Michaelmas Term
[2019] UKSC 44
On appeal from: [2017] EWCA Civ 2220

JUDGMENT

Gilham (Appellant) *v* Ministry of Justice (Respondent)

before

Lady Hale, President
Lord Kerr
Lord Carnwath
Lady Arden
Sir Declan Morgan

JUDGMENT GIVEN ON

16 October 2019

Heard on 5 and 6 June 2019

Appellant
Karon Monaghan QC

(Instructed by Irwin Mitchell LLP (London))

Respondent
Ben Collins QC
Robert Moretto

(Instructed by The Government Legal Department)

Intervener (Protect)
Daniel Stilitz QC
Christopher Milsom

(Instructed by Leigh Day)

LADY HALE: (with whom Lord Kerr, Lord Carnwath, Lady Arden and Sir Declan Morgan agree)

1. This case is about the employment status of district judges, but it could apply to the holder of any judicial office. The issue 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 a district judge does not on the face of it qualify for whistle-blower protection, the further question is whether this is discrimination against her in the enjoyment of her right to freedom of expression under the European Convention on Human Rights. And if it is, what is the remedy?

2. In section 230(3) of the 1996 Act, a "worker" is defined as

> "an individual who has entered into or works under (or where the employment has ceased, worked under) - (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual 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 undertaking carried on by the individual."

3. The appellant does not claim that a judge works under a contract of employment within limb (a) of that definition, but contends that she does fall within limb (b) of the definition.

The history of the case

4. The appellant was appointed a district judge by the then Lord Chancellor, Lord Falconer of Thoroton, with effect from 6 February 2006. Under section 6 of the County Courts Act 1984, as it then stood, district judges were appointed by the Lord Chancellor. As it now stands, they are appointed by Her Majesty the Queen on the recommendation of the Lord Chancellor. In October 2005, the appellant had been sent a letter offering her appointment which talked in terms of her accepting that offer. The letter itself contained several stipulations as to the duration of her appointment, her salary, her pension on retirement, and other matters. Enclosed with the letter was a memorandum entitled "District Judges - Memorandum on conditions of employment and terms of service". This was a detailed document, which included terms as to sitting days, sick

pay, maternity, paternity and adoption leave, training, the prohibition of legal practice, relations with the press and media, outside activities, and much more. The memorandum made it clear that the salary was taxed under Schedule E to the Income Tax Act and that the judge was an employed earner for the purpose of national insurance contributions. Although described as a "life-time" appointment, a judge is required to vacate office on her 70th birthday (unless extended) and can resign before that date. The appellant's Instrument of Appointment, signed by the Lord Chancellor on 27 January 2006, simply talked in terms of his approving her to sit at each of the county courts on the Wales and Chester circuit.

5. In fact, she first sat at the Crewe County Court and in 2009 transferred to the Warrington County Court. In 2010, the Cheshire courts were transferred to the Northern Circuit and major cost cutting reforms were announced. In 2011, the Runcorn County Court was closed and the business transferred to Warrington, as were some tribunal sittings. The appellant raised a number of concerns relating to the cuts, in particular about the lack of appropriate and secure court room accommodation, the severely increased workload placed upon the district judges, and administrative failures. She raised these with the local leadership judges and senior managers in Her Majesty's Courts and Tribunals Service and eventually in a formal grievance.

6. She claims that her complaints fell within the definition of "qualifying disclosures" under section 43B of the 1996 Act, in particular as tending to show a failure to comply with legal obligations, that miscarriages of justice were likely, or that the health and safety of any individual had been, is being or is likely to be endangered. The disclosures were made to an employer or other responsible person within the meaning of section 43C of the 1996 Act and thus they were "protected disclosures" within the meaning of section 43A.

7. Under section 47B(1) of the 1996 Act, a worker has the right "not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure". The appellant claims that she was subjected to a number of detriments as a result of her complaints: a significant delay in investigating her grievance; being seriously bullied, ignored and undermined by her fellow judges and court staff; being informed that her workload and concerns were simply a "personal working style choice"; and inadequate steps to support her in returning to work; she also claims that a severe degradation in her health, resulting in psychiatric injury and a disability under the Equality Act 2010, was such a detriment. The appellant was signed off work due to stress from the end of January 2013 but has recently returned.

8. In February 2015 the appellant made a two-part claim in the Employment Tribunal. Both parts of her claim depended upon her being a "worker" within the meaning of section 230(3) of the 1996 Act (or having the same protection as such a

worker). One part of her claim was for disability discrimination under the Equality Act 2010, as a result of failure to make reasonable adjustments to cater for her disability. This claim is derived from European Union law. It is therefore accepted that, as a result of the decision of this court in *O'Brien v Ministry of Justice (formerly Department for Constitutional Affairs)* [2013] UKSC 6; [2013] 1 WLR 522, in the light of the guidance given by the Court of Justice of the European Union in ((Case C-393/10) [2012] ICR 955), a judge is a "worker" for the purpose of European Union law and national law has to be interpreted in conformity with that. That case concerned discrimination against part-time workers, but the same result was reached by the Court of Appeal for Northern Ireland in *Perceval-Price v Department of Economic Development* [2000] IRLR 380, that tribunal judges were "workers" for the purpose of discrimination on grounds of sex. Hence the disability discrimination claim will continue in any event.

9. The other part of her claim was under the "whistle-blowing" provisions in Part IVA of the 1996 Act, inserted by the Public Interest Disclosure Act 1998. These provisions are not derived from European Union law and accordingly the definition of "worker" does not have to be read so as to conform to the requirements of EU law. This means that a judge may have a different status in employment law, depending upon whether or not the employment right in question is derived from EU law.

10. In relation to the whistle-blowing claim, the Ministry of Justice objected that the appellant was not a "worker" as defined by section 230(3)(b) of the 1996 Act. At a preliminary hearing, the Employment Tribunal judge held that she was not a worker, that accordingly she had no protection against infringement of her right to freedom of expression under article 10 of the ECHR, but that it was not possible to read or give effect to section 230(3)(b) so as to give her that protection. The Employment Appeal Tribunal also held that she was not a worker, but found that there were adequate safeguards in place to protect freedom of speech for judges and there was therefore no need to read section 230(3)(b) so as to bring a judge within it, but that in any event it was not possible to do so: [2017] ICR 404. The Court of Appeal also held that the appellant was not a "worker". The appellant was permitted also to raise for the first time the argument that denying her whistle-blowing protection was discrimination in the enjoyment of her right to freedom of expression and thus contrary to article 14 of the ECHR read with article 10. But she failed in that too: [2018] ICR 827.

11. On appeal to this court, the appellant continues to argue that she is a "worker" within the meaning of section 230(3)(b) of the 1996 Act. She also raises for the first time a new argument, that she is in "Crown employment" within the meaning of section 191 of the 1996 Act. If she fails in each of those, she continues to argue that her exclusion from whistle-blowing protection is a breach, either of her rights under article 10 or under article 14 read with article 10 of the ECHR and that either section 230(3)(b) or section 191 of the 1996 Act should be read and given effect so as to bring her within that protection.

Is a judge a "worker"?

12. It is not in dispute that a judge undertakes personally to perform work or services and that the recipient of that work or services is not a client or customer of the judge. The issue is whether that work or services is performed pursuant to a contract with the recipient of that work or services or pursuant to some different legal arrangement. Nor is it in dispute that judges hold a statutory office. In broad terms, an office has been defined (by Lord Atkin in *McMillan v Guest* [1942] AC 561, 564) as a "subsisting, permanent, substantive position which had an existence independent of the person who filled it, and which went on and was filled in succession by successive holders". Office-holders do not necessarily hold office pursuant to any kind of contract. As Lord Hoffmann explained in *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 75; [2006] 2 AC 28, para 54:

> "The distinction in law between an employee, who enters into a contract with an employer, and an office-holder, who has no employer but holds his position subject to rules dealing with such matters as his duties, the terms of his office, the circumstances in which he may be removed and his entitlement to remuneration, is well established and understood. One of the oldest offices known to law is that of constable. It is notorious that a constable has no employer. It required special provision in [section 17 of the Sex Discrimination Act 1975] to bring the office of constable within the terms of the Act and to deem the chief constable to be his employer. But there are many other examples of offices; public, ecclesiastical and private."

13. However, it is also well established that an office-holder may hold that office under a contract with the person or body for whom he undertakes to perform work or services. The obvious example is a director of a company, who may hold that office concurrently with a service contract. *Percy* itself was another example. Ms Percy was an ordained minister of the Church of Scotland who was appointed associate minister to a particular parish. This was undoubtedly an ecclesiastical office, but the House of Lords held, by a majority, that she also had a contract personally to execute work, thus enabling her to bring a claim for sex discrimination against the Board of Mission which had appointed her.

14. It might be thought that there is a distinction between private or ecclesiastical offices, on the one hand, and public or statutory offices, on the other, and that the former may be held concurrently with a contract whereas the latter may not. After all, before the introduction of modern protection from unfair dismissal, public and statutory office-holders might be better protected than others, under the line of cases beginning with *Ridge v Baldwin* [1964] AC 40. However, in *Miles v Wakefield Metropolitan District Council* [1987] AC 539, which concerned the statutory office of superintendent registrar

of births, deaths and marriages, Lord Oliver of Aylmerton, at p 567, questioned "whether the mere fact that the plaintiff was appointed to his office under the provisions of the [Registration Service Act 1953] necessarily precludes the existence of a parallel contract between him and the council for the carrying out of his statutory duties".

15. As this court held in *Preston (formerly Moore) v President of the Methodist Conference* [2013] 2 AC 163, whether an office-holder holds office under a legally binding contract depends upon the intentions of the parties: "The mere fact that the arrangement includes the payment of a stipend, the provision of accommodation and recognised duties to be performed by the minister, does not without more resolve the issue. The question is whether the parties intended these benefits and burdens of the ministry to be the subject of a legally binding agreement between them" (Lord Sumption, para 26). Earlier, when commenting on the *Percy* case, he had explained that "The primary considerations are the manner in which the minister was engaged, and the character of the rules governing his or her service. But, as with all exercises in contractual construction, these documents and any other admissible evidence of the parties' intentions fall to be construed against their factual background" (para 10). Part of the background in that case was the spiritual purpose of the functions of a minister of religion, although it had been established in *Percy* that there was no presumption against the contractual character of their service. In *Preston*, there was no difference between the majority, led by Lord Sumption, and me, the sole dissenter, as to the nature of the exercise upon which we were engaged: we differed only in our interpretation of the facts.

16. It is clear, therefore, what the question is: did the parties intend to enter into a contractual relationship, defined at least in part by their agreement, or some other legal relationship, defined by the terms of the statutory office of district judge? In answering this question, it is necessary to look at the manner in which the judge was engaged, the source and character of the rules governing her service, and the overall context, but this is not an exhaustive list.

17. In looking at the manner in which the judge was engaged, it could be said that there was classic offer and acceptance: there was a letter offering appointment, upon the terms and conditions set out in the letter and accompanying memorandum, which the appellant was invited to accept and did accept. However, the manner of appointment is laid down in statute: under section 6 of the County Courts Act 1984, district judges are now appointed by Her Majesty on the recommendation of the Lord Chancellor; but under the Constitutional Reform Act 2005, the whole process of selection is in the hands of the Judicial Appointments Commission, applying the criteria laid down in that Act. Furthermore, there was nothing in the letter offering appointment or in the accompanying memorandum which was expressed in contractual terms: indeed, some provisions were expressed in terms of what the Lord Chancellor expected or regarded as essential rather than as contractually binding obligations.

18. In looking at the content of the relationship, it could be said that the terms and conditions contained some provisions, for example, those relating to maternity and paternity and adoption leave, which are not derived from statute. It could also be said that deployment decisions, as in any other employment, may be the subject of some negotiation between the individual judge and the leadership judges in her area; but ultimately the Lord Chief Justice is responsible for the deployment of judges. The essential components of the relationship are derived from statute and are not a matter of choice or negotiation between the parties. Under section 6(5) of the 1984 Act, a district judge is to be paid such salary as the Lord Chancellor may determine with the concurrence of the Treasury, but this cannot later be reduced; nor, of course, can it be increased by individual negotiation, as opposed to later determination of what the remuneration for that office is to be. Judicial pensions are also governed by statute and are not a matter of individual negotiation. Under section 11 of the 1984 Act, district judges must leave office on reaching the age of 70 (with the possibility of extension thereafter); otherwise they hold office during good behaviour and may only be removed for misbehaviour or inability to perform the duties of the office by the Lord Chancellor with the concurrence of the Lord Chief Justice; disciplinary proceedings against them are governed by the Judicial Discipline (Prescribed Procedures) Regulations 2014 (SI 2014/1919).

19. It is also noteworthy that the appellant had difficulty in identifying her employer. These proceedings were brought against the Ministry of Justice. However, the appellant was in fact appointed by the then Lord Chancellor, while later district judges are appointed by Her Majesty the Queen. Responsibility for the judiciary is in fact divided between the Lord Chancellor, as a Minister of the Crown, and the Lord Chief Justice, as Head of the Judiciary. Many of the matters of which the appellant complained related to deployment and workload and many of her complaints were directed towards the local leadership judges, although some were directed to senior officials in Her Majesty's Courts and Tribunals Service. This fragmentation of responsibility has both statutory and constitutional foundations and highlights how different is the position of a judge from that of a worker employed under a contract with a particular employer.

20. Finally, and related to that, there is the constitutional context. Fundamental to the constitution of the United Kingdom is the separation of powers: the judiciary is a branch of government separate from and independent of both Parliament and the executive. While by itself this would not preclude the formation of a contract between a Minister of the Crown and a member of the judiciary, it is a factor which tells against the contention that either of them intended to enter into a contractual relationship.

21. Taken together, all of these factors point against the existence of a contractual relationship between a judge and the executive or any member of it. Still less do they suggest a contractual relationship between the judge and the Lord Chief Justice.

Crown employment

22. Section 191(1) of the 1996 Act provides that

> "Subject to section 192 and 193, the provisions of this Act to which this section applies shall have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees or workers."

Included among the provisions to which the section applies, in section 191(2)(aa), is Part IVA. There is a debate about whether including judges within "Crown employment" would bring with it all the listed protections given to employees and workers or only those given to "limb (b)" workers. Fortunately, it is not necessary for us to resolve that debate in order to decide this case.

23. Section 191(3) provides that "In this Act, 'Crown employment' means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision". Clearly, "employment" in this section cannot mean "employment under a contract" because it would then add nothing to the definition in section 230(3). The predecessor to section 191 was inserted into the Industrial Relations Act 1971 because historically Crown servants had not been seen to be employed under contracts of service and had not been able to complain of wrongful dismissal. The object was to enable them to complain of unfair dismissal and enjoy the other employment rights listed in section 191(2). Thus, argues the appellant, section 191 is apt to give her the protection of Part IVA even if she is not employed under a contract.

24. The definition in section 191(3) has two limbs: employment under or for the purposes of a government department; and employment under or for the purposes of an officer or body exercising on behalf of the Crown functions conferred by a statutory provision. For the reasons given earlier, it is impossible to regard the judiciary as employed under or for the purposes of the Ministry of Justice. They are not civil servants or the equivalent of civil servants. They do not work for the ministry. It is slightly more plausible to regard them as working under or for the purposes of the Lord Chief Justice, who since the 2005 Act has had statutory responsibilities in relation to the judiciary: under section 7 of that Act, he is responsible for the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of England and Wales (within the resources provided by the Lord Chancellor) and for their deployment and the allocation of work within the courts. As already noted, he also shares some responsibility for appointments, discipline and removal with the Lord Chancellor. But it is difficult to think that, by conferring these functions upon the Lord Chief Justice, the 2005 Act brought about such a fundamental change in the application

of section 191. Judges do not work "under and for the purposes of" those functions of the Lord Chief Justice but for the administration of justice in the courts of England and Wales in accordance with their oaths of office. *Mutatis mutandis*, the same reasoning would apply to the identical definition of crown employment in article 236(3) of the Employment Rights (Northern Ireland) Order 1996.

25. It is perhaps worth noting that section 83(2) and (9) of the Equality Act 2010, passed since the 2005 Act, defines "employment" as covering "Crown employment" as defined in section 191 of the 1996 Act. But it also makes express provision, in sections 50 and 51, prohibiting discrimination in relation to, among other things, appointment to public offices. These are defined to include officers appointed by or on the recommendation of a member of the executive (such as the Lord Chancellor) or by the Lord Chief Justice or Senior President of Tribunals. Thus judicial office-holders are clearly protected by these provisions, which would have been quite unnecessary had they already been protected as persons in Crown employment. Sections 50 and 51 do not apply in Northern Ireland, but this does not affect the force of this point.

Human rights

26. The appellant first argued that the failure to extend the 1996 Act's protection against whistle-blowing to judicial officers was a violation of her right to freedom of expression under article 10 of the ECHR. It is indeed possible to see that imposing certain detriments upon her as a result of her public interest disclosures would be an interference with her freedom of expression. It is not enough to say that judges are well protected against dismissal and other disciplinary action if they speak their minds. They are not so well protected against the sort of detriments which are complained about in this case - bullying, victimisation and failure to take seriously the complaints which she was making.

27. Be that as it may, however, there is a remedy for breach of the Convention rights, by way of an action under section 7(1) of the Human Rights Act 1998, which can result in an award of damages, if this is necessary to afford just satisfaction for the wrong done. But this would not have the effect of extending the specific protection of Part IVA of the 1996 Act to judicial or indeed other non-contractual office-holders. It would not enable the appellant to pursue the claim which she has made in the Employment Tribunal.

28. The appellant also complains that the failure to extend the protection of Part IVA to judicial office-holders is a violation of her rights under article 14 of the ECHR read with article 10. Article 14, it will be recalled, reads:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

This gives rise to four well-known questions: (i) do the facts fall within the ambit of one of the Convention rights; (ii) has the applicant been treated less favourably than others in an analogous situation; (iii) is the reason for that less favourable treatment one of the listed grounds or some "other status"; and (iv) is that difference without reasonable justification - put the other way round, is it a proportionate means of achieving a legitimate aim?

29. The answer to question (i) is clearly "yes". Indeed, not only do the facts fall within the ambit of the right to freedom of expression protected by article 10; unusually there may well have been a breach of that article in this case; but that is not required.

30. The answer to question (ii) is also clearly "yes". The applicant, and others like her, have been denied the protection which is available to other employees and workers who make responsible public interest disclosures within the requirements of Part IVA of the 1996 Act. She is denied protection from "any detriment", which is much wider than protection from dismissal or other disciplinary sanctions. She is denied the possibility of bringing proceedings before the Employment Tribunal, with all the advantages those have for applicants. She is denied the right to seek compensation for injury to feelings as well as injury to her health. This is undoubtedly less favourable treatment than that afforded to others in the workplace - employees and "limb (b)" workers - who wish to make responsible public interest disclosures.

31. It is no answer to this to say that, by definition, judicial office-holders are not in an analogous situation to employees and "limb (b)" workers. That is to confuse the difference in treatment with the ground or reason for it. What matters is that the judicial office-holder has been treated less favourably than others *in relation to the exercise or enjoyment of the Convention right in question*, the right to freedom of expression. She is not as well protected in the exercise of that right as are others who wish to exercise it.

32. The answer to question (iii) is also clearly "yes". An occupational classification is clearly capable of being a "status" within the meaning of article 14. Indeed, it is the very classification of the judge as a non-contractual office-holder that takes her out of the whistle-blowing protection which is enjoyed by employees and those who have contracted personally to execute work under limb (b) of section 230(3). The

constitutional position of a judge reinforces the view that this is indeed a recognisable status.

33. The answer to question (iv) is also, in my view, clearly "yes". The respondent argues that this is a case in which the courts should allow a broad margin of discretion to the choices made by Parliament, for two main reasons: first because this is an area of social policy in which the courts should respect the decisions of the democratically elected legislature unless they are "manifestly without reasonable foundation"; and second, because the status in question is not one of the particularly suspect grounds of discrimination, such as race or sex or sexual orientation, and the less favourable treatment is correspondingly easier to justify.

34. There are several problems with this argument. The first is that, while it is well-established that the courts will not hold a difference in treatment in the field of socio-economic policy unjustifiable unless it is "manifestly without reasonable foundation", the cases in which that test - or something like it - has been applied are all cases relating to the welfare benefits system: see *R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2008] UKHL 63; [2009] 1 AC 311 (income support disability premium); *Humphreys v Revenue and Customs Comrs* [2012] UKSC 18; [2012] 1 WLR 1545 (child tax credit); *R (SG) v Secretary of State for Work and Pensions (Child Poverty Action Group intervening)* [2015] UKSC 16; [2015] 1 WLR 1449 (benefit cap); *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47; [2015] 1 WLR 3250 (child disability living allowance); *R (MA) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2016] UKSC 58; [2016] 1 WLR 4550 ("bedroom tax"); *R (HC) v Secretary of State for Work and Pensions (AIRE Centre intervening)* [2017] UKSC 73; [2017] 3 WLR 1486 (benefits for children of "Zambrano carers"); *R (DA) v Secretary of State for Work and Pensions (Shelter Children's Legal Services and others intervening)* [2019] UKSC 21; [2019] 1 WLR 3289 (revised benefit cap). It is also in that context that the test has been articulated by the European Court of Human Rights: see *Stec v United Kingdom* (2006) 43 EHRR 47. This case is not in that category, but rather in the category of social or employment policy, where the courts have not always adopted that test: see, for example, *In re G (A Child) (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173.

35. The courts will always, of course, recognise that sometimes difficult choices have to be made between the rights of the individual and the needs of society and that they may have to defer to the considered opinion of the elected decision maker: see *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 381. But the second problem is that in this case there is no evidence at all that either the executive or Parliament addressed their minds to the exclusion of the judiciary from the protection of Part IVA. While there is evidence of consideration given to whether certain excluded groups should be included (such as police officers), there is no evidence that the position of judges has ever been considered. There is no "considered opinion" to which to defer.

36. That leads on to the third problem, which is that no legitimate aim has been put forward for this exclusion. It has not been explained, for example, how denying the judiciary this protection could enhance judicial independence. Of course, members of the judiciary must take care, in making any public pronouncements, to guard against being seen to descend into the political arena. But responsible public interest disclosures of the sort which are protected under Part IVA do not run that risk. Indeed, the object of the protection was to give workers the confidence to raise malpractice within their organisation rather than placing them in a position where they feel driven to raise concerns externally. It is just as important that members of the judiciary have that confidence. They are just as vulnerable to certain types of detriment as are others in the workplace. To give the judiciary such protection might be thought to enhance their independence by reducing the risk that they might be tempted to "go public" with their concerns, because of the fear that there was no other avenue available to them, and thus unwillingly be drawn into what might be seen as a political debate.

37. As no legitimate aim has been put forward, it is not possible to judge whether the exclusion is a proportionate means of achieving that aim, whatever the test by which proportionality has to be judged. I conclude, therefore, that the exclusion of judges from the whistle-blowing protection in Part IVA of the 1996 Act is in breach of their rights under article 14 read with article 10 of the ECHR.

Remedy

38. The most difficult question in this case, therefore, is how to remedy the incompatibility of the exclusion of the judiciary from the protection of Part IVA of the 1996 Act with article 14 of the ECHR.

39. In *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, the House of Lords held that the interpretive duty in section 3 of the Human Rights Act 1998 was the primary remedy. Section 3(1) reads: "So far as it is possible to do so, primary legislation … must be read and given effect in a way which is compatible with the Convention rights". In *Ghaidan v Godin-Mendoza* it was also established that what is "possible" goes well beyond the normal canons of literal and purposive statutory construction. Philip Sales QC, for the Government, argued (at p 563) that section 3(1) required a similar approach to the duty to interpret domestic legislation compliantly with EU law, so far as possible, citing *Litster v Forth Dry Dock Engineering Co Ltd* [1990] 1 AC 546. Both Lord Steyn (paras 45 and 48) and Lord Rodger (paras 118 and 121) agreed that what was possible by way of interpretation under EU law was a pointer to what was possible under section 3(1), citing *Litster* as well as *Pickstone v Freemans Plc* [1989] AC 66. Lord Nicholls referred to the "unusual and far-reaching character" of the obligation (para 30). He also emphasised that it did not depend critically on the particular form of words used, as opposed to the concept (para 31). Lord Rodger, too, said that to attach decisive importance to the precise adjustments required to the

language of the particular provision would reduce the exercise to a game (para 123). The limits were that it was not possible to "go against the grain" of the legislation in question (para 121) or to interpret it inconsistently with some fundamental feature of the legislation (Lord Nicholls, at para 33, echoing *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] UKHL 10; [2002] 2 AC 291).

40. There are two provisions which might be candidates for such interpretation. Most obvious is section 230(3)(b), which, it will be recalled, relevantly defines a "worker" as:

> "an individual who has entered into or works under (or where the employment has ceased, worked under) … (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual 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 undertaking carried on by the individual."

41. Not surprisingly, the appellant points out that the courts have found it possible to interpret this definition so as to include judicial office-holders when required to do so by European Union law. In *O'Brien v Ministry of Justice (formerly Department for Constitutional Affairs)*, [2013] UKSC 6; [2013] 1 WLR 522, the question was whether part-time judges were entitled to the protection against discrimination given to part-time workers by the Part-Time Workers Directive (Council Directive 97/81/EC) transposed into UK law by the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551). The definition of "worker" in regulation 1(2) was identical to that in section 230(3) of the 1996 Act. Having determined that judges were "workers" for the purpose of European Union law, this court had no difficulty in holding that the Regulations applied to them.

42. The respondent argues that to do this would "cut across a fundamental feature" or "go against the grain" of the 1996 Act. But it is hard to see why that should be so. To interpret section 230(3)(b) so as to include judicial office-holders would not afford them all the rights afforded to "workers" under the 1996 Act, but only those rights afforded to "limb (b)" workers, most of which are inapplicable to judges. But in any event, the interpretation in this case would only relate to an exclusion which is incompatible with the Convention rights - otherwise the section 3(1) power and duty does not apply. And the inclusion of judicial office-holders within the Equality Act 2010, as well as within EU derived employment rights, shows that affording judges some of the rights of other workers does not offend against any fundamental constitutional principle. It is noteworthy that the Court of Appeal, in para 90, was inclined to think that:

> "having regard to the strength of the interpretative obligation under section 3 of the 1998 Act it would be possible to read section 230(3) down so that it extended to an 'employment relationship' of the kind found to exist in *O'Brien*. It does not seem that the definition of a worker by reference to the existence of a contract, so as to exclude a 'mere' office-holder, is a fundamental feature of the legislation."

43. I agree. It would not be difficult to include within limb (b) an individual who works or worked by virtue of appointment to an office whereby the office-holder undertakes to do or perform personally any work or services otherwise than for persons who are clients or customers of a profession or business carried on by the office-holder. The legislation contemplates disclosure to an employer or others responsible for the conduct in question, which in this case would be the leadership judges or the HMCTS or the Ministry of Justice, depending upon the nature of the conduct. It also prohibits both the employer and fellow employees from subjecting the whistle-blower to any detriment, which again would have to embrace fellow judges and those in a position to inflict such detriments. None of this would go against the grain of the legislation. When considering whether the disclosures had been made in the public interest, it would of course be relevant to consider whether there were other more appropriate ways of trying to resolve the situation. This would include the judicial grievance procedures policies (currently, policy no 1 relates to grievances between judicial office-holders and policy no 3 relates to grievances between judicial officer-holders and HMCTS staff); however, the appellant did invoke the grievance procedure and the investigating judge, Tomlinson LJ, commented that it was not a suitable means of dealing with the sort of systemic failures which were being alleged.

44. Bearing in mind, therefore, the parallel seen in *Ghaidan v Godin-Mendoza* between section 3(1) and conforming interpretation in EU law, its strictures against attaching decisive importance to the precise adjustment needed to the language of the provisions, and the ease with which this court interpreted identical language to include judges as limb (b) workers in *O'Brien*, I can reach no other conclusion than that the Employment Rights Act should be read and given effect so as to extend its whistle-blowing protection to the holders of judicial office.

45. The relevant provisions of the Employment Rights Act extend to both England and Wales and Scotland (section 244) but not Northern Ireland. However, the equivalent provisions of the Employment Rights (Northern Ireland) Order 1996 (as amended by the Public Interest Disclosure (Northern Ireland) Order 1998) are to the same effect: article 3(3) defines "worker" in the same times as section 230(3); articles 67A, 67B, 67C define protected disclosures, qualifying disclosures and those to whom such disclosures may be made in the same way as in Part IVA of the 1996 Act; and articles 70B and 71(1A) provide that a maker of a protected disclosure shall not be subjected to any detriment for doing so and for complaints to an employment tribunal. Those

provisions, too, should be read and given effect so as to extend the protection given to whistle-blowers to the holders of judicial office.

46. I would therefore allow this appeal and remit 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.