Whistleblowing

Employment Law

Protection for Whistleblowing LLP Members:
A breakfast briefing from the Partnership Law team at Slater & Gordon

Overview

Andrew Stafford QC of Littleton Chambers came along to our recent breakfast session to talk about the implications of the recent Court of Appeal decision in *Clyde & Co v Bates van Winkelhof* for the rights of LLP members. Having acted successfully for Clyde & Co in the case, Andrew was perfectly placed to lead the discussion, (so far as he was able to do so).

Paul Daniels (pictured) and **Samantha Mangwana**, partners with a special interest in whistleblowing, have put together some of their thoughts following the discussion, which we hope will interest you.

The decision

In *Clyde & Co v Bates van Winkelhof,* the Court of Appeal has overturned the Employment Appeal Tribunal's earlier decision that Ms Bates van Winkelhof, a former LLP member of Clyde and Co LLP was a "worker" under s203(3) of the Employment Rights Act 1996 (ERA). The decision means that it would not be unlawful to subject her to a detriment for making a protected disclosure, as well as depriving her of numerous other employment rights protections as a 'worker'.

In reaching its decision, the Court of Appeal considered the effect of s 4(4) of the Limited Liability Partnerships Act 2000, which states that "*a member of a limited liability partnership shall not be regarded for any purpose as employed by the limited liability partnership unless, if he and the other members were partners in a partnership, he would be regarded for that purpose as employed by the partnership*".

The focus was therefore whether Ms van Winkelhof would have been regarded as a partner in a traditional partnership. If so, she could not be regarded as an employee. Given that she had the right to participate in profits, the right to access the accounts, and certain voting rights, the Court of Appeal decided this was consistent with being a partner in an old style (1891 Act) partnership. This was consistent also with the narrow approach previously taken in *Tiffin v Lester Aldridge LLP*, where the Court of Appeal held that that particular LLP member was not an employee either.

But even though Ms van Winkelhof was not an employee, could she be a worker? Section 230(3)(b) ERA, includes as 'workers' individuals working under a contract personally to undertake to work for another, other than independent contractors.

In the Court of Appeal's view, the concept did not really work, since a partner in a partnership would essentially be contracting with his or herself. Conceptually also, a partner goes into business with others, and so is not subordinate to them.

Application in practice?

But while this logic is clear in theory, as practitioners we may question its application in practice. After all, as was seen by the facts in *Tiffin*, being a junior member in some LLPs is in real-terms often a subordinate position, much more akin in nature to an employee relationship, than a co-owning equity partner. In Hedge Funds, often structured as LLPs, it is standard for the majority to be a member, however remote or hypothetical their bargaining power.

Campaigners are also concerned about the implications of the decision, which as it stands means that an LLP member who suffers reprisals for blowing the whistle on criminality, malpractice, or any other breach of a legal obligation, has no statutory protection under the Public Interest Disclosure Act 1996.

We understand that the UK's leading whistleblowing charity, Public Concern at Work, are seeking to intervene at Supreme Court level for this reason in order to pursue a purposive interpretation of the legislation as well as campaigning to reform whistleblowing laws.

Comparable Rights

Will a revision to the legislation be required, to extend the ambit of protection to partners and LLP members? This is how the Equality Act 2010 operates, so LLP members and partners do not have to prove they are 'workers' for discrimination and harassment against them to be unlawful.

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Again, the comparative lack of protection seems odd from a public policy perspective - that someone ejected from their job for blowing the whistle is less worthy of protection than someone facing discrimination?

Duties to Report

Fiduciary duties will also be owed by members of a LLP, including a duty to act in the utmost good faith, and not to place oneself in a conflict of interests. Complying with these duties could well require a LLP member to make disclosures of wrongdoing or legal/regulatory breaches. Indeed, under outcomes-focused regulation, solicitors are required to report promptly serious misconduct by any employee, manager, owner or other regulated person to the Solicitors Regulatory Authority.

Although the LLP member or partner may be obliged by law to do so, existing whistleblowing laws may now offer no protection from reprisals.

Dispute Resolution

In an expulsion situation, given the principle in *Lavarack v. Woods of Colchester Ltd* the notice monies available to a LLP member may not realistically be of much value. Is there an argument for injunctive relief in these circumstances, on the basis that damages are not an adequate remedy? On any view, it may well be too daunting for a junior member to take on a LLP in such circumstances.

Is there an argument around stigma damages? *BCCI v Malik* started well but ended badly for the employee claimants, since it was very difficult when it came down to it to prove that it made a difference to their job prospects. By the very act of becoming a whistleblower, the individual LLP member is clearly disassociating themselves from the stigma after all. So that route looks troublesome too.

The vulnerability of the junior LLP member

Fiduciary duties of utmost good faith underpin the very essence of an old-style partnership, but a new-style LLP is a very different beast. The LLP is an independent third party, distinct from its constituent members in a way that equity partners in partnerships were not. The duties owed by a LLP to its members can be quite different.

Following on from *Tiffin*, a case where although the LLP member was only on a low fixed share, with low voting rights and a very low percentage of profits on dissolution, he was denied the basic unfair dismissal rights employee status would have afforded, the impact of the Court of Appeal decision in *Bates van Winkelhof* comes as “a double whammy”.

Ambitious associates take a step into junior LLP membership at their peril - sacrificing basic employment rights in the hope of a better bargaining position one day. Across the City, where recent financial scandals have demonstrated the importance to society of encouraging whistleblowers to speak up, LLP structures are commonplace. Many will feel that it is scary in a FSA-regulated environment to have disclosure duties yet no protection.

What can be done to improve the position of LLP members now? Will cases now focus on whether that individual’s specific circumstances in fact fall below the bar to qualify as a genuine partner in an old-style partnership? Could whistleblowing protection instead be given contractually, in LLP agreements?

Although the case may be appealed to the Supreme Court, it is unlikely that the decision will resolve all of these issues. Any Supreme Court decision may perhaps offer clarity on territorial jurisdiction, specifically determining whether having a sufficiently strong connection with England and Wales should be the test, or alternatively a comparative exercise between two jurisdictions to assess where the connection is stronger. But many other conundrums will remain.

What Chambers & Partners say about us:

This partnership practice operates within the firm's employment and business services team. It offers advice on every stage of the partnership process, from the tax issues and paperwork involved in the set-up to issues arising from terminations or departures, including any disputes. Clients consider the lawyers to be "**excellent, very knowledgeable, experienced and supportive. They were decisive and spoke with conviction and authority, which gave me a lot of confidence**." Sources say that the service provided by the team went "**over and above the call of duty and was good value for money**."

Contact us

Please feel free to discuss your own position and concerns.
Contact your nearest office on:

T: 0207 657 1508
E: PDaniels@rjwslatergordon.co.uk
W: www.rjw.co.uk

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