

ENGLAND AND WALES / JUDGMENT

V v Addey & Stanhope School

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Neutral Citation Number: [2004] EWCA Civ 1065 IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE EMPLOYMENT APPEAL
TRIBUNAL MR JUSTICE BURTON (PRESIDENT) Case No: A1/2003/2753 Royal Courts of Justice
Strand, London, WC2A 2LL Friday 30 th July 2004 Before : LORD JUSTICE BROOKE VICE
PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION LORD JUSTICE MUMMERY and LORD
SLYNN OF HADLEY Between :

- ----- V
- and - ADDEY & STANHOPE SCHOOL Appellant Respondent
- ----- (Transcript of the Handed Down Judgment of Smith Bernal
Wordwave Limited, 190 Fleet Street London EC4A 2AG Tel No: 020 7421 4040, Fax No: 020
7831 8838 Official Shorthand Writers to the Court)
- ----- MR JEREMY GORDON (instructed by Dotcom Solicitors) for the
Appellant MR RICHARD LISSACK QC & MR KEITH BRYANT (instructed by Legal Services
Lewisham) for the Respondent
- -----

Judgment

Lord Justice Mummery :

Introduction

1. 2. 3. 4. Complaints to the employment tribunal based on the statutory torts of unfair dismissal and discrimination are sometimes met with the defence that the proceedings are barred by the applicant's involvement in illegal conduct. The general practice of the tribunal is to direct a preliminary hearing of an illegality issue, as was done in this case. Its resolution usually requires some oral evidence, as well as legal argument. A preliminary hearing is appropriate in most cases, as it would be a waste of time and money for the tribunal to conduct a full investigation into the merits of a complaint which, even if established, is liable to be rejected on public policy grounds. As appears from the authorities, such as the judgments in the recent decision of this court in Hall

- v. Woolston Hall Leisure Limited [2001] ICR 99 (a sex discrimination case), and from the Law Commission Consultation Paper No 160 (2001), the precise basis and the exact boundaries of the illegality defence in tort cases are problematical. This is not surprising where there is a clash of different aspects of public policy. In a case of alleged race discrimination at work, for example, the claimant seeks redress from the employer for unlawful treatment. On the one hand, the assertion that the claimant's involvement in illegal conduct disables him from pursuing the claim does not begin to address the factual and legal merits of the case against the defendant. Access to justice is a fundamental human right. Denial of it may confer the benefit of procedural immunity from legal process on a defendant also guilty of illegal conduct. On the other hand, the defence of illegality is an appeal to a self-evident legal principle or policy that justice, and access to it, does not require courts and tribunals to assist litigants to benefit from their illegal conduct, if it is inextricably bound up in their claim. The application of the illegality doctrine in an all-or-nothing way, operating as a complete bar, is obviously open to criticism and has invited proposals that the court should be given a discretion to bar a claim, after taking specified relevant factors into account, or to reduce the damages recoverable by the claimant, depending on the seriousness of the illegal conduct and the degree of connection between the illegal conduct and the claim. There are also real difficulties in formulating, either in case law or in legislation, a comprehensive legal test which works satisfactorily for all torts, ranging, as they do, across a wide spectrum of human conduct, involving different legally protectable interests and multifarious factual situations. Different public policy consideration may be relevant to different kinds of claim. Claims for personal injury and occupiers' liability in the workplace may raise different policy considerations from claims for unfair dismissal or discrimination in employment. The Law Commission observed in its Consultation Paper that- "1.5....the problems with the clarity of the current law....mean that it is difficult to predict an outcome or to explain the outcome in terms of the apparent rationale for the illegality defence, with the result that there is a risk of arbitrariness or possibly disproportionality. Arbitrary or disproportionate results could lead to conflict with the European Convention on Human Rights... 2.2 ...it remains difficult to identify when a claim in tort will be barred on the basis of the defence of illegality: part of the difficulty stems from the wide variety of factual situations in which the illegal conduct may arise." 5. 6. 7. 8. 9. The topic was explored in detail in Hall in the limited context of claims for sex discrimination in employment under the Sex Discrimination Act 1975. It is not disputed that Hall is equally applicable to race discrimination in employment, which is alleged by the applicant in this case and is governed by a similar statutory scheme in the Race Relations Act 1976. The issue in Hall was whether a female employee's claim of sex discrimination, based on dismissal for pregnancy, was barred by public policy, because the applicant was aware that the performance of her contract of employment by the employer involved illegality. The employer did not deduct income tax and National Insurance contributions from her wages. The Court of Appeal unanimously rejected the notion that the applicant's involvement in the illegal performance of the employment contract by her employer denied her access to the tribunal to determine her complaint of discrimination in employment. In the leading judgment Peter Gibson LJ laid down an

approach for the employment tribunal to follow in sex discrimination cases. It is binding on this court. The tribunal purported to apply it to the facts of this case. The proper approach “...should be to consider whether the applicant’s claim arises out of or is 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.” (para 42 at pp111-112). The strength of the Hall approach is that it is flexible. It enables the tribunal to avoid arbitrary and disproportionate outcomes and to reach sensible and just decisions in most cases. The proper application of the test should produce reasonably consistent and predictable results, more so, I am inclined to think, than would be the case if, in cases of illegal conduct involving the applicant, the tribunal were given a general statutory discretion, constrained by specific limiting factors. Although Hall uses some of the familiar language of legal and factual causation (“connection”, “link”), the test does not restrict the tribunal to a causation question. Matters of fact and degree have to be considered: the circumstances surrounding the applicant’s claim and the illegal conduct, the nature and seriousness of the illegal conduct, the extent of the applicant’s involvement in it and the character of the applicant’s claim are all matters relevant to determining whether the claim is so “inextricably bound up with” the applicant’s illegal conduct that, by permitting the applicant to recover compensation, the tribunal might appear to condone the illegality. The Proceedings 10. 11. The appeal is by Mr V against the decision of the employment appeal tribunal of 26 November

2003. Burton J, the President of the employment appeal tribunal, dismissed Mr V’s appeal from a preliminary ruling by the employment tribunal explained in extended reasons sent to the parties on 30 May 2003. The tribunal held that Mr V could not, on the grounds of illegal conduct, proceed with his claim for direct race discrimination and victimisation against the Governing Body of Addey & Stanhope School (the respondent), a voluntary aided school. The case has an unusual procedural history. There was an earlier hearing in the employment tribunal in February 2002, at which the illegality defence was rejected, followed by a successful appeal by the respondent to the employment appeal tribunal and an order in August 2002 remitting the case for re-hearing in the same employment tribunal. This appeal is from the second ruling of the employment tribunal upheld by the appeal tribunal in November 2003. The Facts 12. 13. 14. 15. Mr V is a Croatian national aged 39. He has been resident in the UK since 1992. When his leave to stay expired in June 1992 he applied for asylum. The processing of his application is still not complete. In August 1999 he made a graduate teaching application under a new scheme for those with overseas qualifications to train as UK teachers. On 4 November 1999 he applied to the respondent for a post as a graduate trainee maths teacher. Although he had been informed by the Home Office that he could not work in the UK without a permit, he falsely indicated in his application form for a teaching post with the respondent that he did not need a work permit. At some point in his time in the UK he acquired a National Insurance number, which he was able to supply to the respondent. On 8 November 1999 he began paid employment at the school as a trainee maths teacher. He continued in that post until he

was dismissed 8 months later on 19 July 2000. On 18 September 2000 Mr V presented a complaint of race discrimination and victimisation to the employment tribunal. The totality of his complaints are summarised as follows in the skeleton argument submitted by his counsel: “(a) the respondent failed to provide the applicant with the satisfactory level of quality training and support as they did for his colleague Mr John Anderson;

- (b) the respondent provided a negative reference to the Greater London Tutorial Agency; [no longer pursued].
- (c) Ms Lennon made many insulting and hurtful references to the applicant in relation to his professional background and his country of origin;
- (d) Ms Lennon humiliated the applicant in front of pupils and other members of staff;
- (e) The displaying of a note on the staff room notice board;
- (f) Ms Lennon fabricated observation forms, trainee/mentor meeting notes, needs identification forms, minutes of meetings, and invented events that never occurred;
- (g) Ms Lennon encouraged others to make negative comments about the applicant;
- (h) Mr Whyte [the Head of the school] fully supported Ms Lennon’s actions in relation to the applicant’s dismissal and ignored the applicant’s complaints about Ms Lennon;
- (i) Mr Whyte refused to sign the applicant’s [equal opportunities] declaration;
- (j) the respondent failed to provide the applicant with a written contract of employment until after his dismissal;
- (k) the applicant’s terms of engagement were less favourable than those of his colleague;
- (l) the respondent deleted the equal opportunities declaration in his contract of employment;
- (m) the respondent refused to postpone the applicant’s disciplinary hearing;
- (n) the respondent took no action to investigate the applicant’s complaints that he was being discriminated against;
- (o) the respondent dismissed the applicant on grounds of his race;
- (p) the respondent victimised the applicant because he complained to his union representative about the race discrimination; [no longer pursued].
- (q) members of the respondent’s staff conspired against the applicant, which led to his dismissal. [no longer pursued].” 16. 17. If Mr V establishes that the acts alleged in fact occurred during the course of his work for the respondent and that, on racial grounds, the respondent treated him less favourably than it treated or would treat other persons, he would be entitled to succeed in his claim for race discrimination under s4(2)(b) and (c) of the 1976 Act. The general thrust of his case is that the respondent omitted to afford him access to opportunities for training and other benefits, facilities and services; and subjected

him to dismissal and other forms of detriment on racial grounds. The substantive complaints of discrimination have not been heard on their merits and never will be if the respondent's objection to the proceedings against it is upheld. The employment tribunal held, and the appeal tribunal affirmed, that Mr V is prevented from pursuing the complaints on the ground that they are "so closely or clearly connected with or inextricably bound up with illegal conduct that no claim should lie" and that if the application were permitted to go forward to a hearing "the tribunal would appear to be endorsing the illegal actions of the complainant." Illegal conduct 18. 19. 20. The illegality point was first taken by the respondent after Mr V began the tribunal proceedings. There is no doubt that there has been illegal conduct in the form of Mr V's employment by the respondent. In breach of s24 of the Immigration Act 1971 Mr V obtained his employment with the respondent contrary to the following terms of the Home Office's Standard Acknowledgement Letter (the SAL) sent to him in June 1992 when he applied for asylum following the expiration of his leave to stay in the UK. The letter must have been clear to Mr V, who is an educated man able to read and speak English. "The applicant may not take employment paid or unpaid. Permission to take employment may be granted if the application for asylum has not been resolved within a period of six months. Any application to take employment should be accompanied by this acknowledgement which will be endorsed accordingly." Mr V did not obtain permission to work in the UK until 18 June 2001. The SAL was not so endorsed or stamped, either when he applied for graduate teacher training in August 1999 or when he applied for the teaching post with the respondent on 4 November 1999. In fact he ticked a box indicating that he had a right of abode in the UK. He did not tick the box indicating that he needed a work permit. Mr V may even have caused the respondent to commit a criminal offence under s8(1) of the Asylum & Immigration Act 1996 for employing a person subject to immigration control, including a condition which precludes him from taking up the employment. It should be noted, however, that under s8(2) and the Immigration (Restrictions on Employment) Orders 1996 and 2004 a defence is available to an employer if he proves that, before the employment began, certain requirements were complied with, such as the production to the employer of specified documents, including one issued by a previous employer or certain named agencies containing the National Insurance number of the person named in the document. 21. Throughout the period when he was working for the respondent Mr V also claimed and continued to receive state benefits. In doing so he made fraudulent statements about his employment status. Employment tribunal 22. In its extended reasons sent to the parties on 30 May 2003 the employment tribunal dismissed the originating application, having concluded that "All of the Applicant's allegations fall within the Hall v. Woolston Hall formula and the Applicant is therefore prevented from pursuing them before the Employment Tribunal." 23. It was accepted by counsel then appearing for Mr V in the tribunal that the contract of employment had been illegal on both sides and might well have been illegal throughout, with the effect of making the actions of both parties criminal offences. 24. The tribunal found (para 24) that Mr V had "....knowingly entered into a contract to work while claiming benefits as unemployed and restricted from working by the terms of his leave to enter. He falsified a number of forms to achieve this and put the

respondent in a position where it too was unwittingly committing a criminal offence. He, and the respondent, were in that position throughout his employment as a trainee teacher.”

25. 26. The tribunal analysed the nature of Mr V’s claims and concluded that nearly all the complaints (as listed in paragraph 15 above) ((a), (c), (d), (f), (i), (k)-(n) and (q)) referred to the manner in which the respondent afforded the applicant access to his training opportunity under his contract as a trainee teacher and to the benefits, facilities and services attached to that contract. It had been indicated by the employment appeal tribunal, in allowing the appeal by the respondent against the earlier decision of the tribunal and in remitting the case to the tribunal for re-hearing, that all of those complaints fell within the Hall test (para 22). Complaint (j) was a purely contractual point; and the contract was illegal (para 23). As for complaints (h) and (o), which related to discrimination in dismissal and its investigation by Mr Whyte, rather than to contract, they were so closely connected with the deliberate illegality of that contract on Mr V’s part that, were the tribunal to allow the originating application to go forward to a hearing, it would appear to be endorsing the applicant’s illegal actions (para 25). The Employment Appeal Tribunal 27. The employment appeal tribunal agreed, concluding that the contract of employment could never have been entered into at all but for the fraudulent representations of Mr V. It was void ab initio. It was his illegal conduct which rendered the contract void. The respondent was innocent in the matter. Unknown to it he was not entitled to enter into employment at all, either with the respondent or anyone else, without a permit. Burton J also held that a new point raised by Mr V on EC law, which I shall deal with below, did not help him to overcome the objection of illegal conduct. Appellant’s submissions 28. Many points were taken by Mr Jeremy Gordon on Mr V’s behalf. The nature and the statutory basis of a claim for race discrimination was emphasised. It did not involve the assertion or enforcement of his rights under or based on a contract of employment. He was not basing his claim on a contract at all. His claim, it was argued, arose from the factual employment situation and from unlawful acts of the respondent (i.e. race discrimination), acting through its employees, during the course of his employment and not from a wrong committed by Mr V. There was said to be authority for the proposition that illegality could never defeat a discrimination claim: Leighton

- v. Michael [1995] ICR 1091 (a sex discrimination case holding that the claim was not barred by the applicant’s knowledge that the employer was not making the required deductions from wages), which was approved by this court in Hall and by Lord Rodger of Earlsferry in Rhys Harper v. Relaxation Group [2003] IRLR 484 at paragraph 210. If the illegality defence applies Mr V will be left with no redress for discrimination suffered in the ordinary course of his employment, even against an employer, who had failed to carry out any check at all on the lawfulness of employing the applicant. The European Dimension: EC points 29. 30. 31. 32. The arguments based on EC law can be treated very briefly, as they are plainly unfounded. Mr Gordon relied on Council Directive 2000/43/EC (the Race Directive), which implements the principle of equal treatment between persons irrespective of racial or ethnic origin. The directive was implemented in domestic law by the Race Relations Act 1976 (Amendment) Regulations 2003 (SI 2003/1626), which came into force on 19 July 2003. Mr Gordon accepted

that Mr V was not entitled to rely on the directive to provide him with a cause of action for acts of race discrimination, which are alleged to have taken place in 1999 and 2000. The submission is that, as a result of the directive coming into force under Article 16 on 19 July 2003 (that is, between the date of notification of the employment tribunal decision and the date of the hearing in the employment appeal tribunal), English courts and tribunals (including appellate bodies) are bound, as emanations of the state, not to permit the defence of illegality to succeed in a race discrimination case, because that would involve an impermissible derogation from the directive. The appeal tribunal should have remitted the matter to the employment tribunal for it to consider the effect of the directive on the illegality point. The point does not begin to get off the ground. The directive is of no assistance to Mr V. In order to succeed on this appeal Mr V has to establish that there is an error of law in the decision of, or in the proceedings before, the employment tribunal. There can be no error of law on the part of the tribunal in failing correctly to apply a law, which was not in force at the date of its decision. The directive only came into force after Mr V's cause of action arose and after the employment tribunal had heard and dismissed his originating application. The questions of law arising on an appeal necessarily relate to the interpretation and application of the law in force when the tribunal reached its decision, except in the extremely rare case in which legislation has retrospectively changed the law so as, for example, to take away a defence available when the cause of action arose or at the date of the tribunal decision. It is not argued that the directive has any such retrospective effect. For appeal tribunals and courts to do what Mr Gordon submits they are bound to do when a directive comes into force between the first instance decision and the hearing of the appeal would be to give to the directive a retrospective effect, which it clearly does not have. It is accordingly unnecessary and, I think, undesirable for this court to express any views on a host of interesting points, which were taken on the basis that the directive might be held to be in force at the material time. There were arguments on (a) whether the directive covered differences in treatment based on nationality; (b) whether Mr V's claim of discrimination based on the fact that he is Croatian is one of race or nationality; (c) whether the directive has direct effect against the respondent as an emanation of the state (cf *NUT v. Governing Body of St Mary's Church of England School* [1997] ICR 334); and (d) whether the directive had any impact on the defence of illegality under the domestic law applied by national courts.

Conclusion

33. 34. 35. 36. 37. Result 38. The application of the Hall approach to this case is comparatively straightforward. This case is clearly different from Hall and similar cases, in which (a) the illegal conduct was that of the employer in the performance of the contract and (b) the involvement of the applicant was one of awareness of the employer's illegal conduct and in deriving benefit from it. It is not a case where the applicant has been working in good faith in the belief that it was lawful for him to work: Still

- v. Minister of National Revenue (1998) 1 FC 549 (a Canadian case concerning entitlement to state benefits during employment, which was believed to be lawful, but was unlawful for want of a work permit). As for the illegal conduct here (a) it was that of the applicant; (b) it was criminal; (c) it went far beyond the manner in which one party performed what was otherwise a lawful employment contract; (d) it went to the basic content of an employment situation-work; (e) the duty not to discriminate arises from an employment situation which, without a permit, was unlawful from top to bottom and from beginning to end . It was not a case of innocent oversight or an acceptable misunderstanding. Mr V had been clearly informed in writing of the true position. Instead of making an application for a work permit, he obtained work with the respondent by making a false statement. Mr V was solely responsible for his illegal conduct in working for the respondent and creating an unlawful situation, on which he had to rely in order to establish that there was a duty not to discriminate against him. The fact that he had previously obtained employment and might, or would, have obtained a work permit if he had applied for it is not a defence to a criminal offence committed by him and is irrelevant to the illegal nature of his conduct at the material time. I agree with the employment tribunal that the complaints by Mr V of his discriminatory treatment in employment are so inextricably bound with the illegality of conduct in obtaining and continuing that employment with the respondent that, if it were to permit him to recover compensation for discrimination, the tribunal would appear to condone his illegal conduct. It should be made clear, however, that the tribunal's refusal to allow the originating application to proceed does not condone any unlawful race discrimination that may have occurred during his employment by the respondent. The respondent denies that any race discrimination has occurred; but even if Mr V were able to prove his allegations, the reason why he would still not be entitled to any compensation or other remedy is that he has, by his own illegal conduct in securing employment without the requisite permit, disqualified himself from pursuing his claim. Condonation of the alleged unlawful conduct by the respondent is out of the picture and out of the question. In my judgment, there is no error of law in the decision of, or in the proceedings in, the employment tribunal. The employment appeal tribunal was right to dismiss the appeal. I would also dismiss the appeal. Lord Slynn of Hadley 39. I agree. Lord Justice Brooke 40. I also agree. Order: Appeal dismissed with costs to be subject to detailed assessment. Leave to appeal to the House of Lords refused. (Order does not form part of the approved judgment)

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Prepared on 28 October 2026 · Esheria