

## Apprentices – The Facts

This fact sheet summarises the law relating to apprentices in England and Wales (it does not cover the provisions governing apprenticeships in Scotland or Northern Ireland).

There are two types of apprenticeship:

- Government apprenticeships.
- Traditional or common law apprenticeships.

### Government apprenticeships

Government apprenticeships are work-based training programmes which lead to nationally recognised qualifications. They have been developed with Government sponsorship and funding and they consist of on-the-job training and work experience provided by the employer and off-site training provided through a network of local learning and training providers or colleges, usually on a day release basis. There are three parties to the agreement: the apprentice, the employer and the external training provider. The employer does not have the same training responsibility that an employer has under a traditional apprenticeship (see below) because the formal training leading to qualifications is provided externally; the employer simply has to let the apprentice attend the external training and pay them whilst they attend on day release. The qualifications are not provided by the employer but by the external training provider. Depending on the industry sector and job role, an apprenticeship can take anything between one and four years to complete and it is a package of on-the-job training and off-site qualifications.

Whilst Government apprenticeships are therefore not apprenticeships in the traditional sense, according to case-law they may nevertheless be capable of constituting contracts of apprenticeship. What this means in practice is that these apprentices may not only be employees employed under contracts of employment (overlaid by a tripartite training agreement), and hence entitled to the range of employment rights applicable to employees, but in some cases they may also be entitled to the additional rights and protections available to traditional apprentices and these are discussed further below. The courts have held that the fact an apprenticeship allows for some training to be provided by a third party does not prevent it coming within the common law formulation of a contract of apprenticeship.

### **Apprenticeships, Skills, Children and Learning Act 2009**

In England and Wales, legislation intervened in 2011 and the legal framework for taking on apprentices underwent a transformation, with the primary form of regulation moving from contract of apprenticeship to contract of employment. The Apprenticeships, Skills, Children and Learning Act 2009 (ASCLA) introduced a scheme of officially defined and regulated apprenticeships in certain specified sectors. The employer/apprentice relationship under ASCLA is founded upon an 'apprenticeship agreement', which expressly requires the contract to be a contract of employment (and not a contract of apprenticeship). ASCLA sets out certain requirements which such apprenticeship agreements must satisfy.

However, the position in England has changed again and, with effect from 26 May 2015, ASCLA has been amended so that 'approved English apprenticeships', under 'approved English apprenticeship agreements', apply in England where the apprentice is in a sector of work for which an approved apprenticeship standard has been published. Although the statutory conditions for such an apprenticeship are similar in substance to the previous provisions governing apprenticeship agreements, some of the complexity of the conditions has been removed. For example, the requirement for an apprenticeship to comply with a qualifying apprenticeship framework no longer applies. Instead, the apprenticeship must meet one of the

apprenticeship standards approved by the Secretary of State, which have been developed by employers in the relevant industries.

'Apprenticeship agreements' therefore now only apply in Wales, and also in England where an approved apprenticeship standard has not yet been published for the work sector.

Transitional provisions mean that where an apprentice has properly entered into an apprenticeship agreement in connection with a recognised English apprenticeship framework (either before 26 May 2015, or after 26 May 2015 where an approved apprenticeship standard has not yet been published), this will continue to be valid, covered by the previous regime for apprenticeship agreements and subject to the previous completion conditions.

## Apprenticeship agreements

ASCLA provides that *"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"* and *"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"*. In other words, regardless of the common law and previous case-law, an ASCLA apprentice employed under an apprenticeship agreement will be treated as being an employee employed under a contract of employment and they will not be treated as being employed under a contract of apprenticeship. In practice, this means that the apprentice will have the employment rights currently applicable to employees but they will not have the additional rights and protections available to traditional apprentices that they might otherwise have derived from common law.

For this section to apply, ASCLA states that an apprenticeship agreement must:

- 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.
- State that it is entered into in connection with a qualifying apprenticeship framework (see 'levels of Government apprenticeship' below).
- Include a statement of the skill, trade or occupation for which the apprentice is being trained under the relevant apprenticeship framework.

The Apprenticeships (Form of Apprenticeship Agreement) Regulations 2012 then provide that the prescribed form of an apprenticeship agreement for these purposes is either a written statement of particulars of employment given to an employee under section 1 of the Employment Rights Act 1996, or a document in writing in the form of a contract of employment or letter of engagement which complies with section 1 of the Employment Rights Act 1996.

## Approved English apprenticeships

An approved English apprenticeship takes place under an approved English apprenticeship agreement, or is an alternative English apprenticeship. It must also satisfy certain conditions set out in regulations. An apprentice will complete an approved English apprenticeship if they achieve the approved apprenticeship standard. The Secretary of State may then issue an apprenticeship certificate to an apprentice who has completed an approved English apprenticeship.

An approved English apprenticeship agreement is an agreement which:

- Provides for the apprentice to work for another person for reward as an apprentice in a work sector for

which the Secretary of State has published an approved apprenticeship standard.

- Provides for the apprentice to receive training in order to assist the apprentice to achieve the approved apprenticeship standard in the work done under the agreement.
- Satisfies any other conditions specified in regulations (these have yet to be published).

As with an apprenticeship agreement, under ASCLA (as amended), an approved English apprenticeship agreement is to be treated as a contract of employment and is specifically not a contract of apprenticeship as ASCLA states that

*“to the extent that it would not otherwise be treated as being a contract of service, an approved English apprenticeship agreement is to be treated as being a contract of service” and “to the extent that it would otherwise be treated as being a contract of apprenticeship, an approved English apprenticeship agreement is to be treated as not being a contract of apprenticeship”.* Again, this means that the apprentice will have the employment rights currently applicable to employees but they will not have the additional rights and protections available to traditional apprentices.

In the absence of regulations setting out more detailed conditions, it is assumed that approved English apprenticeship agreements should (like apprenticeship agreements) contain the particulars of employment required to be given to employees under section 1 of the Employment Rights Act 1996.

An alternative English apprenticeship is an arrangement under which a person works which is of a kind described in regulations.

## Approved apprenticeship standards

Approved apprenticeship standards are gradually replacing apprenticeship frameworks in respect of English apprenticeships. Note the following:

- The Secretary of State must publish standards for particular sectors of work.
- Each standard must describe the sector of work to which it relates, or if there is more than one standard for that sector, the kind of work within that sector to which it relates.
- Standards must set the outcomes that those seeking to complete an approved English apprenticeship are expected to achieve.
- The Secretary of State may publish a revised standard or withdraw a standard without replacing it.
- The standards are intended to be short and concise.

These new approved apprenticeship standards are essentially employer-designed (i.e. they have been developed by employers in the relevant industries) and they set a level of skill, knowledge and competency against which an apprentice will be assessed.

The Government has already published a number of approved apprenticeship standards covering a range of occupations and a large number of further standards are currently being developed for approval. The next two years therefore represent a period of transition and the aim is that from the 2017/18 academic year all new apprenticeships will be based on the approved apprenticeship standards (replacing the current apprenticeship frameworks, which will be withdrawn on a phased basis) – and therefore will be approved English apprenticeships.

## Levels of Government apprenticeship

There are currently four levels of Government apprenticeship in England and they are open to everyone above the age of 16:

- Intermediate Apprenticeships (apprentices work towards work-based learning qualifications such as a Level 2 Competence Qualification, Functional Skills and, in most cases, a relevant knowledge-based qualification) – these usually last about a year and allow entry to an Advanced Apprenticeship.
- Advanced Apprenticeships (apprentices work towards work-based learning qualifications such as a Level 3 Competence Qualification, Functional Skills and, in most cases, a relevant knowledge-based qualification) – these usually last at least two years.
- Higher Apprenticeships (apprentices undertake a framework at Level 4 and above which will include a Competence Qualification, Functional Skills and, in some cases, a broader vocationally-related qualification which could be a Foundation degree).
- Approved English Apprenticeships – these require the apprentice to achieve an approved apprenticeship standard, through a rigorous end point assessment. They are also called Trailblazer Apprenticeships and last for a minimum of 12 months.

Employment under a Government apprenticeship is expected to be for a minimum of 30 hours per week, except in a minority of circumstances. In these cases, employment must be for more than 16 hours per week and the length of the apprenticeship will need to be increased accordingly to ensure the apprentice has gained the required level of skills and knowledge to do the job.

There are many different types of apprenticeship available covering more than 170 industry sectors.

The National Apprenticeship Service can be contacted for further information at <http://www.apprenticeships.org.uk/> or on 08000 150 600 (England only).

In Scotland, apprenticeships are called Modern Apprenticeships, in Wales they are called Modern Apprenticeships, Foundation Apprenticeships or Foundation Modern Apprenticeships, and in Northern Ireland they are called Modern Apprenticeships or ApprenticeshipsNI.

## Funding

Apprenticeship funding towards the cost of the apprentice's external training is available from the National Apprenticeship Service in England. The size of the contribution varies depending on the employer's business sector and the age of the apprentice. If the apprentice is aged 16–18 years old, the employer will receive 100% of the cost of the external training; if they are 19-24 years old, he will receive up to 50%; if they are 25 years old or over he may only get a contribution depending on the sector and area in which he operates. The funding is paid directly to the organisation that provides and supports the apprenticeship; in most cases, this will be the external learning and training provider or college.

Government funding for the new approved English apprenticeships, or Trailblazer Apprenticeships, works differently and for every £1 an employer pays towards the cost of training and assessment, the Government will pay £2. The overall amount the Government contributes will depend on which funding cap the approved apprenticeship standard has been allocated to (there are five funding caps) and there is also extra funding available if the apprentice is 16 to 18 years old, and/or the employer is a small business with less than 50 employees, and/or if the apprentice successfully completes their apprenticeship. In this case, the actual price for the external training and assessment that the apprentice undertakes is to be agreed between the employer and their chosen external learning and training provider (employers manage their own training procurement). This price will vary depending on the needs of the apprentice. In 2016, Government funding for apprenticeship training will also be routed to employers, rather than being paid directly to the learning and training provider.

In addition, the Government is currently running a scheme in England which has been extended until 31 December 2015 called the Apprenticeship Grant for Employers of 16 to 24 year olds (AGE 16 to 24). AGE 16 to 24 is aimed at helping eligible employers to offer young people employment through the apprenticeship programme, by providing wage grants to assist employers in recruiting a young apprentice. The National Apprenticeship Service will provide apprenticeship grants of £1,500 per apprentice to small employers who have less than 50 employees recruiting 16 to 24 year olds to encourage employers to take on new apprentices. The £1,500 is in addition to the funding for the external training costs of the apprenticeship framework referred to above. Up to five apprenticeship grants can be made to any one employer and eligible employers are those who have never employed an apprentice before or who have not recruited one in the last 12 months. Note that AGE 16 to 24 is only available in relation to apprentices working to approved apprenticeship frameworks – apprentices working to the new approved apprenticeship standards do not attract the grant.

## **Traditional apprenticeships**

A traditional or common law contract of apprenticeship is a different type of contract to a contract of employment and is subject to special rules. A contract of apprenticeship involves an undertaking on the part of the employer to educate and train the apprentice in the practical and other skills needed to practise a skilled trade or profession and to maintain the apprentice until their training has been completed. In return, the apprentice agrees to attend work, serve their employer and learn from them. The primary purpose of the contract of apprenticeship is training and teaching, to enable the apprentice to secure the required qualification. Work is only a secondary purpose of the contract. A contract of apprenticeship must also be for a fixed term (either for a specified period of time or until the apprentice reaches the required level of qualification) and it must normally be in writing and be signed by both parties. The contract of apprenticeship should ordinarily specify the rights and obligations of both the employer and the apprentice, what training is to be provided and to what level, the length of the apprenticeship and the rates of pay.

A contract of apprenticeship falls within the statutory definition of 'contract of employment' set out in the Employment Rights Act 1996. This means that apprentices are entitled to the full range of employment rights currently applicable to employees. However, they also have additional rights and protections by virtue of the nature of their particular contracts (see 'additional employment protection for apprentices employed under contracts of apprenticeship' below).

A traditional apprenticeship is run by the employer entirely at its own expense and is not Government funded.

Employers should always seek legal advice before entering into a traditional apprenticeship. There are very few traditional apprenticeships still in existence.

## **Rates of pay**

Apprentices who are 16 or over but under 19 years of age, and apprentices who are aged 19 or over but in the first 12 months of their apprenticeship, are entitled to an apprentice NMW of £3.30 per hour – this is the rate applicable from 1 October 2015.

Apprentices who are aged 19 or over and who have completed the first year of their apprenticeship must be paid at least the NMW – the rate they will be entitled to will depend on their age. See the National Minimum Wage fact sheet for further details.

Subject to NMW rates, the amount paid to apprentices is, as a general rule, up to the employer.



## Additional employment protection for apprentices employed under contracts of apprenticeship (traditional apprenticeships)

As a traditional contract of apprenticeship is for a fixed term to enable the apprentice to receive training and obtain qualifications in order to obtain better employment, it cannot lawfully be terminated before the expiry of that fixed term, except in exceptional circumstances.

If the employer terminates the agreement early, thereby depriving the apprentice of the training, the apprentice is entitled to claim damages for wrongful dismissal under the contract for the remainder of the fixed-term apprenticeship and also damages for future loss of earnings and career prospects as a qualified person. This is still the case even if the apprentice is a poor performer or is having difficulty passing any necessary exams or if they have a conduct problem such as poor timekeeping or a poor attendance record. Even a genuine redundancy situation, such as a downturn in work, would not entitle the employer to dismiss the apprentice early, regardless of length of service. The amount of damages awarded against an employer for terminating a contract of apprenticeship early could therefore be substantial, which makes contracts of apprenticeship a potentially significant burden for employers.

The employer can still discipline an apprentice for misconduct or poor performance but the apprentice cannot be dismissed, except in exceptional circumstances. A contract of apprenticeship can probably only be brought to an end either by some fundamental frustrating event or by a repudiatory act on the part of the apprentice. Two examples of the former would be where the employer completely closes down his business or the nature of the employer's business changes to such an extent that the employer cannot properly teach the apprentice the trade or profession that was intended to be taught. The latter would include acts of gross misconduct and continual neglect of duties or serious incapacitation on behalf of the apprentice to such an extent that it has become impossible for the employer to continue to teach the apprentice (subject always, of course, to following a fair dismissal procedure).

However, it is important to note that these additional rights and protections do not apply to ASCLA Government apprentices engaged under apprenticeship agreements or approved English apprenticeship agreements because they are deemed to be employed under contracts of employment, not under contracts of apprenticeship. A wrongfully dismissed ASCLA Government apprentice who seeks a contractual remedy will be limited to the damages available for wrongful termination of a contract of employment (usually limited to damages for the notice period only, if there is a break clause in the contract giving the employer power to terminate the fixed term early on notice).

## The expiry of the fixed term

If the reason for the traditional contract of apprenticeship terminating is because the fixed term has come to an end, then the claim for damages for wrongful dismissal as outlined above is not applicable because there will have been no early termination.

The apprentice could still have a claim for unfair dismissal in these circumstances if they have sufficient continuity of employment (two years' continuous service), so the employer will still need to show a potentially fair reason for dismissal, follow a fair dismissal procedure in the period prior to the expiry of the fixed term and show that the decision to dismiss was fair in all the circumstances of the case. The potentially fair reason for dismissal is likely to be 'some other substantial reason' (SOSR) i.e. that an apprenticeship is a 'once in a lifetime' agreement and there is therefore no need for it to be renewed once it has been successfully completed. The employer will still need to be able to demonstrate that there were no other suitable alternative vacancies available for the apprentice once the apprenticeship had been completed.

The position on unfair dismissal also applies to ASCLA Government apprentices employed under apprenticeship agreements or approved English apprenticeship agreements – they too can claim unfair dismissal on the expiry and non-renewal of their fixed-term contract if they have sufficient continuity of employment. They can also claim unfair dismissal if their contract is terminated early (i.e. before the fixed term has expired), again if they have sufficient continuity of employment.

The apprentice is not redundant on the expiry of their fixed-term apprenticeship and hence no statutory redundancy payment will be due.