

A Month In UK Employment Law

February 2012

Case Update

PARTNER OR EMPLOYEE?

Can a fixed share partner be an employee?

Not according to the Court of Appeal in the case of *Tiffin v Lester Aldridge LLP* [2012] EWCA Civ. 35; [2012] WLR (D) 19. In its decision, the Court of Appeal upheld the decisions of both the Employment Tribunal and Employment Appeals Tribunal, that, as a fixed share partner and member of law firm Lester Aldridge LLP, Mr Tiffin was not an employee. The Court of Appeal held that Mr Tiffin had entered into a partnership agreement with other partners at Lester Aldridge as a fixed share equity partner. Upon conversion to LLP status, he had remained such a fixed share partner, with partial involvement in decision making and a very small share of the firm's profits. The Court of Appeal noted that, under the membership agreement of the LLP, fixed share partners contributed to capital, had a share in the profits, had prospects of a share in any surplus assets on a winding up, and had a voice in the management of the LLP, in the same manner as equity partners, the only difference being the degree of their respective rights and obligations. These factors were material to the decision that Mr Tiffin was not an employee.

Comment

In their decision, the Court of Appeal also referred to a third tier of "partners" working for Lester Aldridge – known as salaried partners. The salaried partners, unlike the fixed share partners, did not contribute to capital, did not enjoy a share of profits or the prospects of a share in any surplus assets on a winding up nor any voice in the management of the LLP. No decision was made as to the status of the salaried partners, which leaves open the possibility that they could be treated as employees. This demonstrates that the facts and circumstances of a particular situation are critical to determining whether someone labeled a partner would be deemed to be an employee as a matter of law and enjoy the protection of employment legislation that applies to employees but not to partners.

DISCRIMINATION

Treatment of married couples

The Employment Appeal Tribunal held that not only is it unlawful to treat married employees less favourably for being married, it is unlawful to treat them less favourably because they are married to a particular person.

In *Dunn v The Institute of Cemetery and Crematorium Management* UKEAT/0531/10/DA, Mr and Mrs Dunn both worked for the same employer. Mrs Dunn was due to open a Northern office for her employer. However, after disputes about her performance and sick pay, in which her husband became involved, her employer wrote to her saying that there was no longer a position for her and she would be made redundant because it would not be opening a Northern office.

Before the redundancy process commenced, Mrs Dunn resigned and claimed constructive dismissal (for not having been paid the correct amount of sick pay) as well as direct marriage discrimination. She claimed that her employer discriminated against her, not because of her marital status, but rather because she was married to Mr Dunn in particular.

Both the Employment Tribunal and the Employment Appeal Tribunal accepted that Mrs Dunn was not discriminated against because she was married. However, the legal issue raised was whether the prohibitions against discrimination on the grounds of marriage extend to discrimination because of the particular person to whom someone is married (rather than the mere fact that they are married). On this issue, the Employment Appeal Tribunal, overturning the decision of the Employment Tribunal ruled that it did. The Employment Appeal Tribunal found that the Employment Tribunal had interpreted the law too narrowly and accepted the less favourable treatment of Mrs Dunn because of her marriage to Mr Dunn (of whom she was regarded as an "adjunct") was unlawful discrimination. This interpretation of the law would apply equally to civil partnerships.

Comment

Employers should therefore ensure that they do not treat an employee differently on account of the identity of his/her spouse or civil partner whether or not they work for the same organisation.

FIDUCIARY DUTIES AND CONFIDENTIALITY

Should an employee divulge confidential information to a current employer that has been obtained as a result of discussions with a potential new employer?

In *Customer Systems Plc v Ranson, Atherton, Edmond and Offland* [2011] EWHC 3304 (QB) the High Court held that no such obligation exists - an employee who finds out confidential information about the competition from a potential new employer is not under a duty to pass that information to his existing employer because the employee owes a duty of confidence to a potential new employer which would be breached by passing such information on to an existing employer. The Court followed *Tullett Prebon Plc v BGC Brokers* [2011] and held that a duty of fidelity to one's current employer would not necessarily defeat the duty of confidence to a new employer.

FIXED-TERM CONTRACTS

Repeated renewals may be justified if for recurring temporary cover

E.U. law requires the use of fixed-term contracts to be objectively justified. In Great Britain, employees who have been continuously employed for four years or more on a series of fixed-term contracts are automatically deemed to be permanent employees unless the employer can justify the repeated use of fixed-term contracts on objective grounds.

In the case of *Kücük v Land Nordrhein-Westfalen* [2012] C-586/10 (ECJ), Ms. Kücük was employed as a clerk in the District Court of Cologne from July 1996 to December 2007. She was engaged under a series of 13 fixed-term contracts of employment. Ms. Kücük was employed to cover the absence of a number of different employees for a variety of different reasons, including both short-term and long-term absences. Ms. Kücük argued that she was a permanent rather than a fixed-term employee because the use of fixed-term contracts could not be objectively justified and in particular, the use of fixed-term contracts could not be deemed to be a response to a temporary need for replacement staff. She further argued that placing her on successive fixed-term contracts of employment was unlawful.

The German Federal Labour Court referred the case to the European Court of Justice (ECJ) asking whether the need for temporary replacement staff could objectively justify treating Ms. Küçük as a fixed-term rather than a permanent employee, and if so, whether this would be the case where the need for replacement staff is in reality permanent or recurring. The ECJ ruled that it may be justified to use successive fixed-term contracts for employees providing temporary cover for those employees on leave. This is justified even where the employer may need to employ temporary replacements on a recurring basis. However, where the renewal of a fixed-term contract is to cover permanent rather than temporary needs, then the use of successive fixed-term contracts in this way cannot be objectively justified. For example, if Ms. Küçük had been engaged to replace a single person who resigned, then the successive use of fixed-term contracts would not have been objectively justified, and Ms. Küçük would have the status of a permanent employee.

News Update

EMPLOYMENT LAW ISSUES ARISING FROM THE OLYMPICS 2012

As the Olympics approach, one potential issue faced by employees is dealing with increased absenteeism as well as potential disruptions to business as a result of anticipated travel difficulties.

ACAS has published [guidance](#) for employers about how to deal with this potential issue. See the link below.

EMPLOYMENT TRIBUNAL STATISTICS

The Tribunals Service has published quarterly statistics for July to September 2011 which include the latest figures about the number of Employment Tribunal claims. The statistics show that during this period, 40,300 Employment Tribunal claims were received. This is 35 percent fewer than for the same quarter in 2009/2010. The number of multiple claims (i.e. claims asserting more than one cause of action) received in July to September 2011/2012 fell by 41 percent to reach 25,000. However the number of single claims only fell slightly from 15,400 to 15,200. On the surface, this appears to be a significant reduction in the number of claims. However, closer scrutiny of the numbers suggests that the drop is due to a significant fall in the number of multiple claims being brought by employees rather than a reduction in the number of employees bringing claims against employers.

Upcoming Legal Developments

CONSULTATION ON TRIBUNAL FEES

The consultation period on the introduction of fees in Employment Tribunals and the Employment Appeal Tribunal ends on 6 March 2012 ([see January 2012 Briefing](#)).

UNFAIR DISMISSAL

Unfair dismissal qualifying period: increase to affect new joiners only

The Government has confirmed that the planned increase in the qualifying period for unfair dismissal from one to two years will only apply to those starting employment on or after 6 April 2012.

INCREASE IN PAY LIMITS FROM APRIL 2012

The amounts of maternity, paternity and adoption pay are to increase ([see January 2012 Briefing](#)).

Statutory sick pay is to increase ([see January 2012 Briefing](#)).

PARENTAL LEAVE

Increase in unpaid parental leave is delayed until 2013

The Government has confirmed that it will not be implementing its proposed increase to unpaid parental leave this March as previously expected.

The U.K. is required to increase unpaid parental leave (for parents of children under the age of 5) from 13 to 18 weeks by March this year, in order to comply with E.U. law. The Government has confirmed that it will be taking advantage of a one year extension permitted under E.U. law in order to accommodate on-going work to address flexible working policies and parental leave provision as part of the Modern Workplace initiative. The extension will now not come into force until March 2013.

EXECUTIVE PAY

The Government's proposals

The Government has announced its response to last year's consultation and discussion paper on the regulation of executive pay. The response was set out in a speech by Dr Vince Cable on 24 January 2012 and the Government published a summary of the responses received to its discussion paper. The Government's proposals are subject to further consultation before Regulations will be published.

The four principle areas for reform are:

Enhanced transparency in reporting: The Government is proposing that remuneration reports be split into two statements: the first will be a section on the company's proposed future remuneration policy; and the second section will detail how the remuneration policy was implemented the past year. In order to increase transparency, remuneration committees will have to explain why they have used specific benchmarks and how they have taken into account employee earnings, including pay differentials, when setting pay. They will also have to explain how they have consulted employees and taken their views into account. In addition, a clear and succinct explanation as to how the company's proposed pay policy reflects and supports the company's strategy, how performance will be assessed and how it will translate into rewards under different scenarios will need to be provided. There should also be a single figure for total pay for each director, an explanation of how pay awards relate to the company's performance and a distribution statement outlining how executive pay compares with other distributions made by the company (such as dividends, taxation and general staffing costs).

Greater shareholder power: The Government indicated that they are proposing to give shareholders a binding vote on the Board's future pay policy as well as making any new director's notice period longer than 12 months and any termination payments in excess of a year's basic salary subject to shareholder approval.

Greater Board diversity: The Government wants to see more diverse Boards as it believes that greater diversity at Board level will help minimise conflicts of interest. The Government would like to see people from different backgrounds being appointed to boards, with all boards comprising at least two board members who have never previously been members of a board of directors.

Other measures: A new project monitoring state of pay at the executive level "The High Pay Centre" is to be launched in a bid to address excessive executive pay.

EXTRA BANK HOLIDAY

The May Bank Holiday will be moved to Monday 4 June 2012 and an extra Bank Holiday added on Tuesday 5 June 2012 to celebrate the Queen's Diamond Jubilee.