

Recruitment and the law

Employers risk being accused of discriminatory practice if they avoid considering applicants who are seeking work permits in the UK. Jane Hannan and Geraldine Kaye explain.

A LARGE NUMBER OF FOREIGN STUDENTS have graduated from British universities in recent years. Many of them wish to pursue an actuarial career and are more than capable of doing the job. However, these students often face difficulties when potential employers refuse their job applications on the grounds that they would need a work permit to work in the UK. This article examines the law in this area and provides some points of advice on how employers can minimise their potential liability under race discrimination legislation.

What is the current market situation?

In the actuarial sector, work permits are frequently granted but many employers decide to disregard applications from foreign students and have a blanket policy of not accepting applications from them because it is simply too much trouble to apply for a work permit, especially when there are many 'local' applicants for the position. These employers could be falling foul of race discrimination legislation.

How does legislation define race discrimination?

It is unlawful to discriminate against foreign job applicants on racial grounds in relation to their employment at an establishment in Britain. This means that even candidates who do not live in Britain when they apply for a job here would theoretically be entitled to bring a claim under the Race Relations Act 1976 in an employment tribunal.

Direct race discrimination occurs when an employer treats one person less favourably than it would treat another person on grounds of race. In this context 'racial grounds' are defined as colour, race, nationality, or ethnic or national origins. By refusing to take on an applicant who does not have a work permit, employers may be discriminating on racial grounds – the holding or not of a work permit is intrinsically linked to nationality and so a policy relating to whether one was held would inherently be tainted. In the absence of a satisfactory explanation from the employer for the less favourable treatment of a job applicant, an employment tribunal would be able to draw an inference that the applicant was treated less favourably on racial grounds. Such explanation would need, among other things, to be objective for it to be deemed 'satisfactory'.

Alternatively, a job applicant could claim indirect discrimination. Indirect discrimination occurs where an employer applies to one person a condition which is such that the proportion of the racial group to which the candidate belongs, and who can comply, is

considerably smaller than the proportion of candidates not from that racial group who can also comply, a condition which cannot be justified, and which is to the detriment of that person. If an employer discriminates against everyone who does not have permission to work in Britain then such a blanket policy will have an adverse impact on foreign nationals, it being inherently a discriminatory condition of employment, with a disproportionate impact, to their detriment, which cannot be justified. Each application should be considered individually on its merits, disregarding the work permit situation.

In short, the factor of a work permit should not feature in the recruitment decision-making process when it comes to selection of which applicant is best for the job.

What are the possible sanctions?

An individual who believes that he or she had been discriminated against on grounds of race in applying for a job could bring a claim against the employer in question. It is relatively cheap and straightforward for an individual to bring such a claim and in an employment tribunal costs will not normally be awarded against the applicant if the claim fails. This could be damaging, both financially and publicity-wise, for the employer.

There is no limit to the amount of damages that can be awarded for discrimination which cover both injury to feelings and loss of opportunity in the labour market, going beyond actual wages. The tribunal could also recommend remedial action to ensure that the discrimination does not happen in future and, potentially, the Commission for Racial Equality could also launch an investigation into the relevant selection procedure. If the employer's actions were held to amount to direct discrimination, there could be criminal liability, punishable with a fine.

How should employers handle applications from applicants needing a work permit?

- ◆ **Do not have a blanket policy that all applications from applicants needing a work permit will be refused**

There is clearly a risk of discrimination if a blanket policy is adopted, as the disregarding of applications is for a reason related to nationality. The fact that an employer has enough local applicants to fill the post is no defence to such a policy, so the employer could face liability. Employers need to consider every application on its merits and it is recommended that strong candidates are interviewed, regardless of their work permit status.



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◆ **Ensure that objective selection criteria are used when deciding who to interview and whom to offer the position**

An employer needs to show that it used objective criteria in deciding which applicants should go forward to the interview stage if it is to avoid potential claims. This could be work experience or qualifications but not work permit status. If, after considering applications, the employer considers that it has enough local candidates of the necessary calibre and, in its experience, it would not be able to get a work permit for a foreign applicant on the grounds that there was a local applicant just as good for the job, then it would probably avoid discrimination claims. However, there is a risk that an applicant may have a hidden skill, such as good communication, which does not come across in an application form but would be revealed in an interview. It is prudent therefore to consider all strong applicants at interview stage.

◆ **Using work permit status as a tie-breaker**

If, at interview, two candidates were equally good, then the employer, generally speaking, should give the job to the local candidate on the grounds that the foreign candidate would not be granted a work permit because there was a local person good enough to do the job. However, employers should be extremely prudent when making such a decision – as mentioned above, tribunals are entitled to draw an adverse inference to them so it is vital that employers can show

that the decision-making process had got that far and that the only reason a work permit became an issue was because in those circumstances it was self-evident that a work permit could not be granted. It is not, therefore, so much a tie-breaker as an obligation in relation to immigration law since, when applying for a work permit, one has to declare that there is no suitable local candidate.

Skills shortage

Employers should remember that it is relatively easy to get permits for actuaries, especially as there is a skills shortage in this area, so it is unwise to assume that a permit would not be granted just because there was a local candidate capable of doing the job. It must be done on a case-by-case basis and a proper considered judgement given. The successful candidate must be chosen in accordance with transparent, objective criteria. Employers should not attempt to fall into discriminatory practices by not making the effort to apply for a work permit for the best candidate and ‘creating’ objective criteria which suit the candidate they have chosen – remember that the tribunal can draw an inference from all of the facts before it if it is not satisfied with the employer’s explanation.

Although it is burdensome to consider all applications, employers should be aware of their potential liability under the Race Relations Act if they do not fully consider applications from applicants requiring work permits. □

Endangered species faces further problems

Pensions actuaries should make the most of things, says Alastair Allan.

ACTUARIES HAVE NEVER BEEN in greater demand. There has been a significant rise in salary averages, and it is apparent that the pension actuarial marketplace is predominantly candidate-led – so much so that shortages have driven employers abroad in their search for this endangered species. South Africa, in its unfortunate state of political unrest, provides an opportunity for UK organisations to dip into its pool of specialist knowledge. Visa consultancies are in their prime, bringing specialists in from abroad to counter UK insufficiencies.

It is a fact that the present high demand for pensions actuaries is a direct result of the ongoing ‘pension mis-selling review’, whereby actuaries from other disciplines have been cross-trained in pensions skills in an attempt to provide the manpower required. There are also, inevitably, a number of individuals cross-training to ‘cash in’ on the premium salaries available. However, shortages still occur.

This has led to an employer war, whereby recruitment consultants and human resources departments battle it out, attempting to secure the best possible candidates for their organisations. The most sought-after actuaries are those with three to four years’ experience, followed closely by less experienced part-qualifieds, who enjoy a rare demand for their skills – an unusual privilege for the inexperienced professional – which underlines the scarceness of quality candidates.

At present the two most sought-after skills within the actuarial marketplace are ‘personal effectiveness’ alongside ‘technical competence’. These two skills will play a pivotal role over the coming five years. According to market research, management and leadership qualities are also becoming more essential, presumably to ensure high-quality candidates for the future success of businesses.

Forecasts indicate that within the next five years the central challenge to the actuarial

profession will be applying actuarial knowledge and skills to ‘wider fields’. With three-quarters of employers recruiting additional actuaries over the coming year, the key personal factor will be excellent interpersonal skills. This was also acknowledged within the student actuary population. In addition, it was agreed that training improved business and reduced staff turnover. Funding of internal training is therefore critical to securing the best possible candidates for today and tomorrow.

It is predicted that by 2002, with the rectification provided by the pension mis-selling review, the actuarial pensions marketplace will do something of a somersault, and a downward trend will transpire, resulting in candidate surpluses – a seemingly inevitable backlash.

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