



Apprenticeships

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Traditionally, the relationship between employers and apprentices has been governed by the common law. More recently there has been statutory provision for other forms of apprenticeship agreements.

Overview of Topic

The question of whether an employee is an apprentice, and, if so, which regime they are employed under, is particularly relevant in two potential respects:

- a. Where an employee is employed under a common law apprenticeship agreement, it is likely to be found that the agreement cannot be terminated by the employer before the conclusion of the agreed training period, and if the employer does wrongfully dismiss, the approach to assessing damages will be different to that in relation to non-apprentice employees; and
- b. The rules relating to minimum wages are different for some apprentices.

Type of apprenticeship agreement, and potential effect on damages

With effect from 6 April 2012, the combination of the [Apprenticeships, Skills, Children and Learning Act 2009](#) ("ASCLA") and the [Apprenticeships \(Form of Apprenticeship Agreement\) Regulations 2012/844](#) ("the Regulations") introduced a new regime in relation to apprentices employed on or after that date. However, further amendments were then introduced to the ASCLA by the [Deregulation Act 2015](#) ("the DA"), effective 26 May 2015 and applicable in England only, and not in Wales. Accordingly, there are now a number of ways in which an apprentice can be employed pursuant to a statutory scheme rather than the common law:

- a. An apprenticeship entered into before 26 May 2015 in England, and/or after that date in Wales, which complies with [s.32 ASCLA](#) (and the "prescribed form" referred to therein which is set out in [reg.2](#) of the Regulations);

- b. An apprenticeship entered into on or after 26 May 2015 in England which is an "approved English apprenticeship" either because, pursuant to [s.A1\(2\) ASCLA](#): it takes place under an "approved English apprenticeship agreement" as defined in [s.A1\(3\) ASCLA](#); or it takes place under "an alternative English apprenticeship" as defined in [s.A1\(4\) ASCLA](#), which means it is of a kind described in regulations made by the Secretary of State. At the time of writing, no such regulations have been made.

By reason of [ss.A5](#) and [35 ASCLA](#) compliant apprenticeship agreements are contracts of service rather than traditional common law contracts of apprenticeship.

When considering the situation in relation to apprentices employed prior to 6 April 2012 or those which do not comply with the relevant statutory requirements so as to fall within the provisions of the ASCLA, common law rules have to be applied to determine if a contract has that character or is a contract of employment. This is important because once it is established that there is a common law apprenticeship, it is likely to be found that it cannot be terminated at will by the employer before the conclusion of the agreed training period. It has effectively been found that nothing short of the employer being unable to teach the apprentice justifies dismissal (as per [Leary v Brook \[1891\] 1 Q.B. 431](#) in which the apprentice was an habitual thief). Furthermore, where there has been a dismissal, higher damages may be awarded than in relation to a non-apprentice employee.

The question of whether an employee is an apprentice was addressed by the Court of Appeal in [Flett v Matheson \[2006\] EWCA Civ 53; \[2006\] I.C.R. 673](#) in which Lord Justice Pill approved the approach of the EAT in [Whitely v Marton Electrical Ltd \[2003\] I.C.R. 495](#) and also considered the findings in [Dunk v George Waller & Son \[1970\] 2 Q.B. 163](#). From those cases it can be seen that the following are factors pointing to a contract of apprenticeship:

- a. One of the principal purposes of the contract being training which, upon completion, places the employee in a better position to secure future employment (and, per [Flett v Matheson \[2006\] EWCA Civ 53; \[2006\] I.C.R. 673](#), it does not matter if an element of that training is to be provided by an organisation outside that of the employer - a "tripartite arrangement");
- b. The apprentice receiving less than the national minimum wage;
- c. The use of the word "apprentice" in construing the agreement (but whilst it is important, the label cannot be relied upon alone).

It was held in [Whitely v Marton Electrical Ltd \[2003\] I.C.R. 495](#) that redundancy is not a permissible reason for terminating an apprenticeship prior to the conclusion of an agreed period of training, "save where the employer's business closes or undergoes a fundamental change in its character".

In terms of remedy for a wrongfully dismissed apprentice, as set out in [Dunk v George Waller & Son \[1970\] 2 Q.B. 163](#), a dismissed apprentice is entitled not only to damages for his loss of earnings and loss of training during the remainder of the apprenticeship agreement, but also for the diminution of his future prospects caused by the loss of training and the loss of status. In that case Karminski L.J. observed that the fact that there are

difficulties in assessing those future damages "does not excuse the court from doing its best to measure the damage as best it can on the information and evidence available". The usual rules of mitigation will of course apply.

Wages

By reason of [reg.4A](#) of the [National Minimum Wage Regulations 2015/621](#), a different hourly rate applies to a worker to whom "the apprenticeship rate" applies. At the time of writing that hourly rate was £3.30. [Regulation 5](#) provides that "the apprenticeship rate" applies to those employed under a contract of apprenticeship or apprenticeship agreement or who are treated as being under a contract of apprenticeship (as set out in [reg.5\(2\)](#)) and are within the first 12 months of commencing such employment or are under the age of 19.

Key Acts

[Apprenticeships, Skills, Children and Learning Act 2009](#) (as amended by the [Deregulation Act 2015](#))

Key Subordinate Legislation

[Apprenticeships \(Form of Apprenticeship Agreement\) Regulations 2012/844](#)

[National Minimum Wage Regulations 2015/621](#)

Key Cases

[Dunk v George Waller & Son \[1970\] 2 Q.B. 163](#)

[Whitely v Marton Electrical Ltd \[2003\] I.C.R. 495](#)

[Flett v Matheson \[2006\] EWCA Civ 53; \[2006\] I.C.R. 673](#)

Possible Future Developments

Regulations relating to "an alternative English apprenticeship" have yet to be developed (see para.2(b) above).