CITY OF LONDON LAW SOCIETY

EMPLOYMENT LAW COMMITTEE

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On 12 March 2014

1 Apologies were received from Anna Rentoul, Nick Robertson, Ian Hunter, Helena Derbyshire and Sian Keall.

2 Minutes were approved for the last meeting subject to adding the apologies from Elaine Aarons and William Dawson for non-attendance at the last meeting which have now been minuted.

3 **Matters Arising**

The Chairman explained that Paul Griffin, having been secretary for some time, has resigned as Secretary and that the Committee is looking for a new Secretary and if members are interested in taking up the position they should speak to the Chairman.

By way of update the Chairman asked two members who sit as part time Employment Judges whether the number of tribunal claims had continued to decrease since the advent of tribunal issuing fees. One member reported that Croydon Employment Tribunal was approximately 50% down in the number of tribunal applications received. In addition, the number of days on which tribunal judges were being required to sit had been reduced reflecting the reduction in the number of claims. It was reported that a number of claims in Birmingham Employment Tribunal had levelled off and that as a result one day cases are being listed for one month later. However, cancellations are still relatively common place. It was also thought that the general public may get used to the fact of fees having to be paid and the number of tribunal claims may well increase in the future.

4 **Cases**

The Chairman reported that it had been relatively quiet on the legislation front and therefore the number of matters of significance to discuss was limited.

USDA case – the Chairman explained that tribunal officers are staying cases pending the outcome of the ECJ in the USDA case. One other member reported that some of his cases were being stayed whilst others are being listed.

Hazel v Manchester College – this case was about the employer trying to get around the case of *Delabole Slate* whereby it was held that changes to terms and conditions by way of harmonisation did not attract the ETO defence because they did not entail changes in the workforce. One member reported that the employer is still weighing up whether to appeal, but that, commercially, it may not be in the client's interests to take the matter to appeal. It was thought that the decision may be right as a matter of law, but it is nonetheless harsh on the employer. Members discussed whether the case would have been decided differently had it been heard under the new amended Regulations. It was felt that it shouldn't have gone any further under the new Regulations as the proposed changes were only "connected" to the transfer. Under the new Regulations the reason for the change in terms and conditions would have to be the transfer rather than reasons "connected to the transfer". However, one member pointed out that the guidance to the TUPE Regulations suggests that the test is a new one and therefore previous case law would be of limited value in interpreting the test and on that basis the decision may well be the same under the new Regulations.

Numura v Portnykh - this case was about the application of the without prejudice rule in negotiations towards a settlement agreement. The EAT had held that the documents the employer wanted to introduce to show that the claimant had changed his position on the reason for dismissal would be inadmissible. It was commented that this case is bringing the whole issue of without prejudice discussions back into the centre ground and may be more favourable to employers in discussions they have with employees.

One member commented that whether or not the employee or employer agrees that a particular conversation is without prejudice may well be relevant to the status of the conversation. It was also noted that there was much talk in the case of "potential" disputes which would suggest that conversations much earlier in the settlement process may well be without prejudice.

One member commented that employees are often under a lot of pressure by employers to, for example, accept a settlement before further action is taken (e.g. a disciplinary) and therefore it is unfair that such conversations should necessarily be covered by the without prejudice cloak. It was also pointed out that a sensible view should be taken in relation to whether or not a document is without prejudice. By taking a particular stance the tribunal will no doubt maintain its focus on the particular document the employer is arguing should not be admitted and therefore it will necessarily give more weight to it.

Members agreed that the protective conversations legislation was not very helpful in that early on in disputes it is not clear what claims the employee may actually bring against the employer and as the legislation only covers unfair dismissal claims other elements of the conversation could well be admissible if the without prejudice rule doesn't apply. A further discussion took place in relation to guidance applicable to new legislation and the status of such guidance. Members were agreed that guidance has no particular status and the statutory guidance should be the only relevant source for deciding what the law actually is. It was observed that the amount of guidance in circulation may, in some circumstances, be a hindrance rather than a help in that it is attempting to shape views of the law without underlying authority.

East England Schools v Parma - this case was about recruitment consultants and an employee leaving and the previous employer enforcing restrictive covenants. It was argued that as the information relating to particular appointments was in the public domain and that there was little loyalty as to which agents and individuals schools would choose in relation to an appointment there was no legitimate interest for the employer to enforce. The court in this case turned the argument on its head and suggested that where a relationship is particularly fragile there is more of a need to protect the employer and therefore a legitimate business interest exists more readily.