

## Immigration and Asylum Act 1999 - Section 22

### Code of Practice

For all employers on the avoidance of race discrimination in recruitment practice while seeking to prevent illegal working.

### Introduction

#### Purpose and status of this Code

1. Illegal working is a growing, global problem. Many countries around the world have laws to deal with illegal employment. However, it is important to remember that the population of the United Kingdom is ethnically diverse. Most people from ethnic minorities are British citizens and most non-British citizens from the ethnic minorities are entitled to work here.
2. Section 8 of the Asylum and Immigration Act 1996 ('the 1996 Act [1]) aims to ensure that employment is offered only to those entitled to live and work in the UK.
3. This Code aims to provide all employers with guidance on avoiding conviction under Section 8 in a way **that does not result in unlawful race discrimination** [2].
4. In 1996, the Home Office issued detailed guidance about what employers must do to avoid a criminal conviction under Section 8 [3]. The 1996 guidance reminds employers of their obligations under the Race Relations Act 1976 (the 1976 Act). This guidance applies also in Northern Ireland where employers have similar obligations under the Race Relations (Northern Ireland) Order 1997. There is evidence, however, that some employers may be unlawfully discriminating when seeking to avoid conviction under Section 8.
5. This new Code is designed to strengthen the safeguards against discrimination by re-emphasising employers' statutory duty to avoid race discrimination in their recruitment practices.
6. The Code does not impose any legal obligations itself, and it is not an authoritative statement of the law. Failure to observe the Code is not a breach of the law. **But failure to observe the code is admissible in evidence** in any proceedings under the 1976 Act or the Race Relations (Northern Ireland) Order 1997 (the 1997 Order) before an Employment Tribunal (Industrial Tribunal in Northern Ireland). The Tribunal must take the Code into account, if it is relevant.
7. This Code outlines your legal obligations under the Race Relations Act 1976, Race Relations (Northern Ireland) Order 1997 and the Asylum and Immigration Act 1996 and provides some best practice in employment

procedures that can help you to meet these obligations. It is not comprehensive and it is for employers to operate transparent recruitment practices which are consistent with the law, ensuring fair treatment to all applicants.

## **Your responsibility under the Law: Race Relations Act 1976 and Race Relations (Northern Ireland) Order 1997**

8. Under the 1976 Act and the 1997 Order **it is unlawful** to discriminate in recruitment or employment on the following grounds:

- race or colour
- nationality (including citizenship) and
- ethnic or national origin.

Race discrimination may be either direct or indirect.

Direct discrimination means treating a person less favourably on racial grounds, for example by rejecting all job applicants who do not have British nationality or by refusing to consider any black job applicants. Treatment based on race or national stereotypes can also constitute direct discrimination.

Indirect discrimination means imposing a condition or requirement which applies equally to everyone but is harder for people from particular racial groups to satisfy, and which cannot be justified. For example, it could be discrimination to ask for a high standard of English when the job does not require this.

9. **It is unlawful** to victimise a person because he or she has made, or supported, a complaint of racial discrimination. It is also unlawful to instruct or induce another person to discriminate. It is also unlawful to publish an advertisement or notice that indicates an intention to discriminate.

### ***Employment Agencies***

10. **An employment agency practising unlawful discrimination will be liable even if it is acting on the instructions of an employer.**

### ***Liability for the actions of others***

11. Under the 1976 Act and the 1997 Order, discrimination committed by an employee in the course of his or her employment is treated as having been committed by the employer as well as by the individual employee whether or not the employer knew or approved. Employers can avoid liability if they can prove that they took sufficient reasonable steps to prevent such

discrimination. A complaint to a Tribunal may be made against both the employer and the individual employee who is alleged to have discriminated.

### ***Right of Complaint***

12. Anyone who believes that he or she has been discriminated against on racial grounds by an employer, a prospective employer or an employment agency may bring a complaint before a Tribunal. If the complaint is upheld, the Tribunal will normally order the employer to pay compensation, for which there is now no upper limit.

13. The Commission for Racial Equality and the Northern Ireland Equality Commission can bring proceedings against an employer who publishes a discriminatory advertisement or who instructs or induces another person to discriminate.

### **Your responsibility under the law: Section 8 of the Asylum and Immigration Act 1996**

14. Under section 8 of the Asylum and Immigration Act 1996 it is a criminal offence to employ a person aged 16 or over who is subject to immigration control [4] unless:

- that person has current and valid permission to be in the United Kingdom and that permission does not prevent him or her from taking the job in question (see paragraph 16); or
- the person comes into a category specified by the Home Secretary [5] where such employment is allowed (e.g. see paragraph 17).

15. In practice, most people seeking work are not subject to immigration control and can be taken on without contravening Section 8. Section 8 does not apply to the employment of: -

- British citizens
- Commonwealth citizens with the right of abode in the UK, and
- Citizens of any country in the European Economic Area (EEA).

16. **It is lawful** to employ anyone who is subject to immigration control so long as his or her leave to enter or remain in the UK has not expired and the leave does not prevent him or her from working.

17. **It is lawful** also to employ asylum seekers, provided they have written permission to work. It is also lawful to employ, people awaiting the outcome of an immigration appeal who before their appeal had permission to work or people who were entitled to work and are awaiting the outcome of a request for an extension to that permission requested before it ran out.

### ***The statutory defence***

18. The 1996 Act makes a statutory defence against prosecution available to all employers. If you establish a defence you will not be convicted, even if it turns out that a person you are employing is subject to immigration control and is working without permission. The defence will be valid unless it can be shown that you knew that the person was not entitled to work when you employed them. **Any employer who knows they are employing people who do not have permission to work can be prosecuted under Section 8.**

19. In order to establish a defence you need to make sure that, before a person starts working for you, you see at least one document which appears to you to be listed in **Appendix 1. You should ensure that the document is an original and that it appears to relate to the person that you are intending to employ.** You should make either a copy or record of the document or retain it. This last option will normally only be appropriate in the case of Part 2 of a P45. The statutory defence is only established by checking documents **before** taking on a new employee. There is no requirement to do anything else, even if the person's permission to be in the United Kingdom is not yet permanent. You should not ask existing employees to demonstrate that they have permission to work.

20. The checks which you need to make to claim the statutory defence are in most cases straightforward and can be built into your normal recruitment procedures. Such checks are not compulsory but they are advisable. If you do not make them you will not have the statutory defence which they provide. But if you make checks you should ensure that they are made in a non-discriminatory manner.

### ***Avoiding Racial Discrimination***

21. As a matter of good practice you should have clear written procedures for recruitment and selection based on equal and fair treatment for all applicants and should make these known to all relevant staff.

22. All job selections should be on the basis of suitability for the post. You should ensure that no prospective job applicants are discouraged or excluded either directly or indirectly because of their appearance or accent. You should not make assumptions about a person's right to work, or immigration status, on the basis of their colour, race, nationality or ethnic or national origins or the length of time they have been in the UK.

23. To avoid prosecution under the 1996 Act you only need to see and either keep or make a copy of one of the documents listed in Appendix 1 before the employment begins. There is **no need** to ask about an applicant's immigration status, apart from asking if he or she needs permission to work. Such enquiries could mislead you into taking decisions which might constitute **unlawful** racial discrimination.

24. The best way to ensure that you do not discriminate is to treat all applicants in the same way at each stage of the recruitment process. For example, if you provide information to prospective applicants, or if you supply an application form, you could also include a reminder that the successful applicant will be asked to produce one of the specified documents - and attach the list.

25. You may ask applicants to provide one of the specified documents at any stage before they start work. Depending on your recruitment processes, you may find it most convenient to request a document from all those called to a first interview, or just from those called to a second interview, or only from the person chosen to fill the vacancy. **It is perfectly satisfactory to ask for a document only from the person chosen to fill the vacancy if that is most administratively convenient.** But if you ask for a document from one applicant make sure you ask for a document from all applicants being considered at that stage.

26. **The documents listed in Appendix one are of equal status under the 1996 Act.** For example, a person who is unable to produce a document showing their National Insurance Number should not be treated less favourably if she or he is able to produce any other document listed. You only need to see one of the specified documents. Rejecting a candidate who does not have a particular document even though they have one of the others could be unlawful discrimination.

27. If a person is not able to produce one of the listed documents, you should not assume that he or she is living or working in the UK illegally. You should refer the person to a Citizens Advice Bureau or other agency for advice. You should try to keep the job open for as long as possible but you are not obliged to do so if you need to recruit someone urgently.

28. As a matter of good practice you should monitor the outcomes of recruitment and selection by the ethnicity of job applicants. This will help you to know whether you are treating applicants fairly and without discrimination and can be used in reviewing recruitment procedures.

## List of specified documents [6]

### Appendix 1

- A document issued by a previous employer, the Inland Revenue, the Benefits Agency, the Contributions Agency or the Employment Service (or the Northern Ireland equivalents) which states the National Insurance number of the person named.
- A passport describing the holder as a British Citizen or having the right of abode in - or an entitlement to readmission to - the United Kingdom.
- A passport containing a Certificate of Entitlement issued by or on behalf of the Government of the United Kingdom certifying that the holder has the right of abode in the United Kingdom.
- A certificate of registration or naturalisation as a British Citizen
- A birth certificate issued in the United Kingdom, the Republic of Ireland, the Channel Islands or the Isle of Man.
- A passport or national identity card issued by a State which is a party to European Economic Area Agreement and which describes the holder as a national of that State.
- A passport or other travel document endorsed to show that the person named is exempt from immigration control, has indefinite leave to enter, or remain in, the United Kingdom or has no time limit on his or her stay; or a letter issued by the Home Office confirming that the person named has such status.
- A passport or other travel document endorsed to show that the person named has current leave to enter or remain in the United Kingdom and is not precluded from taking the employment in question, or a letter issued by the Home Office confirming that this is the case.
- A United Kingdom residence permit issued to a national of a State which is a party to the European Economic Area Agreement.
- A passport or other travel document endorsed to show that the holder has a current right of residence in the United Kingdom as the family member of a named national of a State which is a party to the European Economic Area Agreement and who is resident in the United Kingdom.
- A letter issued by the Immigration and Nationality Directorate of the Home Office indicating that the person named in the letter is a British citizen or has permission to take employment.
- A work permit or other approval to take employment issued by Work Permits (UK) (formerly Department for Education and Employment) or, in Northern Ireland, by the Training and Employment Agency.
- A passport describing the holder as a British Dependent Territories Citizen and which indicates that the status derives from a connection with Gibraltar.

You should ensure that you see the original documents.

## OTHER SOURCES OF INFORMATION

### Appendix 2

#### ***Publications***

- The Asylum and Immigration Act 1996: Implications for Racial Equality. This guidance is produced by the Commission for Racial Equality and copies are available from CRE Distribution Services, Elliot House, 10 - 12 Allington Street, London SW1E 5EH.
- Race Relations Code of Practice: For the Elimination of Racial Discrimination and the Promotion of Equality of Opportunity in Employment.  
This Code contains practical guidance to help employers to comply with the Race Relations Act 1976. It is also produced by the Commission for Racial Equality and copies are available from Central Books, 99 Walis Road, London E9 5LN (Telephone 0208 986 4854)

#### ***The Commission for Racial Equality***

Visit the Commission for Racial Equality website at [www.cre.gov.uk](http://www.cre.gov.uk) .

The Commission for Racial Equality can also advise on particular points. You should consult the office nearest to you for advice:

Birmingham (Midlands & Wales Region)  
3rd Floor  
Lancaster House  
67 Newhall Street  
Birmingham, B3 1NA  
Tel: 0121 710 3000

Cardiff (Midlands and Wales Region)  
14th Floor  
Capital Tower  
Greyfriars Street  
Cardiff, CF1 3AG  
Tel: 0122 238 8977  
Fax: 0122 2399680

Edinburgh (North of England and Scotland Region)  
The Tun  
12 Jackson's Entry  
off Holyrood Road  
Edinburgh, EH8 8PJ  
Tel: 0131 240 2600  
Fax: 0131 240 2601

Leeds (North of England and Scotland Region)  
1st Floor  
Yorkshire Bank Chambers  
Infirmary Street  
Leeds  
LS1 2JP  
Tel: 0113 389 3600  
Fax: 0113 389 3601

London (Head Office / London and South Region)  
Elliot House  
10-12 Allington Street  
London, SW1E 5EH  
Tel: 0171 828 7022  
Fax: 0171 630 7605 (main)

Manchester (North of England and  
Scotland Region)  
5th Floor  
Maybrook House  
40 Blackfriars Street  
Manchester M3 2EG  
Tel: 0161 835 5500  
Fax: 0161 835 5501

**Northern Ireland Council for Ethnic  
Minorities**

3rd Floor  
Ascot House  
Shaftesbury Square  
Belfast BT2  
Tel: 02890 238 645  
Fax: 02890 319 485

**Equality Commission for Northern  
Ireland**

Racial Equality Directorate  
Andras House  
60 Great Victoria Street  
Belfast BT2 7BB  
Tel: 02890 500 600  
Fax: 02890 351 993

If you want further advice about general immigration issues you should  
contact:

Immigration and Nationality Directorate  
Lunar House  
40 Wellesley Road  
Croydon  
CR9 2BY

Tel: 0870 606 7766

**Footnotes**

[1] Introduced by (S 22) of the Immigration and Asylum Act 1999

[2] This code draws heavily on the Commission for Racial Equality's Guide for  
Employers "Racial Equality and the Asylum and Immigration Act 1996".  
Readers may also find it useful to refer to that publication. Details of how to  
get it are in Appendix 2

[3] Prevention of illegal working: Guidance for employers, Home Office  
Communication Directorate, December 1996

[4] A person subject to immigration control is a person who, under the  
Immigration and Asylum Act 1971, requires leave to enter or remain in the  
UK.

[5] The categories are currently listed in the Immigration (Restrictions on  
Employment) Order 1996 (SI 1996/3325).

[6] These documents are currently specified in the Immigration (Restrictions  
on Employment) Order 1996 (SI 1996/3325).