

Can a claimant who has not paid her taxes succeed in a claim for unfair or wrongful dismissal?

By [Katherine Anderson](#)
3PB Barristers

“If she is not paying her way, why should she be entitled to free access to the administration of justice?” That statement is too categoric, said the Court of Appeal in **Robinson v His Highness Sheikh Khalid Bin Saqr Al-Qasimi [2021] EWCA Civ 862 (10 June 2021)**. Denial of a claim must be a proportionate response to the illegality.

The facts

The claimant began working for the respondent in 2007 and her letter of appointment stated her per annum salary and that she would be responsible for her own tax and national insurance on the payment. From 2007 to 2014 she did not declare any tax or NI to HMRC on the payments made to her, and the respondent only became aware of this in 2014. In around July 2014, the claimant asserted that the terms of the contract were that she would be paid net of tax. If that were the case, then the respondent would have been 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. From July 2014 onwards the respondent started deducting tax-equivalent amounts from the claimant’s monthly salary and held them in a separate account so that they would be available for payment to HMRC if necessary. In 2017, the respondent’s solicitors wrote to the claimant’s solicitors that if the claimant failed to account for the tax due to the payments made to her in the past the respondent would have to terminate her contract. The respondent subsequently summarily dismissed her, stating the reason for the dismissal being, among others, her failure to take responsibility for the tax that had been unpaid since 2007.

The ET held that the claimant’s claims of unfair dismissal and wrongful dismissal failed for illegality, and that upon counsel for the respondent undertaking that the deductions from

earnings would be paid to HMRC on the claimant's account within 28 days, no order was made on her claim for unlawful deductions from wages.

The EAT allowed the claimant's appeal. The EAT held that when the claimant was performing the contract illegally from 2007 to July 2014, she would not have been entitled to enforce the contract, but by the time of her dismissal three years later, she was not performing the contract illegally, so she was not prevented from enforcing her contractual and statutory rights.

The Court of Appeal considered the authorities on illegality starting with *Patel v Mirza* in which Lord Toulson JSC summarised the lead judgment by stating:

"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... 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."

Considering *Hall v Woolston Hall Leisure Ltd*, the Court of Appeal considered that the main judgment of Peter Gibson LJ contained an insight of more general importance, emphasising 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 required by *Patel*.

The Court of Appeal doubted the statement in *Coral Leisure Group v Barnett* that the fact that a party committed an unlawful act would not itself prevent them from enforcing that contract unless the contract was entered into with the purpose of doing that unlawful act: the defence of illegality could arise where one or both parties performed the contract illegally at a later date even if that was not their intention at the outset.

The Court of Appeal held that the EAT had conducted the proportionality exercise which was required in accordance with *Patel*. The ET had failed to apply *Patel* and instead had relied on a statement in *Quashie v Stringfellow Restaurants Ltd*, that 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?”). The Court of Appeal held that that passage stated the principle in categorical terms which are inconsistent with the reasoning in *Patel* and should no longer be applied by tribunals.

Comment

This judgment contains an important statement of the key principles to be applied where an employer raises a defence of illegality, a potential defence which is often considered by employers in disputes over employee status where tax and national insurance have not been paid on the basis that the claimant was an employee.

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Katherine Anderson

Barrister
3PB Barristers

0330 332 2633
katherine.anderson@3pb.co.uk

3pb.co.uk