

Byron: Illegal working and employers' duties

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Byron: Illegal working and employers' duties

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Migrant workers and swarms of locusts may sound like warnings from a Leave campaign flyer, but they were factors present in one of the most controversial employment law stories of recent years.

The Byron burger restaurant chain is embroiled in allegations that it duped a large number of its kitchen staff into attending what it said would be a training session, which

turned out to be a covert and jointly arranged event with the UK Border Agency.

Rather than being trained on the dangers of undercooked burgers, 35 of the kitchen staff were arrested by immigration officials on suspicion of working illegally. The arrests are said to have taken place with Byron's 'full co-operation'.

Fair reason and process

Employers have competing legal obligations to prevent illegal working whilst also maintaining the trust and confidence of their employees. These obligations can generally co-exist peacefully but can clash where an employer suspects that employees are working illegally.

Byron should have carried out document checks on those employees before they started employment. This is to establish the employer's defence under the Immigration, Asylum and Nationality Act 2006 to avoid potentially unlimited fines or even a prison sentence (which can be applied as a sanction if an employer knows, or as a result of changes introduced on 12 July 2016, has reasonable cause to believe, that an employee is working illegally).

If the employees had two or more years of service, Byron would have needed a fair reason and to follow a fair process in dismissing them (provided they could show that the illegality involved here did not remove their unfair dismissal rights).

If continued employment would be breaching the law (such as the 2006 Act), this provides a potentially fair reason for dismissal. Whilst the alleged duping of the employees falls as far away from a fair process as one can imagine (especially since it appears the employees had no idea an outcome of the 'training day' could be dismissal), their redress is limited. Byron would no doubt say that it still would have dismissed the employees in any event by following a fair process, as its relationships with the staff were fatally wounded by the fact

the law would have prevented their continued employment.

Byron had a legal duty to each of the employees not to act in such a way that was calculated or likely to destroy or seriously damage mutual trust and confidence without reasonable and proper cause. Sadly for those employees, whose experience that day puts any bad day at the office in perspective, Byron's seeking to prevent illegal working may amount to 'proper cause'.

Discrimination claims

Employers must tread carefully when complying with requests for compliance from the Border Agency. Targeting staff of a particular nationality could expose an employer to discrimination claims for which compensation is uncapped. Byron reportedly called all kitchen staff to the 'training day', which will help deflect claims that this was an act of discrimination on the grounds of nationality.

While the defence of illegality is generally fatal to an illegal worker's claim, the Supreme Court's decision in *Hounga v Allen* [2014] UKSC 47 suggested that in extreme circumstances where employees are being abused or ill treated, the defence of illegality does not necessarily bar an illegal worker from bringing a discrimination claim.

However, it is not only Theresa May's announcement that 'Brexit means Brexit' that spells bad news for migrants hoping to work in the UK. In June 2016, the Supreme Court distinguished discrimination on the grounds of immigration status (as lawful) from discrimination on the basis of nationality (which is unlawful) in *Taiwo v Olajigbe and another* [2016] UK SC 31.

Migrant workers seeking to bring discrimination claims would need to show that the discrimination was on the grounds of a characteristic protected by the Equality Act, such as nationality. For the Byron staff, this would have been

difficult as there are citizens of their nations (including Brazil and Egypt) who are legally in the UK.

For Byron, the damage is likely to be more reputational than legal. After the scandal, a group of protestors released live locusts into two of its central London restaurants. The burger chain may also have harmed its relationships with their existing employees, whose trust may have been lessened by the scandal.

This article by [Paul McAleavey](#) was originally published on 16 August 2016 in the [Solicitors' Journal](#).

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