Appeal No. UKEAT0087/16/LA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 20 & 21 July 2016
Handed Down on 31 October 2016

Before

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

SITTING ALONE

APPELLANT

MS C GILHAM

MINISTRY OF JUSTICE RESPONDENT

JUDGMENT

A FULL HEARING

APPEARANCES

For the Appellant	Ms Rachel Crasnow QC (of Counsel) Ms Rachel Barrett Instructed by Bindmans LLP 236 Grays Inn Road London WC1X 8HB
For the Respondent	Mr Ben Collins QC (of Counsel) Instructed by Government Legal Department Employment Group One Kemble Street London WC2B 4TS

SUMMARY

TOPIC NUMBER(S): 30A

The Employment Judge made no error of law in concluding that District Judges are office- holders and do not also work under a contract of employment or for services.

THE HONOURABLE MRS JUSTICE SIMLER DBE (PRESIDENT)

1. It being common ground that District Judge Gilham is an office-holder, the question raised by this appeal is whether she is also a worker within the meaning of s.230(3) Employment Rights Act 1996 (the "1996 Act") who works under a contract of service or for services, or is to be treated as doing so. Regional Employment Judge Robertson held that she did not work under any contract in a judgment promulgated on 26 October 2015.

2. The appeal challenges that decision and raises a point of general importance. The consequence of the Tribunal's decision if correct, is that District Judges (and other judicial office-holders) may not rely on the whistleblowing provisions in the 1996 Act.

3. I refer to the parties as they were below. Ms Rachel Crasnow QC and Ms Rachel Barrett for the Claimant submit that the Tribunal erred in law in reaching that conclusion. Mr Ben Collins QC for the Respondent resists the appeal and seeks to maintain the decision. I am grateful to all counsel for the focus and clarity of their submissions, both written and oral.

4. Although the Respondent's Answer to the appeal expressly challenges the Employment Judge's conclusion that judicial office-holders' rights under Article 10 are secured by means of statutory and constitutional protection, a similar contention was not advanced in the Respondent's Answer in respect of the Employment Judge's rejection of the argument that judicial independence is a material factor in favour of the argument that judges hold office only and do not also work under contracts. I permitted an amendment to the Respondent's Answer to raise this point (which was pursued below) and granted an adjournment to enable the Claimant to provide additional written submissions on both questions. Those submissions were

duly lodged with the Employment Appeal Tribunal in accordance with my directions by 26 September 2016, and I have considered them carefully. I have concluded that no further oral hearing is necessary to address the points raised by them.

The applicable law

5. In order to come within the terms of s.47B of the 1996 Act, the Claimant must establish that she is a worker within the meaning of s.230(3) of the 1996 Act which provides:

> **"230. Employees, workers etc.**
>
> **……**
>
> **(3) In this Act "worker" …. means an individual who has entered into or works under (or where the employment has ended, 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 of customer of any profession or business undertaking carried on by the individual…".**

The same definition of "worker" appears in the Part-time Workers Regulations 2000 ("the 2000 Regulations") (and in the National Minimum Wage Regulations 1999 and Working Time Regulations 1998). The 2000 Regulations are the means by which the United Kingdom implemented the Framework Directive 97/81/EC which itself was the means of implementing a framework agreement on part-time work. Clause 2.1 of the framework agreement made clear that it applies to part-time workers who "have an employment contract or employment relationship as defined by the law …". In Ministry of Justice (formerly Department of Constitutional Affairs) v O'Brien [2013] ICR 499 at [42] following a reference to the CJEU, the Supreme Court held that Recorders are in an "employment relationship" within the meaning of clause 2.1 of the framework agreement and that, as the result to be achieved by the Framework Directive is binding on the United Kingdom, they must be treated as "workers" for the purposes

of the 2000 Regulations. This decision was expressly not made on the basis of a finding that part-time judges have contracts.

6. Before the Employment Tribunal, the Claimant argued that the same approach as that adopted in O'Brien to the interpretation of the 2000 Regulations applies to "worker" in s.230(3) of the 1996 Act. The Employment Judge rejected that submission, correctly. Unlike the claim in O'Brien, where the rights invoked derived from EU law and extended to those with an "employment relationship" so that the word "worker" had to be read as having that effect, the rights under the 1996 Act that are engaged in this case are domestic rights only and depend upon the existence of a contract (subject to an argument based on the Human Rights Act 1998 (the "HRA")). It is now common ground between the parties that this part of the reasoning in O'Brien does not apply here.

7. It is not in dispute that (subject to the HRA argument) for s.230(3) of the 1996 Act to apply there must be a contract that fulfils the requirements of that provision. If there is no contract at all, those requirements cannot be fulfilled: see Sharpe v Bishop of Worcester [2015] IRLR 663.

The Tribunal's Judgment

8. The Employment Judge examined the question whether the Claimant was a worker and set out his findings of fact and reasons with care. His critical findings can be summarised as follows:

(a) District Judges are appointed by the Queen on the recommendation of the Lord Chancellor under s.6(1) of the County Courts Act 1984. Section 6 (5) provides that District

Judges are paid such salary as is determined by the Lord Chancellor, which may be increased but not reduced. They are assigned to areas or circuits by the Lord Chief Justice after consulting with the Lord Chancellor: see s.100 of the Senior Courts Act 1981.

(b) District Judges hold office until they reach the age of 70: see s.11 of the 1984 Act. They may be removed from office only for misbehaviour or inability to perform the duties of the office. Significantly, removal may only be effected with the concurrence of the Lord Chief Justice: see s.11(4) and 11(5) of the 1984 Act. They cannot otherwise be removed, though they may resign at any time.

(c) The judicial role, functions and authority of District Judges within the structure of the County Court and High Court are prescribed by statute and by the relevant rules of procedure made under statutory authority.

(d) So far as terms of service of District Judges are concerned, these are contained in a Memorandum on Conditions of Appointment and Terms of Service, issued by the Lord Chancellor from time to time. The Memorandum is in three parts. Part 1 deals with conditions of appointment. Part 2 deals with general terms and conditions of service. Part 3 deals with allowances and other provisions, such as travel expenses and subsistence.

(e) At paragraphs 27 to 35 the Employment Judge dealt in more detail with part 2 of the Memorandum as follows:

> "27. In part 2, paragraph 14 describes the responsibility of the Lord Chief Justice, as President of the Courts of England and Wales and Head of the Judiciary, for allocation of work, deployment of judges, their wellbeing and training and general advice and direction. This reflects his statutory responsibility under s.7(2) of the Constitutional Reform Act 2005. It sets out the hierarchy of leadership and management judges who support him in this, assisted by administrative staff. It provides that District Judges are expected to:
> (a) comply with any guidance or instructions issued by, or on behalf of, the Lord Chief Justice;
> (b) cooperate with the administrative directions of the judges appointed to senior judicial roles;
> (c) undertake other judicial duties such as assisting other judges when they run short, sitting at other courts, undertaking liaison duties or serving on public bodies; and

(d) assist senior judiciary to ensure, with the help of court staff, the efficient management of the courts.

28. The Lord Chief Justice, therefore, has responsibility for and control over the activities of District Judges. Whilst involved in their appointment and removal and responsible for their salary, the Lord Chancellor or Secretary of State has no line management control over their day to day functions.

29. Paragraph 16 of Part 2 sets out the statutory prohibition on other legal practice. Paragraphs 18 to 21 repeat the statutory provisions as to tenure and salary (described as payable out of the Lord Chancellor's Vote). Paragraphs 22 to 25 provide for the deduction of Tax and National Insurance Contributions (as if the District Judge were an employee) and paragraphs 26 to 22 (sic) for pension under the Judicial Pensions and Retirement Act 1993. Paragraph 35 provides for salaried part-time appointment.

30. Paragraphs 36 to 40 deal with working time and working arrangements. There are no specific hours of work or paid holiday entitlement. But paragraph 37 provides that:

> **"The Lord Chancellor and the Lord Chief Justice consider it essential for District Judges to devote 215 days in each year to judicial business."**

31. Paragraph 38 describes the activities which will be deemed to constitute judicial business, including box work, reading case papers, preparing judgments and training. Paragraph 40 states that:

> **"Plans for District Judges' sittings are drawn up by HMCS staff for the Presiding Judges' approval. District Judges should, when they wish to make changes to the planned itineraries or make arrangements for holidays or non-judicial commitments, indicate the dates on which they are not available to sit sufficiently far in advance to enable the Presiding Judges and HMCS staff to make other arrangements for the disposal of court business."**

32. In practice, District Judges are required to book annual leave in advance to suit the needs of the judicial work in their court.

33. Paragraph 42 provides that no adjustment is made to a District Judge's salary during sickness absence, as long as there is a reasonable expectation of an eventual return to duty.

34. The remaining provisions of part 2 include many of the matters which, as Ms Crasnow comments, might appear in a contract of employment: maternity, paternity and adoption leave, career breaks, personal and judicial conduct, criminal convictions, outside activities and grievance procedures. I need say nothing more about part 3.

35. These are, of course, generic terms of service. They apply to all District Judges, including Ms Gilham. They are not open to negotiation in any individual case. Judicial salaries are similarly not open to negotiation and are determined annually by the Lord Chancellor with advice from the Senior Salaries Review Board."

(f) The Claimant herself was appointed as a salaried District Judge by an Instrument of Appointment signed by the Lord Chancellor on 27 January 2006 and expressed to be under s.6 of the County Courts Act 1984 and s.100 of the Supreme Court Act 1981. She received a letter of offer of appointment dated 28 October 2005. The letter referred to the terms of the Memorandum. It referred to the understanding set out at paragraph 67 of the Memorandum that there would be no return to practice and that as a full-time judge she would be precluded from private practice under s.75 of the Courts and Legal Services Act 1990. She was assigned to the Wales and Chester Circuit, Crewe County Court. Later she was transferred to Warrington County Court on the same circuit.

(g) The Employment Judge referred to the offer of appointment letter and observed that apart from the fact that part 2 is described as "terms of service", there is nothing in the letter of appointment, or in the Instrument of Appointment or Memorandum, which indicates that a contract is being created or refers to "employment". The language throughout is of appointment or of the office of District Judge.

(h) In terms of day to day activities, deployment and allocation of work to judges is delegated by the Lord Chief Justice to Presiders and Resident Judges, supported by Ministry of Justice administrative staff who allocate the work on a day-to-day basis.

(i) Although all judges have unfettered judicial independence in their judicial decision-making, day-to-day allocation of their work is closely controlled and they have little if any freedom in the work they are asked to do and the organisation of their working day. They are required to book annual leave or other absence in advance in line with their itineraries, sitting commitments and judicial workload. The Claimant's own working arrangements were consistent with that broad summary.

9. The Judge adopted the words of Sir Robert Carswell LCJ in the Northern Ireland Court of Appeal about the work of judges in Perceval-Price v Department of Economic Development [2000] IRLR 380 (approved in O'Brien by the Supreme Court, see [2013] ICR 499 at [32-33]):

> **"All judges, at whatever level, share certain common characteristics. They all must enjoy independence of decision without direction from any source, which the respondents quite rightly defended as an essential part of their work. They all need some organisation of their sittings, whether it be prescribed by the President of the Industrial Tribunals or the Court Service, or more loosely arranged in collegiate fashion between the judges of a particular court. They are all expected to work during defined times and periods, whether they be rigidly laid down or managed by the judges themselves with a greater degree of flexibility. They are not free agents to work as and when they choose, as are self-employed persons. Their office accordingly partakes of some of the characteristics of employment…"**

Having reviewed a number of relevant authorities, including Sharpe v Worcester Diocesan Board of Finance Ltd [2015] ICR 1241(CA), Diocese of Southwark v Coker [1998] ICR 140 (CA), Percy v Board of National Mission of the Church of Scotland [2006] 2 AC 29 (HL) and Preston (formerly Moore) v President of the Methodist Conference [2013] 2 AC 163 (SC), at paragraph 57 the Employment Judge distilled a number of propositions he derived from those cases as follows:

> "57. I distil from these cases the following propositions, which seem to me to be equally applicable to statutory office-holders such as judges, although the nature of a statutory office will be material in assessing the relationship:
> (a) the question of employment status cannot be answered simply by discerning whether a minister has an office or is in employment: the two are not mutually exclusive (Preston, paragraph 10, and Sharpe, paragraphs 67 and 68)
> (b) there must be an exercise of contractual interpretation to decide whether, in all the circumstances, there is a contract between the parties;
> (c) this will involve consideration of the manner of appointment and the way in which the office-holder carries out their duties;
> (d) it is necessary to ask whether rights and duties arise under contract or are defined by the office held;
> (e) in the context of statutory employment protection, arrangements (between a minister and a church) should not lightly be taken to have no legal effect (Percy, paragraph 26);
> (f) if there was no express contract, there will not be any necessity to imply one (Preston, paragraph 12, Sharpe, paragraph 77): it is insufficient that the conduct relied on is no more consistent with an intention to contract than an intention not to contract.
>
> 58. In Preston, the primary considerations in deciding whether the individual was employed under a contract of employment included these, which I take from the case headnote:
> (a) the manner in which the individual was engaged and the character of the rules and terms governing their service;

(b) the intentions of the parties, and the fact that the arrangements included the payment of a stipend, the provision of accommodation and the performance of recognised duties did not without more resolve the issue;
(c) the constitution and standing orders (of the Methodist Church) which showed that the manner in which the minister was engaged was incapable of analysis in terms of contractual formation;
(d) the rights and duties of the minister arose from the constitution of the church and not from contract;
(e) the relationship was not terminable at the will of the parties."

10 The Employment Judge accepted that holding an office does not in itself preclude the creation of a contract, but concluded that there was no intention to create a contractual relationship here. The manner in which, and terms on which, the Claimant was engaged were consistent only with appointment to an office with duties defined by statute. The crux of his reasoning is at paragraph 80 as follows:

> **"80. Fundamentally, however, I can find no intention by the parties to create a relationship of contract. The documents indicate only the appointment to the office of District Judge. The duties are defined by the statutory role of the District Judge. There are no significant duties beyond that role. The rights and responsibilities are defined by the office held. Whilst I accept that the terms of service extend beyond the immediate requirements of the role, they are, it seems to me, incidental to the office held. The Secretary of State or Lord Chancellor is entitled to provide terms of service similar to those accorded to employees without thereby creating a relationship of contract which was not intended. The position of District Judge is not a role which in my view can properly be defined in terms of any contractual relationship, and I do not find any intention by the parties to create any such relationship. I find myself echoing the views expressed by Maurice Kay LJ in O'Brien in the Court of Appeal: it is impossible to analyse the work of judges in terms of a distinction between self-employed and employed status. The answer lies in the absence of any contractual relationship."**

Two other factors weighed against the existence of a contract. First, the fact that there was no element of negotiation in the terms of appointment and level of remuneration. Secondly, that the relationship was not dependent on the will of the parties in the sense that it could not be terminated by the Respondent save in limited circumstances for incapacity or on grounds of misconduct.

11. The Employment Judge did not deal in terms with the question whether a contract was to be implied. Finally, the Employment Judge rejected a submission on behalf of the Claimant that s.230 (3) of the 1996 Act was required to be read and given effect to in conformity with the

HRA and Article 10 of the Convention (the right to freedom of expression) so as not to deprive her of a remedy for whistleblowing detriment, by importing the words "employment relationship" in addition to contract into that section.

The appeal

12. Against that background I turn to address the grounds of appeal advanced on behalf of the Claimant. There are three grounds of appeal although ground one encompasses three separate points of challenge to the judgment.

Ground one: failure to apply the correct test

13. The Claimant contends that the Employment Judge erred as to the legal test for determining whether the Claimant is a worker by failing to adopt the generally accepted approach to determining whether a contract exists, namely identifying on an objective basis whether there was an offer and acceptance, consideration on both sides, an intention to create legal relations and mutuality of obligations. Ms Crasnow QC submits that had he adopted this approach and in particular analysed mutuality of obligations, the Employment Judge would have found that the Respondent was undoubtedly under an obligation to provide work for and pay the Claimant, in return for which the Claimant was obliged to undertake work within and according to the terms of the Memorandum. The wage/work bargain struck is strongly indicative of a contract of or for services. Further, the documents reflecting the offer of appointment on terms identified, and the acceptance of that offer looked at objectively, are a conventional contract between the Claimant and the DCA (now the Ministry of Justice). The additional documents that followed the initial offer and acceptance (including the Instrument of Appointment) are not inconsistent with a contract, and are akin to forms of clearance that generally take place before employment contracts are confirmed. Moreover she submits that

A the only factor relied on to exclude an intention to create contractual relations was the existence of the office of District Judge, as paragraph 80 shows. That was wrong since the two are not mutually exclusive. This led to a blinkered approach by the Employment Judge who wrongly excluded from consideration the Claimant's terms of service that are akin to employment terms and the features of the relationship that have many characteristics of employment. The only lawful conclusion available to the Tribunal on the facts found, adopting a creative and purposive (rather than a restrictive) construction was that the agreement created contractual obligations between the parties. Finally, by reference to the case of ex parte Nangle [1991] ICR 743 the Claimant contends that the weight placed on the existence of a statutory office in this case led the Judge to conclude in effect, that there could be no contract. But for that conclusion, the findings of fact made by the Employment Judge should have led to the opposite result.

14. It is not in doubt that District Judges are office-holders. The critical question in this case, as the Employment Judge acknowledged, is whether or not the Claimant also has a contract with the Respondent.

15. As Lord Sumption JSC explained in Preston (formerly Moore) v President of the Methodist Conference one of two recurrent themes in the case law on employment status involves

> **"… the distinction between an office and an employment. Broadly speaking, the difference is that an office is a position of a public nature, filled by successive incumbents, whose duties were defined not by agreement but by law or by the rules of the institution. A beneficed clergyman of the Church of England is, or was until recent measures modified the position, the paradigm case of a religious office-holder."**

The two are not necessarily mutually exclusive and as Lord Sumption held, the question whether there is an express employment contract is not answered by classifying an occupation

by type: office or employment. Nor is it answered by any presumption that there was no intention to create a contractual relationship. Instead, he held at [10]:

> **"The primary considerations are the manner in which the minister was engaged, and the character of the rules or terms governing his or her service. But, as with all exercises in contractual construction, these documents and any other admissible evidence on the parties' intentions fall to be construed against their factual background. …"**

Finally at [12] Lord Sumption rejected the argument that a contract should be implied in the absence of an express written or oral contract, where it is necessary. He gave three reasons for that. The second of these was that the practical effect of this argument is to reintroduce the presumption of non-contractual status. Thirdly, he said:

> **"… whatever the legal classification of a Methodist minister's relationship with his Church, it is not sensible to regard it as implied. It is documented in great detail in the Deed of Union and the standing orders. The question is whether the incidents of the relationship described in those documents, properly analysed, are characteristic of a contract and, if so, whether it is a contract of employment. Necessity does not come into it."**

In other words, in a case where there was plainly an intention to create legal relations, the question to be decided having regard to the documents and other admissible evidence, is what legal relationship it was intended to create.

16. I do not accept Ms Crasnow's submission that the Employment Judge fell into legal error by failing to consider offer, acceptance, consideration and mutuality of obligations. These concepts, including mutuality of obligation, may be features of an office as well as a contract. Where the question whether there is a contract is to be answered in the case of an acknowledged statutory office-holder, the existence of these features may be equally consistent with appointment to the office alone which gives rise to the legal relationship. While the existence of these features may be very significant in a case where there is no office (Percy v Church of Scotland), and of some significance in a case where the nature of the contract that defines the relationship is in dispute (Autoclenz v Belcher), where the statutory office requires a district judge to perform functions and provides for the receipt of remuneration in return, they

A do not assist the analysis and cannot be the touchstone for identifying whether the relationship is to be characterised as an office, or by reference to a contract, or both.

B 17. For the same reason Ms Crasnow's reliance on ex parte Nangle where the Divisional Court held that if there was an exchange of promises, prima facie there would be an intention to create legal relations, is misplaced. It does not take the matter any further because the primary question here involves determining the source of the legal relationship that undoubtedly exists, and whether it is contractual or not.

C

D 18. The Employment Judge did not apply a presumption that there was no intention to create legal relations in this case. There plainly was an intention to create legal relations. The question was whether those legal relations were a contract of employment, or an appointment to an office imposing legal duties and conferring legal rights, or both.

E

19. In reaching his conclusions in this case the Employment Judge conducted precisely the analysis identified as required by Lord Sumption at paragraph 15 above. Whether there is a contract and if so what is its nature and what are its terms, depends upon the manner in which the individual was engaged and the character of the rules or terms governing her service. Documents dealing with those matters and any other admissible evidence fall to be construed against their factual background. The question is whether the incidents of the relationship described in those documents, properly analysed, are characteristic of a contract and if so, whether it is a contract of employment or for services. The analysis must inevitably take account of the fact that the appointment is described as an office, but that does not preclude a finding that there is a parallel contract even where the duties of the office are statutory.

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20. The Employment Judge considered the manner of the Claimant's appointment as a District Judge to be inconsistent with an intention to enter into a contract. The Claimant's appointment as a District Judge was by the Queen on the recommendation of the Lord Chancellor pursuant to s.6(1) of the County Courts Act 1984. Although the Claimant's selection followed a competitive interview process which might have resembled the process for recruiting an employee, she was placed on a reserve list until a vacancy arose. (Her selection as a District Judge occurred before the introduction of the independent body, the Judicial Appointments Commission, now responsible for making recommendations for appointment, with the final decision on whether to accept a recommendation for appointment to the district bench lying with the Lord Chief Justice).

21. The Claimant's appointment was effected by an Instrument of Appointment signed by the Lord Chancellor following an exchange of letters in which she was offered terms of appointment and accepted these. The language of these documents is that of office rather than contract. The duties, functions and authority of a district judge are defined by the statutory role of district judge and are prescribed by statute and by rules made under statutory authority. There are no significant duties or functions beyond that role, and they do not derive from any private agreement made between the Claimant and the Ministry of Justice.

22. So far as terms of service or appointment are concerned, these are contained in the Memorandum on conditions of appointment and terms of service. The Employment Judge did not disregard the fact that the Memorandum is a non-statutory document. He expressly recognised that certain terms (for example, in respect of remuneration and pension provision) derive from statute, but that the Memorandum does not. The Employment Judge moreover acknowledged the similarity of certain terms of service to those identified by the Employment

Rights Act 1996 as terms to be included in a statutory statement of particulars. However, what is clear (as the Employment Judge found) is that to the extent that the terms of service extend beyond the immediate requirements of the role of district judge, they are incidental to it. Significantly, none of the terms of service or appointment derive from any privately negotiated agreement between the Claimant and the Ministry of Justice.

23. Further, by virtue of s.7 of the Constitutional Reform Act 2005, the Lord Chief Justice (and not the Ministry of Justice or the Lord Chancellor) is responsible for maintaining appropriate arrangements for the welfare, training and guidance of the judiciary and for the deployment of the judiciary and allocation of work within courts.

24. Finally, the relationship is not dependent on the will of the parties. Having been appointed, a district judge holds office until age 70 and cannot be removed save on account of misbehaviour or inability to perform the duties of the office (see s.11 of the County Courts Act 1984). Even then, the power to remove is exercisable by the Lord Chancellor but only with the concurrence of the Lord Chief Justice. The Ministry of Justice is accordingly, powerless to act to remove a district judge unless the Lord Chief Justice also wishes to do so.

25. In my judgment, there are no features of the method of the Claimant's appointment, the duties and functions of her role, or the means by which she could be removed from it which support the existence of a contract between her and the Ministry of Justice in addition to the office she holds. There is nothing in the manner or express terms of appointment to indicate that the parties intended to enter into an employment contract. While there are some terms and conditions of service and some aspects of the function of district judges that "partake of some of the characteristics of employment" when the incidents of the legal relationship between the

Claimant and the Respondent are properly analysed, they lead to the conclusion that she is an office-holder only, and does not also have a contract of employment. The Employment Judge made no error of law in interpreting the documents in this case, and in reaching that conclusion. He did not adopt an unlawfully restrictive approach and nor was he deflected by general policy considerations or any presumption that there is no parallel contract.

26. I reach that conclusion without regard to the line of cases (including Terrell v Secretary of State for the Colonies [1953] QB 482, Knight v Att-General [1979] ICR 194 and Shaikh v Independent Tribunal Service unreported, 16 March 2004) relied on by Mr Collins QC as demonstrating that judges do not have contracts. Those cases were referred to by the Court of Appeal in O'Brien at [47]. As Maurice Kay LJ observed however, none of those authorities was dispositive of that case. The same is true of the present case. Nevertheless, I derive comfort from the conclusion reached by the Court of Appeal in O'Brien that Recorders do not have contracts of employment.

27. The Employment Judge did not regard the principle of judicial independence as itself precluding the existence of a contract. That conclusion is challenged by the Respondent whose case remains that if the Crown were the judge's employer under contract, a real difficulty would arise with the constitutional independence of the judiciary in every case to which the Crown is a party, which necessarily includes every criminal prosecution. I have found this question difficult, but ultimately have come to the conclusion that the Employment Judge was correct on this point too. Since O'Brien it has been accepted that judges are in an "employment relationship" for the purpose of EU derived rights. In O'Brien v Ministry of Justice C-393/10 [2012] ICR 955 at [47-48] the CJEU said:

> **"47. It must be observed that the fact that judges are subject to terms of service and that they might be regarded as workers within the meaning of clause 2.1 of the Framework Agreement on Part-time Work in no way undermines the principle of the independence of the judiciary or the right of the member states to provide for a particular status governing the judiciary.**
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> **48. As the Supreme Court of the United Kingdom observed in its order for reference, judges are independent in the exercise of the function of judging as such, within the meaning of the second sub-paragraph of article 47 of the Charter of Fundamental Rights of the European Union…"**

This was an endorsement of the Advocate General's conclusion that the independence of the judiciary is not a basis for excluding this professional group from the legal protection of the framework agreement. I agree with Ms Crasnow that the real question accordingly is whether acknowledging that "employment relationship" to be on a contractual footing would cause real difficulty with the constitutional independence of the judiciary in every case to which the Crown is a party.

28. For the reasons advanced by Ms Crasnow I do not consider that any real difficulty would arise on this basis. There are substantial safeguards in place to maintain and preserve the constitutional independence of the judiciary. These include the guarantee of continued judicial independence provided pursuant to s.3 of the Constitutional Reform Act 2005; the judicial oath; the security of tenure guaranteed to judges; the fact that an independent body exists to investigate complaints of judicial misconduct pursuant to the Judicial Discipline (Prescribed Procedures) Regulations 2014 and the Judicial Conduct (Judicial and other office holders) Rules 2014; and the fact that the separation of powers between the judiciary, executive and legislature is protected by constitutional conventions whereby the legislature abstains from interference with the judicial function and vice versa. None of these safeguards depends on the absence of a contract between judges and the Ministry of Justice.

29. Further, a district judge's entitlement to pay is governed by statute, and paid "out of money provided by Parliament": s.132 of the County Courts Act 1984. This reinforces the independence of the judiciary.

30. Moreover, there is a distinction between a judge's independence of decision making without direction from anyone, and the inevitable direction all judges must accept regarding when, where and how that function is to be carried out. This too would not be undermined by the existence of a contractual relationship. Nor do I consider that acknowledging the relationship to be a contractual one (if the documents and circumstances of appointment etc. had justified such a conclusion) would create a perception of bias: the informed, fair-minded observer is assumed to know that a judge is expected to be true to his or her oath (Harb v Aziz [2016] EWCA Civ 556 at [71]).

31. Accordingly, in agreement with the Employment Judge, I do not consider that there was an express employment contract between the Claimant and the Respondent. The Employment Judge made no error of law in reaching this conclusion and this ground of appeal therefore fails.

Ground two: implied contract

32. Ms Crasnow submits that the Employment Judge erred in failing to address an argument based on implication of a contract by necessity. Although the Claimant's primary case was that the terms of service contained in the Memorandum amounted to an express contract, she advanced an alternative case based on a contract that was to be implied. She submits that the Tribunal's failure to address this submission and determine this point is an error of law and

demonstrates a failure by the Employment Judge to engage properly with the relevant arguments. Ms Crasnow submits that a contract must be implied to protect whistleblowing rights and afford protection to or redress for those who suffer detriments as a consequence.

33. Mr Collins accepts that the Tribunal did not deal expressly with the question whether a contract was to be implied. However he submits that the findings of fact and conclusions provide a clear and complete explanation for the relationship between the parties and afford no scope for any contract to be implied. I agree. The legal relationship between the Claimant and the Respondent is documented in detail and fully explained by and referable to the Claimant's appointment as an office-holder in accordance with the statutory and constitutional provisions referred to above. I can see no public policy requirement for an employment contract to be implied in this case. The availability of whistleblowing protection that would follow if a contract is implied does not afford any sustainable basis on which it can be said that such a contract is necessary as a means of enforcing such rights. The Claimant has other means available to enforce her rights (including the ability to pursue a grievance and statutory protection against removal from office).

34. Accordingly, the findings of the Employment Judge leave no need or room for an implied contract here, and there was no error of law by him in this regard.

Ground three: Human Rights argument

35. Ms Crasnow submits that the qualified right to freedom of expression under Article 10 of the Convention, which extends to whistleblowing protection at work, can and must be given

effect to by reading s.230(3) of the 1996 Act in a way that is compatible with those rights. She submits that this is the effect of s.3 HRA and that accordingly, the definition of worker in s.230(3)(b) of the 1996 Act can and should be read so as to include those in an "employment relationship" but who do not have a contract for services. The Employment Judge refused to do so despite his conclusion that the Claimant had no protection for whistleblowing, and that failure is challenged as in error of law. Ms Crasnow submits that it is both possible and necessary to read in "or employment relationship" or words akin to that, to give effect to the Claimant's Article 10 rights.

36. I do not accept this argument. While I accept (of course) that the strong interpretive obligation in s.3 HRA may require a court to read in words which change the meaning of legislation so as to make it Convention compliant, courts cannot adopt a meaning that is inconsistent with a fundamental feature of the legislation being construed. I agree with Mr Collins that a fundamental feature of s.230(3) of the 1996 Act is to define those within the scope of protection by reference to the existence of a contract, whether a contract of service or a contract for services.

37. This conclusion is reinforced by a consideration of the extent to which Parliament has extended the meaning of 'worker' (and associated terms) for the purposes of whistleblowing protection beyond that otherwise provided by s.230(3) of the 1996 Act. Section 43(K)(1) extends the meaning of 'worker' and 'employer'. The extended protection afforded is carefully identified and delineated, preserving the general rule that a contractual relationship is required for 'worker' status save only in a limited number of circumstances (for example agency and NHS arrangements) where the requirement to have a contract is replaced by a requirement to work for a person in particular circumstances or performing particular services.

38. Parliament has therefore given detailed consideration to what protection should be given and to whom. The effect of the Claimant's submission is to add an additional category of 'worker' who is not required to have a contractual relationship but nevertheless entitled to protection for whistleblowing, on the assumed basis that this category was wrongly excluded by Parliament when it introduced s.43K.

39. It seems to me that Parliament was or would have been entitled to conclude that extended protection is unnecessary to give effect to the Claimant's Article 10 rights. Judicial office holders have a range of protections for the right not to suffer whistleblowing detriments. These include:

(i) s.3 of the Constitutional Reform Act 2005 which guarantees judicial independence;

(ii) s.11 of the County Courts Act 1984 which guarantees a district judge's tenure, so that he or she can only be removed from office on limited grounds as described above. Any such removal (or other disciplinary action) would have to be consistent with regulations laid down by Parliament in the Judicial Discipline (Prescribed Procedures) Regulations 2014 and the rules made under them;

(iii) a district judge's salary is protected pursuant to s.6(6) of the County Courts Act 1984;

(iv) district judges may make a complaint about another judicial office holder under the 2014 Regulations and the Judicial Grievance Policy; and may make a complaint about Ministry of Justice staff under the relevant Ministry of Justice policy. Although the Claimant relies on asserted restrictions placed on the scope of her own grievance, this is not borne out by the grievance investigation conducted in her case, or by the Judicial Grievance Policy, October 2013.

Any alleged failure to act in accordance with these statutory requirements or the Respondent's own policies is subject to the oversight of the courts.

40. A district judge's position is therefore quite different from that of a worker or employee who does not benefit from such protections (and indeed from the position of the Russian judge in Kudeshkina v Russia 52 EHRR 37). In many respects, a district judge is protected to a greater degree than other workers.

41. Article 10 does not require any particular means of safeguarding the freedom of expression of a judicial office holder. Where adequate safeguards are in place there can be no necessity to rewrite s.230(3)(b) so as to permit the specific route to a remedy provided by s.47B of the 1996 Act. I am satisfied that there are adequate safeguards in place to protect freedom of speech, contrary to the Employment Judge's conclusion to the opposite effect at paragraph 94 (where he concluded that the Claimant has no protection at all). In any event, any further extension of the meaning of worker in s.43K(1) is properly a question for Parliament.

42. Accordingly, in agreement with the Employment Judge, I consider that it is not possible to read s.230(3) of the 1996 Act in the way (or ways) suggested by the Claimant. Such a reading is fundamentally inconsistent with the legislative scheme requiring an individual to be engaged under a contract (save in carefully delineated cases) to qualify as a 'worker' and for whistleblowing protection.

Conclusion

43. For all these reasons notwithstanding the persuasive and forceful submissions advanced by Ms Crasnow, all grounds of appeal fail and the appeal is accordingly dismissed.

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