Case No: 2601081/18

EMPLOYMENT TRIBUNALS

Between:

Mr S Zivarattinam	**and**	Dunelm (Soft Furnishings) Ltd
Claimant		**Respondent**

At an Open Attended Preliminary Hearing

Held at: Leicester **On**: 6 September 2018

Before: Employment Judge Britton (sitting alone)

Representation

For the Claimant: In person
For the Respondent: Mr J Meichen of Counsel

JUDGMENT

1. The attempt to amend the claim to include one of automatically unfair dismissal pursuant to section 104 of the Employment Rights Act 1996 is dismissed, there no longer being any claim before the tribunal based upon unfair dismissal the same having been dismissed by the order of the tribunal of 27 February 2018.

2. The claim related to race discrimination under the Equality Act 2010 is dismissed upon withdrawal.

REASONS

Introduction

1. This case has a complicated history and suffice it to say that before me today is essentially to determine the following, namely as to whether there actually does remain a claim of unfair dismissal and if so can it be amended to include a claim for dismissal by reason of exercising a statutory right pursuant to section 104 of the Employment

Rights Act 1996 (ERA). If so, within that section as to whether it would have no reasonable prospect of success and thus should be struck out, or only little reasonable prospect of success, in which case there should be a deposit order made.

2. The Respondent's position is that the claim as presented cannot proceed because the Claimant lacks the necessary 2 years' qualifying service pursuant to section 108 of the ERA. It was not aware that the Claimant was seeking to amend to include exercising a statutory right until now.

3. In terms of whether therefore section 104 engages and where 2 years' qualifying service would not be needed is something which Mr Meichen has explored before me, the Claimant having given a full explanation of what his case is in that respect and my having read very closely the record of the grievance meeting which he had with his employer on 6 November 2017.

4. The final point to make is that for reasons that I shall come to I had identified some months ago in this case possibly a race discrimination claim, really because of two lines possibly to that effect in an email the Claimant sent in on 14 February 2018. In the discussion today, and from consideration of the grievance interview, it is quite clear that any such claim would on the face of it be untenable. In any event, the Claimant has made plain that he wishes to withdraw that claim and instead proceed on a claim for automatic unfair dismissal for exercising a statutory right pursuant to section 104 of the ERA.

5. That is what the agenda appeared to be for today but in fact it is more complicated than that and for reasons which I shall now come to.

The procedural history

6. The Claimant brought a claim (ET1) to the tribunal on 21 November 2017. He had ticked none of the boxes as to what his claim was about. The narrative provided little or no information to enable the tribunal to fathom out what the claim was about, other than dissatisfaction of the treatment of him by the Respondent, which of course is a well-known large business.

7. In that context, I have got more information today in that the Claimant was employed by Dunelm latterly at its Beckton Store in East London. He was employed as a Sales Consultant on what is described as the bespoke service. Not in dispute is that he was employed between 3 April 2017 and his dismissal on capability grounds on 27 November 2017. Of course, he has not got 2 years' qualifying service.

8. In any event given the state of that claim it was brought to the attention of this Judge on 8 December 2017; and pursuant to rule 27 of the 2013 Rules of Procedure, he directed that the Claimant should be written to and asked to provide full particulars of his claim and as to what the claim was for and that he was to do this otherwise his claim would be struck out.

9. Regrettably, that direction which this Judge had sent to the tribunal secretariat by email was not sent out. So, when this was spotted, it was then sent out by way of a letter from the tribunal dated 31 January 2018 to the Claimant requiring a response by 14 February 2018, failing which the ET1 would be dismissed.

10. As it is, the Claimant replied on 14 February 2018 and he set out in detail what he said his claim was about, which is the email I previously referred to. What he did not do was to address at all the issue of the 2 year qualifying service rule. He did not raise in there anything to the effect that he had been automatically unfairly dismissed by reason of exercising a statutory right.

11. Therefore, on 19 March 2018 this Judge struck out the unfair dismissal claim because the Claimant had not complied with the unless requirements of the letter of 31 January 2018 in that he had not provided as directed reasons why his claim could be accepted for jurisdictional reasons, ie would not be subject to the 2 year qualifying service rule.

12. My order was received by the Claimant. It was dated 27 February 2018 so at that stage, if the Claimant was unhappy so to speak with my adjudication, then pursuant to the 2013 Rules of Procedure commencing at rule 70, he could have applied for a reconsideration but he would have to have done this within 14 days of the sending out of my order or otherwise apply for an extension of time. This he has never done.

13. What it means is that the claim of unfair dismissal simply is no longer there. What it means is the Claimant cannot seek to resurrect it as there is no formal application before me today to reconsider and in any event he is well out of time. His remedy would have to be to appeal by original order to the Employment Appeal Tribunal.

14. If I am wrong on that or to turn it around another way had there been an application for reconsideration and I had been looking at whether or not to allow a claim based upon exercising a statutory right, then the Claimant in fact falls foul of the relevant provision which is section 104 of the ERA and for reasons which Mr Meichen has accurately set out.

15. In particular Section 104(1)(b) deals with where a Claimant has alleged that the employer has infringed a right of his, which is a statutory right. But, reading the very detailed record of the grievance meeting to which I have previously referred and which took place on 6 November 2017 (and which the Claimant has signed throughout as being accurate) his claim in this respect relates to the treatment of Ally. Without going into the whys and wherefores, Ally either resigned or was dismissed in August over an issue to do with whether or not he was entitled to take holiday that he had pre-booked or not. The Claimant's argument is that Ally was unfairly treated. Inter alia that therefore he raised this with the employer and that he should have been allowed to represent Mr Ally. That of course is if the latter decided to remain in the employment and it does not seem that he did.

16. Of course, that is not a statutory right of the Claimant that is engaged. If it is a statutory right that is under review, then it is Ally's right to not be unfairly dismissed, either directly or constructively, in that given scenario. Therefore, it is not the Claimant's right that has been infringed. Therefore, he cannot get within section 104(1)(b).

17. Finally, on that topic and at section 104(4) if the Claimant was seeking to argue that the right infringed was Ally's right to be represented at an internal disciplinary proceeding (and it is not at all clear that he is saying that) then it is not actually covered by section 104(4) and the relevant statute and regulatory provisions which come within statutory rights for the purposes of the protection of an employee.

18. Mr Meichen correctly pointed out that the right to be represented is at section 10 of the Employee Relations Act 1999.

19. What it means is that even if the section 104 exercise of statutory rights amendment to an unfair dismissal claim already dismissed had been granted, then on the scenario taken at its highest, jurisdictionally it would not get off the ground. It is misconceived.

20. The final point to make is that as I said earlier, I did just about detect a possible race related claim when I read the particularisation I had ordered and which came in an email of 14 February 2018. I say that because the Claimant wrote:

> "*There were instances where management scrutinised me for mistakes they made, and when I brought up claims of harassment and racial bullying management failed to take any action. This is not supporting the workforce in any means.*"

21. But, as it is, when we explored the very detailed answers the Claimant gave at the grievance at the hearing on 6 November 2017, he very honestly said that he himself had not been subjected to any racial harassment or bullying. That he heard from others that it had occurred but he had not experienced it himself and therefore he agreed with me that on the face of it there was no such claim. In fact, he had already taken advice from the CAB which was to not proceed with that claim and instead attempt to bring the claim based upon section 104 of the ERA. Put at its simplest, he has withdrawn that claim.

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Employment Judge Britton
Date: 15 November 2018

JUDGMENT SENT TO THE PARTIES ON
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FOR THE TRIBUNAL OFFICE

Notes

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