

MINUTES OF MEETING
CITY OF LONDON LAW SOCIETY
EMPLOYMENT LAW COMMITTEE

**Meeting held at Travers Smith, 10 Snow Hill, London EC1A 2AL on 9 March 2016 at
12:45 pm**

Attendees:

| | |
|------------------------------|------------------------|
| Gary Freer, Chairman | Bryan Cave |
| Helena Derbyshire, Secretary | Skadden, Arps |
| Elaine Aarons | Withers |
| William Dawson | Farrer |
| Paul Griffin | Norton Rose Fullbright |
| Sian Keall | Travers Smith |
| Michael Leftley | Addleshaw Goddard |
| Jane Mann | Fox Williams |
| Laurence Rees | Reed Smith |
| Nick Robertson | Mayer Brown |

Guests:

| | |
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| Tracey Kerr | Government Equalities Office, Legal Service |
| Francis Smith | Government Equalities Office, Legal Service |
| Prity Vaja | Government Equalities Office, Legal Service |

Absent:

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|--------------------|-------------------------|
| Kate Brearley | Stephenson Harwood |
| Helga Breen | DWF |
| Oliver Brettle | White & Case |
| John Evason | Baker & McKenzie |
| Anthony Fincham | CMS Cameron McKenna LLP |
| Mark Greenburgh | Gowling WLG |
| Ian Hunter | Bird & Bird |
| Mark Mansell | Allen & Overy |
| Charles Wynn-Evans | Dechert |

1. Apologies were received from those listed as absent.
2. The Minutes of the last meeting were approved.
3. No matters arising were noted.

4. Draft Gender Pay Gap Reporting Regulations: Discussion with representatives of the GOE

The Chairman welcomed the representatives from the GOE who had solicited the Committee's views on the Draft Gender Pay Gap Reporting Regulations.

They referred to the earlier consultation in which the Committee had participated and stated that they had taken into account responses received in their draft policy. Questions had come back regarding the treatment of bonus (including questions from the Committee) and therefore the GOE had decided to include bonus in the basic remuneration figures to be compared. They emphasised that the draft regulations were still in draft and there was plenty of time to amend them if necessary. They were particularly interested in a technical analysis from the Committee as to whether or not the draft provisions would work for the members of the Committee and their employer clients.

It seems from the GOE's feedback on its consultation that there are ongoing questions about the scope of the Regulations: the definition of "employee" and the relevant employer for comparison purposes, and what was included in the definition of "pay". This would include bonus but the representatives from the GOE would like to understand whether and why we thought certain other provisions should be included.

The draft Regulations included a narrow description of "employee". The representatives in the GOE explained that was because they were looking for consistency with the definition in Section 83 of the Equality Act. We discussed how the definition could potentially cover workers who were not paid through the PAYE system and how their pay could be calculated.

In the consultation paper there had been a reference to "UK legislation" requiring clarification and we queried what was meant by that (as opposed to legislation in Great Britain). The GOE's representatives said they understood that identifying someone who has a contract of employment as an employee would result in a very narrow definition as opposed to someone employed under a worker or consultancy agreement or a member of an LLP. We queried whether the test was intended to reflect contractual or statutory tests (e.g. ordinarily working in Great Britain).

We then discussed what might be included in pay. Loosely, the definition included cash payments and benefits but not benefits in kind. We queried how flexible benefits where employees would have the choice (for example, between a car or a car allowance, insurance or a payment in cash) would be treated for comparison purposes. If employees made an election, employers might not be comparing like with like if they compared cash benefits only.

We also discussed the fact proposal in that the Regulations employers take a snap shot of pay at a particular time. The result could be influenced by the time of year (for example, if the employer chose its bonus week).

We also considered what was meant by "bonus pay" which includes "payments received and earned in relation to profit sharing, productivity, performance and other bonus or incentive pay, piece work and commission". It also included "long term

incentive plans or schemes (including those dependant on company and personal performance)"; and "the cash equivalent or value of shares on the date of payment".

The Committee said that it was unclear how these definitions would work and what payments should be included in relation to certain long term incentive plans. For example, it was unclear how a share award scheme might be counted if the awards vest over a three to four year period. When would the date of "payment" be? There was some discussion as to whether payments would be received "and" earned at a point of grant (as opposed to when the benefit is received by the employee). We discussed the Black Scholes Test and whether or not an auditors valuation would be appropriate.

It was felt that a comparison at the date of grant would be a cleaner comparison but might not capture discrepancies in individual performance targets.

It was agreed, however, that the treatment should be simplified for this category of benefit which was unlikely to have a significant overall impact for most employers given the small number of employees who participate in such schemes. One proposal was that employers should be given the opportunity to measure these variable benefits as they see fit and then explain their parameters for comparison in their report. There was also a suggestion that non-tradeable shares should be removed from the equation because it is difficult to value them. The Committee suggested that the definition should refer to what is paid in cash or received in cash or can be easily converted to cash.

It was noted that the definition of pay would exclude redundancy pay and we queried whether other severance pay should be excluded as well.

We then discussed how the quartile reporting would work. The GOE confirmed that the intention was that employees should be separated into separate quartiles referable to pay. It was discussed that this could give rise to confidentiality issues (for example, if the top quarter in terms of pay includes only one woman). The GOE suggested that it might be appropriate to refer to percentages rather than actual numbers in relation to pay for reporting purposes.

Members of the Committee had received feedback from remuneration consultants that discrepancies could be skewed because they are so much larger in the top quartile.

The general feeling was also that the general concept of reporting on the gender pay cap was not unattractive to employers but their concerns arose from the difficulty in implementing the Regulations correctly.

Anecdotally a number of clients were performing trial runs in April 2016 to see how their reporting would come out.

The representatives of the GOE acknowledged that a challenge was at the definitions and how they would be applied as opposed to the mechanics of the calculation.

We also queried whether it would be appropriate to consider identifying cash benefits and also, to the extent that share benefits were included, the number of shares (which may fluctuate in value over time).

The definition of employer caused some confusion as it was not apparent whether or not this would include group companies: many groups employ their senior executives in a holding company which would mean that that company has fewer than 250 relevant employees and might be exempt from the reporting requirements.

In conclusion the Committee's view of the key issues were consistent with that reported by the GOE:

- Definition of Pay
- Definition of Bonus/Variable Pay
- Definition of Company/Whether it includes subsidiaries.

The concern did not appear to be in reporting itself but in getting it right.

5. Any other business

There was no further business. Those present agreed that we would discuss the Bank of England/PRA Consultation on the Buy Out of Variable Remuneration at our next meeting.

The next meeting would be on Wednesday 8 June at 12.45 at Norton Rose, 3 More London.