

MINUTES OF MEETING
CITY OF LONDON LAW SOCIETY
EMPLOYMENT LAW COMMITTEE
Meeting held at DWF LLP
20 Fenchurch Street, London, EC3M 3AG
on 9 December 2015
at 12:45 pm

In Attendance:

Gary Freer, Chairman	Bryan Cave
Helena Derbyshire, Secretary	Skadden, Arps
Elaine Aarons	Withers
Helga Breen	DWF (Host)
Oliver Brettle	White & Case
William Dawson	Farrer
Anthony Fincham	CMS Cameron McKenna LLP
Mark Greenburgh	Wragge Lawrence Graham
Paul Griffin	Norton Rose Fullbright
Sian Keall	Travers Smith
Jane Mann	Fox Williams
Mark Mansell	Allen & Overy
Laurence Rees	Reed Smith
Nick Robertson	Mayer Brown

Apologies:

Kate Brearley	Stephenson Harwood
John Evason	Baker & McKenzie
Ian Hunter	Bird & Bird
Michael Leftley	Addleshaw Goddard
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:

It was noted that following our discussion with the members of the Government Equality Office ("GEO") at our previous meeting, the GEO had indicated that it would now include bonus in the proposed draft gender pay gap reporting regulations.

4. Senior Managers Regime and Regulatory references::

There was further discussion of the senior managers regime and the extent to which employment lawyers would have a role in implementing and advising on the implications of the proposed disclosure and disciplinary requirements.

The FCA and PRA have proposed rules under the senior managers and certification regime to require regulated firms to provide "regulatory references" including, inter alia, information about past disciplinary action. Regulated employers are responsible for assessing the fitness and propriety of their employees and required to seek regulatory references for candidates applying for certain senior management and certification functions

The Committee reviewed notes that it had been provided by the CLLS Regulatory Committee regarding the proposed regime and agreed with its views.

There was some debate about when it was appropriate to write to a regulator (which might be threatened when an employee departed employment). There was a danger that references in the context of a commercial spat could affect an individual's certification and future employment. There was also a concern that once an individual had been reported to the FCA and their misdemeanours are a matter of record (or recorded in a reference) it might be more difficult for other organisations to hire the person concerned without breaching their own obligation to ensure fitness and propriety.

The Committee considered that dishonesty and integrity would be the more appropriate triggers for reporting, and in the Committee's view it would be helpful for the FCA to provide examples of what might be reportable behaviour and how it should be referred to in references.

The issue of data protection was raised and the extent to which prospective employers should check the accuracy of references. There could be a remedy pursuant to data protection laws if a reference was misused in relation to new employees. (Fair processing of personal data extends to verifying information which could entail seeking an explanation of the circumstances of which an employee had previously been reported to the FCA).

There was a concern about reliance on a former employer's view of a candidate's integrity which, if applied incorrectly, could be career changing. The Committee considered the extent of the FCA might intervene to policing references made and how genuine they are: under the new regime the hiring organisation would have to determine the risk in hiring the person concerned and might be inclined to caution.

A member of the Committee recently obtained a Counsel's opinion regarding a remuneration decision that had been publicly reported (in the employer company's annual report there was reference to a director's share awards having been suspended). This raised a question as to whether or not the organisation had taken the correct steps to suspend the award. Although awards had been "suspended" on the company's register, if the employee had later been dismissed could that have been an intervening act capping the employee's damages? Similar issues could arise in relation to references given if, for example, a disciplinary investigation had not been concluded.

The Committee considered the potential for stigma type damages and the case of *BCCI v Malik* which had predated the *Johnson v Unisys* decision that prevented an employee seeking damages for a breach of the implied term of trust and confidence based on their manner of dismissal. The feeling was that this approach would be more scrutinised under the new system. The Committee considered the possibility of challenging this approach pursuant to the new regime. Members of the Committee were already experiencing employees seeking the right for a dismissal process to be completed (post termination of employment) so that they could clear their name.

The Committee also considered the potential money laundering angle and the involvement of SOCA, which limits the employer's ability to take action if that would entail notifying an individual of a potential investigation, which might contradict the obligation to provide a regulatory reference.

It was considered that the onus would now be placed on the new employer to complete more extensive pre-employment checks. The employer would be less able to take a pragmatic view regarding past offences (for example whether the individual might have learnt from its errors or could be trusted not to commit a similar offence again) than a regulator would be.

5. Recent cases:

The discussion on the senior managers' regime had run over so the cases in the agenda were not discussed.

6. Any other business:

Next year's meetings would be on the second Wednesday of March, June, September and December and members of the Committee volunteered to host those meetings.