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EMPLOYMENT TRIBUNALS

Claimant: John Joseph
Respondent: Outward Housing
Heard at: East London Hearing Centre
On: 2 and 3 February 2021
Before: Employment Judge Burgher
Members: Mr S Woodhouse
Mr J Webb

Appearances

For the Claimant: In person
For the Respondent: Mr D Patel (Counsel)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

The Claimants claims fail and are dismissed.

REASONS

Introduction and issues

1 The Claimant brings claims for detriment on grounds of health and safety duties, contrary to section 44 of the Employment Rights Act 1996; and dismissal on grounds of health and safety duties contrary to section 100 of the Employment Rights Act 1996.

2 The Claimant commenced employment for the Respondent at Catherine House, a residential care home for individuals with learning difficulties on 9 October 2010. He was employed as Service Manager and he asserts that, amongst other things, he was required to manage the health and safety requirements for the property.

3 The Claimant alleged that he raised several concerns about the health and safety of the Catherine House during his short period of employment. He stated that he advised against individual M, a young adult who had learning difficulties, from moving into the building due to the absence of proper heating. He states that he raised these concerns to Ms Nicky Boland, Mr Jimmy Balogan, Jo in operations, social services and M's school around 9 and 10 November 2019.

4 The Claimant stated that there were continuing conversations and he was asked for his opinion on the safety of M moving into Catherine House by Ms Boland and Sonia Lyng, Brokerage and HOLD lead. He maintained that it would be unsafe for M to move into Catherine House given M's learning difficulties. M did not move into the building.

5 The Claimant states in his ET1 that he raised other concerns about safety at Catherine House, such as failure of lights, incidents regarding lifts breaking down, poor electrical maintenance and poor drainage to the building and flats.

6 The Claimant states that his health and safety reports were causing the Respondent to lose money as Catherine House could not be occupied due to safety concerns. He alleges that his line manager Zaydon Alayasa informed him that the Directors were unhappy as they had expected 4 people to move into the building by 31 December 2019.

7 The Claimant also alleges that Zaydon Alayasa subjected him to a covert investigation that he discovered on 15 January 2020.

8 The Claimant was dismissed on 15 January 2020. He alleges that the Respondent dismissed him because he was raising health and safety concerns about Catherine House and that these had prevented M move from moving in. He contends that the Respondent was not justified in maintaining he had not passed his probation and asserts that within 2 days of dismissing him M moved into the building. The Claimant will refer to the absence of a proper probation or dismissal procedure to establish that his dismissal was on health and safety reasons.

9 The Claimant also alleges that he was not provided with a written contract during his employment. He states he asked for a contract in a couple of discussions with Samina Butt, HR manager and after his dismissal he was sent an unsigned statement, on 16 January 2020, which had the wrong surname and wrong job title.

10 The Claimant's claim under section 44 of the Employment Rights Act 1996 (ERA) relates to the covert investigation undertaken by Zaydon Alayasa.

11 The Claimant's section 100 ERA claim relates to his dismissal, which he says was removing him so his concerns could be ignored and the unsafe flat could be offered to M.

Evidence

12 The Claimant gave evidence on his own behalf.

13 The Respondent called the following witnesses:

- 13.1 Nicky Boland, Director of Business Development;
- 13.2 Lindy Shufflebotham, Director of Care and Support;
- 13.3 Samina Butt HR Officer - Lead Recruitment; and
- 13.4 Zaydon Alayasa, Area Manager

14 All witnesses gave evidence by oath of affirmation and were subject to cross examination and questions from the Tribunal. In view of the Tribunal listing the parties were held to a strict timetable for questioning.

15 The Tribunal was also referred to relevant pages in a wholly disproportionate bundle consisting of 717 pages.

Facts

16 The Tribunal has found the following facts from the evidence.

17 The Respondent is a registered charity providing services and support to adults with learning disabilities. It has a number of centres in London providing residential, supported living and day support services for adults from age 18 upwards. It seeks to meet the needs of people with learning disabilities and delivers a range of individual opportunities and quality services for them.

18 The Claimant was successful in being appointed to the position of Service Manager by the Respondent following an interview with Mr Alayasa and another area manager sometime in September 2019 and was issued with an offer letter on 27 September 2019.

19 The Claimant commenced employment on 9 October 2019. He did not attend the full HR led induction but was handed a number of documents for signature including a payroll form and policies. The Claimant maintains that he was not given a contract of employment. Ms Butt maintains that he was.

20 There was no signed contract of employment and the contract that the Respondent sought to rely on indicates the incorrect job title, support worker, albeit the salary and other conditions seem to be commensurate with the role the Claimant was undertaking as service manager. There is no written documentation of the Claimant being chased up to return a signed contract

although Ms Butt stated that she mentioned this to Mr Alayasa and he gave evidence that he would have mentioned this to the Claimant at the relevant time. Against this the Claimant maintains that no stage was he given a written contract of employment and following his termination of employment he requested a written contract of employment and he was given an incomplete draft contract that did not include his full name or address. When this was further queried he was then given an unsigned copy the “support worker” contract.

21 Having considered the evidence, in particular the absence of any chasing for written contract by the Respondent and the fact that a correct contract was not produced we find that it is more likely that not that he was not given a contract and this was a an error on behalf of the Respondent.

22 The Claimant’s job description states, amongst other things that he must

Adhere to all policy and procedure to ensure a healthy and safe environment is maintained for people to live in an staff to work in.

Promote the safety and well-being of those we support ensuring that all safeguarding alerts, see QC notifications and accidents and incident reports are completed and lessons learnt.

23 The Claimant was required to run and manage Catherine House. Catherine House was a newly refurbished property with 8 self -contained flats. It opened a new service on or around 21 October 2019 and the Claimant was responsible as service manager for running the day to day management of this. This included ensuring that the health and well-being of service users and staff was maintained.

24 It was apparent there were teething problems respect of the new refurbishment of Catherine House. There were radiator problems resulting significant heating problems in a number of the rooms. There were issues with the lift working and on one occasion a member of staff had been trapped in the lift for over 50 minutes. There were issues relating to the burst sewage, overflowing toilets and issues relating to the functionality of fire alarms.

25 The Claimant reported these matters to his line manager Mr Alayasa and Mr Balogan, the Maintenance Manager. These were matters that as part of his role he was required to raise. Mr Balogan and sought to resolve the matters in accordance with the appropriate external contractors and he endeavoured to resolve matters. However, it was apparent that the heating was a significant problem bigger and could not be resolved quickly and this affected whether service users could be safely accommodated in Catherine House. We do not find that Mr Alayasa or the Respondent’s directors had any concerns about the Claimant regarding the matters he was raising.

26 If the building was not safe and habitable the Respondent would not have been able to secure and retain referrals for service users to stay at Catherine House at all. We do not accept the implication in the Claimant's evidence that the Respondent's senior personnel were annoyed or upset that such matters were raised. An unsafe building would have totally undermined the service they aimed to provide.

Individual M

27 Catherine House could accommodate 8 individuals. However, at the outset only two rooms were occupied. It was hoped that further individuals would be referred as it was staffed on the basis that it could anticipate being more fully occupied. The Respondent sought to maximise referrals to ensure that its operating costs were covered and it was part of the Claimant's role to seek to generate referrals. We accept the Claimant's evidence that he was informed that he should seek to increase income by maximising referrals.

28 M was an individual that the Respondent hoped to secure as a referral. Apparently, the Respondent would have been able to charge of £6000 per week if M moved into Catherine House. However, in view of the heating problems M could not move into Catherine House. In December 2019 the Respondent's senior management sought to see if M could move in by providing alternative heating such as fan heating. M was a vulnerable individual and whilst there was initial enthusiasm including from the Claimant that M may be able to move in with fan heaters, the Claimant subsequently raised concerns that it may not be safe to do so as M may touch the fan and get burnt. In view of this the Respondent's senior management resolved to check with M's school to assess the risks of fan heating. Following this it was determined that fan heating would not be appropriate for M and he would be unable to move in until the radiators were fixed.

29 We do not accept the implication in the Claimant's evidence that the Respondent's senior personnel were annoyed or upset that he raised concerns about the safety of M moving in with fan heating. It was a concern that he was required to raise as part of his duties and the Tribunal do not accept the suggestion that the Respondent's senior management sought to prioritise the income that M could have generated over M's ability to live safely in Catherine House.

30 We find that M did not move into Catherine House until March/April 2020 after the radiators were fixed. We therefore do not find that M moved in a few days after the Claimant's dismissal on 15 January 2020.

Claimant's performance

31 On 18 October 2019 Ms Lyng made extensive comments on the Support Plan that the Claimant had prepared for a service user on 10 October 2019. The suggestions Ms Lyng made belied a lack of enquiry by the Claimant of the task he was required to do. Numerous questions on the scope

of the service users abilities and the support which needed to be provided remained unanswered.

32 On 19 November 2019 the Claimant had his one-month probationary appraisal. It was a generally positive appraisal. However, Mr Alayasa stated amongst other things:

John seems to adapt well. In such short time he managed to build a good relationship with his staff and professionals. John, need to pay more attention to details O.A medication. It said take at 11am, but the MAR sheet had 8am. There have been few occasion when he presumed/guessed i.e Nicolas email about transport, figures etc.

Action: John, need to pay more attention to details

33 Mr Alayasa had a one-to-one with the Claimant on 26 November 2019. One of the agenda items was attention to details when carrying out needs assessment and create or develop new documents. Mr Alayasa note of the meeting records

I discussed with the John that he needs to pay attention to details when he writes plans, reports, emails and or other documents. John often uses cut and paste from different documents to create or develop new document. i.e. when

completing the need assessment for D.M, there are same information repeated in different section of the plan. Information where copied from other professionals documents instead of having original assessment based on his visit and interview with DM and his carers.

In the need assessment, there are references to attached documents i.e. "Please see attached SALT guidance" this was copied and pasted from the pen picture sent to us by the community nurse.

This practice is worrying. John, as the service manager expected to pay attention to every single detail in all documents related to the people we support in Catherine House as all people have complex and high needs including health needs and incorrect or unchecked information could lead to serious harm.

John confirmed that he did cut and paste from other documents and said that if he want to start everything from the beginning, this will take long time. He added that he thought it will be fine to cut and paste from other document if the purpose is to use the information. John said that we already decided to take him and that we will be creating a support plans anyway.

I told John that he can reference professionals and signpost people to other documents, but in the case of the need assessment, it is important that we have his views and findings about people to

determine if Catherine House is suitable for them or not and if they meet the criteria or not.

Actions:

- *John need to pay attention to details when he write plans, reports, emails and or other documents.*

- *John to review and update D.M's needs assessment*

34 In this meeting it was recorded that the Claimant will take full control over the rota using whatever format he likes to use as soon as it shows the hours used against the contractual hours. When the Rota starts running smoothly and the staff team become familiar with it, then he can hand it over to the deputy manager and all the care coordinators.

35 On 6 December 2019 Mr Alayasa had another one-to-one with the claimant. The following was recorded.

Z.A starting by explaining that this meeting is planned to review the progress of the last meeting's actions and address management matters such as Health and Safety, risk assessment, rotas, staff management, responding to emails, people activities etc.

Zaydon explained that John, in such short time, managed to create good relationship with colleagues, professionals and families. John also managed to put in place most required folders for the service and organise them well. Having said that, there are some concerns about the quality of John's work and his judgements and actions in the area of health and safety, fire risk, Rotas and responding to emails.

ZA assured John that this meeting is not at all about saying that he is not suitable for the job, but about looking at how can we together improve the quality of work in Catherine House and check with him the support he thinks he might need to be able to deliver the job he meant to do as the service manager.

36 The Claimant emphasises that the reference that Mr Alayasa makes to judgments and actions in the area of health and safety means that Mr Alayasa was concerned about the health and safety matters the Claimant was raising. We do not accept this. Mr Alayasa was referring to health and safety matters that the Claimant should have picked up on and has not such as personal evacuation plan for a wheelchair user who was using the service. It was alleged that the Claimant had not identified that the gate was not wide enough for the wheelchair to pass through. There were also concerns about the extent to which fire alarms were effective in relevant room. In particular would the fire alarm be activated in respect of rooms on different floors. Mr Alayasa believed that it was the Claimant's responsibility to identify these risks and he had not done so.

37 On 6 December 2019 Ms Lyng sent the Claimant and deputy manager Ms Berkoh an email expressing concerns about the accuracy of the Respondents record (Iplanit) in respect of service user. Iplanit had not been updated to record that the service user had dysphasia and recorded that the service user used to take baclofen for epilepsy when in fact this service user still did take such medication. These were serious errors on the Iplanit records that were part of the Claimant's duties to complete. It is noted that the itinerant record in this regard was completed on 10 October 2019 and had not been updated by the time Ms Lyng reviewed the file on 5 December 2019.

38 On 10 December 2019 Ms Boland wrote to the Claimant indicating that the commenting on the risk management policy for lone working that he had prepared should be updated with her comments. However the Claimant did not respond to this email and update the policy as requested.

39 Ms Lyng undertook an audit of Catherine house records and completed this on 13 December 2019. She outlined a number of immediate concerns with the running of Catherine House. The concerns related to inadequate management oversight. Failing to properly record food charts, water temperatures and not updating Iplanit appropriately.

40 By email dated 20 December 2019 the Claimant wrote to provide his comments after reflecting over the first eight weeks of his employment. He stated

I have been going through Sonia's audit of Catherine House and I am really surprised with some of the oversights, wrong spellings etc. . Generally, this is unlike what I do, however on reflection, I would have check this over again. I remembered writing some of the support plan on my first two days with outward, however this should not be an excuse. One thing I have learnt through this process, is that I should have taken more time despite the pressure from superiors, I should have had more control of the situation as after all this was my service, I should have taken time to read over again and again. On this occasion, I did not follow my intuition but worked just on the impulse with pressure around me.

I have gone through the work, and I have been updating the records as it should have been in the first place. I have reflected on this and taken solace in the words of my mentor and former lecturer The Rev Prof Jonny Smith, he wrote me a letter on my graduation eve about reflection and mistakes in life, he admonished me that people are allowed to make mistakes however it is how they take the effects and learn from it, he ended by saying only a dead person cannot make mistake (paraphrased).

Secondly, I have sensed the issues with communication with maintenance team and some information missing in transit, as I have discussed with you, this is my 8th /9th week with the company, from my training and previous experiences, I would have thought that one email

to anyone about issue or concern would suffice. I guess this was one of the reasons, when I sent email to maintenance, I presumed that they would act immediately, I have realised that different people work differently. In addition, in future I will send more emails and follow it up with phone calls and to make sure that they act immediately.

41 There was therefore an acknowledgement by the Claimant of some of the shortcomings in his performance to date.

42 Ms Boland, Mr Alayasa and Ms Shufflebotham met to discuss concerns regarding the Claimant on 16 December 2019, 24 December 2019 and 8 January 2020. There were concerns expressed of the Claimant's record-keeping, the fact that he had not updated the loan worker risk assessment, concerns expressed regarding the recruitment of the Claimant in that reference checks had not been requested and the Claimant's employment history is extremely weak and that Mr Alayassa appears to have committed a serious error of judgement by appointing the Claimant. Mr Alayassa was also criticised in respect of the probationary targets that had been set and review periods.

43 Whilst as at 24 December 2019 Mr Alayassa was 50:50 regarding the Claimant's continued employment by 8 January 2020 all agreed that it was unlikely the Claimant would pass his probation due to a number of serious errors and omissions including rota mismanagement, not meeting targets set in supervision, not having read logs and other records, not making sure that room temperatures, bowel charts et cetera are maintained accurately. Feedback on competence from senior staff is that it does not appear to be able to take things in and was a reference to an inappropriate email to Emma.

44 On 6 January 2020 Ms Belabed resigned without notice. Mr Alayassa has a separate telephone discussion with her and we accept that she told him that she was unhappy with the way the Claimant informed her of her working hours and the way he spoke to her.

45 On 8 January 2020 Ms Boland, Mr Alayasa and Ms Shufflebotham resolved to terminate the Claimant and Mr Alayasa handed the Claimant a letter dated eighth of January 2020 placing the Claimant on garden leave and invited the Claimant to a probationary meeting on 15 January 2020. The letter stated:

"You have the right to be accompanied by either a Trade Union Official or a work colleague. You will be given every opportunity to state your case and to put forward any points which you believe could explain these concerns, or put forward any mitigation you feel should be taken into account.

Due to the nature of my concerns, you are advised that this meeting could potentially result in your probation being brought to a close, and your contract of employment with Outward being terminated. You are also advised that the meeting may proceed in your absence should you

not provide me with an acceptable reason should you be unable to attend.”

46 On 13 January 2020 Mr Alayasa prepared notes for himself ahead of the probationary meeting.

47 A probationary meeting was held between Mr Alayasa and the Claimant on 15 January 2020 the Claimant provided his account and he was informed that his employment would be terminated

48 The Claimant subsequently asked for a copy of his contract and raised a grievance invested regarding what he considered to be a bogus investigation conducted by Mr Alayasa,

49 The Claimant was provided formal confirmation of termination of employment by letter dated 21 January 2020 and his grievance was dismissed on 7 February 2020.

Law

50 In respect of detriment section 44 of the Employment Rights Act 1996 states:

44 Health and safety cases.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities

51 In respect of dismissal section 100 of the Employment Rights Act 1996 states:

100 Health and safety cases.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities

Designated to undertake health and safety duties

52 Mr Patel submitted that the Claimant was not designated by the Respondent to carry out activities in connection with preventing or reducing risks to health and safety at work. He stated that the key question is what “designated” means. The Tribunal was referred to the case of *Castano v London General Transport Services Ltd [2020] IRLR 417, EAT*, involving a bus driver operating out of a garage where there was a health and safety representative, who argued that he was so “designated” because as a bus driver he had health and safety responsibilities to passengers and other road users including some responsibilities created by statute. The EAT dismissed his appeal stating that (at para 27):

“Subsection (1)(a) is directed towards the situation in which a particular employee has been designated, over and above their ordinary job duties, to carry out specific activities in connection with preventing or reducing risks (essentially, a health and safety officer’s function). Appointing an employee to do a job in which they must exercise some responsibility to take care of their own health and safety and that of others (which, per Von Goetz, could extend beyond other workers) is not the same thing.”

53 Mr Alayasa gave evidence that the Claimant had some health and safety obligations as part of his duties, as all members of staff do. However, he maintained that the Claimant was not a health and safety representative and that the Claimant did not have any additional duties, responsibilities or obligations in relation to health and safety when compared with any other Service Manager. The Respondent did not adduce any evidence as to who it says the health and safety representative was for Catherine House.

54 We do not accept Mr Patel’s submissions in this regard. The Respondent cannot have it both ways, on the one hand expecting the Claimant by virtue of his job description to undertake health and safety matters to the protection of our service users and staff and to criticise him for not raising them at the level that they expected to undertake his duties and service manager and then at the same time assert that he was not designated to undertake the health and safety duties.

55 We therefore conclude that the job descriptions for Service Managers designated them as the health and safety persons for their respective service as an integral part of their role and as such all Service Managers would have been designated by the Respondent to carry out activities in connection with preventing or reducing risks to health and safety at work within their particular service.

Carrying out health and safety activities

56 It is not in dispute that the Claimant carried out health and safety activities when he was raising concerns about the heating, raising concerns about the lift and the plumbing and sewage. It is accepted that he did raise such concerns. Whilst there is dispute about whether the Claimant raised

concerns about poor electrical maintenance there was a comprehensive report that the claimant referred to were such matters were included.

Reason for treatment

57 Mr Patel referred the Tribunal to the commentary in Harvey on Industrial Relations as follows:

In determining the grounds upon which a particular act was done it is necessary to consider the mental processes both conscious and unconscious of the employer. It is not sufficient to simply apply a 'but for' test to the facts (see Harrow London Borough v Knight [2003] IRLR 140, EAT).

[36] Only the employer knows what prompted him to behave as he did, and therefore formal onus of proof is placed upon the employer to show the ground upon which any act, or any deliberate failure to act, was done (ERA 1996 s 48(2); NMWA 1998 s 24(2)) (see further para [461] ff). The employer must prove on the balance of probabilities that the act, or deliberate failure, complained of was not on the grounds that the employee had done the protected act; meaning that the protected act did not materially influence (in the sense of being more than a trivial influence) the employer's treatment of the employee (see Fecitt v NHS Manchester [2012] IRLR 64, [2012] ICR 372, CA). Therefore, if the employer fails to prove that the act, or deliberate failure, complained of was not on the prohibited grounds, the question or issue must be determined in favour of the employee.

Detriment/ Dismissal

58 We considered whether the Claimant was subjected to detriment or dismissed on the ground that he carried out health and safety activities. We concluded that this was not the case.

59 In respect of the detriment, the covert investigation, the Claimant raised concerns about the matters that were put to him for the first time in the probation review meeting on 15 January 2020. This included what members of staff had told Mr Alayasa about how the Claimant managed them. This no doubt came as a surprise to the Claimant. However, we do not find that Mr Alayasa report of 13 January 2020 was a covert investigation. It was a collation events that Mr Alayasa specifically prepared for use at the meeting on 15 January 2020 recalling matters and statements made about the Claimant throughout his employment.

60 In respect of dismissal we conclude that there was a clear misunderstanding and fundamental fault line in the Claimant's case. The Claimant emphasised the reference by the Respondent to his poor judgement in health and safety matters and the reliance on such matters in his dismissal.

61 If the evidence was dispassionately assessed by the Claimant he would accept that references to his poor health and safety judgement was one of a number of reasons why the Respondent did not believe he had demonstrated the competence, ability or experience to effectively undertake the role. There were concerns that he was not undertaking his health and safety duties to the required standard (completing safety critical documentation competently and not completing the lone working policy) as well as his attention to detail, organisational ability and communication and management with staff. The Respondent concluded that the Claimant's performance fell well below the standard expected in this senior role, that his CV did not match his performance and it would have been ill advised to continue to employ him.

62 The reference to health and safety matters is that the Claimant was not undertaking such duties effectively and not because he had in fact been doing them. If the Claimant had been undertaking his role effectively and displaying good judgment in the areas of health and safety, as the Respondent expected, the Claimant would have been excelling in this role and such concerns would not have been raised. Regrettably, the Claimant was underperforming, he failed to making sure that he was assessing the health and safety risks of various service users and staff by following the Iplanit recording processes and did not comply with the Respondent's recording processes. The Claimant's position before us was either this was not his responsibility or that he was there such a short period of time and should have been given a longer period of time.

63 This was a senior role that the Claimant had to undertaken and he was going to be responsible for the management of very vulnerable and service users. The Respondent had high expectations about how the role should be undertaken and they were not given the confidence from the Claimant's performance and actions during the short period of time that he was employed that that he would have been able to effectively undertake the role.

64 The Respondent's concerns were no surprise to the Claimant. Issues had been raised with him in November and December and ultimately in January. Ms Lyng's audit of Catherine House in December 2019 highlighted serious operational concerns.

65 We accept the Claimant's criticisms regarding the Respondent not following its formal probationary process that allow for 1, 3 and 5 month review periods. The Claimant was cut short at 3 months. We considered whether this supported his claims. In summary the Claimant asserted that he was dismissed to remove him as a barrier so that M could immediately move in. However, there is no evidence that the Claimant was able to produce to contradict the Respondent's evidence that M moved in March 2020 after the radiator heating problems in Catherine House were resolved. With that pillar removed we conclude that the Respondent has established that they dismissed him for what they considered to be well-founded concerns about his performance to deliver against the role.

66 The Claimant's claims for detriment and/or dismissal for health and safety duties therefore fail and are dismissed.

67 We have found that the Claimant was not given a written contract of employment but in view of the fact that he has not succeeded in his other claims no award is due pursuant to section 38 of the Employment Act 2002.

Employment Judge Burgher

10 February 2021