

Apprenticeships

Latest Update

30 January 2018

General updating.

Author(s)

Harriet Fear Davies - Devereux Chambers

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

Overview of Topic

1. 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 contract, it is likely to be found that the contract 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.

2. **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 statutory regime in relation to apprentices employed on or after that date. The ASCLA has been amended a number of times, including by the [Deregulation Act 2015](#) ("the DA"), the [Enterprise Act 2016](#) and the [Technical and Further Education Act 2017](#) ("TFEA"). 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 or Wales, 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 it takes place under an approved English apprenticeship agreement, or under an alternative English apprenticeship ([s.A1\(2\) ASCLA](#)). An "approved English apprenticeship agreement" is defined in [s.A1\(3\) ASCLA](#), which was most recently amended pursuant to the TFEA with effect from 8 November 2017; an "alternative English apprenticeship" is an arrangement of a kind described in regulations made by the Secretary of State ([s.A1\(4\) ASCLA](#)), being the [Apprenticeships \(Miscellaneous Provisions\) Regulations 2017/1310](#), and specifically

[reg.6](#) which came into force on 15 January 2018.

3. Compliant apprenticeship agreements are contracts of service rather than traditional common law contracts of apprenticeship (by reason of [s.A5 ASCLA](#) in relation to approved English apprenticeship agreements, and [s.35 ASCLA](#) in relation to apprenticeship agreements in Wales).
4. Where an agreement fails to comply with all the requirements of ASCLA, it may well be found by a Court or Employment Tribunal that the apprentice is employed under a common law contract of apprenticeship.
5. When considering the situation in such a case, or in relation to apprentices employed prior to 6 April 2012, 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 [Learoyd v Brook \[1891\] 1 Q.B. 431](#) in which such was found on the basis that 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.
6. 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 the agreement (but whilst it is important, the label cannot be relied upon alone).
7. 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".
8. 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.

9. **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 £3.50. [Regulation 5](#) provides that "the apprenticeship rate" applies to those employed under a contract of apprenticeship, an apprenticeship agreement under [s. A1\(3\)](#) or [s.32 ASCLA](#) (see above), or who are treated as being under a contract of apprenticeship (as set out in [reg.5\(2\)](#)). They must also be within the first 12 months of commencing such employment or under the age of 19.
10. **Latest developments:** Regulations relating to "an alternative English apprenticeship", specifically the [Apprenticeships \(Miscellaneous Provisions\) Regulations 2017/1310](#).

Key Acts

[Apprenticeships, Skills, Children and Learning Act 2009](#) (as amended)

Key Subordinate Legislation

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

[Apprenticeships \(Miscellaneous Provisions\) Regulations 2017/1310](#)

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

Key Quasi-legislation

None.

Key European Union Legislation

None.

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](#)

Key Texts

None.

Further Reading

None.

© 2018 Sweet & Maxwell Ltd

