EMPLOYMENT TRIBUNALS

Claimant: **Dr C Esume**

Respondent: **Core Care Links Limited**

Heard: **via Cloud Video Platform** **On:** **21 September 2020**

Before: **Employment Judge Ayre (sitting alone)**

Representatives:

Claimant: **Dr D Ikah, lay representative**
Respondent: **Mr J Boyd, Counsel**

JUDGMENT FOLLOWING PRELIMINARY HEARING

1. The name of the respondent is amended by consent to Core Care Links Limited.

2. The contract between the claimant and the respondent was not so tainted by illegality that it would be contrary to public policy to allow the claimant to seek to enforce the terms of that contract in this Tribunal. The claimant can enforce the terms of his contract with the respondent in this Tribunal.

REASONS

Proceedings

3. By claim form presented on 7 May 2020, following a period of Early Conciliation from 11th March 2020 to 11th April 2020, the claimant brought a complaint of unlawful deduction from wages. He claims that he is entitled to be paid the sum of £10,002 for hours worked during the period from 1 January 2020 to 14 January 2020.

4. The respondent defends the claim. In its response the respondent pleaded that the claimant was neither an employee of the respondent nor a worker, and that accordingly the Tribunal does not have jurisdiction to consider the claim.

5. The claim was listed for a Preliminary Hearing today to consider whether the claimant was an employee of the respondent or a worker.

6. Prior to today's Preliminary Hearing, the respondent's representative wrote to the Tribunal by email dated 27 August 2020, raising the issue of illegality. In summary, the respondent argued that the claimant did not, between 1 and 14 January 2020, have the right to work in the United Kingdom, that he was working illegally and that the illegality rendered his contract unenforceable.

7. Employment Judge Broughton directed, on 5 September 2020, that the issue be dealt with at the outset of today's Preliminary Hearing, and that the claimant should attend today prepared to respond to the issues raised in the respondent's email of 27 August.

8. At the beginning of today's hearing, it was agreed that the correct name of the respondent was Core Care Links Limited. The name of the respondent is therefore amended, by consent, to Core Care Links Limited.

9. Both parties also agreed, at the outset of today's hearing, that the period in respect of which the claimant is claiming unpaid wages is 1st to 14th January 2020.

10. Mr Boyd indicated, on behalf of the respondent, that if the 'illegality' point was determined in the claimant's favour, then:-

    a. The figure of £10,002 claimed by the claimant is accepted by the respondent;
    b. Whilst not formally conceding that the claimant was an employee or a worker, the respondent would not look to run that argument; and
    c. The respondent would look then to make arrangements to pay the sum of £10,002 to the claimant.

11. Both parties submitted documents and witness statements in advance of today's hearing. There was no agreed bundle, but rather each party submitted its own bundle. I explained to the parties that I would only read the documents that I was referred to during the hearing.

12. I heard evidence from the claimant. The respondent had produced a witness statement for Ms Soraya Jenney, but chose not to call her to give evidence. Dr Ikah wanted to cross-examine Ms Jenney, and was keen to have the opportunity to put questions to her.

13. I urged the respondent to consider its position, and adjourned the hearing briefly to enable it to do so. Having taken instructions, Mr Boyd indicated that the respondent still did not wish to call Ms Jenney.

14. Dr Ikah still wanted to question her, and I considered whether I should exercise my powers under Rule 32 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 to require her to give evidence. On balance I decided not to require Ms Jenney to give evidence for the following reasons:-

    a. It is for a party to Tribunal proceedings to present its case in the way that it sees fit, and to call the witnesses that it wishes to;

b. The respondent in this claim has the benefit of expert legal advice and is therefore aware of the consequences of not calling a witness; and
c. I do not consider that the claimant will be prejudiced by the failure of Ms Jenney to give evidence as, in the absence of any witness evidence from the respondent, it is more likely that I will accept the claimant's evidence.

15. I have therefore not read the witness statement of Ms Jenney and, as a result, am not taking it into account at all in reaching my decision.

The Issues

16. In light of the comments by Mr Boyd at the beginning of today's Preliminary Hearing, the only issue that it falls to me to determine today is whether the contract between the claimant and the respondent was tainted by illegality such that it would be contrary to public policy to allow the claimant to seek to enforce the terms of that contract in this Tribunal.

Findings of Fact

17. The claimant is a doctor who works as a General Practitioner. He is a Nigerian national and currently lives in Canada. The respondent is a company limited by guarantee which provides urgent primary care services, including out of hours and emergency GP services, to the North East Lincolnshire Clinical Commissioning Group.

18. Before moving to Canada on 16th January 2020, the claimant worked in the UK for the respondent from 12 July 2019 until 14 January 2020 as a General Practitioner providing out of hours and Emergency services.

19. In July 2019 the claimant was asked by the respondent to provide a number of documents to enable him to begin work. These included copies of his training certificates, his GMC Certification, his Certificate of MDU cover, his CV and his current DBS.

20. Before starting work for the respondent in July 2019 the claimant was sent a number of documents to complete by the respondent. He completed all of the forms sent to him by the respondent and provided all of the documents requested of him.

21. The respondent did not ask the claimant to provide any evidence of his right to work in the UK. On the evidence before me, therefore, it appears that the respondent did not comply with its obligation to carry out pre-employment checks of the claimant's right to work in the UK.

22. The claimant used the services of an immigration consultant to obtain a visa to live and work in the UK. The primary sponsor for the claimant's visa was a company called Fieldhouse. The respondent was not, and has never been, the claimant's sponsor for this visa. The visa was a Tier 2 (General) Visa and gave the claimant leave to remain and carry out restricted work in the UK until 14 September 2020. The conditions of the visa included that:-

a. The claimant must work for his sponsor whilst in the UK;
b. He could also work part time (up to 20 hours a week) in another job if it was either the same role as his current job, or on the shortage occupation list.
c. Any part time work had to be outside the hours he worked for his sponsor.

23. Whilst in the UK the claimant worked for the respondent as well as for his primary sponsor. The claimant ceased working for his primary sponsor on 31 December 2019.

24. The claimant resigned from his position at the respondent, giving 90 days' notice to expire on 31 December 2019. The claimant resigned because he wanted to move to Canada. He was initially due to leave the UK in the first week of January 2020, but due to logistical reasons was unable to travel, and his departure was deferred to 16 January 2020. As the claimant's departure was delayed, he worked some shifts for the respondent between 31 December 2019 and 14 January 2020.

25. At the time he worked the additional shifts for the respondent, the claimant believed that his work visa was still valid until September 2020. He was not aware that if he resigned from his position with his visa sponsor, he was not permitted to work in the UK.

26. On 10 January 2020 Dr Helen Buckley of the respondent wrote to the claimant and informed him that : "*In line with the terms and conditions placed upon the visa sponsorship regulations, any change in circumstances must be notified with ten working days to the government. I have completed notification today that you handed your notice into us and completed work with us by the 31st December 2019. I hope you move to Canada is going well.*" The claimant replied, thanking Dr Buckley for letting him know about the notification.

27. On 28 January 2020 the respondent checked the claimant's visa status. It appears, from the evidence before me, that the 28 January was the first time that the respondent ever checked the claimant's right to work in the UK.

28. On 3 February Soraya Jenny, the respondent's Operations Manager, wrote to the claimant by email. In that email she said that she was processing the termination of the claimant's contract and had a query regarding the claimant's right to work documentation. She asked the claimant to provide her with additional information "in order for me to process your final payment." She also wrote:-

"*I have attached a result from the Employer Checking Service states that you are on a sponsorship visa and you were only allowed to work up to 20 hours outside of the work with your sponsor. Can you provide me with the evidence of your certificate of sponsorship along with confirmation from them that you were employed by them up until 14th January 2020*"

29. The claimant replied to this email, and informed Ms Jenney that his last day of work with them was 31 December 2019. On 12 February Ms Jenney sent a further email to the claimant asking: "*If your last day with Fieldhouse was Dec 31 2019, does that mean your sponsorship ended on*

that day as well?" The claimant replied the same day "*Not at all, you can work for up to 1 month after leaving your sponsor."*

30. At the time he sent this email the claimant genuinely believed that he had the right to stay and work in the UK for 1 month. The claimant accepted in evidence today that, after sending this email he had checked the position online and seen a reference to a 60 day period. He believed that this meant he could stay and work in the UK for 60 days after his employment with his sponsor ended.

31. The claimant told me that he had not taken advice in relation to his immigration status and right to work at that time. He believed at the time that because he was already working for the respondent, and was not looking for a new job, he could continue to work for the respondent for a period of time after his employment with his sponsor ended.

32. I accept the claimant's evidence that he did not consider himself to be staying or working illegally in the UK during the period 1st to 14th January 2020. He did not realise that because he no longer had a primary sponsor he could not continue to work, as his visa was not due to expire until September 2020.

33. I also accept the claimant's evidence that the first time he became aware that he may not have been able to work lawfully in the UK after 31 December 2019 was when he received emails from Ms Jenney in February 2020.

34. I find that the first discussions between the claimant and the respondent about the claimant's immigration status was in the week commencing 10 February 2020, several weeks after the claimant had stopped working for the respondent. t

35. Ms Jenney told the claimant that his payment for the hours he had worked in January had not been processed because of the possibility of irregularities in relation to the claimant's right to work in the UK, and that the respondent needed evidence that the claimant was permitted to work in the UK after his employment with his primary sponsor ended on 31 December 2019.

36. By open letter dated 14 August 2020 the respondent's solicitors wrote to the claimant's representative. In that letter they stated that:-

"*If his employment with his sponsor ended on 31st December 2019, then it was no longer lawful for Dr Esume to continue with any supplementary employment (for any number of hours) after that date. Any such work he carried out in January 2020 would not have been permitted….*

In respect of the claim before the Employment Tribunal, it is understood that Dr Esume's claim is in its entirety for monies relating to the period after 31 December 2019; in other words for the period when it appears he was working illegally… it is our view that any unlawfully performed part of the contract is unenforceable and that a Tribunal (or any other court) could not award any payment in respect of unlawful activity as a matter of public policy…"

37. The claimant has still not been paid for the hours that he worked in January 2020.

The Relevant Law

38. The starting point when considering questions of illegality is that, as a matter of public policy, courts and tribunals will not enforce illegal contracts, and they will be treated as if they never existed. However, whether a particular contract is unenforceable due to illegality will depend on the circumstances of the case.

39. In the case of *Patel v Mirza 2017 AC 467* the Supreme Court reviewed the defence of illegality and held that a claimant (in a non-employment case) was entitled to restitution of sums paid under an illegal agreement because, in cases where illegality is an issue, the key question is not 'should the contract be regarded as tainted by illegality', but rather whether, in the circumstances of the case, the relief claimed should be granted.

40. Lord Toulson, in that case, summarised the fundamental reasoning behind the doctrine of illegality as being that it would be contrary to the public interest to enforce a claim, if doing so would harm the integrity of the legal system. In assessing whether allowing a claim would harm the integrity of the legal system, Lord Toulson indicated that it would be necessary to consider-

    a. The underlying purpose of the law that had been breached, and whether that purpose would be enhanced by the claim being rejected;
    b. Any other relevant public policy which might be affected by the denial of the claim; and
    c. Whether rejecting the claim would be a proportionate response to the illegality, taking account of the fact that punishment of illegality is a matter for the criminal courts.

41. He also set out a number of factors that should be taken into account, in assessing proportionality including:-

    a. The seriousness of the illegal conduct
    b. Its centrality to the contract
    c. Whether it was intentional, and
    d. Whether there was a marked disparity in the parties' respective culpability.

42. In a more recent decision, *Stoffel and Co v Grondona 2020 UKSC 42*, the Supreme Court held that solicitors could not escape liability for negligence in failing to register documents to complete a property transfer on the basis that the transfer was part of an illegal mortgage fraud. Lord Lloyd-Jones confirmed that, following *Patel v Mirza*, the question of whether a claimant must rely on illegal conduct to establish a cause of action is no longer determinative of an illegality defence.

43. The Employment Judge held that the contract between the claimant and the respondent was not illegal. She considered that it was an important

principle of public policy that an individual who worked should be paid the minimum wage, and that foreign nationals without recourse to public funds were particularly vulnerable to potential exploitation because of fear of losing their employment.

44. In *Okedina v Chikale 2019 EWCA Civ 1393* Court of Appeal authority to which I was referred by the respondent, it was held that courts and tribunals, when considering issues of illegality, have to look at all of the circumstances. Where an employee was genuinely mistaken about employment status, should they be debarred from pursuing employment rights?

45. That case involved a claimant who came to the UK to work as a live-in domestic worker for the respondent. The respondent obtained a visa for the claimant by providing false information. When the visa expired the respondent kept the claimant's passport and told her that her visa was being renewed. The respondent applied for an extension of the visa in the claimant's name, providing false information. The extension was refused but the claimant was not told it had been refused and continued to work for the respondent.

46. When she was dismissed the claimant brought a number of claims against the respondent in the Employment Tribunal and the employer sought to rely on the illegality defence. The key issue in the case was whether the fact that the claimant's employment was in breach of the Immigration, Asylum and Nationality Act 2006 ("the Act") meant that her contract was unenforceable.

47. The Court of Appeal took into account the fact that the Act does not explicitly prohibit a person from employing someone in breach of immigration restrictions, but instead sections 15 and 21 provide for civil and criminal penalties on anyone who employs someone without the necessary permission to work in the UK. The penalties are imposed on the employer rather than the employee.

48. The Court took the view that it could not be discerned that Parliament's intention in enacting these provisions was to provide that a contract to employ someone without the appropriate immigration status should be unenforceable. Particularly since doing so would have the effect of depriving an innocent employee of all contractual remedies against the employer. The Court upheld the decisions of the Employment Tribunal and the Employment Appeal Tribunal to reject the employer's illegality defence.

49. In *Okedina v Chikale* the Court did not apply the three-factor public policy test when considering the question of statutory illegality. The Court did however refer to the tribunal having regard to considerations of public policy in the light of the mischief which the statute is designed to prevent, its language, scope and purpose, the consequences for the innocent party and any other relevant considerations. The correct test is one of necessity – i.e. it must be necessary to the particular public policy objective that the contract is unenforceable.

50. In many cases, the levels of culpability of the parties may prove to be a significant factor in deciding whether rejecting a claim would be a proportionate response to the illegality.

Submissions

51. Mr Boyd submitted on behalf of the respondent that:-

    a. It was clear from the terms of the claimant's visa that he had to be working for his sponsor in order to be able to work part-time for the respondent.
    b. On 31 December 2019 the claimant stopped working for his sponsor, and from them on was not permitted to work for the respondent at all.
    c. Although *Okedina v Chikale* involved different facts, the Court of Appeal in that case distilled the applicable legal principles and its decision is not fact specific.
    d. The question of illegality can include considering what the respondent knew or did not know.
    e. It is accepted that in this case the respondent did not seek out information about the claimant's visa status at the outset of the relationship, and that they only checked it after the end of the offending period.
    f. The claimant is articulate and capable of finding out the correct position.

52. Mr Boyd also accepted that if the claimant genuinely did not know that what he was doing was illegal, that he is entitled to pursue his claim in the Employment Tribunal. However, if I were to form the view that the claimant knew what he was doing was wrong, he is not entitled to pursue his claim.

53. In considering whether the claimant had made a 'reasonable' or 'unreasonable' mistake, I should take account of factors such as the claimant's intelligence and his ability to consult and take advice.

54. Mr Ikah submitted on behalf of the claimant that:-

    a. He was displeased not to have had the opportunity to question Ms Jenney.
    b. If he had been given the opportunity to question her, he wanted to submit that this case is in line with something many immigrants suffer.
    c. Employers in the UK use immigration as a hammer against migrants. As soon as Ms Jenney learned that the claimant had left the country, she used the immigration hammer to save £10,000.
    d. 5 GPS contacted the claimant and negotiated with him to be his sponsor. The respondent knew the claimant's immigration status and was originally going to sponsor him.

55. Mr Ikah referred to the Conduct of Employment Agencies and Employment Businesses Regulations 2003, and in particular to Regulations 19 and 20 which, in his submission, set out what steps an employment business or employment agency has to take in order to take on a worker.

56. The respondent should, Mr Ikah argued, have carried out an immigration check on the claimant. If they had done so, we would not be here.

57. Whilst working for the respondent in January 2020 the claimant was, in Mr Ikah's submission, waiting for the Home Office to contact him, and believed that his visa was valid until September 2020. It was reasonable for the claimant not to know the correct position; it was the employer who had failed to comply with its legal obligation.

Conclusions

58. I accept the claimant's evidence that he was not aware at the relevant time (January 2020) that he could no longer work in the UK once his employment with his sponsor had come to an end. He genuinely believed that he could continue to work for a period of time, particularly since his visa was not due to expire until September 2020.

59. The claimant was, therefore, not aware that it was illegal for him to continue to work. Whilst he could have taken steps to check the position, the fact that he did not, in the circumstances, does not render him culpable in my view.

60. The respondent was also not aware at the time that the claimant was no longer permitted to work in the UK. At the time the relevant contractual duties were fulfilled therefore, between 1st and 14th January 2020, both parties were under the mistaken impression that the work that the claimant was carrying out was being performed lawfully in accordance with the terms of the claimant's visa.

61. It was only some time later, when it came to paying the claimant, that the respondent took steps to check the claimant's immigration status.

62. The respondent took no steps prior to late January 2020 to verify the claimant's right to work in the UK. It had singularly failed to comply with its legal obligation to carry out right to work checks before the claimant started working for the respondent, and took no steps to remedy the situation at any time during the period that the claimant worked for the respondent.

63. There is no doubt that the claimant did work for the respondent between 1st and 14th January 2020 and that he earned the sums that he now seeks to recover from the respondent in these proceedings.

64. I accept that the underlying purpose of the immigration rules is to prevent people from working illegally in the UK, I do not think that it can be said that that purpose would be served by preventing the claimant from being able to claim to be paid for hours that he has actually worked. The purpose of the immigration rules is not to deprive employees from enjoying rights granted to them by UK law, or to allow employers to treat individuals unlawfully. Particularly where the employee is not aware of the illegality.

65. Parliament could have incorporated into the immigration rules a prohibition on individuals working in breach of those rules enforcing their contractual

and employment rights. It did not do so, and instead imposed penalties on employers who breach the legislation, rather than on employees.

66. There is no other public policy, in my view, that would be adversely affected should the claimant be allowed to pursue his claim. Quite the contrary in fact, as it is in my view in accordance with public policy for employers who have contracted to pay individuals for work that they have carried out to be required to make those payments. This is evidenced by the legislation surrounding the National Minimum Wage and unlawful deductions from wages.

67. Denying the claimant the right to enforce his contractual rights would not, in my view, be a proportionate response to the illegality. It would not be just for the respondent, who failed to comply with its legal obligations, to benefit from the illegality by obtaining the services of the claimant without having to pay for them. The respondent, in my view, bears the greater degree of culpability in this case. Not only was it party to the illegality, but it failed to comply with its obligations to carry out right to work checks.

68. For those reasons, the claimant is entitled to enforce his rights under his contract with the respondent in the Employment Tribunal, and the respondent's illegality defence fails.

Employment Judge Ayre

Date 18 December 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE