Neutral Citation Number: [2021] EWCA Civ 862

Case Nos: A2/2020/0440 & A2/2020/0457

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
Mr Justice Lewis

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2021

Before :

LORD JUSTICE HOLROYDE
LORD JUSTICE SINGH
and
LORD JUSTICE BAKER

- -

Between :

TRACY ROBINSON	**Claimant**
- and -	
HIS HIGHNESS SHEIKH KHALID BIN SAQR AL-QASIMI	**Respondent**

- -
- -

Ms Heather Williams QC and Mr David Stephenson (instructed by **TMP Solicitors LLP**) for the **Claimant**
Mr James Laddie QC and Mr Mark Greaves (instructed by **B P Collins LLP**) for the **Respondent**

Hearing dates : 5 & 6 May 2021

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Approved Judgment

Lord Justice Singh :

Introduction

1. I will refer to the parties as the Claimant and the Respondent, as they were before the Employment Tribunal ("ET").

2. The Respondent appeals against part of the decision of the Employment Appeal Tribunal ("EAT") given by Lewis J (as he then was) on 4 February 2020, concerning the defence of illegality in the context of a claim for "ordinary" unfair dismissal.

3. The Claimant cross-appeals against another part of the decision of the EAT, concerning interim relief in the context of a claim for "automatic" unfair dismissal based on the ground that she was dismissed for making protected disclosures.

4. Permission to appeal was granted to each party by Bean LJ on 11 July 2020.

5. At the hearing before us we heard submissions from Mr James Laddie QC, who appeared with Mr Mark Greaves for the Respondent; and from Ms Heather Williams QC, who appeared with Mr David Stephenson for the Claimant. I express the Court's gratitude to them all for their excellent submissions.

6. In this judgment I will address, first, the Respondent's appeal and, later, the Claimant's cross-appeal.

Factual Background

7. The Claimant began working for the Respondent on 23 March 2007. Her letter of appointment stated that she would be paid £34,000 per annum and that she would be responsible for her own tax and national insurance on the payment. (For ease of exposition I will refer in this judgment to "tax" so as to include national insurance as well as income tax). In June 2009 the remuneration payable to the Claimant was increased to £37,000 per annum.

8. From 2007 to 2014, the Claimant did not declare or pay any tax to Her Majesty's Revenue and Customs ("HMRC") on the payments made to her. The Respondent only became aware of this in 2014.

9. Around July 2014, the Claimant asserted that the terms of the contract were that she would be paid net of tax. If this was the case, then the Respondent would be responsible for the unpaid tax from the years 2007 to 2014. There was also correspondence between the parties in relation to whether the Claimant was an employee of the Respondent or was self-employed. If she was an employee, then the Respondent would be responsible for deducting her tax before payment was made to her, under the "PAYE" scheme. Some of this correspondence was relied upon by the Claimant as being protected disclosures under the "whistleblowing" legislation, in the Employment Rights Act 1996, as amended in 1998 ("ERA"), in particular section 43A.

10. From 1 July 2014, the Respondent deducted tax-equivalent amounts from the Claimant's monthly salary. These were not paid to HMRC but held by the Respondent in a separate account so that they would be available for payment to HMRC if necessary. The dispute between the parties as to liability for the tax remained unresolved from 2014 until 2017.

11. On 23 March 2017, a letter was sent from the Respondent's solicitors to the Claimant's solicitors making it clear that, if she failed to account for the tax due on the payments made to her in the past, the Respondent would have to terminate her contract.

12. On 19 May 2017, the Respondent wrote a letter to the Claimant summarily dismissing her. The letter stated that the reason for the dismissal was, among others, the failure of the Claimant to take responsibility for the tax that had been unpaid since 2007.

Procedural history

13. The proceedings have a complicated history but I will summarise it briefly here and will return to parts of it in more detail later at the appropriate juncture.

14. The proceedings before the ET (at London Central) were commenced on 25 May 2017. The Claimant complained, among other things, of "automatic" unfair dismissal on the ground that she had been dismissed for making protected disclosures; "ordinary" unfair dismissal; wrongful dismissal; and unlawful deduction of wages.

15. In the context of the claim based on protected disclosures, the Claimant applied for an interim order under section 128 of the ERA. On 30 June 2017 a hearing took place before EJ Stewart to consider that application.

16. On 26 September 2017 judgment was given by EJ Stewart granting the Claimant's application for interim relief.

17. The Respondent appealed against that decision. His appeal was heard on 21-22 December 2017 by HHJ Eady QC (as she then was).

18. On 15 February 2018 the EAT decision was sent to the parties. HHJ Eady QC allowed the Respondent's appeal on three grounds. The matter was remitted to EJ Stewart for consideration.

19. On 23 April 2018 the application for interim relief was heard again by EJ Stewart.

20. On 13 November 2018 the judgment of EJ Stewart was sent to the parties: in fact it was handed to them, as they were then on the second day of the substantive hearing.

21. On 12-16 November 2018 the substantive claims were heard by the ET, chaired by EJ Goodman, sitting with lay members.

22. In a judgment sent to the parties on 26 November 2018 the ET held that:

(1) The claims of unfair dismissal, statutory particulars of employment and wrongful dismissal failed for illegality.

(2) The Claimant was not subjected to detriment for making protected disclosures.

(3) Upon counsel for the Respondent undertaking that the £28,048.46 deducted from earnings would be paid to HMRC on the Claimant's account within 28 days, no order was made on the claim for unlawful deductions from wages.

23. On 27 November 2018 the Respondent applied to EJ Stewart for reconsideration of his decision granting interim relief which had been sent to the parties on 13 November 2018.

24. EJ Stewart refused that application. This judgment was sent to the parties on 23 January 2019.

25. On 17-19 December 2019 there was a hearing before Lewis J in the EAT. He heard the Claimant's appeal against the ET decision of 26 November 2018 and the Respondent's cross-appeal against parts of that decision which were adverse to him. He also heard the Respondent's appeals against the judgment of EJ Stewart of 13 November 2018, granting interim relief, and the decision by EJ Stewart of 23 January 2019, refusing reconsideration of that earlier judgment.

26. On 4 February 2020 Lewis J gave judgment. So far as material for present purposes:

(1) The Claimant's appeal against the ET's conclusion on illegality was allowed. The claims for "ordinary" unfair dismissal and wrongful dismissal were remitted to the ET for consideration of the question of remedies.

(2) Both decisions of EJ Stewart, which were the subject of the Respondent's appeals, were set aside, and were not remitted for reconsideration.

The Respondent's appeal

27. In order to understand what the Respondent's appeal is about, it is necessary now to set out in more detail both the ET's final judgment and what the EAT said about it.

The final judgment of the ET

28. As I have mentioned, the ET (chaired by EJ Goodman) sent its judgment to the parties on 26 November 2018.

29. The ET set out its findings of fact, including in relation to the contract and what it required by way of remuneration; the Claimant's employment status and in particular whether she was self-employed or an employee; and the circumstances of the tax investigation, in particular from 2014. Since there was a claim for automatic unfair dismissal on the ground that the Claimant had made protected disclosures, the ET had to make findings at length about whether there had been such disclosures. It

considered each of seven suggested disclosures individually. At para. 87, the ET concluded that the Claimant was not dismissed because of any protected disclosure. She was dismissed because the Respondent did not want to agree that she was an employee and that PAYE applied. The ET thought that, in reality, the dispute, and the reason for the Claimant's dismissal, was not about whether she should be on PAYE currently, but about who should pay the tax for the period 2007-2014, which was really a dispute about whether the agreed term for remuneration was for £34,000 gross or net.

30. In addressing the question of "ordinary" unfair dismissal, at para. 91, the ET found that there were potentially fair reasons for the dismissal. One potentially fair reason was as set out at section 98(2)(d) of the ERA: that the employee could not continue to work in the position that she held without contravention (either on her part or on that of her employer) of a duty or restriction imposed by or under an enactment, namely the failure to pay tax. If they were wrong about that, said the ET, the other potentially fair reason was that there was "some other substantial reason justifying dismissal": that the Respondent was at risk of participating in a fraud on HMRC if he did not deduct tax when she said that she was an employee. The ET then went on to consider whether that was a sufficient reason for dismissal. It concluded that it was not unfair to dismiss because there was deadlock over whether the term as to remuneration was gross or net of tax.

31. At para. 92, the ET went on to find that there was *procedural* unfairness because no meeting was held and the Claimant was not offered an appeal. To that extent the dismissal was unfair. However, the ET concluded at para. 93, they could see no reason to think that the Claimant would have said anything at the meeting that would have made any difference to the decision. The deadlock would have continued as it had done for three years by then. At best the Claimant might have remained in employment for another month or so while there was a meeting. The claim for "ordinary" unfair dismissal would therefore have succeeded but for the defence of illegality. At paras. 94-105, the ET addressed that issue.

32. Although, at para. 95, the ET referred to *Patel v Mirza* [2016] UKSC 42, [2017] AC 467, it noted that that was not a case about contract and cited it only for the following proposition:

> "A contract may be prohibited by a statute, or it may be entered into for an illegal or immoral purpose, which may be that of one or both parties, or performance according to its terms may involve the commission of an offence, or it may be intended by one or both parties to be performed in a way which will involve the commission of an offence." (Quoted from para. 3 of the judgment of Lord Toulson JSC)

33. The ET referred to a number of other authorities, including the decision of this Court in *Hall v Woolston Hall Leisure Ltd* [2001] 1 WLR 225; and the decision of the EAT in *Quashie v Stringfellow Restaurants Ltd* (UKEAT/0289/11). At para. 97, the ET quoted the following passage from the judgment of HHJ McMullen QC in *Quashie*:

> "The claimant who seeks the protection of the Employment Tribunal in the enforcement of her rights against the respondent should pay the taxes properly due upon the earnings which themselves support the administration of the Tribunal system. If she is not paying her way, why should she be entitled to free access to the administration of justice?"

34. At para. 98, the ET said:

> "Applying this law to the circumstances of this case, while the Claimant submits that the illegality is the initial arrangement to treat her as self-employed and require her to pay the tax, our view is that the illegality is that she did not declare and pay any tax at all, whether as employed or self-employed. This is not a contract illegal from its inception but in performance. …"

At para. 100, in similar vein, the ET said:

> "We concluded that the contract was illegal in performance, because the Claimant was paying no tax, and this was not because the Respondent had represented to her that they were making deductions for tax, nor because they colluded to avoid tax being paid. …"

35. From para. 101 the ET considered whether the position was altered by the Respondent's actions when the tax position came to light in 2014, or in 2015, when HMRC stated that she was an employee. Ultimately, at para. 104, the ET concluded that the Respondent's conduct did not "restore" the Claimant's access to the Tribunal to enforce her employment contract, when she never declared her earnings, even on a self-employed basis. Any illegality there may have been in arrangements for deduction of tax from staff wages on the part of the Respondent did not cure the Claimant's own failure to pay tax on any basis.

36. At para. 106, the ET dismissed the claim for wrongful dismissal, again on grounds of illegality. It took the same view in relation to the claim for statutory particulars of employment, at para. 107.

37. In turning to the claim for unlawful deductions, the ET said, at para. 108, that the deductions in respect of income tax and national insurance which the Respondent had made from 2014 could not lawfully be made but the claim again failed by reason of illegality.

The EAT judgment

38. As I have mentioned, the judgment of the EAT (Lewis J) was handed down on 4 February 2020.

39. The EAT held that the ET was entitled to find that, when the Claimant was performing the contract illegally, from 2007 to 1 July 2014, she would not have been entitled to enforce the contract. However, at the time of her dismissal three years later, when she was not performing the contract illegally, she was not prevented from enforcing her contractual and statutory rights. The Claimant's appeal against the decision of the ET on illegality was allowed and the claims for wrongful and unfair dismissal were remitted to the ET for remedies to be considered.

40. The EAT dismissed the Claimant's appeal on other grounds, which concerned the reason for dismissal and whether there was a detriment for making protected disclosures. This aspect of the decision is not before us. The EAT allowed the Respondent's cross-appeal in relation to two of the protected disclosures but disallowed it in relation to four of them. This aspect of the decision is also not before us.

41. Before I turn to the Respondent's appeal I will summarise the relevant legal principles on illegality in employment law by reference to the main authorities.

Authorities on illegality

42. In *Patel v Mirza*, the lead judgment was given by Lord Toulson JSC, with whom Lady Hale DPSC, Lord Kerr, Lord Wilson and Lord Hodge JJSC agreed.

43. The facts concerned a claim for restitution following a failed conspiracy to commit an offence of insider dealing. It is not the actual decision which is of importance for present purposes but the general statement of principles. Lord Toulson noted at the outset of his judgment that the application of the doctrine of illegality to a variety of situations had caused a good deal of uncertainty, complexity and sometimes inconsistency. From para. 95 Lord Toulson considered "the way forward". At para. 99, he said that there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim:

> "One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand."

44. At para. 101, Lord Toulson said that it is not a matter which can be determined mechanistically:

> "… I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which

> may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the caselaw."

45. At para. 107, Lord Toulson said:

> "In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors may be relevant. … I would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases. Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability."

46. At para. 109, Lord Toulson said:

> "The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. I put it in that way rather than whether the contract should be regarded as tainted by illegality, because the question is whether the relief claimed should be granted."

47. Lord Toulson summarised his judgment in the following way, at para. 120:

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a

> proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

48. It is of some interest to note that in *Patel* Lord Toulson twice referred to the decision of this Court in *Hall v Woolston Hall Leisure Ltd*: see paras. 6 and 38. He noted that this Court reversed the decision of the EAT in that case and held that the employee's acquiescence in the employer's conduct, which was defrauding the Inland Revenue by falsely pretending that her net salary was her gross salary, "was not causally linked with her sex discrimination claim and that public policy did not preclude her from enforcing her statutory claim." As that passage makes clear, the claim in the ET in that case was one for sex discrimination.

49. In *Hall* itself the main judgment was given by Peter Gibson LJ, with concurring judgments given by Mance LJ and Moore-Bick J. At para. 42, Peter Gibson LJ said that:

> "… It therefore follows that the correct approach of the Tribunal in a sex discrimination case should be to consider whether the applicant's claim arises out of or is so clearly connected or inextricably bound up or linked with the illegal conduct of the applicant that the court could not permit the applicant to recover compensation without appearing to condone that conduct."

50. In my view, although that case was about a statutory tort (sex discrimination), and not a contractual claim or a claim such as unfair dismissal, which is regarded as analogous to a contractual claim in the context of the defence of illegality, those passages contain an insight of more general importance. They emphasise the relevance of asking whether there is a sufficient causal link between the illegal conduct and the claim being made before the ET. This will not be decisive but it is a relevant consideration in performing the proportionality exercise now required by *Patel*. Both Mr Laddie and Ms Williams appeared to accept this during the hearing before us.

51. Both *Patel* and *Hall* were considered by this Court in *Okedina v Chikale* [2019] EWCA Civ 1393, [2019] IRLR 905, in which the main judgment was given by Underhill LJ. At para. 12, Underhill LJ noted that there are two distinct bases on which a claim under, or arising out of, a contract may be defeated on the ground of illegality. These are nowadays generally referred to as "statutory" and "common law" illegality. Statutory illegality does not arise in the present case. Common law illegality, as Underhill LJ explained, arises where the formation, purpose or performance of the contract involves conduct that is illegal or contrary to public

policy and where to deny enforcement to one or other party is an appropriate response to that conduct.

52. At para. 13, Underhill LJ also noted that traditionally employment lawyers have tended to refer to the judgment of Peter Gibson LJ in *Hall* as the authoritative statement of the distinction between the two kinds of illegality, with statutory illegality being referred to as the second category and common law illegality as the third. Peter Gibson LJ had identified the touchstone for the availability of a defence in "third category" cases as being that the employee has knowingly participated in the illegal performance of the contract.

53. At para. 62, Underhill LJ accepted the submission of counsel that it had not been necessary for the ET on the facts of that case to carry out an elaborate analysis by reference to the particular factors enumerated; although he also submitted that, if it had done so, the result would have been the same. Underhill LJ continued:

> "In his judgment in *Patel v Mirza* Lord Toulson was attempting to identify the broad principles underlying the illegality rule. His judgment does not require a reconsideration of how the rule has been applied in the previous caselaw except where such an application is inconsistent with those principles. In the case of a contract of employment which has been illegally performed, there is nothing in *Patel v Mirza* inconsistent with the well-established approach in *Hall* as regards 'third category' cases. As Mr Reade put it, *Hall* is how *Patel v Mirza* plays out in that particular type of case. Accordingly the ET was quite right to treat its findings about the claimant's 'knowledge plus participation' as conclusive; and the EAT was right to endorse that approach."

54. In my view, the key to a correct understanding of what was said by Underhill LJ in *Okedina* is to appreciate what the ET had said on the facts of that case. As recorded at para. 59 in the judgment of Underhill LJ, the ET found that the claimant had relied on the respondent to take care of her visa situation. They found that it entirely suited the respondent and her husband to keep the claimant away from the immigration appeal hearing because they were relying on false information and she had not signed the application form. They concluded:

> "We therefore find that the claimant did not knowingly participate in any illegal performance of her contract and that following *Woolston Hall* … the illegality does not render the contract unenforceable."

55. In the EAT the employer argued that that approach did not involve the kind of careful assessment of the public interest and of the requirements of proportionality required by *Patel*. In dismissing that contention, HHJ Eady QC said, in a passage quoted by Underhill LJ at para. 61:

> "Given that the respondent was not given permission to appeal the ET's findings as to the claimant's knowledge, the challenge to the ET's substantive Judgment must therefore be dismissed."

56. It is against that background that what Underhill LJ said at para. 62 must be read. That is entirely consistent, in my view, with the proposition that the "knowledge plus participation" test, long-established in *Hall*, represents a necessary, but not a sufficient, criterion for the defence of illegality to succeed. I will return later to academic commentary which supports that view.

57. In *Henderson v Dorset Healthcare University NHS Foundation Trust* [2020] UKSC 43, [2020] 3 WLR 1124, the lead judgment was given by Lord Hamblen JSC, with whom Lord Reed PSC, Lord Hodge DPSC, Lady Black, Lord Lloyd-Jones, Lady Arden and Lord Kitchin JJSC agreed. At para. 77, Lord Hamblen said that the decision in *Patel* does not represent "year zero". That would be to disregard the value of precedent built up in various areas of the law to address particular factual situations giving rise to the illegality defence. Those decisions remain of value unless it can be shown that they are not compatible with the approach set out in *Patel* in the sense that they cannot stand with the reasoning in *Patel* or were wrongly decided in the light of that reasoning. At para. 78, Lord Hamblen said that this was well illustrated by the decision of the Court of Appeal in *Okedina*. He cited with approval the passage which I have quoted earlier from the judgment of Underhill LJ, at para. 62 in that case.

58. In *Hall*, at para. 33, Peter Gibson LJ cited the decision of the EAT in *Coral Leisure Group Ltd v Barnett* [1981] ICR 503, at 508, with approval. He said that in that case the EAT asked itself the question whether any taint of illegality affecting part of a contract necessarily rendered the whole contract unenforceable by a party who knew of the illegality. In the case of a contract not for an illegal purpose or prohibited by statute the EAT answered that question in the negative, "holding that the fact the employee in the course of his employment committed an unlawful act did not prevent him from asserting thereafter his contract of employment against his employer."

59. The judgment of the EAT in *Coral Leisure Group* was given by Browne-Wilkinson J (as he then was). At p. 508 he said the following:

> "Can it really be the law that an employee who in the course of carrying out his duties knowingly breaks the law in one respect, is thereby automatically debarred forever from enforcing the rest of his contract of employment or of complaining of unfair dismissal? Has the lorry driver who breaks the speed limit thereby lost any rights against his employer even if the employer knows of the breach of the speed limit and does not object at the time? …
>
> The question to be answered is whether any taint of illegality affecting part of a contract necessarily renders the whole contract unenforceable by a party who knew of the illegality. In our judgment a distinction has to be drawn between (a) cases in

> which there is a contractual obligation to do an act which is unlawful, and (b) cases where the contractual obligations are capable of being performed lawfully and were initially intended so to be performed, but which have in fact been performed by unlawful means. As to category (a), the answer to the question depends on what is often called the rules of severance, i.e. how far is it possible to separate the tainted contractual obligations from the untainted? As to category (b), the question is whether the doing of an unlawful act by a party to the contract precludes his further enforcement of that contract.
>
> We are concerned only with category (b). Dealing with the matter, as we must, purely on the basis of the pleaded case, the employee knew nothing of the prostitutes until after he had entered the employment. It never became a term of his contract that he should employ prostitutes: it was a method whereby he carried out his general duty of preserving the employers' goodwill. As to category (b) above, we believe the law is correctly set out in *Treitel, The Law of Contract*, 5th ed. (1979), p. 362:
>
> > 'Where the illegality lies in the method of performance, a party is not "guilty" for the present purpose merely because he performs in an unlawful manner. Thus the shipowner in *St. John Shipping Corporation v Joseph Rank Ltd* succeeded in his claim for freight although he had overloaded his ship. On the other hand a person who intends at the time of contracting to perform in an illegal manner cannot enforce the contract; and in such a case even the other party may be unable to sue on it.'"

60. In my view, that last scenario is merely an example of where the defence of illegality may apply and should not be read as a complete statement of the legal principle at play.

61. At p. 509 he said:

> "We accordingly think the law to be this. The fact that a party has in the course of performing a contract committed an unlawful or immoral act will not by itself prevent him from further enforcing that contract unless the contract was entered into with the *purpose* of doing that unlawful or immoral act or the contract itself (as opposed to the mode of his performance) is prohibited by law. Applying that test to the present case, the fact that the employee procured and paid prostitutes in the course of carrying out his employment does not (if proved) prevent him from asserting that he was employed thereafter by the employers since, on the facts pleaded, he did not enter their employment with the *intention* of procuring prostitutes and

> there is no statutory or common law prohibition against the contract of employment by itself. Therefore the taint of illegality does not preclude the assertion by the employee of his contract of employment against the employers." (Emphasis added)

62. In my respectful view, that is not an entirely accurate statement of the relevant legal principle, because it focuses on the purpose or intention of the parties at the time of the formation of the contract. While that may be one example of where the defence of illegality may arise, it is not a necessary condition for it to do so. The defence may also arise where one or both parties perform the contract illegally at a later date even if that was not their intention or purpose at the outset.

63. In *ParkingEye Ltd v Summerfield Stores Ltd* [2012] EWCA Civ 1338, [2013] QB 840, Toulson LJ (as he then was) gave an interesting judgment which foreshadowed the judgment he was later to give in the Supreme Court in *Patel*. At para. 52, he said:

> "… Rather than having over-complex rules which are indiscriminate in theory but less so in practice, it is better and more honest that the court should look openly at the underlying policy factors and reach a balanced judgment in each case for reasons articulated by it."

64. At para. 53, he continued:

> "This is not to suggest that a list of policy factors should become a complete substitute for the rules about illegality in the law of contract which the courts have developed, but rather that those rules are to be developed and applied with the degree of flexibility necessary to give proper effect to the underlying policy factors. The decision in *Les Laboratoires Servier v Apotex Inc.* [2013] Bus LR 80 provides a good example. I would particularly endorse Etherton LJ's statement at para. 75 that:
>
> > 'What is required in each case is an intense analysis of the particular facts and of the proper application of the various policy considerations underlying the illegality principle so as to produce a just and proportionate response to the illegality. That is not the same as an unbridled discretion.'"

65. In my view, those passages, from *ParkingEye* and *Les Laborotoires Servier* continue to have relevance in the application of the proportionality principle now required by *Patel*.

66. It is also of some interest to note that, on the facts of *ParkingEye*, the Court clearly contemplated that there could be circumstances in which a temporal link between the illegality and the act complained of may be relevant. For example, at para. 77, Toulson LJ noted that the contract was not a one-off contract but was one which created a relationship to last for a minimum of 15 months. He noted that the contract could have been lawfully performed for the rest of the contractual term.

67. The fact that *Patel* is likely to call for a close scrutiny of all the circumstances of the particular case before a court or tribunal is also borne out by *Grondona v Stoffel & Co* [2020] UKSC 42, [2020] 3 WLR 1156, in which the main judgment was given by Lord Lloyd-Jones JSC. At para. 26, he said:

> "It is important to bear in mind when applying the 'trio of necessary considerations' described by Lord Toulson JSC in *Patel* (at para. 101) that they are relevant not because it may be considered desirable that a given policy should be promoted but because of their bearing on determining whether to allow a claim would damage the integrity of the law by permitting incoherent contradictions. Equally such an evaluation of policy considerations, while necessarily structured, must not be permitted to become another mechanistic process. In the application of stages (a) and (b) of this trio a court will be concerned to identify the relevant policy considerations at a relatively high level of generality before considering their application to the situation before the court. In particular, I would not normally expect a court to admit or to address evidence on matters such as the effectiveness of the criminal law in particular situations or the likely social consequences of permitting a claim in specified circumstances. The essential question is whether to allow the claim would damage the integrity of the legal system. The answer will depend on whether it would be inconsistent with the policies to which the legal system gives effect. The court is not concerned here to evaluate the policies in play or to carry out a policy-based evaluation of the relevant laws. It is simply seeking to identify the policies to which the law gives effect which are engaged by the question whether to allow the claim, to ascertain whether to allow it would be inconsistent with those policies or, where the policies compete, where the overall balance lies. In considering proportionality at stage (c), by contrast, *it is likely that the court will have to give close scrutiny to the detail of the case in hand*. Finally, in this regard, since the overriding consideration is the damage that might be done to the integrity of the legal system by its adopting contradictory positions, it may not be necessary in every case to complete an exhaustive examination of all stages of the trio of considerations. If, on an examination of the relevant policy considerations, the clear conclusion emerges that the defence should not be allowed, there will be no need to go on to consider proportionality, because there is no risk of disproportionate harm to the

> Claimant by refusing relief to which he or she would otherwise be entitled. If, on the other hand, a balancing of the policy considerations suggest a denial of the claim, it will be necessary to go on to consider proportionality." (Emphasis added)

68. An illuminating essay by Professor Alan Bogg on 'Illegality in labour law after *Patel v Mirza*' is to be found in a book edited by Sarah Green and Alan Bogg, Illegality after Patel v Mirza (2018, Hart). At pp. 275-276, he suggests that, given the "normative alignment" between cases such as *Hall* and *Patel*, it would be desirable to integrate the existing caselaw into the general *Patel* approach:

> "This would avoid an unsettling rupture with well-established and workable legal principles. It would also provide more determinate content to the abstract norms contained in the 'trio of considerations' in *Patel*. In due course, this may render the application of the trio more predictable in cases after *Patel*. How might this integration occur?"

69. Professor Bogg suggests that *Hall* is best understood "as an accessory liability case." In that case the fraud had been led and orchestrated by the employer as a principal and, in order to ascertain the relevance of illegality as a defence to the employee's claim, it was necessary to establish whether the employee was an accessory to the employer's illegality. It is not coincidental that "knowledge" and "participation" are central concepts in accessory liability in civil and criminal law. Professor Bogg continues:

> "Viewed through the lens of *Patel*, *Hall* cannot be viewed as a *sufficient* test for contractual illegality. This would be undesirable because 'knowledge' and 'active participation' do not allow the courts to examine matters of degree, such as the seriousness of the illegality, relative culpability, and the proximity of the illegality to the legal claim. However, once it is established that the employee is an accessory to the employer's illegality using the *Hall* test, the trio may then be applied in the ordinary way to determine whether illegality operates to bar the claim." (Emphasis in original)

70. I would respectfully agree but would add this. The concept of accessory liability will have no application to a context such as the present, where the illegality in performance of the contract was on the part of the employee. She is not an accessory to any illegality on the part of her employer. She was herself the principal. The broader considerations which Professor Bogg sets out, however, in my view are still of importance. The mere fact that one of the parties to a contract of employment has performed it illegally must be a necessary, but is not a sufficient, test for the doctrine

of illegality to apply. This would take no account of matters of degree, such as the seriousness of the illegality and the proximity of the illegality to the claim. The overall assessment of proportionality needs to be performed, having regard to the "trio of considerations" set out by Lord Toulson in *Patel*. At one point in his submissions before us Mr Laddie appeared to accept this, in answer to questions from Baker LJ, although, in his reply, he appeared to resile from this. In any event, in my view, this is the correct analysis.

The role of an appellate court in reviewing the assessment of proportionality

71. At the hearing before us Mr Laddie raised an issue as to the proper role of an appellate court when reviewing the assessment of proportionality in accordance with *Patel*. As he pointed out, this has not yet been the subject of authoritative decision.

72. In *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2018] EWCA Civ 84, [2018] 1 WLR 2777, Sir Geoffrey Vos C (as he then was) gave the main judgment, with which the other members of this Court agreed. In *obiter* remarks, at paras. 64-65, he considered the question of the role of an appellate court when an issue arises under *Patel*. He said:

> "64. In my judgment, the first question to ask is: in what circumstances should an appellate court interfere with a first instance application of the *Patel v Mirza* test? Both parties submitted that the court should only interfere in a trial judge's decision where the judge made an error of principle or reached a conclusion wholly outside the range of reasonable possibilities, just as is the case in relation to a contributory negligence evaluation … .
>
> 65. It seems to me quite clear that an appellate court should not interfere merely because it would have taken a different view had it been undertaking the evaluation. The test involves balancing multiple policy considerations and applying a proportionality approach. Accordingly, an appellate court should only interfere if the first instance judge has proceeded on an erroneous legal basis, taken into account matters that were legally irrelevant, or failed to take into account matters that were legally relevant. That would be the approach in any other situation where proportionality was in issue on an appeal and should, therefore, be the case here."

73. When that case reached the Supreme Court, the appeal was dismissed: [2019] UKSC 50, [2020] AC 1189. The main judgment was given by Lady Hale PSC, with which the other members of the Court agreed. In another *obiter* passage, she said, at para. 21:

> "… I should, however, record my reservations about the view expressed by the Court of Appeal as to the role of an appellate court in relation to the illegality defence: that 'an appellate court should only interfere if the first instance judge has proceeded on an erroneous legal basis, taken into account matters that were legally irrelevant, or failed to take into account matters that were legally relevant' (para 65). Daiwa point out that applying the defence is 'not akin to the exercise of discretion' (citing Lord Neuberger of Abbotsbury PSC in *Patel v Mirza* [2017] AC 467, para 175) and an appellate court is as well placed to evaluate the arguments as is the trial judge. It is not necessary to resolve this in order to resolve this appeal and there are cases concerning the illegality defence pending in the Supreme Court where it should not be assumed that this court will endorse the approach of the Court of Appeal."

74. Lady Hale may have had in mind the cases of *Henderson* and *Grondona* but in fact no subsequent Supreme Court authority has decided this question. For reasons that will become apparent when I address the Respondent's grounds of appeal, it is unnecessary for us to resolve it in the present case. I now turn to those grounds.

Respondent's Ground 1

75. Under Ground 1 Mr Laddie complains that the EAT wrongly considered that, in order successfully to deploy the defence of illegality, the Respondent would have to identify "contemporaneity" between the illegality relied on and the dismissal on which the Claimant founded her claim.

76. The Judge did not expressly impose such a requirement, or any requirement of a temporal link. Nevertheless, Mr Laddie submits that this must have been the test which the Judge applied. He relies first on the structure of the EAT's judgment: the Judge divided events into the period between 2007 and 1 July 2014, at paras. 88-90, and the period from 1 July 2014 to 9 May 2017, at paras. 91-98. Secondly, the Judge made that temporal link in a number of places in his judgment. The high point of Mr Laddie's submission in this respect is to be found in the following sentence, at para. 98:

> "The Respondent would have to identify (the burden being on him) the way in which the Claimant knowingly participated in the illegal performance of the contract after 1 July 2014."

77. In my view, Ground 1 proceeds on a misunderstanding of the EAT's judgment. It is well-established that a judgment of the ET should be read fairly and as a whole rather than taking one or two sentences in isolation. The same is true of judgments of the EAT. The particular sentence which forms the high point of Mr Laddie's argument

under Ground 1 must be read in its context. Just before that sentence the Judge had said:

> "There is no reasonable basis on which an Employment Tribunal could conclude that it was required as a matter of public policy in May 2017 to refuse to allow the Claimant to enforce the contract of employment, and rights arising out of it, because of the events that had occurred before 1 July 2014."

As Holroyde LJ suggested during the hearing, the next sentence, when read in the context of what had just preceded it, must be read as if some words were inserted just before it to the following effect:

> "*Before it could reasonably reach that conclusion in the circumstances of this case*, the Respondent would have to identify (the burden being on him) the way in which the Claimant knowingly participated in the illegal performance of the contract after 1 July 2014."

78. Furthermore, and fundamentally, when the judgment is read fairly and as a whole, its structure, in my view, is as follows. First, the Judge identified the errors of law into which the ET had fallen in the approach which it took to the question of illegality.

79. At para. 94, he said:

> "… The Employment Tribunal did not consider or identify the illegal conduct in which the Claimant knowingly participated after 1 July 2014 which would disentitle her from being able to enforce the contract, and the right not to be unfairly dismissed when she was dismissed in May 2017."

At para. 95, he said:

> "The Employment Tribunal also does not address the question of whether the Claimant's earlier conduct (prior to 1 July 2014) justified not allowing her to enforce her contractual and statutory rights when she was dismissed almost three years later. For those reasons alone, the decision of the Employment Tribunal on illegality is flawed."

Further, at para. 96, the Judge said:

> "… The question that the Employment Tribunal should have considered is, however, a different one. The question was whether the Claimant had knowingly participated in the illegal performance of the contract after 1 July 2014 and, *if not*, whether she should be precluded from enforcing her rights when she was dismissed in May 2017. The Employment Tribunal did not address that issue and did not consider the Claimant's conduct after 1 July 2014." (Emphasis added)

80. The words which I have emphasised in that passage make it clear that the Judge did contemplate the possibility that the Claimant had not performed the contract illegally after July 2014 but that the ET could still find that she should be prevented from enforcing her contractual or statutory rights. This alone is inconsistent with Mr Laddie's suggestion that the Judge imposed a requirement of "contemporaneity".

81. Having identified those various errors of approach by the ET, the Judge then had to consider the question whether he should remit the case to the ET or whether there was, in truth, only one answer which was reasonably available on this question: see para. 98. It was in that context that the sentence which forms the high point of Mr Laddie's argument under Ground 1 appeared. The Judge was not in that sentence setting out any principle of law, let alone one that required a temporal link or contemporaneity as a matter of law. It may be that Mr Laddie is entitled to submit that the Judge reached the wrong conclusion on the question whether he should remit to the ET but that is his complaint under Ground 3 and does not assist him in advancing Ground 1.

Respondent's Ground 2

82. Under Ground 2 Mr Laddie submits that the EAT wrongly concluded that the ET had not found illegality after 1 July 2014.

83. In this context Mr Laddie repeated a submission which he had made before the EAT, as recorded at para. 97. He submitted that the Claimant was still acting illegally after 1 July 2014; that she fraudulently, and dishonestly, alleged that the agreement was that she would receive £34,000 (later £37,000) net and that the Respondent was responsible for paying any tax due over and above that amount. The Judge rejected that submission on the following grounds. First, there was no finding by the ET that the fact that the Claimant (wrongly) claimed that the remuneration was net, rather than gross, gave rise to any illegality in the performance of the contract such as to preclude the Claimant from being able to enforce it. Secondly, the conduct (however characterised) was a claim for payment of more money than the Claimant was entitled to under her contract. That assertion did not mean that she illegally performed the contract between 1 July 2014 and May 2017 when she worked and received the amount contractually agreed. I would respectfully endorse those observations by the Judge.

84. Turning to the judgment of the ET, it is instructive to see how it formulated what it considered to be the illegality on the part of the Claimant. At para. 98, it said that:

> "The illegality is that she did not declare and pay any tax at all, whether as employed or self-employed."

In similar vein, at para. 100, it said:

> "We concluded that the contract was illegal in performance, because the Claimant was paying no tax, and this was not because the Respondent had represented to her that they were

> making deductions for tax, nor because they colluded to avoid tax being paid."

85. Nowhere did the ET say that the Claimant was continuing to act illegally in the performance of her contract between 1 July 2014 and 9 May 2017. Nor did the ET make any finding to the effect for which Mr Laddie contends, that there was a fraud committed on the Respondent, as distinct from HMRC, in the period from July 2014 to May 2017.

Respondent's Ground 3

86. Mr Laddie submits in the alternative to Ground 2 that, if the ET did not consider the Claimant's conduct after 1 July 2014, the EAT was wrong to conclude that there was no reasonable basis upon which the ET could conclude that she had illegally performed the contract after that date. He submits that, at the very least, the issue should have been remitted to the ET.

87. I do not accept those submissions. It seems to me that the Judge was entirely right to reach the conclusion which he did, having regard to the way in which the ET had formulated what the illegal performance was. When the EAT judgment is read fairly and as a whole, the burden of the point that was being made by the Judge is that, having regard to all the circumstances, the ET could not reasonably regard the Claimant's illegal performance of the contract between 2007 and 2014 as being sufficient justification for not permitting her to rely on her rights *in May 2017*. That appears from para. 96, in the passage I have quoted above. It also appears from para. 98, where the Judge said:

> "There is no reasonable basis upon which the employment tribunal could conclude that it was required as a matter of public policy *in May 2017* to refuse to allow the claimant to enforce the contract of employment, and rights arising out of it, because of the events that had occurred before 1 July 2014." (Emphasis added)

The same point can also be inferred from para. 99, where the Judge was dealing with the alternative argument relating to severance but which still sheds light on his thinking about the earlier issue of justification. There he said:

> "For the reasons given, I would deal with this case on the basis the respondent has not identified any illegal conduct in the period after 1 July 2014 which would *justify* refusing to enforce the contract and the conduct before then *did not justify refusing to enforce the contract almost three years later*." (Emphasis added)

88. In my view, what the Judge was doing in those passages was conducting the proportionality exercise which is required in accordance with *Patel*. He had regard to all the circumstances of the case. It is readily understandable that, if the Respondent

had dismissed the Claimant as soon as he had learnt of the illegal performance of the contract in 2014, the Claimant would have had great difficulty in contending that her illegal conduct did not justify refusing to enforce the contract. That was in effect what the Judge said at paras. 88-90 of his judgment, when he held that there had been no error in the approach taken by the ET to matters in the period from 2007 to 2014. Although Ms Williams did not expressly concede this point before us, she realistically recognised that it would have been a much more difficult argument at that stage.

89. What happened after 2014 was not merely the passage of time, as Mr Laddie submitted before us. Mr Laddie was also wrong to submit that the only relevant conduct which occurred after 2014 was that of the Respondent, for example in setting aside the tax due so that it could be paid to HMRC if necessary. For the three years from 2014 to 2017 the Claimant performed the contract by providing the work that was required of her. If Mr Laddie were right, the Respondent would have been entitled to refuse to pay her wages during some (or even all) of that period. At the hearing before us Mr Laddie candidly accepted that was the effect of his submission, although he mentioned that the Claimant might have had some other basis in law for recovering her wages, a claim based on *quantum meruit*. I cannot see how that outcome could possibly have been reasonable or proportionate.

90. Clearly the fact that there has been some illegal act by an employee at some point in the past may still be relevant to the question of proportionality required by *Patel*. It depends on all the circumstances, for example the seriousness of the illegality, how long the distance in time, how closely it is connected to the nature of the claim now being made and so on. In the circumstances of the present case, what Lewis J was saying in substance was that the ET could not reasonably have found that, in all the circumstances of this case, including the Claimant's illegal performance from 2007 to 2014 and what had happened between 2014 and 2017, there was sufficient justification for not permitting her to enforce the contract in May 2017. I respectfully agree.

Respondent's Ground 4

91. Under Ground 4 Mr Laddie submits that the EAT was wrong to hold (at para. 99) that severance was an alternative method of allowing the Claimant to enforce the contract and her statutory rights arising out of it.

92. As originally formulated in writing (at para. 55 of the Respondent's skeleton argument before this Court), this ground of appeal appeared to stand or fall with Grounds 2 and 3. It was submitted that, since the EAT was wrong to conclude that the contract was lawfully performed in the period from July 2014 to May 2017, it was also wrong to conclude that this period could be severed from the earlier period. As I understood them, Mr Laddie's oral submissions before us were broader. He submitted that, as a separate ground of appeal, the EAT was wrong to conclude that severance was available in a case of this kind.

93. In that context, Mr Laddie sought to distinguish the decision of the EAT in *Blue Chip Trading Ltd v Helbawi* UKEAT/0397/08, [2019] IRLR 128, on which Lewis J relied in the present case. Of course that decision concerned particular facts. In that case

Elias J (the then President of the EAT) was able to sever a contract by reference to the different periods during which the contract was being performed, in particular vacations as opposed to term time. During vacations the student concerned did not have a limit on the number of hours he was permitted to work in accordance with his leave to be in this country.

94. In my view, however, that factual distinction does not alter the underlying principle, which is that it is possible to sever a contract of employment when considering the defence of illegality. In the present circumstances, I accept the submission made by Ms Williams on behalf of the Claimant, that it was open to the EAT to sever the period from 2014 to 2017 from what had happened previously.

The Claimant's alternative grounds

95. In this Court the Claimant has filed a Respondent's Notice to the appeal, inviting this Court to uphold the decision of the EAT on two additional grounds. Strictly speaking it is unnecessary for me to address those grounds in view of the conclusion which I have reached on the Respondent's grounds of appeal. Nevertheless, I will address them briefly here.

96. On behalf of the Claimant Ms Williams submits, first, that the ET failed to apply *Patel*. It seems to me that Ms Williams is correct. In my view, the decision of the ET did not deal adequately with the modern test as set out in *Patel*. In the passages from the ET's judgment, which I have set out earlier, in particular at paras. 98 and 100, it appears to have proceeded on the understanding that the simple fact that the Claimant had performed her contract illegally by not paying the tax due in the period 2007-2014 was a complete bar to the enforceability of the contract, hence its reliance on the passage from *Quashie*, which I will repeat here for convenience:

> "The claimant who seeks the protection of the Employment Tribunal in the enforcement of her rights against the respondent should pay the taxes properly due upon the earnings which themselves support the administration of the Tribunal system. If she is not paying her way, why should she be entitled to free access to the administration of justice?"

In my view, that passage, from the judgment of HHJ McMullen QC, states the principle in categorical terms which are inconsistent with the reasoning in *Patel* and should no longer be applied by tribunals.

The basic award

97. The second submission made by Ms Williams in the Claimant's Respondent's Notice is that the EAT erred in refusing to remit the claim to the ET to consider whether it would be just and equitable to award her a basic award in respect of the years 2007-2014. We did not hear any oral submissions on this point.

98. The point arises from paras. 100-102 of the EAT judgment, where the Judge set out what he understood to be the consequences of his conclusions on the Claimant's appeal before him. He said that, in the result, the Claimant was entitled to bring a claim for wrongful dismissal and unfair dismissal in May 2017. She would therefore be entitled to seek compensation for the 10 weeks of notice that she should have been given and compensation for the unfair dismissal. He recognised that this issue would be subject to argument by the parties but that, on the findings of the ET, the latter would amount to compensation in terms of salary for the period of about one additional month when the Respondent would have employed her pending a further meeting before dismissal.

99. The Judge then turned to the question of the basic award for unfair dismissal. As he said, this is calculated by reference to a certain number of weeks' pay for each year of work, subject to any reduction considered just and equitable because of the Claimant's conduct. He said that it was clear that the ET would have considered it just and equitable to reduce the basic award by an amount referable to the years of service between 2007 and 1 July 2014. In the light of his conclusions on the issue of illegality, it was also clear that the ET would have concluded, and would have been entitled to do so, that the Claimant's conduct between 2007 and 1 July 2014 was such that it would not be just and equitable for her to receive any basic award in respect of that period. He also noted that the ET had not yet heard arguments about whether the basic award should be made for other periods.

100. Finally, for the sake of completeness, the Judge noted that the alternative way of dealing with the case, namely severance of the period of illegal performance from the period of lawful performance, would lead to the same result. The Claimant would not be able to recover any amount of the basic award for the period 2007 to 1 July 2014.

101. In the Respondent's Notice filed on behalf of the Claimant, and in brief written arguments (at para. 66 of the skeleton argument for this Court) Ms Williams submitted that, having correctly decided to remit the unfair and wrongful dismissal claims to the ET to consider the question of remedies, Lewis J should have left the assessment of the basic award for the ET rather than giving an indication of what the ET would (or should) do in relation to the period 2007 to 1 July 2014. This was a matter for the ET's assessment after hearing evidence and submissions.

102. I would note, first, that this is not an appropriate subject for a Respondent's Notice. The purpose of a Respondent's Notice is to invite this Court to *uphold* a decision of the court or tribunal below for additional or alternative reasons. Its purpose is not to complain about an aspect of that decision. That should be a matter for a cross-appeal.

103. Furthermore, and in any event, it does not appear to me that the Judge was making any decision at paras. 101-102 of his judgment. He was merely trying to assist the ET at the remitted hearing when it will consider the issue of remedies. It seems to me that it would be best for this Court to say no more about this issue, which can no doubt be the subject of submissions on behalf of the parties before the ET if it thinks fit.

The Claimant's cross-appeal

The legislation on interim relief

104. Section 128 of the ERA governs applications for interim relief pending determination of a complaint before the ET. Subsection (1) provides that an employee who presents a complaint to an ET that he has been unfairly dismissed and, under para. (a), that the reason (or if more than one the principal reason) for the dismissal is one of those specified in (among others) section 103A, may apply to the Tribunal for interim relief.

105. Under subsection (2) the application has to be made within a very short time: 7 days immediately following the effective date of termination. Subsection (3) provides that the Tribunal shall determine the application for interim relief "as soon as practicable after receiving the application." Subsection (4) provides that the Tribunal shall give to the employer not later than 7 days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.

106. The procedure on the hearing of the application and the making of the order is governed by section 129. Subsection (1) provides that the section applies where, on hearing an employee's application for interim relief, it appears to the Tribunal that it is "likely" that on determining the complaint to which the application relates the Tribunal will find (among other things) that the reason (or if more than one the principal reason) for the dismissal is one of those specified, including for present purposes section 103A.

107. Subsection (2) provides that the Tribunal shall announce its findings and explain to both parties (if present) (a) what powers the Tribunal may exercise on the application, and (b) in what circumstances it will exercise them. Subsection (3) provides that the Tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint, either to reinstate the employee or, if not, to re-engage him in another job on terms and conditions not less favourable.

108. It is common ground that, in practice, neither reinstatement nor re-engagement occurs. In practice what then happens is what is provided for under subsection (9):

> "If on the hearing of an application for interim relief the employer–
>
> (a) fails to attend before the Tribunal, or
>
> (b) states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection (3),
>
> the Tribunal shall make an order for the continuation of the employee's contract of employment."

109. A continuation of the contract of employment order ("CCO") is what was made by EJ Stewart in the present case.

110. Section 130 provides, in subsection (1):

> "An order under section 129 for the continuation of a contract of employment is an order that the contract of employment continues in force–
>
> (a) for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and
>
> (b) for the purposes of determining for any purpose the period for which the employee has been continuously employed,
>
> from the date of its termination (whether before or after the making of the order) until the determination or settlement of the complaint."

111. Although the present case is concerned with an allegation that an employee was unfairly dismissed on grounds of making protected disclosures, a right which was first introduced by amendment to the ERA in 1998, the legislation on interim relief has its origins in the Employment Protection Act 1975 ("the 1975 Act"), sections 78-80. At that time Parliament was concerned to protect in particular the rights of trade union members and those engaged in trade union activities. The concept of an order for the continuation of the contract of employment was first introduced in that context. The relevant legislation is now contained in sections 161-167 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act"). The interpretation section, section 167, provides in subsection (2) that Part X of the ERA shall be construed as one with sections 152-166 of the 1992 Act.

112. The relevant legislation has not, we were informed, been the subject of consideration by this Court. It has, however, for many decades been the subject of decisions by the EAT, which we were told have given rise to a settled practice in this area of law.

113. In *Taplin v C Shippam Ltd* [1978] IRLR 450, the judgment of the EAT was given by Slynn J (as he then was). He considered the legislation in section 78 of the 1975 Act. In particular, he considered the test for the making of an interim order for the continuation of the contract of employment. As I have noted, the statutory word used is "likely". The EAT considered whether that should be construed as meaning only a "reasonable prospect of success", a test which it rejected, at para. 21. On the other hand, at para. 22, Slynn J said that the EAT were not persuaded that the test was simply one of establishing a 51% probability of succeeding in his application. At para. 23, he said that the ET should ask itself whether the applicant has established that he has a "pretty good chance" of succeeding in the final application to it. That "colloquial phrase", as Slynn J described it, suggested by counsel received the endorsement of the EAT and, we were told, has been applied ever since.

114. In *Initial Textile Services v Rendell*, an unreported decision of the EAT dated 23 July 1991, the judgment was given by Wood J. He noted that it was conceded by both sides in that case that the sums paid by an employer pursuant to an interim order are irrecoverable. At that time the EAT was considering the provisions of sections 77-78

of the Employment Protection (Consolidation) Act 1978. Towards the end of his judgment Wood J said:

> "It may be that the effect of these provisions can be examined afresh when those who deal with legislative amendment are re-considering the matter, because it is abundantly clear that money paid under the provisions will be irrecoverable and there is no provision for paying it into a fund or into a court; there is no limit of time for the period which is relevant and there are clearly details of the relevant balance here which could well be examined."

115. In fact, despite that invitation to look at the matter again, Parliament has not changed the law. The parties before us were content to proceed on the basis that Parliament could have changed the received understanding, that the payments made pursuant to an interim order are irrecoverable, but has been content to leave the law as it is.

116. A helpful summary of the legislative framework and the authorities upon it can be found in the judgment of Cavanagh J in *Steer v Stormsure Ltd* [2021] IRLR 172, at paras. 27-40 and 52-56. We were told that case is under appeal to this Court.

117. In *Steer*, at para. 31, Cavanagh J described the continuation of contract interim remedy as "a valuable benefit" because the claimant has "a financial cushion" while they are waiting for the claim to be heard by the ET. He confirmed what has long been the common understanding in this area of practice that the benefit is particularly valuable because "the employee will not have to repay the monies received even if his or her claim ultimately fails." In similar vein, he made the point that the sums "will never be recovered, regardless of the underlying merits of the claim", at para. 54. At para. 56, he noted that the claimant does not have to offer a cross-undertaking as to damages and is not liable to repay the sums paid by way of interim relief, regardless of the final hearing.

118. As was common ground before us, the relatively high threshold required by the "likely" test ("pretty good chance of success") has "priced into it" the serious consequences which follow for an employer if an interim order is made.

119. In *Simply Smile Manor House Ltd v Ter-Berg* [2020] ICR 570, at para. 45, Choudhury J (President) said that:

> "Even cases where an applicant was able to establish a 51% chance of establishing employee status would not be eligible for interim relief."

He went on to say that:

> "True it is that if an initial assessment that a claimant has a pretty good chance of establishing employee status is later disproved, he or she would not be required to repay any interim payments that were ordered, and that might be prejudicial to the

> employer. However, it seems to me that that is a risk that applies in respect of any interim relief application, and not just one where employee status might be disputed."

The first judgment of EJ Stewart

120. The application for interim relief first came before EJ Stewart on 22 June 2017. In a reserved judgment sent to the parties on 26 September 2017 he granted the application and ordered that the contract of employment should continue until the determination or settlement of the Claimant's complaint of "automatic" unfair dismissal, with payment to be made monthly of such net sum as was appropriate after deduction of tax from a gross figure of £3,083.33. The EJ concluded, at para. 77, that the Claimant had "a pretty good chance of success in showing that the reason for her dismissal was because she made a protected disclosure and therefore she is entitled to interim relief." Earlier, at para. 67, he had taken the view that she had "pretty good prospects" of showing that she was an employee, notwithstanding that she had signed a document stating that she was to be paid a management fee and that she would be accountable for her own income tax.

121. An appeal by the Respondent against that interim order was heard on 21-22 December 2017 by HHJ Eady QC at the EAT. In an order sealed on 15 February 2018, the EAT allowed the appeal on three of the grounds of appeal but not the others. The ET's judgment was set aside and the matter was remitted to the same EJ for reconsideration. In setting out her reasons for making the order, at para. (6)(v), HHJ Eady QC said that the effect of her judgment must be that the ET's judgment is set aside:

> "That necessarily means that there is no continuing obligation on the [Respondent] to make payments under the contract of employment as previously ordered. That said, the ET's judgment was not formally set aside until my present Order on disposal …"

122. At para. (6)(vi) she said:

> "As the ET's Judgment has thus been set aside, it is a possible outcome of the remitted hearing that a different decision might then be reached by the ET such as to mean that the … Claimant will need to repay the sums previously paid by the [Respondent] pursuant to that Judgment. It is, however, also possible that the ET will, upon its reconsideration of its decision in the light of three points remitted to it, confirm its earlier Judgment. In the latter event, the payments already made will not fall to be recovered. At this stage I consider it would be premature to pre-empt the ET's decision on the remitted hearing by making any order for repayment at this stage."

123. Two of the three grounds on which the appeals were allowed are not material for present purposes, since they concerned the issue of protected disclosures. The third ground (ground 7) is of relevance because that concerned the ET's failure to address the issue of illegality. HHJ Eady QC held that this was an error of law: see para. 71 of her judgment.

The second judgment of EJ Stewart

124. After a hearing held on 23 April 2018, EJ Stewart gave a reserved judgment, handed to the parties on 13 November 2018 (the second day of the substantive hearing).

125. The Claimant's application for interim relief was again granted and it was ordered that the contract between the parties should continue until the determination or settlement of the complaint of unfair dismissal, with a monthly payment to be made of the same amount as had been previously been ordered net of tax.

126. The EJ considered the issue of illegality at paras. 15-18. He concluded that it was unlikely that the Respondent would succeed at trial on that issue. Accordingly, at para. 19, he concluded that the Claimant stood "a pretty good chance of success" and was therefore entitled to the interim relief sought. The critical part of his reasoning on the issue of illegality was to be found at para. 17. He said that the Claimant's failure to pay tax might cause her to fall foul of HMRC but he could not see that such failure made the contract illegal. He drew an analogy with a self-employed person, who is under a duty to declare truthfully his or her income to HMRC and to account for such tax as lawfully falls to be payable, but that does not mean that the contract under which the income was earned in itself becomes illegal.

The decision of EJ Stewart on the application for reconsideration of the interim order

127. In a decision sent to the parties on 23 January 2019, EJ Stewart refused the application for reconsideration of his judgment dated 9 November 2018. The critical part of his reasoning appears at para. 10, where he said that he doubted whether the concept of reconsidering a judgment regarding interim relief "in the interests of justice" was broad enough to justify the variation of that judgment on the basis of the eventual dismissal of the claims that the application for interim relief was based on. He noted that the final judgment of the ET was one that he could not have read; and was based on disclosed documents that he did not see and on oral evidence which he did not hear at the time that he made the interim order. He took the view, at para. 11, that it was impermissible for him to have regard to events which post-dated his judgment on the interim relief application.

The judgment of the EAT on the interim order

128. The EAT allowed the Respondent's appeal against the decision of EJ Stewart of 13 November 2018 to grant interim relief. The appeal against his refusal on 23 January 2019 to reconsider the 13 November decision was also allowed. Both decisions were set aside, and the issue of interim relief was not remitted to the ET. The EAT took the view that only one outcome was reasonably available to the ET, in view of the final decision which it had already reached by this stage, so there would be no point in remitting that issue.

129. The Judge considered the Respondent's appeals in relation to the decisions on interim relief at paras. 104-120. Having set out the relevant legislation and legal principles, he turned to the decision to grant interim relief at paras. 107-115.

130. He concluded that the decision of EJ Stewart did not begin to address the relevant issue of illegality and was wrong in its understanding of the position. This was because the EJ had not addressed the issue of whether there was illegal performance of the contract because the Claimant had not paid tax on it. EJ Stewart had considered that that was a matter between her and HMRC and not between her and the Respondent. That was clearly an error of law and the EAT concluded that the interim order therefore had to be set aside: see para. 109. I respectfully agree with the EAT and it was not suggested before us on behalf of the Claimant that it was wrong.

131. The Judge then addressed the question whether the application for interim relief should be remitted for reconsideration. He concluded that there was no reason for doing so as now the ET could only come to one conclusion, namely to refuse interim relief: see paras. 111-115.

132. In doing so, the Judge summarised the argument made on behalf of the Claimant by Ms Williams, at para. 114. This was an argument that was repeated by her before this Court. It is to the effect that there would still be a practical purpose served by remitting the interim application to the ET even though the outcome of the final hearing is now known. This is because otherwise the Claimant may be at jeopardy of having to repay the sums which had already been paid pursuant to the interim order. She also submits that not all of the sums which should have been paid at the time when the interim order was in place were in fact paid by the Respondent to the Claimant.

133. In my view, none of these matters is relevant to the issue which this Court now has to decide. Nothing I say should be taken to express any view on other matters that may be in dispute between the Claimant and the Respondent, for example whether she is under any liability to repay the sums which had already been paid by the Respondent pursuant to the interim order.

The Claimant's Grounds

134. There are four grounds of appeal.

135. Ground 1 is that the error which the EAT identified in the decision of EJ Stewart was not in the end material. I disagree. EJ Stewart had failed to consider the relevance of illegality to the claim for unfair dismissal. The question whether the Claimant had illegally performed the contract was plainly material to whether she should be entitled to claim for unfair dismissal.

136. Grounds 2 and 3 go together, as Ms Williams accepted before us. Ground 2 is that the Judge should have remitted to the ET. Ground 3 is that there was a failure to take into account relevant considerations. I do not accept ground 3.

137. The central issue (raised by Ground 2) is whether the EAT was required, having found there to be an error of law in the approach taken by EJ Stewart, to remit to the ET. In my view, this would have been completely unrealistic. The order was indeed an "interim" order. It was intended to continue the contract of employment until the final merits of the unfair dismissal claim could be considered and determined by ET. In the highly unusual circumstances of this case, however, the ET had already made its final decision and the outcome was one which was adverse to the Claimant. This was on the question of automatic unfair dismissal on grounds of her making protected disclosures: that was the only part of the claim in which an interim order could be made. There is no appeal before us in relation to that aspect of the case.

138. I should stress that this is different from the more commonplace situation, where there is simply an interim order of some kind and it turns out that the outcome of the final hearing is different. That does not mean that the interim order ought not to have been made, still less that it should be set aside. The crucial difference, however, in the present circumstances is that the EAT allowed the appeal against the interim order on the ground that there had been an error of law in the approach taken to the making of it. In those circumstances, the EAT then had to consider whether to remit the issue for redetermination in accordance with the law. There was no such requirement: indeed the EAT would have made itself a party to an absurdity, as well as an injustice, if it had required the ET to close its eyes to what everyone by then knew, which was the outcome of the final hearing.

139. That error of law also infected the refusal of the ET to reconsider the grant of the interim order. That therefore disposes of Ground 4 in the cross-appeal before us. I will, however, say a little more about that ground because the power of the ET to reconsider a judgment "in the interests of justice" has not previously been considered by this Court and because I do not entirely agree with the reasoning of the EAT in this respect.

140. The current rules on the procedure to be used in the ET are the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013 No. 1237). Rule 70 provides that a Tribunal may, either on its own initiative (which may reflect a request from the EAT) or on the application of a party, reconsider any judgment where it is "necessary in the interests of justice" to do so. On reconsideration, the original decision may be confirmed, varied or revoked. If it is revoked it may be taken again.

141. Rule 71 provides that, except where it is made in the course of a hearing, an application for reconsideration must be presented in writing within 14 days of the date on which the written record, or other written communication, of the original decision

was sent to the parties or within 14 days of the date the written reasons were sent (if later) and must set out why reconsideration is necessary.

142. This power of reconsideration has replaced the power to review decisions which the ET, and before it the Industrial Tribunal, had long enjoyed.

143. In *Outasight VB Ltd v Brown* (UKEAT/0253/14/LA), HHJ Eady QC considered Rule 70 of the 2013 Procedure Rules and observed, at para. 28, that its provisions can be contrasted with "the rather more complex system laid down by the provisions of Rules 34-36 of the 2004 ET Rules, which governed the review of judgments and other decisions". Further, at para. 30, she observed that:

> "There would not seem to be any immediately obvious reason why cases decided on that basis – the interests of justice – under the old Rules would not still be relevant to cases under the new. Moreover, although there were formerly specific grounds in the previous Rules as well as the more general interests of justice ground, I cannot see why one of the former, specifically identified grounds, should not form the basis of an application for a reconsideration of a Judgment in the interests of justice."

I would respectfully agree.

144. In the present case the EAT turned to consider the Respondent's appeal against EJ Stewart's refusal to reconsider his earlier judgment at paras. 116-120. Lewis J said, at para. 119:

> "The Employment Judge erred in his conclusion on the particular facts of this case. As indicated, the purpose of an interim application under section 128 of ERA is to enable the Employment Tribunal to preserve the position pending the final determination of the Tribunal in the claim in certain circumstances. Where that decision is known, it is permissible in the interests of justice to reconsider the decision on interim relief in the light of the decision on the complaint if the relevant procedural rules on time-limits permit. … If that occurs, then it is open to an Employment Tribunal to conclude that it is in the interests of justice to reconsider the interim relief decision. Indeed, if that were not possible, the likelihood is that there would be injustice. The Respondent would be compelled to comply with an order and pay money (here for a lengthy period of time) which is irrecoverable even though the premise on which the order was made transpired, within a very short period of time, to be incorrect."

145. I am not persuaded that the reasoning of the Judge in that passage was correct. In my view, the eventual outcome of a claim for unfair dismissal is not strictly relevant to whether an interim order was properly made or not. Furthermore, I note that the

Judge said that it would be "open" to the ET to reconsider its earlier order. It does not follow from that proposition that the ET was *required* to reconsider but that is the effect of what the EAT held.

146. Having said that, in my view, the EAT was right to reach the conclusion which it did. This is because it had already identified an error of law. That error of law then continued to taint the refusal to reconsider by EJ Stewart. I would accordingly uphold the decision of the EAT on this point but not for the precise reasons which it gave.

Conclusion

147. For the reasons I have given I would dismiss both the Respondent's appeal and the Claimant's cross-appeal.

Lord Justice Baker:

148. I agree.

Lord Justice Holroyde:

149. I also agree.