Appeal No. UKEAT/0153/20/RN

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 27 April 2021

Before

THE HONOURABLE MRS JUSTICE STACEY DBE

(SITTING ALONE)

MISS ALDA SIMOES — APPELLANT

DE SEDE UK LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS ALDA SIMOES (The Appellant in Person) and MR LEONARD OGILVY (Representative)
For the Respondent	(Neither present nor represented)

SUMMARY

UNFAIR DISMISSAL

WORKING TIME REGULATIONS

It is settled law that to succeed in a complaint of automatically unfair dismissal for asserting a statutory right under s.104 Employment Rights Act 1996 there must have been an infringement of a statutory right, not merely an anticipation or threat of future infringement (see **Mennell v Newell & Wright (Transport Contractors) Limited** [1997] IRLR 519 and **Spaceman v ISS Mediclean Limited T/A ISS Facility Service Healthcare** [2019] IRLR 512.

In this case the Appellant (Claimant) had made a valid assertion that the Respondent's instruction to work a particular shift pattern or rota had infringed her rights under Regulation 11 Working Time Regulations 1998. It was not necessary for the impugned shift or work pattern to have been completed for the alleged infringement to have occurred: it was the instruction which was alleged to have infringed her rights. Her assertion therefore came within the scope of s.104 Employment Rights Act 1996. The appeal succeeded, the Tribunal judgment substituted for a finding of automatically unfair dismissal and the case referred back to the ET for a remedy hearing.

THE HONOURABLE MRS JUSTICE STACEY DBE

1. This matter comes before the Employment Appeal Tribunal on the appeal of Miss Alda Simoes against the Judgment of the Employment Tribunal ("the Tribunal"/"the ET") following a hearing held at London Central on 17 and 18 October 2019 which dismissed her claim of protected interest disclosure dismissal under Section 103A of **The Employment Rights Act 1996** ("ERA") and her claim of dismissal on grounds of assertion of a statutory right contrary to s104 ERA. The Tribunal gave a reserved judgment with reasons that was sent to the parties on 14 November 2019. The hearing took place before Employment Judge Adkin sitting alone.

2. The Appellant was the Claimant before the Tribunal and the Respondent to the appeal, De Sede UK Ltd, was also the respondent before the ET. It describes itself as a manufacturer and seller of exclusive leather furniture and bags and had a concession in the classic furniture department of Harrods, where the Claimant was employed as a sales assistant from 29 June 2018 until her dismissal on 17 August 2018. I shall continue to refer to the parties as they were before the Tribunal.

3. Permission to appeal the Tribunal's findings under s104 was given by His Honour Judge Auerbach on a paper sift under Rule 3 of the **Employment Appeal Tribunal Rules of Procedure**. He refused permission to challenge the Tribunal's findings in relation to the complaint of protected interest disclosure dismissal, against which there had been no challenge. The only live issue in this appeal is the very narrow point of whether, on the facts found by the Tribunal, the Claimant had alleged that her employer had infringed her statutory rights under the **Working Time Regulations 1998** ("WTR") rights, in which case her appeal under s104 ERA will succeed, or whether she had only raised concerns about a future, threatened or intended

A infringement of her rights under the Working time Regulations 1998, in which case the Tribunal was correct to have dismissed her claim.

B 4. The relevant facts and material parts of the ET judgment can be set out very briefly. On 10 July 2018 the Claimant was asked to work from 28 July to 7 August 2018 to cover her manager, Mr Breitner's pre-booked holiday. She initially agreed but later realised that it meant that she would be working for over 14 consecutive days and on 20 July she raised her concern about it, pointing out that working 14 days on the trot without a break was treating her like a slave. No satisfactory solution was found and Mr Breitner refused to engage temporary staff to provide cover and the Claimant was still required to cover Mr Breitner's holiday.

D 5. Matters came to a head on 27 July 2018 as found by the Tribunal as follows:

> **"24. On 27 July 2018 there was a team meeting. This was the last day that Mr Breitner worked before he went on a period of annual leave. Again on this date the Claimant raised that she was not happy. Mr Breitner told the Claimant he would not be able to go on holiday if she was absent. Mr Breitner's account is that the Claimant shouted and banged the table and walked off returning 30 minutes later. The Claimant does not accept his version of events. It is clear that she did become tearful and walked to the next concession. Mr Breitner followed her. The Claimant asked him for some time so that she could compose herself. The Claimant then spoke to a Harrods manager about the period she was being asked to work without a break. This manager told her about ACAS. The Claimant then spoke to ACAS and was told that this was potentially a constructive dismissal situation given an apparent breach of the Working Time Regulations.**
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> **25. To the extent that there was a conflict I accept the Claimant's evidence. In summary the Claimant was very upset and raised the question of the length of time that she was being asked to work.**
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> **26. I find that at the time she did reasonably believe that this amounted to a breach of the Working Time Regulations 1998, specifically regulation 11. I acknowledge that the Respondent argues that working 14 days consecutively might not, construing the provisions strictly amount to a breach. Whether or not there was a breach is beside the point. I accept that the Claimant raised the matter in good faith and was reasonably clear that there was a breach."**

H 6. The Claimant worked the hours in question as instructed. Two days after Mr Breitner returned from holiday on 10 August the Claimant was given notice of termination and was put

on garden leave until the end of her one-week contractual notice due to her in her probationary period.

7. On causation, the Tribunal made a clear finding of fact at para. 85 of its Judgment that although there were multiple reasons for the dismissal, the principal reason for the Claimant's dismissal was that she had made a complaint on 27 July 2018 about her working hours.

8. On analysis of s104 and the case law of **Spaceman v ISS Mediclean Ltd (T/A ISS Facility Service Healthcare)** [2019] IRLR 512 at para. 22 and **Mennell v Newell & Wright (Transport Contractors Ltd)** [1997] ICR 1039 the Tribunal concluded that:

> **"51. … in order to engage the protection of section 104, it seems that a Claimant must complain about a breach of statutory right which has already taken place i.e. it must be a historic breach."**

9. The Tribunal then applied the facts to the law to reach the following conclusion:

> **"52. The Claimant engaged with this argument [the temporal limitation of s.104 and *Spaceman*] and responded to it in her submissions. She says that at the time of her complaint raised on 27 July 2018, the 14 day period of work had commenced, and therefore the breach had already occurred. I refer back to the wording of section 104(1)(b) "alleged that the employer had infringed a right of his which is a statutory right". As at 27 July, the allegation about breach was an one that was being made on a forward-looking basis i.e. the employee in this case was saying there is going to be a breach.**
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> **53. I accept the submission put on behalf of the Respondent that no breach had crystallised at 27 July.**
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> **54. As has been observed in the *Spaceman* case, this is a surprisingly narrow scope for this particular right. Unfortunately for the Claimant I have concluded that, based on the facts in this case following the dicta in Spaceman the section 104 claim must fail."**

The Law

10. S104 of the ERA provides as follows:

> **"104 Assertion of statutory right.**
>
> **(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 the employee—**

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b)whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

11. The section then lists the relevant statutory rights for the purposes of the section which include the Working Time Regulations 1998.

12. It is therefore clear from this section that a statutory right must have been asserted in line with the wording of s104 and causation is established if the assertion of the statutory right is the reason (or if more than one the principal reason) for the dismissal. The past tense is used consistently throughout s.104 and on a plain reading of the statute an allegation about a proposed or prospective future breach is not within the scope of the section. The Tribunal identified the relevant case law and adopted the reasoning of *Spaceman* in paragraph 51 an entirely correct and succinct summary of the law.

13. The issue is whether it has been correctly applied to the facts found by the Tribunal. It is readily apparent from the facts found by the Tribunal, even if not stated in precise terms, that probably on 20 July, but definitely on 27 July the Claimant had been instructed to cover Mr Breitner's holiday and she had therefore been ordered and had been required to work for what she understood to be a 14-day stretch without a break when that instruction was given to her. It

explained why she was so upset. It also explains why ACAS advised her that it could amount to constructive dismissal.

14. It is also apparent on the face of the ET's judgment that the ET had found that when the Claimant raised her concerns with Mr Breitner again on 27 July about being required to cover his holiday work that she was "reasonably clear that there was a breach [of her Working Time rights]". This is a reference to the wording of s.104(3).

15. It therefore follows that from the ET's own findings of fact, the matter had "crystalised" to use the Respondent's term, when she was *instructed* to work that rota by Mr Breitner on 27 July 2018 (if not earlier on 20 July 2018). She had alleged that, by requiring her to work that pattern, her rights had been infringed. Her objections were overridden and Mr Breitner went on holiday. The Claimant was, in a very literal sense, left minding the shop and she worked as she had been ordered to. After she had done as requested and Mr Breitner had returned, she was dismissed because she had asserted her statutory rights.

16. It was therefore *not* an allegation of a future or intended breach and the factual scenario is very different from that in **Spaceman.** In that case the Claimant asserted during the course of his disciplinary hearing that he was going to be unfairly dismissed and it had already been decided to dismiss him. When he then was dismissed he sought to argue that his dismissal had been caused by his comment during the hearing. His assertion was thus to an anticipated, future breach of a statutory right, not a breach that had already occurred. In this case the Claimant had been instructed to work the disputed period and she had alleged that the instruction constituted a breach of her statutory rights. It was not a case of "If you ask me to do that then it will be a breach of my rights" as the instruction had already been given: she had been asked and the instruction was

repeated after her concerns had been raised. It is the instruction which was alleged to breach the Claimant's working time rights. She did not have to wait until she had completed the rota that she had asserted in good faith infringed her rights.

17. The Appeal must, therefore, succeed.

18. The Tribunal decision is a clear and elegant judgment dealing with all the relevant facts. It follows from the Tribunal's findings and my ruling above that the Claimant had asserted her statutory right in accordance with the statutory requirements of s104 on 27 July 2018. Since the Tribunal had found that the principal reason for the Claimant's dismissal was her complaint about her working hours, which did therefore amount to an assertion of her statutory rights, this is a rare case falling within s35(1)(a) of T**he Employment Tribunals Act.** There is no need to remit the case back to the Tribunal to consider liability. This Appeal Tribunal can exercise the power of the ET. Mr Ogilvy does not disagree. This is a case in which I should substitute a finding of automatic unfair dismissal contrary to s.104 ERA for the Tribunal's finding that the Claimant was not automatically unfairly dismissed by virtue of s104. It follows that on substitution with a finding of automatic unfair dismissal, the case now proceeds and be listed for a Remedy Hearing at the London Central Region.