

## Minutes of Meeting

### City of London Law Society Employment Law Committee meeting at the offices of Mayer Brown, 201 Bishopsgate London EC2M 3AF on 7 September 2011

In attendance:

Gary Freer (Chairman)	McGrigors
Elizabeth Adams	Beachcroft
Kate Brearley	Stephenson Harwood
Helga Breen	Lawrence Graham
Oliver Brettle	White and Case
Anthony Fincham	CMS Cameron McKenna
Alan Julyan	Speechly Bircham
Sian Keall	Travers Smith
Michael Leftley	Addleshaw Goddard
June Mann	Fox Williams
Nick Robertson	Mayer Brown
Paul Griffin	Norton Rose
David Harper	Hogan Lovells

Absent with apologies:

Ian Hunter	Bird & Bird
Charles Wynn-Evans	Dechert
Laurence Rees	Reed Smith
John Evason	Baker and McKenzie
William Dawson	Farrer & Co
Elaine Aarons (Vice Chairman)	Withers

#### 1 **Minutes of last meeting**

Minutes of the last meeting were approved subject to minor amendments.

#### 2 **Matters arising**

The Chairman confirmed that the Committee should not submit comments on the Modern Workplaces Consultation. He liaised with the ELA who have all the elements covered and he referred to the Committees' previous deliberations around whether the content of the consultation was sufficiently 'City' in nature.

#### 3 **Agency Workers Regulations (the Regulations)**

The Chairman asked the Committee members how the Regulations had been received by their clients generally. Some members reported that clients had not yet done much by way of implementation. Others reported that larger agencies have been preparing for some time for implementation of the Regulations. The Committee discussed the definition of remuneration for the purposes of the Regulations and also how comparisons are made between agency staff and full time equivalent. It was agreed that these areas provide insufficient clarity. One member reported that agencies are trying to get people to act as independent contractors while others intend to use the Swedish derogation. One member reported that a client has just increased head count in order to save the burden of implementing the Regulations.

#### 4 **Recent Cases**

**Bonuses** - *Attrill & Others v Dresdner Kleinwort Ltd.* In this case, the High Court rejected an application by the defendants for Summary Judgment. The court held that an action based

solely on an announcement of a guaranteed bonus pool was insufficiently clear to be enforceable. The Committee noted that it would be interesting to see what comes of this particular area, but the actual case is a Summary Judgment hearing and therefore of limited value.

**Supreme Court on the without prejudice rule** - *Ocean Bulk Shipping & Trading SA v TMT Asia Limited*. The facts of the case were summarised to the Committee. Evidence of facts communicated in the course of without prejudice negotiations and which are part of the factual matrix or surrounding circumstances are in principle admissible on the true construction of a settlement agreement which resulted from those negotiations. This acknowledged the existence of a new "interpretation exception" to the without prejudice rule.

The Committee noted that it remained to be seen how material the recognition of the interpretation exception will be in practice. It might be that parties are more cautious about what they say in without prejudice negotiations as a result of this. However it was noted that it is only evidence of facts raised during settlement negotiations that can be relied on to help explain what the contract was intended to mean when a dispute arises as to its interpretation and therefore the issue may only arise occasionally. It was also observed that clearly concentrating on getting the settlement agreed in clear terms would avoid the exception being invoked in any event.

#### **Disciplinary proceedings** - *RV Governors of X School*

Here a teaching assistant was held to be entitled to legal representation in disciplinary proceedings relating to sexual misconduct for the following reasons:

A degree of nexus existed between the disciplinary proceedings decision and the procedure to bar someone from the profession.

- A disciplinary hearing, as in this case, could irretrievably prejudice the procedure leading to a bar against working in the sector.
- The unrelated hearing in relation to a possible bar would not be heard orally with the ability to cross examine.

There was some discussion amongst Committee members about whether a similar situation might arise in the financial services sector dealing with, for example, market abuse allegations. It was noted that the FSA do not have open hearings in all cases and whether an employee would be entitled to legal representation in the workplace may depend on the severity of the potential outcome.

**Termination of employment** - *M - Choice UK Limited and Alders*. Here, the employee was summarily dismissed during their notice period depriving him of the opportunity to claim unfair dismissal. It is a reasonably well established principle (confirmed here) that the effective date of termination is the actual date of dismissal. The claim of unfair dismissal did not crystallise at the time the claim was made. It was noted that if the reason for the summary dismissal is that the employee asserted a statutory right not to be unfairly dismissed then they may get in under the fence.

**Protective Award** - *Phillips v Xtera*. In this case, there were a number of candidates for elected representatives. It was held that where the number of candidates is equal to the number of representative positions, it was not necessary to hold an election. The Committee noted that this may be helpful to small employers, although it will be important to allow members to object during the process.

*Independent Insurance Co Ltd v Aspinall*. This case clarified the position where no employee representatives are elected in a collective consultation situation and one employee brings a claim relating to alleged unfairness. The court confirmed that an award in these circumstances would only be made in respect of that employee and not all employees in the particular group. The Committee welcomed the clarification.

5 **Date of next meeting**

The date of the next meeting is 7 December 2011 at Baker and McKenzie (100 New Bridge Street, London EC4V 6JA).