Illegality and separating a PD from an underlying dispute

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Robinson v His Highness Sheikh Khalid Bin Saqr Al Qasim UKEAT/0106/19/RN

(Judgment issued on 4th February 2020)

The Facts

Tracey Robinson ('C') was hired by Mr Cathcart on behalf of the Crown Prince Ras-al-Khaimah ('the Sheikh') in 2007 to carry out a number of duties including looking after the Sheikh's children and properties in the UK. The contract clearly stipulated that C was responsible for paying her own tax.

In early 2014 at a meeting between Mr Cathcart and C it transpired, when C stated *'she was paid in cash'* that C had not in fact paid any tax (income or otherwise) on the sums she had received from the Sheikh in the last 7 years. This understandably caused Mr Cathcart concern as he calculated that with penalties for non-payment the amount owed could be as much as £100,000. The ET concluded that given C was paid by bank transfer, this reference to being *'paid in cash'* was meant by her in the sense that she was paid in a way in which tax could be evaded and that C had 'chosen not to declare it'.

A dispute then developed whereby C was contending she was in fact an employee and not a self-employed person and that accordingly she was paid net, not gross of tax and the Sheikh should have made arrangement for her tax to be deducted at source. Whilst the Sheikh was firmly of the view that C was self-employed and he was not liable to pay C's tax, to protect himself from further potential liability he started deducting tax at source from 1st July 2014 onwards.

Between June 2014 and March 2017 C made a number of allegations in communications to the Sheikh (or his representatives) that he was failing in his legal duty to operate a PAYE system and was manipulating information to make it appear that herself and other staff were

self-employed when in fact they were employed. Given the ongoing dispute between C and the Sheikh as to who was responsible for the 7 years of unpaid tax and with no end to that dispute being in sight, C was ultimately dismissed by way of a letter dated 19th May 2017 with immediate effect.

C brought claims in ET for unfair and wrongful dismissal as well as whistleblowing detriment and automatic unfair dismissal, claiming that her allegations between 2014 and 2017 amounted to protected disclosures.

The ET Decision

The ET held that C had made a number of protected disclosures but that she was not dismissed because of those disclosures but because *'she wanted the Sheikh to pay her outstanding tax bill'*, which the ET considered could be severed or regarded as separate from the protected disclosures. Similarly, the detriment claims were dismissed due to a lack of the requisite causative link.

The ET held that whilst C was dismissed for a potentially fair reason (SOSR) the dismissal was nonetheless unfair because the Sheikh did not hold a final meeting with C before she was dismissed, nor provide C with the opportunity to appeal. Thus, the dismissal was procedurally unfair. In addition, as C should have been given 10 weeks' notice of dismissal but was summarily dismissed, the ET found that C had been wrongfully dismissed.

However, the ET nonetheless dismissed all claims. The unfair and wrongful dismissal claims were dismissed by the ET on the ground that C was not entitled to enforce her contract because she had performed the contract illegally by failing to declare and pay income tax. The contract was not illegal from its inception but was performed illegally by C as the contract made it clear to C that she was to pay tax and the ET concluded that C could not have believed that the tax was being paid for her.

The EAT Decision

The EAT held that the ET finding that the reason for dismissal was not the protected disclosures was not a perverse finding and that read as a whole the ET's Judgment gave adequate reasoning for reaching that conclusion. The EAT stated (Para 50):

'The ET was entitled to draw a distinction between the fact that the claimant was alleging that the respondent was not complying with his legal obligations in relation to operating a PAYE system for his employees (both claimant and others) and was allegedly manipulating information to achieve that result, and the attempt by the claimant to make the respondent responsible for any unpaid tax…the reason for the dismissal was the dispute about who was liable to pay the claimant's unpaid tax bill (rather than the claims about failure properly to operate a PAYE system for employees).'

The EAT held that the ET had erred in its approach to the question of detriment and the ET had failed to properly consider whether 'a change in reporting arrangements' amounted in the view of a reasonable worker to a disadvantage in the circumstances in which C worked. However, the EAT went on to find that the ET applied the right test and asked the right question in terms of causation (i.e. material influence – **Fecitt**).

On causation, the ET had concluded that the detrimental treatment of which C complained was in part influenced by the fact that the Sheikh's children were now in their 30's and were assuming responsibility for some matters that C previously dealt with but also in part because the Sheikh was unhappy about the fact C was expecting him to pay her substantial tax bill. Given the ET had found in relation to the dismissal that that latter aspect was separable from the protected disclosures themselves, the ET had found the causative link not to be made out for the detriment claims and the EAT considered that there was no error of law in the approach the ET had adopted in this regard.

The Sheikh had cross-appealed against the ET having found that a number of protected disclosures were made and the EAT upheld that cross-appeal in part, however ultimately given the EAT's finding in respect of causation for the whistleblowing detriment and dismissal claims, this finding of the EAT did not affect C's appeal against the decision of the ET.

Illegality

A (if not the) key issue in this appeal to the EAT was on the issue of illegality and the ET's finding that whilst in principle C's claims for unfair and wrongful dismissal were made out, they should nonetheless be dismissed because of C's illegal performance under the contract.

On behalf of C it was submitted before the EAT that the ET had erred as the ET had failed to apply the approach of the SC in **Patel v Mirza [2017] AC 467** by failing to assess the proportionality of refusing to allow C to enforce the contract. Alternatively, the ET erred in failing to sever the periods of employment before and after 1st July 2014 and allowing C to claim in respect of periods after 1st July 2014.

The EAT analysed the case-law in this area of illegality and the different circumstances in which it could arise. Ultimately the EAT confirmed that it was clear that C had knowingly performed the contract illegally and accordingly the ET's approach to matters in the period 2007 to 2014 did not demonstrate any error or any failure to have regard to the considerations in **Patel v Mirza** or the other authorities that were cited.

However, the EAT went on, by reference to previous authority (**Coral Leisure Group v Barnett [1981] ICR 503** and **Hall v Woolston Hall Leisure Ltd [2001] ICR 99**), that *'case law recognises that even if an employee has done illegal acts during the performance of the contract he or she may, nonetheless, be able to rely on the contract subsequently to enforce contractual rights'.*

The EAT found that the ET in this case had *'not considered or identified the illegal conduct in which the claimant knowingly participated after 1st 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.'* (Para 94)

Nor did the ET '*address the question as to whether the claimant's earlier conduct (prior to 1st July 2014) justified not allowing her to enforce her contractual and statutory rights when she was dismissed almost three years later.'* (Para 95).

The EAT concluded that there was no basis for concluding that there was illegality in C's performance of the contract *after* 1st July 2014, nor any basis to find that C's illegal performance of the contract prior to the 1st July 2014 would justify refusing to allow C the ability to enforce the contract (and the statutory rights arising out of it) almost three years later.

The EAT went on to state that even if that conclusion were wrong, the EAT would have severed the periods of illegal performance from those where there was no illegality as is permissible and was done in **Blue Chip Trading Ltd v Helbawi [2009] IRLR 128**

Comment

This case does not introduce anything that is a new or novel legal development, but it reminds us that whilst an employee will be unable to enforce an illegal contract, there are shades of grey and the extent and circumstances of an employee's illegal actions in the performance of the contract need to be carefully considered and not simply regarded as a jurisdictional fait accompli.

Furthermore, this case acts as a recent example which those advising respondent employers might wish to bear reference to when dealing with whistleblowing claims, especially those under s.47B ERA 1996.

In short, as practitioners we know that (relatively speaking) the threshold for establishing a protected disclosure and some form of detriment is low. Thus, such cases often turn on the causative element, for which the employer bears the burden of proving that the PD did not have a 'material influence' on the act / omission which caused the detriment.

Often however the PD may be regarded as somewhat interwoven (to a greater or lesser extent) with an underlying dispute which is the core or real reason for the detrimental action and which may have existed in any event and led to the same treatment regardless of whether or not there was a PD. However, given the terminology and threshold of 'material influence' we are understandably (and correctly) often cautious in seeking to advise and run a case on the basis that the underlying dispute (of which arguably the PD forms part) can be severed or separated from the PD itself. Whilst this case may not give us complete confidence in defending such whistleblowing claims on such a basis, it is certainly one to note and keep in our armoury for when the appropriate case to pursue such an argument may arise.

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