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Members as workers: Protect your law firm after Clyde & Co v Bates van Winklehof

Clare Murray examines the impact of the landmark UK Supreme Court decision in *Clyde & Co LLP and another v Bates van Winklehof* on law firms

At the end of May 2014, the UK Supreme Court handed down its decision in *Clyde & Co LLP and another (Respondents) v Bates van Winklehof* (Appellant). The decision confirmed that an LLP member is now a 'worker' within the meaning of section 230(3)(b) of the Employment Rights Act 1996.

The decision is significant for LLPs, their members and for senior management. LLP members who now uncover evidence of wrongdoing or malpractice in business or elsewhere are protected if they blow the whistle on such wrongdoing. As a by-product of the decision, LLP members are now also entitled to other statutory rights that are available to 'workers'.

The case is a landmark partnership and employment law decision, setting a precedent to which all professional practices will need to take heed. But, what are the practical implications of the decision? And what pressing checks and changes should law firm management be carrying out to best protect their firms going forward?

Rights of 'workers'

LLP members now benefit from a range of additional protections. While not all of these are game-changers for LLPs, there is without doubt a sense of a general shift in the perception of LLP members as being something more akin to employees than was commonly understood. The change in the tax treatment of salaried members earlier this year certainly marked a full-on assault on the status, and the changes that have come with the Clyde & Co case have added to that view.

Whistleblowing protection

Most obviously, LLP members now benefit from the protection against an unlawful detriment from having blown the whistle; firms and individuals that victimise them for doing so face potential claims for unlimited compensation. There is no qualifying period for a whistleblowing detriment claim, which must be brought in the employment tribunal (notwithstanding any arbitration clauses in the firm's LLP agreement).

The remedy for a successful claim for suffering an unlawful detriment for having blown the whistle is primarily loss based, but it is uncapped (similar to discrimination remedies). A successful whistleblowing claim against a professional services LLP and, for example, any individual member of senior management who was responsible for such treatment, could be costly, both financially and reputationally.

Whistleblowers will often struggle to find alternative positions elsewhere if they are forced to leave their jobs. In the legal sector, the losses claimed for a whistleblowing LLP member who is expelled will often be substantial, typically based on the loss of a number of years' profit share, or the long-term shortfall suffered if the member had to leave a well-paid job at a top-tier firm for a lower-paid role elsewhere.

Individual members of the firm, including members of senior management, who are named as co-respondents in the proceedings, can be personally responsible for awards of compensation made by the employment tribunal.

Therefore, when taking any negative actions in respect of LLP members, firms should adopt the best practice of:

- identifying and recording the legitimate (and non-discriminatory) reasons as to why such action is being taken; and
- following a clear, consistent and well-documented procedure in doing so, ideally in line with established partner/member policies.

For example, if the firm decides to compulsorily retire, demote, downgrade the profit

share banding or otherwise subject an individual member to unfavourable treatment, it should record the clear business reasons for having done so, in order to assist in showing that it was not in response to whistleblowing by the member but rather for unrelated, genuine business reasons.

Such an approach will also normally help to reduce the risk of successful claims against the firm and senior management for unlawful discrimination against members on the key protected grounds of sex, race, age, disability, religion/belief and sexual orientation. Members and partners were already protected against such unlawful discrimination before the Supreme Court decision in Clyde & Co, but firms rarely do enough to protect themselves against such claims.

Rigorous partner performance management programmes that are consistently applied to all members will also assist firms in showing that steps taken in respect of individual members are not related to whistleblowing but rather to issues around underperformance. Again, this is an area where, while performance reviews are undertaken, they rarely provide an accurate and unflinching account of individual partner performance. Too often, there are gaping holes which leave the firm wide open as to whether the true reason for the treatment was the fact that the member blew the whistle on wrongdoing in the firm or if it was for another discriminatory reason.

Most importantly, though, all professional practices should be updating their whistleblowing policies (and training) not only to reflect the fact that members now have whistleblowing protections, but also to positively encourage members to come forward and promptly disclose to the firm any potentially corrupt and unlawful practices which they may come across in the firm, in their clients' businesses and elsewhere, without fear of placing their careers and livelihoods in jeopardy.

Other worker rights

LLP members also now have a range of quasi-employment protections against certain types of unlawful treatment by their firms. Key additional changes to LLP members' rights (on which LLPs and management should consider taking imminent action) now include the following.

Part-time worker protection

Part-time LLP members can now challenge less favourable treatment which is on the grounds of their part-time status, unless it can be objectively justified by their firm under the Part-Time Workers Regulations (PTW). There is no qualifying period for bringing such a claim and it applies equally to men and women.

While this is a substantial new protection for LLP members, firms that already operate a transparent and fair partnership structure conceivably face limited risk with this type of claim. However, now is an opportune time for firms to audit their procedures, policies and LLP agreement to identify any terms that treat part-time members any less favourably than their full-time counterparts.

During an audit, a firm should adopt the 'pro rata' principle. This means that, compared to full-time LLP members, part-time LLP members should receive a proportion of the profit share or of any benefit relative to the number of weekly days or hours that they work compared to their full-time comparators. If any less favourable terms or treatment cannot be objectively justified, the firm will need to take the necessary steps to remedy the difference in treatment.

Key areas for firms to audit include:

- checking the pro-rata reduction in LLP members' profit share arrangements is no greater than it should be;
- auditing the level of partner promotions from associate to salaried/fixed share member, and from salaried/fixed share to full equity, having regard to any disparities between those who work part time and those who work full time (to ensure that part-time status is not a barrier to any such promotion); and
- checking that the criteria used for partner exits are objectively justified and do not treat part-time workers less favourably.

In practice, part-time working in professional practices remains dominated by female LLP members who, if faced with less favourable treatment, could already bring sex discrimination claims.

Therefore, the new PTW protection for LLP members may not cause a new flurry of claims or exposure for firms, but they may add extra or alternative firepower to those members who are already considering claims on grounds of sex discrimination, given that PTW claims are generally less complex and arguably less costly to run.

Wage deductions

The right not to suffer an unauthorised deduction from wages now also applies to members. A deduction can be made exceptionally where the worker has given prior written consent (before the deduction is made).

LLPs will now have to ensure that they have the express right to deduct and withhold monies (including profit shares) due to members and that such terms are sufficiently well drafted to allow for deductions in particular circumstances (such as for

overdrawings, losses sustained as a result of the member's breach of LLP agreement terms, and any other deductions or debits from a member's current account or related balances).

Many (though not all) LLP agreements contain general blanket deductions clauses; these should be carefully considered to determine whether they provide adequate consent from members to any deduction from their pay. Members may bring unlawful deduction claims to an employment tribunal, in a fast and fairly low-cost regime, to recover amounts that have been deducted from their pay without their clear consent.

Employer pension contributions

Members have also gained the right to pension contributions from their employers under the auto-enrolment scheme. As 'workers', it is also likely that LLP members will be classed as eligible 'jobholders' under the Pensions Act 2011, meaning that LLPs may now also be required to automatically enrol their members into an occupational pension scheme.

Firms will therefore need to take urgent specialist pensions law advice on this issue, especially, for example, if they have already missed the staging date for auto-enrolment of workers. Those firms that have passed their designated staging date should now seek specific advice on how to approach the pensions regulator.

Working hours

Members have also gained protections under the Working Time Regulations (WTR). These include paid annual leave, rest breaks and average working time (including overtime) which does not exceed 48 hours per week. In addition, firms will need to keep records of such working time.

Members with autonomous decision-making powers who have control over the hours they work and whose time is not monitored or determined by their employer are partially exempted from provisions including:

- the limits on average weekly working time;
- the right to daily and weekly rest breaks and periods; and
- the need for employers to keep records of their working time.

Firms will therefore need to consider if their members fall within this exception. If not, LLPs should check their current documentation to see whether the LLP has agreed to modifications or excluded the limits of certain provisions of the WTR (which, again, is permissible under the WTR). In practice, unless a member is bringing a stress and personal injury-related claim against their firm, the impact of the WTR is likely to be limited.

Disciplinary processes

By virtue of the Employment Relations Act 1999, LLP members as 'workers' will now have the right to be accompanied at a disciplinary or grievance hearing if they reasonably request it.

This could, in practice, be quite a significant development, as few LLP agreements presently provide a clear mechanism for handling member disciplinary processes; those that do rarely provide for the member to have an express right to be accompanied in the disciplinary process.

This protection is more likely to open up the decision-making process of senior management in handling disciplinary issues to wider scrutiny and ensure greater transparency amongst partners. This, in turn, should lead to more properly documented procedures and decision making being adopted by firms.

Grievance procedures

The right to be accompanied at a grievance hearing could (and realistically should) lead to the development of partner grievance procedures. This would allow partners to raise in a formal and structured manner their concerns regarding their treatment by their firm and colleagues.

Operating such procedures may allow firms the opportunity to resolve issues and retain talent, whilst at the same time to build their defence against future litigation by documenting their legitimate business reasons for member treatment long before the member threatens proceedings.

Traditional partnerships

The Supreme Court decision is only applicable to members of an LLP, as opposed to general partners in a traditional partnership. Under the Partnership Act 1890, genuine partners in a traditional partnership are currently regarded as neither employees nor workers.

However, Lady Hale – who gave the lead judgment in the Supreme Court decision – considered that there was a "serious challenge" to the rule that a partner can never be an employee and, by extension, a "worker" in a partnership. It is a question which she confirmed was of "some complexity and difficulty".

So, there is currently an uneven playing field between the status (and rights) of LLP

members and general partners. However, does this change how general partners should respond and deal with actions against their partners?

In short, no: prudent partnerships should similarly adopt best practice by implementing clear policies and procedures and consistently following and documenting them when hiring, promoting, paying, performance managing, disciplining and exiting partners.

A seminal case

The *Winklehof* case is a seminal development in both LLP and whistleblowing legislation. The court considered that the conclusion it reached – that LLP members should have protection from whistleblowing legislation – was entirely consistent with the underlying policy of the whistleblowing provisions.

This is particularly applicable to businesses and professions operating within the tightly-regulated fields of legal and financial services. Managing partners now need to ensure that they are on top of the changes created by the case to best ensure protection for their law firms going forward.

Case background: Clyde & Co LLP and another v Bates van Winklehof

The case has been progressing through the court system since 2011. In summary, Krista Bates Van Winklehof was an English qualified solicitor, initially employed by Shadbolt & Co LLP to develop Shadbolt & Co's joint venture relationship with a Tanzanian law firm, FK Law. For Tanzanian legal reasons, she entered into a separate employment contract with FK Law. In 2009, Shadbolt & Co terminated its joint venture agreement with FK Law and entered into a new agreement with Ako Law, a different Tanzanian law firm. The claimant continued to be essentially engaged on the same basis as she had been with FK Law.

In 2009, Clyde & Co was negotiating to take over various parts of Shadbolt & Co's business (the deal was completed in February 2010), including the Tanzanian joint venture. Clyde & Co offered the claimant equity membership of the firm, which she accepted in early 2010, conditional upon the firm taking on certain parts of Shadbolt & Co's business.

Whilst labelled as an equity member, the claimant was essentially paid by way of a guaranteed level of remuneration (£103,000 as a profit share of the partnership; $85,000 as payment attributed to her employment with Ako Law and 20 per cent of the profits of the joint venture). There was another higher level of equity membership in the firm's structure – that of senior equity partner – which would be offered to the claimant once favourable results were achieved from the joint venture.

At the end of 2010, the claimant reported to the LLP's anti-money laundering reporting officers that the managing partner of Ako Law had allegedly been involved in paying bribes to secure work and to affect the outcome of cases. Bates van Winklehof claims that these were 'protected disclosures' within the meaning of the whistleblowing legislation. She alleges that she was subjected to a number of detriments as a result, including her suspension, the making of allegations of misconduct against her and, ultimately, her expulsion from the LLP in January 2011. These allegations are denied by the firm (and have not yet been tried).

The claimant subsequently brought two claims against the firm and a claim against a senior equity member of the firm who was directly involved in her expulsion. The first claim is a whistleblowing complaint. Her other claim relates to unlawful sex discrimination by both the firm and the senior equity member.

Clyde & Co objected to her whistleblowing claims on that grounds that, as an LLP member, she was not a 'worker' within the meaning of section 230(3)(b) of the 1996 Act. After an erratic journey through the court system (the Employment Tribunal and Court of Appeal found that she was not a worker, the Employment Appeal Tribunal held that she was), the Supreme Court had the final say; it confirmed that a member of an LLP could be a 'worker' within the meaning of section 230(3)(b) of the 1996 Act and so has protection from detrimental treatment for having 'blown the whistle'.

The case has now been remitted to the Employment Tribunal to determine the merits of the whistleblowing claim, along with Bates van Winklehof's sex discrimination claim.

Clare Murray is managing partner of specialist partnership and employment law firm CM Murray (www.cm-murray.com), which acted for the intervener, Public Concern at Work, in the Supreme Court in Clyde & Co LLP and another v Bates van Winklehof

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