

PALLANT

C H A M B E R S

ASSERTING A STATUTORY RIGHT

Under [S 104 Employment Rights 1996](#) (ERA) an employee is protected from being dismissed for asserting a statutory right. S104 of the ERA provides as follows (my underlining):

S 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.

In order to succeed in such a claim an employee must prove that the employer had infringed the right. In [Spaceman v ISS Mediclean Ltd \(T/A ISS Facility Service Healthcare\) UKEAT/0142/18](#) an employee alleged that

she was dismissed for asserting a statutory right because during her disciplinary hearing she had stated to her employer that he was going unfairly dismiss her. Her claim was dismissed because at the time she asserted the right it had not been infringed because she had not been dismissed.

Spaceman was recently considered in [Simoes v De Sede UK Ltd UKEAT/0153/20](#)

What was this about?

In this case the Claimant was instructed on 10th July 2018 to work from 28th July to 7th 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 20th July 2018 she raised her concern about it, pointing out that working 14 days on the trot without a break was treating her like a slave. She raised the same point again on 27th July 2018 (the day before her shift commenced). No satisfactory solution was found and Mr Breitner refused to engage temporary staff to provide cover. The Claimant covered Mr Breitner's holiday. A few days after his return from holiday Mr Breitner dismissed the Claimant.

At the Employment Tribunal hearing the following was found:

1. The Claimant raised the matter in good faith (S 104(2)(a) ERA) and was reasonably clear (S 104(3) ERA) that there was a breach of the Working Time Regulations 1998 (WTR) (this is one of the rights to which this section applies S 104(4)(d)).
2. Whether or not there was in fact a breach WTR was not relevant (S 104(2)(b) ERA).

3. The principal reason for the Claimant's dismissal was that she had made a complaint on 27th July 2018 about her working hours. (S 104(1) ERA).
4. The right had not crystallised as on 27th July 2018 she had not in fact worked the shift (applying Spaceman).

As a result her claim for automatic unfair dismissal for asserting a statutory right was dismissed.

What did the Employment Appeal Tribunal think?

The Honourable Mrs Justice Stacey OBE noted in her judgment that the past tense is used consistently throughout S 104 ERA 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. Thus confirming that the approach in Spaceman was correct.

However she went on to uphold the appeal and the basis for doing so was as follows:

1. On 10th July 2018 the Claimant had been instructed to cover Mr Breitner's holiday.
2. This was an order that required her to work (what she understood) to be a 14-day stretch without a break when that instruction was given to her.
3. The right asserted was not the requirement to cover Mr Breitner's holiday or work the days rather it was the requirement to work 14 days without a break.
4. At the time the Claimant raised the matter on 27th July 2018 (although it could have been earlier on 20th July 2018) the instruction to work 14 days without a break had been given.

5. The Claimant did not have to wait until she had completed the rota to assert that the right had been breached.

What can we take away?

The key in this case was the right that the Claimant believed she was asserting which was the right not to be instructed to work 14 days without a break rather than the actual working of 14 consecutive days with no break.

In practice I have come across relatively few cases where S 104 ERA is relied upon as the sole cause of action. The fact that the breach has to have taken place in many cases presents an insurmountable obstacle and it is usually easier to bring such claims as being protected disclosures under S 47B ERA. However it is important to note that there is no requirement under S 104 ERA for the assertion of the statutory right to be in the public interest and so consideration should always be given to an alternative ground of claim under S 104 ERA.

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