Global Workplace Law & Policy

Can whistleblowing claims be brought directly against co-workers, where all parties worked abroad for an international organisation?

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The recent case of *FCO and others v Bamieh* [2019] EWCA Civ 803 in the Court of Appeal considered a particular aspect of the extra-territorial application of the Employment Rights Act 1996 ("ERA"), namely whether whistleblowing provisions could apply in respect of co-workers employed by the UK government but seconded to the international European Union Rule of Law Mission in Kosovo ("EURLEX").

This case was interesting for a number of reasons. First, this was the first time that the (tortious) liability of co-workers was considered in an extra-territorial application claim. Second, there was considerable disagreement between the Employment Tribunal, Employment Appeal Tribunal and the Court of Appeal over the issues involved and indeed the proper outcome of the case. Third, there were a number of policy issues that arose during the course of the litigation which are of wider interest. In particular there was significant discussion about the accountability of international organisations in respect of employment rights, and the balance to be struck between ensuring that accountability whilst at the same time allowing the functional autonomy of such bodies.

At the ET, EJ Wade found against the Claimant, deciding that the co-workers as Respondents were not domiciled in the UK or based there for work purposes and so were outside jurisdiction. This point was specifically overturned by the EAT, who considered it an error of law. The proper test for determining the issue did not turn on the domicile of the Respondent. Rather, the test to be applied was that outlined in *Lawson v Serco* [2006] UKHL 3 and subsequent cases, namely whether normal rules on territoriality (that the Respondent was based outside the UK and so outside the scope of the ERA) were capable of being displaced by the strength of connection with Great Britain and British employment law. This was a matter of fact to be determined in all the circumstances of the case. On the basis of such a factual analysis, the EAT found jurisdiction for the whistleblowing claims against the Respondents (the Respondents were employed by the UK government under contracts governed by English law and worked in an international enclave in Kosovo). The Court of Appeal disagreed, stating that the important consideration was not the sufficient British connection between the employer and employee for the purposes of employment law, but rather the connection between the co-workers. That connection had very little to do with Britain, and much more to do with the 'theatre-level' operations on the ground mediated through EURLEX.

The Court of Appeal was persuaded in its conclusions by the argument that allowing jurisdiction in this case would undermine the operation of EURLEX as an international mission. The implication of finding jurisdiction would mean that whistleblowing claims could potentially apply as against some of its workers and not as against others. This was not acceptable, particularly in the context of the lack of 'international consensus' surrounding whistleblowing protection as a valid labour law right. These conclusions suggest a balance tipped in favour of the 'orderly functioning' of international organisations over issues of accountability, particularly in light of the finding of the EAT that EURLEX had no legal personality as a matter of UK law. Indeed, it was this lack of personality which forced the Claimant to pursue the claims against the individual co-workers rather than the international organisation (through vicarious liability) in the first place.