RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MARK JONES	**V**	**POLICE FEDERATION OF ENGLAND AND WALES**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY AT: HAVERFORDWEST ON: 21 & 22 MAY 2025

BEFORE: EMPLOYMENT JUDGE S POVEY

REPRESENTATION:
FOR THE CLAIMANT: **MS LING (COUNSEL)**
FOR THE RESPONDENT: **MR TATTON-BROWN KC (COUNSEL)**

RESERVED JUDGMENT

1. The Claimant was not an employee of the Respondent, as defined by section 230(1) & (2) of the Employment Rights Act 1996.

2. The Claimant was not a worker of the Respondent, as defined by section 230(3) of the Employment Rights Act 1996.

3. The Claimant was not a worker of the Respondent, as defined by section 43K of the Employment Rights Act 1996

4. In order to avoid an unlawful breach of the Claimant's rights under the European Convention on Human Rights, the Employment Rights Act 1996 is to be read and given effect so as to extend the protection contained in section 47B (and by extension Part IVA) to the Claimant as against the Respondent, for the period when he held the position of Branch Secretary.

RESERVED JUDGMENT

5. As such, the Claimant is permitted to being the complaint of detriment for making protected disclosures.

REASONS

Introduction

1. This is a claim brought by Mark Jones ('the Claimant') against the Police Federation of England & Wales ('the Respondent') wherein he raises complaints of unfair dismissal and detriment for making protected disclosures.

2. By a case management order of 31 January 2025, Employment Judge Brace listed the case for a public preliminary hearing, the purpose of which was to consider and decide the following issues (per Paragraph 2 of the case management order):

    2.1. Was the Claimant an employee of the Respondent, i.e. were they employed under a contract of employment?

    2.2. Was the Claimant a worker of the Respondent, i.e.:

        2.2.1. did they work under a contract to perform the work personally; and

        2.2.2. was the Respondent something other than a client or customer of the Claimant's profession or business?

    2.3. If not, in protected disclosure complaints only:

        2.3.1. was the Claimant a worker under the expanded definition in section 43K Employment Rights Act 1996?

        2.3.2. In the alternative, whether the Claimant is permitted to bring such a claim in reliance on *Gilham v Ministry of Justice [2019] 1 WLR 5905/Art10* and Art 14 ECHR?

3. Employment Judge Brace also made associated directions to prepare for the preliminary hearing.

RESERVED JUDGMENT

The hearing

4. The preliminary hearing was conducted by video on 21 & 22 May 2025. In preparation, the parties provided the following:

    4.1. A paginated & indexed bundle of document ('the Bundle').

    4.2. Witness statements for:

        4.2.1. The Claimant
        4.2.2. Mukund Krishna (the Respondent's Chief Exeiutive Officer)
        4.2.3. Charlie Hall (the Respondent's Strategic Advisor)

    4.3. Written submissions & respective bundles of legal authorities.

5. During the hearing, I heard oral evidence from the witnesses (who each confirmed and adopted their statement) and received oral submissions from Ms Ling for the Claimant and Mr Tatton-Brown KC for the Respondent. Due to lack of time, I reserved my decision.

6. On 15 May 2025, the Claimant applied to amend his claim, to include a compliant under sections 64 – 66 of the Trade Union & Labour Relations (Consolidated) Act 1992 (TULR(C)A 1992). That application was objected to by the Respondent.

7. At the outset of the hearing, and for reasons given orally, I postponed the determination of the Claimant's application until after the determination of the issues listed by Employment Judge Brace for this preliminary hearing. At the conclusion of the hearing, I made consequential directions and listed the case for a further preliminary hearing (on 9 September 2025), to determine the application to amend and, if appropriate, further case management.

8. As such, I have not engaged with those aspects of the evidence and submissions which related to the subject matter of the amendment application (quite reasonably, Ms Ling had prepared her written submission to deal with the subject matter of the amendment application, in case the same were determined in her client's favour).

9. In reaching my decisions, I had full regard to the evidence I saw and heard and the written and oral submissions I received on behalf of the parties.

Background

10. By way of a brief, neutral background to the claim:

10.1. The Claimant is a serving police officer with North Wales Police ('NWP'). He became a member of the Respondent's North Wales Branch the Branch in 2004, a representative in 2014, took on the role of Secretary of the Sergeant's Branch Board from December 2016 and was elected Branch Secretary in summer 2018. He was re-elected Branch Secretary in 2021.

10.2. In January 2024, the Respondent suspended the Claimant from his role as Branch Secretary and, following an investigation and a hearing, permanently removed the Claimant from his role with effect from 29 April 2024. It also barred the Claimant from standing for elected office. The decision was upheld on appeal.

10.3. The Claimant commenced ACAS Early Conciliation on 5 July 2024 and it concluded on 16 August 2024. He presented his claim to the Tribunal on 16 September 2024, wherein he contends that he was unfairly dismissed from his role as Branch Secretary and suffered detriment for making protected disclosures.

10.4. The Respondent resists the claim in its entirety. Its primary defence is that the Claimant was neither an employee or a worker and therefore the Tribunal does not have jurisdiction to consider his claim.

10.5. As detailed above, the Tribunal listed the issue of the Claimant's employment status and its own jurisdiction for determination by way of preliminary issues.

The relevant law

11. As referred to above, I received detailed written and oral submissions from the parties and was provided with respective bundles of legal authorities. I have not reproduced all the legal authorities relied upon but have had regard to them. Rather, I detail the main principles under this part of the judgment, and refer to other principles and legal authorities variously throughout the rest of this judgment.

<u>The Police Federation</u>

12. The purpose of the Respondent is defined by section 59 of the Police Act 1996, as follows (so far as relevant):

(1) There shall continue to be a Police Federation for England and Wales for the purpose of representing members of the police forces in England

> and Wales, and special constables appointed for a police area in England and Wales, in all matters affecting their welfare and efficiency, except for—
>
> (a) questions of promotion affecting individuals, and
>
> (b) (subject to subsection (2)) questions of discipline affecting individuals.
>
> (2) The Police Federation for England and Wales may—
>
> (a) represent a member of a police force at any proceedings brought under regulations made in accordance with section 50(3) above, or on an appeal from any such proceedings;
>
> …

13. Section 50(3) of the Police Act 1996 permits the Secretary of State to make regulations for disciplinary proceedings in respect of members of the police forces, including procedures leading to dismissal.[1]

14. Section 60 empowers the Secretary of State to make regulations prescribing the constitution and proceedings of the Respondent. The current exercise of those powers is contained within The Police Federation (England and Wales) Regulations 2017[2] ('the 2017 Regulations').

15. Regulation 22 of the 2017 Regulations authorises the Respondent to make rules regarding its national and local structure, funds and property, record keeping, services and benefits for members, consequences for breaching the rules, publication of material, transitional and saving provisions, and any other provisions which the Respondent reasonably believes necessary to fulfil its purpose ('the Rules'). The Rules require the approval of the Secretary of State in order to have effect.

16. The relevant edition of the Rules took effect in February 2023 (at [95] – [274] of the Bundle).

Employment status

17. Section 230 of the Employment Rights Act 1996 ('ERA 1996') defines employees and workers, as follows:

[1] Currently to be found in The Police (Conduct) Regulations 2020 SI No.4
[2] SI No. 1140

> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.
>
> (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 cased, worked under)—
>
> (a) a contract of employment, or
>
> (b) any other contract, 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 [hereafter referred to as 'a limb (b) worker']
>
> …

18. Section 47B ERA 1996 affords protection to workers against detriment by their employer for making a protected disclosure (as defined by Part IVA ERA 1996). Section 43K ERA 1996 includes the following extension to the meaning of worker, for the purposes of Part IVA ERA 1996:

> (1) For the purposes of this Part " worker " includes an individual who is not a worker as defined by section 230(3) but who—
>
> (a) works or worked for a person in circumstances in which—
>
> (i) he is or was introduced or supplied to do that work by a third person, and
>
> (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,
>
> …

19. In James v Greenwich LBC [2006] UKEAT/0006/06, the Employment Appeal Tribunal ('EAT') provided the following summary of the law regarding the requirements for a contract of employment (at [13] – [17]):

> 13 In Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515 MacKenna J identified the criteria

for determining whether a contract of employment exists in the following way:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other s control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service . . . As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be."

14 That is a passage which has been applied and followed in many subsequent cases, including Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, 623, per Stephenson LJ and Clark v Oxfordshire Health Authority [1998] IRLR 125, para 22, per Sir Christopher Slade. In Nethermere (St Neots) Ltd v Gardiner Stephenson LJ commented, at p 623f: "There must, in my judgment, be an irreducible minimum of obligation on each side to create a contract of service."

15 These passages were in turn followed by the House of Lords in Carmichael v National Power plc [1999] ICR 1226. The applicants were appointed as station guides, taking members of the public around certain power stations. Their employment was on a casual as required basis. They sought a written statement of the particulars of their contracts but this depended upon whether they were employees or not. They did not argue the case on the basis that they were on a series of ad hoc contracts when actually working, but rather on the basis that the relationship constituted a single contract of employment. The leading judgment was given by Lord Irvine of Lairg LC, who noted, at pp 1226, 1229—1230, that the tribunal had concluded that there was no obligation on the alleged employer to provide casual work nor an obligation on the worker to undertake it and that consequently there was an absence of that irreducible minimum of mutual obligation necessary to create a contract of service .

16 The authorities do not speak with one voice as to precisely what mutual obligations must be established. The relevant cases were analysed carefully by Langstaff J in Cotswold Developments Construction Ltd v Williams [2006] IRLR 181, paras 19—23. As he points out, sometimes the employer's duty is said to be to offer work, sometimes to provide pay. The critical feature, it seems to us, is that the nature of the duty must involve some obligation to

> work such as to locate the contract in the employment field. If there are no mutual obligations of any kind then there is simply no contract at all, as Carmichael v National Power plc [1999] ICR 1226 makes clear; if there are mutual obligations, and they relate in some way to the provision of, or payment for, work which must be personally provided by the worker, there will be a contract in the employment field; and if the nature and extent of the control is sufficient, it will be a contract of employment.
>
> 17 In short, some mutual irreducible minimal obligation is necessary to create a contract; the nature of those mutual obligations must be such as to give rise to a contract in the employment field; and the issue of control determines whether that contract is a contract of employment or not.

20. In the absence of an express contract, it may be permissible to imply a contract to give business reality to the relationship between the parties. The applicable test was so doing was also set out by the Court of Appeal James [2008] EWCA Civ 35 (at [23] – [24]):

> 23….in order to imply a contract to give business reality to what was happening, the question was whether it was necessary to imply a contract of service between the worker and the end-user, the test being that laid down by Bingham LJ in The Aramis [1989] 1Lloyd s Rep 213, 224:
>
> > necessary . . . in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist.
>
> 24 As Bingham LJ went on to point out in the same case it was insufficient to imply a contract that the conduct of the parties was more consistent with an intention to contract than with an intention not to contract. It would be fatal to the implication of a contract that the parties would or might have acted exactly as they did in the absence of a contract.

21. In respect of worker status, the EAT provide a similarly helpful summary of the relevant legal provisions in MacLennan v British Psychological Society & others [2024] EAT 166, which included the following (at [38] – [41]):

> 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.

22. Office holders can be employees or workers. The criteria which need to be established were considered in Gilham v Ministry of Justice [2019] UKSC 44, which concerned a judicial office holder, as follows (at [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.

23. Police officers are not workers or employees. They are office holders and "not in an employment relationship with anyone", per Commissioner of the Police v Lowrey-Nesbitt [1999] ICR 410 at p.407, before continuing at p.408, as follows:

> In summary, therefore, a constable is an office holder. The terms on which he serves are governed by statute and statutory instrument. Section 50(1) of the Police Act 1996 empowers the Secretary of State to make "regulations as to the government, administration and conditions of service of police forces." Section 50(2) entitles the Secretary of State, without prejudice to the generality of his powers, to make provision in relation to all the terms and conditions of service that might otherwise have been contained in a written contract of employment, including his hours of duty, pay and allowances and disciplinary procedure…The general employment protection afforded to civilians working under contracts of employment is not afforded to police officers. As a matter of public policy police constables must not be constrained in the exercise of their functions by their 'employers' asserting private rights. As a matter of public policy, their relationship with the police service is governed and only governed by statute. In performing their duties they must abide by their oath of office. In these circumstances we are quite

> satisfied that there is no room for the implication of a contract of employment…

Conventions rights

24. Article 10 of the European Convention on Human Rights ('the Convention') protects the right to freedom of expression.

25. Article 14 of the Convention states as follows:

> 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.

26. Section 3(1) of the Human Rights Act 1998 requires the following, when interpreting legislation:

> 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.

27. For the sake of convenience and brevity, I set out below the EAT's summary of main principles as to the application of the Convention to office holders who do not have contracts, from MacLennan (at [50] – [60], emphasis retained):

> **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] AC 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.

Findings of fact

28. The Claimant was and continues to be a serving officer with NWP. As a serving police officer, he was eligible to become a member of the Respondent (per Regulation 4 of the 2017 Regulations). He became a member of the North Wales Branch in 2004.

29. Each branch has a council (per Regulations 8 & 9 of the 2017 Regulations). So far as relevant, branch councils include members who have been elected by the membership at large and are known as 'Fed reps'. Elections are held at least every three years. The Claimant was elected as a Fed rep of the North Wales Branch in 2014 (and by extension, became a member of the branch council).

30. Each branch has a board (per Regulation 10 of the 2017 Regulations). So far as relevant, members of the branch board are elected by the members of the branch council. The members of the branch board must elect from their number a branch secretary. Elections to the branch board and to the role of branch secretary are also held at least every three years. In 2018, the Claimant was elected branch secretary of the North Wales Branch ('Branch Secretary').

31. As Branch Secretary, the Claimant was also a member of the National Council (per Rule 31.1 of the Rules, at [120] of the Bundle) and remined so for as long as he was Branch Secretary. (per Rule 32.1, at [120]).

32. All members of the National Council were elected representatives. The National Council elected the National Board (per Rule 33.1, at [121]).

The National Board's role included leading and running the Respondent (per Rule 39.1, at [123]). The National Council held the National Board to account on how it ran and led the Respondent (per Rule 33.2, at [121]).

33. During his time on the National Council, the Claimant was Chair of the Finance Committee.

34. The Respondent also employs staff, including a Chief Executive Officer (CEO) who is responsible for the day-to-day running of the organisation. The CEO is accountable to the National Board (per the Respondent's Standing Orders, quoted at [332] of the Bundle). At the relevant time, Mr Krishna was (and remains) the CEO.

35. The Claimant was subject to the Rules (as were in force from time to time), which apply to all members of the Respondent (per Rule 1.5). The Rules derive from the 2017 Regulations and are to be read alongside the 2017 Regulations (per Rule 1.1). If there is any conflict between them, the 2017 Regulations prevail (per Rule 1.4).

36. The Rules include the following:

    36.1. Standards and Performance Agreement (at Appendix 8)

    36.2. Ethics, Standards and Performance Procedure (at Appendix 9).

37. Appendix 8 "sets out the expectations of all Federation representatives" (per Rule 51). It details the Standards and Performance Agreement ('the Agreement'). The 10 commitments contained therein must be agreed to by the member prior to election or appointment (per Appendix 8, the Candidate Declarations at [614] of the Bundle and the Respondent's National Electoral Arrangements, the relevant extract of which was at [615]).

38. Appendix 8 contains the following (at [268] of the Bundle, emphasis retained):

> **Standards and Performance agreement**
>
> PERFORMANCE AND STANDARDS AGREEMENT v3
>
> If elected or appointed, I make the following commitment:
>
> 1. I embrace the Core Principles of the Police Federation of England and Wales in furthering the objectives and reputation of the Federation.

2. I will maintain exemplary standards of conduct, integrity and professionalism.

3. I will act in the interests of the members and the public, seeking to build public confidence in the police service.

4. I will be open and transparent in my approach which is fundamental to our legitimacy and effectiveness.

5. I make a commitment, where reasonably practicable, to involve and inform the members in the decisions I make.

6. I undertake a commitment to continue my self-development.

7. I am obligated to work together with colleagues at a local and national level in achieving the objectives and promoting the reputation of the Federation.

8. I will encourage police officers to become and remain members of the Federation and to pay voluntary subscriptions.

9. I will not encourage any member not to pay voluntary subscriptions.

10. I will discharge my duties as described in my role description (attached as necessary) to the best of my ability.

39. Appendix 9 *"*will apply to all Federation representatives*"* (per Rule 52 & Paragraph 1, Appendix 9). So far as relevant, the procedure provides as follows:

39.1. Complaints can be raised by members against representatives (Paragraph 4, at [269] of the Bundle);

39.2. Such complaints should be made to the National Secretary (or the National Chair, if the complaint relates to the National Secretary), who will decide what action, if any, to take (Paragraphs 7 & 9, at [269]);

39.3. The National Secretary has the power to suspend the Fed rep or place restrictions upon the duties they can undertake (Paragraph 11, at [269] – [270]);

39.4. There is a right of appeal against suspension and/or restrictions, to the National Board's Ethics, Standards and Performance Committee ('ESPC') (Paragraph 11, at [270]);

39.5. The National Secretary can refer the matter to the appropriate police force in appropriate circumstances (Paragraph 16, at [270]); and

39.6. Procedures exist for investigations, hearings and appeals (Paragraphs 17 to 28, at [270] – [271]).

40. In January 2014, Sir David Normington published his review of the Respondent, which the Respondent had commissioned itself in March 2013 ('the Normington Review'). The Normington Review made 36 recommendations for reforming the Respondent, addressing structural and cultural issues. The recommendations were accepted in full by the Respondent, which led to changes in the Respondent's structure and governance (and the passing of the 2017 Regulations).

41. Two recommendations in particular were of relevance to the issues in this case. The first related to the role of Fed reps and the staffing structure of the Respondent. It was summarised in the following extract from the report of the Home Affairs Committee's May 2014 report, "Reform of the Police Federation" (Paragraph 17, at [395] of the Bundle):

> 17. The Normington Report recommended better training and career development for workplace representatives, accompanied by a role description, a national member service commitment and a professional code of standards and conduct. It recommended that, at national level, the Federation should adopt a structure more like that of many trade unions, employing more professional staff, appointed for their professional skills and experience— including a Director of Finance, a Director of Policy and a Director of Equality and Diversity—and that there should be a much clearer distinction between the role of elected officers, who should set overall policy and exercise oversight, and the role of professional staff, employed for their expertise.

42. That resulted in the creation of role descriptions, including for the Branch Secretary ('the Role Description', at [49] – [53] of the Bundle), training for Fed reps, the commitments at Appendix 8 and the employment of a core staff, including a CEO.

43. The other recommendation of relevance was as follows (per the Additional Responsibility Payments Proposal, Appendix 7 of the Rules, at [223] of the Bundle):

> National guidelines for all expenses, honoraria and hospitality policies should be agreed and local force branches will be required to comply with these – a requirement embedded in regulations. All individual expenses, honoraria, and hospitality received should be declared by and then published online.

44. That resulted in the introduction of Additional Responsibility Payments ('ARP'), the purpose of which were "to acknowledge the additional responsibilities that individuals may incur as a result of their [Respondent] role, relative to those in Force*"* (per Appendix 7 to the Rules, at [225] of the Bundle). These replaced the payments "formerly known as honoraria*"* (per Appendix 7, at [223]).

45. The management and payment of ARPs was also governed by Rule 50 of the Rules (at [130] of the Bundle). There were provisions for payment of ARPs for local, Metropolitan and national roles. At the local level, ARPs were only payable for the Branch Chair, Branch Secretary (whether held on a full or part-time basis) and other specified branch roles, provided they were held on a full-time basis (per Appendix 7 to the Rules, at [227] – [229] of the Bundle).

46. The Claimant was first elected in 2014 (when he became a Fed rep, a role which he confirmed in his oral evidence he was elected to by the members). He was elected again in 2016, to the role of Secretary of the Seargent's Branch Board (per Paragraphs 5 & 6 of his witness statement). He was elected once more in 2018 as Branch Secretary.

47. The Rules in evidence came into force in February 2023 and were the third version (at [95] of the Bundle). Neither party suggested that the earlier versions of the Rules (which would have been in force when the Claimant was elected to his various roles) were materially different from the Rules before me.

48. The Claimant says that prior to his election as Branch Secretary in 2018, he had agreed to the commitments in Appendix 8 ('the Agreement') and was, upon his election to the role, subject to the provisions of Appendix 9.

49. Nothing in the Rules distinguished the applications of Appendix 8 or 9 to different elected roles. Rather, the provisions adopt a general application to "all Federation representatives*".* They were not uniquely applied to the Branch Secretary role. They also applied to Fed reps, elected members of branch councils and boards, and members elected to national roles.

50. Prior to being elected Branch Secretary, the Claimant combined his Fed rep and Sergeant's Board role with his full-time duties as a police officer. However, upon his election in 2018, the Claimant worked full-time as Branch Secretary.

51. The Role Description detailed the purpose and responsibilities of the Branch Secretary (at [49] – [53] of the Bundle). By virtue of Commitment 10 of the Agreement, the Claimant agreed to discharge his duties as per the Role Description, upon his election as Branch Secretary.

52. Both before and during his tenure as Branch Secretary, the Claimant continued to be paid his salary by NWP. His entitlement to annual leave continued to be managed and paid by NWP. He remained subject to local and national police regulations, requirements, policies, codes of ethics and standards of professional behaviour. He could be 'recalled' by NWP, if required.

53. Upon his election to Branch Secretary, the Respondent paid the Claimant an ARP, wherein he began receiving £246.46 per month, net of income tax and national insurance (Paragraph 38 of the Claimant's witness statement). As per the rules regarding ARPs, the sums paid were taxed at source by the Respondent (per Appendix 7 to the Rules, at [225]).

54. Outside of the election process, Rule 13.6 of the Rules provided for the circumstances in which the Claimant would cease to be Branch Secretary (at [109] of the Bundle);

> 13.6. A person elected as Branch Secretary will cease to be the Branch Secretary if he or she:
>
> 13.6.1. resigns as such;
>
> 13.6.2. ceases to be a subscribing member of the Federation;
>
> 13.6.3. ceases to be a member of the police force, a police cadet in that force or a special constable appointed for the police area for which that force is maintained;

> 13.6.4. is removed from his or her position under the Ethics, Standards and Performance Procedure.

55. On 24 January 2024, the Claimant was suspended by the Respondent, following receipt of an anonymised complaint. It was alleged that the Claimant had disclosed confidential information, made malicious statements about the senior management team and enticed an employee of the Respondent's to disclose confidential information (per Paragraph 14 of the Grounds of Resistance, at [30] of the Bundle).

56. The Claimant was notified of his suspension by the Respondent's National Secretary (at [278] – [280] of the Bundle), a role appointed by the National Board from amongst its members (per Rule 41 of the Rules, at [123] – [124] of the Bundle).

57. On 18 March 2024, the Claimant, as a member of the Respondent, raised a complaint against the National Secretary and the CEO (at [283] – [307] of the Bundle). The complaint was raised pursuant to Appendix 9 to the Rules, made to the National Chair (as it related to the National Secretary) and contained a number of allegations regarding the conduct of the National Secretary and the CEO toward the Claimant.

58. Following an investigation by external solicitors, one of the three allegations against the Claimant went forward to be determined. A hearing to determine that allegation and the Claimant's complaint of 18 March 2024 was held on 25 April 2024. In accordance with Appendix 9, the hearing was conducted by the ESPC. The Claimant did not attend the hearing but was represented and agreed for the hearing to proceed in his absence.

59. The outcome of the hearing was contained within a letter to the Claimant of 29 April 2024 (at [308] – [322] of the Bundle). The ESPC upheld the allegation against the Claimant (at [317] – [320] of the Bundle).The ESPC did not uphold the Claimant's complaint (at [320] – [321]).

60. By way of sanction, the ESPC removed the Claimant from all his positions within the Respondent (including Branch Secretary) and permanently banned him from standing for election to any office within the Respondent.

61. The Claimant was informed of his right of appeal against the decisions, which he exercised on 5 May 2024 (at [323] - [329] of the Bundle). The

Claimant's appeal was considered and determined by the National Deputy Chair of the Respondent (a role elected by the National Council, per Rule 43 of the Rules, at [125]). The appeal outcome was contained within a letter to the Claimant dated 17 May 2024 (at [330] – [335]). The Claimant's appeal was not upheld.

62. The Respondent ceased paying the ARP to the Claimant in May 2024 (per [338] of the Bundle).

63. It was not in dispute that nothing within the Claimant's various roles for the Respondent or the circumstances surrounding his removal from those posts had any adverse impact upon his role as a police office with NWP.

64. The Claimant presented his claim to the Tribunal (on 16 September 2024, at [2] – [13] of the Bundle). He brings complaints of unfair dismissal and detriment for making protected disclosures.

The parties' submissions

<u>The Respondent</u>

65. The Respondent accepted that, in his role as Branch Secretary, the Claimant was an office holder. However, it did not accept that he attained the status of employee or limb (b) worker.

66. On the Respondent's case, the Claimant fell at the first hurdle. As advanced by Mr Tatton-Brown in his written and oral submissions, there was no contract, employment or otherwise, between the Claimant and the Respondent.

67. In support of that submission, reliance was placed, in summary, on the following:

    67.1. The absence of any documentation from the time that evidenced either party viewing the Claimant as being employed by the Respondent, or being subject to a contract of service or to perform services;

    67.2. There was no offer and acceptance in the usual sense. Rather, the Claimant stood for election and it was a decision of the members whether or not he took up the role of Branch Secretary. Whatever the wishes of the Claimant and the Respondent, whether he

became Branch Secretary (and remained Branch Secretary) was entirely at the discretion of the members;

67.3. The Agreement (per Appendix 8) was not a legally enforceable contract. Rather, it was a document that contained a number of aspirations, commitments and expectations, not contractual obligations. It contained no requirement for consideration nor was it required to be countersigned by the Respondent. It set out commitments which the Claimant agreed to adhere to if elected and reflected recommendations from the Normington Review;

67.4. That conclusion was further reinforced by the language and purpose of Appendix 9, wherein a procedure existed in deal with complaints from any member "who considers that a representative has, or may have, committed a serious breach of the [Respondent's] expectations in relation to ethics, standards or performance…" (at [269] of the Bundle). The language was again of expectations and Appendix 8 simply served to provide a written statement of what those exceptions were. Appendix 8 served to make sense of Appendix 9 and no more;

67.5. The ARP continued to be a honorarium in all but name and was modest. Despite being paid less than £250 per month for a full-time role, there was no suggestion that either party believed that employment provisions like the national minimum wage applied to the relationship; and

67.6. Linked to that was the fact that the Claimant continued to be paid his full salary by NWP whilst undertaking all his roles with the Respondent, including the full-time role of Branch Secretary.

68. Mr Tatton-Brown also addressed the following further relevant issues:

68.1. On the issue of control (if a contract did exists between the parties), the fact that the Respondent's CEO (nor any of its senior management team) had no power over the Claimant in how he undertook the role of Branch Secretary was telling. Rather, it was the members (including those who held local and national posts) who decided who became Branch Secretary (via election) and to whom the Claimant was answerable (whether by way of re-lection, the Appendix 9 procedure or the application of the various policies in evidence).

68.2. In addition, Mr Tatton-Brown listed a number of features of the Claimant's relationship with the Respondent which, he submitted, spoke to a lack of control, to such a degree that it not only mitigated against a finding of an employment contract but also against a finding of a contract of any kind. These included (but were not limited to):

68.2.1. There was no need to seek permission from the Respondent to take leave and holiday pay was paid by NWP;

68.2.2. The Respondent could not dismiss the Claimant and only the members had the power to remove him from office;

68.2.3. There was no line management, no performance management or appraisal system in place; and

68.2.4. There were no minimum hours required and the Claimant was effectively left to perform the role autonomously.

68.3. As, on the Respondent's case, neither party conducted themselves as if there was a contract between them, it would be surprising if it were deemed necessary to imply a contract in order to understand the parties' dealings. In truth, it wasn't necessary to imply a contract to give business reality to what was happening between the parties or to create enforceable obligations between them. Having regard to the facts of the case and the way in which the parties conducted themselves, the Claimant could not discharge the burden upon him.

68.4. Although it was not in issue that the Claimant, as a matter of law, was not employed by NWP, that did not alter that fact that, in all other practical senses, the Claimant held a full-time job that was paid at a full-time salary by NWP, whilst simultaneously undertaking a full-time role for the Respondent as Branch Secretary. If the Claimant was right, then he was both a full-time office holder with NWP (with enforceable employment rights), whilst at the same time being a full-time employee or worker for the Respondent (with enforceable employment rights). That would create practical difficulties and notwithstanding the Claimant's status with NWP (which is governed by statute, rather than contract), a finding that the Claimant had an employment relationship with the Respondent would breach, in practical terms,

the principles that an employee cannot simultaneously have two employers (per the principles as detailed in Fire Brigades Union v Embery [2023] EAT 51).

69. In respect of the protected disclosure complaints, the extended definition of worker under section 43K ERA 1996 did not assist the Claimant as he did not fall within any of the specific categories contained with section 43K.

70. In addition, and as accepted by Ms Ling in her written submissions (at Paragraphs 31 – 32), section 43K(1)(a) required the existence of a contract, which, on the Respondent's submissions, did not exist.

71. It also required the Claimant to have been introduced or supplied by a third party. To the extent that the Claimant was suggesting that the third party in his case was NWP, that argument was misplaced. The Claimant had chosen to stand for election as Branch Secretary. The fact that all members and Fed reps had to be serving police officers was not what was meant by being introduced or supplied by NWP.

72. In respect of the Claimant's reliance on Gilham as a basis upon which to pursue his protected disclosures complaints, Mr Tatton-Brown made the following written and oral submissions (in summary):

72.1. The Claimant's role as an elected representative of the Respondent was not analogous to that of a limb (b) worker. The Claimant already had workplace protected disclosure protections as a police officer (per section 43KA ERA 1996), and his work as a police officer was integrally linked to his elected role with the Respondent;

72.2. Parliament had considered the position of police officers (as office holders) and decided to extend protected disclosure protections to them. It had also considered in 2014 whether to extend the protections further and, decided not to do so in respect of a number of groups, including "members of organisations" and "workers acting in the capacity of a trade union representative and full-time trade union officials" (per the Government's Response to the Call for Evidence, which appeared in the Respondent's authorities bundle);

72.3. As such, the government had given recent consideration to whether the protections should be extended further to non-workers

and decided against it (in so far as it could conceivably include the Claimant in his role of Branch Secretary). That should be afforded substantial weight;

72.4. In any event, it could not be said, when having regard to those factors, that it was not proportionate for the Claimant in his role as Branch Secretary to not be afforded protected disclosure protections. Further, it could not be said that a failure to extend such protections was manifestly without reasonable foundation; and

72.5. There was a reasonable relationship of proportionality between the aims of the legislation and the means adopted to achieve those aims.

73. For those reasons, the Respondent submitted that it was clear that there was no obligation on the Tribunal to interpret the provisions of the ERA 1996 so as to confer protected disclosure protections on the Claimant as against the Respondent.

The Claimant

74. In her written and oral submissions, Ms Ling's primary position was that, upon taking up the role of Branch Secretary, the Claimant and the Respondent entered into a legally binding contract, under which there was sufficient control and integration for the Claimant to be an employee or, in the alternative, a limb (b) worker.

75. Ms Ling stressed the importance of focussing on what was present in the relationship between the Claimant and Respondent (rather than what was missing) and whether those factors were sufficient to make out the irreducible minimum required for a contract to exist and, thereafter, the nature of that contract. The understanding of the parties at the time, whilst relevant, should not be considered particularly influential. In cases like this, where employment status is ultimately determined by the courts and tribunals, it was not surprising that the parties may not have acted as if they were in an employment relationship. What mattered was the reality of the relationship.

76. In addition, the context of that relationship was important, as was a recognition that employment relationships can and do exist in myriad ways.

77. Particular reliance was placed by Ms Ling on the Claimant's signing of, and being bound by, the provisions of Appendix 8 to the Rules, which incorporated the Role Description, wherein he entered into the Agreement with the Respondent. It was submitted that Appendix 8 used contractual language and the Claimant was required to sign a copy of the Agreement as a precondition of standing for election. If elected, the Claimant was thereafter bound by the terms of the Agreement.

78. In addition, the obligation on the Claimant to perform his role and duties as Branch Secretary derived from the Agreement, which incorporated the Role Description. The only statutory requirement was that there should be branches and branch secretaries (per the 2017 Regulations) and the Rules only provided for the election and removal of branch secretaries and the various councils and boards of which they were or could become members. To that extent, the Agreement, which included the Role Description, derived from some other source. That source, in this case, was the binding contract he entered into with the Respondent.

79. The Claimant was bound to perform the obligations under the Agreement and, if he did not, could be subject to the procedures under Appendix 9 and removal from office (as, in fact, happened).

80. In return, if elected, the Respondent was bound to pay the Claimant the ARP. It was, in Ms Ling's submissions, the *quid pro quo* for signing the Agreement and performing the role of Branch Secretary. Notwithstanding it's modest amount, the ARP had the quality of remuneration (and its modest size was not a reflection of its importance, or lack thereof, but of the reality of the situation and the context in this case, where the Claimant continued to be paid his full salary by NWP whilst undertaking his role as Branch Secretary).

81. The change from honoraria to ARPs was more than a change of name. It was a result of the Normington Review and the recommendations to have a consistent, more accountable structure. That was consistent with a move toward placing such roles on a contractual basis. In any event, the Claimant's contract was express (per the Agreement), so the size, nature or name of the ARP was of less relevance to the existence of that contract.

82. The Claimant also contended that the requirement for sufficient control by the Respondent was met. The Claimant was not elected as Branch Secretary by the members but by the Branch Board, which themselves were officers of the Respondent. Appendix 9 expressly dealt with

performance in the role and the sanctions for underperformance. It was not the case that officials like the Claimant were only answerable to the members and not the Respondent. There was evidence of significant control being exercised by the CEO during the Claimant's suspension. The Role Description set out what the Claimant was required to do in detail and there was a requirement to attend and undertake training. Those factors placed the Claimant in a position of subordination.

83. In contrast, the control exercised by NWP over the Claimant when he was Branch Secretary was largely theoretical and formal. Whilst there was a power to recall the Claimant, none of the witnesses could remember such a power ever being exercised. Any power to discipline the Claimant regarding conduct issues tended to arise only if a referral was made by the Respondent. Reliance was placed on a letter from the Chief Constable of NWP to the Respondent of 25 January 2024, written following the Claimant's suspension (at [281] – [282] of the Bundle). The Chief Constable expressed shock, dismay and concern over the decision to suspend the Claimant. Ms Ling submitted that this showed the extent to which NWP deferred to the Respondent in terms of control, since despite the objections and reservations raised by NWP, it was not suggested that they or anyone else had any power to change or overrule the Respondent's decision to suspend.

84. The Claimant was integrated into the Respondent's organisation (for example, he had a Respondent-specific email address) and was not permitted to substitute another member or colleague as Branch Secretary.

85. Although the Respondent is not a trade union and the Claimant as a serving police officer is not permitted to join a trade union, Ms Ling submitted that in all other ways, this case was analogous to the circumstances in case such as GMB Trade Union v Hughes [2006] UKEAT/0288/06/LA and Prison Officers Association v Gough [2009] UKEAT/0405/09/DA (and clearly distinguishable from the circumstances in Unite the Union v Nailard [2017] ICR 121), such that, like in those cases where union officials were held to be employees or workers, the Claimant's circumstances should also be recognised as satisfying the requirements for a relationship of employment.

86. On the issue of two employees, Ms Ling argued that the policy reasons behind the line of authorities did not apply in the Claimant's case. He was not employed by NWP and does not have any employment rights in his role as a police officer. He would only have those rights as against

the Respondent, such that the issue of employment rights falling on two employers would not arise.

87. In addition, there was a policy reason which did support the finding that the Claimant should be recognised as an employee or worker of the Respondent. Whilst the Claimant had whistleblowing protection in his role as a police officer (by reason of the extension of the protections per section 43KA ERA 1996), he would not have any equivalent protections against the Respondent, unless his status as an employee or worker were recognised.

88. The case of Embury can be distinguished because the claimant in that case (a firefighter) enjoyed rights as against the trade union by reason of the provisions under TULR(C)A 1992, provisions which were not available to the Claimant, give the prohibition on police officers joining trade unions such that the Respondent was not subject to TULR(C)A 1992.

89. For all those reasons, the Claimant submitted that there was a contract between him and the Respondent, upon being elected as Branch Secretary. Further, that contract was one of employment, having regard to its terms and the existence of control, integration and personal service.

90. Although not the Claimant's primary case, if the Tribunal found that a contract existed between the parties, albeit not one of employment, it was argued in the alternative that he may fall within the ambit of section 43K ERA 1996 in respect of his protected disclosure complaints. Reliance was placed on the fact that the Claimant had to be a serving police officer in order to have a relationship with the Respondent. Applying the principles of statutory interpretation (per Uber), it was suggested that those circumstances could satisfy the requirements of section 43K(1)(a)(i) ERA 1996.

91. On the issue of whether, if there was no contract between the parties, the protected disclosure protections should be extended to the Claimant on Convention grounds (per Gilham, et al), Ms Ling made the following submissions (in summary):

    91.1. The Claimant fell between two stools, since his protected disclosure protections as a police officer did not include his role with the Respondent and, as a police officer, he was prevented from joining a trade union and so denied the protections afforded

by TULR(C)A 1992 (which had been available to claimants in cases like Embery);

91.2. His role as Branch Secretary was analogous to that of a limb (b) worker (when considering the relevant factors identified in MacLennan) and the same constituted 'other status' for the purposes of Article 14. That status was the reason why he was treated less favourably;

91.3. The less favourable treatment was being denied protection against detriment for making protected disclosures, which was available to employees and workers;

91.4. The Respondent had failed to identify a legitimate aim for the less favourable treatment. Instead, the Respondent focussed on the aim and rationale of the measures in the ERA 1996 to protect whistleblowers. That did not explain why those protections are not extended to those, like the Claimant, who were full-time office holders, analogous to limb (b) workers. There was no rational connection advanced by the Respondent between the difference in treatment and the aim it sought to rely upon; and

91.5. The Government's Response to the Call for Evidence of 2014 should be afforded limited weight, since it was the response of government, not Parliament and, at its highest, the government chose to make no decision and keep matters under review, rather than explicitly exclude someone in the Claimant's circumstances from protection.

92. For those reasons, the Claimant argued that this was a case where there was less favourable treatment, which engaged the Convention and which was not justified. The four questions were all answerable in the Claimant's favour and, as suggested in Gilham (at [43]), section 230(3)(b) ERA 1996 should be 'read down' to include the words:

> …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.

Analysis & conclusions

The existence of a contract

93. As detailed above, central to this dispute was whether there was an intention by the parties to create legal relations. The Respondent accepts that the Claimant was an office holder at the relevant time (that is, on the Claimant's case, when he was elected Branch Secretary in 2018). The test to be applied in deciding whether an officer holder works under a contract to perform services was summarised in Gilham (at [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.

94. As explained in MacLennan (at [44]), that fundamental question of whether there was an intention to enter into a contractual relationship requires consideration of the following:

94.1. The manner in which the Claimant was engaged by the Respondent;

94.2. The source and character of the rules governing the service the Respondent provides;

94.3. The overall context; and

94.4. Any other relevant factors

95. In considering the manner in which the Claimant was engaged by the Respondent as Branch Secretary, the following factors were, in my judgment, of particular relevance:

95.1. The Claimant stood for election as Branch Secretary and was voted into office by members of the Branch Board (per Rule 13.1 at [108] of the Bundle), who themselves were elected by the Branch Council (per Rule 10.1 at [106]), who themselves were elected by the members (per Rule 8.1 at [105]). It was not suggested that the Respondent was not bound by the decision of its members, Branch Council or Branch Board in who was elected or to which role; and

95.2. Once elected, the Claimant became Branch Secretary and held the role until the next election (which had to take place within 3 years) or until one of the events prescribed by Rule 13.6 took effect (at [109] of the Bundle).

96. In considering the source & character of the rules governing the services which the Respondent provided, I had particular regard to the following:

96.1. The Respondent is a statutory body, with its purpose set by statute (per section 59(1) of the Police Act 1996) and its constitution, its structure and how it operates deriving from regulations made by the Secretary of State (per section 60 of the Police Act 1996);

96.2. The 2017 Regulations (which were made by the Secretary of State pursuant section 60 of the Police Act 1996) defines 'Federation officer' as including branch secretaries (Regulation 2), sets the structure of the Respondent at local and national level, stipulates the requirements for the Branch Council (at Regulation 8), the Branch Boards including requirements for the Board to elect a Brach Secretary (Regulation 10) and creates a power to make the Rules (in order to implement the 2017 Regulations), which must be approved by the Secretary of State (Regulation 22); and

96.3. The 2017 Regulations amended and updated the Police Regulations 2003, such that attendance at Branch Council, Branch Board meetings, national meetings and the Respondent's annual conference are to be treated as police duty. In addition, the approval of the Chief Constable was required by an officer to attend additional meetings of the Branch Council and Branch Board, attendance at which by an officer would, subject to the approval of the Secretary of State, also constitute police duty (per Paragraph 3, Schedule 1 to the 2017 Regulations.

97. As to the overall context, I was mindful of the following:

97.1. Becoming a Fed rep did not change or impact upon the Claimant's existing legal relationship with NWP, as his employer;

97.2. Whilst undertaking his roles for the Respondent, including the full-time role of Branch Secretary, the Claimant continued to hold the office of police constable;

97.3. NWP continued to:

97.3.1. Pay the Claimant's salary as a police officer in full;

97.3.2. Remain responsible and liable for its obligations toward him under the Working Time Regulations 1998 ('WTR 1998') (see further, below);

97.3.3. Retain the power to recall the Claimant, if required

97.4. As noted above, attendance at Respondent meetings was treated as police duty and the Claimant required the approval of the Chief Constable of NWP to attend additional meetings (which, by definition, was at the discretion of the said Chief Constable);

97.5. There was no evidence of the parties ever referring to their relationship during the relevant time, either in writing or verbally, as one of employer, employee or worker respectively. The Respondent never provided the Claimant with a written statement of particulars of employment; and

97.6. The Claimant was paid a modest ARP for his full-time role as Branch Secretary. At no time during or since receiving the ARP has the Claimant suggested that he was paid less than the national minimum wage (per the National Minimum Wage Regulations 2015), which apply to workers and employees;

98. As noted earlier, the WTR 1998 apply to police service (by reason of Regulation 41). The Claimant was, and continues to be, treated as employed by NWP under a worker's contract for the purposes of the rights and obligations under the WTR 1998.

99. It was not in dispute that the Claimant's entitlement to annual leave whilst he was Branch Secretary arose from his police officer role (he booked annual leave via NWP, who administered and recorded his annual leave entitlement). It followed that, as regards the application of the WTR 1998, the Claimant was still treated as a worker with the NWP, whilst undertaking his roles (including that of Branch Secretary) with the Respondent (as he was still treated as holding the office of constable).

100. The Claimant's case was that, whilst he was an office holder and was elected to the role in accordance with the 2017 Regulations, upon taking up his role as Branch Secretary, he entered into contractual relations

with the Respondent upon signing the Agreement, as per Appendix 8 to the Rules.

101. Reliance was also placed upon the payment of ARP, as consideration for the contract and the 'wage/work bargain'.

102. I had a number of difficulties with those submissions:

102.1. The Claimant contends that signing and agreeing to be bound by the Agreement (contained within Appendix 8 of the Rules), and by extension the procedures under Appendix 9, was pivotal in his contention that there was an intention to create contractual relations. He explicitly relied upon entering into the Agreement and being subject to the procedures in Appendix 9 in support of his contention that, upon becoming Branch Secretary, he entered into a lawful contract with the Respondent, a contract which he says rendered him an employee or a worker;

102.2. If the Claimant is right in that contention, then every Fed rep, in whatever capacity they are elected, must also intend to enter into a binding contract with the Respondent (and, by extension, the Respondent intends to contract with each of them). All Fed reps are elected and prior to standing for election must sign the Agreement, to which they become bound if elected;

102.3. The Respondent is a national organisation, with hundreds of elected representatives. If it intended to contract with every Fed rep, it was reasonable to expect that it would have clear and explicit policies, procedures and documentation in place that reflected that, at both a local and national level. But it does not;

102.4. In addition, whilst every Fed rep signs the Agreement, not every Fed rep is paid an ARP. As detailed above, only specified roles attract an ARP. It followed that, contrary to Ms Ling's submission, the payment of the ARP was not a *quid pro quo* for signing the Agreement or performing the role for which the member was elected. The entitlement to an ARP was not contingent on signing the Agreement. Indeed, the ARP was not even referred to in the Agreement (perhaps because, whilst the Agreement is signed by all Fed reps, not all Fed reps are entitled to a ARP). Rather, the ARP was contingent on standing for and being elected to one of the roles specified by the Respondent as attracting the ARP. There were may Fed reps who had signed the Agreement (which

the Claimant relied upon as a binding contract) and were not paid an ARP. In my judgment, that weakened the Claimant's allusion to the wage/work bargain and the link between signing the Agreement (being the terms of contract) and the ARP (being the consideration for the contract); and

102.5. Finally, ARPs were described at their inception as being "formerly known as honoraria" (per Appendix 7 to the Rules, at [223] of the Bundle). That came out of the recommendations of the Normington Review, which were, so far as relevant, "[N]ational guidelines for all expenses, honoraria and hospitality policies" (at [223]). What followed was the national ARP framework. When the provenance of ARPs is examined, what seemed clear was that the nature and purpose of the payments was not changing. Rather, the administration of, and accountability for, such payments was being reformed. That, in itself, did not support a conclusion that what were once honorarium had, from the implementation of ARPs, become something different.

103. I also found force in Mr Tatton-Brown's submissions as to the contents and context of the Agreement. Like the ARP, the Agreement came out of the Normington Review, which included the following recommendation (at [403] of the Bundle):

> A new performance and standards agreement will be drafted, consulted upon, and then signed by all representatives. It will comprise expectations of a Police Federation representative.

104. In its report of the Normington Review, the Home Office Committee in 2014 referenced the need for a "national member service commitment". There was also a distinction between those who were members or elected representatives and those who were employed by the Respondent.

105. The intention of the Agreement from the outset was to "comprise expectations" of a Fed rep, not terms, conditions or obligations. That intent was further reflected by the interplay between the Agreement (at Appendix 8) and the Ethics, Standards and Performance Procedure (at Appendix 9). I agreed with Mr Tatton-Brown's submission that without the Agreement in Appendix 8, Appendix 9 loses a lot of its purpose. As a procedure, it is "intended to…support the application of [the Respondent's] ethics, standards and performance standards" (per Paragraph 2, at 269] of the Bundle). The way the procedure achieved

that was the implementation of a complaints process (per Paragraphs 4 – 28, at [269] - [271]). The ethics, standards and performance to which Appendix 9 refers was contained, in large part, within the Agreement.

106. In addition, the complaints procedure was only triggered if the complainant considered that a Fed rep had not merely breached the expectations placed upon them by the Agreement. The breach must be "serious", "fall sufficiently below what is expected" and "places the reputation and public standing of [the Respondent] at risk" (per Paragraph 4, Appendix 9 at [269] of the Bundle). In other words, a breach of the Agreement was not enough to trigger Appendix 9. If a Fed rep failed to comply with the Agreement, the complaints procedure under Appendix 9, with its attendant powers to suspend, sanction and ultimately remove the Fed rep from their post, could not to triggered. The threshold was much higher.

107. That conclusion further undermined the Claimant's argument that the Agreement had contractual status, since it would result in a situation whereby one party to the contract could fail to comply with its terms with impunity, provided the breaches were not serious, did not fall sufficiently below what was expected and did not bring the Respondent into public disrepute. In those circumstances, the only sanction for breaching the terms of the Agreement would be the risk of not being re-elected, which would only arise every three years.

108. Even if a Fed rep acted in a manner which met the threshold under Appendix 9, the Respondent could only take action if a member raised a complaint. The Respondent itself was powerless to act of its own volition, even in the face of purportedly serious breaches of the Agreement. No matter how egregious the breaches, if no complaint from a member were forthcoming, the Respondent would have no recourse.

109. As well as undermining the Claimant's argument that the parties intended to create legal relations upon the signing of the Agreement, the interplay between the Agreement, Appendix 9 and the election cycle also spoke to the question of control (in circumstances where a contract existed between the parties). The Respondent could not dismiss a Fed rep or, as considered above, take any action to enforce the terms of the Agreement, unless the threshold in Appendix 9 was met and a complaint was made by a member.

110. There was no requirement for the Agreement to be signed by the Respondent and, save for the payment of the ARP, (which, for reasons

explained above, did not arise from the signing of the Agreement), it was far from clear what obligations, if any, fell on the Respondent as a result of the Agreement. The commitments were all on the Claimant. The requirements of Appendix 9 (which set out the procedure for dealing with complaints raised by members) fell on other Fed reps (namely, the National Secretary, National Chair and the members of the ESPC). In addition, Appendix 9 was the mechanism to deal with complaints. It was not, in itself, part of the commitments contained in the Agreement. The requirements for the Respondent to afford the Claimant the benefits and standing which came from being Branch Secretary did not arise form the Agreement. Those obligations arose from the Claimant's successful election.

111. Similarly, whilst the Claimant committed under the Agreement to "discharge my duties as described in my role description…to the best of my ability", a failure to do so could not be enforced or sanctioned by the Respondent. As explored above, that could only be instigated by a complaint being made by a member and, even then, only when a threshold higher than mere breach had been identified. Yet again, that pointed away from binding obligations and toward a set of expectations and preferred or desired behaviours.

112. Both parties addressed the question of two employers, with particular focus on the case of Embery. It was not in dispute that, as a general principle, one employee cannot have two employers for the purpose of employment protection. The rights which employees are afforded by statute should fall on one employer. So, by way of example, the EAT held that Mr Embery, a firefighter employed by London Fire Brigade but on full-time release to the Fire Brigade Union, was not employed by the union.

113. The Respondent said that the Claimant's case had, for all practical reasons, important parallels with Embery. Like Mr Embery, the Claimant was employed (by NWP) but released by his employer on a full-time basis as Branch Secretary. Whilst acknowledging that, as a matter of law, the Claimant is not and cannot be 'employed' by NWP, the practical complications which would arise from a finding of employment with the Respondent would be no different. Indeed, in Mr Tatton-Brown's submission, Mr Embery's case was, in one respect, stronger than that presented by the Claimant, since, unlike the Claimant, Mr Embery was subject to the union's disciplinary process, which also applied to its employed staff. As detailed above, the Appendix 9 procedure only

applied to Fed reps and could only be instigated by a member raising a complaint.

114. The parties must have intended to enter into contractual relations and to be legally bound by their agreement for a contract to exist. Whether there was such an intention is to be judged objectively, although the parties subjective beliefs and their actions may shed light on that analysis (see, for example, RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH and Co KG [2010] UKSC, 14, at [45] – [48]; Blue v Ashley [2017] EWHC 1928 (Comm),at [63] – [64]).

115. In respect of the Claimant's subjective beliefs and actions, the following were of relevance:

115.1. At no point during his tenure as Branch Secretary did the Claimant ever assert in any way whatsoever that his relationship with the Respondent was contractual or that he was a worker or an employee of the Respondent;

115.2. This was particularly noteworthy when it came to his suspension and removal from office. Following his suspension on 24 January 2024, the Claimant made a formal complaint under the Appendix 9 procedure (on 18 March 2024). His written complaint extended to 182 paragraphs over 25 pages. Not once within that complaint did the Claimant suggest that his relationship with the Respondent was contractual or that he enjoyed any form of employment status;

115.3. Ahead of the hearing of the complaint for which he was suspended, the Claimant sought legal advice from senior counsel. The hearing outcome letter of 29 April 2024 refers to "[W]ritten submissions prepared on your behalf by Sam Green KC" *(*at [309] of the Bundle). Whilst those submissions were not in evidence, the hearing outcome letter made no reference to any submissions as to the Claimant's rights in contract or under employment law. Arguments as to the Claimant's contractual or employment status were not subsequently raised as part of his appeal. It was reasonable to conclude that no such submissions were made on behalf of the Claimant, whether in response to his suspension, ahead of the hearing on 25 April 2024 or on appeal;

115.4. That was relevant as it spoke to the Claimant's (and his legal advisors) beliefs at the time, or more notably, their apparent lack

of belief that the Claimant and the Respondent had a contractual relationship worthy of mention in the course of a process which resulted in the Claimant being both removed from his role as Branch Secretary and being permanently bared from standing for elected office again; and

115.5. If the intent to create legal relations that the Claimant now relied upon existed at the relevant time, it was reasonable to assume that the consequences of that intent (namely, the creation of a legally binding contract) would have been raised in the wake of the Respondent purportedly ending that contractual relationship unilaterally. It was of relevance that no such arguments or submission were made, in circumstances where the Claimant had legal advice and representation.

116. That lack of any reference to the Claimant's alleged contractual or employment status at the time that his role as Branch Secretary was being taken away from him was in marked contrast to the Claimant's oral evidence, where he claimed that he was first employed by the Respondent in 2014, when he was first elected as a Fed rep. Whilst that was not the Claimant's pleaded case (Ms Ling specifically resiled from the Claimant's belief that he had been an employee since 2014), it seemed even more likely that, had the Claimant and by extension his legal representatives at time of his suspension, removal and appeal held similar beliefs, they would have raised them at that time. That they did not added further doubt over what the Claimant subjectively believed his and the Respondent's intentions had been when he was elected to the role of Branch Secretary.

117. For all those reasons, I concluded that there was no express contract between the Claimant and the Respondent. The Agreement properly reflect what, in reality, it was and what it was intended to be from the outset, namely a number of commitments made by those seeking election as Fed reps, which created expectations on how they would thereafter perform their elected roles. Neither party had the requisite intention to create a legally binding contract. That was evidenced by the wording and operation of the Agreement, the context in which the Agreement arose, the manner in which the Claimant became Branch Secretary and the manner in which he was removed from the role.

<u>The implication of a contract</u>

118. Was it necessary to imply a contract between the Claimant and the Respondent? It was for the Claimant to show that, in reality, the parties had been conducting their relationship in a manner in which one would expect there to be enforceable obligations, to give what has been termed 'business reality' to that relationship.

119. In my judgment, this was not a case where it was necessary to imply a contract between the parties. The relationship between the Claimant and the Respondent did not require a contract to exist in order for it to have effect, to function or to be reasonably understood. The arrangements between the parties were genuine, accurate (in that they reflected the true nature of the Agreement) and readily evidenced. There was, in that sense, neither a need nor any space within which the inference of a contract was required or necessary.

Contractual status: conclusion

120. There was no express contract between the Claimant and the Respondent, because there was no intention to create a binding, legal relationship of the kind necessary for a contract to exists. It was not necessary to imply a contract.

121. Those conclusions had a number of importance consequences:

    121.1. The Claimant could not have been an employee of the Respondent when he was Branch Secretary (as he did not enter into the role under a contract of any kind, still less one of service, per section 230(1) & (2) ERA 1996);

    121.2. The Claimant could not have been a worker of the Respondent when he was Branch Secretary (again, as the parties did not enter into a contract of any kind, including one that fell within the requirements of section 230(3)(b) ERA 1996); and

    121.3. The Claimant could not benefit from the extended definition of a worker under section 43K ERA 1996, such as to gain protection as a whistleblower (because those provisions were contingent on the existence of a contract).

Convention rights

122. As detailed in the applicable case law, the protections afforded to whistleblowers should be extended to an office holder who is neither an

employee or a worker, in circumstances where to exclude them from such protections would violate Article 14 of the ECHR, in conjunction, in this case, with Article 10.

123. The Claimant says that he was subjected to detriment for making protected disclosures (which he says were made within the complaint he submitted on 18 March 2024).

124. Identifying to whom such protections should be extended requires the consideration and answering of the following four questions (per Michalak, Gilham, et al):

124.1. Do the facts fall within the ambit of one of the Convention rights?

124.2. Has the claimant been treated less favourably than others in an analogous situation?

124.3. Is the reason for that less favourable treatment one of the listed grounds or some 'other status'?

124.4. Is that difference without reasonable justification—put the other way round, is it a proportionate means of achieving a legitimate aim?

125. In respect of the first of those questions, it was not in dispute that the subject of the Claimant's complaint fell within the ambit of the Convention right of free expression (Article 10 of the ECHR).

126. Was the Claimant treated less favourably than other people who are in an analogous, or relevantly similar, situation? The Claimant's case, as advanced by Ms Ling, was that in his role as Branch Secretary (being a non-contractual elected officer holder) he was analogous to a limb (b) worker.[3] His treatment was less favourable because, unlike limb (b) workers, the Claimant had no protection against detrimental treatment by the Respondent when making protected disclosures.

127. The Claimant had (and continues to have) protected disclosure protections as a police officer but only against NWP, not the Respondent.

[3] As noted above, the Claimant has a pending application to amend his claim such that as a member of the Respondent, he was analogous to a member of a trade union. In the circumstances, and as agreed with the parties, I have confined my determination of the Convention rights issue to the limb (b) worker/ERA 1996 issues only.

128. The Respondent did not accept that the role of Branch Secretary was analogous to a limb (b) worker. In order to be elected as Branch Secretary, the Claimant, by definition, had to be a serving police officer. As such, he already had protection in the workplace against detriment for whistleblowing and his work as a police office was integrally linked to the work he undertook as an elected representative for the Respondent.

129. On the question of analogous situations, the Supreme Court in Gilham said the following (at [30] - [31]):

> 30 The answer to question (ii) [has the claimant been treated less favourably than others in an analogous situation] 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 1996Act. 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.

130. Further, helpful guidance was provided by the EAT in MacLennan (at [104]):

> 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

131. Whilst Parliament had acted to make the Claimant's role as a police officer analogous to a limb (b) worker (by way of section 43KA ERA 1996), his role as Branch Secretary attracted no such protections as against the Respondent. The Claimant was an office holder (as was the judge in Gilham), who undertook his role on a full-time basis. In practical terms, there was a workplace relationship between the Claimant and the Respondent whilst he was undertaking his role as Branch Secretary.

132. Looking at the factors identified in MacLennan (above), the role of Branch Secretary had a degree of responsibility (both at a local and national level), was undertaken on a full-time basis and had a range of duties per the Role Description. Given that the role afforded the Claimant "overall responsibility of day to day management of the Branch, its Staff and its Representatives" (per the Role Description), it was likely that the Claimant would become aware of any wrongdoing at branch level. Given his further role as Chair of Finance Committee, that likelihood also extended to the national level.

133. There would be an importance in the Claimant, in his role as Branch Secretary, making disclosures of wrongdoing in the public interest. The Respondent occupies an important role in representing police officers, in circumstances where they are prevented from joining a trade union and only have access to one staff association (namely, the Respondent). Given the comparatively close association and relationship between the Respondent, police officers and the wider police force, there was some degree of vulnerability, particularly to reputation, of any retaliation faced by a Branch Secretary for making disclosures of wrongdoing, whether at a local or national level.

134. Whilst he remained a member, there was an alternative route available to the Claimant to raise concerns of wrongdoing, namely the procedures under Appendix 9. However, those were limited to the actions of Fed

reps. Complaints about the actions of members who did not hold elected office or complaints about the Respondent's staff could not be pursued via the Appendix 9 procedure.

135. Mindful of the need to adopt a broad-brush approach to this question and that the test involves consideration of relevantly similar situations (as regards the aims of the protections afforded to whistleblowers in the workplace), I preferred the Claimant's submissions in this regard. There was, when considering the factual realities of the Claimant's role as Branch Secretary, sufficient similarities between him and a limb (b) worker to find that he was in an analogous situation.

136. In addition, whilst the Claimant had (and continues to have) protection against whistleblowing in his role as a police officer, those protections, as against the Respondent and whilst undertaking the role of Branch Secretary, were not available to him. To that extent, he was subject to the same less favourable treatment as the judicial officer holder in Gilham, when compared to a limb (b) worker, with whom his situation as Branch Secretary was analogous.

137. For those reasons, I found that the second question was satisfied.

138. Is that difference in treatment based on an identifiable characteristic amounting to a status? The third question arises from the wording of Article 14 and the reference, in the absence of one of the other listed grounds in Article 14 being relied upon, to that of "other status".

139. I was mindful of the need to give a generous meaning to "other status" and have regard to the test of personal characteristics, which need not be innate and could include those that were a matter of personal choice (per the summary of the law cited in Sullivan v Ise of Wight Council [2025] EWCA Civ 379, at [72]).

140. Occupational classification or a role akin to an occupation are capable of being "other status" (per Gilham at [32]; MacLennan at [105]). As noted in Gilham, it was the classification of a judge as a non-contractual office holder which deprived the post of the protections afforded to employees and limb (b) workers. There was a similarity in that regard with the Claimant's role as Branch Secretary (being, as he was, a non-contractual office holder).

141. In my judgment, holding the role of Branch Secretary was capable of being some "other status" under Article 14 of the Convention. The holder

can be distinguished from those who do not hold the role. It is a characteristic which is acquired, by standing for and being elected to the office of Branch Secretary. It has a degree of occupational classification or is sufficiently analogous to an occupation.

142. Is the difference in treatment objectively justifiable? The final question involves "consideration of whether the measure giving rise to the differential treatment pursues a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The burden is on those seeking to contend that the legislative measures are objectively justified to demonstrate that that is so*"* (per Sullivan at [29]; see also R(SC) v Secretary of State for Work & Pensions [2021] UKSC 26, at [37], quoting Carson v United Kingdom [2010] 51 EHRR 13).

143. This is not a case that engaged a so-called 'suspect ground' (like sex or race) so the need for close judicial scrutiny, notwithstanding the respect due to the judgment of the executive or legislature, was not engaged. There must be high level of respect accorded to decisions of Parliament not to include roles like the Claimant's within protection.

144. However, there was a central issue as to what legitimate aim was being relied upon by the Respondent (upon whom the burden of proof fell).

145. Mr Tatton-Brown's written and oral submissions appeared to focus on the legitimate aim of the protected disclosure protections themselves, rather than the aim of not extending that protection to someone in an analogous position to those who are protected. The legitimate aim for the differential treatment is necessary in order to be able to assess whether there is a reasonable relationship of proportionality between the means employed and aim sought.

146. What the Respondent appeared to focus on was why it was reasonable to not extend such protections to the Claimant, without first explaining what the legitimate aim of not extending protection was. The legitimate aim of protected disclosure protections was not in issue or dispute. What was in issue was the fact that it does not cover people who, like the Claimant, were in analogous positions to those who were protected and who held some "other status*"*. The legitimate aim had to speak to that difference in treatment. The legitimate aim of the protected disclosure protections themselves did not do that.

147. In other words, what was the legitimate aim being pursued in not extending the protected disclosure protections to someone in the Claimant's position? After all, it is the discriminatory effect of the measure which must be justified, not the measure itself (see, for example AL v Secretary of State for the Home Department [2008] UKHL 42, at [38], quoting Lord Bingham in A v Secretary of State for the Home Department [2004] UKHL 56). It is the exclusion of office holders undertaking full-time roles like the Claimant which has to be justified, not the statutory provisions under the ERA 1996 themselves.

148. In his oral submissions, Mr Tatton-Brown focussed on whether the decision of Parliament not to extend protected disclosure protections to the Claimant was "manifestly without reasonable foundation". As explained in SC, that test is really about the (wide) margin of appreciation afforded (in cases where that test is appropriate, at [151]), which is engaged to justify the means employed to pursue the legitimate aim. However, there remains the need for an identifiable legitimate aim, to which the margin of appreciation can be applied.

149. As noted above, the Respondent also relied upon the government's response of June 2014, following a Call for Evidence as to whether protection for whistleblowers should be extended (per [137] – [196] of the Respondent's Bundle of Authorities). There was force in Mr Tatton-Brown's submission that, unlike for judges in Gilham, there had been consideration by the executive of whether to extend protection to workers in an analogous position to the Claimant and no extension had been forthcoming.

150. However, the difficulty for the Respondent was that whatever arguable force underpinned such submissions, they only gained traction after a legitimate aim had been identified. In my judgment, Ms Ling was correct in her submission that the Respondent had not identified or made out a legitimate aim for the difference in treatment between the Claimant and those employees and workers who were protected. Absent a legitimate aim for the differential treatment, submissions on justification and proportionality were premature.

151. For those reasons, the Respondent failed to show that the difference in treatment was objectively justified.

Convention rights: conclusions

152. It was not in dispute that the facts of the case fell within the ambit of Article 10 of the Convention. For the reasons explained above, the Claimant was treated less favourably than others in analogous situations. The Claimant's role as Branch Secretary was analogous to a limb (b) worker. He did not have the same protections against making protected disclosures, contained within the ERA 1996, as a limb (b) worker.

153. The reason for the less favourable treatment was because the Claimant was a non-contractual officer holder. As such, he did not fall within the definition of a worker, per section 230 ERA 1996. His role did not fall within any other category which attracted protection. But his role did fall within the ambit of 'other status' for the purposes of Article 14 of the Convention.

154. The difference in treatment was without reasonable justification. There was no legitimate aim identified or established for the difference in treatment. It was therefore not possible to determine if the difference in treatment, which arose from the Claimant's exclusion from the protections under the ERA 1996, was a proportionate means of achieving that aim.

155. It follows that the Claimant's exclusion from the protection afforded to whistleblowers by the ERA 1996 is in breach of his rights under Article 14, read with Article 10 of the Convention.

Convention rights: remedy

156. In her submissions, Ms Ling sought a remedy consistent with that granted by the Supreme Court in Gilham to judicial office holders. That involved reading section 230(3) ERA 1996 in such a way as to extend the protections for whistleblowing to judicial office holders (under the interpretive duties on courts and tribunals per section 3 HRA 1998).

157. The form of words contemplated in Gilham were a follows (at [43]:

> …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.

158. Importantly, the powers under section 3 HRA 1998 are limited to those parts of the legislation which are incompatible with the Convention. Any

reading down is limited to that which is necessary to give effect to the Claimant's Convention rights (see, for example, MacLennan at [61]).

159. As was done in Gilham, I concluded that the ERA 1996 should be read and given effect so as to extend the protected disclosure protections to the Claimant when he held the non-contractual office of Branch Secretary. Not to do so would impinge his right to enjoy freedom of expression (per Article 10) without discrimination on a prohibited ground (per Article 14).

160. It follows that the Tribunal has jurisdiction to consider and determine the Claimant's complaints of detriment for making protected disclosures, per section 47B ERA 1996.

Approved by:
EMPLOYMENT JUDGE S POVEY
Dated: 18 August 2025

Order posted to the parties on

22 August 2025

Kacey O'Brien

For Secretary of the Tribunals

Public access to employment tribunal decisions
Judgments (apart from judgments under rule 52) and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.