EMPLOYMENT TRIBUNALS

Claimant: Mr B Beddoes

Respondent: Woodward Electrical Limited

Heard at: Nottingham

On: 25 July 2017

Before: Employment Judge Faulkner (sitting alone)

Representation
Claimant: Mrs D Beddoes (lay representative)
Respondent: Ms Wilson-Theaker (Counsel)

JUDGMENT

1. The Claimant was dismissed in breach of contract. His complaint of breach of contract therefore succeeds.

2. The Respondent is ordered to pay the Claimant the sum of £4,090.80 by way of compensation.

REASONS

Complaints

1. The Claimant's sole complaint was of breach of contract, in two respects, being first that his apprenticeship was wrongfully terminated, and secondly that the Respondent was in breach of its disciplinary procedure prior to termination.

Issues

2. At the outset of the Hearing it was agreed that the issues to be decided were as follows:

2.1. What type of apprenticeship arrangement was in place between the parties?

2.2. What were the terms of the contract between the parties, specifically as to its term, termination and any disciplinary procedure?

2.3. Did the Respondent breach those terms, by not following the disciplinary procedure and/or in terminating the contract?

2.4. If so, what compensation is the Claimant entitled to as a result?

Facts

3. It was agreed that the issue identified at paragraph 2.1 above should be determined essentially as a preliminary issue, the relevant documentation and factual matrix on this point being essentially agreed. As it turned out, the issue is not straightforward, and therefore once submissions had been heard, I notified the parties that in the interests of completing the Hearing within the allotted one-day timescale, I would not be deciding the point as a preliminary issue but would hear evidence and submissions on the remaining issues and reserve my judgment. There was no objection to that course of action.

4. Accordingly, I heard detailed submissions from the parties on the nature of the apprenticeship and read written statements and heard evidence from the Claimant, Mrs Beddoes (the Claimant's mother) and Mr A. Woodward who is the Respondent's Technical Director. The parties submitted an agreed bundle and Ms Wilson-Theaker also provided written submissions. In accordance with an Order made in the course of the Hearing the Respondent provided to the Tribunal (copied to the Claimant) after the Hearing an electronic link to or copy of the approved apprenticeship standard on which it relies for the purposes of section A1(3)(a) of the Apprenticeships, Skills, Children and Learning Act 2009 ("ASCLA") and the Claimant similarly provided comments in relation to the approved apprenticeship standard so disclosed. Having considered all of this material, I make the findings of fact which now follow. References to page numbers are references to the bundle. There were many factual disputes between the parties, but I have only sought to resolve those which were relevant to the issues to be decided.

5. The Respondent is a firm of electrical contractors based in Burton on Trent, employing 20 people. The Claimant was employed from 21 December 2015 to 21 November 2016. He was 18 years old at the effective date of termination. As Mr Woodward explains in paragraphs 3 and 4 of his statement, the Respondent approached Burton & South Derbyshire College ("the College") in the second half of 2015 indicating that because it wanted a junior member of staff who would receive training and support from the College, it was interested in taking on "an Admin Apprentice". The College provided a number of candidates and eventually the Claimant was selected for the position of Apprentice Administrator.

6. The Claimant signed a Combined Initial Learning Plan/Employer and Learner Agreement ("Agreement") on 7 March 2016. It had previously been signed by the Respondent, on 12 January 2016, and by the College on 1 February 2016 – see pages 35 to 39. This was the arrangement which secured government funding for the apprenticeship. The Claimant's case is that he expected his employment to last for 18 months from the date of the Agreement, so that he could obtain his NVQ. The Agreement stated the length of the apprenticeship as 18 months from 7 March 2016, and under the heading, "Components of the Apprenticeship Framework" detailed various skills and qualifications the Claimant was to work towards. The College committed under the Agreement to "review [the Claimant's] progress through the Apprenticeship framework". Among the Claimant's responsibilities were to "Inform the College if I intend to end my Apprenticeship programme early". The Respondent's agreement included to "Provide an Apprenticeship Agreement in the form of a written statement of particulars under the Employment Rights Act 1996; or it can be a contract of

employment or a letter of engagement where the employer's duty under the 1996 Act is treated as met". It also agreed to "provide, as far as reasonably practical, the experience, facilities, and training necessary to achieve the objectives specified".

7. The Respondent contends that the Claimant was employed under an "approved English apprenticeship" pursuant to section A1 of the ASCLA, the details of which legislation I consider in my summary of the relevant law below. In its letter to the Tribunal dated 1 August 2017, the Respondent's representative confirmed that the approved apprenticeship standard on which the Respondent relies was that of "Business Administrator", which was published on the gov.uk website on 11 May 2016. The copy provided by the Respondent appears to be dated January 2017. The details of that standard were attached to the 1 August letter and include a comprehensive "occupational profile", and a statement that it will usually take between 12 and 18 months to complete. The extract provided from the gov.uk website goes on to say, "This standard is not yet ready to use. //An apprenticeship standard is only available for delivery when both the standard and assessment plan is approved and a funding band (core government contribution) has been assigned to the standard. //Under our reforms, employer-designed standards will replace frameworks [there is then a hyperlink] over the course of this parliament".

8. Mr Woodward explains in paragraph 6 of his statement that "As a term of [the Agreement] it was provided that we, as the Claimant's employer, provide (sic) an apprenticeship agreement in the form of a Written Statement of Particulars under the Employment Rights Act 1996. We therefore provided the Claimant with a Written Statement of Particulars of Employment". This document ("the Statement") was signed by the Claimant on 25 February 2016 and for the Respondent on 7 March 2016 and appears at pages 22 to 24.

9. The Statement set out that the Claimant was employed as an Apprentice Administrator. It did not state when the Claimant's continuous service began (referring only to when his employment began) nor that the Claimant would not be required to work outside the United Kingdom, nor was there any reference to disciplinary or grievance procedures, though there is reference to an employee handbook, extracts from which are at pages 25 to 33 ("the Handbook"). The Handbook outlined detailed disciplinary and grievance procedures. This included (at page 28) the statement that "These procedures are not contractual and may be amended by us from time to time". The extracts from the Handbook included in the bundle contain no reference to continuous service or work outside the United Kingdom. Neither the Statement nor the Handbook say that the contract between the parties was governed by the law of England and Wales nor that it was entered into in connection with a qualifying apprenticeship framework (see further below).

10. The Handbook includes the following statement about apprenticeships (page 28): "If you have been employed as an apprentice … it is vital that you complete your apprenticeship in full within 5 years of starting. Failure to do so could lead to termination of your employment". The Statement says in relation to "Notice": "The amount of notice of termination of your employment you are entitled to receive is 4 weeks' notice period [sic]". In its Response (see page 17) the Respondent stated, "The expected length of the apprenticeship under the [Agreement] was stated to be 18 months. It is believed and averred that nothing in the [Agreement] amounted to a fixed term contract of employment … it is believed and averred that the [Agreement] and Statement of Particulars of

Employment in combination constituted the Claimant's terms and conditions of employment".

11. The Claimant was initially released by the Respondent to attend the College, but subsequently carried out College assignments in his own time. At some point, he reached an agreement with Mr Woodward that he would be given time to complete College assignments whilst at work. There is a dispute about whether this continued; it is not necessary for me to resolve it.

12. The Claimant's case is that for the whole period of his apprenticeship his work for the Respondent was satisfactory and his progress reasonable. As to his College work at least, his progress and training was subject to the oversight of Jane Palmer, employed by the College as a Work Based Assessor. There are within the bundle a number of "Work Based Learning Progress Review Reports" recording meetings between Ms Palmer and the Claimant, and signed by them and by Mr Woodward or another employee of the Respondent. I refer to some of these Reports below.

13. Mr Woodward states (paragraph 11 of his statement) that during the first month of the Claimant's employment his progress was satisfactory, but "it became quickly apparent thereafter that the Claimant was not continuing to develop in his role as required. Essentially the Claimant picked up the basics at the commencement of his employment but never progressed beyond this". Specifically (paragraph 12), Mr Woodward says the Claimant would remember information given about a task when it was first provided but had forgotten it a few days later. When asked about the Claimant's performance in his evidence, Mr Woodward gave the example of the Claimant being asked to make telephone calls but saying that he did not want to do so. Mr Woodward accepts that by his own account he appears to have been happy to retain the Claimant's services for 10 months after his work became unsatisfactory; he says that this was because he "tried to make it work".

14. At paragraph 13 Mr Woodward states that the College reported slow progress as well as, he says, the Claimant did not follow instructions and there were problems with the accuracy of his written work. He adds that the Respondent was advised by the College that the Claimant did not complete any of his targets at the first time of asking and was not completing course work. Mr Woodward's evidence is that the College's feedback was passed on by him to the Claimant in their weekly meetings (though this can only have been from September – see below), and that it was documented. He accepted that there are no such documents in the bundle.

15. In the progress review report at page 42, Ms Palmer recorded on 28 June 2016, "All targets met. However, work needs to be checked thoroughly to rectify errors with spelling and grammar". The Claimant says, and it seems also to me, that this related to his College work. The document also records the agreement of Mr Woodward to the Claimant using 4 hours per week to complete College work.

16. Mr Woodward's case is that by September 2016 both he and the College did not feel the Claimant was making adequate progress and so a meeting took place between Mr Woodward and the Claimant to discuss this concern (paragraph 15 of his statement). Mr Woodward says that he informed the Claimant that he would spend more time with him to provide "the best opportunity to succeed" and that accordingly weekly one-to-one meetings were established.

The Claimant's case is that the weekly meetings were not about his personal progress but about the content of the work he was doing for the Respondent and the work that was coming into the business; he says that the comments about the need to improve concerned minor aspects of his work such as spelling. Mr Woodward accepted in his evidence that although he says he noted their discussions in his notebook, he was not able to produce to the Tribunal any documentary evidence of the Claimant's work for the Respondent or of discussions between the two of them regarding the Claimant's progress in that regard. In his verbal evidence, Mr Woodward said that from September 2016 he held daily meetings with the Claimant regarding his progress.

17. I find that the weekly meetings were essentially as the Claimant describes them, principally because whilst I found Mr Woodward to be an entirely straightforward witness, his evidence and recollection in this respect was somewhat confused. In particular, he referred in his written statement to weekly meetings from September 2016 and in his oral evidence to daily meetings from the same point. Also, his statement details two meetings at which he says concerns about progress were highlighted – see paragraphs 15 and 16; although he refers to the weekly meetings as being used to discuss progress, he is specific in identifying the two meetings at which concerns were raised whereas his oral evidence suggested this was a feature of each weekly meeting. In the accepted absence of any written record therefore, I prefer the Claimant's evidence, although as the Claimant accepted, when Mr Woodward did raise concerns he did not describe them as "minor issues"; that is how the Claimant perceived them.

18. The progress report at page 44 is dated 14 October 2016. Ms Palmer notes, "All targets met. Amendments required as Brett had not read Action Plan thoroughly … Brett needs to read Action Plan … thoroughly to ensure evidence is produced to correct standard. Also proof read own work and correct errors". The Action Plan refers to a unit of work given to the Claimant by Ms Palmer.

19. Mr Woodward says that he met again with the Claimant in October 2016 (paragraph 16 of his statement), explained that there had not been adequate progress and that he would be given a further month to improve. The Claimant says that he was told neither of these things; his evidence was that he was never told his employment was in jeopardy. This is a difficult conflict of evidence to resolve but I conclude that the Claimant's evidence is to be preferred. The date of the October meeting is not specified, but it is agreed by Mr Woodward and Mrs Beddoes that when the former attended the latter's home to quote for some work on 11 October 2016 he informed Mrs Beddoes and her husband, in response to a question, that the Claimant was "doing fine". I accept entirely that Mr Woodward could hardly be expected to provide a proper appraisal of the Claimant's performance in those circumstances, but even still it seems to me that this would not have been said if shortly before this exchange the Claimant had been told he had a month to improve or if Mr Woodward knew that he was about to deliver that message. I therefore prefer the Claimant's account.

20. On 21 November 2016 Mr Woodward met with the Claimant and terminated his employment. It is agreed to have been an amicable meeting. The Claimant in his statement records Mr Woodward saying: "I hate to have to do this to an employee I like, it's easier when it is someone I don't like, but due to you forgetting things in the workplace I am going to terminate your contract. I need someone who is more like a robot. I don't think you are the person for that". Mr Woodward's evidence is that he said something along the lines of "Brett, this is

hard because I get on with you, but this is business and it's not working out … we're going to have to call it a day". He says in his witness statement (paragraph 18) that the Claimant's employment was terminated "as a result of his failure to progress in his role to the required standard".

21. The Claimant agrees that he did not challenge Mr Woodward's decision at the time, but does not accept Mr Woodward's evidence that the Claimant said termination was for the best; his evidence is that those were Mr Woodward's words. He also rejects Mr Woodward's evidence that he said to Mr Woodward that he was looking for a more hands on job and considering a different career.

22. On the evening of 21 November, the Claimant emailed Mr Woodward to ask for reasons for the decision to terminate his contract – page 47. Mr Woodward replied and, as far as reasons for termination are concerned, said in the formal letter at page 46 that it was "due to your unsatisfactory performance", adding, "you agreed that this course of action was for the best", and in the covering email (page 48) "we spoke about the lack of progress you had made both at college and within the work place". In his evidence to the Tribunal Mr Woodward stated that he could not continue to employ the Claimant for another 10 months, until the apprenticeship was completed, given that by then he had already been "micro-managing" the Claimant for two months.

23. The Claimant emailed Mr Woodward on 23 November (page 49) rejecting his account of their meeting, and stating: "You have stated that this dismissal is due to unsatisfactory performance, however on [sic] the weeks commencing 31/10 and 7/11 I changed how I was doing certain tasks and we had our weekly meeting to discuss the week's work and there were only minor adjustments to job sheets required". There was subsequent correspondence between the parties (pages 51 to 55) but it is not relevant for me to refer to it further.

24. At page 45 is a report compiled by Ms Palmer on 8 May 2017. She refers to the various Review Reports she completed, some of which I have referred to. In relation to these, she makes comments such as that the Claimant had not followed her instructions regarding the layout of his College work, that he had not answered all of the questions set for him, that his work required amendment and that his progress was slow. She concludes, "In summary, Brett's progress was extremely slow and this was due to the fact that he did not follow verbal and written instructions in relation to what he needed to include in the evidence and the accuracy of his written work. Consequently, amendments were required each session as Brett did not complete any of the targets fully and to the correct standard the first time of asking. This is fairly common for the first couple of visits [i.e. by her to see the Claimant in the workplace] but way below expectations 7 months into the qualification. //The above records show that feedback was given in June to check work thoroughly and no improvement had been made by my last visit to Brett in November". The Claimant's view was that these were minor issues, and described to him as such by Ms Palmer. He states, and I accept, that she did not say anything to him about his apprenticeship being terminated.

25. The Respondent paid the Claimant 4 weeks in lieu of notice. It says that this is all he was due. The Claimant says he was entitled to serve a full 18-month term and seeks compensation for early termination and for damaged future employment prospects. At the date of termination, he was being paid £4.30 per hour. He worked 37.5 hours per week and it is agreed that his weekly net earnings were therefore £160. It is agreed he would have been entitled to an increase, in accordance with National Minimum Wage legislation, had he been

employed on his 19th birthday, which was 30 June 2017.

26. The Claimant says, and I accept, that he has been looking for other work since he was dismissed, applying for roles in administration, retail, warehouse and other contexts. He also applied for another apprenticeship in Business Administration but was told that he would not be given the funding. He has received £251 per month by way of Universal Income Job Credit since December 2016. There was no documentary evidence before me of the Claimant's search for new work, but I accept his unchallenged evidence that the details were retained by those administering payment of State benefits.

27. As set out in Mrs Beddoes' undated letter to the Tribunal at pages 73 and 74, the Claimant seeks compensation for the balance of the term of the apprenticeship, to September 2017. He also wishes the Respondent to refund to the government the money provided for the apprenticeship so that the Claimant will have opportunity to get another apprenticeship in Business Administration and gain his chosen NVQ (I am not entirely clear whether the funding was paid to the Respondent or to the College or a combination of the two). The letter adds that "any further compensation will be decide by the Tribunal".

Law

28. From 26 May 2015, the Deregulation Act 2015 enacted amendments to the ASCLA. Section 3 of the Deregulation Act provided, under the heading "Apprenticeships: simplification":

(1) Schedule 1 makes provision about apprenticeships.

(2) Part 1 of the Schedule amends Part 1 of [the ASCLA] so as to simplify the provision made by that Part about English apprenticeships.

29. The amendments introduced by Part 1 of Schedule 1 of the Deregulation Act into ASCLA included a new Section A1 which as from 26 May 2015 set out as follows the meaning of "approved English apprenticeship", under the heading "*CHAPTER A1 //APPRENTICESHIPS: ENGLAND*":

(1) This section applies for the purposes of this Chapter.
(2) 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.

(3) An approved English apprenticeship agreement is an agreement which –
(a) provides for a person ("the apprentice") to work for another person for reward in a sector for which the Secretary of State has published an approved apprenticeship standard under section A2,
(b) provides for the apprentice to receive training in order to assist the apprentice to achieve the approved apprenticeship standard in the work done under the agreement, and
(c) satisfies any other conditions specified in regulations made by the Secretary of State.
(4) An alternative English apprenticeship is an arrangement, under which a person works, which is of a kind described in regulations made by the Secretary of State.

30. Also from 26 May 2015, Section A2 of the ASCLA provided for the publication of apprenticeship standards for such sectors of work as the Secretary of State thought appropriate, either prepared by the Secretary of State or prepared by another person and approved by the Secretary of State.

31. Section A5 of the ASCLA provided from 26 May 2015:

> *(1) To the extent that it would otherwise be treated as being a contract of apprenticeship, an approved English 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 approved English apprenticeship agreement is to be treated as contract of service.*
> *(3) This section applies for the purposes of any enactment or rule of law.*

32. Revised versions of sections A1 and A2 came into effect as a result of the Enterprise Act 2016 on 1 April 2017. Clearly those further amendments are not of relevance to this case.

33. Prior to 26 May 2015, Chapter 1 of ASCLA was headed, "APPRENTICESHIPS". From 26 May 2015, again as a result of the Deregulation Act (Part 2 of Schedule 1), it was amended so as to be headed, "APPRENTICESHIPS: WALES". The Deregulation Act also omitted (again by Part 2 to Schedule 1) section 1 of the ASCLA from that date – that section dealt with what it meant to complete an English apprenticeship, setting out the "standard English completion conditions" which included, "that the person has entered into an apprenticeship agreement in connection with the apprenticeship framework".

34. Prior to 26 May 2015, section 32 of the ASCLA appeared under the heading, "*Apprenticeship agreements: England and Wales*". The words, "*England and*" were omitted by Part 2 of Schedule 1 to the Deregulation Act with effect from 26 May 2015. Section 32 provides:

> *(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.*

The Apprenticeships (Form of Apprenticeship Agreement) Regulations 2012 (the "2012 Regulations") provide that the prescribed form mentioned in section 32(2)(b) above means a statement of particulars of employment compliant with section 1 of the Employment Rights Act 1996 ("ERA") or a document or letter which is treated as meeting the section 1 duty under section 7A of the ERA.

35. Section 35 provides:

> *(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.

36. Article 6 of The Deregulation Act 2015 (Commencement No. 1 and Transitional and Saving Provisions) Order 2015 ("the 2015 Order") brought section 3 and Part 1 of Schedule 1 of the Deregulation Act into force. Schedule 1, Part 2 of the 2015 Order provides as follows:

2. In this Part—

"the 2009 Act" means the [ASCLA];

"commencement date" means 26th May 2015;

"the saved provisions" means the following provisions of the [ASCLA] as they have effect immediately before the commencement date—

(a) section 1 (meaning of "completing an English apprenticeship");

(b) sections 3 to 6 (apprenticeship certificates: England);

(c) sections 13 to 15 and 17 (apprenticeship frameworks: England);

(d) sections 24 to 27 (specification of apprenticeship standards: England);

(e) sections 11, 12, 32 to 36, 38(1) and 39 to the extent that they apply in connection with the provisions mentioned in paragraphs (a) to (d).

3. Despite Part 2 of Schedule 1 to the Act, the saved provisions, and any subordinate legislation made under them, continue to have effect on and after the commencement date; subject to—

(a) the provision made by paragraph 4 for the phasing out of apprenticeship frameworks, and

(b) the modifications made by paragraphs 5 to 8.

4.

(1) This paragraph applies where, in consequence of the publication of one or more standards under section A2 of the 2009 Act, an apprenticeship framework issued under section 14(1) of that Act is withdrawn under section 14(2).

(2) An apprenticeship framework may not be issued under section 14(1) of the 2009 Act in relation to a skill, trade or occupation to which the withdrawn framework related (whether or not the standard published under section A2 of that Act or, as the case may be, any of the standards published under that section, are subsequently revised or withdrawn).

37. Prior to the coming into force of the ASCLA (its original and amended provisions), apprenticeships were governed by the common law, which I made clear to the parties early on in the Hearing I may have to consider in deciding this case. That common law is still relevant where the requirements of the ASCLA for one of the forms of statutory apprenticeship are not met. I deal briefly with three relevant cases.

38. The first is **Wallace v C A Roofing Services Ltd [1996] IRLR 435**, a decision of the Queen's Bench Division of the High Court. In that case, the plaintiff was dismissed ostensibly on redundancy grounds before completing his apprenticeship. Sedley J identified the issue to be decided as whether an oral agreement between the parties included a term permitting premature termination on redundancy grounds, adding, "If so, it will not have been a true contract of apprenticeship".

39. In commenting on the features of an apprenticeship, Sedley J cites a number of authorities. He described it as "a distinct entity known to the common law" even though apprenticeships have been assimilated to contracts of employment by employment legislation: "its first purpose is training; the execution of work for the employer is secondary". He added, "In such a relationship the ordinary law as to dismissal does not apply … more particularly, although a contract of apprenticeship can be brought to an end by some fundamental frustrating event or repudiatory act, it is not terminable at will as a contract of employment is at common law". In paragraph 15 he stated that "whilst redundancy will normally determine an employment contract, it has no impact on the contract of apprenticeship ... nor does the kind of personal unsuitability which might well justify the dismissal of an employee".

40. Sedley J concluded on the facts of the case that there was no term in the contract to the effect that the apprenticeship could be terminated early for redundancy. It appears the standard statement of terms issued to the plaintiff included standard provisions for early termination on notice. Sedley J held that this did not introduce "by necessary implication a power, where the statement is handed to an apprentice, to give him notice subject to the same statutory requirements as to length. It is elsewhere that one must look for the power to terminate if, when this statement is prepared and handed over, a contract of apprenticeship is already in being". He concluded at paragraph 31, "No doubt it is possible to create a contract which is otherwise one of apprenticeship but is subject to a provision for termination on grounds of redundancy … but [this] would in my judgment require clear words to produce that result once the contract had been characterised within an industrial context as one of apprenticeship. Merely to remark, for example, in the course of concluding an agreement for an apprenticeship, that it can be terminated during its currency on the ground of redundancy may well be simply to advance a proposition which is bad in law".

41. The next case to consider is the decision of the Employment Appeal Tribunal in **Whitely v Marton Electrical Ltd [2003] IRLR 197**. The individual in this case was engaged under a Modern Apprenticeship Pact, which was not hugely dissimilar to the tripartite arrangement in the present case. The employer agreed to engage Mr Whitely for the duration of a training plan, but in due course dismissed him by giving 1 week's notice. Underhill J referred to **Wallace** and its characterisation of apprenticeships as "a different animal" to ordinary employment contracts. He noted that the language of the Pact was that of "apprenticeship", that one of the, if not the, principal purpose of the contract was

training, and that the employer had the advantage of receiving funding for it. The employer relied on the provision of its written particulars whereby it could terminate employment on giving a week's notice. Underhill dealt with this at paragraph 12 by saying, "even assuming in the Respondent's favour that [Mr Whitely] did indeed receive and sign a copy of the terms, it is clear to us that where any of their provisions are inconsistent with those of the Pact, the provisions of the Pact must prevail. It is plainly the Pact which the parties intended should govern their relationship: the cross-reference to the terms and conditions of employment is entirely general …". On this basis, it was held that the employer was not entitled to terminate on notice of 1 week and was in breach of contract by doing so.

42. The final case to mention is **The Commissioners for HMRC v Jones [2014] UKEAT/0458/13**, an EAT decision concerned with entitlement to the national minimum wage. Birtles J in that case accepted the appellant's summary of the case law in relation to contracts of apprenticeship, including: the contract of apprenticeship is of a special character and distinct entity from other contracts of employment as its essential purpose is training in the trade or profession, with the apprentice agreeing to serve, work and follow all reasonable instructions of the employer; the fact that part of the training is provided by a third party is largely immaterial; (referring to **Wallace**) a contract of apprenticeship must be for a fixed duration and have an objectively ascertainable end, which may be the conclusion of a course of study or training plan; (again referring to **Wallace**) a contract of apprenticeship is not terminable at will as a contract of employment is at common law. He then added, in yet another reference to **Wallace** at paragraph 9.6: "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".

43. Birtles J then went on to refer to the fact of a notice provision in the relevant contracts in **Jones,** the effect of which had not been analysed by the Employment Judge (this is said to "contradict **Wallace**"); the express power to dismiss for gross misconduct on no notice, which the Employment Judge disregarded (this is said to be "contrary to **Wallace**"); and the fact that there was no fixed contractual term. Birtles J concluded that the Employment Judge's findings of fact "and the absence of reasoning do not entitle him to draw the conclusion that these terms were consistent with a contract of apprenticeship". He goes on to conclude that the primary purpose of the contracts was work for the employer, not training. On this basis, the workers were employed under contracts of employment not contracts of apprenticeship.

Analysis

Alleged breach of disciplinary procedure

44. I can deal first of all very briefly with the Claimant's claim for compensation as a result of the Respondent's failure to follow its disciplinary procedure. It is not necessary for me to analyse the extent to which the Respondent did or did not follow that procedure, simply because as I have said the Handbook (at page 28) expressly says that "These procedures are not contractual and may be amended by us from time to time". There is no assumption that a disciplinary procedure is contractual, and in the face of such an unambiguous statement it cannot be held to be so. In the light of that, any failure to comply with it cannot be held to be a

breach of contract. The Claimant's complaint of breach of contract in this respect must therefore fail.

Nature of apprenticeship

45. As identified above, in respect of the complaint by the Claimant that he was dismissed in breach of contract, I must first of all determine the nature of the apprenticeship. That will require quite a detailed analysis.

46. The Respondent's primary position is that the Claimant was employed under an "approved English apprenticeship" in accordance with section A1 of the ASCLA as set out above. As a result, it contends that section A5 of the ASCLA determines this case in its entirety in that it makes clear that an approved English apprenticeship is not a contract of apprenticeship but a contract of service or employment. I find that the Claimant was not employed on this basis.

47. At its simplest, this is because the arrangement between the parties did not meet the conditions of section A1(3). Whilst the arrangement did provide for the Claimant to work for the Respondent for reward, this was not, as required by section A1(3)(a), in a sector "for which the Secretary of State has published an approved apprenticeship standard under section A2". As a result, section A1(3)(b) was not satisfied either: whilst the arrangement between the parties provided for the Claimant to receive training, this was not in order to assist him to "achieve the approved apprenticeship standard". For completeness, I am not aware, and neither was Ms Wilson-Theaker, of any "other conditions specified in regulations made by the Secretary of State" (section A1(3)(c)). By the Respondent's own case – see its letter to the Tribunal of 1 August 2017 – there was no approved standard in Business Administration when the Claimant's apprenticeship began on 7 March 2016, as no standard was even published until 11 May 2016. I do not accept that the arrangement could nevertheless have turned into an approved English apprenticeship from 11 May 2016, but as it is I do not have to decide that point because the gov.uk website I have referred to makes clear that, even in January 2017 – after the Claimant's employment ended – the standard the Respondent relies on was not ready to use. The website extract goes on to say that an apprenticeship standard "is only available for delivery when both the standard and assessment plan is approved and a funding band … has been assigned to the standard". In short, there was no approved apprenticeship standard applicable to the Claimant for the duration of his employment.

48. In the light of Ms Wilson-Theaker's detailed submissions on this issue, it is important to say more about the conclusion set out above. It cannot be the case that, from 26 May 2015 when the Deregulation Act amended the ASCLA as I have described, where there was no approved standard the only option available to an English employer was to enter into a traditional contract of apprenticeship. That would clearly run counter to the trajectory of recent legislation relating to apprenticeships and of course to the intention of the Deregulation Act to simplify apprenticeship arrangements. I am satisfied that this was not the only option available to the Respondent, and that contrary to Ms Wilson-Theaker's submissions, and for the reasons which now follow, it could in March 2016 properly have entered into an "apprenticeship agreement" under section 32 of the ASCLA.

49. I note of course that from 26 May 2015 – before the Claimant entered into his apprenticeship arrangements and as described above – Chapter 1 of the ASCLA

became headed “APPRENTICESHIPS: WALES”, section 1 of the ASCLA (the “standard English completion conditions”) was repealed, and the heading preceding section 32 became “Apprenticeship agreements: Wales” and omitted the words “England and”. I have however noted that section 1 of the ASCLA was saved by the transitional provisions set out in the 2015 Order, as were sections 13 to 15 and 17 of the ASCLA relating to apprenticeship frameworks in England, and as was section 32 to the extent it applied in connection with the preceding saved provisions. The 2015 Order expressly says that despite the changes effected by Part 2 of Schedule 1 to the Deregulation Act, which I detailed at paragraphs 33 and 34 above – in other words despite the changes to the ASCLA from 26 May 2015 which would otherwise mean apprenticeship agreements and related apprenticeship frameworks would have no further place in England, but would apply in Wales only – the saved provisions continue to have effect. As far as relevant to this case that saving was subject to paragraph 4 of Schedule 1, Part 2 of the 2015 Order. As quoted above, this says in effect that once a standard is published and as a result an apprenticeship framework is withdrawn, no such framework can be issued again thereafter in relation to a skill, trade or occupation to which it related, even if the apprenticeship standard which caused it to be withdrawn is later revised or itself withdrawn.

50. All of that means that, on the basis of the saved provisions, until an approved apprenticeship standard was published by the Secretary of State in the relevant area – here, Business Administration – an English employer such as the Respondent could at the relevant time have entered into an apprenticeship agreement with an apprenticeship framework applying. It is not the case, as I understood Ms Wilson-Theaker to suggest, that from 26 May 2015 where there was no approved apprenticeship standard, an apprenticeship framework would apply instead and the arrangement would still be an approved English apprenticeship. I am confirmed in this view by the statement on the gov.uk website which explains that over the lifetime of this Parliament employer-designed standards will replace frameworks. The latter do not stand in for the former; they are gradually replaced by them, hence the need for the provisions of the 2015 Order to save the ability to enter into apprenticeship agreements under section 32 whilst that transition takes place. My conclusion is also confirmed by the fact that the Agreement, entered into after 26 May 2015, uses the language of “apprenticeship framework”, which suggests that the relevant apprenticeship framework had not been withdrawn at that stage, namely March 2016. None of that is contrary to the aim of the Deregulation Act to simplify apprenticeships. It will – but with the transition from frameworks to standards over time. As Ms Wilson-Theaker submitted, the frameworks are saved by the 2015 Order, but they do not relate to approved English apprenticeships; rather, they are saved to continue to relate to the previous regime under section 32 which is also saved by the 2015 Order whilst the standards are gradually introduced.

51. In summary, there was at no point an approved standard for Business Administration during the Claimant’s employment. There could therefore be no approved English apprenticeship under section A1 of the ASCLA. Section A5 is not therefore conclusive as Ms Wilson-Theaker argued. For the reasons set out above the Respondent could have entered into an apprenticeship agreement under section 32 and still have retained the ability to end the Claimant’s contract of employment early under the Statement in accordance with section 35 of the ASCLA. The next question therefore is whether the arrangement between the parties complied with section 32.

52. The answer is that it did not. Section 32(1) of the ASCLA is clear that each of

the conditions in section 32(2) must be satisfied for an agreement to amount to an "apprenticeship agreement". Section 32(2)(a) clearly was – the Claimant undertook work for the Respondent under the arrangements between them; and one might say that section 32(2)(d) was just about complied with, in that the Agreement referred to apprenticeship frameworks and stated that it was in connection with "Business Administration". That may be generous to the Respondent, but in any event this question is resolved by the fact that the arrangements between the parties did not meet the requirements of sections 32(2)(b) and 32(2)(c). The 2012 Regulations specify the requirement to issue a statement of terms or contract of employment under the provisions of the ERA. For the reasons I have given, the statement issued by the Respondent was not fully compliant with the ERA, based on the evidence before me. This was so only in minor respects, but it is implicit that the 2012 Regulations envisage a compliant section 1 statement or equivalent, not just a statement that purports to be issued under section 1. In any event the requirement of section 32(2)(c), that the agreement states that it is governed by the law of England and Wales, was not complied with as Ms Wilson-Theaker conceded. She submitted that this was minor non-compliance, but section 32(1) is clear – all the requirements must be satisfied. There was therefore no apprenticeship agreement between the parties, and therefore section 35 does not apply so as to make clear that there was no contract of apprenticeship.

53. I next have to consider therefore whether the arrangement between the parties was a contract of apprenticeship – what might be called a traditional, or common law, apprenticeship arrangement. Certainly, the language of "apprentice" and "apprenticeship" was used throughout the documentation in the bundle, including the Statement and the Agreement, and that is how the Respondent referred to the Claimant both during his employment and these proceedings. Nevertheless, it is now well-known that even in this particular field of employment law the label given to a relationship is not determinative. In her closing submissions Ms Wilson-Theaker argued that this could not be a common law apprenticeship. She gave three reasons.

54. The first was the requirement for the Respondent to issue written particulars of employment, which she said meant that the arrangement was more like a contract of employment. I do not see the force of that point. Employment legislation would require written particulars to be issued whether there was a contract of employment or contract of apprenticeship. I also note that in the **Whitely** and **Wallace** cases written particulars were issued, and expressly acknowledged in the reported decisions, but the arrangements remained contracts of apprenticeship nevertheless. Secondly, she pointed out that under the Agreement the Claimant was obliged to tell the College if he left his apprenticeship programme early – in other words, he had the freedom to do so. I do not accept that this of itself tends to the conclusion that there was no contract of apprenticeship. I will return to this briefly below. Thirdly, she referred to the express power of either party set out in the Statement to terminate the employment on giving 4 weeks' notice. There are a number of points to make in relation to that.

55. First, I note that the Respondent entered into the Agreement before it signed the Written Particulars. The Claimant appears to have signed the documents the other way around, but at least as far as the Respondent is concerned, the Agreement came much earlier – in fact only a few weeks after the Claimant's employment commenced. No written particulars were provided before the Respondent and College had signed the Agreement. Secondly, Mr Woodward's

witness statement explains in precisely that way that this is how the arrangements were concluded with the Claimant. He says at paragraph 5 that the Claimant was issued with the Agreement by the College, and at paragraph 6 explains that it was a term of the Agreement that the Respondent as employer "provide an apprenticeship agreement in the form of a Written Statement of Particulars under the [ERA]. We therefore provided [the Statement]". Mr Woodward's evidence is therefore clear: the principal document governing the relationship was the Agreement; the Statement followed from it – it had not been provided before, although the Claimant had been employed since December 2016. Thirdly, the situation is therefore analogous to those in both **Whitely** and **Wallace** where, as explained above, the terms of the written particulars were held not to be determinative of the contractual relationship between the parties.

56. For these reasons, I do not agree that the terms of the Statement demonstrate what might be called an ordinary employment relationship. The language of apprenticeship used by the parties; how the apprenticeship arrangement was concluded, as described above; the fact that it was clearly intended that a material – if not, the material – feature of the arrangement was that the Respondent would provide training in business administration for the Claimant; the provision of funding for this purpose; the fact that the Claimant was working towards particular qualifications under the Agreement; and the fact that the Agreement stipulated a fixed 18 month term – all of these features are consistent with a common law contract of apprenticeship, and in my judgment far outweigh the fact that the Claimant had the implicit ability under the Agreement to end it early, which might be a factor the other way. For these reasons, given the particular features of a contract of apprenticeship recognised in **Wallace** and the other cases I have referred to, I do not accept that the Respondent was contractually entitled to bring the relationship to an end at will and for any reason before the expiry of the 18-month fixed term on giving 4 weeks' notice. The next question therefore is whether in the circumstances of the case it was entitled to do so.

Termination

57. As Sedley J put it in **Wallace**, whilst a contract of apprenticeship "can be brought to an end by some fundamental frustrating event or repudiatory act, it is not terminable at will as a contract of employment is at common law". Birtles J made the same point in **Jones**: "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". This is not an unfair dismissal case; it is not therefore a question of asking whether the Respondent acted fairly; what must be considered is whether there was some fundamental frustrating event or repudiatory act, which fundamentally undermined the ability to teach the Claimant.

58. It is clear that Ms Palmer had concerns about the Claimant's College work – I have detailed those concerns above. The burden of her comments seems to me to be that the Claimant did not complete tasks at the first time of asking. She is not recorded as saying that the Claimant would not complete his course nor does she express a view to the effect that it might be necessary to end the apprenticeship. I also note that of course Ms Palmer's comments were not concerned with the Claimant's work for the Respondent. For that one must consider Mr Woodward's evidence. When I do so, I conclude that it does not

establish that there was some fundamental frustrating event or repudiatory act which fundamentally undermined the ability to teach the Claimant.

59. Mr Woodward's evidence was not at all detailed about the level of progress made by the Claimant and its impact on the Respondent. In respect of its impact, he said that he was micro-managing the Claimant for the few weeks leading up to termination. I have found as a fact however that in the weekly meetings which commenced in September 2016, two months before termination, Mr Woodward did not set out concerns about the Claimant's performance – at least not of a serious nature – nor did he say that there was a requirement to improve; there were only two meetings at which that kind of discussion took place before the dismissal meeting on 21 November, namely one in September and one in October. I have also found as a fact that the Claimant was not warned that his employment would be terminated if things did not improve; in this case that is not a question of fairness, but it does to my mind indicate that the Claimant's performance was not such as to give rise to a fundamental frustrating event or repudiatory act. I also note Mr Woodward's explanation of the decision to terminate the Claimant's employment in paragraph 18 of his statement, namely that it was because of a "failure to progress to the required standard" and in paragraph 21, where he refers to post-dismissal correspondence in which he mentions the Claimant's "lack of progress" (see the email at page 48). This is in turn consistent with the letter confirming dismissal (page 46) which refers to "unsatisfactory performance". In my judgment, none of this is language which describes a situation in which the ability to teach the Claimant had been fundamentally undermined. As for the Claimant's own evidence, whatever he said at the meeting on 21 November, he certainly did not agree that his performance was so bad as to fundamentally undermine the ability to teach him and thus merit dismissal. It is for these reasons that I conclude that there was no fundamental frustrating event or repudiatory act which fundamentally undermined the ability to teach the Claimant and that accordingly he was dismissed in breach of contract.

Compensation

60. What compensation is the Claimant entitled to as a result? The 18-month apprenticeship provided for by the Agreement would have ended on 6 September 2017. Ms Wilson-Theaker tentatively suggested in submissions that any compensation should be measured over an 18-month period from when the Claimant started employment in December 2015, but the Agreement is clear that the 18-month apprenticeship started on 7 March 2016. From 22 November 2016 to 29 June 2017, the Claimant would have been paid £160 per week. Over those 31.4 weeks this would have equated to £5,024. From 30 June 2017, his 19th birthday, he would have been entitled to the relevant National Minimum Wage rate of £5.60 per hour. For a 37.5 hour week, that equates to earnings of £210. From 30 June to 6 September 2017 is 9.6 weeks. At a rate of £210, that gives earnings of £2,016. The total losses to 6 September 2017 are therefore £7,040. Set against that are the 4 weeks for which the Respondent paid the Claimant following termination, namely £640, plus the £251 per month of benefits received by the Claimant for 9.2 months from December 2016 to 6 September 2017, namely £2,309.20. The total amount to be deducted from the Claimant's overall losses is therefore £2,949.20. His overall net loss is therefore £4,090.80. The burden is on the Respondent to show a failure to mitigate loss. That was not a point which was strongly pursued by Ms Wilson-Theaker and in any event I am satisfied that the Claimant has made more than reasonable efforts to mitigate his loss of earnings and that no further sum should be deducted from the net loss as

just calculated.

61. The Tribunal has no power to order repayment of funding to the government, whoever received it. It is clearly not money that was paid to the Claimant himself, and so even if in principle I felt it right that it should be reimbursed, it would not be appropriate to order payment of that sum to him. The Claimant's case for further damages to reflect the impact on his employment prospects beyond the 18-month fixed term was not in any way particularised. I therefore accept Ms Wilson-Theaker's submission that it is not appropriate to order further compensation in relation to that. The Recoupment Regulations do not apply to breach of contract claims. The Respondent is therefore ordered to pay to the Claimant compensation for breach of contract of £4,090.80.

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Employment Judge Faulkner

Date: 1 September 2017
JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE