



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Respondent

AND

Ms A Fernandez

Mitie Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL AT A PRELIMINARY HEARING

HELD AT Bristol (by video) **ON** 14th September 2021

EMPLOYMENT JUDGE A Richardson

Representation

For the Claimant: Mr A Fernandez, Lay Representative

For the Respondent: Mr A Macmillan, Counsel

JUDGMENT

The judgment of the Tribunal is that

- (1) The claimant was re-employed under S230(1) Employment Rights Act 1996 by the respondent between 15th September 2019 and the effect date of termination of 8th January 2020.
- (2) The claimant's claim of unfair dismissal and unlawful deduction from wages was filed in time.
- (3) The claimant's employment with the respondent during the period 15th September 2019 until 8th January 2020 was tainted by illegality and therefore cannot be relied upon by the claimant in respect of her claims of unfair dismissal and unlawful deduction from wages.
- (4) The claims are dismissed.

REASONS

Background and issues

1. The claimant was employed as a cleaner by the respondent. The claimant claims that at the direction of her line manager she used her two sons' bank accounts and ID/pin numbers to claim payment for the high number of hours she

was working across four to six cleaning sites.

2. When the respondent's head office became aware of this arrangement and commenced a disciplinary investigation, the claimant resigned from her employment, effective on 14th September 2019. The claimant claims that after her effective date of resignation, she continued to work for the respondent and also continued to 'pin in' and claim pay for her working hours using her sons' ID/pin numbers at the instruction of her line manager. This continuing employment was apparently without the knowledge of the respondent's head office. A series of administrative errors by the respondent's HR and/or payroll department/and or management then followed, creating a confused situation as to when the claimant's employment ended and giving rise to the claimant's complaint of unfair dismissal and unlawful deduction from wages. Claims of disability and race discrimination are no longer pursued.

3. The respondent claims the claimant's employment was terminated on 14th September 2014 by resignation, her notice period expiring on that date. The claimant claims that she was dismissed from her employment on 8th December 2019, 8th January when she was instructed not to work by the respondent, or, constructively dismissed on 17th January 2020 when she was issued with a new contract of employment by the respondent which she claims changed her terms and conditions of employment.

4. The issues to be determined were:

(1) what is the effective date of termination of employment?

(2) whether the claimant's claim of unfair dismissal is out of time and if so, was it not reasonably practicable for her to file her complaint in time?

(3) Was the claimant engaged in an illegal contract such that it is contrary to public policy to allow reliance or enforcement of that contract for unfair dismissal and /or alleged unpaid wages by the respondent.

Proceedings and evidence

5. The claimant did not attend the proceedings due to alleged ill health. There was no medical evidence to support the claimed reason for her absence. As the claimant and her representative, her brother, intend to return to Brazil for family reasons at the end of September 2021, and because the hearing had already been postponed from 5th August 2021 and re-listed urgently to today to enable the claimant to travel as intended, it was not possible to postpone the hearing yet again.

6. The claimant produced a witness statement. The Employment Judge explained that without the benefit of cross examination to test the truth of the

witness statement, the Tribunal has a discretion as to what evidential weight can be attributed to the claimant's witness statement.

7. Ms J Mason, Head of the respondent's HR department also provided a statement and was cross examined. The hearing proceeded on the basis of submissions only from the claimant. An agreed bundle of about 500 pages was made available containing both parties' documents. There was a significant difference between the hard copy numbering and the electronic pdf numbering which cause confusion and delay during the hearing whilst the claimant and the Employment Judge located relevant documents.

8. The respondent, at the Employment Judge's request, produced further correspondence which should have been in the bundle but was not. It related to a meeting with the claimant in early January 2021.

9. Following recent EAT guidance I have not referred to the claimant's line manager by his full name in view of the allegations raised potentially implicating him in fraud and the fact that he was not a participant at the hearing.

Findings of Relevant Fact

10. I make my findings of fact on the basis of the evidence before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts and documents. It is to be noted that it is not my function to resolve each and every disputed issue of fact. What follows are the relevant factual findings in relation to the issues set out above.

11. The claimant has Brazilian and British nationality. She transferred to the respondent cleaning company by reason of the TUPE regulations in about November 2017. The claimant entered into a standard form contract with the respondent which stipulated her place of work; it stated that she would work at a Tesco store in Shepton Mallet. The claimant reported to her line manager.

12. The claimant's two sons, Silveira Vinicius and Silveira Vagner had been previously employed by the respondent. Although both are former employees they were not in the UK at the relevant time; furthermore their payroll ID/pin numbers had not been removed from the respondent's payroll records and were still 'live'.

13. The claimant was a diligent, hard worker and was valued by her line manager. At her line manager's direction the claimant started working as a cleaning manager at other Tesco stores – up to six stores in total. As a result, her hours significantly increased. The claimant's case is that her line manager,

allegedly with the acquiescence, if not actual informed consent of the regional manager and payroll manager, instructed the claimant to log her hours by 'pinning in' with the ID/pin numbers of her two sons in addition to using her own pin/ID. She was then paid through three accounts which were subject to the usual PAYE deductions although not necessarily to the extent that the claimant would have been taxed had she entered all her worked hours under her own ID.

14. The claimant claims that the reason for doing this was that her line manager said her contract only permitted her to work at the Shepton Mallett Tesco and that they could not create a new contract for each and every one of the additional Tesco stores she was working in. The claimant was working longer hours than her normal salary of about £2000 per month would cover. It was supposed to be a temporary situation. It is not clear how long this arrangement had been in place; it would appear to have been for a few months. In July /August 2019 the respondent received a complaint from an employee about holiday pay having been paid to another person who was not an employee.

15. This triggered the respondent into commencing a disciplinary investigation. It was suggested to the claimant by another manager, Bruno, that the respondent would make the claimant's life 'hell' as a result of the investigation and she would be better off if she resigned. The claimant sent an email resigning from her employment on 29th August 2019 stating:

" Dear Jamie, please accept this letter as formal notification that I am resigning from my position of ISCM from Shepton, Burnham on Sea, Wells, Ilminster Tesco Stores. My last work day will be on 14th September 2019.

Thank you so much for the opportunity to work in this position for the last near couple years.

I'll do everything possible to wrap up my duties and train other team members over the next two weeks.

Please let me know if there's anything else I can do to help.

I wish the company continued success."

16. The respondent processed the claimant's resignation. She was paid her final salary through the payroll in the normal way on about 24th September 2019. The disciplinary investigation into the claimant's conduct was halted and the file closed.

17. On 13th September 2019, the Regional Operations Manager, Mr James Smith, forwarded a brief summary of "*Findings in [the name of the claimant's line manager's] Area*" which was in turn forwarded to Ms Mason. Mr Smith

described the document as “a brief summary of the fraud issue found in [the claimant’s line manager’s] area”. The document states:

“ Firstly I had a call from an employee stating their pay was incorrect and that there [sic] pay had been paid to somebody that doesn’t work for Mitie.

Upon investigating this claim I found the employee was missing Holiday pay but looked into the other issue by attending the store with another SSM. Bruno went to store first thing and checked Ezitracker to find who was logged in to take pictures of the staff and send for checking. We couldn’t find one of the employee’s logged in (Silveira Vinicius) We then became to Question the ISCM who said she had pinned in this employee to pay herself (Da Costa Fernandes Aleis) to avoid the issue of hours and paying too much tax. The ISCM had been doing this for a number of months across multiple she was looking after. Also across the other sites we found the same issues was also happening with another of the employee’s family members who also do not work for Mitie (Silveira Vagner).

I had this case logged with HR and then received an email of Resignation from Aleis. We had a call with Gill Steel and Peter Walters and was about to attend a meeting to do further investigation but HR advised to accept this Resignation and close the case as it would add more costs to the business and was not worth going down this route.

The case has now been closed with hr (41349) and the Resignation accepted.”

18. Without the claimant’s knowledge or apparently, head office knowledge, on 11th September 2019 a P45 was processed and created by the claimant’s line manager showing an effective date of termination as 31st July 2019 (predating the claimant’s resignation). The copy of the P45 is dated 3rd October 2019. The respondent head office/HR department was unaware that the claimant’s line manager had raised this P45 and could not explain why he had done so. It was not posted to the claimant immediately; she received it on 24th November 2019.

19. On 24th September 2019 the respondent sent a letter to the claimant confirming that her resignation had been accepted with the effective date of termination as 14th September 2019. It confirmed that she would be paid accrued unpaid holiday and wages up to 14th September 2019 at the end of the month and that a P45 would be sent via post to her within 30 days of the date of the termination date. It was submitted by the claimant that she had never received this letter and that it was a fake. Without her evidence in person to support that submission, I accept the document at face value.

20. At some point after her resignation on 14th September 2019 the claimant continued to work in the same capacity of in-store cleaning manager at several

Tesco stores at the direction of her line manager. She continued to work long hours of around 18 hours a day and to log her hours under the Pin/ID of her two sons. She continued to recruit new staff and remit the paperwork to the respondent. There was evidence of her in the course of her duties as in-store cleaning manager, emailing the respondent's Bristol finance office in December 2019 chasing wages for her staff. In the documentary evidence there were copies of emails/texts from the claimant to various members of the respondent's staff at different regional centres or departments including HR/People Support in London on work related matters. The claimant claims that the Regional Operations Manager, Mr James Smith, must have been aware of the claimant working at several Tesco stores after 14th September 2019 because as cleaning manager, she was signing and submitting relevant new starter documentation when taking on new cleaning staff at the various stores.

21. The claimant's final holiday pay was processed and a payslip was provided dated 20th November 2019.

22. On 31st December 2019 the claimant received an email, no doubt in response to a request from her, from the Fresh Lead Manager at the Tesco Shepton Mallet store confirming that the claimant had been doing a fantastic job since July 2019 up to now and that she hoped that this would continue into 2020. Another text message from a Tesco employee to the claimant confirmed that she had been working in Shepton Mallet since July 2019 to 31st December 2019.

23. Despite working long hours each week within the respondent's organisation, the claimant was not paid as her own Pin/ID had been removed from central payroll. She had continued to 'pin in' to the various Tesco stores using her sons' pin numbers. The claimant acknowledges that only two small payments of a few hundred pounds were processed.

24. On 24th November 2019 the claimant received the P45 confirming the termination date of 31st July 2019. This prompted her to message her line manager complaining that she was the only one who had lost her job. The line manager replied by text: *"who said you lost your job? You need to stop and get back to our agreement I have got someone to take over Burnham on sea from Friday and then you don't have to worry about burnham on sea ever again and I would try and meet you in Shepton on Friday to sort [all this] out by the grace of God"*.

25. On 2nd January 2020 Mr Ailton Fernandes wrote to Mr James O'Farrell, Head of Strategic Accounts at the respondent's head office in London, to complain about the treatment of his sister, the claimant, and that she wasn't being paid. Mr O'Farrell replied on the same day by email to state that he could not make any changes to the claimant's contract until he had *"evidence of these requests so we can determine who and why these instructions to Aleis are being made."*

26. Mr O'Farrell was clearly unaware of the claimant's personal circumstances or her anomalous work status at this point; he was effectively sending a holding email to Mr Fernandes until he had established the facts relating to the claimant's employment and Mr Fernandes' communication. This evidence is not, as the claimant alleged, evidence that Mr O'Farrell endorsed the irregular working arrangements agreed between the claimant and her line manager.

27. On 5th January 2020 the claimant forwarded to her 'new' line manager, Ms Luz, her hours as at 5th January 2020.

28. On 8th January 2020 the claimant's line manager Ms Luz emailed the claimant to confirm that they had met on 7th January 2020 when the claimant had explained that she was working for Mitie without a contract. Ms Luz had spoken to Mr James Smith about it and confirmed that he was going to contact HR that day, 8th January, to resolve the issue. She asked the claimant to stop working immediately until the situation was resolved.

29. On 10th January 2020 the claimant attended a meeting with Ms Mason. Ms Mason wrote a letter on 16th January 2020 which confirmed the outcome of those discussions. Ms Mason confirmed to the claimant the following conclusions arising from their discussions.

a. That the claimant's line manager had requested her to retract her resignation and continue working as cleaning manager at four Tesco stores. The claimant had agreed and had "pinned in" not as herself but as Silveira Vinicius and Silveira Vagner, her sons, who still had active Mitie payroll records but were not working for Mitie or indeed, in the UK. At the relevant time Payment had been made in good faith into those accounts on the understanding that the hours were worked by Vagner and Vinicius.

b. Ms Mason confirmed that the claimant's employment had ended on 14th September 2019; her final salary including accrued untaken holiday pay had been processed and a P45 issued. After accepting the claimant's resignation the respondent closed the pinning fraud case and did not pursue the matter further against the claimant. The claimant should not have carried out any work after 14th September 2019 and was not currently an employee of Mitie and did not have an active record to pin her hours or a contract of employment. However she had continued to take instruction from [her line manager] to work and pin her hours under the 'ghost' identities of her sons. Between 14th September – 18th December 2019 the claimant pinned hours in her sons' accounts. Between 19th – 31st December [*the claimant's line manager*] had directly entered her hours worked into the Mitie attendance system. There were no hours pinned for 1st – 8th January 2020.

c. Ms Mason informed the claimant that she would be paid for all pinned hours up to 30th December 2019 which amounted to £5912.10 less PAYE. Ms Mason confirmed that the claimant had been told on 8th December 2019 by Mr Smith to stop working. I find that must be a typographical error made by both the claimant and Ms Mason as there is no evidence of any such instruction being given on 8th December 2019 and if it had been, the claimant would not have continued working until 31st December. I find that the instruction to stop work was made on 8th January 2020.

d. Ms Mason also informed the claimant in this letter, in response to the claimant's request to continue working for Mitie as a Cleaning Manager, that pinning in and receiving wages under false accounts was fraudulent and that the claimant had been involved in fraudulent activity for several months. In the circumstances a full internal investigation was being undertaken and once findings had been analysed, the claimant would be contacted again to discuss possible future employment.

30. Later on the same day, 16th January 2020 Ms Mason wrote a second letter to the claimant regarding their meeting on 10th January 2020. In this letter she reiterated the account of the claimant's resignation, continuing to work using 'ghost' accounts to pin in and out and claim significant amounts of money. Ms Mason confirmed that the claimant's actions had been contrary to Mitie's processes and procedures and that the claimant would have been fully aware that she should not be acting in this way. Ms Mason confirmed that there was evidence suggesting that during the relevant period, the claimant had instructed a new starter to conduct false accounting activity by providing them with other individuals' payroll numbers to pin in and out with, namely her sons, Vagner and Vinicius Silveira, and that the claimant had informed the new starter that she would directly pay them. This was considered to be a breach of policy and fraud.

31. For this reason, Ms Mason confirmed that the claimant would not be considered for re-employment.

32. In order to pay the sum of £5912.10 the respondent had to create a new account for the claimant. It did so and processed the payment. A payslip was produced. The respondent's system also automatically generated a standard letter of new employment setting out terms for new employees. Ms Mason gave instructions for the letter *not* to be sent to the claimant. The first letter was not sent, but due to a failure of miscommunication, a second automatically generated copy of the letter appears to have been sent to the claimant. The respondent believed it had been sent to Ms Luz only. Ms Luz queried with HR why the claimant had been given a new contract. Whether the generation of the new letter was caused by incompetence, it was in any event a mistake. It back dated the claimant's employment until 2nd August 2019. This was nonsense and I find

that the claimant must have been aware that the letter was a mistake.

33. The respondent's case is that the letter was sent by mistake. The claimant appeared to accept that contention at the Hearing but complained that there was no follow up from the respondent whether by phone or email, to explain that the letter had been sent by mistake.

34. The respondent failed to produce a P45 for the claimant, despite her frequent requests for a P45, until 8th June 2020.

35. The claimant commenced tribunal proceedings on 10th April 2020 after a period of early conciliation between 11th February – 6th March 2020.

Submissions

36. I heard submissions from both parties. I have referred to the submissions in the conclusions below.

The law

37. **Jurisdiction:** I have referred to the following relevant law. Unfair dismissal under S111(2)(a) Employment Rights Act 1996 (ERA 1996) states that a complaint must be filed within three months beginning with the effective date of termination. Under Section 111(2)(b) ERA 1996 time may be extended if it was not reasonably practicable to have filed within the preliminary statutory period.

38. **Vicarious Liability:** the common law principal of vicarious liability is that the employer has liability for the wrong doing of its employee committed during the course of his or her employment. By reference to **Lister v Helsley Hall [2011] UKHL 22** and **Mohamud v WM Morrison Supermarkets plc [2016] UKAC 11**, establishing vicarious liability requires the answer to two questions:- 1) what was the field of the employee's activities in his employed role? and (2) what was the degree of connection between the employee's wrongful act and those activities?

39. **Illegal contract:** by reference to **Hall v Woolstone Hall Leisure Ltd [2000] EWCA Civ 170**, **Patel v Mirza [2016] UKSC 42**, and **Robinson v Al-Qasimi [2021] EWCA Civ 862**, the general principal is that a claimant would only be prevented from enforcing his/her rights under the employment contract if the claimant had both knowledge of *and* had participated in the illegal conduct.

40. **Patel v Mirza** established a 'trio of considerations':

- a. The underlying purpose of the law that has been breached;
- b. Any other relevant public policies which may be rendered ineffective or less effective by denial of the claim'

- c. Whether denying the claim would be a proportionate response to the illegality.
41. A range of factors are relevant when considering proportionality:
- a. The seriousness of the illegal conduct;
 - b. Its centrality to the contract;
 - c. Whether it was intentional;
 - d. Whether there was a marked disparity in the parties' respective culpability.

42. Knowledge plus participation is a necessity but is not a sufficient criterion alone for the doctrine of illegality to succeed. **Coral Leisure Group Ltd v Barnett (1981) 1RLR 204** established that the fact that a party has, in the course of performing a contract, committed an unlawful act will not by itself prevent him or her from further enforcing that contract unless the contract was entered into with the purpose of doing that unlawful act, or the contract itself, as opposed to the mode of his performance, was prohibited by law.

Conclusions

43. The first issue is the date of termination of employment. The respondent says that the claimant's employment ended on 14th September 2019 and her tribunal claim is therefore out of time. The claimant claims that her employment was continuous and her claim form was in time whether it was terminated on 8th or 17th January 2020. To establish the answer to that question the nature of the claimant's work before and after resignation must be considered, more particularly whether it was continuous service and whether the respondent has vicarious liability for the conduct of the claimant's line manager.

44. I find that the claimant's employment initially ended on 14th September 2019 in accordance with her resignation. The P45 generated by her line manager with a termination date of 31st July 2019 which pre-dates her resignation letter, is an anomaly and has no contractual bearing.

45. I am satisfied that the claimant continued to work for the respondent at the invitation and/or instruction of her line manager after the 14th September 2019. The respondent in submissions suggested that it was not at all clear whether the claimant continued working immediately under the direction of her line manager, as there was evidence to suggest that there was a significant gap. However there is evidence from two Tesco employees, one of which was a manager, to confirm that the claimant worked continuously at Tesco stores from July 2019 until 31st December 2019.

46. The next question is what was the nature of the relationship between the claimant and the respondent between 14th September 2019 and 8th January 2020? The claimant was working without a formal employment contract generated by head office but she was continuing with her duties in exactly the same way as before, working similar long hours and at the same stores as previously. She was doing so at the direction of her line manager.

47. The respondent denied that it had vicarious liability for the line manager's conduct in re-engaging the claimant in that informal and irregular manner, using 'ghost' pin numbers. I find that the respondent did have vicarious liability for the line manager's conduct. He was acting in the course of his normal duties within his normal field of activity, namely arranging for and supervising cleaning staff to work at Tesco stores in the region. The claimant worked under his direction in doing just that. He managed the claimant after 14th September 2019 in the same way that he managed her work before 14th September 2019; for the benefit of the respondent in his capacity as a supervisor/manager. There was no evidence that he was financially profiting personally from the claimant's engagement under the irregular and anomalous way that she worked from 14th September 2019.

48. When did the second period of employment end? It could have ended on 8th January 2020 or 16th January 2020. I find that it ended on 8th January 2020 when the claimant was told to stop working and to attend a meeting with the respondent. The claimant did not work after that date and she was not paid beyond 31st December 2019 as there were no hours logged after that date.

49. The respondent submits that the second period of employment 14th September 2019 until 8th January 2020 was tainted with illegality.

50. Summarising the facts:

51. The claimant must have known that using her sons' pin numbers was not permissible as she was aware that the respondent had instigated a disciplinary investigation into the practice prior to her resignation. She had resigned before the outcome of that investigation which inevitably would have resulted in her dismissal for gross misconduct. I have no doubt the claimant knew that the practice of using her sons' pin numbers was improper.

52. The claimant denied any wrongful intention to avoid or evade payment of tax. She claimed that she had merely followed her line managers direction claim for her worked hours by using her sons' pin numbers because otherwise he would have to provide an employment contract for each store where she worked which was not possible. She understood that it would be a temporary arrangement. The claimant also submitted that she had paid tax across the three accounts and therefore there had been no wrong doing.

53. I find that account lacking in credibility and disingenuous. The respondent did not need to issue a new contract for each store the claimant worked out. I accept Ms Mason's evidence that it was a matter for the claimant's line manager to direct his staff to any store in the region and that it did not need a new contract to be generated centrally each time a member of staff went to a different store, despite being allocated to one store in the original employment contract.

54. There is contemporaneous documentary evidence that when first questioned about using her sons' accounts, the claimant stated that she had done so *"to avoid the issue of hours and paying too much tax"*. The claimant did not attend the hearing and therefore did not provide evidence disputing the authenticity or reliability of that document. I find that the claimant fully participated in the deception relating to her tax and the lengthy hours that she was working between 14th September and 8th January 2020.

55. The claimant's conduct did result in her paying less tax up to 14th September 2019; the PAYE tax threshold will have been lower and, cumulatively over the three accounts, would have generated less tax than the applicable tax rate on her own account had she logged all hours through her account alone.

56. The claimant complained that she worked lengthy hours each week, 18 hours a day, to the extent that it damaged her health. She described it as 'slave labour' and 'modern slavery'. The respondent has a legal duty to ensure that the provisions of the Working Time Regulations 1998 were observed. These regulations are to protect the health and safety of employees.

57. The conduct of the claimant not only evaded the tax provisions but it also undermined the serious and important purpose of the statutory legislation relating to the health & safety of workers, exposing herself to harm and the respondent to risk of breach of statutory duty.

58. In considering whether it would be proportionate to find that the claimant's unwritten contract of employment with the respondent between 14th September and 8th January 2020 was tainted with illegality I took into account the following:

(1) the claimant's conduct – deliberately and knowingly deceiving her employer. She continued to work after 14th September 2019 using the same deception in the same way that she had before that date, knowing that it was wrong and knowing that the respondent regarded it as a disciplinary issue. She had resigned to avoid disciplinary proceedings;

(2) the claimant's conduct and the arrangement with her line manager was central to her employment. Without the deception she could not have continued working for the respondent after 14th September 2019. Her conduct was

intentional - to benefit herself by working more than permitted hours resulting in increased pay a reduced level of PAYE deductions .

(3) The respondent also has culpability because it had vicarious liability for the manager who participated in the deception of the respondent to enable the claimant to keep working. The respondent is culpable despite the central office of the respondent being unaware of the deception perpetrated by at least one of its managers and the claimant in one of its regions. Effectively the line manager and the claimant exploited the respondent's systems and its decentralisation of control. Other members of staff involved in deception were dismissed by the respondent.

(4) There is a strong public interest in upholding the efficacy of the tax regime and adherence to statutory health and safety provisions for workers. The claimant's conduct was prohibited by law.

59. Whilst the claimant's claim for unfair dismissal and arrears of wages was filed in time, Early Conciliation being completed by 6th March 2020 and the ET1 filed by 4th April 2020, I find in the circumstances that the relevant period of the claimant's employment commencing 15th September 2019 until 8th January 2020 was tainted with illegality and it is proportionate in all the circumstances to reach that conclusion.

60. The claimant's claims are dismissed.

Employment Judge Richardson
Date: 6 October 2021

Judgment sent to parties: 21 October 2021

FOR THE TRIBUNAL OFFICE