EMPLOYMENT TRIBUNALS

Claimant: **Ms D Dhungana**

Respondents: **(1) Mr R Rai**
(2) Mrs A Rai

Heard at: **East London Hearing Centre (via CVP)**

On: **19 January 2023**

Before: **Employment Judge Reid**

Representation

Claimant: Mr J Patel, Counsel
Respondent: Mr T Coglin KC, Counsel

JUDGMENT having been sent to the parties on 3 February 2023 and reasons having been requested by the Claimant (in relation to the statutory redundancy pay claim – time limit issue) in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Background

1 The issue for determination at this hearing was the issue remitted by the Employment Appeal Tribunal in its judgement dated 25 July 2022, namely the application of s164(1) Employment Rights Act 1996 and whether time should be extended for the Claimant's claim for a statutory redundancy payment under s164(2), the test being whether it is just and equitable that the Claimant receive a statutory redundancy payment. This is not exactly the same legal test as for a discrimination claim which is whether time should be extended if the Tribunal considers it just and equitable to do so (s123(1) Equality Act 2010). My then relevant assessment of the just and equitable test as it related to this claim was at para 28-29 of my previous judgement dated 5 January 2021.

2 I was provided with a two volume electronic bundle to page 431 (the Claimant had also provided 3 recordings and 5 video clips but these are not relevant to my decision). Both parties were represented by Counsel and I was provided with a skeleton argument on behalf of the Respondents plus relevant statutory provisions and authorities. I heard oral submission on both sides. An interpreter assisted the Claimant.

Relevant law

3 I considered s15 and s21 Immigration Asylum and Nationality Act 2006 and s24B Immigration Act 1971 on the statutory illegality point raised by the Respondents. I considered *Okedina v Chikale* [2019] IRLR 905 on the statutory illegality issue.

4 The relevant time limit is set out in s164(1) Employment Rights Act 1996. Time can be extended under s164(2) if the Tribunal considers that it is just and equitable that the claimant receive a statutory redundancy payment.

Relevant findings on the time limit issue

5 The relevant dates are as follows. The Claimant's employment on her case had ended on 29 February 2020.The 6 month time limit therefore expired on 28 August 2020. She contacted ACAS on 2 September 2020. She presented her claim on 15 September 2020.

6 My judgment dated 5 January 2021 (after the 18 December 2020 hearing) made findings of fact as it related to the time limit issue. I found the following in that judgment (when also considering all the other claims at that stage):

6.1 para 8 - the Claimant took the lead in contacting ACAS for her husband Mr Basnet, with discussions on his behalf on 23 April 2020 and had had contact with the CAB about Mr Basnet's redundancy

6.2 para 9 – when Mr Basnet presented his claim on 16 May 2020, her own complaints were included on his claim form

6.3 para 10 – she was aware that she needed to get her own ACAS certificate

6.4 para 11 – on or about 15 May 2020 she had received confirmation about her NRM decision

6.5 para 11 – she was hedging her bets by referring to her complaints in Mr Basnet's claim form but not presenting her own claim at this time

6.6 para 12 - once she had the NRM decision she did not act promptly and present her own claim

6.7 para 13 – the time limit issue was flagged up at the Judge Tobin hearing in Mr Basnet's claim on 17 August 2020 at which point had she brought this claim it would have been in time but she did not contact ACAS for herself until 2 September 2020

6.8 para 14 – this was an inexplicable delay in contacting ACAS for 10 working days

6.9 para 14 – she had other sources of advice in addition to Mr Patel

6.10 para 15 – the Claimant delayed a further 6 days in then presenting her claim after issue of the ACAS certificate and by the time the claim was presented it was about a month after Judge Tobin had discussed time limits in relation to her claim with her

6.11 para 16 – the Claimant had legal advice on her immigration matter so had another source of advice.

7 These are findings I have already made about the circumstances pertaining in the months running up to the presentation of the Claimant's claim. Although further points were made today as to the extent of Mr Patel's involvement and when it arose, it remains the case that she had had contact with him in connection with Mr Basnet's bankruptcy proceedings during August 2020 and was available as a source of advice to her, even if he was not formally instructed by the Claimant in relation to her employment matter at that stage; further Mr Basnet had been represented by another Counsel, Mr Chiotu, who had heard exactly what Judge Tobin had told the Claimant about the need to bring her own claim and about time limits; again another source of advice. I have already found that she had sources of advice and information and that finding is not changed.

8 It was also raised today on behalf of the Claimant that she had been 'rebuffed' by ACAS and that she found it hard to challenge an authority figure, as an explanation for the delay – but I have already found that she took a tactical decision to wait for her NRM decision and to include her complaints in Mr Basnet's claim form rather than bring her own claim – para 11 – that is not the actions of someone who feels rebuffed by an authority figure but someone who is weighing up her options and deciding on a way to take legal steps which she thinks will protect her position.

9 The Respondents also raised an issue regarding the merits of the claim, namely the effect of any contract of employment (assuming there was one, which was not accepted) being either illegal under statute or illegal under common law; this was relevant to the potential merits of this claim because if there was in effect an illegality bar to any underlying contract of employment, the statutory redundancy payment claim would have no merits.

10 As regards statutory illegality I was referred to s15 and s21 Immigration Asylum and Nationality Act 2006 and s24B Immigration Act 1971, the latter provision coming into effect on 12 July 2016.

11 On the side of the employer, s21 Immigration Asylum and Nationality Act 2006 provides that it a criminal offence to employ another knowing they are disqualified from working and s15 provides for a penalty for employing a person without leave to remain or without permission to work.

12 On the side of the employee, s24B Immigration Act 1971 provides that the employee also commits an offence if working without permission to do so; s24B(10) defines working as including under a contract of employment (and going on to also include multiple other ways/types of working, making it crystal clear that the provision is a wide one to catch many forms of working).

13 The issue was whether these provisions acted together to make any underlying contract of employment unlawful, relevant to the potential merits and in turn to the just and equitable test.

14 I was referred to *Okedina v Chikale* 2019 IRLR 905 an employment case (and not a commercial contract case where the parties may be on more of an equal footing) which considered the issue of statutory illegality before the law changed in 2016 – namely the case considered the situation before s24B came into force and introduced a parallel provision as regards an offence by the employee, and not just by the employer as had been the case before 2016.

15 At paras 16 – 17 of *Odekina* the identified issue is: does the statute intend to deprive the contract of any legal effect with the result that it is unenforceable (an issue of construction). There must be a clear implication (para 20); in relation to an employment contract, an implication could arise from the fact that the statute forbids the employment; in that context it makes no sense to then say an employment contract is then still permitted.

16 At para 22 the decision identifies the implication arising where both parties are prohibited; this is to be distinguished from where only one party is, where that implication might not be made.

17 At para 31 it emphasises that the case related to the law before the parallel provision was included in 2016 under the Immigration Act 1971; this point is repeated in para 65 – the key issue was that the illegality then was only directed at the employer and at that point not also directed at the employee.

18 As a matter of construction therefore there is a clear implication, given the penalties apply to both the employer and the employee, that the statutes do intend to deprive the underlying contract (if there is one) of any legal effect, taking into account that the change in 2016 was an express step to make the penalty run both ways.

Conclusion

19 Bearing in mind the test is whether it is just and equitable for the Claimant to be paid a statutory redundancy payment:

19.1 para 28 of my judgment as regards Mr Basnet also bringing a claim for a statutory redundancy no longer applies because he has withdrawn his claim though I do not attribute significant weight to this because the withdrawal of his claim is on the basis that he accepts he was in fact paid his statutory redundancy payment (para 25 of his witness statement for this hearing)

19.2 of more weight is that it is highly likely that the Claimant's statutory redundancy payment claim cannot succeed due to the statutory illegality point, meaning the Claimant does not lose anything by being unable to bring this claim

19.3 weighing it up, the balance of prejudice therefore falls in favour of the Respondents having to continue to defend a claim highly likely to fail on the

legal issue of statutory illegality.

20 Therefore applying the test in s164(2) Employment Rights Act 1996 as to whether it is just and equitable for the Claimant to receive a statutory redundancy payment (and taking into account it is for the Claimant to show this):

20.1 if any underlying contract is illegal under statute then it is not just and equitable for her to receive a statutory redundancy payment as the law has said that the employment was illegal meaning any contract is unenforceable; it is a contract of employment which has to underpin the claim for a statutory redundancy payment

20.2 the Claimant had a number of opportunities to present her claim in time before the time limit expired including after specific advice from Judge Tobin; she had access to advice and information and knew about ACAS and claim forms from assisting Mr Basnet; she had chosen for tactical reasons to put her complaints in Mr Basnet's claim form and not do her own

20.3 the reason for delay as presented today was the delay in getting an appointment with Mr Patel but she had already delayed in contacting ACAS (by 10 days) knowing time limits were an issue from Mr Basnet's hearing on 17 August 2020; had she taken Judge Tobin's advice and acted promptly her claim could have been presented in time.

21 In all the circumstances and having weighed it up I conclude that time should not be extended because it is not just and equitable for her to receive a statutory redundancy payment.

22 The reasons for allowing the sex discrimination and marriage discrimination claims to proceed in my previous judgment do not apply in the same way to this claim for a statutory redundancy payment because firstly the statutory test is different, secondly the illegality issue is different for those types of claim which are not based on the contract of employment and thirdly the heart of her discrimination claim is disparity in treatment – Mr Basnet was paid to work but she was not.

Employment Judge Reid
Dated: 17 February 2023