Can a charity trustee be "a worker" for the purposes of whistleblowing protection?

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Summary of decision and consequences

HHJ Tayler in **MacLennan v The British Psychological Society** [2024] EAT 166 has found that the effect of the ECHR is that a charity trustee could potentially be entitled to whistleblowing protection as a "worker". Although the matter has been referred back to the tribunal to decide, this wide-reaching decision is likely to open the door to protection under s.47B ERA for charity trustees. The gist of the judgment is, where something as important as Convention rights is concerned, just because someone is a charity trustee, why should they be denied the whistleblowing protection provided to workers with a different status, like a company director or employee for example, unless it is objectively justified?

In addition, it has been confirmed that a protected disclosure made before employment has begun can be relied upon by someone who later becomes a worker.

The facts and the ET decision

Dr MacLennan was a trustee for the charity, BPS, and had been elected its President-Elect. He argued, before the ET, that he had made thirteen protected disclosures in relation to the running of the organisation, four of which he made before he took up the President-Elect role on 30th June 2020. In May 2021, he was expelled as a trustee and President-Elect, he asserted, because of his disclosures, and he argued that the expulsion was therefore an unlawful detriment contrary to s.47B ERA.

Dr MacLennon did not argue he was an employee or a special category of worker under s.43K ERA. At a preliminary hearing, the tribunal considered whether or not Dr MacLennan was a worker, under s.230(3) ERA and found that he was not.

The EAT decision

The EAT considered that the ET was entitled to find that there was no contract between Dr MacLennan and BPS because there was no intention to enter into a contractual relationship. Nevertheless, referring heavily to Baroness Hale's conclusions in ***Gilham v Ministry of Justice*** [2019] UKSC 44, HHJ Tayler set out how, by operation of Article 14 read with Article 10 ECHR, even where an office-holder has no contract, they may nevertheless be protected from whistleblowing detriments. This protection can be claimed where there are the following four conditions (the Michalak Questions):

(1) Do the facts fall within the ambit of one of the Convention rights (like freedom of expression / freedom from discrimination)?

(2) Has the claimant been treated less favourably than others in an analogous situation?

(3) Is the reason for that less favourable treatment one of the listed grounds (e.g. protected characteristics) or some "other status"?

(4) Is that difference not a proportionate means of achieving a legitimate aim?

The Michalak Questions do not need to be considered in this, or any particular, order, because they overlap. This means the courts might decide, but are not obliged, to consider justification arguments, for example, before deciding whether the situations are analogous.

The ET did consider the first three of the Michalak Questions, but did not consider justification because it had not upheld all of the other three. HHJ Tayler found that the ET had failed to demonstrate that numbers 2 and 3 should be approached in a broad-brush manner. The ET had also (a) failed to consider all the relevant factors as to whether there were analogous circumstances with employees and limb B workers (which HHJ Tayler listed at paragraph 104); and (b) had not considered sufficiently whether the nature of the charity trustee role, responsibilities and regulatory regime meant that being a charity trustee / President / President-Elect was akin to an occupational status (in the same way as being a district judge was in ***Gilham***). HHJ Tayler also found it was an error not to consider the possibility of focusing on the issue of justification in conducting its analysis.

Another important consideration of HHJ Tayler was the submissions of Protect, the whistleblowing charity (set out at paragraphs 65 – 68). Protect urged the EAT to treat all charity trustees as workers for the purposes of whistleblowing protection, in light of the public importance of that protection, particularly in the context of charities and their trustees.

As a result of the ET's errors in answering the Michalak Questions, the appeal was upheld in part and remitted to the ET. It is anticipated that both interveners (Protect and the Charity Commission) are likely to be heard by the ET and that the Secretary of State may wish to intervene. We must watch this space for that judgment, which is likely to be reported. In the meantime, our charity clients might appreciate a heads-up, particularly if considering updating their whistleblowing policies.

Another minor but important point considered in this case is whether a worker can rely on a disclosure made before employment begins. Although s.43C(1)(a) ERA refers to a disclosure "to his employer", the EAT noted the purposive approach adopted previously, and gave a useful summary of the law (paras 30-33) in relation to when either the disclosure or the detriment is not during employment. Although an unsuccessful job applicant is not a worker, the EAT decided that a worker could rely upon disclosures made before the employment began.

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