



EMPLOYMENT TRIBUNALS

SITTING AT: LONDON CENTRAL

BEFORE: EMPLOYMENT JUDGE F SPENCER

BETWEEN: MS C GRIFFITHS CLAIMANT

AND

THE INSTITUTION OF MECHANICAL ENGINEERS RESPONDENT

ON: 3RD, 4TH AND 7TH September 2020

Appearances

For the Claimant: In person

For the Respondent: Mr D Reade QC, counsel

RESERVED JUDGMENT

The Employment Tribunal has no jurisdiction to consider the Claimant's complaints of sex discrimination, harassment related to sex or whistleblowing detriment and the claims are dismissed.

REASONS

Background and Issues

1. This was a preliminary hearing to consider whether the Employment Tribunal had jurisdiction to hear the Claimant's claims of direct sex discrimination/harassment related to sex and whistleblowing detriment.
2. The particular issue which I have to determine is whether the Claimant, as a Trustee of a professional body, the Institute of Mechanical Engineers, has the right to bring her claims in Employment Tribunal.
3. In her claim form the Claimant claims that she was a worker within the definition set out in section 230(3) of the Employment Rights Act 1996 (the ERA), and

that if she did not strictly meet the definition of worker in that section she would rely on the extended definition of worker set out in Gilham v Ministry of Justice (2019 1WLR 5905)

4. During this Preliminary Hearing Ms Griffiths raised a number of additional arguments. She submits that she has status to bring a claim under the Equality Act 2010 because:
 - (1) she is an office holder as set out in section 49 of that Act.
 - (2) the Respondent is a qualifications body which has discriminated against her contrary to section 53(1) and/or (3) of that Act.
5. She also submits that she satisfies the definition of a worker as extended by section 43K(1) of the Employment Rights Act 1996 and she relies on subsections (a) and (d)
6. I deal relatively briefly with those additional arguments because, while the Claimant has worked hard to find provisions which might assist her, these additional arguments are in my view clearly not right. On the other hand, the submissions she makes based on the Supreme Court's judgment in Gilham do give rise to a number of fundamental and important questions about the scope of the protection for whistle-blowers, and they touch on an area of law that is, at present, far from clear.
7. The Respondent responds that, as the Claimant was a Trustee, this tribunal has no jurisdiction to consider the Claimant's complaints. It is their case that she is not "in employment" for the purposes of section 83 of the Equality Act 2010, nor an office holder under section 49 and she does not qualify for protection under part 5 of the Equality Act. The Respondent also submits that she is not a "worker" for the purposes of section 47B of the Employment Rights Act 1996 (either as drafted or under the Gilham extension) who is entitled to bring a claim.
8. I heard **evidence** from the Claimant and, on behalf of the Respondent, from Mr Spall who is currently the President of the Respondent. I had a bundle of documents.
9. **The relevant facts** in this case are not significantly in dispute. What is in dispute is how the facts should be interpreted as a matter of law. In her witness statement the Claimant deals almost exclusively with her role and duties as President of the Respondent, but her claim relates to her status, not simply as President, but more generally as a Trustee or member of the Trustee Board.
10. The Claimant is an experienced professional engineer with a distinguished career in the Railway Industry. The Respondent is a professional membership association established and incorporated by Royal Charter and is registered as a charity. It is governed by Royal Charter and its by-laws. It is prohibited from engaging in any trade or business for the pecuniary gain of its members. It has approximately 120,000 members worldwide and its charitable objects and

purposes “are to promote the development of Mechanical Engineering and to facilitate the exchange of information and ideas thereon”.

11. The Claimant has been a member of the Respondent for many years and was elected by the members, (in accordance with the By-laws of the Respondent), as a Trustee in 2010. The Claimant was subsequently elected as a Vice President, and then elected as President-elect in 2016. In accordance with the By-laws she became President in 2017 following her term as President-elect.
12. Unfortunately despite her success she considers that she has been less favourably treated by the Respondent because of her sex and victimised because she, to put it colloquially, blew the whistle about various matters including matters relating to the annual report and accounts and compliance. I am not concerned here with the merits, or otherwise, of those claims.
13. By Clause 11 of the Royal Charter “The government and control of the institution and its affairs shall be vested in the Trustee Board” subject to the terms of the Royal Charter and its By-laws.
14. By-law 56 provides that the Trustee Board shall consist of: the President, the President-elect, four Vice Presidents, an International Vice President and five (or more) ordinary Trustees. Currently there are 12 Trustees on the Trustee Board. The President has no additional voting rights beyond those of the other Trustees, but is described as the “titular head of the Institution”.
15. All Trustees are elected by the members as provided by By-law 58. Candidates for election are nominated by any corporate member of the institution or by the nomination committee. Vice Presidents are also elected by the members, but eligibility is confined to those who are already Trustees. Ordinary Trustees and Vice Presidents hold office for three years and may be re-elected for a further three-year term.
16. The President-elect is elected by the members from those who have been Vice Presidents (including the international Vice President) and holds office for one year. A new President -elect is elected each year. The President-elect is elected on the basis that he or she will automatically become President after his or her term in office as President-elect. The President also holds office for one year. After the term of their appointment they cease to be a member of the Trustee Board but will contribute in other ways.
17. The Trustee Board can fill casual vacancies by appointment until the next annual general meeting, but otherwise all Trustees are elected. A Trustee can be removed if he or she was declared to have failed to fulfil their proper functions as a member of the Trustee Board by a unanimous resolution of the Trustees (apart from the Trustee in question) and/or failed to attend a single Trustee Board meeting in a year unless the Board resolves that such member should retain such member’s office. (By-law 67) In certain circumstances they will automatically cease to be Trustees.
18. By-law 57 provides that “The office of a member of the Trustee Board shall be honorary and without remuneration. No employee of the Institution nor any

person prohibited by law from being a charity Trustee shall be eligible to be a member of the Trustee Board.” The general law on Trusts also provides that the office of Trustee is gratuitous. The same applies to trustees of charities, though trustees may be reimbursed their reasonable expenses. This is to avoid conflicts of interest. There are some exceptions for professional trustees, but in any event the Respondent’s By-laws expressly prohibit remuneration for its Trustees.

19. Trustees of the Respondent are expected to act jointly and by majority decision.
20. For the most part members of the Trustee Board below the level of President have full-time jobs with a third party in a professional capacity involving some aspect of mechanical engineering. They will also devote time to the Respondent by sitting on committees and attending meetings of the Trustee Board. The Trustee Board met 6 times a year and the Trustees were expected to attend. The Trustees might also sit on various sub committees of the Board.
21. The role of President is a busier one and quite frequently the individual who takes on the role of President will be in his or her early retirement in order to allow sufficient time to devote to the role. Both Mr Spall and Miss Griffiths attested that the role of President is both busy and regarded as a great honour. It is the pinnacle of a distinguished professional career. Mr Spall estimated that he might spend 20 or 30 hours a week in his role as President, though this would vary from President to President; some Presidents delegated many more of their functions to other Trustees. The Claimant says, and I accept, that her diary was very busy. She says she was expected to chair the Trustee Board which met six times a year, to chair and/or be a member of various committees, and to deal with member correspondence. She says she was expected to promote the aims of the Institute by attending dinners, events and undertake overseas tours. A former President, Mr Kneveton set out at page 40 of the bundle what he understood to be the custom and practice duties of the President and these are not insignificant.
22. The Respondent employed a chief executive and nearly 200 other employees. The ordinary affairs of the Respondent are delegated to the chief executive and the employees, but the Board has ultimate responsibility and oversight. The employment contract of the chief executive provided that his line manager was the President, and that he was to perform such duties as the Trustee Board from time to time assigned to him. At some point the Trustees resolved to provide annual appraisals for fellow Trustees and accordingly the Claimant was appraised by the then President in her capacity as President-elect.
23. The Respondent, at the time that she was President, owned a two bedroomed flat in Westminster. The President was allowed to use it when in London on trustee business but was also allowed to use it in her personal capacity. (The flat has however now been sold and the President will stay in a hotel when in London for Trust business, which is paid for by the Respondent.) She was given an allowance of £1,000 for refurbishment of her office or flat, enjoyed an all-expenses paid programme of international visits and was paid for when attending various dining and other internal or external events. She also

benefited from some VIP tickets to events. The President had the use of an office at the Respondent and the use of a personal assistant to assist in his or her work for the Respondent, paid for by the Respondent.

The law

The Employment Rights Act 1996

24. The right not to suffer whistleblowing detriment is restricted to “workers”. A worker is defined in section 230(3) of the Employment Rights Act as:

“An individual who has entered into all 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 will 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 individual; and any reference to workers contract shall be construed accordingly.”

The ordinary reading of those words requires therefore a contract to perform work or services.

25. Section 43K of the Employment Rights Act 1996 extends the definition of worker in certain circumstances. The Claimant relies on subsections (a) and (d) which provide that

(1) “For the purposes of this Part “worker” includes an individual who is not a worker as defined by section 230(3) but who—

(a) works or worked for a person in circumstances in which—

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them.....

(d) is or was provided with work experience provided pursuant to a training course or programme or with training for employment (or with both) otherwise than—

(i) under a contract of employment, or

(ii) by an educational establishment on a course run by that establishment;

and any reference to a worker's contract, to employment or to a worker being "employed" shall be construed accordingly.

26. In Gilham (above) the Supreme Court found that a Judge was a worker and able to bring a whistle-blowing claim notwithstanding that Judges do not work under a contract and therefore did not meet the definition of worker under the Employment Rights Act 1996.
27. It is generally accepted that the judgment in Gilham, although its ratio is confined to judges, has potentially wide ramifications and "opens the gate" for other "status" challenges to be made for individuals who do not qualify for rights under the Employment Rights Act 1996 because they are neither employees nor workers. The authors of the IDS Employment Law Brief comment that "*For example there is now scope for volunteers, non-executive directors and other office holders to bring such claims where Article 14 would be breached if status was a bar to the exercise of domestic rights which fall within the ambit of a Convention right.* (IDS Employment law Brief 2019 1120 3-8)." This case is just such a status challenge

The Equality Act

28. Part 5 of the Equality Act is headed "work". It prohibits discrimination on a number of proscribed grounds by employers and other bodies. Section 39 prohibits discrimination by employers against employees and applicants. Section 83 defines employment as "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work." It is similar to the definition of worker in section 230(3) and it also requires a contract between employer and employee.
29. Part 5 of the Equality Act extends protection to others who do not satisfy the definition above in certain other cases. (Most broadly relate to paid work, such as police officers, barristers, contract workers, partners and paid office holders.) The Claimant relies on sections 49 and 53. Section 49 extends protection from discrimination and harassment to those who hold a personal office. It provides that:
 - (2) "A personal office is an office or post –
 - a. to which a person is appointed to discharge a function personally under the direction of another person; and
 - b. in respect of which an appointed person is entitled to remuneration.
30. Section 52(5) also provides that for the purposes of section 49 "Appointment to an office or post does not include election to it."
31. The Claimant also claims that she may bring a claim under section 53(2)(c) of the Equality Act. Section 53 provides that:
 - (1) "A qualifications body (A) must not discriminate against a person (B) –

- a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;
- b) as to the terms on which A is prepared to confer a relevant qualification on B;
- c) by not conferring a relevant qualification on B.

- (2) A qualifications body (A) must not discriminate against a person (B) upon whom A has conferred relevant qualification –
- (a) by withdrawing the qualification from B;
 - (b) by withdrawing the terms upon which B holds qualification;
 - (c) by subjecting B to any other detriment.

32. In *X v Mid Sussex Citizens Advice Bureau and others* 2012 UKSC 59 the Supreme Court held that volunteers were not covered by the Equality Act and that the EU Discrimination Framework Directive did not apply to unpaid volunteers.

Discussion and Conclusion.

On an ordinary reading does the Claimant satisfy the definition of worker in section 230(3) of the Employment Rights Act 1996 or section 83 of the Equality Act?

33. Both sections 230(3) and section 83 require a contract (express or implied) under which the individual undertakes to do work personally. Mr Reade submits that the Claimant has no contract and accordingly cannot meet those definitions.
34. The Claimant's case is that she had an implied contract with the Respondent defined by its Charter and By-laws, by the Trustee Act, by the requirements of the charity commission, by various institution documents and custom and practice. It is her case that under that contract she had obligations and duties as a Trustee, and subsequently as President, that these obligations were contractual and that she was remunerated for these duties by the use of a flat and the other benefits set out above (see paragraph 23). She submits that had she not performed those duties she could have been removed by a unanimous resolution of the Trustee Board in accordance with By-law 67.7 (see paragraph 17 above). She refers to the case of *Pimlico Plumbers v Smith* 2018 UKSC 29 and *Uber v Aslam* 2018 EWCA 2748 for the proposition that what is in writing is less important than the way the contract was performed in practice.
35. Mr Reade submits that it is not possible to imply a contract between the parties unless it is necessary for such a contract to be implied in order to give business reality to a transaction. It is fatal to the implication of a contract that the parties would have acted exactly as they did in the absence of a contract.
36. The *Uber* and *Pimlico Plumbers* cases were about implying terms into an existing written contract which did not reflect the reality of the relationship; they were not concerned with whether there was a contract at all.

37. I have no doubt that the Claimant took her duties as a Trustee and latterly as President very seriously and felt that she should carry out those duties conscientiously and well. However, the issue is whether those duties derived from a contract between her and the Respondent. The Claimant was elected by the members as a Trustee. She was not offered a job which she then accepted. She put herself forward for election and was then duly elected to her various different positions by the members. The duties were not (and her relationship with the Respondent was not) contractual but arose from the Charter, the By-laws and by the general law as to the obligations of trustees.
38. The Claimant became a Trustee because, as she said in evidence, she believed in what the institution does, and her motivation was to influence the way the society carried out its charitable aims. Individuals put themselves up for election on the basis that they are willing to do the duties expected of a President, and no doubt will have a professional pride in wanting to execute those duties well, but that is not the same as saying they are contractually required to carry out those duties. As submitted by the Respondent, it is not necessary to imply a contract unless it is necessary to do so in order to give business reality to a transaction. It is not necessary on this case to do that.
39. I am therefore satisfied that there was no contract between the Claimant and the Respondent. This means that, on its face, the Claimant does not satisfy the definition of worker for the purposes of the ERA or or as being in employment for the purposes of the Equality Act.
40. The Claimant however has put forward a number of alternative basis upon which she may be able to claim the protection of the whistleblowing provisions of the Employment Rights Act 1996 and the protection of the Equality Act.

Can the Claimant rely on sections 49 and 53 of the Equality Act?

41. Section 49 is headed Personal Offices, appointments etc. and is set out at paragraph 25 above. This section does not require there to be a contract. Instead it extends protection from discrimination and harassment to those who hold a personal office. It provides that:
 - (3) "A personal office is an office or post –
 - a. to which a person is appointed to discharge a function personally under the direction of another person; and
 - b. in respect of which an appointed person is entitled to remuneration.
42. Section 52(5) provides that for the purposes of section 49 "Appointment to an office or post does not include election to it."
43. It is immediately apparent that the Claimant, having been elected, cannot benefit from section 49. Moreover section 49 also excludes from its definition office holders who are not entitled to remuneration. The Claimant submits that she was entitled to remuneration as President (though she has not made such submissions in respect of ordinary trustees). She says that her ability to use the

flat, to use an office and a personal assistant at the Respondent, the provision of VIP tickets to events and all expenses paid trips abroad amount to remuneration.

44. I have no hesitation in rejecting that argument. By-law 57 specifically prohibits a trustee from receiving remuneration. None of those matters amounted to remuneration. The benefits that the Claimant describes were provided to her in order to enable her to do her duty as President, and while the use of the flat might have been more generous than strictly necessary she had no legally enforceable right to use it.

45. The Claimant also claims that she can rely on section 53(2)(c) of the Equality Act. Section 53 provides that:

(1) “A qualifications body (A) must not discriminate against a person (B) –

- a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;
- b) as to the terms on which A is prepared to confer a relevant qualification on B;
- c) by not conferring a relevant qualification on B.

(2) A qualifications body (A) must not discriminate against a person (B) upon whom A has conferred a relevant qualification –

- a. by withdrawing the qualification from B;
- b. by withdrawing the terms upon which B holds the qualification;
- c. by subjecting B to any other detriment.

Section 54(3) provides that “A relevant qualification is an authorisation, qualification, recognition, enrolment, approval or certification which is needed for, or facilitates, engagement in particular trade or profession.”

46. It is accepted that the Respondent is a qualifications body and the Claimant was qualified by it as a chartered engineer. She submits that the Respondent has discriminated against her, as someone upon whom it has conferred a qualification, by subjecting her to “any other detriment” in the various ways described in the pleadings.

47. It is an interesting argument. The Claimant is right in that, on its face, the words of section 5(2) (c) would appear to suggest that the prohibition on discrimination by a qualifications body against those upon whom it has conferred a qualification extends to detriments of any kind; even if that detriment was wholly unrelated to the qualification or the Institutions role in providing that qualification. However as submitted by Mr Reade, it is a principle of construction that wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. In this case the legislative history, context and common sense would indicate that the words “any other detriment” were intended only to apply in the context of the conferment of qualifications.

48. In response to Mr Reade's submission that the words "any other detriment" in section 53(2)(c) had to be read in the context of the conferment of qualifications the Claimant submitted that claim was indeed associated with her qualification in that the Respondent had withdrawn from her "the status of being" President and had tried to withdraw her fellowship when they sought to pursue disciplinary proceedings against her.
49. This argument was raised only in reply to the submissions made by Mr Reade and I was not clear that the Claimant had sought to plead these particular detriments in her extensive pleadings. In any event being President or more loosely "the status of being President" does not satisfy the definition of a relevant qualification in section 54(3). As to fellowship I had no submissions on this (though Mr Reade accepted that membership of the Respondent is a relevant qualification), and the argument was raised too late.
50. Finally the Claimant submitted that the claim involves her rights under Article 8 of the Convention on Human Rights (Right to a private life) coupled with Article 14 and that, in reliance on Rihan v Ernst and Young Global Ltd 2020 EWHC 901, the Respondent owes her a duty of care in providing an ethically sound environment for work and an environment where employees can raise their concerns without fear, and that employers should take reasonable steps to prevent an employee suffering damage to their future career prospects. This new point was raised only in submissions, but it does not address the question at issue here, which is whether the Claimant has the locus to bring a complaint under the Equality Act (or the Employment Rights Act 1996).
51. Consequently, I find that the Claimant has no status to bring a claim under the Equality Act 2010.

Extended definition of worker under section 43K

52. In respect of her whistleblowing claim under the ERA the Claimant's case is that, if she is not a worker as defined in section 230(3), she qualifies as a worker under the extended definition of worker set out in section 43K. In particular she relies on subsections (a) and (d).
53. Subsection (a) is a provision designed to deal with agency workers. The Claimant's case is that she worked for the Respondent in circumstances in which she was introduced or supplied to do that work by a third person namely "the membership" and the terms upon which she was engaged to the work were in practice substantially determined not by her but by the person for whom she worked (namely the Institution), the third person (namely the membership) or by both of them.
54. That cannot be right. Being elected as a Trustee by the members, after having stood for election, is not the same as being introduced or supplied to do that work by a third party. Nor was she "engaged" to do the work. She stood for election and was successful. The terms upon which the Claimant worked were

not determined by the Respondent, or the membership but laid down in the By-laws and the Royal Charter and general charity law.

55. As for subsection (d) the Claimant seeks to argue that she was provided with work experience pursuant to a training course or program, or with training for employment, by the Respondent. She said she was required to do continual professional development and that by being a Board member she was improving her skills. The Board provided a platform to develop her professional skills and interest.
56. However, being a member of a Trustee Board of an important institution is plainly not work experience provided pursuant to training course or program or with training for employment. The Claimant was elected to the Trustee Board because of her experience, not in order that she might gain it.

Extension of the definition of worker in Gilham v Ministry of Justice (2019 1WLR 5905)

57. I turn now to the much more difficult, and substantial part of the Claimant's case; whether the Claimant is a worker under the extended definition of worker provided by the Supreme Court in Gilham, such as to entitle her to bring a whistle-blowing claim.
58. In Gilham the Claimant was a district judge who sought the protection from whistleblowing detriment set out in section 47B. The courts below the Supreme Court had held that the absence of a contractual relationship between the judge and the executive was fatal to the definition of a worker. That is true on a literal interpretation of the words of Section 230(3).
59. However the Supreme Court in Gilham held that the exclusion of Judges from the protection afforded by section 47B was in breach of their rights under Article 14, read with Article 10, of the European Convention on Human Rights (the ECHR). To remedy this breach it found that that the definition of worker in section 230 could be read "to include within limb (b) an individual who works or worked by virtue of an appointment to an office whereby the officeholder undertakes to do or perform personally any work or services otherwise than for persons who are clients or customers of a profession or business carried on by the officeholder". This is a broad formulation.
60. The Claimant relies on this extension. She submits she is an office holder and that the failure to extend protection to her is a violation of her rights under Article 14, read with Article 10. The Respondent resists this submission.
61. Article 14 provides that "*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.*"
62. Article 10 provides the right of freedom of expression and comprises the right in certain circumstances for a worker to make a whistleblowing complaint.

63. In cases involving the protection of Convention rights there is a strong obligation to interpret primary legislation in a way that is compatible with the Convention rights. In Davey v Health Education England and others 2017 EWCA civ 2329, the Court of Appeal, in a slightly different context, said this:
- “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 whistle-blowers 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 such protection while remaining true to the language of the statute”.*
64. As I understand Gilham, in order for the courts to be able to apply a purposive interpretation to the words of the statute there must be a breach not simply of Article 10 but also of Article 14.
65. Although the ratio of the case was simply that judges were to be included within the definition of a worker, the case stresses the importance of applying a purposive interpretation to the whistleblowing provisions in view of the importance of the Article 10 rights and “opens the gates” for other officeholders to claim the protection of section 43B
66. In Gilham the Supreme Court said that to establish a breach of Article 14 the court should answer four well known questions:
- (1) do the facts fall within the ambit of one of the Convention rights?
 - (2) has the Claimant been treated less favourably than others in an analogous situation?
 - (3) is the reason for that less favourable treatment one of the listed grounds or “some other status”? and
 - (4) is that difference without reasonable justification – put the other way round is it a proportionate means of achieving a legitimate aim?
67. The Supreme Court held that judges could answer all those questions in the affirmative.
68. The Respondent accepts that, as the Claimant is claiming protection as a whistle-blower, the facts fall within the ambit of Article 10, and that the first question can be answered in the affirmative. However Mr Reade submits that the answers to questions two and three in the case of this Claimant must be negative.
69. The second question set out above requires a claim that the Claimant has been treated less favourably than others “in an analogous situation”. The analogous situation requires a comparison with “others in the workplace -employees and limb (b) workers who wish to make responsible public interest disclosures”. (see Gilham paragraph 30). Mr Reade submits that the Claimant’s case falls down

because she cannot say that she has been treated less favourably than others in an analogous situation. A Judge is clearly in an analogous situation to others in the workplace, because judges have all the characteristics of a worker in the manner in which they are appointed, the way in which they work, and the way in which they are remunerated.

70. However, he submits that a Trustee cannot be in an analogous situation. A Trustee is an honorary position and unpaid. The Claimant was not appointed, but elected, and her duties arose from the general law on charitable trusts and the constitution of the charity itself.
71. The Claimant's case is that her case is analogous with judges and other workers. She had obligations as a Trustees and was "required to attend" Board meetings and other events. Although she accepted that some Presidents delegated more than others, she says she was not free to turn down the appointments that were made for her. She says that she worked hard in her capacity as a trustee (and more so in her capacity as President) and that the reality of the situation was that she was paid (see above) and had extensive duties which she was obliged to fulfil.
72. As to the third condition Mr Reade submits that being a charity Trustee does not fall within the definition of "an occupational classification" (as a judge does) and the Claimant cannot rely on that to satisfy the "other status" test. He further submits that being a Trustee cannot be of itself a status. He submits that being a Trustee is simply a legal obligation.
73. Finally, he submits that the wording of the extended definition proposed by way of remedy for Ms Gilham would not cover a trustee. He submits that:
 - (1) The Claimant was not appointed to her office. Rather she was elected; and
 - (2) She did not undertake to perform personally any work or service as her functions, duties and obligations did not derive from any undertaking but from the charter and By-laws of the Respondent and the general obligations of charity Trustees.

Conclusions on the Gilham extension

74. Before a court or a tribunal can apply a purposive interpretation to the words of the section a breach of Article 14 must be established using the 4 questions referred to by Baroness Hale in Gilham.
75. It is not disputed that the answer to the first question is yes. However, after much deliberation, I agree with Mr Reade's submission that the Claimant does not satisfy the second question posed by Baroness Hale. Her situation is not analogous to that of "others in the workplace – employees and limb (b) workers who wish to make responsible public interest disclosures".

76. In considering this question I do not find that the Claimant's situation cannot be analogous to others in the workplace simply because she had not entered into an undertaking with the Respondent, or because her duties arose from the charter and the By-laws; that is simply to repeat the contract argument, albeit expressed in another way. Nor do I consider the fact that she was elected is a necessary bar to being in an analogous position in the workplace, (though both those matters are relevant.) There cannot be one single test of whether or not an individual is in a position analogous to others in the workplace, because there are so many different types of position.
77. In looking at the situation of the Claimant in the round I find it particularly significant that the office of Trustee is an honorary one. Trustees of the Respondent are all volunteers, specifically prohibited by the terms of office from accepting remuneration. The Claimant undertook the tasks that she did, not for remuneration, but because she believed in what the society did and wanted to use her considerable experience for the good of fellow engineers and the profession and no doubt also for the honour and status. In X v Mid Sussex Citizens Advice Bureau 2013 ICR 249 the Supreme Court found that the exclusion of volunteers from the discrimination provisions of the Equality Act did not breach the Framework Directive, and that the concept of worker was restricted to persons who were remunerated for what they did. In that case the lack of payment was a critical distinction in defining the concept of worker.
78. It is also relevant (but as I say not determinative) that the Claimant was elected to her position and was not appointed by an appointments commission, or the Board of Trustees. She was elected in accordance with the mechanisms which I have outlined above. While in common parlance appointment and election can be interchangeable, it is instructive that the Equality Act specifically excludes from its definition of officeholders those who have been elected to an office or post.
79. The position of a trustee of a professional membership association is very different to the position of a judge who works during defined times and periods, for remuneration (a salary plus pension) and who is not entitled to delegate their obligations to others. As the Supreme Court commented in O'Brien v Ministry of Justice 2013 "judicial office partakes of most of the characteristics of employment". The working life of a judge is, in all respects but for the absence of a contract, the same as that of a worker. By contrast a trustee has limited obligations, is appointed specifically on an honorary and volunteer basis and undertakes the role as an adjunct to, rather than as a core part, of their professional life.
80. As to the third question I accept that the Claimant cannot rely on the status of an "occupational classification", in the way that Judges can. Can the Claimant rely on her office as Trustee as being "some other status"? The concept of other status is fluid. It is generally accepted as referring to a personal characteristic, but that personal characteristic does not have to be innate, inherent or exist independently from the complaint. On that basis I do not accept Mr Reade's submission that the office of Trustee cannot qualify as some "other status" in the same way that an "occupational classification" can, though I concede that

there will be room for many different opinions on this point. I would therefore answer question 3 in the affirmative i.e. that as a trustee she has “some other status”.

81. Nonetheless, as I have found that the Claimant is not in an analogous situation to others in the workplace, I find that the exclusion of trustees from the definition of a worker for the purposes of section 43 of the ERA is not in breach of Article 10 when read with Article 14. As such the obligation to read additional words into the statute does not apply.
82. I have struggled with this conclusion because the proposed reformulation of the limb b test proposed by Baroness Hale is broad. Mr Reade submits that the Claimant would not in any event satisfy that definition because (a) she was appointed and not elected, and (b) as a trustee she did not undertake perform work or services personally for the Respondent, as her duties did not derive from any personal undertaking.
83. I do not agree. The proposed formulation, read on its own, would appear to encompass all officeholders whatever their characteristics. First, I do not accept that the word “appointment” necessarily excludes those who have been elected, as submitted by Mr Reade. While it may be that, generally, those elected are chosen “from below”, and those appointed are chosen “from above”, in ordinary speech individuals will refer to being appointed, even if they have been chosen by election. I note that in the Equality Act it was thought necessary to clarify the meaning of appointment in order to exclude election to it. The Cambridge dictionary defines the word appointment as “the act of officially choosing someone for a job, or the job itself” which does not appear to preclude those chosen by election.
84. Secondly Trustees do have to perform their duties personally. Their duties may be limited, and they may delegate but their responsibilities and legal obligations are personal to them. They are charged with running the affairs of the charity and to that extent their duties are similar to that of a non-executive director, save that they are unpaid.
85. However I do not read the judgment of Baroness Hale in Gilham as requiring that formulation to be used in respect of all officeholders, but only those who can establish a breach of their Article 14 rights and for that reason I have concluded that the Claimant cannot claim the extended protection in Gilham.
86. This analysis has been finely balanced. The law in this respect is unclear and the limits of the broader definition used in Gilham as yet undefined. However, I have concluded that the exclusion of trustees of professional associations of the kind such as the Respondent from the whistleblowing protection of the ERA does not breach Article 14 of the ECHR and that the Employment Tribunal has no jurisdiction to hear the Claimant’s case.
87. I would like to pay tribute to Ms Gilham, who as a litigant in person has worked hard to present coherent arguments in this very difficult area of the law. I am aware of how disappointed she will be to read this Judgment but the

Employment Rights Act is concerned with workers; and in my view trustees are not analogous to those in the workplace; but volunteers who give their time freely for interest, prestige, and/or the desire to give back.

Employment Judge Spencer

28th September 2020

JUDGMENT SENT TO THE PARTIES ON

28/09/2020

FOR THE TRIBUNAL OFFICE