

**CITY OF LONDON LAW SOCIETY**  
**EMPLOYMENT LAW COMMITTEE**

**MINUTES OF MEETING HELD AT THE OFFICE OF SPEECHLY BIRCHAM LLP,  
6 ST ANDREW STREET, LONDON EC4A 3LX**

**on 12<sup>th</sup> September 2007 at 12:45 p.m.**

In attendance:

Raymond Jeffers (Chairman)	Linklaters
Gary Freer (Secretary)	McGrigors
Catherine Brearley	Stephenson Harwood
Helga Breen	Lawrence Graham
Oliver Brettle	White & Case
Anthony Fincham	CMS Cameron McKenna
Paul Griffin	Norton Rose
Ian Hunter	Bird & Bird
Alan Julyan	Speechly Bircham
Jane Mann	Fox Williams
Laurence Rees	Reed Smith Richards Butler
Geoffrey Tyler	Pinsent Masons

Absent with apologies:

Elaine Aarons (Vice Chairman)	Withers
Elizabeth Adams	Beachcrofts
William Dawson	Farrer & Co
John Farr	Herbert Smith
David Harper	Lovells
Mark Mansell	Allen & Overy
Julian Roskill	Mayer Brown International

**1 Apologies for absence**

These were received as noted above.

**2 Minutes of previous meeting and matters arising**

These were approved.

The Chairman welcomed Helga Breen, Oliver Brettle and Paul Griffin to their first meeting.

**3 Cross-border TUPE issues**

In December 2005 the European Commission appointed the CMS Employment Practice Area Group to research the legal problems in relation to cross – border transfers. The CMS study on the application of the Acquired Rights Directive to cross-border transfers of undertakings can be seen at

[http://ec.europa.eu/employment\\_social/labour\\_law/docs/com\\_2007\\_0334\\_en.pdf](http://ec.europa.eu/employment_social/labour_law/docs/com_2007_0334_en.pdf)

The European Commission has embarked on a first phase consultation of social partners on cross-border transfers:

[http://ec.europa.eu/employment\\_social/labour\\_law/docs/](http://ec.europa.eu/employment_social/labour_law/docs/)

The CMS Report had identified a number of key differences and conflicts of law between member states, for which the Acquired Rights Directive provides no solution. These differences and conflicts included such fundamental issues as whether a transfer would fall within the scope of the Directive, what rights can pass under a cross-border transfer, the extent to which terms and conditions can be harmonised after a transfer, the inclusion of pension-related rights and those connected with first – and second – generation outsourcing outside Europe (notably to India).

Members have encountered difficulties in relation to each of the issues, which have increased since the recent amendments to the TUPE Regulations and the controversial decision of the Scottish Court of Session in *Hynd v Armstrong* [2007] IRLR 338. It was agreed that if possible a submission should be made on the Committee's behalf.

There appears to be no formal method of making the Committee's views known. However, Anthony Fincham (who took part in the production of the CMS Report) confirmed that the relevant personnel in the Commission are always grateful to receive submissions made informally.

Raymond Jeffers, Charles Wynn-Evans and Helga Breen agreed to serve on a sub-committee which would produce a submission.

#### 4 **Amicus v McMillan Publishing [2007] UL/EAT/185/07**

This decision of the EAT (Elias J presiding) was the first example of a fine being imposed on an employee under the Information and Consultation Regulations [2007] IRLR 348.

The consensus was that the level of fine imposed - £55,000 – was not surprising given the findings of fact - a flagrant disregard of legal obligations despite two judicial warnings. There was some disquiet that one factor cited as an aggravating factor against the employer in the judgment was that it had received legal advice.

#### 5 **Age Discrimination**

Members reported that there was still surprisingly little activity in this area.

Some members reported that while age-related provisions in share option schemes - such as "good leaver" provisions which applied only to employees over 45 – had been removed in favour of a general discretion as to whether they should apply, younger employees had been seeking assurances that employer's discretion was being exercised consistently across all age ranges.

#### 6 **Date of next meeting**

12 December at Linklaters.