



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs U D Ale

**Respondents:** (R1) Arjun, Vijay and Preeti Chugani  
(R2) Secretary of State for Business, Energy  
and Industrial Strategy

**Heard at:** Leicester

**On:** 21 July 2017 – Reading Day  
24, 25, 26 and 27 July 2017 – Hearing Days  
28 July 2017 – Reserved Judgment

**Before:** Employment Judge Hutchinson

**Members:** Mrs B Tidd  
Mr C Bhogaita

## Representatives

**Claimant:** Mrs L Price of Counsel  
**Respondents:** (R1) Vijay Chugani  
(R2) No appearance

# CORRECTED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:-

1. The first Respondent's have failed to provide to the Claimant a statement of initial employment particulars.
2. The first Respondent has failed to provide to the Claimant an itemised pay statement.
3. The Claimant was unfairly dismissed by the first Respondent.
4. The Respondents failed to pay the Claimant the minimum wage under the National Minimum Wage Act 1998 and the 1999 Regulations.
5. The Respondents failed to provide daily, weekly and annual rest contrary to the Working Time Regulations 1998.
6. The Respondent harassed the Claimant and the conduct related to the relevant protected characteristic[s] of race ~~and sex~~

~~[7. The Claimant was subjected to direct discrimination by the first Respondent's because of the protected characteristic of race.]~~

~~[8. The Respondent directly discriminated against the Claimant because of the protected characteristic of sex.]~~

9. The Respondent discriminated against the Claimant by way of indirect discrimination because of the protected characteristic of race.

10. The issue of remedy and the Limitation Regulations point regarding the National Minimum Wage will be dealt with at a hearing by this Tribunal on **Monday 13 November 2017 and Tuesday 14 November 2017** at 10 am at the Leicester Employment Tribunal Hearing Centre.

## REASONS

### Background and Issues

1. The Claimant presented her claims to the Employment Tribunal on 8 July 2016. She claimed that she had worked as a domestic worker for the Respondents from March 2013 until she left her employment and resigned on 20 February 2016. She said that she had been working for over 99 hours each week and was paid £120.00 per month in cash. She made claims of:-

- Unfair dismissal
- Sex discrimination – direct and harassment
- Race discrimination – direct and indirect and harassment
- Failure to provide daily and weekly rest breaks and holiday pay
- Failure to provide itemised statements
- Unauthorised deductions of wages

2. Her claim form described how she had originally gone to India in 2005 in an attempt to rejoin her husband who was living in the UK. That she had worked for 4 years in India where she was exploited and that she was then trafficked to the UK on or about 9 March 2013 where she initially joined her husband at the home of the Kumar family. After a week she was taken to the first Respondent's house and there worked for them for long periods each week, with few or any breaks and was paid £120.00 per month.

3. She described how she had escaped from the Chugani household and had been referred to Kalayaan, a Charity helping migrant domestic workers. They helped her and her husband and found accommodation for them and then supported them with this case.

4. The papers were served on the Respondent.

5. The first Respondent's filed their response to the Employment Tribunal claim on 11 August 2016. In the ET1 they said that the Claimant had used a fraudulent name and was never employed by them. They described her as "a guest".

6. They described this as being due to her “temporary accommodation problem”. They said that the Claimant’s statement in her particulars of claims was “total lies”. That she had not been responsible for looking after the children. That she had spent most of her time on her mobile phone, disappearing for many hours upstairs in her room or watching television or roaming in the garden. They said that they had taken her to the cinema on numerous times, together with restaurants for lunch and dinner and participated in children’s birthday parties at bowling, functions and festivals.

7. They went on to say:

“The Claimant had admitted false entry by fraud on a fabricated name and passport, made numerous allegation against an employer in India. Remained in this country under a false name until this time came to return back to India. Fleeing from the home when the threat of being picked up by the Home Office Team. Making false allegations to again try to extend stay and not return back to India where she now says she has a child, very misleading. Lying to extort money from ourselves after we really looked after and helped her.”

8. There was a closed telephone Preliminary Hearing on 19 September 2016 conducted by my colleague Employment Judge Blackwell. In their agenda for that Preliminary Hearing the first Respondent’s repeated their contentions saying that the “Claimant is scandalous using two different fraudulent names” and also saying:

“Claimant Ale has no valid claim against us. We have no knowledge of this person. The claim should be dismissed.”

9. On 21 November 2016 the Tribunal heard from the Treasury Solicitor. The Tribunal was told that the Claimant’s Representatives had contacted the Treasury Solicitor to inform them that the Claimant would be challenging the legality of Section 2 of the Deduction from Wages (Limitation) Regulations 2014 (“Regulation 2”) and that the Claimant invites the Tribunal to dis-apply Regulation 2.

10. It was pointed out that the Secretary of State’s position was that subject to the Tribunal making a finding that the Claimant’s claim of an unlawful deduction from wages for a period of more than 2 years prior to the presentation of her claim is made out and if the Tribunal did so determine that any challenge by the Claimant to the validity of Regulation 2 be held over to a further hearing enabling the Secretary of State to be joined as a party and to make representations as to the appropriate handling of any challenge.

11. My colleague Employment Judge Britton then joined the Secretary of State for Business, Energy and Industrial Strategy as a party to the proceedings and at subsequent case management hearings it was agreed to deal with the Regulation 2 point after initial hearing to determine whether Regulation 2 would be engaged in any event.

12. I conducted a case management Preliminary Hearing in respect of these matters on Monday 20 February 2017 when I relisted the matter for hearing and determined that this hearing would deal with the liability issues only as between the Claimant and the first set of Respondent's namely the Chugani family. Once a decision had been made in respect of that then the matter could be listed to deal with the second point regarding the Regulation 2 matter.

13. I also conducted a further case management Preliminary Hearing to list the limitation hearing on 25 May 2017. I recall at each of these two hearings I discussed with Vijay Chugani that these were very serious matters and that he really ought to consider obtaining legal advice in respect of their defence of the matter.

14. The first Respondent's repeatedly sought to strike out the claim complaining:-

14.1 The Claimant's claim was false because she was shielding behind the name of Gita Devi Rana.

14.2 That the claim was scandalous or vexatious because the Claimant was not allowed to work in the UK.

14.3 That the Claimant had a work contract with another person Renu Sekhri and valid visa only until 22 July 2013.

14.4 The MRM form filled by the Claimant's solicitors had a false declaration and did not disclose the immigration/visa entry details.

15. I determined that these matters should be resolved at the hearing on 21 July and would be considered at the start of the hearing.

16. At the start of the hearing there was another issue. The Claimant sought to rely upon an expert report provided by Abigail Stepnitz. The report had only been served on the first Respondent's on Thursday 17 July 2017 in the evening. The expert's report did not provide any evidence. The evidence had been provided by way of witness statements and these had been exchanged previously. It was an opinion regarding the Claimant's status as a trafficked person.

17. Mrs Price for the Claimant explained that it had been very difficult to obtain such a report and that they had served it on the date of receipt. That it should be admitted because it was highly relevant. It addressed whether the Claimant was a victim of trafficking.

18. The Respondent's had already had details of what the International Labour Organisation ("ILO") indicators were and had previously seen the Claimant's witness statements. There was therefore limited prejudice to the Respondents because they knew the issues that they would have to deal with and this didn't change that.

19. Vijay Chugani objected to this saying that it should not be admissible because it was presented too late. The parties had exchanged the witness statements on 5 July and the expert had only been instructed after the exchange of witness statements on 6 July.

20. The Tribunal was satisfied that the report was admissible. That the report could not be obtained until after the witness statements had been exchanged on 5 July 2017. The expert had been instructed immediately thereafter and as soon as the Representatives of the Claimant had received the report they had served it on the Respondents. The Respondents have not been taken by surprise in respect of this report. I pointed out to the Respondents that it had been their decision not to obtain legal advice throughout these proceedings and that the report did not contain any new evidence, simply an opinion.

21. The Tribunal felt that the report would be useful to us in making our determination and it is relevant. We were satisfied that we should consider the report as the Respondents had had it since Thursday and done nothing at all about taking any advice on it. Indeed they had not taken any advice on any matter since the commencement of the proceedings.

22. We should also mention that during the course of the hearing the Respondents contended that the Court's interpreter had misrepresented what was said to him. This related to our first interpreter on the first day. No complaint was made in respect of our second interpreter. One of our members spoke Hindi himself and he assured us and we were satisfied that there was no error in the interpretation given by our interpreter.

23. At the conclusion of the Claimant's evidence Vijay Chugani applied for a postponement of the hearing. The reason for the postponement was:

"This is not going the way I would anticipate. I don't know how to defend it. I need a lawyer."

24. We were told that the Claimant was partly funded by Legal Aid but otherwise was being provided assistance on a pro bono basis. The Respondent had had ample time to take legal advice and had chosen not to do so and it was far too late for there to be any postponement at that stage of the proceedings. It was in the interests of justice to get on with the case.

### **The Legal Issues**

25. At the commencement of the hearing we identified the issues that we would have to determine which were:-

#### Dates of Employment

25.1 Was the Claimant employed by the Respondent? If so what were the dates of her employment?

#### Statement of Terms and Conditions

25.2 Did the Respondent provide a statement of terms and conditions as required by Section 1 of the Employment Rights Act 1996?

Payslips

25.3 Did the Respondent provide the Claimant with itemised pay statements as required by Section 8 of the Employment Rights Act 1996?

Unfair Dismissal

25.4 Did the Claimant resign or was she dismissed?

25.5. Did the Respondent's act in fundamental breach of the Claimant's Contract of Employment by any or all of the following:-

- a) Withholding the Claimant's passport.
- b) Verbally abusing the Claimant.
- c) Failing to pay the national minimum wage.
- d) Making the Claimant work onerous working hours.
- e) Breaching the Working Time Regulations.
- f) Failing to provide an accurate contract of employment.
- g) Failing to provide payslips.
- h) Restricting the Claimant's movements.

25.6 Did the Claimant resign in response, whether in whole or in part, to the matters identified at paragraph 5 above?

25.7 Can the Respondent show that the reason for the dismissal was a potentially fair reason pursuant to Section 98 of the Employment Rights Act 1996?

25.8 Can the Respondent show that, having regard to the reasons shown, that, in the circumstances that the Respondent acted reasonably in treating any potentially fair reason as a sufficient reason for dismissing the Claimant?

Wages Claim – National Minimum Wage

25.9 What were the hours of work carried out by the Claimant during her employment?

25.10 What salary was the Claimant entitled to receive pursuant to:-

- a) any contract she had with her employers;
- b) the National Minimum Wage Act 1998 and the 1999 Regulations made under that Act?

25.11 What was the total value of salary payments made to the Claimant through her employment?

25.12 Can the Claimant recover loss of wages for such period as fall outside of the limitation provisions of the Deduction from Wages (Limitation) Regulations 2014?

#### Wages Claims – Annual Leave

25.13 Did the Respondent provide to the Claimant paid annual leave and/or pay her in respect of the same as required by the Working Time Regulations 1998 and/or as required by the terms of her employment contract?

25.14 Can the Claimant recover loss of wages for such period as falls outside of the limitation provisions of the Deduction from Wages (Limitation) Regulations 2014?

#### Working Time

25.15 Was the Claimant given daily rest of 11 continuous hours in every 24 hour period during her employment as required by Regulation 10 of the Working Time Regulations 1998?

25.16 Was the Claimant given weekly rest of 24 hours in every 7 day period as required by Regulation 11 of the Working Time Regulations 1998?

25.17 If the Claimant was given rest periods as required, did the Respondent allow her to make full use of those rest periods?

#### Harassment – Race

25.18 Did the Respondent's treatment of the Claimant during her employment amount to unwanted conduct? The Claimant relies on the facts and matters set out at paragraph 9 of her ET1.

25.19 If so:-

a) did it have the purpose of violating the Claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her; and/or;

b) should it reasonably be considered as having the purpose or effect of violating the Claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her having regard to all the circumstances including in particular the perception of the Claimant?

25.20 If so was such treatment related to her Nepalese nationality, national origin or ethnic origin.

Direct Race Discrimination

25.21 Was the Claimant treated in the manner alleged at paragraph 10 of the ET?

25.22 If so, has the Claimant proven sufficient facts from which the Tribunal could conclude, in the absence of an adequate explanation that the Respondent treated the Claimant less favourably than the Respondent treats or would treat others because of her race? The Claimant avers that she was treated less favourably by reason of her race in the following respects:-

- a) Her Nepalese nationality;
- b) Her Nepalese national origin and/or;
- c) Her Nepalese ethnic origin.

25.23 If so, can the Respondent show the acts committed were in no sense whatever because of the Claimant's race (as defined in paragraph 25.22 above)?

25.24 The Claimant avers that she was treated in the manner alleged because she was of Nepalese nationality/national origin/ethnic origin. She relies on the actual comparators (the white man who worked in the Respondent's garden and the Indian domestic workers who worked for one of the third Respondent's friends) referred to at paragraph 15 and 19 of her ET1. Alternatively her comparator is a hypothetical non Nepalese domestic worker.

Indirect Discrimination

25.25 Did the Respondent's apply to the Claimant any or all of the provisions, criterion or practices ("PCP's") set out at paragraph 11 of the ET1.

25.26 If so, would the Respondent have applied any or all of the PCP's equally to persons not of the same race as defined in paragraph 25.20 above as the Claimant?

25.27 If so, do any or all of the PCP's put persons of the Claimant's race (as defined at paragraph 25.20 above) at a particular disadvantage when compared with other persons?

25.28 If so, did any or all of the PCP's put the Claimant at that disadvantage?

25.29 If so, can the Respondent show that the PCP's applied to be a proportionate means of achieving a legitimate aim?



Harassment on the Grounds of Sex

25.30 Did the Respondent's treatment of the Claimant during her employment amount to unwanted conduct? (The Claimant relies on the facts and matters set out at paragraph 15 in her ET1.)

25.31 If so:-

a) Did it have the purpose of violating the Claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her; and/or

b) Should it reasonably be considered as having the purpose or effect of violating the Claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, having regard to all the circumstances, including in particular the perceptions of the Claimant?

25.32 If so, was such treatment related to her sex?

Direct Sex Discrimination

25.33 Was the Claimant treated in the manner alleged at paragraph 16 of the ET1?

25.34 If so has the Claimant proven sufficient facts from which the Tribunal could conclude, in the absence of an adequate explanation that the Respondent treated the Claimant less favourably than the Respondent treats or would treat others because of her sex?

25.35 If so can the Respondent show that the acts committed were in no sense whatsoever because of the Claimant's sex?

25.36 The Claimant avers that she was treated in the manner alleged because she is female. She relies on the actual comparator being the male who worked in the Respondent's garden referred to at paragraph 15 of her Particulars of Claim attached to her ET1. Alternatively her comparator is a hypothetical male domestic worker.

Illegality

25.37 Does a defence of illegality operate so as to defeat all or any of the Claimant's claims?

**Evidence**

26. For the Claimant we heard from the following:-

- The Claimant
- Tul Prasad Ale, the Claimant's husband
- Surya Thapa, the Claimant's cousin

27. For the Respondent's:-

- Arjun Chugani
- Vijay Chugani, the son of Arjun Chugani
- Priti Chugani, wife of Vijay Chugani

28. There was an agreed bundle of documents and where I refer to page numbers it is from that bundle. There was also an expert's report from Abigail Stepnitz who is a consultant and researcher in asylum, trafficking and smuggling and gender based violence.

29. Where there was a dispute in the evidence we preferred the evidence of the Claimant and her witnesses. The Respondent's gave evidence that was unreliable. Their witness statements were almost identical and had been prepared by Arjun Chugani. When asked direct questions which they were uncomfortable about they gave evasive answers. An example of this was when we asked about their gardener. Arjun Chugani would not tell us how much he was paid or what the arrangements were in respect of him.

30. Another example was when the Chugani's were asked whether the Claimant did any domestic tasks, Priti Chugani said that "we didn't ask her to do anything" and failed or was unable to give any explanation as to what she meant by that.

31. Their evidence was contradictory and unbelievable. They failed to explain to us how a wealthy Indian family, who live in a large 7 bedroom house in an expensive part of Leicester in its own grounds, claimed to have as a guest for 3 years a poor Nepalese lady who was not any relation to them and was unknown to them altogether until she arrived on their doorstep via their friends the Kumar's who live in a similarly expensive house just down the road. The Kumar's employed Mrs Ale's husband in similar circumstances.

32. They also failed to explain why such a person would be regarded as a guest and do nothing and how it was they came to be in possession of the passport which they acknowledge themselves they knew was a false passport. In fact the Respondents gave no satisfactory explanation as to why the Claimant was not living with her husband at the Kumar's house. According to their version of events they had not paid her anything and did not receive anything from her and at no stage in the 3 years which she resided with them did they ask her to leave.

33. The Claimant's version of events and the corroborating evidence of Mr Ale and Mr Thapa were consistent and believable. In particular Mr Thapa had worked for 24 years in the forces as a Royal Engineer. He had no reason at all to fabricate his evidence. His version that he had visited the Claimant and her husband once and had been in touch with them every few months was entirely believable as was the fact that he had gone to the Claimant's assistance when she needed help.

34. We have heard Mrs Ale give evidence and we are satisfied that she was not capable of completing the immigration documents that were made on her behalf. We are satisfied that she knew that she had arrived in the UK on a false passport and been deceived into thinking that she would be with her husband when in fact the Chugani's intended her to work for them as a domestic servant.

**The Facts**

35. The Claimant was born in the Syangja district in western Nepal and is a Nepalese national. She comes from a very poor family. She had lived with her parents, 2 elder sisters, a younger sister and 3 younger brothers. Her paternal grandmother also lived with her. She can read and write in Nepalese but does not read, write or speak English except that she can read her name in English script.

36. She married Tul Prasad Ale when she was 17 and they had a son who is now 20. She moved in to live with her husband's family and there were 9 people living together in a small hut. They relied heavily on the food that they grew in the fields and did not have jobs and there was often not enough food to go round. The family was very poor.

37. In about 2000 Mr Ale left and went to India in search of work and found a job in Delhi and was able to send some money home.

38. In or around 2005 Mr Ale was sent to work in the UK. This was arranged by Mr Kumar and Mr Nahwal. Mr Nahwal was based in Delhi and Mr Kumar lived in Leicester. Mr Ale worked for Mr Kumar until he escaped with his wife in February 2016.

39. In about 2009 Mr Ale asked his wife to join him in the UK. They hoped that they would be able to earn money in order to support their family and for her to be reunited with her husband. The Claimant was told that she needed to go to India to get a visa before she was able to come to the UK. Mr Kumar had told Mr Ale to do this. Mrs Ale did not have a passport and had never left the country before and she travelled to India having obtained a passport with the help of her family.

40. When she arrived in India she was taken to her husband's previous employers Mr and Mrs Nahwal. The plan was that she would be staying there for a short period of time for her visa to be processed. Originally she thought this would be a week, and then she was told it would be 10 to 15 days. Eventually she stayed working for them for 4 years.

41. Mr and Mrs Nahwal had their own business arranging manual labour to work in Mauritius. They had a son and 2 daughters, one of whom lived with them.

42. Mrs Ale was required to work for them as a domestic worker and she was told that she could learn how to be a domestic worker with them and that this would help her when she got to the UK. Mr and Mrs Nahwal were of higher status than Mrs Ale and she did not feel in any position to refuse to do the work as she was entirely dependent on them both in terms of her living in India and her long term aim to go to the UK to be with her husband.

43. For the 4 year period Mrs Ale worked for the Nahwal's as a housemaid, generally working from 6 am until 11 pm. Initially she was not allowed to leave the property on her own and would in any event not have been comfortable about doing so as she did not speak Hindi and did not know the area at all. During this time Mr and Mrs Nahwal did not make any payment to the Claimant at all. She only stayed with them because she did not have any alternative option. She

spoke to her husband who told her to be patient and she was.

44. She had travelled to India on her own passport but she was told by Mr and Mrs Nahwal that she would need a different passport for travel to the UK. This was because she was married. She was told that she would be unlikely to get a visa if her passport said that she was married as unmarried people were wanted. Mrs Ale had no idea whether this information was correct but because of her status and that of Mr and Mrs Nahwal she had no reason to believe that they were not telling her the truth.

45. Mr and Mrs Nahwal knew that she had a younger sister and they told her to apply for a passport in her sister's name as an unmarried woman but with Mrs Ale's photo. She was told that if she wanted to meet with her husband she should do what they told her to. She agreed to ask her sister about this because she wanted to be reunited with her husband.

46. Mrs Ale then spoke with her sister and asked her to apply for a passport. Although reluctant she agreed to do so to help Mrs Ale. Mr and Mrs Nahwal told her that it would only be for her to travel to the United Kingdom and that when she joined her husband she would be able to apply for UK citizenship so they could stay together. Mrs Ale had no idea whether this was true but had no reason to disbelieve them. She had no understanding herself of any such matter and just wanted to be with her husband. She had little choice. She could not go back to Nepal and she could not go to the UK unless she did what she was told.

47. After her sister obtained the passport this was couriered to her in Delhi, although it was handed to Mr and Mrs Nahwal and Mrs Ale only saw it once. Mrs Ale sent her own passport back to her sister.

48. Mr Nahwal then arranged to obtain the rest of the papers from the United Kingdom. Mrs Ale was told that once she was in the UK then everything would be fine. She did not appreciate that by using her sister's passport to travel the UK there would be any difficulty. She was reassured by the Nahwal's that she would not be in any trouble if she did this.

49. Mr and Mrs Nahwal told her that she should now be known by her new name of Gita Devi Rana, her sister's name. The daughter of Mr and Mrs Nahwal took her to a shop to have her photograph taken and the photo was handed to Mr and Mrs Nahwal who arranged the visa application. They had Mrs Ale's new passport. The process took a long time and Mr Nahwal took her to the High Commission on two occasions to have her photograph taken. She was given forms to sign. She could not read them and did not understand what they said and the forms were not translated for her. She was simply told to sign which is what she did.

50. In 2010 a visa was issued to her under the name of Gita Devi Rana yet still Mr and Mrs Nahwal delayed her travel to the UK.

51. Unbeknown to Mrs Ale a letter was sent to UKVI by Rene Sekhri on 12 December 2013 stating that she was too ill to travel to the UK when her visa had been issued in 2010. This was not true. The letter also stated that Mrs Ale looked after Ms Sekhri while she was in India. This was not true. Mrs Ale never met Mrs Sekhri.

52. Mrs Sekhri was the daughter of the Kumar family who lived at 43 Moreland Avenue, Leicester. This was the family that Mr Ale worked for. We have seen correspondence between Mrs Sekhri and the British High Commission dated 18 December 2012 (page 98). The letter states that she had been living in India for 25 years and that she had employed Gita Devi Rana as her caretaker since September 2007 and that she took care of all her daily needs. This was not true.

53. The letter referred to her family staying in the UK at 43 Moreland Avenue and that she travelled there for treatment. She requested that the Claimant be allowed to travel with her with a domestic worker visa for one year enabling her to take care of her needs in the UK. It said that the Claimant was being paid INR 6000 each month. A letter was attached (page 97) from Spire Leicester Hospital. The letter refers to an appointment with a Dr P McNally on 23 January 2013.

54. We are satisfied that nothing in the letter relating to the Claimant was true. The Claimant had never met Mrs Sekhri and certainly was not paid anything by anyone in the 5 years that it was said that she had been working for the family. We have also seen a letter dated 15 February 2013 from Mrs Sekhri (page 100) asking that permission be granted for the Claimant to stay in the UK for 6 months so that the Claimant could be her domestic servant in the UK.

55. Mrs Ale was not aware that a visa had been granted to her on this basis. It can be seen from the documentation provided to the Tribunal and particularly the letter of 18 December 2012 (page 96) that Mr Chandar, who was the son of the Kumar's, organised the documents and provided these to the Nahwal's. We understand that the Kumar's paid the Nahwal's approximately £850.00 in connection with the visa.

56. After the visa was obtained travel was arranged for Mrs Ale to the United Kingdom and she arrived here on or around 9 March 2013. The flight was arranged for her and she arrived alone in the UK and was met at Heathrow Airport by her husband and Mr Kumar's driver. She was able to stay with her husband at the Kumar's house for one week.

57. At the end of this week Surindar Kumar told her that she was to go to another house. When Mr Ale asked why this was the case, after it had taken such a long time for them to be reunited, he was told that it was difficult for the Kumar's to keep both of them. The house that she was to move to was owned by relatives of the Kumar's. This was not true. She was told that they would be able to see each other. The Claimant was told that it would only be for a month or two whilst they made arrangements to find her work. This was not true.

58. Very shortly afterwards Mr Arjun Chugani arrived and had a conversation with Mr Kumar and he took Mrs Ale to the Chugani household at the Pantiles, Gartree Road, Oadby, Leicestershire. This was a large 7 bedroom house in its own grounds and with an electric security gate.

59. Living at the house was Mr Arjun Chugani, his son Vijay and daughter-in-law Priti and their 3 young children a boy of about 12 years old and twins being a boy and a girl of about 8.

60. Mrs Ale was extremely upset because after such a long period of time she thought that she was joining her husband to live with him in the United Kingdom and now she was not. She had been lied to again and she was not going to be

living with her husband.

61. We are satisfied that the Chugani family are extremely wealthy. Mr Chugani senior had previously owned a substantial textile business and he and his son were now in commercial property development. Priti Chugani does not work herself.

62. Mrs Ale lived on the top floor of the house in a small bedroom with a bathroom. The Claimant was the only domestic worker who was engaged by them. She started work each day at 7 am and would not finish until she went to bed at approximately 10-10.30 pm at night. She worked 7 days a week and had few breaks other than a 2 hour break on Saturday afternoon so that she could spend some time with her husband who was then allowed to visit her.

63. We have had provided a schedule of activities by the Claimant and we accept her evidence that this is what work she undertook. It can be seen that her main tasks were:-

- Cleaning the house
- Doing the laundry
- Assisting in the preparation of meals
- Childcare
- Helping in the garden

64. It is the evidence of the Chugani's that the Claimant was a guest in their house. We do not accept this. She was a domestic worker for them and was paid in cash £120.00 per month. Payment was made on about the sixteenth to the eighteenth of each month and Mrs Ale would keep the money in a suitcase in her room. Every 3 months she would hand £300.00 to her husband when he came to visit her at the weekend and this would be sent to Nepal by Western Union for her son. Mrs Ale had asked the Chugani's to do this for her because that was the arrangement between her husband and the Kumar's but the Chugani's said this was not possible. The conclusion the Tribunal reached was that they did not want there to be any trace of the money that they paid to the Claimant.

65. The Tribunal has seen the receipts from Western Union in respect of the payments made by the Kumar's on behalf of Mr Ale to his son which are at pages 651-689. When Mr Ale made payments via Western Union for his wife he would hand the receipt for the money to Mrs Ale and she kept that in her suitcase. When she escaped she left these receipts in the suitcase in the Chugani household. She was not able to go back for them as this would have alerted her employers as to her intentions.

66. When the Chugani's were away on holiday Mrs Ale was left in the house on her own. We accept that when she was there on her own she was frightened. She was also afraid to leave the house as she felt unsafe on her own. There was nowhere for her to go and nobody for her to see if she went outside. She could not see her husband who was working for the Kumar's. She could not read or understand any language other than Nepalese. She could not therefore communicate with anyone she might meet.

67. Mr and Mrs Ale were generally not allowed to leave the house when they had their 2 hour meeting on Saturday afternoons. Occasionally they would go to the local Asda to buy things like soap but generally they stayed at the Chugani's house.

68. We have seen photos produced by the Chugani's of Mrs Ale accompanying them occasionally to celebrate birthdays or the like. Generally she did not accompany them and in the years that she spent with them she explained that she went on one occasion to a restaurant to celebrate the twins' birthday and another time to the cinema when she was to look after the children. We accept that apart from these occasional trips out with the Chugani family or with her husband to ASDA she did not leave the Chugani house. In some of these photographs Mrs Ale can be seen smiling. The photographs are at pages 758-763. The photographs, according to the Respondent's, show that she was a guest in their house and they say that she was regularly out with them and the family. They describe her as a temporary guest from their family friend Renu Sekhri and say that she did not undertake any work for them and the photographs show she was a guest and they now complain that:

"First we were told she was single, then she was married and now as per statement she has a son in Nepal, very unreliable and liar, always making up stories, real con artist."

69. This Tribunal does not accept that story. It is unbelievable.

70. When Mrs Ale arrived in the UK she had a visa that was due to expire on 22 July 2013. That visa had been obtained falsely by the Kumar's and the Nahwal's and must have been with the full knowledge of the Chugani's.

71. Shortly after arriving at the Chugani house, Mrs Chugani asked the Claimant for her passport so they could apply to extend her visa. Mrs Ale gave it to her and she in turn passed it to her father-in-law. Mrs Ale never saw the passport again.

72. Mrs Ale was asked on two occasions to sign documents which she was told were in connection with her visa application. The documents were in English so she could not read them and she was not aware of the contents of the documents and these were never explained to her. The Tribunal has had the benefit of papers from the Home Office which show that on 12 June 2013 an application was made on behalf of the Claimant for leave to remain in the United Kingdom as an overseas domestic servant in a private household. That application was refused. The reasons for the refusal letter are at pages 190-192. The letter states:

"You applied for an extension of stay in the United Kingdom as a domestic worker in a private household who entered the UK under the Rules in place on or after 6 April 2012. In view of the fact that you had leave to Enter the UK as an Overseas Domestic worker from 22 January 2013 until 22 July 2013 the Secretary of State is not Satisfied that you have been granted less than 6 months leave to enter as an Overseas Domestic worker. Therefore you do not meet the requirements under paragraphs 159D(ii).

In view of the fact that you applied for an extension of leave in the UK and as your application has not been withdrawn. The Secretary of State is not satisfied that you intend to leave the United Kingdom at the end of six months in the United Kingdom or at the same time as the employer, whichever is the earliest. You do not qualify for leave by virtue of paragraph 159D(vi) with reference to 159A(iv) of the Immigration Rules.”

Your application has been refused under to paragraph 159F or HC395 (as amended)”

73. She was told of her right of appeal and the letter in respect of that is at pages 193-195.

74. We have seen a letter from the Claimant dated 29 October 2013 (page 196) which the Claimant did not understand. She signed the letter but had no idea about the contents of it and what it meant. An appeal was lodged, on her behalf, to the first tier Tribunal Immigration and Asylum Chamber against the Home Office decision on 7 November 2013 (page 197-205). Accompanying that appeal were documents in respect of her alleged employer Renu Sekhri at pages 206-208. The Claimant had still never met Renu Sekhri. We have also seen a letter of sponsorship apparently signed by Renu Sekhri dated 5 November 2013 at page 212 in support of that appeal together with other documentation including medical information.

75. Originally the appeal was to be heard on 5 November 2014 but this had to be postponed and it was rearranged for Friday 10 April 2015. The decision and reasons which were promulgated on 20 April 2015 are at pages 261-264. It can be seen from the findings that the information provided in respect of the appeal which was certainly not provided by the Claimant and must therefore have been provided on behalf of the Respondent's was false. It states that the appellant's claim was that she was employed by a British Citizen Mrs Sekhri as a domestic worker. She was not. It says that she had been working for Mrs Sekhri for the last 13 years mainly at her address in India but also travelling with her when required. She had not. It was said that Mrs Sekhri needed personal care which the appellant provided. She did not. The appeal failed.

76. We have seen a letter allegedly signed by the Claimant dated 1 May 2015 (page 265). It is written to the Upper Tribunal at Field House in London. It refers to the Claimant as care of Mrs Sekhri, at 32 Moreland Avenue, Leicester who was dead. It refers to her previous statement of 29 October 2013. It refers to:

“Again I stress and point out the importance of my being here to me and my employer. You as a kind human being and considering my self supporting position is not harming anyone I request this chance to be given to me.”

77. The contents of the letter were untrue. By this time Mrs Sekhri had died. The letter does not mention that. The Claimant also was not living at 43 Moreland Avenue. It also refers to Mrs Sekhri still needing her service. She did not. We are satisfied that the Claimant had no knowledge of this letter or its contents.

78. The application for a further appeal was refused by Upper Tribunal Judge Reeds on 20 June 2015 (pages 267-268).



79. Throughout this time we are satisfied the Claimant was not aware of any of this and that it was all being undertaken on her behalf without her knowledge. She simply signed documents when required to do so by the Chugani's and had no idea what was happening with regard to her visa.

80. Mr Thapa is a cousin of the Claimant who has been living in Kent for a number of years. He had been in the Royal Engineers and was asked by the family in Nepal to check and see if Mr Ale was okay in 2006. He spoke to him at regular intervals every three or four months. He said that Mr Ale was scared of his employers and they referred to him in derogatory terms as "Bahabur". This is a term used for people of "low rank" in a household. After Mrs Ale arrived in the UK he spoke to her. She told him that she had thought that she would be staying with Mr Ale when she came to the United Kingdom. She had been shocked to discover that they would be working in different households.

81. Mrs Ale told him about her long hours and the £120.00 per month that she was paid. He did not know anything about Mrs Ale's immigration status or about her travelling to the United Kingdom on a false passport. He was told by Mrs Ale that she had been told that as long as she continued to work for the Chugani family, the fact that she did not have a valid visa would not be an issue. Mr Thapa continued to be in regular contact with Mr and Mrs Ale.

82. Eventually in mid 2015 during one of the telephone conversations Mrs Ale begged Mr Thapa to help them. He said that they needed to be sure that they wanted to leave their employers before he could help them with their escape and he explained the potential risk to them as he thought that they might be arrested by the Police if they escaped. Mrs Ale said they were sure about their decision as they did not have a life due to their current working conditions.

83. Mr Thapa made some enquiries and found out about the organisation Kalayaan. He contacted them in early February and explained his concerns about Mr and Mrs Ale's exploitive situations. He was assured that it was highly probable that they had been trafficked to the UK for the purpose of domestic servitude and forced labour. He then began to plan how he would help Mr and Mrs Ale escape.

84. On 20 February 2016 he drove to Leicester and waited for Mr and Mrs Ale at the corner of the Asda car park. They made an excuse that they wanted to go out on that Saturday afternoon to buy some things from Asda and when they got to the car park he drove them away to his home in Kent where they stayed for a week before they were taken to Kalayaan's offices. They were then found accommodation and now live together.

85. We are satisfied that the Claimant did not run away from the Chugani's because she was afraid she would be collected by the Home Office Voluntary Team. She had no idea whether the Home Office wanted her at all as she had nothing to do with any applications to the Home Office. She relied on information provided to her by the Chugani's.

86. Subsequently Mr Ale has obtained a right to stay in the UK and they live and work together in London.

87. During her stay with the Chugani's, Mrs Ale did not receive any payslip or indeed any contract of employment and was paid in cash as described above each month.

## **The Law**

### Failure to Provide a Statement of Terms and Conditions

88. Section 1 of the Employment Rights Act 1996 (ERA) provides:

“(1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.”

89. Section 38 of the Employment Act 2002 provides that where an employer is in breach of his duty to the employee under Section 1(1) ERA, the Tribunal must make a minimum award which is equal to 2 weeks' pay and may:

“If it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.”

The higher amount is equal to 4 weeks' pay.

### Failure to Provide Itemised Pay Statements

90. The right is contained in Section 8 ERA which provides:

“(1) An employee has the right to be given by his employer, at or before the time at which any payment of wages or salary is made to him, a written itemised pay statement.”

91. Section 12 ERA provides that where an Employment Tribunal finds that an employer has failed to give an employee any pay statement in accordance with Section 8, the Tribunal shall make a declaration to that effect under Section 12(3)(b) ERA.

### Unfair Dismissal

92. The claim for unfair dismissal is made under Section 94 ERA. Section 95 provides:-

“(1) For the purposes of this part an employee is dismissed by his employer if (and, subject to subsection (2)..., only if):-

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.”

93. If we are satisfied that the Claimant is dismissed we then have to consider Section 98 of the ERA which provides:

“(1) In determining for the purpose of this part whether the dismissal of

an employee is fair or unfair, it is for the employer to show:-

- (a) the reason (or, if more than one, the principle reason) for the dismissal, and;
  - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) The reason falls within the subsection if it:-
- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;
  - (b) relates to the conduct of the employee;
  - (c) is that the employee was redundant;
  - (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under any enactment.
- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer):-
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee;
  - (b) shall be determined in accordance with equity and the substantial merits of the case."

94. As Ms Price described in her written submissions, in a constructive dismissal case the burden is on the Claimant to show that she was constructively dismissed. In order to do so she must prove that:-

- (i) The Respondent fundamentally breached her contract of employment;
- (ii) she resigned in response to the breach;
- (iii) she did not waive the breach or affirm the contract.

95 These principles are long established since the case of **Western Excavating (ECC) Limited v Sharp** [1978] ICR 221.

96. Ms Price also referred us to a number of cases namely:-

- **London Borough of Waltham Forest v Omilaju** [2005] IRLR 35
- **Wright v North Ayrshire Council** [2014] ICR 77

- X v Y [2004] EWCA civ 662

### Employee Status

97. In order for the Claimant to be able to make a claim for unfair dismissal and indeed her other claims under the ERA she must have employee status. There must be a contract in existence and it must be between the party doing the work and the party for whom the work is done. It is the Respondent's case that the Claimant was not an employee but was a guest of the house and that there was no payment made to the Claimant and she had not undertaken any work for them.

98. Section 230 ERA provides:-

“(1) In this act “an employee” means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this act “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under):-

(a) a contract of employment, or;

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any professional business undertaking carried on by the individual;

And any reference to a worker's contract shall be construed accordingly.”

### Failure to Pay the Minimum Wage under the National Minimum Wage Act 1998 (“NMWA”) and the National Minimum Wage Regulations 1999 (“NMWR”)

99. By Section 1 NMWA a worker is entitled to be paid at least the National Minimum Wage (“NMW”). A worker who is paid less than the NMW is taken to be entitled under his contract of employment to be paid the shortfall (Section 17 NMWA).

100. The enforcement mechanism is by way of a claim for unauthorised deductions from wages contrary to Section 13 ERA which provides:-

“(1) An employer shall not make a deduction from wages of a worker employed by him unless:-

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or;

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.”

101. As Ms Price told us in such a claim it is to be presumed that the worker was paid less than the NMW unless the contrary is established by the Respondent (Section 27 NMWA). Thus, the burden of proof is on the Respondent.

102. The calculation to determine whether the National Minimum Wage has been paid is by reference to Regulation 7 of the National Minimum Wage Regulations 2015 which replace the 1999 Regulations which have been revoked.

Failure to Provide Daily, Weekly and Annual Rest Contrary to the Working Time Regulations 1998 (“WTR”)

103. The Regulations provide the following rest periods:-

Daily Rest

Regulation 10 of the WTR provides:

“(1) A worker is entitled to a rest period of not less than 11 consecutive hours in each 24 hour period during which he works for his employer.”

Weekly rest period

Regulation 11 WTR provides:

“(1) Subject to paragraph (2), a worker is entitled to an uninterrupted rest period of not less than 24 hours in each 7 day period during which he works for his employer.

(2) If his employer so determines, a worker shall be entitled to either:-

(a) Two uninterrupted rest periods each of not less than 24 hours in each 14 day period during which he works for his employer; or

(b) One uninterrupted rest period of not less than 48 hours in each 14 day period in place of the entitlement provided for in paragraph (1).”

Entitlement to Annual Leave

104. Regulation 13 WTR provides:

“(1) Subject to paragraph (5), a worker is entitled to four weeks’ annual leave in each leave year.”

A worker is also entitled to additional annual leave under Regulation 13A which provides:

“(1) Subject to Regulation 26A and paragraphs (3) and (5), a worker is entitled in each leave year to a period of additional leave determined in accordance with paragraph (2).

(2) The period of additional leave to which a worker is entitled under paragraph (1) is:-

(e) In any leave year beginning on or after 1 April 2009, 1.6 weeks.

(3) The aggregate entitlement provided for in paragraph (2) and Regulation 13(1) is subject to a maximum of 28 days.”

### Harassment

105. Section 26 of the Equality Act 2010 (“EA”) provides:-

“(1) A person (A) harasses another (B) if:-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of:-

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account:-

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.”

Under subsection (5) the relevant protected characteristics include race.

### Direct Race Discrimination

106. Section 13 Equality Act 2010 (“EA”) provides:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

107. Ms Price submitted that where the same acts are identified as both direct and indirect discrimination, the latter is advanced very much in the alternative.

The Claimant recognises that the same act cannot be both.

The Burden of Proof

108. Section 136 EA provides:

“(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

109. In respect of this issue Ms Price also referred us to the cases of:-

- **Solicitors Regulation Authority v Mitchell** EAT 17 February 2014
- **Williams v Ministry of Defence** [2013] EQLR 856
- **Birmingham City Council and Semlali v Millwood** [2012] EQLR 910
- **Nagarajan v London Regional Transport** [1999] ICR 877

Indirect Race Discrimination

110. Section 19 EA provides:-

“(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:-

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.”

111. Ms Price referred us to the following cases:-

- **London Underground v Edwards (No2)** [1999] ICR 494
- **Pendleton v Derbyshire County Council** UK EAT/0238/15

112. In respect of the claims of direct and indirect discrimination the protected characteristic is both sex and race.

Victim of Trafficking

113. Ms Price in her submissions to us referred us to the UN protocol to prevent, suppress and punish trafficking in persons (“the Palermo Protocol”) which was ratified by the UK on 9 February 2006. Article 3 provides as follows:

“(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability... for the purpose of exploitation. Exploitation shall include, at a minimum,... sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.”

114. We have also had the benefit of the expert witness report of Abigail Stepnitz dated 20 July 2017. She also referred us to the Palermo Protocol and advised us that there were 3 elements which must be present for someone to be considered a victim of trafficking namely:-

1. The action: recruitment, transportation, harbour or receipt.
2. The means: through use of force, fraud, coercion, deception or exploitation of vulnerability.
3. The purpose: for the purpose of exploitation (or evidence of intended exploitation).

115. Ms Stepnitz also referred us to the notes of the International Labour Organisation with regard to understanding the nature of exploitation and the inherent overlap between the various types of abuse. In particular she quoted us from the International Labour Organisation, 2007, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1B), ILC, 96<sup>th</sup> Session, Geneva, 2007, Paragraph 77 which said:

“A crucial element of the definition of trafficking is its purpose, namely exploitation, which is specifically defined to include forced labour or services, slavery or similar practices, servitude and various forms of sexual exploitation. The notion of exploitation of labour inherent in this definition allows for a link to be established between the Palermo Protocol and Convention number 29, and makes clear that trafficking in persons for the purpose of exploitation is encompassed by the definition of force or compulsory labour provided under Article 2, Paragraph 1, of the Convention. This conjecture facilitates the task of implementing both instruments at the national level.”

116. Ms Stepnitz also referred us to the operational indicators of trafficking in human beings published by the ILO in 2009. We were told and accept that this is the most comprehensive and universally agreed upon set of trafficking indicators in Europe.



Each set is a list of indicators relevant to the following dimensions of the trafficking definition:

- “Deceptive recruitment (or deception during recruitment, transfer and transportation): 10 indicators
- Recruitment by abuse of vulnerability: 16 indicators
- Exploitive conditions of work: 9 indicators
- Coercion at destination: 15 indicators
- Abuse of vulnerability at destination: 7 indicators

117. Ms Stepnitz provided us with a full list of the indicators but she only discussed the relevant indicators in Ms Ale’s case. She explained that for each potential victim, each of the 6 dimensions of the trafficking definition is assessed independently. The result of the assessment is positive if the dimension is present for the potential victim, negative if not. It is important to note that it is only necessary to demonstrate the use of coercion, force, fraud, deception or exploitation of vulnerability to meet the recruitment criterion so only one of those categories needs to be positive.

118. In order to be assessed as positive a dimension must include at least:

- 2 strong indicators, or
- One strong indicator and one medium or weak indicator, or
- 3 medium indicators, or
- 2 medium indicators and one weak indicator

119. After an assessment is done for each dimension, the final analysis provides combining the 6 elements to identify the victims of trafficking.

120. She reminded us that only one kind of recruitment needs to be demonstrated to be consistent with the trafficking definition.

### Illegality

121. As Ms Price pointed out to us the Respondent’s rely heavily on the issue of illegality to defend the claim. She referred us to the recent case of **Hounga v Allen** [2014] UK SC 47.

122. As Ms Price pointed out Lord Wilson in that case considered the foundation for this defence lay upon concepts of public policy. We consider that the aspect of public policy that founds the defence is the duty upon the Courts to preserve the integrity of the legal system. He posed 4 questions and then answered them.

123. The four questions and answers were set out by Ms Price as follows:-

“(a) Did the Tribunal’s award of compensation to Ms Hounga allow her to profit from her wrongful conduct in entering into the contract? No, it was an award of compensation for injury to feelings consequent upon her dismissal, in particular the abusive nature of it.

(b) Did the award permit evasion of a penalty prescribed by the criminal law? No, Ms Houna has not been prosecuted for her entry into the contract and, even had a penalty been thus imposed upon her, it would not represent evasion of it.

(c) Did the award compromise the integrity of the legal system by appearing to encourage those in the situation of Ms Houna to enter into illegal contracts of employment? No, the idea is fanciful.

(d) Conversely, would application of the defence of illegality so as to defeat the award compromise the integrity of the legal system by appearing to encourage those in the situation of Mrs Allen to enter into illegal contracts of employment? Yes, possibly: It might engender a belief that they could even discriminate against such employees with impunity.”

124. He went on to say:

“It is too technical an approach to an international instrument to contend that paragraph 3 relates to compensation only for the trafficking and not for related acts of discrimination.”

And that “in my view it would be a breach of the UK’s international obligations under the convention for its law to cause Ms Houna’s complaint to be defeated by the defence of illegality”.”

125. He also referred to the comments of Lord Hoffman in **R v Lyons** [2002] UK HL 44 2003 IAC 976 at paragraph 27:

“Of course there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation.”

He concluded;

“the decision of the Court of Appeal to uphold Mrs Allen’s defence of illegality to her complaint runs strikingly counter to the prominent strain of current public policy against trafficking and in protection of victims. The public policy in support of the application of that defence, to the extent that it exists at all, should give way to the public policy to which its application is an affront”

126. We were also referred to the case of **Patel v Mirza** [2016] UK SC 42. We were told by Ms Price that that case is the authority for the proposition that the application of a “public policy” test is the correct approach when determining a defence of illegality is not limited to claims concerning the statutory tort of discrimination. Instead it can, and indeed should be applied more generally, including to claims for sums of money claimed under contract.

127. The submissions of the Respondent were that they had not employed the Claimant. Her situation had nothing to do with them. They had no idea that the Claimant had entered the UK under a false passport. She was using a false name and was in the country illegally. That she had a contract with Renu Sekhri which had nothing to do with them. That she was staying with them as a guest from a family friend due to a temporary accommodation problem.

## **Our Conclusions**

### The employment status of the Claimant

128. We are satisfied that the Claimant was employed by the Respondent's as a domestic worker. She was an individual who worked under a contract of employment and the contract of employment was a contract of service which was implied and was oral. The Claimant satisfies the definition in Section 230 ERA.

129. We are satisfied that after arriving in the United Kingdom the Claimant was told to live in the Respondent's household and once there she was made to work for the Respondent's. We do not accept the Respondent's contention that the Claimant was a guest in their house and that she remained there for a period of 3 years. She did not stay with them as a favour for a friend or acquaintance. There is no credible explanation as to why they would allow the Claimant to stay for such a lengthy period of time. We are satisfied that the Respondent's version of events is not credible. The contention that the Claimant should live with them for almost 3 years when they had no prior relationship or knowledge of her and that she was not asked to contribute in any way to the household is simply incredible and we do not believe them.

130. We accept entirely the evidence of the Claimant that she undertook domestic duties for the Respondent and this was supported by the evidence of Mr Thapa and Mr Ale who the Tribunal were satisfied gave credibility in this case. Further corroboration of the fact that she was employed by the Respondent's is the Western Union receipts which show that Mr Kumar, or someone else that worked for Mr Kumar, was transferring money to Nepal for the Claimant's husband.

131. We are satisfied that the immigration documents that were referred to were not completed by the Claimant or her husband. We are satisfied that the Claimant was not aware that an application had been made for her to be a domestic help to a Mrs Sekhri. We are satisfied that the Claimant has never met or even heard of Mrs Sekhri. We are satisfied in this case that the immigration documentation was falsely completed to enable the Respondent's to continue to engage the Claimant as a domestic help in their household. The Respondent's must have been aware that the Claimant's final visa appeal was declined in June 2015 and that they continued to engage her thereafter. Mrs Ale's decision to leave their employment in February 2016 had nothing to do with her immigration status. She was not aware of it. She left their employment because of the conditions under which she was working, namely working on average some 15 hours per day, with little rest, 7 days per week for £120.00 per month. Until the intervention of her cousin she had no passport, no hope and no future.

132. We are satisfied that the Claimant was employed by the Respondent from on or around 16 March 2013 until she left their employment on 20 February 2016.

### Statement of Terms and Conditions of Employment

133. It is not disputed by the Respondent's that they did not provide a statement of terms and conditions as required by Section 1 of the Employment Rights Act 1996. It was of course their contention that the Claimant was not

employed so it would have been surprising if they had done so. As the Claimant was employed the Claimant was entitled to a statement of terms and conditions and the Respondent's have failed to provide her with such a statement at any time during her employment.

### Payslips

134. A similar situation arises in respect of the provision of payslips. The Respondent's paid the Claimant in cash in the sum of £120.00 per month. They did not provide itemised pay statements as required by Section 8 of the Employment Rights Act.

### Unfair Dismissal Claim

135. Having satisfied ourselves that the Claimant was employed between 6 March 2013 and 20 February 2016 we have to decide whether the Claimant resigned from her employment. We are satisfied that on 20 February 2016 the Claimant did resign from the employment when she left with her husband. Whilst she did not tell the Respondent's that she was leaving we are satisfied that she could not do so. It was clear that by her actions she resigned.

136. The Claimant claims constructive unfair dismissal. As outlined above we have to be satisfied that the Respondent's had committed a fundamental breach of her contract of employment and that she resigned in response to that breach and did not delay too long.

137. We are satisfied in this case that the Respondent's have in their behaviour towards the Claimant committed a fundamental breach of her contract of employment. In particular:-

- They withheld her passport for the purposes of keeping her as a domestic servant
- Failed to pay her the minimum wage
- Required her to work onerous hours
- Failed to give her weekly rest in accordance with the Working Time Regulations
- Failed to give the Claimant any paid time off at all

138. The Tribunal was satisfied that this conduct amounted to a repudiatory breach of contract and was the effective cause of her resignation. We are satisfied that the conduct did not merely play a part in the resignation. It was the cause of her resignation. We accept Mrs Ale's evidence that it was the way that she was treated which led to her "running away". She could no longer continue to live with the Respondent's. She had only recently become aware that the way she was being treated was in contravention of UK employment law and not normal here.

139. The matters relied upon above did amount to an infringement of the employer's statutory obligations. Those infringements continued right up until the day the Claimant left. As she had not any means of escaping from the Respondent's employment until the date that she left, we are satisfied that her conduct did not amount to any acceptance of the breach. In any case we accept Ms Price's submission that such breaches mean that the Claimant would not have been capable as a matter of law of accepting the breach.

140. In this case the Respondent's do not accept that they employed the Claimant and do not propose any reason for dismissing the Claimant. As the burden of proof is on the Respondent's to establish a potentially fair reason for the dismissal and no such potentially fair reason has been put forward, we are satisfied that the dismissal was unfair.

#### Wages Claim – National Minimum Wage

141. We accept the evidence of the Claimant that she worked 15 hours per day, 7 days per week with the exception of Saturdays when she worked 13 hours. She had a rest break each day of 30 minutes and on Saturdays she had a total break of 3 hours. She therefore worked 99 hours per week.

The Claimant worked an equivalent of 429 hours per month and was paid £120.00 per month in cash. The Claimant was therefore paid throughout her employment at the rate of 28 pence per hour. The Claimant was not paid the National Minimum Wage.

#### Working Time Regulation Claims

142. We are satisfied that the Respondent's failed to provide the daily and weekly rest breaks that the Claimant was entitled to under Regulations 10 and 11 of the Working Time Regulations 1998. In respect of the daily rest period it can be seen from our findings of fact that the Claimant was not given a rest period of not less than 11 consecutive hours in each 24 hour period and was not given an uninterrupted rest period of not less than 24 hours in each 7 day period during the time that she worked for the employer. The Claimant was also not provided with annual leave in accordance with Regulations 13 and 13A of the Working Time Regulations. She was not given any paid leave at all during her employment with the Respondent's.

#### Harassment

143. In this case we are satisfied that the conduct of the Respondent's amounted to harassment on the grounds of her race. The acts of harassment were:-

- Failing to pay her the National Minimum Wage
- Failing to permit her free movement and association
- Only allowing her to see her husband for 2 hours per week
- Retaining her passport
- Making her work onerous working hours
- Failing to give her breaks and annual leave

144. We had no doubt in coming to the conclusion that the conduct was on the grounds of and related to her national origin, namely that she was Nepalese. We acknowledge that the requirement is that a protected characteristic need only be a more than trivial part of the reason for the treatment. In this case the Respondent's exploited the Claimant on the basis of her precarious immigration status. They were able to make use of the Claimant's limited connections to the UK, her lack of English comprehension and her good nature.

145. In this case the origins of the employment relationship were forged in India as Ms Price has submitted to us. We take judicial notice of the culture of the relationship between India and Nepal and Nepalese workers' role within Indian society. The Respondent's were all aware that the Claimant was Nepalese and it was because of that that they felt able to treat her in the appalling manner that they did. It can be seen from Mr Ale's evidence that he was treated in a very similar manner. Like his wife he was a Nepalese immigrant used as a domestic worker and worked extremely long hours for the Kumar family who are least acquaintances of the Respondent's also.

146. For these reasons we are satisfied that the behaviour of the Respondent's towards the Claimant amounts to harassment on grounds of race.

147. As the same acts are identified as both direct discrimination and harassment and we are satisfied that in this case the detriments set out do constitute harassment, we make no finding as to whether this amounted to direct discrimination.

147. We are also satisfied in this case that this did not amount to sexual harassment. We are satisfied that the reason for her treatment was because of her racial origin not because of her sex. It can be seen from her husbands circumstances that the reason for their treatment was their national origin. It had nothing to do with their gender.

#### Indirect Discrimination

148. In this case the provision, criterion or practices relied upon by the Claimant are:-

- (a) the requirement of employment that the employee did not speak English;
- (b) that it was a requirement of employment that the employee did not understand or have knowledge of work place rights within the UK.

149. We agree with Ms Price that there were a number of factors that support the conclusion that the Respondent's did adopt these PCP's:-

- (i) We accept that an inference can be drawn from the fact that the Claimant was employed and was not paid or treated in accordance with UK employment law. The Respondent's intended to employ someone who was not aware of her rights and not able to gain access to information about those rights;
- (ii) We are satisfied that the Respondent's made a conscious decision not to employ someone who was British. They intended to employ someone from Nepal who was not aware of any rights as an employee and had a subservient attitude towards people of Indian origin.
- (iii) Arjun Chugani and Priti Chugani were able to communicate to the Claimant in a language other than English namely Hindi.

150. We are satisfied that the pool for comparison is those of a Nepalese national origin against British national origin workers within the entire workforce.

151. The disadvantage in this case is the greater risk of negative treatment. The Claimant obtained a position that exposed her to working long hours for almost no pay.

152. We do take judicial notice of the fact that the criterion for employment would put more Nepalese at a disadvantage than those of British origin as per **London Underground v Edwards No2** [1999] ICR 494. We agree with Ms Price that it would be hard to imagine a British worker who would be prepared to work for less than 30 pence per hour. We accept that this does not mean that some could not equally be taken advantage of for example those with learning disabilities or other vulnerabilities and thus the PCP does apply to both the Claimant's group and the comparator group.

### Trafficking

153. We are satisfied that in this case the Claimant was a victim of trafficking. We have considered the ILO indicators and the expert's report from Ms Stepnitz. Following those ILO indicators and accepting the Claimant's account of events we are satisfied that the Claimant meets a number of key criteria for being found to be a victim of trafficking:-

153.1 There was coercion at her destination. The Claimant had very limited autonomy. She did not speak English. She did not know anyone other than her husband in the Leicester area or indeed in the United Kingdom. She did not have her own set of keys to the house. She was kept isolated by the Chugani family and she was only allowed to see her husband for 2 hours on a Saturday afternoon, he being constrained also by his own employers, the Kumar's. We are satisfied that the Claimant did not have any ability to self determine or leave the Chugani household.

153.2 We are satisfied that the Respondent's withheld and retained control of the Claimant's passport from the time shortly after she arrived in the UK. They told her that her visa was being processed and applied for. The Claimant had no understanding at all of the UK legal system and her immigration status. She had no idea of the basis for the application for her to remain in the United Kingdom and her only involvement in the false application for a visa for her was signing the forms when she was told to do so. We are satisfied that this provided the element of coercion that meant that she could not leave the Chugani's while she thought her visa application was still in train.

153.3 We are satisfied that the Claimant thought that she was coming to the UK to live with her husband. This is supported by her husband's evidence that he also thought that she was going to live with him. The Claimant was misled. She had no knowledge of Mrs Sekhri who she was supposed to be working for. Mrs Sekhri according to the applications made to the Home Office was living at 43 Moreland Avenue which was the address of the Kumar's where Mr Ale resided. The Claimant was not aware of the basis of the applications to extend her UK visa and the appeal process that was gone through on her behalf but without her knowledge.

153.4 She had not been aware of the Chugani's at all before she came to the United Kingdom and she was not told that she would be working for them or indeed undertaking such long hours of engagement at such a low rate of pay.

153.5 We are also satisfied that the Respondent's and those who assisted them in obtaining the services of the Claimant abused her vulnerability in recruiting her. She simply wanted to be with her husband and the Respondent's, the Kumar's and the Nahwal's used her lack of knowledge regarding immigration law and employment rights which rendered her vulnerable. This vulnerability was abused by promises that were made for her to be able to join her husband which we are satisfied would never have materialised had it not been for the efforts of Mr Thapa.

154. We note that the Home Office conclusion is that an initial decision has been made that the Claimant was a victim of trafficking and we note that Ms Stepnitz' report also finds that the Claimant satisfies the criterion. We have no hesitation ourselves in finding that the Claimant was a victim of trafficking on the basis of the evidence that we have heard.

155. We do not make any finding as to who was responsible for her trafficked status. There was clearly deception undertaken by both the Nahwal's and the Kumar's and it matters not whether the Chugani's themselves were responsible for her trafficked status.

### Illegality

156. As stated earlier the Respondent's make much of the issue of illegality to defend the claim. We have particularly relied on the case of **Hounga v Allen** where the facts of that case are strikingly similar to the case that we have been dealing with. In paragraph 109 of the judgment in the case of **Patel v Mirza** Lord Toulson said as follows:

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

157. Applying this to the Claimant's case we are satisfied that there are significant policy considerations which are “countervailing” as described by Ms Price. We should not allow the defence of illegality to bar a remedy in this claim. For good reasons as said in **Hounga** there is a:

“Prominent strain of current public policy against trafficking in favour of the protection of its victims.”



158. Parliament has introduced the Modern Slavery Act of 2015 which sets out to do this. The United Kingdom is also under obligations in international law to protect victims of trafficking and to ensure they receive compensation. As in **Hounga** where the Supreme Court considered that not to allow the Claimant to receive compensation would be a breach of those commitments.

159. We are satisfied that an award of compensation to Mrs Ale would not compromise the integrity of the legal system. It does not in our view encourage those in the situation of the Claimant to enter into illegal contracts of employment. The appalling treatment that Mrs Ale suffered is hardly one which could be said to “encourage” illegal contracts. Any award that we make would not allow her to evade any punishment for any criminal wrongdoing if indeed she has done anything wrong.

160. In this case “if we award compensation” the Claimant is not profiting from any wrongdoing as she is simply being compensated for the work that she has done and the treatment that she has suffered.

161. We are satisfied that the same considerations apply to all the claims made in this case. We should not in this case allow the Respondent’s to substantially and unjustly be enriched by the work the Claimant has done for them if she is not properly compensated. We are satisfied that any illegality that taints the context of this contract of employment should not prevent the Claimant from obtaining a remedy in this case.

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Employment Judge Hutchinson

Date: 01 February 2018

JUDGMENT SENT TO THE PARTIES ON

05 February 2018

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FOR THE TRIBUNAL OFFICE