Neutral Citation Number: [2024] EAT 166

Case No: EA-2023-000622-NU

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 October 2024

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

DR NIGEL MACLENNAN

Appellant

- and –

THE BRITISH PSYCHOLOGICAL SOCIETY

Respondent

(1) PROTECT
(2) CHARITY COMMISSION

Interveners

- -
- -

CHRISTOPHER MILSOM and EMMA DARLOW STEARN
(instructed by Morrison Foerster (UK) LLP) for the **Appellant**
PAUL GILROY KC and TIM SHEPPARD
(instructed by Clyde and Co LLP) for the **Respondent**
JEREMY LEWIS KC and MUKHTIAR SINGH
(instructed by Keystone Law) for the **1st Intervener**
NAOMI LING and COURTNEY STEP-MARSDEN
(instructed by the Charity Commission for England and Wales) for the **2nd Intervener**

Hearing dates: 24 & 25 July 2024

- -

JUDGMENT

SUMMARY

WHISTLEBLOWING

1. The claimant was a charity trustee elected to the role of President-Elect of the respondent. He contended that he was, or should be treated as, a worker, so as to be protected against being subject to detriment done on the grounds of making protected disclosures.
2. On an overall assessment of the facts, the Employment Tribunal was entitled to conclude that there was no intention to enter into a contractual relationship.
3. The claimant also relied on Article 10 read with Article 14 ECHR. The Employment Tribunal correctly asked the questions (1) whether the facts fell within the ambit of one of the Convention rights; (2) whether the claimant had been treated less favourably than others in an analogous situation; (3) whether the reason for that less favourable treatment was because of some "other status" and (4) whether the difference of treatment was without reasonable justification. The parties agreed that the answer to question 1 was in the affirmative. The Employment Tribunal answered questions 2 and 3 in the negative and did not go on to consider question 4. The Employment Tribunal did not adequately consider the relevant circumstances and conduct the broad-brush assessment necessary to decide whether there was an "analogous situation" between the claimant and employees or limb B workers; or whether being a charity trustee, President-Elect and/or President is an "other status". The Employment Tribunal also failed to consider the possibility of focusing on the issue of justification.
4. A worker is protected from being subject to a detriment by his current employer for making a protected disclosure to that employer prior to the commencement of the employment.

HIS HONOUR JUDGE JAMES TAYLER

The issue in this appeal

1. This appeal raises the question of whether a charity trustee elected to the role of President-Elect of a charitable institution is, or should be treated as, a worker, so as to be protected against being subjected to detriment done on the grounds of making protected disclosures.

The decision appealed

2. The appeal is brought against the Judgment of Employment Judge M Butler, sent to the parties on 26 April 2023, after a Preliminary Hearing held on 27-28 February and 1 March, and in chambers on 2 and 3 March 2023.

3. Employment Judge Butler held that the claimant was not at any time a worker of the respondent, as a result of which the Employment Tribunal had no jurisdiction to hear his complaints of detriment done on the grounds of making protected disclosures.

The key facts

4. The respondent is a registered charity incorporated by Royal Charter, responsible for the development, promotion and application of psychology for the public good. It is the representative body for psychologists in the UK. The respondent has approximately 60,000 members. It receives about £11.6 million annually in membership fees.

5. The governing documents of the respondent are the Royal Charter, Statute and Rules. The respondent is also subject to legal provisions applicable to all charities. Paragraph 11 of the Royal Charter provides for a Board of Trustees with at least 12 members. The members of the Board of Trustees include the President, Honorary Treasurer, Honorary General Secretary, President-Elect and Vice President. The Board of Trustees is responsible for the management and control of the respondent's affairs and the administration of all property and income.

6. The Presidential Team is made up of the President-Elect, President and Vice President. Each year an election is held for the role of President-Elect. Generally, the President-Elect automatically becomes President after a year as President-Elect, serves a term of one year as President, followed by

a year as Vice President. This pattern has not been followed in exceptional circumstances. The Employment Tribunal held that a member had become President, without previously having been President-Elect, because the President-Elect had died.

7. The President's Role Description sets out the responsibilities of the role:

> 1. To champion and act as an ambassador for the discipline and profession as well as serve as a figurehead for, and offer leadership to, the membership.
>
> 2. Chair the Board of Trustees of the Society and to act on behalf of the Board in day to day relations with the CEO and SMT.
>
> 3. Work with the Board of Trustees to ensure effective governance of the BPS, ensure the Society is run in the interests of the membership and that the organization's activities and achievements are in line with the BPS strategic goals and values.
>
> Tasks include:
>
> 1. To build and maintain positive working relationships with fellow Trustees, members of the Senate, Chief Executive Officer and Senior Management Team.
>
> 2. To be a visible figurehead, establishing two-way communications with the Membership, across the four nations and attending major Member Network events as an ambassador for the wider Society.
>
> 3. To provide guidance, advice and support to the CEO and SMT.
>
> 4. To chair Board Meetings, the AGM and any other General Meetings that may be required, ensuring that Trustee roles are clear, that the Board is adequately supported and functioning to provide effective Governance for the Society.
>
> 5. To support and coordinate the Board of Trustees in regularly reviewing the operational management of the BPS and as necessary, supporting the Trustee Board to update and develop the BPS strategic plan.
>
> 6. To ensure effective co-working through setting objectives for, conducting appraisal of and holding to account the Chief Executive Officer by agreement with the full presidential team.
>
> 7. To represent the discipline and profession on ceremonial occasions, in particular related to Society awards, by arrangement with the Executive Office. This includes delivering a Presidential Address at the Annual Conference.
>
> 8. To prepare and, in conjunction with the CEO, report against a Presidential Plan, Theme or Initiative that the President may or may not want to take up. This Presidential Plan is a working document and subject to amendment as required throughout the Presidential year.

8. The Role Description states that:

> It is anticipated that the Presidential role will take up to 30-35 days per annum.

9. The respective roles of the Presidential team are set out in a Schedule of Responsibilities:

> The President is a figurehead for the Society. The Presidential role has three main functions: representation of the Society, and, subject to the planned changes referred to below, chairing the Board of Trustees and chairing the Annual General Meeting.
>
> The post is held for one year following the Society's AGM. The Presidential year is the middle year of three successive years in the Presidential Team. The President is supported by the President- Elect, Vice-President and the other Officers and will consult regularly with them and other trustees and the Chief Executive and Senior Management Team of the Society, to support continuity and effective delivery of the Society's strategic goals.
>
> The President is a trustee of the Society and as such has collective responsibility for governance of the Society. All trustees have equal standing.
>
> Each President spends a year as President-Elect during which time they shadow as agreed and appropriate the actions of the President to enable a smooth transition to the responsibilities they will assume in the following year. Following the Presidential year, a further year is spent in the role of Vice-President. Election to the Presidency therefore entails a commitment of three successive years.

10. The Employment Tribunal described the role and time commitment of the President-Elect:

> 22. The schedule of responsibilities for the President-Elect role (page 460) provides the primary role being to become fully prepared to assume the full responsibility of the Presidency in the following society year and states that a specific role is "deputising for the President if required". It goes on to detail the time commitment in attending, inter alia, the AGM and 6 meetings of the Board together with event attendance which together are estimated to require a minimum of 16 days per year with a further 4 days allocated for "preparation and correspondence".

11. The Employment Tribunal explained the possibility of a payment for loss of earnings to the President:

> 20. Pursuant to the Royal Charter, the President "may receive payment out of the property of the society to compensate them for the sum or sums or money lost from employment or deducted from their earnings by their employers in respect of time spent on the conduct of the business of the society" ... From 1 March 2021, this was subject to a maximum daily rate of £519.00 and paid on the understanding that, of the 35 days estimated to be required to fulfil their duties, 10 days would receive no such compensation ... Any such payments made to the President are subject to evidence of loss and must be authorised. I accept Mr Mears' evidence that not all Presidents claimed compensation for loss of earnings and, in the 6 years up to the end of the 2021 Presidential year, only 2 Presidents

did so …

12. The Employment Tribunal set out a statement about compensation for loss of earnings in the Schedule of Responsibilities:

> Based on Charity Commission Regulations, trustee positions are appointed on a pro bono basis. Article 13 of the Society's Royal Charter allows for the possibility of limited compensation to individuals for a demonstrable loss of earnings in the case of the President and Honorary General Secretary. The Charity Commission has indicated that this is an extraordinary provision for a charity and must be interpreted narrowly and restrictively in specific circumstances. Accordingly, no guarantee can be given in advance that compensation would be applicable at all nor any indication of an amount. Appointees to Presidential positions should fully understand the primary expectation that the roles will operate on a pro bono basis. Any variation, if considered, would apply only to the terms served as President and not to the terms served either as President-Elect of Vice-President.

13. The Board of Trustees delegates various operational functions to a Senior Management Team, comprising the Chief Executive and six other employees.

14. The claimant is a psychologist. He became a member of the respondent in 1984, when he was a student. He became a Fellow of the respondent, was elected Chair of the London and Home Counties branch, and became a member of the respondent's Senate, in 2019.

15. The claimant has concerns about the manner in which the respondent is run. In 2020, the claimant campaigned to be elected as President-Elect with the aim of addressing these concerns. The claimant was told that he had been elected on 4 May 2020, but that his election would remain confidential until it was ratified at the AGM on 30 June 2020.

16. The claimant contended that he made 4 protected disclosures between 3 June 2020 and 19 June 2020.

17. The claimant took up the role of President-Elect on 30 June 2020.

18. The claimant contended that he made a further 9 protected disclosures between 1 July 2020 and 17 December 2020.

19. At a meeting of the Board on 19 March 2021, the claimant confirmed he would not be seeking any compensation as President and would want any money to go to the Presidential Development Fund.

20. Relations between the claimant and the SMT became strained, which resulted in a grievance against the claimant. An investigation was conducted by a barrister. On 4 May 2021, the claimant was expelled from membership of the respondent which terminated his role as a Trustee and President-Elect.

21. The Employment Tribunal stated:

> It is not within the scope of this judgment to determine whether the Claimant's expulsion from the Respondent's membership was fair.

22. Similarly, at the Preliminary Hearing, the Employment Tribunal did not determine whether the claimant had made protected disclosures and suffered detriments as a result, including his expulsion from the respondent. The Employment Tribunal limited its consideration to whether the claimant was potentially protected from suffering detriment done on the grounds that he had made protected disclosures because he was a worker.

The protection for those who make protected disclosures

23. Protection for those who make protected disclosures is provided for by the **Employment Rights Act 1996** ("**ERA**"). Section 47B **ERA** provides:

> (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**." [emphasis added]

Qualifying and protected disclosures

24. Although the question of whether the claimant had made protected disclosures was not before the Employment Tribunal, it is important to bear in mind the relevant definitions.

25. Section 43A **ERA** defines a "protected disclosure" as a "qualifying disclosure" which is made by a worker in accordance with any of sections 43C to 43H **ERA**.

26. The term "qualifying disclosure" defines the type of information that must be disclosed. So far as relevant, section 43B **ERA** provides:

> 43B Disclosures qualifying for protection.
>
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the **reasonable belief of the worker making the disclosure**, is made

> in the public interest and tends to show one or more of the following—
>
> > (a) that a criminal offence has been committed, is being committed or is likely to be committed,
> >
> > (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, …

27. Sections 43C to 43H **ERA** set out the persons to whom the "qualifying disclosure" must be made to become a "protected disclosure". Section 43C **ERA** provides:

> 43C Disclosure to employer or other responsible person.
>
> (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure
>
> > (a) **to his employer**, or
> >
> > (b) where the worker reasonably believes that the relevant failure relates solely or mainly to—
> >
> > > (i) the conduct of a person other than his employer, or
> > >
> > > (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
>
> (2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

28. Pursuant to section 43F **ERA**, a qualifying disclosure is protected if it is made to a "prescribed person". The Charity Commission is a prescribed person.

Is a worker protected in respect of a disclosure made prior to becoming a worker?

A relatively minor aspect of this appeal concerns the question of whether a worker is protected against being subject to detriment by a current employer when a disclosure was made to that person prior to the complainant becoming a worker for that person.

29. It is convenient to consider this question now because we have just considered the relevant definitions. Section 47B **ERA** provides protection to a worker against being subjected to any detriment done on the ground that the worker has made a protected disclosure. The protection is provided to a worker who "has made" a protected disclosure, Section 47B **ERA** does not expressly require that the

person was a worker (which includes a person who previously worked under a relevant contract: s 230 **ERA**) when the disclosure was made. However, section 43C(1)(a) **ERA** refers to a disclosure to "his employer" which might suggest that, in the case of a disclosure to an employer, it must have been made while the person is a worker for the employer.

30. The Courts have adopted a purposive approach to the provisions. The protection applies where the detriment occurred after employment ended: **Woodward v Abbey National plc** [2006] EWCA Civ 822, [2006] ICR 1436. Ward LJ held:

> 68. If one seeks for the underlying purpose of section 47B one has to start with the Act which introduced the measure. The public interest, which led to the demand for this Act to protect individuals who make certain disclosures of information in the public interest and to give them an action in respect of that victimisation, would surely be sold short by allowing the former employer to victimise his former employee with impunity. It simply makes no sense at all to protect the current employee but not the former employee, especially since the frequent response of the embittered exposed employer may well be dismissal and a determination to make life impossible for the nasty little sneak for as long thereafter as he can. If it is in the public interest to blow the whistle, and the Act shows that it is, then he who blows the whistle should be protected when he becomes victimised for doing so, whenever the retribution is exacted.

31. A worker is also protected from being subject to a detriment done by his current employer because of a protected disclosure made to a former employer: **BP plc v Elstone** [2010] ICR 879.

32. A worker is protected from being subjected to a detriment by a former employer where both the disclosure and detriment occurred after the end of the contract: **Onyango v Berkeley (t/a Berkeley Solicitors)** [2013] IRLR 338. HHJ Peter Clark held that:

> 7. … Since the detriment must occur and be causatively linked to the protected disclosure, it follows that it must come later in time and since the detriment may arise post termination we can see no warrant for limiting the disclosure temporally to the duration of the employment. ...
>
> 8. It follows in our judgment that as a matter of pure construction of the statute post-termination disclosures may be relied on if they lead to detrimental treatment; issues yet to be determined in this case. We think that is also in line with the legislative purpose of protection for whistleblowers and is entirely consistent with the recent authority to which we have referred

33. Adopting the purposive approach supported by these authorities, I consider that a worker is

protected from being subjected to a detriment by his current employer for making a protected disclosure to that employer prior to the commencement of the employment. I can see no reason to interpret the provisions to create a lacuna that would exclude such a worker. The position is different to that of a job applicant who never becomes an employee.

Workers with a contract

34. The term worker is defined by section 230 **ERA**. The term includes employees. It was not suggested that the claimant was an employee of the respondent. So far as is relevant to this appeal, section 230 **ERA** provides:

> (3) In this Act "worker" …means an individual who has **entered into** or **works** under (or, where the employment has ceased, worked under)
> …
>
> > (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.
>
> (4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.
>
> (5) In this Act "employment"—
>
> > (a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
> >
> > (b) in relation to a worker, means employment under his contract; and "employed" shall be construed accordingly. [emphasis added]

35. Section 43K **ERA** extends the definition of worker for the purposes of the protected disclosure provisions to include a wide range of people such as contract workers. Special provision is made in respect of the NHS and Police. These provisions did not apply to the claimant.

36. On a simple reading of section 230 **ERA**, the following questions are posed, so far as is relevant to this appeal:

36.1. had the claimant entered into, or did he work under, a contract, whether express or

implied; and, if express, whether oral or in writing

36.2. if so, did the claimant undertake to do or perform personally any work or services for the respondent as another party to the contract

37. There was no suggestion that the claimant carried out a profession or business undertaking of which the respondent was a client or customer, so we need not consider that element of the definition further.

38. The questions set by the statute are the starting point. In **Bates van Winkelhof v Clyde & Co LLP** [2014] UKSC 32, [2014] ICR 730, Baroness Hale DPSC held, at para 39:

> I agree with Maurice Kay LJ that there is not 'a single key to unlock the words of the statute in every case'. There can be no substitute for applying the words of the statute to the facts of the individual case. There will be cases where that is not easy to do.

39. In most appellate decisions the key issue has not been that of whether there is a contract, but whether the contract is one pursuant to which the individual is a worker. It is in that context that Baroness Hale stated in **Bates van Winkelhof** at para 31:

> As already seen, employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self-employed but do not fall within the second class.

40. Where there is a contract, the question of whether the individual is a worker is to be determined primarily as a matter of statutory construction. In **Uber BV and others v Aslam and others** [2021] UKSC 5, [2021] I.C.R. 657 Lord Leggatt held:

> Interpreting the statutory provisions
>
> 68. The judgment of this court in the *Autoclenz* case [2011] ICR 1157 made it clear that whether a contract is a "worker's contract" within the meaning of the legislation designed to protect employees and other "workers" is not to be determined by applying ordinary principles of contract law such as the parol evidence rule, the signature rule and the principles that govern the rectification of contractual documents on grounds of mistake. Not only was this expressly stated by Lord Clarke JSC but, had ordinary principles of contract law been applied, there would have been no warrant in the *Autoclenz* case for disregarding terms of the written documents which were inconsistent with an employment relationship, as the court held that the employment tribunal had been entitled to

do. What was not, however, fully spelt out in the judgment was the theoretical justification for this approach. It was emphasised that in an employment context the parties are frequently of very unequal bargaining power. But the same may also be true in other contexts and inequality of bargaining power is not generally treated as a reason for disapplying or disregarding ordinary principles of contract law, except in so far as Parliament has made the relative bargaining power of the parties a relevant factor under legislation such as the Unfair Contract Terms Act 1977.

69. Critical to understanding the *Autoclenz* case, as I see it, is that the rights asserted by the claimants were not contractual rights but were created by legislation. Thus, the task for the tribunals and the courts was not, unless the legislation required it, to identify whether, under the terms of their contracts, *Autoclenz* had agreed that the claimants should be paid at least the national minimum wage or receive paid annual leave. It was to determine whether the claimants fell within the definition of a "worker" in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short, the primary question was one of statutory interpretation, not contractual interpretation.

70. The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language, so far as possible, in the way which best gives effect to that purpose. …

The purpose of protecting workers

71. The general purpose of the employment legislation invoked by the claimants in the *Autoclenz* case [2011] ICR 1157 , and by the claimants in the present case, is not in doubt. It is to protect vulnerable workers from being paid too little for the work they do, required to work excessive hours or subjected to other forms of unfair treatment (such as being victimised for whistleblowing). The paradigm case of a worker whom the legislation is designed to protect is an employee, defined as an individual who works under a contract of employment. In addition, however, the statutory definition of a "worker" includes in limb (b) a further category of individuals who are not employees. The purpose of including such individuals within the scope of the legislation was clearly elucidated by Mr Recorder Underhill QC giving the judgment of the Employment Appeal Tribunal in *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667, para 17 (4):

> "the policy behind the inclusion of limb (b) … can only have been to extend the benefits of protection to workers who are in the same need of that type of protection as employees stricto sensu—workers, that is, who are viewed as liable, whatever their formal employment status, to be required to work excessive hours (or, in the cases of Part II of the Employment Rights Act 1996 or the National Minimum Wage Act 1998, to suffer unlawful deductions from their earnings or to be paid too little). The reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-à-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other,

> contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects."

41. The claimant contends that the **Uber** approach of statutory construction also applies to the question of whether there is a contract in existence. In **Uber** there was no issue as to whether there was a contract between the drivers and Uber; the issue was whether the contract gave rise to worker status. I am not persuaded that the question of whether there is a contract between the parties is to be answered purely as a matter of statutory construction. It remains necessary to ask whether there was an intention to enter into a contractual relationship as opposed to some other legal relationship, or no legal relationship. However, as we shall see, there are certain circumstances in which an individual may be a worker in the absence of a contract.

Contracts with office holders

42. The starting point in this appeal is the question of whether there was a contract between the claimant and the respondent. That question was considered in the context of an office holder in **Gilham v Ministry of Justice** [2019] UKSC 44, [2019] 1 WLR 5905. The claimant was a district judge who contended that she had been subject to protected disclosure detriment. Baroness Hale considered the position of office holders:

> 12. It is not in dispute that a judge undertakes personally to perform work or services and that the recipient of that work or services is not a client or customer of the judge. **The issue is whether that work or services is performed pursuant to a contract with the recipient of that work or services or pursuant to some different legal arrangement.** Nor is it in dispute that judges hold a statutory office. **In broad terms, an office has been defined (by Lord Atkin in *McMillan v Guest* [1942] AC 561, 564) as a "subsisting, permanent, substantive position which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders".** Office-holders do not necessarily hold office pursuant to any kind of contract. As Lord Hoffmann explained in *Percy v Board of National Mission of the Church of Scotland* [2006] 2 AC 28, para 54:
>
> > "**The distinction in law between an employee, who enters into a contract with an employer, and an office-holder, who has no employer but holds his position subject to rules dealing with such matters as his duties, the term of his office, the circumstances in which he may be removed and his entitlement to remuneration, is well established and understood.** One of the oldest offices known to the law is that of constable. It is notorious that a constable has no employer. It required special provision in [section 17 of the Sex Discrimination Act 1975] to bring the

> office of constable within the terms of the Act and to deem the chief constable to be his employer. But there are many other examples of offices; public, ecclesiastical and private."

> 13. **However, it is also well established that an office-holder may hold that office under a contract with the person or body for whom he undertakes to perform work or services.** The obvious example is a director of a company, who may hold that office concurrently with a service contract. *Percy* itself was another example. Ms Percy was an ordained minister of the Church of Scotland who was appointed associate minister to a particular parish. This was undoubtedly an ecclesiastical office, but the House of Lords held, by a majority, that she also had a contract personally to execute work, thus enabling her to bring a claim for sex discrimination against the Board of Mission which had appointed her. [emphasis added]

43. Baroness Hale considered the test to be applied to determine whether an office holder has a contract with the person or body for whom he undertakes to perform work or services:

> 16. It is clear, therefore, what **the question is: 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? **In answering this question, it is necessary to look at** the **manner in which the judge was engaged**, the **source and character of the rules governing her service**, and the **overall context**, but this is not an exhaustive list.

44. **Gilham** is authority for the proposition that, in deciding whether an office holder has a contract, the fundamental question is - did the parties intend to enter into a contractual relationship, which involves consideration of:

44.1. the manner in which the office holder was engaged

44.2. the source and character of the rules governing the service the respondent provides

44.3. the overall context

44.4. any other relevant factors

45. In **Gilham** the conclusion was that the district judge had not entered into a contract:

> 17. In looking at the manner in which the judge was engaged, **it could be said that there was classic offer and acceptance**: there was a letter offering appointment, upon the terms and conditions set out in the letter and accompanying memorandum, which the claimant was invited to accept and did accept. **However, the manner of appointment is laid down in statute**: under section 6 of the County Courts Act 1984 , district judges are now appointed by Her Majesty on the recommendation of the Lord Chancellor; but under the Constitutional Reform Act 2005 , **the whole process of selection is in the hands of the Judicial Appointments Commission, applying the criteria laid down in that Act**. Furthermore, there was **nothing in the letter offering appointment**

or in the accompanying memorandum which was expressed in contractual terms: indeed, some provisions were expressed in terms of what the Lord Chancellor expected or regarded as essential rather than as contractually binding obligations.

18. In looking at the content of the relationship, it could be said that the terms and conditions contained some provisions, for example, those relating to maternity and paternity and adoption leave, which are not derived from statute. It could also be said that deployment decisions, as in any other employment, may be the subject of some negotiation between the individual judge and the leadership judges in her area; but ultimately **the Lord Chief Justice is responsible for the deployment of judges. The essential components of the relationship are derived from statute and are not a matter of choice or negotiation between the parties**. Under section 6(5) of the 1984 Act, a district judge is to be **paid such salary as the Lord Chancellor may determine with the concurrence of the Treasury, but this cannot later be reduced; nor, of course, can it be increased by individual negotiation**, as opposed to later determination of what the remuneration for that office is to be. **Judicial pensions are also governed by statute and are not a matter of individual negotiation**. Under section 11 of the 1984 Act, district judges must leave office on reaching the age of 70 (with the possibility of extension thereafter); otherwise they hold office during good behaviour and may only be removed for misbehaviour or inability to perform the duties of the office by the Lord Chancellor with the concurrence of the Lord Chief Justice; disciplinary proceedings against them are governed by the Judicial Discipline (Prescribed Procedures) Regulations 2014 (SI 2014/1919).

19. It is also noteworthy that **the claimant had difficulty in identifying her employer**. These proceedings were brought against the Ministry of Justice. However, the claimant was in fact appointed by the then Lord Chancellor, while later district judges are appointed by Her Majesty the Queen. Responsibility for the judiciary is in fact divided between the Lord Chancellor, as a Minister of the Crown, and the Lord Chief Justice, as Head of the Judiciary. Many of the matters of which the claimant complained related to deployment and workload and **many of her complaints were directed towards the local leadership judges**, although some were directed to senior officials in Her Majesty's Courts and Tribunals Service. **This fragmentation of responsibility has both statutory and constitutional foundations and highlights how different is the position of a judge from that of a worker employed under a contract with a particular employer**.

20. Finally, and related to that, there is the **constitutional context**. Fundamental to the constitution of the United Kingdom is the separation of powers: the judiciary is a branch of government separate from and independent of both Parliament and the executive. While by itself this would not preclude the formation of a contract between a Minister of the Crown and a member of the judiciary, it is a factor which tells against the contention that either of them intended to enter into a contractual relationship.

21. Taken together, all of these factors point against the existence of a contractual relationship between a judge and the executive or any member of it. Still less do they suggest a contractual relationship between the judge and the Lord Chief

Justice. [emphasis added]

Company Directors

46. Company directors can be workers: **Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld** [2009] EWCA Civ 280, [2009] ICR 1183:

> 80 There is no reason in principle why someone who is a shareholder and director of a company cannot also be an employee of the company under a contract of employment. There is also no reason in principle why someone whose shareholding in the company gives him control of it - even total control (as in *Lee's* case) - cannot be an employee.

47. Rimer LJ stated:

> 85 In deciding whether a valid contract of employment was in existence, consideration will have to be given to the requisite conditions for the creation of such a contract and the court or tribunal will want to be satisfied that the contract meets them. In *Lee's* case the position was ostensibly clear on the documents, with the only contentious issue being in relation to the control condition of a contract of employment. In some cases there will be a formal service agreement. Failing that, there may be a minute of a board meeting or a memorandum dealing with the matter. But in many cases involving small companies, with their control being in the hands of perhaps just one or two director/shareholders, the handling of such matters may have been dealt with informally and it may be a difficult question as to whether or not the correct inference from the facts is that the putative employee was, as claimed, truly an employee. In particular, a director of a company is the holder of an office and will not, merely by virtue of such office, be an employee: the putative employee will have to prove more than his appointment as a director. It will be relevant to consider how he has been paid. **Has he been paid a salary, which points towards employment? Or merely by way of director's fees, which points away from it? In considering what the putative employee was actually doing, it will also be relevant to consider whether he was acting merely in his capacity as a director of the company; or whether he was acting as an employee.** [emphasis added]

Contracts with those asserted to be volunteers

48. In **Catt v English Table Tennis Association Ltd and others** [2022] EAT 125, [2022] IRLR 1022, Eady J considered an Employment Tribunal judgment rejecting the contention that the non-executive director of the governing body of table tennis in England, who had been elected and appointed to its board and had the title of "elected deputy chairman", was a worker for the purposes of the whistleblowing provisions. Eady J considered the question that arose:

> It was common ground that, as a non-executive director of the first respondent, the claimant held an office whereby he personally undertook his duties for the

> organisation on a direct basis (the first respondent was not his client or customer). Unlike the position of a judicial office holder, it was not suggested that a non-executive director could not be a limb (b) worker for the purposes of s 230(3) ERA; **it was, however, in dispute as to whether there was a relevant contract between the parties in this particular case**. Given the scope of the disagreement between the parties, therefore, as Lewis LJ observed in *Somerville*, **the first issue the ET needed to resolve was whether there was a contract between the claimant and the first respondent at all; that is, whether they had entered into an agreement containing legally enforceable obligations such as to '*constitute the consideration from each party necessary to create the contract*'; per Elias LJ in *Quashie*.** [emphasis added]

49. Eady J considered the correct approach to be adopted:

> … **the question for the ET was more akin to that identified in *Gilham*** at para [16] (drawing upon the guidance provided in other cases concerned with office-holders, such as *Percy and Preston (President of the Methodist Conference v Preston* [2013] UKSC 29, [2013] IRLR 646, [2013] 2 AC 163)), **that is, whether the parties intended 'to enter into a contractual relationship, defined at least in part by their agreement'**? In answering that question, **the ET would have been assisted by considering the matters identified in *Gilham* (albeit mindful that this is not an exhaustive list): the manner of the claimant's engagement, the source and character of the rules governing his service, and the overall context. [emphasis added]**

Office holders who do not have contracts

50. Even where an office holder does not have a contract, they may have the protection of the whistleblowing provisions by operation of Article 14 read with Article 10 ECHR.

51. Article 14 ECHR provides:

> The enjoyment of the rights and freedoms set forth in the European Convention on Human Rights and the Human Rights Act 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.

52. Article 10 ECHR provides:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the

> protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

53. The questions that arise in such a case were considered by Brooke LJ in **Wandsworth London Borough Council v Michalak** [2002] EWCA Civ 271, [2003] 1 WLR 617, and adopted by Baroness Hale in **Gilham**:

> (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"
>
> (4) is that difference without reasonable justification—put the other way round, is it a proportionate means of achieving a legitimate aim

54. The parties are agreed that the facts in this case clearly fell within the ambit of the Convention right of freedom of expression.

55. The Courts have adopted a broad-brush approach when considering whether situations are analogous, requiring considerably less than that they be identical: **AL (Serbia) v Secretary of State for the Home Department and Regina (Rudi) v Same** [2008] UKHL 42, [2008] 1 WLR. 1434. Baroness Hale stated:

> 25. Nevertheless, as the very helpful analysis of the Strasbourg case law on article 14, carried out on behalf of Mr AL, shows, in only a handful of cases has the court found that the persons with whom the complainant wishes to compare himself are not in a relevantly similar or analogous position (around 4.5%). This bears out the observation of Professor David Feldman, in Civil Liberties and Human Rights in England and Wales , 2nd ed (2002), p144, quoted by Lord Walker of Gestingthorpe in the Carson case, at para 65:
>
> > "The way the court approaches it is not to look for identity of position between different cases, but to ask whether the applicant and the people who are treated differently are in 'analogous' situations. This will to some extent depend on whether there is an objective and reasonable justification for the difference in treatment, which overlaps with the questions about the acceptability of the ground and the justifiability of the difference in treatment. This is why, as van Dijk and van Hoof observe … 'in most instances of the Strasbourg case law … the comparability test is glossed over, and the emphasis is (almost) completely on the justification test'."

56. The Courts have also adopted a broad-brush approach to the concept of "other status": **Regina (Stott) v Secretary of State for Justice** [2018] UKSC 59, [2020] A.C. 51. In **Gilham,** as we shall see, Baroness Hale stated that an "occupational classification" is clearly capable of being a "status".

57. The questions posed in **Michalak** overlap and need not necessarily be considered in order. In **Ghaidan v Godin-Mendoza** [2004] 2 AC 557, [2004] 2 AC 557 Baroness Hale stated:

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

58. While it may be appropriate to focus on whether any difference of treatment is objectively justified, there is no requirement to do so: **In the matter of an application by Stephen Hilland for Judicial Review (Northern Ireland)** [2024] 4 All ER 81, [2024] UKSC 4, Lord Stephens stated:

> 113. Further support for discretion as to the sequence in which the third and fourth elements are addressed is contained in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173. In Lord Nicholls' oft quoted passage, at para 3, he stated that:
>
> > "For my part, in company with all your Lordships, I prefer to keep formulation of the relevant issues in these cases as simple and non-technical as possible. Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. **There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous.** Sometimes, **where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact**."
>
> As the emphasised words make clear Lord Nicholls was not suggesting that a court must determine the question of justification before the question of analogous situation.

> 114. Further support for discretion as to the sequence in which the third and fourth elements are addressed is contained in *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223, at para 60. In that case this court first considered the issue of whether the comparator groups were analogous.
>
> 115. **The wise advice of Lord Nicholls remains advice which may be followed by a court but there is no requirement for a court to determine the question of justification before the question of analogous situation.** Accordingly, I reject the appellant's submission that it is necessary for a court to determine the question of justification before the question of analogous situation. [emphasis added]

59. In **Gilham**, Baroness Hale concluded that the effect of Article 14 read with Article 10 ECHR, applying the **Michalak** questions**,** was that the district judge did have the protection of section 47B **ERA**:

> 29. The answer to question (i) is clearly "yes". Indeed, not only do the facts fall within the ambit of the right to freedom of expression protected by article 10; unusually there may well have been a breach of that article in this case; but that is not required.
>
> 30. The answer to question (ii) is also clearly "yes". **The claimant, and others like her, have been denied the protection which is available to other employees and workers who make responsible public interest disclosures within the requirements of Part IVA of the 1996 Act**. She is denied protection from "any detriment", which is much wider than protection from dismissal or other disciplinary sanctions. She is denied the possibility of bringing proceedings before the employment tribunal, with all the advantages those have for claimants. She is denied the right to seek compensation for injury to feelings as well as injury to her health. This is undoubtedly less favourable treatment than that afforded to others in the workplace—employees and "limb (b)" workers—who wish to make responsible public interest disclosures.
>
> 31. **It is no answer to this to say that, by definition, judicial office-holders are not in an analogous situation to employees and "limb (b)" workers. That is to confuse the difference in treatment with the ground or reason for it.** What matters is that the judicial office-holder has been treated less favourably than others in relation to the exercise or enjoyment of the Convention right in question, the right to freedom of expression. She is not as well protected in the exercise of that right as are others who wish to exercise it.
>
> 32. The answer to question (iii) is also clearly "yes". **An occupational classification is clearly capable of being a "status" within the meaning of article 14. Indeed, it is the very classification of the judge as a non-contractual office-holder that takes her out of the whistle-blowing protection which is enjoyed by employees** and those who have contracted personally to execute work under limb (b) of section 230(3). The constitutional position of a judge reinforces the view that this is indeed a recognisable status.
>
> 33. The answer to question (iv) is also, in my view, clearly "yes". The respondent

argues that this is a case in which the courts should allow a broad margin of discretion to the choices made by Parliament, for two main reasons: first because this is an area of social policy in which the courts should respect the decisions of the democratically elected legislature unless they are "manifestly without reasonable foundation"; and second, because the status in question is not one of the particularly suspect grounds of discrimination, such as race or sex or sexual orientation, and the less favourable treatment is correspondingly easier to justify.

34. There are several problems with this argument. The first is that, while it is well established that the courts will not hold a difference in treatment in the field of socio-economic policy unjustifiable unless it is "manifestly without reasonable foundation", the cases in which that test—or something like it—has been applied are all cases relating to the welfare benefits system: see *R (RJM) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2009] 1 AC 311 (income support disability premium); *Humphreys v Revenue and Customs Comrs* [2012] 1 WLR 1545 (child tax credit); *R (SG) v Secretary of State for Work and Pensions (Child Poverty Action Group intervening)* [2015] 1 WLR 1449 (benefit cap); *Mathieson v Secretary of State for Work and Pensions* [2015] 1 WLR 3250 (child disability living allowance); *R (MA) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)* [2016] 1 WLR 4550 ("bedroom tax"); *R (HC) v Secretary of State for Work and Pensions* (AIRE Centre intervening) [2017] 3 WLR 1486 (benefits for children of " Zambrano carers"); *R (DA) v Secretary of State for Work and Pensions (Shelter Children's Legal Services intervening)* [2019] 1 WLR 3289 (revised benefit cap). It is also in that context that the test has been articulated by the European Court of Human Rights: see *Stec v United Kingdom* (2006) 43 EHRR 47 . This case is not in that category, but rather in the category of social or employment policy, where the courts have not always adopted that test: see, for example, In *re G (Adoption: Unmarried Couple) [2009] AC 173*.

35. The courts will always, of course, recognise that sometimes difficult choices have to be made between the rights of the individual and the needs of society and that they may have to defer to the considered opinion of the elected decision-maker: see *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 381. **But the second problem is that in this case there is no evidence at all that either the executive or Parliament addressed their minds to the exclusion of the judiciary from the protection of Part IVA**. While there is evidence of consideration given to whether certain excluded groups should be included (such as police officers), there is no evidence that the position of judges has ever been considered. There is no "considered opinion" to which to defer.

36. **That leads on to the third problem, which is that no legitimate aim has been put forward for this exclusion. It has not been explained, for example, how denying the judiciary this protection could enhance judicial independence**. Of course, members of the judiciary must take care, in making any public pronouncements, to guard against being seen to descend into the political arena. But responsible public interest disclosures of the sort which are protected under Part IVA do not run that risk. **Indeed, the object of the protection was to give workers the confidence to raise malpractice within their organisation rather than placing them in a position where they feel driven to raise concerns externally. It is just as important that members of**

> **the judiciary have that confidence. They are just as vulnerable to certain types of detriment as are others in the workplace.** To give the judiciary such protection might be thought to enhance their independence by reducing the risk that they might be tempted to "go public" with their concerns, because of the fear that there was no other avenue available to them, and thus unwillingly be drawn into what might be seen as a political debate.
>
> 37. As no legitimate aim has been put forward, it is not possible to judge whether the exclusion is a proportionate means of achieving that aim, whatever the test by which proportionality has to be judged. I conclude, therefore, that the exclusion of judges from the whistle-blowing protection in Part IVA of the 1996 Act is in breach of their rights under article 14 read with article 10 of the ECHR.

60. Baroness Hale went on to consider how section 230 **ERA** might be amended:

> 43. I agree. It would not be difficult to include within limb (b) an individual who works or worked by virtue of appointment to an office whereby the office-holder 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 office-holder.

61. A decision that a charitable trustee is a worker for the purposes of section 47B **ERA** because of the operation of Article 14 with Article 10 would not mean that charity trustees are entitled to all the protections that are offered to workers. In **National Union of Professional Foster Carers v The Certification Officer** [2021] EWCA Civ 548, [2021] ICR 1397 the issue was whether foster carers were workers so that the NUPFC could be listed under section 2 of the **Trade Union and Labour Relations (Consolidation) Act 1992**. Underhill LJ noted:

> 145. As noted at para 81 above, the language of "employment relationship" in *O'Brien* [2013] ICR 499 derived from the Part-time Workers Directive, but it plainly has the same meaning as in *The Good Shepherd* case 58 EHRR 10 . If, therefore, as I would hold, foster carers are in an employment relationship for the purpose of article 11, it must follow that the term "worker" in section 296(1) can equally be read down so as to include them notwithstanding that they do not work under a contract. Importantly, Baroness Hale PSC emphasised in para 42 that "the interpretation in this case would only relate to an exclusion which is incompatible with the Convention rights—otherwise the section 3(1) power and duty does not apply". That confirms, as the appellants have contended throughout, that the effect of the reading down would not be to require foster carers to be treated as workers for the purpose of the 1992 Act generally, still less for the purpose of any other legislation in the employment field. It applies only to the extent necessary to give effect to their Convention rights.

Article 10 alone

62. Although the claimant raised the possibility of relying on Article 10 alone, that point was not raised in the grounds of appeal and the claimant did not seek to raise it in argument. Accordingly, I do not consider it was properly before me in this appeal.

The role of interveners

63. Protect and the Charity Commission have been permitted to intervene in this appeal. In considering their submissions, I have had in mind the role of an intervener as described by Lord Hoffman in **E. v Chief Constable of the RUC** [2008] UKHL 66, [2009] 1 AC 536:

> 2 ... In recent years the House has frequently been assisted by the submissions of statutory bodies and non-governmental organisations on questions of general public importance. Leave is given to such bodies to intervene and make submissions, usually in writing but sometimes orally from the bar, in the expectation that their fund of knowledge or particular point of view will enable them to provide the House with a more rounded picture than it would otherwise obtain. The House is grateful to such bodies for their help.
>
> 3 An intervention is however of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention.

64. I have focused on the submissions made by the interveners that have helped me form a more rounded picture.

The importance of whistleblowing protection

65. Protect, as it says in its submissions, is popularly known as 'the whistleblowing charity'. Protect has given evidence to many public enquiries including the Infected Blood Inquiry chaired by Sir Brian Langstaff.

66. Protect described the use of its helpline by those working in charities:

> 5. Since 2019 Protect has provided a dedicated independent helpline giving support and guidance to whistleblowers in the charity sector. The CC guidance on reporting serious wrongdoing identifies the helpline as a source of free and confidential advice about "blowing the whistle" ... As of 4 June 2024 the Protect helpline had received 2,137 calls from charity workers and volunteers since 2019. 198 of these were from trustees or former trustees. Of these 139 reported that

they had already raised their concerns when they contacted Protect, 50.5% reported being subject to detriment, bullied, forced out of their role or that they had resigned as a result of raising concerns (43 reported victimisation or bullying, 27 had resigned or been pushed out of their role).

67. Protect emphasised the obvious public importance of whistleblowing:

> 6. Experience has shown time and again the importance of those who may be the eyes and ears of the organisation (some of whom, like charity trustees, are expressly charged with managing its operations and may incur personal liability by doing so) feeling able to speak up without being subjected to detriment for doing so. The importance of whistleblowing as an instrument of good corporate governance has long been recognised.
>
> 7. A cross-European consensus as to the importance of whistleblowing protection was reflected in the EU Whistleblowing Directive (2019/1937) which (at Art 4(1)(c)) specifically covers "persons belonging to the administrative, management or supervisory body of an undertaking". Indeed this followed cross-European research by the European Commission in 2017 evidencing "a strong economic case for whistleblower protection".
>
> 8. The importance of whistleblowing in the charity sector has been acknowledged by the [Charity Commission]. Its statutory reports on whistleblowing disclosures record that such disclosures help it to detect serious problems such as fraud, safeguarding and mismanagement in charities and plays a valuable role in its regulation of the charity sector.
>
> 9. However it is also widely recognised that alongside the significant benefits of whistleblowing there is all too often a high cost for those who blow the whistle. See eg the Explanatory Memorandum to the Council of Europe's Recommendation 2014/7 which noted that:
>
> > "4. … it has been shown time and again that whistleblowers often face indifference, hostility or, worse, retaliation, whether they report a concern within an organisation or enterprise, to an appropriate public authority or make a disclosure to the public. Instead of viewing whistleblowing as a positive act of "good citizenship" albeit in the context of work, whistleblowers are branded as disloyal to their colleagues or to their employer. When this happens, the attention is primarily or solely on the whistleblower, admonishing or sanctioning the individual for "breaking ranks" rather than examining and addressing the information reported or disclosed. When the organisation itself is acting improperly or attempts to cover up the problem, the focus is typically on stopping the individual from taking the matter further.
> >
> > 5. So while those at work are often the first to know that something is wrong and, therefore, are in a privileged position to inform those who can address the problem, they are discouraged from reporting their concerns or

> suspicions to their employer or to the appropriate authorities for fear of reprisals and the perceived lack of follow-up given to such warnings. As a result, a significant opportunity to protect the public interest is missed." ...
>
> 10. This applies with full force to the charity sector, including those in charity trustee roles such as fulfilled by C. Indeed the CC commented in 2019 … that:
>
> > "We recognise that both workers and volunteers are likely to find it more difficult to raise concerns with us because to do so might end their relationship with the charity or result in recriminations. We've put in place extra processes and support so that they know that their concerns have been received and listened to. These measures are designed to improve the likelihood that whistle blowers will contact us with serious concerns. … volunteers don't have the equivalent protection in law but we think it's still important for them to feel they can raise serious concerns with us and that they will be treated with care." (emphasis added)
>
> 11. However the fact that a whistleblower may bring to light uncomfortable truths is precisely why the law needs to provide them with protection from retaliatory treatment, both due to the risk of a chilling effect in deterring them from speaking up and because of the serious injustice that those who are encouraged to speak up are then left without remedy for the adverse consequences of doing so.

68. Protect emphasises that unpaid volunteers, such as charity trustees, can suffer reputational damage, akin to workers, that could have a chilling effect on their willingness to blow the whistle - and that European provisions have stressed the importance of volunteer workers being protected and having an effective remedy. Protect contends that all charity trustees should be treated as workers for the purposes of whistleblowing protection.

The important role and regulation of charities and their trustees

69. The Charity Commission is the statutory registrar and regulator of charities in England and Wales.

70. Section 1 of the **Charities Act 2011** ("**CA 2011**") defines a charity:

> (1) For the purposes of the law of England and Wales, "charity" means an institution which—
>
> > (a) is established for charitable purposes only, and
> >
> > (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities

71. Charities are established by their governing documents, which make provision for the appointment of trustees, set out the terms on which they serve, identify the purposes of the charity and its powers to further its objects.

72. Nearly all charities with an income above £5,000 per annum must be registered with the Charity Commission: section 30 **CA 2011**. The Charity Commission keeps a copy of the governing documentation of all registered charities.

73. The objectives of the Charity Commission include promoting compliance by charity trustees with their legal obligations to exercise control and management of the administration of their charities: section 14 **CA 2011**.

74. The general functions of the Charity Commission include encouraging and facilitating the better administration of charities and identifying and investigating apparent misconduct or mismanagement in the administration of charities (and taking remedial or protective action): section 14 **CA 2011**.

75. Section 177 **CA 2011** defines a charity trustee:

> "In this Act, except in so far as the context otherwise requires, "charity trustees" means the persons having the general control and management of the administration of a charity."

76. Charity trustees are required, according to Charity Commission Guidance, to:

76.1. ensure that the charity is carrying out its purposes for the public benefit (ie for the charitable purposes for which it is set up and for no other purposes)

76.2. comply with the charity's governing document and the law

76.3. act in the charity's best interests

76.4. manage the charity's resources responsibly

76.5. act with reasonable care and skill

76.6. ensure the charity is accountable

76.7. report any "serious incident" to the Charity Commission. A serious incident is an adverse event which results in or risks significant harm to the charity's beneficiaries, staff,

volunteers or others who come into contact with the charity, loss of the charity's money or assets, damage to the charity's property or harm to the charity's works or reputation

77. Charity trustees owe a fiduciary duty to the charitable purposes or objects of the charity.

78. The Charity Commission has the power to suspend, remove or disqualify charity trustees where it is satisfied that they have been guilty of misconduct or mismanagement in the administration of a charity pursuant to sections 76, 79 and 181A **CA 2011**. However, the Charity Commission cannot compensate trustees for any losses suffered because of bringing wrongdoing to its attention.

79. The High Court has jurisdiction over charities and can, if necessary, wind up a charity or direct the correct application of charity property.

80. In limited circumstances, charity trustees may receive compensation for loss of earnings. The Charity Commission explained the position in its submissions:

> 23. Section 185 of the 2011 Act makes some provision for remuneration payable for goods and services provided by a trustee. A charity is permitted to enter into such an agreement with its trustees, subject to conditions relating to the governance of such arrangements being satisfied. This provision is also subject to s186 which disqualifies any trustee who is party to such an arrangement from acting as a trustee in relation to any decision or other matter connected with such arrangement, in order to prevent conflicts of interest arising between the trustee and the charity. However, these provisions do not apply to remuneration for services provided in the capacity of trustee. Section 185 provides:
>
> > *"**185 Remuneration of charity trustees or trustees etc. providing [goods] or services to charity***
> >
> > *(1) This section applies to remuneration for goods or services provided by a person ("P") to or on behalf of a charity where-*
> >
> > *(a) P is a charity trustee or trustee for the charity, or*
> >
> > *P is connected with a charity trustee or trustee for the charity and the remuneration might result in that trustee obtaining any benefit.*
> >
> > *This is subject to subsection (3). …*
> >
> > *(3) This section does not apply to any remuneration for services provided by a person in the person's capacity as a charity trustee or trustee for a charity or under a contract of employment.*

> 24. In relation to remuneration provided for services in the capacity of a trustee, this is only permissible where the governing documentation of the charity expressly permits it, or where the Commission authorises it. Authority is provided using the Commission's power to authorise dealings under section 105 or to authorise an amendment of the governing documentation of the company (sections 187, 226, 280A and 280C).
>
> 25. Such authorisation will be granted in accordance with the Commission's published guidance (Trustee expenses and payments C11) which deals separately with 'payments to trustees' (section 6) and 'compensation for loss of earnings' (section 8). The former is likely to be exceptional and only where there is an usually high burden of trusteeship and the charity has tried and failed to recruit Trustees. In relation to the latter, the guidance states that payment must be *"clearly in the interests of a charity and provides a significant and clear advantage over all other options".* Considerations that may be taken into account may include where an individual would not be able to afford to serve without payment of some kind and brings particular skills which are valuable to the charity. However, given the principle that a trustee should not profit from trusteeship, any payment should therefore be compensatory in nature, being the lesser of the reasonable value of the work done for the charity, and the actual loss to the trustee (by way of lost earnings elsewhere). It remains the default position that payment to a trustee should be exceptional, the concept of unpaid trusteeship being a defining characteristic of the charitable sector. Section 16 paragraph 2(b) of the 2011 places the Charity Commission under a duty to act in a way which is compatible with the encouragement of voluntary participation in charity work.

Appeals to the EAT

81. An appeal to the EAT only lies on a question of law. The grounds upon which a decision of the Employment Tribunal can be challenged in the EAT are limited: **DPP Law Ltd v Greenberg** [2021] EWCA Civ 672, [2021] IRLR 1016. The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. Where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal should be slow to conclude that it has not applied those principles. The obligation to give reasons requires that a party knows why he won or lost: **Simpson v Cantor Fitzgerald Europe** [2020] EWCA Civ 1601, [2021] ICR 695, CA at paragraphs 29 to 31 and 64. But, as Sedley LJ noted in **Anya v University of Oxford** [2001] EWCA Civ 405, [2001] ICR 847:

> The courts have repeatedly told appellants that it is not acceptable to comb

through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues.

The Employment Tribunal's decision on the contract issue

82. The Employment Tribunal stated:

> 35. I consider first whether the Claimant can satisfy the definition of worker in section 230(3) ERA. **The first hurdle for the Claimant is to establish the existence of a contract between him and the Respondent**. **Since there is no written contract, the Claimant relies on a contract which he says is implied from his relationship with the Respondent.**
>
> 36. In pursuit of his submissions on these points, Mr Milsom relies on the judgment of HHJ Tayler in *Sejpal* in which the judgment in *Bates Van Winkelhof* was referred to. Combining the principles of both judgments, we may discern that:
>
> > **(1) Determining worker status requires a structured approach and robust common sense.**
> >
> > **(2) There can be no substitute for applying the words of the statute in every case; and**
> >
> > **(3) Many concepts applied in status cases, such as, inter alia, neutrality of obligation, control and subordination are not likely to be relevant in every case.**
>
> 37. In his written opening submissions, Mr Milsom embarked on a long and detailed analysis of the case law on determining status. **It is clear, however, that there was no written contract between the Claimant and Respondent** but Mr Milsom submits that some of the terms of the implied contract he relies upon were written down. **In particular he refers to the code of conduct … and the regulatory obligations of charity trustees**.
>
> 38. **Throughout the hearing, Mr Milsom used the expression "remuneration" to define the compensation payable to the President of the Respondent**. **The Claimant was not the President and was not entitled to any compensation for loss of earnings as the President is.** When I pressed **Mr Milsom on this point, he submitted that in standing for election as President-Elect and being successful in that election, the Claimant was making a 3 year commitment to provide personal services and the fact that he was only "remunerated" for one year was immaterial.** He further suggested that the judgment in the *Griffiths* case in the Employment Tribunal, in which the Claimant as a trustee of the Respondent charity was held not to be a worker, could be

distinguished as the Claimant in that case was not remunerated at all whereas the Claimant in the present case was. **In fact, the Claimant was not remunerated at all as he did not ever become President.**

39. **Mr Milsom also supported the implied contract argument with reference to the Royal Charter, terms of membership and regulatory framework under which the Claimant provided "some" personal services to the Respondent** adding that **the service provided, expected to be 20 days as President-Elect and 35 as President, was more than marginal or ancillary**.

40. **In relation to "remuneration", the Claimant said in his oral evidence that he put himself forward for election "acting voluntarily"** and that he was aware that compensation was available and "would not have applied otherwise". Then, somewhat paradoxically, **he confirmed he had agreed to give his compensation to the PDF. He further accepted there was, in any event, no guarantee of any payment. This inconsistency led me to believe that the compensation the Claimant might have received as President was not a factor in the Claimant standing for election**.

41. **Inconsistently with Mr Milsom's "three year commitment" argument, the Claimant also accepted that not all of those appointed served the full three years**. I also heard evidence from Ms Allan that she did not serve a year as President-Elect before becoming President.

42. Although **Mr Milsom relied in his submissions on the requirements of the role of President-Elect, the Claimant fully accepted that these requirements … clearly stated that trustees were appointed on a pro bono basis**. Subsequently during re-examination, **he said it was his understanding that the compensation he would receive for 25 days work as President was remuneration for highly skilled work. I find there is no basis for this proposition as he was clearly only entitled to any loss of earnings incurred as a result of carrying out his role as President.**

43. For the Respondent, Mr Sheppard submitted there was no contract between the Claimant and Respondent, either express or implied, **the principal point in his argument being that there was no intention to create legal relations and that is an essential ingredient of any contract.** Further, **he submitted that the Courts will imply terms into an agreement where it is necessary to give effect to the intentions of the parties and not otherwise.**

44. **The Claimant also argued that the various policies of the Respondent, such as the code of conduct, formed part of the contract between him and the Respondent. But, as Mr Sheppard pointed out, <u>those policies apply equally to all members and trustees</u>** of the Respondent. Indeed, **I queried with Mr Milsom whether on this basis he was arguing that all charity trustees were workers. After some discussion, <u>I understood his response to be that there may well be different categories of trustees some of which could satisfy the worker definition</u>**.

45. **Mr Sheppard submitted that the Claimant was not entitled to remuneration for acting as President but only compensation.** Indeed, the Respondent's schedule of the responsibilities of the three Presidential roles (page

> 462) makes clear that trustees are appointed on a pro bono basis and that only the President may receive limited compensation for loss of earnings with no guarantee of any payment at all. It is also clear that there was a limit on the amount which could be paid, namely, £519.00 per day for 25 days of the Presidential year with 10 days not being eligible for any payment (page 436).
>
> 46. **Further, the Charity Commission Guidance stipulates that payment of any kind for acting as a trustee is the exception rather than the rule.**
>
> 47. As recorded by HHJ Tayler in *Sejpal*, the starting point in determining status is the statute. There is significant evidence that the Claimant cannot satisfy the definition of section 230(3) ERA. **I find difficulty in seeing an implied contract** in circumstances where **the Claimant accepts he volunteered to stand for election as President-Elect and further accepts that all three Presidential roles are referred to as being pro bono** roles**. Neither do I accept he would have been remunerated for his activities as President** as limited compensation for loss of earnings, which is not guaranteed, does not in my view amount to remuneration. **Further, the policies which are submitted by the Claimant to form the basis of a written contract are clearly not only to be applied to those trustees who fulfil Presidential roles but to all trustees and those members who undertake activities for the Respondent**.
>
> 48. But I also recall HHJ Tayler's words that, in determining worker status, **there is a need for the application of robust common sense** and this **leads me to conclude that the Claimant had full knowledge and acceptance of the fact that he was a volunteer carrying out activities pro bono and at no stage did he consider he had intended to create a legal working relationship.** I find he was thus not a worker as defined by the statutory framework.

Grounds 1 and 2 – Contract

83. The first two grounds challenge the decision that the claimant had not entered into a contract with the respondent. It is asserted that the Employment Tribunal:

83.1. erred in determining the question of status solely by reference to the year served as President-Elect and excluding the agreement to serve as President

83.2. erred in law and/or provided inadequate reasoning in refusing to imply a contract between the parties and/or deciding that the Claimant was not a worker on ordinary principles

Analysis of grounds 1 and 2

84. I consider that these grounds overlap. The key question is whether the Employment Tribunal was entitled to conclude that the was no intention to enter into a contractual relationship, whether as President-Elect, or as President, after serving a term of a year as President-Elect.

85. The Employment Tribunal considered whether it should imply a contract of employment. It

was entitled to look at the position at the time that it was asserted that the contract should be implied; when the claimant had been elected and/or confirmed as President-Elect. The claimant contends that section 230 **ERA** applies to a person who has entered into a contract - and so a person can become a worker before undertaking any work. I do not disagree with that proposition. So, for example, the claimant could have entered into an express contract to become the President of the respondent at a date in the future and that express contract could be analysed to determine whether the claimant was a worker. The situation is different when it is contended that a contract should be implied as a result of the circumstances. It is the existing circumstances that determine whether a contract should be implied. At the time that the claimant contends a contract should be implied he was President-Elect. It is possible that a workers' contract would not be implied while a person was President-Elect but would come into existence on becoming President. However, on a fair reading of the judgment, I consider that the Employment Tribunal concluded that there was no intention to enter into a contractual relationship, whether as President-Elect or President thereafter.

86. The Employment Judge specifically asked whether there was an intention to create legal relations and concluded that there was not (paragraph 44). That is the fundamental question that the Employment Tribunal was required to ask itself: **Gilham**. While the Employment Judge did not expressly ask the subsidiary questions in **Gilham** and focus on the manner in which the claimant was engaged, the source and character of the rules governing the service the respondent provides, the overall context and any other relevant factors, in its analysis section, these matters were considered in some detail in the findings of fact, from which I largely took the factual overview at the beginning of this judgment.

87. The Employment Tribunal took account of the "manner in which the claimant was engaged", which was by election, rather than by entering into any formal agreement that set out the terms of an engagement including terms of the type that might be expected in a contract of employment or for a worker. The Employment Tribunal noted that it was not inevitable that the President-Elect would become the President.

88. The Employment Tribunal considered the "rules governing the service" and noted that the governing documents were the Royal Charter, Statute and Rules. The Employment Tribunal set out in detail the roles and responsibilities of the President and President-Elect. The Employment Tribunal considered the requirement on the claimant upon ratification of his election to sign documents including a declaration that he was not disqualified from acting as a charity trustee, a declaration that his appointment would not result in a conflict of interest and the respondent's code of conduct.

89. The Employment Tribunal considered the "overall context" including the statutory regulation of charities and the expectation that charity trustees are volunteers. The Employment Tribunal concluded that the common intention of the parties was that the claimant would act as a volunteer.

90. The Employment Tribunal also considered "other relevant factors". The Employment Tribunal considered that the claimant would not be paid but could, once President, claim for loss of salary, although he stated that he did not intend to do so. When the Employment Tribunal referred to lack of remuneration I do not consider that it was suggesting that there was no consideration that could support the making of a contract, as the claimant suggests, but that the absence of remuneration was a significant factor pointing against an intention to enter a contractual relationship as a worker. The Employment Tribunal was entitled to have regard to this factor, just as in **Neufeld** it was held that in considering whether a company director is also a worker it is significant if a director's fee is paid rather than a salary.

91. The fact that not all Presidents Elect have become President was a factor the Employment Tribunal was entitled to take into account. There was no contractual obligation on a President-Elect to become President.

92. The relatively limited duties of the President-Elect and President were matters that the Employment Tribunal was entitled to have regard to. I do not consider that, as asserted by the claimant, the Employment Tribunal applied a minimum threshold of work that must be done for a person to be a worker, but took account of the nature and extent of duties when deciding whether there was contractual intention.

93. I do not consider that the claimant can be in any doubt as to why he lost on the contract issue. The Employment Tribunal, on an overall assessment of the facts, answered the question posed in **Gilham** and **Catt** and concluded that there was no intention to enter into a contractual relationship.

94. I do not consider that there was any error of law in the determination of the Employment Tribunal.

The Employment Tribunal's decision on Article 10 read with Article 14

95. The Employment Tribunal analysed this argument relatively briefly:

> 49. In *Gilham*, a District Judge was held by the Supreme Court to be entitled to the statutory protection available to workers as to deny that protection would breach Article 14 read with Article 10 of the ECHR. The Court reached this conclusion by purposively interpreting section 230(3)(b) ERA so as to include an individual who works or worked by virtue of an appointment to an office whereby the office holder 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 office holder. **In my view, that case is readily distinguished from the case before me.** At paragraph 4 of the Judgment, in outlining the history of the facts of the case, **Baroness Hale noted there was a written offer of employment "which talked in terms of (Ms Gilham) accepting the offer" and referred to matters such as the duration of the appointment, salary and pension. The offer letter also enclosed a memorandum detailing sitting days, sick pay, maternity, paternity and adoption leave, training, the prohibition of legal practice and outside activities**. Thus, **there was far more to support the argument that a District Judge is a worker than in the Claimant's case**.
>
> 50. **The Claimant relies on this extension to the definition of worker**.
>
> 51. **The extension in *Gilham* was a product of the Supreme Court finding that the facts of the Claimant's case fell within the ambit of the right to freedom of expression protected by Article 14 read with Article 10**. Thus, holders of judicial office are given the protection extended to whistle-blowers in the ERA. I have, however, already commented that the facts of *Gilham* are distinguishable from the case now before me and this requires further discussion.
>
> 52. In *Gilham*, the Supreme Court set out 4 questions to be answered in the affirmative in order to establish a breach of Article 14. They are:
>
> (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 ie is it a proportionate

means of achieving a legitimate aim?

53. **I consider it to be beyond doubt that the answer to the first question is in the affirmative.** The right to freedom of expression, which can include the right to the blow the whistle, is enshrined in Article 14.

54. **Answering the second question is more problematic and requires careful consideration as to whether the Claimant is in an analogous situation to others**. In *Gilham* the answer to this question was "yes" because the Claimant had, inter alia, been denied the protection available to other employees and workers who blew the whistle and the right to bring a claim in the Tribunal. This was considered to be less favourable treatment than that afforded to others in the workplace, namely, employees and "limb (b)" workers who wish to blow the whistle.

55. The Supreme Court at paragraph 31 of *Gilham* explains further that "what matters is that the judicial officer holder has been treated less favourably than others in relation to the exercise or enjoyment of the convention right in question, the right to freedom of expression". At first blush, this seems to place the Claimant in a very similar position to Ms Gilham except that the Court has made clear, in my interpretation, in paragraph 30 that **"others" are employees and limb (b) workers**. **In Gilham, the circumstances, rights, benefits, obligations and requirements of the Judicial Office of District Judge were held to be analogous to employees and limb (b) workers**.

56. **In the case before me, however, the circumstances are, in my view, very different. Whereas in *Gilham*, the District Judge was remunerated, in the case before me, I cannot find that the Claimant was remunerated.** His evidence on the point was inconsistent, on the one hand acknowledging that he voluntarily stood for election as President-Elect, that all the documentary evidence precluded being remunerated and allowed only limited compensation and, on the other hand, claiming he expected to be remunerated for carrying out highly skilled work. Applying the Cambridge dictionary definition of remuneration to the Claimant's position, **I cannot see that limited compensation for loss of earnings (which did not, in any event, apply to his time as President-Elect), amounts to payment for work** or services for the Respondent. **Accordingly, the Claimant's voluntary role is not analogous to employees and limb (b) workers and the answer to the second question is "no".**

57. **This conclusion is reinforced by the fact that the Charity Commission states that trustees do not have the benefit of statutory protection for whistle-blowing.**

58. In considering the answer to the third question, I have spent some considerable time analysing the words of Baroness Hale at paragraph 33 in *Gilham*. In the case of a Judge, it was held that their occupational classification as such is clearly capable of being a status within the meaning of Article 14 reinforced by their constitutional position. Mr Milsom relies on the EAT judgments in *Sejpal* and *Catt*. **In particular, he cites HHJ Tayler in *Sejpal* who refers to the case of a person who cannot enter into a contract because of being an office holder but I find this to be inconsistent with Mr Milsom's argument that there was a contract between the Claimant and Respondent**.

> 59. In *Griffiths*, Employment Judge Spencer found the Claimant, as a trustee of the charity, had "some other status". The judgment in *Gilham*, as submitted by Mr Milsom, suggests that an occupational classification is capable of constituting an "other status" (per Baroness Hale at paragraph 32). **But, in my view, it is difficult to compare the occupational status of a Judge, or for that matter the holder of any other occupation, with someone acting in a purely voluntary or honorary capacity**. For these reasons, whilst accepting the broad scope of Baroness Hale's statement, I do not find that the Claimant had other status for the purposes of Article 14.

Ground 3 – Convention Rights

96. It is asserted that Article 10 read with Article 14 required that the claimant be treated as a worker, notwithstanding the absence of a contract.

Analysis of Ground 3

97. The Employment Tribunal specifically asked itself the **Michalak** questions as approved in **Gilham**: (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?

98. It was common ground that question 1 was to be answered in the affirmative. The Employment Tribunal answered questions 2 and 3 in the negative and did not go on to answer question 4.

99. While the Employment Tribunal directed itself to the relevant questions, there was no direction as to the correct approach to answering the questions. As set out above, questions 2 and 3 are to be approached in a broad-brush manner and the focus is often best placed on justification, although there is no requirement to do so. Looking at the list of authorities that were put before the Employment Tribunal, it appears that the submissions on the approach to be adopted to the **Michalak** questions were limited. I am well aware that the submissions I have received are much more extensive than those before the Employment Tribunal.

100. The claimant contends that the Employment Tribunal erred in law by severing the question of "analogous situation" from "justification". The respondent counters that this is an argument that was not raised below and that the claimant should not be permitted to raise it on appeal. I consider that the

argument that the questions of "analogous situation" and "justification" must not be severed is incorrect. It is clear from **Hilland** that it is not necessarily an error of law to consider the analogy of situations and conclude that a negative answer is determinative, absent any question of justification.

101. It was incumbent on both parties to make sure that the Employment Tribunal had before it the relevant authorities on the approach to be adopted to the **Michalak** questions.

102. I consider that the Employment Tribunal did not adopt a broad-brush approach to the question of whether the claimant was in an analogous situation to an employee or limb B worker or whether holding an office as a charity trustee, being President-Elect and/or President of the respondent was some other status.

103. The broad-brush approach requires consideration of the relevant surrounding circumstances. The Employment Tribunal appears to have focused almost entirely on lack of remuneration and the linked fact that the claimant was a volunteer. These were relevant factors, but not determinative.

104. In considering whether there were analogous circumstances with employees and limb B workers, the relevant factors would be likely also to include:

104.1. the type of role undertaken and level of responsibility

104.2. the duties of the role

104.3. the likelihood that the person will become aware of wrongdoing

104.4. the importance of the person making disclosures of wrongdoing in the public interest

104.5. the vulnerability of the person to retaliation for making a protected disclosure – including the extent to which livelihood or reputation might be at risk

104.6. the availability of alternative routes to making disclosures of wrongdoing and any alternative protections

104.7. any other relevant distinction between the office holder and an employee and/or limb B worker

105. There was a strong argument that being a charity trustee, President-Elect and/or President is akin to an occupational status. The nature of the role, responsibilities and regulatory regime applied

to charity trustees is strongly suggestive of a status.

106. I consider that the Employment Tribunal did not adequately consider the relevant circumstances and conduct the broad-brush assessment necessary to decide whether there was an "analogous situation" between the claimant and employees or limb B workers and whether being a charity trustee, President-Elect and/or President is an "other status".

107. I consider it was also incumbent on the Employment Tribunal to consider the possibility of focusing on the issue of justification in conducting its analysis.

108. Accordingly, I uphold ground 3.

Disposal of Ground 3

109. I gave the parties and the interveners the opportunity to make submissions on disposal. I have considered their submissions and the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. I accept the point made by the claimant and the Charity Commission that this is a matter of considerable public importance. The Employment Tribunal is likely to be assisted by hearing from the interveners and it may be that the Government will now seek to intervene, particularly as the Employment Tribunal is likely to consider justification. Contrary to the suggestion of the Charity Commission, these are not matters for me, but for the Employment Tribunal on remission. The Employment Tribunal may consider asking the Secretary of State whether an application is to be made to intervene. The Charity Commission may also bring this judgment to the attention of the Secretary of State so that consideration can be given to making an application to intervene. It will also be a matter for the Employment Tribunal to consider what, if any, further evidence should be permitted. I consider that it is appropriate that remission be to the same Employment Tribunal. The Employment Tribunal has made significant findings of fact and is well placed to judge what, if any, further evidence is required. Remission to the same Employment Tribunal is likely to involve some saving of time and expense. I do not consider passage of time will have compromised recollection of this somewhat unusual case. This was not a totally flawed decision and I see no reason to doubt the professionalism of the Employment Judge, or to consider that there is a risk of prejudgment.

Ground 4

110. It is asserted that whistleblowing protection must be conferred on those who are subjected to detriments once they have entered an agreement to work even where the disclosure was made to the employer at an earlier stage.

Analysis of Ground 4

111. As set out above, I consider that a worker is protected from being subject to a detriment by his current employer for making a protected disclosure to that employer prior to the commencement of the employment. Ground 4 is allowed.

Brevity

112. I accept that this appeal raises some points of general importance. That was a reason to take the time necessary to ensure that submissions are clear and concise, rather than tending to prolixity as a result of ensuring that all possible arguments are covered. The claimant's skeleton argument, appealing a 14 page judgment, was 52 pages long. I was provided with an authorities bundle of 3,439 pages including 93 authorities. I would have been assisted by greater concision, which would also have made it easier to know which arguments were deployed in the Employment Tribunal. Without seeking permission, or consulting the other parties, the claimant produced a 13 page reply note. The respondent urged, in trenchant terms, that I should disregard it. I did read the document, but it did not add in any significant way to my analysis.

113. All that said, I am grateful to Counsel for the claimant, who have acted pro-bono, and to them and the other Counsel and legal teams for all the work they have put into preparing the appeal.