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A round-up of Labour and Employment stories from around our global network

December 2012

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UK Border Agency reviews Shortage Occupation List

Businesses which recruit non-European Economic Area (EEA) migrant workers to fill vacancies within their workforce may be familiar with Tier 2 of the UK Border Agency's Points Based System and its strict qualifying criteria, in particular the resident labour market test (RLMT).

The Shortage Occupation List (SOL) sets out those skilled occupations which are considered to suffer from a labour shortage and which might therefore sensibly be filled using non-EEA workers. The current SOL includes specialist science and engineering related roles; qualified actuaries working in the life assurance, general insurance and healthcare sectors; and certain software professionals and graphic designers specialising in visual effects and computer animation. The current full list can be found at http://www.ukba.homeoffice.gov.uk/sitecontent/documents/workingintheuk/shortageoccupationlistnov11.pdf.

To assist those businesses which are experiencing skilled labour shortages, occupations included in the SOL are exempt from the RLMT usually required before non-EEA staff can work in the UK under Tier 2 (General). The RLMT requires employers to demonstrate that a post cannot be filled by a suitably qualified EEA resident worker through their advertising in a prescribed format and medium for at least 4 weeks. In practice, the RLMT is a difficult test to satisfy, as well as being both time-consuming and administratively onerous.

The UK Government has asked the Migration Advisory Committee (MAC) to review the current SOL and the MAC will make recommendations based on evidence received from interested parties (including private and public sector employers and representative bodies). The MAC will apply three key tests when considering which occupations should remain on or be added to the SOL:

(a) is the occupation/job sufficiently skilled?

(b) is there a shortage of labour for that occupation/job?

(c) if yes, is it sensible to fill this shortage with labour from outside the EEA?

The UK Government has already indicated that it wishes to remove from the SOL all those occupations that have been on it for more than a given period, in principle two years, irrespective of any shortages affecting the sectors concerned. Regardless of the MAC's recommendations therefore, it is possible that many of the occupations included on the current SOL will be removed in 2013. This would have a direct adverse impact on any businesses currently reliant on the SOL (particularly those in the engineering, insurance and creative sectors), as they would then be required to fulfil the RLMT when sponsoring such an occupation, even if a clear shortage of suitable staff still exists. For further information on the SOL or any other business immigration issues, please contact:

Annabel Mace, Partner, London

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Hong Kong's highest court gives holiday pay ruling

The Court of Final Appeal in Hong Kong has recently given its judgment in a long-running dispute over holiday pay which may have implications for other employers which offer annual leave over and above the statutory entitlement.

In ***Cathay Pacific Airways Limited v Kwan Siu Wa Becky & ors*** the Court held that where contracts of employment offer annual leave in excess of the requirements in the statutory Employment Ordinance then, in the absence of any term providing for some other rate, that additional holiday pay should be calculated in the same way as for statutory holiday. It also held that Cathay Pacific had to include certain allowances and commissions when calculating that additional contractual holiday pay.

Under the current Employment Ordinance, the daily rate of statutory holiday pay is calculated by reference to an employee's average daily wage during the relevant reference period. This is normally the 12-month period prior to the first day of annual leave or termination of the contract (as appropriate), but for employees who have been employed for less than 12 months the reference period is the actual length of their employment.

The definition of wages for these purposes includes all remuneration, earnings, allowances (including travel and attendance allowances), attendance bonuses, commission, tips and service charges payable to an employee under his contract of employment. It does not include discretionary elements such as a discretionary bonus or discretionary commissions or allowances. Furthermore, no account is taken of overtime pay unless it is of a "constant character" or the monthly average over the reference period is equivalent to or exceeds 20% of the employee's average monthly wages during the same period.

Employers need to be aware that in light of ***Cathay Pacific***, these provisions will apply to any excess contractual annual leave unless the employment contract explicitly states otherwise. Therefore, if an employer wishes to calculate additional contractual holiday in a different manner, for example only including basic salary rather than additional benefits and allowances, this should be explicitly stated in the employment contract.

Nick Chan, Partner and Charles To, Associate, Hong Kong

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Polish Constitutional Tribunal clarifies rules governing work on public holidays

In Poland there are 13 public holidays, including some widely celebrated ones (New Year's Day and Christmas Day) and others specific to Poland such as Constitution Day (3 May), All Saints' Day (1 November) and Independence Day (11 November).

Under the Polish Labour Code working on public holidays (and Sundays for that matter) is generally prohibited but there are exceptions, for example for those workers in the hotel and catering sector, at cultural, educational, tourism and leisure establishments and shift workers, etc.

The Code states that any public holiday on a day other than a Sunday reduces an employee's working time by 8 hours. This provision does not create any problems for those employees who work on a standard 8-hour basis from Monday to Friday, but what about those employees who work shifts and who in accordance with their working schedule are required to work on a public holiday?

Until October 2012 this situation was regulated by Article 130 par 2^1 of the Labour Code. This said that if a public holiday fell on a day which was not a working day under the relevant working time pattern then employees were not entitled to have their working time reduced. So if, for example, Constitution Day fell on a Monday then any employees who worked regular hours would be entitled to a long weekend – their working time would be reduced - but any employees who worked on a shift system and had a rest day on that Monday would not be eligible for an additional day off and their working time would not be reduced.

In October, however, the Polish Constitutional Tribunal stated that this provision violated the principle of equality and said that all employees should be treated equally. Accordingly, this provision is now unenforceable. Employers operating in Poland should be aware that if a public holiday falls on a day other than a Sunday, this will reduce an employee's working time by 8 hours, even if they are a shift worker and they are not actually due to be working on that day because of their work schedule.

Katarzyna Witkowska-Pertkiewicz, Associate, Warsaw

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The Employment Law Ashes – England v Australia

When I moved to Sydney from the Squire Sanders' London office seven years ago, it was for the usual reasons expats move to Australia – climate, beaches and an outdoor lifestyle. Since then, Australia has also become an increasingly popular destination for global companies due to its healthy economy and strategic presence within the Asia Pacific region.

Although England and Australia are both common law jurisdictions, with England generally leading the way, there are some significant differences from an employment law perspective for global companies employing staff in both locations. A snapshot of some key differences is set out below.

Summary of general entitlements

Entitlement	England	Australia
Maximum weekly hours	48 hours over a 17 week period	38 hours plus reasonable additional hours (may be averaged over a period in certain circumstances)
Annual leave	5.6 weeks per annum including bank holidays	20 days per annum excluding public holidays, which vary from State to State
Maternity leave and pay	52 weeks' unpaid maternity leave with no qualifying period of service If qualifying conditions are met, 39 weeks' statutory maternity pay (6 weeks at 90% of average weekly wage and 33 weeks at a standard rate (currently £135.45) or 90% of average weekly wage if lower)	52 weeks' unpaid parental leave after 12 months' continuous service. Right to request an additional 52 weeks If qualifying conditions are met, 18 weeks' pay at the national minimum wage (currently AUD$606.40 per week)
Minimum notice of termination	1 week for every full year worked (maximum 12 weeks)	1 week in the first year of service increasing to a maximum of 4 weeks for 5 full years worked (additional week if an employee is over 45 and has completed 2 years' service)
Redundancy pay	2 years' qualifying service and capped at 30 weeks' pay at the maximum weekly rate (currently £430)	1 year's qualifying service and capped at 16 weeks' pay at the employee's base rate of pay As a universal entitlement to redundancy pay only commenced on 1 January 2010, the current entitlement is 6 weeks' pay at the employee's base rate of pay unless an employee had a prior entitlement under a policy or award (see below)

Entitlement	England	Australia
Unfair dismissal	Qualifying period - 1 year if service commenced prior to 6 April 2012, otherwise 2 years' qualifying service. There are exceptions where no qualifying period is required Time limit for claim – 3 months after effective date of termination Remedies - Basic award (currently up to £12,900) plus compensatory award (currently up to £72,300) Reinstatement or re-engagement	Qualifying period - 6 months (or 1 year if employed by a small business). Must be paid below the High Income Threshold, (currently AUD$123,300) unless they are also covered by a Modern Award (see below) Time limit for claim – within 14 days of the dismissal coming into effect Remedies – reinstatement (if appropriate), otherwise compensation up to six months' pay currently capped at AUD$61,650 (indexed)

Unique entitlements in Australia

Modern Awards – In addition to statutory and contractual entitlements, some Australian employees have a further "safety net" of minimum standards due to the nature of their occupation or the industry they work in. These entitlements are contained in statutory instruments known as 'Modern Awards". Historically there were over 3,000 awards operating at State and Federal level, but on 1 January 2010 these were streamlined into 122 Modern Awards.

Modern Award entitlements include minimum wages, arrangements for when work is performed (i.e. rest breaks), overtime and penalty rates that can increase employees' earning capacity depending on their working patterns and industry. An employer needs to be familiar with any Modern Awards that may apply to its employees or it may be exposed to significant penalties together with underpayment claims. It is therefore important to determine who is covered by a Modern Award and to consider permitted mechanisms for flexibility or to exempt coverage for employees who are paid above the High Income Threshold.

Long service leave – Entitlements vary from State to State and are expected to be harmonised into a single national standard. In New South Wales, for example, employees have an entitlement to two months' paid leave after 10 years' continuous employment.

Adverse action claims – Australian employers must not take "adverse action" against employees, prospective employees and contractors as a result of their having, exercising or proposing to exercise a "workplace right". Adverse action includes dismissing an employee, injuring him, detrimentally altering his position or discriminating against him. A workplace right includes any entitlement under an award, agreement or workplace law, or being able to initiate proceedings under a workplace law or to make a complaint or inquiry in relation to employment. There is also a reverse onus of proof similar to that applicable in UK discrimination claims, whereby the employer must prove that any adverse action was not taken because of a workplace right.

Importantly, there is no qualifying period or maximum income threshold needed to bring an adverse action claim, compensation is uncapped and, other than in certain circumstances, is a no costs jurisdiction. Consequently, adverse action claims are becoming increasingly popular and provide a useful remedy for high income employees.

Other key distinctions

Disciplinary and grievance procedures – In England, the manner in which disciplinary and grievance hearings are addressed is more regulated and prescriptive. Although the statutory procedures were mercifully removed by the Employment Act 2008, there remains a non-binding Acas Code of Practice which sets out broadly similar principles for employers to follow.

In Australia, there is no statutory disciplinary or grievance procedure or similar code of practice, but that is not to say that an employer can ignore issues of procedural fairness. For instance, if a disciplinary process results in an unfair dismissal claim, Fair Work Australia will take certain factors into account in considering whether the dismissal was 'harsh, unjust or unreasonable'. These include, for example, whether the person was warned about unsatisfactory performance and given an opportunity to respond or, in the case of a small business employer, whether the Small Business Fair Dismissal Code was complied with. However, the requirements are generally less onerous and prescriptive for employers in Australia than their UK counterparts.

Global employers seeking to implement Group disciplinary and grievance procedures should be mindful of these differences, particularly in Australia where a policy may potentially create a contractually onerous procedure which, if not followed, could result in a breach of contract claim.

Whistleblowing – England has much broader protection and sanctions that extend to the private sector. Save for some limited exceptions in some States and under corporations' law, whistleblowing protection in Australia is generally limited to the public sector.

Anna Elliott, Senior Associate, Sydney

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French Supreme Court offers guidance on monitoring in the workplace

In two key judgments this year the French Supreme Court reminded employers that whilst they may control and monitor their employees' activities during working hours, the use of unlawful measures to do so is strictly forbidden and any evidence acquired via such means will be inadmissible for disciplinary or dismissal purposes.

Laudably, the Social Chamber of the French Supreme Court has always tried to protect the salaried citizen's individual privacy rights against the actual or presumed interests of third parties, though sadly this can include those of his employer. Indeed, the circumstances in which employers are entitled to monitor their employees' activities in the workplace have always been strictly regulated. Article L.1222-4 of the Labour Code provides that no personal data or information about an employee can be obtained if the employee has not been made aware of it in advance.

In a case before the Supreme Court earlier this year, it was held that an employer was not entitled to use video recordings from a camera on a client's site where its employees were working in order to support an allegation that an employee had breached his contractual obligations. This was because the employee had not been made aware in advance of the existence of the camera there and the purposes for which any recordings might be used. The Court said that the employer should have notified the employee in writing that the surveillance system on the client's site could be used to monitor his activities and working hours as well as optimising any work done for the client and enhancing its production process.

In another case, the Supreme Court said that an employee was entitled to resign and bring a claim against his employer in circumstances where his employer had used a geographical positioning system to monitor the movements of his car for purposes other than those that had been notified to him.

In light of these judgments, French employers should be particularly careful when monitoring their employees' activities and ensure that they have notified them in writing both if they intend to carry out such monitoring and the purposes for which such monitoring will be used. Failing this, employers risk being unable to use any evidence obtained via such measures to support any allegations of misconduct, even gross misconduct however clear and conclusive and damning that evidence would be if it were admissible.

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