Darren Newman
Twitter - @DazNewman

West Midlands employers
PEOPLE & LEADERSHIP SOLUTIONS

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Illegal Working

A recent case has highlighted a common misconception among employers about the obligation to carry out 'right to work' checks on employees.

Under the Immigration Asylum and Nationality Act 2006, it is a criminal offence to employ an illegal worker knowing or having 'reasonable cause to believe' that they are not entitled to work in the UK. A civil penalty of up to £20,000 per worker can be imposed on an employer who employs such people inadvertently. This is a daunting prospect, but the employer will be 'excused' from paying that penalty if it has taken copies of specified documents that demonstrate that the worker is entitled to work in the UK.

So with such draconian penalties at stake it is obviously a good idea to carry out thorough right to work checks and keep copies of the appropriate documents. Looking at the online guidance issued by the Home Office however, you could easily form the impression that it is actually a legal requirement to do so. And it isn't.

In *Baker v Abellio London Ltd* the employee was a Jamaican national who had lived in the UK since childhood and had the right to both live and work in the UK. However, when the employer carried out a right to work audit of its workforce he was unable to provide the required documentation. He did obtain a new Jamaican passport, but this did not contain a visa and the employer was advised by the Home Office that the passport alone was not sufficient evidence of his entitlement to work.

He had no other documentation so was left in the unfortunate position that while he was entitled to work in the UK (there was no doubt about this), he did not have the documentation to prove it. The employer dismissed him on the grounds that his current documents did not provide the employer with a 'statutory excuse' for continuing to employ him.

In the resulting unfair dismissal claim, the Tribunal held that it was not enough for an employee to have the right to work, it was also necessary to provide documentation establishing that right – otherwise the employer could not legally continue to employ him. The Tribunal held that the dismissal was fair on the basis of what is commonly referred to as the 'statutory ban' reason for dismissal set out in s.98(2)(d) of the Employment Rights Act.

The trouble with this conclusion, however, was that it was completely wrong. It totally misunderstood what the 2006 Act actually says about documentary evidence of a right to work.

The Act does not make it illegal to employ people without documentary proof of the right to work in the UK.

It makes it illegal to employ a person 'who is subject to immigration control' and who does not *in fact* have the right to work in the UK.

The Act then provides employers with a 'statutory excuse' if they have obtained specified documents from the employee showing that he or she was entitled to work. But this does not mean that an employer is legally obliged to obtain one of those documents. An employer is perfectly free to take no steps whatsoever to obtain proof of a right to work – but will then be taking the risk of a financial penalty if it turns out that someone is employed illegally. So while proper 'right to work' checks are to be highly recommended, they are not a legal requirement in their own right.

The EAT allowed Mr Baker's appeal. His dismissal did not come under the 'statutory ban' reason for dismissal. Since he was entitled to enter and leave the UK without permission, he was not subject to immigration control and not covered by the employment provisions of the 2006 Act. It was not illegal to employ him even in the absence of the documentation the employer was seeking.

That did not mean that his dismissal was unfair however. It is well established that an employer who dismisses an employee on the basis of a genuine but mistaken belief that their employment is illegal can argue that the dismissal is for 'some other substantial reason' and potentially fair. The EAT accepted in Mr Baker's case that the employer genuinely believed that the documents were required in order for his continued employment to be lawful, so an 'SOSR' reason was established.

That still left open the question of reasonableness. Mr Baker argued that even if the employer's belief was genuine, it should have realised that he was not subject to any restriction on his employment. The employer countered that they had enquired of the Home Office who had advised them that Mr Baker needed to provide documentation for his employment to be lawful. Surely, they said, it was reasonable for them to act on the basis of Home Office advice?

The EAT sent this issue back to a fresh Tribunal to decide. It wasn't apparent from the evidence whether the employer had given enough information to the Home Office to make it clear what the position was. If they had provided full information about Mr Baker – which would have made it clear that he was not subject to immigration control – then it could have been reasonable to rely on incorrect advice from the Home Office. If they had not done so, however, then the Tribunal would be likely to find that the dismissal was unfair.

The lesson to be taken from this case is that an employer should only dismiss someone for not producing 'right to work' documentation if there is some reason to believe that they are not entitled to work in the UK. Of course an employer can insist on that documentation being produced before employment is confirmed – but Mr Baker had been employed for three years when he was dismissed. Surely there is a responsibility on an employer in that situation to take proper advice on the employee's status? A call to a Home Office helpline seems an inadequate basis on which to dismiss someone.

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Twitter - @DazNewman
Blog – darrennewman.wordpress.com