

# Employment Law Matters

Welcome to the spring edition of our quarterly newsletter. Please click on the links to read recent case updates and about current regulatory issues affecting employers.

## News update

Summary of regulatory developments affecting employers... [click here](#)

## Employment law case update

Round-up of recent employment law cases... [click here](#)

## Making multiple redundancies – top ten tips

Some tips to staying within the law when making redundancies on a large scale... [click here](#)

## Equal pay – coming to a workplace near you?

Equal pay legislation in the UK is over 30 years old... [click here](#)

## TUPE – some recent developments

Four cases reported in 2007 have points of practical relevance for anyone involved in the HR aspects of outsourcing or buying a business... [click here](#)

## The immigration revolution – registering as a sponsor

What employers should consider in order to register as a sponsor under Tier 2 of the points based system... [click here](#)

## Pensions – aiming for an Olympic approach from 2012

The Pensions Bill 2007 received its second reading in January 2008 and will affect all employers... [click here](#)

## 2008 – an employment lawyer's wish list

We look at some of the employment law issues we would like to see introduced in 2008... [click here](#)

---

## News update

---

The Employment Bill was published on 6 December 2007. It is now in committee stage and likely to receive royal assent in the summer of 2008. Key elements of the Bill include increasing protection for vulnerable workers by introducing penalties on businesses for not paying minimum wages; increasing the powers of agency inspectors; and laying the statutory authority for the repeal of the workplace dispute resolution procedures (although that does not mean repeal will actually occur this year).

---

Statutory compensation limits increase from 1 February 2008. Most significantly, a week's pay for statutory redundancy and unfair dismissal purposes increases from £310 to £330 and the maximum compensatory award in unfair dismissal cases increases from £60,600 to £63,000.

---

The first national minimum wage prosecution case was brought against the owner of a nursery by the Revenue & Customs Prosecution Office. Mrs Aguda, the owner of the nursery, had deliberately refused to allow inspection of her accounts to check that she was paying her staff minimum wage.

---

The High Court has referred the 'Heyday' case to the European Court of Justice (ECJ), regarding the interpretation of the age provisions in the EC Equal Treatment Framework Directive 2000/78/EC. The Employment Equality (Age) Regulations 2006 implement the equal treatment directive into English law and prohibit both direct and indirect age discrimination. The Heyday group believes the directive has been incorrectly implemented and is seeking judicial review of the regulations. The ECJ has been asked to consider the following:

- the relationship between national retirement ages and the provisions of the directive;
- the definition of direct age discrimination; and
- the defences against direct and indirect discrimination.

---

In September 2007, the Tribunals Service released the employment tribunal and the EAT statistics for 1 April 2006 – 31 March 2007. There has been a 15% rise in the number of claims accepted by the employment tribunals and the Service commented that this was primarily caused by the rise in equal pay claims. The highest awards in race and sex discrimination cases were £123,898 and £64,862 respectively. The average compensation for unfair dismissal fell from £8,679 to £7,974, and over 50% of cases were awarded under £4,000. There were fewer costs orders made last year but more were made in favour of the claimant.

---

The Government's plan to introduce 26 weeks paternity leave, some of which would be paid, by 2009 has been put back to 2010 or later.

---

From April 2008, some amendments to the Employment Agencies Regulations will reduce the administrative burden on agencies and increase the protection of workers who receive other services, such as accommodation, through agencies. The changes include:

- where an agency provides additional services to workers such as living accommodation, for a fee the worker will have a right to opt out of the service after giving notice (10 days for living accommodation and five days for other services). The right to give notice must be specified in the written information which is provided to the worker; and
- the duty on agencies to provide quite extensive information to workers and hirers before a worker begins work will not apply where an assignment lasts for five days or less (although certain basic information must still be provided).

## Case law update

The article in this newsletter, TUPE – **some recent developments**, identifies four cases over the last few months which will be of interest to those dealing with TUPE. Several of these cases are summarised here. First, The Court of Appeal backed the Employment Appeals Tribunal (EAT) when it said that **TUPE cannot be used artificially to create additional rights for an employee** (*Jackson v Computershare Investor Services PLC*, 2007 EWCA Civ 1065). Secondly, *Holis Metal Industries Ltd v GMB and Newell Ltd* (UKEAT/0171/07) confirms that TUPE can potentially apply to the **transfer of undertaking from the UK to an entity that is outside the EU**, where the business is situated in the UK immediately before the transfer.

A further TUPE case is worthy of mention – *Vision Information Services (UK) Ltd v Coutinho* (2007 WL 2414839). Mr Coutinho, the highest paid employee of Vision, was made redundant with effect from 31 March 2004. He was told that negotiations to sell Vision's business to Deluxe Media Services Ltd. had fallen through, but in July 2004, Vision did sell its business to Deluxe. Mr Coutinho's claim against Vision for automatic unfair dismissal succeeded on the grounds that the **termination was linked to the TUPE transfer**. The Tribunal also found that Deluxe was liable for payment of the compensation to Mr Coutinho. When Vision appealed, Mr Coutinho argued that Vision's appeal was "academic" because no finding of legal liability had been made against it. However, the EAT disagreed on the basis that Vision was appealing against the finding that the dismissal was for a transfer related reason. This case may help sellers who face liability on business transfers as a result of indemnities negotiated in the business sale agreement.

*Thomas v Eight Members Club and Killip* (ET/2202603/2007) lays claim to being the first successful **age discrimination** case. A 19 year old employee working in a private members club was dismissed after three months on the basis that she was too young to work there. The Employment Tribunal found that the employee had been dismissed on the ground of her age and awarded £1,500 in damages for injury to feelings plus an uplift of 10% because the employer had failed to follow relevant statutory disciplinary and dismissal procedures.

A **majority shareholder or a director** of a company is not precluded from being an employee unless the employment contract between the company and the employee is a sham. In this case, a husband and wife owned all but one of a company's shares and were board members, but they had written contracts of employment with the company and were paid salaries. All the facts needed to be considered to determine whether they were employees. That included the balance of control (here, the individuals had lost control of the company on the appointment of a liquidator) and the nature of the relationship between the parties (here, that they were husband and wife). Ultimately, they were considered employees and could claim redundancy payments. (*Nesbitt and Nesbitt v Secretary of State for Trade and Industry* UKEAT/0091/07).

*Redcar and Cleveland Borough Council v Bainbridge & Ors* (2007 EWCA Civ 910) is a reminder that in equal pay cases the claimant has plenty of places to look for someone to compare themselves with. In this case, where a job evaluation study placed two employees of opposite sex in different grades, the woman working in the higher graded job could use as her comparator a man in a lower grade earning a higher wage than her.

A situation employers seem to be facing with increasing frequency is where an employee is dismissed and, either as part of an appeal or at another stage in the termination procedure, seeks to raise a **dismissal-related grievance**. This particular issue arose in *ADM Milling Limited v Hodgson* (UKEAT/0051/07) where the employee complained she had been discriminated against. The EAT said that where a dismissal is itself the discriminatory act complained of, there is no need for the employee to have followed statutory grievance procedures, such as raising the grievance in writing. This can be useful (to both employer and employee) who may want to avoid introducing unnecessary steps into the process, although it can be hard at times to determine whether the grievance is actually about the decision to terminate or something which happened earlier in the employment.

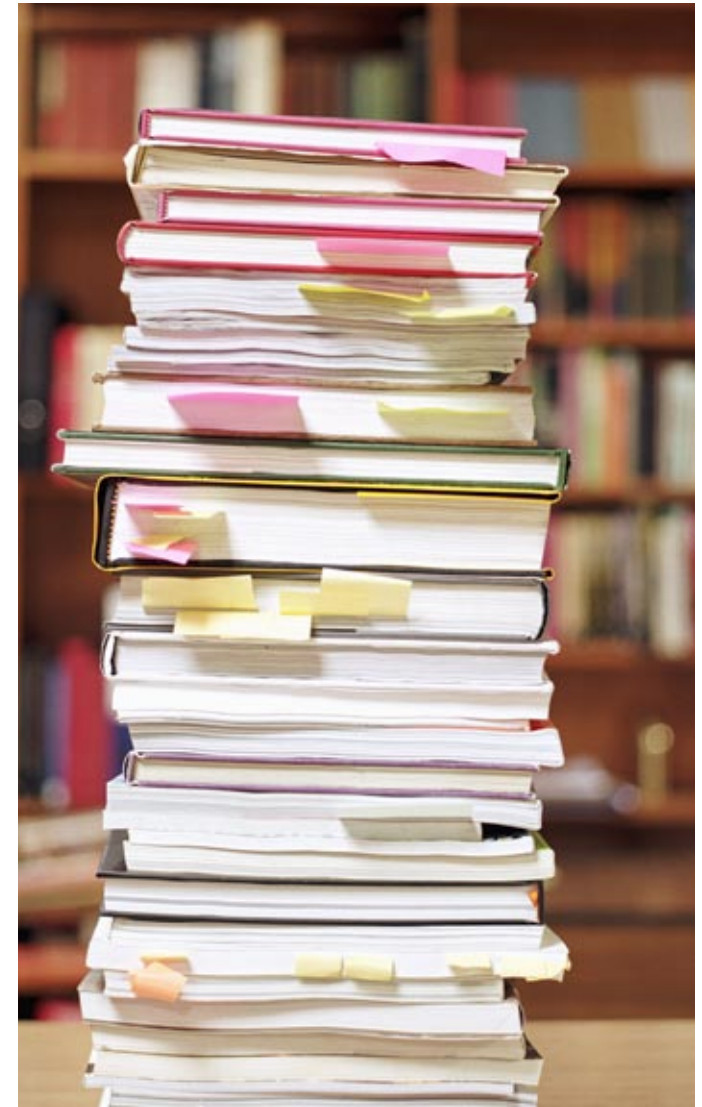
[...Cont'd](#)

## Case law update, cont'd

It is best for employers to assume that **rolled-up holiday pay** (i.e. the inclusion of payment for holiday in the pay rate for days actually worked) is unlawful. However, the ECJ case which led to this conclusion left room for rolled-up holiday pay to work in exceptional circumstances. One such situation appears to be *Lyddon v Englefield Brickwork Limited (UKEAT/0301/07)*. The rolled-up holiday pay was contractually agreed and determined by a transparent and comprehensible system. The employee did not query how much holiday pay he was receiving until he finished his employment. It was held to be valid holiday pay and could be off-set against leave accrued but not taken.

The obligation to **consult with representatives of employees in mass redundancy situations** includes the obligation to consult over the business reasons for the terminations. This decision of the EAT in *UK Coal Mining Limited v National Union of Mineworkers (EAT/0397/06/RN)* has received widespread publicity as a surprising extension to the law. In fact, it seems to do no more than confirm what many thought should already be the case given the requirements of the underlying EU directive and the practice elsewhere in Europe.

UK Coal Mining Limited ran a colliery which employed 329 people. It decided to close the colliery for irreversible safety reasons. The company maintained that the consultation should not take the full 90 days as there were “exceptional circumstances”. The EAT upheld the Tribunal’s view that the company had “flimsy” evidence to support the safety aspect of the shutdown and seemed to be using safety as an excuse. It also rejected the argument that the full 90 days of consultation should not take place. Proper interpretation of the rules in accordance with EU law included consulting over the reason for the redundancies themselves.



## Making multiple redundancies – ten top tips



### Key points

- Recent cases are a reminder that a tried and tested approach can become outdated.
- New legislation, such as age discrimination, can pose new challenges to compliance.

In the case law update section of this newsletter we cover the decision in *UK Coal Mining Limited v National Union of Mineworkers (EAT/0397/06/RN)*, which is a reminder to employers that they can get caught out if they do not follow the correct procedures when making staff redundant. With so much attention recently focused on the economic downturn, making rounds of redundancies more likely, we offer ten top tips on staying within the law if multiple redundancies become necessary.

1. If an employer makes 20 or more people redundant at one establishment within a 90 day period, it must consult with unions and/or other employee representatives. In determining whether a company will make 20 redundancies, (or 100, for the purposes of deciding whether 30 or 90 day consultation is needed), do not 'net off' people expected to slot into alternative roles. For example, an employer may be eliminating 30 positions but creating five new ones. It is tempting for the employer to think that that means just 25 redundancies, but that would be risky because it cannot assume that the five will slot into the new roles. Any voluntary redundancies must also be included.
2. Allow time for the election of representatives unless all affected staff are covered by existing union or other consultation arrangements.
3. Present proposals, not decisions, to the employee representatives. As the UK Coal case shows, consulting over ways to avoid redundancies means discussing the need to make redundancies in the first place. Evidence that the decision to implement redundancies has already been made could leave the consultation open to challenge.

[...Cont'd](#)

## Making multiple redundancies – ten top tips, cont'd

4. The need to submit form HR1 to the Department for Business, Enterprise & Regulatory Reform should not be overlooked. This is a legal requirement which can be forgotten by an employer focusing on the communication process and the consultation exercise. This form must be submitted within the same time frame as the employee consultation – 30 or 90 days ahead of the first termination, depending on how many employees are affected.
5. Think about the tax on severance pay at an early stage. Employers want departing employees to benefit as much as possible from the tax advantages offered to severance payments, and there can be company savings too. If tax issues are only addressed at the end of the process, opportunities may be lost.
6. Take care over the steps taken with individual employees during the 30 or 90 day consultation period. Nothing should be done which pre-empts the content of the consultation. The issuing notice is likely to be regarded as the act of termination and therefore means that the period for consultation has not been honoured. Taking other steps which identify those who will be made redundant could be similarly interpreted.
7. The statutory dismissal procedures can be avoided in mass redundancy situations. There is no need to follow the procedures where there is an obligation to carry out collective consultation with employee representatives. However, that does not mean individual consultation should be disregarded completely – it is an important part of ensuring a fair dismissal.
8. Age discrimination laws may have made an established redundancy pay formula open to legal challenge. Statutory payments are protected from age based challenges, as are schemes which closely follow the statutory formula. Other schemes, which may have age and/or service related criteria, have no such protection. Similarly, it may be necessary to consider redundancy arrangements where terms are different for employees joining before a certain date. Those employees would tend to be older. Later joiners might argue that this breaches the age discrimination laws.
9. Think broadly when considering alternative roles for potentially redundant employees. Judgements should not be made about what is suitable or what an employee may accept. A displaced employee should have the opportunity to consider all alternatives.
10. Finally, a non-legal point: remember the employees who remain with the business – they may not be directly affected but their efficiency could be. Proper communication during this period of upheaval is a vital tool in maintaining the operation of the business.

[darryl.f.evans@pwclegal.co.uk](mailto:darryl.f.evans@pwclegal.co.uk)



## Equal pay – coming to a workplace near you?

### Key points

- **The Equal Opportunities Commission's recent call for a three year amnesty on equal pay claims whilst employers review pay practices, highlights the fact that concerns remain over whether equal pay legislation is working.**
- **The proposal has attractions for employers but, for policy and legal reasons, the Government may prefer to find another solution.**
- **Given the high volume of claims in the public sector, and the added pressure on pay arising from age discrimination, employers should give serious consideration to carrying out equal pay reviews.**

Equal pay legislation in the UK is over 30 years old. Yet the 2005 survey on pay conducted by the Equal Opportunities Commission, now part of the combined Commission for Equality and Human Rights (CEHR), concluded that an average pay differential between full-time male and female workers was over 17%. Among part-time staff that differential escalates to 38%.

The legislation is not working, say many policy makers.

There is no consensus around a solution for this situation. Last autumn, the outgoing CEHR chair suggested something radical has to be done. She proposed that employers be granted a three year amnesty on equal pay claims, during which they must review practices and tackle gender based pay discrepancies – in effect, a once and for all chance to get pay right.

The Conservative Party, adopting a different line, has proposed that employers who lose equal pay claims should be legally obliged to carry out a pay audit, so that other employees in the same situation as the successful claimant should also benefit. At present, if one employee wins a claim, other employees have to bring their own claims in order to protect their positions. The burden on tribunals grows accordingly and the outcome of cases is delayed as a result. This has prompted the CEHR to suggest representative actions should be permitted in equal pay cases.

The Government recognises the problem and is considering a range of options.

The unions' position in this debate is interesting. One union has dismissed CEHR's idea of an amnesty as giving employers an opportunity to stave-off claims and to halt progress on pay equality. On the other hand, the unions themselves have received claims that they have neglectfully represented their female members who

could have done better at tribunal than they did under the settlements agreed by the union on their behalves. This is prompting a more cautious approach from the unions.

Other potential objections to the CEHR's proposal include legal ones: would the amnesty contravene the basic equality rights granted under EU law?

Where does all this leave employers?

First, the apparent pay differences between men and women may exist, in part, for reasons other than pay discrepancies, such as career and lifestyle choices. Dealing specifically with pay equality issues will not address those aspects.

On the basis that there may be pay discrepancies, though, the amnesty suggested by CEHR has attractions for employers as it potentially alleviates some of the risks of carrying out an equal pay review. Having a job evaluation study in place which has not been implemented is very unhelpful if an equality claim is brought as it may give clear evidence of ongoing inequality in pay and grading. For many employers it creates too big a danger. In addition, implementing pay changes often results in pay levels rising because the contractual rights of employees prevent salaries and wages being lowered. A three year amnesty would give time for differentials to be addressed.

[...Cont'd](#)

## Equal pay – coming to a workplace near you? cont'd

On the other hand, there could be disadvantages. Would three years be long enough to resolve all potential issues? After three years employers would have little excuse for differentials, so the risk exposure after the amnesty could be far greater. There is a concern that tribunals might be less inclined to look into the detail of cases to determine whether there really is a gender based pay discrepancy. Certainly the risk could be mitigated by the actions taken during the three year period, but would there be any certainty that the actions would be unchallengeable?

At present, many private sector employers live with the risk of gender-based pay equality claims and regard an equal pay review or a full scale job evaluation, with the resulting grading and pay changes, as less attractive than the risk of claims being made.

Between 1984 and 1994 this was a sustainable position. There were only 23 successful claims in that period by employees claiming 'work of equal value', one of the three headings under which an equal pay claim can be made. The picture is now very different. The number of equal pay claims going to tribunal has recently doubled each year. It is estimated that 50,000 equal pay claims are waiting to be heard by tribunals and the CEHR says that figure could rise to 150,000 this year.

Most of the claims are against public sector bodies (or unions) as a fall-out from the attempts over the past decade to solve the problem in the public sector.

All government departments have been required to carry out an equal pay review and, as a result, lawyers operating no win/no fee arrangements have picked up on discrepancies and attacked negotiated agreements between employers and unions. This has led to a huge growth in claims and a massive potential liability for parts of the public sector. Local authorities have been at the forefront but it is now the NHS's Agenda for Change deal which is in the firing line.

It is unrealistic to assume that the private sector will be ignored as and when public sector pay issues are resolved. Claims for equal value are now easier to bring than they were, owing to technical changes in the law. If a claim is successful, the winnings are greater – six years of back pay instead of two. Further changes, making claims easier, could arise from the potential consolidation of discrimination laws. Very significantly, age discrimination laws provide a whole new opportunity for employees to challenge pay levels, where the difference in pay between two people performing the same role may be attributable solely to the fact that one employee has been in post longer – and may therefore be older.

Ensuring equality in pay is not easy. It may be time for employers to reassess their risk exposure in this area by considering some form of equal pay review, potentially not just investigating gender based differences, but also age and even race ones as well. Otherwise it may be employees who take the initiative by lodging grievances followed by claims.

[marian.fertleman@pwclegal.co.uk](mailto:marian.fertleman@pwclegal.co.uk)



## TUPE – some recent developments

### Key points

- **The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) apply to the sale of a business in the UK, even if that business is moved outside the UK immediately after the sale. The same result is likely to apply to off-shoring functions in the context of outsourcing agreements.**
- **Employers may now find it easier to resist claims by employees for better terms following TUPE – TUPE exists to preserve existing rights, not improve them.**
- **The fact that amendments to terms and conditions made because of the transfer can be void protects employees only.**
- **Employers should be aware that the right of an employee to object to transfer under TUPE and walk away from employment might be a useful tool to senior staff wishing to escape restrictive covenants on a business sale or outsourcing.**

Four cases reported in 2007 on TUPE have points of practical concern for anyone involved in the HR aspects of outsourcing or buying a business.

### **Does TUPE apply to the sale of a business when it is moved out of the UK following the sale?**

In *Holis Metal Industries v (1) GMB, (2) Newell Ltd* part of a manufacturing business was sold and the buyer moved the business to Israel (outside the EU where the Acquired Rights Directive underlying TUPE legislation does not apply). The question arose of whether TUPE applied and the EAT ruled that it did.

The reason for this finding was the clear wording in TUPE that the regulations apply to an undertaking or business ‘situated immediately before the transfer in the United Kingdom to another person...’ The test therefore looks at the situation in place before the transfer, not where the buyer carries out the business post-transfer.

This case deals with the sale of a business as a going concern. There is a different test on whether TUPE applies for a ‘service provision change’ which is the test for outsourcing. Nevertheless, the decision on *Holis* is likely to apply equally here because one of the conditions is that immediately before the change “there is an organised grouping of employees situated in Great Britain...”. Again, the fact that the services in question are off-shored does prevent TUPE from applying.

The conclusions reached in *Holis* are not surprising but the case does highlight the need for buyers and outsource providers not to overlook the application of TUPE even where they will have no presence in the UK post-transfer or are moving the business or functions entirely outside the UK.

### **When will the new employer’s benefits apply to a transferring employee?**

One of the best known and important rules under TUPE is that the contract of employment with the old employer takes effect after the transfer as if it was originally made between the employee and the new employer. This protects existing terms and conditions and length of service. But can the transferring employee claim a benefit provided by the new employer to its employees?

In *Jackson v Computershare Investor Services PLC*, Ms Jackson began working for her previous employer in 1999 and moved under TUPE to Computershare Investor Services (CIS) in 2004. CIS had redundancy terms in place which were more favourable for employees who joined prior to 2002. Ms Jackson argued that under TUPE, she should be deemed to have joined CIS in 1999 and should be entitled to the more favourable terms.

[...Cont’d](#)

## TUPE – some recent developments, cont'd

The Court of Appeal rejected this argument on the basis that the test was the date on which Ms Jackson actually joined CIS. This was 2004 and TUPE should not be used artificially to place the employee in a more favourable position. The result was good for the company but the case demonstrates the need for employers to communicate carefully with transferring employees. It is easy to imagine a situation in which the new employer includes transferring employees in the distribution of notes describing its benefit arrangements. Such an action could create a legally enforceable presumption that those employees are intended to enjoy the benefit.

### When can an employee agree to new terms and conditions after a TUPE transfer?

*Regent Security Services v Power* gave an interesting new twist on the TUPE principle that a transferring employee's terms and conditions are protected by statute and cannot be varied to the employee's detriment. This is the case even if the employee agrees to the change. For example, if a transferring employee signs a new contract under which they get more holiday but less sick pay, they can later claim the original level of sick pay.

In *Power*, the new employer, not the employee, argued that a change to terms resulting from a TUPE transfer was invalid. The new contract contained a contractual retirement age of 65, not 60 as was previously the case. Mr Power was subsequently dismissed at 60 (an act

subsequently prohibited in almost all cases under age discrimination legislation). The company argued that the original age of 65 should apply because a new term could not be agreed under TUPE. Not surprisingly, this argument was rejected by the courts. TUPE is designed to protect the employee, not the employer. The message is clear: if new terms are introduced, the employee gets the best of both worlds. In the example mentioned above, they would get the original sick pay and the increased holiday entitlement.

### When can an employee object to a TUPE transfer?

TUPE automatically moves the employee from the old to the new employer: the employee has little say in the matter. However, an employee does have the right to object to being transferred to the new employer. This is a little used right because if the employee objects, they effectively resign from the old employer and normally do not become entitled to claim notice, redundancy pay or unfair dismissal.

However, the right is of practical use to employees who may want to leave the business anyway, particularly those bound by post-termination covenants. An example is *New ISG Limited v Vernon and others*. In this case, the new employer was attempting to enforce covenants against individuals it said had joined the company under TUPE. The individuals said they had exercised their right of objection and the covenants were therefore unenforceable by New ISG. The case hinged

on the timing of the objection. New ISG argued that the objections were made after the TUPE transfer and therefore were too late. The employees argued that they were not too late because they had not been informed of the identity of the new employing company. The court agreed with the employees' argument.

The case itself rests on unusual and limited circumstances but an important point arises for the buyer of a business. Is it paying a large sum of money for a business which relies on key individuals for its effectiveness? How will the business be affected if some (or all) of those key individuals leave and set-up in competition? This possibility should be taken into account when the deal is structured.

[nick.p.willis@pwclegal.co.uk](mailto:nick.p.willis@pwclegal.co.uk)

## The immigration revolution – registering as a sponsor under Tier 2 of the points based system

### Key points

- **The Government is replacing 80 existing immigration routes into the UK with a five tiered points based system (PBS).**
- **Tier 2 will cover skilled workers with a job offer. An employer wishing to employ any non-European Economic Area (EEA) national under Tier 2 must first obtain a sponsorship licence from the Border and Immigration Agency (BIA). Employers will issue certificates of sponsorship to potential employees, effectively replacing the current work permit.**
- **In exchange for the ability to issue certificates of sponsorship, employers face greater responsibilities and a wealth of compliance obligations. HMRC, the BIA and the police will work closely in tracking individuals requiring immigration permission.**

In our last newsletter we provided an overview of the revolution taking place in UK immigration procedures. This article focuses on what employers must consider in order to register as a sponsor under Tier 2 of PBS. Tier 2 will replace the current work permit system; the roll out for registering as a sponsor is expected soon.

### Considerations for prospective sponsors

Under the new system, any organisation wishing to employ non-EEA nationals must register as a sponsor. There are certain considerations which must be taken into account before an employer can register.

When a sponsor comprises more than one legal entity, it can apply for either a collective licence covering the group or a separate licence for each entity. There are distinct advantages to both options, the former offering more central control to the sponsor's immigration operations and the latter safeguarding the other entities from being downgraded in the event of non-compliance by an individual entity.

It is likely that the sponsor will have to state the number of potential Tier 2 applications it will make. It is important that this estimate is accurate as the sponsor may have to justify its number. Additionally, the Government's November 2007 Statement of Intent (Sponsorship under the Points Based System) states that there will be review thresholds (i.e. a specific number, identified by the BIA, whereby the sponsor's immigration activity will be reviewed). The number of potential Tier 2 applications stated could feed into the review threshold.

Sponsors must have a complete idea of how many non-EEA nationals they employ in the UK, and have sufficient processes to ensure compliance. This will include ensuring:

- the sponsor has a record of the employee's immigration status;
- the employee informs the sponsor of any changes in their status; and
- procedures are sufficiently aligned ensuring the status of each employee is compliant from an immigration and tax perspective. This will be particularly important for those employees in the UK under short-term business visitor agreements.

In common with the current system, sponsors will be able to appoint a representative to advise and assist with registering and future applications under Tier 2. All sponsors must gather and verify all the necessary documentation for registration.

[...Cont'd](#)

## The immigration revolution – registering as a sponsor under Tier 2 of the points based system, cont'd

### The application process

The licence application must initially be made online. The process requires a company to identify its main contacts for immigration purposes and who its immigration representative will be. It is likely that all supporting documentation, including audited accounts, must be submitted in hard copy within 14 days of making the online application. The application will then be considered by the BIA, who will assess the company's set-up and its readiness for PBS.

### Upon approval

After the application is approved by the BIA, the employer can be a sponsor. Sponsors will be divided into A and B ratings, depending on their past record of compliance with immigration rules, and whether the likely compliance of the entity going forward is reliable. Each sponsor will be publicly listed on the Sponsor Register and will also be granted access to the web-based Sponsor Management System.

The sponsor can then issue certificates of sponsorship to any non-EEA national it wishes to employ under Tier 2, provided they meet the criteria for sponsorship. However, together with greater control of whom it employs, the sponsor will be required to adhere to greater compliance obligations. The sponsor must, to the best of its knowledge, ensure that a migrant is legally entitled to work and (if applicable) has the appropriate registration to work.

Sponsors found to be in breach of their sponsorship duties may receive an educational visit to their premises which may result in:

- the implementation of an action plan;
- a written warning for employing an illegal worker; and
- a down-grading on the PBS sponsorship register; removal from the PBS sponsorship register, or civil or criminal penalties.

Employers will still be able to employ the most highly skilled under Tier 1, which replaces among other categories the current highly skilled migrant programme.

[anjali.raman@pwclegal.co.uk](mailto:anjali.raman@pwclegal.co.uk)



## Pensions – aiming for an Olympic approach from 2012

### Key points

- In future, all employers will have to make pension provision for their employees beyond current stakeholder requirements. This system is expected to be in place by 2012.
- Companies should monitor the development of the requirements and plan for the financial implications.
- Key areas of focus are the potential costs involved in the administration and compliance requirements, and benchmarking against what other companies are offering.

The Pensions Bill 2007 received its second reading on 7 January 2008. It affects all employers, not just those with large defined benefit pension schemes.

Part of the Bill, expected to come into effect from 2012, requires employers to offer membership of a qualifying pension scheme to all its employees. Company pension schemes will have to meet specified minimum qualifying criteria. Employers who do not have, or do not want to use, an existing scheme can select the trust-based Personal Accounts scheme instead.

It will be mandatory for all employees to be enrolled automatically and this must take place on the first day of employment, although certain high quality schemes may be allowed a short waiting period.

Employees will be able to opt-out after being automatically enrolled but they must be refunded and automatically re-enrolled within a specific period. If employers have several schemes, at least one scheme must allow the automatic enrolment of all new and non-member employees.

All qualifying schemes will have to be HMRC-registered. Employers will have to inform the Pensions Regulator how they intend to meet their obligations of providing qualifying pension for all their employees and how they will enrol (and re-enrol) their new staff and non-members.

The contribution levels are not laid out in the Bill, but have been announced as 4% for employees, 3% for employers (which will be phased in over 3 years) and 1% tax relief.

All employees (age 22 years old to state pension age) receiving qualifying earnings will be eligible, including employees who are not currently a member of an employer's pension scheme and employees for whom employers did not previously have a duty to provide pensions (e.g. agency workers). Employees aged 16 to 22, and from state pension age to 75, must be allowed to opt in.

A default investment fund requirement (for defined contribution schemes) must be provided so the member does not have to express a choice in order to be a member.

Employers will have to provide specific information to employees about the scheme, their automatic enrolment into it and their right to opt out.

The Personal Accounts Delivery Authority will have powers to design the Personal Accounts scheme at arm's length from the Government. The Pensions Regulator will be the compliance body for these reforms.

In other areas of pensions law, the Bill proposes further simplification to the additional state pension by consolidating the rights people have built up under graduated retirement benefit, state earnings related pension schemes (SERPS) and state second pensions (SSP) into a single cash sum. It also proposes a reduction in the cap on revaluation of deferred pensions from 5% to 2.5% per year (for future accruals only).

2012 is a long way away but employers are on notice that compulsory pension provision could be introduced and could raise workplace employment costs, both in payroll terms as well as through additional administration and compliance requirements.

[oliver.reece@pwclegal.co.uk](mailto:oliver.reece@pwclegal.co.uk)

## 2008 – an employment lawyer’s wish list

At the start of a new year people draw up their resolutions for the next twelve months. Here Employment Law Matters, looks at some of the employment law issues we would like to see addressed in 2008.

Top of the list are the **statutory dispute resolution** procedures. An HR professional needs clarity around this area so they can get on with their job without fear of being taken to a tribunal for carrying out what, not so long ago, would have been accepted as a perfectly fair and reasonable disciplinary or dismissal process. Whilst the Employment Bill paves the way for the repeal of these rules, no date is fixed, and replacement procedures are required. A simple and workable set of statutory procedures to replace the current ones as fast as possible would be welcome.

**Age discrimination** is next on the list. Employment lawyers do not like giving vague advice, yet the age discrimination rules are uncertain and the courts have so far had little opportunity to interpret and clarify them. Areas such as whether retirees can be good leavers under incentive schemes, and whether age or service graded redundancy payments are permissible, remain perilous for employers. The second wish is therefore for some clearly argued age discrimination decisions showing employers and their lawyers the way ahead under these rules.

The third wish is simple: an end to the ‘**implied employment contracts**’ in agency situations. The President of the Employment Appeals Tribunal has fought a campaign to limit the circumstances in which employment contracts will be implied, based on sound legal arguments. Hopefully the Court of Appeal will support him.

The final wish is related to the third. Again, proposals are to be considered under which agency workers are given full employment rights after a set period of time, possibly as short as six weeks. If the **rights of agency workers** are to be considered, and possibly improved, the focus should be on the relationship between the workers and their agency, not the end user of their service. The provision of staff by a third party makes perfect contractual and business sense. If the rights of workers are to be increased, it should be the responsibility of the agency to get to grips with the rules and charge accordingly.

Either way, these uncertainties about agency worker rights should be brought to an end.

[christine.walser-sacau@pwclegal.co.uk](mailto:christine.walser-sacau@pwclegal.co.uk)

This publication has been prepared for general guidance on matters of interest only, and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice. No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication, and, to the extent permitted by law, PricewaterhouseCoopers Legal LLP, its members, employees and agents accept no liability, and disclaim all responsibility, for the consequences of you or anyone else acting, or refraining to act, in reliance on the information contained in this publication or for any decision based on it.