

MINUTES OF MEETING

CITY OF LONDON LAW SOCIETY

EMPLOYMENT LAW COMMITTEE

Meeting held at Wragge Lawrence Graham & Co LLP's offices, 3 Waterhouse Square,
142 Holborn, London, EC1N 2SW (Hosted by Mark Greenburgh)
12:30 pm on Wednesday 9 September 2015

In Attendance:

Gary Freer, Chairman	Bryan Cave
Helena Derbyshire, Secretary	Skadden, Arps
Elaine Aarons	Withers
John Evason	Baker & McKenzie
Anthony Fincham	CMS Cameron McKenna LLP
Mark Greenburgh	Wragge Lawrence Graham
Sian Keall	Travers Smith
Michael Leftley	Addleshaw Goddard
Mark Mansell	Allen & Overy
Laurence Rees	Reed Smith
Charles Wynn-Evans	Dechert

Observers:

Tracy Kerr (Guest)	GEO Legal Advisers - (Government Equalities Office policy group)
Paula Beckwith (Guest)	GEO Legal Advisers - (Government Equalities Office policy group)
Sharmin Choudhury (Guest)	GEO Legal Advisers - (Government Equalities Office policy group)
Fran Smith (Guest)	GEO Legal Advisers - (Government Equalities Office policy group)

Apologies:

Kate Brearley	Stephenson Harwood
Helga Breen	DWF
Oliver Brettle	White & Case
William Dawson	Farrer
Paul Griffin	Norton Rose Fullbright
Ian Hunter	Bird & Bird
Jane Mann	Fox Williams
Nick Robertson	Mayer Brown

1. Apologies were received from those listed as absent.
2. The Minutes of the last meeting were approved with a minor amendment.
3. Matters arising/Recent cases:

Mark Mansell of Allen & Overy had acted for James Petter in *Petter v EMC Europe* in the Court of Appeal. He gave an overview of the background to the case and how it had been conducted. Mr Petter had been a senior sales and marketing employee employed by a UK entity under the terms of their contract of employment governed by English law. He had also been granted restricted stock units pursuant to a Massachusetts Stock Purchase Plan. In the UK, Mr Petter has applied for a speedy trial to declare the covenants in his English contract of employment unenforceable. This was eventually conceded.

The Court of Appeal followed *Samengo-Turner v J&H Marsh & McLennan (4:1)* to find that the English courts had jurisdiction to hear the claim in relation to the share incentive scheme governed by Massachusetts law. It was willing to grant an anti-suit injunction restraining EMC from pursuing the proceedings that had already begun in Massachusetts. It was anticipated that EMC would be granted leave to appeal the decision to the Supreme Court given the universal importance of this issue.

The Committee discussed the Government's proposals for the taxation of termination payments and the Chair would raise this issue with the CLLS' tax/revenue committee to consider whether a joint response would be appropriate.

4. Gender Pay Gap: Consultation with the GEO

Members of the Government Equality Office ("GEO") had attended the meeting to consult with the Committee about their paper "Closing the Gender Pay Gap". The GEO was represented by the members of their legal, government policy, drafting and business engagement teams.

They replaced that there was confusion about what the gender pay gap meant and its relationship to equal pay. Equal pay is one of the three causes of the gender pay gap which is also believed to relate to the hours worked by women and the sectors in which they work (which tend to be in lower paid jobs). So far gender pay gap reporting has been entirely voluntary and only five companies in three years had published their gender pay gap information.

According to research from the IFF two thirds of employers with more than 250 employees (making up approximately 10% of the companies that would be affected by the proposals for gender pay gap reporting) said that closing the gender pay gap was a priority but very few had done anything about it.

The Committee and the representatives from the GEO discussed the following issues:

- The difficulty in calculating appropriate pay and whether this should include deferred payments, variable bonuses or stock options (to exclude them would remove a significant element of remuneration for some higher earners where

there is likely to be a material discrepancy but their inclusion would be onerous for the employers).

- The number of employees to be included and whether this should include seasonal employees or full time equivalent only. Also whether "employees" should be the definition in the Equality Act.
- How the figures should be reported (for example one figure per organisation or by pay grade).
- The extent to which providing these figures might increase the risk of a class action for equal pay. The narrative given in any report to explain the discrepancy would become crucial to defend claims. There was also a concern that once the information had been collated to prepare the report that evidence would be available for disclosure in any subsequent equal pay claims.
- How part time working would fit into the structure for reporting (the GEO would not want to discourage flexibility but part of the discrepancy in pay might be attributable to hours so this would need to be transparent). Also a consideration as to whether or not part time earnings should be grossed up to a full time equivalent for comparison purposes only.
- The potential sanctions and whether criminal sanctions would be required (the GEO's thinking was that a fine would not discourage larger employers but that naming and shaming/reputational damage might).

The representatives of the GEO said that they were aiming to publish draft regulations by the end of the year.

5. Any other business

The Committee discussed the recent High Court decision in *Dawson-Damer & Others v Taylor Wessing LLP* in which the High Court refused an application to make an order for compliance with the subject access request on the basis that it was not reasonable or proportionate for the firm to carry out lengthy and costly searches of its files dating back at least 30 years. The case provided useful commentary on the disproportionate effort exemption under the DPA. The High Court's decision meant that the subject access request was refused in its entirety.

The next meeting would be at DWF, 20 Fenchurch Street on 9 December 2015.