Clayton Comments

Richard Clayton QC

WHAT IS A PUBLIC BODY FOR THE PURPOSES OF JUDICIAL REVIEW?

***R(Hannah) v Chartered Institute of Taxation [2021] EWHC 1069 (Admin)* concerned a decision of Chartered Institute of Taxation to refer the claimant for disciplinary proceedings before the Taxation Disciplinary Board about his advice on Stamp Duty Land Tax.**

The claimant had been a Member of Institute since 1988 and was a chartered tax adviser. He complained that the Institute had acted unfairly in referring the complaint to the Board without giving him any opportunity to put forward his case beforehand. The case is of particular interest because Holgate J discussed in detail the principles to be applied to establishing whether or not the Institute was a public body, an issue regularly was considered by the Courts in the 1990s but now much less frequently in recent years.

The Institute is a membership organisation for tax professionals and is one of the leading bodies in the field of tax advice. It has over 19,000 members and 5,500 students. Membership is by examination, which is said to represent a gold standard in UK tax education. A member is referred to as a Chartered Tax Adviser and is entitled to add the initials CTA after his or her name.

There are at least 14 professional bodies operating in the tax field. About two thirds of tax agents hold a recognised accountancy or tax-based qualification and are members of one or more of these professional bodies. However, a tax adviser is not required to be a member of a professional body like the Institute.

Every Institute member contracts with the Institute to comply with its Bye-laws, Members' Regulations, Council Regulations and disciplinary rules. A member is also required to accept the jurisdiction of the Tax Disciplinary Board which decides complaint referred to it by various bodies including the Institute. The Institute, itself, is a registered charity and a company limited by guarantee which has been granted a Royal Charter.

In 2008 the Institute and the Association of Taxation Technicians jointly established the Taxation Disciplinary Scheme. Together they formed the Taxation Disciplinary Board Limited to deal independently with disciplinary matters affecting their respective members and is jointly funded by the two professional bodies.

The issues the Court had to decide was whether the Institute's function of referring a complaint to the Tax Disciplinary Board is amenable to judicial review and, if so, whether the Institute had acted unfairly.

Whether the Institute was a public body

In the landmark decision in *R v Panel on Take-Overs and Mergers ex parte Datafin plc [1987] QB 815 [1987] QB 815* Court of Appeal held that judicial review is not restricted to bodies which derive their powers from legislation or the prerogative. If the source of power is legislation, then the body in question will generally be subject to judicial review. If at the other end of the scale the source of power is purely contractual, as for example in the case of a private arbitration, judicial review is not

available. In the area between those two poles, it is relevant to look not only at the source of the power but also its nature, to see whether the body is exercising public law functions, or whether the exercise of its functions has public law consequences. The essential distinction is between on the one hand, a purely domestic or private tribunal and on the other, a body which is under a public duty. It is also relevant to consider whether the body was established under the authority of the Government.

When considering whether the decision maker is a public body, the Court considers a number of factors. They have regularly applied the "but for" test—whether, but for the existence of a non-statutory body, the government would itself almost inevitably have intervened to do or regulate the activity in question. For example, in *R v Advertising Standards Authority ex p Insurance Services (1990) 2 Admin R 77 Glidewell LJ* held at 86 that in the absence of a self-regulatory body such as the ASA, its functions "*would no doubt be exercised by the Director General of Fair Trading".* It may also be decisive where the Government has acquiesced or encouraged the activities of the body under challenge- providing "underpinning" for its work so that it is woven the body into the fabric of public regulation (as Sir Thomas Bingham MR in *R v Jockey Club ex p Aga Khan [1993] 1 WLR 909 at 921*) or where the body was established under the authority of Government. Whether the body was exercising extensive or monopolistic powers, for instance by effectively regulating entry to a trade or profession can also be significant. However, the existence of monopolistic power is not, in itself, sufficient to make a decision-maker subject to judicial review, as Rose J *accepted R v Football Association ex p Football League Ltd [1993]* 2 All E.R. 833 at 848 when finding that the Football Association had "virtually monopolistic powers". The Court of Appeal in *Ex p Aga Khan* reached the same conclusion.

In Datafin, Sir John Donaldson MR suggested that possibly *"the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from jurisdiction of bodies where the sole source of power is the consensual submission to its jurisdiction."* However, the legal principles involved have now moved on in recent years.

The modern approach to judicial review and contractual relationships

The Divisional Court in R*((Holmcroft Properties Ltd) v KPMG [2017] Bus LR 932* held at para 24 that it "is now firmly established that the mere fact that the source of power is contract does not of itself necessarily result in the conclusion that public law principles are inapplicable". It then at para 26 cited the principles set out by Dyson LJ in R*(Beer) v Hampshire Farmers' Markets [2004] 1 WLR 233* at para 16.

> *the law has now been developed to the point where, unless the source of power clearly provides the answer, the question whether the decision of a body is amenable to judicial review requires a careful consideration of the nature of the power and function that has been exercised to see whether the decision has a sufficient public element, flavour or character to bring it within the purview of public law. It may be said with some justification that this criterion for amenability is very broad, not to say question-begging. But it provides the framework for the investigation that has to be conducted.*

The Court of Appeal in *Holmcraft* [2020] Bus. LR 203 approved the Divisional Court's approach.

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In *Hannah* reliance was placed on the *Holmcraft* principles. But Holgate J held the function of the Institute in deciding to refer a complaint against a member to the Board was not amenable to judicial review. He stressed that there is no statutory scheme regulating the conduct of tax advisers or providing for disciplinary proceedings to address professional misconduct, that the relationship of the members to the Institute is purely contractual and that Board may receive complaints about a member of the Institute and also from a member of the public like a client.

Although the Government had published a White Paper *"tackling tax evasion and avoidance"* (Cm 9047) which said that at para 3.15 that it was asking the *"regulatory bodies who police professional standards to take on a greater lead and responsibility in setting and enforcing clear professional standards around the facilitation and promotion of avoidance to protect the reputation of the tax and accountancy profession and to act for the greater public good ",* Holgate J ruled that this did not mean that the Government was intending to introduce some form of statutory regulation.

Holgate J went on to decide that in the circumstances of the case the Institute had not acted unfairly and dismissed the application for judicial review. In November 2021 the Court of Appeal refused permission to appeal.

The *Hannah* decision did not reach any striking conclusions. But it shows that the scope for judicial review is wider than many assume.

Richard Clayton QC acted for the claimant. The judgment is at
https://www.bailii.org/ew/cases/EWHC/Admin/2021/1069.html

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