CITY OF LONDON LAW SOCIETY

EMPLOYMENT LAW COMMITTEE

BRYAN CAVE, 88 WOOD STREET
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ON 11 JUNE 2014

1 Apologies were received from Mark Mansell, Jane Mann, Anthony Fincham, Helena Derbyshire, Kate Brearley, John Evason, Lawrence Rees, Alan Julyan and Charles Wynn-Evans.

2 The minutes of the last meeting were approved.

3 The Chairman confirmed that Helena Derbyshire would be the new Secretary to the Committee as of the September 20th meeting. The Chairman also thanked Paul Griffin for all his hard work as Secretary to the Committee.

4 The Chairman informed the Committee that Liz Adams, after many years of service to the Committee, had resigned as she is no longer a partner of Beachcrofts. The Chairman thanked her in her absence for her service to the Committee over many years and noted that she would be particularly missed for her insight into employment tribunal matters (being an employment tribunal judge).

5 The Future of Employment Disputes - talk at Law Society by Sir David Latham.

The Chairman explained that he was called by the Law Society and asked to attend a talk given by Sir David Latham on the future of Employment Tribunals. The first thing Sir David mentioned was that he thought there was no way back for lay members in employment tribunals as the role of the lay member had changed considerably over the years. They are no longer typically representatives, for example, of trade unions, but more likely to be HR people and therefore not representative of the "two sides of industry". He suggested a panel of specialists might be appointed with particular skills relevant to the claim being heard. It was pointed out that this blurs the line between the "judge" and expert witnesses and it was confirmed that this particular issue had been raised by an attendee at the actual meeting.

Secondly, the speaker discussed early neutral evaluation of cases. There is a tendency at tribunals not to comment too early on the prospects of a particular case for fear of allegations of bias it was suggested. It was proposed that there be a separate hearing early on in the process to discuss the prospects of the case generally and even that ACAS might actually attend such a hearing. This would be a separate meeting and not part of the main hearing.

Another point made was that there may well be hearings which are undertaken on the papers alone in the future.

Sir David thought that there should be a one stop shop for employment disputes and that the employment judges' remit should be wider to include, for example, mediation. He also suggested that breach of contract claims (without an upper limit) and even restrictive covenants cases should be heard by employment tribunals.

There was some discussion also about employment arbitration and whether there should be more focus on this dispute resolution procedure in the future.

6 Case Law

Clyde and Co v Bates van Winkelhof [2014] UKSC 32. This case was about whether a member of an LLP is a worker for the purposes of employment legislation. The court held that the individual was a worker. The Committee discussed the consequences of this finding especially in relation to auto enrolment and pensions. One member pointed out that in order to be covered by the auto enrolment provisions, it is necessary to have income and there was some question as to whether partners who are solely remunerated by virtue of the profits of the firm would indeed have "income" for the purposes of the relevant regulations. Another point raised was whether the inducement provisions under the auto enrolment regulations would prevent firms from dissuading partners to have auto enrolment applied to them. One member of the Committee said she is advising clients that it may be appropriate to pay a "pensions allowance" to members of the LLP in order to avoid the need to make contributions to an occupational pension scheme. This issue together with the issue of HRMC and its attack on fixed share partners raises the issue as to whether the LLP entity is an appropriate entity for professional partnerships. In addition, it was observed there is no equality of bargaining power between the LLP and its members. It was noted that there is no guidance from BIS yet in relation to the auto enrolment issue but LLPs will need some advice in relation to the issue.

Prophet plc v Huggett [2014] EWHC 615 (Ch) – this was an interesting case where an individual was subject to a 12 month non-compete covenant. Relatively speaking the employee enjoyed a modest annual salary and yet the effect of the restrictive covenants injunction was that he would be unable to work in that particular sector for a year. A comment was made that it was unusual for a court to go so far in rewriting the covenant in order to make it work. It was also noted that the court made an interesting observation in relation to whether damages was an adequate remedy in these types of cases because breaches of restrictive covenants are an on-going issue and it would not be appropriate for a litigant to issue proceedings on a number of occasions in relation to several different breaches and therefore this alone may be a good argument that damages are not an adequate remedy in these circumstances and that an injunction may be more appropriate.

Capgemini India v Krishnan [2014]EWHC 1092 (QB) – this was about restating covenants in the form of undertakings. The employees had agreed to undertakings containing certain covenants by way of a settlement agreement, but when they had confirmation from their new employer that they would be indemnified in relation to the costs of having restrictive covenants enforced against them, they decided to communicate their intention not to be bound by the undertakings they had given to Capgemini. The court said that they would balance the public policy related issues in relation to restrictive covenants against the public policy issues relating to settlements and the benefit of parties' settling disputes. In this particular instance they felt it was relevant that the employees had changed their minds about being bound by the undertakings because they now had financial backing whereas before when they had given the undertakings they would have been personally liable for breach of the relevant covenants. The courts said all the circumstances should be taken into account, but that it was likely on this occasion the employees would not be bound by the settlement. However, in any event, the court went on to decide that no injunction should be granted to Capgemini on the basis that its need for protection was tenuous to say the least.