



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Mr E Parr- Byrne

Mr Kevin Mason t/a Kevin Mason
Roofing Services

MEMBERS MEETING ON 29 July 2022

EMPLOYMENT JUDGE Goraj

MEMBERS – Mr P Bompas
Mr D Stewart

RESERVED JUDGMENT ON APPLICATION FOR RECONSIDERATION

THE UNANIMOUS JUDGMENT OF THE TRIBUNAL IS THAT: -

The claimant's reconsideration application relating to his breach of contract claim succeeds and the findings of the Tribunal at paragraphs 83, 86, 88 and 89 of the Judgment dated 23 March 2022 (that the claimant was not engaged on a common law contract of apprenticeship but employed on a contract of service which had been lawfully terminated by the respondent) are revoked/ varied as it is in the interests of justice to do so. The Tribunal further declares that the claimant was engaged on a common law contract of apprenticeship between 25 November 2019 and 31 October 2021 which was unlawfully terminated by the respondent on 25 August 2020.

REASONS

Background

1. The claimant applied for a reconsideration of (part) of the reserved judgment with reasons dated 23 March 2022 which was sent to the parties on 4 April 2022 (“the Judgment”). In the Judgment the Tribunal dismissed all of the claimant’s claims including the claimant’s claim for breach of contract (as the Tribunal held that the claimant was employed on a contract of service terminable on one week’s notice for which he had received payment rather than on a common law contract of apprenticeship).
2. The grounds for the claimant’s application are set out in an email and attachments dated 6 April 2022 which were received by the Tribunal on that date (“the reconsideration application”). In summary, the claimant stated that it related in particular to the claimant’s breach of contract claim in respect of which he raised four areas for reconsideration namely :- (1) in respect of the Tribunal’s finding of facts relating to the claimant’s entitlement to notice (2) that, notwithstanding the oral evidence of the parties, they had in fact signed/ entered into the Combined Commitment Statement &ILP (“the signed Commitment Statement”) – the claimant sought to rely on a signed copy of the Commitment Statement provided by South Devon College (“the College”) following the issue of the Judgment, which signed copy had not previously been before the Tribunal (3) in the light of the respondent’s failure to comply with the provisions of the Apprenticeships (Form of Apprenticeship Agreement) Regulations 2012 (“the 2012 Regulations”) the claimant’s contract defaulted to a common law apprenticeship contract/ the claimant was, in any event, engaged on a common law apprenticeship contract and (4) the alleged bias of the Employment Judge including in particular with regard to the alleged refusal to allow the claimant properly to pursue his case regarding the applicability of the 2012 Regulations/ the consequences of the respondent’s failure to comply with the provisions thereof.
3. The Tribunal understands that the claimant is also pursuing an appeal to the Employment Appeal Tribunal on similar grounds.
4. Schedule 1 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 contains the Employment Tribunal Rules of Procedure (“the Rules”) which include at Rules 70 – 73, the rules relating to reconsideration. Under Rule 71 an application for reconsideration under Rule 70 must be made within 14 days of the date on which the decision (or, if later, the written reasons) were sent to the parties. The written reasons were sent to the parties on 4 April 2022 and the reconsideration application was received by the Tribunal

on 6 April 2022. The reconsideration application was therefore received within the relevant time limit.

Position regarding the reconsideration application to date

5. The Tribunal wrote to the parties on 28 April 2022. In the accompanying letter dated 26 April 2022 (“the letter dated 26 April 2022”) the Tribunal dismissed the claimant’s reconsideration application for the reasons set out in that letter, save in respect of the matters referred to below relating to the signed Commitment Statement. A copy of the letter dated 26 April is attached to this judgment.
6. The Tribunal stated in the letter dated 26 April 2022, its provisional view that the signed Commitment Statement should be admitted in evidence as a relevant contemporaneous document. The respondent was invited to confirm whether he now accepted that the document had been entered into / signed by him. The respondent was further asked to comment on whether the signed Commitment Statement should be admitted in evidence and the effect (if any) of the signed Commitment Statement (if admitted) on the Tribunal’s findings of fact at paragraph 85.3 of the Judgment regarding its status and the subsequent conclusion at paragraph 86 of the Judgment that the claimant was not engaged on a common law contract of apprenticeship.
7. The respondent responded by an email dated 10 May 2022. In summary, the respondent :- (a) accepted that the Commitment Statement was signed by the respondent on 25 November 2019 (b) stated that the respondent did not have any recollection of signing the Commitment Statement/ regarded it as a formality of the enrolment process (c) accepted that the signed Commitment Statement was a relevant document which should be admitted in evidence and (d) contended that the contents of the signed Commitment Statement was not however reflective of the true relationship between the parties which had already been established on the basis of an oral agreement and working relationship which had continued as previously following the claimant’s enrolment which was at all times a contract of service terminable on one week’s notice.
8. On 7 June 2022, the Tribunal wrote to the parties advising them that having considered the recent correspondence, in which it was accepted that the Combined Commitment Statement had been signed by both parties, that it was a relevant document, and that the respondent did not object to its admission, the Tribunal was satisfied

that it was in the interests of justice to admit the document and to amend paragraphs 21 and 85.3 of the Judgment accordingly.

9. The Tribunal also advised the parties that as it was stated at paragraph 85.3 of the Judgment that one of the matters which it had taken into account when deciding that the claimant was not engaged on a common law contract of apprenticeship was that neither party had entered into the signed Commitment Statement, it was appropriate to consider the effect, if any, of the admission of the signed Commitment Statement on such finding and that this matter should accordingly, be determined further by the Tribunal.
10. The parties were further advised that the deliberations of the Tribunal would be strictly limited to the issue identified at paragraph 9 above as the Tribunal had already addressed and dismissed the remaining aspects of the claimant's reconsideration application (in the letter dated 26 April 2022). The parties were given the choice of having the matter determined by way of an oral reconsideration hearing or, if both consented, by way of written submissions.
11. The claimant initially requested an oral reconsideration hearing but both parties subsequently consented to the matter being determined by way of written submissions. The Tribunal gave directions for the exchange of written submissions and (any) replies together with associated directions.

The claimant's written submissions dated 11 July 2022

12. The claimant's written submissions are dated 11 July 2022. In brief summary, the claimant contended that:- (a) the College had provided evidence that the claimant was engaged on a Roofing Apprenticeship (Framework) and that the signed Commitment Statement was signed by all parties (b) the signed Commitment Statement is explicit – the duration is for 2 years from the start of the apprenticeship, the main focus of the apprenticeship is on learning which requires the respondent to provide 20% of total hours as off the job training (c) the signed Commitment Statement is a contract as outlined at page two of the document which supersedes any previous employment agreement or conditions (d) the claimant believed that the one week notice period applied until his formal apprenticeship commenced and he did not know any different as a contract of employment/ terms and conditions were never provided by the respondent and the verbal discussion prior to the commencement of the employment were ambiguous (e) the fact that respondent failed to digest the nature of and adhere to the employer responsibilities contained in the signed Commitment

Statement should not be to the detriment of the claimant (f) the signed Commitment Statement which contains details of responsibilities, evidence that a new contract was in place between the parties (g) section 32 of the Apprenticeships Skills, Children and Learning Act 2009 (“the 2009 Act”) set out the prescribed requirements for an statutory apprenticeship agreement including the requirement to provide a contract of employment/ written particulars of employment which was never provided by the respondent and (h) in summary – the signed Commitment Statement was a signed contract between the parties which superseded any previous agreements and which was breached by the respondent. Further, the respondent failed to comply with the provisions of the 2009 Act and the claimant’s contract should therefore be treated as a contract of apprenticeship pursuant to section A5 of the 2009 Act.

The respondent’s submissions dated 11 July 2022

13. The respondent’s submissions are also dated 11 July 2022. In brief summary, the respondent contended that :- (a) the signed Commitment Statement did not have any effect on the Tribunal’s finding that the claimant was not engaged on a common law apprenticeship (b) the signed Commitment Statement did not change the evidence that the claimant gave during the hearing namely, that he accepted that it was his understanding throughout his employment that the agreement was that his employment could be terminated on one week’s notice (b) the intentions and understanding of the parties should be given greater weight than the a document which was signed one month after the employment relationship was established, which was never explained to the respondent and following which there was no further discussions regarding the terms of employment/ any change to the employment relationship (c) the Apprenticeship Agreement at page 57 of the bundle (which was signed by both parties) states that the apprenticeship was to be treated as a contract of service not as a contract of apprenticeship – both parties understood that this was not a contract of apprenticeship and that there was no fixed two year period (and which is further supported by the comments recorded at paragraph 32 of the Judgment) and (d) the bundle of new documentation provided by the claimant after the issue of the Judgment included a checklist which states that the claimant was on a standard rather than a framework – such inconsistencies decreased the weight which should be placed on the signed Commitment Statement.

The claimant’s response dated 18 July 2022

14. The claimant provided a response to the respondent’s written submissions on 18 July 2022. In brief summary, the claimant: - (a)

further relied on the funding arrangements/ rules of the Education & Skills Funding Agency for apprenticeship funding and associated statutory requirements (b) contended that it was the express intention of the respondent that the claimant would be on an apprenticeship. However, as the respondent did not comply with the statutory requirements, he was not employed on an Approved English Apprenticeship and is therefore to be treated as being on a contract of apprenticeship pursuant to section A5 of the 2009 Act and (c) the one week's notice period was invalidated after the respondent enrolled the claimant on a government approved apprenticeship scheme and the signed Commitment Statement was agreed.

The respondent's response dated 15 July 2022

15. The respondent provided a response to the claimant's written submissions on 15 July 2022. In brief summary, the respondent contended as follows: - (a) the conclusions of the Tribunal are not affected by the signed Commitment Statement (b) the signed Statement is not a signed contract of employment and does not set out notice periods and other employment particulars (c) it is clear from the Apprentice Agreement that the signed Commitment Statement does not supersede the terms of employment between employer and employee. Further it states on the face of the document that the contract is to be treated as a contract of service not a contract of apprenticeship (d) the Apprenticeship Agreement has an estimated completion of learning date which is reflected in the signed Commitment Statement (e) the duration of 2 years as set out in the signed Commitment Statement is for the apprenticeship and is not the length of time that the claimant must be employed by the respondent – it does not reflect an agreement by the respondent to employ the claimant for a fixed two year period (f) the signed Combined Commitment Statement is a commitment statement rather than a contract of employment for a fixed term – it does not state that it is a contract of employment or that it replaces any existing employment particulars (g) the claimant's position regarding the agreement as to notice has changed since the hearing. The discussion between the parties regarding notice was not ambiguous or contentious as now contended by the claimant as they both agreed in evidence that the notice period was one week. The claimant was clear in his evidence that the notice period was one week – he did not contend that the one-week notice applied whilst he was on probation (h) The claimant further stated in his evidence that he did not recall a fixed term of employment (i) the signed Commitment Statement did not contain a fixed term of employment or contain any employment particulars. Further the document did not replace the term of the existing employment contract which were verbally agreed between the parties at the commencement

of the employment relationship(j) Section A5 of the 2009 Act applies to Approved English Apprenticeships which are governed by the 2017 Regulations which do not apply to old-style apprenticeship agreement. The 2009 Act does not, in any event, state that if there is a breach of its provisions the apprentice will be treated as if they were on a contract of apprenticeship.

The signed Commitment Statement and associated documents

16. The claimant submitted with the reconsideration application an undated email from the College to which was attached scanned signed copies of the claimant's enrolment form, apprenticeship agreement and the signed Commitment Statement. The College stated in the email that the signed Commitment Statement was not in the correct order in the original file and that it was therefore sending the above documents in the correct order for ease of use.
17. The documents forwarded by the College comprised of :- (a) "a sign - up checklist" (signed by the Workplace Coordinator and LIS Administrator on 16 December 2020 and 13 January 2021) which listed the documents and assessments completed and on which it also records the apprentice start date of 25 November 2019 with an expected end date of 31 October 2021 (b) a College Enrolment form signed by the claimant and the College tutor on 25 November 2019 (c) the Apprenticeship Agreement dated 25 November 2019 (as set out at paragraphs 19- 20 of the Judgment) and (d) the signed Commitment Statement (as previously summarised at paragraph 21 of the Judgment) which records that it was signed by the claimant, the respondent and the College on 25 November 2019.
18. Having reviewed the signed Commitment Statement further for the purposes of the reconsideration application, the Tribunal has reminded itself that it :- (a) states that the claimant was engaged on a Framework Roofing for a duration of 2 years starting on 25 November 2019 and ending on 31 October 2021 (b) confirms that a contract of employment was in place (c) sets out further details of the 20% off the job commitment for training and (d) sets out the respective responsibilities of the parties including the respondent's responsibilities to ensure that the claimant had a contract of employment, was allowed time off during the working week for College study and to provide the claimant with an opportunity to learn specific skills to aid him in achieving his programme of study and to support the claimant to achieve his learning objectives.

THE LAW AND CONCLUSIONS OF THE TRIBUNAL

THE LAW

19. The Tribunal has had regard in particular to: -

19.1 Rules 70 -73 of the Rules referred to above including, that the grounds for reconsideration are limited to those set out in Rule 70, namely that it is necessary in the interests of justice to do so. The interests of justice apply to both parties.

19.2 The legal provisions, authorities and guidance referred to at paragraphs 41 and 82 of the Judgment. The parties did not rely on any legal authorities in the submissions referred to above. When determining the reconsideration application, the Tribunal however considered that it was appropriate to have regard to the further legal authorities and guidance contained in **Flett v Matheson 2006 ICR 673 CA** and **Chassis and Cab Specialists Ltd v Lee EAT 0268/10 EAT** in the light of the admission of the signed Commitment Statement and the dispute between the parties regarding the nature of and legal effect of that document. The Tribunal accordingly wrote to the parties to draw these authorities to their attention and gave them an opportunity to make further representations on the effect (if any) of such authorities before completing its reconsideration judgment. Their additional representations are summarised at paragraphs 19.6 – 19.9 below.

19.3 The findings of the Tribunal at paragraphs 82 – 87 of the Judgment.

19.4 The contents of the reconsideration application together with the submissions and responses of the claimant and the respondent referred to above.

19.5 The parties provided further written representations on the effect of the authorities of **Flett v Matheson** and **Chassis v Lee** as follows: -

The further submissions of the claimant

19.6 The claimant provided two further, brief, written submissions dated 9 August 2022 and 5 September 2022. In summary, the claimant :- (a) indicated that he wished to rely on the authorities referred to above in support of his claim (b) reiterated his reliance on the evidence relating to the training arrangements/ the signed Commitment Statement which had previously been provided to respondent as part

of the claimant's disclosure and which were a legal requirement to enable the respondent to claim his funding from the government scheme and (c) reiterated its previous contention that the respondent's failure to comply with his statutory obligations meant that the claimant's contract of apprenticeship defaulted to a common law contract of apprenticeship which was breached by the respondent.

The further contentions of the respondent

19.7 The respondent provided further detailed written submissions dated 2 September 2022 (which were submitted to the Tribunal on 5 September 2022) which in summary contended as follows: -

19.8 In respect of **Flett v Matheson ("Flett")** The respondent contended/ relied in particular on the following:-

19.8.1 It is a 2006 case, with neutral judicial treatment, which predated the 2009 Act and the outcome of which was to remit the matter back to the Tribunal for further findings of fact. It is not of assistance in this case as each case turns on its own facts.

19.8.2 Although it is recorded in **Flett** that the appellant entered into a tripartite individual learning plan ("ILP"), as is accepted is the situation in this case, there are otherwise significant differences between the cases including :- (a) that there was no history of previous apprenticeships in the present case (b) the information contained in the ILP is more limited than in **Flett**, including as it does not identify the key skills/ detailed training scheme to be achieved, details of the on the job training section (and no log books were completed) and (c) there was no confirmation by the respondent that the ILP was acceptable to him.

19.8.3 The consideration at paragraphs 28 to 29 of **Flett** of the authorities on contracts of apprenticeship (including by reference to the analysis in **Wallace v CA Roofing Services Ltd [1996] IRLR 435**) in reliance of which the respondent contended that it was specifically stated in the signed Commitment Statement that the contract was to be treated as a contract of service not a contract of apprenticeship (with the associated identified limitations on termination) which demonstrated that contract of apprenticeship was not within the contemplation of the parties.

19.8.4 Paragraph 32 of **Flett** which, in turn, referred to the judgment in **Whitely v Marton Electric Ltd [2003] ICR 495** (paragraph 9), in which it stated that in a contract of apprenticeship an

employer undertook much wider responsibilities than towards an ordinary employee in return for advantages. The respondent also relied on the statement at paragraph 33 of **Flett** that if someone is paid less than the minimum wage it points to the agreement being one of apprenticeship. The respondent contended that neither of the above applied in this case including as:- (a) the Tribunal held at paragraph 23 of the Judgment that the claimant's role was to provide general unskilled support as a roofer's mate and (b) that the Tribunal held at paragraph 18 of the Judgment that the claimant was paid £5 per hour which it contended is more than the current minimum wage for apprentices and those under the age of 18.

19.8.5 Paragraph 38 of **Flett** in reliance on which the respondent contends :- (a) that the Tribunal is required to construe the extent of the obligations under the ILP by reference to the particular agreement and not to rely on the label alone and (b) although the words apprentice and apprenticeship are included in the ILP a contract of apprenticeship was expressly excluded and the specific work required to be undertaken with the respondent was never specified.

19.8.6 Paragraphs 39-41 of **Flett** with the distinguishing factors such as the applicability of the JIB scheme and restrictions on termination which contrasted with the present case were there was no such restrictions- only an oral contract providing for termination on one week's notice.

19.8.7 The respondent endorsed paragraph 85 and 86 of the Judgment and reminded the Tribunal that the cases of **Dunk v Waller [1970] 2 QB 163** and **Wallace v CA Roofing** were considered by it when concluding that there was no common law contract of apprenticeship.

19.9 In respect of **Chassis v Cab Specialists ("Chassis")** the respondent contended in particular as follows: -

19.9.1 In the present case the claimant responded to a facebook post and there was no publication stating what was expected of the respondent unlike in **Chassis** (or **Flett**).

19.9.2 The agreement in **Chassis** imposed strict expectations on the employer including an intention that the trainee would be employed for the whole duration of the apprenticeship and a commitment by the employer to use its best endeavours to

secure alternative employment if employment could not be offered on completion of training/ in the event of redundancy. In this case however, there is no such detailed contract, commitment to employ for a fixed term or to find alternative employment for the claimant.

19.9.3 In the **Chassis** case, the claimant underwent on the job training which was reviewed by the assessor which organised the apprenticeship and entered into the agreement with the respondent. However, in the case of the claimant his role was to provide general unskilled support and he received minimal on the job training (paragraph 85.3 of the Judgment).

19.9.4 The EAT concluded at paragraph 21 of **Chassis**, having reviewed the agreements between the parties, that the claimant was engaged on a contract of apprenticeship which was consistent with the restrictive nature of what the employer could/ could not do in relation to the claimant. This was not the position in the present case where the contract was described as one of service and no strict conditions were imposed by the College, or any external organisation, regarding employment matters.

19.9.5 It states at the last paragraph 23 of **Chassis** that “What matters is the substantial character of the relationship”. The Tribunal is reminded of its findings at paragraph 82 to 86 of Judgment, following its analysis of the relationship, that it was not satisfied that the claimant was engaged on a common law contract of apprenticeship.

19.9.6 Finally, the factual matrices of **Flett** and **Chassis** are different to the present case. Further, each case turns on its own facts, and having analysed the facts the Tribunal concluded in the Judgment that it was not a common law contract of apprenticeship which conclusion should not be interfered with.

THE CONCLUSIONS OF THE TRIBUNAL

Background

20. The Tribunal has reminded itself of the statutory provisions referred to at paragraphs 41.5 – 41.9 of the Judgment including, as a starting point: -

20.1 The statutory definition of an employee and contract of employment for the purposes of 230 (1) and (2) of the Employment Rights Act 1996 (“the Act”).

20.2 That a purported statutory apprenticeship agreement which does not comply with the requirements contained in Sections 32 of the 2009 Act and the Apprenticeships (Form of Apprenticeship Agreement) Regulations 2012 (“the 2012 Regulations”)(which are the relevant provisions in this case as the Tribunal held that the claimant was engaged on/ was working towards a Roofing Framework rather than a Roofing Standard) does not engage the provisions of section 35 (2) of the 2009 Act whereby a statutorily compliant agreement is deemed to be a contract of service.

20.3 Section 35 of the 2009 Act and/or the 2012 Regulations do not however, provide for a non – compliant statutory apprenticeship agreement (as is the position in this case) automatically to default in such circumstances to a common law contract of apprenticeship (paragraph 82.4 of the Judgment and section 35 (1) of the 2009 Act). In such circumstances, the Tribunal was therefore required to determine for the purposes of the Judgment the status of the contract, namely, whether the claimant was employed on a contract of service (as contended by the respondent) or engaged on a common law contract of apprenticeship (as contended by the claimant).

21. When determining for the purposes of the Judgment, whether the claimant was engaged on a common law contract of apprenticeship the Tribunal had regard to the authorities of **Dunk v George Waller & Son Limited 1970 2QB, 163, CA** and **Wallace v CA Roofing Services Limited 1996 IRLR 435 QBD** as referred to at paragraph 41.10 of the Judgment together with the associated guidance summarised at paragraphs 82.1 – 82.3 of the Judgment.

22. The Tribunal accepted at paragraph 84 of the Judgment that, for the purposes of the above mentioned authorities, :- (a) the claimant was taken on by the respondent in a trade for financial reward as what was described as an Apprentice Roofer (b) the parties subsequently entered into what was described as an “ Apprenticeship Agreement” under the auspices of the College and the 2012 Regulations for a L12 Framework and (c) that the Framework had a start date of 25 November 2019 and an estimated completion date of 31 October 2021 with the provision of 742 off the job training hours.

23. The Tribunal however weighed against the above, the factors set out at paragraph 85 of the Judgment which included that neither party had entered into the signed Commitment Statement (with its training and associated commitments) and concluded on balance, that the claimant was employed on a contract of service rather than engaged on a common law apprenticeship.
24. As stated at paragraph 19.2 above, the Tribunal has also had regard for the purposes of the reconsideration application to the further authorities of **Flett** and **Chassis** as the Tribunal considers that they are of relevance following the admission of the signed Commitment Statement with its stated training obligations. The Tribunal rejects the contentions of the respondent that they are of limited relevance as they are distinguishable on the facts, as it is satisfied that they provide useful guidance including in particular with regard to the effect of the training overlay.
25. The Tribunal has noted in particular that the Court of Appeal in **Flett** identified three key matters which the Tribunal considers are of relevance in this case following the admission of the signed Commitment Statement namely :- (a) whilst the label attached to the arrangement is of relevance it is necessary to construe the terms of the agreement and not to rely on the label alone (b) whether the existing contract should be treated as “varied or overlaid by the tripartite training arrangements” and (c) whether the employer may have obligations to employ the employee for the contemplated period of the “apprenticeship”.

The Tribunal’s conclusions regarding the period prior to 25 November 2019

26. The Tribunal has reviewed first the contractual position prior to 25 November 2019 (the date upon which the parties entered into the Apprenticeship Agreement and the (tripartite) signed Commitment Statement). The Tribunal is satisfied that the position prior to 25 November 2019 continues to be as recorded at paragraph 18 of the Judgment including that it was orally agreed between the parties that the claimant would be employed as an apprentice roofer, that he was paid at the rate of £5 per hour and that he would be entitled to one week’s notice to terminate his employment. Further, during this period the claimant was utilised by the respondent as an unskilled labourer (paragraph 23 of the Judgment)
27. Further, for the reasons previously explained in the letter dated 26 April 2022, the Tribunal rejects the contentions of the claimant that there

was any agreement between the parties that the one week's notice provision would only apply during the claimant's probationary period/ that there was any express agreement between the parties that the agreed notice provision would only apply until they entered into a formal apprenticeship agreement.

28. In all the circumstances, the Tribunal remains satisfied that although the claimant was described as an apprentice roofer, he was in fact employed by the respondent as an unskilled employee on a contract of service, which was terminable by the respondent on one week's notice, during the period between 21 October 2019 and 25 November 2019.

The effect (if any) of the signed Commitment Statement on the period on and after 25 November 2019

29. The Tribunal has therefore gone on to consider the effect (if any) of the newly admitted signed Commitment Statement on the claimant's contractual status on or after 25 November 2019. The Tribunal has considered the signed Commitment Statement in conjunction with the Apprenticeship Agreement which was also entered into by the parties on 25 November 2019 ("the Apprenticeship Agreement") (paragraphs 19 and 20 of the Judgment).
30. The Tribunal has, as a starting point, considered the matter in accordance with the Court of Appeal guidance in **Dunk v Waller**, as applied at paragraph 84 of the Judgment, and in respect of which the Tribunal has previously concluded that the claimant was taken on by the respondent in a trade (roofing) for financial reward as an apprentice roofer and that the parties subsequently entered into the Apprenticeship Agreement under the auspices of the College for an L2 Roofing Framework as further referred to in that paragraph. The claimant was therefore engaged on a training programme to secure a qualification in a recognised trade (roofing).
31. The Tribunal has therefore gone on to consider whether the contractual position has changed in anyway, in the light of the admission of the signed Commitment Statement/ the approach adopted, in particular, in **Flett**.
32. In essence the claimant's position is that :- (a) even if the existing contractual arrangements did not automatically default to a contract of apprenticeship in the light of the respondent's failure to comply with the legal requirements relating to statutory apprenticeships, they were, in any event, overridden by the Signed Commitment Statement which

imposed a two year training contract during which the respondent agreed to provide/ facilitate the claimant with relevant on and off the job training to enable him to complete his apprenticeship as a roofer (b) in pursuance of such arrangements the respondent benefitted from statutory funding and paid the claimant at a reduced minimum wage as apprentice in recognition of such status and (c) the fact that the respondent failed to comply with the training obligations contained in the signed Commitment Statement should not prejudice the claimant.

33. In essence, the respondent :- (a) contends that the signed Commitment Statement is a commitment statement not a contract (b) contends that it is clear from the Apprenticeship Agreement that the contract is one of service rather than apprenticeship and that the existing contractual arrangements including the respondent's right to terminate the contract on one week's notice continued to apply (d) denies that the signed Commitment Statement gave rise to any obligation on the part of the respondent to employ the claimant for a fixed period of two years which was the duration of the apprenticeship not the employment .

34. The Tribunal has also given careful consideration to the further written submissions which it has recently received from the parties relating to the Judgments of **Flett/ Chassis** as set out in detail at paragraphs 19.6 – 19.9 above.

Does the signed Commitment Statement effect the contractual position for the period on or after 25 November 2019

35. The Tribunal's position regarding the contractual position prior to 25 November 2019 is as stated at paragraphs 26- 28 above. The Tribunal has therefore gone on to consider whether in the light of **Flett** the onset of the Apprenticeship Agreement / signed Commitment Statement imposed their own terms including as to duration or terminability such as to supplement or override the position in the original contract.

36. Having given the matter careful consideration, the Tribunal is satisfied that the combined effect of the Apprenticeship Agreement and the signed Commitment Statement was to supplement/ override the existing contractual commitments of the parties regarding training and termination in the following ways: -

30.1 With regard to the nature of the training obligations placed upon the respondent as contained in the signed Commitment Statement including, in particular, the agreement of the respondent

henceforth to :- (a) allow the claimant paid time off to attend his Roofing course at the College (the 20% (742 hour) off the job commitment) (b) provide the claimant with the opportunity to learn skills to aid him in achieving/ which were relevant to his apprenticeship programme and (c) to support the claimant to achieve his learning objectives (page 60 of the hearing bundle).

30.2 With regard to termination of the contract, the combined effect of the Apprenticeship Agreement and the signed Commitment Statement was to create an objectively ascertainable agreed end date for the period of training of 31 October 2021 as identified in the Apprenticeship Agreement (which gave an estimated completion of learning date of 31 October 2021 - at page 57 of the bundle) and the signed Commitment Statement (in which it was stated that the Apprenticeship Framework in Roofing was for a period of two years starting on 25 November 2019 and ending on 31 October 2021 -at page 58 of the bundle).

30.3 The Tribunal is further satisfied that in the light of **Flett**, the objectively ascertainable agreed end date of 31 October 2021 overrode the original oral agreement between the parties whereby the respondent was previously entitled to terminate the claimant's contract on one week's notice. Further there is no suggestion in this case that there was any subsequent discussion/ agreement between the parties regarding the question of termination including that the respondent issued the claimant at that time with any other contractual documentation entitling him to terminate the arrangement on notice.

37. Further, the Tribunal rejects the contention of the respondent that the signed Commitment Statement did not have contractual effect. The Tribunal is satisfied that, notwithstanding that the signed Commitment Statement is described as a commitment statement, the obligations contained therein were of contractual effect including, as the respondent was able to procure the government grants identified at paragraph 22 of the Judgment in consideration for such training commitments.

38. The Tribunal has therefore gone on to consider whether, in the light of all the above, it continues to be satisfied that the claimant was engaged on a contract of service rather than on a common law contract of apprenticeship.

39. Having given the matter careful consideration, the Tribunal is satisfied, in the light of the contents of the signed Commitment Statement and the Tribunal's associated findings referred to above, that, viewed

objectively, it shifts the balance in the favour of the claimant to a finding that the claimant was engaged by the respondent on a common law contract of apprenticeship (rather than on a contract of service) with effect from 25 November 2019 and that it is in the interests of justice to revoke and vary the Judgment accordingly.

40. When reaching such conclusion, the Tribunal has reminded itself of the factors identified at paragraph 85 of the Judgment which it identified as weighing against the claimant being engaged on a common law contract of apprenticeship, in summary :- (a) the oral agreement of the parties for termination of the claimant's contract on one week's notice (b) that it was stated in the Apprenticeship Agreement that it was agreed that the claimant's apprenticeship was to be treated as a contract of service and not a contract of apprenticeship and (c) on the facts training was very much a subsidiary element of the arrangement. The Tribunal has also taken into the account its previous finding that the claimant was paid (after the completion of his initial trial period) £5 per hour (paragraph 18 of the Judgment) which sum is in excess of the statutory minimum rates otherwise payable to apprentices / employees aged under 18 throughout the relevant period.

41. The Tribunal is however satisfied that, in the light of the admission of the signed Commitment Statement and its associated findings, such factors are no longer determinative for the following reasons: -

40.1 The Tribunal has concluded (for the reasons explained above) that the contractual position (including in particular with regard to the key issues of training and the termination of the contract) were varied by the "training overlay" effected by the Signed Commitment Statement and which the Tribunal is satisfied is more important the label attached to the arrangement by the parties.

40.2 Further, the Tribunal is satisfied that its findings (at paragraph 23 of the Judgment) that the claimant's role was in practice to act as a roofer's mate providing general unskilled support to the respondent/ that the claimant received minimal on the job training should be weighed in the light of :- (a) the identified training obligations placed on the respondent (for on and off the job training) by the Signed Commitment Statement (the purpose of which was to facilitate the claimant to become a qualified roofer in a recognised trade) and (b) that the respondent would otherwise be entitled to rely on his failure to adhere to such training obligations to justify his contentions regarding the claimant's employment status.

Final conclusions

42. In the light of all of the above, the Tribunal is satisfied on reconsideration, that :- (a) the claimant was engaged by the respondent on a common law contract of apprenticeship from 25 November 2019 with an objectively ascertainable end date of 31 October 2021 (b) in such circumstances, the original oral agreement between the parties whereby the respondent was entitled to terminate the claimant's contract on one week's notice was superseded accordingly and (c) the respondent was only entitled to terminate the claimant's contract prior to 31 October 2021 in the limited circumstances identified at paragraphs 82.2 and 82.3 of the Judgment which the Tribunal has previously determined do not apply in this case (at paragraph 87 of the Judgment).
43. Further in all the circumstances, the Tribunal is satisfied that it is in the interests of justice that the the finding of the Tribunal in the Judgment dismissing the claimant's claim for breach of contract is therefore revoked and substituted with a finding that the claimant was engaged on a common law contract of apprenticeship with effect from 25 November 2019 and that such contract was therefore wrongfully terminated by the respondent in breach of such contract.
44. The matter will be listed in due course for a remedy hearing to determine the award of any damages to the claimant.

Employment Judge Goraj
Date: 22 September 2022

Judgment sent to Parties: 22 September 2022

For the Tribunal Office