Truth, proof and the right to work

With recent decisions showing that employers, tribunals and even the Home Office are confused about right-to-work checks, Samar Shams sheds light on this tricky area

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Right-to-work checks and dismissal have always posed a challenge to employers. Recent inconsistent Employment Appeal Tribunal (EAT) judgments have exacerbated the difficulties.

What is an employer to do? In this article, I go back to basics, then extract the most important lessons from the muddled judgments.

Not someone else's problem

Prevention of illegal working requirements and the consequences of non-compliance apply to all UK employers.

A perception exists that illegal working is only a problem among low-skilled workers, or migrants who entered the UK in a clandestine way. Illegal working also frequently occurs in the corporate world. Most commonly, a skilled migrant sponsored to do one job is promoted into a different role; this constitutes illegal working if the sponsoring employer does not report the change to the Home Office. For example, a migrant sponsored for a finance director role might be working illegally after they are promoted to a chief executive role.

Many UK employers are complacent about illegal working if they do not operate in an industry targeted by the Home Office, such as the ethnic restaurant industry. It is true that the Home Office considers some businesses to be higher risk than others, perpetuating the disproportionate penalisation of employers in those industries. In the last quarter of 2017, a Punjabi restaurant in London, Tayyabs, was issued one of the highest fines for illegal working at £100,000.

However, the Home Office's targeting does not mean that there is no enforcement against businesses in other industries. Among the employers fined for illegal working in the first quarter of 2018 were University College London and a business development consultancy.

Know the consequences

The Home Office names and shames employers liable for fines on a quarterly basis, publishing a list that includes trading names and addresses, as well as the amount for which each employer was liable. In today's world where branding is paramount, the negative publicity is often more significant than the fine of up to £20,000 per illegal worker.

Many managers, directors and HR officers seem not to realise that criminal liability for employing an illegal worker extends to them personally if they are responsible for an aspect of the relevant employment. The relevant wording in the Immigration and Nationality Act 2006 is less clear than it used to be on this point, after changes made in 2016 extended liability to the body corporate, but there is no reason to believe that individuals were meant to be excused.

Directors, managers, secretaries or partners of an offending company who consent to or connive in the illegal working may be individually liable. If convicted, they could be disqualified from holding director status, and face five years in jail and an unlimited fine.

The Home Office has been exercising its powers under the Immigration Act 2016 to close, for up to one year, the premises of businesses engaging in illegal working. For most businesses, the effect would be terminal.

A business can also lose its licence to sponsor workers. In the example of the chief executive above, if their employer were to lose its sponsor licence, not only would they have to find another sponsor or leave the UK, all the other sponsored migrants working in the business would have to do so as well. Further, the illegal workers may be criminally liable. They can be jailed for six months and their wages can be seized as proceeds of crime.

Lack of control

Employers should definitely check right-to-work documents. However, it is important to understand the significance and limitations of performing document checks. The essential point to grasp is that someone can have the right to live and work in the UK without having documentation to prove it. In other words, the truth of a person's immigration status does not depend on the proof of it.

Judges and employers alike often ignore the question of a person's immigration status and focus instead on their failure to produce documentation. The risks outlined above and the complexity of legislation, case law and guidance send many employers into a panic where dismissal seems the only option. However, employers only risk jail time and fines if they employ someone who does not have the immigration status required for the employment. Further, if an employer dismisses someone who does have the right to work in the UK, it may expose itself to a legitimate claim of unfair dismissal.

Immigration status that is inadequate for employment has two components:

- the person must be 'subject to immigration control', meaning that under the Immigration Act 1971 they require leave to enter or remain in the UK; and

- they either do not have valid leave (for example, they have stayed beyond expiry of their visa), or they are not authorised to do the work in question (as in the example of the chief executive role).

Close examination of inadequate immigration status gives a steer to employers who are navigating the requirements on prevention of illegal working. Foremost is the question of being 'subject to immigration control'. The two most prominent recent EAT cases on prevention of illegal working involve employees who are not subject to immigration control: one has the right of abode and the other seems to have a right to reside as the spouse of an European Economic Area (EEA) national who is exercising European Treaty rights in the UK.

In *Baker v Abellio* [2017], the employee in question, Mr Baker, is a Jamaican national who has lived in the UK since childhood. British citizens and certain Commonwealth citizens, including Windrush-generation individuals, have the right of abode in the UK under the Immigration Act 1971 and so are not subject to immigration control. Mr Baker is one such Commonwealth citizen and seems to be a Windrush-generation individual.

In *Afzal v East London Pizza Ltd* [2018], the facts summarised in the judgment indicate that the employee, Mr Afzal, has a right to reside in the UK under EU law and related domestic regulation. The right to reside encompasses rights to enter and remain in the UK. Under the Immigration Act 1988, a person does not require leave to enter or remain in the UK if they have those rights by virtue of EU law and related domestic regulation. Therefore, Mr Afzal is not subject to immigration control.

As neither Mr Baker nor Mr Afzal is subject to immigration control in the UK, they fall outside the definition of inadequate immigration status for employment. There is no possibility of either of them working illegally.

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Neither Mr Baker nor Mr Afzal is required to hold immigration-status documentation. In both cases, the employer requested documentation of the right to work in the UK, the employee did not provide documentation to the employer's satisfaction and the employer dismissed them. Ultimately, in both cases, the judge found fault with the employer.

No more excuses

Most UK employers are aware that they should check potential employees' right-to-work documents and also know that they should do so before the person starts work. However, employers do not necessarily realise that checking documentation of right to work is not a positive obligation or statutory requirement. Checking documents according to the Home Office Code of Practice on Preventing Illegal Working merely serves to establish a statutory excuse from the fine of up to £20,000.

The employer in *Baker* fell down when it dismissed Mr Baker because it could not perform right-to-work checks as required when he did not provide documentation. The employer in that case relied on s98(2)(d) of the Employment Rights Act 1996 ('contravention of a duty or restriction imposed by or under an enactment') as the basis for fair dismissal. The problem is that there is no positive obligation or statutory requirement. Checking documents just excuses employers from fines. Therefore, the employer in *Baker* was found not to have dismissed fairly.

Reference point

For more on the facts of *Afzal* and *Baker*, see the 'Employment update' by Rosie Kynman in *ELJ*193, p2 and 'Windrush and the right to work' by Jarmila Entezari and Sejal Raja, *ELJ*190, p10.

It is important to note that employers holding sponsor licences are required to check the right-to-work documents of sponsored workers. Whether the requirement comprises a duty imposed under an enactment is debatable.

Grounds for dismissal

The lesson for employers is to rely on other grounds for fair dismissal.

The conditions of a migrant's leave, for example the right to work, are extended while the Home Office considers a timely application for further leave.

Ideally, the employer will have included wording in the contract of employment requiring the employee to provide right-to-work documentation. If it has, the employer can rely on contractual grounds to dismiss fairly. If it has not, the employer would still do better to rely on the employee's failure to comply with a reasonable instruction and dismiss on the basis of conduct.

Look again

Another important element of prevention of illegal working that employers do not seem to understand properly is the rechecking process for workers who demonstrate a temporary right to work. Where an individual presents documentation showing a temporary right to work in the UK, an employer can only maintain the statutory excuse for that individual if it rechecks their documents before their leave expires.

The conditions of a migrant's leave, for example the right to work, are extended while the Home Office considers a timely application for further leave. An employer can ask the Home Office to verify an individual's right to work in the UK if the migrant has submitted their documents to the Home Office to support an application for further leave. If the individual is an existing employee for whom a statutory excuse has been established, the employer benefits from a 28-day grace period, running from the date when the leave expires. In other words, the statutory excuse is maintained for those 28 days to enable the employer to obtain the requisite verification of the right to work from the Home Office.

In *Afzal*, the employer was not able to obtain the requisite verification of Mr Afzal's right to work because he failed to provide documents showing he had applied for further leave before his current leave expired. Mr Afzal was apparently 'a competent, capable and well-regarded employee', who rose to management level. If Mr Afzal's right to work in the UK did depend on his having applied for further leave, rather than on his rights under EU law, his employer could simply have asked the Home Office about his status. It did not need to wait for Mr Afzal to provide the documents before requesting verification from the Home Office.

In response to the Windrush scandal, in June 2018 the Home Office added to the list of situations where an employer can obtain verification of an individual's right to work in the UK. The list now includes circumstances in which a person presents information indicating they are a long-term resident who arrived in the UK before 1988. Although *Baker* predates the change, employers currently in a similar situation have the option of verification through the Home Office.

Carrying on

Employers should follow normal dismissal processes in right-to-work cases. *Afzal* correctly highlights the importance of a right to appeal any dismissal as well.

Judges seem to contradict one another when reviewing whether a mistaken belief was reasonable. The judge in *Baker* thought that the employer's mistaken belief that Mr Baker did not have the right to work was not reasonable. This was even though the employer claimed to have received advice over the phone from the Home Office that Mr Baker did not have the right to work.

On the other hand, the judge in *Afzal* was quite content with the employer's mistaken belief that the employee did not have the right to work, even though it seems to have made little effort to verify this. The judge in *Afzal* even approved of the reliance on 'some other substantial reason' for dismissal and the summary dismissal of Mr Afzal based on the employer's mistaken belief. This reasoning is weak and employers should not emulate such conduct.

If an employer takes advice from the Home Office, it should keep a contemporaneous note of the call or printout of the email exchange on file. Both judgments indicate that the Home Office itself is confused. In *Baker*, the Home Office seems to have given incorrect information over the phone and, in *Afzal*, the judge noted that the right-to-work verification service 'is not always fully informed or up to date'.

The case law primarily reflects that legislation and guidance on prevention of illegal working are too complicated. The original employment tribunal judge in *Baker* incorrectly viewed right-to-work checks as a positive obligation on employers. The judge in *Afzal* muddles Mr Afzal's immigration status when he writes that Mr Afzal:

> ... had a right to apply for a document evidencing his right to permanent residence that would continue his right to work.

If Mr Afzal acquired the right of permanent residence as the spouse of an EEA national exercising Treaty rights, he did not need documentation of this to continue his right to work. Other facts listed in the judgment about Mr Afzal's immigration history are equally mysterious.

It seems that employers, judges and civil servants are all in the same boat, navigating the confluence of immigration and employment law. Will we sink into the hostile environment that the UK has succeeded in becoming, or swim in the warm waters of close and special trade and labour relationships? ■

Afzal v East London Pizza Ltd t/a Dominos Pizza
[2018] UKEAT/0265/17/DA
Baker v Abellio London Ltd
[2017] UKEAT/0250/16/LA