

Employment

Unfair dismissal - Illegality defence for employers

Types of illegality

There are three types of illegal contracts. This article will focus on the third type which is the most common form of illegality in an employment context.

- a. Statutory illegality. This is where contracts are prohibited by statute because of, for example, restrictions on the employment of children and young persons, or employment of pregnant women. In such cases, contracts are void and unenforceable.
- b. Illegality at common law. This involves contracts whose object involve criminality or immorality and therefore illegal at the outset. They are unenforceable as being contrary to public policy.
- c. Illegality in performance (see below).

Illegality in performance

A contract that is legal when made can become illegal if it is performed in an illegal way. In employment contracts this occurs most commonly when there is some form of tax evasion in the way the employee is paid. The illegality often comes to light when the employee brings a claim and the employer seeks to defend it by asserting that the contract was performed illegally and should not be enforced against it. Where the court accepts the employer's assertion, the consequences for the employee are that he or she is barred from bringing a claim for breach of contract such as wrongful dismissal, and from bringing any statutory claims founded on the contract such as a claim for unfair dismissal or a redundancy payment. Statutory torts such as discrimination claims are not considered to be founded directly on the contract and consequently it is much more difficult to succeed in arguing illegality in those contexts. This article will focus only on illegality in relation to those claims based on contracts, and not on statutory torts (this will be dealt with in a future newsletter).

Which way will the Tribunal go?

Whether or not an illegal act in the performance of an otherwise lawful contract has the effect of rendering that contract unenforceable is an imprecise area of the law. The leading authority in this area of the law in an employment context is the case of *Hall v Woolston Hall Leisure* [2001] ICR 99. The main principle of this case was that an employee may be prevented from enforcing a contract if he or she knowingly participates in the illegal performance. Thus to deny an employee the right to enforce a claim, it must be shown not only that the employee knew about the facts that made the performance illegal but also that he or she actively participated in the illegal performance. The Court of Appeal added that it is a question of fact in each case whether there has been a sufficient degree of participation by the employee for the principle to apply and render the whole contract unenforceable.

Misrepresentation of facts to HMRC

In a linked case of *Enfield Technical Services v Payne; BF Components v Grace* [2008] ICR 1423, CA, the Court of Appeal agreed with the EAT's decision that there was no illegality. It held that there must be some attempt to conceal the true facts of the relationship (between claimant and respondent) before a contract is rendered illegal. Here, the claimants and their employers represented to HMRC that they were self-employed rather than employees, which carried tax advantages. The court held that there could be tax advantages in claiming to have self-employed status but such an advantage of itself does not render unlawful a contract subsequently found to be a contract of employment. The fact that the relationship has been wrongly characterised did not necessarily prevent an employee subsequently claiming the advantages of being an employee.

Can the employee bring another claim arising out of the same contract?

Once an employment tribunal has made a finding that a contract is tainted with illegality, the legal principle of estoppel applies whereby parties to a legal action are prevented from relitigating an issue that has already been decided by a court (*Soteriou v Ultrachem* [2004] IRLR 870). This means that a claimant will not, for example, be entitled to pursue a claim for breach of contract in the county court or the High Court arising from the same contract if his claim for unfair dismissal has been dismissed by an employment tribunal on the ground of illegality, even if he or she has expressly reserved the right to do so.

Continuous service

An employee may only bring an unfair dismissal claim if they had the requisite qualifying period of continuous service with their employer. If an employment contract was legal for only part of its duration, the employee's continuous employment may be broken. The effect of this may be that the employee cannot bring their unfair dismissal claim.

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