

THOMAS · MORE · CHAMBERS

**PREVENTING ILLEGAL
WORKING: EMPLOYERS'
OBLIGATIONS AND LIABILITIES**

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6.30pm to 7.30pm

**EMPLOYMENT AND IMMIGRATION LAW
GROUPS**



7 Lincoln's Inn Fields London WC2A 3BP

T 020 7404 7000 F 020 7381 4606

DX 90 Chancery Lane E

clerks@thomasmore.co.uk

PREVENTING ILLEGAL WORKING: EMPLOYERS' OBLIGATIONS

THE BACKGROUND

The Government has been concerned for a number of years about increases in the number of people detected by the Immigration Service working here illegally.

In 1996 the Government took steps to deal with the problem of illegal working. In order to encourage employers to consider an applicant's eligibility to work in the UK and to discourage illegal working a new criminal offence was created in the Asylum and Immigration Act 1996.

THE OFFENCE

By virtue of section 8 of the Asylum and Immigration Act 1996 it is a criminal offence for employers to employ a person aged 16 or over who is subject to immigration control unless:

- that person has been given valid and subsisting leave to be in the UK by the Government, and that leave does not restrict them from taking the job in question; or
- the person comes into a category where employment is also allowed.

The maximum penalty which a Court can impose on an employer is currently £5,000 for each person found to have been employed illegally. However, the Government is currently considering whether to substantially increase the maximum fine which employers may face if convicted under section 8.

The offence relates to employees who started work on or after the 27th January 1997. It is not retrospective, and it is not therefore an offence to continue to employ someone ineligible to work who had been employed prior to the 27th January 1997

WHO IS NOT SUBJECT TO IMMIGRATION CONTROL?

The main groups of people who are not subject to immigration control, and who can therefore be employed without restriction are:

- British citizens;
- Commonwealth citizens with a right to abode;
- Nationals from the EEA countries and Switzerland;
- Family members of nationals from EEA countries and Switzerland, providing the EEA national is lawfully residing in the UK.

However, an employer should not employ any individual solely on the basis of his claim to belong to one of these groups. If the individual's claim is false the employer will have employed him illegally.

THE STATUTORY DEFENCE

The offence is one of strict liability. It is not necessary for the prosecution to prove that an employer knew that his employee was ineligible to work. However, there is a statutory defence available to employers.

In order to establish the statutory defence an employer must prove that, before an employee commenced work, he saw and retained or copied certain specified documents.

In 2004 the Government decided to change the type of documents that employers must see and retain or copy in order to establish the statutory defence. The changes relate to employees who started work on or after the 1st May 2004. The changes are not retrospective and it is not therefore necessary to ask existing employees for further documents.

HOW TO ESTABLISH THE STATUTORY DEFENCE

In order to establish the statutory defence an employer must follow the 3 steps set out below for every new potential employee. The steps must be completed before employment commences.

Step 1

All potential employees should be asked to provide:

- One of the original documents included in List 1; or
- Two of the original documents in the combinations given in List 2.

Step 2

The employer must satisfy himself that the potential employee is the rightful holder of any of the documents he presents. Further, that the documents allow the potential employee to do the type of work being offered.

Step 3

The employer must make a clear photocopy or a scan (using only the Write Once Read Many/WORM software package) of the following parts of all the documents presented:

- The front cover and all of the pages which give the potential employee's personal details. In particular, the page with the photograph and the page which shows his signature; and
- Any appropriate page containing a United Kingdom Government stamp or endorsement that permits the potential employee to do the type of work offered.

Scanned images must be stored using WORM technology. If others forms of storage technology are used the employer will not be able to establish the statutory defence.

It is not appropriate to retain a potential employee's original documents, except for the purpose of copying them.

The copies should be retained by the employer for the period of the individuals' employment and for at least 3 years after he has left.

GUIDANCE – STEP 1

An employer should ask a potential employee to provide either one of the documents in List 1 or two of the documents in the combinations specified in List 2. An employer should only accept original documents.

List 1

- A UK passport describing the holder as a British citizen or as a citizen of the UK and Colonies having the right to abode in the UK.
- A passport containing a certificate of entitlement issued by or on behalf of the Government of the UK, certifying that the holder has the right to abode in the UK.
- A passport or national ID card, issued by a State which is party to the European Economic Area Agreement or any other agreement forming part of the Communities Treaties which confers rights of entry to or residence in the UK, which describes the holder as a national of a State which is a party to that Agreement.
- A UK residence permit issued to a national of a State which is a party to the European Economic Area Agreement or any other agreement forming part of the Communities Treaties which confers rights of entry to or residence in the UK.
- A passport or other travel document or a residence documents issued by the Home Office which is endorsed to show that the holder has a current right of residence in the UK as the family member of a named national of a State which is a party to the European Economic Area Agreement or any other agreement forming part of the Communities Treaties which confers rights of entry to or residence in the UK, and who is resident in the UK.
- A passport or other travel document endorsed to show that the holder is exempt from immigration control, has indefinite leave to enter, or remain in, the UK or has no time limit on his stay.

- A passport or other travel document endorsed to show that the holder has current leave to enter, or remain, in the UK and is permitted to take the employment in question, provided that it does not require the issue of a work permit.
- A Registration Card which indicated that the holder is entitled to take employment in the UK.

List 2

List 2 covers combinations of documents. An employer must see and copy or scan both documents in the combination list. It is not sufficient to see and copy or scan one document from one combination and one from another.

First Combination

- A document issued by a previous employer, Inland Revenue, the Department for Work and Pensions' Jobcentre Plus, the Employment Service, the Training and Employment Agency (Northern Ireland) or the Northern Ireland Social Security Agency, which contains the permanent National Insurance number of the person named in the document;

And one of the following documents:

- A birth certificate issued in the UK, the Channel Islands, the Isle of Man or Ireland which specifies the names of the holder's parents; or
- A birth certificate issued in the Channel Islands, the Isle of Man or Ireland; or
- A certificate of registration or naturalisation as a British citizen; or
- A letter issued by the Home Office, to the holder, which indicates that the person named in it has been granted indefinite leave to enter or remain in the UK; or
- An immigration status document issued by the Home Office, to the holder, endorsed with a UK residence, which indicates that the holder has been granted indefinite leave to enter or remain in the UK; or

- A letter issued by the Home Office, to the holder, which indicates that the person named in it has subsisting leave to enter or remain in the UK, and is entitled to take the employment in question in the UK; or
- An immigration status document issued by the Home Office, to the holder, endorsed with a UK Residence Permit, which indicates that the holder has been granted limited leave to enter or remain in the United Kingdom and is entitled to take the employment in question in the United Kingdom.

Second Combination

- A work permit or other approval to take employment issued by Work Permits UK;

And either:

- A passport or other travel document endorsed to show that the holder has current leave to enter, or remain in the UK and is permitted to take the work permit employment in question; or
- A letter issued by the Home Office to the holder, confirming the same.

GUIDANCE – STEP 2

The employer must satisfy himself that the potential employee is the rightful holder of any of the documents that he presents. Further, that the documents allow the potential employee to do the type of work being offered.

The employer must carry out the following steps when checking any documents presented by a potential employee:

- Check any photographs, where available, to ensure that he is satisfied they are consistent with the appearance of the potential employee; and

- Check the date of birth listed so that he is satisfied it is consistent with the appearance of the potential employee; and
- Check that the expiry dates are valid; and
- Check any United Kingdom Government stamps or endorsements to see if the potential employee is able to do the type of work that is being offered; and
- If the potential employee provides two documents from List 2 that have different names, a further document should be requested to explain the reason for this. The further document could be a marriage certificate, divorce document, deed poll, adoption certificate or statutory declaration.

GUIDANCE – STEP 3

The employer must make a photocopy or a scan (using only the Write Once Read Many/WORM software package) of the following parts of all documents presented.

- the front cover and all of the pages which give your potential employee's personal details. In particular, you should copy the page with the photograph and the page which shows his or her signature; and
- any appropriate page containing a United Kingdom Government stamp or endorsement that permits your potential employee to do the type of work you are offering.

Some of the documents may contain personal information and that information must remain confidential. Any copies of personal documents should be made specifically for the purpose of establishing a statutory defence under section 8.

UK passports are subject to Crown copyright protection and copies of UK passports can only be made in certain circumstances, which includes for the purposes of establishing a statutory defence under section 8. This allows an employer to keep the copy, but prohibits the passing of the copy to third parties.

An employer can not rely on the statutory defence when he knows that a person working for him is not permitted to work. This targets a minority of employers who deliberately employ illegal workers and use forged documents to obtain a false defence.

WHAT IF A POTENTIAL EMPLOYEE CAN NOT SATISFY THE STATUTORY DEFENCE REQUIREMENTS

The onus is on the potential employee to demonstrate that he is permitted to do the job that the employer is offering.

If an employer needs to fill a post urgently he can withdraw an offer of employment made to a potential employee who is unable to provide satisfactory documentation.

If an employer does not need to fill a post urgently and the potential employee does not produce satisfactory documentation then the employer can leave the post open for a period of time to allow for the documentation to be provided.

If an employer carried out the checks and established that a potential employee was not permitted to work, then he is entitled to refuse employment to that person.

AVOIDING DISCRIMINATION

Under the Race Relations Act 1976 it is unlawful for an employer to discriminate on grounds of race, colour, ethnic or national origin or nationality.

The population of the UK contains a range of ethnic groups; an individual's race, ethnicity or religion is no indication of their right to work here.

An employer can ensure that he does not discriminate by treating all applicants for a job in the same way at each stage of the recruitment process. Documentation can be requested at any stage – but if one applicant is asked for documentation then all applicant's being considered at that stage should be asked for documentation.

CONTINUING OBLIGATIONS?

Providing an employer is satisfied that a potential employ is entitled to take the job being offered, no further checks need to made during the course of that persons employment.

EMPLOYING EEA/EU WORKERS

The Countries that are members of the EEA are as follows:

Austria	<i>Hungary</i>	Norway
Belgium	Iceland	<i>Poland</i>
Cyprus	Ireland	Portugal
<i>Czech Republic</i>	Italy	<i>Slovakia</i>
Denmark	<i>Latvia</i>	<i>Slovenia</i>
<i>Estonia</i>	Liechtenstein	Spain
Finland	<i>Lithuania</i>	Sweden
France	Luxembourg	UK
Germany	Malta	
Greece	Netherlands	

Nationals from all EEA countries are entitled to come to the UK and seek work here.

Since the 1st June 2002, Swiss nationals have had the same rights to come to the UK and seek work here as EEA nationals.

Those countries whose names appear in italic type are often referred to as the, 'Accession States' or 'A8 countries'. Workers from these countries are required to register with the Home Office under the Worker Registration Scheme (WRS) if they start work after the 1st May 2004 unless they are exempt from the requirements to do so.

Registration under the WRS

Applications for registration are the responsibility of the individual employee. The employer should however ensure that the employee is provided with a letter on company paper confirming the date on which he began working. The letter will have to be submitted with the application form.

The employer should:

- Take and retain a copy of the employee's completed WRS application form as evidence that he has applied for registration within one month of starting work.
- Receive and retain a copy of a valid registration certificate.

A8 national exempt from registering under the WRS

The following groups of people are exempt from registering under WRS:

- A8 nationals here on a self-employed basis (for the purposes of the WRS an employer will employ an A8 worker if the employer directly pays his wages); and
- A8 nationals who have been working legally in the UK for 12 months or more in the job they held on 1 May 2004;
- A8 nationals who have been working legally in the UK and have stayed in the same job after 1 May 2004;
- A8 nationals who provide services in the UK on behalf of an employer who is not established in the UK.

An employer should ask all potential employees to provide documentary evidence of their exemption from registration under the WRS.

An employer must see and copy or scan the documents produced. These documents will establish the statutory defence under section 8 and a defence to the offence created by The Accession (Immigration and Worker) Regulations 2004.

An employer should ask a potential employee to provide one of the following documents:

- A UK residence permit issued by the Home Office confirming the holder is an EEA or Swiss national; or

- A national passport or travel document containing an endorsement which states that the holder is also a dual national of the UK, Switzerland or one of the EEA countries; or
- A national passport or travel document containing a valid endorsement which states that the holder is a family member of an EEA or Swiss national; or
- A national passport or travel document containing a valid endorsement which shows that the holder has indefinite or exceptional leave to enter or remain in the UK, or has been granted limited leave to enter or remain with no immigration restrictions on employment.

A8 nationals who are not exempt but fail to register under the WRS

By virtue of the Accession (Immigration and Worker) Regulations 2004 it is a criminal offence for an employer to continue to employ an unregistered A8 worker after 1 month, if he has not obtained a photocopy or scan of the employee's application for registration under the WRS, and the employee does not receive a certificate of registration.

Further, it is a criminal offence for an employer to continue to employ an individual after receiving notification from the Home Office that the employee's application under the WRS has been refused.

It is strongly advisable for an employer to ask all A8 workers for a photocopy or scan of both their application under the WRS and their certificate of registration.

If you do not receive a copy of the worker's registration certificate within one month of employing them, you can contact the Worker Registration Team.

THE FUTURE

In 2008, new measures to help tackle illegal migrant working will come into force. These measures, contained in the Immigration, Asylum and Nationality Act 2006 ('the 2006 Act'), include:

- a system of civil financial penalties for employers who, through negligence, employ illegal migrant workers;
- a new criminal offence for employers who knowingly use illegal migrant labour, carrying a maximum two year prison sentence and/or an unlimited fine; and,
- a continuing responsibility for employers of migrant workers with limited leave to enter or remain in the UK to check their ongoing entitlement to work in the UK.

Under the new measures, employers will be able to obtain a statutory excuse from payment of a civil penalty in a similar way by checking their employees' documents. In addition, employers will be required to undertake repeat document checks for those employees who have limited leave to enter or remain in the UK.

VICTORIA K. QUINN
THOMAS MORE CHAMBERS

Asylum and Immigration Act 1996

1996 CHAPTER 49

ARRANGEMENT OF SECTIONS

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5. SCHEDULES:

1. [Schedule 1](#)

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[Social Security \(Persons From Abroad\) Miscellaneous Amendments Regulations 1996 1996.](#)

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Social Security (Persons From Abroad) (Miscellaneous Amendments) Regulations (Northern Ireland) 1996.

2. Schedule 2

Amendments of the 1971 Act and the Immigration Act 1988.

3. Schedule 3

Amendments of the 1993 Act.

4. Schedule 4

Repeals.

An Act to amend and supplement the Immigration Act 1971 and the Asylum and Immigration Appeals Act 1993; to make further provision with respect to persons subject to immigration control and the employment of such persons; and for connected purposes.

[24th July 1996]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

.....

Persons subject to immigration control

8 Restrictions on employment

(1) Subject to subsection (2) below, if any person ("the employer") employs a person subject to immigration control ("the employee") who has attained the age of 16, the employer shall be guilty of an offence if—

- (a) the employee has not been granted leave to enter or remain in the United Kingdom; or
- (b) the employee's leave is not valid and subsisting, or is subject to a condition precluding him from taking up the employment, and (in either case) the employee does not satisfy such conditions as may be specified in an order made by the Secretary of State.

(2) Subject to subsection (3) below, in proceedings under this section, it shall be a defence to prove that—

- (a) before the employment began, there was produced to the employer a document which appeared to him to relate to the employee and to be of a description specified in an order made by the Secretary of State; and
- (b) either the document was retained by the employer, or a copy or other record of it was made by the employer in a manner specified in the order in relation to documents of that description.

(3) The defence afforded by subsection (2) above shall not be available in any case where the employer knew that his employment of the employee would constitute an offence under this section.

(4) A person guilty of an offence under this section shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(5) Where an offence under this section committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—

(a) any director, manager, secretary or other similar officer of the body corporate; or

(b) any person who was purporting to act in any such capacity,

he as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(6) Where the affairs of a body corporate are managed by its members, subsection (5) above shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

(7) An order under this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(8) In this section—

- “contract of employment” means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether it is oral or in writing;
- “employ” means employ under a contract of employment and “employment” shall be construed accordingly.

ILLEGAL WORKING – EFFECT ON CONTRACTUAL AND STATUTORY EMPLOYMENT RIGHTS

THE BACKGROUND

Employees whose contracts are illegal may be prevented from asserting their contractual and statutory employment rights. The contract of service may be tainted with illegality in the same way as any other contract. However, illegality as a general doctrine may not only taint the contract, it may also undermine the whole of the employment protection rights afforded to the employee.

CLAIMS UNDER THE CONTRACT OF EMPLOYMENT

To gain the rights given by the Employment Rights Act 1996 the employee must show he is an employee as defined in the Act. Usually that means he must show that he is employed under a contract of employment. But if the contract is illegal and void, can he plead the contract?

In this context, ordinary principles of contractual legality or illegality fall to be considered. Moreover, to apply such principles to debar a claim has been held not to offend art 6 of the Convention on Human Rights (right to fair trial) because it constitutes the application of substantive law, not a procedural bar: **Soteriou v Ultrachem Limited** [2004] IRLR 890, QBD.

Contracts may be held illegal and void at common law as being contrary to public policy on a variety of grounds. The rule is that if the illegality is apparent on the face of the contract, or the contract is such that it cannot be performed without illegality on the part of either or both parties, then the contract is illegal and void *ab initio*, and, most importantly, the fact that either or both of the parties are innocent of any fraudulent intent or design is quite immaterial; for ignorance of the law is no excuse: **Miller v Karlinski** [1945] 62 TLR 85, CA and **Corby v Morrison (t/a The Card Shop)** [1980] IRLR 218.

So it is that in claims founded on the contract of employment e.g. unfair dismissal, an employee who has actively participated in the illegal performance of an otherwise lawful contract is barred from bringing a claim. As such illegal workers cannot usually bring claims under the contract of employment.

A court or tribunal will not enforce a claim where the employment is pursuant to an illegal contract, or if there was an intention at the time of the formation of the contract to perform it illegally, or if the complainant has to rely on his illegal conduct in order to found his claim: **Colen v Cebrian (UK) Limited** [2004] ICR 568.

CLAIMS OF DISCRIMINATION

It has been held consistently that discrimination law rights operate differently. This is because such claims do not arise from obligations based on the contract of employment and so the normal rules on contractual illegality are not determinative. Such claims arise from a statutory tort and a broader public policy approach is to be taken. Accordingly, even if an employee has participated in wrongdoing, it does not follow that his claim will be barred.

In discrimination claims the correct approach, according to the Court of Appeal in **Hall v Woolston Hall Leisure Limited** [2000] IRLR 579, CA, is, '*to consider whether the applicant's claim arises out of or is so clearly connected or inextricably bound up or linked with the illegal conduct of the applicant that the court could not permit the applicant to recover compensation without appearing to condone that conduct*' (the 'Woolston Hall formula').

In *Hall* the Court of Appeal held that an employee was entitled to bring a claim against her employer for sex discrimination despite the fact that she knew that her employer had been defrauding the Inland Revenue.

How has the Woolston Hall formula been applied in the case of an illegal worker? The Court of Appeal considered the point in **Vakante v Governing Body of Addey and Stanhope School (No. 2)** [2004] ICR 231.

Vakante, a Croatian national, sought asylum in the United Kingdom. In November 1999 he applied for a post as a trainee teacher at the Addey and Stanhope School, stating that his asylum claim was pending but falsely indicating that he did not need a work permit. The school took no steps to verify this and Vakante started work in 1999. At no point did he apply for permission to work. He was dismissed in July 2000 and complained to an employment tribunal that the school had discriminated against him on racial grounds by dismissing him and by treating him less favourably than others while he was in employment. The tribunal held, applying the Woolston Hall formula, that his lack of permission to work should not bar his claims. The School appealed, arguing that the tribunal had misunderstood the Woolston Hall formula. The EAT ordered Vakante to provide written particulars of his allegation and remitted the matter back to the tribunal.

The complaints detailed by Vakante in the further particulars included lack of training and support; insulting references to his professional background and country of origin; humiliation in front of pupils and other staff; less favourable terms of engagement; failure to investigate his complaints of discrimination and the dismissal itself.

The tribunal found that although his complaints were based on discrimination rather than contract, they were so closely connected with the deliberate illegality of that contract on his part that the tribunal would appear to be endorsing his illegal actions if it allowed the originating application to go forward to a hearing. Vakante brought a second appeal to the EAT.

Applying the Woolston Hall formula, the EAT held that the tribunal had been entitled to find that the illegality 'infected the entirety of the contract and indeed created an employment relationship which could not otherwise have been created, which was not entitled to exist at all...and which could and would and should have been terminated during every day that it operated.' Vakante appealed to the Court of Appeal.

Applying the Woolston Hall formula the Court held that Vakante was solely responsible for his illegal (criminal) conduct in working for the school and creating an unlawful situation on which he had to rely in order to establish that there was a duty not to discriminate against him. His complaints of

discriminatory treatment were so inextricably bound up with his illegal conduct in obtaining and continuing employment with the school that, if the tribunal were to permit him to recover compensation, it would appear to condone his illegal conduct. Accordingly, the tribunal's decision was upheld and the appeal was dismissed.

The burden of proof is on the party alleging illegality: ***Colen v Cebrian (UK) Limited*** [2004] ICR 568.

LEGAL WORKERS THAT BECOME ILLEGAL WORKERS

What of circumstances where a legal worker lawfully employed becomes an illegal worker, by reason, for example, of a work permit expiring? This has recently been considered by the EAT in the case of ***Aroma (Northampton) Limited v Ang*** UKEAT/0048/07.

Ang was employed by Aroma at one of their restaurants in Northampton as a waitress. Both the individuals running the business and Ang came from Malaysia and their first language was Cantonese. She was working under a permit which expired on 1 May 2006. In fact she had expected to end her employment on 22 April 2006 and then return to Malaysia. She was dismissed by Aroma, who conceded that the dismissal was unfair contrary to both sections 98 and 98A of the Employment Rights Act 1996. Accordingly the only question was remedy.

The tribunal concluded, *inter alia*, that it should make an award in respect of lost wages until 6 May 2006. They did this on the basis that one of the directors of Aroma conceded that it was reasonable for Ang to stay in the United Kingdom until the conclusion of the grievance procedure, which was 2 May 2006. The tribunal then added a few days which would have been necessary to allow Ang to make arrangements for her return to Malaysia and concluded that she should be paid until 6 May 2006.

The short point on appeal was that she could not lawfully be employed after 1 May 2006 because that was when her work permit ceased and it was therefore inappropriate to compensate her for any period thereafter. It is in fact a criminal offence for a person to work beyond the time specified in the work permit and for an employer at least knowingly to permit her to do so.

The EAT held that without a valid work permit Ang could not lawfully work after 1 May 2006. The fact that there was a concession as to how long it might have been reasonable for her to remain in the United Kingdom was not material. The question is what she has lost as a result of her dismissal; she could not be said to have lost any salary after 1 May 2006 as a consequence of her dismissal since she could not lawfully work beyond that date.

What would be the situation if the work permit was conditional upon employment with a specified employer and that employer unfairly dismissed the employee, thereby placing that employee in a situation where they could not lawfully work for another employer in the United Kingdom? Arguably the normal approach to remedy would apply on the basis that the right to work was lost as a consequence of the dismissal and but for that dismissal the employee would have continued to work for that specified employer. However, what effect might this have on the duty to mitigate?

SIMON LIVINGSTONE
THOMAS MORE CHAMBERS