



Avoiding (Indirect and Direct) Race Discrimination Towards Non-EEA Migrants in Your Recruitment Practice and Procedures

The Background

A Tier 4 international student from India decides to apply for a two-year graduate training job with an employer based in London and which will commence after graduation.

The student begins to complete the online application form, which asks the question:

Do you need sponsorship/visa to work and carryout the role for which you are applying?

The student notes that her Tier 4 visa would allow her to commence her employment because she would still have 4 months left on her visa after her last day at university (Non-EEA students can work fulltime when not in term time) but that she would need to switch to a Tier 2 work visa before her Tier 4 status expires. She therefore answers Yes to this question.

This answer takes the student to another webpage where the student is told:

You have not met the entry requirement because we do not accept applications from candidates who require Tier 2 visa sponsorship.

Is this discrimination? It depends....

What should be clear in this scenario is that the student is identified as a non-EEA national and is therefore entitled to bring a claim for race discrimination if the student believes that she has been prevented from progressing in the application process because of her nationality.

When Would This Be Justified and Thus Not Discrimination?

We are of the view that there are only five scenarios in which an employer may refuse to take a migrant's application further, where doing so, would require Tier 2 sponsorship:

1. **National security** reasons– an example of this might be a company in the defence sector working on a sensitive project for the Government.
2. A **time critical delivery of a contract obligation** on which the successful candidate would be expected to work on and the delay in acquiring a sponsor licence (if the employer does not yet have one) and then obtaining the Certificate of Sponsorship would delay deliverables set out in the Terms of the contract.
3. The **skill level** for the job on offer is below that for which a Tier 2 visa will be issued.

4. The **salary on offer** for the job is less than the minimum rate for which a Tier 2 visa will be issued.
5. Where there is **not enough time for the business to acquire a sponsor licence** (if they do not have one) before the student's leave expires. Generally, in our experience it will take the Home Office between 3 to 6 weeks (Note that the Government published Guidance states 8 weeks) to make a decision on a sponsor licence application from the date that the application is filed. It also usually takes a business the same length of time to prepare their paperwork and their processes in readiness to make the application.

In each of the scenarios above, it would be **best practice for the business to set out the reason** for not taking the job application further to prevent a discrimination claim later and the time and expense associated with this.

However, in our scenario the business in question is a large multinational marketing agency which already has a sponsor licence but even if they did not have the licence there is enough time for them to apply. Moreover, they are paying a salary which is higher than the minimum rate, the job is at the appropriate skill level and the training will take place in a number of seats thus there are no time sensitive issues.

Therefore, for the reasons that follow we would argue that the approach of the employer in rejecting the application of the Tier 4 student is not in accordance with the law and thus is **indirect discrimination on the grounds of nationality**.

The Law

The [Home Office Code of Practice for employers on avoiding unlawful discrimination](#) states:

“Indirect discrimination occurs where a provision, criterion or practice, although applied equally to others, would put persons of a particular racial group at a particular disadvantage compared with other persons, unless the provision, criterion or practice is objectively justified by a legitimate aim.”

The Code goes on to say:

“You must not discriminate because of race:

(a) in the arrangements you make to decide who should be offered employment; or

(b) as to the terms on which you offer to employ a person; or

(c) by refusing or deliberately failing to offer employment.”

The Code provides guidance to employers on how to avoid race discrimination in recruitment practices and makes it clear that the best way to ensure this is to **treat all applicants fairly and in the same way at each stage of the recruitment process.**

Whilst it is a **statutory requirement that an employer checks that an applicant has the right to work in the UK before they start work**, applicants should not be treated less favourably if they produce acceptable documents showing a time-limited permission to stay in the UK and an on-going entitlement to work. If one of the 5 exceptions above apply then an employer may decide not to take the application further but then be prepared to provide evidence if requested.

Our student's claim for indirect discrimination is also supported by the [Equality Act 2010 Code of Practice \(Employment Statutory Code of Practice\)](#).

This Code covers discrimination in employment and work-related activities. Whilst the Code does not impose legal obligations, it can be used in evidence in legal proceedings and Tribunals/Courts are required to take in to account any part of the Code relevant in the proceedings before them.

This Code states:

*“While nothing prevents an employer from hiring the best person for the job, it is unlawful for an employer to discriminate in any of the arrangements made to fill a vacancy, in the terms of employment that are offered or in any decision to refuse someone a job. **With certain limited exceptions, employers must not make recruitment decisions that are directly or indirectly discriminatory.**”*

*Arrangements refer to the policies, criteria and practices used in the recruitment process including the decision-making process. ‘Arrangements’ for the purposes of the Act are not confined to those which an employer makes in deciding who should be offered a specific job. They also include arrangements for deciding who should be offered employment more generally. **Arrangements include such things as advertisements for jobs, the application process and the interview stage.**”*

The Code was relied upon in the leading case on this subject and a case which further supports our student:

Osborne Clark Vs Purohit (2009).

Whilst this case involved the old-style work permit (therefore in this analysis of the case substitute the term work permit to a Tier 2 visa or even sponsor licence), the facts are very similar to our student's case and to date has not been overruled by subsequent caselaw.

Osborne Clark is a large law firm who had advertised positions for training contracts. Purohit, being an Indian national and international student in the UK applied for this role. His application was rejected and he was told that the firm did not accept applications from candidates that required a work permit because the firm was unable to obtain work permits for candidates to be able to take up employment in the UK.

Osborne Clark had not rejected Purohit's application based on merit i.e. there were more suitable candidates than Purohit but rather they had rejected his application without any further consideration of his skills and qualifications for the role on offer. The Tribunal noted that Purohit had a first-class degree and a 2.1 Master's degree.

Osborne Clark provided no evidence to show that they had made contact with the Home Office. They just made arguments based on cost and clogging up the system which were rejected as they did not provide evidence to justify the assumption that there was no point in applying for a work permit on the basis that one would not be obtainable.

The Tribunal amongst other factors relied on the following passage of the Equality Act Code:

*“Eligibility to work in the UK **should be verified in the final stages of the selection process rather than at the application stage**, to make sure the appointment is **based on merit alone** and is not influenced by other factors. Depending on the employer's recruitment process and the type of job being filled, candidates might be asked for the relevant documents when they are invited to an interview, or when an offer of employment is made. **Employers can, in some circumstances, apply for work permits and should not exclude potentially suitable candidates from the selection process.**”*

Therefore, by **stopping a non-EEA national from applying before assessing merits is in breach of this code.** The employer should assess who are the best candidates and then at a later stage consider their eligibility to work in the UK. If the best candidate is the non-EEA candidate it may be dependent on the circumstances (the five exceptions) if the employer can justify not applying for a tier 2 visa or a sponsor licence.

Conclusion

Employers should consider the contents of this advice carefully and avoid a discrimination claim which could result in unnecessary expense, time defending the claim and **reputational damage.**

By rejecting non-EEA nationals at the beginning of the application process, without considering merits and suitability for the role on offer leaves an employer open to such a claim unless they are **prepared to justify their position later.**

For international students, it is important that if they reach such an obstacle at the recruitment stage that they **ask for written feedback** as to the reasons for rejected the application so that they are clear that a valid and proper reason is given.

Paragon Law are happy to advise further.

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