

MINUTES OF MEETING
CITY OF LONDON LAW SOCIETY
EMPLOYMENT LAW COMMITTEE

**Meeting held at Dechert LLP, 160 Queen Victoria Street, London EC4V 4QQ on
Wednesday 7 March 2018 at 12:45 pm**

Gary Freer, Chairman	Bryan Cave
Helena Derbyshire, Secretary	Skadden, Arps
Kate Brearley	Stephenson Harwood
Helga Breen	DWF
William Dawson	Farrer
Jane Mann	Fox Williams
Charles Wynn-Evans	Dechert
Kevin Hart	CLLS

Apologies

Elaine Aarons	Withers
Oliver Brettle	White & Case
John Evason	Baker & McKenzie
Anthony Fincham	CMS Cameron McKenna LLP
Mark Greenburgh	TBC
Paul Griffin	Norton Rose Fulbright
Sian Keall	Travers Smith
Michael Leftley	Addleshaw Goddard
Mark Mansell	Allen & Overy
Nick Robertson	Mayer Brown

1. Apologies were received from those noted as absent.
2. The minutes of the last meeting were approved subject to comments from Kevin Hart which would be incorporated.

3. Matters arising

There were no matters arising.

4. Opportunity to meet with the Takeover Panel's Policy Advisor

An opportunity had arisen to meet with the Takeover Panel's policy advisor to discuss the Panel's policy with regard to matters pertaining to employees, for example employment and pensions intention statements. The Panel is reviewing its policy in

this regard but may need some assistance in reviewing the employment law implications of the proposals.

It was agreed that certain members of the Committee who regularly advise on Takeover Code transactions would propose a meeting with the Panel's representative and report back to the next Committee meeting.

5. Taylor Review Consultation

The Committee considered the four separate Taylor Review consultation papers and how it could most effectively contribute to the consultation.

Of the different papers the employment status paper lent itself most obviously to a review from an employment law perspective but there were a number of broad issues running across the papers. Those present concluded that it would be most effective to identify the key themes from a City perspective and discuss those at a reconvened meeting in April when the members of the Committee will have had time to consider the issues and before the first of the consultation deadlines.

By paper the following issues arose:

(a) Enforcement of Employment Rights

- (i) The consultation paper included largely open questions regarding the enforcement of employment tribunal awards, naming and shaming repeat offenders and uplifts in awards for aggravated breaches.
- (ii) The idea of class actions had not survived the Taylor Review and the mechanism seemed to lean towards naming and shaming.
- (iii) The absence of US style class actions would be significant for employers.
- (iv) A key legal issue that might merit the Committee's consideration was the identification of "second" offences in the context of aggravated penalties for second offences.

[The deadline for response on the enforcement of employment rights consultation paper is in May].

(b) Agency Workers

- (i) The Committee considered this consultation paper but concluded that of the four papers this was the least relevant for City practices. Only those members with more specialist practices acting for employment agencies and umbrella companies would add value as to this consultation.

(c) Measures to Increase Transparency in the UK Labor Market

- (i) This consultation paper included a significant number of questions and requests for evidence.

- (ii) Those present concluded that the Committee could add greatest value in relation to consultation and the questions relating to the information and consultation regulations, specifically:
 - (1) how the regulations could be improved;
 - (2) the extension of information and consultation rights to include workers;
 - (3) proposals to reduce the threshold of employees/workers requesting an information and consultation forum from 10% to 2%;
 - (4) other ways the government could support employee engagement.

(d) Employment Status

Those present identified the following key issues on which the Committee could comment:

- (i) the proposals that employers should be required to identify an individual's status (as employee, worker or self-employed) on day 1;
- (ii) was it appropriate to have two or three different categories (is the worker classification helpful or problematic?)
- (iii) Codification:
 - (1) is there an advantage in codifying the existing case law? Those present thought it was unlikely to make matters more certain and might fetter discretion.
 - (2) would codifying the different categories fetter the discretion of the employment tribunals? Is it better to rely on the existing common law position given the UK's lack of experience with a more civil approach?
 - (3) In terms of classification:
 - (a) Should control still be relevant?
 - (b) Should intention be included?
 - (c) Should integration be included?
 - (d) What is the importance of personal service?
- (iv) Would restating the tests lead to further uncertainty in litigation?
- (v) Alignment of Employee Status with Tax

The Chair of Committee would speak with the Chair of the Revenue Law Committee. Although it was recognized that the Revenue Law Committee members would not be focused on employee tax they may have colleagues or members of their teams who would be able to contribute the discussion on the alignment of employment status with tax status (and how the intermediate/worker status should be covered).

(vi) What is Working Time?

6. Any other business

It was agreed that those members of the Committee who were able to would meet on Wednesday 18 April to discuss questions in the consultation paper relevant to the following key issues. This is with a view to making representations on the applicable papers before the next meeting in June (which would be after the deadline for responses).

- (a) The proposals to codify the test to determine employment status
 - (i) Would this be counterproductive?
 - (ii) Could there be any unintended consequences?
 - (iii) Would development by precedent be preferable to result in a flexible approach?
- (b) The Committee's views on day 1 statements:
 - (i) Are they useful?
 - (ii) The likelihood of sham arrangements and the ability to enforce rights if the statement is incorrect.
- (c) Enforcement: identifying "second" offences
- (d) Transparency:
 - (i) Proposals to extend information and consultation rights to workers.
- (e) Alignment of employment status with tax (to discuss with the Revenue Committee).

7. The next ordinary meeting would be on 6 June at Farrer & Co.