



EMPLOYMENT TRIBUNALS

Claimant: Mr I F Kamara
Respondent: BS Project Services Limited t/a BS Social Care
Heard at: East London Hearing Centre (by hybrid/CVP)
On: 22 March 2023
Before: Employment Judge C Lewis

Representation

Claimant: In Person
Respondent: Mr Mani-Thompson (Counsel)

UPON AN APPLICATION made by letter dated 7 November 2022, to reconsider the judgment dated 28 February 2022 under Rule 71 of the Employment Tribunals Rules of Procedure 2013.

JUDGMENT

The decision to strike out the Claimant's claim for breach of contract for lack of jurisdiction is confirmed.

REASONS

1 The Claimant was employed by the Respondent from 22 November 2019 until he resigned on 18 March 2021. His breach of contract claim as set out in the claim form, (the ET1) under the heading Breach of Contract is as follows:

"27. Respondent, as an employer, you owe me a general duty of care at under health and safety law to carry out my duty as a Waking Night Support worker. In carrying out this duty, you are required to act reasonably to protect the health safety of my wellbeing.

28. Respondent failure to follow acceptable Health and safety regulation by deliberately failed to disclose to me the potential risk of AS- young person on

staff who verbally abuse and assaulted me by throwing an Oxygen cylinder over my head only a narrow escape prevented me not to be seriously injured.

29. I suffered needlessly is a breach of that duty. A repudiatory breach. As a result, I suffered untold distress, serious inconvenience and financial loss.”

2 At the preliminary hearing on 17 November 2021 the Claimant confirmed that he did not resign in response to the alleged breach of contract, stating that he resigned later as a result of the bullying, harassment and other mistreatment of him by the Respondent, he also disavowed any claim for constructive dismissal. The incident with AS occurred on 26 September 2020, the Claimant resigned on 18 March 2021.

3 In his application for reconsideration, dated the 7 November 2022, the Claimant set out that his position in his case remained the same on all the issues he raised in his employment tribunal claim form (ET1), and his letter of complaint (grievances) against the Respondent dated the 3 January 2021 “to notify that, they are in breach of the employment agreement contract and to request the breach be remedied but, to no avail.”

4 The letter of complaint to the Respondent dated the 3 January 2021 was in the Preliminary hearing bundle at pages 15-16. The Claimant set out a claim for breach of contract, slander and harassment in the following terms:

‘I write in relation to the above matter, and also to inform you about recent incidents that took place on the 26 September 2020 at Stepping Stones, children home, Romford, where I covered a shift as a waking night support worker. During this period, I was seriously assaulted by one of the residents by the name of AS (Service user).

Subsequently, I reported the incident to on call service on the very night. Also, I reported the matter to the police and obtained a crime reference number.

5 The Claimant states that he had been subjected to ridiculous accusations, insults and derogatory remarks by two recruitment consultants and then sets out what he describes as harassment which started on 29 September 2020, after the incident with AS.

6 Under the heading breach of contract, the Claimant sets out the following:-

“As an employer, you owed me a general duty of care at common law and legislation for health and safety, to carry out my duty as a Cover Waking Night Support worker. In carrying out this duty, they are required to act reasonably to protect the health safety of my wellbeing.

*Their failure to follow acceptable health and safety regulations by deliberately failing to disclose to me the potential risk assessment of AS- service user prior to the incident, who verbally abused and assaulted me by throwing a “**Fire Extinguisher**” over my head only a narrow escape prevented me not to be seriously injured.*

*I suffered needlessly as a breach of that duty. **A repudiatory breach.** As a result, I suffered untold distress, serious inconvenience and financial loss, the quantum of which is beyond minor.”*

7 The Claimant went on to set out a description of harassment and intimidation by the 2 recruitment consultants.

8 On the second page of his reconsideration application, the Claimant set out his dissatisfaction with the preliminary hearing in November 2021 and the exclusion of his breach of contract claim, he summarised the issues that were not dealt with properly as follows:

- “1. According to the Health and Safety at Work Act states that, ‘the responsibility of the employer under the Health and Safety at Work Act is that, it is an employer’s duty to protect the health, safety and welfare of their employees and other people who might be affected by their work activities”.
2. Ensure staff are protected from discrimination, bullying and harassment.
- 3 Also provide information about risks and conduct risk assessment.
- 4 According to Regulation 10(1) of Health and Safety at Work (HSWR) to provide comprehensible and relevant information to their employees on the risks to their health and safety wellbeing to identified the risk assessment, preventive and protective measures at work.
- 5 Ensure that all work environment is safe and conducive at all times.
- 6 At common law the Respondent has a duty to undertake reasonable care of the health and safety of its employees in all circumstances, not to be exposed to unnecessary danger or risk at work.

In my case, the Respondent failure to follow the above acceptable regulations of health and safety at work Act. Also do not have a clear formal wellbeing strategy to prevent me from being assaulted and harassed while on duty at Stepping Stone children homes in Romford as a lone night support worker is a potential risk to my wellbeing is a breach of that duty.

During this period, I suffered a demeaning and very offensive verbal threat and assault from (AS)- service user who physically threw a fire extinguisher over my head. Only a narrow escape prevented from a very serious injury on the night from AS-service user. I was absolutely petrified, and I am still having nightmares about it to this day.

As a result of the above, I suffered and developed work related stress, anxiety and hypertension which led me to seek medical help from GP, who treated me for work related stress. Also, I was referred to ‘**Newham Talking Therapies**’ where I was receiving counselling at the time. (For ease of reference, please find enclosed copies of Classes of Mindful Relaxation and introduction to Assertiveness dated 8 December 2021 and 15 December 2021).

Furthermore, I can confirm that, during this difficult time, the Respondent failed to provide me with care management support of occupational health therapy due to my untold distress. The Respondent rather preferred to subject me to unnecessary

investigation and disciplinary hearing for unfounded allegations that I was in possession of a knife caught on CCTV stood inside and outside the Stepping stone children home to attack a service user.

To conclude, please my Lord, could my case of breach of contract claim under health and safety at work with the Respondent be revisited or reviewed based on the Employment Tribunal Rules and Procedures.”

7 The reconsideration hearing was conducted by CVP on the direction of Employment Judge Jones. The Claimant wrote to the Tribunal to request an In-person hearing due to his inability to attend the CVP hearing from his own home and was offered the possibility of attending the Tribunal to use the equipment at the Tribunal offices which he duly took up. The Claimant attended the hearing from a Tribunal room with a CVP link set up by the clerk, the Respondent Counsel and the Judge were connected by CVP.

8 At the start of the hearing, I clarified that the scope of the hearing was to reconsider the decision to strike out the claim for breach of contract and if that claim was reinstated to consider whether to make a deposit order in respect of that claim.

9 The Claimant confirmed that he understood and me that he thought the ambit of his claim was very clear. He was critical of the manner in which the first hearing was conducted. I acknowledged that there are occasions when things go wrong and sometimes need to be looked at again, the role of the Employment Appeal Tribunal is to correct any mistakes of law by the tribunal and in this case, the EAT has suggested that this matter be reconsidered. I confirmed that the reconsideration is to be conducted by the same judge. I explained that I needed to hear from him today to understand more about how he explained his breach of contract claim, and specifically the damages he was seeking as a result of that breach in order to understand whether the Employment Tribunal has jurisdiction over that claim.

10 I explained that the Employment Tribunal is a creature of statute which means that it has jurisdiction only over those matters where jurisdiction is given to it by Parliament. The Extension of Jurisdiction Order 1996 gave the tribunal jurisdiction to deal with breach of contract claims arising or outstanding on the termination of employment but Articles 3 and 4 specifically exclude claims where the remedy or damages sought is for personal injury or for a sum due in respect of personal injuries. I explained that it would be helpful for the Claimant to describe his claim to me and to explain what damages he was seeking as a result of the breach of contract.

11 I also explained that I had seen his letter to the Tribunal dated 7 December 2021 requesting that the deposit order be suspended or set aside, on the basis that “the important issue the case of breach of contract was fished out and not properly dealt with during the preliminary hearing”, as I had granted an extension of time for payment of the deposits in respect of his claims under the Equality Act 2010 until 19 January 2022. I had also seen his letter dated 14 January 2022, headed “Urgent application for Breach of Contract to be included in the Deposit Order”.

12 I explained to the Claimant that his breach of contract claim had not been included in the deposit order because it had been struck out for lack of jurisdiction. This was not an assessment of its merits.

13 Before today's hearing I had reread the Claimant's correspondence referred to above. I also reread the schedule of loss and the agenda that he had prepared for the preliminary hearing in November 2021 and the draft list of issues prepared by the Claimant, to understand how he had put his claim for breach of contract.

14 At this hearing the Claimant explained that his breach of contract claim is for a breach of health and safety at work, that the employer has a duty to all employees which is included in all contracts to take reasonable care for their safety, and before sending an employee for an assignment to ensure there is a safe conducive environment to prevent any injury and attack on the worker. The employer has to make sure that health and safety checks are carried out, carry out a risk assessment to ensure the environment is safe. The Respondent was in breach of his contract when they sent him to a place that was not safe, they had not carried out a health and safety risk assessment and they sent him as a lone worker, or as a support worker [he accepts there was another worker present as a sleep-in] and had not given him any information about the clients who were there, and whether they were violent. That he had made it clear to the Respondent that he refused to carry out personal care before attending any assessment and that he was only going to assignments to protect property and service users. He did not know when he went there that the service user was violent, he could have been killed; it is not part of his job to do personal care, the service user had abused him, called him stupid and all kinds of things and he had to wake up the sleep-in staff member to explain to him what happened and to ask him to explain to the service user that the Claimant was not there to carry out personal care. The service user went upstairs, picked up the fire extinguisher and threw it towards the Claimant over his head. The Claimant went outside and had to wait for his bag outside. He called the Respondent on-call line and told them what had happened, that he had had to abandon his assignment. The Respondent then showed no care that the Claimant was very distressed, he had high blood pressure already and this was very bad for him. The Claimant had reported the matter to the police and he had not been shown any care by the Respondent when he was traumatised. He went to his GP and had been referred to talking therapies, he could not go to his other work for weeks because he was traumatised. The Claimant has letters from Talking Therapies confirming what he says. The Claimant asserted that the breach of contract was free-standing.

15 He reiterated the reason why he had refused to pay the deposit order because he had asked for the breach of contract claim to be included within that and that had been refused, so he refused to pay the deposit, which is why he submitted his appeal when his claim had been struck out.

16 He then went through the grounds that had been set out in his application for reconsideration, [see paragraphs numbered 1-6 set out above]. He told me that as a result of the Respondent's breach he has suffered a humiliating and offensive attack from the service user, that he was petrified and still has nightmares to this day. He suffered from work-related stress, he had to seek help from a GP and was referred to Newham Talking Therapies and he went for almost a month as he was traumatised. He repeated that the Respondent failed to provide him with support from occupational health, even though they had access to this, they did not provide him with any help.

17 When asked what remedy he was seeking from the Tribunal, the Claimant repeated that he had suffered trauma. He had not been provided with a care plan for the service user. The Claimant asked what would have happened if he had been killed, what would become of his family? He asked that the claim for breach of contract be reviewed. He repeated some of his evidence about what took place on the night of the incident and during the Respondent's investigation afterwards.

18 The Claimant repeated that his claim was not for personal injury, he told me that his claim is that the Respondent breached its health and safety duties. He asked me to look at the letter of the 7 November 2022 and the 14 January 2022.

19 I explained that I had read the letter he referred to and I was trying to understand what damages he was claiming as a result of the breach of contract. I explained that I understand what it was that he says amounted to a breach of contract, what he says about what the duty was and why he says it was breached, but I am trying to understand what damages he is claiming as a result.

20 The Claimant responded that the damage was injury to feelings, he had been traumatised and there was a loss of earnings because he had been unable to engage with his other work because he had been traumatised and his blood pressure had gone up.

21 I attempted to explain that injury to feelings and injury to mental health are a form of personal injury damages. The Claimant repeated that he had been traumatised. The Claimant told me he could not identify the other damages, other than he had not been able to take up other assignments with his other work because of what had happened. [He had not disputed that he had completed an assignment for the Respondent between 5 October 2020 to 8 November 2020 during the initial stages of the Respondent's investigation into the incident on 29 September 2020 – ET3 para 14].

22 I tried to explain to the Claimant that injury to feelings and feeling traumatised were included under the heading of personal injury damage. This is what I had understood his claim to be when we discussed it at the previous hearing in November 2021 and which is why I had found that it was outside the Tribunal's jurisdiction, because the damage he was claiming as a result of the breach of contract was for personal injury. So today I was trying to understand what other damages he was seeking, if any. The Claimant reiterated that he was seeking injury to feelings which was a form of damage. I agreed that it was a form of damage, but it falls under the head of personal injury damages, as does damage to his mental health, as well as any physical injury. I reiterated that I was trying to understand what other contractual damages, if any, he was seeking.

23 The Claimant referred to the order from the EAT and quoted from the reasons given by His Honour Judge Martin Barklem at paragraph ii. "The appellant points out that his claims were not for personal injury, rather he alleges breach of contractual duty of care to protect his wellbeing. See paragraph 27 which points out that as a result of a breach, he narrowly avoided being injured."

24 I apologised if we were going round in circles, but it seemed that he had told the EAT he was not claiming personal injury damages so I was trying to understand what he was claiming in terms of contractual damages other than personal injury. The Claimant reiterated that he was claiming a breach of health and safety duty of care, that he had taken advice from a CAB from the beginning and they had said that there was a duty of care to care for

an employee's wellbeing. He had lost earnings through the mistreatment and never been sent to occupational health which should have been done. He feels that it was unfair. He still has continuing trauma and nightmares when he is sleeping. I explained that I was sorry to hear that and for the fact that he was feeling, and had felt traumatised, but that the trauma and the effects of that trauma on his ability to work were classed in law as damages that fell under the head of personal injury. The only financial losses the Claimant referred to were those he claimed for being unable to work for a period of time as a result of the effects of the trauma, i.e losses as a consequence of the injury to his health.

25 The Claimant thought that it was unfair that the claim was not considered and that I had excluded it prematurely. I explained that I was not making a decision on whether there had or had not been a breach of contract but simply that the damage that he sought as a result was of a kind that meant the claim was outside the tribunal's jurisdiction. The Claimant expressed for the last time it was a breach of health and safety, duty of care, whether it was a personal injury that he had suffered at the hands of the people, that the duty of care was contractual. He was saying that the Respondent had breached health and safety rules.

26 I asked the Claimant whether he was satisfied that he had had an opportunity to explain his case and anything he wanted to say. He confirmed he had an opportunity to explain his case and had set it out in the documents he had referred me to, to what he had explained himself clearly and said everything he had to say.

27 I thanked the Claimant and asked the Respondent Counsel for any submissions.

28 Mr Mani-Thompson submitted that it is very clear from what the Claimant had said that he was advancing a claim for personal injury which is outside the jurisdiction of tribunal as per article 3 and 4 of the Extension of Jurisdiction Order. He submitted that the original judgment was correct and should be upheld. The Claimant is saying that there was a breach of health and safety but was also in effect trying to introduce a parasitical constructive dismissal claim, a claim which he had already disavowed. It was clear that, without commenting on its merits, the Claimant's claim for breach of contract is a personal injury claim and can only be pursued in the county court.

29 I gave the Claimant an opportunity to reply. He repeated his earlier submission that his claim is not a personal injury claim, it is a claim for breach of contractual duty to take care of wellbeing and for breach of health and safety rules.

Conclusion

30 Having considered what I had heard from both the Claimant and the Respondent, it appeared to me from everything that the Claimant had said that the damages he is seeking is for the trauma and injury to his physical and mental health, and consequential loss resulting from the trauma, that he says he suffered as a result of the alleged breach of the Respondent's contractual duty towards him. I am satisfied that in law the damages he seeks fall under the definition of "damages, or a sum due, in respect of personal injury". I am satisfied that the decision to dismiss the breach of contract claim for being outside the jurisdiction of tribunal was correct.

31 The Claimant indicated that he did not accept the decision, that he thought I was biased and he felt it was unfair. I explained that he still had the opportunity to pursue his appeal which is currently stayed in the EAT, but that it might be sensible to seek some

advice before any further hearings in the EAT. The Claimant reiterated that I was biased and also accused me of being racist. I drew the hearing to a close.

**Employment Judge C Lewis
Dated: 31 March 2023**