EMPLOYMENT TRIBUNALS

Claimant: Mr Dhiren Ludhra

Respondent: Morgan Sindall Construction Infrastructure Ltd

Heard at: Watford Employment Tribunal **On:** 24-26 May 2023

Before: Employment Judge Young

Representation
Claimant: Ms A Sharma (Claimant's mother)
Respondent: Ms K Barry (Counsel)

Following Judgment and oral reasons given on 26 May 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant was employed by the Respondent from 9 September 2019 as part of an apprenticeship training scheme in the Respondent's aviation business unit based at Heathrow Airport. The apprenticeship was for a term of 24 months with on-the-job training and formal educational training in multiple week blocks at CITB National Construction College, Bircham Newton. On 7 July 2020, the Claimant went off sick. The Claimant left site at approximately 1 pm and went home without informing the Respondent. The Respondent contacted the Claimant by text at approximately 4pm. The Claimant responded to the Respondent the following day in the early hours of the morning by text on 8 July 2020. By letter dated 15 July 2020, the Claimant was dismissed by reason of misconduct. The Claimant contacted ACAS on 1 October 2020. The ACAS early conciliation certificate was issued 28 October 2020. The Claimant presented his claim form for wrongful dismissal dated 12 November 2020.

Claims and Issues

2. The parties had both provided a list of issues. It appeared that the list of issues could not be agreed due in some part to the Claimant raising a claim of unfavourable treatment on the grounds of being a fixed term employee. However, when I asked the Claimant's representative, Ms Sharma what

was the basis of this additional claim, as I had understood from the preliminary hearing with EJ Wood's on 24 May 2022 that the claim for unfavourable treatment on the grounds of being a fixed term employee had been withdrawn. Ms Sharma explained to me that it was brought as a response to the Respondent's assertion that the Claimant was on a statutory apprenticeship agreement. Ms Sharma accepted that the claim was out of time and that she was not proceeding with pursuing the claim.

3. It seemed to me that the list of issues by both parties contained elements that were extraneous in nature. With both parties' assistance, we narrowed the issues to produce a list both parties agreed with.

4. The agreed list of issues was:

4.1 What type of contractual arrangement applied to the Claimant whilst employed by the Respondent?

(a) Was the arrangement the Claimant was engaged under a statutory apprenticeship agreement under section 32 of Apprenticeships, Skills, Children and Learning Act 2009 Act ("Act")?

(b) If so, did it also satisfy conditions specified in regulations made by the Secretary of State (The apprenticeships (Form of Apprenticeship Agreement) Regulations 2012)?

(c) If it was not a statutory apprenticeship agreement under section 32 of the Act, was it a common law contract of apprenticeship?

(d) If it was not a common law contract of apprenticeship, was it a contract of employment?

4.2 Would the Claimant still have been dismissed if the proper disciplinary process had been followed?

4.3 If yes, how long would the proper disciplinary process have taken to complete given the special provisions for apprentices written into the CICJ Working Rules Agreement and nature of the misconduct?

4.4 If the Claimant was engaged under a contract of apprenticeship, was it possible to terminate the contract on the basis of:

a. Claimant's conduct?

b. Redundancy?

4.5 If the Claimant was not employed under a contract of apprenticeship but a contract of employment, was the Claimant wrongfully dismissed?

4.6 If the Claimant was employed under a statutory apprenticeship agreement under section 32 of ASCLA 2009 and the Claimant was dismissed in breach of that agreement, what compensation (if any) should be awarded to the Claimant in all of the circumstances?

4.7 If the Claimant was employed under a common law contract of apprenticeship, what compensation (if any) should be awarded where the Claimant's contract was terminated before completion of the apprenticeship?

4.8 Did the Claimant take all reasonable steps to mitigate his losses?

Hearing

5. I had an indexed bundle of 1076 pages and an authorities bundle of 373 pages which included the Respondent's written submissions. I also received a skeleton argument from the Claimant. I heard evidence from the Claimant, Mr Ludhra, the Claimant's mother Ms Sharma and the HR business Partner for the Respondent, Ms Graham.

6. Following enquiry regarding reasonable adjustments, I was told by the Respondent that Ms Graham suffered from epilepsy and was taking strong medication which made her drowsy. I was asked to make reasonable adjustments of regular breaks and take into consideration that medication affected her concentration and that the witness may need questions repeated. I took regular breaks throughout the hearing asking Ms Graham if she needed breaks.

Finding of Facts

7. The following findings are made on a balance of probabilities. All references in square brackets are a reference to the bundle page numbers.

8. In July 2019, the Claimant answered an advert for a construction operations apprentice with the Respondent **[428]**. The role was for £7.70 ph for 39 hours per week. 8 of those hours would be to attend training college. The 8 hour per week were collated together in multiple week blocks where the Claimant was to attend the National Construction College. The actual dates are set out in an email dated 17 September 2019 to the Claimant **[530]**.

9. On 5 August 2019 the Claimant signed a document entitled "Principal Statement of Terms and Conditions of Employment for Apprentice CIJC– Working Rule Agreement Aviation Business Unit", "the principal statement". The principal statement stated that the Claimant's hours were 39 hours per week. The Claimant's payslips show the Claimant did, on occasion do overtime. The document said *"[t]his agreement is an approved English apprenticeship agreement within the meaning of the apprenticeship, skills, children and learning Act 2009, sA1(3). It is a contract of employment and is not to be treated as being a contract of apprenticeship."* **[434]** This document was not drafted by Ms Graham. Ms Graham did not know how this particular agreement came about but accepted that the agreement was not the appropriate agreement to give to the Claimant as his apprenticeship

was not an approved English apprenticeship. I find that the agreement given to the Claimant was not an approved English apprenticeship.

10. The Claimant also signed an Apprentice training agreement dated 5 November 2019. This agreement was for the purposes of providing the educational elements of the apprenticeship arrangement. The apprenticeship training agreement stated that the apprenticeship was to be from 11 November 2019 to 12 July 2021.

11. There was also a tri-party commitment statement between the Respondent, Claimant and the training provider CITB. This Commitment Statement was signed by the Claimant on 7 November 2019. The commitment statement stated that the employment hours per week were 32 hours per week. The off-site training was to be eight hours per week.

12. It is the case that the Claimant's contract of apprenticeship started 9 September 2019 and was due to finish on 9 September 2021.

13. The Claimant believed that he was being employed with a view to qualifying as a level II civil engineer. However, the Claimant was in actual fact employed by the Respondent to carry out training to become a qualified grounds worker. In essence, the Claimant was an apprentice ground worker.

14. The Claimant enjoyed the educational elements of his apprenticeship and was by all accounts proceeding well in his studies. However, the Claimant's commitment to the practical aspect of his apprenticeship, that is, working on site at Heathrow was less positive. The Respondent had concerns about the Claimant's punctuality and attitude towards his work. I find that the Claimant was not motivated in his practical work as much as he was in his academic work. The Claimant was late on occasion. The Claimant did not pursue an application to work airside.

15. On 7 July 2020, the Claimant left site at approximately 1pm because he felt unwell. I find that on 7 July 2020 the Claimant could have called or texted his employer to let them know that he had left site and that he was unwell and was being picked up by his father who would take him home. There was nothing preventing the Claimant from making this phone call whilst waiting for his father to come and pick him up or at any point before the end of the day.

16. After 8 July 2020, the Claimant did not contact the Respondent again regarding his absence from work even though the Claimant was well aware that he was obliged to do so.

17. The process for dealing with the Claimant's misconduct was contained in the Working Rules Agreement. However, as the Claimant was an apprentice, the Working Rules Agreement required the employer to take a less stringent approach. The Claimant's misconduct was significant but was not out of character for that of an apprentice. As is evidenced by the fact the Respondent accepted that the other two apprentices were also guilty of attitudinal issues and punctuality issues. In contravention of the Working Rules Agreement the Claimant was written to by letter dated 15 July 2020

and dismissed for misconduct.

18. In March 2020 the country experienced lockdown due to Covid 19. The aviation industry was particularly affected, and the Respondent closed down all sites at Heathrow until June 2020. The Respondent re-opened sites, but the Respondent was told its scope of work previously at £60 million were being reduced to approximately 10% of that by the end of the year, with Heathrow confirming that the Respondent was not to be awarded any more contracts.

19. In April 2020 the Respondent began collective consultation with all employees in the aviation business which included the Claimant. It was proposed that the Claimant would have a number of meetings before giving notice of dismissal if the Claimant could not be redeployed. The Claimant was not offered redeployment in Luton for an apprenticeship role. The Claimant was invited to consider a role in Luton which was not an apprenticeship role. The role was more than 5 miles from where the Claimant lived. The Claimant had indicated when asked about what roles he would consider that he did not want any roles more than 5 miles away. At that time the Claimant did not drive nor did the Claimant own or have access to a car. The Claimant would not and did not consider any roles that he could not have travelled to by public transport. The Respondent used its best endeavours to find the Claimant an alternative apprenticeship, but there was none. By the end of June 2020, the Respondent had already made approximately 50 people redundant in the aviation business. The Claimant did not complain in these proceedings that he was not given sufficient notice of the redundancy. I find that the Claimant was given reasonable notice of the redundancy.

20. In July 2020 the Respondent's business was de-mobilising. The Claimant was off sick on 6 July when it was proposed he would have his first consultation meeting. The Claimant's fellow apprentices also did not have the consultation meeting with the Respondent because the Respondent had decided that all three apprentices would be dismissed. It was proposed that the Claimant and his fellow apprentices would have had two meetings before notice of dismissal would have been given. It was proposed that dismissal would take effect on 31 July 2020. The aviation business did close down. The role of ground worker was specific to the Respondent's aviation business. There were no other ground workers in the rest of the Respondent's business. There were no other apprenticeships for ground workers in the rest of the Respondent's business. There was no other work relevant to the Claimant's apprenticeship available for the Claimant to undertake. It has since transpired that after 25 years in the sector, the Respondent's aviation business closed in 2020 and has been closed ever since.

Law

21. I was provided with an authorities bundle which contained various appellate and first instance cases and statutory provisions which I shall refer to. I am grateful to both Ms Sharma and Ms Barry for their helpful and extensive summary of the case law and legislation in this area.

Statutory provisions

22. The relevant statute covering statutory apprenticeships is the Apprenticeships, Skills, Children and Learning Act 2009 Act. "Act".

23. Section A1(2) of the Act provides:

"An approved English apprenticeship is an arrangement which (a) takes place under an approved English apprenticeship agreement, or (b) is an alternative English apprenticeship, and in either case satisfies any conditions specified in Regulations made by the Secretary of State."

24. As it is agreed by the parties that the principal statement does not comply with the approved English apprenticeship agreement, the relevant law to consider is that which applies to alternative English apprenticeships.

25. On 26 May 2015 – before the Claimant entered into his apprenticeship, Chapter 1 of the Act became headed *"APPRENTICESHIPS: WALES".* In essence section 1 of the Act in respect of England was repealed, and the heading preceding section 32 became *"Apprenticeship agreements: Wales".* However, sections 1 & 32 of the Act as it applied to England was saved by the transitional provisions set out in the 2015 Order which were in force at the time of the Claimant's employment.

26. Deregulation Act 2015, section 115 says:
"(9) The Secretary of State may by order made by statutory instrument make such transitional, transitory or saving provision as the Secretary of State considers appropriate in connection with the coming into force of any provision of this Act (other than transitional, transitory or saving provision that the Welsh Ministers have power to make under subsection (8))"

27. By operation of s115(9) of the Deregulation Act 2015, the Secretary of State made the Deregulation Act 2015 (Commencement No.1 and Transitional and Savings Provisions) Order 2015/994. The "Order" which commenced on 26 May 2015.

28. Section 2 of the Order provides the definition of saved provisions and includes ss 11-12, 32-36 of the Act to the extent that they apply in connection with the provisions mentioned in paragraphs (a)- (d). Paragraph (c) is relevant as it refers to sections 13 to 15 and 17 of the Act apprenticeship frameworks: England.

29. Section 12 of the Act states*:*

"Apprenticeship frameworks: interpretation

(1) In this Chapter, "apprenticeship framework" means a specification of requirements, for the purpose of the issue of apprenticeship certificates, that satisfies subsection (2).

(2) The requirements specified must—
(a) be at a particular level stated in the specification, and

(b) relate to a particular skill, trade or occupation included in an apprenticeship sector stated in the specification."

30. Section 32 sets out the Meaning of "apprenticeship agreement.

"(1) In this Chapter, "apprenticeship agreement" means an agreement in relation to which each of the conditions in subsection (2) is satisfied.

(2) The conditions are—
(a) that a person (the "apprentice") undertakes to work for another (the "employer") under the agreement;

(b) that the agreement is in the prescribed form;

(c) that the agreement states that it is governed by the law of England and Wales;

(d) that the agreement states that it is entered into in connection with a qualifying apprenticeship framework.

(3) The power conferred by subsection (2)(b) may be exercised, in particular—
(a) to specify provisions that must be included in an apprenticeship agreement;

(b) to specify provisions that must not be included in an apprenticeship agreement;

(c) to specify all or part of the wording of provisions that must be included in an apprenticeship agreement.

(4) Where an agreement states that it is entered into in connection with an apprenticeship framework ("the relevant framework") that is not a qualifying apprenticeship framework, subsection (2)(d) is to be taken to be satisfied in relation to the agreement if—

(a) at a time within the period of three years ending with the date of the agreement, the relevant framework was a qualifying apprenticeship framework;

(b) at the date of the agreement, the apprentice has not completed the whole of a course of training for the competencies qualification identified in the relevant framework,

(c) before the date of the agreement, the apprentice entered into an apprenticeship agreement ("the earlier agreement") which stated that it was entered into in connection with the relevant framework, and

(d) at the date of the earlier agreement, the relevant framework was a qualifying apprenticeship framework.

(5) In subsection (4)(b), the reference to a course of training for the

competencies qualification is to be read, in a case where the person follows two or more courses of training for the competencies qualification, as a reference to both or all of them.

(6) An apprenticeship framework is a "qualifying apprenticeship framework", for the purposes of this section, if it is—[...]
(b) a recognised Welsh framework."

31. Section 35 of the Act states:

"35 Status

(1) To the extent that it would otherwise be treated as being a contract of apprenticeship, an apprenticeship agreement is to be treated as not being a contract of apprenticeship.

(2) To the extent that it would not otherwise be treated as being a contract of service, an apprenticeship agreement is to be treated as being a contract of service.

(3) This section applies for the purposes of any enactment or rule of law."

Relevant Authorities

32. The common law of apprenticeship has been around since time immemorial. A contract of apprenticeship falls within the definition of a contract of employment in section 230(2) of the Employment Rights Act 1996.

33. The authorities confirm that a contract of apprenticeship is of a special character as its essential purpose is training, the execution of work for the employer being secondary (Dunk v George Waller & Sons [1970] 2 QB 163).

34. It is an essential characteristic of the relationship that education and training is provided in the trade or profession and that the apprentice agrees to work for, and follow all reasonable instructions of, the employer (Edmonds v Lawson and another [2000] EWCA Civ 69).

35. Apprentices employed under a contract of apprenticeship have additional rights on termination of the employment. A contract of apprenticeship is not terminable at will as a contract of employment is at common law.

36. Wallace v CA Roofing Services Ltd [1996] IRLR 435 was a decision of the Queen's Bench Division of the High Court. It concerned a contract of apprenticeship for a sheet metal worker who was dismissed on grounds of redundancy. It was held that the contract of apprenticeship was a distinct entity known to the common law. Its first purpose was training; the execution of work for the employer was secondary. The contract was for a fixed term. Ordinarily, it could be terminated only if the employer's business ceased as a going concern, or changed so fundamentally that the apprentice could no longer be taught the trade for which he was engaged. Except where these conditions applied, a redundancy situation could not terminate a contract of

apprenticeship, nor did the kind of personal unsuitability which might ordinarily justify the dismissal of an employee.

37. Whiteley v Marton Electrical Ltd [2003] IRLR 197 was a decision of the Employment Appeal Tribunal concerning an apprentice who was dismissed in connection with a downturn in orders. He had been employed under a modern apprenticeship pact. The pact was a standard form agreement entered into by the apprentice, the employer and a local training and enterprise council, under which the employer undertook to train the apprentice under the supervision of the training and enterprise council. Under clause 2.2 of the pact the apprentice agreed to be an employee of the employer and to comply with the employer's terms and conditions of employment for the duration of the training plan. Under clause 3.2 of the pact the employer agreed to employ the apprentice for the duration of the training plan. Clause 4.5 of the pact provided that if the employer was unable to complete the apprenticeship, then the training and enterprise council was to assist in finding the apprentice the opportunity to complete the apprenticeship elsewhere. On appeal it was held that the pact was not an ordinary contract of employment but was intended to provide the apprentice with training for the duration of his training plan. The apprenticeship was capable of being objectively determined on the happening of a specified event, namely the satisfactory completion of the apprentice's training and that the provisions of the pact would prevail in the event of any inconsistency with the employer's terms and conditions as it would defeat the principal purpose of the pact if the employer could terminate the contract in the same way as for an ordinary employee. It was noted that the fact that clause 4.5 provided for what would happen on a breach of contract, did not mean that it was any the less a breach.

38. In Revenue and Customs v Jones and others [2014] UKEAT 0458/13, a case concerning entitlement to the National Minimum wage, the position in relation to dismissal of apprentices was summarised and was stated as follows: *"The ordinary law as to dismissal does not apply to contracts of apprenticeship. It can be brought to an end by some fundamental frustrating event or repudiatory act but not by conduct that would ordinarily justify dismissal. It would appear that the frustrating event or repudiatory act must have the effect of fundamentally undermining the ability to teach the apprentice."*

39. In Beddoes v Woodward Electrical Limited [2017] IRLR 435 an apprentice was employed in purported compliance with the provisions of the 2009 Act (as in force at the time). He was dismissed on the basis that he was not making adequate progress. It was held that the provisions of the 2009 Act had not been met on the basis that there was no approved apprenticeship standard. The arrangement fell to be determined as a common law contract of apprenticeship. Following the case law mentioned above, the judge found that there was no fundamental frustrating or repudiatory act which fundamentally undermined the ability to teach the apprentice.

40. The courts have also considered the status of modern tripartite agreements in the context of apprenticeships. The case Flett v Matheson [2006] IRLR 277, CA, concerned an apprenticeship of 42 months. In Flett the Court of Appeal confirmed that a modern tripartite apprenticeship arrangement can

constitute a common law contract of apprenticeship so long as it satisfies the traditional criteria relating to the duration of the agreement and the employer's obligations under it. The fact that the training is provided by a third party and not by the employer is not crucial to the analysis of the employer's obligations under the arrangements. In the circumstances, the arrangements were potentially consistent with a common law contract of apprenticeship and accordingly, it was not open to the employer to dismiss the employee on reasonable notice. In Flett Pill LJ also added at paragraph 29, *"once a contract has been categorized as one of apprenticeship with a specific period of training contemplated, the right to dismiss on the ground of redundancy should not be readily implied".*

41. The issue of how to assess damages in respect of breach of contract in respect of the disciplinary process, is dealt with in the case of Janciuk v Winerite [1997] WL. Janciuk sets out the appropriate approach to assessing damages for breach of contract arising from the contractual disciplinary procedure. Mr Justice Morison says "Where *a contract of employment is terminable upon notice, the measure of damages to which the employee is entitled on summary dismissal is the amount which the employer would have been bound to pay had his contract been terminated lawfully, less any receipts by the employee during that period earned by way of mitigation of his loss. The employee is entitled to be put into the position he would have been in had the contract been performed. It is assumed for this purpose that the employer would have dismissed the employee by notice given at the very moment that the summary dismissal was effected. 2. When, for the purposes of calculating compensation, the Court considers what would have been the loss had the contract been performed, the Court assumes that the contract breaker would have performed the contract in a way most favourable to himself. This principle prevents the employee from recovering a windfall payment. If there were two lawful ways of performing the contract, the employee will be compensated on the basis that the employer will have chosen to perform the contract in the way which was least burdensome to him: Lavarack v Woods of Colchester [1967] 1QB 278 [my emphasis]. Therefore, in a simple wrongful dismissal case, the Court does not ask what might have happened had the employer known that he had no right to determine the contract summarily, and then calculate compensation on a loss of a chance basis. The assumption is that the employer would have chosen to have terminated the contract lawfully at the very moment that he had brought [or sought to bring] the contract to an end unlawfully in breach of contract. 3. Some contracts of employment require the employer to follow a disciplinary procedure before notice of dismissal can be given. In other words, the disciplinary procedure acts as a brake on the giving of notice. In such a case the employer would be acting in breach of contract if he gave notice terminating the contract without first having followed the correct procedure. The measure of the loss for that breach is based upon an assessment of the time which, had the procedure been followed, the employee's employment would have continued. Again, that does not require an analysis of the chances that had the procedure been followed the employee might never have been dismissed. At this stage the Court is engaged on a process of quantifying damage suffered by a dismissed employee. The Court is concerned to know what would have happened, contractually, if instead of unlawfully dismissing the employee the employer had not broken the contract, bearing in mind the Lavarack v Woods*

principle. For this purpose the assumption that must be made is that the employer would have dismissed the employee at the first available moment open to him; namely after the procedure had been exhausted. The Court is not concerned to inquire whether the employee would have been dismissed had the contract been performed, but rather for how long would the employee have been employed before the employer was contractually entitled to give notice."

42. It is well established law that where there are damages for wrongful dismissal, the claimant is expected to take reasonable steps to limit the losses suffered as a consequence of the breach of contract. The burden of proving a failure to mitigate is on the respondent (Fyfe v Scientific Furnishing Ltd [1989] IRLR 331). It is therefore clear that the law does not create a general duty upon the employee to mitigate their losses. It is not enough for the respondent to show the claimant failed to take a step that was reasonable for them to take. They must show the claimant acted unreasonably.

43. The duty arises only after dismissal, so a failure to take up an alternative job offer made before that date will not constitute a failure to mitigate.

Submissions

44. I heard oral submissions from both Ms Barry and Ms Sharma. In summary Ms Barry's submissions amounted to the Respondent's case being that it was accepted that there was no approved English apprenticeship agreement but that the agreement in place was a framework apprenticeship agreement.

45. Ms Barry pointed principally to the principal statement documents as evidence that the arrangement was a framework agreement and that looking at all the documents together, it complied with the requirements of s32(2) of the Act. However, if the Tribunal was not with her on that point, then it was not an apprenticeship agreement but a contract of employment. She said that the Claimant's failure to report this sickness and his absence on 7 July was an act so serious as to amount to misconduct, repudiatory act and the fundamental frustration of the contract. This was because the Claimant was working on a construction site where health and safety was a fundamental intrinsic aspect of working, and that the Claimant as a ground worker should understand that and if he didn't, it would not be possible for the Claimant's training to have continued as it would have meant that the Claimant was unteachable. Next, she addressed me on the issue of redundancy referring to the decision of Wallace v CA Roofing Services Ltd [1996] IRLR 435. Ms Barry asserted that there was a fundamental change in the Respondent's enterprise when the Respondent closed down the aviation business unit. In these circumstances the Claimant could have been made redundant. Ms Barry submitted that the Claimant had not fulfilled his obligation to mitigate his loss and that the burden was upon the Claimant. The Claimant only applied for 39 jobs within a significant period of time and had the Claimant made targeted applications he would have been able to find alternative roles.

46. The Claimant made a claim for pensions, but the Respondent noted that there were no pension deductions from the Claimant's payslip and that the loss of qualification claim in the Claimant's schedule of loss was erroneous.

47. Ms Sharma's submissions were brief and Ms Sharma predominantly relied on her written skeleton. In essence, Ms Sharma said that the contract was one of common law apprenticeship and was not a framework agreement as it did not comply with the requirements, that there was no redundancy as the employer was the Respondent company which Ms Graham confirmed still continued to trade, and there was in no way a fundamental change to the business. Ms Sharma sought to explain that the limited number of job applications provided by the Claimant in the bundle did not reflect the entirety of all the jobs that the Claimant had applied for. Ms Sharma explained that the Claimant had sent her a large amount of job applications which she thought was unnecessary to include in the bundle and that she relied upon the Department of Work and Pensions to prove that the Claimant was doing sufficient to mitigate his losses, which enabled him to claim universal credit. Ms Sharma explained that the Claimant thought that the apprenticeship role would lead to a civil engineering role, that he didn't want to be a ground worker, that he wanted to train as a civil engineer, and he saw the apprenticeship as a means to achieve that. The reference to £9000 for loss of training was the amount referred to in the funding document on page 968. The Claimant now saw his future as seeking to do a foundation course in lettings and sales management with a view to working with his sister who is a surveyor. Ms Sharma explained that she didn't accept the Respondent's position that there were no other roles for him, and he would have been made redundant. She asserted that the purpose of the framework agreement was to enable the Claimant to get his qualification and that the Respondent could have offered him any work that would have supported the qualification so he might obtain the level II NVQ.

Analysis and Conclusions

48. It was implicit in the Respondent's submissions that on the face of the principal statement, it was not compliant with the requirements of Section 32(1) of the ASCLA. Section 32(2) makes it clear that each of the conditions set out in section 32(2) must be satisfied for an agreement to amount to an "apprenticeship agreement" within the legislation. Having broken down all the requirements under their various subsections of Section 32(2), the agreement was not compliant with either (c) or (d). That is to say, the principal statement did not state that it was governed by the law of England and Wales and while I was told that was a minor omission, my powers are governed by the statute and the parties agreed that I did not have the power to amend the agreement to include a requirement it simply did not have. There were no facts upon which I could construe that the principal statement did state it was governed by the law of England and Wales. I was not presented with any evidence to support this; in fact, the only evidence present was provided by Ms Graham who had no experience of drafting apprenticeship agreements and had not even seen a fully compliant agreement at any time during her employment in the aviation sector of the Respondent. In the circumstances, I conclude that the Claimant's contract could not be and was not a Section 32, framework apprenticeship agreement.

49. I was referred to the Supreme Court decision Swainland Builders Ltd v Freehold Properties Ltd [2002] No. A3/2001/1419 in which the Supreme Court considered the equitable power of rectification. However, as my current powers derive from statute, I do not believe that I have this power of rectification and in the circumstances this authority does not assist me.

50. All the authorities confirm that it is the character of the contract between the apprentice and the employer that determines whether the contract is a common law contract of apprenticeship if the principal purpose is the training of the apprentice, then that contract will be characterised as a common law contract of apprenticeship. It seemed to me clear and obvious that the entire purpose of the contract between the Respondent and the Claimant was for the purposes of training. In those circumstances the Claimant's contract was a common law contract of apprenticeship.

51. In the circumstances, I considered whether the Claimant's conduct amounted to gross misconduct which could have resulted in the apprenticeship agreement being terminated. I took the view that whilst the Claimant's conduct demonstrated the Claimant's lack of motivation and drive it did not in my view amount to conduct that would result in the Claimant being regarded as unteachable. Accordingly, no disciplinary process applied could have resulted in the Claimant's dismissal and the Claimant was therefore wrongfully dismissed. The fact that the principal statement and the working rules agreement referred to the various ways in which the apprenticeship could be terminated does not in my view mean that the apprenticeship could be lawfully terminated in accordance with those clauses. I am therefore persuaded by Mr Recorder Underhill QC as he was then, as stated at paragraph 11 of the EAT decision of M I Whitely v Marton Electrical Ltd (2002). "*The agreement contemplates that the employer may not be able to complete the apprenticeship. That is no doubt so, but the fact that an agreement may provide for what shall happen in an eventuality which would be a breach of contract does not mean that it is any less a breach".*

52. However, whilst I have concluded that there was a wrongful termination, I am convinced that that there was a real redundancy situation as contemplated in Wallace. Although there was no express contractual right of the Respondent to dismiss the Claimant by reason of redundancy, it is reasonable in these exceptional circumstances to imply one. The redundancy arose in in such exceptional circumstances as the Covid pandemic. This was not a case of the Respondent just losing orders, this was the wholesale closing of the aviation business, such that the nature of the Respondent's business changed so fundamentally that the Claimant could no longer be taught the trade for which he was engaged. After 25 years the Respondent no longer operates in the sector. There were no longer any ground workers supplied by the Respondent and so the Claimant would not have been taught his trade by being redeployed to another part of the business.

53. The Claimant was not able to contradict the Respondent's evidence that there were no possible roles within the business that the Claimant could have undertaken as a ground worker. There were no ground worker roles

within the Respondent's business following the close of the aviation business. Again, Ms Graham's evidence was not contested that the process for taking the Claimant through redundancy could have been tied up within 2 weeks from the first consultation meeting on 6 July. The Respondent had no more groundworkers after 31 July. It is therefore my judgment that the Claimant would have been dismissed by reason of redundancy by 31 July 2020.

54. As the Claimant was paid up to 22 July 2020 the Claimant would have only been employed for another 10 days before being made redundant. The Claimant did not have the requisite period of service for a redundancy payment. The Claimant's remedy is in damages for breach of contract following the wrongful dismissal. Contrary to Ms Barry's submissions the law is clear, the burden is not upon the Claimant prove he has mitigated his losses. There is however an expectation that the Claimant take reasonable steps to mitigate his loss. However, I do not think that in the period of July 2020 that the Claimant would have been able to obtain work for this short period. In the circumstances I award the Claimant 10 days' pay between 22 July and 31 July. On the basis of the Claimant's weekly pay of £300.30.

55. The Claimant is not awarded damages in respect of the cost of the training course for a ground worker as the Claimant would never have continued this course. Janciuk makes it clear that in the case of breach of contract where a disciplinary process is not followed the question to answer is for how long would the employee have been employed before the employer was contractually entitled to give notice. The Claimant would have been made redundant in the first instance, in the circumstances found, this entitled the Respondent to terminate the contract of apprenticeship lawfully having given reasonable notice of redundancy.

Calculation of damages for breach of contract

56. 22.07.21- 31.07.21 =10 days

57. Claimant's 39 hours per week x £7.70 ph = (£300.3 x 52 weeks /365) x 10 days =£427.82.

_____

Employment Judge Young

_____

Date 26th July 2023

REASONS SENT TO THE PARTIES ON

27 July 2023

GDJ

FOR THE TRIBUNAL OFFICE