Modern apprenticeships: a 'win-win' arrangement

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Readers of the Evening Standard *cannot have failed to notice its 'Ladder for London' campaign, encouraging employers in the capital to provide apprenticeships for unemployed young Londoners. But what does the employment lawyer of today need to know about apprentices?*

Ladder for London is a laudable part of a great British tradition of on-the-job training stretching back to the guilds of the Middle Ages, with early statutory regulation in the form of the Elizabethan Statute of Artificers. The positive encouragement it provides for apprenticeships is in contrast to the negative connotations associated with some forms of internships, another form of on-the-job training.

Commercial advantages

The commercial advantages of taking on apprentices have prompted many employers to re-evaluate apprenticeships. Research carried out by the National Apprenticeship Service shows that employers offering apprenticeships report a more productive workforce, improved staff retention, increased loyalty and savings achieved through a reduction in staff turnover (the NAS/Populus employment survey 2009).

Indeed, the Government is investing £1.4 billion in apprenticeships, including:

- funds for training (100% of training fees for 16-18 year-olds and 50% for apprentices aged 19 and over);
- a small employer incentive of £1,500 per apprentice for small and medium enterprises not currently offering apprenticeships;
- up to a further £2,275 for hiring 18-24 year-olds.

There is considerable political will to increase the number of apprentices in the UK, including the 'Million Extra' campaign – a drive to create one million apprenticeships nationwide by this summer – run by City & Guilds (the UK's largest and leading provider of vocational education and training, with more than two million learners yearly) and the NAS.

The legal basis

The legal framework for taking on apprentices has undergone a transformation in recent times, with the primary form of regulation moving from contract of apprenticeship to contract of employment, through the medium of the 'apprenticeship agreement'.

Traditionally, the relationship of apprentice and master was governed (often by deed) by contracts of apprenticeship, distinguishable from contracts of employment and subject to limited rights of dismissal (*Horan*, *Learoyd)*.

Most of today's apprenticeships are the subject of statutory regulation under ASCLA, which introduced a scheme of officially defined and regulated apprenticeships in certain specified sectors, with three separately certified elements:

- a knowledge-based element (the theoretical knowledge underpinning a job, certified by technical certificate);
- a competence-based element (the ability to discharge the functions of the occupation, certified by work-based NVQs);
- a transferable skills element (focusing on key skills such as literacy and numeracy).

Modern apprenticeships thus provide largely work-based, paid training programmes, giving the apprentice a real-world experience of the workplace that can be shaped by individual businesses to suit their needs. It should be a 'win-win' for both parties. When the young unemployed may number more than one million, such opportunities are plainly invaluable.

Apprenticeships, Skills, Children and Learning Act

The employer/apprentice relationship under ASCLA is founded upon an apprenticeship agreement which, in a conscious move away from the traditional approach, expressly requires the contract to be one of employment.

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All apprenticeships commencing on or after 6 April 2012 must be covered by an apprenticeship agreement which must (s.32):

- provide that the apprentice undertakes to work for the employer under the agreement;
- be in the prescribed form;
- state that it is governed by the law of England and Wales; and
- state that it is entered into in connection with a qualifying apprenticeship framework.

The specific form of agreement is provided by the A(FAA) Regs. These require the agreement to be either a written statement of terms and conditions under s.1 ERA, or a written contract of employment meeting the s.1 requirements. The important point is that the contract is one of ordinary employment and not the traditional contract of apprenticeship.

This is a break with previous treatment of apprenticeships as contracts imposing reciprocal obligations on the parties, where 'the obligation of the apprentice to serve and that of the master to teach were not interdependent but independent covenants' (Shearman J in *Waterman* at p.506).

Such contracts of apprenticeship were not terminable at will and could not be ended early because of the apprentice's failings, unless those failings impacted upon the master's own contractual obligations 'because the apprentice by his own acts has put it out of the power of the master to carry out what he had contracted to do' (AL Smith J in *Learoyd* at p.433).

The consequences at common law could be significant. Early termination of the apprenticeship was likely to amount to a breach of the contract and damages could be enhanced to take into account the loss of future prospects (*Dunk*).

Understanding that background makes sense of the 'through the looking glass' language of s.35 ASCLA, which explains the legal status of the current apprenticeship agreement as follows:

(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.'

So, the apprentice of today is not the apprentice of yesteryear but is now an employee. Employers entering into apprenticeship arrangements under ASCLA are thus protected from the enhanced rights that apprentices might have derived from common law. This in itself may make the hiring of apprentices a more attractive prospect.

Legal rights of ASCLA apprentices

Apprentices are covered by statutory protections against unlawful discrimination and unfair dismissal, subject to meeting the requirement of two years' qualifying service (indeed, a 'contract of employment' was already defined as including a 'contract of apprenticeship' for these purposes, s.83(2) EqA, s.230(2) ERA).

Although apprenticeships are traditionally associated with the young, employers that pledge to offer apprenticeships will need to be careful not to unjustifiably discriminate on the ground of age and may thus wish to make clear, in any recruitment material, that applications are welcomed from all age groups.

The termination of a limited-term contract still amounts to a dismissal (s.95(1)(b) ERA), albeit that the natural expiration of an apprenticeship is likely to be viewed as some other substantial reason such as to justify that dismissal for the purposes of s.98 ERA. And the dismissal of an apprentice prior

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to the end date of the apprenticeship agreement may still present difficulties. In such cases, tribunals may feel that the standards of performance or conduct to be expected of an apprentice are different to those of other employees.

That is not to say that the misconduct or incompetence of an apprentice has to be tolerated or that the common law approach to apprenticeships should be adopted as part of unfair dismissal law. Indeed, the fact that ASCLA deems an apprentice to be an employee and not a person working under a contract of apprenticeship evinces an intention to depart from the additional protections offered to apprentices at common law, including in respect of their dismissal. Tribunals are, however, bound to take into account the particular circumstances of the case and the fact that the employee in question is undertaking training might well be a relevant factor.

Other statutory protections apply to apprentices – who will, for example, be workers for the purposes of the WTR – and a specific apprentice rate has applied for national minimum wage purposes since 1 October 2010 (reg.13(3) NMWR) and, to the extent that differential rates are permitted for younger apprentices, this is expressly provided not to amount to unlawful age discrimination (see para.11 Sch.9 EqA).

Apprentices v interns

By contrast, unpaid internships, which can be used as a form of vocational training, are viewed with increasing suspicion. Often the first stepping stone into many professions, these have been the subject of much criticism with less scrupulous employers taking advantage of those wishing to gain experience. Hazel Blears MP has argued that 'businesses should be expected to shoulder the cost of their labour and not expect an intern to make crippling financial sacrifices'. Her Private Member's Bill to ban the advertisement of unpaid internships is due to be debated in February 2013.

Indeed, it is a popular misconception that internships fall outside the requirements of the national minimum wage legislation and can be unpaid.

NMWA does exclude from its coverage those who are truly volunteers (ie who are not 'workers' as defined); voluntary workers who are engaged by a charity, voluntary organisation, associated fundraising bodies or a statutory body, and who receive no payment except limited reasonable expenses; and students for whom the internship is part of a programme of study and is less than a year. Otherwise, the coverage of NMWA is (intentionally) broad and most internships should be paid.

The volunteer-intern may still seem an attractive option given the limited rights afforded to volunteers under both domestic and EU law (most recently confirmed by the Supreme Court in *Mid-Sussex CAB*) but volunteers are just that: they are not employees and organisations utilising their services have little control over them. Attempting to avoid the consequences of employment rights would be a poor business reason for seeking volunteers rather than employees.

Meanwhile, the Government is keen to ensure that employers are not dissuaded from signing up to offer apprenticeships by uncertainty as to the legal consequences, although apprenticeship agreements are not 'get out of jail free' cards so far as employment rights are concerned. The statutory arrangements of today (set out in ASCLA), coupled with the availability of significant funding for training apprentices, should, however, encourage employers to take on apprentices as archaic notions of apprentice and master are replaced with the more familiar contract of employment, with all that that entails.

KEY:

Horan	*Horan v Hayhoe* [1904] 1 KB 288
Learoyd	*Learoyd v Brook* [1891] 1 QB 431
ASCLA	Apprenticeships, Skills, Children and Learning Act 2009
A(FAA) Regs	Apprenticeships (Form of Apprenticeship Agreement) Regulations 2012
Waterman	*Waterman v Fryer* [1922] 1 KB 499, 506
Dunk	*Dunk v George Waller & Son* [1970] 2 QB 163, CA
EqA	Equality Act 2010
ERA	Employment Rights Act 1996
WTR	Working Time Regulations 1998
NMWR	National Minimum Wage Regulations 1999
NMWA	National Minimum Wage Act 1998
Mid-Sussex CAB	*X v Mid-Sussex CAB & anor* [2012] UKSC 59