Case No: 2300001/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**
BEFORE: **EMPLOYMENT JUDGE BALOGUN**
BETWEEN:

Mr T Purnell

Claimant

And

Ashdown Medway Accommodation Trust

Respondent

ON: 9 & 10 January 2020

Appearances:
For the Claimant: In Person
For the Respondent: Mr R Slyons, Consultant

RESERVED JUDGMENT

All claims fail and are dismissed.

REASONS

1. By a claim form presented on 31 December 2017, the claimant complains of automatic unfair dismissal pursuant to sections 103A and 100 of the Employment Rights Act 1996 (ERA). All claims are resisted by the Respondent.

2. I heard evidence from the claimant. On behalf of the respondent I heard from Rebecca Hutley (RH) HR Manager; Liam Breen (LB) Front Office and Allocations Manager; Jody Geddes (JG) Senior Manager, Operations; George Crozer (GC), Board Member and Dan Hill (DH), Senior Manager, Core Operations and External Relations.

3. There was a joint bundle, although the claimant produced a separate bundle in addition. Also, a number of ad hoc documents were handed up during the hearing. References in square brackets in the judgment are to pages from the joint bundle, unless otherwise stated.

Claims and Issues

4. The claimant's allegations are set out at paragraph 1 of the case management order of Employment Judge Andrews of 30.11.18 [41] and the agreed issues for the tribunal to determine are set out in the respondent's email to the claimant of 15.2.19 [41J-K]. These are referred to more specifically in my conclusions.

The Law

5. Section 103A ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason, (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

6. Section 43B provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the matters listed in paragraphs (a)-(f). (The Claimant relies on (d) – ***"that the health or safety of any individual has been, is being or is likely to be endangered"***)

7. Section 100 ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal was a health and safety reason falling within one or more of paragraphs (a)-(e).

8. The claimant relies on paragraphs:

> c) …… ***that he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety***; **and**
>
> (e)…..***in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger***.

Findings of Fact

1. The respondent is a homelessness charity based in Medway. It was set up to support vulnerable homeless people and those at risk of homelessness. The claimant was employed by the respondent as a Property Maintenance Manager from 15.5.17 until 4.10.17, when he was dismissed. The claimant was line managed by JG.

2. Part of the support provided to homeless people by the respondent is a licence to occupy one of a number of properties it manages in and around Chatham. One of the conditions of the licence is that any article that can be used as or is perceived as an offensive weapon must be handed in. The types of items are various and range from real weapons, such as knives, ceremonial swords, machetes, to perceived ones; such as crutches, golf clubs, pieces of wood, tools. The confiscated items were placed in a basement in boxes or, in the case of larger items, propped up in a corner on the ground. The basement was secured behind a digitally locked door, with only DBS checked staff having access. If an illegal weapon, such as a firearm was confiscated, the police would be informed and would either advise the respondent or attend and remove the item.

3. On 27.9.17, the claimant asked DH, Senior Manager; Core Operations and External Relations, to accompany him to the basement. once there, the claimant asked DH what happened to the confiscated weapons and was told about the procedure of contacting the police, as described above, and that this was the responsibility of LB, Manager. The claimant said that he wanted to build a workbench in the basement to place tools on and asked if he could remove the weapons. DH was happy for him to do so but suggested he speak to LB first.

4. That same day, the claimant went to see LB and told him that he would be removing the weapons from the basement, to which LB responded, that it was for the police to do. It so happened that the police were on the premises later that day, dealing with a completely separate matter. This prompted the claimant to return to LB and insist quite intensely (accordingly to LB) that he ask the police there and then to remove the weapons, which LB refused to do.

5. The encounter with LB prompted the claimant to complain to JG, his line manager, the next day, 28.9.17. This conversation is important as it is on this occasion that the claimant claims he made the protected disclosures giving rise to his claims. A file note of the conversation was prepared by JG later that day and is at pages 89-90 of the bundle. Having initially told the Tribunal that the note was a fairly accurate account of what took place, the claimant then backtracked when his oral evidence conflicted with the written record, claiming that the notes had been fabricated after the event. However, based on the evidence of JG and DH, who was also present at the meeting, at the claimant's request, I find that the note is accurate. The claimant relayed his conversation with LB and in doing so said that he was worried about weapons in the cellar and about staff safety. He told JG that when he informed LB that DH had given him permission to remove the weapons, LB had sworn at him in front of other staff saying that it was his f****ing office and it was f*** all to do with DH. However, when the claimant was asked in cross examination whether LB had sworn at him he replied: "*He never swore at me once. He was always polite*". LB also denied swearing, which leads me to conclude that the account of events given by the claimant to JG was not entirely true.

6. The Claimant was unhappy with JG's response. JG told the Claimant that LB had

already made her aware of the matter and went on to defend his actions. JG also suggested to the claimant that by telling DH what LB had allegedly said about him, he was trying to cause discord between them. The claimant describes the meeting as heated and afterwards sent an email to RH, HR Manager, complaining about JG's conduct, which he described as highly disrespectful, very unprofessional and rude [90-91]

7. As it was obvious to JG that the claimant was still angry about their encounter, she arranged a "clear the air" meeting with him later that day and asked RH to be present. During the meeting, they both aired their dissatisfaction with the way the earlier meeting had gone. JG said that she apologised to the claimant at the meeting though he denies that this was the case. However, looking at the respondent's file note of the meeting, I prefer JG's evidence on this and find that there was an apology. [91-93] Although at the end of the meeting JG treated the matter as closed, that was not the claimant's view and the following day he raised a formal grievance against her. [95-96 & 98-99]

8. JG told the Tribunal that managing the claimant was challenging from the outset. She described him as having a complete lack of social etiquette e.g. walking into a room without knocking; talking over her or ignoring her and addressing remarks or queries to her male colleague, DH instead; a constant need to be right and for his issues to take precedence over everything else etc. Similar observations of the claimant were made by other respondent witnesses, with repeated references to his red face – indicating his level of anger. JG said that she put up with these things because the claimant was good at his job. Although I make no finding as to whether those observations of the claimant were justified, I am satisfied that they represent the genuinely held views of the witnesses.

9. JG describes in evidence arriving at the office on 29.9.17 and being confronted with the claimant, "*red faced and taciturn*". She said that when she opened the door the claimant walked straight past her (without acknowledging her). She said that at this point she knew that she could no longer manage him. I accept that this was her genuine perception of the situation.

10. At a meeting with RH and DH later that day, JG said that the situation with the claimant was untenable and that she could no longer manage him. It was agreed between them that the claimant should be dismissed. DH expanded on this in his evidence. He said that if JG was no longer managing the claimant, it would fall on him to do so and he did not have the time to manage maintenance and to go through the coaching process that he felt the claimant needed to maintain himself within the organisation and improve his interaction with others, which DH felt was poor.

11. On 4.10.17, the claimant was invited to a meeting with RH and DH and was advised that he was to be dismissed with immediate effect. The reason given was a breakdown in the professional relationship between him and JG. A secondary reason given was a failure by the claimant to follow a reasonable instruction from management relating to the contacting of witnesses during the grievance investigation. However, during the course of this hearing, RH conceded that no such instruction was given, or indeed breached.

12. On 9.10.17, the claimant appealed against his dismissal. There were 7 grounds of appeal cited and none of them referred to the claimant having been dismissed for making a protected disclosure or raising a health and safety matter [110-111]

13. The appeal was heard on 17.10.17 by GC, a Board member. The hearing was taped by the claimant and a transcript of the hearing has been provided to the Tribunal. Again, the claimant did not at any point in the appeal allege or suggest that his dismissal was because he had made protected disclosures or raised a health and safety issue. [170]

14. On 1.11.17, the respondent wrote to the claimant informing him that his appeal had been unsuccessful.

Submissions

15. The parties made oral submissions, which I have taken into account.

Conclusions

16. Having considered my findings, the submissions and the relevant law, I have reached the following conclusions on the issues:

Did the claimant in his provision of information to JG on 28/9/17 make a qualifying disclosure?

17. The conversation referred to at paragraph 5 above comprises the alleged disclose. The detail of that conversation is contained in JG's file note [89-90]. The relevant part of the conversation relied upon is the claimant's statement that he was worried about weapons in the cellar and about staff safety. I am satisfied that the statement conveys sufficient facts and comprises information for the purposes of section 43B(1). I am also satisfied that the claimant reasonably believed the disclosure to be in the public interest and I do not accept counsel's characterisation of the claimant's concern as being about his own interests rather than the public's. His reference to staff safety suggests his concerns went beyond the personal. It is implicit in the statement itself that it tends to show that staff could come to harm (either accidentally or deliberately) from the presence of the weapons. I am satisfied from the claimant's actions before making the disclosure that he believed this to be the case. I am referring to his actions the day before the disclosure when he made enquiries about the removal of the weapons of both DH and LB.

18. I am therefore satisfied that the requirements of section 43B(1)(d) ERA are satisfied and that the claimant did make a qualifying disclosure.

Section 100 claim

19. The respondent concedes and I also find that by the above disclosure, the claimant brought to the attention of his employer, by reasonable means, circumstances connected to his work which he reasonably believed were harmful or potentially harmful to health or safety. (section 100(1)(c) (ERA). The respondent's position on paragraph (e) is unclear as the claimant announced for the first time that he was relying on this provision during his closing submissions. The claimant had been asked by the respondent to confirm which provisions of section 100 he was relying upon by an email dated 15.2.19 but had not responded. [41J].

20. I think it would be a stretch to say that 100(1)(e) applied. Whilst the claimant had genuine concerns about the risks to staff posed by the weapons, I do not believe that he considered either himself or staff to be in serious and imminent danger. I do not

consider that (e) is applicable.

Was the Claimant dismissed for either of these reasons?

21. As the claimant had insufficient service to bring an ordinary unfair dismissal claim, he has the evidential burden of proving that the reason for his dismissal was because of his disclosure (I use the term to refer to both statutory claims).

22. Coincidence of timing is often a strong indicator of causation when it comes to automatic unfair dismissal claims. In this case, the disclosure was made on 28/9/17 and the claimant was dismissed 4/10/17, less than a week later. I have therefore looked carefully to see if there are circumstances other than the disclosure that suggest a more likely reason for dismissal.

23. As indicated at paragraph 11 above, the respondent has conceded that there was no instruction given to the claimant regarding the contacting of grievance witnesses and therefore the secondary reason given for dismissal – failure to follow a reasonable instruction - is not made out. However, having heard from RH, I am satisfied that she genuinely believed the claimant was under such an instruction, even though it was based on an incorrect assumption. I therefore draw no adverse inference from this being cited as one of the reasons for dismissal.

24. From the evidence, I am satisfied that the relationship between the claimant and his line manager had broken down. Whilst the disclosure provided the backdrop for the breakdown, it was not the cause. The cause was the refusal of the claimant (as JG saw it) to accept her apology and move forward following their heated exchange, and his attitude towards her thereafter; as described at paragraph 9 above.

25. Once the working relationship between the claimant and his line manager had irretrievably broken down, and in the absence of a viable alternative line manager, it was inevitable that dismissal would follow.

26. The respondent's witnesses gave evidence about their view of the claimant's general attitude and personality citing a number of examples. (para. 8). Whilst this was not a direct reason for the dismissal, I find that it was a significant factor in the respondent's conclusion that the working relationship could not be repaired.

27. I also don't believe that the claimant considered his dismissal to be because of his disclosure or his reports about health and safety as he made no reference to these in his letter of appeal against dismissal despite having consulted with a solicitor about his dismissal. When I asked the claimant why he thought he was dismissed for these reasons, he said it was the only reason he could think of – not a particularly compelling argument.

28. In conclusion, I find that the claimant has not shown that his dismissal was automatically unfair. His claims therefore fail and are dismissed.

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Employment Judge Balogun
Date: 26 March 2020