KALAYAAN AGM: THE LAW AND DOMESTIC WORKERS 2019

Alison Harvey, Co-chair of Kalayaan, barrister No5 Chambers

The Immigration Rules on domestic workers have not changed in 2019 but some laws and policies which affect domestic workers have changed.

Some are laws and policies about employment. Some are laws and policies about how domestic workers who are found to have been trafficked are treated.

RIGHTS AND ENTITLEMENTS

The National Minimum Wage

Domestic workers are entitled to be paid the national minimum wage. The rate of pay went up in April 2019. The rates are now:

- Aged 25 and over: £8.21 hourly rate
- Aged 21 – 24: £7.70 hourly rate
- Aged 18 – 20: £6.15 hourly rate

This is the wage before the employer deducts tax and national insurance.

The National Minimum Wage Regulations 2015 provides that there is no national minimum wage for employees who are treated as members of the employer's family. The UK's Immigration Rules require that an employer must declare that a domestic worker is an employee and the work they will carry out does not involve being part of the employer's family. This means that people on a domestic worker visa must be paid the national minimum wage.

The employer can deduct money from pay if they are providing accommodation. They cannot deduct money for food. The amount they can deduct for accommodation changed in April 2019. Now:

- £7.55 can be deducted for each day that the employer makes accommodation available. A maximum of £52.85 per week can be deducted for accommodation from a domestic worker's pay. If the work is part time, or the accommodation is not provided every day, the maximum amount that can be deducted will be less. If the hourly or daily calculations produce different answers, then the smaller amount should be used.

Rates change every April. More detail and the current rates are provided on Kalayaan's website.

Maximum hours of work

In the UK this is a matter of European Union law – the "Working Time Directive" which says that people can work a maximum of an average 48 hours per week unless they specifically opt out. But workers 'employed as a domestic servant in a private household' are excluded from a number of the key limitations on working time, including the maximum average working week of 48 hours.

EMPLOYMENT LAW CASES

Okedina v Chikale [2019] EWCA Civ 1393 31 July 2019

An employer challenged a decision that although a domestic worker did not have leave in the UK, she had a lawful contract of employment and the courts would enforce her rights under it. The employer lost

Both employer and worker were Malawian nationals. The employer had brought the employee to the UK in July 2013 to work for her as a live-in domestic worker. The employer obtained a six-month domestic-worker visa. Following expiry of the visa in November 2013, the employee remained in the UK and continued to work for the employer. The employer unsuccessfully applied for a visa extension on the false basis that the employee was a family member. The employee was dismissed in June 2015. She brought claims for pay and compensation under her contract of employment in the employment tribunal. The question was, cold the employer say that because of the Immigration, Asylum and Nationality Act 2006 s.15 and s.21, made it a civil wrong a criminal offence to work in the UK without lawful immigration status, , the contract of employment was an illegal contract.

The court said: the provisions punish the employer, not the employee, for employing someone who does not have permission to work. Innocent employees should not be deprived of all remedy against the employer under their contract.

The situation is different where the employee knowingly participates in the illegal arrangement. Then they will not succeed in a claim based on the contract.

Cases of *LP and NN*: Support for trafficked persons

There are two decisions in the National Referral Mechanism:

i) "reasonable grounds" decision – a decision that there are reasonable grounds for thinking that a person might have been trafficked

ii) Conclusive grounds: a final decision whether a person has been trafficked or not.

The Home Office agreed in June that it is not lawful only to support trafficked persons for a maximum of 45 days after their conclusive grounds' decision. Support must be based on need. The Home Office amended its policy.

Judgment Friday 15 November 2019 *OA (Nigeria) v Secretary of State for the Home Department*

A challenge to the Home Office *Victims of Modern Slavery: Competent Authority Guidance*, specifically in relation to the process for reconsidering negative trafficking decisions in the National Referral Mechanism.

In this case the person got a negative "reasonable grounds" decision. It was held that there were no "reasonable grounds" for thinking that she had been trafficked. She got more evidence. The Home Office refused to consider it. It said only support providers or "First Responders" – organisations such as Kalayaan, could submit more evidence, not individuals and their lawyers. Then the Home Office published a new policy which said that only the First Responder or support provider involved in the case could ask for reconsideration. So, if a case had been referred to the national referral mechanism by another body, Kalayaan could not request reconsideration of the decision.

The Court of Appeal said the Home Office was wrong. If a person gets help from someone who is not a First Responder, or is not a support provider, the request for reconsideration will no longer be ignored.

***MS (Pakistan)* – to be heard in the Supreme Court on 21 November 2019**

MS was brought to England in 2011 by his step-grandmother. He was 16 years old and told he was coming to study, but was instead put to work in various food shops. Just over a year later, he came to the attention of the police and was referred to social services. Social workers then referred then referred MS into the National Referral Menasha**.**

He received a negative 'reasonable grounds' decision ¨it was held that there were no reasonable grounds for thinking that he had been trafficked.

MS appealed this decision at the Immigration Tribunal as part of his immigration appeal.

The Upper Tribunal held MS had been trafficked.

The Home Office appealed to the Court of Appeal. It held that only the national referral mechanism could decide whether MS had been trafficked.

It also held that that it difficult to imagione a case in which a failure of the in the national referral mechanism would breach the UK's duties under Article 4 of the European Convention on Human Rights, the prohibition on slavery, servitude and forced labour, to operate adequate procedures to protect people from slavery, servitude and forced labour, and to support them when they were trafficked.