

EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 25/2/2022

Claimant: Ms H Nogueira

Respondent: Ms L Harris

Before: Employment Judge Mr J S Burns

Representation

Claimant: in person

Respondent: Mr D Josse and Ms A Josse

JUDGMENT

The claims are dismissed

REASONS

1. The Claimant who comes from South Africa was employed by an agency in 2018 to work for the Respondent and then entered into a direct informal arrangement with the Respondent whereby she was employed from 12/7/2019 to work as the Respondent's live-in carer in London at the rate of £945 per week. She was summarily dismissed on 19/11/2020.
2. She brought a claim on 18/3/2021 for unfair dismissal (which claim was subsequently dismissed as she did not have two years' service), notice pay (which she accepts is limited to one week's pay (£945) under the ERA 1996) and reimbursement of expenses (claimed in the sum of £1712.68) incurred by her in the course of her employment on the Respondent's behalf.
3. The Claimant by agreement with the Respondent was paid gross and without any deductions, and she told me on oath that she did not register with the tax authorities until February 2022 and that she has not, as of today, paid a penny of tax or national insurance contributions to the UK authorities since she started working in the UK in 2018. As she was earning from the Respondent at the rate of about £49000 per year, she has failed to pay a substantial amount in this regard - probably in excess of £10000.
4. The Claimant offered a variety of conflicting excuses for this. She said that she thought at one time that she might be going back to South Africa, but that of course does not provide a lawful reason for not paying tax and NICs on the sums earned here before any return to her homeland.
5. She also stated that the tax office where she needed an interview was closed because of Covid 19. That would not have affected matters, if at all, before April 2020 and in any event I take judicial notice of the fact that it is and has been for many years possible to register with the tax authorities on-line.
6. The Claimant is an intelligent and sophisticated person who would have been well aware of her responsibilities.
7. There are no acceptable or valid reasons for the Claimant's default, and when I asked her about this she accepted that if and when HMRC deal with her case she will have to pay penalties and interest.
8. I find that the employment relationship has been conducted illegally with the purpose and effect of evading payment of tax and NICs.
9. While some blame may be due also to the Respondent for entering into the informal arrangement, which has allowed this to happen, the Respondent is an elderly lady suffering from Parkinson's disease, which is why she needed a live-in carer in the first place. Also, she and her children - Mr D and Ms A Josse (who were supporting her) believed at the time what the Claimant told them, namely that she was self-employed and was therefore entitled to be paid gross. Therefore, I find that the Claimant is by far the most blameworthy in this regard.

10. If the Claimant has belatedly registered this month with the tax authorities, as she claims, I find on a balance of probabilities that she has done so only because she anticipated that questions about her tax might be asked during today's hearing.

The law

11. An employee may be prevented from asserting his or her contractual or statutory employment rights where the performance of the employment contract involves conduct that is illegal or contrary to public policy. For example in Soteriou v Ultrachem 2004 IRLR 870 EAT 0250/01 an arrangement between two parties to put forward dishonest description of the relationship so as to deceive the revenue was held to be illegal and unenforceable and this also barred the contractual claim.
12. Following the Supreme Court's decision in Patel v Mirza 2017 AC 467, the key question is whether, in light of the illegality, allowing the claim would harm the integrity of the legal system. This depends on the underlying purpose of the law that has been breached, any other public policy considerations, and whether denying the claim would be a proportionate response to the illegality.
13. In Robinson v Al-Qasimi 2021 ICR 1533, the Court of Appeal held that an employee whose contract of employment was performed illegally during a period of seven years when she failed to pay income tax was not prevented from claiming unfair and wrongful dismissal three years after the employer became aware of the non-payment and took steps to address it. Having regard to all the circumstances, and undertaking the proportionality analysis that is required, the illegal performance of the contract could not be regarded as sufficient justification for not permitting the employee to rely on her employment rights three years later.

Conclusion

14. In the current case, I have carried out an assessment. No tax has been paid for over three years - in a substantial sum, deliberately and without reasonable excuse, the Claimant taking advantage of her relationship with a vulnerable employer to break the UK revenue laws. All or most of the culpability is on her side. To allow her to then come with dirty hands to enforce the same contract in the UK Tribunal would harm the integrity of the legal system. Employment is important not only for the parties to the employment, but also to the Inland Revenue. The evasion of tax increases the burden on others who do comply with the law. Even if the Claimant has now registered for tax, she has done so only at the door of the court.
15. For these reasons it is a proportionate response to find that the claims are barred under the illegality doctrine.
16. A copy of this judgment is to be sent to HMRC.

J S Burns Employment Judge
London Central
24/2/2022
For Secretary of the Tribunals
Date sent to parties: 25/02/2022
