Court of Appeal confirms that whistleblowing protection for job applicants remains very limited

In the recent case of *Sullivan v Isle of Wight Council*, the Court of Appeal considered the issue of whether an external job applicant was protected from detriment relating to whistleblowing.

What happened in this case?

The Claimant applied unsuccessfully for posts with Isle of Wight Council (**the Council**) in 2019. After being rejected, the Claimant filed an online crime report with the police alleging that she had been the subject of a verbal assault during an interview. She also alleged that one of her interviewers had been submitting fraudulent accounts to a charitable trust. She also reported these issues to the CEO of the Council and to her MP. She relied upon her letter to her MP as a protected whistleblowing disclosure.

An investigation was carried out by the Council and the Claimant's complaint was dismissed. The investigating officer advised that, given the Claimant's behaviour and the exceptional circumstances of the case, and as per the Council's complaints policy, she was not allowing the Claimant the usual right afforded to employees to refer the matter to a more senior officer for review. This was on the grounds of protecting the Council's employees.

The Claimant complained to the Employment Tribunal that she had been subjected to a detriment, namely the refusal to allow her to seek a further review of her complaint. She argued that the whistleblowing provisions of the Employment Rights Act 1996 were incompatible with Article 14, read with Article 10 of the European Convention of Human Rights (**the Convention**), in so far as they protected workers and applicants for NHS posts but not job applicants generally. The relevance of Article 14 was that it prohibits discrimination affecting the rights and freedoms set out in the Convention (including, via Article 10, the right to protection from detriment relating to whistleblowing) on several grounds, including the ground of "other status". The Claimant contended that being a job applicant fell into this "other status" category.

The Tribunal dismissed the Claimant's claim, finding that her position was not materially analogous to internal job applicants (i.e. already workers/employees) or to NHS job applicants, who are specifically protected under the legislation due to the NHS's almost unique characteristics as an employer and for reasons of patient safety.

The Claimant appealed to the Employment Appeal Tribunal (**EAT**), which upheld the Tribunal's decision. The Claimant appealed to the Court of Appeal. The Secretary of State for Business and Trade and the whistleblowing charity Protect were given permission to intervene.

What was decided?

The Court of Appeal dismissed the claim. It disagreed with the Tribunal and the EAT, and held that being a job applicant *could* amount to "other status" for the purposes of Article 14

of the Convention. It was found that a job applicant was an acquired characteristic, resulting from something that an individual had chosen to do. If a person was subjected to treatment on the ground that they were a job applicant, that was capable of being treatment on the ground of some other status.

However, the Court of Appeal agreed that the Claimant was not in a materially analogous position to either workers or applicants for NHS posts who were protected by the whistleblowing detriment provisions. The position of someone seeking work was materially different from someone in work, and the extension of whistleblowing protection to applicants for jobs with NHS employers was intended to deal with a specific and urgent problem, enabling a culture where health service staff could make protected disclosures about matters concerning patient safety and treatment without fear of retaliation. Since the NHS comprises different legal bodies and entities, the aim was to ensure that people who might want to move from one NHS body to another would not be deterred from making protected disclosures.

The Court of Appeal also opined that in this case, any difference in treatment caused by the legislation would have been objectively justified since it pursued a legitimate aim and the means adopted to achieve that aim were appropriate and proportionate.

What does this mean for employers?

This situation is likely to be rare in practice for employers, but it is nonetheless helpful to know that employers can take a robust stance on complaints from dissatisfied job applicants

which might amount to whistleblowing. However, this case does not change the fact that under the Equality Act 2010, all job applicants remain protected from unlawful discrimination by a prospective employer on the grounds of a protected characteristic (age, sex, race etc).

Parliament had decided twice already that the whistleblowing legislation should not be extended to protect job applicants generally – firstly, when drafting the Public Interest Disclosure Act 1998, and, secondly, in 2015 when Parliament rejected a proposed amendment which would have extended protection to a person who "is or has been a job applicant". The Court of Appeal said in this case that substantial weight should be given to Parliament's judgement.

However, the CEO of Protect, the whistleblowing charity who intervened in the case, expressed disappointment in the outcome. Justin Madders MP (Parliamentary Under-Secretary for State for Business and Trade) indicated that he was to meet Protect to discuss the issues on which it is campaigning, and the government was aware of the "long-overdue requirement to look at whistleblowing law". Whether this case will cause Parliament to look again at whistleblowing protections remains to be seen.

Sullivan v Isle of Wight Council

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Connie Berry (connieberry@bdbf.co.uk), Margaret Welford (MargaretWelford@bdbf.co.uk) or your usual BDBF contact.