Case Number: (1) 3319522/2019 and (2) 3319596/2019 (V)

EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
(1) Mr Shafqat Shah (2) Mr Samuel Adjei	**v**	United Travel Group Limited

Heard at: Bury St Edmunds (by CVP) **On:** 01 & 02 September 2020

Before: Employment Judge M Warren

Appearances
For the Claimants: Mr O Segal, QC.
For the Respondent: Mr M Paulin, Counsel.

COVID-19 Statement on behalf of Sir Ernest Ryder, Senior President of Tribunals.
This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

The defence of illegality does not succeed.

REASONS

Background

1. The claimants are taxi drivers. The respondent operates a taxi and private hire business. The claimants drove for the respondent. It is an issue in this case whether or not the claimants were workers as defined in regulation 2(1) of the Working Time Regulations 1998 and s.233(b) of the Employment Rights Act 1996.

2. The claimants' claims are that the respondent failed to provide them with paid annual leave and rest breaks, contrary to the Working Time Regulations.

3. The case came before Employment Judge Foxwell at a closed preliminary hearing on 11 December 2019. He listed the case for a final hearing in Huntingdon on 22-24 April 2020. He made case management orders.

4. Because of the Coronavirus crisis, the hearing did not proceed on 22 April 2020. A preliminary hearing over the telephone was conducted by Employment Judge Spencer. I do not have before me the employment tribunal file nor do I have a copy of any written summary EJ Spencer may have provided arising out of that telephone hearing. The parties do not have such a written summary either and I would assume that EJ Spencer's written summary is probably amongst the huge backlog of work that has accumulated for the administrative staff at Watford as a result of the Coronavirus crisis. The parties inform me that EJ Spencer granted the respondent's opposed application for leave to amend their Grounds of Resistance to include a defence of illegality. He listed today's open preliminary hearing, (for 1 September 2020 only) to decide whether the claims should be struck out or a deposit order made in light of the illegality defence. On that occasion, the parties agreed that the issue of illegality could be dealt with without witness evidence. Mr Segal for the claimants suggested that it may be more appropriate that the preliminary hearing actually determined the issue of illegality, rather than merely consider striking out or making a deposit order, something with which the respondent subsequently agreed.

5. After the 22 April preliminary hearing, the respondent proposed to call witness evidence and asked for the hearing to be extended into 2 September 2020. The claimants opposed, on the basis that witness evidence was not necessary and Mr Segal would not be available on 2 September. EJ Spencer acceded to the respondent's request on 15 August 2020.

6. As it happens, the matter was referred to me on 20 August 2020, when I refused the respondent's request to adjourn this hearing on the basis that the respondent's principle shareholder and director, Mr Wright did not have time to prepare for the hearing or attend because of the impact of the Coronavirus crisis on his business.

Documents and evidence before me

7. I had the following documents and evidence before me:

   7.1 A bundle of documents prepared by Mr Paulin.

   7.2 Witness statement of Mr David Wright.

   7.3 Witness statement of Mr Phillip Bayliss.

7.4 Skeleton argument from Mr Paulin.

7.5 Skeleton argument from Mr Segal.

7.6 The claimants' bundle of authorities.

7.7 Respondent's bundle of authorities.

7.8 Respondent's additional bundle of authorities.

7.9 Separate copies from Mr Paulin of reports in the cases of Crombach v Bamberski, Vacante v Addey and Stanhope School and Courage Limited v Crehan.

7.10 A pdf file containing additional documents from the claimants, (2018 and 2019 tax returns).

7.11 A pdf file containing additional documents from the respondent, (booking totals).

8. There were no witness statements from the claimants.

9. Mr Bayliss did not attend to give evidence. Mr Wright did attend; he tendered his witness statement under oath, but was not subjected to cross examination.

The Issues

10. The parties agree the issue before me is whether the claimants have illegally performed their contracts with the respondent and they should not therefore be permitted to proceed with their claims. At paragraph 1 of his skeleton argument, Mr Paulin puts this as an application for a strike out pursuant to rule 37(1)(a). The grounds for strike out at rule 37(1)(a) are that the proceedings are scandalous, vexatious or have no reasonable prospects of success. However, as noted above, in our preliminary discussions the representatives informed me that the issue was not one of striking out on the grounds of prospects of success, but was that I should determine the issue of illegality. The issue is therefore whether the claims should be dismissed because they are founded on illegal performance of the contract.

11. The illegality is that in their tax returns, the claimants have under declared their annual income from their work for the respondent. It is not disputed that they have done so. This was discovered as a consequence of the claimants disclosing their tax returns in compliance with an order made by EJ Foxwell, who was persuaded that how the claimants described themselves and their relationship with the respondent in their tax returns would be of relevance to the issue of status.

12. The respondent says:

12.1 The contract between the claimants and the respondent contained an express term that claimants would comply with their legal obligations in respect of their tax affairs.

12.2 It is crucial to the respondent's business model that those who drive for them are honest in their tax affairs.

12.3 By understating their income to HMRC, the claimants performed their contract illegally and in breach of an express term of the contract.

12.4 If the claimants are found to be workers, the respondent will be potentially vulnerable to prosecution under the Criminal Finance Act 2017 for failing to prevent the facilitation of tax evasion.

12.5 The defence of illegality should succeed in order to maintain the integrity of the legal system and uphold the public policy of ensuring that people accurately declare their income to HMRC and pay the correct amount of tax.

13. The claimants say:

13.1 There has been no illegal performance of the contract. The claimants work for the respondent was legal and they were properly and lawfully paid for their work.

13.2 Even if there were a term in the claimants' contract that they would complete their tax returns accurately and honestly, (which is denied) that they may not have done so does not render the performance of the contract, (conveying passengers in return for remuneration) illegal.

13.3 Even if the performance of the contract was illegal, the public policy of: (1) enabling the enforcement of employment rights, (2) in particular those related to health and safety, (holiday pay to encourage taking holiday and the requirement for rest breaks) and (3) upholding treaty obligations, in this case outweigh the public policy of ensuring tax returns are completed accurately and the correct amount of tax paid.

13.4 It would not be proportionate to deny the claims because: (1) the illegality has nothing to do with the overall contract purpose, (2) the facts of this case fall far short of the typical case of tax avoidance schemes resulting in employees not being permitted to enforce their employment rights, and (3) there is an existing criminal process for enforcing tax evasion which has been implemented, (the claimants have been fined by HMRC).

The Facts

14. The witness statement evidence of Mr Wright and Mr Bayliss was unchallenged. With that in mind, I find the facts relevant to the issue which I must decide or by way of contextual background are as set out in the paragraphs below.

15. The respondent's business is that of a vehicle private hire operator. Private hire drivers utilise its booking system and platform and thereby, transport customers to their desired locations in return for a fare. The respondent utilises software developed by Mr Wright.

16. A significant element of the respondent's business is to provide transport to large organisations who hold accounts with it, such as local authorities.

17. It is important to the respondent that it has a reputation of operating ethically. This is particularly important in order to facilitate obtaining contracts with public bodies, such as local authorities. It is therefore important to the respondent that its drivers operate in a legally compliant and honest manner.

18. With that in mind, the respondent employed an ex-police officer and former principle licensing officer with a local authority, Mr Bayliss.

19. With Mr Bayliss, the respondent developed an induction process for new drivers which involved an initial meeting at which their ID and licence information was checked, followed by what is described as a, "formal on-boarding meeting". At that meeting, Mr Bayliss made clear to drivers that they were responsible for any requests for information regarding their takings from HMRC. Drivers were told that any attempt to take advantage of their status, (as they saw it) as self-employed individuals to perpetrate a fraud on HMRC, would not be tolerated. They were told it was a condition of their agreement with the respondent that they would remain compliant with their tax obligation and if they were found to give false information, their relationship with the respondent would cease.

20. Mr Shah attended such an on-boarding meeting. I am unable to find that Mr Adjei attended such a meeting as there is no direct evidence that he did so. Mr Bayliss' evidence was that he recalls Mr Shah attending such a meeting but that he does not recall Mr Adjei doing so. Mr Paulin said in submissions that Mr Adjei in his pleadings accepts that he attended an induction course: it is true that at paragraph 3 of the Particulars of Claim, Mr Adjei refers to being welcomed on to the team and given a short induction. However, whether that is the initial meeting or the second meeting referred to as on-boarding is not clear and so I make no finding.

21. Mr Shah has worked for the respondent on and off over the years, but his latest relationship with the respondent began on 22 November 2016. Mr Adjei has worked for the respondent since 6 February 2017. The relationship for both with the respondent was terminated by the respondent on 30 March 2020.

22. The respondent produced a contract called, "Terms and Conditions for BidTaxi Limited Partners". The document is copied in the bundle starting at page 618. I note this copy states that it was last updated on 6 August 2019. There is no evidence before me that these written terms and conditions were ever expressly agreed to by the claimants. However, at paragraph 27 of his witness statement, Mr Wright states, "All this did was to record in writing that which had already been agreed …. at the on-boarding meeting". That is unchallenged evidence and therefore I find it to be so.

23. Clause 6.6 of the terms and conditions, (referred to by the parties as the Payment Agreement) reads as follows:

> "Tax obligations – Partner is fully and exclusively responsible for compliance with all applicable (local) tax laws and obligations in relation to the provision of Passenger Transport Services pursuant to the terms, including in relation to any Driver using Partner's account or anyone employed or engaged by Partner in the provision of Passenger Transport Services. Partner will indemnify and keep BIDTAXI LIMITED AND/OR UNITED TRAVEL GROUP LIMITED indemnified against any costs (including legal costs), claims, damages, penalties, liabilities, expenses, proceedings or interest BIDTAXI LIMITED may suffer or incur as a result of Partner's failure to comply with this obligation."

24. On 3 March 2020 the respondent changed its name from BidTaxi Limited to United Travel Data Services Limited. Upon doing so, it produced a new Payment Agreement, which begins in the bundle at page 628. Clause 1.6 now reads:

> "For the avoidance of doubt, in accepting this agreement you also accept that, when working as a self-employed driver under an agreement to which United Travel Group Limited was a party (whether before or after the advent of the United Travel Data Services/BidTaxi platform) it was always a fundamental term of that agreement between you and United Travel Group Limited (and any other party to that agreement) that you would adhere to all local tax laws and HM Revenue and Customs Rules and Regulations and bear sole legal responsibility for doing so. Further, you confirm that you have always and will continue to comply with that fundamental term."

25. In order to keep the chronology in perspective one should keep in mind that these proceedings were issued on 21 June 2019 and the respondent obtained copies of Mr Shah's tax returns pursuant to EJ Foxwell's order, on 3 March 2020. Mr Adjei's copy tax returns were disclosed on 20 March 2020.

26. Also on 8 March 2020, the respondent produced a further contractual document entitled, "Private Hire Operator & Partner Agreement". Clause 2.1 of which stated:

> "This Agreement establishes a relationship between the Partner, a licenced private hire vehicle driver, and the Operator, a licence to private hire operator, and sets out the terms of that relationship."

27. Clause 3.4 reads:

> "The Partner acknowledges it is solely responsible for the payment of any due income tax, national insurance or any similar deductions or duties, including any other liabilities, assessments, penalties, costs and claims in respect of the provision of its Services to the Operator."

28. Clause 3.7 reads:

> "The Partner acknowledges that they will declare their full self-employment turnover income in their yearly tax return to HM Revenue and Customs."

29. Each week a driver would log into the respondent's portal and pay a cost for its services in the sum of £175. In the portal, before proceeding, the driver had to click to indicate his or her agreement to the new, "Payment Agreement" and the, "Operator and Partner Agreement". Mr Adjei clicked to agree on 9 March 2020 and Mr Shah on 10 March 2020.

30. On 30 March 2020 Mr Wright emailed Mr Adjei and Mr Shah to terminate their contract with the respondent on the grounds that:

> "It has always been a fundamental term of the agreement with any driver that they are compliant with respect to their own obligations to HMRC are self-employed persons. You confirmed your agreement to this term in writing when you assented to the platform agreement during week commencing 9 December 2019. On 8 March this agreement was updated to ensure clarity that this was always a fundamental term between the parties. On week commencing 9 March you confirmed that you agreed to this term.
>
> The tax return information that you provided shows that it is more likely than not that you have violated this term."

31. The following figures in respect of the claimants' tax returns are not disputed:

    31.1 For the tax year 2016/2017 Mr Shah received takings of £34,403 and declared his income to the Inland Revenue at £12,793.

    31.2 For the tax year 2017/2018 Mr Shah's takings were £46,017 yet he declared £14,493. Mr Adjei's takings were £54,247 but he declared to the Inland Revenue on his tax return a figure of £21,106.

31.3 For the tax year 2018/2019 Mr Shah received takings of £41,380 but he declared to the Inland Revenue just £16,235. Mr Adjei received £58,898 and declared £26,190.

32. The claimants have filed updated tax returns and have paid fines.

The Law

33. The classic statement relating to illegality in Contract Law is that of Lord Mansfield in Holman v Johnson [1775] 1 Cowp 341:

> "No court will lend its aid to a man who founds his course of action upon an immoral or an illegal act."

34. In the context of Employment Law, the seminal case on the application of the doctrine of illegality, reviewing and drawing together single statement of the law in earlier cases, is Hall v Woolston Hall Leisure Ltd [2001] ICR 99 503. In that case, Mrs Hall claimed discrimination by reason of pregnancy and unfair dismissal. The Employment Tribunal held that the contract of employment was tainted with illegality because she had turned a blind eye to the fact that the respondent was not paying tax on part of her income.

35. At paragraph 29 Gibson LJ quotes Lord Browne-Wilkinson from the case of Tinsley v Milligan [1994] 1 AC340, in the context of a claim in contract:

> "… the claimant cannot found his claim on an unlawful act. But when the claimant is not seeking to enforce an unlawful contract but founds his case on co-lateral rights acquired under the contract the Court is neither bound nor entitled to reject the claim unless the illegality of necessity forms part of the claimant's case."

36. Three categories of unenforceability due to illegality are considered in the context of a contract claim:

36.1 Where the contract is entered into with the intention of committing an illegal act;

36.2 Where the contract is expressly or implicitly prohibited by statute, and

36.3 Where a lawfully made contract is illegally performed and the party knowingly participated in that illegal performance.

37. At paragraph 38 Gibson LJ said:

> "In cases where the contract of employment is neither entered into for an illegal purpose nor prohibited by statute, the illegal performance of the contract will not render the contract unenforceable unless in addition to knowledge of the facts which make the performance illegal the employee actively participates in the illegal performance."

38. In the context of statutory tort, (in Hall, sex discrimination) Gibson LJ said at paragraph 42 that the correct approach in a discrimination case should be to consider whether the claimant's:

> "Claim arises out of or are so clearly connected or inextricably bound up or linked with the illegal conduct of the applicant that the Court could not permit the applicant to recover compensation without appearing to condone that conduct."

39. However, since Hall the Supreme Court has reviewed the law relating to illegality generally, in the case of Patel v Mirza [2016] UKSC42. I quote the Lead Judgment of Lord Toulson at paragraph 120.

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment as a matter for the criminal courts."

40. Lord Toulson identified two policy objectives in respect of illegality, (paragraph 99) (1) a person should not be allowed to profit from his own wrongdoing and (2) the law should be coherent and not self-defeating nor condone illegality. He stated at paragraph 107 that courts should keep in mind the possibility of overkill unless the law is applied with the due sense of proportionality.

41. The impact of Patel v Mirza in the field of Employment Law has subsequently been considered by the Court of Appeal in the case Okedina v Chikale [2019] EWCA Civ 1393. The Court of Appeal consisted of Lord Justice Underhill, Lord Justice Davis and Lady Justice Nicola Davies. Judgment was given by Lord Justice Underhill.

42. The case involved claims of unfair and wrongful dismissal, unlawful deduction from wages, unpaid holiday pay, various breaches of the Working Time Regulations and race discrimination. I note at paragraph 4 that Underhill LJ noted that all such claims except the discrimination claim, can be characterised as, "contractual" in that they are either made under the contract of employment or arise out of it, (applying Hounga v Allen [2014] UKSC47).

43. In considering the impact of Patel v Mirza, at paragraph 62 Underhill LJ said that it does not require a reconsideration how the rule relating to illegality has been applied in previous case law, except where such application is inconsistent with the principals set out in Patel v Mirza. Thus, there is nothing inconsistent in Patel v Mirza with, "the well-established approach in Hall as regards third category cases".

Discussion and conclusions

44. Mr Paulin argues, by reference to Patel v Mirza, that tax evasion is a serious matter. He says that it is an anathema to the enforcement of the purported rights to holiday pay and rest breaks, that a party to the contract in question should commit the common law offence of cheating the public revenue in breach of the contract upon which those rights are said to depend. He points out that the respondent was completely unaware of the claimants' illegal conduct and terminated its contract with the claimants upon discovering it. He says that is a venerable principal of Tax Law that there is a public interest in taxpayers paying the correct amount of tax, (citing Tower M Cashback LLP & Another v Revenue and Customs Commissioners [2011] UKSC19 per Lord Walker at paragraph 16).

45. On the question of other relevant public policies which may be rendered ineffective or less effective by denying the claim, Mr Pauline argues that enforcing rights under the Working Time Regulations are less of a barrier than they would be were the claims based on discrimination, (citing Hall v Woolston Hall Leisure Ltd and Blue Chip v Helbawi [2009] IRLR 128).

46. In respect of the required consideration to apply the law with a sense of proportionality, he points to the fact that the contract between the parties contained an express term or condition that the claimants would be legally compliant with regards to their tax obligations. He points to the sums of money involved. He points to the potential for the respondent to be held responsible for facilitating tax evasion. He says that the tax evasion must have been deliberate. He points out that the claimants have submitted Schedules of Loss based upon their actual takings, rather than the significantly lower figures for takings declared originally to the Inland Revenue.

47. Mr Paulin says that it is the role of Judges to preserve the rule of law and that the court system should ensure legal harmony and consistency. He stresses that this is not a minor matter, it strikes at the heart of tax fraud.

48. In my judgment, this case is not founded on an illegal act, (Holman v Johnson). The basis of the claim is not something which the claimants have done illegally.

49. I find the reference to Hall and indeed all the preceding case law cited, unhelpful. This is because all the cases cited relate to situations where, (with the exception of Coral Leisure Group Ltd v Barnett [1981] ICR 503 – the claimant procuring prostitutes for customers outside his duties under his contract of employment) in which the employer is the instigator and the issue arising is the degree of the employee's participation and/or knowledge. What we have here, it seems to me, is a unique and unusual set of facts, (in terms of case law). I consider that the appropriate approach to adopt is that commended to all Judges in all jurisdictions by the Supreme Court in Patel v Mirza. I consider in turn each of the three questions posed.

What is the underlying purpose of the prohibition which has been transgressed and will that purpose be enhanced by denial of the claim?

50. The underlying purpose of the requirement to accurately declare one's income to HMRC in a tax return is to ensure everybody pays taxes which are lawfully due on the income that they receive. It is fundamental to civilised society that people pay their taxes and are not able to evade them by cheating. Denial of the claim, (and potentially of such claims in the future) would discourage putative workers from under-declaring their income to the Inland Revenue in case they lost their employment rights.

Is there any other relevant public policy on which the denial of the claim may have an impact?

51. The claims are for holiday pay and a complaint of failure to provide rest breaks. These are matters of health and safety and pertain to the well-being of workers. The purpose is to ensure that workers are encouraged to take holiday for rest and recuperation, and that they are provided with rest breaks during a long working day.

52. Workers health and safety should be ensured it seems to me, notwithstanding that they may be evading tax. That seems to me to be the overriding consideration. However, considerations such as that English law should be interpreted so as not to place the country in breach of its international obligations, that English law should be interpreted so as to comply with EU Directives and indeed Universal Declaration of Human Rights, also arise.

Would the denial of the claim be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts?

53. Tax evasion is subject to its own enforcement jurisdiction.

54. Those enforcement provisions have been brought into play with the claimants, who have been fined.

55. The essence of this contract is to convey passengers using the respondent's software for which both claimants and respondent receive remuneration.

56. If the claimants are workers, they should receive holiday pay and be afforded rest breaks. To not give them that because they have falsely completed tax returns is in my judgment, disproportionate, given the importance of holidays and daily rest from a health and safety perspective and the existence of an enforcement regime for tax evasion.

57. To do otherwise would suggest that every worker must submit his or her tax returns for scrutiny before being permitted to enforce their employment rights. That would amount to overkill.

58. The claimant's conduct in under-declaring their income is deplorable and they get no sympathy from me. However, I do not consider that by allowing the claims to proceed, I would be endorsing the claimants conduct. It would not be contrary to the public interest to enforce the claims and to do so would not harm the integrity of the legal system.

59. For these reasons, I find that the defence of illegality should not succeed and the claims will now proceed to be heard as scheduled on 26-29 April 2021 when an Employment Judge will decide whether or not the claimants were workers and therefore, whether or not they were wrongly denied rest breaks and holiday pay.

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Employment Judge M Warren

Date: 15 September 2020

Sent to the parties on: .1st Oct 2020.....
Tracey Henry-Yeo
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For the Tribunal Office