

AUDIT • TAX • ADVISORY



# Solutions

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INTERNATIONAL

# Employment Law Case

In **Ponticelli Ltd v Gallagher**, the Court of Session in Scotland (equivalent to the Court of Appeal in England and Wales) found that a share incentive plan would have transferred in a TUPE situation, despite it not being set out in the Contract of Employment.

Mr Gallagher participated in his employer's all-employee Share Incentive Plan via a contractual agreement with his employer and the plan's trustees. His employment was transferred to Ponticelli under TUPE; Ponticelli stated they did not offer a Share Incentive Plan and offered Mr Gallagher a one-off payment as compensation. Mr Gallagher argued that the right to participate in the Share Incentive Plan should have transferred under TUPE and that Ponticelli should therefore provide an equivalent scheme. Ponticelli then claimed that the Share Incentive Plan was not a contractual entitlement and therefore would not transfer under TUPE.

The Court of Session found that as Mr Gallagher would be financially disadvantaged by non-transfer of the employee share plan, this meant that it was a part of his terms and conditions even though it was not set out in the Contract of Employment. It found that the share plan arose "in connection with" Mr Gallagher's Contract of Employment. The right to participate in it therefore did transfer bringing the share plan within the TUPE transfer and so Ponticelli was required to offer an equivalent alternative.

Employers have generally sought to ensure employee share schemes are kept separate from employees' contracts of employment via wording used in the share plan rules and documentation. This court case has decided that notwithstanding this, the right to participate in an employee share plan is connected to an employee's contract and so is within the protection of the TUPE rules on transfers of businesses. As it stands therefore, when one company acquires another company or its business, the acquiring employer will now need to consider what

rights to participate in share plans employees in the transferring company or business have and how these are to be replicated for transferring employees once the business has been acquired. It is not enough simply to say the company or business making the acquisition does not have an employee share plan (that was an argument advanced by Ponticelli). The acquiring business will have to offer some kind of employee share plan to the transferring employees even if it doesn't currently have one.

The case was a Court of Session judgment; however, as TUPE equally applies in England and Wales, the EAT will most likely follow the decision.

**HR Solutions can undertake HR Due Diligence to highlight any areas where terms not set out in the Contract of Employment may transfer, thus giving the prospective transferee the option to consider if it wants to proceed with the business acquisition or taking over of a contract, and to determine how it can provide these terms if it does.**

**HR Solutions can also advise on a TUPE transfer process including the obligations to consult and can provide all the relevant documentation required.**

**If you are considering acquiring a business and that business has an employee share plan or plans in place in which employees are entitled to participate, our tax colleagues in our Human Capital Advisory team can help you identify what share plan rights the employees have in the company you are looking to acquire, determine the quantum of what they will be losing as a result of the transfer, and advise you on what to do to replicate what they will be losing including, if need be, setting up an employee share plan as cost efficiently as possible.**

Click [here](#) to find out more.



# Hot topics

**Increases in fines for employing illegal workers** - from January 2024, the fines for employers who permit illegal migrants to work for them are to be increased threefold. The penalty for employers will increase from £15,000 up to £45,000 per illegal worker for a first breach, and from £20,000 and up to £60,000 for repeat breaches.

Since January 2018, almost 5,000 civil penalties have been issued to employers. In addition, employers can be liable to criminal prosecution and face a sentence of

five years' imprisonment if they know, or have reasonable cause to believe, that the worker does not have permission to be in the UK; has overstayed their leave to remain; is performing a type of work for which they do not have permission; or have falsified their documents in any way.

The UK government publish a quarterly list of employers who have been fined for hiring illegal workers. The latest list includes the following:

Trading name	Location	Penalty
Adega	London	£15,000
Taksim Lounge Ltd	London	£15,000
Nisa Local	London	£10,000
White Horse	Surrey	£15,000
So Beautified Salon	Greater London	£15,000
Golden Scissors	London	£15,000
Hildenborough Square Ltd	Surrey	£10,000
Cozzy Lounge	Middx	£15,000
London Quality Fisheries	London	£15,000
British Hand Car Wash	Newport	£10,000
Hungry Eye Indian Restaurant	Kent	£10,000
Multi Facility Services Ltd	Greater London	£10,000
N&J Consults Ltd	Greater London	£15,000
Nona Restaurant	Greater London	£20,000
Norwood Manor Day Nursery Limited	Greater London	£15,000
8 Till Late (Polski Sklep)	Hounslow	£15,000
Orchid Garden	Kent	£30,000
Redhouse Chinese Takeaway	Kent	£20,000
Pizza Go Go	Croydon	£15,000
Share 2 Care Ltd	Hampshire	£10,000
Fat Pizza Basildon	Essex	£15,000
Taco Bell	London	£10,000
Greek Souvlaki	Kent	£10,000
Cell Fone City	Greater London	£10,000
Vindaloo Indian Takeaway	Hampshire	£10,000

As well as the financial penalties, this obviously also causes a reputational risk to businesses. The list is public and also may lead to a business being reported in the media.

**HR Solutions can advise on Right to Work in the UK checks. We can also conduct them on your behalf; this is particularly useful for if you are a business with overseas ownership and / or remote workers where it is difficult for you to conduct the check yourself.**

**Electronic Travel Authorisation (ETA)** – the UK is set to introduce Electronic Travel Authorisation (ETA) for all current non-visa nationals (those who are eligible to enter the UK without a visa for tourism, visiting family and friends etc e.g. nationals from Australia, New Zealand, Canada, Hong Kong, Singapore, and the USA).

Similar to the ESTA system in the USA, this will be a fully digital process whereby visitors will provide their passport details and biometric information online. It will cost £10 (approximately EUR.50 / USD12.50) and, as with the US ESTA, will be valid for a two year period.

## Case study

Our client, an Indian digital technology company wished to establish an entity in the UK. We advised that they could do so using the Global Business Mobility (UK Expansion Worker) route. This was a relatively new route, introduced on 11 April 2022 and only a few such applications had been granted at the time (May 2022).

It is an unusual route in that the migrant worker is their own Authorising Officer on the Sponsor Licence. A provisional Sponsor Licence is granted and, upon the migrant worker's arrive into the UK, it is uprated to a full "A" Licence.

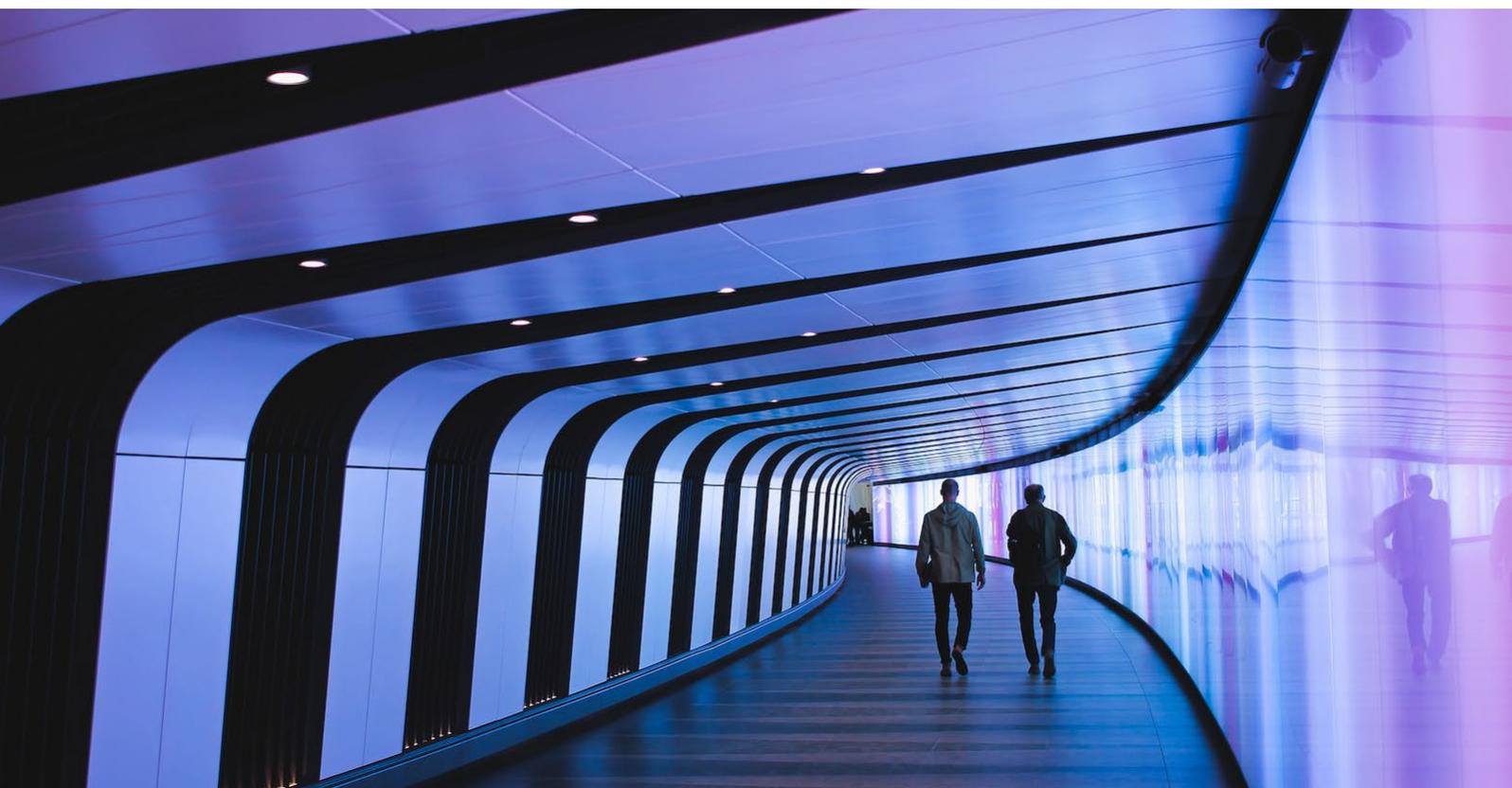
We worked with the client to apply for the provisional Sponsor Licence and a Certificate of Sponsorship for the Technical Director. As the application not only has to justify the requirement for a worker to come to the UK but also satisfy the Home Office that there is a genuine business to be established, it is a very involved process.

The ETA system is being phased in. It will apply to nationals from Qatar starting this month. It will then be extended to nationals from Bahrain, Jordan, Kuwait, Oman, Saudi Arabia, and the UAE in February 2024. Ultimately, all current non-visa nationals will be required to obtain an ETA in order to travel to the UK including EU nationals. Irish nationals will remain exempt as Ireland forms part of the Common Travel Area.

**HR Solutions can advise and assist visa nationals with applying for Visit Visas in order to enter the UK for tourism purposes.**

The application was successful and the Director subsequently entered the UK on his UK Expansion Worker visa.

**HR Solutions can advise you on a number of Immigration routes including Skilled Worker and Global Business Mobility. We can also advise and assist on family visas (spouse / partner / child / adult dependant) as well as Indefinite Leave to Remain (settlement in the UK), Ancestry visas, and British Citizenship.**



**Please see below some examples of the work that we have completed recently.**

 **Northampton**

H&S policy and Risk Assessment template

 **London**

Contract of Employment, Employee Handbook, and Privacy Notice

 **Leicester**

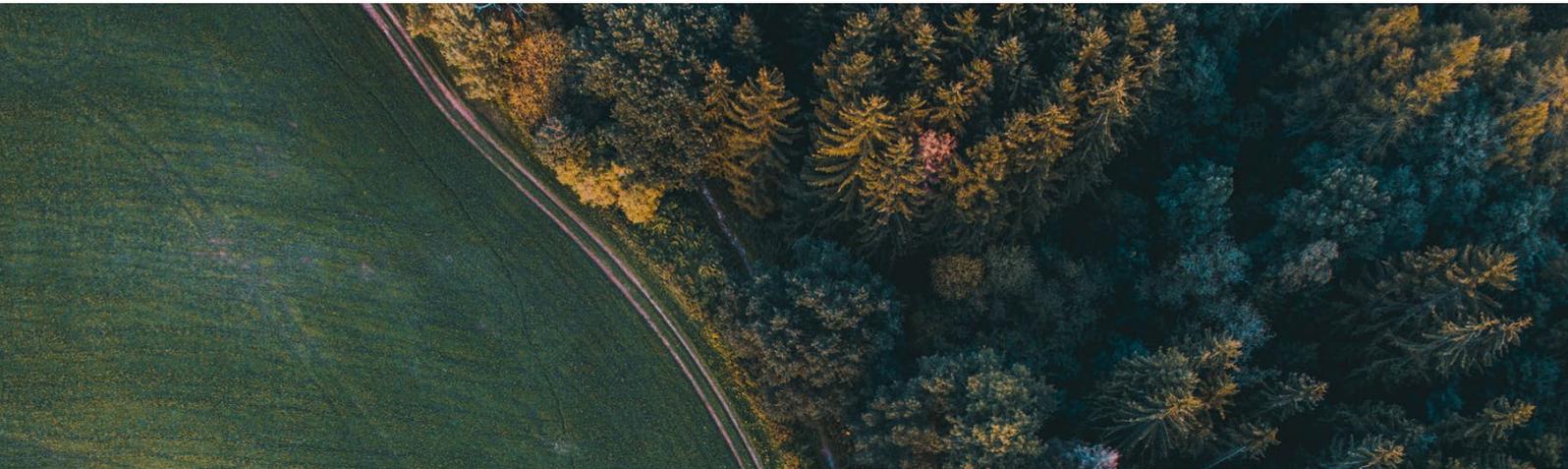
Review of Contract of Employment and Employee Handbook

 **London**

Right To work in the UK check

 **Thames Valley**

Right To work in the UK check



**How we can help?**

If you require HR support, please contact us at [HRsolutions@mha.co.uk](mailto:HRsolutions@mha.co.uk) to discuss how we could assist you.

We can provide support on an hourly, fixed-fee or retainer basis so there are a number of options available according to your needs; as you can see from the above examples, we can assist with a large project or a one-off piece of advice.



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