
**TUC response to the Home Office
Prevention of Illegal Working
July 2007**

Don't penalise, regularise!

Introduction

1. The TUC's comments will be confined to the proposals set out in "Penalties for Rule-Breakers". The TUC's views on the Points-Based System and the Borders Bill have been set out elsewhere.
2. Whilst welcoming the opportunity to comment on the Government's proposals the TUC believes that they are generally moving in the wrong direction and accordingly feels unable to follow the structured questions set out in the consultation document. The TUC believes these proposals would turn employers into the frontline of the immigration services both souring workplace relationships but also concentrating more power into the hands of would be abusers.
3. The TUC believes that more can be achieved by following a rights-based approach than through potentially penalising the employer for breaches of immigration law. A rights-based approach would not only help to prevent the exploitation of undocumented workers, it would also provide a disincentive to those unscrupulous employers who deliberately hire undocumented workers because they are so easily exploited.
4. The TUC opposed the penalties for employers under the Asylum and Immigration Act 1996 not only because, as proved to be the case, they would produce very few convictions, but also because their impact would be perverse – as elaborated below.
5. The TUC also believes that all such discussions should be set in the context of an acknowledgement of the enormous contribution that migrant workers make to our economy and wider society.

The evidence for a penalty-based approach

6. The TUC is guided in its belief that a right-based approach would be preferable to a penalty-based approach by the experience of our colleagues in the USA – we therefore set out their experience in some detail.
7. The American trade union movement, the AFL-CIO, used to call for criminal sanctions against employers of undocumented workers, and in 1986, the US

Immigration Reform and Control Act imposed such sanctions. But by February 2000 the AFL-CIO was calling for the repeal of the Act. AFL-CIO President John Sweeney explained the reasons to the Senate in the following year: "even though the object of employer sanctions was to punish employers who knowingly hire undocumented workers, and not the workers themselves, in reality employers have manipulated the program to violate federal and state labor laws and to discriminate against workers. The current situation not only harms all workers, but also those employers who face unfair competition from others who skimp on labour costs by hiring and then exploiting undocumented workers....Although employer sanctions did not create the problems of exploitation and discrimination, they have contributed significantly to the inability of immigrant workers to enjoy and enforce the most basic labour and workplace rights."

8. In their new position, as part of the American immigration services, some unscrupulous employers exploited their duties for their own interests. Union recruitment activities were frequently interrupted by threats by employers to carry out document checks. Many undocumented workers faced with such action just slipped away rather than organising for their rights. In the UK, we have anecdotal evidence of similar behaviour, with employers doing nothing about workers' status until they begin to demand their rights.

9. Following the 1986 Act the US General Accounting Office carried out a survey in 1990 which showed that it had resulted in "widespread discrimination" and "a serious pattern of discrimination". An earlier survey of 20 countries which imposed such sanctions showed that they were not effective in preventing the hiring of undocumented workers. Indeed, the number of undocumented workers in the USA continues to rise. Estimates would similarly suggest that undocumented working in the UK, despite the sanctions brought in by the Asylum and Immigration Act 1996, continue to grow.

10. The CBI have also expressed their concern that a sanctions approach will not be fit for purpose but will provide needless burdens for right-minded employers: "the introduction of civil penalties for negligent employers . . . is a distraction. We are concerned that the difficulty of taking enforcement actions against true rogue employers will lead to a perverse incentive to target legal firms who employ legitimate migrants and may make the occasional mistake. The introduction of civil penalties for negligent employers may present enforcement officers with an 'easy win'."

Discrimination

11. The Joint Council for the Welfare of Immigrants has rightly identified the following problem: "'enforcers' of immigration control and the threat of civil penalties as well as the requirement to repeatedly check documents will act as a

disincentive to employers hiring foreign nationals, including those who are 'documented', and ethnic minorities."

12. The requirement for employers to carry out repeated checks on those who do not have an unqualified right to work and reside in the UK – a process which does not seem to be limited in any way by the code – will provide the unscrupulous with another means by which to harass the vulnerable and undermine union organisation. Even in workplaces where employers still seek to employ migrant workers and comply with the law such checks will create fear (even if not justified), feelings of humiliation and divisions within the workforce. It is a regime which if anything will drive undocumented workers even further underground and into the arms of exploitative employers.

A rights-based approach

13. There needs to be an appreciation that people become undocumented by a number of routes (it is possible for an overseas student working legally to become undocumented by working a couple of extra hours a week, for example; and if it was easier for people in productive work to extend their visas, many would not become 'over-stayers'). The evidence would suggest that the majority of such people have entered the country quite legally. A lot could be done to ensure that the present and new system does not create needless incentives or disincentives for workers to drift from documented to undocumented.

14. In addition, the incentive for bad employers to exploit undocumented workers needs to be reduced.

15. In both of these instances a rights based approach is not only correct in that it underpins the dignity of the individual but also would help maintain the documented status of many workers.

16. Both in its previous and revised form the UK's immigration policy continues to be in breach of ILO Convention No. 143, denying migrant workers important employment rights. For example, Article 8 of this Convention expressly states that a migrant worker lawfully residing in a territory for purposes of employment may not lose the right to go on living or working there merely through loss of employment. For example, in relation the new tier 2, this would remove the incentive for migrant workers to go down the undocumented route should they feel the need to leave a potentially abusive employer without permission.

17. Similarly, under the new proposals for Migrant Domestic Workers, many (predominately women) will be faced with the unacceptable choice of putting up with gross abuse by their employer or going underground.

18. In other instances it needs to be questioned whether technical breaches of rights to work in the UK warrant tax payers' money being spent in tracking down

undocumented workers and whether the possible penalties such as removal are proportionate.

19. Although it is important not to confuse the asylum and migrant worker issues, nevertheless, a large number of asylum seekers are prevented from working in the UK and forced into undocumented labour to avoid destitution. The government persists with this approach despite the fact that it is nigh on impossible to remove the vast bulk of this group.

20. The TUC is firmly committed to the belief that the issue of a migrant's rights to reside and work in the UK should be separated from that of their employment rights. The current unenforceability of undocumented workers' employment rights creates a market for such workers amongst some of the worst of employers.

21. At present, undocumented workers can be denied their wages, forced to work intolerable hours and abused in many other ways. If they are not sufficiently compliant they may be threatened with denunciation and removal. Even if not, they have no means of seeking redress to the wrongs done to them. Such practices can have a detrimental effect on documented workers who are working in the same labour market and even lead them, through competition with abused undocumented workers, to be subject to an unsafe working environment.

22. This denial of employment rights to undocumented workers is far from universal. Across Europe one finds many examples where undocumented workers' employment rights are respected. Undocumented workers can make a claim against their employers for withholding their pay in the labour courts of Belgium, France, Germany, Greece, Italy, the Netherlands and Portugal. If the worker was employed in Belgium, Germany or Greece, and was deported or voluntarily returned to his/her country of origin, s/he may still initiate a claim against the employer from abroad.

23. With regards to America: "undocumented workers in the United States generally have the same workplace rights under many labor and civil rights laws as documented workers and citizens, including the right to minimum wage and overtime pay, disability pay and compensation and safe worksite conditions"¹.

24. The 2002 Supreme Court ruling in the Hoffman Plastics case seemed to undermine these rights by accepting that an undocumented worker's rights had been breached but then agreeing that his irregularity was a justification for the non-payment of back pay. The undocumented worker had been fired because of his union organising activities. This ruling has been followed by growing fear amongst the undocumented and confusion in the American courts².

¹ Anna Marie Gallagher, "The Situation of Undocumented Persons in the USA: A Practical Overview".

² There have been a number of instances in which courts have been persuaded to issue protective orders to forbid an employer from asking a worker about his/her immigration status.

25. The international response to Hoffman Plastics ruling was however unequivocal and should be of direct interest to the UK. In November 2003, the ILO's Committee on Freedom of Association issued a decision that the US Supreme Court's ruling violated international legal obligations to protect workers' organising rights. The Committee concluded that "the remedial measures left to the NLRB³ in cases of illegal dismissals of undocumented workers are inadequate to ensure effective protection against acts of anti-union discrimination." The Committee recommended congressional action to bring US law "into conformity with freedom of association principles, in full consultation with the social partners concerned, with the aim of ensuring effective protection for all workers against acts of anti-union discrimination".

26. Being able to enforce labour rights for undocumented workers poses practical problems such as the fear of deportation should one step forward to claim such rights. Without wishing to dismiss this very real difficulty, the TUC would restate that a worker's employment rights under the law and that of their legal status to reside and work in the UK should be treated as two separate legal issues. Currently abuser employers know that there is no possibility of those who they exploit obtaining legal redress against them in a UK court.

Conclusion

27. In conclusion, the TUC urges the Home Office to reconsider its proposals to put the law on penalties for employers into effect. The evidence both from the UK to date and from other countries, clearly shows that attempting to use employers as the front line in the drive against irregular working is both ineffectual and brings with it undesired consequences.

28. There will be employers who will cynically use the requirement to repeatedly check employees' papers to intimidate both documented and undocumented workers, intimidation which will be aimed at denying workers their rights including the right to freedom of association. The requirement to carry out such checks will undoubtedly lead to discriminatory behaviour, with some employers 'profiling' employees and targeting British ethnic minorities for particular attention. Other employers concerned by possible fines and criminal proceedings will abandon the idea of employing migrants altogether.

29. The proposed penalties will not deter many employees who employ undocumented workers as a matter of deliberate policy. Such employers are attracted to undocumented workers because of their vulnerability. This market for undocumented workers can only be dealt with by taking steps to minimise the vulnerability of these workers.

³ NLRB – National Labour Relations Board – the body that took the case on behalf of the undocumented worker.