MINUTES OF MEETING

CITY OF LONDON LAW SOCIETY

EMPLOYMENT LAW COMMITTEE

Meeting held at Addleshaw Goddard, Milton Gate, 60 Chiswell Street, London EC1Y 4AG
12:45 pm on Wednesday 10 June 2015

Attendees:

Gary Freer, Chairman	Bryan Cave
Helena Derbyshire, Secretary	Skadden, Arps
Kate Brearley	Stephenson Harwood
Helga Breen	DWF
Oliver Brettle	White & Case
Mark Greenburgh	Wragge Lawrence Graham
Paul Griffin	Norton Rose Fullbright
Sian Keall	Travers Smith
Michael Leftley	Addleshaw Goddard
Jane Mann	Fox Williams
Nick Robertson	Mayer Brown

Apologies:

Elaine Aarons	Withers
William Dawson	Farrer
John Evason	Baker & McKenzie
Anthony Fincham	CMS Cameron McKenna LLP
Ian Hunter	Bird & Bird
Mark Mansell	Allen & Overy
Laurence Rees	Reed Smith
Charles Wynn-Evans	Dechert

1. Apologies were received from those listed as absent.

2. The Minutes of the last meeting were approved.

3. Matters arising

   The Chairman confirmed that Alan Julyan had retired from the Committee. He was thanked in his absence for his contribution.

4. Call for Evidence on Collective Consultation in Insolvency

   The Committee had been asked to contribute to the Insolvency Committee's comments on the Insolvency Service's call for evidence on collective redundancy

consultation for employers facing insolvency. It identified an inherent tension between insolvency and employment law requirements. Members of the Committee had experience of the employment tribunal attempting to address whether or not it is reasonably practicable to consult in the circumstances of an insolvency and the fact that the law does not reflect the specific circumstances of an insolvency situation. The process and intervention of the Secretary of State made the process complicated and costly. The way that cases have interpreted the law to date has led to an incentive not to comply with the consultation requirements to the extent possible as it is likely that a protective award would be made in any event. The only way to address this would be for employers to establish a standing consultation committee for TUPE and collective redundancy consultation.

5. Impact of fees and early conciliation in Employment Tribunals

Members of the Committee had attended a speech by Brian Doyle, the President of the Employment Tribunals on the introduction of fees. The introduction of fees has not led to better funding of the employment tribunal service (the original intention had been that fees would cover at least 33% of the cost of the tribunals. However, only 7% of the costs had been covered due to the significant reduction in claims since fees have been introduced).

Members of the Committee had experienced claims being listed but then pushed back due to the complexity of the claims that remain to be heard which tend to be those that require more case management. It was noted that in the market there has been a significant drop of employment tribunal claims since fees had been introduced. The Committee then considered the scope for claims to be passed to the High Court and it was thought that there may be increasing scope to moving employment claims to the High Court as contract disputes (for example, disciplinary process particularly in the regulated space). The impact of naming and shaming for pay and equality and also the introduction of the senior manager's regime involving certification of fitness (which could have a reputational impact if decided incorrectly), could lead to increased legal representation in the disciplinary arena.

The Committee was referred to the City HR Association Practice Group Guidance with regard to the senior manager's regime. This is a subject that the Committee would be well qualified to comment upon.

In his speech Brian Doyle J had recommended a single Employment and Equality Act and considered specialist judges for employment related High Court claims (for example enforcement of post termination covenant). There was also a discussion about lifting the cap on the value of contract claims that can be bought in the employment tribunal so that the parties would have a genuine choice of forum. Although, that would potentially avoid the costs regime of the High Court.

6. Recent cases:

(a) *Petter v EMC Europe [2015] EWHC 1498*– this case was likely to be heard at the Court of Appeal by the end of the current term. The case concerned an anti-suit injunction to restrain proceedings brought in the US, concerning restrictions in stock option documents subject to Massachusetts Law and jurisdiction. The employee had brought a claim in the High Court for an

injunction on the basis that the US stock options were part and parcel of the employee's employment contract and that therefore the Brussels Convention applied to say that the claim should be heard in his place of work (the UK). Cooke J had agreed that there was an arguable case that thus defendant was his employer and the claim related to his employment contract. However, on the balance of convenience, the anti-suit injunction was denied. The US court had already accepted jurisdiction and in the interest of comity, its decision should be observed.

(b) *Chesterton Global v Nurmohamed UKEAT/0335/14* and *Deer v University of Oxford [2015] IRLR 481* – the meeting had run out of time so the Committee was unable to discuss these two cases in any detail. In the Chesterton case (involving the public interest test in whistleblowing cases) it was felt that the threshold applied had not been very high. The Court had been pushing boundaries to find that the disclosure of commission sharing around the office was in beyond the whistleblower's own personal interest in his reasonable belief. Leave to appeal is being sought. It was noted that in practice the removal of the good faith requirement for a protected disclosure and its replacement with the belief that disclosure was in the public interest, lead to a lower test than before.

7. There was no further business. The next meeting is at 12.45 on 9 September at Wragge Lawrence Graham.