MINUTES OF USER GROUP MEETING

THURSDAY 26 SEPTEMBER 2013

1. **Apologies:**

Peter Coll
Dympna Murtagh
Rosemary Lundy
Emma-Jane Flannery
Mark McEvoy
Gerry Daly
Mary Gavin
Gerry Grainger

2. **Minutes of last User Group Meeting on 7 March 2013**

These minutes were approved.

3. **Matters arising**

There were no matters arising from the minutes.

4. **Issues**

The Labour Relations Agency had sought guidance as to the role which it could usefully play in situations in which a self-represented claimant wanted to include certain additional issues in the Statement of Issues, but the legally-represented respondent was asserting that those additional issues were inappropriate. Adam Brett pointed out that it is not infrequent for a claimant to want to ventilate issues which are either irrelevant in the context of the existing discrimination allegations, or which are not included in the proceedings as currently pleaded. It was noted that the Statement of Issues can cut down on the issues which are contained in the claim form, but that it cannot broaden the issues as set out in the claim form. On behalf of the Labour Relations Agency, Maxine Murphy-Higgins stressed that the LRA could only provide information, and could not provide advice.

5. **The Employment Lawyers Group's query**

It was noted that Rachel Best, on behalf of the ELG, had raised a query regarding the roles played by lawyers in the context of the preparation of witness statements in employment tribunals. The President pointed out that, in that general connection, Guidance by the Scottish Commercial Judges, in relation to "[the] role of legal advisers or other parties in the preparation of [witness] statements" had been endorsed by the President, by the Vice-President and by the full-time Chairmen of the Industrial Tribunals, as being suitable guidance in the context of preparing statements for use in

Northern Ireland industrial tribunal litigation. A copy of the relevant part of the Guidance is annexed to these minutes.

6. **Supplementary Witness Statements**

Reference was made to the new, experimental, arrangements in relation to supplementary witness statements. How well are those new arrangements working? The general consensus seemed to be that it was too early to say but no negative experiences, in this connection, were reported by those who were present at this meeting.

7. **Early Case Review in recession cases**

It was noted that the numbers of "recession" cases had declined recently. It was stated that "Options" CMDs were being scheduled to take place within 2 to 3 weeks after the date of commencement of proceedings, and that recession fast track hearings were typically taking place approximately 8 weeks after the commencement of proceedings. It was also noted that, in recession fast track cases, Decisions were being made available to the parties on the actual day of the hearing.

8. **Early Case Review in "ordinary" fast track and unfair dismissal cases**

The President and Vice President have been engaged in a pilot study, under which case reviews have been carried out, at an early stage, in approximately 100 cases. The Vice President provided a brief presentation on the outcomes of those reviews. A copy of his aide memoire in relation to those outcomes is attached to these minutes.

9. The Vice President made it clear that, in conducting those case reviews, it was his usual practice to order the provision of simultaneous written witness statements in unfair dismissal cases, on the basis that, if some unexpected matter emerged, some limited oral evidence would be allowed during the main hearing. The pilot study has been extended beyond the original 100 cases. It is likely to continue for some time. One of the main aims of the exercise is to seek to engage the parties, at an early stage, in addressing the key issues which have arisen in the litigation. The Vice President stressed that it was important that the exercise should be dealt with as informally as possible. He therefore urged practitioners to participate, as requested, by phone, rather than attending in person. Michelle McGinley, in that context, noted that it could be useful to have a client present, to hear the issues which were being discussed by the Chairman. In that context, it was also noted that it might be useful to allow a party, if his/her representative so advised, to sit in (with his representative) on a telephone-based case review. The President pointed out that, in appropriate cases, it might be useful if the case reviewer (the Chairman conducting the review) were to indicate to the parties the strengths and weakness of their respective positions in the case; however, in such a situation, the case reviewer could not of course thereafter conduct any main hearing of the case. The issues being addressed in these case reviews were mainly as follows: (1) the likely duration of the main hearing; (2) the likely number of witnesses; (3) the main issues; (4) whether there should be any preliminary hearings; (5) whether the parties should be required to provide written witness statements; (6) the date for hearing if a Notice of Hearing had not already been

issued; and (7) any postponement application if the case had already been listed. The Vice President expressed the view that the requirement to produce written witness statements in unfair dismissal cases was not generally an overly onerous requirement, although he noted that in some instances (for example, if there was a literacy issue or a language difficulty) such a requirement might be inappropriate. John O'Neill generally welcomed the initiative but had queries on the question of when it would be regarded as appropriate to order the provision of written witness statements. It was noted that the statements were being ordered to be provided on a simultaneous (as distinct from sequential) basis, because of the desirability of making sure that there was no need to adjourn the scheduled date for the main hearing. The reviews were being scheduled to take place approximately 2 weeks after the date of presentation of the response.

10. **Deposit Orders**

The Vice President provided up-to-date details in relation to Deposit Order hearings. In all, 99 Deposit Order PHRs were listed. Of those, 36 claims were withdrawn or conciliated prior to the Deposit Order hearing. That left 63 cases still pending at the time of the Deposit Order hearing. So there were 63 Deposit Order hearings. 30 of those resulted in the imposition of a Deposit Order. So there were 30 Deposit Orders. In 7 of those 30 cases, the Deposit Orders were paid. In the other 23 cases, the proceedings were dismissed or withdrawn in the context of the non-payment of the deposit. It was noted that, as yet, only respondents, and their representatives, are seeking Deposit Orders. There was a general discussion at this meeting about the effects of the Deposit Order initiative. There appeared to be a general consensus that it is useful to both parties for there to be an authoritative steer, on the question of the liability of the proceedings, in circumstances in which the respondent is saying that the proceedings are non-viable.

11. **Re-scheduling Witness Statements**

The President drew attention to the need for parties to agree modifications to the schedule for the provision of witness statements in discrimination cases, in circumstances in which the main hearing has been postponed and to confirm those modifications when making an application for postponement.

12. **Decision Turnaround statistics**

The President referred to the statistics from 1 April 2013 to 26 September 2013, which were as follows:-

74% of decisions were issued within 6 weeks
77% of decisions were issued within 7 weeks; and
93% decisions were issued within 12 weeks.

13. **Employment Law Review**

It was noted that the deadline for providing comments, in relation to the Department for Employment and Learning's Employment Law Review, is 5.00pm on 5 November 2013.

14. **Any other business**

Various practitioners drew attention to their experience of taking claims in the Small Claims Court (which, in practice has a concurrent jurisdiction, alongside the industrial tribunals, in respect of breach of employment contract claims). It was noted that, the Small Claims Court often takes a rather relaxed attitude to postponement requests. In that context, the President drew attention to the fact that the avoidance of unnecessary adjournments is a key issue for her, in her role as President.

Date of next meeting

15. It was agreed that the next User Group meeting will take place on:-

Thursday 27 February 2013 at 1.30pm.

The role of legal advisers or other parties in the preparation of the statements

The purpose of a statement is to record the evidence of a witness. The court does not expect to receive a document which is in large measure framed by lawyers and which uses language which the witness would not use. Words should not be put into a witness's mouth. If a party produces such a document as the evidence of the witness, it is likely that it will receive little weight from the court and it may in some circumstances significantly damage a party's case. Equally, if it appears that a witness has been improperly tutored in his evidence,[2] the court is likely to discount his evidence. In preparing such statements, legal advisers should bear in mind that a witness may have to justify on cross-examination things contained in his statement.

What the court is looking for is the actual evidence of the witness in written form. It seems that the best approach is for the witness to give a precognition in the normal way. As the statement has a different role from a precognition, it is likely that the legal advisers will want to consider the draft statement carefully.

The legal advisers, including - where appropriate - counsel, can consider the draft statement to ensure that the witness has covered the relevant matters to which he can speak. They can also seek to clarify ambiguous statements within his evidence when his statement is in draft, and seek his comments on documents and other materials which might appear to raise questions about the accuracy of his recollection. Where there are matters, which the legal advisers think he might be able to address, they can properly ask him whether he can give evidence on those subjects. They can show him documents which he might have seen at the time, and if he had seen them, ask for his comments on them.[3] Where the witness comments on documents which he had not seen at the relevant time, the fact that he had not seen them then should be made clear in his statement.

We recognise that the process of taking a precognition means that the product involves input from the precognoscer. We expect that care will be taken to ensure that the witness's testimony is accurately represented. He is also to be given the opportunity to consider carefully what the draft statement says and to confirm its terms or instruct its amendment before he is asked to sign the statement. The legal advisers should also inform him that he may be cross-examined on his statement in court.