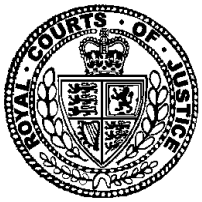

Neutral Citation Number: [2017] EWCA Civ 2220

Case No: A2/2016/4359

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM the Employment Appeal Tribunal
Mrs Justice Simler (President)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2017

Before:

LADY JUSTICE GLOSTER
(Vice President of the Court of Appeal (Civil Division))
LORD JUSTICE UNDERHILL
and
LORD JUSTICE SINGH

- -

Between:

CLAIRE GILHAM	**Appellant**
- and -	
MINISTRY OF JUSTICE	**Respondent**

- -
- -

Ms Rachel Crasnow QC and **Ms Rachel Barrett** (instructed by **Bindmans LLP**) for the **Appellant**
Mr Ben Collins QC and **Mr Robert Moretto** (instructed by **the Treasury Solicitor**) for the **Respondent**
Mr Daniel Stilitz QC and **Mr Christopher Milsom** (Instructed by **Leigh Day** for the **Intervener**, Public Concern at Work)

Hearing dates: 18 and 19 October 2017

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Approved Judgment

Lord Justice Underhill :

INTRODUCTION

1. This is the judgment of the Court, to which all its members have contributed**.** The Appellant is a district judge. On 27 February 2015 she brought proceedings in the Employment Tribunal against the Ministry of Justice under Part IVA of the Employment Rights Act 1996 claiming that she had been subjected to various detriments contrary to section 47B of the Act – that is, for whistleblowing (or, more formally, making protected disclosures). The detail of the disclosures is irrelevant for the purpose of this appeal: very broadly, they concerned what were said to be poor and unsafe working conditions and an excessive workload in the courts where the Appellant worked, affecting both herself and the other judges working there. She also brought a claim for disability discrimination.

2. A whistleblowing claim may be brought only by a "worker" (see section 47B (1)). "Worker" is defined by section 230 (3) of the 1996 Act as follows:

> "In this Act 'worker' (except in the phrases 'shop worker' and 'betting worker') means an individual who has entered into or works under (or, where the employment has ceased, worked under) —
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
>
> and any reference to a worker's contract shall be construed accordingly."

"Contract of employment" is defined by sub-section (2) as "a contract of service or apprenticeship".

3. By a Judgment with Reasons sent to the parties on 26 October 2015 an Employment Tribunal in Manchester (Regional Employment Judge Robertson sitting alone) dismissed the Appellant's complaint under Part IVA on the basis that she was not a worker within the meaning of the 1996 Act, because she was an office-holder and not a party to a contract falling under either limb of section 230 (3). That conclusion did not affect the Appellant's disability discrimination claim because it was established in the *O'Brien* litigation – see paras. 48-52 below – that for the purpose of EU law, and thus of domestic legislation implementing it, a judge falls within the protection of the discrimination legislation if he or she is in an "employment relationship",

which need not be contractual; but the whistleblower legislation is purely domestic and does not derive from any EU Directive.

4. The Appellant appealed to the Employment Appeal Tribunal against the dismissal of her whistleblowing claim. By a judgment handed down on 31 October 2016 Simler P dismissed the appeal. This is an appeal against that decision.

5. The Appellant has been represented before us by Ms Rachel Crasnow QC, leading Ms Rachel Barrett, and the Respondent by Mr Ben Collins QC and Mr Robert Moretto. Both the leaders appeared both in the ET and the EAT and Ms Barrett in the EAT. The charity Public Concern at Work ("PCAW") was given permission to intervene in this Court and was represented by Mr Daniel Stilitz QC, leading Mr Christopher Milsom.

6. In the ET and the EAT the Appellant's primary case was that she fell within the terms of section 230 (3) as construed on ordinary domestic law principles, essentially because she did indeed work under a contract with the Ministry of Justice or the Lord Chancellor[1]. However, she had an alternative case that even if that were not so the Court should apply section 3 of the Human Rights Act 1998 to achieve a construction of section 230 (3) under which she could be treated as a worker in order to avoid a breach of her rights under article 10 of the European Convention on Human Rights. In this Court PCAW sought permission to advance a further argument, based on article 14 of the Convention. That application was supported by the Appellant, who sought permission to amend her grounds of appeal to incorporate that argument. The Respondent opposed those applications, but we decided that the point should be allowed to be taken and granted the necessary permission to amend: our reasons appear at para. 92 below. We will address the domestic law, article 10 and article 14 issues in turn.

A. THE DOMESTIC LAW ISSUE

THE ISSUE

7. It is common ground that as a district judge the Appellant is an office-holder. But it is also common ground that that is not inherently inconsistent with her working under a contract so as to fall within the terms of section 230 (3). As to that, she does not contend that she works under a contract of employment so as to be caught by limb (a); rather, she relies on limb (b). To spell it out, it is her case (i) that she works under a contract; (ii) that the other party to that contract is the Lord Chancellor; (iii) that under the contract she undertakes to do or perform work or services personally; (iv) that the work or services in question are "for" the Lord Chancellor; and (v) that under that contract the Lord Chancellor's status is not that of a client or customer.

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[1] It seems to us that any contract would, as a matter of strict form, be with the Lord Chancellor rather than the Department. It should also be noted that the relevant statutory references in this field are to "the Lord Chancellor" rather than "the Secretary of State", so although the Lord Chancellor nowadays is also Secretary of State for Justice it is correct to refer to him in this context under the former title.

8. It is the Lord Chancellor's primary case in response that the relationship established by the appointment of a district judge – or indeed any judge – is not contractual in nature, so that the Claimant's case accordingly falls at step (i). It is also his case that he is not a party to any such contract as might be found (step (ii)), nor are the work or service which a judge performs done "for" him (step (iv)); but although those points are in principle capable of being free-standing answers to the claim he treats them mainly as feeding into the primary question of whether there is a contract at all.

THE STATUTORY PROVISIONS RELATING TO DISTRICT JUDGES

9. The statutory basis on which judges are appointed and serve was subject to important changes as a result of the Constitutional Reform Act 2005, which came into force on 3 April 2006, about two months after the Appellant's appointment. It was both parties' case that those changes did not affect the essential analysis for the purpose of the issues which we have to decide. Accordingly, although we will set out the pre-2005 Act position as it relates to the Appellant's initial appointment, as regards her service thereafter we will confine ourselves to the current position.

10. *Appointment to County Court and salary.* The Appellant was appointed a district judge with effect from 6 February 2006: see para. 20 below. At that date section 6 (1) of the County Courts Act 1984 provided that there should be a district judge for each county court district "who shall be appointed by the Lord Chancellor and paid such salary as the Lord Chancellor may, with the concurrence of the Treasury, direct". Section 6 was amended by the 2005 Act (and subsequently also by the Crime and Courts Act 2013, which created a single County Court) and now reads, so far as material, as follows:

> "(1) Her Majesty may, on the recommendation of the Lord Chancellor, appoint district judges.
>
> …
>
> (5) A district judge is to be paid such salary as may be determined by the Lord Chancellor with the concurrence of the Treasury.
>
> (6) A salary payable under this section may be increased but not reduced by a determination or further determination under this section."

11. *The High Court.* By section 100 of the Senior Courts Act 1981 district judges are also "district judges of the High Court". Their assignment to a particular district registry is the responsibility of the Lord Chief Justice, after consulting the Lord Chancellor (see sub-section (1)), but they may also act in a different district registry in accordance with arrangements made by or on behalf of the Lord Chief Justice (see sub-section (3)).

12. *Tenure.* Section 11 of the 1984 Act provides as follows:

> "(1) This subsection applies to the office of district judge.
>
> (2) Subject to the following provisions of this section and to subsections (4) to (6) of section 26 of the Judicial Pensions and Retirement Act 1993 (Lord Chancellor's power to authorise continuance in office up to the age of 75), a person who holds an office to which subsection (1) applies shall vacate his office on the day on which he attains the age of 70 years.
>
> ...
>
> (4) A person appointed to an office to which subsection (1) applies shall hold that office during good behaviour.
>
> (5) The power to remove such a person from his office on account of misbehaviour shall be exercisable by the Lord Chancellor, but only with the concurrence of the Lord Chief Justice.
>
> (6) The Lord Chancellor may, with the concurrence of the Lord Chief Justice, also remove such a person from his office on account of inability to perform the duties of his office."

13. *Pension*. Judicial pensions are provided for under the Judicial Pensions and Retirement Act 1993 (as amended). We need not summarise the provisions here.

14. *Discipline*. Section 108 of the 2005 Act gives the Lord Chief Justice power to give a judicial office-holder formal advice or a formal warning or reprimand and also powers of suspension, "but only with the agreement of the Lord Chancellor and only after complying with prescribed procedures". Section 115 gives the Lord Chief Justice power, with the agreement of the Lord Chancellor, to make regulations providing for the procedure to be followed when allegations of misconduct are made against a judge. The current Regulations are the Judicial Discipline (Prescribed Procedures) Regulations 2014. We need not set out their terms.

15. *Responsibilities of the Lord Chief Justice*. Section 7 (1) of the 2005 Act constitutes the Lord Chief Justice as President of the Courts of England and Wales and Head of the Judiciary of England and Wales. Section 7 (2) reads, so far as material:

> "As President of the Courts of England and Wales [the Lord Chief Justice] is responsible —
>
> (a) ...
>
> (b) for the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of England and Wales within the resources made available by the Lord Chancellor;

> (c) for the maintenance of appropriate arrangements for the deployment of the judiciary of England and Wales and the allocation of work within courts."[2]

16. *Functions.* As regards the judicial role, functions and authority of district judges in the County Court and High Court, these derive from statutes and statutory instruments which it is unnecessary to enumerate here.

17. *Oath.* By section 76 (1) of the Courts and Legal Services Act 1990 district judges are required to take the judicial oath, the form of which is that they will

> "well and truly serve our Sovereign Lady Queen Elizabeth the Second in the office of District Judge, and … do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will".

THE APPELLANT'S APPOINTMENT AND TERMS OF SERVICE

18. In 2005 the Appellant applied for appointment as a district judge and was in due course approved as fit for appointment and placed on a reserve list. On 28 October 2005 the Head of Judicial Competitions (Courts) Division at the Department of Constitutional Affairs ("the DCA"), Lee Hughes CBE, wrote a letter to her headed "District Judge Appointment" informing her that a vacancy had arisen on the Wales and Chester Circuit, in the Crewe County Court, and that "Lord Falconer [the then Lord Chancellor] has decided to offer you that appointment" and inviting her "acceptance". She was told that the offer was subject to her confirmation that her living arrangements would be compatible with the effective performance of her judicial duties and also to her being able to satisfy the conditions of appointment and to agree satisfactory sitting arrangements with the Regional Director. The letter proceeded to go through a number of matters. We need not summarise them all but would note the following points from paras. 1-8, which are headed "Terms of Appointment":

    (1) At para. 2 the Appellant was referred to an enclosed Memorandum dated February 2005 which was said to set out "the terms and conditions of appointment, together with other relevant information": we give further details at para. 22 below.

    (2) At para. 3 the current salary for a district judge was stated and reference made to the statutory retirement age of 70.

    (3) At para. 4 she was told that the Lord Chancellor regarded judgeship as a lifetime appointment and accordingly that the offer was made "on the understanding" that she would not thereafter return to private practice.

    (4) Para. 5 asks the Appellant, "if you wish to accept Lord Falconer's offer", to contact the Regional Director to discuss sitting arrangements.

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[2] These functions are in practice mostly delegated to the Senior Presiding Judge or to the Presiding Judges of each Circuit.

> It goes on to say that while every effort will be made to abide by "arrangements which may finally be agreed between you" the appointment is to the Region as a whole (that is, to the Wales and Chester Circuit) and that the Lord Chancellor reserves the right to alter the arrangements.

19. Within a very few days the Appellant replied to Mr Hughes accepting the appointment offered (her letter does not survive). On 2 November 2005 she met the Regional Director, Nick Chibnall, and agreed sitting arrangements: she was to be based at Crewe County Court, with some sittings elsewhere. The following day Mr Chibnall wrote to confirm what had been agreed, though noting that various checks still had to be completed. On 22 December Mr Hughes wrote to confirm that those checks were now complete and invited the Appellant to contact Mr Chibnall to agree a start date. It appears that a start date of 6 February 2006 was agreed, though it is not known exactly when.

20. On 31 January 2006 the Judicial Human Resources Branch at the DCA wrote to the Appellant enclosing an Instrument of Appointment as a District Judge on the Wales and Chester Circuit, pointing out that it had been signed by the Lord Chancellor to take effect from 6 February. The enclosed Instrument is signed by Lord Falconer and dated 27 January 2006. It reads:

> "I, CHARLES LESLIE, BARON FALCONER OF THOROTON, Lord High Chancellor of Great Britain, by virtue of Section 6 of the County Courts Act 1984 and Section 100 of the Supreme Court Act 1981 (as amended by Section 74 of the Courts and Legal Services Act 1990) do hereby appoint
>
> CLAIRE FRANCES GILHAM
>
> You are authorised to sit as a Joint District Judge at the following courts: [the County Court on the Wales and Chester Circuit] and Joint District Judge in the District Registry of the High Court at [the relevant District Registries] with effect from the sixth day of February 2006."

21. It is convenient to note at this point that in her oral submissions Ms Crasnow initially submitted that the communications between the Appellant and the Department summarised at paras. 18-19 above gave rise to a contract as soon as the various matters requiring agreement, and more particularly the start-date, had been agreed. But she acknowledged that it was hard to square that submission with the rule that ministers may not bind themselves by contract as to the exercise of their statutory powers, and her eventual submission was that a contract came into being either on 27 January 2006, being the date of the Instrument of Appointment, or 31 January, being the date that it was sent to her.

22. The Memorandum sent with Mr Hughes' letter of 28 October 2005 has been through numerous editions. At the time of the issue of the Claimant's proceedings the current version was issued in 2009. We were supplied with the 2005 version in full, together with some extracts from the 2009 version.

The Memorandum is extremely lengthy. Part II is described as setting out "the general terms and conditions of service of a District Judge". In some parts it simply recapitulates the statutory provisions to which we have already referred. Other parts are purely administrative in character. But we should note the following (from the 2009 version):

(1) There is no specific provision for hours of work or holiday entitlement. But para. 37 states 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."

Para. 38 describes what constitutes "judicial business".

(2) Para. 42, which is headed "Sickness", begins:

> "No adjustment in a District Judge's salary is made during any absence by reason of sickness. Although nothing is laid down in statute, no limit is placed on the length of any absence, provided there is a reasonable prospect of an eventual return to duty."

(3) Paras. 43-49 contain provisions for maternity, paternity and adoption leave and career breaks. Salary is payable for such leave periods but not for career breaks.

(4) Para. 85 refers to the existence of a protocol setting out a process to be followed where one judge has a complaint against another. We were shown the version issued in October 2013, which is titled "Judicial Grievance Policy". The procedure is elaborate. It allows for grievances to be investigated by senior members of the judiciary as appropriate and if necessary escalated to the Senior Presiding Judge or the Lord Chief Justice.

THE AUTHORITIES

23. The issue whether an office-holder is in a contractual relationship with the person who appoints them does not only arise in the context of the judiciary, and in fact the most recent and authoritative discussion of that issue has been in three decisions concerning the employment status of the clergy. We will consider those authorities first before turning to those which directly address the employment status of judges.

(a) The Clergy Cases

Percy

24. In *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 73, [2006] 2 AC 28, the issue was whether a minister appointed to a Church of Scotland parish was an employee within the meaning of the Sex Discrimination Act 1975. The definition of employment in section 82 (1) of

the 1975 Act goes beyond employment under a contract of service, and it is now established that it is substantially equivalent to the definition of "worker" in section 230 (3) of the 1996 Act[3]: we will refer to this as "employment in the extended sense". Her claim had failed in the Court of Session because it was held that she had no contract with the Church. The House of Lords by a majority allowed her appeal.

25. One element in the Church's case was that the appellant's post as a minister constituted an office. It was not on any view a statutory office, and Lady Hale expressed some doubt as to whether it was an office at all – see para. 148 of her opinion (p. 73B). But the case proceeded on the basis that it was, and for our purposes the principal point which it decides is that there is no necessary inconsistency between holding an office and being party to a contract for carrying out the duties of that office. Lord Nicholls, with whom Lord Scott and Lady Hale agreed, addressed that issue at paras. 14-22 of his opinion (pp. 37-39), under the heading "Office Holders and Employees". He noted at paras. 19-20 (p. 39 A-E) the wide range of types of office, from ancient common law offices (such as that of constable or beneficed clergy in the Church of England), through offices created by statute (such as registrars of births, deaths and marriages), to directors of a company or other associations, and points out that in some such cases there is unquestionably a parallel contract of service. At para. 20 he says (p. 39 D-E):

> "Whether there is a contract in a particular case, and if so what is its nature and what are its terms, depends upon an application of familiar general principles. That the appointment in question is or may be described as an 'office' is a matter to be taken into account. The weight of this feature will depend upon all the circumstances. But this feature does not of itself pre-empt the answer to the question whether the holder of the 'office' is an employee. This feature does not necessarily preclude the existence of a parallel contract for carrying out the duties of the office even where they are statutory: see Lord Oliver of Aylmerton in *Miles v Wakefield Metropolitan District Council* [1987] AC 539, 566-567."

26. Lord Nicholls went on to hold that, applying those principles to the case before the House, the claimant was employed by the Church. In short, the documents passing between the relevant Church authorities and the appellant about her appointment were on their face contractual, stating her duties and providing for a stipend and accommodation – see paras. 30-33 (p. 42 A-F); and there was nothing to displace that impression.

27. There are two other points made by Lord Nicholls to which Ms Crasnow drew our attention.

28. First, he pointed out at paras. 15-16 (pp. 37-38) that prior to the development of statutory employment protection rights there were positive advantages to

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[3] See *Windle v Secretary of State for Justice* [2016] EWCA Civ 459, [2016] ICR 721, at paras. 7-10 (pp. 723-5).

establishing that a particular "employment" had the character of an office, since that brought with it certain common law protections: he referred to *Ridge v Baldwin* [1964] AC 40 and *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578. But he endorsed the observations of Phillips J in *102 Social Club and Institute Ltd v Bickerton* [1977] ICR 911 to the effect that the Industrial Relations Act 1971 had changed the forensic perspective. Phillips J said, at p. 917 G-H:

> "Previously, it was a case of defendants seeking to deny an office-holder a right of complaint on the ground that he was party to a 'pure contract of service'; now it is a question of defendants seeking to deny employees the right not to be unfairly dismissed on the ground that in reality they are not employees but 'pure office-holders'."

That is indeed an interesting observation, but we are not sure how it advances the argument in the present case.

29. Secondly, Lord Nicholls acknowledged at paras. 27-28 (p. 41 C-F) that there was a problem in identifying the precise identity of the employer because of the fragmentation of entities within the Church of Scotland; but he observed that "this internal fragmentation ought not to stand in the way of otherwise well-founded claims".

30. Lady Hale reached the same conclusion as Lord Nicholls and said that her reasoning was essentially the same as his: see para. 140 (p. 70D). It may, however, be arguable that she went rather further than he did. After making at para. 142 the same point as Lord Nicholls based on *Bickerton*, she went on at paras. 143-6 (pp. 70-71) to discuss, and quote at length from, the decision of the Northern Ireland Court of Appeal in *Perceval-Price v Department of Economic Development* [2000] IRLR 380, which was concerned with the employment status of judges. We address that decision at paras. 45-47 below, but the important point to note at this stage is that Lady Hale regarded it as establishing that judges are indeed employees in the extended sense, essentially because they are not free to work as and when they please, and that this illustrated that "the essential distinction is ... between the employed and the self-employed": see para. 146 (p. 72 G-H). She continued:

> "The fact that the worker has very considerable freedom and independence in how she performs the duties of her office does not take her outside the definition. Judges are servants of the law, in the sense that the law governs all that they do and decide, just as clergy are servants of God, in the sense that God's word, as interpreted in the doctrines of their faith, governs all that they practise, preach and teach. This does not mean that they cannot be 'workers' or in the 'employment' of those who decide how their Ministry should be put to the service of the Church."

That is an important passage, but it will be seen that the issue to which it is principally directed is whether there is any inconsistency between being an

employee and serving a higher purpose than that of the putative employer, that being one of the crucial issues in the clergy cases. It is not addressing as such the question whether judges do actually serve under a contract of employment (in either the narrow or the extended sense).

31. Lord Hope's reasoning on this issue essentially reflects that of Lord Nicholls: see paras. 114-5 (p. 62 E-H). Lord Scott agreed with Lord Nicholls, Lord Hope and Lady Hale: para. 137 (p. 69F).

32. Lord Hoffmann dissented. There are nevertheless two passages from his opinion which we should quote. The first is from para. 54 (p. 46 E-F) and reads:

> "The distinction in law between an employee, who enters into a contract with an employer, and an office-holder, who has no employer but holds his position subject to rules dealing with such matters as his duties, the term of his office, the circumstances in which he may be removed and his entitlement to remuneration, is well established and understood. One of the oldest offices known to the law is that of constable. It is notorious that a constable has no employer. It required special provision in section 17 of the 1975 Act to bring the office of constable within the terms of the Act and to deem the Chief Constable to be his employer."

That is valuable as a recognition that in principle an office-holder's duties, tenure and remuneration may be defined by rules applicable to the office rather than by contract. That is consistent with what we take to be the ratio of the majority: the question was whether that was the proper analysis in the particular case. The reminder that at common law a constable is not an employee is also useful. Secondly, at para. 62, having rejected a submission that there was no intention to create legal relations between the applicant and the Church, Lord Hoffmann continues (p. 48 E-G):

> "There was plainly an intention to create legal relations. But those legal relations were not a contract of employment. They were an appointment to a well-recognised office, imposing legal duties and conferring legal rights. The nature of an office inevitably means that the procedures for appointment will closely resemble those attending the engagement of an employee. No doubt similar documentation could be found concerning the appointment of, among many others, judges, rent officers and superintendent registrars of births, deaths and marriages (see *Miles v Wakefield Metropolitan District Council* [1987] AC 539). But that does not mean that their appointment to these offices created contractual relations."

The reference to judges in that passage foreshadows the issue in the present case. There is evidently a tension, to put it no higher, between his view and that of Lady Hale.

Preston

33. In *Preston v President of the Methodist Conference* [2013] UKSC 29, [2013] 2 AC 163, the issue was whether the claimant, who was a Methodist minister, was an employee in the narrower sense, i.e. employed under a contract of service. The Supreme Court held by a majority that she was not. The majority judgment was delivered by Lord Sumption. He reviewed the recent case-law, observing at para. 4 (p. 170D) that one of the main themes was the distinction between an office and employment. He defined an office as:

> "[b]roadly speaking, ... 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."

At para. 8 (p. 172 A-C) he summarised the approach adopted by the majority in *Percy* as follows:

> "Lord Nicholls regarded office-holding as an unsatisfactory criterion, at any rate on its own, for deciding whether a person was employed. The concept is clear enough but the boundaries are not, except in the case of holders of a small number of offices which have long been recognised as such by the common law, such as constables and beneficed clergymen of the Church of England. Moreover, offices and employments are not always mutually exclusive categories. A contract of employment is capable of subsisting side by side with many of the characteristics of an office. It followed that the classification of a minister's occupation as an office was no more than one factor in a judgment that depended on all the circumstances."

At para. 10 (p. 173 E-F) he said:

> "It is clear from the judgments of the majority in *Percy* that the question whether a minister of religion serves under a contract of employment can no longer be answered simply by classifying the minister's occupation by type: office or employment, spiritual or secular. ... 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. Part of that background is the fundamentally spiritual purpose of the functions of a minister of religion."

At para. 12 (pp. 173-4) he rejected a submission on behalf of the church that a contract should only be implied if it was necessary to do so. The exercise was not one of implication but simply of considering the legal effect of the documents recording the relationship:

> "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."

34. Applying that approach, Lord Sumption proceeded to analyse the arrangements governing the appointment and role of ministers in the Methodist Church and concluded that the relationship arising under them was not contractual in character. At para. 26 (p. 178 F-G) he observed:

> "The question whether an arrangement is a legally binding contract depends on the intentions of the parties. The mere fact that the arrangement includes the payment of a stipend, the provision of accommodation and recognised duties to be performed by the minister, does not without more resolve the issue. The question is whether the parties intended these benefits and burdens of the ministry to be the subject of a legally binding agreement between them."

The answer to that question was no.

35. Lady Hale dissented. In her view what was decisive was that, as she put it at para. 49 (p. 184 E-F), "everything about this arrangement looks contractual, as did everything about the relationship in the *Percy* case". Her judgment contained a fuller analysis than Lord Sumption's of the relevant Standing Orders of the Methodist church. These included a Part headed "Terms of Service", which at para. 43 (p. 183C) she summarised as follows:

> "These deal with the right to a stipend …, the right of a Circuit minister to be provided with a manse as a base for the work of ministry as well as a home …, membership of the pension scheme …, parenthood …, including antenatal care, maternity, paternity, adoption and parental leave …. There is a Connexional Allowances Committee which annually recommends stipends to Conference. There is a standard stipend and allowances for extra responsibilities, including those of a superintendent minister."

At para. 44 (p. 183 D-E) she summarised the elaborate grievance and disciplinary procedures in place. At para. 47 (p. 184 B-C), she noted that in the appellant's case there was an "assignment … to a particular post, with a particular set of duties and expectations, a particular manse and a stipend which depends (at the very least) on the level of responsibility entailed, and for a defined period of time"; and she observed that in any other context that would involve a contract of employment. She did not regard the fact that the appellant's duties were, at least in part, spiritual as requiring any different conclusion.

Sharpe

36. We were also referred to the recent decision of this Court in *Sharpe v Worcester Diocesan Board of Finance Ltd* [2015] EWCA Civ 399, [2015] ICR 1241, in which the issue was whether a Church of England minister was either an employee of the Church[4] for the purpose of the unfair dismissal provisions or a worker for the purpose of a whistleblower claim. It was held that he was neither. Arden LJ, who delivered the leading judgment, acknowledged at para. 108 (p. 1266H) that it was important, in a case "where the shadows of history and tradition are as long as they are here", to look at substance rather than form. She acknowledged that where a clergyman assumes office as the rector of a parish he accepts an obligation to perform his calling in that capacity and that "in exchange" the Church provides him with the facilities to do so, including his stipend. But she concluded that in substance that relationship was not contractual. She says, at the end of para. 108 (p. 1267 D-E):

> "... by accepting office as rector he or she agrees to follow their calling. They do not enter into an agreement to do work for the purposes and benefit of the Church as a commercial transaction. On the facts as found by the employment judge, the Church, personified in these proceedings by the Bishop (in his corporate capacity), provides the institutional structure in which the incumbent can indeed follow his or her calling to be part of the ministry. The office of rector is governed by a regime which is a part of ecclesiastical law. It is not the result of a contractual arrangement."

37. We should also note that at para. 77 of her judgment (p. 1260 B-D) Arden LJ considered what Lord Sumption had meant by saying at para. 12 of his judgment in *Preston* that "necessity does not come into it" (see para.33 above). She referred to what she said was "well-established law that a contract should not be implied unless the party seeking to establish such a contract shows that it is necessarily to be implied (see *Tilson v Alstom Transport* [2011] IRLR 169, paras. 8-103)". She continued:

> "As Bingham LJ put it in *The Aramis* [1989] 1 Lloyd's Law Reports 213 at 224, it is not sufficient that the conduct relied on for implying a contract was no more consistent with an intention to contract than an intention not to contract. Bingham LJ continued:
>
> > 'It must, surely, be necessary to identify conduct referable to the contract contended for or, at the very least, conduct inconsistent with there being no contract made between the parties to the contract to the effect contended for.'"

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[4] We say "the Church" as a shorthand. It was the claimant's case that his employer was the bishop, but even if a contractual relationship had been established the identity of the other party would have been debatable.

38. Both Davis and Lewison LJJ delivered substantial judgments. Both held that the relationship between the claimant and the church in his capacity as rector was not contractual: see paras. 128-132 (pp. 1270-1) and paras. 179-183 (pp. 1282-3).

39. In *Sharpe*, as in *Preston*, there appear to have been some standard terms governing aspects of an incumbent's rights and obligations, particularly as to stipend, housing and other financial matters – see paras. 23-31 of Arden LJ's judgment (pp. 1248-50) – though it is fair to say that they seem to have been less elaborate and narrower in their scope than those of the Methodist church considered in *Preston.*

Overview on the clergy cases

40. The primary point of principle established by the clergy cases is that there is nothing inconsistent in the holder of an office being party to a contract to perform the duties of that office; and, as we have said, that was common ground before us. Whether there was such a contract in any given case depends, in the usual way, on an analysis of the dealings between the parties against the relevant background – see in particular the passages from para. 20 of Lord Nicholls' opinion in *Percy* and from para. 10 of the judgment of Lord Sumption in *Preston* quoted at paras. 25 and 33 above. If *Percy* stood alone, it might be thought that the fact that a relationship involved defined duties and was subject to agreed terms and conditions as regards such matters as remuneration created at least a strong presumption in favour of a contractual analysis; arguably indeed it might be thought that the decisive question was simply whether the office-holder is "self-employed" in the sense described Lady Hale. But *Preston* is a corrective to that view, as appears not only from para. 26 of Lord Sumption's judgment but also from the terms of Lady Hale's dissent: even where those features are present it is necessary to consider whether the parties intended them to create a contractual relationship. In *Preston* itself the Court's conclusion did not in fact depend specifically on the proposition that the alternative analysis of the relevant rights and obligations was that they derived from the holding of an office; but it is clear that that is an available analysis, as Lord Hoffmann made clear in *Percy*, and it was the analysis adopted in *Sharpe*.

(b) The Judiciary Cases

The background cases

41. In *Terrell v Secretary of State for the Colonies* [1953] 2 QB 482 the claimant was a puisne judge of the Supreme Court of Malaya who had been appointed in 1930 on the basis that he would serve to the age of 62. In 1942 he was dismissed by the Secretary of State as a result of the Japanese occupation of Malaya: he was at that point aged only 60. He claimed that his dismissal was unlawful, either on the basis that by the law of Malaya, as in England, a judge held office during good behaviour and could not be removed, alternatively on the basis that the offer of appointment made to him by the Secretary of State, and his acceptance, gave rise to a contract under which he was entitled to serve until retirement. The claim was first heard by an arbitrator but came

before Lord Goddard CJ on a case stated. He held that the Crown had the right to dismiss a colonial judge at pleasure and that that power could not be limited by contract. But he also observed, more materially to the issue before us, that (see p. 499):

> "I agree with the arbitrator that a judge holds office by Royal appointment and not by contract. I think that the correspondence referred to does no more than inform the claimant of the general conditions applicable to the office. It tells him that at the age of 62 he will have to retire and might expect to receive a pension; it does not amount to an agreement that he is to be appointed for a definite period and not at the pleasure of the Crown."

42. In *Knight v Attorney-General* [1979] ICR 194 a female candidate for appointment as a justice of the peace whose application had been unsuccessful brought proceedings under the Sex Discrimination Act 1975 against the Lord Chancellor complaining that her non-appointment was on the grounds of her sex. Such a claim could only be brought in relation to potential "employment", which, as already noted, was defined in an extended sense substantially equivalent to the definition of "worker" in the 1996 Act. The Industrial Tribunal dismissed her claim, and that decision was upheld by the EAT. Slynn J dealt with the point shortly, saying (at p. 199 D-E):

> "We are quite satisfied that a justice of the peace is appointed to hold an office. He is not employed under a contract of service or apprenticeship, nor does he make with the Crown a contract to execute personally any work or labour."

43. In *Shaikh v Independent Tribunal Service* UKEAT/0656/03 the EAT, HH Judge Peter Clark presiding, held that part-time chairmen of the Social Security Appeals Tribunal and the Disability Appeals Tribunal, were neither employees in the narrower sense, for the purpose of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 nor employees in the extended sense for the purpose of the Race Relations Act 1976, apparently – though the reasoning at para. 31 of the judgment is not crystal clear – because they were not in a contractual relationship with the Lord Chancellor or any other person.

44. We have referred to these authorities, which are not binding on us, not so much because the conclusions reached in them would necessarily be directly applicable in the present case as because they are referred to in the later case-law. But they are of some value as reflecting a general understanding that the rights and obligations of judicial office-holders arose from the office rather than from contract.

Perceval-Price

45. In *Perceval-Price*, to which we have already referred (see para. 30 above), chairmen of a number of statutory tribunals in Northern Ireland – the Industrial Tribunal, the Fair Employment Tribunal, the Social Security

Appeals Tribunal and the Medical Appeals Tribunal – brought proceedings in the Industrial Tribunal claiming that the terms of the judicial pension scheme were discriminatory on the ground of sex. The definition of employment in section 1 (7) of the Equal Pay Act (Northern Ireland) 1970 was identical to that in the Sex Discrimination Act 1975 – i.e. it covered employees in the extended sense – and section 1 (9) (a) provided that it extended to Crown service, "other than service of a person holding a statutory office".

46. The Industrial Tribunal held that it had jurisdiction to determine the claims, and that decision was upheld by the Northern Ireland Court of Appeal. The Court held that the applicants were "workers" within the meaning of article 119 of the Treaty of Rome (what is now article 157 of the Treaty on the Functioning of the European Union). Sir Robert Carswell LCJ said, at para. 26 (p. 384):

> "The object of Article 119 and the directives is to give protection against inequality and discrimination to those who may be vulnerable to exploitation. The term 'workers' should be construed purposively, as the Tribunal held, by reference to the object of the legislation. In the course of the argument before us emphasis was laid on the extent to which the respondents and holders of judicial office in general could be said to be under the direction of another person. We consider that the differences in the formality of expression of the terms and conditions of service and the extent of administrative direction of their patterns of work are not conclusive as criteria, for they reflect only differences in emphasis in the way that the same conditions are expressed. 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, as servants of the State, even though as office holders they do not come within the definition of employment in domestic law."

47. It is important to note, however, that the Court's reasoning was not that it followed that the applicants were employees within the meaning of the statute: on the contrary, they were clearly excluded by the words which we have quoted from section 1 (9) (a). Rather, it relied, at para. 38 (pp. 385-6), on the direct effect of article 119 as disapplying the exclusion, observing at para. 39 (p. 386) that once the exclusion was disapplied the applicants "are included

within the remaining wording of section 1 (9)" – that is, that section 1 applied to "service for purposes of a Minister of the Crown or government department". That proposition does not appear to have been in issue, and the judgment contains no discussion of the nature of that service as a matter of domestic law.

O'Brien

48. In *O'Brien v Ministry of Justice* the issue was whether the claimant, a recorder, was a worker for the purpose of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, which implemented EU Council Directive 97/81/EC. The definition of "worker" was identical to that in section 230 (3) of the 1996 Act. Regulation 17 provided that:

> "These Regulations do not apply to any individual in his capacity as the holder of a judicial office if he is remunerated on a daily fee-paid basis."

49. The question whether the claimant was a worker was not considered in the ET or the EAT, where the only issue concerned limitation. The issue did, however, arise in this Court – [2008] EWCA Civ 1448, [2009] ICR 593. Maurice Kay LJ, with whose judgment Sir Andrew Morritt C and Smith LJ agreed, regarded it as necessary to decide whether the incorporation of regulation 17 constituted a tacit recognition that judges would otherwise fall within the definition of "worker". He held that it did not. He said, at paras. 47-51 (pp. 606-7), omitting a couple of immaterial passages:

> "47. There is copious authority to support the proposition that a statutory office holder such as a judge is not employed under a contract (for example, *Terrell v Secretary of State for the Colonies* [1953] QB 482) and is not 'in employment' within the meaning of the Sex Discrimination Act 1975 (*Knight v Attorney General* [1979] ICR 194). In *Shaikh v Independent Tribunal Service* (unreported) 16 March 2004, the Employment Appeal Tribunal (Judge Peter Clark presiding) held that part-time chairmen of social security tribunals were office holders rather than employees and were not Crown employees. None of these authorities is dispositive of the present case, but they do illustrate that it would have been ground-breaking if the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 were to have departed from their underlying assumption. Regulation 1(2) is in language that inhabits a different terrain from that exemplified by the 'office holder' authorities. It defines 'worker' in terms of a contract of employment (which a part-time judge does not have), or [limb (b) of the definition is then quoted].
>
> 48. For good and obvious reasons, the purpose of that provision is to ensure that protection is not lost where the relationship is properly classified as one of employer/independent contractor, rather than

> employer/employee. It does not describe the work of a judge who does not undertake to do or perform personally work or services 'for another party to the contract'. One asks rhetorically: Which other party? What contract?
>
> 49 ...
>
> 50. It would be wholly inimical to the independence of the judiciary if any judicial office holder were to be discharging his judicial functions 'under or for the purposes of a government department or any officer or body exercising … functions' on behalf of the Crown. As [counsel for the Secretary of State] wryly observes, the Crown is a party to every trial or indictment and is a party to some civil litigation.
>
> 51. All this leads me to the clear conclusion that it was not intended that any part-time judicial office holders were to be protected by the Regulations and that regulation 17 was no more than a 'belt and braces' provision prompted by the Northern Irish case [i.e. *Perceval-Price*]. ..."

50. That conclusion was not dispositive of the appeal, because it was the claimant's case that he was a worker within the meaning of the underlying Directive, and that that trumped what might otherwise be the meaning of the term in the Regulations. But the Court followed the decision of the EAT in *Christie v Department of Constitutional Affairs* [2007] ICR 1553 that a domestic definition of worker which excluded part-time judges would not contravene EU law.

51. The claimant appealed to the Supreme Court, which made a reference to the Court of Justice of the European Union ("the CJEU"). The CJEU held that the exclusion of judges from the protection of the Directive was justified only if "the relationship between judges and the Ministry of Justice is, by its nature, substantially different from that between employers and their employees falling, according to national law, under the category of workers": see C-393/10, [2012] ICR 955, at para. 68. It also specified a number of principles and criteria which had to be taken into account in deciding whether the relationship was substantially different.

52. When the appeal returned to the Supreme Court it answered that question in favour of the claimant, holding that judges were indeed in an "employment relationship" of the kind identified by the CJEU, and thus essentially endorsing *Perceval-Price*: see [2013] UKSC 6, [2013] 1 WLR 522. However, in its judgment, delivered by Lord Hope and Lady Hale, it made clear that its reasoning involved no consideration of "the very large question of whether all or any servants of the Crown have contracts of employment": see para. 31 (p. 534H). It was accordingly common ground before us that the Court's decision was of no direct relevance to the issue which we have to decide.

53. Nevertheless, at least one of the points considered in the CJEU is relevant. One of the arguments there advanced was that treating a judge as being in a

relationship with the Secretary of State which was substantially the same as that between worker and employer would be inconsistent with judicial independence. That argument was rejected. The Court said, at paras. 47-48 of its judgment:

> "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.
>
> 48. As the Supreme Court of the United Kingdom observed in paragraph 27 of its order for reference, judges are independent in the exercise of the function of judging as such, within the meaning of the second subparagraph of Article 47 of the Charter of Fundamental Rights of the European Union."

In the Supreme Court counsel for the Secretary of State did not pursue the argument: see para. 35 (at p. 536 B-C).

THE DECISIONS OF THE ET AND THE EAT

The Employment Tribunal

54. The ET's Reasons are careful and well-structured. After setting out the facts and the relevant statutory provisions, the Judge proceeds to an analysis of the case-law and concludes, at paras. 57-58:

> "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."

55. After summarising the parties' submissions the Judge gives his conclusion and reasons at paras. 74-83. His starting-point, uncontentiously, is that district judges are statutory office-holders under the 1984 Act and that their role and responsibilities in that capacity arise from the applicable statutes and rules made by statutory instrument. He accepts that, as clearly established by *Percy*, that fact does not preclude the existence of a contract. He further accepts, acknowledging what was said by Sir Robert Carswell in *Perceval-Price*, that the relationship created by appointment has many of the characteristics of employment, and in particular that district judges do not have freedom to work as they please and that the detailed terms in the Memorandum are akin to employment terms. However, he also notes that there are features untypical of employment. As he says at para. 78:

"The relationship is not dependent on the will of the parties: it cannot be terminated by the Secretary of State, except in the limited circumstances of incapacity or misconduct. It is regarded as 'a lifetime appointment'. The duties are defined by

> the statutory role of the District Judge, rather than the will of the parties."

56. Ms Crasnow had argued that it was not open to the Lord Chancellor, in the light of the non-pursuit of the point in *O'Brien*, to argue that the existence of a contractual relationship between judges and the Lord Chancellor was inconsistent with judicial independence. The judge did not accept that the point could not be taken, but he agreed with the CJEU in rejecting it, saying at para. 79:

> "I see no reason why the existence of judicial independence precludes judges carrying out their functions under contract, it being, in effect, a term of any contract that they have that judicial independence in how they do their work."

57. The judge's conclusion, at para. 80, reads:

> "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."

<u>The Employment Appeal Tribunal</u>

58. Simler P's judgment ([2017] ICR 404) is mainly structured by reference to the particular challenges which Ms Crasnow advanced to the Employment Judge's reasoning, and it is not useful to follow these through at this stage. Essentially, what she held was that the Judge's approach to the material before him was correct and his conclusion that there was no contract could not be impugned. Paras. 19-25 (pp. 414-5) read as follows:

> "19. In reaching his conclusions in this case the Employment Judge conducted precisely the analysis identified as required by Lord Sumption [at para. 10 of his judgment in *Preston*]. 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.

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."

She went on to say, at para. 26 (pp. 415-6), that she reached that conclusion without reference to authority, though she derived comfort from the reasoning of Maurice Kay LJ in *O'Brien*.

59. Since the Employment Judge had not based his reasoning on the argument that the existence of a contract was incompatible with judicial independence, Simler P did not strictly need to consider the point. However she did so at para. 27-30 and endorsed his conclusion. She said (pp. 416-7):

> "28. ... 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])."

A PRELIMINARY POINT: IS *O'BRIEN* IN THE COURT OF APPEAL BINDING ?

60. As appears from para. 49 above, when *O'Brien* was in this Court Maurice Kay LJ, with whose judgment the other members of the Court agreed, clearly concluded that a judge is not a worker within the meaning of a definition in identical terms to those of section 230 (3), principally because there was no relevant contract: see the rhetorical question at the end of para. 48 of his judgment. On the face of it, it would seem that we were bound by that conclusion. Although of course the case went to the Supreme Court, it was decided there on a different basis, which did not in any way impugn the reasoning of the Court of Appeal: see para. 52 above.

61. Ms Crasnow submitted that that was not the case, for two distinct reasons.

    (1) She submitted that Maurice Kay LJ's conclusion did not form part of his *ratio*.

    (2) In any event, even if it did, she contended that the effect of the decision of this Court in *Al-Mehdawi v Secretary of State for the Home Department* [1990] 1 AC 876 is that it is not bound by a previous decision of its own where there had been an appeal to the House of Lords, albeit that the point in issue had not there fallen for decision: see the judgment of Taylor LJ at pp. 880-3.

62. We are not convinced by either point. As to the first, the chain of reasoning in Maurice Kay LJ's judgment is quite complicated, but our strong provisional view is that the passage which we have quoted was an essential part of it. As for *Al-Mehdawi*, Taylor LJ's conclusion is indeed *prima facie* binding (though not, we are bound to say, self-evidently right). But the decision was itself the subject of an appeal to the House of Lords, which declined to consider the question (see the speech of Lord Bridge, at p. 894B) and decided the case on another point. We are thus in the Gilbertian situation that the application of Taylor LJ's reasoning means that it is itself not authoritative. However, we believe that in the circumstances of this case we should reach a conclusion on the substantive issue and not duck it on the basis of nice questions of precedent of that kind. A problem would only arise if we reached a different conclusion from that of the Court of Appeal in *O'Brien* – which, to anticipate, we do not. We decline therefore to spill further ink in elaborating the provisional views expressed above. We proceed on the basis that Maurice Kay LJ's reasoning is no more than persuasive.

DISCUSSION AND CONCLUSION

63. We think it more convenient to start by stating our conclusion and the reasons for it. We will then address the counter-arguments advanced by Ms Crasnow save in so far as we have already covered them. In our judgement the ET and the EAT reached the right decision, essentially for the reasons which they gave. Nevertheless, in view of the importance of the issue we will state those reasons for ourselves.

64. We start by acknowledging that there are some superficial indicia of a contractual relationship. Mr Hughes's letter of 28 October 2005 conveyed an "offer" of appointment, which the Appellant was invited to, and did, "accept". Likewise she was informed that the "terms and conditions" of the appointment could be found in the Memorandum, and much of the material that appears there is of a character that might readily be found in a contract of employment. She was also invited to "agree" her sitting arrangements.

65. However, those points are far from decisive. In practice no-one can be appointed to an office without a prior indication of their willingness to accept it, so the language of offer and acceptance is insignificant as an indication of a specifically contractual relationship alongside that created by the appointment. As to the terms and conditions, again, some such terms are in truth essential in

the case of any office involving full-time work, and the fact that they are specified at the time of appointment is neutral as to whether they derive their force from a contract or from other sources. The minister in *Preston* and the rector in *Sharpe* enjoyed terms of service of, at least in the former case, an equally elaborate nature and yet were not held to be parties to a contract with their respective churches. Lord Hoffmann's observations in *Percy* quoted at para. 32 above are also apposite on this point, and in particular his reference to police constables, whose service, it can safely be assumed, is subject to elaborate terms and conditions but who are recognised as not being employees at common law. As to the sitting arrangements, it was made clear that the Lord Chancellor could change them if necessary. It is thus necessary to go beyond the surface and consider the true source and nature of the rights and obligations of a judicial office-holder.

66. As to that, the essential point appears to us to be that the core rights and obligations of a judicial office-holder derive from statute and not from any relationship with the Lord Chancellor (or indeed any other member of the executive). At the most profound level, a judge's obligations derive from the office itself, symbolised by the taking of the judicial oath. The particular functions of a district judge derive from the statutes and statutory instruments governing the operation of the Courts. The duration of the appointment is likewise set by statute: although the Lord Chancellor retains a power of removal short of the statutory term, that power can be exercised only on the basis of misbehaviour or incapacity and its exercise requires the concurrence of the Lord Chief Justice and the operation of an independent disciplinary procedure (for which, again, the Lord Chief Justice has the primary responsibility). There is thus no analogy with the right of an employer, in either the narrow or the extended sense, to terminate a contractual employment relationship. The power to "determine" the salary of a district judge again derives explicitly from statute, and the language connotes the exercise of a unilateral public law power, not the right of an employer to agree remuneration as part of a contract, which would not need to be the subject of express provision. Pension rights likewise derive from statute or statutory instruments. There is no need to look for a contract in order to establish these basic rights and obligations.

67. Those points are reflected in the terms of the correspondence leading up to the Appellant's formal appointment, which contains no reference to contract or even (save as regards the details of the Appellant's sitting arrangements) to agreement and which clearly proceeds on the basis that there is no scope for negotiation and culminates in the formal and very clearly unilateral language of the Instrument of Appointment itself. That is not decisive, but it is, as Lord Nicholls acknowledged in *Percy*, relevant that the parties expressed themselves in terms only of an appointment to an office.

68. There is nothing inherently implausible about the parties not intending to enter into a contractual relationship. In *Preston* Lord Sumption emphasised that it was legitimate, indeed necessary, to take into account not only the terms of the various documents but also what appeared to be the general understanding about the nature of ministry in the Methodist church, which was hard to

reconcile with the existence of a contract. Similarly, there is, we think, sufficient evidence that the ordinary understanding at the time of the Appellant's appointment, at least among lawyers who thought about the point, was that judges were office-holders only and did not serve under any kind of contract. That is apparent from Maurice Kay LJ's judgment in *O'Brien*, which does not simply express his own view (and those of the Chancellor and Smith LJ) but refers to "copious authority" to that effect, including *Terrell*, *Knight* and *Shaikh*. We do not suggest that that, is determinative: the general view might be wrong. Rather, our point is that, in assessing what kind of legal relationship the Appellant must be taken to have understood that she was entering, there is nothing implausible about the shared understanding being that judges were in a different position from ordinary civil servants or other Crown employees.

69. It is in this connection that perceptions about judicial independence seem to us to remain relevant. We, like Simler P, would accept that the existence of a contractual relationship between a judge and the state is not necessarily incompatible with judicial independence. But the fact remains that it is in principle desirable to have as much visible distance between the judiciary and the executive, and a status that depends purely on the holding of an office is better from that point of view than a contractual relationship of worker and employer, with its inevitable connotations of the former being subordinate to the latter. Maurice Kay LJ in *O'Brien* may – see para. 50 – have believed that that was a decisive consideration (though in fact his observations were directed specifically to the proposition that judges were "in Crown employment" within the meaning of the PTWR); but even if that is putting it too high, it is a further reason why the Appellant can reasonably be taken to have understood that her relationship with the Lord Chancellor was non-contractual.

70. There are other respects also in which the relationship between the Appellant and the Lord Chancellor is untypical of a contract for the provision of services. The fact that there are no sick-pay arrangements and salary continues to be payable as long as the Appellant holds the office, even if she is incapacitated, departs from the paradigm of a work-wage bargain. It is likewise unusual that the terms and conditions refer only to an "expectation" as to the minimum number of days that a judge will work. Neither point is decisive but they contribute to the overall picture of a relationship dependent only on the holding of a statutory office.

71. The same goes for the fact that, although the supposed contract is with the Lord Chancellor, his role in relation to the Appellant is extremely limited. In so far as she is subordinate, or answerable, to anyone in the performance of her functions, it is the Lord Chief Justice, who is responsible for her welfare, training and guidance and for her deployment. If that were the only difficulty, we would accept Ms Crasnow's submission, based on Lord Nicholls' observations in *Percy*, that organisational fragmentation should not be allowed to stand in the way of employment protection; but, as it is, it is a further indicator against the existence of a contract with the Lord Chancellor, still less one in which she provides services "for" him.

72. Ms Crasnow referred us to the decision of the Divisional Court (Stuart-Smith LJ and Turner J) in *R v Lord Chancellor's Department, ex p Nangle* [1991] ICR 743, in which it was held that a civil servant was employed under a contract of service notwithstanding that the original letter under which he had been engaged referred to him being "appointed" as a clerical officer. The Court said, at p. 749E:

> "In our judgment the use of the word 'appointment' is neutral and certainly does not negative an intention to create legal relations. Many contractual relationships of employer and employee are described as appointments."

Ms Crasnow submitted that likewise we should not in this case place weight on the language of "appointment". We hope it is sufficiently apparent from what we have said above that our approach is based on substance rather than labels.

73. Ms Crasnow also relied on the judgment of the EAT, presided over by Morison P, in *Johnson v Ryan* [2000] ICR 236. The issue was whether a rent officer was an employee notwithstanding that the position was a statutory officer. It was held, foreshadowing the approach in *Percy*, in which the decision was cited with approval, that there was no reason why he should not be both an office-holder and an employee. Morison P said, at para. 22 (p. 242F), that it was necessary to take "an inclusive and purposive approach … in relation to employee protection". As a generalisation that is unexceptionable, but it cannot be a licence for finding a contract where, applying ordinary principles, none exists; and it was clearly not the approach taken by the Supreme Court in *Preston*.

74. We are very aware that our decision that, subject to issues (B) and (C) which we consider below, the Appellant is not a worker within the meaning of section 230 (3) creates a distinction between those employment rights accorded to workers which derive purely from domestic law and those which derive from EU law, as established in *O'Brien*; and that may not appear to be a coherent or particularly satisfactory state of affairs. But the only way of avoiding the problem is to find that judges work under a contract with the Lord Chancellor, and such a finding is not open to us on the conscientious application of the principles most recently expounded in *Preston*. If that is an anomaly it can only be remedied by Parliament.

(B) THE ARTICLE 10 ISSUE

THE ISSUE

75. Article 10 of the Convention provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not

> prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

76. It is common ground that the right established by article 10 comprises a right in certain circumstances for a worker to make a whistleblowing complaint about her working conditions of the kind advanced by the Appellant in this case. That appears from numerous decisions of the European Court of Human Rights ("the ECHR"), including *Kudeshkina v Russia* (2009) 52 EHRR 37 (which in fact concerned a judge) and *Heinisch v Germany* (2014) 58 EHRR 868, [2011] IRLR 922: see also the discussion in the judgment of Lady Hale in *Bates van Winkelhof v Clyde & Co* [2014] UKSC 32, [2014] 1 WLR 2047, at paras. 41-42 (p. 2059 D-H). It is the Appellant's case that she has a concomitant right to an effective remedy for a breach of those rights and that there would be a breach of that right if she were not entitled to pursue her claim under Part IVA of the 1996 Act. She claims that it is possible, pursuant to the special interpretative obligation under section 3 of the 1998 Act, to construe section 230 (3) so as to cover the case of a judicial office-holder. That could be done broadly by reading in the words "or employment relationship" in limb (b), after "any other contract", or more narrowly by inserting a limb (c) reading "for the purpose of section 47B [of the 1996 Act], a judicial office". Alternatively she seeks a declaration of incompatibility under section 4 of the 1998 Act.

77. It is the Lord Chancellor's case that the Appellant's article 10 right to complain about her working conditions is sufficiently protected without the need for recourse to Part IVA of the 1996 Act: we set out later the nature of the protections on which he relies. However he would also if necessary contend that even if the Appellant's inability to take advantage of those provisions would be a breach of article 10 it was impossible to construe section 230 so as to avoid it. Her only remedy would be a declaration of incompatibility.

78. The issues are accordingly:

(1) *Adequate protection*. Are the Appellant's article 10 rights adequately protected without her having access to Part IVA of the 1996 Act ?

(2) *Construction*. If not, can section 230 (3) be construed so as to afford her such access ?

THE DECISIONS OF THE ET AND THE EAT

79. *The ET*. The ET dealt with this issue very shortly. At para. 94 of the Reasons the Judge says simply:

> "If the Claimant is not entitled to the right under Section 47B, it is impossible to see what protection she has from infringement of her Convention right. She is deprived of any remedy if she believes she is subjected to detriment for whistleblowing. I reject Mr Collins' contention that she has sufficient protection; in fact she has none."

But he goes on at paras. 95-96 to hold that it is impossible to read down section 230 (3) in the manner proposed by the Appellant.

80. *The EAT*. At paras. 35-38 of her judgment (p. 418 A-G) Simler P upheld the conclusion of the ET that it was impossible to read section 230 (3) down so that the definition could extend to the Appellant. Paras. 36-37 read:

> "36. … 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."

However, she went on at paras. 39-41 (pp. 418-9) to hold, disagreeing with the Employment Judge, that there were in any event adequate protections in place for the Appellant's article 10 rights. We will not set out her detailed reasoning because we will have to traverse the same ground ourselves below.

ISSUE (1): ADEQUATE PROTECTION

81. Mr Collins relied on the following matters as amounting to adequate protection for the Appellant's article 10 rights.

(1) A district judge is secure from dismissal on whistleblowing grounds. Responsible disclosures of the kind protected by article 10 could plainly not constitute misbehaviour within the meaning of section 11 (4) and (5) of the 1984 Act. Nor could it constitute misconduct within the meaning of the 2014 Regulations, and he or she could accordingly not suffer any of the lesser sanctions there provided for.

(2) A district judge could not have his or her salary reduced for whistleblowing (or indeed any other reason): see section 6 (6) of the 1984 Act.

(3) In the case of any detriment that constituted a breach of his or her rights under article 10 a judge would be entitled to bring proceedings under section 7 of the 1998 Act, which (in short) gives a right of action (in the ordinary civil courts) to the victim of any breach of her human rights committed by a public authority.

(4) Section 3 (1) of the 2005 Act guarantees judicial independence, in the following terms:

> "The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary."

(5) As regards other detriments suffered as a result of responsible whistleblowing, district judges were entitled to invoke the Judicial Grievance Procedure.

Those are essentially the matters on which Simler P relied in reaching her conclusion at para. 39 of her judgment, save that she made no reference to section 7 of the 1998 Act.

82. Ms Crasnow did not accept that those protections were adequate. She acknowledged that Mr Collins' points (1) and (2) were good as far as they went, but they did not afford protection against detriments short of dismissal or formal disciplining or reduction in salary. There are innumerable other ways in which a judge could suffer detriment. A grievance procedure confers no right of compensation. As for section 7, she acknowledged that a judge who had suffered a detriment at the hands of other judges or of officials in HMCTS as a result of making a disclosure in circumstances that constituted a breach of her article 10 rights would be able to bring proceedings, but she submitted that such proceedings were evidently inferior to proceedings under Part IVA of the 1996 Act. Her submissions at para. 106 of her skeleton argument were as follows:

> "(a) The ERA specifically prohibits detrimental behaviour in relation for whistleblowing, thus providing effective protection and substantive whistleblowing rights. Such prohibition deters unlawful behaviour, provides an effective remedy and incentivises disclosures made in the public interest. In contrast a s7 claim has no deterrent or incentivising objective or outcome.
>
> (b) A successful complainant under the ERA obtains a declaration as well as compensation for injury to feelings and lost earnings. At most a s.7 HRA claim could provide limited damages for breach of the right in question.
>
> (c) Success following a s.7 claim only affects the individual; whereas if the wording of s.230 ERA is read in an Article 10 compliant manner, all current and future judges would benefit.
>
> (d) It is submitted that a s.7 claim for breach of Article 10 rights of is not in and of itself effective protection for judicial whistle-blowers. In any event such a claim could not be made in the ET (see para. 105 above)."

The point made at para. 105, referred to under (d), is that the ET, being a specialist court, was the appropriate forum for the resolution of employment disputes involving the judiciary.

83. We do not accept those submissions. Given that the Appellant is, as Ms Crasnow acknowledged, properly protected against dismissal or formal disciplinary sanctions, and from any reduction in her salary, the real issue is whether section 7 is an adequate protection against other forms of whistleblower detriment. We take Ms Crasnow's objections in turn.

84. As to (a), we do not think that Ms Crasnow means that judicial colleagues or HMCTS staff will not be deterred from taking detrimental action against a whistleblowing judge by the fear of proceedings under section 7 of the 1998 Act whereas they would be by the fear of proceedings under Part IVA of the 1996 Act: in the real world wrongdoers do not usually think about the potential legal consequences of their actions in the first place, but even if they do the difference in the forum in which they might be sued is hardly likely to be a significant factor. We take her real point to be that whistleblowing detriment is a specific form of wrongdoing of which many people at least are aware and which they generally do their best to avoid, whereas liability under section 7 is a less specific and probably much less well-known concept. But that seems to us, with respect, equally unrealistic. In workplaces where there is, as there should be, an awareness of the right of colleagues to make responsible disclosures, even where that is uncomfortable, those rights will be respected irrespective of the arcana of whether they are protected by the 1996 Act or the Convention (via the 1998 Act).

85. As to (b), we can see no substantial difference between a finding of a breach of article 10, in the form of "whistleblower detriment", and a declaration under the 1996 Act that such a detriment has occurred. As regards the matters covered by a compensatory award, or its amount, section 8 (4) of the 1998 Act requires the Court to "take into account" the principles applied by the ECHR in awarding compensation under article 41 of the Convention. We heard no detailed submissions on the effect of section 8, including the specific question of the availability of an award for injury for feelings. We are far from convinced that an award under article 8 in a whistleblowing case would in fact be any lower than an award under the 1996 Act.[5] But in any event the short answer is that the claimant would recover appropriate compensation for breach of her article 10 rights, which is all that she can be entitled to so far as this limb of the argument is concerned.

86. We do not understand point (c). If a remedy is available under section 7 it will be available to all "current and future judges".

87. The only specific point made at (d) is that the ET is a specialist, and thus more appropriate, tribunal. There are clearly some advantages in a whistleblowing claim being brought in a specialist tribunal (though the ET may also in particular cases be regarded by claimants as having disadvantages when compared with the ordinary courts). But even if that is correct as a general proposition it does not follow that a remedy in the ordinary civil courts is not adequate or effective. It is important not to lose sight of the fact that what the Appellant is entitled to, and all that she is entitled to, under the 1998 Act is an adequate remedy for breaches of her Convention rights. There is no entitlement for that remedy to take a particular form or, more specifically, for it to be in the same form as is available to other persons or classes of person. Any case that the remedy is adequate but inferior to that afforded to others would have to be advanced under article 14; and that is of course the case considered under (C) below.

88. For those reasons we consider that section 7 of the 1998 Act does afford the Appellant adequate protection against breaches of her article 10 rights.

89. Having reached that point, it is not necessary to consider whether, or to what extent, the Lord Chancellor can rely on the existence of the Judicial Grievance Policy as an aspect of the protection of the Appellant's article 10 rights. We should, however, mention that in support of her submissions on this aspect Ms Crasnow referred to what had in fact happened in grievance proceedings initiated by the Appellant in respect of her complaints about working conditions and her treatment by other judges when she sought to raise the issue. At the request of the Senior Presiding Judge, an investigation was undertaken by Tomlinson LJ, who on 3 February 2016 produced a thirty-page decision which recommended no action. At an early stage in the process he

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5 The thorough and lucid analysis of the relevant principles conducted by Leggatt J at paras. 904-948 of his judgment in *Alseran v Ministry of Defence* [2017] EWHC 3289 (QB), albeit concerned with damages for breaches of articles 3 and 5, suggests that in a case where the breach in question corresponds to a wrong recognised in domestic law, compensation should be awarded on an equivalent basis.

expressed concern about its suitability as a means of addressing the Appellant's grievances, which he characterised as "in reality … a wider attack upon the administration of the entire civil justice system and of the judicial culture which underpins it", although he nevertheless went on to conduct a full investigation. But even if his comments on the suitability of the process for addressing such complaints were well-founded, they would have no relevance to the particular point with which we are concerned: on any view, the process could (and if invoked should) be used where a judge complains that she has been subjected to specified detriments as a result of responsible whistleblowing.

ISSUE (2): CONSTRUCTION

90. If we are right as regards issue (1) it is unnecessary to reach a view about issue (2). We are inclined to think, however, that having regard to the strength of the interpretative obligation under section 3 of the 1998 Act it would be possible to read section 230 (3) down so that it extended to an "employment relationship" of the kind found to exist in *O'Brien*. It does not seem that the definition of a worker by reference to the existence of a contract, so as to exclude a "mere" office-holder, is a fundamental feature of the legislation.

CONCLUSION ON ISSUE (B)

91. We reject the contention that section 230 (3) must be construed so as to extend to the Appellant's case in order to protect her rights under article 10 of the Convention.

(C) THE ARTICLE 14 ISSUE

INTRODUCTION

92. As explained above, this issue was raised for the first time in this Court. We allowed the necessary amendment to the Appellant's grounds because the point is plainly one of importance and we could see no prejudice to the Respondent in allowing it to be taken at this stage. It seemed possible, though not very likely, that if the determinative issue were the justification for section 230 (3) being formulated in terms that it is it might be necessary to admit evidence going to that question, and we indicated that in that case a further hearing would probably be required. In the event, however, that has not proved necessary. The lead on this part of the case was taken by Mr Stilitz, whose submissions were adopted by Ms Crasnow.

93. Mr Stilitz submits that, even if we were of the view that there was no breach of article 10, there is a breach of the equality provision in article 14. He submits therefore that it is necessary, so far as possible, to read and give effect to the definition of "worker" in the 1996 Act in a way which would avoid that incompatibility, pursuant to the strong duty of interpretation in section 3 of the 1998 Act. In the alternative, he submits that, if such an interpretation is not possible, we should make a declaration of incompatibility under section 4 of that Act. He reminds us that the power to make a declaration of that kind was not available to either the ET or the EAT but is available to this Court.

94. Article 14 provides as follows:

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

95. Although there is much which is in dispute between the parties, the following four propositions are uncontroversial and are well-established in the authorities.

96. First, article 14 is not a freestanding provision. It does not provide for equal treatment by the state in all circumstances, only in the enjoyment of the other Convention rights.

97. Secondly, article 14 does not require there to be a breach of another Convention right before there can be a breach of it. It requires merely that the subject-matter of the case falls within the "ambit" of another Convention right. In the present case it is common ground that the subject-matter does fall within the ambit of article 10.

98. Thirdly, the list of express grounds on which discrimination is prohibited by article 14 is not exhaustive. The text of article 14 makes it clear that discrimination is prohibited on "any ground such as …". Furthermore, the list of grounds ends with a generic one: "or other status." We shall have to return to the significance of the concept of a "status" later but for now we would simply note that it is well-established that the list in article 14 is not static. For example, the jurisprudence of the ECHR, which has been followed by the courts of this country, has recognised that discrimination on the ground of sexual orientation is in principle prohibited by article 14 even though it is not one of the express grounds listed there: see, for example, *Salgueiro Da Silva Mouta v Portugal* (2001) 31 EHRR 47.

99. Fourthly, there may be circumstances in which a case falls within the ambit of article 10 even though that article itself would not impose an obligation on the state to do something. It will suffice that the state has chosen to go beyond the minimum required by article 10, provided that the subject-matter still falls within the ambit of that article. This has been made clear by the ECHR on a number of occasions.

100. In *Stec v United Kingdom* (2005) 41 EHRR SE 18, at para. 39, the Grand Chamber of the ECHR said:

> "The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and Protocols require each state to guarantee. It applies also to those additional rights, falling within the general scope of any Convention article, for which the state has

> voluntarily decided to provide. This principle is well entrenched in the Court's case law. It was expressed for the first time in *Belgian Linguistic Case (No. 2)* (1968) 1 EHRR 252, para. 9, when the Court noted that the right to obtain from the public authorities the creation of a particular kind of educational establishment could not be inferred from Article 2 of Protocol No 1, and continued as follows:
>
> > 'Nevertheless, a state which had set up such an establishment could not, in laying down entrance requirements, take discriminatory measures within the meaning of Article 14.'"

That passage was cited with approval by Lord Bingham in *R (Clift) v Secretary of State for the Home Department* [2006] UKHL 54, [2007] 1 AC 484, at para. 12.

101. When *Clift* went to the ECHR, as *Clift v United Kingdom* (Application No. 7205/07, judgment of 13 July 2010), that Court said, at para. 60:

> "… It should be recalled in this regards that the general purpose of Article 14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified."

THE APPROACH TO BE TAKEN BY THE COURT

102. In the domestic case law under the 1998 Act, the approach which was initially favoured by this Court was that set out in *Wandsworth LBC v Michalak* [2002] EWCA Civ 271, [2003] 1 WLR 617, at para. 20 (Brooke LJ). It was suggested that, in an article 14 case, four questions should be asked:

(1) Do the facts fall within the ambit of one or more of the Convention rights?

(2) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?

(3) Were those others in an analogous situation?

(4) Was the difference in treatment objectively justifiable? In other words, did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?

103. In *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, at para. 134, Lady Hale approved the *Michalak* approach but said that there is an additional question which needs to be asked: whether the difference in treatment is based on one or more of the grounds proscribed – whether expressly or by inference – in article 14.

104. Lady Hale also said that the *Michalak* approach was subject to the important caveat that a "rigidly formulaic approach is to be avoided". She said:

> "… In my view, the *Michalak* questions are a useful tool of analysis but there is a considerable overlap between them: in particular between whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification. If the situations were not truly analogous it may be easier to conclude that the difference was based on something other than a proscribed ground. The reasons why their situations are analogous but their treatment different will be relevant to whether the treatment is objectively justified. A rigidly formulaic approach is to be avoided."

105. In *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42, [2008] 1 WLR 1434, Lady Hale noted that the approach which the ECHR traditionally takes under article 14 is different from our own domestic anti-discrimination laws. She said, at para. 23:

> "… These focus on less favourable treatment rather than a difference in treatment. They also draw a distinction between direct and indirect discrimination. Direct discrimination, for example treating a woman less favourably than a man, or a black person less favourably than a white, cannot be justified. This means that a great deal of attention has to be paid to whether or not the woman and the man, real or hypothetical, with whom she wishes to compare herself are in truly comparable situations. The law requires that their circumstances be the same or not materially different from one another."

106. Lady Hale went on to note the contrast with Strasbourg, at para. 24:

> "It will be noted, however, that the classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator. They ask whether 'differences in otherwise similar situations justify a different treatment'. Lord Nicholls put it this way in *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, para. 3:
>
> > 'The essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to that question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's

> scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.'"

107. In para. 25 Lady Hale suggested that:

> "… Unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification."

108. At para. 30 Lady Hale said that it is "obvious" that discrimination on some grounds is easier to justify than others. She noted that in the *Carson* case, at paras. 15-17, Lord Hoffmann had referred to the American constitutional law concept of "suspect" categories of discrimination, such as race and sex. At para. 31 she noted that in the same case Lord Walker had pointed out, at para. 55, there are important differences between the 14th Amendment to the US Constitution and article 14 of the Convention "which mean that it cannot simply be transplanted to the European situation".

109. Finally, in the citation from *AL (Serbia)* it is important to note that, at para. 38 Lady Hale recalled what Lord Bingham had said in *A v Secretary of State for the Home Department*, [2004] UKHL 56, [2005] 2 AC 68, at para. 68, that, in a discrimination case, it is the discriminatory effect of a measure which must be justified and not only the underlying measure itself.

110. In *Stec v United Kingdom* (2006) 43 EHRR 47, at para. 51, the Grand Chamber of the ECHR noted that Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. It said, at para. 52:

> "The scope of this margin will vary according to the circumstances, the subject-matter and the background. As a general rule, very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'."

111. In *Humphreys v HM Commissioners of Revenue and Customs*, [2012] UKSC 18, [2012] 1 WLR 1545, at para. 17, Lady Hale noted that the Grand Chamber applied the *Stec* test again to social security benefits in *Carson v United*

Kingdom (2010) 51 EHRR 369, para. 61, in the context of discrimination on grounds of country of residence and age rather than sex.

112. At para. 18 of *Humphreys* Lady Hale noted that the same test was applied by the House of Lords in *R (RJM) v Secretary of State for Work and Pensions*, [2008] UKHL 63, [2009] AC 311, which concerned the denial of income support disability premium to rough sleepers. Having quoted para. 52 of the *Stec* judgment, Lord Neuberger said, at para. 56, that this was "an area where the court should be very slow to substitute its view for that of the executive, especially as the discrimination is not on one of the express, or primary grounds". He concluded, at para. 57:

> "The fact that there are grounds for criticising, or disagreeing with, these views does not mean that they must be rejected. Equally, the fact that the line may have drawn imperfectly does not mean that the policy cannot be justified. Of course, there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable."

113. At para. 19 of *Humphreys* Lady Hale observed that in *RJM* all the members of the House of Lords stressed that this was not a case of discrimination "on one of the core or listed grounds and that this might make a difference."

114. Finally, in this context it is also important to note the observations of Lord Reed in *R (SG and others) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, at paras. 92-96, where he discussed the "intensity of review" which is appropriate. At para. 93 Lord Reed observed that "… since the question of proportionality involves controversial issues of social and economic policy, with major implications for public expenditure", the determination of those issues:

> "… is pre-eminently the function of democratically elected institutions. It is therefore necessary for the Court to give due weight to the considered assessment made by those institutions. Unless manifestly without reasonable foundation, their assessment should be respected."

APPLICATION OF THOSE PRINCIPLES TO THE PRESENT CASE

115. Bearing in mind the caveat issued by Lady Hale in *Ghaidan* that a rigidly formulaic approach is to be avoided, we will address the specific questions that were suggested in *Michalak*, together with the additional question mentioned in *Ghaidan* itself:

(1) Do the facts fall within the ambit of one or more of the Convention rights? Yes, there is no dispute that they fall within the ambit of article 10.

(2) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison? Yes. Again there is no dispute that others would be able to rely upon the whistle-blowing provisions of the 1996 Act and bring a complaint in the ET.

(3) Was the difference in treatment based on one or more of the grounds proscribed by article 14? This is in dispute. Mr Collins submits that the difference of treatment was not on any of the proscribed grounds and, in particular, that it was not on the ground of any "other status".

(4) Were those others in an analogous situation? Again this is in dispute.

(5) Was the difference in treatment objectively justifiable? In other words did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim? This too is in dispute.

116. We take in turn the questions which are in dispute.

QUESTION (3): "OTHER STATUS"

117. Mr Stilitz reminds us that the jurisprudence of the ECHR has established that, although the concept of a "status" must entail a "personal" characteristic, there is no requirement that the characteristic should be innate, inherent or exist independently from the complaint. In support of that submission he relies in particular on the decision in *Clift v United Kingdom.* He also cites as examples of various kinds of status which have been found: *Engel and Others v Netherlands* (1979-80) 1 EHRR 706 (distinctions based on military rank); *Pine Valley Developments Limited and Others v Ireland* (1993) 16 EHRR 379 (differential categories of planning permission); *Larkos v Cyprus* (2000) 30 EHRR 597 (tenants of the state as compared to tenants of private landlords).

118. In the domestic case law under the 1998 Act, Mr Stilitz relies on *Carson* (residents in South Africa as compared to another country with which the UK has entered into a bilateral treaty on social security rights); *R (Tigere) v Secretary of State for Business, Innovation and Skills* [2015] UKSC 57, [2015] 1 WLR 3820, (immigration status); *RJM* (homelessness); *R (L (a child)) v Manchester City Council* [2001] EWHC 707 (Admin), [2002] 1 FLR 43, (those acting as foster carers of relative as compared to those caring for non-relatives); and *YA v Hammersmith and Fulham LBC* [2016] EWHC 1850 (Admin) ("care leaver" status).

119. Mr Stilitz submits that the position of those working other than under a contract within the meaning of section 230 (3) of the 1996 Act should be recognised as a relevant "other status" for the purposes of article 14. Alternatively he submits that the relevant status is either that of a person "holding judicial office" or the larger class of "office-holder". We do not accept those submissions.

120. First, it seems to us that the legislation in question does not draw a distinction based on belonging to a class of judicial office-holders or indeed office-holders as such. It is important to keep in mind that Parliament has not

discriminated against either the class of office-holders generally, or the sub-class within that class of judges, as such. What it has done in defining "worker" in section 230 (3) is to draw the line in such a way that the effect is that all persons who do not have a relevant contract within the meaning of that definition (which includes judges) fall outside the scope of protection.

121. Secondly, the distinction which is in truth used by Parliament in defining the scope of protection in section 230 (3) of the 1996 Act is all to do with having a relevant contract and nothing to do with "personal" characteristics.

122. Therefore we have come to the conclusion that there is no difference of treatment on the ground of any "other status" within the meaning of article 14.

QUESTION 4: "ANALOGOUS SITUATION"

123. At paras. 51-53 of his skeleton argument, Mr Stilitz submits that, in the absence of protection under the 1996 Act, the Appellant would be left without protection for the exercise of her article 10 rights in whistleblowing. He relies on para. 94 of the ET's Reasons (see para. 79 above), in which the Judge says in blunt terms that if the Appellant is not entitled to protection under Part IVA, she has no protection from infringement of her article 10 rights. We have already made clear that we, like Simler P, do not accept that that that is correct: see paras. 81-88 above

124. For that reason alone the Appellant is not, in our view, in an analogous situation to those with whom she compares herself, at least some of whom will not have available any right to bring proceedings under the 1998 Act, for example if they work in the private sector.

125. Furthermore, we are of the view that judges are not in an analogous situation to the suggested comparators for all the reasons which have been mentioned in the earlier part of our judgment.

126. Judges are in fact in a unique position and have many protections, for fundamental constitutional reasons, which no one else does. For example, they have security of tenure until the statutory retirement age. This means that, unlike most workers, they cannot be made redundant. The grounds on which district judges can be removed from office are very limited, in particular misconduct, and removal requires the concurrence of the Lord Chief Justice.

QUESTION (5): JUSTIFICATION

127. It is important to keep in mind that the same definition of "worker" which we have to consider is used in a variety of contexts in employment legislation. That definition is used to determine the scope of many different pieces of legislation, not only the one that is directly in issue before the Court in the present case. This is a field, in other words, which concerns social and economic regulation and the arguments made by Mr Stilitz, if accepted, may well have repercussions for other legislation.

128. It is also important to keep in mind that this is a context in which, on any view, and even if we are wrong on question (3) above, there is certainly no discrimination on any of the express or core grounds which are prohibited by article 14, such as race or sex.

129. Against the background of the authorities to which we have referred earlier, therefore, this is a context in which the Court should tread with care in case it inadvertently (but impermissibly) interferes in an area which is within the province of the democratically elected legislature. As Lord Nicholls observed in *Ghaidan*, at para. 9: "all law, civil and criminal, has to draw distinctions." In order to define the scope of application of a particular law this is inevitable. Lines have to be drawn somewhere. In the field of employment law there are many different statutes which confer protection on persons according to different definitions. In the context of the 1996 Act, with which we are concerned in the present case, a distinction is drawn between the rights accorded to "employees" – that is, those employed under a contract of service or apprenticeship (see section 230 (2)) – and to "workers" as defined in section 230 (3). The most obvious example of a right accorded only to the former is the right not to be unfairly dismissed. The rights accorded to workers include, besides whistleblowers, the right under Part II of the Act not to suffer deductions from wages. Turning to other legislation, a definition of "worker" in identical terms to section 230 (3) appears in the Working Time Regulations 1998 (regulation 2 (1)), the National Minimum Wage Act 1998 (section 54 (3)) and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (regulation 1 (2)). As already noted (see para. 24 above), the Equality Act 2010 confers rights on "employees" but defines them in terms which have been held to be equivalent to the definition of "worker" in those other provisions. Different definitions of "employee" and/or "worker" appear in sections 235, 295 and 296 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (regulation 2 (1)), the statutory maternity pay provisions of the Social Security Contributions and Benefits Act 1992 (section 171 (1) and regulation 17 of the Statutory Maternity Pay (General) Regulations 1986). The definition in section 171 (1) of the 1992 Act is notable in as much as it refers to a woman being employed "under a contract of service or in an office".

130. It can therefore be seen that the definition of "worker" which is in issue in the present case is far from unusual. It is also clear that Parliament has used a number of different formulae in order to define the scope of protection of different pieces of employment legislation. It may well be that the line which it has drawn is open to criticism from those who are dissatisfied with the lack of apparent protection for them. For example, they may qualify as "workers" but may be excluded from the definition of "employees" for the purpose of the law of unfair dismissal. Nevertheless, that is the policy choice which the democratically elected Parliament of the United Kingdom has made.

131. In the present context, it seems to us that what is criticised by Mr Stilitz is the policy choice which Parliament has made to give protection under the "whistleblowing" provisions of the 1996 Act to a category of persons which

has the effect of excluding office-holders and, in particular, judges. However, Parliament has not left those people totally without protection in the present context. For reasons which have already been explained earlier, article 10 of the Convention rights does provide protection and is enforceable under section 7 of the 1998 Act.

132. What Mr Stilitz submits is that, even if that is so, there are better and more efficient protections available to those who can bring a claim under the 1996 Act. We would not necessarily accept the premise of his argument. It might be said that the opportunity to bring a case before the High Court, which has a great deal of experience in dealing with human rights issues, is at least as good as the Employment Tribunal. However, for the purpose of the argument, we will assume that what Mr Stilitz submits may be so. That is not the test in the present context. The question is whether the way in which Parliament has thought fit to protect judges in the exercise of their article 10 right in comparison with "workers" as traditionally understood is one which was reasonably open to it. In our view, it clearly was. The policy choice which Parliament has made in drawing the lines which it has done in the present context cannot be regarded by this Court as being "manifestly without reasonable foundation".

133. Accordingly we have come to the conclusion that there would be no breach of article 14 if this Court maintains the interpretation of section 230 (3) which has been given to it to date and which was given to it by the EAT in the present case. There is no obligation, in our view, under section 3 of the 1998 Act to reach a different interpretation because there is no incompatibility with article 14.

DISPOSAL

134. We dismiss this appeal.