

## RIGHT TO WORK CHECKS

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**In *Badara v Pulse Healthcare Limited*, the UK's Employment Appeal Tribunal (EAT) ruled that an employer cannot reasonably require an employee with the right to work in the UK under the Immigration (European Economic Area) Regulations 2006 (the EEA Regulations) to produce evidence of said right in the form of positive Employer Checking Services (ECS) checks from the Home Office.**

**"B had the right to work in the UK pursuant to the Free Movement European Directive 2004 (the Directive) and rights conferred under the EEA Regulations."**

The case revolved around B, a Nigerian national who was a family member of an EEA national residing in the UK, who was employed by PH Limited. B had the right to work in the UK pursuant to the Free Movement European Directive 2004 (the Directive) and rights conferred under the EEA Regulations. When PH Limited refused to provide B with work after the expiry of his UK Residence card, B brought claims in the employment tribunal for unlawful deductions from wages and direct and indirect discrimination on the grounds of race and/or nationality. A tribunal held that it was reasonable for PH Limited to require proof of eligibility to work in the form of positive ECS checks. This was taking into account the penalty provisions against employers under the Immigration, Asylum and Nationality Act 2006 and the Immigration (Restrictions on Employment) Order 2007, and as stipulated in a

contractual term in B's contract of employment concerning the production of evidence of eligibility to work. For similar reasons, the discrimination claims were dismissed.

B appealed, contending that, pursuant to the EAT judgment in *Okuoimose v City Facilities Management Ltd*, the 2006 Act and 2007 Order were irrelevant in circumstances where the employee had a right to work pursuant to the Directive and the EEA Regulations. The EAT upheld B's appeal and held that the employment tribunal had erred by failing to take account of Home Office guidance which made it clear that B did not need to obtain positive ECS checks to determine his eligibility to work. The EAT remitted B's claims for indirect discrimination and unlawful deductions from wages to an employment tribunal.

Given the ongoing Home Office crackdown on illegal employment, coupled with the uncertainty Brexit has created, this case is a helpful reminder of the current rights of non-EEA family members of EEA or Swiss nationals. The case also reiterates the importance of employers conducting the appropriate right to work document checks, before they take a hardline approach by refusing work or terminating employment.

This article was written by Paralegal Valerie Shao and Associate Chris Warwick-Evans.

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