Discrimination Law Association

Prevention of Illegal Working

Consultation on the Implementation of New Powers to Prevent Illegal Migrant Working in the UK

Response by the Discrimination Law Association

The Discrimination Law Association was not amongst the organisations formally invited to this consultation. However, as the equality impact assessment shows that implementation of the new powers described in the consultation document may result in unlawful racial discrimination, we hope that the Borders and Immigration Agency will consider our views as set out below.

The Discrimination Law Association ('DLA') is a national organisation that seeks to secure improvements in discrimination law and practice in the UK, Europe and at an international level. It achieves this by, among other things, the promotion and dissemination of advice and information; arranging seminars and conferences, making representations to government and bodies concerned with legal practice and the administration of justice, and the development and co-ordination of contacts with discrimination law practitioners and similar people and organisations in the UK and internationally. The DLA is concerned with achieving an understanding of the needs of victims of discrimination amongst lawyers, law makers and others, and of the necessity for a complainant-centred approach to anti-discrimination law and practice. The DLA has a wide and diverse membership. Our more than 350 members include practising lawyers, law firms, academic lawyers, legal or advice workers or other substantially engaged or interested in discrimination law. The membership comprises, in the main, persons concerned with discrimination law from a complainant perspective.

Our main focus in responding to the questions in Annex A has been on the ways in which:

- The new procedures that employers will be expected to adopt, and
- The civil penalty regime

may result in unlawful discrimination.

We have not developed recommendations for alternative ways to deal with the government's concerns regarding the significant number of migrant workers working illegally. In this regard the DLA endorses the response to this consultation by the

TUC. The TUC highlights the problems and undesirable consequences likely to occur under the proposed penalty scheme. Referring to experience in the US and in other EU member states, the TUC recommends that the market for undocumented workers can be dealt with most effectively by protecting the employment rights of migrant workers. Without the "bargain" of exploitation, there will remain little incentive to employ people to work illegally. The DLA supports the TUC position in this regard.

The DLA is concerned regarding the proportionality of scale of the problem weighed against the increased risk of unlawful discrimination and the additional unwanted burden on employers. Is there evidence to support the need for the new penalties procedure? Are there data to show that the greater problem in terms of migrants working illegally occurs where employees immigration status changes during the course of their employment; or, as seems more likely, is the problem greater where employers are prepared to recruit and employ migrant workers for as long as suits them without checking - or being deliberately blind to - whether they can legally do the jobs in question? If it is the latter, then the DLA is not clear what difference the new repeat checking duty will make.

We have set out below our responses to those questions in Annex A which raise issues relevant to the knowledge and experience of the DLA and our members.

1. Will the measures outlined in this consultation document lead to significant additional economic costs to recruitment practices?

Yes

Even those employers with personnel/HR staff already trained to carry out the document checks required by s.8 of the Asylum and Immigration Act 1996 ("the 1996 Act) will have additional economic costs to carry out the steps required to avoid civil or criminal sanctions under the Immigration, Asylum and Nationality Act 2006 ("the 2006 Act"). The one-off checks required under the 1996 Act are to be replaced by a continuous programme of checking for some, but not all, new employees subject to immigration control, and the initial checking procedure will be more complex since employers will need to identify those employees who will need to be re-checked. There will be training costs for personnel/HR staff to be able to carry out the new checking requirements. The checking of documents will take more time and there will be the need to establish some system for the repeat checking of those employees whose documents included one in List 2. Where employees may be working at different locations across the UK the employer's system for timely re-checking would need to be able to track each relevant employee and where at the relevant time they are working.

The majority of employers who employ migrant workers, are small businesses without specialist personnel/HR staff, for whom the economic costs of compliance are likely to be significantly greater. The additional economic costs will include increased time of managers or other staff with responsibility for recruitment. For many small businesses, recruitment is often informal and staff turnover rates are often very high. To avoid penalties, small employers will need the same procedures and systems as large, well resourced employers. The new measures are likely to be

a significant additional burden for businesses with high proportions of migrant workers such as small catering establishments, sub-contractors in the construction industry, small peripatetic cleaning companies, suppliers of casual agricultural workers, where copying facilities are not normally available and where there are unlikely to be good systems for the storage and retrieval of paperwork. The anticipation of the costs of these measures is likely to operate as a strong incentive to avoid recruiting any person to whom the 2006 Act could possibly apply.

For employers who elect to avoid civil or criminal sanctions by adopting recruitment procedures that at the earliest stage exclude any person who looks or sounds foreign, then there would be no increase in direct financial costs. They will not train staff, use staff time to carry out checks, they will not make copies of documents and will not need to introduce systems for the retention and access to documents for any re-checking.

The DLA is aware of a growing practice amongst employers to require all prospective "employees" who are subject to immigration control to change their status to 'self-employed', with all of the implications such different status has for the full range of statutory employment rights. Such employers who would not be "employing" migrant workers would also incur no costs to comply with these provisions of the 2006 Act.

The financial costs for employers who discriminate directly or indirectly on racial grounds, including both segregation and victimisation, or who commit acts of harassment in breach of the Race Relations Act 1976 ("RRA") will be the awards of compensation made against them by employment tribunals for unlawful direct racial discrimination. In 2006 the average compensation for race discrimination was £13,176 and the median was £5,302.[1]

Aside from direct financial costs, would these measures give rise to additional indirect costs?

YES

Considering first those employers who, in order to avoid the need to take the measures prescribed to avoid civil or criminal sanctions, will deliberately not recruit any person who looks or sounds foreign. There will be the cost of denying for themselves the opportunity to select from the widest range of potential employees in order to recruit the most suitable employees. Further, as the number of such employers is likely to increase under the new procedures, there will be the serious costs to society in perpetuating disadvantage amongst ethnic minorities, including those with British passports or otherwise fully entitled to take up any jobs in the UK.

For those employers who will attempt to take necessary steps to protect themselves against civil or criminal sanctions, we expect that these measures will carry significant indirect costs as well. As suggested, individuals may, possibly wisely,

[1] Equal Opportunities Review, Issue 167,August 2007, p.14

seek to protect themselves and their future business careers by refusing to become directors of companies that employ, or might employ, migrant workers. For larger employers with both UK and non-UK workers, the measures are likely to create unnecessary divisions within the workforce that will affect cohesion, which in turn will affect performance, productivity, discipline and staff retention. For smaller employers, including those with all or a section of their workforce comprised solely of migrant workers, there are real risks of poor employment practices, exploitation, undue scrutiny, lack of trust, that will affect performance, productivity, discipline and retention.

Where employers choose to discriminate instead of taking the steps necessary to avoid penalties or prosecution, the indirect costs will be very great. It is difficult to quantify the harm caused to the employer, their other employees and society generally by the adoption and maintenance of policies to exclude people from participation in gainful employment -- and the benefits that flow from such participation -- because they are, or appear to be, foreign.

2. Will the proposed codes that require employers, in some instances, to undertake repeat checks significantly impact upon recruitment <u>and employment</u> practices?

Yes

It is likely that the requirement for repeat checking will influence recruitment and selection. As stated in reply to Question 1, repeat checks impose a significant new responsibility on employers that will be seen at best as an unwanted task producing no additional benefit to them and at worst as an oppressive burden to be avoided if at all possible. The DLA anticipate that the prospect of repeat checking of certain existing employees may prompt many employers to demand the requisite documents at the start of their recruitment procedure and then to exclude at the earliest stage any applicants who produce as evidence of their right to work a document from list 2, which could constitute unlawful direct or indirect racial discrimination.

With regard to employment practices where employees are taken on whose documents must be re-checked to retain the statutory excuse, the DLA anticipates that employers will see good business reasons for treating such employees less favourably than they treat others. For example, as a repeat check could raise questions regarding the entitlement of the employee to continue in her/his job, employers may not offer such employees the same terms and conditions, rates of pay, or the same opportunities for training or promotion, as other employees doing the same work. They may subject them to greater scrutiny, especially as there is a ‘reward’ in order to ‘earn’ a reduced penalty for reporting suspected employees to the Borders & Immigration Authority. In turn this could affect the relationships of such employees with fellow workers and expose them to different forms of harassment.

3. How well understood are the requirements for employers under the current (1996) legislation?

How much have the Government communication methods described above contributed to a good understanding of the current (1996) legislation?

If you do not think the current (1996) legislation is well understood, please outline why you think this is so.

What improvements to the Government communication process would aid understanding of the proposed codes and assist employers in complying with the law?

Despite strong denial in the consultation document and the Code at Annex B that the aim is not to require employers to take on the role of immigration officers, the DLA submit that it would be difficult for employers to see the requirements of the 1996 Act and the more onerous requirements in the 2006 Act as having any other purpose. The checking of new employees and the repeat checking of existing employees is not a task employers have sought; that this is the case was clear to the Home Office from the outset when it imposed criminal sanctions in the 1996 Act and now a potentially more severe combination of civil and criminal sanctions in the 2006 Act.

Further, so far as the DLA is aware, none of the communication with employers regarding their obligations as employers of migrant workers has drawn attention to their obligations under employment and health and safety legislation, despite very clear evidence of exploitation of migrant workers including failure to pay at national minimum wage rates, unauthorised withholding of wages and inadequate health and safety measures. We comment below on the proposed guidance on racial discrimination.

4. **Would the provision of any other services assist employers in complying with their duties under the legislation? If so, please describe them below and indicate the benefit these services would bring.**

Would employers be prepared to pay a fee for use of these services?

As stated above, the DLA is concerned that the imposition of obligations on employers to assist in the control of illegal working with sanctions for failing to do so may prompt many employers to seek to avoid their obligations altogether by restricting their recruitment to white British workers. The kinds of checks that are expected of all employers, regardless of their size, experience, staffing and other resources, are not simple, and it is likely that many employers may need some assistance. To impose a fee for such assistance would, in our view, further discourage employers from becoming involved in this process altogether and encourage a decision to exclude anyone who looks or sounds foreign.

5. The Code to Prevent Unlawful Discrimination recommends that employers conduct document checks on all prospective employees to avoid allegations of unlawful discrimination. Do you think this recommendation will be followed?

Do you think the recommendation is enough to provide a safeguard against unlawful discrimination? No

Are there any alternatives that would provide further safeguards against unlawful discrimination?

The DLA welcomes the decision by the Border and Immigration Agency to issue a code of practice to help employers avoid unlawful discrimination while seeking to prevent illegal working. It reflects the findings of the equality impact assessment that a statutory system of employer sanctions in relation to illegal migrant working may have an adverse impact on race equality including unlawful race discrimination against job seekers who are or might appear to be a foreign national.

The DLA is aware that some large employers in the public and private sector now include as a standard part of their formal recruitment procedures for permanent posts a requirement on the successful applicant or on all short-listed applicants to provide documents required by regulations made under the 1996 Act. Such employers, if they receive sufficient, clear information, should have little difficulty in adapting their procedure so far as is necessary to meet the requirements of the 2006 Act, and would therefore continue to conduct document checks on all applicants at the designated stage in the procedure.

On the other hand, the CRE issued its first Code of Practice on Employment in 1984 and issued a new Code in November 2005. These statutory codes carry the same legal status as the Code at Annex C will have. Regretfully, the experience of the DLA is that guidance in codes of practice is not sufficient to prevent discrimination. As indicated in the equality impact assessment, and has we have stated above, the procedures outlined in the current consultation document create an incentive to discriminate, and employers may prefer the risk of possible complaints in the employment tribunal to the burdens these procedures may be seen to involve.

More significantly, the draft Code at Annex C does not meet the description of the Code which, under section 23 of the 2006 Act, the Secretary of State is required to issue, since it refers only to discrimination in recruitment, yet under the 2006 Act the checking obligations – and the risks of discrimination - do not stop at the recruitment stage. To avoid liability for sanctions under section 15 and/or section 21, employers must have systems in place for repeat checking of certain migrant workers and can further protect themselves by reporting any person they suspect of working or attempting to work illegally.

As indicated above, these additional features of the new procedure could easily encourage employers who wish to avoid sanctions under the 2006 Act to discriminate contrary to the Race Relations Act 1976 in their treatment of their employees who are subject to immigration control. It is essential that good, clear guidance is provided so employers will understand what is required of them under section 4 (2) of the Race Relations Act in their treatment of their employees.

The Code should advise employers of the implications of unlawful discrimination including the possibility of adverse publicity if a claim against them succeeds in the employment tribunal, and the levels of awards for compensation including compensation for injury to feelings and aggravated damages. The Code should also draw the attention of employers to the provisions in EC and UK law that permit public authorities to exclude contractors from participation in any of their contracts if they have had a recent finding of unlawful discrimination against them in a court or tribunal.[2]

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[2] EC Directive 2004/18/EC recital 43 and article 45(2)(c) and (d) and The Public Contracts Regulations 2006, SI 2006 No. 5, regulation 23(4)(e).