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Client Alert Commentary

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UK Supreme Court Says Members of Limited Liability Partnerships are Workers

Ruling implies that additional protections will be afforded to members of LLPs.

The UK Supreme Court recently ruled that members of a limited liability partnership (an LLP) are workers for the purpose of protections for whistleblowing. As the definition of "worker" used in the statute concerned is identical or very similar to that used in various other pieces of legislation, this decision means that the protection afforded to members of an LLP is wider than had previously been understood. In particular:

- The decision means that members of an LLP are potentially caught by minimum wage legislation (although this is not likely to be an issue in most cases).
- LLPs should consider whether the employer duties under the automatic enrolment legislation apply to their members. If so, and if the members meet the statutory conditions (including if they earn sufficient "qualifying earnings"), they would need to be automatically enrolled into a qualifying pension plan by the LLP.

Background

Most previous case law, including the decision of the Court of Appeal on the facts of this case, held that the concept of "worker" in UK law is incompatible with the status of members of an LLP and partners of a general partnership (in this article, we use the phrase "general partnership" to refer to partnerships governed by the Partnership Act 1890), who co-own the business and operate it in common with their fellow members (or partners, in the case of a general partnership). In particular, it was thought that the notion of "worker" indicated a degree of subordination to the employer which was inconsistent with co-ownership.

Decision

The Supreme Court disagreed with this approach, and found that while "subordination" is often a good indicator that someone is a worker, it is not a necessary element before a person will be considered a worker.

The Court affirmed the traditional formulation of the test of "who is a worker", which requires all three of the following:

- A contract
- That the contract obliges the individual to perform work or services personally

- That the individual is not providing that work or those services as part of his own business, where the recipient of the services receives them in the role of client or customer

The Court noted that while members of an LLP are providing services as part of their own business (the business of the LLP operated in common with the other members), the recipient of the services is the LLP itself, which then markets those services to the LLP's clients. The LLP is not the member's "client or customer", and therefore the third limb of the worker test is satisfied for members.

The Court considered it significant that, on the facts of the case, the member provided her services exclusively to the LLP (the partnership agreement prohibited her from working for others), and that she was integrated into the business of the LLP, for example, she was held out as part of that business.

Are Partners of General Partnerships Workers?

The facts of the case only required the Supreme Court to determine the status of members of LLPs, but it the same reasoning could apply to partners of general partnerships.

Are Members of LLPs Employees?

The Court stopped short of finding that members of LLPs are employees (who have greater protections than workers). This was not something that needed to be decided on the facts, and a careful reading of the judgments given by three of the five members of Supreme Court reveal slightly different attitudes to this question. Whether members of an LLP are employees therefore remains an open question.

Implications of the Decision

The panel made no distinction between "equity members" and "salaried members". This suggests that all members of an LLP will now be regarded as workers, but of course the facts of the partnership relationship will need to be considered in each case.

In most instances, this should not make a substantial difference to the operation of an LLP, although policies on whistleblowing, discrimination and harassment should be reviewed to ensure that they protect members as well as staff of the LLP.

Arguably the most significant wider implication of the ruling is that members of LLPs could be treated as workers for auto-enrolment purposes. In the case of salaried partners, this may mean that they should be automatically enrolled into a qualifying pension plan. In the case of equity partners entirely remunerated by means of profit-related drawings, it could be argued that no "qualifying earnings" are payable in respect of them, and therefore that they should be categorised as "entitled workers", to whom relatively low level duties are owed under the legislation concerning auto-enrolment.

Next Steps

In light of this decision, LLPs should:

- Review their whistleblowing policies to ensure that it they make it clear that members can "blow the whistle" without fear of retaliation (in the same way as employees)
- Check that discrimination and harassment policies also protect members
- Consider whether members should be auto-enrolled into the LLP's qualifying pension plan, or whether some lesser duties are owed to them under the auto-enrolment legislation

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