EMPLOYMENT TRIBUNALS

Claimant Mr E Parr- Byrne

Respondent Mr Kevin Mason t/a Kevin Mason Roofing Services

Heard at: Exeter (by video hearing) **On:** 13 March 2023

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 is awarded, and the respondent is ordered to pay to him, the sum of £2,212.50 in respect of his breach of contract (wrongful dismissal) claim and which sum includes an uplift of 25 per cent (£1,770 plus £442.50) pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

2. The claimant is further awarded, and the respondent is ordered to pay to him, 4 weeks' pay (at £200 gross per week) in the sum of £800 pursuant to section 38 of the Employment Act 2002.

3. The total award is therefore **£3,012.50.**

REASONS

BACKGROUND

1. This is a reserved remedy judgment following a reconsideration Judgment dated 22 September 2022 (which was also issued on that date) ("the reconsideration judgment"). The Tribunal held in the reconsideration judgment, reversing its previous decision in the original liability judgment dated 23 March 2022 and issued on 4 April 2022 ("the liability judgment"), that the claimant was engaged by the respondent on a common law contract of apprenticeship as a roofer from 25 November 2019 with an objectively ascertainable end date of 31 October 2021 and that the contract was wrongfully terminated by the respondent in breach of contract on 17 August 2020.

2. A copy of the liability judgment and of the reconsideration judgment are at pages 1-27 and 34 – 51 respectively of the remedy bundle prepared for this hearing ("the remedy bundle").

3. This remedy hearing was originally listed for hearing on 16 December 2022. The remedy hearing did not however proceed on that date (following an application by the respondent for a postponement which was not opposed by the claimant and other issues) and the matter was instead the subject of a case management hearing. The associated case management order is at pages 59 – 63 of the remedy bundle ("the CMO dated 19 December 2022"). The claimant was required, pursuant to paragraph 5 of the CMO dated 19 December 2022, to exchange any further documents relevant to remedy including those specifically identified in that paragraph.

Documentation

4. The Tribunal was provided with the remedy bundle together with a copy of an email dated 16 December 2021 (which had previously been submitted) providing details of the profit and loss for year ended 2021/ 2022 for the claimant's business Rapid Roofing together with a payslip relating to the claimant's employment with the respondent for the pay date 17 March 2020 (together "the remedy bundle"). The remedy bundle contains the helpful written submissions of the parties together with the summary of points of agreement / disagreement which the parties were directed to provide by the CMO dated 19 December 2022.

5. The Tribunal has also had regard to the original bundle which was provided for the liability hearing.

Witness statements

6. The claimant and his grandmother, Miss Gabrielle Bassett, submitted witness statements for the purposes of the remedy hearing. The claimant has also given oral evidence to the Tribunal. Miss Bassett did not however attend the remedy hearing or provide any documentary evidence to substantiate her contended payments to the claimant (notwithstanding that paragraph 5 of the CMO dated 19 December 2022 directed that any document – including receipts- relating to the start-up costs of the claimant's business Rapid Roofing should be provided).

7. The Tribunal has also had regard to the witness statements which were provided to the Tribunal by the parties for the liability hearing.

8. The Tribunal also permitted the claimant's mother, Ms Vuitton, to give oral evidence to the Tribunal relating to the claimant's finances/ costs and expenses / the associated documents contained in the remedy bundle including in respect of the costs/ expenses relating to the setting up of the claimant's business Rapid Roofing/ qualification costs. The Tribunal permitted Ms Vuitton to give such evidence, notwithstanding that she had not submitted a witness statement, as she had dealt with such matters on the claimant's behalf including in the light of the claimant's stated condition of autism.

THE ISSUES

9. In summary, the claimant seeks the following compensation: -

   (a) Damages for breach of contract (up to the maximum permitted limit of £25,000) pursuant to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the 1994 Order") in respect of the wrongful termination of his common law contract of apprenticeship which terminated on 17 August 2020 (prior to its due end date of 31 October 2021).

   (b) The claimant seeks in respect of the above :- (a) compensation for loss of earnings to include the pay rise in line with that afforded to the respondent's apprentice Mr Blight in his second year of apprenticeship (which the claimant contends he would also have received if he had remained with the respondent) (b) the loss of future prospects (limited to 23 February 2023) (c) the set up costs of his business Rapid Roofing (d) the costs to complete his NVQ qualification and (e) interest thereon at 8 per cent.

   (c) A 25 per cent uplift pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") in respect of the respondent's failure to comply with the ACAS Code

of Practice on Disciplinary and Grievance Procedures ("the ACAS Code") and,

(d) 4 weeks' pay pursuant to section 38 of the Employment Act 2002. for the respondent's failure to issue a statement of terms and employment as required by section 1 of the Employment Rights Act 1996 ("the 1996 Act").

10. In summary, the respondent's position is as follows: -

(a) The respondent accepts that the claimant is entitled to be compensated for an amount reflecting a loss of earnings, less mitigation (but not the claimed increase in salary to bring the claimant in line with Mr Blight).

(b) The respondent's position is however, that the claimant's employment with Watertight Roofing ("Watertight") and its termination on 15 January 2021 constitutes a break in the chain of causation and that the respondent should not be responsible for any losses following that employment or flowing from it including for loss of earnings, the costs to complete his NVQ qualifications/ the set up costs of Rapid Roofing. The respondent further contends that as the claimant has not provided the ordered evidence (in respect of the Bell Group) he is not, in any event, entitled to pursue any claim for future loss of earnings. Still further, the respondent does not, in any event, agree with the figures which the claimant has given for losses/ mitigation.

(c) The respondent accepts that the claimant would be entitled to an award of interest on any compensation awarded for breach of contract pursuant to the 1994 Order but says that the percentage and period is at the Tribunal's discretion up to a maximum of 8 per cent.

(d) The respondent accepts that the claimant is entitled to an ACAS uplift in respect of the respondent's failure to adhere to the ACAS Code but says that any uplift should be limited to 15 per cent.

(e) The respondent also accepts that the claimant is entitled to compensation for the respondent's failure to provide a statement of terms and particulars but says that it should be limited to two weeks' pay.

THE FINDINGS OF FACT ON REMEDY

The liability judgment

11. The Tribunal has had regard to the findings contained in the liability judgment including in particular: -

    (a) paragraph 15 (relating to the claimant).

    (b) Paragraphs 17.2/34 (relating to Jacob Blight – including that he was engaged by the respondent as apprentice roofer/ labourer around 20 July 2020 on (after a trial period) a substantive salary of £5 per hour which subsequently rose to £7 per hour).

    (c) Paragraph 18 (the claimant's salary was £5 per hour/ that it was accepted by the respondent that he did not confirm the agreed terms of employment in writing).

    (d) Paragraph 25 (the claimant's mode of transport to get to work including the initial use by the claimant of a moped because of the lack of availability of public transport/ that the claimant was accompanied by his mother by car when he was learning to drive and that there were a number of occasions when the claimant was late/ not ready for work).

    (e) Paragraph 28 (the claimant was on furlough leave between 30 March 2020 and 11 May 2020) and,

    (f) Paragraphs 38 – 39 (when the claimant arrived for work on the morning of 17 August 2020 he discovered his personal possessions at the side of the road, he was told by the respondent that he had been dismissed because he had not improved and, the claimant was paid one week's pay in lieu of notice. Further, the claimant and his mother subsequently tried unsuccessfully to contact the respondent on a number of occasions to obtain a copy of the respondent's disciplinary and grievance procedure / a copy of a contract of employment, but the respondent did not respond).

The claimant's payslip

12. The claimant's pay slip (added as page 109 of the remedy bundle) with the respondent which shows that the claimant was paid £200 gross for 40 hours per week with a net weekly figure of £195.92 (pay date 17 March 2020).

Alternative employment

13. Following the termination of his employment with the respondent the claimant understood that he had 4 weeks' to secure alternative employment in order to be permitted to continue to attend his apprenticeship college course. The Tribunal is satisfied that the formal position with regard to such matters is as confirmed by the South Devon College at page 58 of the remedy bundle.

Watertight Roofing

14. The claimant secured alternative employment with Watertight, which the claimant describes as a large roofing company based in Plymouth, with effect from 1 September 2021. The Tribunal has not been provided with any documentary evidence relating to the claimant's employment with Watertight/ any information from that company. Accordingly, the Tribunal has had limited information to aid its determination of the terms of the claimant's employment / apprenticeship with Watertight and/ or the reasons for the termination of such employment.

15. The following findings of fact have therefore been made by the Tribunal, on the balance of probabilities, having considered the claimant's witness statements (prepared for the liability and remedy hearings) and oral evidence.

16. The claimant was employed by Watertight as an Apprentice Roofer with effect from1 September 2021 on an initial probationary period of one month. A contract of employment was issued together with a disciplinary/ grievance procedure and "the 3- way agreement signed (LSC)." The Tribunal understands the final document to be a tripartite training agreement made between the claimant, Watertight and South Devon College, as in the claimant's previous employment with the respondent, and as further described at paragraph 21 of the liability judgment and paragraph 18 of the reconsideration judgment.

17. The terms and conditions of the claimant's employment required him to attend for work at 8am at Watertight's main base in Plymouth which was approximately 12 miles from his home. The claimant was initially assigned to a team who lived locally to the depot and who had the use of a work's van which was returned to the depot at the end of the working day. At this time the claimant, who was continuing to learn to drive, was assisted by his mother to get to and from work because of limited available public transport. The claimant has not however contended that he experienced any difficulties meeting the requirement to attend at Watertight's base in Plymouth by 8am.

18. The claimant contended that in or around November 2020, Watertight increased in size, re-organised its work teams and assigned the claimant to a team who lived near the Tamar Bridge and who undertook most of their work in Cornwall. The claimant further contended that the works team to which he was assigned required the claimant to meet them close to the Tamar Bridge by 7/ 7.30am and if he was not there by such time to make his own way to job sites in Cornwall (including Launceston), causing him difficulties with transport as he did not drive and relied on his mother to assist him to get to work. The claimant further contended that he raised his transport difficulties with the owner of the business who told him that he did not wish to get involved and advised the claimant that he should "work things out" with the leader of the work team. The claimant further stated in evidence that when he spoke to the leader of the work team he was not prepared to collect the claimant from the Plymouth base, that he was therefore required to travel to the Tamar Bridge / sites in Cornwall as referred to above and that in the circumstances the claimant decided that he could no longer meet the requirements of the job and that it was better to resign his employment and leave on good terms. The claimant stated that he believed that Watertight's actions would be classed as constructive dismissal. The claimant does not contend that the raised any formal grievance with Watertight regarding any transport difficulties. The claimant resigned his employment with Watertight Roofing on 15 January 2021.

19. Having given careful consideration to the above, the Tribunal is not satisfied, on the balance of probabilities, and having considered the limited available evidence that the claimant has substantiated his contentions including that he was required to attend at the Tamar Bridge/ travel to sites in Cornwall as contended and/or that any transport difficulties were dismissed as contended by Watertight.

20. When reaching this conclusion, the Tribunal has taken into account in particular, that it is the claimant's case that it was an express term of his contract that he was required to attend the respondent's base in Plymouth by 8am. The Tribunal therefore considers it unlikely, on the balance of probabilities, that the respondent would have required an apprentice in training who was employed on such terms to attend as contended above/ would not have assigned him to a more local team (as he was employed initially) if the claimant had raised with them difficulties regarding transport. Further, the claimant has not provided any particulars to substantiate his contentions including the identification of any relevant dates, times or jobs when he says he was required to travel as contended above and/or the dates of any alleged discussions with management of Watertight relating to any such concerns. Further, when asked in evidence why he did not leave his tools in the works van and use his motorcycle to attend any jobs the claimant stated that he could

not do so as he was not always assigned to the same van and could be working locally.

21. There is a dispute between the parties as to the monies earned by the claimant whilst in the employment of Watertight and in particular whether the figures provided by the claimant to the Tribunal were gross or net. The claimant has not provided the Tribunal with any payslips from Watertight. The claimant says that the gross total figure received from Watertight was £3,800 with a total net figure of £2,855 and that he initially confused the gross and net figures. The respondent says that the figure initially stated by the claimant to have been received from Watertight was £3,800 and that this is the figure which should be adopted. The Tribunal accepts, on the balance of probabilities and, notwithstanding the claimant's failure to provide a copy of any payslips from Watertight, the claimant's evidence/ explanation regarding such monies.

22. The claimant contends that following his departure from Watertight he tried unsuccessfully to find an alternative work placement but was unable to do so within the 4-week period required by the College. Whilst the claimant has not provided any documentary evidence of the attempts which he made to secure an alternative placement the Tribunal accepts such evidence, on the balance of probabilities.

23. The claimant passed his driving test around the end of February 2021/ beginning of March from which time he had the use of the Ford Focus which had been given to him in or around the end of October / the beginning of November 2020.

Rapid Roofing

24. As the claimant was unable to secure an alternative placement he decided, after discussion with his College Tutor, to go self-employed over a period of 3 years to enable him to complete his roofing college course and obtain an NVQ. The claimant has recently been informed that he can apply for his NVQ with effect from 28 February 2023.

25. In February 2021 the claimant started, with the assistance of his family, his own business called Rapid Roofing. The business was officially set up on 8 March 2021 with the first customer on 22 March 2021.

26. The claimant is claiming (after various revisions/ adjusted figures) start-up costs totalling £5,555.38 (including £2,888.00 for a car and £2,381.38 for car insurance together with smaller sums for tools/ ladders). The claimant has submitted a statement from his grandmother Miss Bassett in which she states that she paid the set-up costs of £5,555.38 from her personal bank account. Miss Bassett did not however attend the remedy hearing to support her statement and the claimant has not provided any

documentary evidence in support of his start-up costs. The claimant contended that he did not have/ did not save the receipt for the car (which is described as a Skoda) or ladders and sought to explain the absence of such documents on his lack of experience and understanding of Tribunal matters. The respondent stated that the Tribunal should approach any such claims with caution in the light of the varying figures put forward and lack of any documentary evidence.

27. Whilst the Tribunal appreciates that the claimant is a litigant in person with a stated diagnosis of autism/ no previous experience of Tribunal proceedings the Tribunal is nevertheless, not satisfied that claimant has provided a satisfactory explanation for the absence of any supporting documentary evidence. This is particularly so in the light of the expensive nature of the items involved namely, a motor vehicle / associated insurance in a combined sum of in excess of £5,000 and further that the claimant (who has been very ably assisted by his mother in these proceedings) was directed by the CMO dated 19 December 2022 to provide such evidence. The Tribunal is therefore not satisfied, in the absence of any supporting evidence, that the claimant/ his grandmother have incurred such costs.

Rapid Roofing Trading

28. The "balance sheet" which was provided by the claimant for the hearing on 16 December 2022 (inserted as pages 107-108 in the remedy bundle) records that (disregarding any start-up costs) the claimant had outgoings of £14, 856.53 and an income of £16. 818.25 for the period between March and December 2021. Therefore, disregarding any start-up costs (of which there must have been some notwithstanding that the claimant has been unable to prove those referred to above) the claimant had a net income of less that £2,000 for such period. In the following 10 months the claimant however achieved an impressive increase in income to £72,994.36 with outgoings of £56, 002.48 (a surplus income of £16,991.88). Deductions for CIS and a loan from the claimant, as a company director with money received from his late father, gave a small overall recorded loss of £74.87.

Costs of completing his qualification as a roofer

29. If the claimant had remained with the respondent/ Watertight the claimant's costs of qualification as a roofer would have been met by them as part of their training arrangements. The documentary evidence shows that the cost of the lead course would be £900 (£750 plus VAT) (page 56 of the bundle) and that the further cost of completing the NVQ would be £724 (page 57 of the bundle).

THE SUBMISSIONS OF THE PARTIES

30. The Tribunal has given careful consideration to the helpful points of agreement / disagreement / responses provided by the parties together with their respective skeleton arguments contained at pages 71-79 and 85 -106 of the remedy bundle the contents of which are referred to further in the Tribunal's Conclusions below.

31. The Tribunal has also had regard to the authorities which are relied upon by the parties as referred to below; -

Hadley v Baxendale [1843- 60] All ER Rep 461]
Robinson v Harman (1848) 1 Exch 850
Dunk v George Waller & Son Limited [1970] 2 AER 630, CA
Hardwick v Leeds Area Health Authority [1975] IRLR 319
Radford v De Froberville [1978] 1AER 33.
Kinnear v Marley (case number 4105371/ 2016 – ET).

THE LAW

The claimant's breach of contract claim

32. The Tribunal has had regard in particular in respect of the claimant's wrongful dismissal claim (damages for breach of contract in respect of the wrongful termination of his common law apprenticeship) to the provisions of the 1994 Order. The Tribunal has also had regard to the authorities referred to above.

The claimant's further claims

33. The Tribunal has also had regard to the following statutory provisions: -

(a) The provisions of the ACAS Code together with section 207 A of 1992 Act and Schedule A2 thereof.

(b) The provisions of section 1 and 11 of the 1996 Act together with section 38 of the Employment Act 2002 and sections 221/ 222 of the 1996 Act (a week's pay).

34. The Tribunal has reminded itself in particular of the following matters in respect of the claimant's claim for wrongful dismissal: -

(a) This is a contractual claim and the Tribunal is therefore required to determine it in accordance with the principles of common law.

(b) The starting point is that "where a party sustains a loss by reason of a breach of contract, he is so far as money can do it, to be placed in

the same situation with respect to damages, as if the contract had been performed" **Robinson v Harman** (as referred to above).

(c) In **Dunk v Waller** it was recognised that the wrongful termination of a common law contract of apprenticeship entitled the claimant to damages for wages up to the intended end of the apprenticeship together with an amount to reflect the lack of training and loss of opportunities that the completion of the apprenticeship would give.

(d) If a claimant does not take reasonable steps to mitigate his losses, he is not entitled to recover damages which could have been reasonably mitigated. The respondent bears the burden of proving that the claimant has not mitigated his loss.

(e) The further related, but separate question is whether the losses claimed by the claimant for the period following the termination of his employment with Watertight are too remote and therefore break the chain of causation or are they losses which, viewed objectively, are properly attributable to the original wrongful dismissal by the respondent. The Tribunal has reminded itself that the fact that an employee has been able to secure suitable permanent employment following the original wrongful dismissal does not necessarily mean that the chain of causation has been broken. A reasonable but unsuccessful attempt to mitigate does not cut the chain between the wrongdoing and loss which on ordinary principles of causation flowed from it.

THE CONCLUSIONS OF THE TRIBUNAL

The claimant's wrongful dismissal claim

35. The Tribunal has considered first the claimant's claim for damages for breach of contract for lost wages and further costs in respect of the wrongful termination of his common law apprenticeship (which had a due end date of 31 October 2021) on 17 August 2020.

The claimant's submissions

36. In summary, the claimant contends that he, at all times, made reasonable attempts to mitigate his losses including by :- (a) initially securing alternative employment with Watertight (b) when he was unable to continue to work for them by reason of their unilateral changes in work location / pick up arrangements reasonably left their employment and (c) thereafter set up his own business when unable to secure other alternative employment.

37. The claimant further denied that there had been any break in the chain of causation. The claimant contended that the losses which he suffered

following the alleged breakdown of his relationship with Watertight, including in respect of his decision to set up his own business following his inability to secure further suitable alternative employment, were properly attributable to his original wrongful dismissal by the respondent and were moreover reasonably foreseeable.

38. The claimant relies in particular on the authorities of **Dunk v Waller** and **Kinnear v Marley** in support of his claims.

The respondent's submissions

39. In summary, whilst the respondent accepts that the claimant is entitled to be placed in the position that he would have been in if the contract had been performed, he contended, in essence, that the claimant had failed reasonably to mitigate his losses when he decided to leave Watertight and thereafter to set up his own business. The respondent says that the claimant did not act reasonably in leaving Watertight as there were other ways in which any difficulties could have been resolved including by using his motorcycle until he had passed his driving test and that other options were therefore available to the claimant. The respondent further contended that if the claimant acted unreasonably in failing to mitigate it is more likely that leaving Watertight was a break in the chain of causation.

40. The respondent further contended that whatever happened with Watertight should not, in any event, fall on the respondent's shoulders as the losses sustained by the claimant following the obtaining and his subsequent resignation from Watertight was a new and independent cause of further damage occurring namely, the costs of the increased time involved in adopting a self-employed route to qualification / the setting up of Rapid Roofing. The respondent further contended that the loss following the ending of the employment relationship with Watertight was too remote as it was not a loss which fairly and reasonably arose naturally from the breach by the respondent and/or was not foreseeable.

Mitigation of Loss

41. The Tribunal has considered first whether the claimant has taken reasonable steps to mitigate his losses.

42. When considering this question the Tribunal has reminded itself that the burden is on the respondent to satisfy the Tribunal that the claimant has failed to discharge such duty.

43. The Tribunal is satisfied that the claimant secured, with commendable promptness, with effect from 1 September 2020, not only suitable alternative employment with Watertight but also the continuance of his roofing apprenticeship which enabled him to remain on his course at the

South Devon College and on track to qualify as a roofer. This alternative employment as an apprentice also provided the claimant with a written contract of employment together with the tripartite training commitment agreement referred to above on what the claimant contended was a broadly similar level of salary.

44. The Tribunal has therefore gone on to consider whether, viewed objectively, that the claimant took reasonable steps to mitigate any further losses when leaving the employment of Watertight and subsequently setting up on his own account when further alternative employment was not available.

45. Having given careful consideration to the competing arguments the Tribunal is not satisfied that the claimant took reasonable steps to mitigate any future losses when leaving Watertight on 15 January 2021 for the reasons explained below.

46. Firstly, the claimant had secured alternative employment / a roofing apprenticeship with a company which he described as a large and expanding company based in Plymouth. The claimant further described the teaching which he received at Watertight as “amazing”.

47. The Tribunal is not satisfied, on the available evidence, that the claimant was required to make his own way as contended above or that the claimant, in any event, gave sufficient consideration to the possible ways in which any transport difficulties could be resolved. The claimant did not contend that he had requested a transfer to another team / that he had made any attempt to invoke the respondent’s grievance procedure to try to resolve any issues relating to transport/ any alleged breaches of the terms of his employment by the respondent. Further the claimant, in any event, had the potential interim use of his motorbike together with the likely use of his own motor vehicle in prospect at the time of his resignation from Watertight as he had acquired a motor vehicle (a ford focus) from in or around October 2020 and had been learning to drive since the time of his employment with the respondent (and did in fact subsequently pass his driving test around the end of February 2021, shortly after his resignation from Watertight).

48. In all the circumstances, the Tribunal is not satisfied on the facts, that the claimant took reasonable steps to mitigate any further losses when he resigned his employment with the respondent in January 2021.

The chain of causation/ foreseeability

49. The Tribunal has gone on to consider the effect of the claimant’s employment with Watertight on 1 September 2020 and the subsequent termination thereof on 15 January 2021 on the claimant’s claim for

damages including whether any losses incurred after that date are, in any event, properly attributable to the wrongful termination of the contract by the respondent in August 2020 / the losses were foreseeable or whether the chain of causation was broken.

50. As stated previously above, the claimant contends that the loss of wages together with the further losses claimed by him (including for the start-up costs of Rapid Roofing, the costs of NVQ qualification and for loss of opportunity / future prospects) are all properly attributable to the respondent's wrongful dismissal and that the claimant should not be penalised for his reasonable attempts to mitigate his losses. The claimant seeks damages in accordance with the authorities of **Dunk and Waller** and **Kinnear.**

51. As stated above, the respondent contends that the claimant's employment with Watertight, together with claimant's subsequent resignation in January 2021 breaks the chain of causation/ means that any losses incurred thereafter are no longer attributable to the claimant's wrongful dismissal in August 2020/ were not foreseeable.

The Conclusions of the Tribunal

52. Having weighed the competing arguments and had regard to the relevant findings of fact, the Tribunal is not satisfied that, viewed objectively, (and regardless of whether the claimant was entitled to resign his employment by reason of any culpable conduct by Watertight) any losses incurred by the claimant after 15 January 2021 (the date of his resignation from Watertight) flow from / are, in any event, properly attributable to the wrongful dismissal by the respondent on 17 August 2020 / were reasonably foreseeable for the reasons explained below.

53. Firstly, the claimant secured permanent employment (after completing an initial probationary period), which he accepted was on broadly comparable terms to that on which he was engaged with the respondent, as a roofing apprentice with Watertight with effect from 1 September 2020. This employment was also the subject of a tripartite training agreement which included South Devon College and enabled the claimant to continue to study for his NVQ and benefit from high quality on the job training. In practice, Watertight therefore stepped into the shoes of the respondent including with regard to training and the associated commitments.

54. The claimant had been employed by Watertight for a period of 4 ½ months before it came to an end by reason of the claimant's resignation. Further, the Tribunal is not satisfied on the facts that the claimant acted reasonably in all the circumstances in resigning his employment at that time for the reasons explained previously above.

55. Further, even if the Tribunal is wrong about the conduct of Watertight/ the circumstances in which the claimant resigned from Watertight, the Tribunal is not, in any event, satisfied, viewed objectively, that their actions after an intervening period of 4.5 months employment are properly attributable to/ flow from the original dismissal by a respondent who had himself employed the claimant for no more than 10 months (and less if the period of covid furlough is taken into account) and that there is therefore a break in the chain of causation/ such losses were not forseeable.

56. When reaching its conclusions, the Tribunal has had regard to the judgments in **Dunk &Waller** and **Kinnear** relied upon by the claimant. Both cases are however, distinguishable from the present case as in those cases neither of the claimants had been able to secure an alternative apprenticeship and /or had resigned from subsequent employment.

57. The claimant's contractual claim is therefore limited to any losses incurred up to 15 January 2021 which are as calculated below.

Damages for loss of wages up to 15 January 2021

58. On the basis of its findings of fact, the Tribunal is satisfied that the claimant's net weekly salary at the time of the termination of his employment with the respondent was £195 per week (the payslip at page 109 of the bundle) which was based on a gross hourly rate of £5 for 40 hours per week (£200 gross per week less statutory deductions).

59. The claimant contends that his hourly rate during his second year of employment with the respondent would have been adjusted to £7/ £7.50 per week in accordance with the increase afforded to Jacob Blight during his second year of employment. The respondent disputes this and says that the applicable hourly rate is the claimant's hourly rate at the date of the termination of his employment of £5.

60. Having given the matter careful consideration, including that in contractual claims a Tribunal is required to place a claimant in the position he would have been in if the contract had been performed, the Tribunal is satisfied that if the claimant had remained in the respondent's employment, he would, on the balance of probabilities, have received a pay rise in line with that afforded to Mr Blight (which the Tribunal has found in the liability judgment was an increase to £7 per hour) particularly as the Tribunal also found that the respondent did not have proper cause to terminate the claimant's employment without notice.

61. The Tribunal is therefore satisfied that the claimant's net weekly pay would have risen to £200 per week (allowing for statutory deductions) with effect from 21 October 2020 and that any loss in wages between 21 October 2020 and 15 January 2021 should be calculated accordingly.

62. When calculating the net loss of wages, the Tribunal has taken into account that the respondent paid the claimant a week's notice on termination on 17 August 2020 and that the claimant's losses therefore accrue from 24 August 2020.

63. When calculating the loss of wages the Tribunal has also taken into account the total net figure which the claimant has given (and has been accepted by the Tribunal) for his wages received from Watertight in the sum of £2,855.

64. The Tribunal calculates that the claimant was employed by Watertight for approximately 19 weeks and therefore, in the absence of any relevant payslips or other information, calculates that the claimant's net weekly pay with Watertight was therefore £150 net per week.

65. The Tribunal therefore calculates that the claimant is entitled to the following damages for breach of contract: -

(a) Week of 24 August – 31 August - £195 net.
(b) 1 September 2020 – 20 October 2020 (7 weeks) 7 x £195 net = £1,755 less 7x £150 net = £1,050 = £705 net.
(c) 21 October 2020 to 15 January 2021 (12 weeks) 12 x £200 (the net increased figure) = £2,400 less 12 x £150 net = £1,800 = £600 net
(d) Total net loss = £1,500.
(e) The Tribunal also considers that it is appropriate to exercise its discretion to award interest at 8 per cent per annum (being equivalent to the judgment rate) from 15 January 2021 (when the potential claim accrued) until the date of this judgment of 7 April 2023 which the Tribunal calculates as follows (2 years and 12 weeks) = £270.

(f) The breach of contract award is therefore = **£ 1,770.**

ACAS uplift

66. The Tribunal has therefore gone on to consider whether the above award should be uplifted for any breach of the ACAS Code pursuant to section 207 (A) of the 1992 Act. The claimant contends that it should be uplifted by 25 per cent in the light of the respondent's complete failure to adhere to the ACAS Code. The respondent contends that any ACAS uplift should be limited to 15 per cent in the light of the serious nature of

the allegations against the claimant and the potential negative impact to his business.

67. Having given careful consideration to the provisions of section 207 A of the 1992 Act, the ACAS Code together with the relevant findings of fact the Tribunal is satisfied that the claimant's claim of wrongful dismissal is one to which the ACAS Code applies. The Tribunal is further satisfied that the respondent has failed to comply with the ACAS Code and that such failure is unreasonable. The Tribunal is further satisfied that, in all the circumstances of the case, it is just and equitable to increase the above award by 25 per cent.

68. When reaching the above conclusions, the Tribunal is satisfied on the facts that there was a complete failure by the respondent to comply with the provisions of the ACAS Code. The Tribunal found on the facts that when the claimant arrived for work on 17 August 2020, he found his possessions by the side of the road and was told by the respondent that he had been dismissed. Further, the respondent did not respond to the subsequent requests of the claimant / his mother for a copy of the respondent's disciplinary and grievance procedure/ copy contract and reasons for the claimant's dismissal (paragraphs 38 and 39 of the liability bundle).

69. Further, the Tribunal rejects the respondent's contention that the award should be reduced to 15 per cent for the reasons referred to above and also because the Tribunal held that the allegations against the claimant were not serious enough to justify the termination of his employment/ common law contract of apprenticeship (paragraph 87 of the liability judgment).

70. The claimant's damages for breach of contract are therefore uplifted by 25 per cent to £2,212.50.

71. The claimant is therefore awarded, and the respondent is ordered to pay to him, the total sum of **£2, 212.50** in respect of his breach of contract claim for wrongful dismissal.

Failure to provide written particulars of employment.

72. Finally, the Tribunal has considered the claimant's claim for compensation pursuant to sections 1 and 11 of the 1996 Act and section 38 of the Employment Act 2002 in respect of the respondent's failure to issue a written statement of terms and conditions of employment as required by such statutory provisions.

73. The claimant is claiming 4 week's pay, which he variously cites as being between £6.98 - £7.50 per hour to align with the pay rise which Jacob Blight received during his second year as an apprentice. The claimant also contends that it should be 4 weeks' rather than 2 weeks' because his dismissal was brought about in part by the lack of any written statement of terms of employment.

74. The respondent contends that it should be limited to 2 weeks' at £195.92 per week which was the claimant's net pay at the time of his dismissal. The respondent further says that it should be limited to 2 weeks' pay as the respondent is a small employer.

The conclusions of the Tribunal

75. The Tribunal has given careful consideration to the provisions of section 38 of the Employment Act 2002 together with sections 221 and 222 of the 1996 Act relating to the statutory definition of a week's pay.

76. Having given careful consideration to the above provisions and the relevant facts the Tribunal is satisfied that it is just and equitable to award the claimant the higher amount of 4 weeks' pay. The reasons for this is that notwithstanding that the respondent is a sole trader/ small employer his failure to issue the claimant with a statement of terms and conditions of employment goes to the heart of the difficulties which arose in this case relating to the claimant's employment status. Moreover, when the respondent signed the training documentation with South Devon College, he wrongly represented to the College that he had issued a statement of terms and conditions to the claimant.

77. As to the amount of the award – the Tribunal disagrees with both parties. The provisions of the 1996 Act, and in particular sections 220 and 221 define a week's pay and the relevant calculation date. This is a gross sum (which is subject to a statutory maximum which is not relevant here). Doing the best that we can with the available information (the pay slip at page 109) the Tribunal has taken the claimant's stated gross weekly pay as £200.

78. The claimant is therefore awarded, and the respondent is ordered to pay to him the sum of £800 (4x £200) pursuant to section 38 of the Employment Act 2002.

79. The final total sum awarded to the claimant and which the respondent is ordered to pay to him is therefore (£2,212.50 plus £800) = **£3,012.50.**

80. The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply in this case.

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Employment Judge Goraj
Date: 7 April 2023

Judgment sent to the Parties on 12 April 2023
For the Office of the Tribunals

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