Appeal No. UKEAT/0152/17/RN
UKEAT/0153/17/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 30 November 2017
Judgment handed down on 15 January 2018

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MRS I OKEDINA APPELLANT

MISS J CHIKALE RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2018

APPEARANCES

For the Appellant

MR JOSEPH ENGLAND
(of Counsel)
Direct Public Access

For the Respondent

MR DAVID READE
(One of Her Majesty's Counsel)
and
MR GRAHAME ANDERSON
(of Counsel)
Instructed by:
Freshfields Bruckhaus Deringer LLP
65 Fleet Street
London
EC4Y 1HS

SUMMARY

JURISDICTIONAL POINTS - Fraud and illegality

PRACTICE AND PROCEDURE - Review

Illegality - whether the Claimant had worked under a contract of employment that was illegal at inception

Reconsideration - whether the ET had erred in dismissing the application for reconsideration given an adverse Rule 3(7) ruling by the EAT

The Claimant, a national of Malawi, had initially been employed by the Respondent (also originally from Malawi) to look after her parents in that country. In 2013, however, the Respondent brought the Claimant to the UK, applying for a visa for her to work directly for the Respondent and her family, as a domestic worker, at her home in the UK. The Claimant's immigration status meant that after six months it was in breach of **Immigration Rules** for her to continue working and, under the **Immigration Asylum and Nationality Act 2006**, the Respondent could face possible criminal sanctions for continuing to employ her. The ET found, however, that the Claimant did not knowingly participate in any breach of the immigration provisions but trusted the Respondent, who assured her that her visa had been taken care of. Her employment continued until 18 June 2015, when she was summarily dismissed. The Claimant (relevantly) brought proceedings for unfair and wrongful dismissal, breach of contract and unauthorised deductions, breach of the **Working Time Regulations 2006** and failure to provide written particulars of employment and an itemised wage slip. The Respondent objected that she was not entitled to bring these claims in reliance upon an employment contract that was illegal, being in breach of immigration law. The ET disagreed, finding that this was a case falling within the third category identified in **Hall v Woolston Hall**

Leisure Ltd [2001] ICR 99 CA and the Claimant had not knowingly participated in the illegal performance of her contract.

The Respondent sought to challenge the ET's ruling, both by applying for reconsideration and by lodging an appeal with the EAT (the "first appeal"). It was directed that the reconsideration application should be listed for a hearing but before this took place the EAT gave a ruling under Rule 3(7) **EAT Rules 1993** on the Respondent's first appeal. In the light of the EAT's ruling, the ET then dismissed the reconsideration application, although after a hearing under Rule 3(10), one ground of appeal - on the ET's approach to the application of the doctrine of illegality - was permitted to proceed to a Full Hearing. The Respondent also appealed against the ET's refusal of her reconsideration application (the "second appeal").

Held: *dismissing both appeals*

The ET had not erred in its approach to illegality in this case. If the contract of employment was that entered into in Malawi, there could be no suggestion that it had been illegal at inception. Even if the parties had entered into a new contract upon the Claimant's coming to the UK in 2013, the written terms made clear that too was not illegal at inception: the Claimant's employment being terminable on six weeks' notice and thus, on its face, giving rise to no breach of the immigration provisions at the outset. In any event, the immigration provisions relied on by the Respondent did not explicitly or implicitly prohibit the Claimant's contract of employment. To the extent that broader public policy issues arose in the immigration context, that was consistent with the ET's approach and characterisation of this case as falling within the third (rather than the second) category identified in **Hall v Woolston**.

As for the ET's approach to the reconsideration application, the process adopted was not entirely clear and might be open to criticism. That said, ultimately the points raised were now academic as it was apparent that no ET could properly consider that there was any reasonable prospect of the original decision being varied or revoked.

A

HER HONOUR JUDGE EADY QC

Introduction

B

1. These appeals raise questions (1) as to the approach to be adopted when a Claimant's contract of employment is said to be illegal by virtue of the operation of immigration law, and (2) as to the potential relevance of overlapping grounds of appeal when an Employment Tribunal is considering a reconsideration application.

C

2. In my Judgment, I refer to the parties as the Claimant and Respondent, as below; this is the Full Hearing of the Respondent's appeals. The first (UKEAT/0152/17/RN) is from a Judgment of the London (South) Employment Tribunal (Employment Judge Elliott, sitting with members Ms Christofi and Mr Goodden, over three days in October 2016; "the ET"), sent out on 31 October 2016, upholding the Claimant's complaints of unfair and wrongful dismissal, breach of contract and unauthorised deductions, breach of the **Working Time Regulations 2006** and failure to provide written particulars of employment and an itemised wage slip. It dismissed, however, the Claimant's claim of direct race discrimination. The second appeal (UKEAT/0153/17/RN) relates to the ET's subsequent refusal of the Respondent's application for reconsideration, a decision communicated by letter of 28 March 2017.

D

E

F

3. The appeals were initially considered on the papers to disclose no reasonable basis to proceed; the first appeal having been so considered by The Honourable Mrs Justice Laing DBE, the second by The Honourable Mr Justice Soole. Both then came before me at a hearing under Rule 3(10) of the **EAT Rules 1993**, on 23 June 2017, when I permitted the first appeal to proceed on the following ground:

G

H

A

Whether the ET erred in law in finding that the Claimant's contract of employment was lawful at the point it was made? In so doing, did the ET fail to take into account that it was only ever going to be lawful for the Claimant to work in the UK for six months and yet it was always understood that she would work for more than six months and thus the contract between the parties was illegal at inception, falling into the second category of illegality, per **Hall v Woolston Hall Leisure Ltd** [2001] ICR 99 CA.

B

C

As for the second appeal, I considered that it was reasonably arguable the ET erred in declining to consider the reconsideration application because the grounds had been the subject of a Rule 3(7) direction by the EAT. I otherwise dismissed the Respondent's grounds of appeal.

D

4. The Claimant resists the appeals, relying on the ET's reasoning and further contending, in respect of the first appeal, that: (1) there was no evidence (or finding by the ET) that, at the time of its inception, the employment contract was expressly or impliedly prohibited by statute, but, in any event, (2) the ET had allowed that there were public policy reasons which would lead it to find that the employment contract could be enforced. On the second appeal, the Claimant argued that there was no reason under Rule 72 Schedule 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules") why the ET should not take into account an adverse ruling by the EAT under Rule 3(7) **EAT Rules** where there was an overlap between the grounds relied on for an application for reconsideration and the grounds of an appeal.

E

F

G

H

A

The Background Facts

5. The Respondent is originally from Malawi. She is a self-employed businesswoman who lives in the UK with her husband and other family members; both she and her husband run their own businesses in which they employ others.

B

6. The Claimant is a Malawian national. At the time of the ET hearing, she was 28 and had a 14 year old son who lived with her parents in Malawi. She had entered the UK in July 2013, when she worked for the Respondent, living and working in the Respondent's home.

C

7. It was the Respondent's case before the ET that she had never employed the Claimant before her arrival in the UK. In any event, she contended, the Claimant's employment ended on 29 November 2013 with the expiry of her permit to work as a domestic worker. At that stage, the Respondent said she had applied for the Claimant to be registered as a dependent; the Claimant, she said, could not have been employed after 28 November 2013 because her contract of employment would have been tainted by illegality. And, if she was not an employee after that date, then her ET claims, presented on 10 November 2015, were out of time.

D

E

F

8. The ET rejected the Respondent's case. It found that, from September 2010 to July 2013, the Claimant had been employed by the Respondent as a domestic worker in Malawi, working for the Respondent's parents. Specifically, the ET found that the Claimant had entered into a contract of employment with the Respondent in 2010 (it was signed by each of the parties on 9 September 2010); as the ET recorded:

G

> **"41. … It was for the role of house helper / carer and hours of work were simply put as "live in". The duties were said to be cleaning the house, caring for the mother, cooking and washing laundry."**

H

A

9. In July 2013, however, the ET found that the Respondent had arranged for the Claimant to travel to the UK to work directly for the Respondent as a domestic worker:

> **"45. In early 2013 the respondent made enquiries of her sister as to whether the claimant would be amenable to coming to the UK to work for her and her family. The respondent said that this was only going to be for a limited period, about 2 months, while she, the respondent, was in Malawi.**
>
> **46. The claimant agreed to go to the UK. She was told she would be paid £400 per month, she would have bed and board and that she could go to college in the UK. She understood that the respondent would pay for her education in the UK. She did not understand it to be a temporary arrangement.**
>
> **47. Until 2011 the claimant did not have a birth certificate or a passport. In 2011 the respondent's sister Lydia Chapasuka assisted in obtaining both of these official documents. Ms Chapasuka swore an affidavit on 13 July 2011 saying that the claimant was her cousin, the daughter of her aunt. Ms Chapasuka gave completely incorrect names for the claimant's parents in that affidavit. The names of the parents were given as David Chikale and Joyce Mlundira. The respondent and Ms Chapasuka's parents' last name is Mlundira and this surname provided the family link. The affidavit said that the person (claimed to be the aunt) named Joyce Mlundira was deceased. The claimant's parents' names are Ezara Chikale and Esnat Shemba-Lembani who are still alive. This affidavit enabled a passport to be obtained for the claimant so that the claimant could travel to Botswana to look after other members of Ms Chapasuka's family. This passport was also used in obtaining the domestic worker's visa for the UK.**
>
> **48. The affidavit also said that Lydia Chapasuka took care of the claimant since 7 October 1996 when her mother passed away. The claimant was 8 years old in 1996. The claimant's mother is still alive.**
>
> **49. As part of the visa application a one-page contract of employment was drawn up by the respondent for the claimant (page 112). It was signed by the respondent in the UK and countersigned by the claimant in Malawi. Both parties accepted the authenticity of their signatures on that document. Hours of work were again expressed to be "live in". The salary was typed in as £500 per month and handwritten over at £400 per month. The duties were stated as dropping and collecting the children to and from school, cleaning the house, washing and ironing the laundry, preparing meals and looking after the children at home.**
>
> **50. The contract referred to above was sent to the British High Commission in Lilongwe, Malawi as part of the visa application. It was with the respondent's letter dated 10 March 2013 stating that she had employed the claimant since September 2010 at her parent's residence. She said she was responsible for the wages and wished the claimant to continue in the employment in the UK.**
>
> **51. Also on 10 March 2013 the respondent, as the employer, filled out a form for the UK Border Agency setting out the terms and conditions of employment of an overseas domestic worker. It said "*By signing this document, the employer is declaring that the employee will be paid in accordance with the UK National Minimum Wage (NMW) Act 1998 and ant Regulations made under it for the duration of the employment in the United Kingdom*" (page 120).**
>
> **52. The UKBA document gave the claimant's duties as "*Cleaning, laundry, child care, cooking; cleaning and tidying the house; washing laundry, minding the children after school and during holidays*". The free periods per day were stated as 3 hours, and the free periods per week were stated as 15 hours. It said the claimant would have her own double bedroom in the house. In the section as to ending the employment it was not stated to be a fixed term contract, but "until further notice". We find that it was not therefore intended as a temporary two month arrangement. It was an indefinite contract.**
>
> **53. The visa was granted under 29 November 2013 (page 419)."**

B C D E F G H

A

10. The contract of employment referred to by the ET as being part of the visa application, drawn up by the Respondent, included a section entitled "Ending the employment". It was there provided:

B

> **"Employee must give 6 weeks notice if he/she decides to leave his/her job.**
>
> **Employee is entitled to 6 weeks notice if the employer decides to dismiss him/her.**
>
> **Employee is employed on a fixed term contract until FURTHER NOTICE …"**

C

11. As for the position when the Claimant reached the UK, the ET again rejected the Respondent's characterisation of events, finding:

(1) That although the Claimant was given accommodation in the Respondent's home, she did not have her own room throughout her time with the Respondent, having to share a room with the Respondent's daughter.

D

(2) Although the Claimant travelled to Ireland in 2013 (at least initially with the Respondent and then with the Respondent's husband and daughter), she never resided there and never attended college there. Other than when the Claimant travelled to Ireland, the Respondent retained her passport.

E

(3) In November 2013, the Respondent made an application for an EEA family permit for the Claimant, providing false information with the intention of regularising the Claimant's position in the UK. For her part, the Claimant relied on the Respondent to take care of her visa situation; when she asked the Respondent about this, she was reassured that the documents had been sent to the Home Office to be renewed; after her visa expired, there was no change in the Claimant's working arrangements.

F

G

(4) In January 2014, the Claimant first raised with the Respondent that she was not receiving her contractual remuneration of £400 per month.

H

A

(5) In February 2014, the application for leave to remain for the Claimant as a family member was refused and the Respondent completed an appeal form, again providing false information in support. The appeal hearing subsequently took place in January 2015. Although the Claimant generally saw the post arriving at the Respondent's home and the notice of the appeal hearing was addressed to her personally, the ET accepted she was unaware of the hearing. The appeal hearing was attended by the Respondent's husband, who provided false information to the First-tier Immigration Tribunal in support of the appeal. On 27 January 2015, the First-tier Tribunal gave its decision, rejecting the appeal.

B

C

(6) In the meantime, in July 2014, the Claimant's duties had increased to include providing care for the Respondent's mother-in-law. At around this time and until March 2015, the Claimant began to be paid £200 a month in cash; in April and May 2015 that increased to £300 per month.

D

E

(7) In mid-June 2015, the Claimant asked for an increase in her pay and for holiday pay. This provoked an argument and the Respondent and her husband told the Claimant to leave their home that evening, returning her passport to her at that stage. The Claimant duly left and subsequently contacted the Salvation Army for assistance.

F

(8) By mid July 2015, the Claimant had instructed solicitors who wrote to the Respondent on her behalf seeking payment of arrears of salary owed. The ET noted that when the Respondent replied she did not dispute that the Claimant had continued to work for her after 29 November 2013; it was satisfied the Claimant had done so throughout her time in the UK, assisting with the Respondent's children and carrying out cooking and other domestic duties, working 12 hours a

G

H

A

day Monday to Saturday - increasing to 14 hours after August 2014 - and eight hours on a Sunday.

B

The ET's Decision and Reasoning on the Claimant's Claims - Judgment promulgated 31 October 2016

12. Turning to the Claimant's various claims, the ET first considered the question of illegality. It found, however, that there was nothing inherently unlawful about the contract of

C

employment: this was not a case falling within the second category of **Hall v Woolston**, but the third; the question was, therefore, whether it had been illegally performed, and whether the Claimant had knowingly participated in that illegal performance. Although the ET was

D

satisfied that the contract had been illegally performed after 29 November 2013, it found that the Claimant had not participated in that illegality (see the ET, paragraph 139). If wrong in that regard, there were public policy reasons that would have allowed the ET to find that the

E

contract could be enforced in any event (ET, paragraph 140), albeit the ET's reasoning in this regard was not set out in any detail.

F

13. The ET was also satisfied that under section 215(1) of the **Employment Rights Act 1996** ("the ERA"), the Claimant could rely on her previous employment in Malawi as giving her continuous service from 9 September 2010, until she was summarily dismissed by the Respondent on 18 June 2015, on being told to leave the Respondent's house; she had otherwise

G

been employed by the Respondent as a domestic worker until that date. The ET specifically rejected any suggestion that the Claimant's continuous service was broken by any period of residence as a college student in the Republic of Ireland. No process was followed in respect of

H

the termination of the Claimant's employment, and the ET was clear that this was an unfair dismissal. There having been no compliance with the **ACAS Code**, the ET considered there

A

should be an uplift in compensation but that this should be limited to 5%, allowing for the fact that this was a family home situation. The ET was also satisfied that, having been dismissed without notice, the Claimant had been wrongfully dismissed.

B

14. The ET further rejected the Respondent's case that the exemption under regulation 57(3) **National Minimum Wage Regulations 2015** (or the earlier provision under the **1999 Regulations**) applied. Although the Claimant lived in the Respondent's family home, she was not treated as a member of the family and was entitled to be paid at **National Minimum Wage Act** rates. Over the period of her employment with the Respondent, she had in fact only been paid £3,300 and she was therefore entitled to recover the difference between that and the sums that had been due to her but deducted without lawful authorisation. She was also entitled to holiday pay.

C

D

E

15. The ET did not, however, accept that the Respondent's treatment of the Claimant was because of race; it was, rather, due to her precarious immigration status and thus her complaint of race discrimination failed.

F

The Reconsideration Decision

16. Subsequent to the ET's substantive decision on the claims, on 9 December 2016, the Respondent applied for a reconsideration. By her first ground, she contended the ET had erred in law in its approach to the issue of illegality. By her second and third grounds, she objected that the ET had failed to address her applications to strike out the Claimant's claim (specifically, founded upon her contention that the Claimant's passport showed she had been in Botswana for six months when she was meant to be working for the Respondent's parents in Malawi - "the Botswana issue") and to treat additional evidence from the Claimant as an

G

H

A

application to amend the claim (which should have been denied) - "the additional evidence issue".

B

17. On 11 December 2016, the Respondent also lodged her first appeal, in which she again contended that the ET had erred in law in respect of the illegality issue, and raised a number of points relating to the ET's factual findings, referring to what she contended was its failure to deal with the Botswana issue and the additional evidence issue.

C

18. Initially, it appears that the ET directed that a reconsideration hearing would take place to consider the Respondent's application. Before that could take place, however, the initial sift

D

of the Respondent's appeal had taken place, with Laing J's reasons under Rule 3(7) **EAT Rules** being sent out by letter of 22 February 2017. In rejecting the appeal at that stage, Laing J specifically referred to the Botswana and additional evidence issues, holding that the ET had

E

been entitled to decline to strike out the claim and had reached permissible findings of fact; she further observed:

> **"6. The Claimant was a vulnerable person and a potential victim of trafficking. She had logistical difficulties communicating with her solicitors. It is unsurprising that her evidence emerged piecemeal. Nor is it surprising that she did not mention a 2010 contract when she first spoke to the Salvation Army about her trafficking claim. The Respondent's explanation**

F

> **for the date on the contract was not especially plausible, in any event. In those circumstances it is not arguable that the Employment Tribunal erred in law by not referring in its decision to the matters listed in paragraph 32 of the Grounds of Appeal [that is (relevantly): to the strike out application and the additional evidence issue]. …"**

19. Noting that there was an outstanding application for review, Laing J did not consider

G

that prevented her from considering whether the proposed appeal was arguable, observing:

> **"9. Nothing I say in these reasons should prevent the Employment Tribunal from reconsidering its decision in response to the application of 9 December 2016, if it considers that it is in the interests of justice to do so …"**

H

A

20. Having received a copy of Laing J's Rule 3(7) reasons, by letter of 28 March 2017, the ET wrote to the parties as follows:

> **"In the light of the decision of the EAT … the employment judge [EJ Elliott] has considered the respondent's application for reconsideration under rule 72(1) and considers in the light of that decision that there is no reasonable prospect of the original decision being varied or revoked. The parties are therefore informed of the refusal of the reconsideration application."**

B

Submissions

The Respondent's Case

C

(i) The First Appeal

21. The Respondent relies on the ET's finding that the Claimant had not understood her employment in the UK to be temporary (ET, paragraph 46) and that her contract was indeed not

D

intended as a temporary two month arrangement but was "indefinite" (paragraph 52). Those findings were consistent with the Claimant's witness statement, where she had stated (see paragraph 26) that she had "*understood that it [her employment by the Respondent in the UK] would be for a couple of years*". There had, moreover, been a separate UK contract: the

E

Claimant, in her witness statement, had distinguished between the job she had had in Malawi and that she took up in the UK (again, see paragraph 26) and the ET had made findings that there had been a new contract, which had been included with the visa application (see ET,

F

paragraph 49), and that was distinct from the Malawian contract the ET had found had existed (ET, paragraph 142), and, of course, the terms were very different (different location, different duties etc), and that position was not undermined by the ET's finding that continuity of service

G

had been maintained (a different statutory concept).

22. Based on those findings, the Respondent contends that the contract between the parties for the Claimant to work in the UK was unlawful when formed because it was prohibited by

H

statute. Although the ET had recorded the Respondent's case as founded upon section

A

21(1B)(b)(ii) **Immigration and Asylum and Nationality Act 2006** ("the IANA") that was incorrect (it was not in force at the relevant time) although made no difference to the point. What was in force at the relevant time (and rendered the contract unlawful) was section 15 and the original section 21 **IANA**, and those provisions rendered it illegal for the Claimant to be employed contrary to her conditions of leave to remain, which expired on 29 November 2013. The contract was further prohibited by virtue of the **Immigration Rules** (secondary legislation made pursuant to section 3(2) **Immigration Act 1971**), which provided (see Rule 159A) that persons seeking leave to enter the UK as a domestic worker in a private household must meet the requirement that they intend to leave the UK at the end of six months or at the same time as the employer, whichever is the earlier, and do not intend to live for extended periods in the UK through frequent or successive visits. The relevant provisions of the **IANA** forbade the act of employment in these circumstances and it was appropriate to construe these provisions as rendering illegal the contract of employment in this case (the context being very different to the private commercial relations with which the Court was concerned in **St John Shipping Corporation v Joseph Rank Ltd** [1957] 1 QB 267). And it was no answer to suggest that the ET was permitted to adopt a purposive construction; that did not permit the distortion of the language of a statute to achieve a particular end. Here sections 15 and 21 **IANA** were clear in their language and, as made clear in **Patel v Mirza** [2016] UKSC 42, it was the particular statute to which regard had to be had - here the **IANA** - and not to other statutes (here, the protective employment provisions relied on). As was recognised in **Patel**, it would be rare that a statute would expressly prohibit the making of a contract (see the opening sentence of paragraph 40), it would generally be something that had to be implied.

23. The ET having found that the parties had entered into an indefinite contract, on any proper construction of sections 15 and 21 **IANA**, that meant the contract was, at least implicitly,

A

prohibited by statute and thus fell within the second category under **Hall** (albeit that was not the complete answer, as the approach now was as laid down in **Hounga v Allen** [2014] UKSC 47, which offered revised guidance and should be followed). In any event, even if the contract had not been prohibited at its outset (i.e. in 2010, when the parties initially signed the contract in Malawi), it became prohibited in November 2013 and the second category in **Hall** would apply from that point: it was not the performance of the contract that made it illegal but the contract itself.

B

C

24. And it was no answer to this point for the Claimant to rely on the ET's alternative "public policy" finding (ET, paragraph 140) as there was simply no explanation for what that meant. In any event, the "public policy" finding was apparently derived from the approach laid down in **Hounga**, but that case was concerned with discrimination claims and expressly *not* with claims founded upon a contract (albeit that Lord Wilson did seem to allow it was possible that public policy considerations might impact upon a claim for unpaid wages, see the observation at the end of paragraph 24). That was a distinction that could also be seen in at least some of the judgments in **Patel v Mirza**, which again seemed to allow that there was a difference between putting the parties back to where they were before the illegality rather than having to engage on a wholescale unpicking of the contract between them (see, e.g. per Lord Sumption at paragraph 268, **Patel**).

D

E

F

G

25. As for the effect of the illegality, unlike in **Hounga**, that went to the very basis of the claims being made: permitting the Claimant to claim unpaid wages, holiday pay or unfair or wrongful dismissal inevitably meant she was being permitted to benefit from a contract that had to be illegal, given the prohibitions under the **IANA**. Accepting that public policy was not irrelevant, this was also not a case on all fours, on the facts, with cases such as **Hounga**.

H

Further, in considering whether it would be disproportionate to refuse relief to the Claimant in the circumstances of this case - and having regard to the guidance laid down on this issue by Lord Toulson in **Patel** (see paragraphs 93 and 108): (i) here the contract was clearly contrary to immigration law and public policy in that field; (ii) the Claimant must be taken to have known that she was entering into a contract that was in breach of her visa requirements; (iii) the illegality was, further, central to the contract; (iv) denial of enforcement was serious but not in the same way as might be in other cases; and (v) would plainly further the purpose of the immigration provisions in issue; and (vi) would further act as an appropriate deterrent; as well as (vii) ensuring the Claimant did not profit from her illegal conduct; thereby (viii) maintaining the integrity of the legal system.

(ii) The Second Appeal

26. As for the second appeal, as Laing J had recognised in giving her Rule 3(7) reasons, there was nothing in what she had said that prevented the ET from reconsidering its decision in response to the Respondent's application; that gave rise to a different test under Rule 70 **ET Rules 2013** to that arising under Rule 3(7) **EAT Rules 1993**.

27. Moreover, there was not a complete coincidence in the grounds of the reconsideration application and the grounds of appeal. Although that might have been the case in respect of the first ground for reconsideration (taking the illegality point canvassed by the appeal), that was not so for the second and third of those grounds. More specifically, the issue raised by the Respondent on her strike-out application before the ET (as to whether the Claimant had ever worked for the Respondent in Malawi) was never addressed, notwithstanding the ET having said that it would need to make findings of fact in this regard (see ET, paragraph 32) and this informed the other grounds of reconsideration and was simply not answered by the EAT's Rule

A B C D E F G H

3(7) direction (not least as the Respondent had an outstanding application under Rule 3(10) **EAT Rules**). There was, further, a difficulty in the ET's response under the **ET Rules**; it had been directed that the reconsideration application would be listed for a hearing but the ET had then simply failed to consider the application - a course not provided for under Rule 72 **ET Rules**.

The Claimant's Case

(i) The First Appeal

28. At the heart of the ground permitted to proceed under this appeal was the parties' disagreement as to which category of illegality this case fell to be considered under (see **Hall**): the Respondent was saying that the Claimant's contract of employment was void from inception as being implicitly prohibited by statute; the Claimant contended that it was merely performed illegally and she was innocent of any involvement in the illegality.

29. On the ET's findings, however, there was no factual basis for the Respondent's assertion that the Claimant's contract of employment was void at inception. The ET had found as a fact that the Claimant's employment contract was signed on - and thus effective from - 9 September 2010 (see paragraph 42); this was the start of the Claimant's continuous employment. And as at September 2010, there was no suggestion that the Claimant would be working in the UK; on the ET's findings, that was something that arose only in early 2013 (see paragraph 45). The Claimant's contract was thus (as the ET found) lawful at the point when it was made and lawful until 29 November 2013. The way the case was being run on appeal was, further, inconsistent with the way the Respondent's case had been put below, which was that there had been no contractual relationship between the parties covering the time the Claimant

said she was working in Malawi (a conflict in the evidence the ET had resolved in the Claimant's favour).

30. As for the suggestion that there was a new contract of employment when the Claimant came to the UK (apparently relying on the ET's finding at paragraph 52), that was simply based on what was being told to the Home Office. In any event, if that was a new contract then it was expressly stated to be subject to termination on six weeks' notice on either side; that was what the ET was really referring to at paragraph 52. Such a contract (even if it had not been simply a continuation - subject to changed terms, e.g. as to location - of the original contract was plainly not illegal from inception because it could be terminated on six weeks' notice; it was thus consistent with the immigration provisions (as was to be expected as this was how the arrangement was being described to the Home Office) and lawful at inception.

31. That was the short answer to the first appeal but even if it was necessary to engage further with the law on this issue the Claimant must still succeed. Even if this was not a case strictly falling within the third category under **Hall** (and it was noted that had been a case involving a discrimination claim), in the light of Lord Wilson's observation at the end of paragraph 25 **Hounga**, the Claimant could still argue that the door had been left open for her claims of unfair dismissal and unauthorised deductions of wages. Moreover, in **Patel**, the Supreme Court majority had made clear that the enforcement of rights in such cases should be subject to the public policy approach laid down in **Hounga**, which the ET - in its alternative finding at paragraph 140 (albeit, without any detail of reasoning) - had found would cover the Claimant's case.

32. More specifically, the statutory provision relied on by the Respondent made no express provision for the validity, or otherwise, at common law of a contract under which an employee continued to work beyond the expiry of their leave to remain. The legislative provisions in question provided only that there would be criminal sanctions on the employer who knowingly (or with constructive knowledge) employed someone who was disqualified from employment by reason of immigration status; as a matter of construction, there was no basis for adding in further consequences that Parliament could have provided (but did not) that would be at the expense of an employee. If any inference should be drawn, it should be that such a contract was not rendered void at inception but could continue, subject to the employer's risk of penalty under **IANA**. That would also be consistent with section 98(2)(d) **ERA**, which allowed that there might be a fair dismissal when a contract becomes unlawful, thus suggesting such a contract might exist even if the employment of the employee was illegal. Yet further, the statutory provisions in question could not have intended that the contract in issue in this case was rendered void *ab initio*: Parliament could not have meant that a contract of employment entered into between Malawians in Malawi was void from inception if, at some point, its continued performance put the employer in contravention of the English criminal law.

33. This was plainly a case of illegal performance, not illegality at inception; the ET thus approached the case correctly and, applying the taxonomy set out in **Hall**, permissibly and properly saw this as a case of illegality in performance in which the Claimant lacked knowledge of the illegalities and frauds perpetuated by the Respondent and her family. Applying the relevant public policy and proportionality factors, the ET further permissibly concluded it would not be appropriate to decline to enforce the Claimant's rights, which was entirely in accordance with the approach in **Hall**, **Hounga** and **Patel**.

A

(ii) The Second Appeal

34. The test for an ET on a reconsideration application was whether or not reconsideration was "*necessary in the interests of justice*" (Rule 70 **ET Rules**). Here the reconsideration application in question was, in substance, identical to the grounds of appeal in the first appeal; it was raising no issue that would fall to be treated differently by the ET under Rule 70 **ET Rules** as compared to the issues raised for consideration by the EAT under Rule 3(7) **EAT Rules**. Further, in line with Rule 72(1) **ET Rules**, Laing J had already considered substantially the same application; the ET had thus permissibly concluded there was no reasonable prospect of the original decision being varied or revoked. Even if the ET had erred, given that the factual matters raised in the first appeal had also been rejected at the Rule 3(10) stage, it was open to the EAT - able to exercise the powers of the ET - to determine that the reconsideration was not necessary in the interests of justice.

B

C

D

E

The Relevant Legal Principles

35. It is helpful to start with the guidance laid down by Peter Gibson LJ in **Hall v Woolston Hall Leisure Ltd** [2001] ICR 99 CA, as that informed the ET's approach and is expressly referenced by the first appeal. In **Hall**, it was envisaged that there might be different categories of illegality as follows:

F

> **"30. In two types of case it is well established that illegality renders a contract unenforceable from the outset. One is where the contract is entered into with the intention of committing an illegal act; the other is where the contract is expressly or implicitly prohibited by statute …**
>
> **31. In a third category of cases a party may be prevented from enforcing it. That is where a contract, lawful when made, is illegally performed and the party knowingly participated in that illegal performance. …"**

G

36. In **Patel v Mirza** [2016] UKSC 42 (drawing upon the approach adopted in **Hounga v Allen** [2014] UKSC 47), the Supreme Court offered a re-statement of the doctrine of illegality,

H

A

focussing on the underlying public policy considerations. In **Hounga**, Lord Wilson had offered the following guidance as to the approach that should be adopted:

> **"42. The defence of illegality rests upon the foundation of public policy. … So it is necessary, first, to ask "What is the aspect of public policy which founds the defence?" and, second, to ask "But is there another aspect of public policy to which the application of the defence would run counter?" "**

B

37. In **Patel**, this was taken further, providing for a revised approach based on a triumvirate of policy-focussed considerations (see Lord Toulson, at paragraph 101): the first two replicating

C

the questions identified by Lord Wilson in **Hounga**, the third providing an additional proportionality safeguard:

> **"101. … 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 that 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. …"**

D

E

38. In the present case, it is contended (by the Respondent) that the contract of employment was prohibited by the immigration legislation and rules and was thus rendered void from the outset. Specifically, the Respondent relies on sections 15 and 21 of the **Immigration Asylum and Nationality Act 2006**, which provided (at the relevant time):

F

> **"15. *Penalty***
>
> **(1) It is contrary to this section to employ an adult subject to immigration control if -**
>
> **(a) he has not been granted leave to enter or remain in the United Kingdom, or**
>
> **(b) his leave to enter or remain in the United Kingdom -**
>
> **(i) is invalid,**

G

> **(ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or**
>
> **(iii) is subject to a condition preventing him from accepting the employment.**
>
> **…**
>
> **21. *Offence***

H

> **(1) A person commits an offence if he employs another ("the employee") knowing that the employee is an adult subject to immigration control and that -**

A

(a) he has not been granted leave to enter or remain in the United Kingdom, or

(b) his leave to enter or remain in the United Kingdom -

(i) is invalid,

(ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or

B

(iii) is subject to a condition preventing him from accepting the employment."

39. And, further, upon Rule 159A **Immigration Rules**:

"159A. The requirements to be met by a person seeking leave to enter the United Kingdom as a domestic worker in a private household are that the applicant:

C

…

(iv) intends to leave the UK at the end of six months … or at the same time as the employer, whichever is the earlier, and does not intend to live for extended periods in the United Kingdom through frequent or successive visits …"

D

40. In determining whether a contract is prohibited by statute, in **St John Shipping Corporation v Joseph Rank Ltd** [1957] 1 QB 267 at page 288, Devlin J opined as follows:

"… A court should not hold that any contract or class of contracts is prohibited by statute unless there is a clear implication … that the statute so intended. … a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. …"

E

41. In **Patel**, Lord Toulson further observed:

F

"40. Where the terms or performance of a contract involve breach of a legislative provision, it is rare … for the statute to state expressly what are to be the consequences in terms of its enforceability. … The question whether a statute has the implied effect of nullifying any contract which infringes it requires a purposive construction of the statute, …"

42. Turning to the second appeal, this raises a separate point as to the ET's approach to a reconsideration application under Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**, which relevantly provides:

G

"70. *Principles*

H

A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) 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 decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

A

…

72. ***Process***

(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

B

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

C

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part."

D

43. In this case, the ET declined to entertain the application because of the ruling made by Laing J in the EAT under Rule 3(7) **EAT Rules 1993** (as amended), which provides:

E

"(7) Where it appears to a judge or the Registrar that a notice of appeal … -

(a) discloses no reasonable grounds for bringing the appeal; or

(b) is an abuse of the Appeal Tribunal's process or is otherwise likely to obstruct the just disposal of proceedings,

he shall notify the Appellant or special advocate accordingly informing him of the reasons for his opinion and, subject to paragraph (10), no further action shall be taken on the notice of appeal …"

F

Discussion and Conclusions

G

44. In permitting the first appeal to proceed, I was persuaded by counsel then appearing for the Respondent that it was arguable that the parties had entered into a separate contract of employment when the Claimant came to the UK and that, given the ET's finding at paragraph 52 (specifically that the contract was intended as "an indefinite contract"), this arguably gave

H

rise to contract of employment prohibited by immigration law and thus falling to be considered within the second category of illegality envisaged in **Hall**.

45. For the Claimant, it is observed, however, that there is nothing in the ET's findings to support the suggestion that there was any new contract between the parties in 2013: the contract of employment was that entered into between the parties in Malawi in September 2010; in 2013 there was a change in the way it was performed - the Claimant was no longer employed to look after the Respondent's parents in Malawi but was brought to the UK to work directly for the Respondent - but there was no new contract. Mr England (now acting for the Respondent but not appearing at any earlier stage) contends, on the contrary, that this must be the finding made by the ET at paragraph 52 and he makes the (entirely fair) point that a finding of continuous service is not the same as a finding that there was only one contract of employment throughout that service.

46. The difficulty for the Respondent's argument is, however, that it is not at all clear that the ET did find that there was a separate contract of employment entered into by the parties in 2013. It certainly recorded what the Respondent had told the UK Border Agency about the Claimant's contract at that stage, but it is also apparent that the ET found a number of false statements had been made in support of the Claimant's visa application by the Respondent or members of her family at that stage.

47. Even if I assume, however, that the parties did enter into a new contract in 2013, I am not, in any event, persuaded that it was prohibited from the outset by the legislative provisions relied on by the Respondent or, more generally, by reason of the public policy underlying those provisions.

48. Primarily, that is because the document recording the 2013 contractual terms expressly provided that the Claimant's employment could be terminated on six weeks' notice. The ET's finding that this was "an indefinite contract" does not detract from this fact. The ET was distinguishing (as did the pro forma document used by the Respondent) between this and a fixed term contract: this was not a contract fixed as to its term; it was of indefinite duration but subject to termination on six weeks' notice. At inception, the 2013 contract was, therefore, in breach of none of the immigration law provisions the Respondent relies on. That, of course, is hardly surprising given that the Respondent provided this statement of terms to the immigration authorities in support of the application for the Claimant's visa. It is, however, the short answer to the Respondent's attempt to re-characterise this as a case falling within the second, rather than the third, category of illegality identified in **Hall**.

49. In any event, I would also agree with the Claimant that the statutory provisions relied on by the Respondent did not clearly invalidate any contract entered into in 2013. Legislation that provides for a potential criminal offence on the part of an employer (sections 15 and 21 **IANA**) says nothing about the validity of any contract entered into by that employer (a contract, moreover, that could be fairly terminated should it become apparent that the employee could not continue to work without contravention of a duty or restriction imposed by or under an enactment, see section 98(2)(d) **ERA**). And although I allow that regard should be had to the broader, underlying purpose of the prohibition in question (and thus to the Claimant's potential breach - by virtue of the **Immigration Rules** - of her leave to remain), that simply brings into play the balancing of public policy considerations (as allowed in **Hounga** and **Patel**), in a way that is entirely consistent with the ET's characterisation of this as a case falling within the third category in **Hall**; that is, a case where illegal performance of a contract may mean it cannot be enforced by a party who knowingly participated in the illegal performance.

A

50. In this case, the ET found that the Claimant did not knowingly engage in any illegal performance of her contract of employment, and was thus not complicit in any illegality that arose after 29 November 2013 (see, e.g., ET at paragraph 139). In the circumstances, it was satisfied that the illegality identified by the Respondent did not render the contract unenforceable by the Claimant. 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.

B

C

51. I therefore turn to the second appeal and the ET's decision on the reconsideration application. Here a difficulty arises in that it appears that a decision had been taken that the application should be considered at a hearing (I say "appears" as I have only seen part of the correspondence from the ET, relating to the re-listing of the reconsideration hearing, and not the initial communication explaining the course the ET decided to adopt under Rule 72) but then, without first seeking further written representations from the parties, it was determined that there should be no hearing as, in the light of Laing J's Rule 3(7) ruling on the first appeal, there was no reasonable prospect of the original decision being varied or revoked. It is unclear whether the initial decision to list the application for a hearing was taken by EJ Elliott (certainly at least some of the correspondence emanated from a different Employment Judge) but the decision that the hearing should not go ahead was, and the explanation given purported to be made under Rule 72(1) **ET Rules**.

D

E

F

G

52. Even if I am prepared to assume that the ET correctly followed the process laid down by Rule 72, I am troubled by the explanation given for the decision to refuse the application. As the Respondent observes, the test for a reconsideration application is not identical to that

H

A

applied by the EAT under Rule 3(7) **EAT Rules**: the ET and the EAT are fulfilling different functions and applying different tests.

B

53. The Claimant observes, however, that here the Respondent's first appeal raised points that were largely the same as those made in her reconsideration application; once the EAT had determined that these had no merit, there was no prospect of the ET finding that there was any reasonable prospect of its original decision being varied or revoked. I am not sure that is entirely correct, not least as the Respondent still had the right to seek an oral hearing under Rule 3(10), so her appeal had not been determined at that stage. That said, even after the Rule 3(10) Hearing, permission was refused in respect of any attempt to challenge the ET's findings of fact (which is how the second and third grounds of the reconsideration application might be characterised, although those specific points were not the focus of the Respondent's arguments at the Rule 3(10) Hearing) and the illegality point (raised by the first ground of the reconsideration application) has failed after consideration at this Full Hearing.

C

D

E

54. To descend into the detail of these points further, on her Rule 3(7) ruling, Laing J had expressed the view that the ET had been entitled to refuse the Respondent's strike out application and had permissibly allowed the Claimant's additional evidence, given the circumstances she faced and absence of any prejudice to the Respondent. These were plainly case management decisions for the ET and it is fair to observe that they were not the subject of oral representations at the Rule 3(10) Hearing. It is also notable that the ET did make findings covering the Botswana issue (see, e.g. paragraph 47) and the Respondent was not given permission to challenge any such findings of fact on the appeal. In the circumstances, I am unable to see any proper basis on which the ET might still have found that it should reconsider its original decision. As for the illegality issue, this was always really a matter that was for the

F

G

H

appeal hearing rather than for the ET on a reconsideration application. Although it is right that the Respondent was permitted to pursue this (at least to some extent) to a Full Hearing, ultimately the appeal has failed and the ET's approach upheld.

55. In the circumstances, I consider that the second appeal has become academic. Whether or not the ET adopted the correct process in reaching its original decision, it is apparent that substantially the same points as were raised in the reconsideration application have now been considered in the appeal proceedings and, at various stages, rejected. In the circumstances, I am unable to see that the ET could now reach any conclusion other than that the reconsideration application should be refused.

56. For all those reasons, these appeals are dismissed.

Postscript

57. Adopting the EAT's customary practice, the draft Judgment in this matter was sent to the parties' legal representatives before arrangements were made for it to be handed down, so that any typographical errors etc might be picked up. In response, the Respondent - acting in person - made an application (said to be made under the authority of **L and B (children), Re** [2013] UKSC 8) for a reconsideration of the Judgment so as to correct what was said to be a misrepresentation of a conclusive ET finding of fact, namely "*a clear confirmation of the existence of a separate contract of employment when the Claimant came to the UK*", the Respondent contending that this had a "*vital impact on the limited ground*" of appeal. Correcting the Judgment, the Respondent urged, would require that paragraph 46 should be amended to read as follows:

> **"The ~~difficulty for the~~ Respondent's argument is, ~~however,~~ that it is ~~not at~~ all clear that the ET did find that there was a separate contract of employment entered into by the parties in**

> **2013. It certainly recorded what the Respondent had told the UK Border Agency about the Claimant's contract at that stage, ~~but~~ it is also apparent that the ET found a number of false statements had been made in support of the Claimant's <u>Immigration Appeal in 2015 and not Claimant's</u> visa application by the Respondent or members of her family at that stage."**

58. The Respondent submitted that the ET's finding was plain from paragraphs 49 to 50 of its reasoning and that the correction sought would mean that the EAT would have been satisfied that the case fell within the second category of **<u>Hall</u>**.

59. As the Respondent has identified, errors in a Judgment may be corrected prior to its being handed down and it would be right to correct a mistake made where it was apparent that (for example) there was an unintended error in the factual record. In the present case, however, there was a dispute between the parties on the appeal as to whether the ET had actually found there was a new contract of employment entered into between the parties in 2013. The findings of the ET relied on by the Respondent, at paragraphs 49 to 50 of its Judgment, are set out at paragraph 9 above. It is right that the ET records what had been sent to the British High Commission, as part of the visa application, and refers to this as a contract, signed by both parties. As I observed at paragraph 46, however, the ET also found that much of what was included within the visa application was false and I accepted the Claimant's submission that it was open to question whether the ET had actually found that there had been a new contract of employment entered into at that stage.

60. The Respondent now (but not during submissions on 30 November 2017) points to parts of the Claimant's particulars of claim, attached to her form ET1, which suggest that she was relying on a contract that had been agreed in 2013. Even if it is appropriate for me to accept further submissions made in this regard after the oral hearing (and I am not sure that it is), I do not see that this definitively changes the position. As the ET found, the Claimant had little

A

awareness of the position regarding the visa application that had been made on her behalf and I note that at paragraph 41 of the particulars of claim it is stated that:

> **"41. The Claimant's solicitors are currently seeking a copy of the Claimant's file from the UK Border Agency. The Claimant reserves her position in respect of any documentation filed with the UK Border Agency."**

B

61. Having heard the entirety of the evidence, the ET (relevantly) made the findings set out at paragraph 9 above. On the submissions made to me at the hearing of the appeal, I was not satisfied that this amounted to a clear finding that there was a new contract in 2013.

C

62. In any event, even if I was wrong in taking that view, the point goes nowhere. As I explained at paragraph 47 of the Judgment, I expressly went on to consider the alternative possibility that the parties had entered into a new contract of employment in 2013. For the reasons then set out at paragraphs 48 to 50, I was satisfied that this still would not have fallen within the second category in **Hall**. In the circumstances, I do not consider it would be in the interests of justice for me to review my Judgment (see Rule 33 **EAT Rules 1993**) as the Respondent requests, because: (1) I do not consider that paragraph 46 misrepresents any finding of fact by the ET, and (2) even if I was wrong about that, I cannot see that there is any prospect of my reaching a different conclusion on the appeal, given that I went on to consider the alternative case urged by the Respondent in any event. The Respondent's application is therefore refused.

D

E

F

G

H