

RIGHT TO WORK CHECKS

21 NOVEMBER 2019 • ARTICLE



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 *Okuimose 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.

DISCLAIMER

Watson Farley & Williams is a sector specialist international law firm with a focus on the energy, infrastructure and transport sectors. With offices in Athens, Bangkok, Dubai, Dusseldorf, Frankfurt, Hamburg, Hanoi, Hong Kong, London, Madrid, Milan, Munich, New York, Paris, Rome, Seoul, Singapore, Sydney and Tokyo our 700+ lawyers work as integrated teams to provide practical, commercially focussed advice to our clients around the world.

All references to 'Watson Farley & Williams', 'WFW' and 'the firm' in this document mean Watson Farley & Williams LLP and/or its affiliated entities. Any reference to a 'partner' means a member of Watson Farley & Williams LLP, or a member, partner, employee or consultant with equivalent standing and qualification in WFW Affiliated Entities. A list of members of Watson Farley & Williams LLP and their professional qualifications is open to inspection on request.

Watson Farley & Williams LLP is a limited liability partnership registered in England and Wales with registered number OC312252. It is authorised and regulated by the Solicitors Regulation Authority and its members are solicitors or registered foreign lawyers.

The information provided in this publication (the "Information") is for general and illustrative purposes only and it is not intended to provide advice whether that advice is financial, legal, accounting, tax or any other type of advice, and should not be relied upon in that regard. While every reasonable effort is made to ensure that the Information provided is accurate at the time of publication, no representation or warranty, express or implied, is made as to the accuracy, timeliness, completeness, validity or currency of the Information and WFW assume no responsibility to you or any third party for the consequences of any errors or omissions. To the maximum extent permitted by law, WFW shall not be liable for indirect or consequential loss or damage, including without limitation any loss or damage whatsoever arising from any use of this publication or the Information.

This publication constitutes attorney advertising.