



EMPLOYMENT TRIBUNALS

Claimant: Mr K Hanif
Respondents: Asim Saleem and Iram Ikram t/a Kashmir Crown Bakeries
Heard at: Leeds **On:** 1 and 2 October 2018
Before: Employment Judge Davies

Representation

Claimant: Mr J Anderson (counsel)
Respondents: Mr J Dable (counsel)

RESERVED JUDGMENT

1. The contract between the Claimant and the Respondents is unenforceable by reason of illegality and Claimant's claims of unfair dismissal and unauthorised deduction from wages are dismissed for that reason.

REASONS

Introduction

- 1.1 These are claims of unfair dismissal and unauthorised deduction from wages brought by Mr K Hanif against Asim Saleem and Iram Ikram trading as Kashmir Crown Bakeries. The Claimant was represented by Mr Anderson of counsel and the Respondents by Mr Dable of counsel.
- 1.2 Kashmir Crown Bakeries is a family firm founded many years ago by Mr Saleem's late father. The Claimant is married to Mr Saleem's sister and has worked in the family business for some years. At the time of the events I have been considering, he was its Financial Controller. Prior to 2014 a number of Mr Saleem's other siblings and/or their spouses were involved in the business too. There was a split in 2014 after which the two Respondents became the sole partners in the business. The Claimant continued to work for the business. In August 2017 the Claimant and Mr Saleem fell out over the arrangements for the funeral of Mr Saleem's late father. Mr Saleem stopped talking to the Claimant. The Claimant stopped working for the business shortly afterwards in circumstances that are disputed. He brings claims of unfair dismissal and unauthorised deduction from wages as a result. The Respondents say that he was a self-employed contractor of the business from 2014 onwards and cannot therefore bring such claims. The Claimant says that he was a salaried partner and employee before 2014 and continued to be so until he stopped working for the business. Thus, the first issue in these claims is whether

the Claimant was an employee or worker of the Respondents. Part of the evidence relevant to that question relates to the parties' tax affairs. Consideration of that evidence gave rise to the question whether the contract between the parties was, in any event, unenforceable by reason of illegality. This judgment deals with that question.

Procedural history

- 2.1 It is necessary to refer to some parts of the procedural history. I record at the outset that the Tribunal file is characterised by a lack of proportionality from both parties. The correspondence is frequently intemperate and points to a wholesale lack of cooperation between the parties. Both parties have been legally represented throughout, and have been represented by counsel at all hearings.
- 2.2 The Claimant presented an ET1 claim form in which he complained of unfair dismissal and unauthorised deduction from wages and explained the basis for saying that he was an employee of the Respondents. In their ET3 response the Respondents said that the Claimant was not their employee. They said that from April 2014 he had worked under a contract of services and had been responsible for his own tax and National Insurance, but that after he had left the business they had learnt through their new accountants that he had settled his and his wife's tax returns by unauthorised payments from the partnership from 2014 to 2017.
- 2.3 Reference was made to proceedings in the County Court. The Claimant has indeed brought a claim in the County Court against Mr Saleem for the repayment of a loan of around £25,000 made by him to Mr Saleem in 2015. In turn, Mr Saleem has brought a counterclaim seeking repayment of the tax and National Insurance payments referred to above.
- 2.4 The Tribunal directed that there should be a Preliminary Hearing to determine as a preliminary issue whether the Claimant was an employee and/or worker of the Respondents. Employment Judge Wade ordered that witness statements for the Claimant and Mr Saleem should be exchanged and that no other witness statement could be relied on without the Tribunal's permission. The Claimant prepared a witness statement for the preliminary hearing. He described the work he did and explained that latterly he received a salary of £5000 per month paid directly into his bank account. He added, "Throughout my time at the business it paid my Tax and National Insurance and described me and my wife, as Partners. This I was told, at various times by [other siblings] and Asim, was on the advice of the business's Accountants. I regarded myself as an employee and salaried partner of the business. I did not receive any share of the profits of the business and I was not a signatory to the Partnership Accounts." Later in the statement, the Claimant said, "... the Company's Accountant completed mine and my wife's Tax Returns and the Respondents paid our Tax and National Insurance so as to ensure that my net salary was £5000 per month. The Respondents were fully aware of this because the Respondents had sole access to the Company's Bank Accounts and received the Company's Bank Statements."
- 2.5 Mr Saleem also prepared a witness statement. He set out detailed evidence relating to the Claimant's employment/worker status. He said that the Claimant had his tax affairs undertaken by the accountant of the business, an individual I shall refer to as SC. SC had left the business at the beginning of 2016. New accountants

were appointed to investigate the payments made on behalf of Mr Saleem and his wife to HMRC. Mr Saleem said that it transpired as a result that the Claimant had continued to make his and his wife's tax and National Insurance payments from the business and had reconciled the entries in the payments to Mr Saleem and his wife. Mr Saleem said in his witness statement that there was no legitimate basis for the business to pay tax or National Insurance for the Claimant or his wife.

- 2.6 By the time of the Preliminary Hearing, the parties had made various applications, including an application by the Claimant for the response to be struck out. Employment Judge Bright rejected that application, but it was not possible to deal with the preliminary issue of employment/worker status in the remaining time available. Rather than list a further preliminary hearing, Employment Judge Bright listed the matter for a full hearing. She ordered the exchange of witness evidence relating to the remaining issues in the unfair dismissal and wages claims. Her order contains no limit on the number of witnesses to be called.
- 2.7 Employment Judge Bright also ordered the Respondents to provide full particulars of the basis on which they were contending that if the Claimant succeeded in his unfair dismissal claim, his compensation should be reduced because of contributory fault or applying the principles in *Polkey v AE Dayton Services Ltd*.
- 2.8 The Respondents provided such particulars. They said that the Claimant was at all material times self-employed. They said that he had prepared tax returns in relation to his own income derived from the business, holding himself out to be a self-employed consultant and that in doing so he had provided incorrect and misleading declarations to HMRC. Further, they said that he had fabricated tax returns on behalf of his wife, indicating to HMRC that she was engaged on a self-employed basis when he knew that she had not provided any service to the business in any capacity. They further said that the Claimant made payments to HMRC on account of his and his wife's declared tax liability using the business's funds.
- 2.9 The Claimant and Mr Saleem produced further witness statements for the final hearing. The Claimant responded to the Respondents' further particulars. He said that he had not been guilty of gross misconduct. As far as the tax position was concerned, he said that his employers were fully aware of that. His tax returns and those of his wife were prepared and submitted by the business's own accountants. He said that this had been going on for years and was something of which Mr Saleem was fully aware. Mr Saleem had told him it was being done on the advice of the business's accountants in order to save the business money. The Claimant said that since he had stopped working for the business he had contacted HMRC and amended his self-assessment tax returns for the years ended April 2015 and April 2016. He said that he could not see how he could be guilty of gross misconduct when he was acting on his employers' instructions. He set out in detail the basis on which he said that Mr Saleem was aware of the financial arrangements. The Claimant did not suggest that his wife had done work for the Respondents or the business.
- 2.10 In his supplementary witness statement, Mr Saleem maintained that he did not know about the payments made for the Claimant's tax and National Insurance or that of his wife.

- 2.11 Against that background, the matter came before me for a full hearing on 1 October 2018. I was not provided with a single joint file of documents. I was provided with a file of documents from the previous preliminary hearing, a further short file of documents, and a separate sheaf of documents labelled “disputed”. In addition, documents were annexed to the witness statement of Mr Saleem. As regards the disputed documents, the parties sought to rely on a small number of them during the hearing and that was done by agreement.
- 2.12 I heard evidence from the Claimant on his own behalf and from Mr Saleem for the Respondents. The parties had been ordered to make appropriate arrangements for the documents to be in a format that Mr Saleem could read, since he has a visual impairment. They had not done so. On my instructions, while I was reading into the case counsel for the Claimant produced large font copies of certain documents about which he intended to cross-examine Mr Saleem. Mr Saleem used a magnifying glass, and I read out relevant passages as well. Mr Saleem did not indicate any difficulty in reading or understanding any document about which he was asked. Mr Saleem also has diabetes. We took regular breaks and he asked for additional breaks if necessary.
- 2.13 After I had read the witness statements and the documents to which they referred, we discussed the issues and the Claimant then gave his evidence. He was represented by counsel. I did not give him a warning of his right not to incriminate himself in respect of the evidence relating to his and his wife’s tax affairs. In view of the content of the pleadings and witness statements and given that he had been legally represented throughout I would expect that to have been discussed with him.
- 2.14 In cross-examination, the Claimant was asked detailed questions about his tax arrangements. Towards the end of his evidence the Claimant was asked questions about other companies in which he was involved and there was a suggestion of wrongdoing in respect of those. That issue had not previously been raised and at that point I warned him of his right not to incriminate himself.
- 2.15 At the conclusion of the Claimant’s cross-examination, having heard the detailed evidence about his and his wife’s tax affairs, I informed the parties that I intended to add a further issue to the list to be determined. That was whether the Claimant was prevented by illegality from relying on the contract between him and the Respondents. I made clear that I would also need to consider whether the Respondents had knowledge of any illegality and had participated in it. I suggested that if I did find that there was such illegality this would have implications in the County Court proceedings because one or both of the parties might be prevented as a result of my findings from relying on the contract in those proceedings. At that stage we took a break so that the Claimant’s counsel could take instructions in respect of a new document. When the evidence resumed, no application was made for the Claimant to change or withdraw any of the evidence he had given, nor was there any objection to my considering the issue of illegality. Indeed, the Claimant was asked questions in re-examination about his tax affairs.
- 2.16 When Mr Saleem gave his evidence he was aware of the right not to incriminate himself and in response to certain questions about his own tax affairs he exercised

it. No application was made for the Second Respondent or anybody else to give evidence.

- 2.17 At the conclusion of the evidence the parties suggested to me that since neither was raising the question of illegality I should not deal with it. I expressed the view that this was a matter of public policy going to my jurisdiction and that it did not depend on the matter being raised by a party. I offered counsel the opportunity to put in written submissions dealing with it and they decided to do so.

Findings of fact

- 3.1 Against that background, I make the following findings of fact. I begin by observing that I found the evidence of both the Claimant and Mr Saleem wholly implausible in many respects. By way of example in 2014 there were legal proceedings between the various partners of the business, which culminated in the publication in the London Gazette of a notice of changes in the partnership. The Claimant's evidence in cross-examination was that he was not aware of the changes at the time. He was asked if he was aware of a legal dispute and he said that he was aware of a dispute between Mr Saleem and his brothers. When his evidence resumed on the second day information relating to those proceedings had been obtained by the Respondents. Court documents listed the Defendants to the legal proceedings and the Claimant and his wife were named as Defendants. Solicitors had taken steps on their behalf. The Claimant then said that he did not know that solicitors were acting on his behalf in those proceedings. Then he admitted that he did know about the claim at the time. He also said that he was never told that he was no longer a partner in the business. He was asked about WhatsApp exchanges between him and an accountant I shall refer to as SK. In March 2017 the Claimant had received a penalty notice for late submission of a tax return. He sent a message to SK saying, "I thought u done it. Why they charging us." SK replied saying, "Personal tax returns submitted on time, it's for partnership tax return, HMRC have not updated and still considered you are in KCB partnership, check tax reference no on top right which is different. I will speak to them today!!" It was suggested to the Claimant that this indicated that he was well aware that he was no longer in the partnership. He said that he did not understand SK's message. He was asked if he had asked SK what he meant and he said that he had not. He was asked why and he said that it did not come into his mind. As already indicated, the Claimant was the Financial Controller of the business. His evidence that he did not know that he was no longer a partner in the business from 2014 to 2017 was wholly incredible.
- 3.2 As regards Mr Saleem's credibility, by way of example, his case is that even if the Claimant were an employee, he was employed by a limited company not the partnership. I have not made findings on that issue. However, Mr Saleem's evidence was that a limited company had been incorporated and had taken over the operation of the partnership from 1 April 2017. He said that everything except the properties had been transferred to the limited company and that the partnership had ceased to trade. His attention was then drawn to an application made in the current County Court proceedings last month. Mr Saleem had originally been named as the Defendant and Part 20 Claimant in those proceedings. An application was made and allowed on 14 September 2018 (i.e. just over two weeks before this hearing) to substitute as the correct Defendant/Part 20 Claimant "Asim Saleem and Iram Ikram Saleem trading as KCB (a Partnership)." Mr Saleem was

asked about that application and he said, "I can't remember." It was put to him that his counterclaim in the County Court was now brought by a business he said no longer existed. He then said that he had not even looked at the County Court claim. He was then asked why he had applied to change the name to an entity that he said did not trade. He said that he could not answer the question; his solicitor could. That evidence, too, entirely lacked credibility. It was clear throughout Mr Saleem's evidence that he had a close personal knowledge of and involvement in all the affairs of the business. The suggestion that he could not remember or did not know why an application had been made a fortnight ago to name the partnership as the appropriate party in the County Court proceedings was not believable.

3.3 These findings of fact are therefore made in the context that neither witness gave reliable evidence. Where possible, I have considered the contemporaneous documents, although the disclosure appeared to me to have been incomplete.

3.4 I find that for the tax years 2014/2015, 2015/2016 and 2016/2017 tax returns were filed with HMRC for the Claimant and his wife so as wrongly to use her tax allowance to minimise the amount of tax paid by him. The Claimant's wife did not do any work for the business and did not have any earnings from the business that could or should be taxed. From 2014 she was no longer a partner in it. The Claimant knew that was being done and was a willing participant in it. He knew that the tax returns being submitted did not reflect the parties' actual earnings and that their tax and National Insurance were being incorrectly calculated. Further, the tax returns submitted did not appear to include any reference to the substantial, valuable benefits the Claimant received. These included healthcare insurance, car, fuel and pension. Although the Claimant's evidence to me was that he worked as an employee, the tax returns also offset substantial sums by way of expenses, for example car, travel, accountancy fees and telephone costs. Not only was the Claimant not incurring such expenses, in fact he was receiving contributions towards such matters from the business. I noted in particular the following:

3.4.1 The Claimant worked as Financial Controller for the business. He was closely involved in its financial affairs, reconciling bank statements and producing daily spreadsheets. A very small number of bank statements had been disclosed by the Respondents. However, the ones that were disclosed clearly showed payments to HMRC or tax payments in March 2015, August 2015, December 2016 and July 2017, which identified the Claimant or his wife either by first name or by initial.

3.4.2 In his first witness statement, as set out above, the Claimant said that throughout his time at the business it had paid his and his wife's tax and National Insurance so as to ensure that *his* salary was £5000 net per month.

3.4.3 In his third witness statement, made after he had seen the allegations in the Respondents' further particulars, the Claimant did not make any suggestion that his wife had been working for the business or was entitled to be paid by it. Nor did he make any suggestion that he was unaware was being done. Rather, he said that the Respondents too were fully aware. He said that SK's company had done the tax returns and that this had been going on for years. He also said that he had recently amended his tax returns, suggesting that he knew that the original returns did not reflect the correct position.

- 3.4.4 In cross-examination the Claimant said that Mr Saleem's accountant (SK) had submitted the Claimant's wife's tax returns and that it had always been the company dealing with their tax affairs.
- 3.4.5 I saw the tax returns themselves. For the tax year 2014/2015 the Claimant was declared as being self-employed. His turnover was said to be £35,140. Expenses totalling £4597 (car/travel, accountancy fees, phone and other expenses) were identified and the net profit was said to be £30,543. The Claimant accepted that he had seen this tax return because it was emailed to him by SK. I saw that email. For the tax year 2015/2016 the Claimant was again said to be self-employed. His turnover was said to be £30,000, his expenses £3275 and his net profit £26,725. Neither tax return made reference to the benefits the Claimant received.
- 3.4.6 The tax return for 2016/2017 was completed after the Claimant had left the business. It too declared him as self-employed and said that his turnover was £30,000, his expenses £4861 and his net profit £25,139. The Claimant was asked in cross-examination how that tax return came to be completed. He said that he had instructed his accountant to do it. He told the accountant to follow what the previous accountant had done and the accountant did so. The new accountant was SC, the accountant who had worked for the business until 2016. The Claimant said that SC simply copied his previous year's accounts and did not check with him what he had actually earned. I did not find that credible. Rather, I found that it suggested that the Claimant was continuing to arrange his tax affairs in the same way, even though he no longer worked for the business. That pointed towards his willing participation in the submission of these tax returns. Steps have subsequently been taken by the Claimant to remedy the position (at least in part) with HMRC. That may reflect advice he has been given. I do not find that it indicates that he was going along with the arrangements unwillingly.
- 3.4.7 I have already referred to the Claimant's correspondence with SK about the penalty notice. It was suggested to him in cross-examination that this suggested he was involved in the management of the tax returns. He disagreed. He said that he had a penalty, which he had to pay out of his own pocket. Mr Saleem told him to ask SK and he was trying to ask SK if he had dealt with it. That did not seem to me to be consistent with the message he in fact sent and the reply he received.
- 3.4.8 At one stage in cross-examination, the Claimant suggested that a tax return had been submitted for his wife in 2015 because she was a partner in the business. He said that he did not know that she was no longer a partner by then. I did not find that evidence credible. It was suggested to him that he had contrived with the accountant to apportion some of his earnings to his wife so as to minimise the tax payable. He then said that this was done by the accountant on Mr Saleem's instructions. At one stage he said that his wife had never received anything and at another he said that he "thought" they were declaring something for her. That was inconsistent with what he had himself volunteered in his witness statement. Indeed, he was asked in re-examination when he first knew that they were putting his wife down as a partner and he said that this was since he started with the business. He added that he knew they were "using his wife as well."

- 3.5 I noted the Claimant's evidence that he has more recently contacted HMRC and amended his tax returns for the years ended April 2015 and April 2016. In evidence

he said that he had told HMRC that his accountant had “made a mistake” and put his income too low. They had allowed him to amend the return. He was asked whether anything had been done in respect of the returns submitted for his wife and he said that he had told HMRC that his accountant had made a mistake putting half of his earnings down as his wife’s and that they should all be his. There was no suggestion that any change had been made to the position as regards business expenses entered in the returns, nor as regards the benefits the Claimant had received.

3.6 I further find that Mr Saleem knew about the preparation and submission of tax returns for the Claimant and his wife by the company’s accountant. Indeed, he was fully involved in that and it was done on his authority so as to reduce the tax payments made by the business. The parties were not troubled by the precise legal nature of their contractual relationship until they fell out. Prior to that, it was understood and agreed that the business would pay the Claimant’s tax and that this would be dealt with by its accountants. I noted in particular:

3.6.1 The Claimant’s evidence was that Mr Saleem paid close attention to the bank statements, spreadsheets prepared daily by the Claimant and other financial documents. Mr Saleem would ask for details, e.g. of direct debits or individual payments if he had a query. He had access to the bank accounts online and had to authorise at least some payments. The business’s accountant checked the bank statements and spreadsheets and raised queries with the Claimant and Mr Saleem. As indicated above even the limited number of bank statements disclosed made clear reference to tax payments or payments to HMRC in respect of the Claimant and his wife, identified by first name or initial. It was plain from Mr Saleem’s evidence that he did maintain close control of the business and had a detailed knowledge of its financial position. He was able in evidence, for example, to state the precise sum to the penny paid by him and his wife in tax. He volunteered that he had been involved in litigation in the past and would not sign anything without first reading it. Even on that evidence, the suggestion that he was unaware of the way the Claimant’s tax affairs were being handled or that the Claimant’s tax was being paid by the business, was simply not believable.

3.6.2 In cross-examination it was suggested to Mr Saleem that he and others involved in the business were using the tax allowances of those who did not work in the business to reduce their own tax liabilities. He said that he could only say what had happened from 2014. He was then asked the question again and he asked to which period counsel was referring. He was asked at that stage if he was saying that he had never used his wife’s tax allowance to mitigate his own tax liabilities and he then said that he was exercising his right not to incriminate himself. That suggested that he may have been doing so. That was consistent with what the Claimant said.

3.6.3 Both witnesses gave evidence about different accountants who were involved in the business. Neither of them gave consistent evidence about that, no doubt because the arrangements themselves were somewhat unclear. However, it was evident that both SC and SK (accountants who worked for two different external companies) were involved in the business’s finances from 2010 to 2016. One or other of those accountants also prepared tax returns for Mr Saleem and his wife and the Claimant and

his wife. All the evidence tended to suggest that the personal tax returns were dealt with by the business, with the knowledge of its accountants and Mr Saleem.

3.6.4 After Mr Saleem had stopped talking to the Claimant in August 2017. At the time when the Claimant was then said to be suspended, SK emailed him to say that he (SK) worked for the business and because of a conflict of interest he was unable to prepare the Claimant's and his wife's personal tax returns for the year ended April 2017 onward. He went on to say that there was an outstanding fee payable of £400 for the preparation of personal tax returns for the tax years 2014/15 and 2015/16. That was an email out of the blue written at a time when the dispute that led to these proceedings had begun. There was no evidence before me to suggest that SK had ever sought to invoice the Claimant for the preparation of tax returns prior to then and I am quite satisfied that he had not. This was a cost absorbed by the business until the parties fell out. The email was part of a transparent attempt to rewrite history in the context of that dispute.

3.7 In short, therefore, I was quite satisfied that the Claimant and Mr Saleem knowingly and willingly participated in the submission of tax returns to HMRC for the Claimant and his wife that did not accurately reflect the position. This was done deliberately so as unlawfully to reduce the amount of tax payable. I did not hear evidence from the Second Respondent or the Claimant's wife and I do not make any finding about their knowledge of or involvement in these matters.

Legal principles

4.1 I have considered carefully the legal submissions provided by counsel and the authorities to which they referred. I do not repeat them here.

4.2 A contract that is lawful when made but is performed in an illegal way may become unenforceable. In the employment context, this has frequently arisen when there is some form of tax evasion in the way the worker is paid. The proper approach to questions of illegality is now as explained by the Supreme Court in *Patel v Mirza* [2017] AC 467 in the speech of Lord Toulson (with which the majority agreed). That approach is summarised 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 is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.

4.3 The factors that may be relevant to deciding whether denial of the claim would be a proportionate response include, but are not limited to, the seriousness of the

conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability: see Lord Toulson at paragraph 107.

- 4.4 Those factors resonate with decisions in the employment context that pre-date the decision in *Patel v Mirza*. It has generally been held that the employees must not only know about the illegality, but must also participate in it, before they are prevented from enforcing their employment rights. If their participation is unwilling, that will point towards allowing them to rely on the contract.
- 4.5 I note that if a Tribunal makes a finding that a contract is unenforceable by virtue of illegality, the doctrine of issue estoppel applies. That issue cannot be re-litigated in different legal proceedings: see e.g. *Soteriou v Ultrachem Ltd* [2004] IRLR 870.
- 4.6 Mr Anderson refers to the decision of the EAT in *Sheibani v Elan and Co LLP* UAEAT/0133/12/RN. There, a Tribunal was held to have breached natural justice by making a finding that a contract was tainted by illegality without having raised that possibility with the parties at all. The matter was remitted to a different Tribunal for consideration. There was no suggestion that the Tribunal could not raise the issue of its own motion; the unfairness arose from the fact that it did so without telling the parties or warning the witnesses.

Application of the law to the facts

- 5.1 I begin with Mr Anderson's submission that it would be inappropriate or contrary to natural justice for me to make a finding of illegality when neither party is inviting me to do so, and when the Claimant was not warned of his right not to incriminate himself before he gave evidence. I do not accept that submission. I have referred in detail to the procedural history above. It was clear that the Respondents were saying that the Claimant had misled HMRC in respect of his own and his wife's tax affairs. His third witness statement was prepared in response to that. He dealt with that point not by saying that HMRC were not misled, nor by saying that he did not know about it, but by saying that Mr Saleem knew about it too and that he had now taken steps to remedy the position with HMRC. He had legal representation when he prepared that statement and when it was tendered as his evidence in chief. Further, I raised the issue of illegality before the conclusion of his evidence. I had warned him of his right not to incriminate himself at that stage. Had he, with advice, wished to change or withdraw his evidence or adduce further evidence, he had the opportunity to do so. He did not. Indeed, further questions were asked of him in re-examination about his tax affairs and he confirmed again that he had known for a few years that the business was using his wife's tax allowance as well. This is fundamentally different from the *Sheibani* case, where the Tribunal did not alert the parties at any stage to the possibility of a finding of illegality before it made it. Nor do I consider that a Tribunal is precluded from making a finding of illegality if the parties have not raised the point. That would, itself, be contrary to the public policy that underpins the doctrine. Parties complicit in illegality would be able to prevent the Tribunal from dealing with the point by agreement between themselves.
- 5.2 I turn then to whether the Claimant should be able to rely on the contract between him and the Respondents (regardless of whether he was self-employed, a worker or an employee) on the basis that it was performed in an illegal manner and that he knowingly and willingly participated in that.

- 5.3 I have no hesitation in finding that he should not be able to rely on it. Applying the approach in *Patel v Mirza*, the underlying purpose of the prohibition that has been transgressed is the preservation of tax collection. As Mr Anderson acknowledges, that is likely to remain a strong policy factor pointing towards unenforceability. Here, no countervailing public policy has been identified that would weigh against that position. As to proportionality, I consider that it is entirely proportionate to prevent the Claimant from bringing claims of unfair dismissal and unauthorised deduction from wages in reliance on a contract that has been operated in this way, with his knowledge and willing participation. Essentially, the Claimant and Mr Saleem are individuals who, while their family relationship remained on good terms, operated a business in such a manner that they were handsomely remunerated while misleading and incorrect tax returns were filed. The nature of the contractual relationship between them appears not to have troubled them. The Claimant earned the very generous sum of £5000 per month net, along with a host of other benefits. His tax returns bore little relation to that. After a personal falling out, they seek to play out their private dispute in this Tribunal (and in the County Court). Now they seek to characterise the contractual relationship in the way that suits their case, they seek to minimise or avoid responsibility for the way the tax affairs were conducted and they ask the Tribunal to adjudicate on legal disputes that depend on a contract that was performed so as to avoid the proper payment of tax. This is precisely the kind of case in which it would be consistent with public policy and entirely proportionate to deny the Claimant relief. That is not to “punish” the Claimant, but to recognise that it is not appropriate or proportionate to allow him to bring these claims against that background. Nor do I consider that the Claimant derived no benefit from the arrangements. It seems to me that he enjoyed a very generous income, which cannot simply be divorced from the amounts of tax being paid by the business in respect of his earnings. If the tax liabilities were being reduced, that enabled the business to make a more generous payment. In addition, there is the question of how expenses and benefits in kind were treated in the tax returns. Mr Anderson submits that it would be unjust for the Claimant to be deprived of a remedy if this practice was endemic in the business and the other partners have “reached terms” with it. I have not made a finding about the other partners, but in any event they left the business in 2014. None of them seeks to advance claims in this Tribunal.
- 5.4 In view of my finding about illegality, I do not need to deal with the remaining issues in the claim and I do not do so. This judgment should be brought to the attention of the County Court judge in the proceedings between the parties.

Employment Judge Davies
17 October 2018

FOR EMPLOYMENT TRIBUNALS

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