Case Number: 2304452/2023

EMPLOYMENT TRIBUNALS

Claimant: **Mrs G Foster**

Respondent: **Secretary of State for Justice**

Heard at: London South (remotely by CVP)
On: 2 and 3 June 2025

Before: Employment Judge Heath

Representation
Claimant: In person
Respondent: **Mr B Collins KC**

RESERVED JUDGMENT

1. The claimant was not a worker for the purposes of section 230 Employment Rights Act 1996.
2. The claimant was not a worker for the purposes of Regulation 2 Working Time Regulations 1998.
3. The claimant was not a worker for the purposes of the Employment Rights Act 1996 or the Working Time Regulations 1998 having regard to section 3 Human Rights Act 1998.
4. The claimant did not provide the requisite notice under Regulation 15 Working Time Regulations 1998.
5. The claimant's claims are out of time for the purposes of Regulation 30 Working Time Regulations 1998.
6. For the avoidance of doubt, the claimant's claims are not well-found and are dismissed.

REASONS

Introduction

1. The claimant is a specialist tribunal member who sits in the First Tier Tribunal. This is her claim for holiday pay which she says the respondent has not paid her. Determining the issues has involved looking at her employment status through the lens of domestic, EU and human rights law, as well as looking at the mechanics of the Working Time Regulations 1998 (WTR).

Issues

2. The issues were clarified at a preliminary hearing for case management before EJ Leith on 14 March 2024. It was clear from the parties' skeleton arguments, and clarified at the start of the hearing, that not all of the issues required determination, and that additionally, the claimant had sought to amend her claim (which the respondent did not object to, as long as it could amend its Response).

3. The claimant had made it clear in her witness statement that she was not running a claim that the respondent had failed to permit her to take annual leave, and so Issues 6 and 7 were removed (indicated in ~~strike-through~~ below). The amendments to the claim and the Response (both of which I allowed by consent) concerned an argument that the claimant should be considered a worker in order to give effect to her ECHR rights. This is reflected in the added paragraph 2a) below, which is <u>underlined</u>. This was a form of wording I suggested to the parties on reading their skeleton arguments, and which both parties agreed reflected the issue to be determined in respect of the amendments.

4. Subject to these changes, the parties agreed that the List of Issues set out in EJ Leith's Case Management Summary were the issues I was to determine. I annexe the finalised List of Issues at the end of this decision.

Procedure

5. In the interests of transparency, at the start of the hearing I told the parties that I had sat in the Mental Health Tribunal from 2020 until earlier this year, but that I had found no record and had no memory of sitting with the claimant. I also mentioned that I had, as a fee-paid employment judge in another region, sat a couple of times with a non-legal member the claimant had mentioned in her Skeleton Argument who had brought proceedings in the employment tribunal against the respondent. I said I was unaware of any litigation when I sat with this member. The claimant could not recall sitting with me, and neither party considered that my disclosures compromised my ability to hear the case.

6. EJ Leith made case management orders for the preparation of this final hearing. Pursuant to those, I was provided with a 1478 page bundle of documents. I made it clear to the parties that I would not read any documents unless the parties specifically drew them to my attention. The claimant provided a short reading list in her Skeleton Argument, and the respondent referred to various documents in its Skeleton Argument. Certain documents were referred to in witness statements and others referred to in the course of cross examination. I read those documents. If I do not specifically refer to any of these documents in these Reasons, it is not to be taken that I have not read them. A further 118 pages of documents were produced during the course of the hearing, which were added to the bundle.

7. As set out above, both parties produced Skeleton Arguments which I received very shortly before the hearing.

8. The claimant provided a witness statement and gave oral evidence on her own behalf. Mr Edwards, Head of Judicial Pay Policy Projects in the Judicial Pay, Expenses and Terms and Conditions team, part of the Judicial and Legal Service Directorate in the Ministry of Justice, provided a witness statement and gave oral evidence.

9. The claimant provided written closing submissions. Mr Collins made oral closing submissions as did the claimant.

10. The matter had been listed for 4 days. Closing submissions were delivered by the parties on the second day. There was some discussion as to how to proceed. It was clear that this was a complex case raising a number of legal issues (the authorities bundle alone ran to 1108 pages) of considerable importance to both parties. It was practically certain that if I gave an oral decision one or other party would request written reasons. I had misgivings as to whether I could review the evidence, consider the law, apply the law to the facts, determine the issues and prepare a reasoned oral decision by Day 4. It was agreed that I would send the parties away, and provide a Reserved Decision.

Facts

The tribunals

1. Without going into unnecessary detail, tribunals are specialist courts whose judges and members hear a wide range of cases in various spheres of life. In 2007 the Tribunals, Courts and Enforcement Act 2007 created a unified tribunal service.

2. It is a feature of the tribunal service that tribunals often sit as a panel, with a legally qualified member and (generally) 2 non-legally qualified members (“NLMs”). The NLMs provide practical and specialised views of the facts and evidence before the tribunal, and will generally have relevant expertise and experience of the subject matter of the tribunal. Both the legally qualified member and the NLMs are judicial office holders.

3. Prior to the creation of the unified tribunal services, individual tribunals were sponsored by individual government departments which had an interest in the subject matter of the respective tribunal. For example, the Mental Health Review Tribunal (the MHT) was sponsored by the Department of Health, and the SEND tribunal was sponsored by the Department for Education. Different Secretaries of State in different departments would therefore be responsible for determining pay in different tribunals.

4. The Mental Health Act 1983, as originally enacted, provided at section 65(4):

> *The Secretary of State may pay to the members of Mental Health Review Tribunals such remuneration and allowances as he may with the consent of the Treasury determine, and defray the expenses of such tribunals to such amount as he may with the consent of the Treasury determine, and may provide for each such tribunal such officers and servants, and such accommodation, as the tribunal may require.*

5. Similarly, section 179 of the Education Act 1993 (repealed 1996) provided:

> *The Secretary of State may pay to the President, and to any other person in respect of his service as a member of the Tribunal, such remuneration and allowances as he may, with the consent of the Treasury, determine.*

6. Mr Edwards was candid in his evidence that the respondent has not been able to locate Treasury papers which set out the rationale for the initial determination of fee rates for NLMs. He made reference to an internal minute dated 4 August 1993 found within hard copy files provided to the respondent's solicitors by the Department for Education [844-846]. The minute and an annexe to it concern proposed fees to be paid to the Tribunal President, legal members and NLMs of what was then the Special Educational Needs Tribunal.

7. The minute was headed "SEN TRIBUNAL: FEES FOR PRESIDENT, CHAIRMEN AND MEMBERS". The minute referred to the agreed Treasury fee rates for appointments to the tribunal (reflecting the involvement of the Treasury with setting remuneration under the Education Act 1993). The minute enclosed a further minute dated July 1986 which included a heading "MEMBERS OF TRIBUNALS, APPEAL BOARDS, INQUIRIES ETC" which set out a range of fees payable to chairmen and members of various tribunals and other bodies. The top of the range, (A to D) were for legally qualified chairmen, and the lower end, F to H, were payable to non-legally qualified members. This minute stated at paragraph 5417 that "*Assessors may be paid fees in a range calculated by dividing by 220 the minimum of the Senior Professional and Technical Officer scale and the maximum of the Unified Grade 7 scale*". Mr Edwards' evidence was that an Annex K attached to the 4 August 1993 minute contains a list of fees

running from A to H, and that A to C "*correspond to a 220 divisor of salary group 6 and 7 salaries*".

8. Mr Edwards also made reference in his evidence to the Civil Service management Code – Pay (January 1994 [786]. This set out that payment for short notice work and standby appointments was by a daily or hourly fee. The daily fee was arrived at by "*dividing the appropriate full time salary by 220*".

9. The significance of a 220 divisor is that this represents, the number of days a full time salaried government employee would work in a year, net of holidays, privilege days and weekends. Dividing the full earnings, including the 40 days holiday pay, by 220, the number of days the full time salaried employee would actually work, is a means of incorporating a rolled up payment for holiday into a daily fee. The holiday element would equate to just over 15% (40/260).

10. The Senior Salaries Review Body (SSRB) was established in May 1971 to provide independent pay advice to the Government in respect of senior public sector workers, including the judiciary.

11. Within the unified structure created by the Tribunals, Courts and Enforcements Act 2007 is the First-tier Tribunal, which itself is comprised of seven chambers, one of which is the Health, Education and Social Care Chamber, which itself includes the Mental Health Tribunal ("MHT") and the Special Educational Needs, Care Standards and Primary Health Lists ("SEND").

12. Schedule 2 of the Tribunals, Courts and Enforcements Act 2007 gave the Senior President of Tribunals the power to appoint a person to be a judge, or to be a member, who is not a judge, of the First-tier Tribunal. This Schedule also gives the Lord Chancellor the power to determine remuneration, allowances and expenses payable to members and judges of the First-tier Tribunal.

The claimant

13. The claimant is a qualified solicitor. In 2013 she was working part-time for a local authority as a solicitor. In that year she was appointed a Specialist Member of the MHT. The evidence is not entirely clear as to when, but shortly after that she was also appointed as an NLM of the SEND Tribunal. She continued to work part-time as a local authority solicitor combining that with her sitting in the tribunal. Her schedule of loss indicates her earnings from the Ministry of Justice ("MoJ") (i.e. for her tribunal sittings) increased from £2199.89 in the financial year 2013/2014 to £26,654.67 in the financial year 2019/2020. This reflects the fact that she increased the number of sitting days she undertook in each tribunal.

14. Additionally the claimant from around 2017 onwards sat as a panel member of Nursing & Midwifery Council ("NMC") Fitness to Practice

Committees, a role she continued until earlier this year. This is not an MoJ appointment. In around 2018 she gave up working for the local authority.

15. It appears the claimant had what is sometimes known as a "portfolio career" sitting as an NLM and with the NMC. From the time of the Covid pandemic the claimant substantially increased her sitting to the point where she was working more or less full-time sitting as an NLM or with the NMC. Her earnings in 2021/2022 were £63,788.96.

Terms and conditions of appointment and policies

16. When the claimant was appointed in 2013 the respondent had in place a "Memorandum on conditions of appointment and terms of service" in respect of fee paid judicial office holders within the tribunal service. This document stated the position as at April 2010, and expressed itself to be applicable to judicial office holders whose appointment was administered by the MoJ. It included the following:

> *This memorandum contains information about the terms and conditions of appointment, which should be understood and agreed by all those accepting appointment. The terms and conditions are correct as at the date given at the bottom of this page, but may in some circumstances be subject to change.*
>
> *The Memorandum should be read in conjunction with, and may be supplemented by or subject to, other guidance which may be made available to office holders*.
>
> …
>
> ***5. Tenure***
>
> *5.1 An appointment as a fee-paid office holder is for a renewable period of five years [this was automatically renewed subject to the individual's agreement and the upper age limit]*
>
> *…*
>
> ***9. Fees***
>
> *9.1 The fee of a Tribunal office holder is paid out of the Ministry of Justice's Vote. Details about the arrangements for the claiming/payment of fees will be sent to the judicial office holder shortly before he/she takes up his/her appointment. Service as a fee paid office holder does not attract a pension.*
>
> …
>
> ***12. Sitting requirements***

12.1 Office holders are usually required to make themselves available for a minimum of 30 days a year on tribunal business. This figure may be varied from time to time, in accordance with business needs either generally or for certain categories of office. Where a different sitting level is required, it will be specified in the recruitment material or otherwise notified. The Tribunals Service will try to allocate sittings
equally but cannot guarantee a minimum number of days in any year.

…

13. Sitting arrangements

13.2 Office holders are asked to indicate sufficiently far in advance the dates on which, because of other official commitments or their holidays, they do not expect to be available to sit.

17. Judicial office holders have access to the judicial intranet. On 23 June 2014 a message to all fee paid judiciary was sent relating to terms and conditions. It read as follows:

> *We have been asked to make all fee-paid judges aware of the following*
> *message issued by MoJ Judicial Policy, Pay and Pensions*
> *We write to clarify the method of calculating the daily fee rate you receive in your capacity as a fee paid Judge. The daily fee is calculated by dividing the salary for the equivalent full-time office by the appropriate divisor. The effect of this divisor is that a pro rata allowance for annual leave and public and privilege holidays is built into the daily fee. For the avoidance of doubt, the MoJ hereby confirms that the daily rate that is paid to you incorporates an element which represents your entitlement to paid annual leave under the Working Time Regulations 1998.*

18. As can be seen, this announcement was directed towards fee-paid judges. The announcement also conveys an understanding that fee-paid judges are entitled to be paid annual leave under the WTR. I would observe that this message on the intranet was published a few months after the promulgation of the judgment of the Employment Tribunal in *Miller and others v The Ministry of Justice* 1700853/2007 long-running litigation about the terms and conditions of fee-paid judicial office holders.

19. A further "Memorandum on conditions of appointment and terms of service" for fee-paid NLMs was published, which stated the position as at April 2016. This document included the following:

> ***9. Fees***
>
> *9.1. The fee of a Tribunal office holder is paid by the Ministry of Justice. Details about the arrangements for the claiming/payment of*

fees will be sent to the judicial office holder shortly before he/she takes up his/her appointment. Service as a fee paid non-legal member does not attract a pension. The fee is calculated by dividing the equivalent full-time office salary by 220. The effect of this divisor is that a pro rata allowance for annual leave, and public and privilege holidays is incorporated into the daily fee.

…

10. Income tax and national insurance contributions

10.1. The status of 'office holder' determines the treatment in matters of taxation because Section 5 of the Income Tax (Earnings and Pensions Act) 2003 applies the provisions (of the act) to 'offices' in the same way as they apply to employments. As a result, income tax is payable under the Income Tax (Earnings and Pensions) Act 2003 and is deducted at source from the fee paid to a judicial office holder, in accordance with
PAYE regulations. Class 1 National Insurance (NI) contributions will also be deducted from the fee that is paid. Liability for NI contributions ceases automatically when a judicial office holder reaches state retirement age even if service continues thereafter. These liabilities will be deducted via the Ministry of Justice's payroll system and the net

fee paid to the office-holder. Fees are not subject to VAT.

20. In September 2019 there was a message to all fee-paid judiciary on terms and conditions. It read as follows:

We have been asked to make all fee-paid judicial office holders (including legal and non-legal panel members) aware of the following message issued by MoJ Judicial Policy, Pay and Pensions:
We write to clarify the method of calculating the daily fee rate you receive in your capacity as a fee-paid judicial office holder.
The daily fee is calculated by dividing the salary for the equivalent full-time office by the appropriate divisor.
The effect of this divisor is that a pro rata allowance for annual leave and public and privilege holidays is built into the daily fee.
For the avoidance of doubt, the MoJ hereby confirms that the daily rate that is paid to you incorporates an element which represents your entitlement to paid annual leave under the Working Time Regulations 1998.

21. A further "Memorandum on terms of appointment and conditions of service" was published setting out the position as at February 2020. It includes the following:

9. Fees

9.1 The fee of a Judicial Office Holder is paid by the Ministry of Justice. The relevant fee is published in the Judicial Fees Schedule which is updated annually and available on thegov.uk website. An allowance for annual leave, public and privilege holidays is incorporated into the daily fee. Details about the arrangements for claiming / payment of fees will be sent to the judicial office holder shortly before they take up their appointment.

22. The chamber president of HESC on 2 April 2022 produced a POLICY AND PRINCIPLES CONCERNING THE BOOKING OF FEE-PAID JUDICIAL OFFICE-HOLDERS IN THE MENTAL HEALTH JURISDICTION, THE LISTING OF CASES, AND THE SUBMISSION OF DECISIONS. This included the following:

4. Availability to Sit, and Requests to Withdraw from a Notified Booking

4.1 Judicial office holders are required by their terms of service to make themselves available for a minimum of 30 sitting days a year. For judges and Specialist Members this means must offer a minimum of 30 sitting days during the sitting year (from 1st April through to 31st March in any given year). Medical Members must offer a minimum of 20 sitting days during the sitting year. Sittings cannot be guaranteed. The booking team will prioritise Judicial Office Holders (JOHs) who have sat the least to be booked first. This is to ensure all JOHs have the opportunity to meet the minimum availability. It will also ensure skills are maintained and a fair distribution of work.

23. Section 4 of this policy set out how availability would be requested from judicial office holders, and how they should indicate their availability.

24. There was a further update to the "Memorandum on terms of appointment and conditions of service" in May 2022. Section 9.1 on fees, containing reference to an allowance for annual leave being incorporated into the daily fee, remained identical to the previous iteration of the memorandum.

Further findings

25. The claimant accepts that she became aware of the provision in the 2016 Memorandum on conditions of appointment and terms of service which set out that a divisor of 220 would be applied, to reflect the incorporation of an allowance for annual leave and public and privilege holidays into the daily fee. The claimant's evidence, which I accept, was that she disputed that the respondent was entitled to do this. She set out her disagreement in correspondence with the respondent.

26. The claimant (as with other NLMs and fee-paid judges) indicates her availability to sit in the MHT by filling in an availability form. She is required to indicate a few months in advance her availability for a two month period

by marking “A” when she is available against dates in a two-month period. The claimant indicates her availability to sit in the SEND Tribunal by marking her availability within an Excel spreadsheet. She supplies both documents to administrative staff.

27. The MoJ outsources payroll function to an external organisation. Judicial officeholders, including the claimant, are provided with payslips. These payslips include a payroll number. The claimant’s payslips include boxes which set out the payments she receives, together with deductions for tax, national insurance and pension contributions. Cumulative totals are set out indicating “Employees NI”, “Employers NI”, “ERS Pension” and “Ees pension”. There are no entries on the claimants payslips relating to holiday pay.

28. There are certain salaried non-legal members, but these appear to hold particular offices, such as a Chief Medical Officer in HESC, a Surveyor Member in the Upper Tribunal Lands (England & Wales), and Salaried (Regional) Medical Members, Social Entitlement Chamber. The evidence of Mr Edwards (witness statement paragraphs 15 and 17) was that the fee-paid equivalents of the Surveyor Member and the Regional Medical members was 1/220th of the salaried role. The oral evidence of the claimant was that Medical Members in the MHT receive 1/220th of the salary of the Chief Medical Officer. However, outside of these particular roles, there is no salaried equivalent of an NLM.

The law

29. The parties presented me with an agreed authorities bundle running to 1108 pages, to which was added one more authority. The parties must not be under any illusion that I have read every single page. Also, with no discourtesy intended to the industry of both parties, I will not seek to set out every single legal principle put before me. I will set out what I consider to be sufficient legal material in order to determine the issues in this case.

Employment Status

Employment Rights Act 1996 (“ERA”)

30. The claimant claims the respondent failed to pay her the amount of holiday pay she was entitled to as part of her “wages” under Part II ERA. In order to do this she must establish that she was a “worker” for the purposes of the ERA. Work is defined under section 230 ERA as follows:

> *(3) In this Act “worker” (except in the phrases “shop worker” and “betting worker”) means an individual who has entered into or works under (or, where the employment has ceased, worked under)—*
>
> *(a) a contract of employment, or*
>
> *(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for*

another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

31. As can be seen, the claimant must establish that she worked under a contract of employment or any other contract.

32. In *Gilham v Ministry of Justice* [2019] UKSC 44 the Supreme Court considered whether a district judge was a worker for the purposes of Part IVA ERA (the whistleblowing provisions). Baroness Hale PSC began her judgment "*This case is about the employment status of district judges, but it could apply to the holder of any judicial office*". Between paragraphs 12 and 21 Baroness Hale PSC examined whether a district judge performed their work pursuant to a contract or pursuant to some different legal arrangement. She concluded at paragraph 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.

WTR

33. Reg. 2(1) WTR defines worker in materially identical terms to section 230(3) ERA. However, unlike the ERA the WTR is EU-derived domestic legislation (as was confirmed in *Harpur Trust v Brazel* [2022] ICR 1380). I would observe that this claim is confined to matters running up to the presentation of the ET1 on 16 August 2023. There are no issues to be considered under European Union (Withdrawal) Act 2018, and I am accordingly to read domestic law to be in line with EU law.

34. The Working Time Directive 2003/88/EC did not define worker. The Framework Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work had included at Art 3 the following definitions:

(a) worker: any person employed by an employer, including trainees and apprentices but excluding domestic servants;

(b) employer: any natural or legal person who has an employment relationship with the worker and has responsibility for the undertaking and/or establishment;

35. In the case of *Union Syndicale Solidaires Isère v Premier Ministre* (C-428/09) the ECJ held:

27. It must also be borne in mind that, while the concept of a 'worker' is defined in Article 3(a) of Directive 89/391 to mean any person employed by an employer, including trainees and

apprentices but excluding domestic servants, Directive 2003/88 made no reference to either that provision of Directive 89/391 or the definition of a 'worker' to be derived from national legislation and/or practices.

28. The consequence of that fact is that, for the purposes of applying Directive 2003/88, that concept may not be interpreted differently according to the law of member states but has an autonomous meaning specific to European Union law. The concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. ***The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration*** *(see, by analogy, for the purposes of Article 39 EC, case 66/85 Lawrie-Blum [1986] ECR 2121, paragraphs 16 and 17, and also case C-138/02 Collins [2004] ECR I-2703, paragraph 26).* [Emphasis added].

29 It is for the national court to apply that concept of a 'worker' in any classification, and the national court must base that classification on objective criteria and make an overall assessment of all the circumstances of the case brought before it, having regard both to the nature of the activities concerned and the relationship of the parties involved.

36. In the subsequent case of *Fenoll v Centre d'Aide par le Travail "La Jouvene*" (C-316/13) set out the opinion of the Advocate General. He observed at paragraph 29, reviewing the case law on the concept of worker, that "*There is no single definition of worker in Community law: it varies according to the area in which the definition is to be applied*". He then quoted much of paragraph 28 of *Union Syndicale Solidaires Isère* verbatim. Indeed, in dealing with working time cases, the formulation "*The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration*" has been repeated in a number of European cases including ; *Sindicatul Familia Constanta v Directia Generala de Asistenta Sociala si Protectia Copilului Constanta* (Case C-147/17) [2019] IRLR 167 (para 41); and *B v Yodel Delivery Network Ltd* (Case C-692/19) [2020] IRLR 550 (para 29).

37. As *Fennoll* observed, there is no single definition of worker in Community law, and that it varies according to the area the definition is applied.

38. The Supreme Court, in *Ministry of Justice v O'Brien* [2013] UKSC 6, has examined the question of whether a judicial office holder was a "worker" for the purposes of the Part-time Workers (Prevention of Less Favourable

Treatment) Regulations 2000 ("PTWR"), which implemented the Part-time Worker Directive 97/81/EC ("PTWD").

39. Clause 2(1) of the PTWD provided:

> *Clause 2: Scope*
>
> *1. This Agreement applies to part-time workers who have an employment contract or employment relationship as defined by the law, collective agreement or practice in force in each Member State.*

40. The definition of worker under Reg 1(2) PTWR was in materially identical terms to section 230 ERA.

41. The Supreme Court at paragraph 42 concluded that recorders (the judicial office Mr O'Brien had held) are in an employment relationship within the meaning of the PTWD and that they must be treated as "workers" for the purposes of the PTWR.

Human Rights

42. Section 3(1) of the Human Rights Act 1998 provides:

> *So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*

43. Article 14 of the European Convention on Human Rights ("ECHR") provides:

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

44. Article 8 ECHR provides:

> *1 Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

45. Article 1 of the First Protocol ("A1P1") of the ECHR provides:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions*

except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

46. In In *R (Stott) v Justice Secretary* [2020] AC 51 the Supreme Court set out the approach to an Article 14 claim:

> *In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or "other status". Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para 3 of R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173. He observed that once the first two elements are 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."*

<u>Ambit</u>

47. In *Stec v United Kingdom* (2005) 41 EHRR SE18 the European Court of Human Rights held that in complaints under Article 14 in conjunction with A1P1 concerning the denial of a particular benefit "*the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question (see Gaygusuz, and Willis, also cited above, at [34]). Although Protocol No.1 does not include the right to receive a social security payment of any kind, if a State does decide to*

create a benefits scheme, it must do so in a manner which is compatible with Art.14".

48. The Court of Appeal in *JT v First-tier Tribunal* 1 WLR 1313 confirmed that this approach was not confined to welfare benefits, and that where a state creates rights under its domestic law which fall within the ambit of a Convention article, it must do so in a non-discriminatory way.

49. The European Court of Human Rights held in *Denisov v Ukraine (Application No 76639/11* 25 September 2018) at paragraph 116 that in order to come within the ambit of Article 8:

> *It is for the applicant to show convincingly that the threshold was attained in his or her case. The applicant has to present evidence substantiating consequences of the impugned measure. The Court will only accept that Article 8 is applicable where these consequences are very serious and affect his or her private life to a very significant degree.*

50. The EAT in *Djalo v SSJ* [2025] EAT 67 summarised the principles of *Denisov* at paragraphs 155-158, observing that applicants are obliged to identify the concrete repercussions on their private lives and the nature and extent of their suffering, and how their private life had been affected to a significant degree.

Status

51. In *Stott* Lady Black summarised the case law and analysed the "other status" requirement. Lady Black commented that a generous meaning ought to be given to the definition of other status; there needs to be identified a "personal characteristic" by which persons or groups of persons were distinguishable from each other; personal characteristics need not be innate, but could be a matter of personal choice; that the personal characteristic cannot be simply defined by the differential treatment complained of.

52. "Other status" was considered in *Gilham*. At paragraph 32 the Supreme Court held:

> *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.*

Analagous position and justification

53. In *Stott* Lady Black observed at paragraph 8 that it is not always easy to keep analogous position and justification separate.

54. In *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 Lord Walker at paragraph 5 described the personal characteristics that make up status as being like a series of concentric circles. At the centre are innate or largely immutable characteristics such as race, sex, disability etc., while other acquired characteristics are further out in the concentric circles. "*The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify*".

55. The characteristics closest to the centre of the concentric circles are often termed "suspect" grounds.

56. In *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223 the Supreme Court made a number of observations about the need for the courts to have regard for the separation of powers between the judiciary and the elected branches of government and to accord appropriate respect to the choices made by government and parliament in the field of social and economic policy, while at the same time providing a safeguard against unjustifiable discrimination (paragraph 144). In the field of economic and social policy a high level of respect is to be accorded to the judgments of public authorities, but balancing this with the need for close scrutiny where differences of treatment are based on "suspect" grounds (paragraph 146). And at paragraph 161

> *The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues. It follows… that the ordinary approach to proportionality will accord the same margin to the decision-maker as the "manifestly without reasonable foundation" formulation in circumstances where a particularly wide margin is appropriate.*

57. In *Gilham* the Supreme Court was invited to allow a broad margin of discretion to the choices of parliament and to apply the "manifestly without reasonable foundation" test as the context (the exclusion of a judicial office holder from the protections relating to whistleblowing in the ERA) was in the field of socio-economic policy. The Supreme Court found "*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*".

58. In another whistleblowing employment case *Sullivan v Isle of Wight* [2025] EWCA Civ 379 at para 93, the Court of Appeal observed:

> *Legislation necessarily has to differentiate between groups of people. Legislation by its nature operates by identifying which groups, in which circumstances, are to enjoy protection. The fact that legislation could, in theory, extend to some cases which could be said to be on the periphery of, or fall outside, the core purpose of*

the legislation does not mean that the legislation lacks objective justification. Still less does it mean that the legislation must be made to extend to whole groups of people to whom Parliament does not intend the legislation to apply, in order for the legislation to avoid being stigmatised as incompatible with Article 14 of the Convention. In truth, such a form of reasoning discredits the important purpose underlying Article 14. That Article seeks to prohibit unjustified discrimination on certain grounds. In the case of some grounds, such as those specified in Article 14 like race or sex, courts will naturally and instinctively be concerned to ensure that there is a proper basis for distinguishing between people for such reasons. However, Article 14 and the concept of differential treatment on grounds of status has been applied to a far broader range of circumstances. Courts need to be equally astute to ensure that challenges to legislation do not become a means of arguing for a particular policy outcome under the guise of challenges to differences in treatment resulting from primary legislation adopted by a democratically elected legislature.

The WTR

Notice requirements

59. Reg. 15 WTR provides:

> *(1) A worker may take leave to which he is entitled under regulations 13, 13A and 15B on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).*
>
> *(2) A worker's employer may require the worker—*
>
> > *(a) to take leave to which the worker is entitled under regulation 13, 13A or 15B; or*
> > *(b) not to take such leave …,*
> > *on particular days, by giving notice to the worker in accordance with paragraph (3).*
>
> *(3) A notice under paragraph (1) or (2)—*
>
> > *(a) may relate to all or part of the leave to which a worker is entitled in a leave year;*
> > *(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and*
> > *(c) shall be given to the employer or, as the case may be, the worker before the relevant date.*
>
> *(4) The relevant date, for the purposes of paragraph (3), is the date—*

(a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and

(b) in the case of a notice under paragraph (2)(b), as many days in advance of the earliest day so specified as the number of days or part-days to which the notice relates.

(5) Any right or obligation under paragraphs (1) to (4) may be varied or excluded by a relevant agreement.

60. For the purposes of Reg. 15(5) a relevant agreement is defined in Reg 2 as "*in relation to a worker, means a workforce agreement which applies to him, any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer*". A "collective agreement" "*means a collective agreement within the meaning of section 178 of the Trade Union and Labour Relations (Consolidation) Act 1992, the trade union parties to which are independent trade unions within the meaning of section 5 of that Act*".

61. Reg. 16 provides:

(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under [regulations 13, 13A and 15B], at the rate of a week's pay in respect of each week of leave.

(1A) The hourly rate of pay in respect of any period of annual leave to which a worker is entitled under regulation 15B is determined according to the formula—

A / B

where—

A is the week's pay mentioned in paragraph (1); and

B is the average number of hours worked by the worker in each week used to calculate A.

(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3), the supplementary provisions in paragraphs (3ZA) to (3ZG) and the exception in paragraph (3A).

(3) The provisions referred to in paragraph (2) shall apply—

(a) as if references to the employee were references to the worker;

(b) as if references to the employee's contract of employment were references to the worker's contract;

(c) as if the calculation date were the first day of the period of leave in question; …

(d) as if the references to sections 227 and 228 did not apply.

(da) as if, in the case of entitlement under regulations 13 and 15B, sections 223(3) and 234 did not apply;

(e) subject to the exception in sub-paragraph (f)(ii), as if in sections 221(3), 222(3) and (4), 223(2) and 224(2) and (3) references to twelve were references to—

(i) in the case of a worker who on the calculation date has been employed by their employer for less than 52 complete weeks, the number of complete weeks for which the worker has been employed, or

(ii) in any other case, 52; and

(f) in any case where section 223(2) or 224(3) applies as if—

(i) account were not to be taken of remuneration in weeks preceding the period of 104 weeks ending—

(aa) where the calculation date is the last day of a week, with that week, and

(bb) otherwise, with the last complete week before the calculation date; and

(ii) the period of weeks required for the purposes of sections 221(3), 222(3) and (4) and 224(2) was the number of weeks of which account is taken.

…

(3B) For the purposes of paragraphs (3)[, (3ZA) to (3ZG)] and (3A) "week" means, in relation to a worker whose remuneration is calculated weekly by a week ending with a day other than Saturday, a week ending with that other day and, in relation to any other worker, a week ending with Saturday.

(4) A right to payment under paragraph (1) does not affect any right of a worker to remuneration under his contract ("contractual remuneration") [(and paragraph (1) does not confer a right under that contract).

(5) Any contractual remuneration paid to a worker in respect of a period of leave goes towards discharging any liability of the employer to make payments under this regulation in respect of that period; and, conversely, any payment of remuneration under this regulation in respect of a period goes towards discharging any liability of the employer to pay contractual remuneration in respect of that period.

WTR remedies and time limits (also Part II ERA time limits)

62. Reg 30 provides:

> *(1) A worker may present a complaint to an employment tribunal that his employer—*
>
> *…*
>
> *(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2), 15E, 16(1) or 16A.*
>
> *(2) Subject to regulation 30B, an employment tribunal shall not consider a complaint under this regulation unless it is presented—*
>
> > *(a) before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;*
> >
> > *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.*

63. Reg 30B concerns the extension of time limits to allow ACAS early conciliation.

64. Section 23 ERA provides:

> *(1) A worker may present a complaint to an employment tribunal—*
>
> > *(a) that his employer has made a deduction from his wages in contravention of section 13*
>
> *(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—*
>
> > *(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or*
> > *(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.*
>
> *(3) Where a complaint is brought under this section in respect of—*

(a) a series of deductions or payments, or
(b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,
the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4) Where the [employment tribunal] is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

[(4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

Rolled up holiday pay and set off

65. In *Robertson-Steele v RD Retail Services Ltd* [2006] ICR 932 paragraph 69 the ECJ held:

> *Article 7 of the [WTD] does not preclude, as a rule, sums paid, transparently and comprehensibly, in respect of minimum annual leave, within the meaning of that provision, in the form of part payments staggered over the corresponding annual period of work and paid together with the remuneration for work done, from being set off against the payment for specific leave which is actually taken by the worker.*

66. The EAT had set out guidelines for tribunals considering the issue of rolled-up holiday pay in *Smith v Morrisroe* ICR 596 at paragraph 5:

> *There must be mutual agreement for genuine payment for holidays, representing a true addition to the contractual rate of pay for time worked. The best way of evidencing this is for;*
>
> *(a) the provision for rolled-up holiday pay to be clearly incorporated into the contract of employment;*
> *(b) the percentage or amount allocated to holiday pay (or particulars sufficient to enable it to be calculated) to be identified in the contract, and preferably also in the payslip;*

(c) records to be kept of holidays taken (or of absences from work when holidays can be taken) and for reasonably practicable steps to be taken to ensure that workers take their holidays before the end of the relevant holiday year.

67. In *Lyddon v Englefield Brickwork Ltd* [2008] IRLR 198 considered the guidelines in *Smith* and held:

> *It follows that we do not accept that the tribunal was in error in failing to follow the guidelines enunciated in Smith. It is important to emphasise that the principles there set out are only guidance. The fundamental question is whether there is a consensual agreement identifying a specific sum properly attributable to periods of holiday. We are satisfied that this requirement was met in this case. Smith sets out the best way of satisfactorily evidencing that an appropriate and transparent agreement has been made. We respectfully agree with those guidelines. It is obviously desirable that the sum or a formula for calculating it, should be identified in writing in advance of the worker starting work. But the case does not purport to lay down an exhaustive set of criteria which have to be satisfied before a tribunal can properly reach the conclusion that there is a clear and transparent contractual term.*

Conclusions

Worker status under ERA

68. The claimant's case in her witness statement and skeleton argument is that she was a "worker" under section 230 ERA (paragraph 7 skeleton, paragraph 4 witness statement). She says in paragraph 4 of her witness statement that her case is on "all fours" with the first instance Employment Tribunal case of *Somerville v NMC* Claim No, 2413617/2018. In her witness statement she pointed to a number of factors which she says establish that she works under a contract:

    a. She says that she was required "*under a contractual relationship*" by virtue of the booking policy to sit a minimum number of 30 days per year (paragraph 13, 19 and 22);

    b. She was paid monthly as a worker and the respondent paid her tax and national insurance and pension contributions. Her payslips refer to her as an employee and she has an employee number (paragraph 15);

    c. She is required to undertake mandatory training (paragraph 20);

    d. She is integrated into the respondent organisation as she is subject to an appraisal system and cannot negotiate her pay (paragraph 21).

69. What this ignores is the key element to the definition of a worker under section 230 ERA that the individual has entered into or works under a

contract of employment or any other contract. The tribunal at first instance in *Somerville* found at paragraph 189 that Mr Somerville did in fact work under an overarching contract between him and the NMC, and a series of individual contracts. It further found that he was a worker of the NMC within the meaning of section 230(3)(b) ERA.

70. As I have set out above, *Gilham* (which could apply to the holder of any judicial office) considered that all of the factors concerning the relationship between a judge and the executive or any member of it did not point towards the existence of a contractual relationship. As *Gilham* makes clear, whether the parties are in a contractual relationship depends on the intention of the parties, and not on the fact that there are features to the relationship such as remuneration, duties to be performed and other such matters.

71. There are a number of factors within the terms of office of a judicial office holder which would be equally at home in a contract of employment, such as obligations to perform duties, agreement as to remuneration, obligations to undertake training, and other benefits and burdens. These do not turn the relationship into a contractual one.

72. The fact that the claimant pays income tax is not a pointer towards her working under contract. Section 5 Income Tax (Earnings and Pensions) Act 2003 expressly applies the income provisions that are expressed apply to employments as equally applying to officeholders. References to the claimant as an employee on her payslips, and the provision of payslips themselves equally do not indicate a contractual relationship. The provision of these payslips by a payroll provider is a convenient way to administer the respondent's payroll.

73. I conclude that the claimant did not work under a contract, but held office. She therefore cannot satisfy the definition of worker under section 230 ERA.

Worker status under WTR

74. Despite "worker" being defined materially identically in regulation 2(1) WTR and section 230 ERA, the term worker is to be defined under the EU definition. There is no difficulty with the same word having different meanings in different statutory provisions.

75. The claimant's case, at paragraph 8 of her skeleton argument and paragraph 11 of her witness statement is, essentially, that *O'Brien* has decided that judges are "workers" for the purposes of EU law. She also submits that *Somerville* is also authority for the proposition that judicial officeholders can be protected under EU law. In *Somerville* the tribunal was not dealing with judicial officeholders, but panel members who worked under a contract, and who the tribunal found on the facts satisfied the WTR definition of workers. *Somerville* is therefore of no assistance in this analysis.

76. In *Gilham* in paragraph 8 the Supreme Court stated:

> *In February 2015 the claimant made a two-part claim in the tribunal. Both parts of her claim depended upon her being a worker within the meaning of section 230(3) of the 1996 Act (or having the same protection as such a worker). One part of her claim was for disability discrimination under the Equality Act 2010, as a result of failure to make reasonable adjustments to cater for her disability. This claim is derived from European Union law. It is therefore accepted that, as a result of the decision of this court in O'Brien v Ministry of Justice (formerly Department for Constitutional Affairs) [2013] UKSC 6; [2013] 1 WLR 522, in the light of the guidance given by the Court of Justice of the European Union in ((Case C-393/10) [2012] ICR 955), a judge is a "worker" for the purpose of European Union law and national law has to be interpreted in conformity with that. That case concerned discrimination against part-time workers, but the same result was reached by the Court of Appeal for Northern Ireland in Perceval-Price v Department of Economic Development [2000] IRLR 380, that tribunal judges were "workers" for the purpose of discrimination on grounds of sex. Hence the disability discrimination claim will continue in any event.* [Emphasis added]

77. This, on the face of it, appears to be at odds with the respondent's argument before me, and possibly with the EU cases relied on by the respondent.

78. I note that the case of *Fennoll* was not considered by the Supreme Court in *Gilham*. I note also, that what paragraph 8 was recording was that the claimant's disability discrimination claim under the Equality Act 2010 would be proceeding, based on *O'Brien's* conclusions on worker status. Essentially, this paragraph was simply recording something in the nature of a concession, and it did not form part of the reasoning in the case.

79. What *O'Brien* had held on status was as follows:

> *For these reasons the court holds recorders are in an employment relationship within the meaning of clause 2.1 of the Framework Agreement on Part-time Work and that, as the result to be achieved by the PTWD is binding on the United Kingdom, they must be treated as "workers" for the purposes of the 2000 Regulations.* [Emphasis added]

80. As I have set out above, the WTD did not contain a definition of worker as the PTWD did. Given the frequent observations within EU jurisprudence about there not being a single definition of worker in EU law, I consider myself bound to apply the *Fennoll* definition of worker, reiterated in a number of further ECJ decisions.

81. I remind myself of this – "*The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration*".

82. The claimant sets out her case as to why she should be regarded as a worker under EU law in paragraphs 10 to 17 of her skeleton argument, and paragraphs 13 to 22 of her witness statement. She repeats some of the same arguments as she relies on in respect of domestic law. Additionally, she refers to *Uber v Aslam* [2021] UKSC 5, and urges me to look at the practical reality for working relationship, submits that labels are not determinative, and says that mutuality of obligation is not essential for worker status.

83. For its part, the respondent relies on a number of the conclusions in *Gilham* about the working relationship of an officeholder with the executive. Mr Collins submitted that *Gilham's* conclusions about why judges do not work pursuant to contract also demonstrate that they do not receive remuneration in return for the performance of services. He says that a judge, and indeed an NLM, are not remunerated for the services they perform, but by virtue of their office.

84. Mr Collins further highlighted paragraphs 19 of *Gilham*:

> *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.*

85. He also made reference to paragraph 24, which, while being in relation to crown employment, still highlighted the difficulty the claimant had in establishing that she performed services for and under the direction of another person:

> *For the reasons given earlier, it is impossible to regard the judiciary as employed under or for the purposes of the Ministry of Justice. They are not civil servants or the equivalent of civil servants. They do not work for the ministry. It is slightly more plausible to regard them as working under or for the purposes of the Lord Chief Justice, who since the 2005 Act has had statutory responsibilities in relation to the judiciary: under section 7of that Act, he is responsible for the maintenance of appropriate arrangements for the welfare, training and guidance of the judiciary of England and Wales (within the resources provided by the Lord Chancellor) and for their deployment and the allocation of work within the courts. As already noted, he also shares some responsibility for appointments,*

discipline and removal with the Lord Chancellor. But it is difficult to think that, by conferring these functions upon the Lord Chief Justice, the 2005 Act brought about such a fundamental change in the application of section 191. Judges do not work "under and for the purposes of" those functions of the Lord Chief Justice but for the administration of justice in the courts of England and Wales in accordance with their oaths of office.

86. I am persuaded by the respondent that these features identified in *Gilham* make it difficult to see who the claimant is providing services to, and at whose direction. This is a critical element of the EU definition of worker for the purposes of the WTD. I consider that the "fragmentation of responsibility" which Baroness Hale considered "*highlights how different is the position of a judge from that of the worker employed under a contract with a particular employer*" also makes it difficult for an officeholder to satisfy WTD worker definition. Although the context of Baroness Hale's observations were in relation either to the contractual relationship or Crown employment, they are nonetheless observations about the "*essential feature of the employment relationship*" and related to the persons or bodies who it might be said services were performed for or under the direction of. Or to look at things through the *Uber* lens, Baroness Hale is talking about the practical reality of the working relationship. It is not easy to see where control is located or what the claimant is integrated into.

87. I did raise with Mr Collins the fact that the *Miller* claims included claims by fee-paid judges for holiday pay, and that the Ministry for Justice did not defend those claims on the basis that judges were not workers. He candidly accepted that this was the case, saying the point was not taken at the time, but is taken now. He also acknowledged that messages on the intranet in 2014 indicating, in terms, an entitlement to paid annual leave under the Working Time Regulations 1998 closely followed the *O'Brien* case, and reflected a view of the law by the respondent held then which is not held now.

88. In all the circumstances I conclude that the claimant was not a worker under the EU definition as set out in the case law in respect of the WTD.

Worker status under human rights law

89. It seems to be the case that the claimant is not directing her arguments towards establishing that as an officeholder she is being discriminated against by virtue of that status in the exercise of her A1P1 rights and Article 8 rights by not having access to holiday pay under the WTR. In fact a number of her complaints seemed to be that as an NLM she was being treated worse than judges, who are also officeholders. Nonetheless, I will address issues of ambit, status et cetera.

90. I also observed that Article 14 does not create stand-alone rights, but is about discrimination in the sphere of substantive Convention rights.

Ambit

A1P1

91. It is for the claimants to establish that "*but for the condition of entitlement about which she complains she would have had a right, enforceable under domestic law" per Stec*. She would also need to be able to point to something she had and had lost before she can say that she has been deprived of the possession. A1P1 cannot be used to create a right or a possession, but is to protect possessions or rights that exist.

92. Although she does not articulate it in this way, the claimant's case appears to be essentially that because of the definition of worker within Reg. 2 of the WTR she is deprived of the right to paid annual leave. Mr Collins says that she cannot show that she has been deprived of a possession. He also submits that a conclusion that, but for the requirement that an individual meets the definition of worker within Reg 2 WTR, the claimant would have been entitled to holiday pay would involve the tribunal determining how Parliament should have drawn the line as to who should benefit from holiday pay rights.

93. I conclude that the claimant does not bring herself within the ambit of A1P1. A1P1 protects rights that exist. It is also impossible for me to say where Parliament should have drawn the line as to who should benefit from holiday pay rights absent a requirement that an individual meets the definition of worker. The claimant does not bring herself within the ambit of A1P1.

Article 8

94. The authorities make clear that it is for the applicant to show convincingly on the evidence that there have been very significant consequences on their private life by reason of the impugned measure.

95. I do not conclude that the claimant has satisfied this high threshold. The claimant does not really address the issue fully in her witness statement, and there is nothing to suggest, in the wording of *Denisov,* that the consequences of the requirement to satisfy the definition of worker in Reg 2 WTR "*are very serious and effect… her private life to a very significant degree*".

96. The claimant has not brought herself within the ambit of Article 8.

Status

97. As *Stott* makes clear, it is necessary to identify a "personal characteristic" by which persons or groups of persons are distinguishable from each other. A generous meaning ought to be given to other status, and the characteristic need not be innate and can be a matter of personal choice.

98. *Gilham* has held that the status of "judge" can amount to a status within article 14. At paragraph 32 the Supreme Court set out:

> *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.*

99. The reasoning is fairly brief. The Supreme Court observes that occupational classification is "capable" of being a status. It's observation that the classification of the judge as a non-contractual officeholder is what takes her out of the whistleblowing protection enjoyed by employees and workers might run the risk of being seen to be defining a status by reference to the alleged discrimination or law which creates the difference in treatment. The status must have an independent existence distinct from the law which creates the difference. However, the Supreme Court goes on to observe that the constitutional position of a judge reinforces the view that this particular occupational classification, that of judge, is a recognisable status.

100. I therefore do not consider *Gilham* to be anything more than authority for the occupational classification of "judge" as being an "other status" for the purposes of Article 14. As Baroness Hale explained, there constitutional position reinforces the view of their recognisable status.

101. On the evidence it is difficult to see how an NLM, a Specialist Tribunal Member, or an officeholder who does not work pursuant to a contract, has personal characteristics such that they should be considered, even adopting a generous meaning, as having a status for the purposes of Article 14.

<u>Analogous of position and justification</u>

102. If I had found that the claimant had brought herself within the ambit of A1P1 and/or Art 8, the claimant would have been treated less favourably with respect to access to such rights than an employee or a worker. In this counterfactual situation the claimant would have been in an analogous position.

103. Further, if I were to have held that the claimant's status, perhaps as officeholder or NLM, was sufficient for the purposes of Article 14, it is clear that such status would not be a "suspect" one. It follows that less weighty reasons are required to justify any difference in treatment.

104. The claimant's case on this issue is slightly puzzling. She says at paragraph 46 and 47:

> *46. This is not a matter of treating "employees" better than "officeholders" – it is that <u>some officeholders</u> (ie fee paid judges) are treated better than others (nonlegal members), despite performing complimentary judicial functions on the same panels.*

47. The distinction is irrational and discriminatory, especially given that

- *The claimant's adjudicative responsibilities of the same;*
- *The claimant's decisions carry equal legal weight;*
- *The claimant was competently pointed via JAC-style processes;*
- *The claimant is bound by the same judicial standards and codes.*

105. The ERA is primary legislation, and the WTR is secondary legislation which uses the same definition of employee and worker. Parliament has, in enacting this legislation, made decisions about persons who satisfy the definitions, and generally the rights and protections within the legislation, i.e. those who are employees and workers, and those who are not, such as independent contractors and officeholders.

106. The respondent's pleaded justification is that "*the exclusion of office-holders from an entitlement to paid annual leave under the WTR is a proportionate method which has been adopted by Parliament in order to afford protection to those most in need of it*".

107. The evidence of Mr Edwards does not touch upon the justification for excluding office-holders.

108. I confess that all of the above has put me in a position that I find rather puzzling. I am to determine whether less favourable treatment on non-suspect grounds, which I have not found to be within the ambit of the respective rights, and which do not appear to be the claimant's case anyway, can be justified by evidence which has not been provided to me. Within this scenario is implicit that whatever conclusion I come to would be academic anyway, as I have not found that the claimant to have brought herself within the ambit of A1P1 and Article 8.

109. The respondent has drawn my attention to the first instance decisions in *Miller v Ministry of Justice* 1700853/2007 and *Mistlin v Ministry of Justice* 2204666/2013.

110. In *Miller* EJ MacMillan observed that fee-paid judges are casual workers and take their holidays at times when they do not sit, convenient to themselves, and owe no obligation to the MoJ beyond meeting a minimum sitting requirement. No judge has been deterred from taking leave by the fact that they had not been told that their daily fee did not include holiday pay. In *Mistlin* EJ MacMillan observed that fee-paid judges are wholly atypical workers and none of the health and safety policy underpinning the Directive could remotely apply to them. All in all, this cohort did not seem a particularly vulnerable group and was one that enjoyed a substantial element of flexibility.

111. For what it is worth, probably the best I can say, is that had the claimant brought herself within the ambit of A1P1, the respondent has adduced no evidence that excluding office-holders from an entitlement to paid leave is a proportionate method of affording protection to those most in need of it, beyond the observations in *Miller* and *Mistlin* that this cohort is not particularly vulnerable.

Overall conclusion on Article 14

112. I do not conclude that excluding the claimant as an NLM or office-holder from enjoying holiday rights under the WTR was in breach of her rights under Article 14. I do not conclude that section 230 ERA and Reg 2(1) WTR should be read to include holders of judicial office.

Unpaid holiday pay

113. I will go on to examine the claimant's claims for holiday pay as though I had determined that she had the requisite worker status to bring the claims.

Notice requirements

114. The claimant's case at paragraph 42 of her witness statement is that she is not making a claim under Reg 14 WTR, and is not claiming that she has been prevented from taking leave. She claims, under Reg. 16 that payments should have been made in respect of annual leave. She says that she gave notice of her intention to take annual leave by marking herself as unavailable on availability sheets for both the MHT and SEND, which was notice in advance of taking the holiday. She says that it is accepted that notice is given by marking oneself unavailable, and said that the obligation to give notice has been varied by relevant agreement under Reg 15(5).

115. The respondent's case is that simply marking herself as unavailable on the availability sheet does not amount to valid notice under Reg 15. There is no evidence of the dates on which holiday was taken. There is no evidence that the claimant, by marking herself as unavailable was saying that she was taking a holiday; in a year when she sat for 30 days as an NLM was she indicating that she was taking 230 days holiday? As a matter of evidence should would not have been taking holiday on dates she had marked as unavailable, as for some of these dates she would have been working for the local authority, or pursuant to her contract with the NMC. The respondent does not accept that there was a relevant agreement.

116. I accept the respondent's submissions.

117. As EJ Macmillan found at first instance in *Miller*, the right to take annual leave for which the employer is obliged to pay is dependent on the service of a notice under Reg 15(1) (unless the worker was too ill to take the leave during the reference period). Notice is clearly important, as it sets out the proposed dates of annual leave, which identifies the

calculation date for pay under Reg 16 and section 224 ERA. The dates are also important as they determine the time limits applicable under Reg 30.

118. I cannot accept that simply marking one's unavailability on an availability sheet is giving notice specifying "*the days on which leave is…to be taken*". Fee paid judicial office holders, both legal and non-legal give a range of commitments to sit. In the claimant's own case, in her early years of sitting she would commit to 30 days in the MHT and would work part time for the local authority. In later years she would sit for an increasing number of days as an NLM in the two tribunals, but would also work for the NMC and the local authority. It cannot be said that that when she was marking herself unavailable for work in the MHT or SEND she was specifying dates when she was taking annual leave. Some of those days she would be working elsewhere, some she may even have been taking annual leave from her role at the local authority. Mr Collins posed the rhetorical question, if the claimant only sat for 30 days, does that mean she is giving notice of her taking 230-odd days' leave? This illustrates the difficulty of the claimant's position.

119. I have also received no evidence of a relevant agreement, and have not been taken to any material which might indicate a variation or exclusion of any notice obligations under Reg 15. There is nothing in the Booking Policy (see paragraph 22 above) which could be remotely construed as being a relevant agreement varying or excluding notice obligations.

120. In the circumstances I conclude that the claimant has not given proper notice under Reg 15 and had she status to bring a claim under the WTR (or for holiday pay as wages under the ERA) such claim would have not been well-founded and would have been dismissed.

Time limits

121. As set out above, notice under Reg. 15 is critical to establishing the dates that would establish time limits. The claimant's case (paragraph 7 witness statement), however, appears to be that her claim is on "all fours" with the *Somerville* case where the claimant was held to be entitled, by virtue of Art 7 WTD to payments that accrued up to the presentation of the claim. The claimant claims all sums up to the presentation of her claim from October 2013.

122. Mr Collins says that this case is not on all fours with *Somerville* in one critical respect. It is clear from the Judgment in *Somerville* when it was before EJ Crosfill in 2023 (paragraph 121), that for reasons the judge did not fully understand, the respondent had conceded that the claimant did not have to demonstrate that he actually took annual leave. Given that concession the judge considered he was bound to accept that the claimant did take annual leave, exhausting his entitlement to leave under Reg 13 and that there was no need to identify particular dates as being time off from working for the respondent.

123. Mr Collins emphasises that the respondent here does not make any concession that the claimant does not have to demonstrate that she actually had taken leave, or that she did not have to identify particular dates as times off from working.

124. I do not accept that this case is on all fours with *Somerville*. The claimant must demonstrate that she brought the claim before the end of three months beginning with the date on which it is alleged that payment should have been made; or failing that, within such further period as is reasonable if I am satisfied that it was no reasonably practicable for her to put the claim in on time.

125. Without any evidence as to dates on which the claimant took leave, or dates on which she say she should have been paid, it is not possible for the claimant to establish that she brought her claims in time. I note also that the WTR has no provision for any series of failures to pay. Furthermore, there is no evidence advanced on which I could determine that it was not reasonably practicable for the claimant to put her claims in on time. In the circumstances, had the claimant had the status to bring the claim, and had she given valid notice, her claims would have been out of time under Reg 30 WTR.

126. In terms of time limits under the ERA, the claimant would be able to claim for a series of deductions. Again, the claimant faces the difficulty of not having set out when the deductions were made. In the circumstances, she cannot establish that any WTR claim brought as a deductions from wages claim has been brought in time, or that it was not reasonably practicable to bring it in time or within a reasonable period thereafter.

127. Had any claims advances, they would have been out of time howsoever brought.

Rolled up holiday pay and set off

128. On the issue of rolled up holiday pay, the claimant's case is that she, and her fellow NLMs, were not paid any (witness statement paragraph 43). She says that rolling up pay was unlawful (paragraph 44), and that none of her payslips or P60s show payment of holiday pay (paragraphs 45-6). A broad plank of her contention that she has not been paid holiday pay relates to the way the respondent has expressed itself to have paid legal and non-legal members rolled up holiday pay (paragraphs 47-52).

129. In essence, she says that it is easy to see the rationale for how the respondent has paid holiday pay to fee-paid judges. She exhibits the 2024 salary scaled of judges (Exhibit 7) and the 2024 schedule of fees for fee-paid judges. It is clear to see that the daily fee for a First-tier Tribunal fee paid judge is 1/220 of the salary of a full-time salaried First-tiered Tribunal judge.

130. In contrast, there is no salaried comparator for a non-legal member. There simply is not a salaried non-legal member – the role does not exist.

Furthermore, within HESC alone, the 4 different tribunals all pay different daily fees to their non-legal members.

131. The claimant says that this shows that non-legal members have never been paid holiday pay. I also understood from the claimant that her case is that there has been a lack of transparency about the whole issue. She gave oral evidence at one point that when the respondent purported to pay holiday pay around the time of the revision of the memorandum of terms and conditions in April 2016 there was no increase in the daily fee. This was not challenged, and no evidence has been put forward by the respondent on this issue.

132. The respondent makes reference in its skeleton argument to the guidelines in *Smith* and the observations in *Lyddon* and drew my attention to how the guidance in these cases was applied in *Miller* (which included consideration of issues relating to set-off in claims by fee-paid judges).

133. In terms of the facts, the respondent submitted that the 2016 Memorandum on conditions of appointment and terms of service for fee-paid non-legal members (and subsequent iterations) transparently set out that the fee is calculated by dividing the equivalent full-time office salary by 220 which meant that a pro-rata allowance for annual leave, and public and privilege holidays was incorporated into the daily fee.

134. The respondent candidly accepted that there is no salaried equivalent NLM, but submitted that this did not matter. What matters is that NLMs have received and have been told that they receive 1/220th of what a full time salary is or notionally would be.

135. The respondent also drew attention to the Civil Service Management Code (see paragraph 8 above) and other documents pre-2007 reform which indicated that the government would set fees for certain appointments by reference to the 1/220 formula. The respondent relied on the observations in *Miller* on the issue of payment of rolled up holiday pay and set-off as illustrating that the claimant had been transparently and clearly paid rolled up holiday pay, and that such sums as have been paid should be set-off any successful claim.

136. I have found this aspect of the case extremely difficult to determine. It appears clear that many years prior to the 2007 reforms government departments were applying a 220 formula to remunerate daily fees for certain appointments, including judicial office appointments. I also have little difficulty accepting that the respondent has had considerable difficulty locating and documents that set out the rationale for the determination of fee rates for NLMs when they were first paid a fee. The underlying principle of the 220 formula is also easy to understand, and is an obvious attempt to factor in a holiday element into a daily fee. There are 260 weekdays in a year; government employees would normally take around 40 days holiday and public and privilege days. Dividing an annual salary by the actual number of days worked net of leave incorporated holiday pay

into a daily fee. The mere reference to such a formula is therefore, in my judgment, an obvious indication of an attempt to include holiday pay.

137. The 220 formula is a divisor. In the case of a fee-paid First-tier Tribunal judge it is a divisor that can be applied to something concrete – the full time salary of a Salaried First-tier Tribunal judge. The same can be said for the Surveyor and Medical offices I have just mentioned. However, what is to be done when there is nothing concrete to be divided?

138. There is nothing wrong in principle with there being nothing concrete to be divided. Indeed, in most of the work situation where rolled-up pay might be attractive, such as the gig economy or other irregular work patterns, there is unlikely to be a question of a full-time equivalent to be divided. Here a percentage of 12.07% is often applied. This is a percentage that would reflect a divisor using the statutory number of leave days. An employer might, in these circumstances simply set out what the total remuneration would be, inclusive of the 12.07%.

139. There are two matters which particularly trouble me about the respondent's position here.

a. The first is that the respondent has, quite candidly, essentially run the case that the evolution of NLMs' pay has been something of an evidential mystery as the service was unified from one sponsored by different Departments. There is no real clarity as to whether it says that NLMs remuneration increased when the memorandum indicated that the 220 formula was applied. The claimant's case was not clear from pleadings or witness statement, but orally she said that there was no pay increase.

b. The second issue is that the respondent in the 2016 memorandum said *The fee is calculated by dividing the equivalent full-time office salary by 220. The effect of this divisor is that a pro rata allowance for annual leave, and public and privilege holidays is incorporated into the daily fee.*" But there was no equivalent full-time office. The rationale as set out to the NLMs was incorrect.

140. While the respondent is correct to say that the NLMs were told transparently and clearly that they would be paid a sum that is easily ascertainable as pay, and an ascertainable sum for holiday pay, it is not clear that NLMs were given a clear and accurate rationale for the calculation. An incorrect assertion appears to have been put to them. This undermines the clarity and transparency of the arrangement.

141. In the circumstances, had my conclusions been otherwise on the earlier issues, I would not have concluded that the respondent would have been entitled to set off sums paid to the respondent expressed as rolled up holiday pay.

Approved by:

Employment Judge Heath

11 June 2025

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision. If written reasons are provided they will be placed online.

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

ANNEXE

The Issues

41. The issues the Tribunal will decide are set out below.

Worker Status

1. Is the Claimant a worker for the purposes of the Working Time Regulations 1998 ("WTR") and / or the Employment Rights Act 1996 ("ERA")?

2. If not, is the Claimant a worker for the purposes of EU law such that she would have rights to holiday pay under the Working Time Directive ("WTD")?

2a) If not, should the claimant be treated as a worker for the purposes of WTR and ERA in order to give effect to her rights under the Human Rights Act 1998 (namely Art 14 read with A1P1, or Article 8 ECHR)

Working Time Regulations Jurisdiction

3. Have the claims for unpaid holiday pay been presented within three months of the date on which it is alleged that the exercise of the right should have been permitted or the payment should have been made in accordance with regulation 30(2) WTR?

4. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

5. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

~~Failure to permit the Claimant to take annual leave~~

6. ~~Did the Respondent fail to permit the Claimant to take annual leave during the period from the start of the Claimant's engagement to the date when proceedings were issued. In particular, the Tribunal will need to decide whether the Respondent:~~

   a) ~~Specifically and transparently gave the worker the opportunity to take paid annual leave;~~
   b) ~~encouraged the worker to take paid annual leave; and~~
   c) ~~informed the worker that the right would be lost at the end of the leave year.~~

7. ~~If so, how many weeks of annual leave has the Claimant carried over and what if any remedy is she entitled to?~~

Unpaid holiday pay

8. Alternatively, was the Claimant entitled to receive holiday pay under the WTR/WTD in circumstances where she did not provide notice in accordance with regulation 15(1) WTR? The Claimant's case is that, by marking herself as unavailable to sit, she was impliedly taking leave.

9. Has the Respondent failed to pay the Claimant holiday pay to which she is entitled to under the WTR / WTD?

10. What is the calculation of a "week's pay" for the Claimant?

11. What is the total amount of unpaid holiday pay?

12. Is the Respondent entitled to set off the rolled-up holiday pay that they contend that they have paid to the Claimant? If so, how much is the Respondent entitled to set off?

Unlawful deduction of wages

13. Was the Claimant entitled to receive holiday pay under the WTR/WTD in circumstances where she did not provide notice in accordance with regulation 15(1) WTR? The Claimant's case is that, by marking herself as unavailable to sit, she was impliedly taking leave.

14. Did the Respondent fail to pay the Claimant the amount of holiday pay she was entitled to as part of her "wages"?

15. If so, does it amount to an unlawful "series of deductions" of the Claimant's wages?

16. If so, does the backstop provision in section 23(4A) of the Employment Rights Act 1996 apply? The Claimant's case is that it does not.

17. Is the Claimant therefore entitled to claim unlawful deduction of wages, as claimed?