EMPLOYMENT TRIBUNALS

Claimant: Mr. M. Smith

Respondent: XGAS Ltd

HELD AT: Mold **ON:** 6th August 2018

BEFORE: Employment Judge T. Vincent Ryan

REPRESENTATION:

Claimant: Mr. A. Mitchell (friend)
Respondent: Mr. D. Smith (Consultant)

JUDGMENT having been sent to the parties on 29th August 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Issues: In circumstances where the claimant was dismissed while in training and was referred to as an apprentice, the issues for the tribunal to decide were:

    1.1. Whether the claimant was an *apprentice* with the benefit of a Welsh apprenticeship and an apprenticeship *contract* (giving him security for the period of the apprenticeship) or whether he was an employee with the benefit of an apprenticeship agreement (such that he could be dismissed at any time).

    1.2. Subject to the above it was for the tribunal to decide whether the claimant was dismissed for a potentially fair reason or reasons, in this case whether the reason(s) were related to the claimant's capability by reference to aptitude and skill and/or his conduct in and in relation to work

    1.3. Whether in all the circumstances, the respondent had acted reasonably or unreasonably in treating that or those reasons as sufficient reason(s) to dismiss the claimant. In that respect tribunals usually consider whether the

"dismissing officer" had a reasonable and genuine belief, based upon and following a reasonable investigation, that the capability or conduct was as alleged against the employee and whether dismissal fell within the range of reasonable responses of an employer in those circumstances.

1.4. Whether any award made to the claimant ought to be reduced in the circumstances of his dismissal or to reflect the risk of his being fairly dismissed.

1.5. Whether any award ought to be increased because of the respondent's alleged failure to follow an applicable ACAS code.

1.6. Subject to the above, how much ought the respondent pay to the claimant by way of compensation?

2. The Facts:

2.1. The Respondent is a small company with a total complement of 14 employees or thereabouts including 5 to 6 engineers and 4 employees who are in training and who are called apprentices. The Respondent company does not have in-house professional HR or legal support and is inexperienced, lacking knowledge of employment law requirements on employers. Assistance has been obtained in such matters from a friend of the directors. The Respondent does not have any proper system of record-keeping and at the material time it had no written policies and procedures in respect of employment relations. The Respondent did however issue written statements of employment particulars to its employees. The Respondent's directors are Paul Jones and Alan Taylor both of whom gave evidence. The Respondent is a company providing heating/plumbing engineers to domestic and business customers serving their central heating systems, gas services, and plumbing requirements since 2003. The Respondent has trained more than ten employees, calling them "apprentices", and at the date of the final hearing employed four employed trainees.

2.2. The Claimant commenced his employment with the Respondent on the 26 October 2014. There are two documents entitled "principal statement of terms and conditions" in the trial bundle namely that dated the 16 January 2017 at pages 38 to 41 and the 20 September 2017 at pages 42 to 45. (Henceforth all page references are to the trial bundle unless otherwise stated). The statement of terms and conditions makes clear that there was an employment relationship with some emphasis on the provision of training. The Claimant was obliged to attend college to achieve pass grades appropriate to his level and to complete case work and exams. The relationship was also supported by a tripartite agreement including the provision of academic training and onsite monitoring for academic purposes made between the Claimant, the Respondent, and Coleg Cambria (14 September 2016 pages 46 to 47). This tripartite agreement is not a contract of employment and its emphasis is on educational funding and the means to achieving accreditation or qualifications. The tripartite agreement includes

"best endeavours" provisions in respect of finding of alternative employment for the Claimant in circumstances of his being made redundant by the Respondent or where the Respondent cannot continue the relationship. The contractual documentation whilst placing some emphasis on training does not include either expressly or by implication terms commensurate with a common law apprenticeship such as a fixed term placement and it imposed performance management provisions such that the Respondent could so manage the Claimant. The contractual documentation does not include expressly or by implication protected measures appropriate to a common law apprenticeship.

2.3. The Respondent was dissatisfied with the Claimant's practical work generally during his employment. Some of the Claimant's work had to be re-done either by him or his colleagues and discounts were on occasions granted to clients who were dissatisfied. The Claimant made relatively slow academic progress with his training at Coleg Cambria. The Claimant attended college and he passed his exams. He did not complete his coursework in a timely fashion and to an acceptable, satisfactory, standard. The Respondent received reports from Coleg Cambria to this effect.

2.4. Both Alan Taylor and Paul Jones line-managed the Claimant; both spoke to the Claimant during his employment about his underachieving and underperformance. In his statement Alan Taylor gives specific examples of poor workmanship and lack of academic advancement as well as the meetings that were held between the directors and the Claimant regarding these issues. I accept the evidence of Mr Paul Jones and Mr Alan Taylor as set out in their written statements of evidence in chief as being credible and reliable. The Claimant's errors risked damaging the Respondent's reputation, caused inconvenience and expense and could have contributed to dangerous situations arising. The Respondent's employees RLl, RB and ZS all of whom are engineers, offered to assist and mentor the Claimant but all reported to Mr Taylor that he was not responding satisfactorily. Several of the Respondent's employees raised their concerns with Mr Taylor and both Mr Taylor and Mr Jones had a series of meetings (which are detailed in their respective statements) with the Claimant about these matters but to no avail.

2.5. By the 5 October 2017 the Respondent had decided that the Claimant had no future with it. The Respondent had lost trust and confidence in the Claimant reaching an acceptable standard of performance and fulfilling his duties as an employee. The Respondent reached the point where it was not prepared to continue the relationship. On that date the Respondent summarily dismissed the Claimant for a reason related to capability by reference to skill and aptitude and his conduct in and around the performance of his duties. The Respondent wrote to the Claimant on 5 October 2017 (page 68B). The Respondent criticised the Claimant's lack of progress at college, his sub-standard poor-quality work, lack of response to ultimatums given and general lack of effort. Citing colleagues' frustration with the Claimant's poor workmanship and the Claimant's college work being behind schedule, the Respondent stated its disappointment with the Claimant's quality of work in customers' houses and confirmed summary dismissal. The reason or

reasons for dismissal were both capability and conduct in and around academic effort and attendance to studies as well as practical work in customers houses with what the Respondent perceived to be a lack of effort. The Respondent did not refer in that letter or at any point to any specific customer jobs or instances in support of its assertions; it did not invite the Claimant to a hearing nor provide any mechanism by which the Claimant could appeal the decision to dismiss him. The Respondent made no reference to it having considered alternatives to dismissal such as to retraining, to the issuing of warnings or to considering any mitigating circumstances. None of these things are mentioned because the Respondent did not consider them and the directors minds were made up. Having made up their minds, the directors did not waiver and rather followed through their decision to dismiss. The Claimant was paid in lieu of notice.

2.6. With the assistance of Trade Union advice and representation the Claimant wrote a letter of appeal to the Respondent (pages 69 to 70). The Claimant's Trade Union representative Mr David Griffiths (Regional Officer, Unite the Union) arranged to meet with the Respondents directors to discuss their obligations to the Claimant in his capacity as an apprentice. He wished to discuss the protection of apprentices especially in terms of capability and performance and to emphasise what he considered to be the Respondent's duty to find an alternative placement to allow the Claimant to continue with his apprenticeship up to and including qualification, which would include continued studying and practical work. Primarily he sought the Claimant's reinstatement but alternatively that the Respondent use its best endeavours to redeploy the Claimant with another employer. That meeting was arranged but it was not held as an appeal hearing.

2.7. On the 31 October 2017 the Respondent met with the Claimant and the Respondent's script which it followed is at pages 87 to 94. The Respondent provided the Claimant with information that had not previously been disclosed and in more detail than had previously been discussed with him either in advance of the dismissal or in preparation for the meeting. Neither the Claimant nor the Claimant's representative believed that this was a hearing of the Claimant's appeal and they were not able to proceed on the basis of it being an appeal without having had an opportunity to prepare on the basis of the details that were then given to them. Mr Griffiths explained his views on the Claimant's rights and the Respondent's duties and responsibilities towards the Claimant. The Respondent confirmed that it would seek an alternative placement for the Claimant if necessary. During this meeting whilst details of shortcomings were given by the Respondent's directors to the Claimant and his representative they were given without reference to any written records other than that the Respondents checked some dates of college advisers' visits to the workplace and completed jobs for customers. The details of the work and all the conversations held between the directors or other colleagues and the Claimant about his shortcomings were all details given from the memory of the directors and in the absence of any proper reference to records. There was no enquiry of customers or colleagues. There was no investigation into the details of the matters asserted by the

Respondent but the directors' views were firm based on their feelings over a period.

2.8. Later the same day, that is 31 October 2017, the Respondent told the Claimant that if he was to contact a Mr Chris Jones at a firm called Total Boilers "there is a good chance of a job"; this is contained in an email from one of the directors, Alan Taylor, that appears at page 77. Mr Chris Jones had told Mr Taylor that he had a vacancy. Mr Taylor merely referred the Claimant to Mr Jones without any further discussion or making any arrangements. The Respondent was not prepared to reconsider its decision. Indeed, on 2 November 2017 the Respondent confirmed that its "position remains the same". The Claimant would not be reinstated. The Respondent said it had found alternative employment for the Claimant (with Mr Chris Jones and Total Boilers) so the Claimant could continue his Level 3 NVQ training. By this stage the Claimant was Level 2 qualified.

2.9. It was anticipated and stated in the documents that the Claimant could obtain Level 3 by June 2018 (that is within 8 months of his dismissal) albeit the Respondent recognised in reality that trainees often needed a further 12 months to finalise their NVQ. The Respondent had anticipated that the Claimant may in approximately 20 months achieve his Level 3 NVQ goal. This was the directors' understanding at the time of the Claimant's dismissal. The Claimant contends that he found it difficult to complete assessments when he had a lack of notice from the Respondent as to what his work would be and that made it difficult for him to arrange for Coleg Cambria's assessors to visit him on site; insofar as that was the case then it was not the Claimant's fault. However, the delays with work, the underperformance, lack of application and response to warnings for poor and unsatisfactory performance that frustrated colleagues and led to work being redone and discounts given to clients was the fault of the Claimant. The Claimant demonstrated a lack of capability but also that by his conduct he was not improving and showing the necessary application to his studies or work (hence I find as a fact that the matters of which the Respondent complained and for which the Claimant was dismissed was a combination of a reason related to capability by reference to aptitude and conduct).

2.10. <u>Additional facts relevant to Remedy:</u>

2.9.1 The Claimant was aged 20 years at the effective date of termination and he had 3 complete years of employment prior to his dismissal. As at the time of his dismissal his gross weekly earnings were £288.46 and his gross net weekly earnings were £259.19.

2.9.1 The Claimant commenced employment at Ifor Williams Trailers Limited on 13 November 2017 via an agency and his net earnings of £280 per week exceed those previously earned by him.

2.9.3 In the period from 5 October to 13 November 2017 the Claimant searched for alternative employment and could not find a suitable apprenticeship. He did not claim any state benefits but lived on money

that he had previously earned. He was without income by way of earnings or benefits for a period of some 6 weeks.

2.9.4 The Claimant did not approach Mr Jones at Total Boilers for alternative employment because he did not want to mention the circumstances of his having been dismissed. He did not take into account that Mr Thomas, director of the Respondent, had already spoken to Mr Chris Jones and he did not take up the opportunity putting forward any explanation or even avoiding the subject. Mr Thomas told the Claimant (page 79) in an email that he had not mentioned the meetings he had held with the Claimant but had stressed that the Claimant was a hard worker who might be better suited to a position with Total Boilers than carrying out site work in the homes of private individuals. He was told that he would be able to transfer as a fourth-year apprentice to Total Boilers continuing with his Coleg Cambria studying and that funding would transfer over from the Respondent to that company without any issue. Mr Thomas also confirmed a meeting he had held with a Mr Henry from Coleg Cambria who would assist in the transition and in particular with any updating on academic progress or lack thereof. Notwithstanding this the Claimant did not want to approach Mr Jones; he did not.

2.9.5 The Claimant was paid 3 weeks' pay in lieu of notice which was effectively pay to the 27 October 2017.

3. The Law

3.1 Sections 2 and 3 of the Apprenticeships, Skills, Children and Learning Act 2009 (ASCLA) define Welsh apprenticeships and apprenticeship agreements. Those sections set out the conditions of such agreements. Section 35 ASCLA confirms as to status that such agreements are not to be treated as contracts of apprenticeship but rather contracts of service. It follows that somebody in training who is working with the benefit of an apprenticeship agreement is an employee, who can therefore be subject to performance management and such like, and not the holder of a common law apprenticeship contract with fixed term protection and the imposition of specific obligations and responsibilities on the employer over and above those stated in the agreement document.

3.2 Section 1 Employment Rights Act 1996 (ERA) sets out the requirements with regard to the statement of employment particulars to be provided to an employee not later than 2 months after the beginning of employment.

3.3 Section 94 ERA states the right of an employee not to be unfairly dismissed by his employer and section 95 ERA describes circumstances in which an employee is dismissed, including where the contract under which he or she is employed is terminated by the employer whether with or without notice. Section 98 ERA then provides in respect of fairness in general setting out five

potentially fair reasons for dismissal including at section 98(2)(a) reasons related to capability or qualifications for performing work of the kind for which the person was employed to do (where capability may be assessed by reference to skill, aptitude, health, or any other physical or mental quality) and section 98(2)(b) reasons related to the conduct of the employee.

3.4 Subject to an employer establishing that any dismissal was for a potentially fair reason it is for the Tribunal to determine in accordance with section 98(4) ERA whether the dismissal was fair or unfair having regard to the reason shown by the employer. Such consideration depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and those issues shall be determined in accordance with equity and substantial merits of the case. Whilst the Tribunal must give effect to those statutory requirements precedent has set out guidance applicable in respect of both capability and conduct dismissals of this nature such that it is appropriate for the Tribunal to consider whether an employer has undertaken a fair and reasonable investigation, and whether the dismissing officer had a reasonable and genuine belief in the employee's lack of capability or relevant conduct based upon that investigation; consideration ought to be given in capability matters to the possibility of correction by training; both in respect of capability and conduct the Tribunal will consider whether dismissal fell within the band of reasonable responses of a reasonable employer.

3.5 Regarding remedy a Tribunal may reduce a basic and or compensatory award to an extent that would be considered just and equitable. By section 122 ERA a Tribunal may reduce or further reduce a basis award where any conduct of the complainant before the dismissal or where the dismissal was with notice before the notice was given, was such that it would be just and equitable to reduce. By section 123 ERA compensatory awards may be reduced where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant; it shall then reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. Compensatory awards may also be reduced to reflect the risk facing the Claimant of his having been fairly dismissed.

3.6 Section 207A Trade Union and Labour Relations (Consolidation) Act 1992 provides that a Tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce or increase an award by no more than 25% if one or other party has or has not complied with an applicable code of practice such as the ACAS Code on Disciplinary and Grievance Procedures.

4. Application of the law to the facts:

4.1 The agreement between the Claimant and the Respondent was not a common law apprenticeship. There was no apprenticeship contract but there was an apprenticeship agreement. The Claimant was therefore an employee without additional protections and without the imposition of the respective duties and responsibilities on him and on the Respondent. The Respondent

could performance-manage the Claimant. In considering the reasonableness and fairness of the Respondent's treatment of the Claimant however it would be appropriate to take due account of the significance of the training nature of the relationship, that the Claimant was in training and that the parties owed each other duties and responsibilities regarding both provision of work, oversight, and supervision as well as due diligence and timely and efficient completion of work.

4.2 The Respondent dismissed the Claimant on 5 October 2017 without warning, without proper enquiry, without following a procedure, and without considering alternative sanctions or the Claimant's mitigating circumstances if any.

4.3 The Respondent's decision was made on or about 5 October 2017 and the Respondent had no intention of reconsidering it. Once the Respondent's directors decided to dismiss the Claimant there was no going back whatever the Claimant said.

4.4 The meeting on 31 October 2017 involving the Claimant and his Trade Union representative did not amount to an appeal hearing. It was a meeting about the Respondent's duties in general in the light of the Trade Union representative's view that this was a common law apprenticeship contract. The Respondent then took the opportunity to explain why the Claimant had been dismissed. There was no proper consideration of any grounds of appeal and the Respondent had no intention of reconsidering its earlier decision hence my finding that this was not an appeal hearing. Neither party thought it was one.

4.5 The Respondent did not find the Claimant an alternative placement but did provide the Claimant with an opportunity to apply for a placement with another company and arranged for the transition of academic training and its funding.

4.6 The Claimant did not take the opportunity that was given to him. His academic and practical work was not satisfactory; there had been problems with both. The Claimant underperformed and underachieved. In consequence of his failures practically, some of the work had to be redone at the expense of the Respondent and some customers had financial refunds in respect of charges that would otherwise have been due; his colleagues became frustrated and impatient with him. The Claimant was aware of these problems and it was also clear to him that he was underachieving academically apart from his college records and from conversations (not amounting to formal review meetings) held with the Respondent's directors.

4.7 The Respondent failed to note reviews or to maintain records. The informality amounted to inefficiency and in this regard there was fault on both sides.

4.8 The decision to dismiss the Claimant without availing of the opportunity to remedy the unfairness by way of appeals procedure was unfair. The Claimant however contributed to his own downfall significantly by his conduct in not completing work in a timely efficient and satisfactory manner both as to practical work and academic work and by not availing himself of opportunities

that were made available to him to improve when he was spoken to about underachieving. He did not avail of the opportunity of alternative employment when the Respondent introduced him to another potential employer following dismissal and facilitated the continuation of academic training.

4.9 In any event the Claimant was at considerable risk of being fairly dismissed if a fair and proper procedure had been followed, either on the capability or conduct route and with an appeals procedure in either case. It is possible that had a fair procedure been followed from the outset the clock may have been reset and the Claimant may have been given a further opportunity to complete his academic and practical training and to continue in employment; this may have been possible had the Respondent for example given him a formal warning either oral, written, or final. On the other hand, considering the extent of the Claimant's under-performance (which appeared to be wilful in that it was persistent despite obvious deficiencies that were made obvious to him both in the academic and practical field) he may nevertheless have been dismissed following a fair procedure.

4.10 In all the circumstances and having found that the Claimant was unfairly dismissed I assessed the risk facing him of his being fairly dismissed at 25% and the extent to which he contributed to the dismissal also at 25%. I consider that the Claimant's conduct before dismissal was such that it would be just and equitable to reduce the basic award by 25%; I consider that the dismissal was caused or contributed to by the action of the Claimant such that it would be appropriate to reduce the compensatory award by 25% to reflect that.

4.11 Remedy

4.11.1 The Claimant failed to take up an opportunity of work that was presented to him which could have preserved his apprenticeship. Instead he obtained employment with a different company on a higher wage than he had been receiving. In those circumstances I consider that the Claimant's loss attributable to the Respondent came to an end on 13 November 2017. The Claimant was unemployed for a period of 6 weeks but was paid in lieu of notice for 3 of those weeks such that his total loss of pay was for 3 weeks.

4.11.2 The Respondent breached the ACAS Code of Practice regarding disciplinary procedures. There was no proper investigation or hearing and the Claimant was not allowed his right of appeal; there was no consideration of the appeal that was submitted.

4.11.3 In those circumstances I adjudged that the Respondent should pay to the Claimant £1053.49 made up as follows:

Basic Award:	£432.69	
LESS 25% contribution	£108.17	
		£324.52

Compensatory Award:

Statutory Rights	£ 259.19
Loss of income 05.10.17 to date	£ 777.57
	£1,036.76
LESS 25% risk	£ 259.19
	£ 777.57
Less 25% contribution	£ 194.39
	£ 583.18
Plus uplift 25%	£ 145.79
	£ 728.97
Grand Total:	£1,053.49

Employment Judge T Vincent Ryan

Date 2nd November 2018

REASONS SENT TO THE PARTIES ON

9 November 2018

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FOR THE TRIBUNAL OFFICE