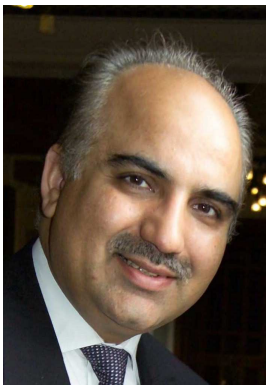

Dr Mirza Ahmad

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"Top 10 Trade Union cases : 2013

24th October 2013

The seminar will highlight some key learning points emerging from the following top 10 cases impacting on trade unions during 2013 (so far): -

1. *East Midlands Trains Ltd v National Union of Rail etc* - Court of Appeal 15 August 2013;
2. *Mark Alemo – Herron et al v Parkwood Leisure Ltd* – European Court of Justice 18 July 2013;
3. *Akinosun v Certification Officer* – EAT 5 July 2013;
4. *USDAW v Ethel Austin Ltd (in liquidation)* – EAT 30 May 2013;
5. *Toal v GB Oils Ltd* – EAT 22 May 2013;
6. *Roffey v UK* – EHHR 21 May 2013;
7. *Professional Trades Union for Prison etc v UK* – EHHR 21 May 2013;
8. *Union of Construction Allied Trade & Technicians (UCATT) v Dooley* – EAT 3 May 2013;
9. *George v Ministry of Justice* - Court of Appeal 17 April 2013; and
10. *Working Links (Employment) Ltd v Public and Commercial Services Union* - EAT 12 March 2013.

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- The ***East Midlands Trains Ltd case*** related to the interpretation of collective agreements and whether certain terms had become incorporated into the terms and conditions of employment of the staff and arose from the failure of the train company to obtain an injunction against the trade union when it asked its members to take industrial action short of a strike. The clause at issue in the proceedings concerned amendments made by the train company to the start times of the hours of its staff because of planned engineering works and whether the same constituted 'cancellation' of the original rosters under the collective agreements.

- The Court of Appeal emphasised that the starting point was that the parties had meant what they said and said what they meant. Accordingly, the court had to ask what the collective agreements, read as a whole, against the relevant background, would reasonably be expected to mean. Since the cancellation of work rosters was in the reasonable contemplation of the parties to the collective agreements and, as evidenced by the terms of the agreements, it was a reasonable interpretation of the same that the employer - *so long as the employer acting reasonably did not breach the duty of co-operation to its employees* – could make amendments without the agreement of the staff/unions because of the planned engineering works. The court was not interested in whether any event was limited to a small number of trains or a large number of workers / services.

- The ***Mark Alemo – Herron case*** is an interesting one involving the rights of collective agreements post TUPE transfers. In that case, the House of Lords had made a request to the ECJ for a preliminary ruling relating to a transfer of leisure services from Lewisham LBC to a private contractor (CCL) in 2002, which was subsequently sold in 2004 to another private company (Parkwood). The issue was

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whether the collective agreements applicable to Lewisham LBC and agreed post the TUPE transfer were binding on the subsequent private contractors.

- The European Court of Justice was asked, in effect, whether Article 3 of Transfer of Undertakings Directive 2001/23/EC must be interpreted as precluding a Member State from providing that dynamic clauses referred to in collective agreements negotiated and agreed after the date of transfer are enforceable against the transferee.

- In noting that Parkwood (subject to private laws) did not have any right to participate in any of the negotiations or otherwise agree to any of the terms established by a third party collective agreement relating to Lewisham/ local government (subject to public laws), the ECJ held that the private contractor's contractual freedom was seriously reduced to a point that that it adversely affected the very essence of its freedom to conduct business.

- Accordingly, Article 3 precluded a Member State from providing, on transfer, that dynamic clauses relating to collective agreements negotiated and adopted after the transfer were enforceable against the transferee, if such transferee did not have the possibility of participating in the negotiation process, after transfer, of such collective agreements. Regardless of the rights and wrongs of any other ECJ rulings, the decision in this case appears to be a pragmatic one and stands the test of common sense.

- The ***Akinosun case*** is a timely reminder that, when determining whether an organisation is a 'trade union' or not, for the purposes of registration under section 1 of the Trade Union and Labour Relations (Consolidation) Act 1992, what was important was for the certification officer to be persuaded on the present facts in terms of what the organisation was actually doing as opposed to what it might want to do in the future.

- In the present case, the Certification Officer could not be faulted on appeal and the EAT adjudicated accordingly as it was not the function of the EAT to decide whether the organisation was or was not a trade union, but to decide whether the CO was wrong, in law, in deciding that it was or was not a trade union.

- The *USDAW case* is an interesting case of the EAT's confidence in re-writing primary legislation and using the *Marleasing case* [1990] ECR I-4135 principles; namely, the words 'at one establishment' in section 188 of the Trade Union and Labour relations (Consolidation) Act 1992, were to be omitted - and there was no need to add the words 'at one or more establishments' - so as to give it effect to and conform to the core objective of Directive 98/59 relating to the protection of workers dismissed by collective redundancy.

- This case will have long term implications far exceeding the present case, which granted protective awards to workplaces where 20 or more redundancies, in total, were made and not limited to 'one establishment', as there was no requirement in the Directive to introduce 'at one establishment' into the 1992 Act and those words did not come from the Directive and nor had those words been the subject of any consultation or Parliamentary debate around the Act.

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- The *Marleasing* principles permitted the words to be added or removed when interpreting national law in accordance with EU law and the only way to deliver the core objective of the Directive was to construe 'establishment' as being the business of the employer - ie not limited to any site/unit. The Directive did, of course, have direct effect in respect of emanations of the State.

- The ***Toal case*** is also a timely reinforcement that an employee's right to be accompanied at a grievance meeting by a companion of his choice, pursuant to section 10 of the Employment Relations Act 1999, did not require approval of that choice from the employer or that the choice had to be a reasonable one. It was up to the employee who he brought to the meeting - provided the proposed companion met the requirements of section 10(3) - and the employer must permit him to accompany the employee.

- The ***Roffey case*** related to the revocation of travel benefits for striking British Airways air crew and the Blacklist Regulations 2010, which prohibited discrimination on the basis of trade union membership or participation in trade union activities. The employees were undertaking "official" strike action, at the relevant time, which had been authorised by a trade union and had been organised in conformity with the relevant statutory criteria.

- Before the European Court of Human Rights, the applicants complained that the loss of travel for the strikers constituted an unjustified interference with their right to freedom of association in violation of Article 11 of the Convention on Human Rights and Fundamental Freedoms.

- The Government mounted a fierce defence of the case arguing:-

  i. the applicants and the union did not have victim status;
  ii. the domestic remedies had not been exhausted; and
  iii. the complaints were outside of the 6 month time limit for complaint.

- The Court dismissed the cases on the 6 months time limit and refused to come to any firm conclusions on the victim status or the exhaustion of the domestic remedies.

- The ***Professional Trades Union for Prison case*** related to prison officers who were vested with the 'powers or privileges of a constable' under the Prisons Act 1952 and used to be expressly excluded from the term "employees" and "workers" action under sections 219 and 280 of the Trade Union and Labour Relations (Consolidation) Act 1992. However, sections 126 and 127 of the Criminal Justice and Public Order Act 1994 restored the right of prison officers to be "workers" for the purpose of employment law, but retained the ban on industrial action.

- The present complaint was under Article 11 of the Convention that the outright statutory ban on industrial action by all prison officers and prison custody officers was in itself an unjustified restriction on the exercise of the right to freedom of association, along with the inexistence of adequate measure to compensate for the removal of any essential component of trade union rights.

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- The Court held that it was bound, for good legal and policy reasons, to not deal with any application that 'is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information' under Article 35(2)(b) of the Convention.

- The Court in, rejecting the applications, noted previous substantially similar (or same in substance) applications had been before the Committee on Freedom of Association and the European Committee of Social Rights. A sober lesson for the Government; in that, whilst the UK Government did not 'advert to this point in their submissions', it was still necessary for the Court to 'examine it of its own motion'.

- The ***UCATT case*** is peculiar on the facts as it involved the discipline of one of its members who was held to have been unfairly dismissed by an ET, with no *Polkey* discount as no reasonable employer would have found employee guilty of fraud or dishonesty, but that the employee had contributed to his dismissal in a situation that he knew was wrong. The employee was summarily dismissed for gross misconduct and alleged dishonesty.

- The EAT ruled that the ET had not made a finding as to the reason for dismissal and the ET reference to 'substantively unfair' was confusing because, in normal usage, procedural unfairness was distinguished from substantive unfairness. Some of the reasons given by the ET for finding the employee dismissal to have been unfair were held to be unsustainable and the issues concerning Polkey reduction and contributory conduct were remitted, with the hearing to proceed on the basis of dismissal being for dishonesty, but that it was procedurally unfair. The EAT also held that, in this case, it would not be just to impose a reduction for contributory liability as well as a *Polkey* discount.

- The ***George case*** related to prison officers and collective agreements. It was held that a term which provided that prison officers who worked more then their normal 39 hours week would be given time off in lieu 'as soon as operationally possible and within a maximum period of 5 weeks' had not been incorporated into the contract of employment. Furthermore, even if it had been impliedly incorporated, it was not intended to be anything more then guidance and was not 'apt' for incorporation, as there was no evidence that the parties intended the relevant paragraph to be legally binding. At best, the paragraph was aspirational and for guidance purposes, only.

- The key evidence being that two standard letters from the Ministry indicated that 'procedures, policies and rules' relevant to the employment were set out in the staff handbook, but made it clear that what was in the handbook did not generally form part of the contract of employment. The claimant had no contrary evidence to satisfy his claim and duly lost.

- The ***Working Links case*** involved the potential recognition of a trade union and the EAT held that an employer was not to be held to have recognised a trade union, unless the evidence was clear. Evidence of discussions did not convert it to negotiations for purposes of trade union recognition and the case was duly remitted.