Case No: 2307734/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr J Lee

Respondent: C C Cousins Ltd

Heard at: Croydon ET, by CVP **On:** 3 August 2022

Before: Employment Judge Rea

Representation
Claimant: Mr D Lee (Father of Claimant)
Respondent: Mrs E Afriyie (Senior Litigation Consultant)

JUDGMENT

1. The Claimant's complaint of unfair dismissal is well-founded and succeeds.
2. The Claimant's complaint of breach of contract is well-founded and succeeds.
3. The Respondent must pay to the Claimant the sum of £14,251.

REASONS

4. The Claimant was employed by the Respondent as an apprentice from 15 June 2016 until his employment terminated on 19 August 2020.

Claims and issues

5. The agreed claims and issues are set out below.

Unfair dismissal

1. What was the principal reason for dismissal and was it a potentially fair one in accordance with ss 98(1) and (2) Employment Rights Act 1996 (ERA)? The Respondent asserts that the reason was redundancy which is a potentially fair reason.
1.2 The Claimant was, at the material time, employed as an Apprentice (per the judgment of EJ Truscott QC.
1.3 Was there a cessation or diminution in the requirement for employees to carry out that role?
2. If the principal reason for dismissal was a fair one, was the dismissal fair or unfair in accordance with s98(4) ERA and, in particular, did the Respondent in all respects act within the so-called band of reasonable response with regard to the procedure followed to include:

2.1 identifying the pool for selection;
2.2 the criteria for selection and scores;
2.3 prior consultation?
3. If the Claimant was unfairly dismissed, should any compensation be adjusted to reflect:
3.1 mitigation or any failure on the part of the Claimant to take reasonable steps to mitigate his loss; and/or
3.2 the possibility that the Claimant would still have been dismissed at the date of termination or in time anyway regardless of any procedural failings (Polkey)?

Breach of Contract

4. How much notice of termination of employment was the Claimant entitled to?
4.1 In accordance with the earlier judgment of EJ Truscott QC, The Claimant was an Apprentice and the Apprenticeship Agreement was not due to end until 15 September 2020. The Claimant avers that this would, in fact, have been extended further due to the impact of the Covid-19 pandemic
4.2 The Respondent says he was given due notice.
5. As already found by EJ Truscott QC, the Claimant was an Apprentice at the date on which his employment was terminated. Is he entitled to damages - and if so to what quantum - for any diminution in his future prospects as a result of the alleged failure on the part of the Respondent to allow him to complete that Apprenticeship?
6. Is the Claimant entitled to damages for any alleged breaches by the Respondent to provide training pursuant to the terms of the Apprenticeship Agreement dated 14 July 2016 (see para. 2 of the particulars of claim, ET1)?
7. If the Respondent breached the Claimant's contract of employment, how much is he entitled to by way of damages (subject to a cap of £25,000)?

Procedure and documents

6. The Tribunal considered a bundle of documents together with witness testimony from the Claimant, Mr Parker, Mr Paul Crookes and Mr Lewis Crookes.

The Law

Unfair dismissal

1. A dismissal will only be fair in accordance with section 94 of the Employment Rights Act 1996 if it was for one of the specified fair reasons, a fair procedure was followed and this was a sufficient reason to justify the Claimant's dismissal.

2. Where the reason for dismissal is redundancy, the Respondent must demonstrate that it carried out a fair consultation process with the Claimant. This will include consideration of the appropriate selection pool and the application of objective selection criteria (where relevant), alternatives to redundancy and whether there are any suitable alternative roles for the Claimant.

3. The question then is whether the decision to dismiss fell within the range of reasonable responses which an employer might have adopted. A dismissal will fall outside the range of reasonable responses only if no reasonable employer would dismiss in the circumstances. A tribunal should not substitute its own judgment for that of the employer.

4. The tribunal's task is to assess the reasonableness of the decision to dismiss against the objective standards of the hypothetical reasonable employer, measured by reference to the band of reasonable responses.

Polkey deduction

5. If there was a chance that the claimant would have been dismissed in any event at some point the compensatory award may be reduced.

Acas Code

6. The Acas Code of Practice on Disciplinary and Grievance Procedures does not apply to dismissals by reason of redundancy or expiry of fixed-term contracts and so no increase or decrease to any award made will be applicable.

Wrongful dismissal

7. Dismissal by an employer in breach of contract will give rise to a wrongful dismissal claim at common law. Dismissal with no notice or inadequate notice where summary dismissal is not justifiable is an example of a breach of contract by the employer. Unfair dismissal

8. Apprentices may also recover damages for loss of future prospects since the purpose of the arrangement is to improve their prospects by providing training and experience. The Court of Appeal in *Drunk* v *George Waller and Son Ltd 1970* 2 *QB 163* awarded damages for loss of training and diminution of future prospects for two years after his apprenticeship was terminated.

Decision

Unfair dismissal

9. The respondent was facing a redundancy situation and there was a reduced requirement for employees to carry out the electrician work. The respondent dwelt on alleged failings in the Claimant's performance to an extent which concerned the Tribunal. The witness statement provided by Mr Parker is so negative that it would seem to suggest that the real reason for the Claimant's dismissal was capability. Ultimately, the Tribunal having listened to all of the evidence is satisfied that redundancy was indeed the primary reason for dismissal.

10. However, the redundancy process carried out was flawed. The consultation with the claimant was inadequate both in terms of the manner in which it was carried out and the quality of the discussions with him. The Tribunal recognises that this took place during the pandemic which influenced the choice of virtual meetings rather than face to face ones. However, this does not excuse the Respondent for failing to arrange suitable times and dates to meet with the Claimant virtually when he would be able to give his full attention and avail himself of the right to be accompanied. It was the Respondent's responsibility to ensure this, not the Claimant's, and so he should not have been consulted with when driving or when he was on holiday. The Respondent was in control of the Claimant's workload and should have made adjustments to his duties to ensure he would be available at the time set for each consultation meeting.

11. The very short length of these consultation meetings, as evidenced by the Claimant's phone records, demonstrated that no more than a cursory attempt was made to consult with him about the redundancy proposal, how the selection pool and criteria had been determined and, how his scores had been calculated. There were in fact only two consultation meetings, the first lasting only 6 minutes, followed by a call to inform him of the outcome of the process. This fell short of constituting genuine consultation with the claimant.

12. The claimant repeatedly requested his scores in writing, together with an explanation of how these had been calculated and, how these compared to the scores given to the other employees in the same pool as him. After several

requests, the claimant finally received the scores given to him and the other two employees in his pool. However, he never received a written explanation of how these scores had been calculated. Despite the fact he attended a meeting with Mr Parker, he did not receive a verbal explanation of this from him either.

13. The Tribunal finds that the Respondent's decision to split the apprentices into two separate redundancy selection pools was within the band of reasonable responses. In any event, it was clear from the evidence that a combined selection pool would have made no difference as the respondent's decision was to make 4 out of 6 apprentices redundant, with all three of the less experienced apprentices selected for redundancy. Another individual, James Varley was referred to by the claimant, but the respondent's representative confirmed that he was in fact not an apprentice at the relevant time and was employed as a labourer. He did later enter into an apprenticeship agreement in March 2021. Therefore, his situation did not influence the outcome of the claimant's redundancy consultation. The decision, as far as the claimant was concerned was always going to come down to a selection between him and the other two apprentices at a similar level of experience to him, the so-called Improvers.

14. The Tribunal finds that the selection criteria originally chosen by the Respondent were fair and objective. The Tribunal finds that it was Mr Parker's decision to not score the candidates against the length of service criterion which he admitted during cross-examination. The Tribunal accepts that Mr Parker genuinely held the view that this was a less important factor than the skills and experience of the employees. However, the same could be said of the rate of absence and this was not removed as a criterion. The claimant would have received a higher score for length of service than the other two Improvers which would have put him on the same overall score as one of them. This would have led to a tie-break situation which Mr Parker said he wanted to avoid. On the balance of probabilities, the Tribunal concludes that this influenced Mr Parker's decision to remove this criterion from his assessment so that the claimant would be the lowest scoring employee in the pool and the one selected for redundancy.

15. The Respondent's representative submitted that the Tribunal should not scrutinise selection criteria and the scoring system in too much detail. However, crucially the respondent has not shown to this Tribunal a fair and objective basis on which the scores were calculated. The Respondent has produced no written records of any learning plan for the Claimant, any monitoring or assessment of his knowledge or skills gained during his apprenticeship. Neither has the Respondent produced any evidence of feedback provided by those who supervised the Claimant and how this compared to their feedback on the other Improvers.

16. Mr Parker maintained in his evidence that the Claimant's performance was poor but only provided one example of this. The Tribunal finds there is a conflict in the Respondent's position; on the one hand maintaining the Claimant's performance was poor, yet on the other hand allowing him to work unsupervised, promoting him to be an Improver and, choosing to furlough the other Improvers but keep the claimant at work. Mr Parker stated that he was giving the Claimant a chance to improve during this period, but the Tribunal finds this explanation unlikely given the pressures on the Respondent at the time which would necessarily be greater when working with a skeleton staff.

17. Mr Parker also referred to the two disciplinary warnings given to the Claimant. This was not relevant to the selection criteria, but the Tribunal finds that they negatively influenced Mr Parker's assessment of the Claimant and the scores he awarded to him for knowledge and skills. Taking that all into account, the Tribunal concludes that the Respondent acted outside the range of reasonable responses with regards to determining the selection criteria, the scores given to the Claimant and, the inadequate consultation carried out with the Claimant. The Claimant's dismissal

was therefore procedurally unfair.

18. Having made that determination the Tribunal must go on to consider whether any deduction to the compensation awarded to the Claimant should be made in accordance with Polkey, on the basis that the Claimant's dismissal would have happened in any event, had a fair process been followed by the Respondent. The Tribunal finds that had a fair process been followed either the Claimant or, the employee whose score was closest to his, would have been selected for redundancy. The Tribunal therefore finds that there is a 50% chance the Claimant would have been dismissed in those circumstances and therefore any compensation awarded to him for unfair dismissal should be reduced by 50%.

Breach of contract

19. Moving on to the Claimant's breach of contract claim, the Tribunal has found that the claimant was intended to be employed under a statutory apprenticeship agreement. However, the agreement did not meet all of the relevant statutory criteria. In particular, the apprenticeship agreement signed on the 21st June 2016 (pages 50-51) was not updated to reflect the actual qualification, framework or completion date of the apprenticeship that the Claimant was undertaking, hence it did not satisfy the relevant statutory requirements in accordance with the Apprenticeships, Skills, Children and Learning Act 2009, Part 1, Chapter 1, Section 32.

20. On the 14th July 2016, the Respondent and training provider also signed a financial agreement (pages 52-56) detailing the financial arrangements between them during the apprenticeship. The document indicated that the Respondent obtained grants to fund the apprenticeship via the Skills Funding Agency even though the apprenticeship agreement did not satisfy the funding rules sections 41-44.

21. The Tribunal considers that the evidence demonstrates that at the outset the parties intended to enter into a fully compliant statutory apprenticeship agreement and that the errors identified were of a minor nature, being of form more than substance. Had the situation remained as such by the time of the Claimant's dismissal, the Tribunal would have held that the Claimant's breach of contract claim must be determined on the basis of the claimant being employed under a statutory apprenticeship agreement.

22. However, in August 2019, the Respondent changed the basis on which the Claimant was employed. The Claimant was issued with a contract of employment in the role of Electrical Improver (pages 60-62). The Respondent asserted in its ET3 Response that the claimant was not an apprentice from 1 September 2019 onwards. The Tribunal has already found at the Preliminary Hearing on 24th March 2022 that the Claimant remained employed by the Respondent as an apprentice. However, the Tribunal finds that the statutory apprenticeship agreement no longer subsisted and that from 1st September 2019 onwards the Claimant was employed under a contract of apprenticeship.

23. Therefore, the Respondent was not contractually entitled to unilaterally terminate the Claimant's apprenticeship early. The Tribunal finds that the Respondent made a commitment to employ the Claimant for a four-year fixed period and that his end date was 15 September 2020. The Claimant received 4 weeks' notice of termination and his employment ended on 22 August 2020. The Claimant is entitled to compensation for wrongful dismissal for the period from 23 August 2020 to 15 September 2020 inclusive.

24. The Claimant submits that his period of employment under the apprenticeship agreement would have been extended, in light of the pandemic, to enable him to qualify. It is possible this would have happened, considering that the other two

Improvers remained apprentices for a further extended period. However, the Respondent was under no obligation to extend the four-year period and so the Tribunal cannot award damages for wrongful dismissal in respect of this.

25. The Claimant is also seeking damages for diminution in his future prospects as a result of the failure on the part of the Respondent to allow him to complete that apprenticeship. This is one of the rare occasions when such damages can be awarded by the Tribunal. The Claimant has given evidence that as a result of his dismissal and the failure of the Respondent to provide him with a suitable range of supervised work or sign off his portfolio, he had to repeat the fourth year of his apprenticeship. The subsequent delay in him qualifying reduced his income for that period.

26. The Tribunal finds that the Claimant's completion of his apprenticeship would have been delayed in any event due to the impact of the pandemic by approximately 6 months. However, his dismissal and the Respondent's other breaches of contract led to the Claimant qualifying a year later than the realistic end date of his apprenticeship had he remained employed. The Tribunal's decision is that the Claimant is entitled to damages reflecting the reduced pay he received during that year. Although the Claimant asserted that this has continued to impact his pay no evidence of this was provided and so the Tribunal makes no award in respect of any further period.

27. Remedy

28. The Claimant is entitled to a basic award for unfair dismissal calculated on the basis of his length of service, age and weekly pay. However, as he received a statutory redundancy payment, his basic award is reduced to zero.

29. The Claimant is awarded damages for wrongful dismissal in respect of the remaining period of the contract from 23 August to 15 September 2020. The Tribunal adopts the Claimant's calculation of this which is £1463 plus £48 for employer pension contributions, less income received during this period from other employment in the sum of £850. This gives a sum of £661.

30. The Claimant has earned more than he was paid by the Respondent since the end of his contract of employment and therefore is not entitled to any compensation for financial loss. The Claimant is awarded £400 for loss of statutory rights. This is subject to a Polkey deduction of 50% giving a sum of £200.

31. The Claimant is awarded damages for diminution of his future prospects for a period of one year. The Tribunal assesses this as being £13,000 plus loss of pension contributions of £390 giving a total of £13,390.

32. The Claimant's total award is therefore £14,251.

Preparation Time Order

33. The Claimant made an application for a preparation time order in respect of the time spent preparing the case for hearing. Costs do not “follow the event” in the Employment Tribunals and so a preparation time order may only be made in accordance with Rule 76. Applying this test the Tribunal's decision is that the Respondent did not act vexatiously, abusively, disruptively or otherwise unreasonably in defending the proceedings and nor can it be said that the Repondent's defence had no reasonable prospects of success. Therefore as the threshold has not been met the Tribunal does not need to go on to consider whether a preparation time order should be made.

Employment Judge Rea

_____17/02/2023_____
Date