



## EMPLOYMENT NEWS HEADLINES

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### COVID-19 UPDATE AND THIRD UK LOCKDOWN

Shortly following the chimes of the New Year came the third UK lockdown currently underway and expected to last until at least mid-February 2021 as the Government rolls out its nationwide vaccination programme. With a substantial spike in infection rates across all ages and a rising death toll with a new variant of the Covid-19 virus, below are useful links to the most recent changes announced by the UK Government impacting employers:

- The chancellor announced earlier in January that a new £4.6 billion grants scheme will be introduced to support businesses and jobs as a result of this new national lockdown. Guidance can be found at [Coronavirus \(COVID-19\): Business support - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/coronavirus-covid-19-business-support)
- As more and more people are needing to self-isolate with symptoms, employers are reminded about the revised sick pay rules, details in Issue 28 and further lockdown guidance is available at [Coronavirus \(COVID-19\): guidance and support - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/coronavirus-covid-19-guidance-and-support)

We will provide further updates as this challenging situation continues to unfold in our next edition.

### BUSINESS IMMIGRATION AND BREXIT

With the United Kingdom's departure from the European Union with effect from 1 January 2021, below are some key points employers need to be aware of in the context of recruitment and employee movement across borders.

The new UK immigration points-based system will apply to non-EEA nationals and EEA and Swiss nationals for work visas. The main visas in this category are the Tier 2 General visas now called Skilled Worker visas and the Tier 2 Intra-Company Transfer visas now called ICT visas. Key changes for each are listed below. Employers wishing to sponsor migrant workers should either review their current sponsor licence to ensure it is fit for purpose or should carefully consider the scope of the sponsorship licence where employers are applying for the first time.

#### Skilled Worker visa

- The requirements for employers to satisfy the Resident Labour Market Test (RLMT) has been abolished which means employers will no longer need to satisfy the advertising requirements to ensure the skills cannot be found in the local market;

- The cap on the Skilled Worker quota has been removed which will mean employers will have more flexibility to apply as the skills requirement arises. Note: this position may change in time with caps being reintroduced;
- Those sponsors with existing employees with Tier 2 General visas can continue on the current visa until the application to extend or a settlement application is made by the holder which will need to be under the new regime;
- The limit of six (6) years for this category of visa has also been removed so visa holders can extend indefinitely if they do not wish to apply for settlement and no longer need to be outside the UK for 12 months before reapplication;
- The minimum salary requirements have also been slightly reduced.

#### ICT visa

- There is no longer a requirement to hold tenure with the employer overseas for a period of 12 months to apply for an ICT visa;
- The application can also now be made from within the UK making it easier to transfer to an ICT visa from a different visa category without the need to leave the UK;
- The skills and minimum salary level requirements for this category will, however, remain unchanged;
- The higher earner salary threshold has been considerably reduced from £120,000 to £73,900 which will assist multinational employers bringing in skilled employees under this visa category.

The above is a high-level snapshot of some of the immigration changes impacting employers. While employers assess their future business needs for a foreign skills-set they should continue to carry out the normal 'right to work' checks for EU nationals which will continue until 30 June 2021.

### **AGE DISCRIMINATION IN TALENT POOLS – RYAN V SOUTH WEST AMBULANCE SERVICES NHS TRUST (EAT)**

The case of *Ryan v South West Ambulance Services* highlights the importance for employers to carefully consider any direct or indirect discriminatory impact on a protected group or an individual where the provision, practice or criterion (PCP) may, on the face of it, appear logical and sound.

Mrs Ryan was an education and training officer with the NHS trust (the "Trust") and was in her late sixties. In order to fill vacancies quickly and efficiently from within, the Trust set up a "talent pool" from which employees would be considered when vacancies arose. There were two ways of getting into the talent pool either by (i) a high-performance appraisal rating or (ii) self-nomination. Mrs Ryan was not in the talent pool. When a managerial vacancy arose, Mrs Ryan was overlooked for it despite her interest in the role. She was told it was due to her not being in the talent pool. Mrs Ryan brought an indirect age discrimination claim on the grounds of the Trust's PCP of under-representing her age group in the talent pool. At first instance Mrs Ryan's claim failed because the Employment Tribunal found:

- There was no causal link between the PCP and the disadvantage suffered by Mrs Ryan as she had not attempted to get in the talent pool by the means available to her;

- In any event, the PCP was a proportionate means of achieving a legitimate aim in that it was a reasonable way for the Trust to succession plan from the talent available to it.

Mrs Ryan appealed. The EAT overturning the ET's findings said Mrs Ryan had been indirectly discriminated against as the ET had:

- Failed to consider the statistics which showed the group disadvantage of her age group (55 years and above) which did have a reduced likelihood of being in the talent pool;
- Not considered the Trust's inability to prove by evidence that Mrs Ryan had been given every opportunity to get into the talent pool and there was no evidence to suggest that had she pursued the routes available to her she would have been in the talent pool;
- Additionally, the EAT found that the PCP could not be objectively justified as the Trust had not considered the potential discriminatory impact it could have on a protected group.

It is extremely important when introducing policies and practices in the workplace for employers to consider all potential angles and the impact the policy or practice may have on a group and individual basis.

## **GOVERNMENT LAUNCHES CONSULTATION ON RESTRICTIVE COVENANTS IN EMPLOYMENT CONTRACTS**

The UK Government has launched a consultation on restrictive covenants specifically, non-compete provisions, in contracts of employment. Although restrictive covenants have been debated before, by and large, case law has found and general consensus has been that they are "a valuable and necessary tool for employers to use to protect their business interests and do not unfairly impact on an individual's ability to find other work". With the brutal impact that the Covid-19 pandemic has had on the economy the Government is now looking to find ways to ensure that employees are able to maximise their ability to work whether that is with more than one employer (for lower paid employees), to start up a business of their own or to freely move on and work elsewhere with a competitor in cases of redundancy, for example. To this end, the Government is seeking views on the following proposals:

- The introduction of mandatory payments by the employer for the period of the restriction and whether that is a percentage of the exiting employee's pre-termination earnings or a statutory fixed rate. This is commonly a practice already seen on mainland Europe in countries such as Germany and France;
- A complete ban on non-compete restrictions in employment contracts already a practice in jurisdictions such as California. This would not impact restrictions in other agreements such as partnerships, share agreements or consultancy agreements and is focused on the employment relationship;
- Additionally, were restrictions to remain, views are invited on whether there should be a statutory limit on the duration of the restriction and whether there should be transparency in that the restrictions are clear and agreed pre-employment rather than, as is often the case at present, where the detailed contract is issued later, although this is less likely for senior hires.

- Views are also sought on whether non-solicitation of employees and customers and non-dealing provisions should be covered.

The consultation period is open until 26 February 2021

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