



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103011/2018

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Held at Edinburgh on 23 October 2018

Employment Judge: M Robison

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Mr C McGrouther

**Claimant
Represented by
Mr M Hughes
Trainee Solicitor**

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Express Joinery Products

**Respondent
No appearance**

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JUDGMENT

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The judgment of the Employment Tribunal is that the respondent shall pay to the claimant:

- i) the sum of Nine Hundred and Twenty Four Pounds and Eighty Three Pence (£924.83) in damages for breach of contract.
- ii) the sum of Two Hundred and Twenty Five Pounds and Twenty Five Pence (£225.25) in respect of untaken annual leave.

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REASONS

1. This case again called for a final hearing on 23 October 2018, having been adjourned on 2 August 2018 for reasons set out in a note following the adjournment, and another hearing set down for 20 September having been postponed due to lack of availability of the sitting judge.
- 5 2. Shortly prior to the hearing, I was advised by the clerk that a Mr MacKay from the respondent had telephoned the Tribunal, complaining that he had called the previous week but no-one had returned his call. These calls were to advise that he had understood that the claim had been withdrawn last summer. He had however received a letter the week prior
10 to 23 October to advise of the hearing taking place on that date. He advised that he wished to attend but was unable to.
3. As stated in the note following the adjournment on 2 August 2018, the claimant had lodged two claims against the same respondent arising out of the same facts. The claims were essentially the same, but the second
15 included a claim for breach of contract. The respondent had lodged an ET3 in respect of the first claim, but not the second. The first claim was subsequently withdrawn. It is understood that both the claimant's representative and the Tribunal corresponded with the respondent in regard to the error. Notwithstanding, the respondent did not lodge an ET3
20 in respect of this, the second, claim. I noted at the time that the address on the ET3 differs from the address on the file, so the correspondence address was changed accordingly.
4. It would appear therefore that there may have been some failure of communication, but the fact remains that no defence has been lodged to
25 this particular claim.
5. I explained this to the claimant's representative, who after a short adjournment to explain the circumstances to his client, stated that his client wished to proceed with the hearing. My view too was that this hearing should proceed, not least because no defence has been lodged
30 to this claim.
6. I heard evidence only from the claimant. He was referred to a number of documents lodged (referred to in this judgment by page number). I

accepted the claimant's evidence because I considered him to be a credible and candid witness.

Findings in fact

- 5 7. The claimant commenced work with the respondent on 13 February 2017 as an apprentice joiner. He entered into an arrangement to undertake an apprenticeship under the auspices of the CITB, and signed a tripartite agreement with an anticipated end date of 31 January 2020 (pages 27 – 38).
- 10 8. Prior to that the claimant had been engaged as an apprentice joiner with an organisation called Avoca Joinery where he had worked for almost a year and a half before being dismissed. A claim he made for unfair dismissal settled out of court. During his time there he completed his first year of his apprenticeship and certain college courses.
- 15 9. Given he was 21 and had already completed one year of his apprenticeship, he was paid £7.05 per hour. He worked for 39 hours per week. The agreement was that he would continue to attend college on a block basis.
- 20 10. On or around June or July 2017, the claimant was assaulted by a colleague, William McKay, a qualified joiner, who has subsequently been on trial for assault. As a result of the assault the claimant's two front teeth were damaged and he required root canal treatment at the dental hospital which meant that he was absent from work for two days. He required follow up treatment from his dentist which meant that on occasions he had
- 25 to start his work late or leave early.
11. Subsequently he took one day of absence to attend his aunt's funeral and he was absent from work for up to two days with tonsillitis in or around October 2017.
- 30 12. When he returned to work after being absent with tonsillitis on 12 October, the owner of the business, Ian MacKay, called him into his office and told him that his contract was terminated on account of the absences. He received no notice pay.

13. With regard to holidays, during the whole of the time he worked for the respondent he took two days holiday when he visited his girlfriend's family in Manchester for a long weekend.
14. While working with the respondent, the claimant continued to work as a delivery driver for Pizza Hut, a job he had commenced in 2016. When his employment was terminated, he increased his hours (which were variable).
15. In the meantime, he made every effort to obtain another apprenticeship, sending letters and e-mails to relevant organisations.
16. Towards the end of 2017, he was approached by Robert Reid Joinery who had obtained his name from the CITB. He commenced employment on 1 December 2017, initially on a trial basis.
17. Subsequently on 9 May 2018, he entered into another tripartite apprenticeship agreement with Mr Reid and CITB, (pages 39 – 47). When he commenced this agreement, he was in his second year of his apprenticeship agreement, and moved into his third, having completed more than the required college courses at that stage.
18. By letter dated 24 June 2018, the claimant was advised that he was to be made redundant "due to the current very competitive trading conditions in the construction industry" (page 48).
19. The claimant, who had continued to work at Pizza Hut on a part-time basis, increased his hours there, recently being promoted to manager.
20. The claimant's date of birth is 9 February 1996.

25 **Submissions**

21. Mr Hughes submitted that the claimant was engaged on a contract of apprenticeship. He relied also on the more recent case of *Flett v Matheson [2006] EWCA Civ 53*, at [38] a decision of the Court of Appeal in England prior to the coming into force of the Apprenticeships, Skills, Children and Learning Act 2009, an Act which regulates apprenticeships in England but does not apply in Scotland. Consequently, it sets out the common law position, which he submitted still applies in Scotland and confirms that a modern apprenticeship is not fundamentally different from

a traditional apprenticeship. He submitted that the common law rules relating to the requirements for a contract of apprenticeship, set down in *Dunk v George Waller & Son Ltd [1970] 2 QB 163*, were met in this case.

5 22. In this case there is a tripartite agreement in place for the claimant and that agreement fulfills the essential requirements of a contract of apprenticeship, the main purpose of which relates to training, and which has a stated end date.

23. With regard to his claim for loss of opportunity, relied on the case of *Dench v Flynn 1998 IRLR 653* (a case relating to unfair dismissal compensation). He submitted that although the claimant has obtained 10 another apprenticeship contract, he had been dismissed because of the competitive market. He submitted that the continuing loss was caused by the actions of the respondent.

24. Mr Hughes subsequently lodged an updated schedule of loss and 15 vouching of the sums sought, and to show mitigation.

Deliberations and decision

Contract of Apprenticeship

20 25. This is a claim for breach of contract. The claim is pursued on the basis that the claimant was engaged on a contract of apprenticeship (rather than a contract of service).

26. In *Dunk v George Waller and Son Ltd 1970 2 QB 163, CA*, the Court of Appeal set out three essential conditions to establish a contract of apprenticeship, Lord Justice Widgery observing: 'A contract of 25 apprenticeship is significantly different from an ordinary contract of service if one has to consider damages for breach of contract by an employer. A contract of apprenticeship secures three things for the apprentice: it secures him, first, a money payment during the period of apprenticeship, 30 secondly, that he shall be instructed and trained and thus acquire skills which would be of value to him for the rest of his life, and, thirdly, it gives him status, because the evidence in this case made it quite clear that once a young man, as here, completes his apprenticeship and can show

by certificate that he has completed his time with a well-known employer, this gets him off to a good start in the labour market and gives him a status the loss of which may be of considerable damage to him.’

5 27. In *Flett v Matheson 2006 ICR 673* the Court of Appeal held a government-funded modern apprenticeship was also subject to the common law rules on apprenticeship. The tripartite nature of the agreement — between the apprentice, the employer and a government-sponsored training provider — did not deprive the relationship between employer and apprentice of a long-term character which persisted until the end of the training period
10 contemplated. Although the employer did not provide the academic part of the training, it was required to give the claimant time off to obtain it and to fund the cost of attendance at classes.

15 28. In *Flett v Matheson*, Pill LJ stated that “in my judgment the use of the word “apprentice” in the document is an important element in construing the obligations under the ILP. To decide upon the extent of those obligations it is, however, necessary to construe the particular agreement and not rely on the label alone. On the other hand because an agreement is described as a modern apprenticeship its constructions should not be
20 approached on the basis that it is necessarily something fundamentally different from a traditional apprenticeship...the employers are bound for the training period specified in the ILP.....The arrangement has the essential features of an apprenticeship, as stated by Widgery LJ in *Dunk v Waller....*”

25 29. I accepted Mr Hughes submissions that in Scotland the common law principles apply to the question whether the a contract of apprenticeship has been established. Thus the answer to the question whether a contract is a contract of service or a contract of apprenticeship will depend on the agreement reached between the parties.

30 30. In this case, the claimant entered into an agreement, called an Individual Training Plan, under the Modern Apprenticeship Training Programme. The agreement is described (page 31) as a Modern Apprenticeship Training Agreement. There are three parties to the agreement, namely the claimant, Ian MacKay, on behalf of the respondent, and Kevin O’Donnell,

on behalf of CITB (page 30). The claimant is described as the apprentice. It is clear that the central purpose of the agreement is training, since it described, in some detail, the extent of the on-site, on-the-job training, and the off-the-job training at college, and includes support and progress review arrangements. Under participant declaration, it is stated at point 3
5 “I am employed by an employer (a) for whom I am working as an employee to consolidate the skills to be acquired during my MS programme; (b) by whom I shall be directly managed whilst performing my apprenticeship tasks on a daily basis with the apprenticeship tasks being undertaken as part of my employment during working hours; and (c)
10 under a contract of employment relevant to the MS in which I shall be participating” (page 36).

31. I was of the view that the fact that this agreement is stated to be a contract of employment does not preclude it also being a contract of
15 apprenticeship, the two not being mutually exclusive. Indeed, for statutory purposes, section 230(2) of the ERA states that “In this Act “contract of employment” means a contract of service or apprenticeship whether express or implied (and if it is express) whether oral or in writing”. Thus since apprentices are also employees for the purposes of the rights under
20 the ERA, there is little difference between the operation of terms under the different types of contract.

32. There is however one important difference between a contract of service and a contract of apprenticeship, and that relates to the position on
25 termination. A contract of apprenticeship, which is a fixed term contract, will terminate on the date specified in the contract. It is a feature of contracts of apprenticeship that they cannot usually be terminated earlier except in cases of serious misconduct by the apprentice.

33. In *Wallace v CA Roofing Services Ltd* 1996 IRLR 485, the High Court concluded that a contract of apprenticeship could not include a provision
30 allowing the employer to terminate the apprenticeship in case of a downturn in work (redundancy) (see also *Flett v Matheson*).

34. Further, in *Whitely v Marton Electrical Ltd* 2003 IRLR 197, the EAT held that a ‘modern apprenticeship agreement’ was a common law contract of

apprenticeship and could not be terminated before the end of the training period.

Damages for breach of contract

5 35. I accepted therefore that the claimant was engaged on a contract of apprenticeship, that the respondent was not entitled to terminate it early in the circumstances in which he did, and therefore that there was a breach of contract. I therefore came to consider damages.

10 36. I accepted that in regard to damages for breach of contract the claimant would in principle be entitled to compensation for the whole of the period until the end day of the contract. That is of course subject to the principle of mitigation. Is to the claimant's credit that he took speedy and fruitful steps to mitigate his loss.

15 37. In particular, he took more hours with Pizza Hut, where he already had a part-time job. As set out in the schedule of loss, from 12 October 2017 to 1 December 2017 he earned £1,712.47 from Pizza Hut, that is an average of £244.63 per week.

20 38. While he was working for the respondent, together with his earnings from Pizza Hut, he was earning an average of £344.57, that is his losses during that period were £99.94 per week. For a total of seven weeks, until he obtained new employment, his losses therefore amount to £699.58, and I find the claimant entitled to that sum.

25 39. I also find that the claimant was dismissed without notice, and that he is entitled to one week of notice pay, totalling £225.25.

Loss of opportunity

30 40. Mr Hughes also sought damages for loss of opportunity, beyond the losses suffered by the claimant up to the point that he obtained a new apprenticeship contract. He submitted that it was unlikely that the claimant will be able to finish his apprenticeship, and that his age and the fact that he was in the third year of his apprenticeship meant that it would be more difficult for him to get another apprenticeship. He has lost the opportunity to earn tradesmen rates as a qualified joiner. The claimant is currently

earning £7.83 per hour for 20 hours per week, that is £156.60 net per week. As a tradesman he could earn £11.17 per hour for a 39 hour week, which amount to £361.25. On an annual basis that amounts to around £10,000. The claim was restricted to two years of such loss.

5 41. The claimant gave evidence that he continues to seek another apprenticeship but that his age and the fact that he was in his third year of apprenticeship will work against him because it is more expensive to employ him than other apprentices. He is working with CITB and managed to get another apprenticeship with Robert Reid Joinery relatively soon after the contract with the respondent terminated. He has been looking for another post since that ended, some 18 months ago.

10 42. Mr Hughes relied on the dicta of Lord Justice Widgery in *Dunk v George Waller and Son Ltd 1970 2 QB 163* that damages can be sought for 'the loss of teaching, the loss of instruction and the loss of status'. Mr Hughes also referred to another first instance decision where the claimant in a similar situation had been awarded a substantial sum in damages. That decision of course is not binding on this Tribunal, and in any event in that case there was no intervening act in regard to ongoing losses, and there was a finding that the claimant in that case had sought but failed to mitigate his losses.

15 43. Mr Hughes also cited the case of *Dench v Flynn 1998 IRLR 653*, as authority for the proposition that a loss consequent upon unfair dismissal does not necessarily cease when an applicant gets employment of a permanent nature at an equivalent or higher salary than the employee previously enjoyed. That was however an unfair dismissal claim, where compensation is assessed according to the principles set out in the Employment Rights Act, which in particular requires compensation to be assessed as is just and reasonable.

20 44. He did not however refer me to any other authorities which considered loss of opportunity in circumstances similar to this one, that is a breach of contract case where there has been an intervening act.

25 45. I took the view that the usual common law principles apply. Consequently in assessing loss, I require to take account of the principles of causation

and remoteness, including whether there is a novus actus interveniens, and how these principles interplay with the principles of mitigation.

46. In this case, the claimant had completed two years of his apprenticeship and had started his third year. He successfully mitigated his losses by obtaining another apprenticeship contract, which is to his credit. Unfortunately however his new employer also ended his contract prematurely. It is clear from the information provided that too is a contract of apprenticeship. As discussed above, the termination of such a contract in the circumstances described may well be unlawful. Arguably therefore losses flow not from the fact that this respondent terminated the contract prematurely, but rather from the subsequent employer's unlawful act. While the claimant will be time barred from pursuing a claim in the employment tribunal in respect of those losses, as he would have a straightforward breach of contract claim against the subsequent employer, that claim could be pursued in the sheriff court, and he is not time-barred from doing so.
47. I consider the act of obtaining a new contract and the termination of that contract to be a novus actus interveniens, breaking the chain of causation for loss. That new contract was a contract of apprenticeship, again for a fixed term, again under the auspices of the CITB, entered into after a trial period. Had that contract not been signed and the claimant taken on only on a trial basis, the position may have been different. However, given the claimant was under a duty to mitigate his losses, I consider that it could not properly be said that the loss of opportunity to become a qualified joiner should be laid at the door of the respondent.

Holiday pay

48. I accepted the claimant's evidence that he had taken only two days holidays during the period when he worked for the respondent, and that the claimant was due to be paid for a total of 5 days untaken holiday. On the basis of a weekly wage of £251.98, that is £50.40 per day. I therefore find that the claimant is due the sum of £225.25 in respect of holiday pay.

Employment Judge: Robison

Judgment Date: 26 November 2018

5 **Entered into the Register: 30 November 2018**
And Copied to Parties