

STATUS AFFIRMED AS COUNSEL'S OPINION BOOSTS TRAINEES

Trainees have never been under as much pressure as they have since the recession hit & deferments and job losses have impacted on those lucky enough to secure a training place. In a stunning development **Steven Raeburn** finds out how the SYLA and their Senior Counsel have teamed up and broken new ground to establish protection for trainees that will change everything.

Pay attention folks. The world is about to change. And definitely for the better. In April 2008 The Firm initiated a campaign to root out abuse of trainees, a small scale but particularly nasty problem. Since the campaign launched we have had the displeasure to report on ritualised, systematic and callous abuse to exploit vulnerable trainees entering a closed profession when their self confidence is low and their reliance on their benefactors total.

In certain corners of Scotland, trainees who have focused and invested huge swathes of their lives to get where they are have been cast aside and discarded as the good times ground to an inevitable halt. The Law Society told us it received official notification of 56 prospective trainees "affected" by the downturn, although there were no redundancies notified to the Society after a policy statement was published earlier in the year. Convention and incremental changes to habit may have convinced some employers that a trainee was a disposable asset who could be deemed redundant on a last in first out basis in the event of a failure to yield a good return on investment. The majority of practitioners knew otherwise, and the SYLA thought so too.

Not content to sit idle, the SYLA's Chris Nicholson took steps to obtain Senior Counsel's opinion on whether a trainee could in fact be made redundant in law, with definitive and game changing results that not only affirm and secure the special status of trainees in the legal

framework, but provides armament for those trainees aggrieved by the slipshod manner of their dismissal, something which is purely wrong as a matter of law. The Firm pledged to stand by trainees as long as there was a need to. And we meant it.

Iain Mitchell QC was approached to provide the Opinion.

"What I seriously tried to do was use the memorial as a peg to take step back and ask -fundamentally- what a traineeship is. If you crack that question, the rest falls into place," he says.

"What tends to make it less obvious to people is the change in terminology. Because words like apprentice are old fashioned and they invent new words like trainee, they think it is a new concept. In reality it is in substance, a contract of apprenticeship."

The effect of the contract, as Mitchell states clearly in his Opinion is that a trainee may not be made redundant, and if "redundancy" occurs, damages may be claimed under three heads: Loss of wages and benefits for the remainder of the traineeship term; Loss of the value of the instruction for the remainder of the term; and diminution in future prospects.

"Because they are called trainees, people imagine they are employed as trainees. If you are engaged as an apprentice, the obligation that the employer takes upon himself is to train you. The work you do for the employer is incidental to the training. It is a means of training, perhaps. If an employers sacks a trainee because he thinks he is not any good, he should be a little wary lest the fault is his for not training you properly," he told The Firm.



Settled law

Iain Mitchell QC has established that the status of the trainee has never changed since the days of the apprenticeships

"In this economic climate, employers are looking to try and downsize and trainees are a very tempting place to start. There is not a great deal of investment in their training which would be lost. From an economic perspective, the temptation to sack trainees is quite attractive. Three factors have conspired to confound the view of what a traineeship actually really is; the change in the economy, the change in nomenclature and statutory assimilation of the concept. At the end of the day, all of these social and fashion type changes mean people lose sight of the ball. Legally the role hasn't changed at all. It is still the same thing that it always was."

Solicitor Chris Nicholson of the SYLA said they as a voluntary body are not in a position to take legal advice, but he spoke to friends at the Faculty pro bono network and wrote to the Dean's secretariat to establish if they could work for SYLA, and they asked Nicholson to provide a memorial for the Opinion.

"Everybody that is a partner in a firm has been a trainee themselves at some point, so they'll know what it was like. Most of them will know that it is not the loss of employment, it is the loss of prospects that is the main part. That is why I got into it," he says.

"My priority wasn't litigious, it was protective. People have been affected, and OK here is the tool if you want to seek a remedy. But more importantly, I wanted to get it out there to begin with. It is a warning sign to anyone thinking of making people redundant. You can't protect the future of the legal profession by getting rid of younger members, otherwise you'll have a talent gap in later years."

" The primary obligation on the employer is to provide training. In its Policy Statement of February, 2009, the Law Society of Scotland states:

"We are of the view that a Training Contract is analogous to a contract of Apprenticeship."

I should go further and suggest that, rather than a mere analogue, a Training Contract is, in substance, a contract of Apprenticeship.

The above discussion is not academic. If a Training Contract is a contract of apprenticeship, then real consequences flow from it having as its primary purpose the training of the apprentice.

All such contracts are contracts not at will, but for the fixed term of the apprenticeship (whether or not explicitly stated on the face of the contract); furthermore since the apprentice is in the course of being trained, it is to be expected that he will make mistakes, that he will not be as good at his job nor as diligent as a servant might be expected to be. It is one of the purposes of the contract to train him out of such bad habits.

Most particularly, although a contract of apprenticeship can be brought to an end by some fundamental frustrating event or repudiatory act, it is not terminable at will as a contract of employment is at common law.

Iain Mitchell QC, Senior Counsel's Opinion

COVER STORY TRAINEE CAMPAIGN

Mitchell says that as he was delving into the legal position, he became aware that the time had come to look at the whole thing in the round and get some clarity as to what a trainee is.

"I think putting it out there is hugely important. People do need to know quite literally what they are letting themselves in for on each side when they sign a trainee contract," he says.

"Redundancy is a statutory concept that occurs as a consequence of a contract of employment. As a traineeship is not a contract of employment, it therefore follows that there is no such thing as redundancy. So if somebody is made "redundant" from a traineeship contract, well I am sorry, they are not being made redundant; they are just being sacked. You can make an employed solicitor redundant, but you can't make the trainee redundant. We would do a great service to the legal profession if we never said that trainees are made "redundant", and instead used the word sacked. That is the reality of what happens.

The peculiar vulnerability of trainees entering an oversubscribed, closed profession makes them less likely to rock the boat or take action against a defaulting employer, perhaps in fear of securing a reputation that may be perceived as problematic. But what is the law for, if not to establish and correct legal wrongs?

"People who have been made "redundant" and done nothing about it should realise they probably have a valuable claim," Mitchell says.

"The most valuable part of their claim could be the effect that has had on their career. At a minimum, they are going to be put back for a period before they resume their training, which translates to a late start to their career, and a loss of the catch up earnings they would otherwise have had. The primary jurisdiction is on the part of the court, this being wrongful dismissal at common law. You might have missed the bus with the three month limit imposed by an employment tribunal, but there will be a lot more buses along before five years are up, which is the time available to get the case into court."

Rachael Gibson, President of the SYLA, said the organisation had become aware that a lot of traineeships were being terminated due to "redundancy" and was concerned about the impact of the trend on present and future lawyers.

"They need this qualification to go on and do further work and to have their career. SYLA had very strong views on this and decided we wanted

to do something about it," she says.

"At the end of the day, trainees can't be made redundant. We now know that. Firms should be finding somewhere else for trainees to go. They have taken on a commitment to complete someone's training, so the trainee leaves with a set of core skills and abilities and can progress at the firm they trained in or somewhere else."

Anecdotally, the fates of trainees whose contracts have been terminated vary greatly, with one candidate uprooting their life to work in Australia, and at last report was employed in a call centre. Ensuring such talent is not wasted in the future is the prime reason the SYLA sought legal clarification.

“ However, notwithstanding such assimilation of apprenticeship with employment for certain purposes, the contract of apprenticeship remains a distinct entity at common law. Its primary purpose is training: the execution of work for the employer is secondary.

Senior Counsel's Opinion

"We know that trainees are concerned that, due to the size of the Scottish legal community, taking action against a former employer may cause them problems in the future, perhaps securing employment or the way they are perceived. The main reason we obtained this opinion was to raise awareness, to make sure that this doesn't happen to trainees in other firms again, and to put a stop to it.

"The SYLA would definitely support any trainee who wanted to take action

against a former employer. I would be very pleased if there were sanctions that could be placed on firms to prevent them making trainees redundant from now on. Senior members of law firms need to view the development of trainees as a reflection on themselves. I hope the Opinion changes the culture towards trainees. A trainee has to be salvaged and relocated somewhere else so they can finish their training and then have their qualification. I know how committed these people have been to their traineeships, and they are entitled to the same commitment from their training firm."

Trainees who have unlawfully found themselves on the wrong end of a p45 can also take heart from the knowledge that the near-unanimous breadth of legal opinion coming from the largest commercial firms backs them and the conclusions of the Opinion, and who offer a supportive environment for trainees past and present to ventilate any concerns with the assurance of a sympathetic profession.

Alan Campbell, managing partner of Dundas and Wilson confirmed his agreement with Counsel's Opinion, and proposes that where the legal landscape does not square with the trainees' position, then it is the profession itself that requires to change.

“ It might be suggested that there is no express obligation on the trainee to learn, but the obligation to accept instruction from the employer is, however, clearly implied, and, indeed there is an express obligation on the Trainee "to apply himself diligently while engaged upon the Professional Competence Course."

There are also express obligations to serve the Employer and "to perform such tasks or to work in such departments of the Employer's business as the Employer may reasonably require" - It might be suggested that this could also include an obligation on the employee to perform

tasks which might also be carried out by an employee; but this in no way dilutes the essential nature of the contract as one of Apprenticeship.

The clarity of this distinction has become apparently blurred over the years by three trends: first, an increasing assimilation both of the work done by apprentices to the work done by employees, second a legislative assimilation of the two relationships and, third, a change in nomenclature with the word "apprentice" becoming increasingly unfashionable and being supplanted by words such as "trainee".

So far as the first trend is concerned,

the test remains not the work done but the status of the person doing it.

A contract of apprenticeship may only be terminated prematurely as a result of:

1. A frustrating event, as where for example, the business closes down or
2. A repudiatory act.

It cannot be terminated independently of those causes, and, in particular, cannot be terminated on the ground of redundancy. Apprentices are extraordinarily difficult to sack. It is not so much bad behaviour which amounts to repudiation, as repeated bad behaviour providing evidence of the unwillingness or inability of the apprentice to learn.

"At D&W we have always recognised that our commitment to train our trainees is not sourced from an employment relationship. So the Opinion for us describes the landscape as we know it and the one within which we operate," he says.

"But the world has changed and change breeds change. In fact the traineeship programme trains our fledgling lawyers to be employees in legal businesses or legal departments. This is as it should be because they are already grounded in legal theory. As such they are treated as employees and work in that environment. So the better question is surely whether trainees should be employees or apprentices. If we cannot rely upon the economics of supply and demand to ensure employers invest in our future population of solicitors then it may become necessary to change our current model.

"Counsel colourfully illustrates the distinction between substance and form as follows: "A cat can have kittens in an oven, but that does not make them biscuits, even if the cat calls them biscuits." But in riposte can I surmise that if a cat were to have kittens in an oven and the kittens were to look and taste like biscuits then they would be biscuits whatever the cat calls them."

Christine McLintock of McGrigors says the firm takes the strong view that a training contract is exactly that - a contract which should not be renege upon.

"Not only do we believe it is wrong to make trainee solicitors redundant, we have not deferred the start dates of any of our trainee solicitors' training contracts. Trainees begin their careers often in debt, having spent a lot of time studying, and need to know that their training firm is committed to them. We take that commitment very seriously - with or without legal opinion," she adds.

Malcolm McPherson of HBJ Gateley Wareing acknowledges that the recent economic downturn - whilst not excusing the dismissal of trainees - came unexpectedly quickly, with a direct effect on firm income.

"You must have some sympathy with firms that simply ran out of work and were feeling extreme financial pressure," he says.

"I don't think people were casual in the taking on of trainees. It was such an enormous and quick downturn, and were wondering if they could actually cope with their office outgoings once the work plummeted. It was a cataclysmic event. Work stopped very quickly. I suspect most firms were very reluctant to make redundancies. I think it must have been an act of desperation.

McPherson agrees that taking on a trainee is a decision that ought to be made with the future of your business at the front of your mind, which may necessitate less trainees being taken on.

"There is a great deal more formality to the training, and a great deal more effort is out into it than there was 20 years ago. It is a much more defined position. A huge amount more effort is put into the recruitment effort for trainee. It is now very much seen as a vital part of your business, because it is the training of your practice for tomorrow. Our aim in recruiting trainees is to try to recruit the partners of the future.

"If you become aware of the onerous obligation of not being able to cut your cloth according to the work that is coming in, will a firm keep the same number of trainees? They may decide they are not going to do that. Rather than take four they may take two, because they know that will fit with the work they have. Our firm has always been of the view that the contract was a contract for two years. We have certainly taken our training obligations very seriously."

It seems self evident that the more thought and consideration that goes into the process of taking on a trainee, the better for all parties and indeed the wider profession. Ian Smart, President of the Law Society reiterates their policy statement that a training contract cannot be



All in favour, say "Aye!"
Rachael Gibson, David Laing, Diane Cairney and Alan Campbell welcome the affirmation of the trainee's status

“ In the event that an apprenticeship contract is terminated improperly by the master, he will be liable in damages to the apprentice. Clearly, in the case of a Training Contract, the damages will include loss of wages. However, this may not be anything like the most valuable part of the claim. Traditionally, apprentices were not paid remuneration (and, indeed, may well have paid the master a premium to be instructed), so the most valuable thing lost by the apprentice is likely to be the instruction which he is no longer able to receive.

Of course, each individual case will turn on its own facts, but there will be seen to be the following potential heads of damages:

1. Loss of wages and benefits for the remainder of the traineeship term;
2. Loss of the value of the instruction for the remainder of the term - this might be easily quantifiable, as in the cost of college courses which the employer would have paid for, but will also include the value of the instruction given by the master. The actual arithmetic of this may prove difficult in any given case (in Dunk Lord Denning in fact dealt with this under head 3 below) but it may be worth seeking where the circumstances allow;
3. Diminution in future prospects. Again each case will turn on its facts, but no doubt the appropriate method will be followed, whether diminution in wages until such time as the apprentice is able to "catch up" with his peers (the method employed by Lord Denning) or a more nebulous claim for loss of value on the labour market. A lot may depend upon the availability of alternative traineeships and the time delay involved in getting such alternative training, if available.

The nature of an apprenticeship contract is such that the proper analysis of a claim arising in the event of dismissal for redundancy or for some other reason is that it is a claim for wrongful dismissal at common law, rather than in respect of redundancy or unfair dismissal under statute.

The availability of relief from the Court is likely to be useful to those trainees who may have been made redundant more than three months previously, especially if they have accepted a redundancy payment in ignorance of the true legal position.

Senior Counsel's Opinion

COVER STORY TRAINEE CAMPAIGN

terminated by way of redundancy.

"The SYLA has an important role to play in giving a voice to those in the earlier stages of their legal careers. We are pleased that the SYLA has sought this Opinion in its own right," he said.

"Part of the Society's role throughout the downturn has been to help and support those on the route to qualification to ensure that they are able to make informed decisions about their future. We've endeavoured to do that through the ongoing programme of engagement with new lawyers, which has most recently included running seminars on how to deal with the downturn and drop in advice clinics. Trainees are clearly very important to the future of the profession and even during difficult times, we have to ensure that talented people continue to enter the solicitors profession."

David Laing, chairman of Ledingham Chalmers, says a culture shift has taken place in the years since he undertook his own apprenticeship, changing the way young lawyers at the training stage are viewed.

"As the Opinion recognises, the term "apprentice" became less fashionable. Undoubtedly related to the realisation that trainees can be put to profitable use, trainees began to expect to be treated like employees and to be paid accordingly. We recognise the importance of educating the profession of the future, as well as the commitment we make when accepting a trainee. For those reasons we have actually deferred the arrival of trainees in order that we can ensure they received the training which they deserve and which we want to deliver. At the same time we have not considered asking a trainee in post to leave."

Diane Cairney, managing partner at Miller Samuel is one of many who told us she was surprised that firms were ever under the impression that they could include trainees in redundancy processes. (although eight trainees in Dundee could probably name a firm that laboured under the misapprehension).

"The training contract is pretty unique. I think my main concern is not what redress the trainees have, or indeed, what protection this affords them but more what is being done to look at the plans for introducing people into the profession in the first place," she says.

"It strikes me that there are an ever-increasing number of legal graduates going through the system with limited prospects of securing, firstly, a diploma place and secondly a traineeship. Expanding the offer of the LLB at an increasing numbers of institutions has, in my view,



The man with the plan
Solicitor Chris Nicholson took the first steps to obtain Counsel's Opinion on behalf of trainees past and future

simply compounded the situation. Until that is addressed, I feel that those coming through the system remain pretty exposed. The demand for Traineeships will greatly exceed the supply for the foreseeable future and that, I believe, creates a fundamental problem and imbalance for those coming through."

As part of its long term pledge The Firm is already investigating the issues surrounding the integration of undergraduate, diploma students and trainees for a future issue. In the meantime, let Counsel's Opinion resonate and ensure that the status of trainees is restored for the future, and the bad practices of former days are banished firmly to the past.

“In conclusion therefore:

1. A Traineeship Contract is an Apprenticeship Contract at common law;
2. A trainee may not be made redundant;
3. The contract may be frustrated as a result of the solicitor's firm/master, ceasing to exist, though the effect of this might be mitigated through the exercise of the powers contained in regulation 17 of the 2001 Regulations;
4. A trainee may be prematurely dismissed only in the event of misconduct so grave and so repeated and persistent as to amount (in effect) to a repudiation by him of the training contract;
5. The contract probably cannot be brought to an end at the hand of the

master himself. The correct procedure would be for that action to be taken only by the Council of the Law Society of Scotland acting under the powers given and procedures laid down in Regulation 16;

6. In the event that the master purported to act at his own hand to terminate the contract, redress might be sought by an action for wrongful dismissal brought before the appropriate court, or by means of a similar action timeously brought before the Employment Tribunal. There may be a technical argument as to the jurisdiction of the tribunal insofar as the claim was characterised as being based in a breach of article 16 which makes the Council the only person able to terminate a Traineeship Agreement.

On balance, however, clause (Five) of the contract should enable the case properly to be characterised as a breach of contract claim, and so as falling within the Tribunal's jurisdiction.
7. Damages will include the following heads:

- a) Loss of wages and benefits for the remainder of the traineeship term;
- b) Loss of the value of the instruction for the remainder of the term; and
- c) Diminution in future prospects.

An artificial separation of the relationship into separate training and employment contracts is unlikely to be successful as a means of the employer's avoiding exposure to the claims discussed above.

Iain Mitchell QC