Employment

Do they have the right to work: a review of Badara v Pulse Healthcare Ltd

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Employers who engage workers with no right to work in the UK can suffer severe consequences, including significant civil penalties. However, dismissing workers or refusing to employ workers based on a genuine, but incorrect, view that they have no right to work can leave employers open to claims by employees and the risk of significant liability. *Badara v Pulse Healthcare Ltd* (UKEAT/0210/18/BA) provides an example of the challenges for employers and the consequences for employees when their employers get it wrong.

Factual background

The Claimant was employed by the Respondent from February 2013 until November 2015. He was a Nigerian national, but by virtue of his marriage to an EEA national he had a right to work in the UK at all material times pursuant to Directive 2004/38 (**the Directive)** and the Immigration (European Economic Area) Regulations 2006 EEA Regulations (**EEA Regulations).** However, following the expiry of his residence card in January 2015, the Claimant was provided with no further work on the basis that, in breach of his contract, he had not provided evidence of his right to work upon request.

The Respondent had carried out several checks pursuant to the Home Office's Employment Checking Service **(ECS)**, from 21 January 2015 all of which had been negative and which wrongly indicated that the Claimant had no right to work and therefore should not be employed. Due to the Respondent's refusal to provide work, the Claimant pursued an employment tribunal claim.

ET Judgment

The tribunal found that the Respondent had erroneously, but genuinely, believed that the Claimant's right to work expired on the date his residence card expired and had relied on the Home Office's Guide to Right to Work Checks (**Home Office guidance)** in coming to that belief. Therefore, as regards an unlawful deduction from wages claim, the tribunal found that the Respondent was entitled to require proof of a right to work to be provided in the form of a positive ECS check. In relation to the indirect discrimination claim, the tribunal accepted that any substantial disadvantage from the ECS check requirement could be objectively justified on the basis that compliance with immigration controls and laws was a legitimate aim and that reliance on the ECS checks was a proportionate means of achieving that.

Okuoimose v City Facilities Ltd (UKEAT/0192/11/DA) had confirmed that the civil penalty scheme under s. 15 of the Immigration, Asylum and Nationality Act 2006 (**2006 Act**), was irrelevant where there was an established right to work, as in the case of EEA family members. Therefore, given that the system of ECS checks arose from that scheme, it would arguably have been inappropriate for the Respondent to rely on them as the basis for a refusal to provide work to the Claimant. However, the tribunal believed that *Okuoimose* could be distinguished due to the differing factual matrix in that case.

Employment Appeal Tribunal

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The EAT was persuaded that the tribunal had erred in its failure to take *Okuoimose* into account and rejected the finding that it could be distinguished. As regards the unlawful deduction from wages claim, the ratio in *Okuoimose* was potentially relevant to whether the Claimant had in fact failed to satisfy the contractual requirement to provide evidence of eligibility to work. For the indirect discrimination claim, *Okuoimose* was relevant to the objective justification and should have been taken into account when determining the legitimate aim and the proportionality of the steps taken. Significantly, proportionality could only be determined by considering the available guidance on what steps were required to comply with the law. Notably, in this case the guidance set out in *Okuoimose* was plainly relevant and had been raised by the Claimant as early as March 2015.

A further important factor which was not considered at tribunal was that the Home Office guidance had a specific section headed 'Additional Information' that was relevant to employees who had a right to work under the Directive/EEA Regulations which expressly stated that such persons did not have to register with the Home Office or obtain documentation issued by the Home Office. In these circumstances (where an employee has a right to work, but the Home Office has no information for them) it is easy to see why an ECS check might provide inaccurate results. The EAT therefore found that the tribunal has also erred in its failure to consider this guidance when deciding on each of the above claims.

Comment

This case highlights the difficult balance between ensuring compliance with immigration legislation and employment law.

From the employer's perspective, employing someone who does not have the right to work can have very serious consequences including civil penalties of up to £20,000 per employee. However, incorrectly interpreting the immigration legislation can lead to the unjustifiable termination or refusal of employment and can give rise to the risk of liability, as in this case.

To ensure that employers get this right they need a clear understanding of how the legislation works. The Employers Guide to Right to Work Checks is a helpful starting point, however the rules vary depending on the status of the relevant worker, so employers should ensure that the guidance is understood in full. The Home Office also has an online Employer Checking Service tool, which can be used to determine whether or not an ECS check is appropriate, along with helpful Codes of Practice, including one on how to avoid unlawful discrimination while preventing illegal work. If in doubt as to the correct approach employers should nonetheless contact the Home Office for clarification.

Bayo Randle appeared for the Appellant, Mr Badara

Bayo Randle practises in all areas of employment law and frequently appears in the employment tribunals and civil courts. Bayo has considerable experience acting in discrimination, whistleblowing, unfair and wrongful dismissal, TUPE and pay claims. He advises and appears on behalf of claimants and respondents in Employment Tribunal hearings, as well as contractual disputes in the civil courts. Notable cases include the long running Construction Industry Vetting Information Group Litigation, which was highlighted by The Lawyer as one of the Top 20 Cases to watch in 2016. Bayo regularly writes articles and blogs on issues spanning the full spectrum of employment law.

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