

Employing illegal immigrants: the Baroness Scotland affair



The lessons that organisations should learn from her mistake
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The story of attorney general Baroness Scotland and her "illegal" housekeeper certainly enjoyed more than its fair share of headlines. What did the attorney general do wrong and, more important, what should another employer in her place have done to avoid the £5,000 fine levied against her?

What went wrong?

Put simply, Baroness Scotland employed a Tongan national who did not have the required immigration permission to carry out the job as her housekeeper. Under English law, this is an offence.

Is there no exemption for small employers?

No – the current law applies in exactly the same way to sole traders as it does to large multinational companies.

A technical breach or a criminal offence?

Talk in the press compared the Baroness' error to forgetting to pay the congestion charge - in other words, this was more of a technical breach than a criminal offence.

This is correct up to a point. Where an employer knowingly employs someone who does not have permission to do the job in question, it commits a criminal offence, attracting an unlimited fine and a maximum penalty of six months' imprisonment. However, in this case, the UK Border Agency carried out an investigation, with which the attorney general co-operated fully, and was satisfied that she had not knowingly broken the law. As such, she had only committed a civil offence and was fined £5,000. The alleged technical breach concerned her failure to follow fully the four-step procedure set out below. If employers can show they have followed this procedure, they can avoid the civil charge.

Could the fine have been bigger?

Yes. Where an employer is found to have unwittingly employed an illegal worker, the maximum fine is £10,000 per illegal worker. In this case, however, the UK Border Agency considered that the civil penalty of £5,000 was in line with those imposed on other employers that have found themselves in a similar situation and no doubt reflected the attorney general's cooperation with the investigation and her efforts to carry out the "right to work" checks on her housekeeper.

What should employers do?

It is reported that the attorney general checked certain documents provided by her housekeeper as proof of immigration status, but failed to retain proof that the documents had been checked. As a full defence against the civil offence of employing illegal workers, employers should carry out the following specific steps before employees start work:

- Step 1** is to request certain original documents. The relevant documents vary depending on the immigration status of the individual.
- Step 2** is to check the validity of the documents provided. In doing so, the employer must be satisfied that the individual is the person named in the documents presented.
- Step 3** is to make copies of the relevant sections of the original documents. For example, where a passport is presented, its front cover, any page containing the holder's details (including photos) and any page containing UK visa stamps, must be copied. These copies must be kept for the duration of employment and for a further two years after it has ended.
- Step 4** applies where an individual does not have the right to stay indefinitely in the UK. In this case, the employer must carry out Steps 1 to 3 above on at least an annual basis.

Can employers avoid liability for these tests?

No. This is a strict liability test and ignorance is no defence. If employers are in any doubt about this tricky area, advice should be sought as early as possible.

Further Info

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