16 October 2019

PRESS SUMMARY

Gilham (Appellant) v Ministry of Justice (Respondent)

[2019] UKSC 44

On appeal from: [2017] EWCA Civ 2220

JUSTICES: Lady Hale (President), Lord Kerr, Lord Carnwath, Lady Arden, Sir Declan Morgan

BACKGROUND TO THE APPEAL

The issue in the appeal is whether a District Judge qualifies as a 'worker' or a 'person in Crown employment' for the purpose of the protection given to whistle-blowers under Part IVA of the Employment Rights Act 1996 ('the 1996 Act'). If not, is this discrimination against her in the enjoyment of her right to freedom of expression, protected by article 14 taken with article 10 of the European Convention on Human Rights (ECHR)?

The appellant was appointed a District Judge by the Lord Chancellor with effect from 6 February 2006. The letter offering her appointment specified the duration, salary, pension and conditions of employment, including as to sitting days, sick pay, maternity leave and conduct. By an Instrument of Appointment the Lord Chancellor approved her to sit at county courts on the Wales and Chester circuit.

Major cost cutting reforms took place after 2010. The appellant raised a number of concerns relating to the cuts, in particular the lack of appropriate and secure court room accommodation, her severely increased workload and administrative failures, initially with the local leadership judges and senior court managers, and eventually in a formal grievance. She claims that the handling of her complaints led to a severe degradation in her health, resulting in psychiatric injury and disability.

In February 2015 she made a two-part claim in the Employment Tribunal, both of which depended on her being a 'worker' within the meaning of section 230(3) of the 1996 Act. Her claim for disability discrimination under the Equality Act 2010 is proceeding, as it is accepted that she is a worker for the purpose of European Union law, from which this claim is derived. Her claim under Part IVA of the 1996 Act is not so derived, and the Employment Tribunal determined as a preliminary issue that she was not a 'worker' under domestic law for the purpose of the whistle-blowing provisions. It accepted that she therefore had no protection against the infringement of her right to freedom of expression under article 10 ECHR, but that it was not possible to give effect to section 230(3) so as to give her that protection. Her appeals to the Employment Appeal Tribunal and to the Court of Appeal were dismissed.

JUDGMENT

The Supreme Court unanimously allows the appeal and remits the case to the Employment Tribunal on the basis that the appellant is entitled to claim the protection of Part IVA of the 1996 Act. Lady Hale gives the judgment.

REASONS FOR THE JUDGMENT

'Worker' under domestic law

The appellant argued that she is a 'limb (b)' worker under the definition in section 230(3) of the 1996 Act: namely that she works under a contract whereby she 'undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business' she is undertaking **[2]** – **[3]**.

The issue is whether the appellant's work is performed pursuant to a contract with the recipient of that work or services, or pursuant to some different legal arrangement. Judges hold a statutory office, and office-holders do not necessarily hold office pursuant to a contract **[12]**. It depends on the intention of the parties, which is reflected in the manner of engagement, the source and character of the rules governing service and the overall context **[16]**. In the appellant's case, the essential components of the relationship are derived from statute and not a matter for negotiation; it is difficult to identify her employer; and the separation of powers is a factor against a contract between a Minister of the Crown and a member of the judiciary. Taken together, these factors do not suggest a contractual relationship **[17]** – **[21]**.

Nor are judges in Crown employment. They are not civil servants or the equivalent of civil servants. They do not work under or for the purposes of the functions of the Lord Chief Justice, but for the administration of justice in accordance with their oaths of office **[22]** – **[25]**.

Human rights

The imposition of detriments, such as the bullying, victimisation and failure to take complaints seriously which the appellant alleges, would be an interference with her right to freedom of speech under article 10 ECHR **[26]**. A claim under the Human Rights Act 1998 ('the HRA') would not enable the appellant to seek the wider relief that a worker could under Part IVA of the 1996 Act **[27]**, **[30]**. The failure to extend the Part IVA protections to judicial office-holders is a violation of the appellant's right under article 14 not to be discriminated against in her enjoyment of the rights under the ECHR: (i) the facts of her case are within the ambit of article 10; (ii) she has been treated less favourably than other employees and workers who make responsible public interest disclosures; (iii) her occupational classification is clearly a 'status' within the meaning of article 14; and (iv) exclusion of judges is not a proportionate means of achieving a legitimate aim. There is no evidence that either the executive or Parliament addressed their minds to the exclusion of the judiciary from the protection of Part IVA and no legitimate aim has been put forward **[28]** – **[37]**.

The remedy for the incompatibility of the exclusion of the judiciary from the protection of Part IVA of the 1996 Act with the rights under the ECHR is found in the obligation on the courts in section 3 of the HRA to read and give effect to primary legislation in a way which is compatible with those rights. It has been established that it is possible to interpret the

definition of a 'limb (b)' worker to include judicial office-holders when required to do so by EU law, and it would not 'go against the grain' of the 1996 Act to do so in respect of the protections of Part IVA. This interpretation should also apply to the equivalent provisions in the Employment Rights (Northern Ireland) Order 1996 **[39] – [45]**.

Accordingly the appeal is allowed and the case is remitted to the Employment Tribunal on the basis that the appellant is entitled to claim the protection of Part IVA of the 1996 Act **[46]**.

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
https://supremecourt.uk/decided-cases/index.html