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Richard Grogan: Illegal contracts – can unpaid wages be recovered?

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Employment law solicitor **Richard Grogan of Richard Grogan & Associates** writes on a case brought by an employee with an illegal contract.

In case ADJ15311, the Adjudication Officer had to deal with the dismissal of an employee where an issue arose in relation to the contract.

The Adjudication Officer was satisfied that, at all material times, the complainant was engaged in an arrangement with her then-employer whereby she would receive part of her wages off the books without the deduction of income tax.

The AO held in those circumstances that the employee's contract was tainted with illegality and refused to entertain the complaint.

The AO in this case quoted the decision in *Hayden v Sean Quinn Properties Limited* [1994] ELR 54, where Baron J set out the position as follows:

“The defendant is clearly in breach of contract in that the plaintiff's dismissal was wrongful. However the contract itself was an illegal one. It contained a term designed to lessen the defendant's liability at the expense of the Revenue, something with which the plaintiff concurred with in *Napier v National Business Agency Limited* [1951] 2 All ER 264 the facts were almost identical. Part of the plaintiff's salary purported to be in respect of expenses, which at the best were only minimum. The plaintiff had claimed to have been dismissed wrongfully. He sued for damages. His claim was dismissed upon the grounds that the contract was unlawful and so enforceable. Sir Raymond Evershed said at page 26 it must surely be that, by making an agreement in that form the parties to it were doing that which they must be taken to know would be liable to defeat proper claims of the Inland Revenue and to avoid altogether, or at least postpone, the proper payment of income tax. If that is the right conclusion, it seems to me equally clear ... that the agreement must be regarded as contrary to public policy. There is a strong legal obligation placed on all citizens to make true and faithful returns for tax purposes, and, if parties make an agreement which is designed to do the contrary, i.e. to mislead and to delay, it seems to me impossible for this court to enforce that contract at the suit of one party to it.”

The judge then went on to consider whether or not the fraudulent part of the agreement could be severed and held it could not.

This is useful that the Adjudication Officer has set this out.



Richard Grogan



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The AO however in this case had also set out other cases which are useful in relation to matters. The AO pointed out in the case of a contract which is neither entered into for an illegal purpose nor prohibited by statute, that performance of the contract will not render it unenforceable unless, in addition to knowledge of the facts which make the performance illegal, the employee actively participated in the illegality.

The AO referred to the comments of Peter Gibson LJ in *Hall v Woolston Hall Leisure Limited* [2001] 1 WLR 225 at page 226, being a UK decision. The requirement as the AO pointed out of act to participation was adopted in this jurisdiction by Lafoy J in *Re Red Sail Frozen Foods Ltd* [2006] IEHC 328.

The fact that a contract may be illegal in that part of an employee's wages may not be put through the books does not of itself make the contract unenforceable by the employee unless the employee participated in the illegality.

There will be cases where an employee is earning, say, €1,000 a week but the tax returns made by the employer, rather than showing an income of €52,000 per annum, show a figure of €35,000 per annum. These issues more regularly arise where an employee is paid by cash. The *Payment of Wages Act* does allow for payment of wages by way of cash.

The sad reality is that many employees do not check their payslips other than to check what the net amount is and may not check as to whether a portion of their wages is specified as expenses. The fact that this is done does not make the contract unenforceable by the employee unless the employee participated in matters.

With the new tax regime in place it is now a lot easier for employees to check whether their tax is being properly paid. They can now check online. Their own records online which will show the net and gross wages. This decision, which issued from the Adjudication Officer, is an extremely useful decision on this issue.

It is interesting in relation to this case that the company representative was the one claiming that the contract was illegal because of what was an effective tax fraud. What is not in the decision is whether the Adjudication Officer in this case reported this matter to the Revenue.

- **Richard Grogan** is the principal solicitor at **Richard Grogan & Associates Solicitors**. You can subscribe to the firm's monthly newsletter at grogansolicitors.ie.

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