Appeal No. UKEAT/0044/17/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 10 October 2018
Judgment handed down on 10 December 2018

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

THE OFFICE FOR GAS AND ELECTRICITY MARKETS — APPELLANT

MR G PYTEL — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS DIYA SEN GUPTA (of Counsel) Instructed by: Burgess Salmon LLP One Glass Wharf Bristol BS2 0ZX
For the Respondent	MR PAUL MITCHELL (of Counsel) and MS SHERYN OMERI (of Counsel) Instructed by: Bindmans LLP 236 Grays Inn Road London WC1X 8HB

SUMMARY

VICTIMISATION DISCRIMINATION - Whistleblowing

The Employment Tribunal ("the ET") held that (1) section 105 of the **Utilities Act 2000** was incompatible with the Convention Rights of the Claimant. The ET held (2) that it was "possible", in accordance with section 3 of the **Human Rights Act 1998**, to read section 105 so as to be compatible with the Claimant's Convention Rights by inserting a new paragraph in section 105(6).

The Respondent appealed only against the second finding.

The **Employment Appeal Tribunal** ("EAT") analysed the statutory context and the Authorities on section of the **Human Rights Act 1998**. The EAT decided that the ET erred in law in its approach to the interpretation of section 105. The parties agreed that the EAT should substitute its decision for that of the EAT. The EAT decided that it was not possible to read section 105 so as to be compatible with the Claimant's Convention Rights, and that that was the only conclusion which it had been open to the ET to reach. The EAT accordingly substituted its Decision for that of the ET.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. This is an appeal from a Decision of the Employment Tribunal ("the ET") sitting at London Central and sent to the parties on 9 January 2017. The ET consisted of Employment Judge Lewzey ("the EJ"). I will refer to the parties as they were below. Paragraph references are to the ET's Judgment, unless I say otherwise.

2. At the Hearing of the appeal, the Claimant (the Respondent to the appeal) was represented by Mr Michell, who also represented the Claimant at the ET Hearing. His junior, Ms Omeri, did not represent the Claimant at the ET hearing; his junior at the ET Hearing was Miss Barrett. She was also the co-author of the Claimant's skeleton argument. The Respondent ("R") ("the appellant") was represented by Miss Sen Gupta. I thank counsel for their written and oral submissions. I should mention that the author of the Respondent's primary skeleton argument for this appeal was Mr Whitcombe. I gather that after he drafted that document he left practice to become an Employment Judge in Scotland. He represented the Respondent at the ET Hearing.

3. The Hearing of the appeal was initially listed as a private hearing, as a result of an earlier Order of the Employment Appeal Tribunal ("the EAT"). Counsel agreed that, in the light of the issues on the appeal, there was no justification for such an Order in relation to the Hearing on 10 October 2018. I revoked it for the purposes of that Hearing.

The position of the Department for Business, Enterprise and Industrial Strategy

4. The Department for Business, Enterprise and Industrial Strategy ("BEIS") is the sponsoring department for the legislation which is the subject of this appeal. BEIS has been aware of this appeal for some time; an official came to the Hearing in 2017, which was adjourned part-heard. I consider that it should have been clear to BEIS that this appeal might very well require the EAT to decide whether or not the ET was right to re-draft section 105 of the **Utilities Act 2000** in reliance on section 3 of the **Human Rights Act 1998**. BEIS has not, however, at any stage, asked to be joined as a party to this appeal. An official from BEIS attended at the start of Hearing on 10 October. I asked him what his department's position was, and whether he had instructions to apply for BEIS to be joined, or to ask for an adjournment. He did not. He told me that BEIS had only recently been told that the Respondent was abandoning its third ground of appeal (a challenge to the EJ's Decision that section 105 breached the Claimant's Convention Rights); but I consider that it must have been obvious for a long time that the section 3 issue was likely to be a live issue in this appeal. I do not consider, in the circumstances, that BEIS has suffered any unfairness, or that, given its apparent position, I should have adjourned the hearing to enable the official to take further instructions, not least, because he did not ask me to. Had he done so, I doubt whether I would have considered that a second adjournment, in these circumstances, would have furthered the overriding objective.

The Facts

5. The Claimant ("C") is an Economic Analyst. He was, and still is, employed by the Respondent. He made a claim that the Respondent had subjected him to detriments as a result of protected disclosures which he had made; colloquially, a "whistleblowing" claim. The relevant statutory provision is section 47B of the **Employment Rights Act 1996**.

6. He applied to the ET for an Order requiring the Respondent to disclose documents which, he contended, would enable him to pursue that claim.

7. The Respondent contended that it was prevented by section 105 of the **Utilities Act 2000** ("the **2000 Act**") from disclosing many potentially relevant documents.

8. The ET ordered the Respondent to disclose the documents for which the Claimant had asked.

The ET's Decision

9. The ET recorded that the Respondent is the 'executive arm' of the Gas and Electricity Markets Authority ('GEMA'). GEMA regulates the Gas and Electricity Markets in Great Britain. The Respondent is responsible for the programme of smart meters, including licensing an external company, the Data Communications Company ("DCC") to set up and manage the data and communications infrastructure for smart meters. These measure the consumption of gas and electricity, display household usage, and communicate automatically with suppliers using mobile phone technology. The Government is keen to introduce them as soon as possible (paragraph 16).

10. The Claimant worked on the Respondent's programme for smart meters. The protected disclosures on which the Claimant relied concerned the arrangements for the public procurement of smart meters. The EJ listed, in paragraph 18, the areas of concern which the Claimant had raised. Eight out of ten of these were in writing, or were evidenced in writing. The EJ recorded Mr Michell's concession that the alleged protected disclosures included information obtained under or by virtue of Part 1 of the **Gas Act 1986** or Part 1 of the

Electricity Act 1989, and that they fell "squarely within section 105(1) of the **2000 Act**" (paragraph 18).

11. After a Preliminary Hearing for case management, at which the parties were ordered to give disclosure by lists, the Respondent, in an email dated 4 November 2016 to the Claimant's solicitors, said that there was a potential conflict between its disclosure obligations and section 105 of the **2000 Act,** "due to the nature of your client's alleged protected disclosures and the information which he says constitutes the provision of information that constitutes qualifying disclosures" (paragraph 5). In paragraphs 6-9 the EJ described further emails between the parties. She recorded, in relation to an email of 9 November 2016, Mr Michell's point that "many of the Claimant's protected disclosures related to [the Claimant] in so far as they were written by him and expressed his personal concerns, but also related to the affairs of third parties for the purposes of section 105."

12. The ET set out section 105 in paragraph 10. I will say more about the legislative scheme below. In paragraph 11, the ET made an express finding that "The information contained in the documents which [the Respondent] declines to disclose was obtained pursuant to functions conferred on [the Respondent] by the Secretary of State under section 56FA of **Electricity Act 1989** and section 41HA of the **Gas Act 1986**, both of which are covered by the restrictions in section 105 [of the **2000 Act**]."

13. The EJ recorded that it was common ground that [the Clamaint's] protected disclosures were caught by section 105 and that none of exceptions from section 105 applied (paragraph 12).

14. The EJ described Mr Michell's argument, in outline, in paragraph 13. It was that since the Respondent had denied every aspect of the Claimant's claim, it was essential for the ET to consider the content of the Claimant's disclosures. Eight of the ten disclosures were documented. "Examination of the content will be necessary to see whether they contain information that could, objectively, give rise to a reasonable belief that the disclosure would not be in the public interest and a person had failed or was likely to fail to comply with a legal obligation. Mr Michell argues that highly restricted disclosure, especially in relation to paperwork going to central issues in the case and witness statements and evidence that could not fully address the issues, would unacceptably curtail the examination of the evidence by the [ET]." A private Hearing would not solve the problem that the Claimant would be deprived of his rights under the **Employment Rights Act 1996** ("the ERA") and that there would be breaches of **Article 10** and **Article 6** of the **European Convention on Human Rights** ("the ECHR").

15. The ET recorded Mr Whitcombe's argument, in outline, in paragraph 15. He argued that the first question was what section 105 meant. He argued that there should be no disclosure of material which was covered by section 105. There was no infringement of the Claimant's **Article 10** rights.

16. In paragraphs 16-55, under the heading "Conclusions", the EJ described the parties' contentions in more detail, and set out her own reasoning. She repeated, at paragraph 20, that it was clear to her that the Claimant's protected disclosures did fall within section 105(1) of the **2000 Act**. She then considered whether any of the exceptions listed in section 105 applied. She decided that they did not. The whistleblowing provisions of the ERA were not listed as an exception (paragraph 22). At paragraph 24 she described the difficulties which the prohibition

on disclosure would create for the Claimant's claim. It had a "profound and probably fatal effect" on that claim. A private Hearing would not obviate those difficulties.

17. She recorded Mr Michell's argument that the effect of section 105(1) was to deprive the Claimant of his rights under the ERA (paragraph 26), and, in paragraph 27, Mr Whitcombe's argument that the inescapable inference was that Parliament intended the prohibition on disclosure to apply to whistleblowing claims. Mr Michell argued that it could not have been Parliament's intention to exclude the rights of whistleblowers. The purpose of the **2000 Act** was to protect the rights of consumers, which "militates against the approach taken by [the Respondent]" (paragraph 28).

18. She acknowledged in paragraph 28, that the ET could not absolve the parties of their criminal liability under section 105. The parties agreed that redaction would not help. It was therefore necessary for her to consider legislative interpretation. The suggestion of a declaration of incompatibility did not help "in the present forum" because the ET had no power to make one (paragraph 29). A further possible solution was for the Secretary of State to make an Order under section 105(7) (paragraph 30). The Respondent had asked for this, but the outcome was uncertain. I note that no such Order has in fact been made. In paragraph 32, the EJ said that "the only possible solution for [the Claimant] was in legislative interpretation."

19. She set out section 3 of the **Human Rights Act 1998** ("the HRA") and referred to some of the Authorities (paragraphs 33-37).

20. She recorded that Mr Michell had asked her to read section 105(1) in a way that was compatible both with the HRA and with the ERA. He relied on the absence of any discussion

of the rights of whistleblowers in the Parliamentary debates on the passage of the **2000 Act**. This was said to show that the purpose of section 105(1) was "surely not" to restrict the rights of whistleblowers. She quoted selectively from the "principal objective" in sections 4AA and 3A of the **Gas Act 1986** and of the **Electricity Act 1989** respectively. Mr Michell argued that section 105 would have a deterrent effect on whistleblowing and whistleblowing would "serve to assist and promote the [principal] objective" (paragraph 38). She referred again to the Parliamentary debates in paragraph 41.

21. The EJ described Mr Michell's proposed solutions in paragraph 39.

> **"39…the solution to the present disclosure problem is to read down through the gateway at section 105 to interpret it to include proceedings brought under section 47B or section 103A Employment Rights Act 1996. In the alternative he suggests that the Tribunal could insert new wording to include a new exception for disclosure made pursuant to a court or Employment Tribunal order…or that Parts IV and V could be added as a new subsection to section 105(6) of the 2000 Act. Mr Michell accepts that this approach involves effectively rewriting part of the statutory provision, but it is well established that such a process can be legitimate and apt where necessary… [she then referred to two authorities]"**

22. She returned to Mr Whitcombe's argument in paragraph 40. He relied on the wide terms of section 105(1). It would be contrary to Parliament's clear intention for the ET to order disclosure. Section 105 enacted a broad prohibition. The ET should not order disclosure in a way which contravened the statutory provisions. To do so would not give effect to Parliament's intention.

23. In paragraph 41, the EJ repeated that she had been told that Parliament had not discussed the impact of section 105 on whistleblowers. She referred to some of the Authorities. She noted that **Article 10** was a qualified right and that some restrictions on rights of access to a court were "imprints in a pool on objectionable" [which Mr Michell helpfully interpreted as "in principle unobjectionable"]. She said, without explaining why (other than by saying that it was a whistleblowing case), that "This case is different."

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24. She referred in paragraph 42 to the Respondent's **Article 6** rights. "To follow the exact wording of section 10 would result in [the Claimant] being unable to produce evidence that his protected disclosures contained information that could objectively give rise to a reasonable belief that the disclosure would be in the public interest and that a person had failed or was likely to fail to comply with a legal obligation". Without disclosure he could not have a fair and public hearing. She then said that "I have a duty to read and give effect to legislation in a way which is compatible with the Convention Rights." She accepted Mr Michell's arguments that 'to "read down" to give effect to [Convention Rights] would not be "against the grain" of the **2000 Act**. Indeed, not to do so might deter whistleblowers.' She rejected Mr Whitcombe's argument that Parliament intended whistleblowers to be excluded from section 105. She considered it likely that Parliament had overlooked the position of whistleblowers.

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25. She referred to ***EBR Attridge Law LLP v Coleman*** [2010] ICR 242 (a case about associative discrimination) and to ***Rowstock Limited v Jessemey*** [2014] ICR 550, both cases which required the court to construe domestic legislation so as to give effect to the United Kingdom's obligations imposed by EU law (paragraphs 43 and 44).

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26. She was "permitted to construe the provisions of the **2000 Act** in accordance with the ***Ghaidan*** approach". She referred to **Article 10**, which had been extended to whistleblowing. It was accepted that **Article 10** is a qualified right. The Claimant was entitled to a fair hearing and could not have it without the information he sought, because he would not be able to prove his case. Parts IVA and V of ERA were intended to give protection to a whistleblower, "which they cannot do in the present case because of the prohibition in section 105…"

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27. She set out section 105(4)(g) of the **2000 Act**. She concluded (paragraph 46) that the "simplest way to give effect to the rights of [the Claimant] and whistleblowers pursuant to **Article 10** and **Article 6**, following the ***Ghaidan*** approach, is to add a new subsection (z) to section 105(6) of [the **2000 Act**] as follows:

> **"Parts IVA and V of the Employment Rights Act 1996."**

28. Both sides were, I think, more, or less, critical of the EJ's legislative "solution". They agreed that I did not need to resolve any issues about that at this stage.

The Employment Rights Act 1996

29. Part IVA was inserted in the **Employment Rights Act 1996** ("the ERA") by section 1(1) of the **Public Disclosure Act 1998**. Section 43A of the ERA defines "protected disclosure" as "a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H." Section 43B defines a qualifying disclosure as "any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show" various things, including (section 43B(1)(b)) that a person "has failed, is failing or is likely to fail to comply with any legal obligation". Section 43B(3) provides that a disclosure of information is not a qualifying disclosure if the person making the disclosure commits a criminal offence by making it. Section 43J(1) avoids any contractual provision "in so far as it purports to preclude an employee from making protected disclosure."

30. By section 43L(3), any reference in Part IVA to "the disclosure of information shall have effect, in relation to any case where the person receiving it is already aware of it, as a reference to bringing the information to his attention."

The Utilities Act 2000 and related Legislation

31. Section 1(1) of the **2000 Act** established GEMA, for the purposes of carrying out functions formerly carried out by the Directors General of Gas, and of Electricity Supply, respectively. Section 1(4) enacts Schedule 1, which make further provision about GEMA. GEMA is to consist of a chairman and at least two other members, who are appointed by the Secretary of State (paragraph 10). GEMA may employ staff and committees (paragraphs 5 and 6). GEMA's functions can be carried out by any member of the GEMA, of its staff, or of one of its committees, provided that the members of any such committee are, either, members or employees of GEMA (paragraph 9). Section 3A provides that GEMA is designated the regulatory authority for Great Britain for the purposes of the Gas and Electricity Directives.

32. Subject to the exceptions in section 4B, the principal objective of GEMA under Part 1 of the **Gas Act 1986** ("the **1986 Act**"), (which relates to gas supply), as further elaborated in section 4AA, is to protect the interests of consumers in relation to gas conveyed through pipes (section 4AA of the **1986 Act**). Section 4AA provides for a complex web of relevant factors to which GEMA is to have regard in carrying out its functions under Part 1. Section 5(1) provides that, in general, it is an offence to carry out the activities listed in that provision without a licence. Those activities include the provision of smart meter communication services (section 5(1)(d)). Section 6A gives the Secretary of State power to confer exemptions in relation to section 5(1).

33. Further provisions enable GEMA to licence other activities. Section 7AB gives GEMA power to licence a person providing a smart meter communications service. Such a licence cannot be granted unless the person is, at the same time, given a licence under section 6(1)(f) of the **Electricity Act 1989** ("the **1989 Act**") (section 7AB(5)). It is clear from various

provisions, for example section 7B(1), 8D(2) and (4), (5) and (6), 8L, 11B, 12(6), 33BC(6), 33C, and, most notably, sections 34A and 38, that in carrying out its functions in relation to licences and certification, GEMA can require information to be supplied by the entities which it regulates.

34. The remaining provisions of Part 1 of the **1986 Act** confer a wide range of functions on GEMA connected with the regulation of many aspects of the supply of gas. Many provisions (for example, section 23(2)(d) and section 29(1)) require GEMA to consider representations by those affected by the prospective exercise of one of its functions. Representations received by GEMA by this route may well contain information as well as arguments. Section 41HA gives the Secretary of State power to make amend Part 1 by order in connection with the licensing of smart meters.

35. The **1989 Act** makes broadly similar provision about the supply of electricity, mutatis mutandis. Section 3A imposes a widely framed principal objective and general duties. Section 4 enacts a prohibition on unlicensed supply, and section 5 gives the Secretary of State, by order, power to make exemptions from that prohibition. Section 6 lists the activities for which GEMA may grant a licence. They include the provision of a smart meter communications service (section 6(1)(f)). Section 6(2B) mirrors, mutatis mutandis, section 7AB(5) of the **1986 Act**. Many provisions of the **1989 Act** require the entities which are regulated by GEMA to provide it with information.

36. Section 105 of the **2000 Act** is headed "General restrictions on disclosure of information". Section 105(1) provides that "information which has been obtained by or under or by virtue of a range of statutory provisions, including, but not limited to, the **2000 Act**, Part 1

of the **1986 Act**, and Part 1 of the **1989 Act**, and which "relates to the affairs of any individual or to any particular business, shall not be disclosed during the lifetime of the individual or so long as the business continues to be carried on, except as provided below."

37. Section 105(1) does not apply to a disclosure made with the consent of the individual or the person carrying on the business (section 105(2)). Section 105(1) does not apply to a disclosure made for any of the purposes listed in section 105(3)(a)-(b). These purposes, broadly, are purposes which are connected with the operation of the legislative scheme. Section 105(1) does not apply, either, to disclosures made by a body specified in section 105(5) for the purposes of its functions under any of the Acts or Instruments listed in section 105(6), or by any other body for any of the purposes listed in the 12 sub-paragraphs of section 105(4). Those purposes, broadly, are purposes connected with this and other legislative schemes connected with regulation of business activities, for example in relation to health and safety and insolvency. Section 105(4)(g) is an exemption "for the purposes of any civil proceedings brought under or by virtue of the **1986 Act**, the **1989 Act**, this **Act**, or any **Act** or instrument specified in subsection (6))." Section 105(6) specifies 26 different Acts and Instruments. It has been amended since it was enacted. The ERA is not so specified. Section 105(11), (11A) and 11B) make further express exceptions from section 105(1).

38. Section 105(7) gives the Secretary of State power by order to modify subsections (3), (4), (5), or (6).

39. Section 105(9) provides that "a person who discloses any information in contravention of section 105 is guilty of an offence and liable, on summary conviction, to a fine, or, on conviction on indictment, to a maximum sentence of two years" imprisonment.

The Human Rights Act 1998 and the interpretation of sections 6 and 3

40. Section 1 of the HRA defines "the Convention Rights". They are set out in Schedule 1 to the HRA (section 1(3)). Section 2 makes provision about the interpretation of Convention Rights. Section 3(1) provides that "So far as it is possible to do so, primary and subordinate legislation must be read and given effect to in a way which is compatible with the Convention Rights." By section 3(2)(b), section 3 "does not affect the validity, continuing operation or enforcement of any incompatible primary legislation."

41. Section 4 confers on listed senior courts a power to make a declaration of incompatibility. So far as is relevant, it provides:

> **"(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.**
>
> **(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility…**
>
> **(4) If the court is satisfied—**
>
> **(a) that the provision is incompatible with a Convention right, and**
>
> **(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,**
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> **it may make a declaration of that incompatibility…**
>
> **(6) A declaration under this section ('a declaration of incompatibility')—**
>
> **(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and**
>
> **(b) is not binding on the parties to the proceedings in which it is made."**

The courts which can make a declaration of incompatibility do not include the ET, or the EAT.

42. Section 6(1) makes it unlawful for a public authority to act in a way which is incompatible with a Convention Right. Section 6(2) provides:

> **"Subsection (1) does not apply to an act if—(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."**

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43. ***Re S (Minors) (Care Order: Implementation of Care Plan)*** [2002] UKHL 10; [2002] 2 AC 291, 313-314, was a family case which concerned section 3. The Court of Appeal decided, without identifying any specific provisions of the **Children Act 1989**, that the **Act's** regime for making of Care Orders was incompatible with the rights of parents and children under **Articles 6(1)** and **8** of the ECHR. So, the Court of Appeal devised its own procedure for making Care Orders. The House of Lords held that this procedure was inconsistent with a fundamental feature of the primary legislation (that the courts could not interfere with the way in which Local Authorities discharged their functions under final Care Orders). The approach of the Court of Appeal crossed the boundary between interpretation and legislation.

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44. Referring to section 3(1) Lord Nicholls said, in paragraph 38, that it did not confer an unlimited power. This was clear from the phrase "So far as it is possible to do so." Taken together, the side-heading of section 3 (which refers to "interpretation"), the power conferred by section 4 to make a declaration of incompatibility, and the words of section 3(2)(b) "pre-suppose" that not all provisions of primary legislation can be interpreted so as to comply with Convention Rights. This point had already been made in other cases: ***Poplar Housing and Regeneration Community Association Ltd v Donoghue*** [2002] QB 48, 72-73, paragraph 75, and ***R v Lambert*** [2001] 3 WLR 206, 233-235, paras 79-81.

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45. When courts apply section 3, they must always bear that limit in mind. The HRA "reserves the amendment of primary legislation to Parliament", and thus preserves Parliamentary Sovereignty. The HRA observes that constitutional boundary (paragraph 39). In paragraph 40, he said that the real difficulty was identifying the limits of interpretation in a particular case. The more "liberal" the courts' approach to interpretation, the harder it was to define the boundary.

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46. He continued:

> **"For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the statutory provision Convention-compliant by legitimate use of the process of interpretation. The boundary line may be crossed even though a limitation on Convention rights is not stated in express terms. Lord Steyn's observations in *R v A (No 2)* [2002] 1 AC 45, 68d-e, para 44 are not to be read as meaning that a clear limitation on Convention rights in terms is the only circumstance in which an interpretation incompatible with Convention rights may arise."**

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47. He agreed with the dissenting member of the Court of Appeal that the Court of Appeal's "innovation" went "well beyond the boundary of interpretation". No provision of the **Act** lent itself to that interpretation. The starring system invented by the Court of Appeal was inconsistent in an important respect with the **Act**. It would be an amendment of the **Act**, not its interpretation, and would have "far-reaching practice ramifications for Local Authorities and their care of children…" (paragraph 43).

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48. In paragraph 44, he said that such matters were for Parliament to decide, not the courts. **"**It is impossible for a court to attempt to evaluate these ramifications or assess what would be the views of Parliament if changes are needed." It would amount to Judicial amendment. In a sensitive and controversial field in which Parliament had legislated, any amendment was for Parliament, after full consideration of the policy arguments. Lord Nicholls considered that the Court of Appeal "exceeded the bounds of its judicial jurisdiction under section 3 in introducing this new scheme."

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49. In ***R v Anderson*** [2002] UKHL 46, [2001] EWCA Civ 1698 the House of Lords held that section 29 of the **Crime (Sentences) Act 1997**, a provision which enabled the Secretary of State to set the tariff period for a life sentence of imprisonment, was incompatible with the prisoner's **Article 6** rights. The House of Lords also held, having regard to the legislative

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history, that section 29 was the expression of a deliberate legislative intention to assign decisions about the length of the tariff of a mandatory sentence of life imprisonment to the Secretary of State. It could not, therefore, be read and given effect to in a way which was compatible with Convention Rights. The only available remedy was a declaration of incompatibility under section 4 of the HRA.

50. At paragraph 30, Lord Bingham said:

> **"30. It cannot be doubted that Parliament intended this result when enacting section 29 and its predecessor sections. An entirely different regime was established, in the case of discretionary life sentence prisoners, in section 28. The contrast was plainly deliberate. In section 1(2) of the Murder (Abolition of Death Penalty) Act 1965, Parliament was at pains to give judges a power to recommend minimum periods of detention, but not to rule. That was for the Home Secretary. To read section 29 as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism: it would give the section an effect quite different from that which Parliament intended and would go well beyond any interpretative process sanctioned by section 3 of the 1998 Act (*In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, 313-314, para 41)."**

51. Lord Steyn said, at paragraph 59, that the Appellant's argument required not "interpretation but interpolation inconsistent with the plain legislative intent to entrust the decision to the Home Secretary, who was intended to be free to follow or reject judicial advice. Section 3(1) is not available where the suggested interpretation is contrary to the express statutory words, or is by implication necessarily contradicted by the statute." He referred to the *S* case, and continued, "It is therefore impossible to imply the suggested words into the statute or to secure the same result by a process of construction."

52. ***Ghaidan v Godin-Mendoza*** [2004] UKHL 30; [2004] 2 AC 557 concerned the interpretation of the **Rent Act 1977** ("the **1977 Act**"). Paragraph 2(2) of Schedule 1 to the **1977 Act**, governs the right of succession to a tenancy on the death of the protected tenant. Paragraph 2(1) of Schedule 2 to the **1977 Act**, provides that the surviving spouse of the protected tenant succeeds to the tenancy on the death of the original tenant. Paragraph 2(2)

provides that "a person who was living with the original tenant as his or her husband or wife", is to be treated as the spouse of the original tenant.

53. The House of Lords had decided in ***Fitzpatrick v Sterling Housing Association Limited*** [2001] 1 AC 27, that these words did not include people living in a same-sex relationship (but had held that a long-term homosexual partner was a "member of the family" of the protected tenant). The issue in ***Ghaidan*** was whether the enactment of section 3 changed the "ordinary reading" of these words, making it "possible" to read and give effect to paragraph 2 in a way which was compatible to the Respondent's Convention Rights. Lord Nicholls said that section 3 could have a range of meanings. It was (by then) clear that a compliant reading could be required when the legislation which was being construed was unambiguous (paragraph 29).

54. In paragraph 30, he said that the obligation was of:

> **"30. an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3."**

55. The operation of section 3 did not depend critically on the words used by the draftsman. The mere fact that the language used was inconsistent with a Convention-compliant reading did not make such a reading "impossible". Section 3 was apt to require a court to read in words which changed the meaning of the words enacted by Parliament (paragraphs 31 and 32). Parliament did not intend, however, that the courts should adopt "a meaning inconsistent with a fundamental feature of the legislation." Parliament has retained the right to enact legislation which is incompatible with Convention Rights. "The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed.

Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, "go with the grain of the legislation". Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation (paragraph 33)."

56. Lord Steyn, at paragraph 45, that the draftsman of section 3 had used the analogy of the obligation imposed by EU law on domestic courts, as far as possible, to interpret national legislation in the light of the wording and purpose of Directives. He referred to ***Marleasing SA v La Comercial Internacional de Alimentación SA*** (Case C-106/89) [1990] ECR I-4135, 4159. He cited paragraph 34 of the Judgment of the European Court of Justice:

> **"34. It follows that, in applying national law, whether the provisions in question were adopted before or after the Directive, the national court called upon to interpret it is required to do so, as far as possible, in light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of article 189 of the Treaty."**

He said that this was a significant signpost to the meaning of section 3(1) (see also paragraph 118 of the speech of Lord Rodger).

57. Agreeing with the principles described by the majority, but dissenting in the result, Lord Millett said, at paragraph 71:

> **"71. Again, "red, blue or green" cannot be read as meaning "red, blue, green or yellow"; the specification of three only of the four primary colours indicates a deliberate omission of the fourth (unless, of course, this can be shown to be an error). Section 3 cannot be used to supply the missing colour, for this would be not to interpret the statutory language but to contradict it."**

58. Lord Rodger considered the difference between implication and amendment in paragraph 121 (see also paragraphs 122-124). He said:

> **"121. When the court spells out the words that are to be implied, it may look as if it is "amending" the legislation, but that is not the case. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with**

Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute."

59. ***Sheldrake v DPP*** [2004] UKHL 43; [2005] 1 AC 264 concerned provisions in criminal statutes which imposed a legal burden on a defendant to prove a state of affairs in order to exonerate himself. The House of Lords decided that in one case, the reverse burden of proof did not infringe **Article 6**, and that, in the other (by a majority) that it did. The majority held that section 3, enabled them to read section 11(1) of the **Terrorism Act 2000** as imposing an evidential burden on the defendant, rather than, as was clearly Parliament's intention, a legal burden (see paragraph 50 of Lord Bingham's speech).

60. In paragraph 28 of ***Sheldrake***, Lord Bingham (who was in the majority) summarised the decision in ***Ghaidan***. The various speeches left no room for doubt on four important points.

i. The interpretative obligation is very strong and far-reaching. It may require the court to depart from the intention of Parliament.

ii. A Convention-compliant reading is the primary remedial measure and a declaration of declaration of incompatibility an exceptional course.

iii. During the passage of the Bill its promoters told both Houses that a declaration of incompatibility would be rare.

iv. But there is limit beyond which a Convention-compliant reading is not possible. Different words were used: "such an interpretation would be incompatible with the underlying thrust of the legislation, or would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely, or would remove its pith and substance, or would violate a

cardinal principle of the legislation". The expressions were valuable, but should not add to the simple statutory test: "so far as it is possible to do so."

61. The significance of section 6 in the interpretation of section 3 was explained by Lord Rodger in ***Ghaidan v Godin-Mendoza*** at paragraph 108. He said

> **"108. Next, the Act discloses one clear limit to section 3(1). It is not concerned with provisions which, properly interpreted, impose an unavoidable obligation to act in a particular way. This can be seen from a comparison of paragraphs (a) and (b) of section 6(2). According to paragraph (a), section 6(1) does not apply, and a public authority therefore acts lawfully, if, as a result of primary legislation, "the authority could not have acted differently." An example might be a provision requiring a local authority to dismiss an application if the applicant failed to take a particular step within seven days. Even if this results in the violation of a Convention right, the local authority must dismiss the application and, in doing so, it acts lawfully: it cannot act differently in terms of the legislation. By paragraph (b), on the other hand, the public authority also acts lawfully if, in the case of one or more provisions of primary or secondary legislation "which cannot be read or given effect in a way which is compatible with the Convention rights", the authority was acting so as to give effect to or enforce those provisions. Paragraph (b) echoes the language of section 3(1) and therefore deals with the (different) situation where, in terms of section 3(1), it has not proved possible to read and give effect to a provision in a way which is compatible with Convention rights. In that situation, as section 3(2)(b) provides, the validity, continuing operation and enforcement of the legislation are not affected and so it is lawful for a public authority to act in terms of the legislation. In that case too, section 6(2) disapplies section 6(1)."**

62. He explained that if such provisions did not fall within the scope of section 3, that could only be "because, by definition, it is not possible to read or give effect to them in a way which is compatible with Convention Rights" (paragraph 109). He continued, at paragraph 110

> **"110. What excludes such provisions from the scope of section 3(1) is not any mere matter of the linguistic form in which Parliament has chosen to express the obligation. Rather, they are excluded because the entire substance of the provision, what it requires the public authority to do, is incompatible with the Convention. The only cure is to change the provision and that is a matter for Parliament and not for the courts: they, like everyone else, are bound by the provision. So from section 6(2)(a) and (b) one can tell that, however powerful the obligation in section 3(1) may be, it does not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says that x is to happen into one saying that x is not to happen. And, of course, in considering what constitutes the substance of the provision or provisions under consideration, it is necessary to have regard to their place in the overall scheme of the legislation as enacted by Parliament. In *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, for instance, the Court of Appeal held that it was impossible for the court to use the interpretative obligation in section 3(1) in effect to recreate the fixed penalty scheme enacted by Parliament so as to turn it into a scheme that was compatible with article 6. As Simon Brown LJ observed, at p 758, it would have involved turning the scheme inside out—something that the court could not do. Only Parliament, not the courts, could create a wholly different scheme so as to provide an acceptable alternative means of immigration control."**

Discussion

(1) The starting points for this appeal

63. There are two starting points for this appeal. First, the EAT cannot interfere with findings of fact of the ET unless they are perverse, and they are in issue on the appeal. Neither party has suggested that I can, or should, go behind the ET's finding that the Clamaint's protected disclosures fell within section 105(1) of the **2000 Act**. Second, the Respondent argued at the ET that the section 105 of the **2000 Act** was not incompatible with the Clamaint's rights under **Article 6** or **Article 10** of the ECHR. The Respondent has now conceded that section 105 is incompatible with those two provisions. The Respondent has not asked to withdraw that concession. So, there is no issue before me about whether section 105 is incompatible with the Claimant's Convention Rights. I assume, therefore that it is.

64. The only issue the EAT has to decide, therefore, is whether it is "possible" to read section 105 of the **2000 Act** so as to be compatible with the Claimant's **Article 6** and **Article 10** rights.

(2) Is section 43B(3) relevant to the issue in this appeal?

65. Before the Hearing, I asked counsel by email whether they had any submissions about the relationship between section 105 of the **2000 Act** and section 43B(3) of the ERA. Mr Michell replied that "Pursuant to section 43B(3) ERA, a disclosure is not "qualifying" if the person making it commits a criminal offence by doing so. The Claimant's disclosures were all internal to OFGEM and made in the course of his work. They were thus not impacted by either section 43B(3) ERA or section105(1) or (9) UA, as no criminal offence was committed by making them. OFGEM has not sought to assert otherwise." Ms Sen Gupta did not reply. She

A has explained that she overlooked the email and has apologised for that. I, of course, accept that apology.

B 66. Mr Michell's response was somewhat elliptical. I consider that the answer to my question may be that the word "disclosure" in section 105 of the **2000 Act** has a different meaning, in its statutory context, from the same word when it is used and in Part IVA of the ERA. In its context, it is clear that "disclosure" in section 105 means telling a person C something he does not already know (section 105(6A) seems to me to make this clear). Section 43L(3) of the ERA, by contrast, which I have quoted above, makes it clear that "disclosure" in Part IVA of the ERA has a wider meaning, and can include, in cases where a worker makes a D protected disclosure to his employer, cases in which the worker is telling the employer something of which the employer is already aware.

E 67. The Claimant's disclosures to the Respondent were not news to the Respondent. The Respondent already knew the information which formed the basis of what the Claimant claimed were his protected disclosures. So, when the Claimant gave that information to the Respondent, it was capable of being a protected disclosure, despite the fact that the Respondent was already F aware of it. Moreover, those disclosures to the Respondent would not infringe section 105, precisely because they were not news to the Respondent. The Respondent already had the information. However, unless section 105 is in some way disapplied or modified, any G disclosure of information covered by section 105 in proceedings in the ET would infringe section 105, and would be a criminal offence.

H 68. In any event, the Respondent did not suggest to the EJ, or in either of its skeleton arguments for the appeal, that section 43B(3) was relevant to the issues in this appeal. The

Respondent confirmed that this was its position at the hearing of this appeal. I say no more about section 43B(3).

(3) Did the EJ err in law?

69. I consider that it is clear that the EJ erred materially in law in two important and linked respects.

a. She appears to have decided (paragraph 29, see also paragraph 32) that the fact that the ET did not have power to make a declaration of incompatibility required her to resort to section 3, instead of asking herself whether it was just not possible to read section 105 compatibly with the Respondent's Convention Rights. She should have asked herself whether, even if the ET did not have power to make one, this was a case in which (had it been litigated in a different forum) the only available option would have been to make a declaration of incompatibility.

b. Although there are passages in which the EJ appears to have appreciated that section 3 did not have this effect, I consider that, reading her decision as a whole, she misconstrued section 3 (paragraph 42), by asserting that she had a "duty to read and give effect to legislation in a way which is compatible with the Convention Rights." The duty imposed by section 3 is not to read legislation so as to make it compatible with Convention Rights, but to read and give effect to legislation in such a way where it is possible to do so. This conclusion is supported by her apparent view, expressed in different ways in the Judgment, that she had to find a remedy or solution for the Claimant.

70. I consider that the EJ erred materially in law in three further, linked ways.

a. She took too narrow a view of the statutory purposes (paragraph 38).

b. She took into account what she was told about the Parliamentary debates on the Utilities Bill (paragraphs 38, 41 and 42, last sentence). Whatever else may be said about it, section 105(1) is not ambiguous. Material about proceedings in Parliament, such as debates, is therefore inadmissible as a guide to construing it (***Pepper v Hart*** [1993] AC 593).

c. She concluded, in consequence, (paragraph 42) that Parliament did not intend to exclude whistleblowers from section 105.

71. I therefore allow the appeal. Neither the Claimant nor the Respondent suggested that the EAT should remit this case to the EJ for her to reconsider the application for disclosure. They invited me to decide the issue. I bear in mind, that I can only substitute my decision for the EJ's if there was only one decision which was open to her.

(4) Is it possible to read section 105 in a way which is compatible with Clamaint's Convention Rights?

72. What Parliament intends legislation to mean is to be derived from the words Parliament uses when enacting legislation, and not from the proceedings in Parliament, unless the rule in ***Pepper v Hart*** is engaged. Those words are to be interpreted in their immediate statutory context (here section 105) and by reference to the wider statutory context (the **2000 Act** and, to a lesser extent, other legislation in pari materia).

73. I consider, first, the immediate statutory context, that is, the **2000 Act**. Two features of this are significant. They are the regulatory functions which it confers on GEMA, and the many

ancillary provisions which support GEMA's regulatory functions. It is an intrinsic feature of the statutory scheme that GEMA will amass large amounts of information in the discharge of its regulatory functions. Some of that information is obtained compulsorily, and in some cases, it is a criminal offence not to provide information when required. Much of that information is likely to be sensitive commercial information provided by such entities as licensees, applicants for licences and applicants for certifications. It is not surprising, in that situation, that Parliament has provided an express prohibition on the disclosure of, effectively, business information, and which is obtained in the exercise of the statutory functions which are listed in section 105(1)(a).

74. The next feature of the statutory background is the wider context, to which Ms Sen Gupta drew my attention in argument. Prohibitions on disclosure similar to that in section 105 are not unique to the **2000 Act**. A letter from BEIS dated 1 February 2017, refers to four other such provisions. Two were in sections 42 of the **Gas Act 1986** and section 57 of the **Electricity Act 1989** (the predecessors of section 105 of the **2000 Act**). The Departments responsible for those areas of legislation vary. Her clients assembled a bundle including those provisions and 13 other similar provisions from other fields.

75. Such provisions are not new. ***Rowell v Pratt*** [1938] AC 101 is a decision of the House of Lords. It concerned an early example of such a provision, section 17 of the **Agricultural Marketing Act 1931**. It is clear from ***Rowell*** that a court order to disclose documents cannot override such a provision. As Lord Wright put it (at paragraph 106), "A Judge cannot compel a man to commit a criminal offence." It follows from the number of different contexts in which such prohibitions have been enacted that Parliament is to be taken to have known, when enacting such provisions, that that is their effect. Parliament is better placed than the courts to

see the landscape of these and of similar provisions, and to work out how they should fit with other legislation, in particular, with legislation like the ERA.

76. The immediate statutory context shows that section 105 is part of an intricate regulatory scheme. The scheme affects the way that suppliers, and other commercial, or semi-commercial entities carry on their business. It affects competition between those entities. It also affects the relationship between those entities and consumers. In other words, the scheme is multilateral. Section 105, moreover, is one of many similar prohibitions which operate in different fields of activity. It mirrors a mechanism which Parliament considers to be a suitable safeguard to protect commercial information which is obtained in the exercise of public functions, sometimes under compulsion. Parliament, not the court (with its narrow focus on the issues of this litigation only), has an overall view both of this statutory scheme, and of the statutory schemes with similar prohibitions.

77. I turn to section 105. Section 105(1) creates a very widely worded prohibition. It applies to information obtained "under or by virtue of" various provisions. The prohibition does not just apply to disclosure of information by GEMA. It is cast in the passive voice, so it applies to any natural or legal person who comes to know information which has been obtained in the exercise of the listed statutory functions. The importance of the prohibition is emphasised by the imposition of criminal sanctions for its breach (section 105(9)). The prohibition is a long-lasting one, tailored to the continued existence and operations of the entity whose information is at issue.

78. Section 105, then provides a carefully crafted scheme of exceptions from the prohibition. The grain, or thrust, or pith, of this provision is that Parliament has carefully

considered in precisely what circumstances and legal contexts the wide prohibition in section 105(1) should not apply. Thus, there are statutory purposes for the exercise of which the prohibition does not apply, bodies to the exercise of whose functions it does not apply, and many specific statutes specified for the purposes of section 105(4)(a) and (g). Those provisions were printed out by Mr Michell and Ms Omeri. I am grateful for their industry. The provisions fill four lever-arch files. They show that Parliament has given careful thought to the relationship between this prohibition and a range of other statutory regimes in which disclosure might be necessary or desirable. It is Parliament's intention that some, but not all, types of civil litigation should be exempted from section 105(1); that is, those types of cases specifically described in section 105(4)(g) read with section 105(6).

79. Moreover section 105 has been amended many times since its enactment, most recently, this year, showing that the scope of section 105 appears to be under regular review. A significant point, which was made by Ms Sen Gupta, is that section 43B(1) of the ERA, which in part defines "qualifying disclosure", was amended by section 17 of the **Enterprise and Regulatory Reform Act 2013** ("the ERRA"), and section 105 has been amended in several respects by various provisions of the **Enterprise and Regulatory Reform Act 2013** (Competition) (Consequential, Transitional, and Saving Provisions) Order 2014, 2014 SI No 892, an instrument made under powers conferred by the ERRA. In other words, the scope of both section 105 of the **2000 Act** and of section 43B(1) were being considered, either by Parliament, or by the executive, pursuant to powers granted by Parliament, in the same enactment.

80. Parliament has given the Secretary of State power, by order, to modify the relevant provisions of section 105. The clear inference to be drawn from this is that Parliament intended

that, absent amendment by or under other enactments, there would be a mechanism to ensure that the scope of section 105 keeps pace with relevant developments. Parliament's intention is that the Secretary of State should be the gatekeeper for any amendment of the material provisions of section 105. The Secretary of State and his officials are better placed than courts to decide which developments are relevant, and how, if at all, they should affect the scope of section 105.

81. Only two inferences can properly be drawn from the fact that an enactment is not listed in section 105(6). The first is, not that Parliament has somehow overlooked that enactment, or forgotten about it. It is, rather, that Parliament having decided not to specify that enactment, Parliament intended that the prohibition in section 105(1) should apply in respect of it. The express exceptions are the exceptions which Parliament has provided for. If an enactment is not specified, then section 105(1) applies in respect of it. The second inference is that the Secretary of State, having regard to the text of section 105(6) and to the various amendments which have been made to it from time to time both by primary and by secondary legislation, has decided that it is not necessary for him, in respect of that enactment, to exercise the power conferred by section 105(7), so that the prohibition in section 105(1) should continue to apply in respect of enactments not from time to time specified in it.

82. The Decisions of the House of Lords, clearly acknowledge that there is a line between interpretation and legislation, and that section 3 does not permit a court to cross that line. The cases also show that the line is difficult to draw precisely. As the oral argument developed, it became clear that the real question in this case, is whether what the EJ did cross that line. I accept that those Decisions show that different techniques are available to a court. A court can take out words, or put words in. A court can even decline to formulate a precise amendment

(see, recently, the Decision of the Court of Appeal in ***Wandsworth London Borough Council v Vining*** [2017] EWCA Civ 1092; [2018] ICR 499). A court, it seems, can even interpret a provision so as to produce a result which is contrary to Parliament's intention. The issue here is not the technique used by the EJ, but whether what she did in substance amounted to legislation, rather than interpretation.

83. There are two factors in my judgment which are relevant in a case like this in which the issue is where to draw that elusive line. Lord Nicholls referred to them in paragraph 40 of his speech in ***Re S (Minors)***. The first, is the extent to which it may be clear, or not, whether a proposed amendment is contrary to Parliament's intention. The second, is the ramifications of any amendment, and, linked to this, the extent to which a court can be confident that it has understood those ramifications.

84. I start with Parliament's intention. As Lord Bingham noted in ***R v Sheldrake***, various metaphors have been used to describe a reading of legislation which is not "possible". More precisely, in paragraph 59 of his speech in ***R v Anderson***, Lord Steyn referred to interpolations which are either, contradicted by express statutory words, or by implication necessarily contradicted by the statute, echoing the point Lord Millett made about primary colours in paragraph 71 of his dissenting speech in ***Ghaidan***.

85. There are four main ways in which the addition of a new sub-paragraph to section 105(6) is by implication necessarily contradicted by the **2000 Act**. The first is that, if a statutory provision has been omitted from section 105(6), the necessary implication is that it has been omitted deliberately. That necessary implication is the flip side of the necessary implication to be drawn from the presence of a statutory provision in section 105(6) (which is

A that Parliament intended the section 105(1) prohibition not to apply in that specified case). To contend otherwise would lead to absurdly prolix drafting, by requiring Parliament to specify, instead, each statute which is subject to the prohibition. See, by analogy paragraph 69 of the Judgment of the Supreme Court in ***McDonald v McDonald*** [2016] UKSC 28; [2017] AC 273, in which the court, after citing paragraph 121 of Lord Rodger's speech in ***Ghaidan***, noted a careful distinction in the scheme of the housing legislation between cases in which good grounds must be shown for obtaining a possession order, and those in which no good ground need be shown. A careful distinction has been made in section 105. It is clear, and not any the less clear, because it has been expressed by using fewer words than would have been used if another, less terse, drafting method had been used.

86. The second is that, the person whose information is at issue may consent to its disclosure, or withhold consent (section 105(2)). In this case, the owners of the information were asked to consent, and refused. The EJ's interpretation overrides their withholding of consent, a right conferred on them by Parliament, contrary to Parliament's intention.

87. The third is that, section 105 was enacted after the HRA. Parliament gave the Secretary of State power to amend section 105(6) by order. Parliament's clear intention, therefore, was that if the section is to be amended, that is either to be done by Parliament (by means of other primary legislation, or by a route authorised in primary legislation) or by the Secretary of State, using the power conferred by section 105(7). I note that in this case, the Claimant's solicitors specifically asked the Secretary of State, in writing, to amend section 105(6) (see p 129 of the EAT bundle). The Secretary of State has not acceded to that request.

88. The fourth is that, in its current form, section 105(1) makes it a criminal offence to disclose information to which section 105(1) applies. The effect of the EJ's amendment is to remove criminal liability from acts to which it would otherwise attach. In none of the cases on section 3 has a court so far thought it right to take such an unconstitutional step. ***R v A***, for example, does not have anything like such a far-reaching effect.

89. The ET's amendment is not only contrary to Parliament's intention, but is, by necessary implication, contradicted by the **2000 Act**. The HRA preserves Parliamentary Sovereignty by recognising in section 3 that Parliament is free to legislate in a way which is incompatible with Convention Rights, a point which I am not sure that the EJ appreciated.

90. To insert a new sub-paragraph 105(6)(z), "Parts IVA and V of the **Employment Rights Act 1996"** is not to draw out a necessary implication from the statutory scheme, or to apply a conceptual approach such is evident in ***EBR Attridge Law LLP v Coleman***. What was at issue in ***Attridge*** was the need for domestic legislation to be read so as to conform with EU law, and, in particular, with the recognition by the ECJ of the concept of associative discrimination.

91. I turn to the second factor. I consider that this is an area in which the court is not equipped to understand the effect of a piecemeal amendment of one provision in an intricate scheme, just as a lay person would think twice before trying to fix one cold radiator in the attic of a huge building by opening up the boiler in a distant basement and loosening a random nut. As Ms Sen Gupta put it in her submissions, the EJ did not have the "panoramic view" of the statutory landscape and policy considerations which Parliament has.

92. It is crude to use the size of the bundles of statutory material in this case as a surrogate for the complexity of this scheme, but it does make some of that complexity visible. This is a policy area in which Parliament, or the Secretary of State, in the exercise of his power of amendment (with the help of his officials), is in a better position to see the big picture. If Parliament and the Secretary of State have decided, as it is apparent that they have, that this type of information cannot be used in whistleblowing claims, that is a matter for them, not for the courts. The balance to be struck between the rights of putative whistleblowers, and the safeguarding of rights to restrict the circulation of business information which has been obtained, broadly, in the exercise of regulatory functions, is for them, not for the courts. They are politically accountable, and the courts are not. I have only summarised parts of this evidently complex statutory scheme in this Judgment. Parliament and the Secretary of State are better placed than any court to understand the ramifications for that complex scheme of specifying enactments in section 105(6).

93. A related point is that section 105, unlike, for example, section 41 of the **Youth Justice and Criminal Evidence Act 1999**, which was at issue in ***R v A (No 2)***, is a multilateral provision. It affects the rights and obligations of many actors who are not before the court, and who are not, therefore, able to argue their corner. The effect of re-writing such a provision is inherently less predictable than the effect of re-writing a provision such as section 41. Moreover, a re-writing of section 105 (if that is indeed permitted by section 3) is likely to have a de-stabilising effect on the many similar provisions in other statutory schemes to which Ms Sen Gupta drew my attention.

94. Finally, I should say something about Mr Michell's argument, based on dicta in paragraphs 44 of Lord Steyn's speech in ***R v A***, repeated in paragraph 46 of his speech in

Ghaidan, and referred to by Lord Bingham in ***Sheldrake***. Lord Steyn quoted the then Lord Chancellor's statement, during the passage of the Human Rights Bill through Parliament, that he expected that in 99% of cases, there would be no need for a declaration of incompatibility. Mr Michell submitted that section 4 was a remedy of last resort, with the implication that in nearly all cases it must be possible to read statutory provisions (including section 105) so as to be compatible with Convention Rights.

95. There are four reasons why this submission does not take the argument very far. First, the Lord Chancellor's statement is ambiguous. It might have meant that the Government was confident that much, if not all, legislation was already, on its face, compatible with Convention Rights. Second, there is nothing in the text of sections 3 and 4 to support the idea that section 4 is a "remedy of last resort", other than in the uninformative, sequential sense, which is that it can only be considered by a court if a provision cannot be interpreted compatibly with Convention Rights. Third, statements of the Government's expectations about the likely frequency of section 4 declarations made in Parliament during the passage of the Bill are political statements which are not admissible under ***Pepper v Hart*** to construe the relationship between sections 3 and 4, as there is no relevant linguistic ambiguity to resolve. Fourth, even if the first three points are wrong, and the statistical prediction meant what Mr Michell submits it did, and it was, miraculously, an accurate prediction, the submission does not explain how a court is to recognise the critical 1% of cases.

96. For the reasons I have given, I consider that it is altogether clear that it is not possible to read and give effect to section 105 so as to make it compatible with the Claimant's Convention Rights. If that is so, it must follow that this is one of those cases in the one per cent.

Conclusion

97. I have already decided to allow this appeal. As I have just said, I do not consider that it is possible to read section 105 of the **2000 Act** so as to be compatible with the Claimant's Convention Rights. It follows that section 105 of the **2000 Act** cannot be amended by "reading in" a new section 105(6)(z). That is the only decision which was open to the EJ to make. I substitute my Decision for the Decision of the ET. It follows that the ET's consequential directions about disclosure were wrong in law and are of no effect.