Appeal No. UKEAT/0222/13/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 5 December 2013

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MRS S WIJESUNDERA — APPELLANT

(1) HEATHROW 3PL LOGISTICS LTD (DEBARRED)
(2) MR M NATARAJAN (DEBARRED) — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JAKE DUTTON (Solicitor-Advocate)
For the Respondent	No appearance or representation by or on behalf of the Respondents (debarred)

SUMMARY

JURISDICTIONAL POINTS – Fraud and illegality

A Sri Lankan woman agreed to work for the First and Second Respondents, but made it clear she could not do so unless and until she was sponsored by them to do so, so that she had a valid work permit. For some months she remained in contact with the Respondents, until eventually she began to work in anticipation of, but without, the necessary work permit. During that period – prior to her actually working – she was seriously sexually assaulted by the Second Respondent.

Her work permit did materialise but after she had worked for over a year, during which she had again been subjected to serious sexual harassment.

An Employment Tribunal dismissed her claims because either she was not an employee, and could not claim, or she was but was employed under an illegal contract, which it would not condone.

On an appeal at which the Respondents were debarred from appearing, held that the ET had failed to consider s.40(1)(b) of the **Equality Act 2010** which protected applicants for employment (which she plainly was when the first assaults occurred); and had wrongly failed to identify the principles by which defences of illegality were to be considered when it wrongly asked whether the facts of the present case could be distinguished from two Court of Appeal authorities, neither of which established the applicable principles. Applying these principles as set out in **Hall v Woolston Leisure**, the claim save in respect of dismissal was not so inextricably bound up with the contract of employment or the illegality as to be defeated by the defence.

The ET had not resolved whether the First or Second Respondents were the employer, but the findings of fact justified only one answer. However, the question whether the First Respondent was liable under s.109 **EqA 2010** for the actions of the Second Respondent who alone had been the sexual predator was remitted to the ET, with observations as to the approach it should adopt.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. Employment Judge Ryan at Watford, for Reasons given on 21 March 2013, dismissed complaints that the Claimant had been unfairly and wrongfully dismissed and subjected to discrimination on the grounds of sex contrary to section 13 of the **Equality Act**, and harassed contrary to section 26 and section 40. The reason the Judge dismissed the claims was "because they are founded on illegality".

2. There is no appeal against his decision insofar as it related to unfair and wrongful dismissal. There is, insofar as he determined the discrimination claims, by which expression I include harassment. Insofar as the discrimination claims include a complaint that dismissal was an act of discrimination or harassment, the rejection of that, too, is subject to appeal.

3. By Further and Better Particulars the Claimant set out 17 separate acts of sexual harassment. Each was said to have been committed against her by the Second Respondent for whose acts she claimed both he and the First Respondent were responsible.

The facts

4. The essential facts, taken from the Judgment, are these. The Claimant is Sri Lankan. From 2006 until February 2009 she worked, having a work permit on her visa which permitted to do so, for a number of companies. That visa was renewed, with permission to work until March 2014, at the end of January 2009. But very shortly after that, she was made redundant. Conscious of the need to obtain work, without which she would have no continuing leave to remain in the country, she applied in May 2009 for work through an agency. She applied to the First Respondent. The Second Respondent, known as Mr Raj, interviewed her on behalf of the First Respondent. At that stage, therefore, plainly, he was acting either as an employee or agent

of the First Respondent. At that stage, too, the Tribunal found that she was an applicant for employment. She did not in fact begin work for the First and, on the Tribunal's findings, the Second Respondent (whom we shall call respectively H3PL and Raj), until 1 August 2009. Between May and August the Claimant was, on a number of occasions, invited to discuss the work which she was to do and invited to go to the offices of Mr Raj and also H3PL to do so. They were in separate places a few doors apart.

5. At this stage the Claimant had told Raj of her immigration status. She had said that she could do no work lawfully unless her work permit was transferred to permit her to work for H3PL. She was told that would be put in hand. During that period two serious sexual assaults were committed by Raj on the Claimant. Five other of the 17 incidents complained of also happened during that period.

6. From 1 August 2009 the Claimant (as the Tribunal put it, "from that day on") worked at the premises of both H3PL and Mr Raj's undertaking. She knew that she had no work permit. She chased her employer to obtain one, but the fact is that she knew that she had no lawful right to be in employment for H3PL or Mr Raj.

7. During that period she was repeatedly touched, sexually and inappropriately. There were other acts, bar dismissal, of which she complained which she said occurred to her during that period.

8. After two years, H3PL obtained a certificate of sponsorship to employ the Claimant, but at that time Raj told her that he no longer required her to work and she could go home, and it is plain that she did so. She complains that this act of dismissal from the service of H3PL and, insofar as she was in service with Raj, from that, was a further act of sexual harassment.

9. When matters came to the Tribunal, Raj was absent. He had been convicted of Customs offences and sentenced to six years' imprisonment in his absence, he having fled the jurisdiction. The First Respondent was, however, represented by counsel. Neither Respondent is represented before me on this appeal. The Respondent did not enter a Respondent's Notice and was debarred, and has not sought to lift the restriction. Accordingly I have had argument only on behalf of the Appellant from Mr Dutton, who appears for her here as he did below. Though he has been careful to ensure that his duty to place contrary authority before the court in these circumstances has been honoured, nonetheless it remains a fact that, in the findings which I shall make, there has been no argument addressed to me on behalf of the Respondent.

The Employment Tribunal decision

10. The Tribunal accepted the factual case put forward by the Claimant. At paragraph 39 it said it believed the Claimant that she had been subjected as she said, and described what had happened as sexual harassment of a serious and repeated nature.

11. However, it decided that the Claimant could have no successful claim, for reasons it expressed between paragraphs 53 and 57. It said:

> **"The authorities make it clear that at the very least the claimant must establish some relationship of identity between employee and employer before she can invoke the jurisdiction of the tribunal in any event. Insofar as the first two serious assaults were concerned, it appears to the tribunal that in fact they occurred before the claimant was employed by anybody, there being still uncertainty on the evidence as to precisely who the employer was at any given time. There is no basis for the tribunal having jurisdiction to award the claimant a remedy for these despicable assaults on that basis.**
>
> **54. To consider the case in the way potentially most favourable to the claimant we assume, for the sake of argument, that she was employed by either the first or the second respondents throughout the period of her claims, but it is clear that that analysis causes difficulty in relation to our findings of fact. Even if the claimant were employed throughout in this case, it was an employment that was illegal from the beginning. The claimant knew that she could not be employed by anybody in the United Kingdom unless she had a work permit, that is a certificate of sponsorship. The claimant knew that from her three previous employments and, notwithstanding the economic pressure on her to find work and support her family, she freely admitted throughout the course of the case that she was aware of this. Indeed, she was insistent upon Mr Raj obtaining such certification.**

> **55. So, assuming in the claimant's favour that she was employed throughout, and if she were not employed, of course, then the tribunal has no jurisdiction to give a remedy for harassment in relation to the earlier acts, the respondent's objection of illegality is rightly made. The illegality in this case was such that the employment situation, without a permit, was, as was stated in paragraph 34 in *Vakante*** [that being a reference to *Vakante v Governing Body of Addey and Stanhope School [2005] ICR 23*]**, unlawful from top to bottom and from beginning to end. It seem, to the tribunal, that there is no arguable distinction between the cases of *Vakante* and *Hounga*** [that being a reference to *Hounga v Allen [2012] EWCA Civ 609*] **and the instant case. Whilst they are factually different situations, the reality is that because of Mrs Wijesundera's understanding and acknowledgment of the need for the provision of the certificate of sponsorship, in other words, a work permit, she is unable to say that any of the acts were not inextricably bound up with the employment that she was seeking or had obtained.**
>
> **56. So far as the claims based upon the contract are concerned, the respondent's position is that much stronger because if the employment was illegal, as it was, then the claimant's claims of unfair dismissal, breach of contract and unauthorised deductions from wages, all being based upon the contract, must fall also. ...The Claimant's own admission shows that she was a knowing participant in the illegality throughout the process, albeit she may have been reluctant in doing so. "**

Some observations

12. First, these paragraphs must be read as a whole in order to understand the force of them. Second, paragraph 53 is a finding that the Claimant could not bring a claim in respect of sexual discrimination and harassment unless she was an employee at the time the acts occurred. The words "relationship of identity" are not easily understood, but may relate to the uncertainty as to whether Raj or H3PL was the employer. As to that, the Tribunal had found, at paragraph 25, that she worked for both. Since it is plain that she worked for both by an agreement reached at H3PL, where she met Miss Johnson, who was plainly a principal, employee or agent of H3PL and did so at Raj's request, this seems to be a finding that she was employed by both. Third, paragraphs 54 and 55 adopt a hypothetical case in order to deal what the Tribunal regarded as a knockout blow. Rather than analyse the facts such that a distinction was drawn between the period after the application for employment, but before work under it began, on the one hand, and work in employment, on the other, the Tribunal simply thought it easiest to assume what it thought would be in the Claimant's favour namely that she was employed throughout. This of course emphasises the assumption that the Claimant had no right to make a claim whilst not employed. The effect is as if the Tribunal had said "If she had a claim, then...", and the

conclusion the Tribunal reached would have been that it would have foundered on the rock of illegality.

13. Next, there was a clear finding, in [54], that the Claimant knew of and participated in the illegality. That was repeated at the end of [56].

14. Next, the Tribunal in [55] set out no particular analysis of any principle arising from **Vakante** and **Hounga** and did not make any factual assessment of all those circumstances of her employment or employments which might have informed the question whether she could bring a claim or not. The approach is akin to an estoppel approach (see the words "unable to say that any of the acts were not inextricably bound up..."). The effect was that the illegality in entering the contract, which was prohibited by law, trumped any other right she might have had which was before the Tribunal.

The submissions

15. Mr Dutton argued that those conclusions were in error of law. The Tribunal had clearly found (paragraph 15) that the Claimant had applied for work. It was not until after that that acts of harassment began. In taking the view that somebody who was discriminated against or harassed prior to actually working as an employee under a contract of employment could not sue in respect of those acts the Tribunal had simply ignored section 40(1)(b) of the **Equality Act 2010.** That section conveys the prohibition in the Equality Act of that which is, by section 26, defined as harassment. Section 40 provides, so far as material:

> **"(1) An employer (A) must not, in relation to employment by A, harass a person (B)—**
>
> **(a) who is an employee of A's;**
>
> **(b) who has applied to A for employment."**

16. The Act thus contemplates that a person who is not an employee may successfully complain of harassment where he has applied for employment. There is a limitation, lest it be overlooked, upon the circumstances in which somebody who has ever applied to an employer can make a claim against that person or company for harassment. That is contained in the six words in 40(1) "...in relation to employment by A". There has to be a link between the harassment and the employment, but it is plain, as it seems to me, that the factual circumstances set out here were capable of coming within section 40(1)(b). The harassment which the Tribunal found to have taken place was committed upon her by Raj when she was expecting employment with Raj and H3PL, having applied for it.

17. At that stage, it should be noted, that on the findings of fact the Claimant had not known of any illegality which her employment might involve, since she was plain that there had to be a work permit in place before she began any work. She therefore, at this stage, had no knowledge, nor did she participate in, any illegality: that was to follow when she actually began work. It follows from that that the Tribunal was in error in saying, in paragraphs 53 and 55, that the Tribunal had no jurisdiction because the Claimant was not an employee at the time. The Tribunal was also in error in applying any test of illegality as a bar to her claim at that time. At the time the acts occurred, there could be, on the findings of fact, no arguable case that she was doing anything illegal, and the doctrine of illegality, whether addressed contractually or in tort, simply had no bearing upon the jurisdiction of the Tribunal.

18. Accordingly, I accept that the first ground of appeal is made out.

19. The second ground addresses the illegality conclusion. Here, Mr Dutton argues that the Tribunal took too absolutist an approach. It did not apply the appropriate legal tests. The proper legal approach was not to be gained simply by asking whether was "an arguable

distinction" between the cases of **Vakante** and **Hounga**, on the one hand, and the instant case, on the other. The principle to be applied emerges from a number of cases. In **Leighton v Michael** [1995] ICR 1091 the Appeal Tribunal, presided over by Mummery J (as he was), considered complaints that the applicant, who knew that tax and insurance would not, as they should be, be deducted from her wages by her employer, complained that she had been discriminated against unlawfully on the ground of sex. The Tribunal held that she could not pursue her complaint because her contract of employment was tainted with illegality. After reviewing the case-law, the majority, with whom the minority agreed in the result but not in the reasoning, first noted (see paragraph 9, page 1098 of the report) that the class of those who were protected in respect of the right to complain of discrimination was wider than the class of those entitled to claim unfair dismissal and redundancy. The definition of employment was wider in such circumstances. Then the majority held that cases in which an illegal contract of employment would be held to disqualify applicants for unfair dismissal and redundancy payments were distinguishable from claims under the **Sex Discrimination Act.** In the former, dismissal was an essential part of the cause of the action, but:

> **"11. Protection under the 1975 Act against sex discrimination involves a reference to the contract to determine whether the person is 'employed' within the meaning of the statute, but the claim of sex discrimination does not involve enforcing, relying on or founding a claim on the contract of employment. In brief, the right not to be discriminated against on the ground of sex is conferred by statute on persons who are employed. There is nothing in the statute to disqualify a person, who is in fact employed, from protection by reason of illegality in the fact of, or in the performance of, the contract of employment. There is nothing in public policy to disqualify a person from the protection of the statute, if the claim to the statutory protection is not founded on, or is not seeking to enforce, contractual obligations."**

20. The importance of those passages is their adoption as entirely correct by the Court of Appeal in the subsequent decision of **Hall v Woolston Hall Leisure Limited** [2001] ICR 99 (CA). In that case the employee had been engaged upon a contract of employment, which at its inception, was lawful. It became llegal as performed when her payslips showed her gross pay as £250 per week, whereas in fact £250 was her net pay. The payslips showed deductions

which had not in fact been made. The Tribunal refused to permit her to succeed in claims made under the Sex Discrimination Act because the contract was illegal as performed. In the Court of Appeal Peter Gibson LJ, in the leading Judgment, conducted an extensive review of authority. He set out the principle, which the common law adopted, where illegality was raised as a defence in relation to a claim in tort. He noted that authorities supported a pragmatic approach, described by Bingham LJ in **Saunders v Edwards** [1987] 1 WLR 1116 at 1134:

> **"'When the plaintiff's action in truth arises directly ex turpi causa, he is likely to fail .... Where the plaintiff has suffered a genuine wrong, to which the allegedly unlawful conduct is incidental, he is likely to succeed."**

At paragraph 42 he said this:

> **"As ss. 65 and 66 of the 1975 Act indicate, sex discrimination which is unlawful under the 1975 Act is a statutory tort, to which the tortious measure of damages is applicable if the remedy in s. 65 (1)(b) is that chosen by the Tribunal as being the just and equitable remedy (see *Ministry of Defence v Cannock* [1994] I.C.R. 918 at pp. 936-7). 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."**

21. At paragraph 46 he said that, in his judgment:

> **"...it could not properly be said that the complaint of sex discrimination by dismissal** [that being a reference to the facts of the case before him] **was based on the contract of employment, still less that her claim of such discrimination was so closely connected with or inextricably bound up or linked with the acquiescence by the employee in the unlawful failure by the employer to deduct PAYE and NIC that the court would be seen to be condoning unlawful conduct by the employee. It is the sex discrimination that is the core of the complaint, the fact of employment and the dismissal being the particular factual circumstances which Parliament has prescribed for the sex discrimination complaint to be capable of being made. The illegality consists only of the employer's mode of paying wages. In my judgment *Leighton v Michael* was rightly decided and the awareness of the employee that the employer was failing to deduct tax and NIC and to account to the Revenue does not of itself constitute a valid ground for refusing jurisdiction."**

22. It is plain that he regarded it as relevant that there had been no active participation in the illegality in that case. In the Judgement of Mance LJ a similar approach is taken though not in

identical words. He too cited **Leighton v Michael** with no disapproval. He expressed the principle, at paragraph 79, in these terms:

> **"While the underlying test therefore remains one of public policy, the test evolved in this court for its application in a tortious context thus requires an inextricable link between the facts giving rise to the claim and the illegality, before any question arises of the court refusing relief on the grounds of illegality. In practice, as is evident, it requires quite extreme circumstances before the test will exclude a tort claim."**

That last sentence gives some clue to the closeness which the link has to constitute in order to defeat a claim. Moore-Bick J (as he was) agreed expressly with Peter Gibson and Mance LJJ that **Leighton v Michael** was correctly decided and that

> **"...even if Mrs. Hall would have been prevented by reason of illegality from enforcing her contract of employment as such she would nonetheless be entitled to recover substantial compensation for wrongful discrimination under the Sex Discrimination Act 1975."**

23. **Hall v Woolston**, being Court of Appeal authority and stating principle, remains in my view the case law to be applied. Mr Dutton took me next to **Vakante** at first instance, reported at [2004] ICR 279. The case was heard at the Appeal Tribunal before a Tribunal presided over by Burton J. He did so because although the case went to appeal, at which the Judgment of the Appeal Tribunal was upheld, the Tribunal commented, at paragraph 14, upon findings made in the same case when, at an earlier stage, it had been before the Appeal Tribunal before being remitted, the appeal which the Burton Tribunal considered being the appeal following the decision on remission. There, the Appeal Tribunal, per HHJ Serota QC ([2003] ICR 290), had noted that, applying the test set out by Peter Gibson LJ, it seemed to the Appeal Tribunal:

> **"...prima facie, that if a claim falls within section 4(2)(b) of the Race Relations Act 1976, it would be so closely or clearly connected, or inextricably bound up or linked with illegal conduct, that no claim should lie."**

24. That section made it unlawful for a person to discriminate against an employee:

> **"in the way he affords him access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them..."**

25. Judge Serota had observed that claims falling within section 4, but outside 4(2)(b), might not be caught by the same principle. It is plain, submitted Mr Dutton, that all of the complaints made by Mr Vakante, save two, were covered by 4(2)(b). They were matters which plainly had a close and intimate connection with employment, though only relevant if an individual were employed. They were benefits and matters ancillary to the employment itself and therefore intimately bound up with the contract of employment.

26. The particular complaints made by Mr Vakante were set out in paragraph 15 of the Court of Appeal decision. It is unnecessary to set them all out. The illegality relied on in that case was that the claimant was a Croatian national. He applied for a post as a graduate trainee maths teacher and falsely indicated in his application that he did not need a work permit. He did. He alleged that, in the matters identified at paragraph 15, all of which have, on the face of it, a close, indeed intimate relationship with employment, save arguably two to which I shall come, that there had been discrimination against him on the grounds of his race.

27. The Court of Appeal applied the principle set out in **Hall** (see paragraph 33). Mummery LJ observed that the strength of that approach (see paragraph 8) was:

> **"...that it is flexible. It enables the tribunal to avoid arbitrary and disproportionate outcomes and to reach sensible and just decisions in most cases. The proper application of the test should produce reasonably consistent and predictable results, more so, I am inclined to think, than would be the case if, in cases of illegal conduct involving the applicant, the tribunal were given a general statutory discretion, constrained by specific limiting factors."**

28. On the facts of **Vakante** he thought the application of the **Hall** principle was "comparatively straightforward" (paragraph 33). It was not a case where the illegal conduct was that of the employer in the performance of the contract and the involvement of the

applicant one of awareness of the illegal conduct and deriving benefit from it. It was not a case where the applicant had been working in good faith and believed that it was lawful for him to work. The illegal conduct was rather (see paragraph 34):

> **"(a) ….that of the applicant; (b) it was criminal; (c) it went far beyond the manner in which one party performed what was otherwise a lawful employment contract; (d) it went to the basic content of an employment situation – work; (e) the duty not to discriminate arises from an employment situation which, without a permit, was unlawful from top to bottom and from beginning to end."**
>
> **It was not a case of innocent oversight or an acceptable misunderstanding. The applicant had been clearly informed in writing of the true position..."**

29. He agreed that, on those facts, the complaints by the applicant of his discriminatory treatment were so inextricably bound with the illegality of his conduct in obtaining and continuing the employment by the employer, that if it were to permit him to recover compensation for discrimination, the Tribunal would appear to condone his illegal conduct. Without adding observations of their own, both Lord Slynn of Hadley and Brooke LJ agreed.

30. **Hounga v Allen** was the next consideration of this general territory by the Court of Appeal. Prior to it, a similar case came before this Tribunal, **Zarkasi v Anindita** [2012] ICR 788, that of an Indonesian, who had entered into a contract of employment to work here, which she knew from the outset was unlawful. There were allegations of sexual discrimination. Before this Tribunal, the parties had accepted that claims made under the **Race Relations Act** by the Claimant of direct and indirect discrimination and harassment were:

> **"..not based upon a contract and therefore not affected by any illegality of the contract, if there was such illegality properly described."**

31. In **Hounga** the court considered a case in which an illiterate Nigerian national, in order to come to England to work, made an affidavit before the High Court in Nigeria by which she untruthfully declared herself to be a relation of the family. She lied to immigration officers on

entering. Having begun to work, she suffered serious physical abuse from her employer. Ultimately she was dismissed and evicted. She brought a number of claims including a claim for dismissal on racially discriminatory grounds under the Race Relations Act. The Tribunal concluded that the dismissal had been an act of unlawful direct race discrimination, a conclusion upheld by the Appeal Tribunal considering **Hall** and **Vakante.** The employer appealed. It held that the claim for dismissal on racially discriminatory grounds was barred. To have allowed it would have been to have condoned her illegal conduct.

32. In the Judgment of Rimer LJ he accepted that **Hall's** case established the relevant principles. The application of those principles had required **Hall's** case to be decided one way and **Vakante's** another (see paragraph 58). He added, that:

> **"In *Hall's* case the claimant was - at most – only on the very fringe of the illegality tainting her employment contract. She was aware of the employer's illegal performance of it, but was not herself participating in it and could in practice do nothing about it. The court's assessment was that, on the facts, it could not be said that her complaint of her discriminatory treatment was so inextricably tied up with her acquiescence in the employer's illegal conduct that to permit her to pursue her claim would amount to condoning unlawful conduct by her. The illegality related only to the employer's mode of paying her wages, whereas the core of her complaint was in no manner related to that: it was based on sex discrimination. The court effectively acquitted her of any illegal conduct at all and the decision was therefore an unsurprising one."**

He contrasted with that the vice in **Vakante's** case, which was that the whole employment relationship had been achieved by his dishonest and criminal conduct, with the result that the duty not to discriminate, which he was claiming to enforce, arose from an employment situation which was unlawful from top to bottom and from beginning to end. He thought that, on the facts of **Hounga**, she could be in no better position than was the claimant in **Vakante.**

33. It is at this point that I need to return, as I indicated I would, to the two complaints by Vakante which would not necessarily fall within the scope of the matters referred to in paragraph 4(2)(b) of the **Race Relations Act 1976**. Those were a complaint that the head of the

school at which Mr Vakante taught had supported a Miss Lennon's action in relation to his dismissal and ignored the applicant's complaints about her, and had dismissed the applicant on the grounds of his race (complaints (h) and (o)). As to those, the Judgment of Mummery LJ said, paragraph 26:

> **"...they were so closely connected with the deliberate illegality of that contract on** [the Applicant's] **part that, were the tribunal to allow the originating application to go forward to a hearing, it would appear to be endorsing the applicant's illegal actions."**

34. The matter which came for decision in **Hounga** was that of dismissal. There had been an argument before the court that the complaints which Miss Hounga wished to bring could be divided into two sections. One was "dismissal discrimination". The other was "non-dismissal discrimination". As to the non-dismissal discrimination, she could not proceed with that, but that was upon the basis that she was prevented from doing so by the bar of illegality. The bar to those claims proceeding was that her actions meant that she fell foul of the dispute resolution provisions in section 32 of, and Schedule 2(2) to, the **Employment Act 2002** and the regulations made under section 32. There is no general statement in **Hounga** to the effect that those allegations, had they survived the dispute resolution procedures, could not have been pursued by Miss Hounga. The principle to be applied would, on the Judgments, have been that set out in **Hall**.

35. Against the background of those cases, upon the decisions of which I have already commented in passing, Mr Dutton argued, first, that there were two approaches which might be taken once it was appreciated that the rule was not an absolute rule, meaning that any claim which related to a contract which was illegal in its inception or performance should be struck out. The first was that there would only be a jurisdictional bar if there was a sufficient link between the detriment complained of in the discrimination claim and the illegality. A second

interpretation of the authorities would be that a broader point was being taken, namely, whether to permit the claim to be heard would amount to condoning the illegality.

36. In paragraph 9 of **Vakante** Mummery LJ observed that:

> **"Although *Hall* uses some of the familiar language of legal and factual causation ('connection', 'link'), the test does not restrict the tribunal to a causation question. Matters of fact and degree have to be considered: the circumstances surrounding the applicant's claim and the illegal conduct, the nature and seriousness of the illegal conduct, the extent of the applicant's involvement in it and the character of the applicant's claim are all matters relevant to determining whether the claim is so 'inextricably bound up with' the applicant's illegal conduct that, by permitting the applicant to recover compensation, the tribunal might appear to condone the illegality."**

37. He argues that the approach which the Tribunal here took, as set out at paragraph 55, did not purport to apply in terms the test in **Hall**, as endorsed in **Vakante** and as recognised in **Hounga** as the approach to be taken. It is plain, he submitted, that the question involves a careful factual analysis. The effect of his submissions was that it is inadequate and wrong legal reasoning to regard the fact of a contract of employment giving rise to an employment during which the Claimant was subject to sexual discrimination against her and harassment as thereby inevitably and always bound up with the illegality so as to defeat the claims. I agree.

Considerations

38. First, I observe that in **Leighton v Michael** Mummery LJ, in paragraph 11, did not draw a distinction between a contract which was illegal as made from one which was illegal as performed for the purposes of the application of the principle he expressed. Though that distinction is of importance in dealing with the test of illegality in contract, the field here is that of the illegality defence in tort. It is plain that the degree of illegality may be relevant as one of the circumstances to which Mummery LJ referred in **Vakante** at paragraph 9. I do not, though, for myself think it helpful to analyse the test to be applied as dependent on whether a narrow reading or a broader reading is adopted. It is sufficiently expressed in **Hall v Woolson** in both

the Judgments of Peter Gibson and Mance LJJ. It is a test which looks to see whether, on all the facts, and not just simply applying a causation test, the claim is inextricably bound up with the applicant's illegal conduct. Mr Dutton submitted to me that the claim for dismissal as one of the 17 acts could succeed before a Tribunal without being successfully met by a defence of illegality. In both **Vakante** and **Hounga** this possibility was, on the facts of those cases, applying the principle in **Hall**, denied. I see very good reason why that should be. To assert that there is a detriment of dismissal is to claim that one has been done wrong by being removed from a post which one should never have occupied in the first place because it was unlawful to do so. Dismissal is intimately bound up with employment. Though Mr Dutton argues that it is a statutory concept where one comes to section 95 of the Employment Rights Act and that allowing a claim to proceed would not be to condone the illegality, I cannot accept those submissions. In my view, on any showing, dismissal by termination of a contract which did not lawfully exist, and could never lawfully have existed as it was, seems to be either no detriment or not such an act that the courts should condone a reward or compensation in respect of it.

39. It seems to me entirely appropriate and obvious that the courts reached the conclusions that they did in **Vakante** and **Hounga**, dealing with the issue of dismissal. However, I conclude here, on the argument that Mr Dutton puts to me, that upon the entirety of the claim the Tribunal misdirected itself by not having regard to the appropriate legal test. It follows that unless the conclusion which the Tribunal reached was plainly and obviously right, that the appeal must be allowed; and I do not consider it can be said to be.

40. The next question is what the consequence should be. Mr Dutton invites me to exercise my own discretion to determine the claims upon the basis of the findings of fact made by the Tribunal. The Tribunal here made no factual assessment of whether or not the acts were

extricably or inextricably bound up with the illegality because of the approach that it took, akin to estoppel, at the conclusion of paragraph 55.

41. I accede to that application so far as Raj is concerned: the position of H3PL, which is more complicated, I return to later. First, the findings of fact are clear. Second, all that is required is an assessment of those findings of fact. I do not see that seeing and hearing the witnesses would have such a value in this case as to make it necessary for me to do so. Thirdly, I have regard to the overriding objective. It would seem to be expeditious to make the decision here and now. As I have indicated, of the first seven acts alleged, the Tribunal accepted the facts that the Claimant was an applicant for employment; she was party to no illegality before 1 August apart from being the victim of the actions of Mr Raj. She was entitled to compensation for those actions. I shall deal with the party required to compensate in short course.

42. As for the allegations, apart from the last which relates to dismissal, I take the view that the actions could not be said to be inextricably bound up with the legal conduct, for there is nothing intrinsic about being an employee that leads to sexual harassment or freedom from it. The fact of employment may have given rise to a practical opportunity for the acts to be committed. That is far from saying that the employment was in any sense necessary, causative or inextricably linked with the employment itself. This is not a case, as was **Vakante** and as was the dismissal in **Hounga**, in which the detriments complained of entirely depended upon there being a contract of employment and upon its terms. Applying the approach in **Leighton v Michael** and that demonstrated by the principle at paragraph 42 and 79 of **Hall**, the circumstances are not such that the illegality excludes a tort claim. They do not reach the extreme which, though not itself a test, at least gives a flavour of the nature of the link which

must be shown, referred to by Mance LJ. As to the 17th complaint, that of dismissal, I have already expressed my views. That plainly is clearly linked.

43. In reaching this determination I have distinguished between one act and others. I accept Mr Dutton's submission that it is possible to do so. He submits that is the consequence of **Blue Chip Trading v Helbawi** [2009] IRLR 128, a decision of this Tribunal presided over by Elias J, and it is indeed that which was attempted in **Hounga v Allen** without, as it seems to me, adverse criticism from the courts in that case and in which, as I have already pointed out, there were different reasons for dismissing different claims.

The proper Respondent

44. The identity of the proper Respondent is more difficult. Raj is liable himself for what he did. But here I return to the position of H3PL: the issue is whether they are. No act was conducted by that body, if it is a corporate entity, nor was it suggested that Miss Johnson who appeared was herself a direct party in what occurred. But section 109 of the **Equality Act 2010** provides as follows, under the heading of "Liability of employers and principals":

> **"(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.**
>
> **(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.**
>
> **(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.**
>
> **(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—**
>
> **(a) from doing that thing, or**
>
> **(b) from doing anything of that description…"**

H3PL would therefore be liable if Raj was a co-employee of the Claimant or was "an agent…with the authority of the principal".

45. The facts found by the Tribunal show that it was unclear as to who it was who was the employer. It was one of the issues (2.1.9) as to which Respondent might be liable and in what capacity. That was a question that was never conclusively argued. But the relevant facts, it seems to me, were set out by the Tribunal at paragraph 25 to the effect that the Claimant worked for both. Mr Raj interviewed her on behalf of H3PL in May 2009. Although the first episode of sexual attack occurred at what were Mr Raj's premises, the relationship between Raj and H3PL was, to adopt a phrase from the illegality cases, inextricably interwined. See the references at paragraph 20 and paragraph 24, the description of how the contract materialised (paragraph 25), and the inter-relationship between Raj and Johnson there set out, the fact that although the Claimant approached Miss Johnson (see paragraph 27) to chase the work permit, Mr Raj was plainly acting on its behalf (see paragraph 28 in respect of driving insurance and salary), the regular contact between her and Raj throughout her employment (see paragraph 30), the assumption of entitlement to tell the Claimant she was dismissed (paragraph 32), a dismissal which, on the face of the Tribunal's decision, appears to have been from both H3PL and Mr Raj. It therefore seems to me that the effect of what the Tribunal has decided is that Raj was either an employee or a co-principal in the businesses or an agent of H3PL within the meaning of the legislation. That then brings section 109(2) into consideration. The words "with the authority of the principal" qualify anything done by an agent for the principal. Mr Dutton was unable in argument to refer me to any authority as to the precise scope of that phrase, but pointed out with obvious force that the Act cannot have been speaking of authority to commit an act which was intrinsically one of sexual harassment.

46. I accept that. I do so for these reasons. It is highly unlikely that Parliament would have considered that a principal would have authorised an act which would amount to discrimination or harassment as such. Second, such a construction does not fit with subsection (3). If the

authority is to be understood as meaning authority directly to harass, then to refer to the fact that it does not matter that it is done with the employer's or principal's knowledge or approval seems meaningless. The principal must in such a case know and approve of the act. Therefore this indicates that the words in subsection (2) are used in a much more general sense. Third, this is a provision in an anti-discrimination statute. Such provisions are to be interpreted, generally, purposively in order to promote the remedy and to remedy the vice. Fourthly, during the recess before I gave Judgment, I have come upon the authority of **Bungay v Saini** UKEAT/331/10, a Judgment of the Appeal Tribunal, Silber J presiding, delivered on 27 September 2011. That was a case which involved claims of discrimination on the grounds of religious faith and harassment. The question arose whether a party was liable for the actions of some said to be agents toward the claimant. Those were members of the Board of a centre. It was held that employees of the centre, the claimants, had been unfairly discriminated against on the grounds of their faith. As members of the Board, the respondents were not employees, but they were held to be agents. They were liable because they were acting within their authority when managing the centre and the regulations had to be construed in a purposive manner. All that needed to be shown to make the appellants liable is that they were authorised to manage the centre in a way which was capable of being done in a lawful manner, the principle in **Lana v Positive Action in Training Housing (London) Ltd** [2011] IRLR 501 being applied.

47. The discussion relevant to this issue begins at paragraph 21 of **Bungay**. The starting point was the common law rules of agency, as explained in *Bowstead and Reynolds on Agency*, as approved in **Yearwood v Commissioner of Police for the Metropolis** [2004] IC 1660. Silber J commented, paragraph 24:

> **"Thus the test of authority is whether when doing a discriminatory act the discriminator was exercising authority conferred by the principal (which in this case was the Centre) and not**

whether the principal had (namely the centre) in fact authorised the Appellants to discriminate. Indeed in *Lana v Positive Action Training Housing (London) [2001] IRLR 501* Mr Recorder Langstaff QC (as he then was) giving the judgment of this Appeal Tribunal had to consider a provision identical to that in Regulation 22(2) contained in section 14 of the Sex Discrimination Act 1975 when he said in respect of an argument that a party would only be liable for an act of discrimination which was done with the authority '*whether expressed or implied whether precedent or subsequent to commit discrimination*':-

> **'32. However, to read this subsection in that way would be to place an almost impossible restriction upon its utility. It is difficult if not impossible to conceive any situation in which a contract could lawfully provide an agent with the authority to discriminate. It seems to us that the proper construction of section 41(2) is that the authority referred to must be the authority to do an act which is capable of being done in a discriminatory manner just as it is capable of being done in a lawful manner.'"**

It was noted that a similar approach had been taken by this Tribunal in **Victor-Davis v London Borough of Hackney** EAT/1269/01 and in **Mahood v Irish Centre Housing Ltd** UKEAT/0228/10, paragraphs 54 and 58.

48. That conclusion is consistent with the conclusions reached in respect of vicarious liability in which the test once seen as course of employment is regarded as including those matters which have a sufficiently close connection with the employment. Here, therefore, adopting that approach, the effect is that the words "with the authority of the principal" are to be equated with "in the course of his agency", and a broad view of the scope of that agency is necessary so long as there is a sufficiently close connection between the actions which are complained of and that which the agent was authorised to do.

49. Subsection (4) provides a defence to an employer where a fellow employee has committed the act. That defence is not open to the employer where it is an agent of a principal who has done so. Does that mean that the words "with the authority of the principal" are to be construed more narrowly? I do not think so. Just as in subsection (4) the employer can show that it took all reasonable steps to prevent an employee from doing a particular act, the employer is he who has the authority of the principal. I suspect, though the matter has not been tested in argument before me, that it is open to the employer expressly to restrict the authority

of the agent, and an agent is only entitled to act within the scope of his lawful authority. That may be the answer to what would otherwise be a problem created by subsection (4). As I say, I have not had detailed argument on these provisions. What I express, therefore, is the view on such discussion as there has been. The effect of it is that it seems to me that, on the findings of fact made by the Tribunal, there is a very considerable case that H3PL are responsible for the actions of Raj in committing those acts which I have determined in this Judgment are not barred by the defence of illegality. I shirk making a final determination as to the responsibility of H3PL, though conscious that I have set out what my current view of the law is, so that it will be open, on remission to the Tribunal for remedy, for H3PL to argue that the facts before the Tribunal were such that Raj should be regarded as neither their agent nor their employee or that there is some other fact which was before the Tribunal which would mean that, applying the principles as I have set them out, the conclusion that Raj was an agent is correct but that he was not in these circumstances acting with the authority of the principal within the meaning which I have considered, consistently with **Bungay v Saini,** it should bear. In doing so, no new fact may be called before the Tribunal unless both parties agree to that being the case. My reason for that is that it was expressly an issue before the Tribunal below which of the Respondents might be liable and in what capacity. Therefore all of the facts relevant to those issues should have been put before the Tribunal for its determination on the first occasion, and it is too late to call further evidence now.

Conclusion

50. The appeal is allowed in respect of all complaints, with the exception of the 17th. Illegality is declared to be no defence to the action brought by the Claimant. The issue of whether there is remedy against H3PL for the acts of Raj (Raj himself undoubtedly being liable) and any further finding that may be necessary under the liberty I have just expressed is to be made by the Tribunal on remission.