EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/2300568/2015

Held in Birmingham on 16 June 2017

Employment Judge: Robert Gall

Mr D Ibekwe	**Claimant** **In Person**
B. Doyle	**First Respondent** **Represented by:** **Mr J Milford – Counsel**
P. Hildebrand	**Second Respondent** **Represented by:** **Mr J Milford – Counsel**
The Secretary for Justice	**Third Respondent** **Represented by:** **Mr J Milford – Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:-

(1) That the claimant is not a worker in terms of Section 230(3) of the Employment Rights Act 1996 in that he is a judicial office holder and has not entered into and did not work under a contract of employment or any other contract whereby he undertook to do or perform personally any work or services for another party to the contract as defined in Section 230(3) of the Employment Rights Act 1996. The Tribunal does not therefore have jurisdiction to consider this claim. It is therefore dismissed.

(2) Acts which were done by the claimant were potentially protected acts in terms of Section 27 of the Equality Act 2010. Those acts are (adopting the numbering utilised by the claimant in his listing of potential protected acts) the following:-

1. Letter, Claimant to Regional Employment Judge Hildebrand dated 29/03/2010 in the case of Mr F Neckles v London General Transport Services Ltd (Case No 2303124/2009) – Comprising a request to give evidence in a Race complaint and imminent concerns about miscarriage of justice.

2. Letter, Claimant to Regional Employment Judge Hildebrand dated 01/04/2010 in the case of Mr F Neckles v London General Transport Services Ltd (Case No 2303124/2009) – Comprising a request to give evidence in a Race complaint and imminent concerns about miscarriage of justice.

3. Letter, Claimant to Regional Employment Judge Hildebrand dated 06/04/2010 setting out matters of Judicial concern – Comprising details of potential judicial impropriety or misconduct or discrimination.

4. Letter, Claimant to Regional Employment Judge Hildebrand dated 07/04/2010 setting out matters of Judicial concern – Comprising details of potential judicial impropriety or misconduct or discrimination.

5. Letter, Claimant to Regional Employment Judge Hildebrand dated 11/07/2011 setting out matters of Judicial concern – Comprising details of potential judicial impropriety or misconduct or discrimination.

6. Letter, Claimant to Regional Employment Judge Hildebrand dated 19/07/2011 setting out matters of Judicial concern – Comprising

details of potential judicial impropriety or misconduct or discrimination.

7. Letter, Claimant to Regional Employment Judge Hildebrand dated 06/09/2012 in the case of Mr J Fontes De Moura v Abbelio London Ltd (Case No 2300419/2012).

9. Letter, Claimant to Regional Employment Judge Hildebrand dated 03/04/2013 setting out matters of Judicial concern. The matter was brought to the attention of the President. Comprising details of potential judicial impropriety or misconduct or discrimination.

17. Letter, Claimant to President dated 02/07/2014 setting out matters of Judicial concern – Comprising details of potential judicial impropriety or misconduct or discrimination.

19. Letter, Claimant to President dated 05/08/2014 setting out matters of Judicial concern – Comprising details of potential judicial impropriety or misconduct or discrimination.

20. Formal complaint to the JACO (Judicial ombudsman) against President dated 15/08/2014 – Comprising details of potential judicial impropriety or misconduct or discrimination.

REASONS

1. This was a Preliminary Hearing ("PH") held at Birmingham on 16 June 2017. The claimant appeared in person. He said that it had been intended that he be represented at the PH by Mr Neckles. Mr Neckles was however, unfortunately ill and unable to attend the PH. The claimant confirmed that he did not seek a postponement. He said that he would speak to the

skeleton argument lodged. He duly did that. The respondents were represented by Mr Milford.

2. Both parties had helpfully lodged written skeleton arguments. They had also submitted a list of authorities with copies of the cases and regulatory provisions of statutes to which they referred. This was extremely helpful and enabled the PH to be conducted in an efficient and focused manner.

3. The PH was set down to address two areas. This was as confirmed in the Hearing Notice of 26 April 2017.

Areas for determination by the Tribunal

4. The two questions for determination by the Tribunal at the PH were:-

> *"(1) Was the claimant, as a Tribunal member, properly viewed as a worker having an entitlement to bring a claim under the Employment Rights Act 1996 alleging detriment due to having made a protected disclosure?*
>
> *(2) Are the acts which the claimant says constitute protected acts founding a claim of victimisation appropriately viewed as being protected acts?"*

5. The respondents sought that the claim referred to in question 1 above be dismissed. In the alternative, they sought that a Deposit Order be issued on the basis that claim had little reasonable prospect of success.

6. It was agreed that, in the event I concluded that a Deposit Order was appropriately issued, a further hearing would be set down at which the claimant would give evidence and provide vouching as to his ability to pay any sum which might be ordered to be paid in terms of the Deposit Order. This was as the claimant did not have with him information which would have enabled him to give that evidence at this PH.

7. It is also relevant and appropriate to record that there was no evidence led before me as to the duties and responsibilities of a lay member of the Employment Tribunal. There was however no dispute in this area apparent to me from anything which was said at the PH.

Question 2 – Protected Acts

8. In a document which appeared at pages 102 to 105 of the bundle the claimant had set out the protected acts upon which he relied in his complaint of victimisation. Specifically he confirmed at the foot of page 104 and top of page 105 of the bundle that the acts which he relied upon in that regard appeared as numbers 1 to 20 in the list at pages 102 and 103 of the bundle.

9. Prior to the PH, the respondents had confirmed that they accepted certain of those acts as being potentially protected acts. Whether they were properly so categorised was yet to be determined. It was accepted by the respondents, however, that the possibility of those acts being protected acts existed. In relation to other acts alleged by the claimant to be protected acts, the respondents set out in their skeleton argument that, on the information then available, there was no basis detailed on which the alleged protected acts could, in their view, be viewed as being appropriately categorised as protected acts. The claimant maintained that all twenty acts were properly viewed as being protected acts. In relation to this point, the term "*protected act*" is used in relation to an act founding a possible claim of victimisation, rather than in the sense of a protected act relative to a whistleblowing or public interest disclosure claim.

10. Having heard submissions for both the claimant and the respondent, the position of both parties altered. The respondents were prepared to accept that some alleged acts which they had initially said did not have a basis for being properly categorised protected acts were now viewed by them as having potential to be regarded as protected acts. The claimant accepted

that some acts to which he referred were not in fact ones which he sought now to advance as being protected acts.

11. Looking to the list of protected acts which the claimant set out at pages 102 and 103 of the bundle which he claimed to be protected acts for the purposes of his victimisation claim, the following were agreed by both parties as being in that category, adopting the numbering used by the claimant in that list:-

1. Letter, Claimant to Regional Employment Judge Hildebrand dated 29/03/2010 in the case of Mr F Neckles v London General Transport Services Ltd (Case No 2303124/2009) – Comprising a request to give evidence in a Race complaint and imminent concerns about miscarriage of justice.

2. Letter, Claimant to Regional Employment Judge Hildebrand dated 01804/2010 in the case of Mr F Neckles v London General Transport Services Ltd (Case No 2303124/2009) – Comprising a request to give evidence in a Race complaint and imminent concerns about miscarriage of justice.

3. Letter, Claimant to Regional Employment Judge Hildebrand dated 06/04/2010 setting out matters of Judicial concern – Comprising details of potential judicial impropriety or misconduct or discrimination.

4. Letter, Claimant to Regional Employment Judge Hildebrand dated 07/04/2010 setting out matters of Judicial concern – Comprising details of potential judicial impropriety or misconduct or discrimination.

5. Letter, Claimant to Regional Employment Judge Hildebrand dated 11/07/2011 setting out matters of Judicial concern – Comprising

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7. Letter, Claimant to Regional Employment Judge Hildebrand dated 06/09/2012 in the case of Mr J Fontes De Moura v Abbelio London Ltd (Case No 2300419/2012).

9. Letter, Claimant to Regional Employment Judge Hildebrand dated 03/04/2013 setting out matters of Judicial concern. The matter was brought to the attention of the President. Comprising details of potential judicial impropriety or misconduct or discrimination.

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12. I was grateful to both Mr Ibekwe and Mr Milford for clarifying their position as the submissions unfolded.

13. Although Mr Ibekwe had intended he be represented by Mr Neckles which, as mentioned above, had not occurred, I was satisfied that Mr Ibekwe had an understanding of the points at issue in this regard and indeed in the PH

in general. I was satisfied that he took each decision that he would not insist upon a particular element being viewed as a possible protected act on an informed basis and with an appreciation of the import of that decision. Similarly, Mr Milford took decisions that certain acts to which exception had initially been taken by the respondents on the basis that he could not see why those acts would be viewed by a Tribunal as being protected acts, would now be accepted by the respondents as being potentially protected acts. He did this having heard from Mr Ibekwe as to why it was Mr Ibekwe argued that the points in question were properly viewed as being protected acts.

14. As and when the claim of victimisation proceeds therefore, it is clear to which acts the claimant will point as being protected acts. Whilst the respondents see the potential for these acts to be viewed as protected acts, their position is that some, if not all, are not properly viewed so categorised once facts come out. They also dispute that victimisation occurred as a result of any of these acts which are found by a Tribunal to be protected acts.

Entitlement of the Claimant as a Tribunal Member to bring a claim alleging detriment due to have made a protected disclosure

15. The contentious area was therefore that set out in question 1.

Applicable Law

16. In terms of Section 47B of the Employment Rights Act 1996 ("ERA"):-

> "*(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."*

17. ERA contains in Section 230(3) a definition of the term "*worker*".

18. That sub section reads:-

> *"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."*

19. There was no argument advanced by the claimant that he was an employee of the respondents. The applicable law therefore related to the question of whether the claimant, as a Tribunal member, was properly viewed as a worker having regard to the definition of that term in ERA and also to case law.

20. Relevant cases were cited by both parties.

21. The most recent case is that of ***Gilham v Ministry of Justice [2017] ICR 404 ("Gilham").***

22. The claim in ***Gilham*** was brought on the basis that the claimant, a District Judge, was a worker who, it was said, was entitled to bring a claim under Section 47B of ERA. The Employment Appeal Tribunal ("EAT") held that there was no contract of employment or other contract between the claimant

and the respondents in relation to her role as a District Judge. It held that she was not a worker in terms of ERA.

23. The decision of the EAT is subject to appeal. It is understood that the appeal will be heard at the end of 2017 or shortly thereafter.

24. There are other cases referred to by each party which interpret the law and are said to support the position of one party or the other. Specifically, I was referred to –

- ***Terrell v Colonial Secretary [1953] 2 QB 482 CA ("Terrell")***
- ***Knight v Attorney-General [1979] ICR 194 (EAT) ("Knight")***
- ***Arthur v Attorney General [1999] ICR 631 ("Arthur")***
- ***Photis and Bruce v KMC International Search and Selection and the Department of Trade and Industry UKEAT/766/00, 6 December 2001 ("Photis")***
- ***Shaikh and Banerjee v Independent Tribunal Service UKEAT/0829/03, 16 March 2004, unreported ("Shaikh")***
- ***O'Brien v Ministry of Justice [2009] IRLR 294 ("O'Brien 1")***
- ***Khatri v Cooperative Centrale Raiffeisen-Boerenleenbank BA [2010] IRLR 715***
- ***O'Brien v Ministry of Justice [2010] 4 AII ER 62 ("O'Brien 2")***
- ***O'Brien v Ministry of Justice C-393/10 [2012] ICR 955 ("O'Brien 3")***

- ***Department of Constitutional Affairs v O'Brien [2013] ICR 499 ("O'Brien 4")***

- ***Engel v Joint Committee for parking and Traffic Regulation outside London [2013] ICR 1086 ("Engel")***

- ***Bear (Scotland) Ltd v Fulton [2015] ICR 221 ("Fulton")***

- ***Gilham v Ministry of Justice [2017] ICR 404 ("Gilham")***

Authorities referred to by the claimant:-

- ***Dragos Constantin Tarsia v Statul roman Case ECLI.EU.C.2015.269 ("Dragos")***

- ***Percy v Church of Scotland Board of National Mission (Scotland) [2005] UKHL 73 ("Percy")***

- ***Internationale Hendel Sgesellschaft v Einfuhr – und Vorratsstelle ECLI.EU.C.1970.114 ("Internationale")***

- ***Miller v Crime Concern Trust Ltd UKEAT/0758/04***

25. In relation to the appointment of a lay member of the Employment Tribunals and conduct, the relevant provisions are within the Constitutional Reform Act 2005 Sections 108 to 119, the Judicial Conduct (Tribunal) Rules 2014, the Employment Tribunals Act 1996 and the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

26. There is also potential relevance in the European Convention on Human Rights, specifically Articles 6 and 10 thereof and in the Charter of Fundamental Rights of the European Union.

27. The Ministry of Justice memorandum on conditions of appointment and terms of service appeared at pages 244 to 283 of the bundle. ("MoJ Memorandum").

28. The provisions in relation to the making of the Deposit Order by the Tribunal are set out in Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. In terms thereof the Tribunal has the power to order a party to pay a deposit if it considers that any specific allegation or argument in a claim, or response, has little reasonable prospect of success. When deciding the amount of any deposit to be paid, the Tribunal is obliged to make reasonable enquiries into the ability on the part of the person who has to be ordered to pay a deposit to make payment of such a deposit.

Submissions

Submissions for the Respondents

29. Mr Milford spoke to the skeleton argument he had tendered. The following is a summary of his position as set out to the Tribunal.

30. The fundamental proposition advanced by Mr Milford was that ***Gilham*** was a decision of the EAT which was binding upon this Tribunal.

31. ***Gilham*** confirmed that judicial office holders were not workers for the purposes of Section 47B of ERA. This was as they did not meet the definition of "*worker*" in terms of Section 230 of ERA as they did not have a contract of employment or any other contract as was referred to in Section 230(3)(b).

32. It was important that the EAT in ***Gilham*** had had before it many of the cases referred to in submission of the parties. Those cases included the cases of ***O'Brien (1 – 4)*** founded upon by the claimant, together with ***Percy*** and ***Engel.***

33. The EAT in ***Gilham*** had specifically stated in paragraph 6 that the definition of worker adopted in ***O'Brien 4*** did not apply to this type of situation. This was as the public interest disclosure or whistleblowing rights which were being considered in ***Gilham*** and were being considered in the case brought by the claimant presently before the Tribunal, were domestic rights only. They were not rights derived from EU Law. If the rights were derived from EU Law then "*worker*" had to be determined in line with EU Law. For there to be a worker in terms of the whistleblowing provisions under ERA there required to be a contract. This was in order that the terms of Section 230(3) of ERA were met.

34. This position was set out with clarity in ***Gilham*** in paragraphs 7 and 10 in particular.

35. ***Gilham*** was directly in point and was binding upon this Tribunal, said Mr Milford. It had determined that the claimant as a District Judge did not have a contract with the respondents. That determined this point in the current case.

36. The fact that work was carried out and remuneration was paid was not determinative. That was stated in paragraph 16 of ***Gilham***. Paragraphs 19 to 26 saw the relationship between a District Judge and the Ministry of Justice analysed. The conclusion was that a District Judge was an office holder who was not in a contractual relationship with the Ministry of Justice in relation to that office. Paragraph 25 of ***Gilham*** was of importance in summarising the nub of the reasoning of the EAT.

37. It was of import that the appointment was by the Queen on the recommendation of the Lord Chancellor. It was the Lord Chief Justice and not the Ministry of Justice or Lord Chancellor who had responsibility for welfare, training and guidance of judiciary and for deployment for judiciary together with allocation of work in the Courts. Office was held until an age

was reached save if misbehaviour or an inability to perform the duties of office occurred. An office holder in that circumstance could be removed by the Lord Chancellor but only with the concurrence of the Lord Chief Justice.

38. The claimant in this case potentially advanced the argument that there was an implied contract. That too had been dealt with in ***Gilham.*** An implied contract only occurred if it was necessary and only in circumstances where the relationship had not been fully contained in or set out in documents defining the office. There were such documents in ***Gilham*** and there were such documents in this case, submitted Mr Milford.

39. It was relevant both in relation to the express and implied contract that the position of the claimant as a lay member of the Tribunal was materially indistinguishable from that of the claimant in ***Gilham.***

40. Mr Milford referred to the fact that lay members of the Employment Tribunal held office on appointment of the Lord Chancellor. The documents detailing their appointment used the language of "office". Their duties, functions and authority were all defined by their statutory role, not by private agreement. There was statutory protection from dismissal and removal from office only occurred if cause existed.

41. Reference was made by Mr Milford to Section 4 of the Employment Tribunals Act 1996 and to Sections 5B(3) and 5C of that Act. The latter two elements referred firstly to the power of removal being exercised only with the concurrence of the Lord Chief Justice or his nominee and secondly to panel members requiring to take the appropriate judicial oath of independence.

42. Regulation 8 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 detailed the position in respect of Employment Tribunal Constitution.

43. As far as discipline was concerned, Section 118 of the Constitutional Reform Act 2005 specified that the office of lay member involved application of the provisions of Chapter 3 of that Act. The Judicial Conduct (Tribunals) Rules 2014 applied.

44. The MoJ memorandum set out the terms under which the claimant and others held office as lay members of the Employment Tribunal. The language used was that of office holding. There was security of tenure, with non-renewal of appointment and also dismissal being possible only if cause applied. Only incapacity or misconduct saw an ability on the part of the Lord Chancellor to terminate an appointment of a judicial office holder, which included an Employment Tribunal lay member.

45. An Employment Tribunal lay member carried an equal vote in any decision making. Guidance on the law in particular might be given by an Employment Judge. That was not due to any lesser degree of independence on the part of a member. It merely reflected the greater legal expertise and experience of the Employment Judge.

46. The claimant also advanced an argument with reference to freedom of expression under Article 10 of the European Convention on Human Rights, Mr Milford said. A similar argument had however been run in ***Gilham.*** The argument had been that the definition of "*worker*" should be read to include those in an employment relationship, even those who did not have a contract for services. The EAT had confirmed that this argument was correctly rejected by the Employment Tribunal. The EAT had said in ***Gilham*** that Section 230(3) of the ERA contained a fundamental feature defining those within the scope of protection. The existence of a contract was essential. The rights in question were derived from Parliament and not from EU law. Rights under Article 10 were not required in order to extend protection given protection for judicial office holders against suffering detriment due to whistleblowing which already existed, the EAT had held. The protections were the guarantee which existed of judicial independence and the guarantee of tenure. There was also protection of salary and the

right to lodge a grievance. The conclusion of the EAT was that a District Judge was protected to a greater degree in many respects than other workers.

47. Mr Milford was aware that the claimant referred to ***Engel***. He said that it should be appreciated that the authorities supported the decision reached in ***Gilham.*** Those authorities were ***Terrell, Knight*** and ***Arthur.***

48. Mr Milford recognised that in ***O'Brien 3*** the view had been taken that a part-time judicial office holder was a worker. What was important however was that the rights in issue in that case derived from EU law. t was said in paragraph 16 of the Judgment of the Court of Justice of the European Union which appeared at page 972, that it was:-

> "*apparent from the file before the Court that, in the United Kingdom, judges are historically described as "office holders" and work outside the framework of an employment contract."*

49. The position of lay members, albeit not lay members of an Employment Tribunal, had followed the same path in confirming that those involved were office holders. Reference was made by Mr Milford to ***Photis*** and ***Shaikh.***

50. Mr Milford then addressed the Tribunal in relation to ***Engel.*** He recognised that ***Engel*** had come to a different conclusion from that detailed in other cases.

51. ***Engel*** concerned the case of a parking adjudicator. A claim had been made for detriment said to have been suffered following whistleblowing.

52. What was important, said Mr Milford, was that the Employment Tribunal had concluded that the claim in ***Engel*** could not proceed on an entirely different point. The basis of the decision of the Employment Tribunal was that the allocation of cases was a judicial act to which judicial immunity applied. The EAT had agreed with that view. That had lead to dismissal of the appeal.

53. In ***Engel*** Counsel for the respondents had abandoned the submission that the claimant was not a worker within Section 230(3) of ERA. That point had not been determined. It was not involved in the decision at appeal.

54. Mr Milford recognised that Justice Mitting had commented that the position that the claimant did not perform his functions pursuant to a contract was untenable and that the abandonment of the argument that the claimant was not a worker within Section 230 of ERA was the right thing to do. These comments however were *obiter*. They were not therefore binding upon this Tribunal. Furthermore, the line of authority in ***Gilham*** had not been placed fully before the Court in ***Engel***. ***Engel*** had also been cited to the EAT in ***Gilham***. The EAT had, in ***Gilham*** reached its conclusion therefore in knowledge of the comments of Justice Mitting in ***Engel.***

55. Although Justice Mitting had referred to there being difficulty in that EU and domestic law "*cannot readily be disentangled"* and to "*the proposition that the same words mean different things depending on whether or not they can be disentangled"* as being *"unlikely to be correct",* it was the case, said Mr Milford, that rights derived from EU law and rights derived from UK law t do not require to be the same and could be construed differently. He referred to ***Fulton*** in this regard. ***Gilham*** has also taken the view that a worker for the purposes of whistleblowing required to have a contract of employment rather than being in an employment relationship The existence of an employment relationship was key to the ***O'Brien 3 and 4*** decisions. That was the basis under European law, the Directive, on which the rights then in question, part time workers' rights, applied to Judges.

56. The key element in this current case was that whistleblowing rights were derived from UK law. A contractual relationship was required. It was not present here.

<u>Submissions for the Claimant</u>

57. Mr Ibekwe addressed the Tribunal, basing his submissions upon the written submissions he had tendered.

58. The case of ***O'Brien 4*** was the first authority referred to by Mr Ibekwe. He said that the Part-time Workers Regulations were elements of domestic legislation. The term "*worker"* was used. The Supreme Court ruling had said that for someone to be a worker an employment relationship was what was required. A part-time Judge was a worker in terms of the Judgment in that case. That must be so in relation to all instances where the term "*worker*" was used.

59. The Judgment in ***Engel*** confirmed this. Justice Mitting had commented upon the difficulty in the same words meaning different things depending upon them being disentangled. Although concessions in the case had been made, Justice Mitting had said that it was right that this was so. He had said that it was *"untenable*" that the claimant did not perform his functions pursuant to a contract. It would, said Mr Ibekwe, be very difficult to go through ERA saying which parts applied to Judges as workers according to ***O'Brien 3 and 4*** as against those which did not apply to Judges as workers according to any other interpretation of that word. ***Gilham*** had avoided this point. Further, ***Gilham*** was under appeal.

60. It was very significant that Justice Mitting said that he would have "*gone further than the employment judge and held that the claimant was a "worker" for the purposes of part IVA of the 1996 Act (the protected disclosure provisions)"*

61. It was wrong for the respondents to say that the ***O'Brien*** cases had not dealt with whether or not there was a contract. That was a misreading of the ***O'Brien*** cases***.*** The correct reading, Mr Ibekwe submitted, was that the Supreme Court in ***O'Brien 4*** had said that there was an employment relationship in the case of a part-time Judge and that therefore there was a contract. That was the only way to read the Judgment. The employment relationship was to be construed as a contract. There was a contract in

existence or was one was to be implied, consistent with the definition of a contract in EU law.

62. The Judgments in the ***O'Brien*** cases were available and featured in the case of ***Engel***. It was in light of the ***O'Brien*** Judgment that the Court in ***Engel*** confirmed its view that a Judge was a worker.

63. The decision of the Supreme Court in ***O'Brien 4*** had, Mr Ibekwe said, read words into all legislation resulting in amendment, in effect, of Section 230(3) of ERA and also of the Employment Tribunals (Constitution and Rules of Procedure) Regulations to ensure that they were consistent with EU law.

64. As a result of the ***O'Brien*** cases Judges were workers.

65. ***Engel*** had emphasised the difficulty if the same word meant different things. It was not for the Tribunal to separate and disentangle these areas and to "nit pick". In reality what was happening, Mr Ibekwe submitted, was that the respondents were asking the Tribunal to read words into the legislation. European law provided a basis in which words could be read into statute or other provisions. There was no provision however to the contrary effect.

66. Mr Ibekwe highlighted the nature of a lay appointment in his written submission and mentioned this in passing in his oral submissions. He referred to the requirement to attend training, the requirement to be available for hearings on certain days, to the offer of renewal being made and to the ability on the part of the Lord Chancellor and Secretary of State for Justice to remove a lay member by written notice on certain grounds.

67. The position of Judges under the whistleblowing provisions of ERA was contrasted with that of policemen. Mr Ibekwe said that had Parliament intended to exclude judicial appointees from the provisions in this area, they would specifically have been excluded. That had been the case with Police Officers. Police Officers had now however been specifically included as being covered by the whistleblowing provisions. By analogy, if Parliament had wished to exclude Judges that would have occurred by express

provision. As, unlike Police Officers, they had not been excluded, the clear intention had been to include them within the cover of the whistleblowing provisions, meaning that they would obtain protection if they whistleblew, Mr Ibekwe said. It did not make sense, Mr Ibekwe submitted, for Judges to be excluded where there was no express exclusion of Judges in ERA.

68. Although Mr Ibekwe mentioned Article 10 of the European Convention on Human Rights, he said that he was founding specifically upon the European Charter. He referred to ***Dragos.*** His written submission expanded upon this point.

69. The point which Mr Ibekwe emphasised was that he had, in his disclosures, raised or had sought to raise significant issues of fundamental concern relating to the rights of specific, and in reality general, users of Employment Tribunals to receive a fair hearing. This was something required in terms of Article 47 of the Charter of Fundamental Rights of the EU. It was also a requirement of Article 6 of the European Convention of Human Rights. These cases all related to pursuit of rights which had a European Union context. If the whistleblowing legislation and protection was viewed as being derived only from domestic legislation and gave no protection to a judicial whistleblower that was inconsistent with the terms of Article 47 and Article 6. The view which Mr Ibekwe set out was, he said, consistent with ***Dragos*** and ***Internationale***.

70. It was clear that where national law negated or infringed upon rights provided by or derived from European law the Courts should have regard to European law and would be obliged to read into national law the provisions of European law, as the Court had done in ***O'Brien 4.***

71. The whistleblowing legislation provided different safeguards from those given by the broad propositions of judicial independence and protection which Judges had from dismissal. It was not the case that the rights which Judges had were sufficient to mean that there was no need for them to receive protection if they whistleblew.

72. I raised with Mr Ibekwe a submission which seemed to me be at the core of the respondents' position. Mr Milford maintained that ***Gilham*** was binding upon me. It seemed to me that it was appropriate to raise this with Mr Ibekwe to give him the chance to comment specifically upon this point.

73. Mr Ibekwe said that in ***Gilham*** the EAT was never confronted with the point which came out in ***Engel.*** The words which the Supreme Court had read into the provisions as detailed in ***O'Brien 4*** should be viewed as meaning that Judges were workers. This Tribunal and indeed the EAT were bound by the Supreme Court. The Tribunal could not now say that the amendment referred to by the Supreme Court did not apply.

74. I also raised with Mr Ibekwe the position of Mr Milford that the comments in ***Engel*** by Justice Mitting were *obiter* i.e. the decision did not turn upon this point and he had made observations rather than making rulings on law. Mr Ibekwe said that he accepted this but said that ***O'Brien 4*** had amended the ERA and the definition of worker and the Tribunal did not have the power to unpick the extension of jurisdiction.

Brief reply by the Respondents

75. I invited Mr Milford to reply briefly to any points which Ibekwe had raised which had not been covered in his initial submission.

76. Mr Milford addressed a number of points in brief fashion.

77. He said that rather than events being overtaken by the ***O'Brien*** cases***,*** ***Gilham*** had superseded and overtaken the ***O'Brien*** cases on the particular point at issue.

78. It was vital, said Mr Milford, to keep in mind that under the ERA the whistleblowing provisions which were at issue in this case were derived

from UK law. Judges being in an employment relationship was only relevant to rights which were derived from EU law.

79. ***Gilham*** had confirmed the distinction which could be drawn between "*worker*" in one context, which turned upon consideration of EU derived rights, and another, which turned upon consideration of rights derived from UK law. Paragraph 6 of ***Gilham*** was relevant in that regard. The obiter comment in ***Engel*** therefore as to difficulty disentangling EU and UK law ultimately was not persuasive to the EAT in ***Gilham.*** There was no difficulty in knowing which rights were derived from EU law and which were derived from UK law.

80. Regard should be had to paragraphs 29 and 30 and 39 and 42 of the decision in ***O'Brien 4***. Those paragraphs set out the basis of the Judgment in ***O'Brien 4.*** That Judgment turned on whether there was an employment relationship. That had been contrasted with the position of a self-employed person. The test therefore had been in the context of an EU derived right, whether an employment relationship existed. That was not the test where the right was derived from UK law. In terms of Section 230 of ERA the test was specifically whether there was a contract of employment. Paragraph 42 of ***O'Brien 4*** confirmed the decision as being based on the employment relationship. There was no reference to there being a contract between Judges and the Ministry of Justice or Secretary of State.

81. As far as Police Officers were concerned, Mr Milford said that it was now the case that Police Officers were covered by the whistleblowing provisions. If they were naturally covered there would have been no need for that provision. There was no express provision for Judges to be covered. That therefore contrasted with the provision which now existed in respect of Police Officers. It could be concluded, said Mr Milford that Judges were therefore not covered by these provisions.

82. As far as the EU Charter was concerned, Mr Milford said that the Charter would be relevant where rights were derived from EU law. That was not the

case here. It might also be relevant if there were corresponding rights in the Convention. That was not so here.

83. It was true, said Mr Milford, that the cases in relation to which Mr Ibekwe said that he had raised points included issues of rights derived from EU law. The point however was that for Mr Ibekwe to claim that, in the case which he now brought, EU law was involved, he would require to rely upon his own European Union rights rather than the rights of other claimants in cases about which he had raised different matters. His rights in this case derived from UK law. If he said that he had suffered a detriment due to raising the European Union rights of others, that was, submitted Mr Milford, a victimisation claim in reality.

84. Mr Milford recognised that ***Gilham*** had been appealed. The appeal was due to be heard towards the end of 2017. His view was that the Tribunal required to apply the law as it stood. ***Gilham*** was binding. If the Court of Appeal subsequently said that ***Gilham*** was wrong then there might exist grounds for reconsideration. It would not be possible not to apply ***Gilham.***

85. As far as reading words into the Tribunals rules including the provisions for appointment of Judges was concerned, Mr Milford said that this was not what the Supreme Court had in fact done in ***O'Brien 4***. It had relied upon the construction of *"worker*" as being someone in an employment relationship and had applied that to the Part-time Workers Regulations. The case had nothing to do with the Rules of Procedure and nothing to do with Section 230 of ERA.

Discussion and Decision

86. As detailed above, point 2 became an issue upon which there was common ground. The respondents accepted some acts had potential to be protected acts for the purposes of a victimisation claim. The claimant accepted that other acts were not ones which he would seek to argue were protected acts for such a purpose.

87. Point 1 however saw parties take a different view, one from the other, as to whether a lay member of a Tribunal was a worker entitled to protection from being subjected to a detriment on the ground that a protected disclosure had been made, i.e. that he had whistleblown.

88. In my deliberations I have regard both to the written submissions and to the oral submissions made. I have also had regard to the cases to which I was referred and to the documents to which I was taken.

89. In my view the starting point for this Judgment was for me to consider the case of ***Gilham*** and whether or not I was bound by that Judgment of the EAT. This in itself would involve consideration of ***Engel*** and how that authority sat both in relation to ***Gilham*** and also of whether it was binding upon me or not, in my view. I will also require to consider as part of this exercise the position in respect of European law having regard to the proposition advanced by the claimant as to words being read into the statute and regulations.

Gilham

90. I was conscious that it had been confirmed to me that ***Gilham*** was under appeal that the appeal is due to be heard at the end of this year. I considered whether it was appropriate to sist this case to await the outcome in ***Gilham*** at appeal stage. I was aware that both parties were keen to progress this case and had each urged me to have regard to ***Gilham*** in its present position, albeit to different effect. I concluded, on balance, that it was appropriate to proceed to determine the matter aired before me at this PH. It seemed to me that this would allow progress to be made. It might be that the appeal in ***Gilham*** does not proceed or indeed that there is a further appeal taken as and when the decision of the Court of Appeal is known.

91. There was no evidence led in this case. There was however no disagreement as to the role and duties which the claimant had as a lay member of the Employment Tribunal. There was what might be, in my view,

labelled a *"difference of emphasis"*. The claimant said that as a lay member he carried out his duties, responsibility and functions under the supervision and guidance of the presiding Employment Judge, whereas the respondents said that the claimant looked only to the Employment Judge for guidance on legal matters due to expertise and experience on the part of the Employment Judge. Given however that the claimant said in his written submission, in addition to the point just made, that "*Lay Judicial Members are equal Members to the Employment Judges,"* I did not regard the difference between the parties as in any way meaningful to the Judgment I required to make.

92. I concluded therefore that it was appropriate to regard the claimant as a judicial office holder and in a position, in so far as considering his status as a worker in terms of Section 230(3) of ERA, which was the same as the claimant in ***Gilham*** and indeed in ***Engel.***

93. There was of course a case brought by Tribunal members, the combined case of ***Photis.*** The decision in those combined appeals supports the respondents' position in this case and does not differentiate between a legally qualified chairman and the members of the Tribunal.

94. I recognised that ***Gilham*** and ***Engel*** appear potentially to be at odds with one another. I have used the word "*potentially*" given certain critical matters. This is not in my view the situation, which can occur from time to time, where the Employment Appeal Tribunal, differently constituted, can reach different views upon the same point. In that situation the Employment Tribunal would have to consider the reasoning in each of the cases and its applicability to the facts and circumstances before it. The Employment Tribunal would then potentially have to reach a view as to which of the cases contained reasoning seemed to the Employment Tribunal to be more sound, on whatever basis the Employment Tribunal regarded as leading it to that view.

95. The critical differences between ***Gilham*** and ***Engel*** are the following:-

(a) The question of whether the claimant was a worker in terms of Section 230 of ERA was critical to the decision in ***Gilham***. It was not critical to determination of the case by the EAT in ***Engel***.

(b) The comments made by Mr Justice Mitting in ***Engel*** do not therefore form part of the basis of decision making in the case. There is in effect no ruling on the point by Mr Justice Mitting. He offers a firm opinion on the point. It is however just that, an opinion. It is not given with the benefit of there having been argument and submissions made to him given that Counsel for the respondents conceded the point. I accept that there is persuasive value in the opinion expressed by Mr Justice Mitting, particularly when it is expressed in such forthright and forceful terms. That however may be contrasted with the clear view reached by the EAT in ***Gilham*** on the very point which was central to this Judgment. The same point was determined in ***Gilham.***

(c) The case of ***Gilham*** and the view reached as to whether or not judicial office holders are workers working under a contract of employment or any other contract is also, in my view, entirely consistent with the line of earlier authorities referred to in ***Gilham*** and referred to in the submissions by Mr Milford before me.

96. I have therefore concluded that ***Gilham*** is directly in point and is binding upon me. On that basis the claim cannot proceed on this ground as the Tribunal has no jurisdiction.

97. That said, I would also say that I have concluded that, in my respectful view, ***Gilham*** is correctly decided. This is not a case therefore where, as occasionally occurs, I am of the view as the Employment Judge involved that I am bound by higher authority notwithstanding the fact that I, absent that higher authority, would have come to a different view.

98. I do not see that, given the terms of appointment of the claimant as a judicial office holder and all the points which were made in submission, there is a contract of employment or any other contract between the claimant and the respondents. There is clearly a working relationship. That is not however sufficient in terms of Section 230(3) of ERA to found a claim of detriment said to have been suffered due to a protected disclosure having been made, a claim in terms of Sections 47B and 48 of ERA.

99. The claimant founded upon what I might label as "*the European point*." He emphasised that domestic law required to be interpreted in light of European law. He referred to the European Convention on Human Rights and to the Charter of Fundamental Rights of the European Union. He referred to the ***O'Brien*** cases and to the important decision that Judges were workers, looking to the point before the Court, the legislative provisions and their derivation.

100. These are all powerful points which were well made by the claimant. I understand the basis for his argument and indeed perhaps the desirability that exists of having one meaning for the term *"worker*" where it appears in various statutory provisions.

101. Nevertheless, it did seem to me that ***O'Brien 4*** had proceeded on the basis that a part-time Judge was a worker not on the footing that he or she had a contract of employment or some other contract with the respondents, but rather on the basis that what he or she had was an employment relationship with the respondents.

102. The rights being considered in that case derived from European law. It was sufficient for the rights in question to exist that there was an employment relationship between the claimant and the respondents.

103. The distinction between that case and this, and indeed ***Gilham*** (all cases of ***O'Brien*** having been cited to the EAT in ***Gilham***) is that the rights

potentially involved in the factual position in this case, and indeed in ***Gilham,*** were created under UK law.

104. ***Gilham*** dealt with this point and indeed the human rights point. As stated above, in my view ***Gilham*** is binding upon me. Again, although it is not strictly relevant to the Judgment in this case, I agree with the conclusion and reasoning set out in ***Gilham*** on this point.

105. The regulations involved in the ***O'Brien*** cases are reflective of an EU directive. That **directive** applies to part-timers who have an employment contract or **an employment relationship**. In determining the extent of applicability of the regulations, the view taken by the Court was that the directive fell to be complied with and meant that the regulations could apply even if there was no contract between the parties. There is no such directive to defer to or to take account of in relation to the provisions regarding protected disclosures and protection from detriment. Equally, I do not see, both standing ***Gilham*** and also having regard to my own view in the matter, that I can simply "read in" to Section 230(3) of ERA for the purposes of Section 47B of that Act any words which widen the definition of "*worker."*

106. In short I do not see that the nature of the judicial appointment such as is held by the claimant can lead to the view that there is a **contractual** relationship between someone in his position and the respondents in this case. Such a **contractual** relationship is required prior to it being possible for someone in the position of the claimant to proceed with a claim to an Employment Tribunal founded upon the allegation that he or she has made a protected disclosure and has suffered a detriment because of that.

Conclusion

107. For these reasons I concluded that the Tribunal had no jurisdiction to hear the claim brought by the claimant in terms of Section 48 of ERA, that claim being founded upon Section 47B of that Act.

108. I regard it as appropriate that a Case Management PH be set down in order to discuss future proceedings in this case and indeed to consider whether the other cases, which are currently sisted, remain sisted or are set down for a Hearing of some type. The nature of any further Hearing in this case, and indeed in the other currently sisted cases, can be discussed at the PH. I asked that the Clerk to the Tribunals consults with parties in order to fix a mutually acceptable date and time for this Case Management PH. It seems to me that it can be conducted by way of Telephone Conference Call for convenience of all parties. If either party has a different view and believes that the Case Management PH would require to be in person, they can of course make the appropriate representations to that effect.

Employment Judge: Robert Gall
Date of Judgment: 10 July 2017
Entered in register and copied to parties: 10 July 2017