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CAN ONLY WORKERS BE WHISTLEBLOWERS? MACLENNAN V THE BRITISH PSYCHOLOGICAL SOCIETY

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SUMMARY

The main question in this case was whether an unpaid, voluntary charity trustee can be considered a "worker" for the purposes of the Employment Rights Act 1996 (ERA) and be protected against detriments after making protected disclosures under section 47B of the ERA.

MacLennan (M) was a member of the British Psychological Society (BPS) and became President-Elect on 30 June 2020. Generally, after a period of one year, a President-Elect becomes President. This is relevant because the President can claim for expenses relating to loss of income for completing duties (subject to a cap), whereas the President-Elect cannot. To all intents and purposes, M was a volunteer.

M alleged he made four protected disclosures between 3 and 19 June 2020 (before he became President-Elect) and a further nine protected disclosures between 1 July and 17 December 2020. Relations between M and BPS became strained, resulting in a grievance against M which led to his expulsion from the BPS and the termination of his role as President-Elect.

M brought several claims alleging he had suffered detriments (including his expulsion) as a result of making protected disclosures.

The law on this issue is important. Under section 230(3) of the ERA, a "worker" includes an employee and an individual working under any contract where the individual undertakes to personally perform work or services. The only exception is where the work is carried out for a party who is a client or customer of any profession or business carried on by the individual. This did not apply in this case.

M was an unpaid volunteer and there was no written contract. The tribunal considered whether there could be an implied contract between M and BPS. Applying the test in the 2014 case of *Gilham v Ministry of Justice,* a case about whether judges could be workers, the tribunal

considered whether the parties intended to enter into a contractual relationship. The tribunal considered:

- Manner of engagement - M was elected, not recruited through a formal agreement;
- Rules governing the role/duties - the governing documents were the Royal Charter, Statute and Rules. M signed declarations relating to conflicts of interest and the BPS's code of conduct. The BPS did not determine or dictate M's duties;
- Overall context - the tribunal found the common intention was that M would act as a volunteer; and
- Other factors - M was not remunerated as President-Elect and even stated he would not claim for loss of income etc as President.

The tribunal found that no implied worker contract existed.

However, office holders without express or implied contracts may still enjoy similar statutory whistleblowing protection to workers by operation of Article 14 of the European Convention for Human Rights (ECHR) read with Article 10 of the ECHR (freedom of speech/expression). *Gilham* held that a District Judge was entitled to whistleblowing protection (as freedom of speech) on this basis. The applicable tests ask:

- Do the facts fall within the ambit of a Convention right?
- Has (in this case) M been treated less favourably than others in an analogous situation?
- Is the reason for that less favourable treatment because of "some other status" than a worker?
- Can the difference in treatment be justified?

The tribunal agreed on the facts being within the ambit of a Convention right, but distinguished this case from *Gilham*, focusing on M's lack of remuneration. *Gilham* was a judge who received salary, pension and other benefits. M received nothing and was by his own admission a volunteer. The lack of remuneration made it difficult for the tribunal to place him in an analogous situation to individuals such as *Gilham*. The tribunal did not accept the third test and did not consider justification.

M appealed. The EAT upheld the tribunal's decision on the lack of any contract.

On other issues however, the EAT did not agree with the tribunal. When looking at the issue of whether M was in an "analogous situation" to others, particularly workers, they found the tribunal had focused too narrowly on remuneration. Whilst remuneration was obviously relevant, the ECHR

test required consideration of other factors that might be “analogous”, including the type and level of responsibility of the role, the duties involved, and the likelihood that the person will become aware of wrongdoing.

The EAT also found the tribunal should have considered the *possibility* of focusing on justification. Accordingly, the tribunal’s decisions on the third and fourth tests were remitted to the same tribunal for reconsideration.

This case is important because the EAT is effectively asking a broader question, and it was mentioned that the government might even want to intervene. The broader question is who and who is not protected under whistleblowing legislation and this raises questions such as:

- why should individuals other than workers (and certain remunerated office-holders) be deprived of whistleblowing protection? M may have been a volunteer President-Elect, but should he still not be protected if he reports wrongdoings and then suffers termination or detriments as a result?
- is it just/appropriate that whistleblowing protection is drawn relatively narrowly and should that protection be wider – this was certainly advocated by Protect, the whistleblowing charity who intervened in this case.

The EAT made no specific ruling on whether charity trustees can be treated as workers, although the remittal demonstrates that whistleblowing protection may be open to them.

Finally, on a completely different point, raised because some of M’s disclosures were made before he took up the position of President-Elect, the EAT confirmed that a worker is protected against detriments for a protected disclosure made *before* commencing work. This was distinguished from a job applicant who does not become an employee and would not have the same protection.

BCLP would like to thank Trainee Solicitor, Danny Hollinworth, for his contribution to this insight.

If you would like to discuss this case further or have any queries about its implications, please get in touch.

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