MINUTES OF USER GROUP MEETING

THURSDAY 27 FEBRUARY 2014

1. **Apologies:**

Peter Coll
Daire Murphy
Claire Shields
Scott Alexander
Mary Gavin
John O'Neill
Dymphna Murtagh

2. **Minutes of last User Group Meeting on 26 September 2013**

These minutes were approved.

3. **Matters arising**

In *Paragraph 6* of the minutes of the User Group Meeting *on 26 September 2013*, reference was made to the new arrangements in relation to supplementary witness statements. At that time, the general consensus seemed to be that it was too early to say whether these arrangements were working; but no negative experience, in relation to the working of the new arrangements, was reported by those who were present at that meeting. The President asked whether any persons present at this meeting had any further comments to make on this issue. Again, the general consensus was that supplementary witness statements were not 'missed'; but that Chairmen had allowed supplementary witness statements in the relatively rare circumstances where such statements were appropriate.

4. **Early case review in non-discrimination cases**

The Vice President briefly explained how these reviews operated and that, in his opinion, they were working satisfactorily and were helping to identify issues at an early stage to enable relevant interlocutory orders to be made, where necessary, and thereby reduce the risk of last-minute applications for orders and/or adjournments. In relation to practical matters, the Vice President stressed that representatives should ensure that they are available for these hearings, which are normally conducted by telephone conference, since a Chairman will have a long list of these reviews and the non-availability of a representative at the relevant time causes delay and inconvenience. He pointed out that representatives should ensure that the telephone operator in their office is made aware of the telephone conference in advance, and to expect a telephone call from the tribunal and for this purpose to know, at all relevant times, where the representative was so he/she could be contacted for the hearing. If necessary, the representative should provide to the tribunal and/or the telephone operator his/her mobile phone if he/she is likely to be out of the office. He said that, in

most cases, it has been possible to give relevant directions/orders at one hearing; but where a non-discrimination case is more complicated it can be necessary to have two such hearings in order to progress the matter to the substantive hearing.

5. **Deposit Order pre-hearing reviews**

The Vice President indicated that the use of Deposit Orders has been very successful in resolving matters and, in particular, weeding out weak cases. He stated that most applications are made by respondents against claimants but pointed out that such applications can be made by claimants against respondents and, in the limited number of cases, where Deposit Orders have been made against respondents, such Orders have assisted in the resolution of the matter and/or narrowing of the issues required to be determined by the tribunal. The general consensus of those present at the meeting was that Deposit Order hearings were very useful and all were anxious that nothing should be done to deter parties from making such applications for Deposit Orders to the tribunal. The Vice President then referred the meeting to the recent decision of Coghlin LJ in the Court of Appeal in the case of ***Dr Malgozata Stadnik-Borowiec v Southern Health & Social Care Trust & Others [unreported]***, which considered the making of Deposit Orders in this jurisdiction. Copies of the judgment were distributed to those at the meeting, as the judgment is not yet available on the Court Service website. There was considerable discussion about the decision and, in particular, whether the judgment had provided, as the grounds of appeal might have suggested, relevant guidance on issues relating to whether a Deposit Order can be made against one or more parties and/or in relation to one or more claims/grounds of response. Again, it was agreed, by those attending this meeting, that the tribunal should continue its present practice of ensuring that the tribunal, at the substantive hearing, have no previous knowledge of any Deposit Order/application for a Deposit Order that may have been made in advance of the substantive hearing, until **after** the decision is made in the substantive hearing and the relevance of any Deposit Order has to be considered by the tribunal in relation to any issue of costs and/or repayment of the deposit. Many at the meeting emphasised that it was not often recognised by parties, and, in particular, litigants-in-person that, if the party against whom the Order is made persists in participating in proceedings relating to the matter to which the Order relates, that party may have an award of costs made against them as well as the loss of the deposit itself. In this context, the President pointed out the terms of the Order that is made by the tribunal, on the making of a Deposit Order refers to this.

Concern was raised about the fact that, in the ***Stadnik-Borowiec*** judgment, reference was made by the Court to the use of strike-out applications; albeit a different test is required to be applied to such applications and/or evidence is able to be called before such a determination is made and there is considerable case law both in this jurisdiction and Great Britain in relation to the draconian nature of such a remedy and the difficulty of obtaining such a remedy in the tribunal. It was pointed out that an application for a Deposit Order, even if it is unsuccessful, can have relevance in relation to whether an Order for Costs should be made by a tribunal at the conclusion of the substantive hearing against the claimant whose claim has ultimately been found to be unsuccessful by the tribunal. There was general concern by those at the meeting that ***Stadnik-Borowiec***, if applied strictly to all cases, put at risk the ability of a party to

make an application for a Deposit Order and enable weak claims/responses to be 'filtered out' at an earlier stage of the proceedings.

The Vice President acknowledged that the ***Stadnik-Borowiec*** case may relate to particular circumstances and the Court's decision may be limited to those circumstances; but he acknowledged that clearly the tribunal and parties and their representatives will have to carefully consider this decision and all the potential consequences arising from it. In this context, he welcomed any comments that any of the Users may wish to make, when they have had an opportunity to fully consider the judgment and invited any such comments to be sent to the President, in writing, as soon as possible.

6. **Tribunal reform**

The President reported that she now understood that the Department of Justice do not intend to proceed, following their consultation exercise on tribunal reform, at the present time and it would appear that no relevant decisions will be taken on that issue before 2019, according to letters which have been sent to stakeholders. In the circumstances, she did not consider that this issue required to be addressed further at this time. It was noted that both the President and Vice President, but also the Council of Employment Judges and the Employment Lawyers' Group had responded to the said consultation exercise.

7. **Decisions – Statistics**

The President referred to the statistics from January 2014 – February 2014:-

51% decisions were issued within six weeks;

59% decision issued within seven weeks; and

84% of decisions issued within 12 weeks

8. **Any other business**

Suggestions were made to possible improvements to the tribunal's website and decision search facility. The Secretary of the Tribunals indicated this was a matter kept under review and changes are made from time to time and as relevant technology permits.

9. **Date of next meeting**

It was agreed that the next User Group meeting should take place at:-

1.30 pm on Thursday 18 September 2014