EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107677/2020

Preliminary Hearing Held by Cloud Video Platform (CVP) on 28 May 2021

Employment Judge Russell Bradley

Mrs Virginia Sutters	**Claimant** **Represented by** **Ms M Dalziel** **Solicitor**
Secretary of State for Foreign, Commonwealth and Development Affairs	**Respondent** **Represented by** **Mr R Turnbull** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the employment Tribunal is that: -

1. the contract of employment between the parties was prohibited by statute and was thus void from its start by virtue of the claimant's status as an alien;

2. the Tribunal has no jurisdiction to determine the claim of unfair dismissal, which claim is dismissed.

REASONS

Introduction

1. This was a preliminary hearing fixed to determine the preliminary issue of jurisdiction. In an ET1 presented on 3 December 2020, the claimant made the single claim of unfair dismissal. Within her ET1 she set out in detail the background to her dismissal. There is no real dispute that the claimant worked for the respondent between March 2018 and 1 September 2020. The detail in her ET1 included a number of assertions of fact which set out the background to the preliminary point taken by the respondent.

2. On 6 January 2021, an ET3 was lodged. The primary position adopted by the respondent was that the claimant's employment was prohibited by statute and was thus void and unenforceable. Notwithstanding, and following from the summary termination of "*the contract*", the respondent accepted that it had paid contractual notice and holiday pay to the claimant. At paragraph 12 of its Grounds of Resistance the respondent says, "*The Respondent reserves the right to submit further and better particulars in responding to the substance of the Claimant's claim in the event that the Tribunal has jurisdiction*." At paragraph 11, he says, "*For the avoidance of doubt, the Claimant's averments except in so far as coinciding herewith are denied and the claim should be dismissed*." That blanket denial was (apparently) an answer to a number of the claimant's factual averments which were within the respondent's knowledge.

The issues

3. From the Grounds of Resistance and from exchanges between the parties' solicitors in advance of the hearing (Mr Turnbull's email of 6 January, Ms Dalziel's email of 19 February and Mr Turnbull's reply of 2 March) the issues for this hearing are:-

    a. Was the contract of employment between the parties void from its start on the basis that, by virtue of the claimant's status as an alien,

it was prohibited by statute, the provision being section 6 of the Aliens Restriction (Amendment) Act 1919?

b. If so, does the employment Tribunal have jurisdiction to consider the claim of unfair dismissal?

Findings in fact

4. I heard no evidence. However, I found as fact, based on the claimant's email of 19 February, that she was "*at all material times an alien for the purposes of that legislation …*"

Submissions

5. Both parties made oral submissions. They made reference to a number of authorities albeit no copies were provided in advance or during the hearing. At my request, a list was provided afterwards. The authorities are as noted here. None contains a consideration of the statutory provision relied on by the respondent. Where they have been reported, I have included a citation. Again, at my request, it has been clarified that the definition of *"alien*" is to be found in section 51(4) of the British Nationality Act 1981.

a. Okedina v Chikale [2019] IRLR 905; 2019 ICR 65

b. Hall v Woolston Hall Leisure Ltd [2001] ICR 99

c. Hounga v Allen [2014] ICR 847

d. Leighton v Michael and another [1995] ICR 1091 (EAT))

e. Cohen v Sandhu UKEAT/494/80

f. Zarkasi v Anindita [2012] ICR 788

g. Patel v Mirza [2017] AC 467

h. Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd [1988] QB 216

i. Bedford Insurance Co Ltd v Instituto de Resseguros do Brasil [1985] Q.B. 966

j. Blue Chip Trading Ltd v Helbawi [2009] IRLR 128 (EAT)

6. For the respondent, Mr Turnbull argued that the effect of the relevant legislation, (section 6 of the Aliens Restriction (Amendment) Act 1919) is to render the contract between the parties void *ab initio*. That being so, any rights derived from it, including the right to claim unfair dismissal, were unenforceable. Section 6 of the 1919 Act expressly prohibited a contract such as between the claimant and the respondent. Three factors were relevant. First, the type of illegality. In this case it is "*statutory*" illegality, that is, an activity expressly prohibited by the statute. He contrasted the "*common law of illegality*". Second, the context, which in this case was an employment relationship. ***Okedina*** is an example of a case which considered the question of illegality in that context. Third, the type of claim being made, in this case unfair dismissal. ***Hall*** was a contrasting example where the Court of Appeal allowed a claim for loss of earnings based on the statutory tort of discrimination as distinct from a claim of unfair dismissal. In ***Leighton*** (which I noted had been approved by the Court of Appeal in ***Hall***) the EAT allowed the claimant's appeal on the basis that the claim of sex discrimination did not involve enforcing, relying on, or founding a claim on the contract of employment, that appeal being against the Tribunal's decision that the claimant could not pursue her complaint of sex discrimination because her contract of employment was tainted with illegality. In Mr Turnbull's submission, employment tribunals must ensure that they do not enforce illegal contracts (***Cohen***). If a contract was expressly illegal a court should not as a matter of public policy permit a party to enforce it (in claims of unfair dismissal and unlawful deduction of wages) (***Zarkasi***). That position could be contrasted with a claim of discrimination in ***Hounga***. On the case of ***Patel***, Mr Turnbull's submission was that (i) the case involved the common law doctrine of illegality, not statutory illegality and was thus not in point and (ii) did not concern a contract of employment. He referred to paragraph 62 in ***Okedina***

wherein there is reference to ***Patel***. In ***Okedina***, the relevant passage from paragraph 62 is, "*In his judgment in **Patel v Mirza** [2017] AC 467 Lord Toulson JSC was attempting to identify the broad principles underlying the illegality rule. His judgment does not require a reconsideration of how the rule has been applied in the previous case law except where such an application is inconsistent with those principles*." In this case, Mr Turnbull said, the key question is; has illegality been established? Or when considering the question of statutory illegality, does the statute prohibit the contract? In his submission, the contract between the parties was expressly prohibited. It was clearly illegal. He referred to the Act of Settlement 1700. The particular part of the section to which Mr Turnbull referred (section 3) provides, "*no Person born out of the Kingdoms of England Scotland or Ireland or the Dominions thereunto belonging (although he be made a Denizen (except such as are born of English Parents) shall be capable to be of the Privy Council or a Member of either House of Parliament or to enjoy any Office or Place of Trust either Civill or Military or to have any Grant of Lands Tenements or Hereditaments from the Crown to himself or to any other or others in Trust for him.*" In this case the respondent relied explicitly on sections 6 and 13 of the Aliens Restriction (Amendment) Act 1919. "*Alien*" has a statutory definition (later clarified as deriving from section 51(4) of the British Nationality Act 1981) which the claimant accepts applies to her. While the Aliens' Employment Act 1955 permits certain exceptions, none apply in this case. When the three provisions are read together (by which was meant the Act of Settlement 1700 section 3, the 1919 Act section 6 and the 1955 Act section 1(1)), there is an express prohibition on the claimant being employed by the respondent as a civil servant. The Act of Settlement renders an alien incapable of enjoying any office within the Civil Service. "***Appointment***" in section 6 means formal choice. Further assistance as to the definition of "*appointment*" as meaning employment can be got from section 1 of the 1955 Act and its preamble, "*An Act to provide for the employment of aliens and British protected persons in the civil service under the Crown*." In his submission, a contract of employment between the parties in this case cannot

be reconciled with the legislation. From the point in time of its signing it was void. Further, section 13 makes it a criminal offence.

7. Alternatively, Mr Turnbull submitted, the contract was impliedly illegal. He referred to the case of ***Phoenix*** in support of this subsidiary argument. I noted that in ***Phoenix*** the Court of Appeal decided *"Where a statute merely prohibits one party from entering into a contract without authority and/or imposes a penalty upon him if he does so, it does not follow that the contract itself is impliedly prohibited so as to render it illegal and void. Whether the statute has that effect depends upon considerations of public policy*." I understood Mr Turnbull to mean that even if the contract in this case is not void *ab initio*, then applying ***Phoenix***, the question of whether the 1919 Act impliedly prohibits it depends on considerations of public policy. But under reference to ***Bedford***, I took Mr Turnbull to extract the principle that once it is concluded that on its true construction the legislation in question prohibited both a contract and performance under it, that is the public policy (see page 986 of the report). Thus, so the respondent argued, there can be no public policy issues over-riding it. And in contrast with the decision of the EAT in ***Blue Chip Trading Ltd***, this case is not one which is suitable "*for severing the illegal parts of the contract from the legal parts*." Here, the whole contract was prohibited from the start.

8. In reply Ms Dalziel reinforced the distinction between statutory illegality and common law illegality, the former being the respondent's case. She directed me to ***Patel*** and in particular paragraph 109 part of the judgment of Lord Toulson. That paragraph says,

> "*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 should 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 claimed should be granted."

9. In Ms Dalziel's submission, if the statute does not contain an express prohibition, a court should consider one to be implied only if it is clear from its terms. (***Phoenix***). The claimant's position is that sections 6 and 13 of the 1919 Act do not render her contract void because that is not clear or express from them. They do not prohibit "*in terms*" what the parties in this case have done. Nor do they say that the contract is unenforceable. In her submission they fall short of doing so. They do no more than provide a penalty. The question then becomes; is prohibition or illegality to be implied? And in her submission it is not. ***Okedina***, she said, was a parallel case. She directed attention to paragraphs 64 and 65 of the report. At paragraph 65 Lord Justice Davis said,

"*In my view, the key to this case lies in the fact that section 15 and section 21 of the 2006 Act are directed at the employer. They are not, in my opinion, directed at the employee. I do not, in this regard, consider that the words "employ" and "employs", as used in those two sections respectively, are required to be taken as extending the unlawful conduct in question to employees who carry out their employment obligations. Cases such as Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd [1988] QB 216 are accordingly distinguishable. On that basis, and given further the finding of fact in this case that the claimant did not know of the illegality, it follows that the defences based on statutory and common law illegality must both fail. Such a conclusion fortunately also accords with the merits of this particular case*."

10. The cases are parallel in that there was no prohibition on employment in either of the statutes relied on. In Ms Dalziel's submission, sections 6 and 13 of the 1919 Act (like sections 15 and 21 of the 2006 Act) are directed at the employer.

11. On the relevance of the 1955 Act, I understood Ms Dalziel's position to be that without hearing evidence, the Tribunal could not decide whether the provision for civil employment of aliens by the Act extended to the claimant.

12. Finally, as an alternative to her primary position that the 1919 Act did not expressly prohibit the claimant's employment she argued that by section 98 of the Employment Rights Act 1996, Parliament had clearly anticipated the right to claim unfair dismissal which right was legally effective even if the employment was in breach of a statutory prohibition.

The law

13. Section 94 of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by his employer. Section 230(1) of the 1996 Act provides that 'employee' means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. Section 230(2) provides that 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

14. Section 6 of the Aliens Restriction (Amendment) Act 1919 provides that "*After the passing of this Act no alien shall be appointed to any office or place in the Civil Service of the State*."

15. Section 1(1) of the Aliens' Employment Act 1955 provides

"(1) Notwithstanding anything in section three of the Act of Settlement, or in section six of the Aliens Restriction (Amendment) Act, 1919, and alien may be employed in any civil capacity under the Crown—(a) if he is appointed in any country or territory outside the United Kingdom, the Channel Islands and the Isle of Man and employed in any such country or territory in service of a class or description which appears to the responsible Minister to be appropriate for the employment of aliens; or (b) if a certificate in respect of

his employment, issued by the responsible Minister with the consent of the Treasury, is for the time being in force under this section; or(c) if he is a relevant European and he is not employed in a reserved post; and so much of the said section three as imposes disability for employment in any such capacity shall cease to have effect in relation to British protected persons."

Discussion and decision

16. The primary issue in this case turns on whether section 6 of the Aliens Restriction (Amendment) Act 1919 is a statutory prohibition on a contract of employment between the parties because the claimant is an "*alien*" as defined. If there is such a prohibition does that render any contract of employment between them void *ab initio*? While neither party referred to it, the only reported decision on section 6 of the 1919 Act is in ***Re Colgan and Others*** [1997] 1 C.M.L.R. 53, a decision of Mr Justice Girvan in the High Court of Northern Ireland (Queen's Bench Division). The facts were clearly distinguishable from those in this case. Ms Colgan was an Irish citizen. She applied for the post of management trainee in the Northern Ireland Civil Service. Her application was rejected on the grounds that she did not meet the nationality requirements of the Northern Ireland Civil Service. For historical reasons, those requirements differed from those applied in the rest of the United Kingdom. She sought judicial review of the decision that she was not eligible for the post. The obvious difference from the argument in this case is that the court was not considering the question of the validity of a contract between the parties. But the 1919 Act was considered as part of the relevant domestic provisions, which the court said also included the Act of Settlement and the 1955 Act.

17. In ***Okedina*** the provisions in question were sections 15 and 21 of the Immigration, Asylum and Nationality Act 2006. In that case the claimant was a Malawian national who had been engaged by the employer to look after her parents in Malawi. In July 2013 the employer decided to bring the claimant to the United Kingdom. She applied for a visa for her to work directly for the family as a live-in domestic worker. The visa was granted for a six-month

period after which, unless extended, the claimant's leave to remain expired. She continued in her employment for the next two years believing that the employer had, as she had promised, extended her visa. In fact the employer had made a fraudulent application on behalf of the claimant and no extension was ever granted. In June 2015 the claimant was summarily dismissed and ejected from the house when she asked for more money. She brought a number of claims under or arising from the employment contract, including for unfair and wrongful dismissal, deduction of wages and race discrimination. The employer objected on the ground that, as from November 2013, the contract was illegal, or illegally performed, because the claimant no longer had leave to remain and that, accordingly, any contractual claim was unenforceable. The employment tribunal found that the claimant had not knowingly participated in the illegal performance of her contract, as she had trusted the employer that her visa had been taken care of. It allowed the contractual claims. The Employment Appeal Tribunal dismissed the employer's appeal.

18. In dismissing the employer's appeal the Court of Appeal held that sections 15 and 21 provided for a penalty imposed only on the employer in the event of a contract of employment where the employee did not have the appropriate immigration status. Under the heading and sub-heading of ***The statutory illegality issue*** and ***The background law*** at paragraphs 15 and 16 of the report, Lord Justice Underhill said,

"*We were referred to a good deal of authority about the circumstances in which a contract is to be regarded as prohibited within the meaning of the statutory illegality rule. The basic principles emerging from those authorities are not in doubt, and I can take them relatively shortly. I start with a point about terminology. In alternative (a) in the formulation at para 12(1) above I refer to the question being whether the statute "prohibits the making of a contract so that it is unenforceable by either party". The language of "prohibiting" the contract is found in several of the authorities, but other language is also used, including whether the contract is "illegal" or "forbidden"*

or whether there is an intention to "nullify" the contract or render it "void". *These are all expressions of the same concept, namely that the statute intends to deprive the contract of any legal effect, with the result …. that it is unenforceable by either party*."

18. The relevant part of paragraph 12 records,

"*Statutory illegality applies where a legislative provision either (a) prohibits the making of a contract so that it is unenforceable by either party or (b) provides that it, or some particular term, is unenforceable by one or other party. The underlying principle is straightforward: if the legislation itself has provided that the contract is unenforceable, in full or in the relevant respect, the court is bound to respect that provision. That being the rationale, the knowledge or culpability of the party who is prevented from recovering is irrelevant: it is a simple matter of obeying the statute*."

19. At paragraphs 17 and 18 Lord Justice Underhill continued;

"*17. The question whether the statute has that effect depends purely on its proper construction. As Devlin J put it in* ***St John Shipping Corpn v Joseph Rank Ltd*** *[1957] 1 QB 267 , 287:"The fundamental question is whether the statute means to prohibit the contract. The statute is to be construed in the ordinary way; one must have regard to all relevant considerations and no single consideration, however important, is conclusive."* ***In Archbolds (Freightage) Ltd v S Spanglett Ltd*** *[1961] 1 QB 374 this court endorsed that approach. At p 390 Devlin LJ added to what he had said in St John Shipping, "one must have regard to the language used and to the scope and purpose of the statute". Both cases were followed and applied in* ***Hughes v Asset Managers plc*** *[1995] 3 All ER 669*."

"*18. The example of an express prohibition most often cited is* ***In re Mahmoud and Ispahani*** *[1921] 2 KB 716. In that case an order had been made under the Defence of the Realm Regulations providing that no person should without a licence "buy or sell or otherwise deal in" various foodstuffs. The*

defendant buyer reneged on a contract to buy a quantity of oil. When the seller sued, the buyer took the point that he had no relevant licence and that the contract was accordingly unenforceable. This court held that the contract was unenforceable. As Bankes LJ put it at p 724, the order expressly "makes it illegal, on the part both of the buyer and of the seller , to enter into a contract prohibited by the clause" (emphasis supplied): see, to the same effect, per Scrutton LJ at pp 727–729 and Atkin LJ at p 731. It was common ground that the seller was in fact unaware that the buyer had no licence, but that made no difference: if the contract was prohibited by statute that is an absolute bar to its being enforced."

19. At paragraph 19 of ***Okedina*** Lord Justice Underhill continues, "*More commonly, however, the statute contains no express prohibition of the kind found in* ***In re Mahmoud and Ispahani*** *and the issue is whether such a prohibition must be implied*."

20. In this case, the respondent submits that section 6 of the 1919 Act expressly prohibits a contract of employment between the parties. As noted above, it provides that "*no alien shall be appointed to any office or place in the Civil Service of the State*". That appears to me to be an express prohibition on the appointment of an alien to any office, or employment, in the Civil Service. It is, in contrast with the Court of Appeal's comments in ***Okedina*** on the relevant provisions in the Immigration, Asylum and Nationality Act 2006, not limited to a penalty imposed only on the employer. Section 6 is not directed at either party. As quoted above, the fundamental question is whether the statute means to prohibit the contract. Read another way, section 6 provides that anyone who is an "*alien*" shall not be appointed to the Civil Service. That seems to me to be an express prohibition on such an appointment. Section 13(1) of the 1919 Act provides that "*If any person acts in contravention of or fails to comply with the provisions of this Act, he shall be guilty of an offence against this Act*." That section in my view is intended to be a deterrent to prevent such an appointment, by the creation of a statutory offence. In my view it enhances and does not detract from the prohibition within section 6.

21. I respectfully agree with Mr Justice Girvan in ***Re Colgan*** that the 1995 Act forms part of the relevant domestic provisions. Mr Turnbull referred to that Act. Part of Ms Dalziel's submission proceeded on the basis that it was indeed relevant. Its preamble says that it is "*An Act to provide for the employment of aliens and British protected persons in the civil service under the Crown.*" Section 1 begins "***Provision for civil employment of aliens***" and continues "(1) *Notwithstanding anything in section three of the Act of Settlement, or in section six of the Aliens Restriction (Amendment) Act, 1919, and alien may be employed in any civil capacity under the Crown …*" on one of three conditions. None of them is relevant in this case. I do not agree with Ms Dalziel's submission to the effect that whether the claimant satisfied one of them was a matter for evidence. If the claimant did, then in my view she would have been aware of the fact and would have pled it. In my view section 1 recognises that the 1919 Act prevents the employment of an alien by the Civil Service. It then permits that employment in certain limited circumstances.

22. As noted by Lord Justice Underhill in ***Okedina*** at paragraph 18 under reference to ***In re Mahmoud and Ispahani*** "*if the contract was prohibited by statute that is an absolute bar to its being enforced*." In my view the contract between the parties in this case was prohibited by the 1919 Act. Following what was said in ***Okedina***, that Act is an absolute bar to it being enforced. It follows therefore that there was no contract of employment as required by section 230 of the 1996 Act. The claimant was thus not an employee of the respondent and so did not have the right not to be unfairly dismissed. The Tribunal does not have jurisdiction to hear her complaint.

23. I did not agree with Ms Dalziel's submission that this case was parallel with ***Okedina***. The facts were very different. The statutory provisions were different as indeed was their effect.

24. It was not necessary to decide whether or not the relevant statutory framework implied that the contract was illegal. I understood the respondent to adopt that argument as an alternative if I did not accept its primary position. That being

so, it was not necessary for me to form a view on the relevance of any policy considerations to which reference was made from a number of the authorities.

25. Accordingly, in my opinion the employment Tribunal does not have jurisdiction to consider the complaint of unfair dismissed. It is therefore dismissed.

Employment Judge: Russell Bradley
Date of Judgment: 24 June 2021
Entered in register: 12 July 2021
and copied to parties