WORKERS WITHOUT BORDERS

Commission(s) in charge of the Session/Workshop:

Labour Law and Immigration Commission

Munich, 2016

National Report of United Kingdom

Malini Skandachanmugarasan	Hester Jewitt	Clare Hedges
Laura Devine Solicitors 100 Canon Street London EC4N 6EU 020 7469 6474 malinis@lauradevine.co	Penningtons Manches LLP 125 Wood Street London EC2V 7AW 020 7872 8616 Hester.jewitt@penningtons.co.uk	Birketts LLP 22 Station Road Cambridge CB1 2JD 01223 326605 clare-hedges@birketts.co.uk

General Reporter

Stefanie Tack, Stappers, Eliaerts & Thiers advocaten cvba, Antwerp, Belgium

29 February 2016

INTRODUCTION

Global mobility is on the rise. More and more companies increasingly operate on a cross-border scale. However, companies assigning their employees to another or multiple countries are often confronted with an increase of formalities and requirements affecting the cross-border employment. At first glance, only the work place of the employee temporarily changes. However, many other legal issues come into play and employees must comply with the rules and regulations governing immigration, employment and labour and social security law of each of those countries.

The aim of the present questionnaire is to outlining the legal aspects and issues affecting the temporary assignments of employees within and outside the European Economic Area (EEA).

1. Immigration

The first question employers should consider is whether the employee needs an authorization to work and reside in the country to which he/she is (temporarily) assigned.

Within the European Union, freedom of movement of persons is one of the main fundamental principles, guaranteeing EEA nationals the right to live and work freely in another EEA member state.

Non-EEA nationals in principle need an authorisation to work within the EEA. Does this obligation also apply to EEA nationals assigned by their employer outside the EEA?

2. Labour and employment law

Secondly, assuming the employee is allowed to work and reside in the relevant country, it is important knowing which law is governing the employment relationship during the assignment period. Is it the law of the employer (home country) or the law of the country where the employee will be assigned (host country)?

Within the European Union, the Rome Convention and the Rome I EC Regulation are the two sources dealing with this matter. Does these sources also apply when a non-EEA national is assigned to an EEA country and when an EEA employee is assigned outside the EEA? Can the employer and employee choose the law applicable to their employment relationship? Which law applies in case no law has been chosen? Can the employee also invoke the protection of statutory provisions of the country where he/she will be assigned?

The labour and employment law part of this questionnaire also includes a part on the strict rules on the 'lease of personnel' in assignment situations. Finally, we will look into (the content of) the assignment letter and the early termination of the assignment and employment relationship.

3. Social Security

The third part of this questionnaire deals with the social security aspects linked to assignments, as it is relevant and important to know in which country the social security must be paid during the assignment.

4. Other obligations and formalities

We will look into possible other obligations and formalities to be complied with in your countries in case of assignments of employees to your countries (e.g., prior notifications, drafting and keeping of social documents, etc.).

5. Social inspection

The last part of this questionnaire is based on whether or not cross-border assignments are a priority for the social inspectorate.

QUESTIONNAIRE

1. IMMIGRATION

1.1. Who needs a work permit to work in your country? Are there types of employees exempted (e.g., based on their nationality or type of work performed (business trips, etc.)?

Non-EEA Nationals

All non-EEA nationals who wish to work in the UK must obtain the relevant permission to enable them to work.

EEA Nationals

Nationals of countries in the European Economic Area (EEA) and Switzerland and members of their families (whether or not they are EEA or Swiss nationals themselves) can come to, live in and work in the UK without any immigration permission, provided the EEA national is exercising rights under EU law under the Treaty on the Functioning of the European Union. The rights of third-country family members of EEA nationals are covered in EU Directive 2004/38 which has subsequently been implemented into UK law by the Immigration (EEA) Regulations 2006.

EEA/Swiss nationals are considered to be exercising their Treaty rights if they are employed or self-employed, studying, economically self-sufficient, a job-seeker, retired or someone who has had to cease working in the UK owing to permanent incapacity.

Although it is not mandatory under European law for a national of a country in the EEA to obtain documentation confirming the right of residence in the UK, migrants may wish to apply for acknowledgment of their right to reside and work in the UK.

When an EEA/Swiss national and their non-EEA family members have lived in the UK for a continuous period of five years in accordance with the Treaty it is possible to apply for permanent residence in the UK, the equivalent to Indefinite Leave to Remain (ILR) under UK immigration law.

Business Trips

Individuals may come to the UK for a business trip however non-EEA nationals who are visa nationals must obtain immigration permission as a visitor before coming to the UK. Non-visa nationals must still obtain the correct immigration permission as a visitor, but can do so on arrival to the UK. Provided the business activities the individual plans to undertake whilst in the UK do not amount to productive work and meet one of the specified business activities (which can include but are not limited to conferences, meetings and training) under the Immigration Rules the individual may come to the UK as a business visitor.

Therefore employees coming to the UK on a business trip are not exempt from obtaining immigration permission.

1.2. Are there different types of work permits in your legal system? Are there work permits for highly educated/qualified employees? If so, what are the conditions and what is the procedure to be followed? Who needs to file for the application and where? Which information and documents are to be provided to the competent authorities? What is the timing? What is the duration of the work permit? Can it be renewed? Is it possible to apply for permanent status after a certain period of time under the work permit?

There are different types of immigration permission which allow a non-EEA national to work in the UK. Under the current Immigration Rules a non-EEA national may most commonly work in one of the relevant categories of the Points Based System (PBS), which was originally implemented in 2008. The system consists of four tiers (with further subdivisions) comprising:

- Tier 1: High value migrants
- Tier 2: Skilled workers
- (Tier 3: Low skilled - not implemented)
- Tier 4: Students
- Tier 5: Temporary workers and youth mobility

Tier 1 – High value migrants

These immigration routes are targeted at exceptionally talented and highly skilled workers, investors and entrepreneurs. The Post Study Worker and General sub-categories have closed to new applicants. The categories available to new applicants under Tier 1 are as follows:

Tier 1 (Exceptional Talent)

This category is for people who are internationally recognised as world leaders or potential world-leaders in the fields of science, the arts and digital technology, and who wish to work in the UK. Applicants must have an endorsement from a 'designated competent body' that is able to judge whether the applicant is internationally recognised in their field as a world-leading talent, or has demonstrated exceptional promise and is likely to become a world-leading talent.

Tier 1 (Investor)

High-net-worth individuals who will invest at least £2,000,000 in the UK may apply under Tier 1 (Investor) category. Applicants do not need a job offer or business proposal to apply in this category and may work in any role once in the UK, if they wish to.

Tier 1 (Entrepreneur)

This route is for migrants who will establish, join or take over (and be actively involved in the running of) a business or businesses in the UK. Applicants must

be able to demonstrate access to not less than £200,000 (or £50,000 in certain circumstances) to invest in the UK business(es) and must create at least 2 full-time jobs in the UK. Work under this category is restricted to the business(es) the applicant has established, joined or taken over in the UK.

Tier 1 (Graduate Entrepreneur)

This category allows non-EEA graduates to extend their stay in the UK after graduation in order to establish one or more business(es) in the UK. Applicants must be endorsed by a UK Higher Education Institution and have been awarded a recognised UK degree.

Tier 2 - Skilled workers

Tier 2 is intended for highly skilled workers with a specific job offer in the UK with a licensed sponsor. The non-EEA national is only able to work for the sponsoring company and in the specific job s/he is sponsored to do. Although there are various sub-categories including **Tier 2 (Minister of Religion)** and **Tier (Sportsperson)** which relate specifically to specialised work in the Religious and Sporting sectors in the UK, the two main categories under Tier 2 are:

Tier 2 (General)

This category is for non-EEA nationals who have been offered a graduate level skilled role to fill a genuine vacancy in the workforce that cannot be filled by a resident or settled worker.

Tier 2 (Intra Company Transfer)

This category is for foreign employees of multi-national companies who are being transferred by their overseas employer to a UK branch of the organisation, either on a short or long-term basis.

Tier 2 (Intra Company Transfer (ICT)) is further broken down into four sub-categories: **Short Term Staff; Long Term Staff; Graduate Trainee; and Skills Transfer.**

Roles under both sub-categories of Tier 2 are subject to a minimum salary and skill level dictated by the Home Office.

Tier 5 (Temporary Worker)

This category is for migrants who intend to undertake temporary work in the UK. There are a number of sub-categories including **'Creative and Sporting'** for people coming to work/perform in the UK for up to 12 months as sportspeople, entertainers or creative artists. There is also the **'Government Authorised Exchange'** sub-category which allows non-EEA nationals coming to the UK through approved schemes that aim to share knowledge, experience and best practice and to experience the UK's social and cultural life.

Tier 5 (Youth Mobility Scheme)

Young people from Australia, Canada, Hong Kong, Japan, Monaco, New Zealand, Republic of Korea and Taiwan who wish to come and experience life in

the UK, may use this route for working in the UK. Applicants must between the age of 18 and 30 and may undertake any work in the UK except for self-employment (subject to certain conditions), working as a professional sportsperson or working as a doctor or dentist in training. The applicant can remain in the UK for no longer than two years.

Other categories

There are a number of business immigration categories outside the PBS including the **UK Ancestry** (for Commonwealth citizens with a UK born grandparent) and **sole representative** routes (for an employee of an overseas company coming to establish a branch/subsidiary in the UK).

Work permits for highly educated/qualified employees

There are categories under the UK Immigration Rules which are aimed at highly educated and/or qualified employees, however there is no specific category designated for this calibre of employee. As previously mentioned, Tier 2 is the main worker route which is aimed at skilled workers. Highly educated and/or qualified employees who have PhDs or are filling a Shortage Occupation in the UK (which falls within a specific role on the Shortage Occupation list) would find it easier to apply under this route.

If so, what are the conditions and what is the procedure to be followed? Who needs to file for the application and where? Which information and documents are to be provided to the competent authorities? What is the timing? What is the duration of the work permit? Can it be renewed? Is it possible to apply for permanent status after a certain period of time under the work permit?

Tier 1 (Exceptional Talent)

Conditions

While in the UK migrants can:

• Work for an employer, as a director of a company or be self-employed

• Change jobs without telling the Home Office

• Do voluntary work

• Travel abroad and return to the UK

• Bring family members with them

While in the UK migrants cannot:

• get public funds

• work as a doctor or dentist in training

• work as a professional sportsperson or sports coach

Procedure

In order for a migrant to apply for this visa there is a two stage application process which is filled out using online forms. First, the migrant must apply to the Home Office for an endorsement from a 'designated competent body' (DCB) that is able to judge whether the applicant is internationally recognised in their field as a world-leading talent, or has demonstrated exceptional promise and is likely to become a world-leading talent. The Home Office sends the relevant documentation to the applicant's chosen DCB, which will in turn advise the Home Office whether the applicant meets its endorsement criteria. If so, the Home Office will then consider the application and notify the applicant of the result. There are limited places available under this visa category, with 500 places released on both 6 April and 1 October of each year.

After the first stage and having received the endorsement from the DCB, the applicant must complete application form and must provide their biometric information at an appointment at a Visa Application Centre in their country of nationality or residence. Once the application has been approved, the applicant will then be issued with a temporary travel vignette to come to the UK and later collect Biometric Residence Permit which acts as proof of their right of residence in the UK.

Before coming to the UK the prospective migrant must also pay the Immigration Health Surcharge (unless any exceptions apply). This payment acts as a form of health insurance allowing the migrant to use the UK's National Health Service for the period of immigration permission granted.

Who and where

The prospective applicant must apply from their country of legal residence or nationality outside the EEA or Switzerland.

Information/documents

Migrant must provide their completed application form, original passport, passport photographs, endorsement letter from the DCB/evidence of being internationally recognised in their field.

Timing

The processing times for visas vary as a result of many factors such as the country from which the application is made, the time of year, the DCB dealing with the matter and so on. The Home Office also offer several different levels of service for the processing of applications including postal, premium and super premium. The premium applications services are designed to speed up the process. In recent experience, the endorsement part of the process (first stage) has taken between one and two months. The Home Office website states that once the endorsement has been given, the visa application can take up to three weeks.

Duration, renewal and permanent status

Limited leave is granted initially for up to five years and four months if the migrant applies from outside the UK and a total period of five years is the

maximum period a migrant may remain in the UK under this category. Therefore if a migrant is initially granted permission to enter the UK for a period of three years, the migrant may extend his/her stay in the UK for up to two years. An application for settlement may be made once the migrant has been in the UK for five years.

Tier 2 (General) and (Intra Company Transfer)

Most Tier 2 Certificates of Sponsorship for out of country applications are subject to an annual cap of 20,700 (known as Restricted CoS). Unrestricted CoS' must be assigned for some out of country applications (eg all Tier 2 (ICT) applications and high earner Tier 2 (General) applications) and for all in-country applications under both Tier 2 sub-categories. The procedure will differ depending on what kind of CoS needs to be assigned by the sponsoring company to the migrant.

Conditions

While in the UK migrants can:

• work for their sponsor in the job described in their Certificate of Sponsorship (CoS)

• do a second job in the same sector and at the same level as their main job for up to 20 hours per week

• do a job which has a shortage of workers in the UK for up to 20 hours per week

• do voluntary work

• study as long as it does not interfere with the job they are sponsored for

• bring dependants with them.

While in the UK migrants cannot:

• own more than 10% of their sponsor's shares (unless they earn more than £155,300 a year)

• claim public funds

• apply for a second job (under certain circumstances) until they have started working for their sponsor

• change their role within the sponsoring employer without Home Office authorisation

Procedure

For all Tier 2 (General) applications the job in the UK must meet the requisite skill level, which must be at graduate level or above (NQF level 6), although some shortage occupations featured on the Shortage Occupation list do not have to meet this criterion. The salary for the role must also meet the minimum salary threshold of £20,800 and also the salary rate set by the specific Standard Occupation Classification (SOC) code which matches the role.

For Tier 2 (General) applications to be made out of country, a strictly prescribed advertising campaign for a period of 28 days (known as the Resident Labour Market Test (RLMT)) is usually required to show that the job cannot be filled by a resident worker in the UK, unless the salary for the post in the UK is at least £155,300 per annum. After this, a Restricted CoS must be applied for by the sponsoring company to the Home Office monthly panel. Once granted by the Home Office, the sponsor may assign the Restricted CoS under Tier 2 (General) to the specific migrant.

For Tier 2 (ICT) applications made outside of the UK, an Unrestricted CoS must be assigned to the migrant providing s/he meets all of the Tier 2 requirements (for example, that the migrant has been employed by the overseas company for the required length of time and that the overseas company is linked to the UK sponsoring entity by common ownership and control and has been added to the sponsor's licence).

The migrant can then make an online application and pay the associated fees to the Home Office. After completing the application form the migrant must complete application form and must provide their biometric information at an appointment at a Visa Application Centre in their country of nationality or residence. Once the application has been approved, the applicant will then be issued with a temporary travel vignette to come to the UK and later collect Biometric Residence Permit which acts as proof of their right to live and work in the UK.

For in country applications under Tier 2 (General) and Tier 2 (ICT), provided the role in question and the migrant meet the Tier 2 (General) requirements, the sponsor may assign an Unrestricted CoS to the migrant without prior permission from the Home Office. The migrant must then submit an application form and original documents to the Home Office for processing. The RLMT must still be completed for Tier 2 (General) unless one of a limited number of exceptions apply, for example the migrant is switching from a Tier 4 (Student) visa.

As part of their application to enter or remain in the UK, the prospective migrant must also pay the Immigration Health Surcharge (unless any exceptions apply). This payment acts as a form of health insurance allowing the migrant to use the UK's National Health Service for the duration of their stay in the UK.

Who/where

The prospective migrant must apply from their country of legal residence or nationality provided it is outside the EEA or Switzerland.

Information/documents

Migrant must provide their completed application form, original passport, passport photographs, evidence of maintenance funds (if required) and evidence of meeting the English language requirement (if required).

Timing

The processing times for visas vary as a result of many factors such as the country from which the application is made, the time of year, the overseas British diplomatic post dealing with the matter and so on. The Home Office also offer several different levels of service for the processing of applications including postal, premium and super premium. The premium applications services are designed to speed up the process.

The Home Office website states that prospective migrants can apply for a visa three months before they travel to the UK. It also provides that a decision should be made within three weeks after the application is submitted.

Duration, renewal and permanent status

Immigration permission under Tier 2 (General) may be granted for up to five years, and may be extended if the migrant has the attributes required for the role such as continuing to be employed in the same occupation for the same sponsor and being remunerated at the same level of salary or higher to a maximum of six years in total. Migrants may be able to apply for settlement (known as 'indefinite leave to remain' - ILR) once they have been in the UK for five years, subject to meeting all requirements. If the migrant cannot meet the requirements for ILR after six years as a Tier 2 (General) migrant, s/he must leave the UK and cannot re-enter under Tier 2 for 12 months (unless the salary in the UK will be at or above £155,300) from his/her departure or expiry of his/her last Tier 2 leave.

Tier 2 (ICT - Short Term Staff) and (Graduate Trainee) migrants may only be granted a maximum of 12 months, however if the initial grant of leave is less than 12 months, the migrant may extend up to the maximum period in the UK. Under Tier 2 (ICT - Long Term Staff) migrants can be granted initial leave for up to five years and one month. There is only the possibility of extending for a further period if the initial period was under five years. Tier 2 (Skills Transfer) migrants may be granted permission up to six months. A migrant must leave the UK before his/her leave expires and will not be able to re-enter the UK under Tier 2 (other than into the Tier 2 (Long Term Staff) sub-category) until 12 months after his/her departure or expiry of his/her last Tier 2 leave.

1.3. Is a separate residence permit required/ granted via the work permit? Please explain.

A separate residence permit is not required or granted for migrants under the Immigration Rules in the UK. Having had their application approved migrants will be granted immigration permission which is evidenced by a Biometric Residence Permit (BRP), however for migrants making their applications from outside the UK, a temporary travel vignette will be endorsed in their passport to enable them to travel to the UK and collect their BRP. A migrant is not required

or granted any other permit to evidence his/her permission to live and work in the UK.

1.4. Who can be sanctioned in case of illegal employment in your country (e.g., the employer, the employee, the host company, etc.)? What are the sanctions (civil and/or criminal) in case of illegal employment?

Employers

All employers (not just licensed sponsors) must make sure that all their employees are entitled to work for them in the UK.

Civil Penalty

A civil penalty of up to £20,000 may be incurred if the employer employs a person aged 16 or over who is subject to immigration control and who has no permission to work in the UK, or who works in breach of his conditions of stay in the UK

Criminal penalty

An employer commits a criminal offence if he knowingly employs a person aged 16 or over who is subject to immigration control and who has no permission to work in the UK, or who works in breach of his conditions of stay in the UK. An unlimited fine and/or a maximum two-year prison sentence can be imposed.

Employees

Individuals may be subject to having their leave curtailed, be removed or deported from the UK if found to be working in the UK illegally.

Curtailment

Curtailment is normally considered only where the person's actions are not so serious as to merit enforcement action, but where it would be inappropriate to let him remain for the duration of his leave. The Home Office's discretion to curtail leave may be used when a person has failed to comply with certain requirements of the Immigration Rules or has lost the justification for his presence in the UK, eg an employee's job ends. It is only available when a person has limited leave. Guidance from the Home Office is that curtailment should not normally be used unless the person has at least six months' leave outstanding. As curtailment is a matter of Home Office discretion it is not automatic. The burden of proof rests with the Secretary of State.

Administrative removal

Very often a person will be removed rather than his leave curtailed, eg where a person has failed to disclose relevant facts or has made false representations in order to obtain leave, consideration may be given to curtailing any subsisting leave, but it is more usual to proceed directly to or, in the case of leave to enter, removal for illegal entry. Equally, although leave may be curtailed where a person

fails to observe the conditions of his leave to enter or remain, normally the Home Office proceeds direct to administrative removal for breach of conditions.

The most common grounds for administrative removal are that a person has remained beyond the period specified in his limited leave, or has broken a condition attached to it. For example, a person's leave to enter or remain will often either prohibit or restrict his freedom to take employment, and the person is liable to administrative removal procedures if he is found to be working without authority.

Deportation

The Secretary of State has a discretionary power to make a deportation order. This requires a person to leave the UK and prohibits him from lawfully re-entering while the order is in force. It also invalidates any existing leave to enter or remain. Deportation is usually justifiable if it is conducive to the public good, for example, if the individual in question has committed a crime which is punishable by imprisonment.

Host companies

Compliance officers auditing companies who hold a Tier 2, 4 and/or 5 licence will refer cases of illegal working for prosecution or the issue of a civil penalty. If a sponsor is issued with a civil penalty for employing illegal workers their licence may be suspended and any new licence application may be refused. The Home Office also reserve the right to suspend sponsor licences or remove CoS allocations while any investigation is in process.

Sponsors who employ workers illegally may face the following penalties:

(a) revocation of sponsor licence and then there will be a cooling off period of 12 months before a licence can be applied for;

(b) a civil penalty of up to £20,000 for each illegal worker;

(c) enforcement action to obtain a civil penalty can adversely affect a sponsor's ability to obtain credit;

(d) a sponsor may be prosecuted for having in their possession or under their control an identity document (or a copy of it) that is false or improperly obtained. They may go to prison for up to two years and receive an unlimited fine;

(e) a sponsor may be prosecuted for knowingly employing an illegal migrant worker for which they can go to prison for up to two years and/or receive an unlimited fine;

(f) a sponsor may be disqualified from acting as a company director;

(g) a sponsor may be prosecuted for facilitation or trafficking and if convicted, you may go to prison for up to 14 years and/or receive an unlimited fine;

(h) if a sponsor is subject to UK immigration control, and found to be liable for employing illegal workers, this will be recorded on Home Office systems and may be used in the consideration of future immigration applications;

(i) if the Home Office find that a sponsor has employed someone illegally they may tell other bodies such as:

1. the Gangmasters Licensing Authority (GLA);
2. the Office of the Immigration Services Commissioner (OISC);
3. the Insolvency Service;
4. HM Revenue and Customs;
5. another government agency.

1.5. Did your country implement the European Blue Card Directive 2009/50/EC? If so, please explain the scope, conditions, application process and validity of the blue card?

The United Kingdom did not implement the European Blue Card Directive 009/50EC.

1.6. Did your country implement the European Directive 2014/66/EU on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer? If so, please briefly describe and explain importance and impact?

The United Kingdom did not implement the European Directive 2014/66/EU. However the European Court of Justice's decision in Van der Elst is aimed at facilitating EU companies to temporarily assign non EEA employees in the UK.

Under the provisions of Van der Elst, provided certain criteria are met, non-EEA nationals who are working for an EU employer in an EU country should be allowed to provide services in another Member State (eg the UK) for a temporary period without the need to obtain a work permit. This means that an established non-EEA employee of an EU company in the EU can come to the UK to provide a time-limited service on behalf of the EU company without a work permit.

2. LABOUR AND EMPLOYMENT LAW

2.1. In your country, how is the applicable law governing the employment contract during the assignment period determined?

In the UK, when deciding which system of law applies to an employment contract during an international assignment we benefit from the standardised rules and jurisprudence which Rome I (EC Regulation 593/2008) and Rome II (EC Regulation 864 2007) afford to most European Member States.

Rome I sets out the rules for deciding which law governs the parties' contractual obligations for contracts entered into from 17 December 2009 and Rome II their non-contractual obligations (including tortious obligations and those relating to industrial action).

The Rome Convention applies to all contracts entered into before this date. The scope of Rome I is very similar to that of the Rome Convention and the provisions contained within do not differ significantly. For the sake of simplicity, we have focused on Rome I in this Report. References to Articles in our response to this section are therefore to Articles in Rome I.

Rome I must be applied by the UK courts to determine the governing law of a contract. It must be applied even if one or more of the parties to a dispute are based outside the EU and even where the law which is determined to apply is not the law of an EU state. This means that a UK court must apply Rome I to determine the law applicable to the contract of a non-EEA national who is assigned to work in the UK. Equally, the UK court must apply Rome I if asked to determine the law applicable to a UK national's assignment outside the EEA.

The key principle in Rome I is that the parties are free to choose the law that will govern an international assignment (Article 3(1)).

There are default provisions for which system of law should apply where there is no express agreement. However, these can be difficult to interpret, particularly where the assignment spans multiple countries. To avoid a lengthy and expensive dispute if the relationship breaks down, the employer should consider carefully which system of law is most appropriate to the assignment and expressly refer to it in the assignment contract and any related documents, including, remuneration terms/rules etc.

However, the parties cannot choose an artificial system of law to govern an assignment to avoid the application of mandatory UK employment laws (whether these are the laws of England and Wales, Scotland or Northern Ireland) - for example, a UK business hiring an employee for a UK based role but providing that the assignment is governed by Italian law (where neither party has any connection to Italy) would not oust UK mandatory rules in the relevant territory such as unfair dismissal protection. The mandatory rules will apply automatically notwithstanding any express choice of law.

Where the parties have not chosen a governing law for the assignment the default rules in Article 8 of Rome I provide that

- The contract shall be governed by the law of the country in which, or from which, the employee habitually carries out their work (Article 8(2)).
- Where the employee does not have a habitual place of work, the contract will be governed by the law of the country where the business through which the employee was engaged is situated (Article 8 (3)).
- That said, where it appears from the circumstances as a whole that the contract is more closely connected with a different country, then the laws of that country shall apply (Article 8(4)).

These are known as the conflict of law rules and are construed in favour of the employee as the weaker party in the employment relationship.

However, as the case law indicates, given the complexity of modern international working patterns (which can span multiple jurisdictions), the default rules can be difficult to interpret. The key European cases on how to apply these default provisions include:

Article 8(2) – 'Habitually carries out work'

In the case of Koelzsch v Etat du Grand-Duche de Luxembourg [2011] IRLR 514 (ECJ) it was held that the country an employee habitually carries out work from is the country "in which or from which, in the light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer". This case involved a lorry driver who delivered all over Europe, but mainly in Germany. The ECJ directed the court to consider all of the factors of the case, including the place from which the employee carried out his transport tasks and received his instructions, where his tools were situated and the place the employee returned to after completing his jobs.

It is worth stressing however that employees that are working abroad temporarily should not to be considered as changing the place that they habitually work. Recital 36 of Article 8(2) says that "work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying his tasks out abroad". This means that an assignment to another country will not necessarily change the employee's habitual place of work to the new country. Whether it does must be determined on a review of all the relevant facts including the length of the assignment, any intention to return, ties with the original country etc.

Article 8(3) 'Business through which the employee is engaged'

This default provision will only be considered if it has not been possible to determine the country from which the employee habitually works or a country with which the employment is more closely connected. Therefore, this provision is usually only used for peripatetic employees without any permanent base.

In the case of Voogsgeerd v Navimer SA C-384/10 the ECJ held that place of business refers exclusively to the place of business that engaged the employee, therefore factors relating to where the work was to be performed were irrelevant. This test very much focuses on the physical place of business of the employer/undertaking that concluded the contract with the employee (i.e. the place of business that advertised, interviewed and made an offer to the employee).

Article 8(4) 'Contract more closely connected with a different country'

Articles 8(2) and 8(3) can be overridden by the laws of a country with which the contract is more closely connected to a different country. This is determined by looking at all the circumstances as a whole, including where the parties are based, the locations from which the decisions are made, how the employee is paid and where the employee is managed from. The result can be that the applicable law of an employment contract may not necessarily be the laws of the country where the employee works.

In the case of Schlecker v Boedeker [2014] IRLR 151, despite the fact that the employee worked for a long period in the Netherlands, it did not mean that the governing law would be the Netherlands. The employee worked for a German company, lived in Germany, paid in German Marks and paid taxes in Germany, therefore the ECJ directed that it was open for the national courts to determine that, if it considered the contract to be more closely connected to Germany, the contract would be governed by German law. In this case (as with the UK territorial jurisdiction case Olsen v Gearbulk Services Ltd [2015] IRLR 818 EAT) particular weight was given to the country in which income tax/national insurance (or equivalent) was paid.

This case also highlights that, despite the fact that Article 8 is intended to give sufficient protection to the employee, it does not mean that the laws of the country most favourable to the employee should automatically apply. It is all down to the relevant factors in each individual situation.

It is worth mentioning at this point that, just because the laws of the UK (be those the laws of England and Wales, Scotland or Northern Ireland) are held to govern the employment contract, it does not follow that a claim under that contract can be brought in the UK courts or Tribunals. International employment assignments and the disputes which arise out of them potentially raise three core legal issues in the UK: whether the UK courts or Tribunals have jurisdiction to hear the dispute; the law which should apply to the contract; and whether the territorial scope of UK employment legislation allows the employee to bring a claim (see response to 2.2 below).

We do not propose dealing in detail with the circumstances in which the UK Courts or Tribunals will seize jurisdiction as we have not been asked to address this in the questionnaire. However, in summary, for proceedings started prior to 10 January 2015, the matter will be determined by Brussels I Regulation 44/2001/E and, where the proceedings are started on or after that date, by the Recast Brussels Regulation being Regulation 1215/2012.

2.2. Which local employment laws of your country are determined as mandatory minimum laws/ minimum hardcore protective rules and working conditions? Please explain. Is there relevant case law?

As lawyers qualified in England and Wales, the UK Reporters have limited our response to mandatory laws of the territory of England and Wales. The Rules of Northern Ireland and Scotland are likely to be similar but there may be some differences. Where a Member State has different territories with different laws, under Article 22(1) of Rome I each territory is to be considered as a country for deciding the applicable law.

The mandatory minimum laws in England and Wales that will apply to an assignment will depend on the nature of the assignment.

Rome I protects employees on assignment in England and Wales from being deprived of mandatory minimum local employment laws which cannot be contracted out of (whether these laws or rights are conferred by statute, case law or collective agreement).

In broad terms, where employees work in England or Wales the laws of England and Wales will more often than not apply. However, where employees are assigned to work outside the country, in whole or part, the position is less clear cut.

To decide whether the mandatory laws of England and Wales apply to an assignment, the test at Articles 8.2 – 8.4 (see response to question 2.1 above) should be followed i.e. is England and Wales the place where the employee habitually worked or, where there is no habitual place of work, the place of business through which the employee was engaged, or is it the country (read territory) which meets the overriding "closer connection" test. If the answer is yes to any of these, then the mandatory rules of England and Wales should, in principle, apply to the assignment.

As for which laws qualify as minimum mandatory rules, the majority of statutory employment rights in England and Wales cannot be contracted out of (other by way of a prescribed settlement agreement/ACAS negotiated settlement) and so should qualify as mandatory rules for the purposes of Rome I. These include by way of non-exhaustive list:

- **Unfair dismissal** – an employee who has been dismissed and has two years' qualifying period of service has the right to claim for unfair dismissal. Under the Employment Rights Act 1996 (ERA), a dismissal will be unfair unless the employer can show the reason for dismissal was for one of five potentially fair reasons being: conduct, capability, redundancy, breach of statutory restriction or some other substantial reason, and the employer acts reasonably in treating that reason as a sufficient reason for dismissal and follows a fair dismissal procedure.

  There are also automatically unfair reasons for dismissal, which include dismissal for reasons connected to pregnancy or childbirth, health and safety activities, whistleblowing, exercising various time off rights or asserting a statutory right under the ERA. An employee does not need a qualifying period of service before claiming for these.

- **Discrimination protections** – The Equality Act 2010 (EA) provides for protection for employees against discrimination on the grounds of nine protected characteristics which include age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation and includes the right to equal pay.

- **Redundancy payment rights** – Under the ERA an employee with at least two years' continuous employment is entitled to a statutory redundancy payment if they are dismissed by reason of redundancy (provided the statutory definition of redundancy is met).

- **Maternity rights –** An employee is granted a period of 26 weeks' ordinary maternity leave and entitled to a further 26 weeks 'additional maternity leave. The ERA also ensures that an employee who is on maternity leave is entitled to the terms and conditions of employment which would have applied if she had not been absent (bar remuneration).

- **Whistleblowing rights –** The ERA also provides protection for workers who report malpractice by their employers or third parties against detriment or dismissal.

- **Working Time Regulations –**The Working Time Regulations 1998 includes limits on working time and includes other minimum weekly and daily rest breaks as well as holidays.

- **Insolvency protection rights** – Part XII of ERA provides that an employee may be able to make a claim for money owed by their employer if their employer becomes insolvent and their employment is terminated as a result of this.

- **Minimum notice rights** – Statutory minimum notice periods will be implied into a contract and will override any express terms that provide for shorter notice periods. Employees are entitled to receive one week's notice for every year of service, up to a maximum of 12 weeks' notice after 12 years' service.

- **Minimum wage requirements** – Workers over the age of 16 who are working, or ordinarily working, in the UK must be paid at least the National Minimum Wage. This currently stands at:

    a) £6.70 for 21years and over
    b) £5.30 for 18years to 20years
    c) £3.87 for under 18s
    d) £3.30 for apprentices

    From 6 April 2016 a new National Living Wage will be introduced, at a rate of £7.20 for workers aged 25 and over.

- **Protection for fixed term or part time employee/workers** – under the Fixed Term employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034) and Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551) employees are protected from detriment/dismissal on the grounds of their fixed term or part-time status.

Collective agreements which cannot be contracted out of and are therefore apt for application as mandatory rules, are not as prevalent in England and Wales as they may be in continental Europe and are not therefore referred to in this report.

Territorial scope

However, the test under Article 8, Rome I, is not the end of the matter as highlighted in our response to question 2.1.

Even where Rome I says that these UK mandatory rules should, in principle, apply to an assignment and the UK courts/Tribunals have jurisdiction, the employee is not guaranteed the right to bring such UK statutory employment.

The territorial scope of the different UK statutes themselves needs to be considered to decide whether the employee can actually bring claims under the UK's mandatory rules.

Unfair dismissal

The ERA (which includes the right not to be unfairly dismissed) does not expressly provide for its territorial scope, however in the case of Serco Ltd v Lawson and other cases [2006] IRLR 289 the House of Lords held that there were four types of case in which an individual can benefit from unfair dismissal protection:

1. The obvious case warranting protection is where an employee is ordinarily working in Great Britain at the time of their dismissal (albeit that a person on a casual visit is not protected).

1. Peripatetic employees – these include for example, airline pilots and cabin crew. If their base is Great Britain, they will be treated as employed in Great Britain. Factors which indicate where the base is include: where the employee's home is, where the employer's headquarters are, where and in what currency they are paid and where they pay national insurance.

2. Expatriate employees – who live and work abroad will only be protected in exceptional cases. Recruitment in Great Britain alone is not enough to gain protection from unfair dismissal. Something further will be required, for example being:
    a. posted abroad for purposes of a British business e.g. a foreign correspondent; or
    b. a person who is operating within what amounts to an extra-territorial British enclave in a foreign country e.g. a military base or embassy provided that the person has not been recruited locally as local recruitment suggests a stronger connection with a local system of law (Bryant v Foreign and Commonwealth Office 10 March 20103 EAT).

3. Relationships which are equally strong connection with Great Britain – employees to whom the categories 1-3 above do not apply, but who have "equally strong" connections with Great Britain and British employment law might be able to bring an unfair dismissal claim.

The later case of Ravat v Halliburton Manufacturing and Services Ltd [2010] IRLR 315 decided that the territorial scope for those who are not ordinarily working in Great Britain during their assignment could actually be decided by asking one question alone. Where an employee's place of work is not Great Britain, is their connection with Great Britain sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for a tribunal to deal with the claim?

In the case of Ravat, the employee was on a monthly rotational contract in Libya at the time of dismissal. He was allowed to claim unfair dismissal under ERA as he had substantial connections with Great Britain, namely his home was there, he was paid in sterling, retained normal UK pay structure, his contract said it was governed by UK law (a fact repeated by his employer) and human resource issues were handled in Great Britain. He had a closer connection to Great Britain in comparison to any other country. This case demonstrates that an employee does not need to fit into one of the four specific categories set out in Lawson v Serco, and that the UK courts will look at the situation as a whole and ask, how is the employee's connection with Great Britain defined to decide whether, in practice, mandatory rules will apply to the assignment?

Relevant factors may include:

- where the employee was recruited;
- where the employee is based;
- where the work was done;
- where the relationship is managed from;
- where the employee's home is;
- the parties' choice of law;
- what has been said to the employee about the governing law;
- where the employee gets paid and in what currency;
- where the employee pays tax/National Insurance (or equivalent); and
- where the employer is based and any connections it has with the state.

Discrimination

The EA is also silent on the issue of its territorial scope. The employment Statutory Code of Practice developed by the Equality and Human Rights Commission to aid interpretation of the EA says that an employee/job applicant can be afforded

discrimination protection "when there is a sufficiently close link between the employment relationship and Great Britain". This test appears to echo the test established in Ravat (above), and includes factors such as where the employee lives and works, where the employer is based, where tax is paid and what laws govern the employment relationship in other respects.

In the case of Bates Van Winklehof v Clyde & Co and another ET/2200549/11 the Tribunal decided that Lawson v Serco was the most useful authority to decide territorial jurisdiction under the EA. The Claimant who was a member of an LLP in England and Wales but worked in Tanzania could therefore bring sex/pregnancy discrimination claims in England and Wales. Her employment had very strong connections with Great Britain as she worked partly in Great Britain, the LLP agreement was governed by English law, and she was mainly paid from in Great Britain and appeared on the law society website as a member of the LLP.

That said, even where the test in Lawson v Serco/Ravat tests are not met, employees may still acquire protection from mandatory UK employment rights if it is necessary to give effect to directly effective rights under EU law. This was confirmed in the case of Bleuse v MBT Transport Ltd [2008] IRLR 264.

Mr Bleuse was employed by a company registered in the UK but he only worked in mainland Europe (not Britain). His contract said it was governed by English law and the English courts had exclusive jurisdiction over disputes under the contract. He bought claims for unfair dismissal and under the Working Time Regulations 1998 for unpaid holiday.

The court dismissed his unfair dismissal claim as he did not meet the Lawson and Serco test - he was a peripatetic employee who was not based in the UK and his unfair dismissal rights did not derive from EU law. However it upheld his holiday pay claim saying that it must seek to give effect to directly effective rights derived from an EU directive by construing the English statute in a way that is compatible with the rights conferred. Although the Working Time Regulations (WTR) said they extended to Great Britain only, the WTR is the implementing legislation for the Working Time Directive and so the English courts should allow Mr Bleuse's claim for paid annual leave to be heard under the WTR.

The Bleuse principle has also been applied to discrimination claims (Ministry of Defence v Wallis and another [2011] EWCA Civ 231) to allow employees who were based at NATO establishments in Belgium and the Netherlands to bring UK sex discrimination claims.

Posted Workers Directive 96/71 (PWD)

The minimum mandatory UK rules that will apply during an assignment can also be impacted by the PWD. Where an employee is posted from another EU member state to the UK and the employee remains employed by his home EU country employer, the posted worker is guaranteed the protection of UK rules covering broadly: working time, minimum pay, agency working, health and safety, pregnancy and childbirth and non-discrimination (Article 3.1 of the PWD).

A posted worker includes any worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.

PWD applies to 3 types of posting:

1. Where an EU undertaking posts a worker to another member state under a contract between itself and the party for whom the services are intended and the employment relationship with the posted undertaking subsists (Article 1.3(a));
2. A secondment arrangement between associated companies in different member states (Article 1.3(b)); and
3. Transnational hiring arrangements by employment businesses where the posted worker remains an employee of the employment business during the posting (Article 1.3(c).

So, where PWD applies (irrespective of the applicable law or mandatory rules which apply to the assignment) there is a minimum floor of rights that the UK courts must apply to an assignment.

In addition to the minimum mandatory rules that apply to assignments in the circumstances set out above, employees assigned to or from the UK may also rely on Article 21 Rome I to access UK rights/ legal principles.

Under Article 21 Rome I the application of a provision of the law may be refused if such application is manifestly incompatible with the public policy of the host country. In Duarte v Black and Decker Corporation [2007] All ER (d) 378, an employee was poached by a competitor. He was a beneficiary under an LTIP which included a 2 year restriction on competing which was governed by the laws of the State of Maryland, USA. It was held that as the doctrine of restraint of trade is an aspect of English public policy and it fell within Article 21, which meant that the covenants were unenforceable under the LTIP as they offended UK public policy. This could be a significant business risk issue for businesses seconding staff to the UK and is often overlooked. Local advice on enforceability of covenants (in the assignment or remuneration documents) in the UK should always be sought.

2.3. Does your country foresee specific rules on the 'lease of personnel'? Is there a principle prohibition of 'lease of personnel'? Please explain and provide examples. What are the sanctions and penalties? Is there a possibility to reduce the risk? Please explain. Is there relevant case law dealing with this matter?

There is no specific prohibition on lease of personnel in the UK, however the leasing of personnel is subject to specific rules which will depend on the model of leasing used.

There are a number of different ways to structure an international lease of personnel including broadly:

1. An internal or external assignment from a home employer to a host employer where employment stays with the home employer and a charge for the assignment is made to the host employer for the employee's services.

   There are no specific rules for "leasing personnel" in this way (including employer registration). However, care should be taken to avoid an employment relationship being created between the employee and the host. For example, responsibility for HR/management issues should remain with the home employer (such as disciplinary processes, grievances and salary reviews). There is always a risk that an employment relationship could be implied between the host employer and employee resulting in the employee being entitled to the UK employment rights and protections (including but not limited to unfair dismissal, statutory minimum notice *etc*) enforceable against the host employer and the host employer acquiring liability to deduct income tax and national insurance contributions under the PAYE system in the UK, with the resultant penalties and interest for non-payment.

   The home employer should seek tax advice on the implications for its UK tax status on employing someone to work in the UK.

2. As above but the contract with the home employer is suspended and a local contract signed with the host employer.

   There are no specific rules for leasing personnel in this way.

3. As above but the contract with the home employer is terminated and a local contract signed with or without a commitment for the home employer to reengage at the end of the assignment.

   As per our response to 2 above.

4. Agency assignment- where a worker is engaged or employed by an employment business and is then leased to work for one of the business' clients.

   There are no prohibitions on leasing personnel in this way. However agency workers are subject to the Agency Workers Regulations 2010. This includes rights for agency workers to the same pay and other basic working conditions as equivalent permanent staff in the business' client after a 12 week qualifying period. They should also have access to collective facilities and information about employment vacancies with the business' client from day 1 of their assignment.

The relationship between the agency and the client is regulated by the Employment Agencies Act 1973 and the Conduct of Employment Agencies and Employment Businesses Regulations 2003 (SI 2003/3319), as amended. Broadly, these rules restrict:

- the terms an agency can agree with their agency workers and clients;
- the fees that an agency can charge their clients if the agency worker is subsequently employed by the client direct, via another agency or is introduced by the client to a third party employer;
- and prescribe the information the agency must provide to the agency worker and client about the other prior to the assignment.

The same level of care should be taken to avoid an employment relationship arising between the client and the employee as highlighted in our response at paragraph 1 above. Although employers can take some comfort from the case of James v Greenwich Council UKEAT 0006/06/1812 which confirmed that an employment relationship will only be found to exist between the agency worker and a client where it is necessary to give effect to the reality of the relationship, which should be relatively exceptional.

5. An assignment through an intermediary company – either a Personal Service Company or a Managed Services Company.

Again, there are no employment prohibitions on leasing personnel through these vehicles. However they are governed by different tax rules (IR 35 for Personal Services Companies and the Managed Services Company tax scheme for the latter) to ensure that the correct levels of income tax and national insurance contributions are deducted on all employment income (whether withdrawn via salary or dividends). The same safeguards against an implied employment relationship (including an unqualified right to provide a substitute for the assignment) should be considered in the assignment documents.

2.4. If you were asked by one of your clients to draft an assignment letter (secondment agreement between the original employer in the home country and the employee), which clauses would you include? What should the assignment letter cover? Is this foreseen by a specific law or based on case law? Please explain

In the UK, the key terms we would include in an assignment letter cover both the practical and legal issues associated with international secondments including:

- **Duration** – how long the employee is required to work on assignment (which would need to reflect any immigration, tax or social security restrictions).

- **Duties** - which would again need to dovetail with any tax and immigration restrictions as well as the client's business objectives.

- **Location/place of work** – will need to be carefully documented during the assignment.

- **Management process** - how the employee will be managed during the assignment and by whom?

- **Termination provisions** – whether the assignment can be terminated early (either summarily or on notice) where for example, the employee turns out to be unsuitable for the role, becomes ill or is guilty of misconduct or the needs of the employer change.

- **Payment**- what will the employee be paid, in what currency and where? Where will the employee pay tax and will the home employer offer him a tax equalization service to ensure that he is not at a disadvantage (or conversely an advantage) as a result of higher/lower tax rates in the host country? Will there be any additional remuneration payable (for example a Cost of Living Allowance) or benefits provided (flights to home country, relocation costs, school fees, accommodation allowances, accountancy advice *etc*) at the beginning, during and/or at the end of the assignment?

- **Terms and conditions relating to return to the UK** - will the relocation costs be paid by the employer and is the employee guaranteed a role in the home employer workforce at the end of the assignment and if not, will his employment also terminate and, if so, on what grounds?

- **Choice of law** – the appropriate choice of law for the contract including its impact on the mandatory rules which apply to the contract.

- **Local employment law of the host country** – Regardless of the governing clause the parties choose to apply to their agreement, there will be mandatory minimum rules in the host country. If this is not the UK, advice should be taken from a local lawyer at the host country to ensure that it meets the minimum requirements of that country.

- **Confidentiality and restrictive covenants –** this is less likely to be an issue where the employer remains the same and the employee is seconded to a different part of the company overseas. However the employer will still be concerned to protect its confidential information in a new jurisdiction/climate at all times. Although this is likely to be included in the

employee's original contract of employment, further provisions could be built into the assignment agreement. Restrictive covenants may also need to be reviewed to ensure that they reflect the business needs of the assignment and the local laws of the host company to maximise the protection afforded by these covenants.

- **Intellectual Property** – if the employee will be creating intellectual property whilst on the assignment, the employer will need to consider how ownership of this intellectual property can be transferred to the home or host employer (as appropriate) and what steps must be taken to protect the intellectual property in the host country and at home.

  The only statutory requirements for the contents of an assignment letter in the UK is that it meets the requirements of S1 of the ERA which requires written particulars of employment to be given to the employee including, for international assignments, details on the currency, rate of pay and the duration of assignment if it is outside UK) (S 1(4) (k) ERA).

2.5. Please explain the applicable and most relevant rules of your country in case the employer wishes (1) to early terminate the assignment and (2) to terminate the employment relationship (e.g., is there a right to return? Should the assignment allowances be included in the calculation of the notice indemnity? Etc.). Is there relevant case law?

Where the laws of England and Wales (including our mandatory rules) apply to an assignment, if an employer wishes to terminate an assignment lawfully, it must do so in accordance with the employee's statutory and contractual rights.

The parties have contractual freedom to agree what they like regarding the termination of the assignment albeit that the terms should reflect the commercial necessities - allowing for the relocation of the employee (if appropriate) and the handover of the employee's responsibilities to his/her successor (where appropriate).

The circumstances in which the assignment terminates (at the end of assignment if it is short term or earlier if the employee is guilty of misconduct, incapable or the employer's needs change) should be clearly anticipated in the assignment letter to avoid a breach of the employee's contract.

If UK mandatory rules apply to the assignment, the employee will also be protected from discrimination. If the employer terminates an employee's assignment for a reason that relates to a "protected characteristic": age, sex, race, disability, sexual orientation, gender reassignment, marriage and civil partnership, pregnancy and maternity, or religion or belief, it could face a discrimination claim. Consequently, an employer considering terminating an assignment should give careful consideration to the reason for termination, how the termination is documented and to the procedure that it adopts when carrying out the dismissal if it thinks there is a risk of a discrimination claim. For example, if an international assignment is terminated early

because a host country national is recruited for the role, this could amount to discrimination on the grounds of nationality/national origin, unless a non-discriminatory reason for replacing the assignee with the host country national can identified.

There is no limit to the amount of compensation a tribunal can award in a discrimination claim. Compensation is calculated by reference to the loss the employee has suffered by reason of the discrimination and an award for injury to feelings will also usually be made. Substantial loss of earnings awards (including assignment allowances and additional costs such as relocation allowances) are possible in the case of employees on international assignments although the employee will have a duty to mitigate their loss by seeking alternative employment which could include accepting an alternative role with their home country employer.

Equally, if the assignment is terminated because the employee had "blown the whistle", he/she could bring a whistleblowing claim against his home employer. Again, compensation for such a claim is uncapped and may include an element for injury to feelings.

Whether the employee has a right to return to the home employer in his or her original or an alternative role when the assignment ends, will depend on what was agreed in the assignment letter.

In practice most employers will be reluctant to guarantee a role at the end of an assignment but this will obviously depend on the value of retaining the employee and the employer's visibility regarding its future staffing requirements.

If there is no role available for the employee in the host employer at the end of the assignment, the employer will need to terminate the employment relationship at the same time as it terminates the assignment.

To terminate the employment contract lawfully, the employer would need to ensure that all accrued contractual payments (salary, bonus, other benefits *etc*) are paid up to the termination date and that the employment relationship is terminated in accordance with the contract terms either by:

- serving the notice required by the contract (subject always to UK statutory minimum notice periods); or
- placing the employee on garden leave or paying him/her in lieu of notice if allowed for under the employment contract.

Whether or not the assignment allowances would be included in the notice payment will depend on what was agreed in the contract. If the employee is still on assignment and receiving his assignment allowances, it is likely that these will need to be paid during notice or garden leave. However, if the employer decides to pay in lieu of the notice period, it is fairly standard to provide that this payment will be limited to basic salary only. In these circumstances the employer could terminate the contract lawfully by making a payment in lieu of basic salary during and not benefits during the notice period.

An employer who wishes to terminate both an assignment and the employee's employment should consider also any potential statutory claims. This could include a potential claim for unfair dismissal - if the employee has two years continuous service with the employer. To avoid a claim for unfair dismissal, the employer would need to ensure that they have a fair reason for terminating the employment i.e. conduct, capability, redundancy, breach of statutory restriction; or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

The employer must ensure that they have acted reasonably in treating that reason as a sufficient reason for dismissal (which would include fairly warning and consulting with the employee about the termination of the assignment and employment relationship). If the assignment comes to an end and the employee's original role is no longer available and there are no suitable alternative roles available, the employer may be able to terminate fairly on the grounds of redundancy or, if not, the catch all category of "some other substantial reason".

The employee would also need to be paid a statutory redundancy payment (or any enhanced contractual redundancy terms.

If the employer terminated without a fair reason or did not follow a fair procedure, the dismissal would be unfair and an employment tribunal will award such compensation as it thinks is "just and equitable", having regard to the employee's financial loss arising out of the dismissal, and excluding any compensation for injury to feelings, subject to a statutory upper limit or "cap" of currently the lesser of £78,335 or 12 months' pay. An employee who is successful in an unfair dismissal claim is also entitled to a basic award. This is calculated on the same basis as a statutory redundancy payment i.e. a formula bases on age, salary (subject to a statutory cap of £475 per week) and length of service.

The overriding intention behind the compensatory award is to put the claimant in the position they would have been in financially, had they not been unfairly dismissed. If the employment is terminated unfairly during the assignment whilst the employee was receiving assignment allowances, the employee could potentially claim his/her assignment allowances and related costs (including potentially relocation expenses *etc*) provided that the employer cannot successfully argue that the assignment (and the additional allowances) would have ended in any event.

An employer may face a discrimination claim (as outlined above) if it terminates an employee's employment for a reason that relates to the following "protected characteristics": age, sex, race, disability, sexual orientation, gender reassignment, marriage and civil partnership, pregnancy and maternity, or religion or belief or if the termination is because the employee "blew the whistle", an automatically unfair dismissal claim. Compensation for both is uncapped subject always to the employee being under a duty to mitigate his/her loss and could include assignment allowances and/or relocation expenses *etc* on the basis outlined above.

3. SOCIAL SECURITY

3.1. Provide a short overview of the level of social security charges in your country. What are the employer social security contributions? What are the employee social security contributions? Is there a cap/ maximum? Please briefly explain.

The UK's social security system is referred to as National Insurance (NI) and both employers and employees are required to make contributions (NICs). The rates quoted in this report are those applicable in the tax year 2015/2016.

Employees pay 'primary' Class 1 NICs. The employer is responsible for collecting payment through the Pay As You Earn system (PAYE). Under PAYE the employer deducts income tax and NICs from the employee's wages and accounts for them to Her Majesty's Revenue and Customs (HMRC).

Employees' Class 1 NICs are charged at 12% on earnings between the primary threshold of £155 per week and the upper earnings limit of £815 per week. Earnings above £815 per week incur a further 2% charge. There is no cap or maximum.

Employers pay 'secondary' Class 1 NICs on their employees' earnings. The standard rate is 13.8% on all earnings above the threshold of £155 per week. However, employers pay 0% for employees under the age of 21 and who are earning between £155 to £185 per week.

Since April 2014 businesses and charities have been entitled to a £2,000 allowance to set against their liability to pay secondary class 1 NICs. This will rise to £3,000 from April 2016. There are anti-avoidance rules to prevent abuse of this allowance. From 6 April 2016 employers will not be able to claim the allowance if they have one sole employee who is also the director of the business.

There has historically been a possibility of contracting out of the UK state second pension if the employer is providing separate top-up benefits. In such cases a reduced rate of primary and secondary Class 1 NICs would apply. This possibility is being removed from April 2016.

Class 3 NICs are paid on a voluntary basis by an individual who wishes to protect their entitlement to certain contributory benefits. They are paid at a flate rate of £14.10 per week.

Self-employed individuals pay income tax and NICs via Self-Assessment, which involves the individual declaring their profits for the year to HMRC and calculating their tax and NICs payable. They pay Class 4 NICs. If profits are £5,965 or more a

year then the rate is £2.80 a week and if profits are £8,060 or more a year then the rate is 9% on profits between £8,060 and £42,385, and 2% on profits over £42,385.

3.2. In case of assignments from outside the EEA to your country or from your country to non-EEA countries, with what countries has your country signed a social security agreement?

The UK has signed bilateral social security agreements with Barbados, Bermuda, Bosnia-Herzegovina, Canada, Chile, Croatia, Guernsey, Israel, Jamaica, Japan, Jersey, the Former Yugoslav Republic of Macedonia, Mauritius, Montenegro, New Zealand, Philippines, Republic of Korea, Serbia, Turkey, and the USA.

4. OTHER OBLIGATIONS AND FORMALITIES

4.1. Are there other relevant formalities and obligations in your country in case of assignments to your country (e.g., prior notification to the authorities, drafting and keeping social documents, etc.)?

Right to work checks

The requirements in respect of immigration law and right to work checks have already been discussed in the first section of this report.

TB tests

Before an individual coming from one of the following countries can be granted a visa to enter the UK for more than 6 months, they must produce a certificate showing they have been tested for tuberculosis: Afghanistan, Algeria, Angola, Armenia, Azerbaijan, Bangladesh, Belarus, Benin, Bolivia, Botswana, Brunei, Burkina Faso, Burma, Burundi, Cambodia, Cameroon, Cape Verde, Central African Republic, Chad, China, Congo, Democratic Republic of the Congo, Djibouti, Dominican Republic, Timor-Leste, Ecuador, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Georgia, Ghana, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Hong Kong, India, Indonesia, Iraq, Ivory Coast, Kazakhstan, Kenya, Kiribati, Kyrgyzstan, Laos, Lesotho, Liberia, Macau, Madagascar, Malawi, Malaysia, Mali, Marshall Islands, Mauritania, F.S. Micronesia, Moldova, Mongolia, Morocco, Mozambique, Namibia, Nepal, Niger, Nigeria, North Korea, Pakistan, Palau, Papua New Guinea, Peru, Philippines, Russia, Rwanda, São Tomé and Príncipe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Africa, South Korea, South Sudan, Sri Lanka, Swaziland, Sudan, Tajikistan, Tanzania, Thailand, Togo, Turkmenistan, Tuvalu, Uganda, Ukraine, Uzbekistan, Vanuatu, Vietnam, and Zambia.

Registration with police

Nationals of the following countries who are coming to the UK for more than 6 months must register with the police upon arrival to the UK: Afghanistan, Algeria, Argentina, Armenia, Azerbaijan, Bahrain, Belarus, Bolivia, Brazil, China, Colombia, Cuba, Egypt, Georgia, Iran, Iraq, Israel, Jordan, Kazakhstan, Kuwait, Kyrgyzstan, Lebanon, Libya, Moldova, Morocco, North Korea, Oman, Palestine, Peru, Qatar, Russia, Saudi Arabia, Sudan, Syria, Tajikistan, Tunisia, Turkey, Turkmenistan, United Arab Emirates, Ukraine, Uzbekistan, Yemen.

This registration costs £34 and must be done within 7 days of arriving in the UK.

This obligation does not apply if the individual is a dual national and holds nationality of a country not on the above list. They also do not apply to those with indefinite leave to remain in the UK, or to family members of EEA citizens.

NICs

Migrant workers who are required to pay UK NICs must apply for a NI number. The individual should call the NI allocation service to arrange an interview, where they will be required to provide proof of identity, proof of their right to work in the UK, proof of their address and evidence of their job. The individual may commence employment without a NI number, but if they do so then NICs will be charged at an emergency rate (see 4.2 below).

If the migrant worker is not required to pay UK NICs, then there is no need to apply for a NI number. This applies if the individual has a Portable Document A1, E101 or E102 that proves he/she is paying social security contributions in another EEA country, or a certificate from a country that has a bilateral social security agreement with the UK (see list at 3.2 above)

PAYE

UK employers have a statutory obligation to operate PAYE on earnings paid to employees and this applies to those assigned from another country.

If the employee is not resident in the UK, but is liable to tax on UK source earnings, is likely to be entitled to split year treatment, or is likely to be entitled to overseas workday relief, then the employer should seek a direction from HMRC to determine the portion of earnings subject to PAYE.

From 6 April 2013, information on payments made to employees must be provided to HMRC in real time. The employer should send to HMRC details of every payment made to an employee on or before the date the payment is made. HMRC has confirmed that real-time information (RTI) will apply to internationally mobile employees who have a UK tax and NICs liability, even if they are paid by an overseas employer.

Business visitors

Many business visitors will be covered by a UK double taxation treaty. However, this is not always the case, for example if their country is not signatory to such a

treaty, or if they do not meet the requirements of the relevant treaty, for example because they are actually employed by the UK company, albeit normally overseas.

PAYE administration associated with these individuals can be reduced if the employer enters into an agreement with HMRC under the Short Term Business Visitors (STBV) scheme. In such cases the strict PAYE requirements are relaxed, but the employer must monitor and may be required to report details to HMRC. Under a STBV agreement where a non-UK resident employee spends 30 workdays or less in the UK, no further action should be required and no PAYE liability will be triggered, so long as the conditions are met. This arrangement applies only to income tax and not to NICs. It cannot be used for directors of the UK company.

What are the penalties and sanctions in case these formalities and obligations are not complied with? Who can be sanctioned? Is there relevant case law?

Right to work checks

If an employer fails to carry out a pre-employment right to work check then there is no penalty per se. However, if it turns out that the employee was working illegally then the employer will be subject to the penalties discussed in section 1 of this rerpot. Furthermore, if the employer is a licensed sponsor, the failure to carry out the check would be a breach of sponsor duties. If the Home Office has concerns about the sponsor's ability to comply with its duties, this could result in the sponsorship licence being suspended or even revoked.

Registration with police

Failure to register with the police when required is a criminal offence, for which the penalty is a fine of up to £5,000 and/or 6 months in prison. Failure to register is likely to also be a breach of the individual's visa conditions. This could affect their right to remain in the UK and there is a risk of future visa applications being refused.

Tax and NI

If an individual fails to supply a NI number, then NICs will be deducted from their salary through PAYE at an emergency rate of 20% on all earnings.

An employer who is late in filing RTI returns will be subject to a penalty levied by HMRC. There are concessions which apply to an employer's first failure to supply RTI and to the first default in a tax year. The penalty depends on how many employees there were at the time of the default. It starts at £100 for employers with 1-9 employees and increases ot £400 for those with 250 employees or more.

If an employer submits inaccurate returns to HMRC then up to 100% of the tax liability can be levied as a penalty. However there is a system of reductions which varies depending on how culpable the employer was. This encourages the employer to disclose the problem:

- Unpromted disclosure where the inaccuracy was careless: 0-30%
- Unpromted disclosure where the inaccuracy was deliberate: 20-70%

- Unpromoted disclosure where the inaccuracy was deliberate and concealed: 30-100%
- Prompted disclosure where the inaccuracy was careless: 15-30%
- Prompted disclosure where the inaccuracy was deliberate: 35-70%
- Prompted disclosure where the inaccuracy was deliberate and concealed: 50-100%.

HMRC also charges late penalties for outstanding NICs and tax. As the number of defaults in a tax year increases, so does the penalty percentage applied to the amount that is late in the relevant tax month (ignoring the first late payment in the tax year):

(a) 1 to 3 defaults - 1%

(b) 4 to 6 defaults - 2%

(c) 7 to 9 defaults - 3%

(d) 10 or more defaults- 4%

If a late penalty is not paid in full after 6 months, an additional penalty of 5% of the amounts unpaid is charged. A further penalty of 5% is charged if amount has not been paid after 12 months. Interest is also chargeable.

However, there is a £100 payment tolerance for late paid tax and Class 1 NICs. If the difference is no more than £100 then payments will be treated as having been made "in full".

If an employer fails to withhold employee NICs, HMRC will usually pursue the employer for the under-deduction and any penalties. However this liability can instead fall on the employee if HMRC is either satsifed that the failure is due the employee's act of default and the employer has not been negligent, or that the employee knew the employer had wilfully failed to pay the NICs and had recovered the NICs already from the employee.

5. SOCIAL INSPECTION

5.1. Are cross-border assignments a priority in your country for the social inspection? Please explain.

Prevention of illegal working

The maintenance of immigration control and the prevention of illegal working is a very high priority for the UK government. In 2013 the UK Border Agency was disbanded and its functions brought back in to the Home Office. Those functions were then split in two, between UK Visas and Immigration and Immigration Enforcement. This represented a cultural shift, placing greater emphasis on enforcement.

Employers who are licensed sponsors of migrant workers are particularly likely to be inspected. They may face a pre or post-licensing visit. This visit will check compliance with their sponsorship duties, including their obligations in respect of right to work checks. To date resources have been targeted at specific 'risk' industries such as construction, care, cleaning, taxi and private hire drivers, street markets, catering and agriculture industries. "Operation Magnify" was launched in October 2015 . The first step of this operation, which begun in the same month, saw 69 enforcement visits to businesses and 257 individuals being arrested.

Labour market enforcement

We are starting to see a more joined up approach between different enforcement agencies, such as the Home Office, HMRC, the Gangmaster Licensing Agency (GLA) and the Health and Safety Executive (HSE). They are starting to share information and conduct inspections together and negative findings by one agency may trigger inspecion by the others.

The government is prioritising labour market enforcement and there are several relevant provisions in the Immigration Bill which is currently making its way through Parliament. Proposals include creating a statutory position of "Director of Labour Market Enforcement", creating a new offence of aggravataed breach of labour market legislation, strengthening information sharing and reforming the GLA, so it becmes the Gangmasters and Labour Abuse Authority. Its aims will be to prevent, detect and investigate worker exploitation across all labour sectors.

HMRC

HMRC has recently begun to prioritise inspections in respect of short term business visitors. These are employees and directors who are employed overseas, but who are coming to spend a short amount of time in the UK, working with an associated UK employer. Whilst they are working in the UK, a liabiality to UK PAYE may arise. Historically this has often been overlooked, but HMRC are now policing this rigourously, irrespective of the number of employees involved, or the number of days worked in the UK. Therefore it is important that employers report properly (see 4.1 above).

CONCLUSIONS

The introduction to this questionnaire noted that EU free movement rules make the assignment of EEA nationals to the UK much more straightforward than the assignment of non-EEA nationals.

The UK is holding a referendum on 23 June 2016 to decide whether we should remain in or leave the EU. At the time of preparing this report nobody knows what the outcome will be and we can only speculate what will happen should the vote be in favour of a Brexit. However we hope this report has provided some reassurance that there are routes available to employers who wish to assign workers to the UK in circumstances where the EEA free movement rights do not apply.

It is an exciting time to be a young international lawyer in the UK. The National Reporters look forward to the Annual Congress and to sharing with delegates an update to this report followng the outcome of the referendum.