned that it could constitute a risk to his health and safety because of his allergies and the possibility of an anaphylactic reaction. The respondent was informed of the matter by the site foreman the following day. The claimant accepted that the respondent did not respond to the matter in a negative way, that the respondent advised the claimant of the health and safety materials which he carried in his van and also that he had spoken to the site foreman about the matter. The claimant also accepted in his evidence that when he suggested to the respondent that it was a little late to be advising him of the whereabouts of the face masks, the respondent made no comment, and the matter was never referred to again.

The Market Hall – (Issue 2.2 (ii))

30. In or around early July 2020, the claimant was working at height (around 30 feet) on the roof of an old market hall whilst the respondent was working at ground level. The claimant contends that the roof was extremely old with damaged / eroded wooden battens and as a result of which he put his foot through the roof but was fortunately able to prevent himself from falling through the roof. The claimant further contends that the respondent was not concerned about the claimant's welfare, found the incident extremely funny and stated that it was "the nature of the job". The respondent accepts that an incident occurred at the Market Hall but contends that it occurred because the claimant was not paying proper attention to instructions, that the

claimant was not in any danger of falling through the roof as it was "close boarded" and that the claimant put his foot through a board which was no larger than 400mm x 150mm wide. The respondent accepts that after he had established that the claimant was unharmed, he made light hearted comments about the incident.

31. In the absence of any further evidence regarding the incident, the Tribunal accepts, on the balance of probabilities, the respondent's account of the incident in question. When reaching this conclusion, the Tribunal has taken into account in particular, that the respondent is an experienced roofer who is therefore likely to have a better understanding of the close boarded nature of the roof and the associated risks. The Tribunal however accepts that the claimant genuinely believed himself to be a risk of falling and that such belief was not unreasonable in the light of the heights involved and his lack of knowledge/ experience of the roofing system in question. The Tribunal also accepts that the respondent made light-hearted comments about the incident after the respondent had ascertained that the claimant was unharmed, including that it was the nature of the job,

10 July 2020

32. On 10 July 2020 there was an incident on a job whereby the claimant caused roofing materials to fall onto scaffolding. Following that incident, the respondent had a discussion with the claimant at the end of the working day during which he told the claimant that he had intended to dismiss him that day but had decided instead to give the claimant another chance. The respondent also told the claimant that he needed to "pull his socks up" and that he was going to give him four weeks in which to do so. The respondent further informed the claimant that he was taking on another apprentice as he was so busy and he needed to slow down and that the new apprentice, who would be on a 4 week trial period, would be starting on 13 July 2020 and that he expected the claimant to help with his training. The claimant was shocked by the conversation and therefore spoke to his College Tutor who advised him not to give the respondent any reason to dismiss him and that he should not train anyone else as he was still an apprentice.

Dover Road (Issue Paragraph 2.2 (i))

33. On or around 13 July 2020, whilst working on a property in Dover Road, the claimant put his foot through the roof felt damaging the ceiling. The claimant accepted that he had misjudged the positioning of a wooden batten and that he had apologised to the respondent regarding the matter. The respondent was initially annoyed by what had happened and threatened to take the costs of the repairs from the claimant's wages. The client was however understanding about the accident. Later that week the respondent informed the claimant that

his father-in-law, who was a builder, was going to rectify the damage at the property and that the costs would not therefore be taken from the claimant's wages.

Joseph Blight

34. Joseph Blight 's employment with the respondent commencement on or around 20 July 2020.

The Scaffolding at Dover Road (Issue2.2 (i))

35. During week commencing 20 July 2020, the claimant was working with the respondent and Mr Blight on a property requiring scaffolding. It is accepted by the respondent that the claimant raised concerns orally with the respondent that the scaffolding did not appear to be properly secured to the property and that it felt unsafe. Following such discussion, the respondent contacted the scaffolding company for advice and assistance. The scaffolding company advised the respondent that the weight ratio of the scaffolding was correct and that they were unable to provide any outrigger assistance for a few days. The respondent was satisfied with their advice and instructed the claimant and Mr Blight to carry on with the roofing work on the property on the following 2 days.

The following period

36. In the following 4-week period the claimant was given extra responsibilities by the respondent and was also given some cash bonuses for work successfully undertaken. The respondent did not undertake any review or make any criticisms of the claimant's work during this period.

14 August 2020

37. On 14 August 2020, the claimant assisted Mr Mason's father in law to repair the ceiling, which the claimant had previously damaged at the Dover Road property, whilst the respondent went to price up another job. The respondent returned to the property after the claimant had left at the end of the working day. On the respondent's return to the property, he discovered that the claimant had left, without telling anybody, the client's car covered in dirty plaster water after cleaning out the buckets.

17 August 2020

38. When the claimant arrived for work on the morning of 17 August 2020, he discovered his personal possessions and tools at the side of the

road next to the respondent's van. The respondent told the claimant that he was dismissed because he had not improved. The respondent paid the claimant one week's pay in lieu of notice.

39. The claimant, and also his mother, tried unsuccessfully to contact the respondent on a number of occasions following his dismissal in order to obtain a copy of the respondent's disciplinary and grievance procedure, a copy of a contract of employment and reasons for the claimant's dismissal .The respondent did not however respond to any such requests.

THE SUBMISSIONS OF THE PARTIES

40. The Tribunal has had regard to the closing submissions of the parties together with the additional written information/ material which both parties helpfully provided regarding the application of the 2012/ 2017 Regulations, the associated transitional arrangements and the Government guidance regarding the replacement and phasing out of framework agreements. The Tribunal has also had regard to the guidance and extract statutory provisions relating to health and safety whilst working at height and requirements for the issue of written particulars of employment included at pages 130 – 135 of the bundle together with the Employment Tribunal case of **Mr D Kinnear v Marley Eternit Ltd trading as Marley Contract Services (S/4105271/16)** at pages 114 – 118 of the bundle (relating to the award of damages in an undefended claim for the wrongful termination of a common law apprenticeship agreement).

THE LAW

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

The age discrimination claim

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

41.2 The National Minimum Wage Regulations 2015 ("MWRs") – Regulation 5.

The complaint of unfair dismissal on health and safety grounds

41.3 Section 100 (1) (c) of the Employment Rights Act 1996 ("the 1996 Act").

The contractual claim

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

41.5 Sections 1 and 230 of the 1996 Act.

41.6 The Apprenticeships, Skills, Children and Learnings Act 2009 ("the 2009") and in particular – Sections A1 (3) (6) & (7) A2, 5 and 32.

41.7 The Deregulation Act 2015 – (including section 3).

41.8 The Apprenticeships (Form of Apprenticeship Agreement) Regulations 2012 ("the 2012 Regulations").

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

41.10 The Tribunal has also had regard in particular to the legal authorities of **Dunk v George Wallace & Son Limited 1970, 2 QB, 163, CA** and **Wallace v CA Roofing Services Ltd 1996 IRLR 435 QBD** relating to common law apprenticeships.

Other

41.11 Section 38 of the Employment Act 2002.
41.12 The ACAS Code on disciplinary and grievance procedures

CONCLUSIONS

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

42. The Tribunal has considered first the claimant's complaint of direct age discrimination (paragraph 57.3 of the Order and paragraph 11 above).

43. The claimant's date of birth is 14 November 2002. The claimant was therefore about to reach the age of 18 approximately three months after his dismissal on 17 August 2020. The claimant says that he has been unlawfully directly discriminated against in respect of his dismissal because of his age as set out at paragraph 11 above.

44. The Tribunal has considered first the allegation that the claimant was replaced by another apprentice roofer, Mr Blight, who was in a younger

age group of under 18 and, that the claimant was subsequently dismissed in order that the respondent could avoid paying a higher rate of pay to him as this would have increased under the MWRs when the claimant reached his 18th birthday.

45. In summary, the respondent says that the claimant's age played no part in the appointment of Joseph Blight and /or the dismissal of the claimant, that the claimant's rate of pay would not have increased under the MWRs when he reached the age of 18 and that the reason for the claimant's dismissal was conduct/ capability.

46. 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 in respect of the matters referred to above so as to engage the shifting of the burden of proof pursuant to section 136 of the 2010 Act.

47. The claimant has established on the facts that: - (a) he would have reached his 18th birthday (14 November 2020) approximately 3 months after his dismissal (b) that the apprentice roofer Mr Blight, who was taken on by the respondent on or around 20 July 2020 (date of birth 9 April 2004), was aged 16 at the relevant time and (c) Mr Blight was not dismissed by the respondent.

48. Having given the matter careful consideration, the Tribunal is not however satisfied that claimant has established any prima facie evidence that Mr Blight was employed as a replacement for the claimant because he was younger than the claimant and/or that the claimant was dismissed because of his age, including that the respondent dismissed the claimant in order to avoid paying an increase in pay as required pursuant to the MWRs.

49. When reaching such conclusions, the Tribunal has taken into account in particular that: -

    49.1 Mr Blight was employed by the respondent as an apprentice roofer in July 2020 after he had asked the respondent for employment and against the background of an increased workload following covid (paragraphs 17.2 and 22 above). Further on 7 September 2020, shortly after the claimant's dismissal, the respondent took on a further proposed apprentice/ labourer who was then aged 18 (Jack Hardy date of birth 23 April 2002) (paragraph 17.3 above).

49.2 Mr Blight was paid during his trial period an hourly rate of pay of £4.50 per hour (which was 10 per hour more than the claimant was paid during his trial period in 2019) which rose to £5 per hour following the completion of his trial period and which was the same hourly rate of pay which the claimant received at the time of his dismissal.

49.3 There was no requirement under the MWRs for the respondent to increase the claimant's rate of pay on his 18th birthday to the higher non apprentice National Minimum Wage as such entitlement only applied to apprentices who were aged 19 or over (Regulation 5 of the MWRs) (and by which time the claimant was projected to have completed his training framework).

49.4 The findings of fact concerning the circumstances leading to the claimant's dismissal including that :- (a) the respondent and the claimant had, at times, a strained relationship (paragraph 27) (b) the respondent's concerns relating to the claimant's conduct and capability (paragraphs 25, 26) (c) the claimant had been warned on 10 July 2020 that his employment was at risk and that improvement was required (paragraph 32) (d) following such warning there were two further incidents at the Dover Road property – one on 13 July 2020, when the claimant damaged the ceiling (paragraph 33), and again on 14 August 2020, when the claimant left the client's car in a dirty state and went home without telling anybody (paragraph 37).

49.5 The claimant did not contend in his evidence that there were any similar concerns in respect of the conduct or capability of his comparator, Mr Blight.

49.6 This allegation is therefore dismissed.

50. The Tribunal has therefore gone on to consider the remaining elements of the claimant's direct age discrimination claim (paragraph 11 above) namely that the respondent dismissed the claimant because he could obtain greater funding by employing a new (younger) apprentice and/or that the respondent operated a pattern of age discrimination whereby the respondent only retained (younger ie aged less than 18) apprentices for the first year.

51. After giving the matter careful consideration, the Tribunal is not satisfied that the claimant has established facts from which the Tribunal could conclude, in the absence of any other explanation from the respondent, that the claimant has been discriminated against because of age by reason of funding arrangements.

52. When reaching such conclusions, the Tribunal has taken into account in particular that: -

    52.1 The Tribunal was satisfied on the facts that Mr Blight was taken on for the reasons identified at paragraphs 17.2, 22 and 49.1 above.

    52.2 The Tribunal was further satisfied on the facts, that there was no evidence that the respondent received and/or was aware of any increased government funding for taking on new / younger apprentices when he engaged Mr Blight (paragraph 22 above).

    52.3 This allegation is therefore dismissed.

53. Finally, the Tribunal has considered whether the claimant has established any prima facie evidence that he has been unlawfully discriminated against by the respondent because of age on the grounds that his dismissal formed part of a pattern of conduct whereby the respondent only retained younger (ie aged less than 18) apprentices for the first year.

54. Having given the matter careful consideration, the Tribunal is not satisfied that the respondent has established any facts from which the Tribunal could conclude that the respondent had operated any such pattern of conduct.

55. When reaching such conclusion, the Tribunal has taken into account in particular its findings at paragraph 17 above including that :- (a) Mr Harris (the claimant's predecessor who was aged 16/ 17at the relevant time) left the respondent to join his friends at another roofing company at a higher rate of pay (paragraph 17.1) (b) Mr Blight, who is now in his second year, remains in the employment of the respondent (c) Mr J Hardy was aged 18 when he was engaged by the respondent in September 2020 (and who subsequently left because he did not like the work) and (d) the respondent employed his son in February 2021 who was aged 23 (date of birth 2 January 1998) when he was engaged by the respondent.

56. In all the circumstances, the claimant's complaint of direct age discrimination is therefore dismissed.

The claimant's complaint of unfair dismissal for raising health and safety concerns pursuant to section 100 (1) (c) of the 1996 Act

57. The Tribunal has considered next the claimant's claim that the principal reason for his dismissal was that being employed at a place where there was no health and safety representative or safety committee, he brought to the respondent's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety pursuant to section 100 (1) (c) of the 1996 Act (paragraph 57.2 of the Order and paragraph 10 above).

58. It is accepted by the respondent that there was no health and safety representative or safety committee at the respondent.

59. The claimant contends that he raised with the respondent by reasonable means the matters identified at paragraph 10 above which he reasonably believed were harmful to health and safety and that such matters were singularly or collectively the principal reason for his dismissal. The respondent denies such allegations including that they were, in any event, the principal reason for the claimant's dismissal which he says was by reason of capability / conduct.

60. The claimant had less than 2 year's qualifying service at the date of his dismissal by the respondent and the claimant is therefore required to satisfy the Tribunal, on the balance probabilities, that the raising of the alleged health and safety concerns (either singularly or collectively) was/ were the principal reason for the claimant's dismissal.

61. Paragraph 10.1 above (paragraph 2.2 (iii) of paragraph 57 of the Order) and paragraph 29 above – the PPE incident)

62. This matter relates to the claimant's request for a face mask whilst on site in or around May 2020 (paragraph 29 above). The Tribunal is satisfied on the facts, that the claimant brought to the attention of the site foreman, by reasonable means, circumstances connected with his work which he reasonably believed were harmful to health and safety namely, that following an instruction to brush / clean up a dusty area the claimant requested from the site foreman a face mask and when the site foreman refused to provide one refused to undertake the task because of his allergies / concerns that if he did so it could cause a possible anaphylactic reaction. The Tribunal is also satisfied that the respondent was informed of the matter by the site foreman and there was also a discussion about the provision of face masks between the respondent and the claimant the following day during which the

respondent advised the claimant of the whereabouts of face masks and the claimant indicated that it was “a little late” to inform him of such availability. The Tribunal is therefore satisfied that the claimant has met the qualifying requirements of section 100 (1) (c) of the 1996 Act.

63. The Tribunal is not however satisfied the claimant has established, on the balance of probabilities, that the matter played any part in his subsequent dismissal. When reaching this conclusion the Tribunal has taken into account in particular the following matters:- (a) the incident occurred approximately 3 ½ months prior to the claimant’s dismissal (b) the claimant accepted in his evidence that when the matter was discussed with the respondent, he advised the claimant of the whereabouts of the protective masks, did not respond to the matter in a negative manner and that the matter was never referred to again (paragraph 29 above).

Paragraph 10.2 above (paragraph 2.2 (ii) of Paragraph 57.2 of the Order and paragraph 30 – 31 above) – the Market Hall incident).

64. The Tribunal is satisfied, in the light of its findings at paragraphs 30 and 31 above that the claimant brought to the respondent’s attention by reasonable means circumstances connected with his work which he reasonably believed (in the light of the heights involved/potential for serious injury and his lack of knowledge / experience of the roofing system in question) were harmful or potentially harmful to health and safety. The Tribunal is accordingly satisfied that the claimant has established the qualifying requirements for section 100 (1) (c) of the 1996 Act.

65. Tribunal is not however satisfied that the claimant has established, on the balance of probabilities, that the matter played any part in the claimant’s subsequent dismissal. When reaching this conclusion the Tribunal has taken into account in particular that :- (a) the incident occurred approximately 6 weeks prior to the claimant’s dismissal and (b) its findings at paragraph 31 above that after ascertaining that the claimant was unharmed the respondent made light – hearted comments about what had happened including that it was the nature of the job.

Paragraph 10.3 above (paragraph 2.2 (i) of paragraph 57.2 of the Order) and paragraphs 33 and 35 above - relating to Dover Road

66. The Tribunal has considered first the additional allegation that was relied upon by the claimant during the course of the hearing namely, that in July 2020 he raised health and safety concerns with the respondent concerning an incident when the claimant damaged the roof felt / ceiling at the property at Dover Road (paragraph 10.3 and paragraph 33 above).

67. The Tribunal is not satisfied on the facts that the claimant has established the qualifying requirements for the purposes of section 100 (1) (c) of the 1996 Act in respect of such matter. When reaching such conclusion, the Tribunal has taken into account its findings at paragraph 33 above including in particular, that not only has the claimant failed to establish that he raised any health and safety concerns with the respondent regarding this matter but that he also accepted in evidence that the incident had occurred because he had misjudged the positioning of the roof batten and thereby damaged the roof felt/ the ceiling for which he apologised to the respondent.

68. The Tribunal has therefore gone on to consider the further allegation relating to the scaffolding (paragraph 35 above). The Tribunal is satisfied in the light of its findings at paragraph 35, that the claimant brought to the respondent's attention by reasonable means circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health and safety. When reaching such conclusion, the Tribunal has taken into account in particular its findings that the claimant raised concerns with the respondent regarding the safety of the scaffolding following which the respondent sought advice from the scaffolding company as set out at paragraph 35 above. The Tribunal is accordingly satisfied that the claimant has established the qualifying requirements for the purposes of section 100 (1) (c) of the 1996 Act.

69. The Tribunal is not however satisfied that the claimant has established, on the balance of probabilities, that the matter played any part in the claimant's dismissal. When reaching this conclusion the Tribunal has taken into account in particular its findings at paragraphs 35 and 36 above including that:- (a) when the claimant raised with the respondent his concerns regarding the scaffolding the respondent sought advice from the scaffolding company and (b) during the following period the claimant was given extra responsibilities by the respondent/ received bonuses for work successfully undertaken (paragraph 36).

The collective position

70. Finally for the purposes of the claimant's claim pursuant to section 100 (1) (c) of the 1996 Act, the Tribunal has considered, whether viewed collectively, the claimant has established, on the balance of probabilities, that the established health and safety concerns were the principal reason for the claimant's dismissal.

71. The Tribunal is not however satisfied, on the balance of probabilities, that the claimant's established health and safety concerns were, viewed collectively, the principal reason for the claimant's dismissal.

72. When reaching such conclusion the Tribunal has taken into account that the claimant has established that he raised three health and safety concerns namely:- (a) relating to the request for a face mask – paragraph 62 above (b) relating to the incident on the roof at the Market Hall – paragraph 64 above (c) and relating to the scaffolding at Dover Road – paragraph 68 above.

73. The Tribunal is not however satisfied that the claimant has established, on the balance of probabilities, that they were collectively the principal reason for the claimant's dismissal. When reaching this conclusion, the Tribunal has taken into account its findings in respect of each of the alleged matters (paragraphs 63, 65 and 69 above).

74. The Tribunal has further taken into account that viewing the matter overall :- (a) it is satisfied on the facts that the respondent had a number of concerns relating to the claimant's conduct and capability (paragraphs 25 and 26) (b) the parties had at times a strained relationship – paragraph 27 (c) Following an incident on 10 July 2020, the claimant was advised that the respondent had intended to dismiss him but had decided to give him a further 4 weeks in which to improve (paragraph 32) and (d) during that period there were further issues relating to the damage to the roof felt/ ceiling at Dover Road (for which the claimant accepted responsibility – paragraph 33) and the dirty plaster water on the client's car at Dover Road on 14 August 2020 (when the claimant left for the evening without rectifying the situation or telling anyone about what had happened – paragraph 37 above).

75. In all the circumstances, the claimant has not established, on the balance of probabilities, that the principal reason for his dismissal was that he had brought health and safety issues to the attention of the respondent pursuant to section 100 (1) (c) of the 1996 Act and the claimant's complaint is therefore dismissed.

The contractual claim (for breach of contract pursuant to the 1994 Order)

76. The respective legal positions of the parties, which developed on both sides during the course of the hearing, is summarised at paragraphs 8 and 9 above. In essence, the claimant contends that in he was engaged by the respondent as an apprentice roofer on a "framework agreement" and that in the light of the respondent's failure to comply with the relevant statutory requirements he was by default engaged by the respondent on a two-year common-law apprenticeship which

accordingly entitled him to damages for breach of contract. In essence, the respondent's case is that the claimant was employed as an Approved English Apprentice in respect of which a relevant standard was in place, that the respondent met the relevant statutory requirements for such an apprenticeship which was therefore a contract of service terminable on one week's notice (which was paid in lieu). The respondent further denies that the claimant was engaged on a common law contract of apprenticeship and contends that, even if that was the case, it was, in any event, entitled to terminate such contract in the light of the claimant's fundamental lack of capability for the role/ his conduct.

Was the claimant employed on an Approved English Apprenticeship

77. The Tribunal has considered first whether the claimant was employed by the respondent on an Approved English Apprenticeship as contended by the respondent. After giving the matter careful consideration, the Tribunal is not satisfied having regard to the facts and the relevant law, that the claimant was employed on an Approved English Apprenticeship.

78. When reaching such conclusion, the Tribunal has taken into account in particular the following: -

78.1 The contractual arrangements between the parties are as recorded at paragraphs 18 – 20 above. In summary, the parties: - (a) initially reached an oral agreement in October 2019 on the terms set out at paragraph 18 and, on the basis of which, the claimant joined the respondent as an apprentice roofer and (b) which was supplemented by a written Apprenticeship Agreement on the terms at paragraphs 19 – 20 (page 57) which was signed by the parties on or after 25 November 2019. The Apprenticeship Agreement expressly states that the claimant was engaged on a roofing framework with a start date of 25 November 2019 with an expected completion date of 31 October 2021 and is further stated to be regulated by the 2009 Act and the 2012 Regulations.

78.2 The Tribunal is satisfied on the facts of this case, that notwithstanding that the Institute of Apprenticeships states on its website that a roofing standard had been delivered for delivery on 30 September 2019, the claimant was, at all relevant times, nevertheless engaged on a roofing framework. Notwithstanding that the claimant did not commence his course at the South Devon College until 25 November 2019, he was enrolled on and participated at all relevant times on the framework course at the College which had commenced in September 2019. The Tribunal is

also satisfied on the facts that a framework course operates in a different manner to a standard course involving in particular a different form of assessment (paragraph 24 above).

78.3 Further, and in any event, in order to constitute an Approved English Apprenticeship, the apprenticeship agreement has to comply with the relevant provisions of the 2009 Act and the 2017 Regulations. The Tribunal is not however satisfied on the facts of this case, that the agreement between the parties complied with the requirements of the 2009 Act as section A1 (3) requires not only that a relevant standard has been published (section A1 (3) (a)) but also section A1 (3) (b) provides for the "apprentice to receive training in order to assist the apprentice to achieve the approved standard in the work done under the agreement". This is not the position in this case as (regardless of whether a relevant roofing standard was in place at the relevant time) :- (a) the Apprenticeship Agreement expressly states that the claimant is engaged on a Roofing Framework (not a standard) (paragraphs 19 -20 and page 57 of the bundle) and further (b) at all relevant times, the claimant receiving training from the College in accordance with the L2 Roofing Framework (paragraph 24 above) rather than, " to achieve the approved standard" referred to in the 2009 Act.

79. The Tribunal is therefore not satisfied that the respondent has complied with the requirements of section A 1 (3) of the 2009 Act. In all the circumstances, the Tribunal is accordingly not satisfied that the claimant was engaged on an "Approved English Apprenticeship".

80. The respondent did not contend that if the agreement did not constitute an Approved English Apprenticeship, it could nevertheless still qualify as a statutory apprenticeship for the purposes of the 2012 Regulations. For the avoidance of doubt, the Tribunal is however, satisfied that the respondent could not, in any event, have relied on the 2012 Regulations for such purposes including as Regulation 2 of the 2012 Regulations requires the employer to provide the apprentice with a written statement of particulars of employment for the purposes of section 1 of the 1996 Act and/or to provide a written document providing such information - neither of which were provided in this case.

Common Law contract of apprenticeship and associated matters

81. The Tribunal has therefore gone on to consider whether, for the purposes of the claimant's contractual claim for wrongful dismissal, the claimant's contract was a common law contract of apprenticeship or a contract of service. The claimant contends that in the light of the

respondent's failure to comply with the statutory provisions of the 2009 Act/ the provisions of the 2012 Regulations, the agreement was a common law contract of apprenticeship for 2 years. The respondent denies that it was a common law contract of apprenticeship and says that it was a contract of service terminable on one week's notice.

82. When considering this issue, the Tribunal had has reminded itself in particular of the following: -

82.1 The guidance of the Court of Appeal in **Dunk v Waller** that a contract of apprenticeship secures three things for an apprentice in summary: - (a) a monetary payment during the period of apprenticeship (b) that he/ she should be instructed and trained and thereby acquire skills which would be of value to him/ her for the rest of his/her life and (c) gives him/her status in the labour market.

82.2 The further guidance contained in **Wallace v CA Roofing** Services including that: - (a) the primary purpose of a common law contract of apprenticeship is training and that the execution of work for the employer is secondary and (b) ordinarily a contract of apprenticeship would be for a fixed term which could only be terminated (in the context of redundancy) if the employer's business ceased as a going concern or changed so fundamentally that the apprentice could no longer be taught the trade.

82.3 Similarly, a contract of apprenticeship could only be terminated for conduct/ capability in exceptional circumstances including where the claimant was thereby considered as untrainable.

82.4 There is nothing in the 2009 Act and/or the 2012 Regulations and /or the 2017 Regulations which provides for an Apprenticeship Agreement to default to a common law apprenticeship contract if an Apprenticeship Agreement fails to comply with the relevant statutory provisions.

83. Having given the matter careful consideration, the Tribunal is not satisfied on the facts of this case that the claimant was engaged with the respondent on a common law contract of apprenticeship.

84. When reaching this conclusion, the Tribunal has taken into account that the claimant was taken on by the respondent in a trade for financial reward as what was described as an Apprentice roofer (paragraph 18), that the parties subsequently entered into what was described as an "Apprenticeship Agreement" under the auspices of South Devon College and the 2012 Regulations for an L2 Roofing

Framework with a start date of 25 November 2019, and estimated completion date of 31 October 2021 (page 57 of the bundle) together with the provision of 742 off the job training hours (paragraphs 19 and 20 and page 57 of the bundle).

85. The Tribunal has however weighed against such factors that: -

85.1 It was agreed between the parties at the outset of the relationship that the claimant's employment would be terminable on one week's notice during the first two years' of his employment (paragraph 18).

85.2 In the Apprenticeship Agreement which was signed between the parties on or after 25 November 2019, it was agreed that the apprenticeship was to be treated as a contract of service and not a contract of apprenticeship (paragraphs 19 and 20 and page 57 of the bundle).

85.3 On the facts, training was very much a subsidiary element of the arrangement between the parties. When reaching this conclusion, the Tribunal has taken into account in particular, that :- (a) neither party entered into the Combined Commitment Statement & ILP prepared by South Devon College regarding training and associated matters (paragraph 21 and pages 58 -61 of the bundle) (b) the claimant only undertook 3 x 5 day periods of off the job training during the course of his employment with the respondent (paragraph 24) and (c) the Tribunal was satisfied on the evidence (including the claimant's own contentions) that the claimant's role was to provide general unskilled support to the respondent together with labouring and cleaning and that the claimant received minimal on the job training (also paragraph 24).

86. In all the circumstances, the Tribunal is not satisfied that the claimant was engaged on a common law contract of apprenticeship.

87. In the event that the Tribunal had found that the claimant had been engaged on a common law contract of apprenticeship, the Tribunal is not satisfied that the respondent's concerns relating to the claimant's conduct / capability as identified at paragraphs 25,26, 27, 32, 33 and 37) were, viewed objectively, sufficiently serious to have entitled the respondent lawfully to have terminated any such common law contract of apprenticeship.

88. Finally, the Tribunal has considered whether the claimant's contract of service was for a fixed 2 year period (as contended by the claimant) or

terminable on one week's notice (as contended by the respondent). The Tribunal is satisfied on the facts, that notwithstanding that the Apprenticeship Agreement contained an "Estimated completion of learning date" of 31 October 2021 (page 57), the claimant's contract of service was terminable on one week's notice in accordance with the oral agreement reached between the parties at the commencement of the claimant's employment (paragraph 18). Moreover, the Tribunal is also satisfied that the claimant received payment in lieu of such notice upon the termination of his employment with the respondent (paragraph 38 above).

89. The contractual claim for breach of contract is therefore also dismissed.

Employment Judge Goraj
Date: 23 March 2022

Judgment sent to the parties: 04 April 2022

FOR THE TRIBUNAL OFFICE

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