MINUTES OF MEETING

CITY OF LONDON LAW SOCIETY

EMPLOYMENT LAW COMMITTEE

Meeting held at Travers Smith, 10 Snow Hill, London EC1A 2AL on Wednesday 1 March 2017 at 12:45 pm

Present:

Helena Derbyshire, Secretary	Skadden, Arps
Helga Breen	DWF
William Dawson	Farrer
Paul Griffin	Norton Rose Fulbright
Sian Keall (Host)	Travers Smith
Michael Leftley	Addleshaw Goddard
Jane Mann	Fox Williams
Nick Robertson	Mayer Brown
Charles Wynn-Evans	Dechert

Apologies:

Elaine Aarons	Withers
Kate Brearley	Stephenson Harwood
Oliver Brettle	White & Case
John Evason	Baker & McKenzie
Anthony Fincham	CMS Cameron McKenna LLP
Gary Freer, Chairman	Bryan Cave
Mark Greenburgh	Gowling WLG
Kevin Hart	CLLS
Ian Hunter	Bird & Bird
Mark Mansell	Allen & Overy
Laurence Rees	Reed Smith

1. Apologies were received from those noted as absent, including Gary Freer. Helena Derbyshire chaired the meeting.

2. The Minutes of the last meeting were approved with a minor correction to the attendees.

3. <u>Matters arising</u>

   (a) There was a general discussion around the Taylor Review of Modern Working Practices. Gary Freer was to ask Diane Nichol, a member of the panel supporting the review, to our next meeting.

   (b) The Committee discussed:

(i) the purpose of the review;

(ii) how the recent gig economy cases is possibly undermined that:

(1) if the Employment Tribunals are finding in favour of "workers", do we need further legislation to address atypical workers?

(2) is the existing worker status sufficient in the light of recent case law; or

(3) is it the intention of the review to codify this?

(iii) the real issue is possible tax abuse: how does the Review sit with the Treasury's proposals to address the tax status of atypical workers (this is outside the remit of the Taylor Review but how do they come together?) there should be consistency.

(iv) anecdotal evidence of commentators about other jurisdictions (for example the Netherlands and US) considering a new intermediate "worker" status based on ours.

4. Senior Managers and Certification Regime (SMCR): review and forthcoming extension

Members reported that their clients had difficulty grappling with attempts to decouple the disciplinary process from a "fit and proper" hearing in accordance with SMCR. Some heard disciplinary matters and the fit and proper determination together and some separated them. There was not always an easy match between HR requirement and compliance. A practical difficulty was the extent to which the disciplinary panel might make a finding of fact which could tie the hands of separate managers dealing with compliance issues.

Members discussed clients who were amending their disciplinary policies to provide "fit and proper" sanctions as provided for in the Statement of Responsibility for Senior Managers, within their disciplinary process.

Anecdotally clients are also struggling with the need to make a finding as to whether conduct was in fact a "fit and proper", even in the absence of the employee concerned (in circumstances where they might not necessarily continue a disciplinary process, for example after ta resignation. Others were just making a note to their file that the individual resigned mid-way through the disciplinary process and that the organisation has reached a conclusion in the absence of any representations from the individual in those circumstances.

We also discussed the practical difficulty of obtaining references if an individual was previously employed by a regulated firm that no longer exists. This was a potential loop hole in the SMCR.

5. Corporate Governance Green Paper

The Committee discussed this briefly. It was noted that the proposals no longer included a requirement that employees be represented on the company's main board. There was a brief discussion of a potential route to enabling employee voices to be heard including possible advisory committees.

6. Recent Cases:

(a) Pimlico Plumbers Limited v. Charlie Mullins and Gary Smith

This case regarded "workers" of Pimlico Plumbers. It was agreed that although the employment documentation had not been clear the facts were. In order for an individual to be self-employed there would need to be an unfettered right of substitution at any time (not just when the individual was unavailable). In the Pimlico case the plumbers had to be replaced by another Pimlico plumber.

(b) Dawson-Damer v. Taylor Wessing

The Court of Appeal had overturned the High Court decision and ordered compliance with the valid subject access request because efforts made to comply with it so far had been inadequate. The Court of Appeal confirmed that a narrow view should be taken of legal professional privilege. The exception relieves the data controller from complying with a subject access request only if there is a relevant privilege according to the law of any part of the UK. The Court of Appeal also found that subject access requests should be purpose blind – a request is not rendered invalid just because it is made for the collateral purposes of assisting litigation.

(c) Marathon Asset Management v. Seddon and Bridgman – Damages for breach of confidentiality obligations

In this case the High Court considered whether two employees of the Claimant had breached their duty of confidence and, if so, the amount of damages that should be awarded for those breaches. (The case considered Wrotham Park damages: that an award of "hypothetical bargain" damages may be available on the basis that the (Claimant can recover such a sum as the Defendant would have paid to negotiate a release of its obligations under the contract). This particular case appeared to have unique facts although there may have been a clear breach (the employees had copied and retained files belonging to the employer) they had not actually used the confidential information and the Judge rejected the idea of hypothetical damages in this case.

7. Any other business

There was no further business. We thanked Sian Keall for hosting the Committee. The next meeting would be on Wednesday 7 June, at Baker and McKenzie.