

Illegally Formed Contracts of Employment and Equal Treatment at Work

SIMON FORSHAW

MARCUS PILGERSTORFER

Introduction

The question of how to deal with asylum-seekers has increasingly become a political 'hot-potato'. However, the political debate which surrounds these people tends to overlook the sad reality recently brought into the public eye by the deaths of the cockle-pickers in Morecambe Bay; namely the reality that asylum seekers who do not have permanent leave to remain, are left without the majority of employment protections available under the law because they are working under illegally formed contracts of employment. This article considers the extent to which those working under illegally formed employment contracts are excluded from a full hearing of their case in the face of less favourable treatment at work and suggests a more coherent framework for determining outcomes to these claims.

Illegally Formed Contracts of Employment

An illegally formed contract of employment is a contract of employment which requires either or both of the parties to it, to commit a criminal offence either by making that contract, or by performing that contract according to its terms. These may be contrasted with contracts of employment which, although legal on their face, are in fact *performed* illegally by the parties. Illegally formed employment contracts tend to arise in two types of situations. The first of these occurs when both parties are aware of the illegality and collude in the illegality. This situation can be termed an illegally *agreed* contract of employment. The second situation occurs where one party lies to the other party in order to bring about the contractual relationship. This situation can be termed an illegally *procured* contract of employment.¹

¹ In theory there might be a third type of illegally formed contract of employment. That would arise where neither party is aware of the illegality but the contract is, in fact, illegal on its face. We are not aware of any reported decisions which highlight this situation.

Illegally agreed contracts of employment are rife throughout the UK² but this type of employment relationship rarely results in any litigation. Since both parties will have committed a criminal offence in creating the employment relationship, it is in the interests of neither party to bring the contract to the attention of the authorities by requiring courts and tribunals to adjudicate upon it. Illegally agreed contracts of employment are often created in order that the parties might evade tax, avoid statutory employment rights, or alternatively because one or both of the parties does not have the legal authority to contract. For example, it is easy to see why the employment of illegal immigrants by gangmasters³ is attractive for both parties. The illegal immigrant cannot earn wages legally and therefore has little choice but to work illegally. The gangmaster is able to circumvent employment legislation, pay low wages, require workers to work long hours and can avoid accounting to the Inland Revenue.

Illegally procured contracts of employment, on the other hand, can arise in more varied factual matrices. The employment of some illegal immigrants may fall into this category, for example, where the putative employee fraudulently leads his employer to believe that he has the authority to work within the UK, in breach of section 24 of the Immigration Act 1971.⁴ However, this type of criminal deception in order to gain employment is not limited to the context of immigrants and work permits.

Section 16 of the Theft Act 1968 created the offence of obtaining property by deception. Section 16(2)(c) includes within that offence the situation where a person “... is given the opportunity to earn remuneration or greater remuneration in an office or employment...”. Therefore any deception on the part of a prospective employee in order to help their application for employment may render that person in breach of section 16, provided that the deception would be considered dishonest by virtue of the *Ghosh* test.⁵ Thus, a seafarer who did not disclose to his employers that he had

² Although there are no official figures detailing the number of illegal immigrants working in the UK, even the most conservative figures place the estimate at several hundred thousand illegal immigrants entering the UK per year.

³ The illegal employment of workers by gangmasters has now been tackled by the Gangmasters (Licensing) Act 2004. Gangmasters are defined at section 4. This Act requires “gangmasters” to join a register and gives enforcement powers to officials to increase the transparency of the gangmasters’ activities.

⁴ An example of this situation can be found in the facts of *Vakante v. Addey and Stanhope School* [2004] EWCA (Civ) 1065

⁵ See *R v. Ghosh* [1982] QB 1053 where Lord Lane concluded that there were two elements to dishonesty. He stated at page 1064, “*In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by*

epilepsy,⁶ a member of the Royal Air Force who in a medical examination denied that she had ever suffered from an episode of self-injury⁷ and an individual who represented that he was a member of the Chartered Institute of Management Accountants when in fact he was not have all been held to fall within the provisions of section 16(2)(c).⁸

It is clear that employees who have illegally formed employment contracts are unable to enforce their contractual rights.⁹ However, it does not necessarily follow that these same employees are unable to enforce rights at work which are derived from statute or European Directives rather than the contract of employment itself. Given the combined effect of a large number of illegal immigrants entering into illegally agreed employment contracts and the potentially wide application of section 16 of the Theft Act with regard to illegally procured employment contracts, it is likely that there are a large number of individuals working under illegally formed employment contracts. As a result, it is particularly important that the law in this area is certain, achieves a fair balance between the interests of the parties and is underpinned by a coherent rationale. It will be argued that the law, at present, has failed to achieve any of these aims, particularly in the context of discrimination claims. The discrimination legislation will be used to suggest an alternative approach which might be applied more generally to the employment protection legislation and beyond.

Discrimination Claims and Illegally Formed Contracts of Employment

There are provisions which make it unlawful to discriminate on grounds of sex, race, disability, sexual orientation and religion or belief in the employment context.¹⁰ Discrimination in employment on grounds of age must be outlawed by the end of

those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest."

⁶ *Hewison v. Meridian Shipping* [2002] EWCA Civ 1821

⁷ *Major v. Ministry of Defence* [2003] EWCA Civ 1433

⁸ *R v. Callender* [1993] QB 303

⁹ See *St. John Shipping Corporation v. Joseph Rank Ltd.* [1957] 1 QB 267

2006.¹¹ In order to bring an action claiming discrimination in employment on any of these 'protected grounds' a claimant first needs to show that he has a contract of employment.¹² However, an illegally formed contract of employment can suffice for these purposes. In *Leighton v. Michael*¹³ the Employment Appeal Tribunal (EAT) presided over by Mummery J (P), allowed a claim for sex discrimination even though the Employment Tribunal which had heard the claim was of the view that the employment contract had been performed illegally. The EAT was of the view that the illegality of the contract was irrelevant since a claimant did not need to rely on their contract of employment to bring a claim for sex discrimination.

*Protection under the 1975 Act against sex discrimination involves a reference to the contract to determine whether the person is 'employed' within the meaning of the statute, but the claim of sex discrimination does not involve enforcing, relying on or founding a claim on the contract of employment. In brief, the right not to be discriminated against on the ground of sex is conferred by statute on persons who are employed. There is nothing in the statute to disqualify a person, who is in fact employed, from protection by reason of illegality in the fact of, or in the performance of, the contract of employment.*¹⁴

However, the employee who is party to an illegal contract of employment might still find their claim barred by illegality by virtue of a tortious test rather than a contractual test. In *Hall v. Woolston Hall Leisure*¹⁵ it was argued by the Respondent¹⁶ that Mrs. Hall's claim ought to be barred since she had, they alleged, participated in their illegal scheme to defraud the Inland Revenue. The Court of Appeal explained that although *Leighton v. Michael* was correctly decided - and therefore whether or not Mrs Hall's contract of employment was illegal was not relevant - Mrs. Hall still had to show that her claim was not prevented from proceeding in tort. That might happen if it were to be found that:

¹⁰ Sex Discrimination Act 1975, Race Relations Act 1976, Disability Discrimination Act 1995, Employment Equality (Religion or Belief) Regulations 2003, Employment Equality (Sexual Orientation) Regulations 2003.

¹¹ See Article 18, Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation.

¹² See Sex Discrimination Act 1975, section 82, where employment is defined as "employment under a contract of service or apprenticeship or a contract personally to execute any work or labour" and similarly Race Relations Act 1976, section 78, Disability Discrimination Act 1995, section 68, Employment Equality (Religion or Belief) Regulations 2003, regulation 2(3), Employment Equality (Sexual Orientation) Regulations 2003, regulation 2(3).

¹³ [1996] IRLR 67

¹⁴ *ibid* at [29]

¹⁵ [2000] IRLR 578

¹⁶ This argument was put by the Respondent in the EAT since the Respondent did not appear at all in the Court of Appeal.

... the claimant's claim is so closely connected or inextricably bound up with [her] own criminal or illegal conduct that the court could not permit [her] to recover without appearing to condone that conduct.¹⁷

The application of this tortious test gives rise to two questions. The first is whether it constitutes an unlawful derogation from the European directives which underpin certain parts of the discrimination legislation. It might be the case that this 'dependent'¹⁸ legislation cannot be restricted by domestic common law rules of public policy. Secondly, whether judicial application of the tort test to cases of illegally formed employment contracts have given the illegality doctrine too broad a role.

The Illegality Doctrine and the European Directives

Most of the discrimination legislation which protects employees as a matter of English law is now underpinned by a series of European Directives.¹⁹ The Sex Discrimination Act 1975, for example, is underpinned by the provisions of the Equal Treatment Directive.²⁰ The other national legislation is similarly underpinned by other Directives.²¹ Article 249²² of the Treaty of Rome (as revised) makes these directives binding as to the result to be achieved on all Member States. Although directives leave the method of implementation to individual Member States, they must be implemented fully and no derogations are permitted unless authority for such derogations can be found in the directives themselves or elsewhere in European Law.²³ Directives may be enforced by virtue of their having 'direct effect' in a case where a claim is brought against a Member State or one of its emanations. However,

¹⁷ [2000] IRLR 578 at [41] Peter Gibson LJ quoting from Beldam LJ in *Cross v. Kirkby* unreported, 18th February, 2000.

¹⁸ This legislation is dependent in the sense that its interpretation depends on the European legislation as a result of the duty of consistent interpretation outlined in *Marleasing SA v La Comercial Internacional de Alimentacion* [1990] ECR I – 4135.

¹⁹ Not all of the legislation is underpinned by the Directives. For example, the Race Relations Act 1976 prohibits discrimination on the grounds of nationality whereas the Race Directive in article 3(2) makes an exception for such discrimination.

²⁰ Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

²¹ See, Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, hereafter referred to as the "Race Directive"; and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, hereafter referred to as the "Framework Directive".

²² Formerly article 189

²³ For example, in the Treaty of Rome.

even if the claim is brought against a private employer and the discrimination Directives cannot be relied on directly, the duty of consistent interpretation applies so that, as was stated by the European Court of Justice (ECJ) in *Marleasing SA v La Comercial Internacional de Alimentacion*.²⁴

... in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and therefore comply with the third paragraph of Article 189 of the Treaty.

It is clear then that in claims where the Directives are directly effective, the illegality defence can only operate to the extent that it was permitted to do so by European law. The domestic discrimination legislation is silent as to whether or not the common law public policy rules of illegality should operate to prevent those whose illegality is closely connected to their claims from pursuing those claims. Thus the domestic legislation could entertain an interpretation which permitted the illegality defence to operate or indeed an interpretation which did not permit its operation. As such, the *Marleasing* interpretative obligation must be invoked such that a court would have to fall back on the Directives themselves so as to eliminate inconsistency. Thus, whether a discrimination claim is brought against an emanation of a Member State or a private employer, the extent to which the illegality defence can be relied on is a matter of European law.

In *Hall v Woolston Hall Leisure* the Court of Appeal considered the interaction between the common law illegality rules and European law and specifically the Equal Treatment Directive. It was not necessary to express a concluded view on whether or not the Equal Treatment Directive excluded the rules of illegality from operating altogether, since the Court came to the view that the domestic rules, in and of themselves, did not prevent Mrs. Hall from bringing her claim against her former employers.

However, both Peter Gibson LJ and Mance LJ were of the view that European law prevented a restriction on the ambit of the Equal Treatment Directive by national rules of public policy.²⁵ They were influenced by the case of *Johnston v Chief*

²⁴ [1990] ECR I - 4135

²⁵ [2000] ICR 99; Mance LJ at [64]-[66], Peter Gibson LJ at [23] – [27].

*Constable of the Royal Ulster Constabulary*²⁶ in which the ECJ declined to accept a public policy exception to the application of the Directive on the basis of either safeguarding national security or of protecting public order. The same principle has been accepted in a number of other decisions of the ECJ.²⁷ Thus Peter Gibson LJ came to the following conclusion at paragraph 26:

The reasoning of the European Court of Justice in the cases to which I have referred suggests that there can be no derogation from the Directive on the ground of public policy, no relevant derogation having been provided for in the Directive or in the EC Treaty.

Similarly, Mance LJ concluded at paragraph 65:

any limitation of this nature in the protection in respect of sex discrimination afforded by the Directive must be derived from the wording and purpose of the Directive.

Thus the illegality rules, which are grounded in domestic conceptions of public policy, cannot be used in order to restrict the ambit of the discrimination Directives in any way as a matter of European law. That, of itself, does not dispose of the question since it may be the case that aside from domestic conceptions of public policy, the Directives themselves permit some restriction on their ambit based on concerns relating to illegality. In order to investigate this proposition, the Race Directive is taken by way of example. The provisions of the Race Directive are so similar to those of the Equal Treatment Directive and Framework Directive that what is true for one should be true for all in this context.

The provisions of the Race Directive are unequivocal. They intend to set in motion a framework for completely removing discrimination, subject to the limited exceptions in the Directive (Article 1²⁸). Article 2(1)²⁹ states that there shall be *no* discrimination based on racial or ethnic origin. Articles 7³⁰ and 14³¹ go further in requiring Member

²⁶ [1987] QB 129

²⁷ See *Sidar v Army Board* [2000] ICR 130 and *Kreil v Bundesrepublik Deutschland* [2000] All ER (D) 08

²⁸ Art 1: “*The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.*”

²⁹ Art 2(1): “*For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.*”

³⁰ Art 7(1): “*Member States shall ensure that **judicial** and/ or administrative **procedures**, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the*

States to dismantle procedural or substantive laws which might operate to prevent an individual from asserting their right not to be discriminated against. Far from allowing room for the illegality doctrine to operate, any illegality rules which prevent a claimant from bringing a discrimination action before a tribunal could be an unlawful derogation from Articles 7 and 14. If that is the case, a court which was called on to interpret the Race Relations Act 1976 in the light of the purpose and wording of the Race Directive would have no alternative but to come to the conclusion that the illegality rules could not operate in an action brought under the 1976 Act.

On the two occasions that the courts have investigated the relationship between European law and the illegality doctrine, they have frowned upon a doctrine which acts indiscriminately and provides an absolute bar to claims.

The ECJ considered whether the domestic public policy rules of illegality fall foul of provisions of European law in *Courage v Crehan*.³² The provision in question was Article 81 of the Treaty of Rome which seeks to prohibit anti-competitive practices.³³ The ECJ found that the full effectiveness of the Article and, in particular, the practical effect of the prohibition would be put at risk if it were not open to an individual to claim damages for loss caused to him as a result of entering into a contract which was illegal and void under Article 81.³⁴ The ECJ was keen to stress that the problem with the illegality doctrine was that it provided an absolute bar to an action being brought in these circumstances.³⁵

Similarly, the EAT (presided over by Elias J) considered in *Duke v Rosan Heims Plc*³⁶ that the Acquired Rights Directive³⁷ could not be restricted by the fact that some employees in an undertaking were working under contracts of employment tainted by illegality. In this context the illegality doctrine:

principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended." [emphasis added]

³¹ Art 14: "Member States shall take the necessary measures to ensure that: **any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished;**" [emphasis added]

³² [2002] QB 507

³³ Formerly Article 85

³⁴ n 17 above, at [26]

³⁵ *ibid* at [28]

³⁶ [2003] All ER (D) 328 (Apr)

³⁷ Council Directive 2001/23/EC on the approximation of the laws of Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, business or parts of undertakings of businesses.

...would operate indiscriminately and could defeat the legitimate claims of transferred staff who may have behaved perfectly lawfully at all times.³⁸

Moreover, the EAT was of the view that the Directive required a consideration of all the relevant factors. This might include contracts of employment, even if they were void under English law.³⁹ Again, while this does not conclude the question of whether the discrimination Directives permit the illegality rules to restrict their operation, it suggests that if they were to operate “indiscriminately” and to defeat “legitimate claims” that they may well fall foul.

Each provision of European law should be looked at on its own merits so as to determine whether it is consistent or inconsistent with the illegality doctrine and therefore it is impossible to extrapolate a definite answer to the question as regards the discrimination Directives from either *Courage v. Crehan* or *Duke v. Rosan Heims*. However, it seems that the prohibition against discrimination found in the Directives may well be put at risk, should those who enter into contracts which are illegal as formed have no right to recover at all in the event of discriminatory conduct on the part of their employers. This would provide exactly the sort of absolute bar to actions which the ECJ was keen to see removed in *Courage v Crehan* and the sort of “indiscriminate” rule which has the potential to defeat “legitimate claims” which the EAT disapproved of in *Duke*.

The argument indicates so far that there can be no restriction on the operation of the discrimination Directives by any illegality doctrine. However, remarks made by Mance LJ in *Hall v Woolston Hall Leisure* suggest that the Equal Treatment Directive might not have been intended to apply in a really extreme case. In paragraph 65 of his judgment, Mance LJ states that the draftsmen of the Equal Treatment Directive are unlikely to have considered that the Directive might confer protection in the case of a “hit-squad” or a “company known to have been established to carry out bank robberies or to launder stolen money”. He suggests that it might be the case that the Directive does not require national law to provide a remedy for discrimination in such a context.

One way such an argument could be made would be to suggest that when the Directives refer to “*employment and working conditions*”, they are only referring to

³⁸ [2003] All ER (D) 328 (Apr) at [49]

³⁹ *ibid* at [50]

those persons in employment legally and thus working under a contract of employment not tainted by illegality. However, this would be a strange interpretation of the Directives given that in *Leighton v Michael*⁴⁰ the EAT declined to interpret that terminology in the Equal Treatment Directive in that way. In addition, such an approach would exclude all illegally formed contracts, many of which do not fall into this 'extreme category' highlighted by Mance LJ's hit-man example.⁴¹ As such, if the Directives are not intended to cover 'extreme cases', since they provide no workable test to determine what an 'extreme case' is, it would have to be a matter for courts and tribunals to determine on a case by case basis whether the illegal conduct before them is so extreme that it takes that employment relationship outside the shelter of the Directive in question. This approach is unattractive since it involves importing into the Directives a meaning which is not suggested by any of their wording; in fact it amounts to adding words which simply are not there and which contradict the words which are there. There are exceptions to the prohibition of discrimination in the Directives,⁴² but the public policy rule of illegality is not one of them.

It has been argued that the employee who is working under an illegally formed contract of employment would never be prevented from bringing a claim for discrimination on the basis that their contract was illegal since the European Directives prevent any illegality doctrine from operating in this area. However, these arguments have never been effectively determined by the courts despite having been argued before the Court of Appeal on two separate occasions. As has been stated, in *Hall v. Woolston Hall Leisure*, the Court of Appeal did not feel it was necessary to decide the issue since Ms. Hall's claim was not barred by the domestic illegality rules.

More recently, in *Vakante v. Addey and Stanhope School*,⁴³ Mr. Vakante sought to bring a claim of race discrimination against his employers, the Addey and Stanhope School. His was an illegally procured employment contract since he had told his employers that he was entitled to work in the UK when in fact he was not and by working he was breaching section 24 of the Immigration Act 1971. The Court of Appeal avoided consideration of the question of the relationship between the illegality rules and the Race Directive since it claimed that when the Employment Tribunal

⁴⁰ [1996] IRLR 67

⁴¹ For example a contract formed in breach of section 24 of the Immigration Act 1971 or an illegally procured employment contract in breach section 16 of the Theft Act 1968.

⁴² See, for example, Article 3(2) and Article 4 of the Race Directive.

⁴³ [2004] EWCA Civ 1065

heard Mr. Vakante's claim, the Race Directive had not been in force. As such the Employment Tribunal in question had made no error of law in dismissing the claim on the basis of the *Hall* test.⁴⁴ The Court of Appeal may well be correct as regards the result of this case but its reasoning is somewhat difficult to understand. The Race Directive did not come into force on 19th July, 2003 as was asserted in the speech of Mummery LJ,⁴⁵ but rather came into force on 19th July, 2000 as a result of its publication in the Official Journal of the European Communities.⁴⁶ The former of these dates was the deadline for implementation for Member States. Moreover, it has been established, since the ECJ gave judgment in *Officer van Justitie v. Kolpinghuis Nijmegen*,⁴⁷ that the interpretative obligation on Member States arises before the deadline for implementation has passed and at the time of the Directive's entry into force subject to the qualification that a directive cannot, in and of itself, overturn a contradictory law of a Member State. Thus, when the Employment Tribunal heard Mr. Vakante's case in September of 2000 they ought to have interpreted the Race Relations Act in accordance with the Race Directive which had come into force some two months earlier. If they had done so, they may have gone on to exclude any application of the illegality doctrine had they found that the Directive did not allow for its application. As has been indicated, it might be that this discussion is somewhat academic since the discriminatory acts complained of pre-dated the publication of the Race Directive⁴⁸ and non retro-activity is firmly established as a principle of European law.⁴⁹ However, it is a matter of some regret that the Court of Appeal dismissed this case on questionable grounds and that it failed to give any indication as to the potential application of the illegality doctrine in the context of the Race Directive. Even if Mr. Vakante's claim, by virtue of the principle of non retro-activity, did not require such a discussion, employment tribunals would no doubt have benefited from guidance given by a weighty Court of Appeal⁵⁰ which had heard two days of argument on the issue.

⁴⁴ *Ibid.* at [31]

⁴⁵ *Ibid.*

⁴⁶ See article 18 of the Race Directive and the Official Journal of the European Communities (19th July 2000).

⁴⁷ [1987] ECR 3969

⁴⁸ Mr Vakante was dismissed on the same day that the Race Directive came into force and therefore difficult factual questions might arise as to the time at which the Directive was published and the time at which he was dismissed since the dismissal itself formed part of Mr. Vakante's allegations of race discrimination.

⁴⁹ *Finanze v. Srl Meridionale Industria Salumi* [1981] ECR 2735

⁵⁰ The Court of Appeal was formed of Brooke LJ, Mummery LJ and Lord Slynn of Hadley.

Since there is no authority, as yet, to suggest that the *Hall* test cannot be used to exclude claims of discrimination brought by those who are working under illegally formed employment contracts, the *Hall* test must be considered to assess whether or not courts and tribunals apply it correctly.

Do the Courts Apply the *Hall* Test Correctly?

There are a limited number of reported decisions in which the courts and tribunals have applied the *Hall v Woolston Hall Leisure* test to cases of illegally *formed* contracts of employment. This may be contrasted with cases concerning illegally *performed* contracts of employment where there is a plethora of decisions. Mr. Vakante's claim for race discrimination is therefore particularly useful in providing an insight into the methodology that the judiciary use to determine whether claims for discrimination can be brought by a party to an illegally formed employment contract. The approaches of the EAT⁵¹ and Court of Appeal⁵² are examined below, leading to the conclusion that the *Hall* test has been applied inappropriately.

The Approach of the EAT

The EAT considered that it was open to a Tribunal in the circumstances of Mr Vakante's illegality to find that:

...the illegal contract infected the entirety of the contract and indeed created an employment relationship which would not otherwise have been created, which was not entitled to exist at all because the Applicant was not entitled to be in employment, and which could and would and should have been terminated during every day that it operated⁵³.

The EAT went on to conclude that:

...all the ordinary events of such a contract would be likely to be found to be inextricably linked up with the illegal conduct⁵⁴

and that an employee

⁵¹ [2004] ICR 279

⁵² [2004] EWCA Civ 1065

⁵³ *ibid* at [70]

*...would have no complaint about acts of discrimination if they consist of an alleged discriminatory manner of operating that contract.*⁵⁵

The EAT therefore considered that because the employment contract was created by an illegal act, any alleged discrimination in the 'operation of the contract', would, to use the language in *Hall*, be so closely connected or inextricably bound up with the illegality to prevent it from being actionable. For these purposes, no distinction was to be drawn between the operation of such a contract and its alleged discriminatory termination.⁵⁶ Indeed, the only example given by the EAT of allegedly discriminatory conduct which was considered sufficiently extrinsic to the employment relationship to be permitted to form the basis of a complaint was:

*...gratuitous racial abuse which had nothing to do with the employment relationship, committed during the contract of employment, or on the employer's premises.*⁵⁷

In Mr. Vakante's case, however, the allegations of racial abuse could not proceed to a hearing because they had been committed by his supervisor and mentor and were therefore not sufficiently extrinsic to the employment relationship.

In our view the EAT did not properly apply the *Hall* test in Mr. Vakante's case. As we have seen, that test requires the Tribunal to consider the connection between two acts: the illegal acts of the employee and the alleged acts of discrimination forming the subject matter of the claim. By contrast, the EAT's approach first connects the contract of employment to the illegal acts of the employee and then bars any alleged acts of discrimination that can be connected to the 'operation' of that contract.

By necessity this judgment gives a specific legal meaning to the 'operation' of a contract of employment. Unfortunately the scope of that phrase was not defined. It is therefore unclear which acts would fall within and which outside the 'operation' of the contract. To take the EAT's example, racial abuse by a mentor/supervisor was considered part of the 'operation' of the contract, whereas gratuitous racial abuse, which had nothing to do with the employment relationship, might be extrinsic to that

⁵⁴ *ibid* at [71]

⁵⁵ *ibid* at [72].

⁵⁶ *ibid* at [75].

⁵⁷ *ibid* at [76].

relationship.⁵⁸ Thus had Mr Vakante complained of racial abuse by another member of staff during the lunch hour or as he was leaving the school premises at the end of the day, and in circumstances which were unrelated to work, such discriminatory conduct would seemingly be permitted to form the subject matter of a complaint.

This distinction yields very odd and, it is submitted, undesirable results. Fine factual distinctions are drawn in respect of the precise moment and content of the abuse or other discrimination. It seems that in essence, the more work related discriminatory abuse is, the less likely the claimant can recover for it. Such an approach is not grounded in principle. Moreover, it should be noted that the EAT's approach is positioned at the very cusp of the Tribunal's jurisdiction in respect of employment discrimination. On the one hand the alleged discrimination must fall within section 4 of the Race Relations Act, yet on the other it must be 'extrinsic to the employment relationship' or beyond the scope of the operation of the contract of employment if the employee's complaint is to proceed.

The example of abuse by a supervisor indicates that the EAT did not equate the 'operation' of the contract to the performance of the contractual terms. It seems that the EAT envisaged 'operation' to be a wider term than performance. Indeed, far from performing the contract of employment, racial abuse by a supervisor may well fundamentally breach the terms of that contract.⁵⁹ Certainly a failure of an employer to respond to a complaint of such abuse can amount to a fundamental breach of contract.⁶⁰ The EAT's judgment in *Vakante* therefore permits of acts which amount to a breach of contract being described as acts taken in 'operation of the contract'. In this context it is of note that the EAT drew no distinction between the 'operation of the contract' and dismissal. One form of dismissal is, of course, where the employer has

⁵⁸ Although in order to fall within section 4 of the Race Relations Act, it was suggested that it would have to be committed during the contract of employment, for example, on the employer's premises.

⁵⁹ In *Malik v BCCI* [1997] IRLR 462 (HL), Lord Nicholls described the implied term of mutual trust and confidence in this way: "[The employer] would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee." This term not to undermine trust and confidence is of potentially wide scope. It can extend to extremely inconsiderate or thoughtless behaviour and unacceptable abuse may fall within its scope: *Palmanor Ltd v Cedron* [1978] IRLR 303 (EAT). The majority of the EAT in *Moores v Bude-Stratton Town Council* [2001] ICR 271 (EAT) held that it was an aspect of the implied term that an "employer will provide and maintain a working environment, which is reasonably tolerable to all employees. Such term must apply to protection from unacceptable treatment and behaviour and unauthorised interference in work duties." Any breach of this implied term is fundamental: *Morrow v Safeways Stores plc* [2002] IRLR 9 (EAT).

⁶⁰ It is an aspect of the *Malik* implied term that employers will reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have: *W A*

acted in fundamental breach of contract in consequence of which the employee has resigned.⁶¹

It is submitted therefore, that the EAT's 'operation of the contract' application of the *Hall* test is too blunt a tool to distinguish between the many and varied contexts in which discrimination in the workplace might occur.

The Approach of the Court of Appeal

The Court of Appeal's approach is even more robust than that of the EAT. After extracting and affirming the *Hall* test⁶², Mummery LJ expressed the Court's conclusion as to its application in the following manner:

*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*⁶³.

The Court made no attempt to distinguish between the various allegations of discrimination that Mr. Vakante had presented to the Tribunal, nor did the Court indicate that there were any allegations capable of satisfying the *Hall* test on the facts. Because the unlawful conduct went to the basic content of an 'employment situation', from which the duty not to discriminate arose, Mr. Vakante could not maintain his claim.

Whilst the EAT had not been prepared to go quite as far as to state that in the case of an illegally formed employment contract, no claim for discrimination could ever succeed,⁶⁴ the Court of Appeal was willing to adopt precisely that position. The Court was impressed by the deliberate nature of Mr Vakante's illegal conduct and that he was thereby responsible for creating the unlawful 'employment situation' upon which

Goold (Pearmak Ltd) v McConnell [1997] IRLR 516 (EAT), *Bracebridge Engineering Ltd v Darby* [1990] IRLR 3 (EAT).

⁶¹ The 'constructive' dismissal – see Employment Rights Act 1996 s95(1)(c) and *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27 (CA)

⁶² [2004] EWCA Civ. 1065 at [5] to [8]. Note that at paragraph [7], Mummery LJ acknowledged that the *Hall* test was "binding on this court".

⁶³ *Ibid.* at [34]

⁶⁴ The EAT's example of gratuitous racial abuse will be recalled.

he had to rely in order to establish there was a duty not to discriminate against him. In the Court's view the illegal 'employment situation' operated to prevent any complaint being raised under section 4 of the Race Relations Act 1976.

This approach seems to leave the *Hall* test completely redundant in the case of the illegally formed employment contract. No matter what the allegations of discrimination were and how unrelated to the initial illegal procurement of the employment contract, the factors mentioned by Mummery LJ would remain. The Court of Appeal's error is, in our view, similar to that of the EAT in that it connected the illegality to the 'employment relationship' and hence any claim under s4 of the 1976 Act. Rather the Court of Appeal ought to have appreciated that although the illegality was causally connected to the employment contract, there might be many aspects of the wider employment relationship which are not sufficiently proximate to that illegal contract such that to allow the claim would involve condoning the illegal procurement of that contract. This is exactly what is required by the *Hall* test, which the Court appreciated was binding upon it,⁶⁵ since that test requires the Tribunal to consider whether the allegations of discrimination forming the subject matter of the particular claim arise out of or are sufficiently connected to the illegal act that the Court would have to condone the illegal act if it were to allow the claim to proceed.

Although in *Hall* Peter Gibson LJ states that the question which should be considered is whether "the claim" arises out of or is sufficiently connected to the illegal conduct, "the claim" must refer to each individual allegation in a discrimination claim. Therefore the tribunal must consider each allegation so as to determine whether that allegation falls foul of the *Hall* test rather than merely declaring that the employment relationship and anything which falls within it is illegal. This is clear from *Leighton v Michael* which was approved in *Hall*, where Peter Gibson LJ stated that

*"...It is the sex discrimination that is the core of the complaint, the fact of employment and the dismissal being the particular factual circumstances which Parliament has prescribed for the sex discrimination complaint to be capable of being made"*⁶⁶.

This reasoning has subsequently been approved by Lord Rodger in *Rhys Harper*⁶⁷ where he confirmed that

⁶⁵ See paragraph [7]

⁶⁶ Op. cit. at paragraph [46]

⁶⁷ *Rhys Harper and Others v. Relaxion Group Plc and Others* [2003] IRLR 484 (HL).

“...the anti-discrimination Acts are not really concerned with employees’ rights under their contracts of employment. So, for instance, where a contract of employment is tainted by illegality, an employee may none the less complain that her employer discriminated against her on the ground of her sex by dismissing her, since both the Equal Treatment Directive and the 1975 Act are designed to provide effective relief in respect of discriminatory conduct ‘rather than relief which reflects any contractual entitlement which may or may not exist’.”⁶⁸

The source of the Court of Appeal’s error is best found, perhaps, in a paragraph of the judgment which provides some commentary on the *Hall* test:

“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.”⁶⁹

It is submitted that a proper reading of the *Hall* test, by contrast, makes it clear that a causal link between the illegality and the acts complained of is a prerequisite to the operation of the illegality doctrine. Causal link in this context refers not to the ‘but for’ test but rather to denote the requirement that the illegal conduct and act complained of are inextricably bound together. It is only once that causation element is satisfied that the Court may go on to consider, as a matter of fact and degree, whether the Tribunal might appear to condone the illegality by hearing and determining the complaint. To the extent that the above paragraph from the Court of Appeal’s judgment suggests that fears of condoning the illegal conduct, without causation, would suffice, one is compelled to the conclusion that the Court departed from the test prescribed by *Hall* and, indeed, tended towards the public conscience test described by Lord Browne-Wilkinson as depending on “*imponderable factors*” in

⁶⁸ Ibid at paragraph [210]. See also the approach in *Tinsley v. Milligan* [1994] 1 AC 340 (HL) at p.376F per Lord Browne-Wilkinson: “...In a case where the plaintiff is not seeking to enforce an unlawful contract but founds his case on collateral rights acquired under the contract (such as a right of property) the court is neither bound nor entitled to reject the claim unless the illegality of necessity forms part of the plaintiff’s case.”

⁶⁹ [2004] EWCA Civ. 1065 at paragraph [9]

Tinsley v. Milligan.⁷⁰ Indeed, determining matters as politically sensitive as the employment rights of those working under illegal employment contracts ought not to depend merely on the judicial perception of the 'public conscience'.

The reasoning of Mummery LJ focuses purely on the illegality and does so at the expense of considering any of the allegations of discrimination. It will be recalled that the *Hall* test calls upon the courts to perform a balancing exercise between enforcing rights and at the same time failing to condone illegality. As such, a claim can only succeed if it is not so inextricably bound up with the illegality or causally related to the illegality that in order to allow the claim, the court would have to condone the illegal conduct. Suggesting that the entirety of the 'employment situation' is illegal and that therefore no discrimination claim could ever be brought in the case of an illegally formed employment contract does not perform that balancing exercise and does not seem to take account of the fact that there may be many allegations of discrimination which arise in the employment relationship some of which are closely connected to the illegal contract of employment and some of which are entirely unrelated.

We therefore consider that the applications of the *Hall* test as seen in the judgments of the Court of Appeal and EAT are not only unsupported by authority but are unfounded in principle and, moreover, produce unattractive results.

A More Principled Approach

When dealing with case of an illegally formed employment contract, the courts should approach the problem by adopting a two stage consideration of the effect of the illegality. Stage one of that test would require consideration of whether or not the individual allegations of discrimination pass the *Hall* test in the light of the illegality concerned. Stage two requires a consideration of whether any remedies which might result from those allegations of discrimination passing through stage one, should be barred by the illegality doctrine.

Stage One – Which Allegations ought to Proceed?

The critical question flowing from the relevant paragraphs of *Hall* is whether *the act of discrimination complained of* is so closely connected with or inextricably bound up or

⁷⁰ *Tinsley v. Milligan* [1994] 1 AC 340 (HL) – see per Lord Goff of Chieveley at p. 363 (a judgment

linked with the illegal act of the claimant that the court could not permit the claimant to recover without condoning the illegal conduct.⁷¹ This clearly requires a consideration of each individual allegation of discrimination so as to determine whether or not each allegation is too proximate to the illegality to allow the claim, on that allegation, to proceed without condoning the illegality.

Thus, taking *Vakante* by way of example, the Tribunal ought to have considered whether the allegations of discrimination⁷² were sufficiently bound up with the claimant's illegal act so that the Tribunal would have had tacitly to condone the illegal act in allowing the claimant to recover. In our view, it cannot be said that acts such as racial abuse by a supervisor are in any way connected to, or bound up in, the initial illegal procurement of the contract by the claimant, so that a Tribunal would by awarding damages, be forced to condone Mr. Vakante's illegal procurement of the contract of employment.

Similarly, most of the other allegations of discrimination alleged by Mr. Vakante cannot be said to be caught up with his illegal act of procuring the contract. These allegations included the receipt of training and support, provision of references, humiliation and abuse, the postponement of a disciplinary hearing, and dismissal. There are three allegations which are more problematic. These allegations concern the provision of a written contract, and the content of the terms of his contract. It is suggested that there is more scope for contending that these allegations are bound up and connected with Mr. Vakante's illegal act, although, ultimately, this should be for the Tribunal to decide in light of all the evidence.

It is submitted that this approach is not only more faithful to authority but also achieves a more satisfactory balance of competing policy interests. Bingham LJ expressed those competing policy concerns where a contract is tainted by illegality from its outset, graphically in *Saunders v Edwards*:⁷³

Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. One the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the course

concurrent in by Lords Keith of Kinkel and Lord Browne-Wilkinson).

⁷¹ See [42] and [46] of Peter Gibson LJ's judgment.

⁷² Set out by the EAT at [19].

*should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss or how disproportionate his loss to the unlawfulness of his conduct.*⁷⁴

In Mr. Vakante's situation, the Court ought not to condone the claimant's illegal act of fraudulently obtaining employment by granting him employment rights he should never have been entitled to. On the other hand, if Mr. Vakante can substantiate his allegations, he has suffered the effects of unpleasant discrimination in an employment context. The *Hall* test balances precisely these policy considerations since it prevents a Tribunal from awarding damages in a situation where the discriminatory conduct is so closely connected to Mr. Vakante's fraudulent procurement of the employment contract, that to award Mr. Vakante damages would be tantamount to overlooking or even condoning that illegal conduct. However, at the same time it ensures that any discriminatory conduct which is not so closely interrelated to the illegality is neither overlooked nor condoned, but rather is remedied. It is in this way that the *Hall* test, as properly understood, creates a better and more principled balance of the underlying policy concerns. In contrast, the EAT's approach effectively prohibits all but the most unusual allegations of discrimination from being determined on liability and the Court of Appeal's stance is even more prohibitive, barring all such allegations.

Stage two – Which Remedies ought to be Awarded?

In *Hewison v Meridian Shipping PTE & Others*⁷⁵ the Court of Appeal had to consider the application of the rules of illegality to the measure of compensation in the tort of negligence. In that case the claimant was a crane operator who worked at sea. He had suffered from epilepsy since the age of 17 but had not disclosed this fact to his employers despite being asked so to do a number of times. Had he done so, he could not have been employed at sea. He suffered injury as a result of his employers' negligence and the question arose as to whether his loss of earnings was recoverable. The defendants took the point that in order to continue to earn, the claimant would have had to continue to deceive his employers. This deception was illegal since Mr. Hewison was gaining a pecuniary advantage by his deception

⁷³ [1987] 2 All ER 651

⁷⁴ *ibid* at page 665

⁷⁵ [2003] ICR 766, [2003] PIQR 252 (CA)

contrary to section 16 of the Theft Act 1968 and was therefore working under an illegally procured contract of employment.

The majority of the Court of Appeal considered that although there was no causal connection between the claimant's illegal conduct and his employer's negligence, the claimant might still be prevented from recovering his loss of earnings. Clarke LJ stated that this was so since in order to continue to earn, he would have to continue to deceive his employers illegally. Thus, although there was no connection between the negligence and the illegal act of deception, so as to prevent an action in the tort of negligence *per se*, there was such a close connection between one of the remedies and the illegal act that that remedy alone ought to be barred or else in awarding that remedy the court would have to condone the illegal act. That was so since in order to make out his claim for loss of earnings, Mr. Hewison would have been forced to assert that he would have continued to work for his employers and that he would have therefore continued with his criminal deception, had it not been for their negligence.⁷⁶

It is submitted that this approach has substantial merit. To allow a claim for loss of earnings in this type of case would involve an inconsistency⁷⁷ in approach since it would, on the one hand, discourage the illegal procurement of an employment contract, but on the other hand be prepared to award damages which would effectively enforce that contract of employment.

By contrast, this approach accepts that the claim for negligence is not barred completely by the rules of illegality, since there is not the required connection between the illegal act and the negligence. Thus, the claimant was not prevented from recovering under the other heads of damages such as pain and suffering and loss of amenity. However, this approach prevents an award for damages being made for future earnings on the basis that the claimant had no right to continued employment and would have been dismissed, quite properly, had his employers been aware of his criminal deception. This seems delicately to walk the tightrope between

⁷⁶ Mr. Hewison's case was contrasted to cases of collateral illegality, where the illegality is not central to the continuation of the claimant's future employment. In such cases, the illegal contract is called in aid only as evidence of the claimant's loss of earnings. The Court of Appeal approved, obiter dicta, the judgment of Garland J in *Newman v Folkes* (unreported, 5 May 2001) to the effect that in such cases an award can be made with some financial adjustment for unpaid tax and national insurance: see *Hewison* [37].

⁷⁷ For an analysis of the consistency / stultification approach to the law of illegality see *The Illegality Defence in Tort*, Law Commission Consultation Paper 160 (2000).

discouraging the negligence of Mr. Hewison's employers and at the same time discouraging Mr. Hewison's illegal procurement of an employment contract. In adopting this approach, the Court cannot be said to have condoned the illegal contract.

The majority judgments in *Hewison* ought, it is suggested, to be applied in the context of statutory torts, such as unlawful discrimination in cases where claimants have been working under illegally formed contracts of employment. There are a number of remedies available to the successful discrimination litigant⁷⁸: (a) a declaration of discrimination, (b) compensation, and (c) a recommendation. In practice, it is often the payment of compensation that is the most important element for a claimant.

Unfortunately, the two legally separate issues of on the one hand liability for discrimination and on the other hand the quantum of any compensation, are frequently merged in the context of the application of the rules of illegality. This can be seen from the facts of *Hall v Woolston Hall Leisure*. There the issue of illegality arose at a remedies hearing when the employer took the point that the contract of employment was tainted with illegality and Mrs. Hall could recover nothing.⁷⁹ Liability had already been established at this point.

Hall reiterated the provisions of the legislation, that discrimination complaints were statutory torts "*to which the tortious measure of damages is applicable*".⁸⁰ However, the common law tortious rules of recoverability do not apply *per se*. In *Laing Limited v Yassin Essa*⁸¹ the Court of Appeal confirmed that foreseeability of harm is not a prerequisite for recovery⁸² and that the appropriate test for recoverability is:

*...the victim is to be compensated for the loss which arises naturally and directly from the wrong.*⁸³

⁷⁸ Race Relations Act 1976 s56(1), Sex Discrimination Act 1975 s65(1), Disability Discrimination Act s17A(2), Employment Equality (Sexual Orientation) Regulations 2003, Regulation 30(1), Employment Equality (Religion or Belief) Regulations 2003, Regulation 30(1).

⁷⁹ *Hall v. Woolston Hall Leisure* at [3]

⁸⁰ *Hall* at [42]; see also *Hurley v Mustoe (No 2)* [1983] ICR 422 (EAT) and Sex Discrimination Act 1975 s66(1)(b) see also, Race Relations Act 1976 s57(1)(b), Disability Discrimination Act s 8(3), Employment Equality (Sexual Orientation) Regulations 2003 SI 2003/1661 Regulation 31(1), Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660 Regulation 31(1).

⁸¹ [2004] IRLR 313 (CA)

⁸² *ibid* per Pill LJ at [38] – [39]; Clarke LJ at [62].

⁸³ *ibid* at [39] per Pill LJ

On this basis, successful claimants routinely claim compensation for injury to feelings and loss of earnings or other pecuniary losses arising from their contracts of employment.⁸⁴

A consideration of the illegality issue in the context of remedies will be particularly helpful in cases where the contract of employment has been illegally formed. With regard to these cases it appears that claims for non-pecuniary loss as well as the other remedies of a declaration and recommendation should be allowed to proceed despite the illegal formation of the contract of employment. Claims for loss of earnings, however, are likely to be more difficult.

Assessing damages for injury to feelings and other non-pecuniary losses requires no enforcement whatsoever of the contract of employment. Thus, if a claimant were successful in their complaints on liability, he should properly recover in respect of injury to feelings and other similar losses caused by the discrimination, such as any personal injury s/he might have suffered.

In respect of pecuniary losses and in particular, loss of earnings, a claimant is likely to need to place reliance on their contract of employment in order to be able to prove these. Under *Hewison*, this is a way of enforcing his contract and directly depends upon future deception in the case of an illegally procured employment contract or future illegal conduct in the case of an illegally agreed employment contract. Such damages ought therefore not to be recoverable.

The European Directives and the Suggested Approach

This approach provides a more coherent structure for addressing illegality concerns arising on the presentation of a discrimination complaint.

Stage one of the suggested test might have to be modified or removed should it be accepted that the European Directives prohibit or confine to a very limited extent the operation of the illegality rules.

⁸⁴ Race Relations Act 1976 s56(1)(b) and s57, Sex Discrimination Act 1975 s65(1)(b) and s66, Disability Discrimination Act s17A(3) and s17A(4), Employment Equality (Sexual Orientation)

However, the suggested approach as regards stage two ought not to be incompatible with the Equal Treatment, Race or Framework Directives, or the principle of effective remedy. These Directives require Member States to ensure that those who consider themselves wronged by a failure to apply the principles of equal treatment are able to enforce obligations under the Directives. However, the Directives do not state what form that enforcement should take – this is left to individual Member States. In any case, the approach set out above does allow for enforcement by means of first, a declaration, secondly, a recommendation and finally, a limited award of damages. There is nothing in the Directives or the principle of effective remedy which requires an award of loss of earnings to be made to a claimant who had no right to continue to be employed and whose continued employment would depend upon them continuing to commit criminal offences.

Moreover, this analysis seems to be compatible with the approach of the ECJ in *Courage v Crehan*. It was stated in that judgment⁸⁵ in the context of a discussion of the provision of an effective remedy:

...the court has held that Community law does not prevent national courts from taking steps to ensure the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them...

It is certainly arguable that employees who are working under illegally formed contracts of employment would be ‘unjustly enriched’ by being awarded damages for earnings lost by their failure to continue to be employed as a result of their employers’ discriminatory conduct when they had no right to be employed in the first place and their employment constituted a breach of the criminal law. Moreover, this approach simply does not operate indiscriminately, does not provide an absolute bar and does not defeat legitimate claims in the way that the illegality doctrine has been criticised for so doing in other areas.

Conclusion

On a correct application of European law, the employee working under an illegally formed employment contract should be permitted a hearing on all⁸⁶ allegations of

Regulations 2003, Regulation 30(1), Employment Equality (Religion or Belief) Regulations 2003, Regulation 30(1).

⁸⁵ At [30]

discrimination. Alternatively, as a matter of domestic law the *ex turpi causa* rule should only bar those allegations of discrimination which are intricately caught up in the illegal act. In any case, the effect of the illegally formed employment contract is best dealt with in discrimination claims at the remedies stage so as to prevent the employee profiting from the illegal formation of the contract by recovering substantial loss of earnings.

Simon Forshaw⁸⁷

Marcus Pilgerstorfer⁸⁸

12th December, 2004.⁸⁹

⁸⁶ Subject to the caveat stated above as to those exceptional cases pointed out by Mance LJ in *Hall* such as a hit-squad.

⁸⁷ Pupil, Littleton Chambers.

⁸⁸ Barrister specialising in employment and discrimination law at Old Square Chambers.

⁸⁹ We are grateful to the following for their comments on earlier drafts of this article: Frederic Reynold QC, John Bowers QC, Ian Gatt QC, Rupert Allen.