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WHEN PARTNERS FALL SHORT

Processes for dealing with underperforming partners are often found to be the weak spot in a legal firm's management policies and procedures. Sarah Chilton discusses the risks to which this can give rise, and proposes some essential steps to minimise these

The management of underperforming partners can be a difficult process for any firm and one fraught with pitfalls, both legal and from the perspective of working relationships. Many professional practice firms will have comprehensive policies in place to manage the conduct and performance of their employees, and will usually implement those policies, but frequently will have no equivalent policies or procedures for partners. In particular, firms often have no formal performance management processes to deal with partner underperformance.

It is this deficiency that often makes partnership and LLP management so difficult. While many partnerships may have broad values and ethics statements to set standards for both the partners' relationships with each other and with the firm, such statements are usually not sufficiently prescriptive or robust to manage many difficult situations regularly faced by firms. The use and implementation of more specific policies and procedures is good practice management, but their existence and use is also important when managing the exit of underperforming partners, or partner conduct issues.

Exiting partners and discrimination claims

In our experience, the request that a partner leave a firm is often not preceded by any proper formal or meaningful discussion with the partner – a deficiency in an exit process that typically leads to confusion and anger on the part of the exiting partner, who will often feel unfairly targeted, leaving the firm exposed to the risk of a claim, and giving rise to an unnecessary dispute. Such an information gap and lack of communication between the firm, or its management, and the partner can, rightly or wrongly, create resentment and a sense of unfair treatment and lead to allegations against the firm and senior management of, among other things, discrimination, acting in bad faith or breach of express or implied terms of the partnership deed or LLP agreement.

One of the most common claims in this context is an allegation by the exiting partner of discrimination – age, sex and disability are the most common forms of discrimination claims which we encounter when advising firms or partners asked to leave on the grounds of poor performance.

Often allegations of sex discrimination are made when a firm raises concerns about the performance of a partner who has recently returned to work after maternity leave. The management of a partner's return from maternity leave can present challenges: the returning partner may receive little help to reintegrate; often their clients may have been transferred to another partner who may be reluctant to

return them; they will often have to build up a pipeline of work from very little; they may not have had an appraisal during which their performance was recorded prior to maternity leave; and there may be misconceptions about the partner's commitment, especially if she takes multiple maternity leaves and/or requests flexible or part-time working for childcare reasons. Those factors may negatively and unfairly impact perceptions of the partner's performance and skew some key performance indicators such as billings and chargeable hours.

Steps such as placing the partner on a performance management process or taking steps to retire or expel the partner, reduce her profit share or otherwise treat her unfavourably or less favourably in such circumstances, will expose the firm to potential claims of unlawful discrimination on grounds of pregnancy, maternity leave or sex.

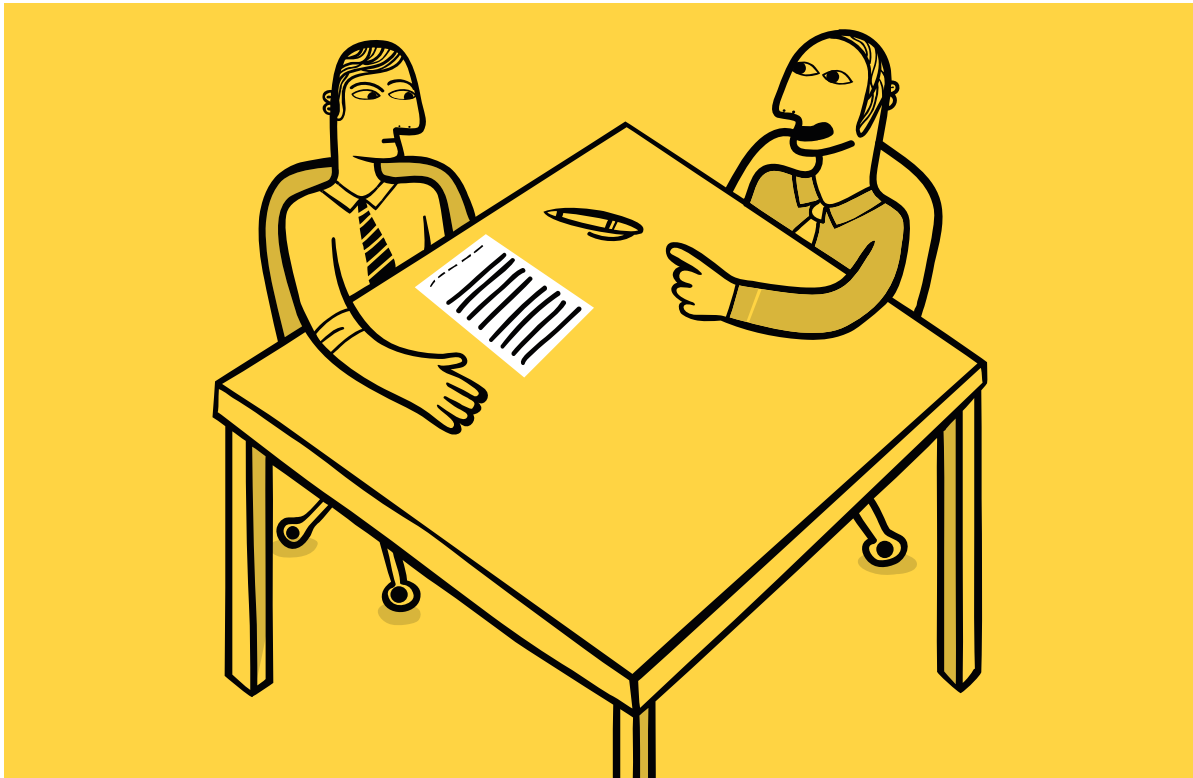
Of course, not all concerns will be unfounded, and in those situations it is crucial that any concerns have been documented properly. If the firm has no proper record of any performance concerns which existed before that partner informed it she was pregnant or commenced maternity leave, taking any action to manage or exit the partner exposes the firm to the risk of allegations of discrimination.

This issue was highlighted by the Employment Appeal Tribunal in the case of *Fennell v Foot Anstey LLP* UKEAT/0290/15/DM (28 July 2016). Foot Anstey was accused of age discrimination by Fennell, a limited equity partner (LEP). As part of a restructuring, the partnership removed LEP status, moving to a structure of a new grade of equity partner and a new employed legal director status; Fennell was offered a legal director role. He presented a claim to the employment tribunal alleging age discrimination. His complaints were rejected, the tribunal being satisfied that the reason he had not been offered the new equity partner status was because of his performance and not his age. Foot Anstey's record-keeping and earlier processes, including proper appraisals and performance management, were of key importance in their successful defence of this claim.

Other risks

In 2014 the Supreme Court ruled in *Clyde & Co v Bates van Winkelhof* [2014] UKSC 32 that LLP members were workers, and entitled to protection under the whistleblowing legislation. Any attempt to expel, retire or performance manage an LLP member on the grounds of performance, without properly recorded and documented appraisals and performance management processes, could expose a firm to a claim of unlawful detriment in circumstances where an LLP member has made a protected disclosure and can argue they are being unfairly treated as a result.

A further area of risk for firms is an allegation that they have breached an express or implied term of the LLP agreement or



partnership deed. There is no implied duty of good faith in LLPs, but some LLP agreements provide for an express duty of good faith as between members, or between the firm and each member, and traditional partnerships have an implied duty of good faith between all partners. A failure to manage underperforming partners properly may expose the firm (or other partners) to allegations that they have acted in bad faith, that is, that they have deliberately sought to damage the interests of the partner who is alleging that they are being unfairly treated. Before any action is taken, the firm should closely examine the partnership documentation and be aware of its express and implied obligations toward its partners.

What should firms do?

It is the vacuum of evidence which often places the firm at greatest risk in relation to claims from exiting partners.

To manage the exit of underperforming partners properly, it is critical that all necessary steps are taken properly and promptly both to minimise the risk and – importantly – to align partner contribution to the strategic needs of the business. The following steps are essential to consider for any professional practice:

- 1.** Have clear performance objectives for all partners and prospective partners so they all know what level of performance is expected of them, and the criteria against which they will be assessed for fixed share and equity promotion, profit share allocation, reallocation of partner status during any restructuring or downsizing, and ultimately expulsion or forced retirement.
- 2.** Have regular appraisals for partners, including those who are on any kind of family leave, with honest feedback. It is important that the firm gets to the bottom of the reason any partner is underperforming so it can deal with concerns and provide appropriate support, in order to help improve performance. This is particularly important in minimising the risk of a claim of disability discrimination, and allowing the firm to make reasonable adjustments for any disabled partners, where required.
- 3.** Have properly drafted, clear and unambiguous policies in place for dealing with underperforming partners, and make sure partners know which policies apply to them, and that those policies will be implemented consistently across the partnership. Firms should also have specific policies in

place which relate to, among other things, equality, anti-bullying and harassment, and partner conduct. Employee policies are often not appropriate for partners. Well-drafted policies can help manage any issues with performance and conduct, and help to defend firms from allegations of discrimination and bullying.

- 4.** Manage expectations – where a partner is warned that there are performance concerns, it should reduce the likelihood of a dispute. Often a dispute arises because the partner is shocked and distressed because they did not pick up (or were in denial) about the “subtle messages” the firm may have been sending them about their performance. Bridging this information gap will go some way to making any discussion with the partner about action being taken as regards their performance that bit easier, more productive and less risky.
- 5.** Know your LLP or partnership agreement – be on top of the provisions, grounds and processes for exiting a partner for performance and other reasons. Do not assume that silence in the agreement as to process or procedure gives the firm a free hand to exit a partner. Following and documenting the grounds and process for an underperforming partner exit will not only reduce the risk of potential discrimination and whistleblowing claims; it will also help address any allegations that the firm or senior management have acted in bad faith or in breach of the partnership/LLP agreement terms.
- 6.** Be aware of the various methods of exiting partners provided in the partnership or LLP agreement. Many agreements will allow for expulsion, a form of involuntary retirement and voluntary retirement (resignation). The provisions applicable to each of these types of exit will vary from firm to firm, with some involving return of capital in instalments, some involving accelerated return and others involving some form of lump sum additional payment with certain categories of exits. Firms should ensure that they have appropriate mechanisms in place and consider carefully the financial implications for exiting partners that they want to include in their agreements.

By adopting robust and proper policies and procedures throughout, a firm can place itself in a much stronger position to manage exiting partners and to respond to any claims and complaints. Such steps will also put individual partners in a better position to understand and have time to address any performance issues before the situation becomes untenable. 📌



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