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Illegal contracts and discrimination claims

From: Richard Alford of Tanfield Chambers

04/04/2014

S WIJESUNDERA v (1) HEATHROW 3PL LOGISTICS LTD (DEBARRED) (2) M NATARAJAN (DEBARRED) (2013)

EAT (Langstaff J (President)) 05/12/2013

DISCRIMINATION - EMPLOYMENT

Mr Justice Langstaff, the President of the EAT, sitting alone, reviewed the approach of the employment tribunal when considering whether the tribunal has jurisdiction to hear discrimination complaints where the contract of service between the parties is found to be illegal.

Mrs W, a Sri Lankan national, had initially approached the respondents for work in May 2009, making it clear that she would not be able to work lawfully until her work permit was transferred to allow her to work for the first respondent. Between May 2009 and August 2009, the claimant was invited to attend the offices of the respondents to discuss the work that she was to do. During that period, she was repeatedly touched sexually and inappropriately by the second respondent. In August 2009, in anticipation of the confirmation of her work permit, but knowing that she did not yet have the right to work, the claimant began to work for one of the respondents (the issue of which actually was the employer was remitted to the employment tribunal to determine). The inappropriate and sexual touching continued during her employment.

Upon her dismissal in 2011, the claimant brought claims of unfair and wrongful dismissal, as well as direct discrimination on the grounds of sex and harassment in relation to events both before and during her employment. The employment tribunal found that, as the facts complained of were inextricably bound up with her [illegal] employment, they had no jurisdiction to hear the claimant's claims.

Allowing the appeal, Langstaff P held that the tribunal did have jurisdiction to hear the claimant's sex discrimination claims relating to both before and during her employment, but not her claim for discriminatory dismissal. His conclusions can be summarised as follows:

(i) The relevant principles are to be found in the case of Hall v Woolston Hall Leisure Ltd (2001) ICR 99, CA
, namely that the tribunal should consider whether the "claim arises out of or is so clearly connected or inextricably bound up or linked with the illegal conduct of the [claimant] that the court could not permit the [claimant] to recover compensation without appearing to condone that conduct". An appropriate analogy can be made with the approach of the courts to the illegality defence (ex turpi causa) in tort law. The degree of illegality and the extent of the claimant's participation in it are relevant considerations. In the instant case, though the illegal contract had given rise to a practical opportunity for the acts of sexual harassment to be committed, it could not be said "that the employment was in any sense necessary, causative or inextricably linked with the [harassment] itself". The decisions in V v Governing Body of Addey and Stanhope School (2005) ICR 231
and Hounga v Allen (2012) IRLR 685
were held to be correct in their application of the Hall test, but fell to be distinguished on their facts.

(ii)The application of such principles should not give the tribunal jurisdiction to consider a discriminatory dismissal from an illegal contract, as "dismissal is intimately bound up with employment" and the courts should not award compensation for the termination of a contract that did not lawfully exist.

(iii) Despite making a clear finding that the claimant was an applicant for employment in the period from May 2009 to August 2009, the tribunal had failed to properly apply s.40 of the Equality Act 2010
, which extends the Act's protection to applicants for employment. It was further held that, as she was open and honest about her immigration status, the claimant did not participate in any illegality until she actually began employment. A claim in relation to the application period could not be correctly excluded on the grounds of the

illegality of the subsequent employment relationship.

It should be noted that both respondents were debarred from appearing at the EAT, so the President only had the benefit of submissions on behalf of the claimant.

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