Supreme Court: A Judge, even though not a worker, can rely on whistleblowing protection in a boost for the application of EU rights to domestic law

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Gilham v Ministry of Justice [2019] UKSC 44

1. The Supreme Court handed down its judgment in *Gilham* on 16 October 2019. The SC considered whether a Judge could rely on whistleblowing protection, holding that she could despite not being a worker but to avoid a clash with the European Convention on Human Rights.

2. The ramifications of the decision from the UK's highest court stem across the law relating to whistleblowing, worker status and how European law should be applied in this country. A summary of *Gilham*'s implications is at the end of this article and references in square brackets are to paragraphs of the judgment.

Summary of Facts

3. Judge Gilham is a District Judge sitting latterly at Warrington County Court. Following budget cuts and court closures, she raised concerns about their effect, relied upon as protected disclosures. The concerns echo many that employment lawyers and indeed Judges are likely to share given the parallel cuts in the Employment Tribunal system, with the SC recording:

"The appellant raised a number of concerns relating to the cuts, in particular about the lack of appropriate and secure court room accommodation, the severely increased workload placed upon the district judges, and administrative failures." [5]

4. Her 'whistleblowing' claim (detriment contrary to s.47B ERA 1996) failed at the initial hurdle because she was held not to be a worker and therefore unable to rely upon the legislative protection, a decision upheld by the EAT and Court of Appeal.

5. At the SC, the Judge maintained that she was a worker and maintained her argument that to find otherwise deprived her of rights granted by the ECHR.

Is a Judge a worker?

6. DJ Gilham contended that she was a 'limb b' worker within s.230(3) ERA 1996, a provision familiar to employment lawyers from the raft of cases examining worker status in recent years.

7. The key question was: "did the parties intend to enter into a contractual relationship, defined at least in part by their agreement, or some other legal relationship, defined by the terms of the statutory office of district judge?" [16].

8. The SC found that DJ Gilham was not a worker in this context. Examining as ever all of the facts and circumstances, particular weight was placed on the fact that the appointment procedure and subsequent terms and conditions were laid out by statute, in contrast to contractual appointments that are governed by choice or negotiation [17-18].

9. The SC went on to reject a further argument that judges undertake "crown employment". Judges should instead be considered 'office holders' and although this does not necessarily preclude a concurrent worker relationship (e.g. company directors), there was no such worker relationship within the terms of s.230 here.

10. The Supreme Court highlighted the inconsistency with discrimination legislation (whether based on a protected characteristic or a factor such as part-time status). Following *O'Brien v Ministry of Justice (formerly Department for Constitutional Affairs)* [2013] UKSC 6 and the guidance given by the Court of Justice of the European Union in ((Case C-393/10) [2012] ICR 955, it was accepted in *Gilham* that DJ Gilham would be a 'worker' for the purposes of discrimination legislation because this derives from European Union

law. Her concurrent disability discrimination claim would therefore "continue in any event" [8].

Whistleblowing protection nevertheless

11. Despite the findings on worker status, the SC found that a Judge is nevertheless able to benefit from the whistleblowing protection afforded by the ERA 1996. This resolution was found in the Human Rights Act 1998 and its application of the ECHR.

12. The SC first considered a submission that applying article 10 (right to freedom of expression) alone should provide DJ Gilham with a remedy because of the potential infringement on a whistleblower's right to raise concerns and "speak their minds" [26-27]. Art.10 alone was not enough though to extend the ERA, a remedy instead lat in damages under the HRA.

13. However, the broad terms of art.14 combined with art.10 was enough to ensure mirror protection. Art.14 provides a broad prohibition on discrimination, stating:

> "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*." [emphasis added]

14. The SC's reasoning was based on four findings:

    a. article 10 was engaged because the facts concerned whistleblowing;

    b. a Judge is treated less favourably than others by her inability to rely on whistleblowing legislation;

    c. the reason for this less favourable treatment was the holding of a judicial office, which came within "other status" cited by art.14;

    d. No legitimate aim had been put forward as justification.

15. The conclusion was therefore that "the Employment Rights Act should be read and given effect so as to extend its whistle-blowing protection to the holders of judicial office" [44]. Judges are therefore able to benefit from the protection of the ERA by a purposive

application of the legislation, read in light of the freedoms secured by the Human Rights Act.

How broad can the judgment be applied?

16. Employment cases involving Judges are rare, although they are very interesting to lawyers. It is worthwhile therefore considering how the reasoning of *Gilham* may be applied in other contexts.

17. Firstly and beginning with the judicial office, although this case involved a District Judge of the county court, the SC were unambiguous that *Gilham*'s principles can be applied to any Judge. The Judgment opens, "this case is about the employment status of district judges, but it could apply to the holder of any judicial office." [1]. There is no reason to think that an Employment Judge, sitting in a tribunal rather than a court, should be treated any differently to a Judge sitting in a court.

18. Other office holders are also likely to be treated in the same beneficial way, such as those holding ecclesiastical offices, if required. Some office holders already however benefit from more straightforward protection because they are classed as workers and therefore do not rely on the interpretative application of the ERA applied to Judges here. For example, the SC observed that in *Percy v Board of National Mission of the Church of Scotland* [2005] UKHL 75, an ordained minister of the Church of Scotland was held to be an office holder as well as holding a contract personally to execute work.

19. Outside of judicial office, this judgment is important in supporting once again a purposive approach to whistleblowing legislation and highlighting that the protection it seeks to provide should be provided rather than denied. The same approach was applied in *Day v Health Education England & Ors* [2017] EWCA Civ 329, a case that also secured a broader application of whistleblowing legislation in the context of end-users and principals. The Court of Appeal in *Day* at para. 18 held that:

> "the whistleblowing legislation should be given a purposive construction. That does not permit the court to distort the language of a statute on the vague premise that action against whistleblowers is undesirable and should be forbidden... But where, as here, some words need to be read into the provision because a literal construction cannot be what Parliament intended, then in my view the court should read in such

words as maximise the protection whilst remaining true to the language of the statute."

20. Similarly, the EAT in *McTigue v University Hospital Bristol NHS Trust* [2016] ICR 1156, a case relied on by the Court of Appeal in Day and in which I appeared, the legislation was applied to secure wider protection, "having regard to the statutory and social context" [29]. Whereas in *Gilham* a purposive construction was on the basis of a clash with EU law rather than domestic, the same flexibility in interpretation is permitted in all 3 cases and ensures that the whistleblowing legislation fulfils its purpose of providing protection.

21. This wide application of the whistleblowing legislation may be particularly useful for those testing the borders of the worker definition. In *Gilham*, the Claimant was held not to be a worker for the purposes of the ERA but this did not matter because she could rely on the protection anyway. If art.14 or other parts of the ECHR can be applied in this way, it may make some arguments about worker status otiose. Arguments on worker status for the enforcement of other rights, such as holiday, sick and other elements of pay, may still need airing.

22. Finally and importantly, the application of art.14 in this way may have wide ramifications if it can be successfully argued that other rights are denied to workers in contravention of ECHR rights. A Tribunal may be invited to find that although domestic legislation does not extend to the individual or right in question, a clash with the ECHR means that the legislation must be read in a way to provide that right. Uncertainty remains as to what level of tribunal or court would be willing to extend the application of *Gilham* in this way and of course what effect Brexit may have for whatever status we have after October 31st.

Conclusion

23. The following points can be summarised:

    a. A Judge is a worker for discrimination legislation, but not for whistleblowing legislation.

    b. A Judge, and very likely any office holder, can nevertheless rely on whistleblowing protection by a legislative interpretation based on art.14.

c. A purposive application of whistleblowing legislation is once again effected, here by an application of the ECHR and Human Rights Act.

d. Workers who are deprived of ECHR rights by domestic legislation are boosted in their argument that an application of domestic law consistent with those ECHR rights should be applied.

16 October 2019

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