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The points-based system: a guide for international law firms

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The points-based system: a guide for international law firms

IN 2008, WITH A VIEW TO SIMPLIFYING and streamlining the UK immigration visa classification, the UK Border Agency (UKBA) launched a new points-based system (PBS). The main idea behind the scheme was to encourage UK employers to fill their vacancies with candidates from within the European Economic Area (EEA) by restricting the influx of foreign workers. Although entirely at odds with the recent globalisation of the legal industry, this move is an altogether predictable response to the current economic storm. Last month the UKBA introduced new measures in an attempt to 'raise the bar' even further by demanding that all roles are advertised in Jobcentre Plus and that all self-sponsored migrants hold a recognised Master's degree.

WHAT IS THE POINTS-BASED SYSTEM?

The PBS consists of five tiers, with Tiers 1, 2 and 5 being the most relevant to international law firms. Migrants from outside the EEA are allocated points depending on how beneficial their presence in the UK could be to the national economy. Their potential contribution is calculated by assessing attributes such as qualifications, previous earnings, age, work history, command of the English language and the ability to maintain themselves without recourse to public funds. The number of points required and how they are scored depends on the tier under which the migrant applies. Tier 1 caters for investors, post-study workers and highly skilled migrants, and does not require the migrant to be sponsored by an employer. For Tier 2, on the other hand, having a sponsor is mandatory. Tier 2 is subdivided into Tier 2 General and Tier 2 Intra Company Transfer (ICT). While Tier 2 General is aimed at new recruits, Tier 2 ICT enables employers to bring existing employees from their overseas branches to the UK. Under Tier 2 General, to employ a foreign worker, employers have to show that they have tested the resident labour market (RLM) through advertising and have not been able

to find a suitable candidate to fill the role. Tier 5 is subdivided into six categories; the government-authorised exchange category being the most pertinent here.

TIER 2 SPONSOR LICENCE

Before they can sponsor foreign workers under Tier 2, UK employers have to register with the UKBA to obtain a licence. Although the registration process is fairly straightforward, preparing for the audit that may follow can be time consuming. The audit itself has been described by some as very intrusive. The authorities may choose to interview a sponsored worker without the presence of the sponsor or legal representative. Once registered, employers are able to issue certificates of sponsorship, which act as work permits, to foreign workers without seeking further approval from the authorities.

Although, in theory, this new process appears far simpler and less bureaucratic than its predecessor, the 'work permit scheme', in practice it is a minefield as it leaves very little room for human error. Before issuing a certificate of sponsorship, registered employers have to satisfy themselves that:

- the role is sufficiently skilled;
- the applicant has the required skills and/or qualifications; and
- except for ICTs, the RLM has been tested satisfactorily.

Most professions have been catalogued and given specific codes of practice, which list the level of qualification required, the prevailing wage and the prescribed medium to show that the RLM has been tested. In an aggressive move to restrict access to the UK labour market, the UKBA have recently called for all positions to be advertised in Jobcentre Plus for two weeks, regardless of the level of seniority or specialisation.



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This new requirement has now been rolled out for Tier 2 General applications and is additional to advertising the role using one of the approved methods and/or media listed in the codes of practice. While in most cases it is quite clear which codes are applicable to lawyers, not all professions have been blessed with specific codes and it is often difficult for employers to determine which criteria must be met.

As licensed employers will be subject to UKBA compliance visits from time to time, it is essential that the PBS' requirements are strictly adhered to. The ramifications of getting it wrong could be catastrophic. It would range from being downgraded from an A-rated to a B-rated sponsor, to losing a license, resulting in all sponsored workers having to leave the UK. In the worse case scenario, employers can face civil and/or criminal penalties. As if these deterrents were not enough, for good measure the UKBA also have a name-and-shame page on their website listing employers who have been found to be non-compliant.

COMPLIANCE: EMPLOYERS' DUTIES AND RESPONSIBILITIES

Through Tier 2 the UKBA has shifted the responsibility of part of the migrant worker population and its associated costs towards UK employers.

To maintain their registration and avoid potential prosecution, registered employers must comply with several reporting and monitoring duties. Employers are expected to inform the UKBA if:

- the sponsored worker does not turn up on their first day at work;
- if the sponsored worker is absent for more than ten days without the sponsor's permission;
- the sponsored worker's contract ends;
- the requirement for the sponsor is no longer necessary (this will occur when the worker switches to another immigration category that does not require sponsorship);
- there are significant changes to the worker's role; and

- there are any suspicions that the worker is breaking the conditions of their permission to stay in the UK.

Complying with these duties rigorously can be somewhat challenging. The most

(IPS) has confirmed that not one police station, immigration post or job centre has a machine that can read the cards' biometric chips. It also appears that there is still no firm timetable for the introduction of card readers.

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obvious compliance hazard lies with the duty to report changes of personal details or immigration status. Short of making it a sackable offence not to inform the employer of any change of address, telephone number or immigration status, there is little a sponsor can do to ensure compliance.

In addition to the monitoring and reporting on their sponsored migrants, employers are also required to check their entire migrant population's entitlement to work in the UK whether registered or not. Since February 2008, this exercise must be carried out every 12 months until the foreign worker has obtained indefinite leave to remain.

In an attempt to assist employers in their task, the UKBA has published guidance listing the documents that would be accepted as evidence of a migrant's entitlement to work in the UK. Unfortunately not all scenarios are covered and employers often have to seek professional advice to avoid civil and, in more serious cases, criminal prosecution.

The UKBA is hoping to make the monitoring of migrants increasingly more manageable by introducing ID cards. The cards, which are already being issued to some specific migrant categories, contain a biometric chip that should provide employers with an easier and more secure way to confirm a person's immigration status and eligibility to work. There is, however, a small problem that remains to be addressed. At present, there are no machines that can read the cards. The Identity and Passport Service

HOW DOES IT AFFECT INTERNATIONAL LAW FIRMS?

Since Tier 2 was officially launched, international firms have had to address several issues. For instance, the code of practice for lawyers initially demanded that all practising lawyers held a UK practising certificate. This mistakenly omitted to take into account foreign lawyers advising in the UK on foreign law and has now been rectified. Problems have also been encountered with meeting the RLM test. The requirement that a certificate of sponsorship must be issued no more than six to 12 months after a role being advertised does not accord with the legal industry's common practice relating to milkrounds, which are typically conducted at least two years in advance. Regrettably, this requirement is to be applied retrospectively thereby affecting this year's recruits.

Quick to foresee the impact the PBS would have on the UK legal industry, the Law Society has been very proactive and persistent in its attempts to raise the government's awareness of the difficulties that international firms would face. Months of battling to get themselves registered under a scheme, which initially existed only in theory, has resulted in the Law Society being one of the first licensed overarching bodies able to sponsor foreign workers under one of the subdivisions of Tier 5. This category is aimed at internships only since, to qualify, the role must be supernumerary. With this recent registration, employers will now have an alternative to having to re-advertise the internship programmes filled over six to 12 months ago. To benefit

from this scheme, firms will have to enter into a contract with the Law Society to ensure compliance, especially with reporting and monitoring duties.

One of the conundrums that remains to be resolved is that to qualify for a Tier 2 ICT, the overseas employee has to show that they have been working (as opposed to being 'employed') for the overseas branch for the six months immediately preceding their transfer. This seems to automatically disqualify employees who have been on maternity or study leave, whether paid or unpaid, immediately prior to their secondment. It would appear that in these circumstances, employers are expected to advertise the role to bring the employee to the UK under Tier 2 General.

It is still unclear whether, under PBS, the transition from trainee to associate constitutes a natural career progression or a change of employment. If the latter, employers will in most cases be expected to issue a new certificate of sponsorship under Tier 2 General and test the RLM to ensure that there are no EEA-resident workers available to fill the role. If firms cannot guarantee that they will be able to retain their foreign trainees there is very little point training them in the first place. The jury is still out on this point. A negative outcome is likely to drastically reduce the pool of candidates, skills and expertise in other jurisdictions.

As Tier 2 only applies to employees, equity partners have to find an alternative route to the UK. Historically, these individuals have used the Tier 1 General, which permits self-employment. However, with the recent changes whereby only Master's degree holders qualify, this route will no longer be an option for many candidates. Furthermore, as US Juris Doctors are not recognised as the equivalent of a UK Master's degree for the purpose of Tier 1 General, we are likely to see a sharp decrease in the number of US firms opening satellite offices in the UK. This added hurdle also precludes firms from offering partnership to their foreign senior associates who do not hold recognised Master's degrees.

IMMIGRATION AND DISCRIMINATION

Paradoxically, while the Home Office is fortifying our RLM's defences even further, in the recent *Osborne Clarke Services v Purohit* [2009] the Employment Appeal Tribunal (EAT) upheld the Employment Tribunal's (ET) decision that refusing to consider applications from non-EEA nationals amounted to indirect race discrimination.

The claim arose out of the application of Osborne Clarke Services' (OC) policy of not considering any application for training contracts from individuals requiring permission from the UKBA to work in the UK to Mr Purohit. Purohit, an Indian national, applied online for a training contract at OC in 2007. The application process asked three preliminary filter questions. The third question related to whether the applicant had a work permit in the UK. By answering 'no' the potential candidate would be put through to a further page where he was told that he did not meet the entry requirements, with this additional comment:

'We are sorry but we are unable to accept applications from candidates who require a work permit to take up employment in the UK.'

After submitting his application, Purohit was informed that OC could not obtain work permits for trainee solicitor roles. Purohit claimed direct and indirect discrimination. The ET turned down his direct discrimination claim but concluded that the condition applied by OC (ie that they would not accept applications from those requiring work permits) was such that a smaller proportion of non-EEA nationals could comply with it than the proportion of persons not of that group that could comply with it. It was therefore held to constitute indirect discrimination. OC sought to justify its policy by referring to the UKBA's guidance in operation at the time, which stipulated that employers applying for work permits for new recruits would have to demonstrate why they could not fill a role with an EEA national. OC referred to the application form for work permits, in which employers were required to give specific reasons as to why it had not employed each of the EEA nationals who had applied for a role. The form also contained a declaration page that forewarned employers that they could commit offences under

immigration legislation if any of the details in the form were knowingly false. One of OC's arguments was that had they applied for a work permit, the application would have most likely failed as they would have been unable to provide credible evidence to demonstrate that no suitable EEA-resident worker could be found to fill the role. The ET criticised OC's assumption that an application would have failed and concluded that their policy could not be justified. On appeal, the EAT took the view that it was not for OC to second guess whether the UKBA would issue a work permit and concurred with the ET that OC could not justify its policy.

While this case relates to the previous work-permit scheme, it remains relevant in that before being able to issue a certificate of sponsorship for a new recruit under Tier 2, employers must ensure that the RLM has been tested.

Only recently *The Gazette* reported having found that several large firms have a similar condition for prospective trainees from countries outside the EEA. Whether licence holders would be able to justify a similar policy now and what the position of employers who have opted against registering as sponsors is, are two of the questions to be pondered over when considering reviewing current practice.

WHAT DOES THE FUTURE HOLD?

To remain competitive, international UK law firms must be able to assist clients to negotiate cross-border transactions, which often requires expertise in US, English and other national laws. To achieve this, these organisations must be able to employ lawyers qualified in different jurisdictions. By preventing overseas lawyers from accessing the UK market, the PBS is likely to affect the position of international firms in the global legal market, which in turn will impact on the entire UK legal industry. Despite the Law Society's efforts to raise the UKBA's awareness on these potentially devastating effects, no exceptions or provisions have been made. The perception that foreign lawyers are no longer welcome in the UK, albeit perhaps not entirely founded, will suffice to jeopardise our place in the global legal market.

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