Employer Resource: Hiring and International Applications
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Discrimination on the grounds of nationality - the ramifications of Osborne Clarke Services v Purohit

The EAT in the case of Osborne Clarke Services vs. Purohit [2009] upheld the Tribunal’s decision that an employer’s policy of refusing to accept applications for training contracts from non-EEA nationals who require permission to work in the UK was indirectly discriminatory on the grounds of nationality. Employers should not prevent an individual from submitting an application for employment, even if they do not have the right to work in the UK at the date of the application. The EAT referred to the guidance in the Commission for Racial Equality Statutory Code of Practice which states that employers should, as far as possible, select applicants on the basis of merit and address right to work issues at the last stages of selection.

In light of this case, it is clear that employers need to ensure that their recruitment procedures do not discriminate on the grounds of nationality. The question was recently raised as to whether it would be indirectly discriminatory for an employer (who is a licensed sponsor) to only advertise a job vacancy for a 2 week period?

Requirements of Tier 2 (General)
Under Tier 2 (General) of the PBS, a migrant worker (non-EEA) may only apply to work in the UK if he/she has a sponsor (a licensed employer) and has been issued with a valid CoS by its sponsor.

Before a licensed sponsor can issue a valid CoS, it must ensure that the job is at skill level S/NVQ 6 or above; that the resident labour market test has been satisfied or the job is on the shortage occupation list; and that the migrant worker will be paid a salary and/or other allowances at or above the appropriate rate.

The aim of the resident labour market test is to show that no suitably qualified resident (EEA) worker is available to fill the vacancy. In order to satisfy this test, the sponsor must have advertised the vacancy in accordance with UKBA guidance and the code of practice specific to the type of job but must also have advertised it to resident workers for 28 calendar days (from 14 December 2009).

In order for a licensed sponsor to issue a valid CoS and legally employ a migrant worker, it must have advertised the vacancy for 28 calendar days.

Discriminatory practice?
Once an employer has chosen to sign up to the PBS and become a licensed sponsor in order to employ migrants, it would seem illogical for the employer to then, by virtue of its own recruitment practice, prevent a successful migrant from being employed for the role.
The Equality Act 2010 (“the EQA”) makes it clear that it is unlawful to treat persons less favourably in relation to recruitment and selection because of their race, nationality, colour, national or ethnic origin.

Further, under Section 19 of the EQA, an employer may indirectly discriminate on the grounds of race if it applies a provision criterion or practice (“PCP”) which is applied, or would be applied, generally and irrespective of race/ nationality, but:

• it puts, or would put, persons within a particular racial or national group at a disadvantage;
• it creates an actual disadvantage to an individual applicant from within that group; and
• it cannot be shown to be of proportionate means of achieving a legitimate aim.

If a claim was brought against a licensed sponsor on the grounds that its recruitment practice of advertising job vacancies for less than 28 calendar days was indirectly discriminatory against non-EEA nationals, the employer would have to show it could justify this as a proportionate means of achieving a legitimate aim. This would appear difficult to do as the employer has signed up to the PBS in order to employ migrants and should therefore adhere to the relevant guidance. An employer does after all have the choice to sign up to the PBS in order to employ migrant workers.

The same concerns about discrimination on the grounds of nationality do not arise for employers which are not licensed sponsors under the PBS. There is no legal obligation for an employer to be licensed under the PBS and no positive obligation for a UK employer to employ migrants. The PBS was introduced by the Government to improve immigration controls and to ensure that jobs are filled where possible by resident workers. An employer which is not a licensed sponsor cannot legally employ a migrant (non-EEA) and is therefore under no obligation to advertise for 28 calendar days.

All employers, whether licensed sponsors or not, should however, take note of Osborne Clarke and ensure that all job applications are sifted on merit. Employers should also ensure that recruitment practices do not potentially discriminate on grounds of age, sex, sexual orientation, disability, race, religion or belief.

The Code of Practice issued under the EQA 2010 makes it clear that eligibility to work in the UK should be verified in the final stages of the selection process, rather than at the application stage, to ensure that any appointment is based on merit alone and is not influenced by other (potentially unlawful) factors. Employers would therefore expose themselves to claims of indirect race discrimination by refusing to consider applications at all from non-EEA candidates. In order to minimise the legal risks, all applicants should be considered on their merits in the first instance. If a shortlisted applicant requires sponsorship and the employer does not have a UKBA sponsor licence, then the individual facts of the case will need to be considered with care in order to ascertain whether or not a decision not to join the UKBA Register of Sponsors can be justified.

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