



EMPLOYMENT TRIBUNALS

Claimant: Mr Liam Holt

Respondent: Raja M Arshad t/a Village Cars

Heard at: Middlesbrough

On: 24 April 2019

Before: Employment Judge A.M.S. Green

Representation

Claimant: Mr Wilkin - Solicitor

Respondent: Mr Copley - Solicitor

RESERVED JUDGMENT

The Claimant's contract of employment being illegal by performance, his claims for constructive unfair dismissal, payment of holiday pay and payment of arrears of pay are dismissed.

REASONS

1. The claimant presented a claim form to the Tribunal on 13 September 2018 claiming unfair dismissal, unauthorised deduction from wages and outstanding holiday pay.

The claims

2. The claimant claimed that his employment transferred to the respondent from Philip Mason, the proprietor of Village Cars in or around December 2017. He contends that his employment was transferred under the provisions of Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

The issues

3. At a preliminary hearing on 17 January 2019, Employment Judge Shepherd identified the following issues:

- a. Whether the claimant was an employee?
 - b. Was there a TUPE transfer to the respondent?
 - c. Did the claimant have continuous employment from 2012?
 - d. When did the claimant's employment terminated?
 - e. Did the claimant continue to be employed by his former employer?
 - f. Did the respondent constructively dismissed the claimant?
4. At the hearing, the parties agreed that the claimant was an employee and this issue no longer needed to be determined. However, during the course of the claimant's evidence relating to his remuneration whilst he worked for Mr Mason, it became clear to me that there could be an issue of the claimant and Mr Mason performing an illegal contract for the purposes of understating income to HMRC thereby minimizing or avoiding payment of income tax and national insurance. Because of this, I considered it only proper and in the interests of justice to raise my concerns with the representatives and I invited them to make written submissions on the question of whether the claimant's contract of employment with Mr Mason was tainted by illegality. I raised this prior to the claimant being re-examined by Mr Wilkin. Mr Wilkin re-examined the claimant but did not ask him any questions arising from his evidence relating to the alleged illegality of performance of his contract despite being warned that illegality was a live issue. I did not warn the claimant about self-incrimination because he was not asked any questions that were incriminating. Both representatives provided the Tribunal with detailed written submissions on all of the issues.
5. As a matter of procedural fairness, I am satisfied that as doubts arose as to the legality of the contract, the matter was put to both sides so that they had the chance to call evidence and to make full submissions. The claimant has been given the opportunity to refute the allegation.

Findings of fact

6. I have decided this matter on the higher end of the civil standard of proof given the seriousness of the allegations (i.e. misrepresentation to HMRC and potential tax fraud).
7. Having considered the evidence and the representatives' written submissions regarding the arrangements for remuneration and accounting for income tax and national insurance at the time when the claimant was working for Mr Mason, I make the following findings of fact.
8. The claimant was employed as a mechanic/MOT tester by Mr Mason from 15 November 2012. He worked closely with Mr Mason. He never received a written contract of employment. He asked Mr Mason to provide him with a written contract. Despite this, he never received one, although he did tell me that he never chased Mr Mason up on that. He neither received nor asked for payslips The entire time that he worked for Mr Mason.
9. Throughout his employment with Mr Mason, he was paid in cash. He said he was paid £300 on Fridays and a further £40 on Saturdays. This equated to an annual income of approximately £17,000. He took two weeks off at Christmas as well as the bank holidays. In paragraph 4 of his witness statement he states that Mr Mason was responsible for paying his income

tax and national insurance at the end of the tax year and he would receive a P60. Under cross examination, he accepted that the £340 that he was paid each week was net of income tax and national insurance. Consequently, there is no doubt that he understood that the money he was receiving had been subject to statutory deductions. He clearly understood was meant by net pay.

10. The claimant told me that he had previously worked for Boro Taxis for seven years and he was paid in cash for that employment.
11. The claimant's annual income was significantly understated to HMRC by Mr Mason. That is beyond dispute. During cross examination, the claimant was taken to his most recent HMRC tax statement and two P 60s. The P60 for the year ended 5 April 2016 indicated that his total pay received from Mr Mason was £8040. It also clearly indicated that no tax or national insurance had been deducted. The P60 for the year ended 5 April 2014 indicated that his total pay received from Mr Mason was £7680. No tax or national insurance had been deducted. A similar picture was painted by the HMRC statement which indicated that approximately £10,000 income had not been declared to HMRC in the tax year ended 5 April 2018.
12. The claimant admitted that he had received his P 60s although he claimed that he never read them but simply put them into a drawer. His declared income to HMRC was at least £10,000 less and what he had actually earned. This was a material discrepancy given his level of earnings. When he was questioned about this under cross examination, he was asked what he had done in response to that. He admitted that the figures did not add up. He simply went on to say that he didn't deal with the tax. Furthermore, he did not think it necessary to have raised the matter with Mr Mason or deal with it or even to check the figures. When I sought clarification from the claimant, he accepted that there was a significant discrepancy between what had been reported to HMRC and his P 60s. He accepted that he had not paid enough income tax. He simply told me that he never raised the matter with Mr Mason. I find the claimant's accommodation not of ignorance of the under declared income and lack of curiosity hard to believe and most improbable given his knowledge of what he actually earned and despite stating that Mr Mason had told him that tax and national insurance would be deducted. Given that it was a small business and he worked closely with Mr Mason one would reasonably have expected him to have raised the matter of the discrepancy with him. I believe that he should have also raised the matter with HMRC.

Applicable Law

13. A contract that is lawful when made can become illegal if it is performed in an illegal way. In employment contracts this occurs most commonly when there is some form of tax evasion in the way the employee is paid. If a tribunal accepts illegality in performance, an employee is barred from bringing a claim for breach of contract, such as wrongful dismissal, and from bringing any statutory claims founded on the contract, such as a claim for unfair dismissal.

14. I remind myself that in **Miller v Karlinski 62 TLR 85**, the Court of Appeal set out the principal that if the way an employee is paid is illegal because it amounts to fraud on the Revenue, neither party can bring a breach of contract claim. Public policy dictates that the contract is unenforceable, and this is unaffected by the parties' ignorance.
15. In **Patel v Mirza 2016 UKCS 42**, the Supreme Court ruled that a claimant was entitled to restitution of sums paid under an illegal agreement and revisited the common law defence of illegality. It held by a majority that the key question was whether allowing the claim would harm the integrity of the legal system. This depended on the underlying purpose of the law that had been breached, any other public policy considerations, and whether denying the claim would be a proportionate response to the illegality. A range of factors was relevant to proportionality, including the seriousness of the illegal conduct, its centrality to the contract, whether it was intentional, and whether there was a marked disparity in the parties' respective culpability.
16. I accept that if an employee is an unwilling participant in the illegal arrangement, this is a factor that is likely to weigh in his favour.
17. In **Newland v Simons and Willer (Hairdressers) Limited 1981 ICR 521**, the EAT enunciated the principal that if a contract is lawful on the face of it, but in its performances is tainted with illegality, the employee will be prevented from pursuing an unfair dismissal complaint if aware of the illegality. The fact that the employee ought to have been aware of it is irrelevant, if in fact unaware of it. An agreement to pay an employee a sum net is not, on the face of it unlawful. The employer is under a duty to gross the sum up and account for tax and national insurance contributions. If the employee becomes aware that this is not being done, his duty is to tell HMRC.

Application of the law to the facts

18. In his written submissions, Mr Wilkins accepts that Mr Mason appears to have under declared the claimant's earnings to HMRC. I agree. Indeed, that is an incontrovertible fact.
19. I do not think that it can be said that the claimant was an unwilling participant in the illegal arrangement. If I was satisfied, on the evidence that this was a case where the claimant ought to have known that there was a deliberate understatement of his income so as to avoid or minimise payment of income tax and national insurance but did in fact not know about that arrangement, that then I would have found in his favour as was the case in **Newland**. However, the evidence points to the claimant's actual knowledge of the arrangement. He knew that Mr Mason was responsible for deducting income tax and national insurance and would pay his wages net. He knew how much he was paid each year. When he received his P 60s, he would have seen a **substantial** understatement of his annual income for the relevant tax year. He would have seen that no tax or national insurance had been deducted and accounted for to HMRC. Despite that knowledge, he chose to do nothing, He did not raise the very substantial discrepancy between what he was actually paid and what had been declared to HMRC with Mr Mason. Furthermore, he did not raise the matter with HMRC. Under

this arrangement, he enjoyed a very significant benefit because he received money which should have been subject to taxation. He turned a blind eye and connived with what Mr Mason was doing which was, in effect, misrepresenting his true level of earnings and defrauding HMRC of tax revenue and national insurance contributions. The evidence is clear on this.

20. The underlying purpose of our tax law is to raise revenue to fund our health service, the welfare system and many other departments that provide services for the public good. Taxes are levied on a variety of sources of income including salaries and wages that are paid in the course of employment. It is clearly in the public interest and for the economic well-being of our society that employers and employees pay their dues to the Exchequer. The Tribunal cannot be seen to be condoning illegal performance such as this. The claimant has paid no tax or national insurance on his earnings with Mr Mason. There was a substantial discrepancy between what was declared to HMRC and what Mr Mason actually paid to the claimant. Given the claimant's level of earnings, this is not a case where there was a minor discrepancy. It cannot be consistent with public policy to allow the claimant to enforce his claims under his contract and under statute in this case; to do so would harm the integrity of our legal system. The payment of wages is central to the performance of an employment contract. Both Mr Mason and the claimant benefited from their arrangement. Mr Mason did not have to pay national insurance and the claimant received the full amount of his remuneration without deduction of national insurance or income tax. I do not see that there was a marked disparity in the culpability of Mr Mason and the claimant.
21. It was more probable than not that the claimant was aware that Mr Mason acting unlawfully and he knew that he was not paying tax or national insurance. The claimant participated in the misrepresentation to HMRC. I cannot see any good policy reason not to apply the principle set out in **Patel**. The claimant cannot rely on the contract and statute to enforce his claims against the respondent.
22. In view of my finding on illegality, it would be otiose to address the remaining issues because if there had been a relevant transfer under TUPE his contractual and statutory claims could no be enforced against the respondent.

Employment Judge A.M.S. Green
Date 7 May 2019