EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR H BIRCH	AND	PROPTECH AERO LTD

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 1ST AUGUST 2025

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE) **MEMBERS:**

APPEARANCES:-

FOR THE CLAIMANT:- **IN PERSON**

FOR THE RESPONDENT:- **MR K ALI (COUNSEL)**

JUDGMENT

The judgment of the tribunal is that:-

i) The claimant's claim of unfair dismissal is dismissed.

ii) The claimant's application to amend to pursue a claim of wrongful dismissal / breach of contract is dismissed.

Reasons

1. By this claim, submitted on the 10th November 2024, the claimant brings a claim of unfair dismissal. The respondent submits that he does not have two years continuous service at the point of dismissal, and that the tribunal therefore has no jurisdiction to hear the claim for unfair dismissal which should be struck out.

Facts

2. In his ET1 / claim form the claimant gives his dates of employment as the 12th of September 2022 until 31st of August 2024. This is on the face of it, and even with the addition of statutory notice would be, less than the two years required. The respondent in its ET3 accepts that the claimant was employed under contract of apprenticeship (which it also accepts is a contract of employment) as a non-destructive testing (NDT) apprentice from 12th September 2022 on a fixed term contract for a period of one year and four months. It contends that he was dismissed with immediate effect in a meeting on the 6th of August 2024, as was subsequently confirmed by a letter of the same date, and was not required to work his notice but received payment in lieu of notice. The claimant appealed on the 9th August. An appeal meeting was held on the 15th August 2024, but it was not upheld. It contends therefore, that the claimant was dismissed with immediate effect on the 6th August 2024 not the 31st August, which equally is less an two years. In the course of this hearing the claimant has accepted that he was dismissed on 6th August 2024 and did not have two years continuous service at the point of dismissal.

3. On receipt of the ET3 the claimant was asked for his comments on the respondents application to strike out the claim as the claimant had insufficient service. The claimant's response was "*I wish to proceed with my case as this matter is unrelated to having under two years' service. I was employed as an apprentice which grants me additional legal rights. The company PropTech terminated my apprenticeship early without valid justification. As I have not received a written apprenticeship agreement the law deems it to default to a contract of apprenticeship. This remains a binding contract affording me greater rights compared to a standard employment contract. As a result the employer PropTech may face greater liabilities for terminating the apprenticeship prematurely*." In essence the claimant was asserting that a contract of apprenticeship is one of the exceptions to the requirement for two years' service to give the tribunal jurisdiction to hear a claim of unfair dismissal.

4. As a result the case was listed for today's hearing to:

"Determine whether the claimant has sufficient service to bring a clam for unfair dismissal."

5. Dates of Employment / Effective Date of Termination - As set out above the claimant accepts that he was dismissed with immediate effect on 6th August 2024 and did not have two years' continuous service. He contends that he has taken advice from the CAB and Portsmouth University Law Centre and that it was confirmed to him that he did not require two years continuous service to bring the claim. In support of this he relies on two authorities :

   i) Flett v Matheson [2006] EWCA Civ 53
   ii) Kinnear v Marley Eternit Ltd - First instance ET 2017

6. These had not been disclosed to the respondent, and after a short break Mr Ali contended that neither related to the two year requirement. Flett concerned the issue

of whether the claimant was employed under a contract of apprenticeship or employment or both; Kinnear was a claim for breach of contract in the early termination of a fixed term agreement. Neither relates to the two year requirement for a claim of unfair dismissal and, he submits, it is absolutely clear that the termination of an apprenticeship contact is not one of the exceptions to that rule. It follows that the claim is bound to be dismissed as the tribunal simply does not have jurisdiction to hear the claim.

7. I expressed the view to the claimant that that analysis was correct, and that I was bound to dismiss the unfair dismissal claim.

8. Amendment Application - The claimant accepted that analysis, but applied to amend his claim to bring it in line with Kinnear, and pursue a claim of wrongful dismissal / breach of contract in the early termination of a fixed term contract. The claimant contended that he had either been given wrong advice, or had misunderstood the advice he had been given, and that he had applied the wrong label of unfair dismissal to the claim he actually wished to bring.

9. The factual basis for that application is that:

   i) He was employed under the terms of an oral fixed term contract for four years from 12th September 2022;
   ii) Which was terminated in breach of contract in August 2024;
   iii) He is entitled to damages in the sums due for the balance of the fixed term contract until September 2026.

10. Law – The relevant law is summarised below:

Employment tribunals have a broad discretion to allow amendments at any stage of the proceedings, either on the tribunal's own initiative or on application by a party (rule 29) Such a discretion must be exercised in accordance with the overriding objective in rule 2 of dealing with cases fairly and justly.

As set out in Chaudhry v Cerberus Security and Monitoring Services Ltd [2022] EAT 172, a two-step approach should be adopted. First, the amendment or amendments sought should be identified, ideally in writing. Secondly, it is necessary to balance the injustice and/or hardship of allowing or refusing the amendment or amendments, taking account of all the relevant factors, including, to the extent appropriate, those referred to in Selkent. The balancing of the injustice and/or hardship of allowing or refusing the amendment is paramount (as stressed for example in Vaughan v Modality Partnership [2021] ICR 535 (EAT). Vaughan was dealt with in the EAT by the same Judge who later dealt with Chaudhry (see below).

The paradigm analysis was set out by the EAT in Selkent Bus Company Ltd-v-Moore [1996] ICR 836 EAT,(which was endorsed by the Court of Appeal in Ali-v-Office of National Statistics [2005] IRLR 201 CA).

The EAT held in Selkent that, in determining whether to grant an application to amend, the Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. The relevant factors were set out by Mummery J, and include:

1. The nature of the proposed amendment;

2 The applicability of time limits; if a new claim or cause of action is proposed to be added by way of amendment, whether or not it arises out of the same facts as the original claim, it is "essential" (per Mummery J in Selkent) for the Tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended. Where the amendment is simply changing the basis of, or "re-labelling", the existing claim, it raises no question of time limitation (see, for example, Foxtons Ltd-v-Ruwiel UKEAT/0056/08 per Elias P at para 13).

3 The timing and manner of the application; an application should not be refused solely because there has been a delay in making it. The later the application is made, the greater the risk of the balance of hardship being in favour of rejecting the amendment (Martin-v-Microgen Wealth Management Systems Ltd EAT 0505/06). However, an application to amend should not be refused solely because there has been a delay in making it, as amendments may properly be made at any stage of the proceedings..

These factors are not exhaustive and there may be additional factors to consider.

In Vaughan v Modality Partnership 2021 ICR 535, EAT, the EAT gave detailed guidance on the correct procedure to adopt when considering applications to amend tribunal pleadings.

"A practical approach should underlie the fundamental exercise of balancing the hardship and injustice of allowing as against refusing the amendment. Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis of instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim.

*The **Selkent** factors are: the nature of the amendment, the applicability of time limits and the timing and manner of the application. The examples were given to assist in conducting the fundamental balancing exercise. They are not the only factors that may be relevant. Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it"*

Following Vaughn, tribunals should consider what evidence there is of the real, practical consequences of allowing or refusing the amendment will be. If the application to amend is refused, how severe will the consequences be, in terms of the prospects of success of the claim or defence? If permitted, what will be the practical problems in responding? No one factor is likely to be decisive. The balance of justice is always key. A balancing exercise always requires express consideration of the interests of both parties, both quantitively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice.

Parties Submissions

11. The respondent did not object to the claimant being given permission to apply to amend, or to that application being determined today, but did object to the application itself. The respondent submits that :

12. Firstly, the claim is wholly new both legally and factually. This is not simply the relabelling of a factual claim that is already before the tribunal. In the ET1 the claimant sets out his claim which is for compensation for the wasted first two years of his contract and for a further six months in which to find a new contract of apprenticeship. There is no mention of the claim being for the termination of a fixed term contract, whatever legal label was applied to that claim. Similarly in his response to the respondents application set out above, the claimant explicitly stated, having taken legal advice that a contract of apprenticeship provided extra protection to a standard contract of employment and was an exception to the requirement to have two years continuous service. There was again no mention that his claim was actually for breach of a four year fixed term contract irrespective of whether he had two years' service.

13. Secondly the claim is significantly out of time. The application to amend was made almost exactly one year after the dismissal and is one to which the reasonable practicability test applies.

14. Thirdly the reason for the timing of the application and for the delay, is suggested by the claimant to be a misunderstanding as to the legal advice he had received resulting in a mislabelling of the factual claim. This, however, fails to address the point that the claim is wholly new factually, not simply legally, and the first time the claimant has asserted that he was employed under the terms of a four year fixed term contract is orally in the course of this hearing.

15. Fourthly and most pertinently is the issue of prejudice. The claimant expressly relies on what he says was a verbal / oral agreement made in or around August / early September 2022. The respondent is necessarily evidentially prejudiced in seeking the recollections of witnesses as to events that are already three years old. Moreover the dispute, if it is allowed to proceed will not simply turn on whether here was an agreement to form a fixed term contract, but what its precise terms were. In the bundle is a copy of the contract which the respondent asserts was the one provided to the claimant, albeit that it was not signed. That contract contains a right to dismiss during the currency of the fixed term (expressed in the contract to 1 year four months) on one months' notice. The respondent applied this when it dismissed the claimant and paid one month in lieu. In order for the claimant to be able to pursue this claim he will need to assert (which in fact he has not done, at least explicitly) that there was no such term in the verbal / oral contract and that the respondent agreed to enter into a fixed term contract outside the terms of its standard apprenticeship contract. This is not a case in which the respondent is being asked simply to call evidence as to the length of an agreed fixed term contract (1 year four months / four years) but as to the other specific terms of that verbal agreement, and that gives it very particular evidential difficulties. The prejudice to the respondent if the application is allowed is very significant.

16. Fifthly, it submits that the claim has in any event very limited prospects of success. As set out above the respondent does not dispute that the claimant has been employed under a fixed term contract. The claimant does not appear to have understood or appreciated that he will need, in order to succeed, to persuade the tribunal not simply that there was a verbal agreement for a four year fixed term contract, but one with no notice provisions, in order to succeed in a claim for breach of contract in the termination of the agreement before four years had elapsed. If the actual agreement was a four year fixed term agreement on the respondent's standard terms as set out in the bundle, the claim is still bound to fail. The claimant has not, even today actually suggested this, or suggested that he understands this point. On the basis of the actual claim as set out orally by the claimant, simply that the agreement was for four years, not one year four months, it is probably bound to fail, but at very least, it self-evidently has little prospect of success.

17. The claimant in response set out the basis for his assertion that he had been treated extremely unfairly by the respondent. Whether it is labelled unfair dismissal / wrongful dismissal / or breach of contract the reasons for his dismissal were either false or at very least did not justify dismissal. He was dismissed from an apprenticeship in a field and a job that he loved without any proper reason; and he has not been able to resurrect the apprenticeship elsewhere. Whatever the label, he wants and believes himself entitled to place before the tribunal the unfairness of what has occurred, and the respondent should not be permitted to get away with it. He has acted in good faith and accepted and acted on the advice he was given, even if he may have misunderstood it, and the respondent should not escape justice for their actions simply because he is litigant in person who applied the wrong label to his claim.

18. The difficulty for the claimant is, as set out above, that he has insufficient service to bring a claim of unfair dismissal; and the claim he seeks to bring by way of amendment is a narrow claim which turns on the terms of the contract and whether it contained a notice clause. Whether the respondent acted generally fairly or unfairly is not an issue that will ever be decided by the tribunal; and what the claimant seeks is not something that will ever be resolved by the tribunal. .

19. Conclusions - It is difficult not be sympathetic to the claimant; but in my judgment the respondent is correct that this is a wholly new claim, legally and factually; it was advanced significantly out of time; and there are very significant difficulties in the path of the claimant even were the application to be allowed. The central issue is, however prejudice. Clearly the claimant will be prejudiced if the application is not permitted; but in my judgment the respondent is also correct when it points out that the factual claim it would have to meet is wholly different to the claim set out originally. Instead of needing to defend a decision to dismiss made in August 2024, they would have to defend a claim based on recollections of an oral contract entered into three years ago and I accept that the prejudice is very considerable.

20. On balance, and taking into account all of the factors set out above, in particular the issue of prejudice, I am not persuaded that this is a case in which I should exercise my discretion to permit the amendment application.

EMPLOYMENT JUDGE CADNEY
Dated: 4th August 2025

Judgment Sent to the parties on

17 September 2025