



EMPLOYMENT TRIBUNALS

Claimant: Dr N MacLennan

Respondent: The British Psychological Society

Interveners: (1) Secretary of State for Business and Trade
(2) The Charity Commission

Record of a Preliminary Hearing Heard by CVP

Heard at: Nottingham

On: 10, 11, 12 and 15 September 2025

Before: Employment Judge M Butler sitting alone

Representation

Claimant: Mr C Milsom, Counsel and Ms E Darlow Stearn, Counsel

Respondent: Mr T Sheppard, Counsel

First Intervener: Mr R Moretto, Counsel

Second Intervener: Ms N Ling, Counsel

JUDGMENT

The Judgment of the Employment Judge is that:

1. The Claimant's role as Charity Trustee is not in an analogous position to a worker for the purposes of Part IVA and/or Section 47B of the Employment Rights Act 1006;
2. The Claimant, as a Charity Trustee, does have an "other status" for the purpose of Article 14 ECHR;
3. The Claimant was treated less favourably in not being entitled to bring a whistleblowing claim against the Respondent;
4. The difference in treatment of the Claimant is reasonably justified in pursuance of a legitimate aim.

REASONS

Background

1. This Hearing was listed following the judgment of HHJ Tayler following the appeal heard by the Employment Appeal Tribunal on 24 and 25 July 2024 against my judgment dated 31 March 2023 and sent to the parties on 31 March 2023. In my judgment, I found that the Claimant was not at any time a worker of the Respondent and the Tribunal had no jurisdiction to hear the claims of detriment for making protected disclosures.
2. My judgment that the Claimant was not a worker was upheld. The issues remitted to the Employment Tribunal are set out in paragraphs 1 and 2 and 106 to 109 of the EAT judgment, which are
 - 2.1 whether the Claimant was in an analogous situation to an employee or limb (b) worker or whether holding an office as a charity trustee, being president - elect and/or president of the Respondent was some “*other status*”
 - 2.2 to consider the possibility of focusing on the issue of justification in conducting my analysis.
3. At the EAT appeal hearing before HHJ Tayler were the Claimant and Respondent with Protect and the Charity Commission as Interveners. Before me, Protect did not intervene but the Secretary of State for Business and Trade did, along with the Charity Commission.
4. Neither I, nor those appearing before me, considered that further oral evidence was necessary and the hearing proceeded with consideration given to the skeleton arguments already provided and oral submissions by Counsel. Mr Milsom spoke for 3 hours and Ms Darlow Stearn for 30 minutes. Mr Moretto spoke for a little over 90 minutes, Mr Sheppard for 30 minutes and Ms Ling for 20 minutes.
5. Mr Milsom and Ms Darlow Stearn’s skeleton argument ran to 42 pages, Mr Sheppard’s to 10 pages, Mr Moretto’s to 24 pages and Ms Ling’s to 17 pages. There was a hearing bundle of over 800 pages and an authorities bundle of in excess of 3,000 pages.

Preliminary issue

6. Prior to the hearing, Mr Milsom raised a preliminary issue by application that I should consider Article 10 on a free-standing basis. This was opposed by all other parties. This application was refused. Put simply, considering Article 10 on a free-standing basis did not fall within my remit for this hearing. In fact, Mr Milsom had already raised this issue before the EAT where HHJ Tayler at paragraph 62 of his judgment said:

“62. *Although the claimant raised the possibility of relying on Article 10 alone,*

that point was not raised in the grounds of appeal and the Claimant did not seek to raise it in argument. Accordingly, I do not consider it was properly before me in this appeal”.

With respect to Mr Milsom, if the point was not before the EAT, it cannot be said to fall within the scope of this remitted hearing **[Aparau v Iceland Frozen Foods plc [2000] ICR 341 CA]**.

The issues

7. The Claimant no longer pursues his claim that being President, Present Elect or Vice President of the Respondent is a relevant “*other status*” for the purposes of Article 14. The Respondent and Interveners accept that being a charity trustee is capable of being an “*other status*” and accept that as a charity trustee, the Claimant is not able to make a claim for compensation for detriment for making a protected disclosure in the Employment Tribunal. Accordingly, the Claimant is treated differently as a charity trustee than an employee or worker.
8. The remaining issues, therefore, are
 - 8.1 whether there were analogous circumstances with employees and limb (b) workers;
 - 8.2 if so, was the Claimant treated less favourably because of that other status; and
 - 8.3 if so, what is the difference in treatment without reasonable justification or, in other words, is that a proportionate means of achieving a legitimate aim.

Submissions

9. This has become a complex case made more so by the length of some of the submissions, both oral and written. As was acknowledged by HHJ Tayler in the appeal Judgment, some of the submissions made before him were not made, at least in some parts, in the same way before me at the first Employment Tribunal hearing.
10. I have spent a considerable amount of time reading and re-reading the written submissions of the parties and the interveners. I have also spent a considerable amount of time reviewing my notes of the oral submissions made before me. It would be wrong not to make reference to those submissions but their length prohibits anything other than giving a concise summary in this Judgment. Nonetheless, I confirm I have considered them in great detail and have taken them into account in determining those matters remitted to me.

The Claimant’s submissions

11. These submissions were made mainly by Mr Milsom, with Ms Darlow Stearn

assisting dealing with one discrete area. I summarise their submissions below.

12. It was submitted that in determining whether the Claimant was in an analogous situation to an employee or limb (b) worker, a broad brush approach must be taken as set out by HHJ Tayler at paragraph 104 of his Judgment. Matters to be considered were the Claimant's duty to comply with his regulatory obligations, along with his statutory obligations and that he was effectively held to a professional standard as a Trustee commensurate with his profession as a psychologist. He also had duties and obligations, which included reporting wrongdoing and a fiduciary duty in overseeing the charitable purposes and objects of the charity, breach of which could give rise to legal liability. This level of responsibility for governance of the Respondent bore an obvious close parallel with an employee or limb (b) worker.
13. The Claimant submits that he was as likely to become aware of wrongdoing as any employee or limb (b) worker and perhaps more so given he oversaw the work of the senior leadership team and was tasked with ensuring legal and regulatory compliance. He was in a decision-making governance role providing strategic leadership of the Respondent, making it important that he, and any charity trustee, make public interest disclosures. He had insider knowledge and was likely to come across information it was in the public interest to disclose. Accordingly, the denial of whistleblowing protection, bearing in mind his positive obligation to speak up, amounts to detrimental treatment requiring particularly weighty justification.
14. It was submitted that the Claimant, and all charity trustees, are vulnerable to retaliation in the form of, inter alia, ostracisation, bullying, harassment, removal of duties, removal from post and blacklisting. The Claimant alleges that both his livelihood and reputation have already been adversely impacted by the alleged detriments, namely, his public expulsion from the Respondent as a member and trustee and the publication by the Respondent of a video and statement announcing that expulsion. This is a hallmark of workplace detriment which supports his claim to be in an analogous situation to an employee or limb (b) worker.
15. The Claimant attaches little weight to his ability to raise concerns about the Charity through the Charity Commission or under the supervision of the High Court. He justifies this statement on the basis that workers may raise concerns with regulators, whether on the prescribed persons list or not. There is no justification for charity trustees being excluded from the (protected) routes of disclosure available to employees, workers and limb (b) workers. The lack of alternative protections is of fundamental importance.
16. It was submitted that the most important factors are the statutory and regulatory obligations and vulnerability to protected disclosure detriment which charity trustees face. The Claimant submits that these factors are "front and centre" of why charity trustees are in an analogous situation to employees/limb (b) workers and why denial of whistleblowing protection is without justification. The Claimant submits that there are "striking similarities between charity trustees and employees/limb (b) workers that hit at the heart

of the purpose of legislative whistleblowing protection” and any relevant difference needs to be substantial in order to justify differential treatment and the Claimant submits that there is no such difference.

17. In relation to “other status”, the Claimant submits that “occupational classification” is capable of being, “a status”. He submits that the reason for the less favourable treatment is the Claimant’s status as a charity trustee and that his status as a charity trustee prevents him from availing himself of whistleblowing protection and is the reason for the less favourable treatment.
18. The Claimant submits there is no justification for excluding charity trustees from whistleblowing protection. Responding to the Secretary of State’s and Charity Commission’s justification arguments, the Claimant submits that the provision of pay is not an inherent feature of a worker relationship, the Claimant was under an obligation to provide personal service to the Respondent, charity trustees have valuable inside information and the detriments he suffered are “quintessential features of a worker relationship”. The Claimant further submits that there is no risk of harm to charities in bestowing whistleblowing protection on charity trustees. Indeed, such protection and the ability to blow the whistle enhances the good functioning of charities and aids its own performance of regulatory responsibilities. Further reasons for including charity trustees within the ambit of full whistleblowing protection would reduce or extinguish the vulnerability to retaliation that the Claimant experienced.
19. The Claimant does not accept that the prospect of litigation brought by charity trustees would expose a charity to costs and there is no evidence to suggest that such costs would be outweighed by the financial benefit which responsible whistleblowing may bring to a charity.
20. The Claimant has considered further justification provided by the Interveners in relation to the lack of protection to charity trustees, discouraging voluntary participation in charity work. The Claimant submits that the Employment Tribunal “can have no confidence, therefore, in concluding that any of the identified aims are rationally connected to the Article 14 discrimination”.
21. In relation to proportionality, the Claimant dismisses any argument of proportionality since no legitimate aims have been presented to the Employment Tribunal which would engage a proportionality defence.
22. The Claimant’s submissions relied heavily on factors to be considered in the balancing exercise. These include that blowing the whistle facilitates the discharge of a charity trustee’s statutory obligations and ensures the proper use of charitable funds. There is a statutory obligation on trustees to speak out; detriments experienced by charity trustees are similar in scope to those experienced in the orthodox employment field; the lack of evidence that denying whistleblowing protection furthers the fulfillment of any legitimate aim; and the absence of any legislative consideration of whether charity trustees should receive whistleblowing protection.
23. The Claimant further submits that there is no conflict of interest between

carrying out duties and obligations as a charity trustee and carrying out the responsibilities of that role. The Claimant also dismisses the argument that small charities may not be able to financially resource the defence of a whistleblowing claim and, in fact, the opposite applies because conferring whistleblowing protection on trustees would serve as an incentive for acting as a charitable trustee, especially where a charity seems to be in need of “a drastic shift in governance”.

The Respondent’s submissions

24. In considering whether a charity trustee is in an analogous situation to a worker, Mr Sheppard submitted this depends on whether there is a material difference between them with regard to the aims of the measure in question (***R (SC) and others v Secretary of State for Work and Pensions & others [2022] AC 223***). He further relied on a Judgment in ***Sullivan v Isle of Wight Council [2025] IRLR 520*** which provided that whistleblowing legislation is designed to protect “*those in work*” and “*disclosures by those in work*”. In assessing the analogous position situation, Mr Sheppard noted seven particular points which included that charity trustees are not in work, they have no employment relationship with the charity, they are not paid, they are not in a subordinate position to the charity, their livelihood is not at risk if they make a protected disclosure in the way a worker’s livelihood might be, they have a duty to act in the best interests of the charity they volunteer for and should avoid conflicts of interest. Further, they may raise any concerns they may have with the charity they volunteer for through the Charity Commission and/or the High Court. The submission is, therefore, that charity trustees are clearly not in an analogous position to workers for the purposes of Part IVA or Section 47B of the ERA.
25. In relation to the question whether the statutory provisions treat the Claimant less favourably on the grounds of an “*other status*” within Article 14, the Respondent submits that charity trustees are capable of being an “*other status*”.
26. The Respondent then considers whether the difference of treatment afforded to those with an “*other status*” has reasonable objective justification. The first point of this submission is that the courts have adopted an approach reflecting the need to give the legislature a wide margin of discretion in respect of its legislative decision making (***R (SC) and others***). The Respondent then adopts the submissions made by the Secretary of State and the Charity Commission in relation to justification and makes the brief point that the very existence of many charities would be threatened if the right to bring whistleblowing complaints in the Employment Tribunal was extended to charity trustees as this would create a conflict of interest between a trustee’s personal interest and the duty to act in the best interests of the charity.
27. The Respondent also considers the question of whether Part IVA or Section 47B of the ERA is compatible with the Claimant’s ECHR rights under Section 3 of the Human Rights Act 1998. The Respondent submits that for this to be the case the definition of “*worker*” would need to be amended and the identity

of who charity trustees could make a disclosure to would need to be added. Further, extending the legislation beyond the employment sphere would run contrary to the fundamental basis of the legislation, which is squarely focused on workers in employment. Accordingly, the Respondent's submission is that Part IVA and Section 47B of the ERA cannot be read and given effect so as to be compatible with the Claimant's ECHR rights under Section 3 of the Human Rights Act 1998.

Submissions on behalf of the First Intervener (Secretary of State for Business and Trade)

28. In first considering whether a charity trustee is in an analogous position to a worker, Mr Moretto refers to both ***R (SC and others)*** and ***Sullivan*** and, in particular, as per Lewis LJ in ***Sullivan***:

"The (whistleblowing) legislation aims to protect the public by ensuring that those in work who make disclosures of information about wrongdoing, or dangers to health and safety or the environment, to their employers ... are protected from dismissal or being subjected to a detriment in their employment as a result of having disclosed information in the prescribed way. The legislation is aimed at disclosures by those in work."

Thus, the First Intervener submits the differences between a worker and a charity trustee are clear in that a charity trustee has "*general control and management of the administration of a charity*" and they are not controlled by the charity. Further, charities and the trustees that control them are subject to supervision by the High Court and by the Charity Commission.

29. Mr Moretto then set out various differences between workers and charity trustees which includes the fact that trustees are generally not paid and, unlike workers, are not subordinate to the charity for which they volunteer. A further difference is that a charity trustee has not put himself in a position of conflict between their role as a trustee and their own personal interest. Accordingly, they do not have an employment relationship with the charity and their status, role and relationship with the charity is very different to that as between employee or worker and their employer.
30. The Secretary of State also submits the position of charity trustees with their respective charities may well differ from case to case and legislation can only be framed in broad terms and cannot cater for every existing charity.
31. The Secretary of State also draws attention to the fact that the role of a trustee is not an executive role involving day to day management of the affairs of the charity but it is a governance/oversight role only.
32. Reference is also made to the Judgment in ***Sullivan*** which sets out that the purpose of the ERA is to protect the public by protecting those in work who make disclosures to their employers, thereby encouraging them to make disclosures notwithstanding the position of subordination and dependence that they generally have with their employer. As Mr Moretto puts it, "*Its*

purpose is not to protect charity trustees who are not in an employment relationship, and who are in a completely different position, or charities, in respect of which there is an entirely different regime for the protection namely through the Charities Act 2011 and regulation and investigation by the Charity Commission". Thus, Mr Moretto submits that a charity trustee is not in an analogous position to a worker for the purposes of the ERA.

33. The Secretary of State accepts that being a charity trustee is capable of being an "*other status*" within Article 14 and that because the Claimant was a charity trustee rather than an employee or worker, he is not able to make a claim for compensation for detriment in the Employment Tribunal. In that sense, the legislation affords differential treatment to the Claimant as a charity trustee than it does to an employee or worker. As far as being president, president-elect or vice-president is concerned, Mr Moretto advises that those particular roles are no longer under consideration because the Claimant has confirmed he does not rely on them as some "*other status*".
34. In terms of being a non-contractual office holder, the Secretary of State submits that this is not a relevant "*other status*" nor is differential treatment afforded by the legislation on grounds of such an "*other status*" nor is different treatment afforded by the legislation on grounds of such an "*other status*". The explanation for this position is that there are numerous non-contractual office holders who do fall within the whistleblowing provisions of the ERA and are specifically mentioned in the statute as having the right to bring claims for whistleblowing detriment. Examples include police officers. Accordingly, the ERA does not treat people less favourably on the grounds that they are a non-contractual office holder. Further, Mr Moretto submits there is real conceptual uncertainty to the alleged "*other status*". He submits that the term "*office*" can be given a range of meanings and is of indefinite content. Applying this to the charity sector, a charity trustee is not an office holder in the traditional meaning of the term and there are difficulties in identifying the scope of such a group of people who might fall within this "*other status*".
35. In considering the justification for the differential treatment within Article 14, Mr Moretto raises the principle of the wide margin of appreciation. This relates to the degree of respect to be given to decisions of Parliament as expressed in primary legislation. The Supreme Court in ***R (SC and others)*** stressed that: "*Domestic courts have to respect the separation of powers between the judiciary and the elected branches of Government. They therefore have to accord appropriate respect to the choices made in the field of social and economic policy by the Government and Parliament, whilst at the same time providing a safeguard against unjustifiable discrimination*". Further, the Supreme Court endorsed the comments of Judges Pejchal and Wojtyczek who said: "*Judicial independence is accepted only if the judiciary refrains from interfering with political processes. If the judicial power is to be independent, the judicial and political spheres have to remain separated.*" Mr Moretto submits that the correct approach in deciding whether the difference of treatment is "*manifestly without reasonable foundation*", requires that a high degree of respect must be given to decisions of Parliament.
36. The Secretary of State then goes on to consider the application of the above

principle to this case. He submits that applying the proper respect that must be given to primary legislation, and as applied by the Court of Appeal in **Sullivan**, the exclusion of charity trustees who are not workers from Part IVA and Section 47B ERA is plainly objectively justified under Article 14. The legislation lies firmly within the field of social and economic policy and impacts those who would seek to bring claims and also those against whom claims may be brought. Extending employment rights and the right to claim damages to individuals which in turn impacts on businesses, other individuals and organisations would be an unwelcome consequence. The submission is that there are no suspect grounds of discrimination identified in this case and, accordingly, we are dealing with legislation in respect of which the courts must properly be very slow to intervene and the Tribunal cannot properly do so here. Further, the aim of the legislation is to protect the public interest by providing that those in work who disclose information responsibly are protected from being subjected to detriments by their employers. This was expressly determined by Parliament and applied to workers. There is plainly a reasonable relationship of proportionality between that aim and the means adopted by Parliament to achieve that aim which demonstrates that in this case it is justified for the legislation to extend to workers but not charity workers.

37. The Secretary of State submits that there is no reasonable relationship of proportionality between the Claimant and the Respondent. Charity trustees are not workers or in work. They are generally not paid and do not rely on the charity to support their livelihood. They are not in a subordinate position to the charity as a worker or employee would be. Affording them the protection of Part IVA and Section 47B of the ERA would give rise to significant conflicts of interest as a trustee bringing such a claim would be seeking compensation for themselves from the funds of the charity and causing charitable funds to be used to defend the litigation. Charity trustees also have a right to raise any concerns with their charity to the Charity Commission. Consequently, extending the whistleblowing provisions to charity trustees would require very careful consideration as to how that could be consistent with their primary duties as trustees of the charity and its funds. This may include reference to the fact that since charity trustees generally work as volunteers without payment, there is not the same need for a remedy by bringing a whistleblowing claim.
38. Finally, Mr Moretto submits that if there was found to be a breach of Article 14, it is not accepted that Part IVA and Section 47B ERA can be read and given the effect so as to be compatible with the Claimant's ECHR rights in accordance with Section 3 of the Human Rights Act 1998. He cites the Court of Appeal Judgment in **Sullivan** which states: "*It is clear that Parliament has taken a considered decision to limit the scope of the protection available to workers It would not be possible to interpret the relevant sections as applying to job applicants generally without cutting across the basic feature of the legislation.*" He submits that the same applies to charity trustees.

Submissions of the Second Intervener (the Charity Commission)

39. On behalf of the Second Intervener, Ms Ling provided a summary of the

general functions of the Charity Commission which are performed on behalf of the Crown. These functions include encouraging and facilitating the better administration of charities and identifying and investigating apparent misconduct or mismanagement in the administration of charities and taking remedial or protective action in respect of it. The Charity Commission is required to act in a way which is compatible with the encouragement of voluntary participation in charity work. She notes that charities are subject to the control of the High Court in the exercise of this jurisdiction.

40. It is noted that all charity trustees, irrespective of the legal structure of the charity, continue to owe fiduciary duties to the charitable purposes or objects of the charity. This requires charity trustees to act with reasonable diligence and due care and skill, take advice as appropriate, act independently of their own interests or those of third parties and not to profit from the trust except as authorised by the governing documents of the charity and prior approval of the Charity Commission.
41. In relation to remuneration, Section 185 of the Charities Act 2011 provides that, whilst it is permissible in certain circumstances for goods or services provided by a trustee to a charity to be paid for by a charity, this is subject to strict conditions and does not apply to any remuneration for services provided by a person in that person's capacity as a charity trustee.
42. The Charity Commission's supervisory role includes instituting enquiries into charities and carrying out investigations including directing documents be provided, statements be given and to obtain and execute search warrants. Warnings against individuals or charities may be given and trustees may be suspended or removed.
43. In relation to whistleblowers, Ms Ling submitted that the Charity Commission encourages whistleblowers to come forward to report wrongdoing of any kind so that it may be investigated and appropriate steps taken. It also encourages charities to provide routes for raising complaints such as whistleblowing hotlines. Ms Ling notes that the protection the law gives to workers who blow the whistle focusses on the protection of those people and redress is legally enforceable. Parliament has, however, chosen to adopt a separate and distinctive regime in the workplace and in the voluntary charitable sector and that the policy intent of the legislation is clear.
44. It is also submitted that the decision in **Sullivan** and in particular the comments of Lewis LJ are relevant in this case and there are a number of submissions confirming the scope of the judgment and that Parliament has decreed that whistleblowing protection is not available to charity trustees.
45. I have already noted the submissions of the Respondent and First Intervener in relation to why the Claimant is not in an analogous situation with limb (b) workers and these are set out again by Ms Ling but I do not repeat them here.
46. Ms Ling makes submissions in relation to whether the Claimant has an "*other status*" and whether there is an objective justification for the difference in treatment in being excluded from the right to blow the whistle as a charity

trustee. In submitting that for the Claimant to succeed on this issue it must be found that the difference is manifestly without reasonable foundation and in finding there is no such premise in this case, Ms Ling submits it is undesirable for the protections contained in the whistleblowing provisions to be extended to charity trustees because, inter alia, they are not at work, not subordinate or dependent and sit at the apex of the charity, and bringing a whistleblowing claim against the charity would effectively result in them claiming against their peers and themselves. Bringing such litigation in the Employment Tribunal would place a costs burden on the charity and bringing a claim gives rise to a conflict of interest that would be inconsistent with a trustee's duty to act independently of their own interests. Further, extending whistleblowing protections to charity trustees would result in the extension of the jurisdiction of the employment tribunals to a field beyond that of the workplace.

Discussion and conclusions

47. This is an interesting but complex case. I have had the benefit of submissions from Counsel who have pursued the positions of their respective clients, adopting a learned and professional approach at all times. I am grateful for the courtesy extended to me during this remitted hearing.
48. I approach my conclusions by firstly considering whether a charity trustee is in an analogous situation to an employee or limb (b) worker and then by considering whether the charity trustees have an "*other status*". I also consider whether there is a difference in treatment of charity trustees as opposed to employees or workers and, if so, whether that difference is justified. My intention is to present my conclusions as concisely as possible bearing in mind that this is a case of significant public interest generally and to those already engaged in the charitable sector and those who may be contemplating doing so.
49. I have been provided with a very significant hearing bundle and an even more significant bundle of relevant authorities. I regret that I did not consider them all to be relevant but refer to those upon which I relied. Where relevant, I also take my lead from the comprehensive Judgment of HHJ Tayler in the EAT and, in particular, in adopting the broadbrush approach to whether charity trustees are in an analogous situation to that of employees or limb (b) workers, I have considered the factors set out by HHJ Tayler in determining that issue.

Is a charity trustee in an analogous situation to that of employees or limb (b) workers ?

50. In the first hearing before me, I determined that charity trustees were not in an analogous situation to that of employees and limb (b) workers. My rationale for this conclusion was effectively limited to the fact that charity trustees are not workers or employees and received no remuneration for their services. Of course, as pointed out by HHJ Tayler, lack of remuneration and the fact that the Claimant was a volunteer, whilst relevant, are not determinative and at paragraph 104 of his Judgment he sets out what other relevant factors are likely to be considered.

51. The first such factor is *“the type of role undertaken and level of responsibility”*. Mr Milsom combines his answer to this factor with that of the second factor noted by HHJ Tayler being *“the duties of the role”*. Mr Milsom lists fourteen functions undertaken by the Claimant in order to comply with his statutory and regulatory duties. I find that some of these functions listed by Mr Milsom show a significant bias in favour of the Claimant as they are claimed in such a way as to suggest he alone had to undertake these functions. By way of example, items ii and viii take no account of the fact that these functions, obligations and duties were matters for which the trustees of the Respondent Charity were jointly responsible. Mr Milsom at point vi on his list states that the Claimant *“fell within scope of the Respondent’s whistleblowing policy”*. I consider this to be a rather bold statement and whether he does or does not fall within scope of the policy is the whole point of this case. He also asserts that the Claimant spent most of his time as trustee and president elect *“occupied in trying to ensure that the Respondent addressed their legal and regulatory obligations”*. My understanding is that the Claimant withdrew his reliance on being president elect by email some time before this hearing. I am also told at point xiii of the list that the Claimant *“had important stewardship responsibilities”* but there is no elaboration on these responsibilities.
52. At paragraphs 80 and 81 of his written submissions, Mr Milsom rightly points out that the Claimant as a charity trustee had duties and obligations which included to report wrongdoing. He submits that the most high level of responsibility for governance of the Respondent assumes by (him), *“the close parallel with an employee/limb (b) worker is ... obvious”*. There is then an acknowledgment that the Claimant’s role involves acting individually and collectively as part of the Board of Trustees.
53. The third and fourth factors set out by HHJ Tayler are *“the likelihood that the person will become aware of wrongdoing”* and *“the importance of the person making disclosures of wrongdoing in the public interest”*. In relation to these factors, I agree with Mr Milsom that the Claimant, along with his fellow trustees, was likely to become aware of wrongdoing and, as with employees and limb (b) workers, it is important that they raise public interest concerns in a responsible way. The Claimant’s argument that the Claimant’s functions and duties and likelihood of unearthing wrongdoing put him in an analogous situation to an employee or limb (b) worker at first blush seem to support finding this to be the case. Mr Milsom goes on to say these matters are important due to the denial of whistleblowing protection but this does not accord with the ability and, indeed, encouragement and duty, to report wrongdoing to the Charity Commission. The Claimant says he identified potential fraud by senior members of the Respondent’s management and one wonders whether he would have considered whether blowing the whistle to the management board would be as effective as reporting it to the Charity Commission.
54. The next relevant factor is *“the vulnerability of the person to retaliation for making a protected disclosure – including the extent to which livelihood or reputation might be at risk.”* In relation to this factor, Mr Milsom submits that charity trustees are vulnerable to retaliation because they have something to

lose by “*sticking their head above the parapet, including, but by no means limited to, their role as charity trustee*”. This particular example is not, in my view, a good one. Losing a role as a charity trustee does not compare with the nuclear option of dismissal. I am told the Claimant suffered damage to his reputation and his livelihood but there was no evidence of either of these consequences before me and that may, in any event, be a matter for consideration at a later date.

55. The next factor to be considered is “*the availability of alternative routes to making disclosures of wrongdoing and any alternative protections*”. I do not consider the Claimant’s argument in relation to this factor to be particularly strong. The submission that the fact that he can raise these concerns with the Charity Commission would carry little, if any, weight is nothing short of surprising. Indeed, I consider that such a course of action might, in any instance, be preferable to attempting to raise an issue of wrongdoing with persons allegedly engaged in that wrongdoing.
56. I accept that HHJ Tayler’s reference to remuneration and the Claimant being a volunteer are not determinative in considering the Claimant’s status. However, the challenge to my finding that the Claimant was not a worker failed, which leaves him in the position, in my view, of being less vulnerable to retaliation and suffering an adverse effect on his livelihood. Charity trustees are not workers; they are not paid to work for an employer and are not subordinate to the charity of which they are trustees. This is an important distinction and one which runs through the thread of this whole case. In **Sullivan**, Lewis LJ said with reference to the whistleblowing provisions of the ERA, “*Legislation aims to protect the public by ensuring that those in work who make disclosures of information about wrongdoing, or dangers to health and safety or the environment, to their employers (or, in defined circumstances, to others) are protected from dismissal or being subjected to any detriment in their employment as a result of having disclosed information in the prescribed way. The legislation is aimed at disclosures by those in work.*” This decision of the Court of Appeal is relevant to whether a charity trustee is in an analogous situation to an employee or limb (b) worker and plays a part in the issues around justification and proportionality. **Sullivan** also makes clear that, in assessing whether a situation is relevantly similar, generally depends on whether there is a material difference between charity trustees and employees and limb (b) workers as regards the aims of the measure in question. This brings into play a significant material difference in these two situations. Whilst the Claimant makes the point that trustees must abide by the statutory regulations and the rules of their charity, it must be recognised that they are not subordinate to the charity. The role of a charity trustee is one of governance and oversight which, in my view, is entirely different, and materially so, to an employee or worker who is paid by their employer and subordinate to them.
57. The Claimant’s submissions on this point are at times quite subjective in exploring and explaining his particular position within the Respondent. I cannot take that view and must bear in mind that, whilst the role of charity trustees may differ in some ways from the situation in other charities, I must approach my decision considering the role of charity trustees more generally.

It would be inappropriate to find that this Claimant's position is analogous to an employee or worker when the position of other charity trustees may be completely different.

58. The Claimant does make some good points but, in my view, these are outweighed by the fact that, firstly, he was not an employee but a volunteer and was not subordinate to the Respondent. Secondly, any retaliation for making a protected disclosure could not include the nuclear option of dismissal as a detriment and consequently there is a much lower risk of a charity trustee being vulnerable to retaliation which could damage their reputation and their livelihood.
59. But the most obvious material differences between a charity trustee and an employee or worker are, in my view, the fact that they are not paid, they are volunteers and have the rather obvious possibility of raising any concerns directly with the Charity Commission which has statutory obligations to consider, investigate and act upon any wrongdoing reported to it by a charity trustee.
60. Accordingly, I find that charity trustees are not in an analogous situation with an employee or worker.

Do the relevant statutory provisions treat the Claimant less favourably than a worker on grounds of an "other status" within Article 14 ECHR?

61. The Respondent and the Interveners accept that being a charity trustee may amount to an "*other status*". Having listened to the arguments and submissions presented to me, I find that being a charity trustee is an "*other status*" within Article 14. I do not accept the relevance here of the Claimant's reference to the Supreme Court in ***Gilham*** suggesting an occupational status is capable of being an "*other status*" for the purposes of Article 14. The status of charity trustees is defined by statute and the regulatory framework in which they all act and this does not, in my view, constitute an occupational status.
62. It follows that I must determine whether the statutory provisions within the ERA treat charity trustees less favourably on the ground of "*other status*". I consider that this particular question can only have one answer based upon the fact that charity trustees are excluded from the right to take full advantage of the right to the benefit of making protected disclosures about wrongdoing within their charities.
63. Accordingly, I must consider the justification for the differential treatment between employer and workers on the one hand and charity trustees on the other.
64. It is worth noting at this stage, as I have previously alluded, I must approach this question in general terms and not solely in relation to this Claimant. I bear in mind Lord Bingham's comments in ***R (Animal Defenders International) v DCMS [2008] 1AC.1312*** where he said "... legislation cannot be framed as to address particular cases. It must lay down general rules ..." I do not consider it necessary to consider whether the Claimant has an "*other*

status” being president, president elect or vice-president of the Respondent (on which the Claimant no longer relies) or being a non-contractual office holder.

Justification for the differential treatment within Article 14

65. Again, taking my lead from the comments of HHJ Tayler, I must consider whether the difference in treatment has a reasonable justification or, put another way, is a proportionate means of achieving a legitimate aim.
66. Mr Moretto, on behalf of the Secretary of State, considered that when deciding whether the difference in treatment is “*manifestly without reasonable foundation*”, he submits that due regard should be had to the separation of powers and the “*wide margin of appreciation*” must be given to decisions of Parliament as expressed in primary legislation. Mr Moretto cites R(SC) as stating, “*There is nothing alien or new about an approach which, in general, accords a high level of respect to the judgement of public authorities in the field of economic or social policy, but balances that with the need for close scrutiny where differences of treatment are based on suspect grounds*”. He points out that the Claimant has not raised an argument in relation to any suspect grounds. He continues with the Supreme Court’s comments that, “*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 as the Court of Appeal noted in ***R (Joint Council for the Welfare of Immigrants) the Secretary of State for the Home Department [2021] 1WLR1151*** ... that the ordinary approach to proportionately 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. And finally on this point, “*the reasons for judicial restraint are greater where the arrangements have been reviewed by Parliament*” ***(R)(A) The CICA [2021] 1 WLR 3746***.
67. Mr Moretto is suggesting that I should be slow or hesitant in finding that Parliament’s decision in relation to the treatment of charity trustees and the rights available to them are manifestly without reasonable foundation. To be fair to Mr Moretto, he does point out following ***R (RJM) v SSWP [2009] AC311***, “*The fact that there are grounds for criticising or disagreeing with, these views does not mean that they must be rejected. Equally, the fact the line may have been drawn imperfectly does not mean that the policy cannot be justified. Of course, there would become a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the State, the court will conclude that the policy is unjustifiable.*”
68. I take the arguments above to direct me to be careful in finding that primary legislation should not be without justification, but I am able to do so if I consider that there is inadequate justification for the legislation in question, that it satisfies no legitimate aim or is not proportionate.

69. The Claimant submits that at every stage of the objective justification test, the burden remains with the “*putative discriminator*”, including when assessing proportionality. The standard of scrutiny is:
- 69.1 whether the objective of the measure is sufficiently important to justify the limitation of a protected right;
 - 69.2 whether the measure is rationally connected to the objective;
 - 69.3 whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and
 - 69.4 whether, balancing the severity of the measures and effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievements, the former outweighs the latter (***Bank Mellat v HM Treasury (Number 2) [2013] UKSC 39.***)
70. The submissions on the part of the Secretary of State begin with the principle in ***Sullivan*** that charity trustees are in a different position to employees and workers or “*in work*”. They are not paid and do not rely on their charity to support their livelihood, nor are they in a subordinate position to the charity as a worker or employee.
71. The submission continues by suggesting that giving charity trustees the right to protection under the ERA would give rise to conflicts of interest because they would be bringing claims against a charity causing the charity to utilise its funds in defence of an application by one of its trustees for compensation thereby attacking the very funds the trustee is obliged to protect. The suggestion is, if I understand it correctly, that excluding them from the rights contained in the ERA will encourage trustees to raise concerns with the Charity Commission.
72. Continuing this theme, it is submitted that many charities are very small with limited funds and their very existence could be in peril in defending just one claim. The point is made that, as charity trustees are volunteers and unpaid, there is not the same need for a remedy by way of a whistleblowing claim.
73. The Claimant accepts that the prospect of litigation brought by trustees may expose the charity to costs but suggests there is no evidence that such costs would be outweighed by the financial benefit which responsible whistleblowing may bring. What the Claimant omits to say is that this works both ways in that costs incurred by the charity may not outweigh any benefit. The Claimant notes that charities are already exposed to the cost of employment tribunal claims so presumably the point is that allowing those who are not workers or volunteers to bring claims would not really make any difference. The statement that “*whistleblowing protection is perhaps the one field of legal proceedings which actively furthers the charity’s objectives*” is not supported by any data.
74. Mr Milsom, for the Claimant, submits that there is no evidence of legislative

consideration prior to excluding charity trustees from rights under the ERA. However, all draft legislation is considered and debated before being enacted, although, admittedly, the degree of scrutiny may differ from case to case.

75. The issues and arguments around the question of justification are likely to continue for some time to come. But in the context of this case, I must find a balance between those issues I consider to be of relevance. I consider these to be as follows. Firstly, is it justifiable to exclude charity trustees from the provisions of the ERA in relation to whistleblowing when their role and the regulatory framework generally surrounding charities require them to raise concerns either with the charity or the Charity Commission? Secondly, there is a potential conflict of interest if a charity trustee is allowed to bring a claim against their charity resulting in the charity's funds being used to defend and potentially satisfy the claim. Thirdly, the authorities, in particular **Sullivan**, which acknowledge that the legislation provides safeguards and avenues for those "*in work*" and not volunteers. Fourthly, the quite wide margin of appreciation which I should afford to the enactments of parliament when, as in this case, there are no suspect circumstances. Fifthly, as previously submitted by Mr Moretto, it is not possible to legislate for the differences in the functions and responsibilities of trustees of all charities as these may lack consistency, for example, between small and larger charities.
76. Having considered these matters, I find that the balance weighs in favour of finding that there is reasonable justification for excluding charity trustees from the benefits of the ERA in relation to public interest disclosures. There is a legitimate aim in avoiding conflicts of interest and preserving the financial interests of charities and that aim is one which benefits from that exclusion. I further consider the exclusion to be proportionate given, in particular, the potential conflict of interest between a charity trustee's responsibilities and bringing a whistleblowing claim which might result in significant financial damage to the charity. There is, I find in this case, a clear relationship between the justification and proportionality.

Closing comments

77. I am grateful to Counsel for the significant preparation that clearly went into their submissions, both written and verbal. In summarising those submissions, it may be the case that they feel I have omitted something of importance. Rest assured, however, I considered all of the submissions and, over the course of the last few weeks, have read them more than once. I took them all into account but giving further detail in this Judgment would have resulted in it being unnecessarily long. In all respects in relation to the issues, I have tried to balance the competing arguments made by the parties and on behalf of the Interveners.

Approved by:

Employment Judge M Butler

5 December 2025

JUDGMENT SENT TO THE PARTIES ON

.....04 February 2026.....

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FOR THE TRIBUNAL OFFICE

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