

Right to work in the UK

Many employers are taking active steps to ensure that their employee 'right-to-work' records are up to date in order that they can ensure compliance with the revised Immigration Rules. In doing so, employers sometimes find that they have employees that are no longer entitled to work in the UK, or even employees that have no means of demonstrating that they were entitled to work in the UK in the first place.

The problem for an employer that discovers it is employing an employee who has no right to work in the UK is the fact that it will be committing a criminal offence in knowingly employing an illegal worker. Quite often, employers in these situations immediately dismiss the employee, without recourse to usual good practice.

However, employers should tread carefully when doing so, and at the very least make an informed choice about how they will manage the tension that exists between complying with the Immigration Rules and general employment law.

For employees with less than a year's service the risks (discrimination aside) are quite low in a dismissal that does not follow due process. However, some employers still take the view that they should as a minimum comply with the statutory dismissal procedures in any event, albeit in an abridged form.

If the employee has more than a year's service, the matter is a little more complex as in order to avoid a claim for unfair dismissal, the employer will need to establish a potentially fair reason for dismissal.

The first potentially fair reason for dismissing such an employee that could be applicable is that it is illegal to employ the employee, and as such it is a breach of a statutory restriction. The advantage for the employer with an illegality dismissal is that the statutory dismissal procedures will not apply, and the dismissal can be implemented without delay. However, it can be risky to assume that illegality applies in all cases, and it is usually best practice for illegality to be one of the reasons for dismissal, rather than the only one.

The question of illegality was recently considered in the case of *Blue Chip Trading Limited v Helbawi*. In this case Mr Helbawi was permitted to work under a student working visa, but in fact worked in excess of his permitted working time. Mr Helbawi brought a claim that he had been paid less than the national minimum wage, and his employer sought to argue that by working in excess of his permitted working time, the employment contract was illegal and as a result there was no liability. The Employment Appeal Tribunal held that notwithstanding the flagrant and deliberate breach by Mr Helbawi of his permitted working time, he was still entitled to bring a claim for those hours that he was permitted to work.

The second potentially fair reason for dismissal could be misconduct. This reason can be made out if the employee has provided fraudulent documents, has lied in the process when his or her right to work was being considered, or has otherwise sought to mislead the employer. Many employers preempt such a situation by making it clear in their documentation that they require evidence of an employee's right to work in the UK and that if the employee deliberately misleads the employer, then a gross misconduct dismissal would follow.

The third potentially fair reason for dismissal could be some other substantial reason. This would be a reason of last resort, and could be open to the employer where it had a 'reasonable belief' that the employee in question was not entitled to work in the UK. The fact that the employer's belief turns out to be incorrect will not necessarily make the dismissal unfair, provided that the belief is genuine in the first place.

When dismissing an employee that is not entitled to work in the UK, employers could where appropriate consider using all three of the above reasons, and taking each as being a standalone reason for the termination of employment.

Finally, employers should ensure that if they are going to pay notice (and perhaps not dismiss summarily for gross misconduct), then they should ensure that a payment in lieu of notice is made. The employee should certainly not be permitted to work a period of notice.

For further details on this topic, or any employment law issue that you may be facing, please contact Mark Minns.

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