RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

Claimant: Mrs P Varley

Respondent: Secretary of State for Justice

Heard at: Leeds Employment Tribunal (by CVP)

Before: Employment Judge Deeley

On: 30 September, 1 and 2 October 2025 (in public) and on 3 October 2025 (in chambers)

Representation

Claimant: represented herself

Respondent: Mr B Collins KC (Counsel)

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1. The claimant's claim that she has not been paid for holiday that she has taken from 1 October 1998 fails and is dismissed. In particular:

   1.1 the claimant is not a 'worker' for the purposes of Regulation 2 of the Working Time Regulations 1998 (the "**WTR**") (whether (i) under domestic law; or (ii) under the Working Time Directive for complaints relating to periods of leave that pre-date 31 December 2023);

   1.2 the claimant is not a 'worker' for the purposes of section 230 of the Employment Rights Act 1996 (the "**ERA**");

   1.3 the definition of 'worker' under the WTR and/or the ERA should not be interpreted to include the claimant status as a non-legal member, having regard to s3 of the HRA and the claimant's Article 14 rights (read with Article 8 and/or Article 1 of Protocol 1 of the European Convention on Human Rights); and

   1.4 the claimant has failed to comply with the notice requirements under Regulation 15 of the WTR.

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REASONS

INTRODUCTION

Tribunal proceedings

1. I considered the following evidence during the hearing:

    1.1 a joint file of documents (including a list of holidays that the claimant says she took from 1998 to 31 December 2023 at page 799 of the hearing file) and a separate joint file of authorities;

    1.2 witness statements and oral evidence from the claimant and from Mr Robert Edwards (Head of Judicial Pay Policy Projects for the respondent); and

    1.3 skeleton arguments provided by each party.

2. I also considered the helpful oral submissions made by both representatives.

Additional disclosure

3. The claimant and the respondent both disclosed additional documents at the start of the hearing. Neither party objected to the inclusion of those documents in the hearing file.

Adjustments

4. The claimant asked for the hearing to take place by CVP as a reasonable adjustment and this request was accepted. We adjourned shortly after 12pm on the second day of the hearing for the rest of the day so that the claimant had time to prepare her submissions, which she presented on the third day of the hearing.

5. I reminded both parties and their witnesses that they could request additional breaks during the hearing at any time if required and frequent breaks were taken throughout the hearing.

CLAIMS AND ISSUES

6. The claimant has served as a non-legal member of the Special Educational Needs and Disability Tribunal (and its predecessors) since 1998 and remains a member of that Tribunal. She claimed that she has never been paid holiday pay for the holiday that she has taken since 1 October 1998. The respondent contends that the claimant is not a 'worker' for the purposes of the WTR or the ERA and is not entitled to receive holiday pay.

7. The claimant's complaints were set out by Employment Judge Ayre in her list of issues at the preliminary hearing on 19 November 2024. The claimant had the benefit of experienced Counsel's representation at that preliminary hearing.

8. The claimant accepted in her skeleton argument that the respondent had not prevented her from taking annual leave. The amended list of issues is set out below, with the complaint under Regulation 30(1)(a) of the WTR (refusal to permit the taking of annual leave) that the claimant did not pursue highlighted using ~~strike through~~. The claimant's Human Rights Act complaints are set out in italics (after

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she provided Further and Better Particulars of her claim, following the preliminary hearing). The amended questions regarding the claimant's complaint under Regulation 30(1)(b) of the WTR after she withdrew her contention that the respondent prevented her from taking annual leave are also set out in italics.

LIST OF ISSUES

1. Employment status

1.1 Is the claimant a worker for the purposes of the Working Time Regulations 1998 (WTR) and/or the Employment Rights Act 1996 (ERA)?

1.2 If not, is the claimant a worker for the purposes of EU law such that she would have rights to holiday pay under the Working Time Directive 2003/88/EC (WTD)?

1.3 Should the claimant be regarded as a worker to give effect to her rights under the Human Rights Act 1998 (HRA)? ~~This issue is subject to the provision of further information by the claimant.~~ *In particular:*

1.3.1 Do the claimant's complaints engage rights under the HRA, namely Article 14 read with Article 1 of Protocol 1 (Protection of Property) and/or Article 8 (Private and Family Life)? In particular, as set out in R(SC) v Secretary of State for Work and Pensions [2022] AC 223 at paras 37-53:

a) Ambit: Does the alleged discrimination relate to a matter which falls within the ambit of A1P1 and/or Article 8?

b) Status: Is the claimant's occupation as a judicial office holder a 'status' for the purposes of Article 14?

c) Analogous position: Is there a difference in the treatment of persons in analogous or relevantly similar situations?

d) Justification: Can the respondent show that there is an objective and reasonable justification for the alleged discrimination, i.e. is there:

i. a legitimate aim; and
ii. a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be realised?

1.3.2 If so, should the claimant be treated as a 'worker' in order to give effect to her rights under the HRA?

2. Time limits

2.1 Was the claim for unpaid holiday pay presented within three months (plus early conciliation extension) of the date on which it is alleged that the exercise of the right should have been permitted or the payment should have been made in accordance with regulation 30(2) of the WTR?

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2.2 Was the claim for unauthorised deduction from wages made within the time limit in section 23 of the Employment Rights Act 1996? The Tribunal will decide:

2.2.1 Was the claim made to the Tribunal within three months (plus early conciliation) of the date of the payment of the wages from which the deduction was made?

2.2.2 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

2.3 If not, was it reasonably practicable for the claims to be made to the Tribunal within the time limit?

2.4 If it was not reasonably practicable for the claims to be made to the Tribunal within the time limit, were they made within such further period as was reasonable?

2.5 Does the backstop provision in section 23(4A) of the Employment Rights Act 1996 apply to limit the claim to a 2-year period prior to the presentation of the claim?

3. Holiday Pay (Working Time Regulations 1998)

~~*Regulation 30(1)(a) of the WTR*~~

~~3.1 Has the respondent refused to permit the claimant to exercise her rights to annual leave under Regulations 13 and 13A of the WTR?~~

~~3.2 If so, is the claimant entitled to a declaration to that effect?~~

~~3.3 What compensation should the respondent pay to the claimant, taking account of the matters below?~~

Regulation 30(1)(b) of the WTR

~~3.4 Did the respondent fail to pay the claimant for annual leave during the period from the start of her appointment to the date when proceedings were issued and/or did the respondent fail to pay the claimant for annual leave at the time she took annual leave under Regulation 16(1) of the WTR? In particular, did the respondent:~~

~~3.4.1 Specifically and transparently give the claimant the opportunity to take paid annual leave;~~

~~3.4.2 Encourage the claimant to take paid annual leave; and~~

~~3.4.3 Inform the claimant that the right would be lost at the end of the leave year?~~

~~3.5 Did the claimant's right to paid holiday carry over from year to year?~~

~~3.6 If so, how many weeks of annual leave has the claimant caried over and what, if any, remedy is she entitled to?~~

3.7 ~~Alternatively,~~ Was the claimant entitled to receive holiday pay under the WTR or the WTD in circumstances where she did not provide notice in accordance with Regulation 15(1) of the WTR? *The claimant's case is that by marking herself as unavailable to sit, she in effect gave notice to take leave.*

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3.8 Has the respondent failed to pay the claimant holiday pay to which she is entitled under the WTR and/or the WTD?

3.9 What is the calculation of a "week's pay" for the claimant?

3.10 What is the total amount of unpaid holiday pay?

3.11 Did the respondent pay rolled-up holiday pay to the claimant?

3.12 Is the respondent entitled to set off the rolled-up holiday pay it says it has paid to the claimant? If so, how much is the respondent entitled to set off?

4. Unauthorised deductions from wages

4.1 Was the claimant entitled to be paid holiday pay under the WTR and/or the WTD in circumstances where she did not provide notice of annual leave in accordance with Regulation 15(1) of the WTR? *The claimant's case is that by marking herself as unavailable to sit, she in effect gave notice to take leave.*

4.2 Did the respondent make unauthorised deductions from the claimant's wages by not paying her holiday pay to which she was entitled under Regulation 16(1) of the WTR?

4.3 If so when did the respondent make the deductions and how much was deducted? *Was there a 'series of deductions' from the claimant's wages?*

4.4 Does section 23(4A) of the ERA apply to limit the claim to a 2 year period prior to the presentation of the claim?

FINDINGS OF FACT

Background

9. The claimant was appointed as a lay member of the former Special Educational Needs Tribunal ("**SEN**") on 20 August 1998 by the Department for Education and Employment (as the SEN's sponsoring government department). Her appointment continued with SEN's successors and is continuing as at the date of this hearing. The current description of the claimant's role is that of Specialist Member for the First-Tier Tribunal (Special Educational Needs and Disability) ("**SEND**"). The claimant sits on panels consisting of a judge and one or two specialist members.

10. The claimant's letter of appointment dated 20 August 1998 was signed by Mr Charles Clarke MP (Parliamentary Under-Secretary of State). The letter stated:

    "I am pleased to inform you that the interview panel has recommended your appointment as a lay member….Officials will be contacting you in the new few days with the terms and conditions of employment."

11. I note that the letter of appointment referred to 'terms and conditions of employment' to be sent to the claimant. However, the document that was sent to the claimant did not in fact purport to be a contract of employment. The terms and conditions were headed: *"Terms of Appointment as a Lay Member of the Special*

Educational Needs Tribunal". The Terms of Appointment did not refer to the claimant being an employee of the Department for Education and Employment or any other entity.

12. In addition, the notice provisions set out in the Terms of Appointment were not consistent with a contract of employment. They stated: *"An appointment may be terminated at any time by one month's notice in writing on either side, without cause assigned."* By way of contrast, employment contracts are subject to minimum statutory notice periods from both parties.

13. The claimant's SEND appointment was renewed for 5 years beginning on 1 September 2024. She received a document headed "*Terms of Appointment for Lay Members of the Special Educational Needs and Disability Tribunal*", which she signed and returned on 11 August 2004. The letter stated: *"The terms and conditions set out in the paragraphs below will apply for your appointment, which will be for 5 years beginning on 1 September 2024, should you decide to take this up".*

Notification of availability for sitting on Tribunal panels

14. All SEND lay members are required to make themselves available to sit on Tribunal hearing panels for a minimum number of days each year. In practice, the claimant has sat for a significantly higher number of days than the minimum.

15. The claimant's appointment letter dated 20 August 1998 enclosed Terms of Appointment which stated that: *"It is anticipated that lay members will be required to work no less than 20 days and no more than 70 days, according to employment status and availability, for the period of this appointment."*

16. The claimant stated that SEND's listing team sent a spreadsheet to her around two to three months in advance, which she completed to state on which dates she was available or not available to sit. The claimant did not (and was not required to) provide a reason as to why she could not sit on certain dates.

Calculation of fee rates

17. Section 179 of the Education Act 1993 (repealed in 1996) stated:

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

18. The Review Body on Senior Salaries ("**SSRB**") (previously known as the Review Body on Top Salaries) was established in May 1971 to provide independent pay advice to the Government. The SSRB provides pay recommendations on roles including senior NHS managers, senior police officers, senior civil servants and the judiciary. Mr Edwards stated that the SSRB does not advise on fee-paid remuneration. However, the current practice (and possibly the previous practice) is that the same annual pay increase is applied to both salaried and fee-paid judicial office holders.

19. Mr Edwards explained that the respondent uses a 'divisor' when setting fees for fee-paid judicial office holders, where there is a full-time salaried equivalent. He

stated that the divisor for full-time salaried Tribunal posts is 220. Mr Edwards explained that the reason for using 220 as a divisor is that:

19.1 there are 365 days per year, of which 104 to 105 days are Saturdays or Sundays;

19.2 there are therefore 220 working days for courts and tribunals (Monday to Friday) per year;

19.3 this leaves 40 (occasionally 41) days per year of annual leave, public holidays and privilege days per annum.

20. The claimant was also provided with terms of appointment dated 1998 stated:

"A daily fee will be paid for a notional day to include hearing and adjudicating cases and the necessary advance consideration of papers. Where attendance at a hearing takes half a day only, half the daily fee will be paid…

Lay members are currently paid a fee of £149 per day for each day they are required to work. It is the responsibility of the Department for Education and Employment to apply PAYE deductions in respect of Income Tax and National Insurance, unless instructed to the contrary by the Inland Revenue or the Department of Health."

21. The claimant stated that she completed her induction training in October 1994 and started sitting as a lay member for SEN shortly after that time.

22. The respondent was unable to explain how the level of the lay members' fees were calculated as at 1998 by the Department for Education and Employment because they had been unable to locate the relevant paperwork. The respondent produced an internal minute dated 4 August 1993 headed *"SEN TRIBUNAL: FEES FOR PRESIDENT, CHAIRMEN AND MEMBERS"*. It enclosed a further minute dated March 1993 which set out under the heading of "*FEES FOR JUDICAIL APPOINTMENTS AND APPOINTMENTS TO TRIBUNALS, APPEAL BOARDS, INQUIRIES ETC*" a range of fees payable to chairmen and members of various tribunals and other bodies.

23. The 4 August 1993 minute also enclosed a document dated July 1986 which referred to fee levels contained in an Annex. This minute stated that:

"MEMBERS OF TRIBUNALS, APPEAL BOARDS, INQUIRIES ETC.

5416 - For the purposes of paying fees, appointments of chairmen and members of tribunals, appeal boards, inquiries and similar bodies and part-time judicial appointments have been listed in S classes, A to H. Of these, classes A to D relate mainly to appointments of barristers and solicitors whilst classes F to H relate to appointments of people who are not required to be legally qualified. The fees appropriate to each class are attached in Annex K.

5417 - Assessors may be paid fees in a range calculated by dividing by 220 the minimum of the Senior Professional and Technical Officer scale and the maximum of the Unified Grade 7 scale".

24. Mr Edwards' evidence was that Annex K attached to the 4 August 1993 minute contained a list of fees for classes of appointments listed at A to H. He stated that the fees for classes A to D correspond to a 220 divisor of salary full-time judicial salaries. Mr Edwards was unable to explain what full-time equivalent post had

been used to calculate the fees for classes E to H, which related to non-legal members. He suggested that they may have been calculated by reference to a particular civil service grade, but accepted that the respondent had not provided any evidence in support of this suggestion.

25. Mr Edwards also referred the Tribunal to the Civil Service Management Code – Pay (issued on 1 January 1994). The Code set out that payment for short notice work and standby appointments was by a daily or hourly fee. The Code stated that:

3.6 Part Time, Temporary, Short Notice and Standby Appointments

3.6.1 Part time staff, including temporary staff working less than full time, are paid a proportion of the full time rate for the grade appropriate to the hours worked, adjusted to reflect their lack of entitlement to paid meal breaks.

3.6.2 Payment for short notice work and standby appointments is by a daily or hourly fee. Departments and agencies may also pay part time staff employed on an irregular basis by a daily or hourly fee.

3.6.3 Fees payable under paragraph 3.6.2 above should be calculated by dividing the appropriate full time salary by 220 for a daily fee, and for an hourly fee, by reducing the resultant figure by the proportion which the hours worked bear to the net hours of the grade by reference to which the appropriate full time salary has been determined. Where these calculations produce fractions of a penny, rounding up to the next penny should be applied.

26. The government decided to reform the Tribunal system and enacted the Tribunals, Courts and Enforcement Act 2007. The former Special Educational Needs Tribunal became part of the First-Tier Tribunal system, that also included other tribunals covering jurisdictions such as Social Security, Immigration and Mental Health. First-Tier Tribunal panels consist of judges and (most commonly two) non-legal members ("**NLMs**").

27. Under the 2007 Act, SEND became part of the Health, Education & Social Care Chambers (known as "**HESC**"). The non-legal members in that chamber included 'Medical Members' and 'Other Members' (such as the claimant). The fee rates paid to HESC members varied significantly, with Medical Members being paid at a significantly higher rate than non-medical members. The fees paid for 'Other Members' also varied from Tribunal to Tribunal. (I also note in passing that the claimant was a member for a number of years of the Social Security and Child Support Tribunal, which formed part of the Social Entitlement Chamber ("**SEC**"). In that role, she was paid at lower fee rate in her SEC role as a 'Member with experience of disability' than she was a Specialist Member of the HESC).

28. Mr Edwards stated that there are no salaried full-time non-legal tribunal members in SEND. Mr Edwards referred to the following examples from other Tribunals that use the 220 divisor (the figures below relate to 2024 salary/fees):

Salaried Member's role	**Salary**	**Equivalent Fee Paid Member's fees**
Surveyor Member in Upper Tribunal Lands (England and Wales)	£173,856 pa	£790.27 per day

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Salaried (Regional) Medical Members of the Social Entitlement Chamber	£106,563 pa	Medical Members - £484.37 per day

2010 Memorandum on conditions of appointment and terms of service

29. The respondent issued a Memorandum on conditions of appointment and terms of service for Fee Paid Judicial Office-Holders that was stated to apply from 1 April 2010 (the "**2010 Memorandum**"). The Memorandum consisted of around 40 pages and contained far more detail than the claimant's previous terms of appointment (which were less than two pages).

30. The claimant stated that the 2010 Memorandum was the first and only Memorandum that was sent to her after the creation of the First-Tier Tribunal system. She said that she received a copy by post. She did not sign and return a copy, but she does not dispute that the terms set out in the 2010 Memorandum apply to her.

31. The introduction section of the 2010 Memorandum stated:

This Memorandum has been prepared for the information of persons who are offered a judicial appointment on a fee paid basis to the Tribunals Service or are transferred in under S.30 of the Tribunals, Courts and Enforcement Act 2007.

[…]

References in the Memorandum to "office holders", etc., are to be construed accordingly and apply 'mutatis mutandis' to professional and other members...

This memorandum contains information about the terms and conditions of appointment, which should be understood and agreed by all those accepting appointment. The terms and conditions are correct as at the date given at the bottom of this page, but may in some circumstances be subject to change.

The Memorandum should be read in conjunction with, and may be supplemented by or subject to, other guidance which may be made available to office holders.

Part I outlines the requirements which must be satisfied before appointment;

Part II sets out the general terms and conditions of service; and

Part III sets out the current arrangements for travelling, subsistence and other allowances.

The Memorandum states the position as at 1st April 2010 and applies to judicial office holders whose appointment is administered by the Ministry of Justice.

32. The terms included:

5. Tenure

5.1 An appointment as a fee-paid office holder is for a renewable period of five years

6. Renewal of Appointment

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6.1 At the end of the initial five year appointment, renewal for further successive periods of five years is automatic subject to the individual's agreement and the upper age limit unless a question of cause for non-renewal is raised, or the individual no longer satisfies the conditions or qualifications for appointment. The grounds for non-renewal are:

i. inability;

ii. misbehaviour, including:

iii. failure to comply with sitting requirements (without good reason);

iv. failure to comply with training and appraisal requirements;

v. sustained failure to observe the standards reasonably expected from a holder of such office.

vi. part of a reduction in numbers because of changes in operational requirements;

vii. part of a structural change to enable recruitment of new tribunal officeholders.

6.2 All decisions not to renew on grounds i - v are taken by the Lord Chancellor with the concurrence of the relevant Chief Justice.

[…]

8. Removal from Office

8.1 The main legislative provisions governing tenure and powers of removal are set out in Annex 1. The Lord Chancellor may, if he thinks fit, terminate the appointment of an office holder (other than a lay member of the Employment Appeal Tribunals) on grounds of:

i. inability;

ii. misbehaviour, including:

iii. failure to comply with sitting requirements (without good reason);

iv. failure to comply with training and appraisal requirements;

v. failure to observe the standards reasonably expected from a holder of such office.

[…]

8.3 The decision to remove an office holder is taken by the Lord Chancellor with the concurrence of the relevant Chief Justice. Decisions to remove are taken in accordance with the procedures contained in Regulations made under the Constitutional Reform Act 2005, where applicable.

9. Fees

9.1 The fee of a Tribunal office holder is paid out of the Ministry of Justice's Vote. Details about the arrangements for the claiming/payment of fees will be sent to the judicial office holder shortly before he/she takes up his/her appointment. Service as a fee paid office holder does not attract a pension.

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10. Income tax and national insurance contributions

10.1 Office holders are regarded as holders of an office for tax and National Insurance purposes. Fees payable will, as a result, be chargeable to tax under Schedule E of the Taxes Act and subject to Class 1 National Insurance contributions. These liabilities will be deducted via the Ministry of Justice's payroll system and the net fee paid to the office-holder. Fees are not subject to VAT.

[…]

12. Sitting requirements

12.1 Office holders are usually required to make themselves available for a minimum of 30 days a year on tribunal business. This figure may be varied from time to time, in accordance with business needs either generally or for certain categories of office. Where a different sitting level is required, it will be specified in the recruitment material or otherwise notified. The Tribunals Service will try to allocate sittings equally but cannot guarantee a minimum number of days in any year. Training days and any sittings undertaken by virtue of an appointment to an office in the Courts administered by Her Majesty's Court Service, or to tribunals which are not covered by this Memorandum, do not count towards this minimum requirement.

12.2 A maximum number of days may be set where business needs dictate.

13. Sitting arrangements

13.1 An office holder's workload (which can comprise a combination of paperwork, preparation, writing up, hearing cases etc) is arranged by the tribunal or centre manager in the light of directions and instructions etc. given by, or on behalf of, the senior judicial officer. The balance and nature of sittings, and other forms of judicial work, may vary from time to time across jurisdictions according to business needs and the nature of the workload. Senior judicial officers have responsibility for overseeing the disposal of judicial business and in that capacity may wish to be reassured as to the work which an office holder is undertaking at any particular time, and may seek the assistance of the tribunal administration in providing information about patterns of work by individual office holders.

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

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15. Sick leave

15.1 Up to 28 weeks Statutory Sick Pay (SSP) may be payable subject to meeting the qualifying thresholds. See Annex 2.

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16. Maternity, Paternity and Adoption Leave

16.1 Arrangements for maternity leave, maternity pay, adoption leave and adoption pay may be made by analogy with those applicable to staff in the Department. Two weeks paid paternity leave (at the statutory rates) is available for the secondary carer irrespective of sex and it applies to both new born and adopted children. In addition, parental leave entitles the office holder to 13 weeks additional but unpaid leave for the period up to the child's 5th birthday. If the child is disabled, 18 weeks are available for the period up to their 18th birthday. Annex 2 provides further details.

17. The Senior Judicial Officer

17.1 If an office holder has a judicial problem, he/she should consult the tribunal's senior judicial officer. If he/she has an administrative problem which he/she cannot resolve with the relevant tribunal manager, the Area Manager or ultimately, the Regional Director, he/she should consult the tribunal's senior judicial officer.

18. Training, judicial studies, conferences etc.

18.1 The Senior President expects all office holders from time to time to undertake training activity, and to attend training events and courses organised by the tribunal itself or otherwise, which are relevant to the work they do. The Senior President and Lord Chancellor consider that such activity is of considerable value not only for newly appointed office holders but also for those who have been in office for some time.

18.2 Office holders will not normally be allowed to sit until they have attended and satisfactorily completed an initial induction. During the course of their appointment office holders are required to undertake such further training as may be arranged and required by the Senior President. Failure to complete required training may mean that office holders will not be permitted to sit and may be grounds for removal from office.

18.3 Office holders will be paid fifty percent of their daily fee for attending training courses.

19. Appraisal and Mentoring

19.1 The Lord Chancellor and Senior President expect all office holders to comply with, and participate in, any appraisal and mentoring schemes which have been developed in their respective tribunal. The Lord Chancellor and Senior President consider that such activity is of considerable value to office holders. Failure to participate in appraisal may result in removal from office.

JUDICIAL CONDUCT

20.1 The requirements for Judicial Conduct set out in the paragraphs below are supplemented by the Judges' Council's 'Guide to Judicial Conduct', which offers

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assistance to the judiciary when considering issues of conduct. A copy can be obtained from www.judiciary.gov.uk/about_judiciary/conduct_and_appeals.

[…]

22. Conviction for criminal offences

22.1 Where, either before or after he/she has commenced service, an office holder is cautioned for, or charged with, any criminal offence, other than a parking or speeding offence without aggravating circumstances, (i.e. an offence for which a period of disqualification, or at least 6 penalty points, are imposed, or which results in a total of more than 6 currently accumulated penalty points) he/she should report the matter at once to the Senior President and should keep him informed of the progress and outcome of the case. Failure to do so could itself in some cases amount, prima facie, to misbehaviour.

[…]

23. Personal Conduct

23.1 The Lord Chancellor, relevant Chief Justice and Senior President believe that the public must be entitled to expect all office holders to maintain at all times proper standards of courtesy and consideration. Behaviour which could cause offence, particularly on racial or religious grounds, or amounting to sexual harassment, is not consistent with the standards expected of those who hold judicial office. A substantiated complaint of conduct of this kind, whether or not previous complaints have also been made, is in the Lord Chancellor's and relevant Chief Justice's view capable of being regarded as misbehaviour.

23.2 An office holder must also notify the Senior President if he/she gets into serious financial difficulties, particularly if legal proceedings appear likely to be, or have actually been, initiated. They should also inform the Senior President of any complaint made against them by their professional body, whether it relates to their professional or judicial capacity. Office Holders must notify the Senior President if they are involved or likely to be involved in any court proceedings.

23.4 The Lord Chancellor's and relevant Chief Justice's disciplinary powers are exercised in accordance with the procedures contained in Regulations made under the Constitutional Reform Act 2005. In agreement with the Lord Chancellor, the Senior President exercises many of the Lord Chief Justice's disciplinary functions, under the Judicial Discipline (Prescribed Procedures) Regulations 2006.

24. Conflicts of Interest

24.1 General Principles. Office holders must ensure that while holding judicial office they conduct themselves in a manner consistent with the authority and standing of an office holder. They must not, in any capacity, engage in any activity which might undermine, or be reasonably thought to undermine, their judicial independence. The governing principle is that no person should sit in a judicial capacity in any circumstances, which would lead an objective onlooker with

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knowledge of all the material facts reasonably to suspect that the person might be biased.

[…]

27. Political or other activities

27.1 Office holders are expected to refrain from any activity, political or otherwise, which would conflict with their judicial office or be seen to compromise their impartiality, having regard for example to the comments of the Court of Appeal in the case of Locabail*.*

[…]

29. Involvement in legal proceedings

29.1 There may, for obvious reasons, be difficulty with an office holder becoming involved in legal proceedings, either in his/her private capacity or in the event of such proceedings (outside the normal processes of appeal or judicial review) arising in some way from the performance of his/her judicial functions. As regards proceedings in a purely private capacity, the Lord Chancellor and the Chief Justices are concerned that the normal legal rights of the office holder as a private citizen should not be unduly prejudiced. However, an office holder may think it appropriate to seek advice from the Tribunal Judicial Office and/or his/her senior judicial officer, etc. before himself/herself initiating any such proceedings. He/she may also wish to consider whether to seek advice from these same sources before initiating any proceedings arising as a consequence of his/her judicial functions.

[…]

34. Further information

34.1 Any further information about terms of appointment that may be needed by office holders, or by practitioners who have been offered appointment to judicial office, will be readily supplied by the Ministry of Justice. Most inquiries are best made in the first instance to the Tribunal Judicial Office.

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PROVISIONS GOVERNING TENURE AND REMOVAL FROM OFFICE

[…]

First Tier and Upper Tribunal Judges and Members

Schedule 2 paragraph 4 and schedule 3 paragraph 4 of the Tribunals, Courts and Enforcement Act 2007

Later Memoranda on conditions of appointment and terms of service

33. The respondent issued further Memoranda on conditions of appointment and terms of service for Fee Paid Non-Legal Members which set out the position on

various dates. Copies of the updated Memoranda were published on the judicial intranet and included in the hearing file. The provisions of the terms of service contained broadly similar wording to that set out in the 2010 Memorandum, save for the paragraph headed "Fees", which I have highlighted in the table below (with wording re annual leave highlighted in bold for emphasis):

Memorandum date	Paragraph on Fees
April 2010	9. Fees 9.1 The fee of a Tribunal office holder is paid out of the Ministry of Justice's Vote. Details about the arrangements for the claiming/payment of fees will be sent to the judicial office holder shortly before he/she takes up his/her appointment. Service as a fee paid office holder does not attract a pension.
April 2016	9. Fees 9.1. The fee of a Tribunal office holder is paid by the Ministry of Justice. Details about the arrangements for the claiming/payment of fees will be sent to the judicial office holder shortly before he/she takes up his/her appointment. Service as a fee paid non-legal member does not attract a pension. **The fee is calculated by dividing the equivalent full-time office salary by 220. The effect of this divisor is that a pro rata allowance for annual leave, and public and privilege holidays is incorporated into the daily fee.**
October 2019	9. Fees 9.1 The fee of a Judicial Office Holder is paid by the Ministry of Justice. The relevant fee is published in the Judicial Fees Schedule which is updated annually and available on the gov.uk website. **An allowance for annual leave, public and privilege holidays is incorporated into the daily fee.** Details about the arrangements for claiming / payment of fees will be sent to the judicial office holder shortly before they take up their appointment.
February 2020	9. Fees 9.1 The fee of a Judicial Office Holder is paid by the Ministry of Justice. The relevant fee is published in the Judicial Fees Schedule which is updated annually and available on the gov.uk website. **An allowance for annual leave, public and privilege holidays is incorporated into the daily fee.** Details about the arrangements for claiming / payment of fees will be sent to the judicial office holder shortly before they take up their appointment.

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RESERVED JUDGMENT

May 2022	9. Fees 9.1 The fee of a Judicial Office Holder is paid by the Ministry of Justice. The relevant fee is published in the Judicial Fees Schedule which is updated annually and available on the gov.uk website. **An allowance for annual leave, public and privilege holidays is incorporated into the daily fee.** Details about the arrangements for claiming / payment of fees will be sent to the judicial office holder shortly before they take up their appointment. (The May 2022 Memorandum also contained provisions regarding Fee Paid Non-Legal Members' participation in the Judicial Pension Scheme).

34. The respondent stated that all Fee Paid Judicial Office-Holders (including Non-Legal Members) were notified of the 2016 Memorandum when a copy was placed on the intranet. The claimant states that she did not see a copy of the 2016 Memorandum for the same reasons that she did not see the 2014 and 2019 intranet messages regarding holiday pay (which are dealt with in the next section of this Judgment).

Respondent's intranet messages – 2014 and 2019

35. The respondent posted a message on the judicial intranet on 23 June 2014 which stated (with the Tribunal's underlining for emphasis). This message was addressed to 'all fee-paid judiciary' but referred to 'fee-paid judges':

Message to all fee-paid judiciary: Terms and conditions

23 June 2014

We have been asked to make all fee-paid judges aware of the following message issued by MoJ Judicial Policy, Pay and Pensions

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

36. I note that the 2014 intranet message was published shortly after the promulgation of the judgment of the Employment Tribunal in *Miller and others v The Ministry of Justice* 1700853/2007 (which involved long-running litigation about the terms and conditions of fee paid judges).

37. The 2014 intranet message regarding holiday pay was updated in September 2019 (with the Tribunal's underlining for emphasis). This message was addressed to 'all fee-paid judiciary', but stated expressly that it applied to all fee-paid judicial office holders, including non-legal panel members:

Message to all fee-paid judiciary: Terms and conditions

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Updated September 2019

We have been asked to make all fee-paid judicial office holders (including legal and non-legal panel members) aware of the following message issued by the MoJ Judicial Policy, Pay and Pensions:

We write to clarify the method of calculating the daily fee rate you receive in your capacity as a fee paid judicial office holder.

The daily fee is calculated by dividing the salary for the equivalent full-time office by the appropriate divisor.

The effect of this divisor is that a pro rata allowance for annual leave and public and privilege holidays is built into the daily fee.

For the avoidance of doubt, the MoJ hereby confirms that the daily rate that is paid to you incorporates an element which represents your entitlement to paid annual leave under the Working Time Regulations 1998.

38. The respondent contends that the claimant, as a judicial office-holder, should have checked the judicial intranet regularly for any important updates. In addition to the claimant's role as a SEND member, she also sat in the Social Security Tribunal from August 2013 until December 2021. The claimant accepted during cross-examination that the 2010 Memorandum referred to guidance on the intranet and told her how to access it. However, she stated that she did not look at the intranet.

39. Mr Edwards said that the judicial intranet is the main way in which communications are made with judicial office holders, including non-legal members. He said that any key updates would be included in the news section. Mr Edwards maintained that email newsletters and various other communications flagging key updates were sent to non-legal members with links to the judicial intranet, although no copies of such newsletters were included in the hearing file.

40. In addition, Mr Edwards said that since 2022 judicial office-holders' payslips included a statement referring them to the intranet pages where they could find answer to questions on pay. For example, the claimant's February 2024 payslip stated:

Information on who to contact if you have a pay or pension query, and for other information about pay, please see the Judicial Intranet, Practical Matters > Finance and Expenses > Pay and Pensions

41. The claimant stated that she did not see a copy of either the 2014 or the 2019 message on the judicial intranet. She said that she did not check the intranet for messages or updates to her terms of service. She said she raised the difficulties that she was having using IT and accessing the intranet at a meeting with the then Deputy Chamber President for SEND (Judge John Aitken) in Darlington in 2016, after he mentioned that there was a message on the intranet. The claimant says that she was sent a copy of the 2016 Judicial Finance Guidance (set out in more detail later in this Judgment) by the Office Manager after that meeting, but that no one sent her the 2016 Memorandum or the messages.

42. The claimant stated that the respondent should have written to her directly (by email or by post) to make her aware of any important updates.

43. The claimant said that she had always had difficulty in scrolling through documents on screen, but that she did not realise it was a significant problem until the Covid-

19 lockdown in March 2020. The claimant said that she participated in a trial of on-screen working for SEND and was ill for several days afterwards with what she said was colloquially known as 'cyber sickness' (akin to travel sickness). The claimant said that when the SEND work shifted to online hearings during 2020, she printed all documents out herself for the first three months and then later requested HMCTS to send paper files to her as a reasonable adjustment. The claimant says that she had two Healthcare Professional Assessments, one for SEND and the other for the Social Security Tribunal where she was also working at that time as part of the process of obtaining adjustments.

44. Mr Edwards said that if individual judicial office-holders have reasonable adjustments, then the judicial office would need to be made aware so that appropriate arrangements could be made for that individual.

45. The claimant says that she was sent a copy of the Judicial Finance Guidance (issued by HMCTS) dated July 2016 (the "**Guidance**"), after she asked for it during the 2016 meeting with SEND's Deputy President referred to above. I note that the copy of the Guidance in the hearing file was limited to the first nine pages of that document. The Introduction section to the Guidance contains links to the judicial intranet (with the Tribunal's text in bold for emphasis):

0.1 The target audience for this guidance is fee-paid judicial office holders (hereafter referred to as JOHs) who attend tribunal hearings administered by HM Courts and Tribunals Service.

0.2 This guidance is designed to provide assistance to JOHs in claiming fees for sittings and associated work, training, and claiming for Travel and Subsistence (T&S). *The guidance also provides instruction on the use of the contracted hotel and travel booking services.*

0.3 The guidance has been written to ensure consistency with the Memorandum on Conditions of Appointment and Terms of Service, effective April 2010, which can be found at:

https://intranet.judiciary.gov.uk/practical-matters/hr-matters/condition-service/review-tribunals-judiciary-terms-and-conditions

Annexes are provided at the end of this document to highlight unique practices in each jurisdiction.

The schedule of fee rates is not shown in this guide, but can be found at:

https://intranet.judiciary.gov.uk/practical-matters/hr-matters/condition-service/review-tribunals-judiciary-terms-and-conditions

Each section explains the rules and procedures and provides practical guidance to assist JOHs on how to complete a claim. If there is anything a JOH is unsure about in relation to a claim, in the first instance they should refer to their local Administrative Centre *where they will be provided with the correct information.*

0.4 This document supersedes any previous version, and will be updated with any future changes at appropriate intervals.

46. The wording of the introduction makes it clear that this is an administrative guide to claiming fees for sittings and associated work, training and travel/subsistence.

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The Judicial Finance Guidance does not purport to replace the Memorandum set out earlier in this Judgment.

47. In summary:

    47.1 the respondent maintains that it communicated the updates and messages to judicial office-holders by placing these on the judicial intranet. It also says that these were flagged in other communications, such as newsletters (although copies of these were not provided in the hearing file);

    47.2 the claimant accepts that she was aware of the judicial intranet and knew how to access it. However, she contends that she had some IT difficulties and that the updated memorandum and messages should have been sent to her directly (by email or by post). She says that she requested paper copies of hearing documents to be sent to her as a formal reasonable adjustment after the Covid-19 lockdown in 2020.

48. I concluded that at least in the period prior to being granted reasonable adjustments in 2020, the claimant should have accessed the news page of the judicial intranet regularly to check for updates. In particular:

    48.1 I accept the respondent's evidence that judicial office-holders were expected to access the judicial intranet regularly to check for news and updates;

    48.2 the claimant's discussion with the Deputy Chamber President in 2016 regarding her IT difficulties was not a formal request for reasonable adjustments or a suggestion that she was permanently unable to access the judicial intranet. I note that, for example, the claimant was participated in a trial of electronic hearings during the early part of the Covid-19 lockdown in 2020 (which was when she realised the extent of the difficulties she experienced when being required to scroll through documents on screen);

49. Whether or not the claimant should have accessed the judicial intranet after her request for reasonable adjustments was granted in 2020 will depend in part on the contents of her occupational health report (which was not included in the hearing file) and the contents of other discussions with those administering the claimant's appointment. However, I note that the claimant is able to log into her emails and attend video hearings. I also note that there may well be a difference between being required to scroll through electronic hearing files of around 400 pages and being required to log into the judicial intranet (the first page of which is the 'News' section) and navigate around the intranet using the tabs at the top of the page (such as those referred to on the payslips).

Claimant's other work

50. The claimant states that she spent a significant proportion of her working time since 1998 sitting as a NLM for SEND. However, the claimant also worked for the other organisations set out in the table below from 2003 onwards. She said that she did not receive holiday pay from any of the other organisations for which she worked during that time.

Organisation	Role	Period worked	Approximate days/hours worked	Paid holiday?
Dyslexia Association	Northern Regional Manager	2003-2006	30 hours per week (included evenings and weekend work)	No
Bar Standards Board - disciplinary tribunal	Non-legally qualified member	2012 to 2018	Three to four hearings per annum, usually lasting one or two days each	No
Social Security and Child Support Tribunal	Non-legal Member	August 2013 to December 2021	normally two days per month, sometimes three days per month during busy periods	*[claimant's holiday pay entitlement may have been subject to the same dispute as the current claim]*
Study Right (claimant's daughter's company)	1.Invigilator 2. Learning Support Assistant/ Teacher	2014 to April 2024	Around 10 days per annum	No

51. The claimant prepared a schedule of the dates on which she states that she took holiday each year from the start of her appointment in 1998 to late December 2023. The claimant states that she took between 38 and 67 days' holiday in each complete year during this period. She stated that she prepared this list by checking her diaries, however it is clear that the claimant was in some difficulty in preparing this list given the passage of time. She states at the top of the document *"Please note the odd days of holidays are not noted here but can be provided if needed".* She also said in her evidence that she did not always include public holidays in her list, which would add up to a further eight days' holiday per annum.

52. For example, when we compared the holiday dates listed for December 2023 with her payslips covering this period during the claimant's evidence:

    52.1 the claimant stated in her schedule that she had taken holiday from 2-6 December 2023 (excluding weekends). However, she had also provided a payslip, stating that she had been paid for working on 4 December 2023. The claimant said that there may have been a mistake in her diary; and

    52.2 the claimant did not include Christmas day and Boxing day as holidays in her schedule for December 2023. She stated in evidence that she thought that it was obvious that she had taken public holidays as holidays. However, the claimant also told the Tribunal that she frequently worked at

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weekends and whilst she was away on holiday, in order to ensure that she had read the materials required for hearings and when reviewing decisions that had to be finalised within ten days of a hearing.

53. I also note that the claimant's schedule did not state when she took holiday from her work as an NLM of the Social Security Tribunal or from her other jobs or appointments.

Claimant's evidence on impact of non-eligibility for/non-payment of holiday pay (relevant to submissions re Human Rights Act 1998)

54. The claimant stated at paragraphs 51 and 52 of her witness statement (with the Tribunal's emphasis underlined) that:

51 Alternatively, I aver that right to, or claim for, paid holiday falls within the ambit of Article 8 EHCR, namely the right to respect for private and family life. In short, if one is unable to take paid holiday, that is likely, given the purpose of holiday, to interfere with one's ability to enjoy a family and private life away from the workplace. [Pages 56 & 57] When SM's [Specialist Members] are going on holiday abroad we are unable to work up to the date of our holiday and often have to stop working one week before we go, due to being unable to respond to decisions as we are not allowed to use the judicial internet when abroad. Decisions have to be issued within 10 working days and being abroad on holiday is not a reasonable excuse to deviate from this.

Impact

52This adds to additional planning of holidays as loss of income for the holiday and this extra income has to be taken into account. The impact of this is, extra planning and thought has to be given to how much income will be lost on all holidays and more so on holidays taken abroad. Because I don't get paid holiday pay, the impact of this is less household income, less pension contributions and more money withdrawn from my savings to cover the costs of my holidays. Less money to look after myself and or to pay for a care home in my later years and less money to leave my children and grandchildren when I leave this earth. Had I been paid holiday pay I would have had £84,241.45 plus more in my bank, plus a higher pension, to spend on my daily living activities and to have money to adapt my house for my later years. For instance I do not have a downstairs loo or shower room. That considerable sum of extra money would have paid towards practical items to ensure my older years are spent in a more comfortable way. I am a widow so my household has namely one income, mine only. This is unfair treatment, discriminates against me and is unfair under the Human Rights Act.

Findings relevant to 'reasonably practicable' test for time limits

55. One issue that I may have to determine is whether or not it was reasonably practicable for the claimant to present her claim at an earlier time.

56. The claimant engaged in ACAS early claim conciliation from 16 to 20 February 2024. She presented her claim on 23 May 2024. The respondent submits that any complaints relating to the claimant's contention that she is a 'worker' for the

purposes of the Working Time Directive (and that the WTR should be interpreted accordingly) under European Union law are limited to any underpayment of holiday pay that took place on or before 31 December 2023 (i.e. the date on which the supremacy of EU law ended under the relevant legislation). (I note that this would not be an issue if the claimant's submission that s3 of the HRA requires the Tribunal to interpret the definition of 'worker' under the WTR and/or the ERA succeeds.)

57. The claimant stated that she aware that time limits would apply in the Employment Tribunal, noting that there are time limits for many of the matters that are dealt with in the SEND. The claimant said that she believed, mistakenly, that the time limit did not start to run until 1 April 2024. She said that she thought she needed to present her claim form to the Employment Tribunal before she went on holiday in late May 2024 and that is why she presented it on 23 May 2024.

58. The claimant said that she became seriously ill in June 2024 and was hospitalised with a life-threatening condition. She says that the symptoms of that illness continued to affect her long after her discharge from hospital. The claimant said that her consultant advised her that symptoms of her condition would have built up during the five month period prior to her hospitalisation.

59. The claimant also stated during her evidence that:

    59.1 she did not seek legal advice on her potential claim and did not carry out any research on time limits on her claim (e.g. by looking at the Citizen's Advice Bureau or ACAS website);

    59.2 she did not ask ACAS if there was a time limit for presenting her claim;

    59.3 she continued working for SEND during the period from 1 January up to the time that she presented her Employment Tribunal claim on 23 May 2024;

    59.4 her work for SEND includes reading lengthy files of documents (averaging 400 pages) before the day of a hearing (usually sent to her up to ten days in advance). She then attends video hearings lasting between half a day and a day.

60. I note that the January 2024 and February 2024 payslips included in the hearing file indicate that the claimant was paid for hearings during this period, including hearings which took place on:

    60.1 January 2024: 3-6 (inclusive), 10-12 (inclusive), 17, 20, 23, 26;

    60.2 February 2024: 2, 10.

61. The respondent's representative cross-examined the claimant and put to her that there was no practical reason why she could not have brought her claim at any time after speaking to ACAS in February 2024 (e.g. the end of February 2024 or in March 2024). The claimant stated:

    "I didn't have my paperwork ready – I thought to begin with you had to have all your paperwork in to send as proof. Afterwards I realised I could just have sent the form in. It was the pressure of work and busyness of life. I didn't realise – had I realised, I certainly would have had [the claim form] *in by 31 March."*

62. The claimant also wrote to Mr Edwards in a letter sent by email on 1 May 2024, shortly before presenting her claim on 23 May 2024. In her letter she stated that she had not been paid holiday pay and had not been encouraged to take holiday.

63. Mr Edwards responded by emailed letter on 2 May 2024 and stated that the claimant had already been paid for the annual leave that she had taken by way of rolled up holiday pay, which was included in her daily fee. Mr Edwards also explained how that rolled up holiday pay had been calculated. The claimant and Mr Edwards exchanged further correspondence during May 2024 on this matter.

64. The details that the claimant provided in her claim form consisted of around one page of text in total. The claimant said that she thought (mistakenly) that she had to include documents supporting her claim with her claim form. The seven documents (totalling 8 pages) that the claimant attached to her claim form consisted of:

    64.1 her ACAS certificate;

    64.2 her correspondence with Mr Edwards in May 2024;

    64.3 a breakdown of the fee structure since 1999;

    64.4 her February 2024 payslip; and

    64.5 her 2022/23 P60.

65. These documents were not lengthy nor were they onerous to for the claimant to obtain. In any event, I note that the correspondence with Mr Edwards did not take place until May 2024 and therefore could not have been included with the claimant's claim form if it had been submitted prior to May 2024.

RELEVANT LAW

66. The relevant law relating to the issues raised by this claim is complex. The parties submitted an authorities file of around 1500 pages in total. I have read the pages of the authorities that the parties referred me to in their skeleton arguments and their submissions. I have not read every single page of the authorities file as it would be impossible to do so within the hearing time allocated to this claim.

Worker status

67. In order to bring a claim for failure to pay holiday pay, the claimant must first establish that she is a 'worker' for the purposes of:

    67.1 the Employment Rights Act 1996 (the "**ERA**");

    67.2 the Working Time Regulations 1998 (the "**WTR**").

Employment Rights Act 1996

68. A worker is defined under s230(3) ERA as set out below:

    (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) -

    (a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

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

69. The Supreme Court in *Gilham v Ministry of Justice* [2019] UKSC 44 had to consider whether a District Judge was a 'worker' for the purposes of Part IV(A) of the ERA (relating to protected disclosures). I note that the protected disclosure provisions of the ERA contain a wider definition of 'worker' than under s230(3). However, the Supreme Court's judgment is still relevant when considering the worker status of judicial office holders under domestic law. Baroness Hale PSC explained at the start of her judgment:

This case is about the employment status of district judges, but it could apply to the holder of any judicial office.

70. Baroness Hale first considered whether or not a District Judge worked under a contract or another legal arrangement. She observed at paragraph 12 (with the Tribunal's underlining for emphasis):

Is a judge a worker?

12 It is not in dispute that a judge undertakes personally to perform work or services and that the recipient of that work or services is not a client or customer of the judge. The issue is whether that work or services is performed pursuant to a contract with the recipient of that work or services or pursuant to some different legal arrangement. Nor is it in dispute that judges hold a statutory office. In broad terms, an office has been defined (by Lord Atkin in McMillan v Guest [1942] AC 561, 564) as a subsisting, permanent, substantive position which had an existence independent of the person who filled it, which went on and was filled in succession by successive holders. Office-holders do not necessarily hold office pursuant to any kind of contract.

71. Baroness Hale noted at paragraph 13 that some office-holders may hold that office as a result of a contract with the person or body for whom they undertake to perform work or services, such as a statutory director of a company. At paragraph 15, she identified the question as follows:

"…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.

72. At paragraphs 17-20, Baroness Hale considered these matters in more detail with the Tribunal's underlining for emphasis):

17 In looking at the manner in which the judge was engaged, it could be said that there was classic offer and acceptance: there was a letter offering appointment, upon the terms and conditions set out in the letter and accompanying memorandum, which the claimant was invited to accept and did accept. However, the manner of appointment is laid down in statute: under section 6 of the County

> *Courts Act 1984, district judges are now appointed by Her Majesty on the recommendation of the Lord Chancellor; but under the Constitutional Reform Act 2005, the whole process of selection is in the hands of the Judicial Appointments Commission, applying the criteria laid down in that Act. Furthermore, there was nothing in the letter offering appointment or in the accompanying memorandum which was expressed in contractual terms: indeed, some provisions were expressed in terms of what the Lord Chancellor expected or regarded as essential rather than as contractually binding obligations.*
>
> *18 In looking at the content of the relationship, it could be said that the terms and conditions contained some provisions, for example, those relating to maternity and paternity and adoption leave, which are not derived from statute. It could also be said that deployment decisions, as in any other employment, may be the subject of some negotiation between the individual judge and the leadership judges in her area; but ultimately the Lord Chief Justice is responsible for the deployment of judges. The essential components of the relationship are derived from statute and are not a matter of choice or negotiation between the parties. Under section 6(5) of the 1984 Act, a district judge is to be paid such salary as the Lord Chancellor may determine with the concurrence of the Treasury, but this cannot later be reduced; nor, of course, can it be increased by individual negotiation, as opposed to later determination of what the remuneration for that office is to be. Judicial pensions are also governed by statute and are not a matter of individual negotiation. Under section 11 of the 1984 Act, district judges must leave office on reaching the age of 70 (with the possibility of extension thereafter); otherwise they hold office during good behaviour and may only be removed for misbehaviour or inability to perform the duties of the office by the Lord Chancellor with the concurrence of the Lord Chief Justice; disciplinary proceedings against them are governed by the Judicial Discipline (Prescribed Procedures) Regulations 2014 (SI 2014/1919).*
>
> *19 It is also noteworthy that the claimant had difficulty in identifying her employer. These proceedings were brought against the Ministry of Justice. However, the claimant was in fact appointed by the then Lord Chancellor, while later district judges are appointed by Her Majesty the Queen. Responsibility for the judiciary is in fact divided between the Lord Chancellor, as a Minister of the Crown, and the Lord Chief Justice, as Head of the Judiciary. Many of the matters of which the claimant complained related to deployment and workload and many of her complaints were directed towards the local leadership judges, although some were directed to senior officials in Her Majesty s Courts and Tribunals Service. This fragmentation of responsibility has both statutory and constitutional foundations and highlights how different is the position of a judge from that of a worker employed under a contract with a particular employer.*
>
> *20 Finally, and related to that, there is the constitutional context. Fundamental to the constitution of the United Kingdom is the separation of powers: the judiciary is a branch of government separate from and independent of both Parliament and the executive. While by itself this would not preclude the formation of a contract between a Minister of the Crown and a member of the judiciary, it is a factor which tells against the contention that either of them intended to enter into a contractual relationship.*

73. Baroness Hale concluded at paragraph 21:

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

Working Time Regulations 1998

74. Regulation 2(1) WTR defines a 'worker' in very similar terms to s230(3) ERA:

> *"worker" means an individual who has entered into or works under (or, where the employment has ceased, worked under)–*
>
> *(a) a contract of employment; or*
>
> *(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;*
>
> *and any reference to a worker's contract shall be construed accordingly;*

75. The WTR are derived from the European Working Time Directive 2003/88/EC and must therefore be interpreted in accordance with European Union law, in relation to matters that fall before 31 December 2023. One of the general principles of EU law is the principle of its supremacy over the national laws of the Member States of the European Union.

76. The reason why there is a 'cut-off date' of 31 December 2023 is because:

    76.1 the UK left the European Union and its withdrawal was dealt with by the European Union (Withdrawal) Act 2018 (the "**EUWA**");

    76.2 the EUWA retained most EU law as it applied in the UK at 31 December 2020 (known as '**Retained EU law'**);

    76.3 the Retained EU Law (Revocation and Reform) Act 2023, abolished the principle of supremacy of EU law in UK law from 1 January 2024 onwards, such that it no longer applies in relation to any domestic legislation (regardless of whether that legislation came into effect before or after 1 January 2024).

77. There is no single definition of the concept of 'worker' under EU Law (see, for example, the opinion of the Advocate General in *Fenoll v Centre D'aide Par Le Travail 'La Jouvene'* (C-316/13) [2016] IRLR 67). The definition of worker varies according to the European Directive in question.

78. For example, the ECJ in *O'Brien v Ministry of Justice* [2012] ICR 955 considered the concept of 'worker' under the Framework Agreement on Part-time Work (Directive 97/81), following a referral from the UK Supreme Court. *O'Brien* related to the provision of pensions for Recorders (who were fee paid and part-time) compared to Circuit Judges (who were salaried and full-time). The ECJ focussed on whether or not the nature of a judge's office: *"is not substantially different from what is regarded as an employment relationship according to national law"* (see paragraph 52). The Supreme Court considered the ECJ's answer to the questions

referred to it and concluded that a Recorder was in 'an employment relationship' within the meaning of the Framework Agreement.

79. By way of contrast, European law considering the definition of 'worker' under the Working Time Directive (2003/88/EC) (the "**WTD**") focuses on whether a person performs services for and under the direction of another person in return for which he receives remuneration.

80. The Working Time Directive itself did not contain a definition of 'worker'. The WTD referred to the provisions of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (the "**Framework Directive**").

81. Article 3 of the Framework Directive contains the following definition of 'worker' and 'employer':

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

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

82. The ECJ held in the case of *Union Syndicale Solidaires Isère v Premier Ministre* (C428/09) (with the Tribunal's emphasis underlined):

27. It must also be borne in mind that, while the concept of a 'worker' is defined in Article 3(a) of Directive 89/391 to mean any person employed by an employer, including trainees and apprentices but excluding domestic servants, Directive 2003/88 made no reference to either that provision of Directive 89/391 or the definition of a 'worker' to be derived from national legislation and/or practices.

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

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

83. This formulation was also used in other European cases, including: *Sindicatul Familia Constanta v Directia Generala de Asistenta Sociala si Protectia Copilului Constanta* (Case C-147/17) [2019] IRLR 167 (paragraph 41) and *B v Yodel Delivery Network Ltd* (Case C-692/19) [2020] IRLR 550 (paragraph 29).

*

Human Rights Act 1998 ("HRA") and the European Convention on Human Rights ("ECHR")

84. Section 3(1) of the HRA provides that the Tribunal should (so far as is possible) read the WTR and the ERA in such a way as to give effect to human rights:

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.

85. The claimant seeks to claim under Article 14 of the ECHR that she has been discriminated against on grounds of 'other status' (i.e. being a non-legal member) in relation to the following ECHR Articles:

85.1 Article 1 of the First Protocol (peaceful enjoyment of possessions); and/or

85.2 Article 8 (respect for private and family life);

86. Article 14 of the ECHR provides:

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

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

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

88. Article 8 of the ECHR provides:

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

89. The Supreme Court in *R (Stott) v Justice Secretary* [2020] AC 51 held that the correct approach to an Article 14 claim is as follows:

In order to establish that different treatment amounts to a violation of article 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in article 14 or "other status". Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question

of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para 3 of R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173. He observed that once the first two elements are satisfied:

"the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

90. The Tribunal must therefore consider whether:

90.1 the claimant's compliant falls within the ambit of either A1P1 and/or Article 8;

90.2 the claimant's role as a fee paid judicial office holder can be characterised as an 'other status' for the purposes of Article 14;

90.3 whether the claimant and a 'worker' under domestic law are in analogous situations; and

90.4 if so, whether the respondent can objectively justify the difference in treatment.

1. Ambit

91. In *Stec v United Kingdom* (2005) 41 EHRR SE18, the European Court of Human Rights held that when considering complaints under Article 14 in conjunction with A1P1 concerning the denial of a particular benefit:

…the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question…Although Protocol No.1 does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme, it must do so in a manner which is compatible with Art.14.

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

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

It is for the applicant to show convincingly that the threshold was attained in his or her case. The applicant has to present evidence substantiating consequences of the impugned measure. The Court will only accept that Article 8 is applicable where

these consequences are very serious and affect his or her private life to a very significant degree.

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

2. Status

95. Lady Black in *Stott* commented that a generous meaning ought to be given to the definition of other status. A "personal characteristic" must first be identified by which persons or groups of persons were distinguishable from each other. She also stated that personal characteristics need not be innate, but could be a matter of personal choice. However, the personal characteristic cannot be simply defined by looking at the differential treatment of which the individual has complained.

96. The Supreme Court also considered what might fall within "other status" in *Gilham*. At paragraph 32, the Supreme Court held:

An occupational classification is clearly capable of being a "status" within the meaning of article 14. Indeed, it is the very classification of the judge as a non-contractual office-holder that takes her out of the whistle-blowing protection which is enjoyed by employees and those who have contracted personally to execute work under limb (b) of section 230(3). The constitutional position of a judge reinforces the view that this is indeed a recognisable status.

97. In *Sullivan v Isle of Wight Council* [2025] EWCA Civ 379, the Court of Appeal noted that legislation, by its nature, identifies certain groups that Parliament legitimately wishes to enjoy protection. Lewis LJ observed:

Courts need to be equally astute to ensure that challenges to legislation do not become a means of arguing for a particular policy outcome under the guise of challenges to differences in treatment resulting from primary legislation adopted by a democratically elected legislature.

3. and 4. - Analagous position and Justification

98. Lady Black observed at paragraph 8 of Stott that it is not always easy to keep analogous position and justification separate. Lord Walker at paragraph 5 of *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 5 described the personal characteristics that make up status as comparable to a series of concentric circles. At the centre are innate or largely immutable characteristics such as race, sex, disability etc. (often termed 'suspect grounds'), while other acquired characteristics are further out in the concentric circle. Lord Walker commented:

The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify.

99. In *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223 the Supreme Court made a number of observations about the need for the courts to have regard

for the separation of powers between the judiciary and the elected branches of government and to accord appropriate respect to the choices made by government and parliament in the field of social and economic policy, while at the same time providing a safeguard against unjustifiable discrimination (paragraph 144). In the field of economic and social policy a high level of respect is to be accorded to the judgments of public authorities, but balancing this with the need for close scrutiny where differences of treatment are based on "suspect" grounds (paragraph 146). The Supreme Court held at paragraph 161:

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

100. The Supreme Court in *Gilham* considered whether the exclusion of a judicial office holder from the protections relating to whistleblowing in the ERA was in the field of socio-economic policy. The Supreme Court concluded that it was not:

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.

101. The Court of Appeal *in Sullivan v Isle of Wight* [2025] EWCA Civ 379 (also involving a whistleblowing claim) observed at paragraph 93:

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

Notice requirements – Regulation 15 WTR

102. Regulation 15 of the WTR provides:

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(1) A worker may take leave to which he is entitled under regulations 13, 13A and 15B on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).

(2) A worker's employer may require the worker—

(a) to take leave to which the worker is entitled under regulation 13, 13A or 15B; or (b) not to take such leave …,

on particular days, by giving notice to the worker in accordance with paragraph (3).

(3) A notice under paragraph (1) or (2)—

(a) may relate to all or part of the leave to which a worker is entitled in a leave year;

(b) shall specify the days on which leave is or (as the case may be) is not to be taken and, where the leave on a particular day is to be in respect of only part of the day, its duration; and

(c) shall be given to the employer or, as the case may be, the worker before the relevant date.

(4) The relevant date, for the purposes of paragraph (3), is the date— (a) in the case of a notice under paragraph (1) or (2)(a), twice as many days in advance of the earliest day specified in the notice as the number of days or part-days to which the notice relates, and

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

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

103. For the purposes of Reg. 15(5) a relevant agreement is defined in Reg 2 as:

…in relation to a worker, means a workforce agreement which applies to him, any provision of a collective agreement which forms part of a contract between him and his employer, or any other agreement in writing which is legally enforceable as between the worker and his employer.

104. A “collective agreement” is defined as follows:

…a collective agreement within the meaning of section 178 of the Trade Union and Labour Relations (Consolidation) Act 1992, the trade union parties to which are independent trade unions within the meaning of section 5 of that Act.

105. Regulation 16 of the WTR provides:

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

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

A / B

where—

*

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

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

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

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

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

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

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

…

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

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

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

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

(ii) in any other case, 52; and

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

if—

(i) account were not to be taken of remuneration in

weeks preceding the period of 104 weeks ending—

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

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

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

…

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

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

*

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

Time Limits

106. Claims under the WTR and the ERA are both subject to time limits. The primary time limit expires on the date which is three months (less a day) from the date on which holiday pay should have been paid. The Tribunal may extend the time limit for the claimant to present their claim under both the WTR and the ERA if they are able to show that:

    106.1 it was not reasonably practicable for them to present their claim within the time limit; and

    106.2 if so, they presented their claim within such further period as the Tribunal consider reasonable.

107. In addition, s23(4A) of the ERA contains a two year backstop such that a Tribunal cannot consider deductions from wages where the deduction was made more than two years before the claim was presented to the Tribunal.

108. Regulation 30 of the WTR provides:

(1) A worker may present a complaint to an employment tribunal that his employer—

…

(b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2), 15E, 16(1) or 16A.

(2) Subject to regulation 30B, an employment tribunal shall not consider a complaint under this regulation unless it is presented—

(a) before the end of the period of three months…

beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three … months.

109. Regulation 30B relates to the extension of time limits to allow ACAS early conciliation.

110. Section 23 of the ERA provides:

(1) A worker may present a complaint to an employment tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13

[…]

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

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

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

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

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

'Not reasonably practicable' test

111. The courts have considered the definition of "reasonably practicable" in many cases. Lady Smith in *Asda Stores Ltd v Kause*r EAT 0165/07 explained that: *"the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."*

112. Lord Justice Underhill in Lowri Beck Services Ltd v Brophy [2019] EWCA Civ 2490) summarised the essential points as follows (with words underlined for emphasis):

1. The test should be given "a liberal interpretation in favour of the employee" (Marks and Spencer plc v Williams-Ryan [2005] 20 EWCA Civ 479, which reaffirms the older case law going back to Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53);

2. The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see Palmer and Saunders v Southend on-Sea Borough Council [1984] IRLR 119….

3. If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the

*

question is whether that ignorance or mistake is reasonable. If it is, then it will [not] have been reasonably practicable for them to bring the claim in time (see Wall's Meat Co Ltd v Khan [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made;

4. If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee 5 (Dedman)…

5. The test of reasonable practicability is one of fact and not law (Palmer).

113. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. *'That imposes a duty upon him to show precisely why it was that he did not present his complaint' — Porter v Bandridge Ltd 1978 ICR 943, CA.*

Rolled up holiday pay

114. Regulation 16(5) of the WTR states:

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

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

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

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

There must be mutual agreement for genuine payment for holidays, representing a true addition to the contractual rate of pay for time worked. The best way of evidencing this is for;

(a) the provision for rolled-up holiday pay to be clearly incorporated into the contract of employment;

(b) the percentage or amount allocated to holiday pay (or particulars sufficient to enable it to be calculated) to be identified in the contract, and preferably also in the payslip;

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

117. In *Lyddon v Englefield Brickwork Ltd* [2008] IRLR 198, the EAT considered the guidelines in *Smith* and held that these were guidance only:

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

118. I also note that Employment Judge Macmillan observed at paragraph 13 in *Mistlin v Ministry of Justice* (case reference 2204666/13 - a first instance decision that is not binding on this Tribunal) that:

Mr Mistlin contends that the notice placed on the judicial intranet by the Respondents on 23 June 2014 notifying the whole of the judicial community that the daily sitting fee for fee-paid Judges included rolled-up holiday pay was insufficient for the purposes of Robinson-Steele because it was not directed at individual Judges. Had it been necessary for me to do so, I would have rejected that argument. Robinson-Steele requires the employer's notice to the employee to be transparent and comprehensible. There is no claim that it was not. The judicial intranet has been set up for the express purpose of enabling the Respondents to communicate with the judicial community as a whole and it was an entirely appropriate method for putting right the administrative chaos which they had inherited from all of the various Tribunals which delivered different terms and conditions to their judiciary.

APPLYING THE LAW TO THE FINDINGS OF FACT

119. The claimant's skeleton argument was 15 pages and the respondent's skeleton argument totalled 30 pages. The respondent's oral submissions lasted nearly two hours and the claimant's oral submissions lasted nearly one hour. I have not summarised every single submission made by the parties due to the length of the skeleton arguments and submissions. However, I have considered carefully each of the points that they have raised.

A) IS THE CLAIMANT A WORKER?

Position under ERA and WTR – domestic law

Claimant's submissions

120. The claimant sought to argue that she was a worker under domestic law for the purposes of both the ERA and WTR. She submitted that:

120.1 Her appointment letter in 1998 referred to 'terms and conditions of employment';

120.2 She is subject to terms and conditions (including minimum sitting days and training days commitments);

120.3 She is subject to a code of conduct that applies whether she is sitting on a hearing or not;

120.4 She could be subject to disciplinary proceedings which could ultimately result in removal from office;

120.5 Her role has not changed throughout her period of appointment as a non-legal member, despite the reforms to SEND in that time;

120.6 She is eligible to receive statutory sick pay;

120.7 Her pay was subject to deductions for income tax and national insurance contributions as an employee;

120.8 Her payslips describe her as an employee.

121. The claimant also sought to rely on the Employment Tribunal's judgment in *Somerville v MPTS and the NMC* (Case reference 2413617/18) in which Mr Somerville was found to be an employee of the NMC.

Respondent's submissions

122. The respondent submitted that the Supreme Court held in *Gilham* that judges do not work pursuant to a contract and are therefore not 'workers' for the purpose of domestic legislation. There is no proper basis on which to distinguish the position of non-legal members from legally qualified judicial office holders. They noted that the matters listed by the claimant relating to her appointment also apply to judges.

123. The respondent submitted that the claimant's terms derive from her appointment to the office of non-legal member, rather than any contractual agreement. In particular:

123.1 the income tax treatment of office holders arises from the provisions of the Income Tax (Earnings and Pensions) Act 2003;

123.2 office holders are also eligible to receive statutory sick pay, as set out in s136 of the Social Security Contributions and Benefits Act 1992.

124. The respondent also noted that the parties in *Somerville* agreed that Mr Somerville provided services to the NMC under a contract. This was recorded in the Tribunal's judgment at paragraphs 89 and 90, which set out the terms of that contract including a provision which stated:

You are not an employee or an office holder of the NMC. Your appointment as a Practice Committee member makes you eligible to provide services, as an independent contractor, to the NMC, as a panellist or Panel Chair.

Conclusions on worker status under domestic law

125. I have concluded that the claimant's appointment as a non-legal member was that of an office-holder under the terms of her appointment. She did not enter into a contract with the respondent. I appreciate that many of the terms of appointment appear to be similar to those that might be found frequently in a contract of employment. However, that does not mean that the claimant is worker. As Baroness Hale noted in *Gilham* when considering whether or not a District Judge was a worker*:*

17 In looking at the manner in which the judge was engaged, it could be said that there was classic offer and acceptance: there was a letter offering appointment,

upon the terms and conditions set out in the letter and accompanying memorandum, which the claimant was invited to accept and did accept. However, the manner of appointment is laid down in statute: under section 6 of the County Courts Act 1984, district judges are now appointed by Her Majesty on the recommendation of the Lord Chancellor; but under the Constitutional Reform Act 2005, the whole process of selection is in the hands of the Judicial Appointments Commission, applying the criteria laid down in that Act. Furthermore, there was nothing in the letter offering appointment or in the accompanying memorandum which was expressed in contractual terms: indeed, some provisions were expressed in terms of what the Lord Chancellor expected or regarded as essential rather than as contractually binding obligations.

126. The claimant did not put forwards any arguable basis on which the determination in *Gilham* that judicial office-holders are not workers should not apply to non-legal members. In particular:

    126.1 the claimant was originally appointed by the Department of Education, which was the sponsoring department for SEND;

    126.2 following the reorganisation under the Tribunals, Courts and Enforcement Act 2007, SEND became part of the HESC;

    126.3 the claimant accepts that the 2010 Memorandum on conditions of appointment and terms of service apply to her. This referred throughout to 'office holders' and stated in the introduction section that it applied to *"persons who…are transferred in under s30 of the Tribunals, Courts and Enforcement Act 2007"*. The Memorandum set out the general terms and conditions of service. It contained provisions around tenure, renewal of appointment and removal form Office (with any non-renewal and removal decisions being taken by the Lord Chancellor with the concurrence of the Chief Justice) under the Act and related legislation. The Memorandum also contained details of the standards of judicial and personal conduct required;

    126.4 similar provisions were set out in later versions of the Memorandum.

127. Finally, I will turn to the claimant's submissions on *Somerville.* The NMC is an independent regulator, governed by its Council. The panel member role that was in issue in *Somerville* was stated expressly to be that of an independent contractor, subject to the terms of the NMC's Panel Member Services Agreement. I also note that the claimant in *Somerville* paid tax as a self-employed person, as agreed between the NMC and HMRC (see paragraph 93 of the *Somerville* judgment). Paragraph 94 of the *Somerville* judgment stated:

    By letter dated 5 May 2016 the Claimant was reappointed; that letter included the following paragraph:

    'I am required to remind you that as a Panel Member you are not an employee or an office holder of the NMC. You are appointed as a Practice Committee member who is eligible to provide services, as an independent contractor, to the NMC as a fitness to practice Panel Member. The terms upon which you will be invited to provide services as a Panel Member following your appointment are set out in the PMSA [Panel Member Services Agreement]*.'*

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128. The question that the Tribunal decided in *Somerville* was whether the claimant was an employee or a worker of the NMC, as opposed to an independent contractor. There was no question of office-holder status to consider.

European Union law – definition of 'worker'

129. I then turn to the question of whether the claimant is a 'worker' for the purposes of the WTD. I note that there is no single definition of 'worker' under EU law (see *Fennoll* referred to above). I also note that the WTD does not contain a definition of 'worker'.

130. *O'Brien* held that it was sufficient for the purposes of the PTWD for someone to be a worker if they were in an 'employment relationship'. However, the Framework Directive (from which the WTD was derived) contains a different definition of 'worker':

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

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

131. The ECJ *Union Syndicale* considered the definition of 'worker' for the purposes of the WTD and held that:

28. … for the purposes of applying Directive 2003/88, that concept [of "worker"] may not be interpreted differently according to the law of member states but has an autonomous meaning specific to European Union law. The concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration…

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

132. In *Gilham*, the Supreme Court held that judges to do not work 'under' or 'for the purposes of any state appointed body or individual. They held that judges are remunerated by virtue of their office, rather than the services that they perform. The same analysis applies to non-legal members, such as the claimant. They are also officeholders and are remunerated because of their office as a judicial office-holder, rather than for the services that they perform.

133. In conclusion, a non-legal member is not a worker for the purposes of the WTD. The Tribunal therefore cannot interpret the WTR in such a way that the definition of 'worker' includes non-legal members.

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TIME LIMITS UNDER THE WTR AND THE ERA (IN RELATION TO EUROPEAN LAW PURPOSES ONLY)

134. The respondent submitted that the claimant presented her claim outside of the Tribunal's time limits to the extent that her claim relies on European law. If I am incorrect in my findings on the definition of 'worker' under the Working Time Directive set out above, I have gone on to consider the time limits issue.

135. The domestic courts are only required to take into account European law in relation to claims relating to events up to 31 December 2023 because:

    135.1 the UK left the European Union and its withdrawal was dealt with by the European Union (Withdrawal) Act 2018 (the "**EUWA**");

    135.2 the EUWA retained most EU law as it applied in the UK at 31 December 2020 (known as '**Retained EU law'**);

    135.3 the Retained EU Law (Revocation and Reform) Act 2023, abolished the principle of supremacy of EU law in UK law from 1 January 2024 onwards, such that it no longer applies in relation to any domestic legislation (regardless of whether that legislation came into effect before or after 1 January 2024).

136. The claimant engaged in ACAS early claim conciliation from 16 to 20 February 2024. The time limit for presenting her claim in relation to matters up to 31 December 2023 (for the purposes of the European law arguments) therefore ended on 4 April 2024. The claimant did not present her claim until 23 May 2024.

137. The Tribunal may extend the time limit for the claimant to present their claim under both the WTR and the ERA if they are able to show that:

    137.1 it was not reasonably practicable for them to present their claim within the time limit; and

    137.2 if so, they presented their claim within such further period as the Tribunal consider reasonable.

138. I have concluded that it was reasonably practicable for the claimant to present her claim by 4 April 2024 because:

    138.1 the claimant was aware of the existence of time limits, but she did not research what those time limits might be or seek legal advice at that stage. The claimant did not ask ACAS about time limits during early conciliation;

    138.2 the claimant continued to sit for SEND throughout the period from early January to early April 2024, which involved reading lengthy hearing files and attending multiple video hearings. She was also able to communicate with ACAS during this period as part of the early conciliation process;

    138.3 the claimant said that the reason for her delay in presenting her claim form was 'due to pressure of work and busyness of life'. She also said that she believed mistakenly that she needed to submit her paperwork with the claim form. However, the seven documents (totalling 8 pages) that the claimant submitted which were dated prior to 4 April 2024 consisted of her ACAS certificate, a breakdown of the fee structure since 1999, her February 2024 payslip and her 2022/23 P60. The claimant also submitted her correspondence with Mr Edwards in May 2024;

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138.4 the claimant went on holiday in late May 2024 and became seriously ill after her return from holiday. She states that her consultant advised her that her symptoms would have started in early 2024. However, given that the claimant was able to read lengthy files, conduct hearings, and speak to ACAS during the period from early January to early April 2024, I have concluded that it was reasonably practicable for her to have presented the claim form on or before 4 April 2024.

HUMAN RIGHTS ACT 1998 ("HRA")

139. I note that the Employment Tribunal does not have jurisdiction to hear a freestanding claim under the HRA 1998. However, the Employment Tribunal is subject to the duty set out in section 3 of the HRA to interpret legislation compatibly with Convention rights so far as is possible. The claimant submits that the Tribunal should interpret the WTR and/or the ERA such that non-legal members fall within the definition of worker on the basis of her human rights.

140. The claimant claims under Article 14 of the ECHR that she has been discriminated against on grounds of 'other status' (i.e. being a non-legal member) in relation to A1P1 (peaceful enjoyment of possessions) and/or Article 8 (respect for private and family life) of the ECHR. The claimant stated in her witness statement that:

Because I don't get paid holiday pay, the impact of this is less household income, less pension contributions and more money withdrawn from my savings to cover the costs of my holidays. Less money to look after myself and or to pay for a care home in my later years and less money to leave my children and grandchildren when I leave this earth. Had I been paid holiday pay I would have had £84,241.45 plus more in my bank, plus a higher pension, to spend on my daily living activities and to have money to adapt my house for my later years. For instance I do not have a downstairs loo or shower room. That considerable sum of extra money would have paid towards practical items to ensure my older years are spent in a more comfortable way. I am a widow so my household has namely one income, mine only. This is unfair treatment, discriminates against me and is unfair under the Human Rights Act.

141. The Supreme Court in *Stott* (referred to in the section on Relevant Law) held that a claimant has to establish four elements in order to show that 'different treatment' amounted to a violation of Article 14:

141.1 the circumstances must fall within the ambit of a Convention right;

141.2 the difference in treatment must have been on the ground of one of the characteristics listed in Article 14 or 'other status';

141.3 the claimant and the person who has been treated differently must be in analogous situations;

141.4 there must be no objective justification for the difference in treatment.

Ambit

142. I note that Article 14 is not a standalone right. The claimant has to show that her complaint of failure to pay holiday pay falls within another human right under the ECHR. The claimant relies on Article 1 of Protocol 1 (right to peaceful enjoyment

of possessions) ("**A1P1**") and/or Article 8 (right to respect for a private and family life).

143. The European Court of Human Rights held at paragraph 116 of the decision in *Denisov* that in order to come within the ambit of Article 8:

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

144. *Denisov* related to the dismissal of Mr Densiov as President of the Kyiv Administrative Court of Appeal for a failure to meet his administrative duties. I note that in *Densiov,* the ECtHR concluded the threshold of severity was not met and therefore there was no violation of Mr Denisov's Article 8 rights. Mr Denisov was dismissed from the office of President of the Kiev Administrative Court of Appeal, although he continued to work as a judge alongside colleagues in the same court. The Court noted that dismissal from the role of President did not affect his future career as a judge and that the presidential role was not an essential feature of the judicial function, no matter how prestigious it was or however much the role was valued by Mr Denisov. The Court noted was no evidence that his opportunities to establish and maintain relations of a professional nature had been substantially reduced, nor that his professional or social reputation had been seriously affected. The Court also concluded that Mr Denisov's judicial competence, professionalism and moral values had not been called into question. There was no evidence that his removal from office had caused harm to the interests of his family, as he had alleged.

145. By way of contrast, the applicant's complaint in *Budimir v Croatia* [2021] ECHR 1096 did fall within the ambit of Article 8. Mr Budimir's licence to act as a vehicle inspector by the Croatian authorities was revoked for alleged falsification of a vehicle inspection (of which he was later acquitted and his licence was later restored). However, the revocation led to his dismissal by the private company that employed him. The ECtHR considered the consequences for Mr Budimir and stated at paragraphs 46 and 47:

46. In doing so, the Court has to examine whether the impugned measure had sufficiently serious negative consequences for the applicant's private life - in particular as regards his "inner circle", opportunities for him to establish and develop relationships with others, and his reputation (see paragraph 41 above). In this regard, it notes that the revocation of the applicant's professional licence resulted in his dismissal from his employment and his inability to pursue his profession for a period of five years. According to the applicant, the foregoing caused him pecuniary damage and health problems and adversely affected his relations with other persons, including those of a professional nature.

47. The Court considers that the combination of those factors must have had very serious consequences for the applicant's "inner circle" and his capacity to establish and develop relationships with others, as well as his social and professional reputation, affecting him to a very significant degree. He was not merely suspended, demoted or transferred to a position of lesser responsibility, but dismissed from work after 20 years of employment and excluded from performing

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the duties of a certified motor vehicle inspector altogether, consequently losing his entire source of remuneration with immediate effect (compare Polyakh and Others v. Ukraine, nos. 58812/15 and 4 others, § 209, 17 October 2019; and Milojević and Others v. Serbia, nos. 43519/07 and 2 others, § 60, 12 January 2016; also contrast J.B. and Others v. Hungary (dec.), no. 45434/12 and 2 others, §§ 132-33, 27 November 2018). He was excluded from any employment as a certified vehicle inspector, a profession for which he had obtained special certification and which he had pursued for about two years previously (see paragraph 5 above). Taking all this into account, the Court can accept that the revocation of his licence for the alleged falsification of the vehicle inspection record had encroached upon his reputation in such a way that it seriously affected his esteem among others, with the result that it has had a serious impact on his interaction with society. Consequently, the Court is satisfied that Article 8 is applicable to the facts of the present case.

146. The ECtHR in *Stec* referred to a 'but for' test when considering the ambit of an individual's human rights in a case involving denial of a particular social security benefit. The Court of Appeal in *JT* confirmed that this approach was not limited to welfare benefits, but held that where a state creates rights under domestic law which fall within the ambit of Convention rights, it must do so in a non-discriminatory way.

147. The EAT summarised the approach to question of ambit in *Djalo* at paragraphs 155-158 and noted that: *"applicants are obliged to identify and explain the concrete repercussions on their private life and the nature and extent of their suffering"* and for an individual to show that their private life had been affected *"to a very significant degree".*

148. *Djalo* involved a claim that a cleaner employed by a third party was indirectly discriminated against on grounds of race because she was paid less than directly employed staff of the Ministry of Justice. She claimed that the Ministry of Justice should instruct the respondent to uplift her pay to the London Living Wage. The claimant argued in *Djalo* that Article 14 requires the Equality Act 2010 to be construed in a way that permits race discrimination claims to be brought against someone other than the worker's employer in certain circumstances (see paragraph 253). The EAT held that Ms Djalo's claim did not fall within the ambit of Article 8 or A1P1 and stated at paragraph 259:

259. The earlier cases where article 8 has arisen in the employment context have generally involved dismissal, demotion or the equivalent (para 158 above). No case was cited to me where a complaint about the level of pay, whether on the basis of discrimination or otherwise, was found to have engaged article 8 or to be within its ambit, despite the myriad of situations in which workers have litigated over their level of pay. There can be no question of the consequence-based approach applying here; no evidence has been adduced to indicate that the pay differential complained of here has very serious consequences for the claimant affecting her private life to a very significant degree (para 157 above)… [emphasis added]

260. *Mr Lewis' reliance on A1P1 is no more promising from his point of view. The claimant's claim for pay discrimination does not amount to a "possession". She cannot show that, but for the discriminatory ground about which she complains,*

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she would have an enforceable right in domestic law to equality of pay in LLW [the London Living Wage] *terms with a cohort of the respondent's employees (paras 161 – 165 above). The claimant in JT fulfilled the eligibility criteria and would have had a good claim for criminal injuries compensation, but for the "same roof" exclusion. The claimants in AA – whose A1P1 argument did not succeed by this route - had brought a successful discrimination claim, but could not be awarded compensation as a result of the challenged measure. By contrast, even if section 41 EqA fell to be interpreted as the claimant contends, it is far from clear that the present circumstances would come within it; in any event, the claim would fail because of the inability to meet the section 19 definition of indirect discrimination; and there are outstanding issues regarding, for example, the appropriateness of the chosen comparators and whether the alleged disparate impact on BME workers can be established. The modality reasoning that Saini J applied in AA does not assist the claimant either, as it depends upon the person having the domestic law right relied upon but for the discrimination (para 165 above)...*[emphasis added]

149. The key findings of fact that this Tribunal has made relating to ambit are:

149.1 the claimant took at least 40 days per leave per annum, according to her schedule of dates (noting that the claimant stated during her evidence that the holidays in her schedule do not include public holidays). The claimant says that she went on holiday in the UK and abroad on some (but not all) of these dates. She also spent time undertaking other non-work commitments, such as caring for her grandchildren;

149.2 the claimant says that if she had received holiday pay, she would have more money to "ensure my older years are spent in a more comfortable way" (e.g. house adaptations, ability to pay care home fees) and more money to leave to her family.

150. The respondent submitted that:

150.1 the claimant's evidence of the impact of non-eligibility for and/or non-payment of statutory holiday pay does not meet the high threshold required to bring it within Article 8;

150.2 in relation to A1P1, the cases of *Stec* and *JT* relate to social security and other state benefits which involve payment of sums by the state to individuals, rather than the regulation of relationships between workers and those engaging workers;

150.3 the Court of Appeal in *JT* did not hold that every piece of legislation which confers rights on individuals falls within A1P1. Rights under the WTR are too far removed from the social security and other state benefits considered in *Stec* and *JT*;

150.4 even if the 'but for' test in *Stec* applies, the claimant would still have to establish that 'but for' the condition of entitlement, she would have a right under domestic law to statutory holiday pay. This would be impossible in this situation – if the relevant test was not that of 'worker', then what test would apply? It is not for the courts to determine the line between who should be paid annual leave and who should not; rather that is a decision that must be made by Parliament. By way of contrast, in *JT* all that the

court had to do was to remove the 'same roof' exclusion and the claimant in *JT* would be eligible to receive the criminal injuries compensation that she claimed.

150.5 The decisions of other Employment Tribunals (which are not binding on this Tribunal) support the contentions set out above. For example:

150.5.1 in *Oni v London Borough of Waltham Forest* (Case reference 3204635/21) at paragraph 292-3, Employment Judge Crosfill concluded that:

292…I would accept that a right to take paid holiday could be considered a possession. However the difficulty for the Claimants is that identified above in the claim for National Minimum Wage. By reason of the definition of 'worker' in Reg 2(1) of the Working Time Regulations the Claimants are excluded from the right to paid annual leave (unless they succeed on their other arguments). They do not have any 'possession' that they are deprived of. They are in the same position as the Claimant in Roche.[1]

293. I find that the Claimants cannot show that A1P1 is engaged because they cannot show that their complaint falls within the ambit of A1P1 even applying the very broad test approved in R(SC) v Secretary of State for Work and Pensions. I accept the point made by Mr Moretto, A1P1 cannot be used to create a right/possession. It protects rights/possessions that exist.

150.5.2 In Foster v Secretary of State for Justice (Case reference 2304452/23) at paragraph 103, Employment Judge Heath noted that:

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

151. I concluded that the claimant's compliant of failure to pay holiday pay does not fall within the ambit of Article 8. The claimant's evidence does not meet the high threshold required of very serious consequences for the claimant affecting her private life to a very significant degree. I note, for example, the ECtHR concluded that Mr Denisov's effective demotion from his role of President was not sufficient to meet that threshold. He did not adduce evidence to show that the reduction in his salary had seriously affected any aspect of his private life. I concluded that the claimant in this case has also failed to show that any failure to pay her holiday pay has seriously affected any aspect of her private life. It is obvious that a higher level of remuneration would provide the claimant with more financial options. However,

[1] In Roche v UK (2006) 42 ECHR 30 - the ECHR held that a former Crown Servant was not deprived of any possession (a cause of action against the Crown for personal Injury) because he never had an absolute right to bring proceedings in Tort (see paragraphs 127-129).

the claimant's own evidence is that she was able to take over 40 days' leave per annum, despite not being paid holiday pay during this period.

152. I have also concluded that the claimant's complaint of failure to pay holiday pay does not fall within the ambit of A1P1 for the following key reasons:

    152.1 the claimant is seeking to compare herself to 'workers' (who are entitled under statute to receive holiday pay). In effect, she submits that the definition of worker set out in Regulation 2 of the WTR deprives her of the right to annual leave;

    152.2 the EAT in *Djalo* differentiated between claims where the claimant would fulfil the eligibility criteria if the discriminatory ground was removed and those who would not (including Ms Djalo herself). For example, the claimant in *JT* would have had a good claim for criminal injuries compensation if she had not lived under the 'same roof' as the perpetrator. If the 'same roof' exclusion' was removed, then the claimant in *JT* would have received the compensation that she claimed;

    152.3 by way of contrast to *JT*, in order for this part of the claimant's case to succeed, the Tribunal would have to conclude that she had a 'contract' whereby she undertook to do or perform personally any work or services for another party to the contract. However, the Supreme Court in *Gilham* at paragraph 32 concluded that judges and indeed 'the holder of any judicial office' (see paragraph 1), which would include non-legal members, do not have a contract;

    152.4 if the definition of 'worker' were somehow widened to include judicial office-holders, this Tribunal would in effect be re-drawing the line that Parliament adopted in deciding who should benefit from holiday pay. This falls outside of the Tribunal's jurisdiction. I note the warning given by the Court of Appeal in *Sullivan* at paragraph 93:

    …Courts need to be equally astute to ensure that challenges to legislation do not become a means of arguing for a particular policy outcome under the guise of challenges to differences in treatment resulting from primary legislation adopted by a democratically elected legislature.

153. The claimant's submission that the definition of 'worker' under Regulation 2 of the WTR and/or section 230 of the ERA should be interpreted under s3 of the HRA to include judicial office-holders in order to give effect to her A1P1 and/or Article 8 Convention rights therefore fails and is dismissed.

NOTICE REQUIREMENTS – REGULATION 15 OF THE WTR

154. The claimant contends that she complied with the notice requirements under the WTR by marking the spreadsheets that HMCTS sent to her with the dates on which she was not available to sit on hearings.

155. The respondent submits that the claimant's actions do not come close to meeting the requirements of Regulation 15. They submit that:

    155.1 the expectation was that the claimant would sit for a minimum number of days. For practical reasons, she had to let the Tribunal's administration

know when she would or not would not be available to sit. However, this did not mean that she was taking annual leave on those dates;

155.2 the purpose of annual leave is to provide a worker with the opportunity to rest and recuperate away from work. However, the claimant was in fact working on at least some of the days that she was not available to sit as part of her portfolio career;

155.3 the list of dates that the claimant marked herself as unavailable far exceed the 40/41 days per annum that a hypothetical full time equivalent role would be entitled to. The respondent was not entitled to say that the claimant had taken 'too much' holiday in those circumstances because the claimant's only obligation was to make herself available to meet the minimum sittings;

155.4 the claimant is attempting to fit her circumstances within the framework of the WTR, but this did not reflect the reality of her situation; and

155.5 if the claimant cannot identify when she took leave and when she should have been paid for that leave, then she cannot show a series of deductions from pay for that leave.

156. I concluded that the claimant did not give notice to take leave under the WTR. In particular:

156.1 the WTR contains specific provisions regarding the provision of notice. The provision of notice under the WTR is not just a way of a worker informing their employer of the dates when they might take leave. An employer must be able to identify the dates on which leave will be taken because a worker's holiday pay (where they do not have standard working hours) is calculated by reference to their average pay and hours worked during the 52 weeks prior to the dates on which leave is taken;

156.2 the dates when the claimant marked herself as unavailable to sit were not limited to the dates when she was on holiday. The claimant's unavailable dates included days when she was working for other organisations (including the Social Security Tribunal, the Bar Standards Board and her daughter's company);

156.3 the claimant herself has been unable to identify with any certainty the dates on which she took annual leave (as opposed to being unavailable to sit for SEND due to other commitments) since 1998;

156.4 this presents an additional difficulty in that the claimant cannot establish the date when she should have been paid for a particular period of annual leave either under the WTR or under the ERA. I note that the ERA provisions permit claimants to claim for a series of deductions, unlike the WTR which does not contain any such provision. However, in either case the claimant would have to identify a notice to the respondent setting out the dates when she took annual leave, identify the dates on which she should have been paid for each period of leave and use that information as part of the calculation of the amounts payable for each period of leave;

156.5 the claimant would also have to show that she presented her claim within the primary time limits under the WTR and ERA for each period of leave (or within the last in a series of deductions under the ERA). Without a

notice identifying dates on which leave was taken, the primary time limit cannot be identified;

156.6 as such, the claimant has failed to comply with the notice requirements under Regulation 15 of the WTR.

157. I have concluded that the claimant has failed to provide the notice required under Regulation 15 of the WTR. Therefore, even if the claimant fell within the definition of 'worker' under the WTR (or for unauthorised deductions of wages under s13 of the ERA relating to non-payment of holiday pay), that claim would be dismissed because she cannot show that she complied with the notice requirements under Regulation 15.

ROLLED UP HOLIDAY PAY AND SET OFF

158. I have already concluded that the claimant's complaint of failure to pay holiday pay fails and is dismissed. I therefore do not need to consider whether or not the respondent paid to the claimant any rolled up holiday pay and/or whether such payments should be set off against any holiday pay claimed.

CONCLUSIONS

159. For the reasons set out above, the claimant's claim that she has not been paid for holiday that she has taken fails and is dismissed. In particular, I concluded that:

159.1 the claimant is not a 'worker' for the purposes of Regulation 2 of the Working Time Regulations 1998 (the "**WTR**") (whether (i) under domestic law; or (ii) under the Working Time Directive for complaints relating to periods of leave that pre-date 31 December 2023);

159.2 the claimant is not a 'worker' for the purposes of section 230 of the Employment Rights Act 1996 (the "**ERA**");

159.3 the definition of 'worker' under the WTR and/or the ERA should not be interpreted to include the claimant status as a non-legal member, having regard to s3 of the HRA and the claimant's Article 14 rights (read with Article 8 and/or Article 1 of Protocol 1 of the European Convention on Human Rights); and

159.4 the claimant has failed to comply with the notice requirements under Regulation 15 of the WTR.

Employment Judge Deeley

Employment Judge Deeley

17 October 2025

Judgment sent to the parties on:

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RESERVED JUDGMENT

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For the Tribunal:

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