Partners, Priests and Politics

In this paper I seek to pick up on three specific areas which have recently been under the spotlight.

- The status of partners is due to be examined by the Supreme Court on 24 March 2014 in *Bates van Winkelhof v Clyde & Co*.
- Employment status of the clergy has generated a large body of recent case law – but does it generate principles of wider significance?
- The role of politics in employment law has been most starkly seen in the last year with employment fees. In the area of employment status we have had the introduction of "employee shareholders" – the level of take up is not clear. Looking to the future the topic of zero hours contracts - which are undoubtedly very widely used – continues to be of significant interest.

Partners

The Limited Liability Partnership Act 2000 provides at s4(4) :

> "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 other partners were in a partnership, he would be regarded for that purpose as employed by the partnership."

Simply being a member of an LLP will not answer the enquiry as to whether that person might also be considered an 'employee'. There are obviously different "types" of partners; while equity partners will not be employees and salaried partners probably will these are not the only categories of partnership.

It is of note that most of the authority on whether there is a true partnership arises in the context of the question whether a salaried partner's actions *bind* the partnership, not in the context of the relationship *with* the partnership as such (for example, for the purpose of this exercise of employment law rights by the salaried partner). In the latter context, it was said in *Burgess v O'Brien (1966) 1 ITR 164* that a salaried partner is not *necessarily* an employee for statutory purposes, and so the position remains (in the words of the ultimate lawyer's cop-out) a question of fact in each case.

Tiffin v Lester Aldridge LLP [2012] IRLR 391, CA.

Martin Tiffin commenced employment with Lester Aldridge as an associate in 2001. In 2005 he was promoted to salaried partner – and was expressly said still to be an employee. In 2006 he was admitted to the partnership as a "fixed share partner". Upon that promotion, the facts as found by the ET were as follows:

> "Instead of a salary, he was paid monthly drawings, calculated on the basis of an annual fixed share of profits of £62,500. He was also entitled to five 'profit share points', the value of which depended on LA's actual profits for the financial year. He was required to, and did, make a capital contribution of £5,000 to LA. He became a signatory on LA's client and office bank accounts. LA regarded him as no longer an employee, but as a partner, and issued him with a P45 confirming 30 April 2006 as his last day of employment. His national insurance contribution classes changed to classes 2 and 4. LA paid for additional benefits of permanent health insurance and life assurance for him, being benefits differing from those he had previously enjoyed as an employee. He was required to make his own pension arrangements, could claim motor, other travel and also telephone expenses for his personal use and was responsible for dealing with his own income tax."

He signed a partnership agreement in 2007 when LA - which until then had been a 'partnership' under the Partnership Act 1890, became an LLP. Full equity partners were considered to be those who had fifty profit share points or more – most having 100 – 200 points ,while fixed share partners were those with fewer than 50 points. Salaried partners were expressly said to be employees; they did not pay any contribution to the LLP, had no share of the profit and no say in management.

In 2008 Mr Lester was served with a dismissal notice and his membership of the LLP was terminated. He sought to bring a claim in the ET for unfair dismissal and for a redundancy payment. A preliminary hearing was held to determine whether Mr Tiffin was an "employee" for the purposes of s 230 ERA 1996. It was held that he was not – that he did not work under a contract for services, but pursuant to the LLPs membership agreement.
This judgment was upheld by the EAT and CA.

Rimer LJ giving judgment of CA explained that the drafting of s.4(4) LLP Act 2000 raises problems.

> "In law, an individual cannot be an employee of himself. Nor can a partner in a partnership be an employee of the partnership, because it is equally not possible for an

> individual to be an employee of himself and his co-partners. Unfortunately, the authors of s.4(4) were apparently unaware of this."

He went on to consider firstly the problem raised:

> "The subsection is directed to ascertaining whether a particular member (call him A) of an LLP is or is not for any purpose an employee of it. The statutory hypothesis which the subsection requires in order to answer that question is that A and the other members of the LLP 'were partners in a partnership'. That hypothesis, if it is to be read and applied literally, must in every case produce the same answer, namely that A cannot be an employee of the LLP for any purpose. If that had been Parliament's intention when enacting s.4(4), it might just as well have ended the subsection immediately before the word 'unless'. That, however, was plainly not its intention. The subsequent words must be contemplating a practical inquiry that, in particular factual circumstances, will yield a yes or no answer to the question whether a particular member of an LLP is an employee of it. The subsection must, therefore, be interpreted in a way that avoids the absurdity inherent in a literal application of its chosen language so that it can be applied in a practical manner that will achieve the result that I consider it obviously intended. The presumption is that Parliament does not intend to enact legislation whose application results in absurdities, and s.4(4) must therefore be interpreted with that in mind.

And secondly the correct approach to avoid the absurdity:

> "it requires an assumption that the business of the LLP has been carried on in partnership by two or more of its members as partners; and, upon that assumption, an inquiry as to whether or not the person whose status is in question would have been one of such partners. If the answer to that inquiry is that he *would* have been a partner, then he could not have been an employee and so he will not be, nor have been, an employee of the LLP. If the answer is that he would *not* have been a partner, there must then be a further inquiry as to whether his relationship with the notional partnership would have been that of an employee.

To make this enquiry the membership agreement will be a key document, but alongside that there must be an examination of the circumstances in which a person could be a partner under the Partnership Act 1890.

Applying this to Mr Tiffin, the CA held that it was proper to regard the full equity partners and fixed share partners as being in a partnership relationship – albeit that their commercial interests were materially different. Full equity partners put more capital in and expected greater profits in return. They also had a great deal more say in management. Nevertheless, both categories contributed capital, shared profits, had a voice in management and had a

prospect of a share in the surplus assets on winding up. The relevant contrast drawn by the members' agreement was not between the full equity partners and the fixed share partners. It was between those two classes of partner on the one hand and the salaried partners on the other – with the members' agreement making it clear that the latter were employees. They made no capital contribution and had no share of the profits, no share in surplus assets on a winding up, and no voice as of right in relation to the management of the firm.

Bates van Winkelhof v Clyde & Co LLP [2012] IRLR 992, CA

The rationale from *Tiffin* - the simple principle that a person cannot be his or her own employer –was applied and taken a stage further in *Bates van Winkelhof* where it was held that an LLP partner is not a 'worker' either. It was held that s 4(4) LLP Act 2000 applies to both employee *and* worker status, partly on the legal ground that a person cannot be their own employer and partly on the wider social ground that there is not the necessary element of subordination.

Ms Bates van Winklehof was a solicitor working for Shadbolt and Co LLP, seconded to a Tanzanian law firm with whom she had an employment contract to enable her to work in Tanzania. Mrs Bates van Winklehof worked principally (though not exclusively) in Tanzania. Shadbolts entered into a joint venture with a second Tanzanian firm, Ako law to which she transferred. Clyde and Co LLP acquired parts of Shadbolts, including the part in which Mrs Bates van W was engaged. In February 2010 she was made an equity partner of Clyde & Co LLP and continued working mainly in Tanzania. In November 2010 she reported to the LLP's money laundering officers that the managing partner of Ako Law told her that he paid bribes to secure work and the outcome of cases. She was dismissed by Ako Law and suspended by the LLP, and in January 2011 expelled by the LLP.

Mrs Bates van W brought claims in the ET for sex discrimination, pregnancy related discrimination and 'whistle blowing'. Jurisdictional issues arose as to territorial jurisdiction and whether she was a "worker" under s 230 ERA so as to be able to bring a whistleblowing complaint. (She could clearly bring the discrimination complaints under s 45 EqA which extends protection to partners of LLPs.) The ET held that she was not a 'worker' so they did not have jurisdiction. The EAT disagreed and considered she was a "worker" – both were satisfied as to territorial jurisdiction.

Elias LJ gave the judgment of the CA and held that under s4(4) LLP Act 2000 Mrs Bates Van W was a member of the LLP who, if it had not been registered as an LLP would have been a partner in an 1890 Act partnership and could not be a "worker" within s 230 ERA. She could not therefore pursue her whistleblowing complaint. Elias LJ considered that the essential nature of the relationship between partners, who act as agents for other partners and are responsible for the acts of other partners, places them outside the sphere of employment relations entirely.

The Supreme Court heard argument on 24 and 25 March 2014.

One of the arguments on behalf of Ms Bates van W is that it ought not to be considered to be legally impossible for a person who is a "partner" to contract with themselves, so as to make them either a worker – or even an employee.

Interesting Issues:

- Should whistleblowers have less protection than those discriminated against?
- What of situations where an LLP Partner has a duty to report wrongdoing? Eg solicitors to the SRA? Are they left without protection?
- What of LLPs in the financial sector where there may be obligations imposed by the FCA (Financial Conduct Authority)? Will they have a duty to disclose and yet no protection if they do so and are "fired"?
- Could …. Or should… whistleblowing protection be given contractually in LLP agreements?

Priests.

Members of the clergy have traditionally been regarded as officeholders. In Percy v Church of Scotland Board of National Mission [2005] UKHL 73 there was a concession that a minister was not an "employee" but a finding that she did come within the definition of worker so as to be able to pursue a discrimination claim. Caselaw followed as to whether clergy could be "employees" within the ERA. Most recently the Supreme Court have visited the question of the status of members of the clergy in *President of the Methodist Conference v Preston* [2013] IRLR 646. Lord Sumption stated:

> "… the question of whether a minister of religion serves under a contract of employment can no longer be answered simply by classifying the minister's occupation by type: office or employment, spiritual or secular….. The primary considerations are the manner in which the minister was engaged and the character of the rules or terms governing his or her service. But as with all exercises in contractual construction, these documents and any other admissible evidence on the parties' intentions fall to be construed against their factual background Part of that background is the fundamentally spiritual purpose of the functions of a minister of religion".

In Preston regard was had to the non contractual manner of engagement, the fact the ministry was for life with no right of resignation, and the provision of the stipend and manse (accommodation). The majority viewed those matters as pointing against an employment relationship where an individual in effect had a vocation.

Baroness Hale – the sole voice of dissent – held "everything about this arrangement looks contractual" noting that a Methodist minister is assigned "to a particular post, with a particular set of duties and expectations, a particular manse and a stipend which depends (at the very least) on the level of responsibility entailed, and for a defined period of time. In any other context, that would involve a contract of employment in that post."

Political moves:

As always in the sphere of employment law, political ideology is never far away. New legislative provisions for employee shareholders came into force on 1 September 2013, and 'zero hours' contracts feature regularly in the news.

Employee shareholders

Coalition Government were keen to see the use of employee shareholder agreements encouraged and facilitated. The concept is that an 'employee shareholder' will remain in essence an employee but with certain share rights (with tax advantages). The trade-off for this is the abandonment by such persons of certain employment protection rights. In so providing, the government were also pursuing their policy of lessening the regulatory burden on

business. In drafting this new concept, however, they had to be careful not to remove any rights underwritten by EU law, which explains some of the exceptions.

Employment Rights Act 1996 s 205A was inserted as from 1 September 2013 by the Growth and Infrastructure Act 2013 s 31.

The statutory definition of an 'employee shareholder' is set out in s 205A(1):

> "An individual who is or becomes an employee of a company is an "employee shareholder" if—
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> (a) the company and the individual agree that the individual is to be an employee shareholder,
>
> (b) in consideration of that agreement, the company issues or allots to the individual fully paid up shares in the company, or procures the issue or allotment to the individual of fully paid up shares in its parent undertaking, which have a value, on the day of issue or allotment, of no less than £2,000,
>
> (c) the company gives the individual a written statement of the particulars of the status of employee shareholder and of the rights which attach to the shares referred to in paragraph (b) ("the employee shares") …, and
>
> (d) the individual gives no consideration other than by entering into the agreement."

The alterations to an employee's employment rights made by s 205A(2)–(4) are that he or she does *not* have the right:

(1) to make a request to undertake study or training under the ERA 1996 s 63D;

(2) to make a request for flexible working under s 80F (other than making such a request within 14 days of returning from parental leave);

(3) not to be unfairly dismissed under s 94; and

(4) to claim a redundancy payment under s 135.

In relation to the unfair dismissal exclusion, it is important to note that this does *not* apply to:

(1) dismissal for a reason made *automatically* unfair by any legislation (in practice this primarily means the ERA 1996 ss 98B to 105);

(2) dismissal which 'amounts to a contravention of the Equality Act 2010'; and

(3) dismissal because of suspension from work for health and safety reasons (ERA 1996 s 64(2)).

Further, an individual is specifically protected from detriment or dismissal because he or she refused to accept an offer by the employer to become an employee shareholder (ERA 1996 ss 47A and 104G, added by the Growth and Infrastructure Act 2013 s 31(2) and (4)). A dismissal on these grounds is declared to be automatically unfair, with no need for the employee to serve the usual qualifying period. This is of course important (particularly with a two year qualifying period normally) to prevent an employer taking the individual on and then shortly afterwards pressurising him or her to transfer status. On the other hand, however, there is nothing in the legislation to stop an employer advertising a post on the basis that it is to be under employee shareholder status and appointing appropriately, provided the procedure set out below is adopted.

The section mentions the minimum amount of shares that must be on offer, namely £2,000. There is then for tax purposes a maximum of £50,000 under this scheme. The necessary changes to tax law were made by the Finance Act 2013 Sch 23. In essence, the first £2,000 worth is free of income tax and NICs and there is no charge to capital gains tax on the eventual disposal of the shares (up to the £50,000 maximum). The value of shares for these purposes is to be their market value – defined by the Taxation of Chargeable Gains Act 1992 ss 272 and 273.

Zero Hours.

Ann Sharpe, Chief Exec of ACAS said in January 2014:

> "If used responsibly by employers, zero hours contracts can offer valuable flexibility for both them and employees. But we know from calls to the Acas Helpline that there's a lot of uncertainty on both sides around these contracts which leads to confusion.
>
> "Employee callers in particular identified strong concerns about their terms being changed at short notice. That's why we welcome the Government's announcement of a consultation on zero hours contracts which will look at improving guidance for both employers and employees on their use."

The government consultation referred to closed on 13 March 2014, and the focus seemed to be on maximising the opportunities for zero hours contracts while minimising abuse by setting out core protective standards. In particular the consultation explored concerns about "exclusivity clauses" and "transparency" (ie. do individuals know they are to be recruited onto zero hours contracts / how much notice will they get if they are not required to work / what rights will individuals on such contracts have?).

The types of issues which the use of zero hours contracts give rise to was seen in the recent judgment of HHJ McMullen QC in *G4S Secure Solutions Ltd v Alphonso* UKEAT 0051/13. In that case we are reminded that the starting point to consider whether a person under no obligation to accept work, from another who is under no obligation to offer it, *may* still be under a contract with sufficient mutuality of obligation to make them an "employee". As set out in the judgment of the CA in *Clark v Oxfordshire Health Authority* [1998] IRLR 125 at p 130,

> "On the findings of the industrial tribunal, the authority was at no relevant time under any obligation to offer the Applicant work now was she under any obligation to accept it. I would, for my part, accept that the mutual obligations required to found a global contract of employment need not necessarily and in every case consist of obligations to provide and perform work. To take one obvious example, an obligation by the one party to accept and do work if offered and an obligation on the other party to pay a retainer during such periods as work was not offered would in my opinion, be likely to suffice."

This was followed of course in *Carmichael v National Power* [2000] IRLR 43, [1999] ICR 1226 where it was made clear that the key factor in the decision making was that the Respondent was not obliged to provide work and the Claimants were not obliged to accept work when it was offered, but that does not close the argument because it is possible for a contract of employment to survive.

Against this legal background the EAT considered the position of Mr Alphonso who originally started work as security guard for G4S in 2002. In 2011 he asked to move to a zero hours contract for personal reasons; this was agreed and put in place on 14 November that year. He was thereafter offered work twice, but then in May the next year he was sent his P45. It was automatically generated because he had not worked for three months and his

screening for suitability to work as a security guard had expired. He made an unfair dismissal claim. The question was, when did he stop being employed – when he received his P45, or when he transferred to a zero hours contract? G4S said his zero hours contract meant there was no obligation to offer work, or for him to take it, so it was not an employment contract but a self-employed arrangement.

It was not as simple as that, said the EAT - mutuality is only part of the equation.
Citing himself, HHJ McMullen set out "I said in the Judgment I gave in the EAT in *Quashie v Stringfellows Restaurants Ltd* [2012] EWCA Civ 1735, [2013] IRLR 99 with the agreement of counsel on both sides in that case that the starting point is to examine the relationship on the occasion when work is actually done. For, if that is an employment relationship, it is easier to bridge the gaps between those days when work is done than it is if the work is done as an independent contractor. In other words, you will not put up an umbrella relationship of employment when, on the days' work is done, there is not an employment relationship; rather it is the other way round."

This case was therefore remitted to "*examine the detail which is required to determine whether or not there was a contract of employment in this case*".

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