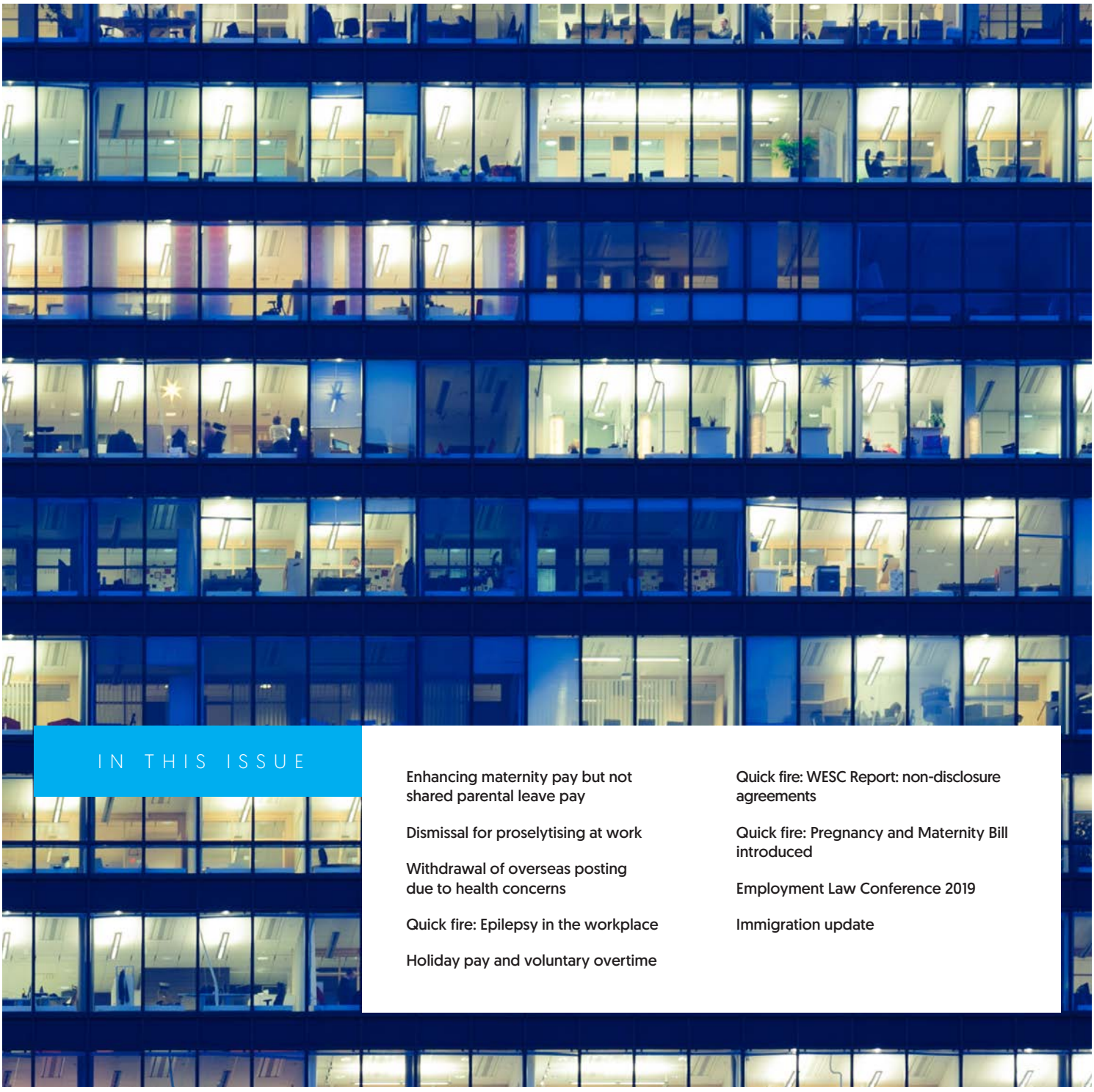
Birketts

WELCOME TO THE JUNE 2019

Employment and Immigration Law Update



IN THIS ISSUE

Welcome to the June 2019 edition of Employment and Immigration Law Update, our monthly newsletter for HR professionals.

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Unusually this month, we report on four important Court of Appeal decisions, three of which were decided in the employers' favour.

The court's decision in the conjoined cases of *Ali v Capita Customer Management Ltd and Hextall v Chief Constable of Leicestershire Police* provides employers with some reassurance, for now at least, that a contractual enhancement to maternity pay but not shared parental leave pay will not be regarded as discrimination on the grounds of sex.

We also look at a decision concerning a nurse who was dismissed following repeated religious proselytising at work and a case involving a disabled employee whose offer of an overseas posting was withdrawn. The court has also ruled on the issue of calculating holiday pay to include voluntary overtime.

As well as our usual round up of employment law news items we also include our regular immigration update.

Many thanks to all of those who attended our recent series of Early Bird seminars on the topic of recruitment. Don't forget to book your place at our 2019 Employment Law Conference, on 15 October 2019.

IN THIS ISSUE

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Enhancing maternity pay but not shared parental leave pay

In these conjoined cases, the Court of Appeal held that it was not discrimination on the grounds of sex, or in breach of equal pay rules, to enhance pay for maternity leave but not for shared parental leave.

Ali v Capita Customer Management Ltd; Hextall v Chief Constable of Leicestershire Police [2019] EWCA Civ 900

> *...the statutory 'special treatment' exception applicable to women in connection with pregnancy or childbirth includes enhanced maternity pay.*

Facts

Both Mr Ali and Mr Hextall had taken a period of shared parental leave after becoming new fathers. Both employers paid an enhanced rate of contractual maternity pay but only paid the statutory rate of pay in respect of shared parental leave.

Mr Ali's claim for direct sex discrimination was initially upheld by the employment tribunal, but this decision was overturned by the Employment Appeal Tribunal (EAT) last year. Mr Hextall's claim for direct and indirect sex discrimination was initially rejected. The EAT held that the tribunal had taken the wrong approach in its consideration of indirect discrimination, so remitted this aspect of the claim to be reheard, potentially leaving open the door for an indirect discrimination claim to succeed. See our previous summary of these decisions.

Court of Appeal decision

The Court of Appeal has rejected the discrepancy in pay as either amounting to direct or indirect discrimination on the grounds of sex, or a breach of the sex equality clause under equal pay legislation.

In relation to Mr Ali's claim of direct discrimination, the court held that the statutory 'special treatment' exception applicable to women in connection with pregnancy or childbirth includes enhanced maternity pay. The predominant purpose of taking maternity leave is to protect a woman in connection with the effects of pregnancy and childbirth, rather than for childcare. Men taking shared parental leave and women taking maternity leave are therefore not comparable under the provisions of the Equality Act 2010.

...employers who enhance maternity pay but not shared parental leave pay can continue to do so...

The court decided that Mr Hextall's claim was more properly categorised as a claim for equal pay, rather than indirect discrimination, since it relied on his comparator's more favourable contractual terms for enhanced maternity pay. However, the sex equality clause that would be implied into Mr Hextall's contract under section 66 Equality Act 2010, is excluded as a result of the 'special treatment' exception that applies to women in connection with pregnancy and childbirth. This means that a claim for equal pay failed for the same reason as Mr Ali's claim for direct discrimination.

In relation to indirect discrimination, such claims are excluded if they would be regarded as an equal pay claim if not for a specific exception – which in this case was the 'special treatment' exception. Even without this exception, the court decided that the indirect discrimination claim would fail in any event, due to the fact that women on maternity leave are materially different from men or women taking shared parental leave. Any disadvantage to Mr Hextall would be justified as a proportionate means of achieving a legitimate aim, namely the special treatment of mothers in connection with pregnancy or childbirth.

Consequences

The Court of Appeal has comprehensively dismissed the claims of Mr Ali and Mr Hextall, meaning that for now, employers who enhance maternity pay but not shared parental leave pay can continue to do so without risk of a similar claim succeeding against them.

It has been reported that both Mr Ali and Mr Hextall are both seeking permission to appeal their case to the Supreme Court. We will have to wait to see whether permission is granted, and any further hearing is unlikely to be for some months - probably not before the second half of 2020.

Dismissal for proselytising at work

The Court of Appeal has considered whether a NHS Trust had unfairly dismissed a Christian nurse who had repeatedly talked about religion to patients and prayed for them.

Kuteh v Dartford and Gravesham NHS Trust [2019] EWCA Civ 818

Facts

"The Trust ... had issued a reasonable instruction to the claimant not to initiate such discussions.

The claimant was a Christian nurse who had been warned not to initiate unwanted religious discussions with patients following several previous complaints. Despite assuring the matron that she would no longer discuss religion with patients, further complaints were received that she had told a patient that she would pray for them, she had preached at a patient and asked a patient to sing a psalm with her. The claimant was suspended and then dismissed for gross misconduct following an investigation and a disciplinary hearing.

The claimant brought a claim for unfair dismissal (note, she did not bring a claim for discrimination on the grounds of religion or belief). She claimed in particular that the Nursing and Midwifery Council (NMC) code, which prevents the inappropriate expression of personal beliefs, should be interpreted in a way compatible with her rights under Article 9 (right to freedom of thought, conscience and religion) of the European Convention on Human Rights (EHRC). Her claim for unfair dismissal was rejected by both the employment tribunal and the Employment Appeal Tribunal.

Court of Appeal decision

"The claimant had acted inappropriately by improperly proselytising to patients, contrary to the Nursing and Midwifery Council (NMC) code...

The Court of Appeal has dismissed the claimant's appeal. Improper proselytising is not protected by Article 9 of the EHRC, and interference with Article 9 rights can be justified as proportionate to a legitimate aim. The Trust did not have a blanket ban on religious speech in the workplace, but had issued a reasonable instruction to the claimant not to initiate such discussions. The claimant had acted inappropriately by improperly proselytising to patients, contrary to the NMC code, and by failing to follow a lawful management order. The claimant's dismissal for gross misconduct, following a fair investigation and disciplinary procedure, therefore fell within the band of reasonable responses.

Consequences

It is perhaps surprising, on the face of it, that the claimant in this case did not pursue a claim for discrimination on the grounds of religion or belief. However, it is unlikely that such a claim would have succeeded in view of previous authorities that have established a clear distinction between the manifestation of a religious belief and the inappropriate promotion of that belief in the workplace. This case confirms that the same principle applies in relation to Article 9 rights under the ECHR.

Withdrawal of overseas posting due to health concerns

The Court of Appeal has ruled on whether the withdrawal of the offer of an overseas posting due to health concerns amounted to disability discrimination.

Owen v AMEC Foster Wheeler Energy Ltd and another [2019] EWCA Civ 822

Facts

> *...no reasonable adjustment could be made to avoid the disadvantage resulting from the medical assessment.*

The claimant had a number of significant health issues. He had double below knee amputations, type two diabetes, hypertension, kidney disease, heart disease and morbid obesity. He was offered the opportunity of a 12 month posting to Sharjah in the United Arab Emirates, subject to a medical assessment with an occupational health provider. The doctor who carried out the assessment raised concerns about whether the claimant's disabilities rendered him unfit for the overseas assignment, due to a high risk that he would need medical attention during that period. The assignment was withdrawn on the basis that it would not be consistent with the company's duty of care towards the claimant.

The claimant brought claims for direct and indirect disability discrimination and a failure to make reasonable adjustments. His claims were dismissed by an employment tribunal and the Employment Appeal Tribunal. He appealed to the Court of Appeal.

...a reminder of the importance of considering the results of a medical assessment very carefully, and seeking further clarification or advice...

Court of Appeal decision

The court has rejected the claimant's appeal. In relation to direct discrimination, a person without the claimant's disabilities who was identified as a high risk in a medical assessment would not have been treated any differently. The requirement to pass a medical assessment amounted to a provision, criterion or practice (PCP) for the purposes of indirect discrimination, but the court agreed that the PCP was a proportionate means of achieving a legitimate aim. The legitimate aim in this case was ensuring that those who go on an overseas assignment are fit to do so, and that individuals are not subject to health risks as a result of the assignment. The court agreed that there was no reasonable adjustment that could be made to avoid the disadvantage resulting from the medical assessment.

Consequences

The risks associated with overseas travel will clearly vary enormously depending on the destination and the nature of an individual's disability. In this case, the tribunal heard independent medical evidence from an occupational health doctor about the general medical risks in the UAE. This assisted the tribunal in concluding that the company's decision was justified and not discriminatory. It is a reminder of the importance of considering the results of a medical assessment very carefully, and seeking further clarification or advice where the results are in any doubt. The court also helpfully observed that the concept of disability is not a binary one and that it is not the case that an individual's health is always entirely irrelevant to his or her ability to do a job.

QUICK FIRE

Epilepsy in the workplace

A new report has been published by the Institute for Employment Studies (IES) on employment support for people with epilepsy. The report follows research commissioned by the charity Epilepsy Action exploring the factors that contribute to people with epilepsy being disadvantaged at work. The research revealed a lack of knowledge and understanding of the condition and the report makes recommendations for employers on how to support those with epilepsy in the recruitment process and in the workplace.

In the UK, around one in 100 people have a diagnosis of epilepsy and they are more than twice as likely to be unemployed as those without the condition. The IES report recommends a personalised online toolkit relating to epilepsy, to improve awareness and provide advice on possible reasonable adjustments.

Holiday pay and voluntary overtime

The Court of Appeal has considered whether the calculation of employees' holiday pay should include non-guaranteed and voluntary overtime.

East of England Ambulance Service NHS Trust v Neil Flowers and others [2019] EWCA Civ 947

Facts

A group of NHS employees brought claims against the trust for unlawful deductions from wages, on the basis that their holiday pay had not been calculated to include either non-guaranteed (compulsory) or voluntary overtime. An employment tribunal ruled that their holiday pay should include the non-guaranteed overtime, but not the voluntary overtime.

The Employment Appeal Tribunal (EAT) ruled that the claimants' holiday pay should be calculated to include both non-guaranteed and voluntary overtime (see our previous summary of the EAT decision). The trust appealed.

"...under the terms of the claimants' contracts they were entitled to have their holiday pay calculated to include both types of overtime.

Court of Appeal decision

The court has upheld the EAT's decision, finding that under the terms of the claimants' contracts they were entitled to have their holiday pay calculated to include both types of overtime. In addition, the court agreed with the EAT's conclusion that under the requirements of the Working Time Directive (WTD), voluntary overtime was capable of forming part of the claimants' normal remuneration and therefore included in the calculation of holiday pay.

"...voluntary overtime was capable of forming part of the claimants' normal remuneration...

Consequences

This decision confirms the EAT's conclusion that voluntary overtime is capable of forming part of normal remuneration for the purposes of calculating holiday pay under the Working Time Directive. Whether or not it actually does in respect of each individual worker will depend on an analysis of the pattern of overtime worked, to decide whether it is sufficiently regular for it to amount to 'normal remuneration'. Although this decision

was reached on the basis of the ECJ's interpretation of the Working Time Directive, it is likely that tribunals will apply the same interpretation to the Working Time Regulations 1998. For those employed under the NHS Agenda for Change terms and conditions, they will be able to rely on the court's confirmation that as a matter of contractual interpretation, voluntary overtime is included in the calculation of overtime. Subject to any further appeal, this is likely to be a costly decision particularly for NHS employers.

QUICK FIRE

WESC Report: non-disclosure agreements

The Government has been consulting on proposals for the regulation of the use of non-disclosure agreements (NDAs) in cases of workplace harassment and discrimination (see our previous Quick Fire item, March 2019). The proposals would apply to confidentiality clauses and non-disparagement clauses commonly included in settlement agreements. The consultation closed on 29 April 2019 and the government's response is now awaited.

In the meantime, the Women and Equalities Select Committee (WESC) has conducted an inquiry into the use of NDAs, and has recently published its report. The report is critical of the routine use of confidentiality clauses in settlement agreements, particularly where such agreements are used by employers to avoid carrying out a full investigation into allegations of discrimination and harassment. It recommends that the government should introduce new measures to ensure that NDAs cannot be used to prevent the legitimate discussion of allegations of unlawful discrimination or harassment. It also wants standard, plain English wording to be required for such clauses.

In addition, the WESC has repeated its call for the time limit in claims of sexual harassment and pregnancy or maternity discrimination to be extended from three months to six months. It highlights the lack of affordable legal advice accessible to claimants and calls for improvements to the remedies available in the employment tribunals, as well as a presumption that employers would usually pay the employee's costs in a successful claim of sexual harassment.

The WESC report contains many wide-ranging recommendations, some of which have already been rejected by the government and others that were included in the recent government consultation. The majority of the WESC recommendations are unlikely to be taken forward, but we are certain to see at least some changes being introduced in the way NDAs are used in the employment context.

QUICK FIRE

Pregnancy and Maternity Bill introduced

A new Private Members Bill has been introduced in the House of Commons to protect pregnant women and new mothers from redundancy. The Pregnancy and Maternity (Redundancy Protection) Bill prevents employees from being made redundant during pregnancy, maternity leave and for six months after the end of maternity leave, unless the employer has ceased to carry on business.

There has already been a consultation on government proposals to extend existing redundancy protection for new mothers from the date they notify their employer in writing of their pregnancy to six months after their return from maternity leave (see our previous Quick Fire item, February 2019). This new Bill goes further in seeking to prevent redundancy, rather than just extending the period of protection.

As a Private Members Bill it is less likely to progress and become law than a Government Bill, although it reportedly has cross-party support. It is, however, likely to have some influence on the outcome of the government's consultation on the extension of redundancy protection, for which the response is still awaited.

Employment Law Conference 2019

Tuesday 15 October 2019
Rowley Mile Conference Centre, Newmarket

Event details

Date
Tuesday 15 October 2019

Venue
Rowley Mile Conference Centre, Newmarket

Times
Registration and refreshments 09.00, close by 17:00

Cost
£120 inc VAT

More information about the day and details of the breakout sessions to follow. For further details and to book your place, please visit www.birketts.co.uk/events

Event Summary

This October, our employment conference will provide you with an annual update covering all the key developments within employment law, with a particular focus throughout the day on employee engagement. Our keynote speaker, Mark Robb will lead a fascinating session on motivating and engaging staff that will resonate with organisations of all sizes and sectors.

Mark Robb is an award-winning speaker, who works around the world delivering talks & programmes for some of the world's largest organisations. He has had a commercially measurable impact on some of the UK's best-known brands over the last fifteen years.

Delegates will be able to choose from a range of breakout sessions relevant to their organisation, delivered by our employment law experts. The sessions will cover a wide variety of topics including employee engagement, business immigration and attending an employment tribunal.

Programme

9.00	Arrival and registration	12.30	Lunch
9.30	Welcome	13.30	Annual employment law update: part 2
9.45	Annual employment law update: part 1	14.20	Choice of breakout session
10.35	Coffee	15.30	Refreshments
11.00	Keynote speaker – Mark Robb 'How to lead, motivate and engage'	15.50	Choice of breakout session
		17.00	Finish

Immigration update

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"The SOL is important, because it is much easier to obtain a Tier 2 General visa for a role that is on the SOL.

Review of the Shortage Occupation List

The Migration Advisory Committee (MAC), an independent public body that advises the government on migration issues, has completed a full review of the Shortage Occupation List (SOL). The SOL is incorporated into the Immigration Rules as Appendix K.

Why does it matter?

The SOL is important, because it is much easier to obtain a Tier 2 General visa for a role that is on the SOL. If an employer wishes to sponsor a migrant worker to fill a shortage occupation they are not required to complete a resident labour market test. Shortage occupations are given priority when awarding restricted Certificates of Sponsorship (needed if the migrant is applying from outside the UK) and there is a slightly lower visa application fee. Shortage occupations are exempt from the minimum salary requirement for settlement after five years. In addition, asylum seekers who have been in the UK for over 12 months can apply for permission to work in shortage occupations.

The MAC has noted that since it last fully reviewed the SOL in 2013, economic conditions have changed considerably and it is generally much harder for employers to recruit. It therefore recommends expanding the SOL. However it also notes that it cannot be expanded to cover every role requested by employers, as to broaden the SOL too widely would dilute the benefits of an occupation being on the SOL. If accepted by the government, the new SOL would cover 9% (rather than 1%) of the jobs in the UK.

What would change?

The MAC has recommended adding some new occupations to the SOL. For example vets, web designers and architects.

It has also recommended broadening the SOL. At the moment there are some occupations on the list, but only where specific requirements must be met. For example software development professionals are only covered if the role requires at least five years' experience and the employer is registered as a Digitech sponsor. The MAC has recommended that all roles in occupations such as software developers, programmers, nurses and medical practitioners should be included. In our experience the current conditions cause a lot of confusion and covering all roles within these occupations should make it easier for employers to work out if a particular vacancy is actually covered by the SOL.

...all roles in occupations such as software developers, programmers, nurses and medical practitioners should be included.

The MAC has also recommended removing the current prohibition on chefs working in a restaurant that also offers a take-away service.

...widespread cheating did take place but some people may have been wrongly accused and in some cases, unfairly removed from the UK.

The MAC has also recommended removing the current prohibition on chefs working in a restaurant that also offers a take-away service. Other restrictions would remain regarding experience, salary and the requirement for all food to be cooked fresh to order.

What does the future hold?

There is already a separate SOL for Scotland and the MAC has recommended that SOL for Wales and Northern Ireland should also be implemented. The MAC has also suggested that a separate scheme is needed to address issues of de-population in some remote communities.

The UK Government's 2018 White Paper on Immigration suggests that after Brexit the required skill level for visa sponsorship may be lowered. The MAC has therefore provided some initial feedback on submissions it received regarding occupations below RQF level 6. Particular concerns were raised by the agriculture, food processing, warehousing, hospitality, construction, transport, cleaning and social care sectors. However, the MAC has suggested that if a new system is implemented a review should be completed to decide if it is still appropriate to have a SOL at all.

Illegal working penalties

The Home Office has published information on penalties imposed on employers for employing illegal workers. In addition to fines of up to £20,000 per illegal worker, employers have been named and shamed. The list features a large number of catering establishments. Whilst many are small businesses, the list also includes franchise brands such as Papa John's. The NAO recently criticised enforcement teams for focusing too much on restaurants and fast food outlets, so it will be interesting to see if there is more variety in enforcement action in the next quarter.

Birketts offers a 'Right to Work' checks master class aimed at members of the HR team and front line managers. For further details please contact Clare Hedges, Senior Associate, Head of Immigration.

Alleged cheating in English language tests

In our last newsletter we referred to a review being completed by the National Audit Office (NAO) of the Home Office's handling of allegations of cheating in English language tests. The NAO reviewed the evidence and found widespread cheating did take place but some people may have been wrongly accused and in some cases, unfairly removed from the UK. Sir Amyas Morse, head of the NAO, has been critical of the Home Office. He said "*When the Home Office acted vigorously to exclude individuals and shut down colleges involved in the English language test cheating scandal, we think they should have taken an equally vigorous approach to protecting those who did not cheat but who were still caught up in the process, however small a proportion they might be. This did not happen.*"

... it is now possible for Tier 4 Students to apply for their Tier 2 visa up to 3 months before they complete their bachelor's or master's course, so long as they have an academic reference from their university.

Recruiting Tier 4 students

At this time of year many Tier 2 General sponsors are recruiting graduates who are currently in the UK on a Tier 4 Student visa. There are particular advantages if a migrant is switching from Tier 4 to Tier 2 in the UK. In particular the employer is not required to complete a resident labour market test and there is also an exemption from the Immigration Skills Charge.

It has always been possible for PhD students to switch to Tier 2 after completing one year of PhD study. However, those studying for a bachelor's or master's degree have been required to produce either their degree certificate, or confirmation of their final results, with their Tier 2 visa application. Following changes to the Immigration Rules from 30 March 2019, it is now possible for Tier 4 Students to apply for their Tier 2 visa up to 3 months before they complete their bachelor's or master's course, so long as they have an academic reference from their university. This must be on official headed paper, signed by an authorised official and must confirm the student's name, the course title/award, duration and the expected date when the student will have taken all exams and submitted all academic papers.

This change will enable graduates to get visa applications submitted earlier, so long as their employer is happy to provide a Certificate of Sponsorship and incur the costs of sponsorship before they have confirmation that the individual has actually been successful in obtaining the qualification in question.

Student visitors

In our last update we explained that visitors from Australia, Canada, Japan, New Zealand, Singapore, South Korea and the US are now allowed to use ePassport gates. This is beneficial, but it has come to our attention that problems are arising in cases where the individual wishes to complete some more than 30 days of short term study in the UK. This is because permission for short term study (up to six months) can only be granted by an entry clearance officer and so cannot be obtained through an ePassport gate. Instead students need to queue up and get a 'STS' stamp in their passport or apply in advance for entry clearance. In particular this may affect those planning to attend summer schools or English language courses in the UK.

Lack of flexibility for Tier 1 (Entrepreneur) migrants

"The claimant's application was refused because she was unable to provide this payroll information in the exact form required.

The recent case of *R (Khajuria) v SSHD [2019] EWHC 1226* demonstrated that there is no obligation on the Secretary of State for the Home Department to exercise discretion in favour of Entrepreneur applicants where they do not meet the notoriously complex Immigration Rules.

The Rules require those seeking further leave to remain as Tier 1 (Entrepreneur) Migrants to provide Real Time Information (RTI) about tax and other deductions transmitted to HM Revenue and Customs (HMRC) by an employer. The claimant's application was refused because she was unable to provide this payroll information in the exact form required. She argued however that this requirement was unreasonable and unlawful because their business had closed the PAYE scheme and therefore were not required to provide RTI to HMRC.

The High Court disagreed with the claimant and held that this requirement was neither unreasonable nor unlawful, stating that "*...although the rule operates in such a way that someone in the position of the Claimant cannot comply with it because she does not operate a PAYE system which involves submission of RTI, that does not make the rule invalid*".

The Tier 1 (Entrepreneur) visa route has been closed to new applicants from 29 March 2019 (and replaced with a new Innovator route), but remaining Entrepreneurs who have until 6 April 2023 to apply for further leave to remain and until 6 April 2025 to apply for indefinite leave to remain (ILR), should ensure they meet all of the Rules before submitting an application for further leave to remain, or ILR.

For further information on any of the matters covered in this update, please contact Clare Hedges or Janice Leggett in our Immigration Team. Law covered as at June 2019.