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Immigration raids, employer collusion and the Immigration Act 2016

In July 2016 Immigration Enforcement (a branch of the Home Office) raided a number of Byron burger branches throughout London resulting in the arrest and detention of 35 Byron workers. Byron cooperated with the Home Office raid by helping to arrange ‘arrest by appointment’ meetings for staff, informing workers that they had to attend health and safety meetings on ‘the dangers of cooking medium to medium rare burgers’. In light of Byron’s press release stating that the firm was under a ‘legal obligation’ to cooperate with Home Office officials,¹ and following royal assent to the Immigration Act 2016 (which increases the enforcement powers of immigration officers), the first two sections of this article set out the legal limits on employers’ cooperation with Immigration Enforcement. In establishing that employers owe few duties to the Home Office, the final section will consider the competing duties owed between employer and employee, asking whether such duties override immigration obligations.

1. The Byron ‘sting’

As a consequence of the immigration raid on Byron burgers, it was reported that 35 irregular migrants were arrested and a number of individuals were deported without the opportunity to say goodbye to their friends or families.² Unlike other European countries such as Sweden, Greece, and Poland which have transposed the European Union (EU) Employer’s Sanctions Directive,³ the UK does not enforce the payment of unpaid wages for irregular migrants caught working without the right to work.⁴ Any contractual claims made by undocumented workers have also, up until now, been barred in domestic law by the doctrine of illegality on the ground that the contracts were illegal from inception due to the workers’ immigration status.⁵ As a result of this overarching legal framework, it is therefore possible that Byron extracted free labour from those arrested (if wages remained unpaid) whilst avoiding financial liability under immigration law due to their ‘cooperation’ with the Home Office. Stripping irregular migrants of their fundamental labour rights whilst allowing employers to escape financial liability thus heightens the legal vulnerability of those who are undocumented.

In response to mass protests following the raids, Byron released a statement declaring that the firm was unaware that any of their workers were in possession of counterfeit documentation.⁶ Despite ‘vigorous right to work checks’, Byron claimed that ‘sophisticated counterfeit documentation was used’ by the workers; meaning Byron had no idea that those individuals were without the right to work. Byron also claimed that they were under a ‘legal obligation’ to cooperate with the Home Office, suggesting that cooperation with immigration enforcement was mandatory as opposed to

¹ Byron, ‘Home Office Investigation’ (Byron, August 2016) <https://www.byronhamburgers.com/news/home-office-investigation>> accessed 1 September 2016

² O’Carrell and Jones, ‘“It was a fake meeting”: Byron Hamburgers staff on immigration raid’ (The Guardian, 28 July 2016) <<https://www.theguardian.com/uk-news/2016/jul/28/it-was-a-fake-meeting-byron-hamburgers-staff-on-immigration-raid>> accessed 19 August 2016

³ Council Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals

⁴ Council Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, Article 6.1.

⁵ *Hall v Woolston Hall Leisure* [2001] ICR 99, CA; *Hounga v Allen* [2014] ICR 847, SC

⁶ Byron, ‘Home Office Investigation’ (Byron, August 2016) <https://www.byronhamburgers.com/news/home-office-investigation>> accessed 1 September 2016

voluntary. So what are the legal obligations placed upon employers in these types of situations and was Byron's collusion a 'legal obligation'?

2. Employer duties and sanctions

Under the Immigration Act 2016 the enforcement powers of immigration officers have been strengthened and the circumstances in which an employer can be found guilty of employing 'illegal' workers have been broadened. Section 35 of the Immigration Act 2016 thereby broadens the *mens rea* requirement under section 21 of the Immigration, Asylum and Nationality Act 2006 meaning it is now a criminal offence to 'employ another person knowing, or where an employer has reasonable cause to believe, that the worker is disqualified from employment by reason of their immigration status'. Whereas the prior offence required actual knowledge of illegal working, liability will now arise where the employer has a 'reasonable cause to believe' that the worker is disqualified. Section 35(4) of the Immigration Act 2016 also increases the criminal penalty for employing persons without the right to work under section 21(4) of the Immigration, Asylum and Nationality Act 2006 from a maximum of three to five years imprisonment alongside a fine, or both.

In parallel with the criminal offence, 'civil penalties' may also be imposed upon employers employing those without the right to work. The civil penalty consists of either a £15,000 or £20,000 fine per worker depending on whether it is a repeat offence, issued by way of notice.⁷ This differs from a criminal charge as civil penalties can be issued by Immigration Enforcement without having to bring the matter before a court, or prove that the employer knew, or had reasonable cause to believe, that the individual had no right to work. Where employers are found to be employing workers without the right to work, the civil penalty can be reduced if the employer agrees to cooperate with Home Office officials. A £5,000 discount, for example, will be made where employers report 'suspected illegal workers' and a further £5,000 will be granted where there is evidence of 'active cooperation'.⁸

There is however a defence to the civil penalty under section 15(3) of the Immigration, Asylum and Nationality Act 2006 in the form of a 'statutory excuse', where an employer can show that they carried out the correct 'right to work' checks. This includes the re-checking of the workers status where they do not have a long term right to work in the UK. This 'excuse' will provide a defence as long as the employer has no knowledge that an individual is without the right to work throughout the entire period of employment. If a penalty notice is issued by the Secretary of State, an employer can thus object on grounds that the correct right to work checks were complied with. Such checks also eliminate the *mens rea* requirement for the criminal offence as the employer can demonstrate that they reasonably believed the individual *had* a right to work. In summary, this means that if the correct right to work checks are carried out by the employer, the employer need not fear criminal or civil sanctions as they have a defence against both types of action. As a result, the financial incentives for cooperation become meaningless where the statutory excuse can be used in an employer's defence.

Accordingly, although there is no *legal* obligation upon employers to carry out right to work checks, they are compelled to do so in practice due to the potential effects of the civil penalty and criminal

⁷ Section 15 of the Immigration, Asylum and Nationality Act 2006

⁸ Home Office, 'Code of practice on preventing illegal working: Civil penalty scheme for employers, 2014

sanction. Where employers fail to perform the correct right to work checks or gain knowledge that workers have no right to work, their defence of a statutory excuse is lost making them liable in both civil and criminal law. Where knowledge is gained during the employment relationship, in order to avoid liability, employers are best advised to suspend the worker with pay for reasons of investigation or dismiss the worker following the correct procedures.⁹

3. No duty to cooperate

Given Byron's stated ignorance, the claim that the firm was 'legally obliged' to cooperate with the Home Office is unfounded. If, as stated in their press release, Byron had performed 'vigorous right to work checks', the company would have possessed an adequate defence against the criminal charge and civil penalty as they could have raised a statutory excuse which would have alleviated them from paying any fines. Byron's cooperation in setting up the raid was therefore voluntary, their motivations remain unclear.

Where employers fail to conduct right to work checks and are without a statutory excuse, there is still no legal duty upon them to collude with Immigration Enforcement and set up 'arrest by appointment' meetings for staff. For these employers, the primary motivation behind collusion is financial: to avoid paying the full civil penalty and to receive a discount on their penalty for cooperation. The voluntary nature of cooperation is confirmed by paragraph 31.8 of the Home Office's 2016 'Enforcement instructions and guidance' which states that Immigration Enforcement officers should *'try to enlist the co-operation of employers in identifying employees who may be immigration offenders...If unsuccessful, only undertake a visit where there is apparently reliable information that immigration offenders will be found'*.

Where employers refuse to cooperate, the ability of Immigration Enforcement officers to enter the business premises will depend upon their reasons for entry. Section 34(8) of the Immigration Act 2016 increases the search powers of immigration officers where personnel records are concerned. Consequently an officer can enter and search for employee records where the officer provides identification and has reasonable belief that an individual has illegally entered or overstayed their visa, and that the individual has been 'illegally working' at the premises.¹⁰ In such circumstances, officers are able to enter the premises, seize employee records (other than those subject to legal privilege) and retain records if they are of value to the investigation. There is no general requirement however for employers to hand over staff records unless a specific request has been made for disclosure by the Secretary of State.¹¹

Where immigration officers seek to enter business premises in order to arrest an individual, as was the case with Byron, the officers must again have reasonable belief that the individual engaged in 'illegal work' and must possess one of the following: a warrant; an 'AD' letter, which enables immigration officers to legally enter a business without a search warrant where authorised by a Home Office Assistant Director;¹² or informed consent, meaning 'a person's agreement to allow something to happen after the person has been informed of all the risks involved and the

⁹ Ryan, 'Employer Checks of Immigration Status and Employment Law' in Costello and Freedland (eds) *Migrants at work* (OUP 2014).

¹⁰ Section 28FA Immigration Act 1971.

¹¹ Section 134 Nationality, Immigration and Asylum Act 2002.

¹² Section 28CA Immigration Act 1971.

alternatives'.¹³ The Home Office guidance on enforcement visits does not make clear from whom 'informed consent' must be gained. What is clear however is that immigration officers have no independent statutory power to enter and search for immigration offenders unless they meet one of the three requirements set out above. As Byron helped the Home Office to set up 'arrest by appointment' meetings it appears as though consent was given voluntarily.

Though the Byron raids attracted a great deal of media attention, Home Office data regarding immigration enforcement indicate that employer cooperation with Home Office officials is common and that Immigration Enforcement officers often threaten use of the civil penalty as a means of coercion.¹⁴ Research from the Anti-Raids network also raises concern over the issue of informed consent, as during their outreach work, the organisation found that many employers were unaware that signing consent forms was voluntary.¹⁵ This is particularly alarming given that in 184 sampled files examined by the Independent Chief Inspector of Borders concerning immigration enforcement, authority for entry was primarily gained by informed consent (55%), whereas warrants permitted entry in only 43% of cases.¹⁶ This suggests that Immigration Enforcement officers are taking advantage of employers' ignorance over enforcement policies, which correlates with concerns raised by the Chief Inspector of Borders and Immigration in 2014. In his report, 'An inspection of the use of the power to enter business premises without a search warrant', the Chief Inspector notes numerous failings, including the unlawful use of the power of entry, widespread non-compliance with guidance, and weak justifications for entry.

Although analysis demonstrates that employers' obligations in terms of immigration enforcement are limited, numerous obligations are owed between employers and employees (or workers) as a result of the employment relationship. Consequently many commentators have asked whether the rights of the Byron workers could have offset the company's 'legal obligations' with regards to Immigration Enforcement.¹⁷

4. The rights of workers?

Contractual claims

Ordinarily the employment relationship gives rise to a number of duties on the part of the employer and employee, such as the duty of mutual trust and confidence which imposes obligations upon both parties not to undermine the trust and confidence required if the employment relationship is

¹³ Independent Chief Inspector of Borders, 'An inspection of how the Home Office tackles illegal working, 2015.

¹⁴ Corporate Watch, 'Snitches, Stings & Leaks: how Immigration Enforcement works' (Corporate Watch, 30 August 2016) <<https://corporatewatch.org/news/2016/aug/30/snitches-stings-leaks-how-immigration-enforcement-works>> accessed 5 September 2016.

¹⁵ Anti Raids Network, 'Operation Skybreaker', (Anti Raids Network, September 25 2014) <<https://network23.org/antiraid/2014/09/25/operation-skybreaker/>> accessed 5 September 2016.

¹⁶ Independent Chief Inspector of Borders and Immigration, 'An inspection of how the Home Office tackles illegal working' 2015, figure 12.

¹⁷ McAleavy, 'Byron: Illegal working and employers duties' (Solicitors Journal 15 August 2016) <<https://www.solicitorsjournal.com/comment/byron-illegal-working-%E2%80%A8and-employers%E2%80%99-duties>> accessed 19 August 2016.

to continue.¹⁸ However, the enforcement of these duties is problematic where the worker has no legal right to work.

This is primarily because up until now the doctrine of illegality invariably barred contractual claims by employees where the employee was relying on a contract which was illegal from its inception for reasons of immigration status.¹⁹ The illegality doctrine has recently been reformulated however by the Supreme Court in the case of *Patel v Mirza* [2016] UKSC 42 in which Lord Toulson overruled the old case-law and applied a 'range of factors' test including, but not limited to: the weight of competing public policy considerations; the seriousness of the conduct of the parties; the centrality of the illegal conduct to the contract; whether the illegal conduct was intentional; and whether there was a marked disparity in the parties respective culpability.²⁰ In theory this test provides more flexibility in permitting claims from undocumented workers; yet in practice, the public policy considerations may well point the other way, meaning illegality would remain a bar to contractual claims from undocumented workers, such as those raided at Byron.

Relevant public policy factors that favour barring such contracts include: the creation of a criminal offence for 'illegal' working;²¹ the ability of the courts to confiscate wages as proceeds of crime;²² and the UK's rejection of the EU Sanctions Directive. Even where the range of factors approach is applied, it is therefore likely that the above public policies would endorse the strict application of the illegality doctrine as opposed to trumping it. Where workers are protected under statutes such as the Modern Slavery Act 2015 or the Gangmasters Licensing Act 2014 because, for example, they are trafficked, the public policy reasons may outweigh the illegality, permitting them to bring a contractual claim.²³ Yet for undocumented workers who fall outside the scope of these protective statutes illegality will likely remain a bar to enforcing contractual rights.

The duty of care in tort

Employers owe a duty of care to employees and workers in respect of a safe working environment, adequate equipment and competent colleagues.²⁴ This duty also extends beyond the physical health and safety of employees to psychiatric injury caused by stress, long hours, harassment or bullying, encompassing a number of different aspects of working life.²⁵ In terms of immigration raids which are, in part, organised by the employer, an employee could claim for a breach of the duty of care if an identifiable psychiatric or physical injury develops as a consequence of the raid. Arguments against claims of this nature however might raise the remoteness of causation and the fact that such injuries were not reasonably foreseeable as a consequence of the employer's actions.

The doctrine of illegality also presents another barrier to bringing a tortious claim where there is an 'inextricable link' between the facts giving rise to the claim and the illegality.²⁶ For irregular migrants

¹⁸ *Malik v BCCI* [1998] AC 20.

¹⁹ *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99; *Zarkasi v Anandita* [2012] ICR 788.

²⁰ *Patel v Mirza* [2016] UKSC 42 [109].

²¹ Section 24(B)(1) Immigration Act 1971.

²² Section 24(B)(5) Immigration Act 1971.

²³ see *Hounga v Allen* [2014] ICR 847, SC as endorsed in *Patel v Mirza* [2016] UKSC 42.

²⁴ *Wilson and Clyde Coal Ltd v English* [1938] AC 57.

²⁵ *Walker v Northumberland CC* [1995] ICR 702.

²⁶ *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99.

working without the right to work, it is likely that injuries arising from immigration enforcement actions (such as raids) would be regarded as inextricably linked to their illegal status. Consequently the duty of care in tort offers very little protection to irregular migrants threatened with enforcement action in the workplace.

Non-discrimination

Another potential ground of protection for workers is protection from discrimination under the Equality Act 2010. The level of protection granted to irregular migrants under this Act however is called into question by the recent Supreme Court ruling in *Taiwo v Olaigbe* [2016] UKSC 31 which confirmed that immigration status does not fall within the protected characteristic of nationality. Employees that are targeted in the workplace on the basis of their immigration status (or suspected immigration status) will not therefore be able to make any claim under the Equality Act 2010. Employers should however proceed with caution in targeting particular members of staff as if there is any pattern which shows that workers of a particular nationality or racial or ethnic background are being targeted on grounds of immigration enforcement then this could lead to a discrimination claim. Examples might arise where an employer makes certain assumptions about someone based on their accent or appearance and targets that person for right to work checks; where an employer submits information to the Home Office on the basis of a workers' appearance or accent; or where sting operations are only conducted on individuals from a certain country.

Data protection

In a 2016 report by Corporate Watch, concerns were raised over the release of personal data as leaked Home Office intelligence documents revealed that employers commonly hand over staff records to immigration officers, including detailed personal information such as home addresses.²⁷ As the majority of employers will be 'data controllers' they must comply with the provisions of the Data Protection Act 1998 in relation to all data held.²⁸ The term 'data controller' is defined as 'a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed'.²⁹ This can apply to any 'person' recognised in law which includes: individuals; organisations; and other corporate and unincorporated bodies of persons. Where an individual is given responsibility for data protection in an organisation, they will be acting on behalf of the organisation, which will be the data controller.³⁰

Under the Act personal data is defined as any recorded information about a living individual that can be identified from that data and other information which is in the possession of the data controller.³¹ Accordingly this would include staff records and employment files. Staff files may also contain 'sensitive personal data', as defined in section 2, which includes, for example, information concerning the racial or ethnic origin of the data subject or their commission, or alleged commission,

²⁷ Corporate Watch, 'Snitches, Stings & Leaks: how Immigration Enforcement works' (Corporate Watch, 30 August 2016) <<https://corporatewatch.org/news/2016/aug/30/snitches-stings-leaks-how-immigration-enforcement-works>> accessed 5 September 2016.

²⁸ Section 4(4) Data Protection Act 1998.

²⁹ Section 1(1) Data Protection Act 1998.

³⁰ Information Commissioners Office, 'Guide to data protection' <<https://ico.org.uk/for-organisations/guide-to-data-protection/>> accessed 23 September 2016.

³¹ Section 1(1) Data Protection Act 1998.

of an offence (such as an immigration offence). Note however that nationality is not included in the remit of racial or ethnic origin and thus falls in the general personal data category rather than that of sensitive personal data.³²

If employers (as data controllers) wish to fairly and lawfully share the personal data of their workforce, they must comply with all of Schedule 1 and one of the conditions set out in Schedule 2 of the Act. Where sensitive personal data is concerned the employer must also meet Schedule 1, one of the conditions from Schedule 2 *and* one of the conditions in Schedule 3.

An employer is lawfully allowed to share an employees' personal data where necessary for the exercise of any functions of the Crown, a Minister of the Crown, or a government department, which would include the Home Office.³³ It is unclear when it will be 'necessary' for an employer to release information to the Home Office as there is no obligation upon employers to release staff records unless a disclosure request is issued by the Secretary of State.³⁴ Complications may also arise where general managers release information about employees or workers without the consent of the data controller. Under section 55 of the Data Protection Act 1998, it is thus a criminal offence to knowingly or recklessly, without the consent of the data controller disclose personal data or information. There are a number of exceptions to this offence as set out in section 55(2). This includes disclosing information where necessary for the purpose of preventing or detecting a crime (s55(2)(a)(ii)) or where the disclosing of information is in the public interest (s55(2)(d)).

Given the complexities of data protection law, it is advised that employers and staff members carefully consider their obligations under the Act before handing over personnel files to immigration officers. As previously discussed, there is no legal obligation upon employers to hand over staff files or records outside of specific notice from the Secretary of State. Where employers refuse to cooperate however, Immigration Enforcement officials may enter and search the premises for personnel records and seize them if they are of importance to the investigation.

5. Discussion

As evident from the preceding analysis, where investigation and enforcement proceedings are issued against irregular migrant workers, the law affords the group minimal protection. This makes it easier for employers to cooperate with the Home Office as workers' rights are readily undermined in law for reasons of immigration control. The notion that employers are under a 'legal obligation' to cooperate with Immigration Enforcement however, is false. Employers are under no obligation to permit entry or the searching of property, or indeed to collude in setting up sting operations in order to catch their own staff. Though the enforcement powers of immigration officers have been increased by the Immigration Act 2016, there is no legal authority obliging employers to assist with enforcement.

As a result of the restrictions placed upon irregular migrants engaging in work, this group is prevented from enforcing rights with regards to: unpaid wages; holiday pay; injury to feelings; or in situations of mistreatment or discrimination based on immigration status (notwithstanding the situation of slavery, servitude and forced or compulsory labour under the Modern Slavery Act 2015).

³² Lord Williams of Mostyn, HL Deb 23 February 1998, vol 58, col 17GC.

³³ Data Protection Act 1998, schedule 2 para 5(c) and schedule 3 para 7(1)(c).

³⁴ Nationality, Immigration and Asylum Act 2002, s 134.

In light of the lack of available remedies facing workers who suffer discrimination on grounds of their immigration status, it has been suggested by Baroness Hale that Parliament consider broadening section 8 of the Modern Slavery Act 2015 which allows for the reparation of compensation to victims.³⁵

Though the UK Government seeks to minimise illegal working within the UK, creating barriers to the enforcement of fundamental labour and other legal rights has the paradoxical effect of heightening the vulnerability of undocumented migrants making them more attractive to exploitative employers.³⁶ As a means of overcoming these concerns, the Government has sought to create a 'hostile' environment for illegal working by increasing the penalties and sanctions imposed upon employers. A new criminal offence of 'illegal working' has also been introduced by the Immigration Act 2016 which carries a maximum penalty term of six months imprisonment, or a fine, or both.³⁷ What the situation of Byron burgers demonstrates however, is that where employers cooperate with immigration enforcement, full responsibility for the 'illegal working' is transferred from the employer onto the worker as civil penalties are reduced or removed in exchange for cooperation. This is particularly significant as reports suggest that civil penalties are more commonly used as a form of deterrence than criminal sanctions, most likely because of the ease with which they can be issued.³⁸

Indeed in the 2010 report on the use of civil penalties by the Independent Chief Inspector of the UK Border Agency, the Inspector notes that rather 'than being a deterrent to employing illegal workers...leniency and perceived passivity may actually have had the opposite effect. It most certainly did not constitute a "hostile environment" for employers of illegal workers'.³⁹ Consequently, whilst hostile policies are implemented upon irregular migrant workers, restricting opportunities for work and heightening exploitation,⁴⁰ employers can avoid full financial responsibility through cutting a deal with the Home Office. The result is that employers, who have no legal duty to expose their staff to Immigration Enforcement raids, are incentivized to do so. In conjunction with the Immigration, Asylum and Nationality Act 2006, the Immigration Act 2016 thus reinforces a legal framework where employers who exploit their immigrant workforce can avoid civil liability through discounts on their civil penalties. The UK Government's resistance to adopting the EU Employer's Sanctions Directive alongside the strict application of the illegality doctrine also allows employers to avoid claims concerning minimum or unpaid wages. In light of these imbalances it is difficult to see how the current sanctions policy upholds the Government's agenda of 'reducing exploitation'.

³⁵ *Taiwo v Olaigbe* [2016] UKSC 31 [34].

³⁶ Virginia Mantouvalou, 'The Right to Non-Exploitative Work' in Mantouvalou (ed) *The Right to Work* (Hart Publishing 2015).

³⁷ Immigration Act 1971, s 24B, as inserted by Immigration Act 2016, s 34.

³⁸ Corporate Watch, 'Snitches, Stings & Leaks: how Immigration Enforcement works' (Corporate Watch, 30 August 2016) <<https://corporatewatch.org/news/2016/aug/30/snitches-stings-leaks-how-immigration-enforcement-works>> accessed 5 September 2016.

³⁹ Independent Chief Inspector of the UK Border Agency, 'An inspection of the Civil Penalties Compliance Team - Illegal Working March - April 2010', 18 November 2010.

⁴⁰ Alice Bloch, Leena Kumarappan and Sonia McKay, 'Sanctions Policy Briefing: A discussion document' (ESRC, 2013).