



EMPLOYMENT TRIBUNALS

Claimant: Dr M McLean

Respondent: Bradford Teaching Hospitals NHS Foundation Trust

Heard: in Leeds **On:** 18, 19, 20 and (in chambers) 21 February 2025

Before: Employment Judge Ayre, sitting alone

Representation

Claimant: Richard Ryan, counsel

Respondent: Richard Stubbs, counsel

RESERVED JUDGMENT AT PRELIMINARY HEARING

The claimant was a worker within the definition set out in section 230(3)(b) of the Employment Rights Act 1996.

REASONS

Background

1. The claimant was the Chairperson of the respondent NHS Foundation Trust from 1 May 2019 until 3 October 2023. He issued this claim in the Employment Tribunal on 26 January 2024 following a period of early conciliation that started on 18 December 2023 and finished on 25 January 2024. The claim includes a complaint of whistleblowing detriment under section 48 of the Employment Rights Act 1996.
2. The respondent defends the claim. It says that the claimant does not have status to

bring a complaint of whistleblowing detriment because he was a statutory office holder and was neither an employee nor a worker.

3. The case was listed for a Preliminary Hearing in public to determine the question of the claimant's status.

The hearing

4. The first day of the hearing was a reading day and the parties did not attend. Each party submitted an opening skeleton argument, for which I am grateful.
5. The Tribunal heard evidence from the claimant and, for the respondent, from Mark Chambers, Lead Governor of the respondent's Board of Governors, and Laura Parsons, Associate Director of Corporate Governance and Board Secretary.
6. The claimant also produced a witness statement for Naz Shah MP. I have not taken this statement into account when reaching my decision.
7. There was an agreed bundle of documents running to 639 pages. An additional 11 pages of documents were added to the bundle by agreement at the start of the third day of the hearing.

The issues

8. The issue to be decided at today's hearing was identified at the Preliminary Hearing as being the following:
 1. Was the claimant (who is agreed to have been an office holder and not an employee) a worker who is entitled to bring a claim for whistleblowing detriment.
9. It was agreed at the start of this hearing that the above question required consideration of the following issues:
 1. Does the claimant, who is agreed to be an office holder, fall within the definition of "worker" in section 230(3)(b) of the Employment Rights Act 1996 ("**the ERA**") such that he is entitled to bring a claim for protected qualifying disclosure detriment?
 2. If not, do the claimant's Convention rights mean that section 230(3)(b) should be read so as to include the claimant to enable him to bring such a claim?
10. At the start of the hearing the respondent informed the Tribunal that:
 1. It was not seeking to argue that the respondent was a client or customer of any business of the claimant; and
 2. It accepted that the jurisdiction of the Employment Tribunal was not excluded

by wording to that effect in the claimant's contracts with the respondent.

Findings of fact

11. The respondent is an NHS Foundation Trust which provides hospital services to the population of Bradford and across Yorkshire. It has approximately 6,500 members of staff who work across a number of sites, including Bradford Royal Infirmary and St Luke's hospital.
12. The claimant was appointed as Chairperson of the respondent on 1 May 2019 and held this position until 3 October 2023 when he resigned with immediate effect.
13. The respondent is a public benefit corporation, falling within Schedule 7 of the National Health Service Act 2006. The relevant provisions of Schedule 7 for the purposes of this hearing are the following:
 - "1 (1) A public benefit corporation must have a constitution.
(2) As well as any provision authorised or required to be made by this Schedule, the constitution may make further provision (other than provision as to the powers of the corporation) consistent with this Schedule.*
 -*
 - 7 (1) A public benefit corporation has a council of governors.*
 -*
 - 10A The general duties of the council of governors are –
(a) To hold the non-executive directors individually and collectively to account for the performance of the board of directors, and
(b) To represent the interests of the members of the corporation as a whole and the interests of the public.*
 -*
 - 12 The constitution must provide for the chairman of the corporation or (in his absence) another person to preside at meetings of the council of governors.*
 -*
 - 15 (1) A public benefit corporation has a board of directors.
(2) The constitution must provide for all of the powers of the corporation to be exercisable by the board of directors on its behalf.*
 -*
 - 16 (1) The board consists of –
(a) executive directors, one of whom is the chief executive....
(b) non-executive directors, one of whom is the chairman.*
 -*
 - 17 (1) It is for the council of governors at a general meeting to appoint or remove the chairman and the other non-executive directors.*
 -*
 - (3) It is for the non-executive directors to appoint or remove the chief executive.*
 -*
 - (5) The appointment of a chief executive requires the approval of the council of governors.*

....
18 (1) *It is for the council of governors at a general meeting to decide the remuneration and allowances, and the other terms and conditions of office, of the non-executive directors.*

14. The respondent also has a Constitution. The Constitution which was in force at the time of the matters giving rise to this claim contains the following relevant provisions:

“4 POWERS

4.1 *The powers of the trust are set out in the 2006 Act.*

....
6 COUNCIL OF GOVERNORS

6.1 Composition of the Council of Governors

6.1.1 *The Foundation Trust shall have a Council of Governors....*

....
6.12 Duties and Responsibilities of Governors

6.12.1 *The general duties of the Council of Governors are –*

- (a) to hold the Non-Executive Directors individually and collectively to account for the performance of the Board of Directors, and*
- (b) to represent the interests of the members of the Foundation Trust as a whole and the interests of the public.*

6.12.2 *The roles and responsibilities of the Council of Governors are to:*

-
- (b) Appoint or dismiss the Chair and the other Non-Executive Directors and to decide....their remuneration allowances and other Terms and Conditions of their offices. The removal of the Chair or a Non-Executive Director requires a motion in accordance with Standing Orders approved by three-quarters of the Governors.*

....
6.16 Meetings

6.16.1 *The Chairman of the Foundation Trust or, in their absence, the Vice Chair, appointed under paragraph 7.16.2, is to preside at meetings of the Council of Governors.*

6.16.2 *The Council of Governors shall appoint from the public or patient Governors a Vice Chair who shall preside at meetings of the Council of Governors in the absence of the Chair....The appointment of the Vice Chair shall be by majority vote at a general meeting.*

....
7 BOARD OF DIRECTORS

8.1 Composition of the Board of Directors

8.1.1 *The Foundation Trust is to have a Board of Directors. It is to consist of Executive and Non-Executive Directors.*

8.1.2 *The Board is to include –*

- (a) the following Non-Executive Directors –*
 - (i) a Chair*

....
8.1.5 *The Council of Governors at a general meeting of the Council of*

Governors shall appoint or remove the Chair of the Foundation Trust and the other Non-Executive Directors in accordance with the Governors Standing Orders.”

15. The Standing Orders of the respondent’s Board of Directors state that:

“2.8 Terms of Office of the Chairperson and Directors

The regulations governing the period of tenure of office of the Chairperson and Directors and the termination or suspension of office of the Chairperson and Directors are contained in the Constitution.

2.9 Appointment of Deputy Chairperson

For the purpose of enabling the proceedings of the Foundation Trust to be conducted in the absence of the Chairperson, the directors may appoint a Non-Executive Director from amongst them to be Deputy Chairperson for such a period, not exceeding the remainder of his/her term as Non-Executive Director, as they may specify on appointing him/her.

....

3.2 Calling meetings

Ordinary meetings of the Board shall be held at such times and in such places as the Board may determine.

....

3.4 *The Chairperson may call a meeting of the Board at any time....*

....

3.12 Chairperson of meetings

The Chairperson of the Foundation Trust or, in their absence, the Deputy Chairperson, is to chair meetings of the Board.”

16. The claimant was interviewed for the role of Chairperson on 11 March 2019. On 13 March the respondent wrote to him making a conditional offer of the post of Non-Executive Chairman. The offer letter stated that the role was subject to Regulation 5 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, and in particular the requirement that the claimant was a ‘fit and proper person’. The claimant was required to undergo a Disclosure and Barring Service check.

17. The respondent prepared and sent to the claimant a five page letter headed “Terms of Engagement”. The letter contained the following wording:

“These are the terms on which your engagement as Chairperson have been made. Please indicate your acceptance of these terms of engagement by signing one copy and returning to the Director for Human Resources.

- 1. Basis of Appointment** – *Non Executive Directors of the Trust hold office under the Constitution of the Trust. Your appointment gives rise to a contract for services between yourself and Bradford Teaching Hospitals NHS Foundation Trust. The appointment and tenure of office of the Non-Executive Directors of the Trusts are governed by the Trust’s Constitution and Trusts Standing Orders for the Board of Directors (available on request from the*

Board Secretary).

2. **Employment Law** – *This appointment does not create a contract of employment and is not within the jurisdiction of Employment Tribunals. Neither is there any entitlement for loss of office through employment law.*
 3. **Appraisal** – *Annual appraisal will be led by the Senior Independent Director within a framework agreed by the Council of Governors and taking into account the views of the directors and governors.*
 4. **Tenure** – *Your appointment is effective from 1st May 2019 to 30 April 2022 unless terminated by either party giving to the other two months prior written notice.”*
18. The Terms of Engagement also contained provisions dealing with the termination of the claimant’s appointment, the claimant’s role, remuneration, mileage allowances, the provision by the respondent of an indemnity, a fit and proper persons warranty, confidentiality, equality and diversity, safeguarding, and data protection, amongst others.
19. The claimant was required to sign the Terms of Engagement and did so on 7 May 2019. His signature came below the following ‘Acceptance Statement’:
- “I have read and accept this Contract for Service in respect of the office of Chairperson outlined in this document and have retained a copy for my records.”*
20. The claimant’s initial appointment was for a period of three years. In 2022 it was extended for a further three years, and on 22 March 2022 the respondent sent a further Terms of Engagement letter to the claimant. The letter was in substantially the same terms as the original Terms of Engagement, but provided for the claimant’s tenure as Chairperson to run from 1 May 2022 to 30 April 2025 unless terminated by either party giving two months’ notice in writing. The claimant signed the second Terms of Engagement in April 2022, underneath the same ‘Acceptance Statement’ as in the first Terms of Engagement.
21. Both the first and the second Terms of Engagement letters contained a clause stating that: *“On termination of your appointment you shall at the Trust’s request resign from your office as Director of the Trust and all other offices held by you connected with Trust.”*
22. There was a job description for the claimant’s role, which ran to 8 pages and included, on the back two pages, Terms and Conditions of Service. The job description stated that the Chairperson reports and is accountable to The Council of Governors, and contains the following provisions:

“JOB PURPOSE

The Chairperson leads both the Board of Directors and the Council of Governors,

ensuring that high standards of probity and governance prevail and the Trust remains within its terms of authorisation.

....

He/she will lead and direct work within the Trust with other Non-Executives, the Chief Executive and other Executive Directors....

He/she will arrange the regular evaluation of the performance of the Council of Governors and Board of Directors and its Committees. They will also appraise the Chief Executive and individual Non-Executive Directors....

He/she will be expected to use his/her leadership ability and understanding of healthcare issues and personal knowledge of the community to lead, guide and advise the work of the Board of Directors and the Council of Governors....

....

JOB DIMENSIONS

The Chairperson participates fully in the work of the Board of Directors and Council of Governors...."

23. The job description also contains a long list of the Chairperson's responsibilities under the heading 'Primary Duties & Areas of Responsibility'. The areas for which he was responsible included Strategy; Compliance and Governance; Values; People; Board of Directors responsibilities; Council of Governors responsibilities; Health and Safety/Risk Management; Equality and Diversity; Training and Personal Development – Continuous Professional Development; Respect for Patient Confidentiality; Environment and Sustainability; Infection Prevention and Control, and Safeguarding Children and Adults.
24. The job description uses mandatory language, and the words "*The Chairperson will....*" appear repeatedly in the document. Under the heading "*Strategy*" there are five paragraphs, all of which begin with "*The Chairperson will*". Under the heading "*Compliance and Governance*" there are four paragraphs beginning with "*The Chairperson will*"; under "*Values*" there are eight paragraphs beginning with "*The Chairperson will*"; under "*People*" are seven such paragraphs, under "*Board of Directors responsibilities*" there are eleven and under "*Council of Governors responsibilities*" there are six.
25. Elsewhere in the job description there are references to "*The Chairperson must*" and "*The Chairperson is required to*". The job description imposes a large number of obligations and responsibilities on the claimant.
26. The Terms and Conditions of Service which appear at the back of the job description provide for the claimant to be paid remuneration of £55,145 pa, which is not pensionable, and that the hours of work are "*approximately 10 days per month. This may be during the working day or in the evening, as required.*"
27. NHS England produces guidance for NHS Chairs and Non-Executive Directors. The guidance before the Tribunal was published in June 2023, more than four years after the claimant took up his role as Chairperson of the respondent, and more than a year after his appointment had been extended. The guidance contains the following:

“Statutory basis for appointment – Chairs and non-executive directors hold a statutory office under the National Health Service Act 2006. The appointment and tenure of office are governed by the NHS Trusts (Membership and Procedure) Regulations 1990. Your appointment is made by NHS England using powers delegated by the Secretary of State for Health. It does not create any contract of service or contract for services between you and the Secretary of State, the NHS Trust to which you have been appointed or NHS England.

....

Employment law – This is a public appointment and not employment and therefore does not fall within the jurisdiction of Employment Tribunals.”

28. The Tribunal was also provided with an undated document entitled ‘The Role and responsibilities of an NHS Trust Chair’. It is not clear from the document itself whether it is intended to apply to traditional NHS Trusts or to NHS Foundation Trusts such as the respondent, or both.
29. The role of chairperson is a senior one. One of the important facets of the position is that the Chairperson acts independently of the management structure of the respondent and is able to ask challenging questions of the management. The claimant was responsible for taking the lead in ensuring good governance and oversight within the respondent. He also sought to influence management decisions in the manner that he thought fit. He visited areas of the Trust regularly.
30. The respondent is required by statute to have a Chairperson. The manner in which the Chairperson is appointed or removed is also set out in statute. Some of the Chairperson’s responsibilities, such as the duty to chair meetings of the Council of Governors and the Board of Directors, are also set out in statute. Other requirements are set out in the respondent’s Constitution.
31. The main duties of the claimant were to lead the respondent’s Council of Governors and Board of Directors, to oversee the development of the respondent’s strategy, to advise the CEO and hold her to account, and to carry out her appraisals, to ensure the respondent’s financial viability and to represent the respondent at some external events. The claimant also chaired the respondent’s Annual General Meeting of members and introduced the presentation of the annual reports and accounts.
32. The claimant took up the role of Chairperson on 1 May 2019 and worked in the role until 3 October 2023. During the time that the claimant was Chairperson of the respondent he dedicated more than 10 days a month to the role. He was free to set his own working hours and times, subject to attending meetings of the Board, of the Council of Governors and of external organisations that he was expected as Chairperson to attend.
33. In practice the claimant worked much more than 10 days a month. This was not because he was instructed or required to do so, but because he chose to. He was not required to be at work at particular times or on particular days and could work as

and when he wanted to. He had control over his working hours, but carried out some work on behalf of the respondent on most days.

34. During the time that he worked for the respondent the claimant had annual appraisals with the respondent's Senior Independent Director. He was given feedback on his performance, and suggestions were made for areas where he could improve. He was also set objectives. Those objectives were a combination of national objectives, reflecting national priorities, and local objectives which were suggested by the claimant and agreed with the Senior Independent Director. A report was produced following the claimant's appraisal and presented to the Council of Governors.
35. The claimant was paid a fixed amount monthly through payroll, with tax and National Insurance contributions being deducted. This was in line with HMRC guidance that tax and national insurance must be deducted from payments to office holders. The HMRC Internal Manual section ESM2502 – Offices states that *"The holder of an office is automatically chargeable under Schedule E/as employment income on the emoluments from it and generally there will also be liability for Class 1 NICs. It is not necessary to show, as for an employee, that an office holder works under a contract of service."* It also comments that, whilst there is no statutory definition of the term 'office', it has been judicially defined as a *"permanent, substantive position which had an existence independent from the person who filled it, which went on and was filled in succession by successive holders"*.
36. The claimant was provided by the respondent with payslips, P60s and a P45.
37. The claimant was not in business on his own account and did not submit any timesheets or invoices. It cannot be said that the respondent was a client of the claimant. There was no evidence before the Tribunal to suggest that the claimant was carrying out other work at the time he was working for the respondent.
38. The claimant was entitled to claim for mileage but in practice did not do so. The role of Chairperson was not pensionable. The claimant was not entitled to sick pay or to paid holidays.
39. The appointment was a personal one, and the identity of the individual performing the role of Chairperson was critical to it. This was reflected in the fact that the claimant was required to be a 'fit and proper person' and to undergo a check with the Disclosure and Barring Service before taking up the role.
40. The claimant performed the duties of Chairperson personally and it would not have been possible for him to send a substitute to perform his duties. On the rare occasions that he could not attend a meeting of the Council of Governors or the Board of Directors, a vice or deputy chair would step in and chair the meeting, but there was no evidence before the Tribunal to suggest that in doing so they took over all of the claimant's responsibilities, but rather just those of chairing the meeting. The respondent's Standing Orders Board of Directors provide for a Deputy Chairperson to chair a Board meeting if the Chairperson is absent. During his time as Chairperson, the claimant only missed two meetings of the Board.

41. The claimant was free to carry out his duties in the way that he saw fit, and there was no day to day control over him. He had the power to call a meeting of the Board and to decide when that meeting took place, although there was no evidence that he exercised that power. Six public Board meetings a year were scheduled by the respondent without reference to the claimant. The dates of those meetings were published so that members of the public could attend. Dates for board meetings were normally checked in advance with the claimant.
42. The claimant also had the power to call ad hoc meetings or forums. He was assigned more duties and responsibilities than non-executive directors of the respondent.
43. The claimant was provided with an office at the respondent's headquarters. Prior to the Covid 19 pandemic the claimant normally attended his office on at least two days a week. During the pandemic, in line with guidance from NHS England, the claimant worked virtually. He gave up his office so that a communications facility could be set up there.
44. The claimant had an email account with the respondent. He also had an NHS England email account. He was provided with administrative support, which he shared with the CEO. He was issued with business cards, a security pass, a Trust laptop and a Trust iPad. He was frequently included in Trust literature and publications and produced a quarterly briefing for governors and members of the Trust.
45. The claimant undertook training arranged by the respondent, much of which was mandatory.
46. On the morning of 3rd October 2023, following a meeting of members of the Board the previous day, the Senior Independent Director telephoned the claimant. Following that conversation the claimant tendered his resignation. The respondent subsequently paid the claimant two months' remuneration in lieu of notice.

The Law

47. Section 230 of the Employment Rights Act 1996 defines a worker as follows:

"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 or any profession or business undertaking carried on by the individual;

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

48. Section 43K of the Employment Rights Act 1996 provides an extended definition of worker for the purposes of Part IVA of the Act:

“(1) For the purposes of this Part “worker” includes an individual who is not a worker as defined by section 230(3) but who –

(a) works or worked for a person in circumstances in which –

(i) he is or was introduced or supplied to do that work by a third person, and

(ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(b) contracts or contracted with a person, for the purposes of that person’s business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for “personally” in that provision there were substituted “(whether personally or otherwise)”,

(ba) works or worked as a person performing services under a contract entered into by him with NHS England under section 83(2), 84, 92, 100, 107, 115(4), 117 or 134 of, or Schedule 12 to, the National Health Service Act 2006 or with a Local Health Board under section 41(2)(b), 42, 50, 57, 64 or 92 of, or Schedule 7 to, the National Health Service (Wales) Act 2006.

....

(c) works or worked as a person providing services in accordance with arrangements made –

(i) by NHS England under section 126 of the National Health Service Act 2006, or Local Health Board under section 71 or 80 of the National Health Service (Wales) Act 2006...”

49. Section 3(1) of the Human Rights Act 1998 provides that: *“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.”*

50. By virtue of Article 10 of the European Convention on Human Rights (Freedom of expression):

“1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the

prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

51. Article 14 of the European Convention on Human Rights (Prohibition of discrimination) states that:

“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.”

52. In **Johnson v Unisys Ltd** the House of Lords held that:

“...judges, in developing the law, must have regard to the policies expressed by Parliament in legislation. Employment law requires a balancing of the interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also to the general economic interest. Subject to observance of fundamental human rights, the point at which this balance should be struck is a matter for democratic decision. The development of the common law by the judges plays a subsidiary role. Their traditional function is to adapt and modernize the common law. But such developments must be consistent with legislative policy as expressed in statutes. The courts may proceed in harmony with Parliament but there should be no discord.”

53. In **Sejpal v Rodericks Dental Ltd** the EAT held that, when applying the statutory test for worker status under section 230(3)(b) of the Employment Rights Act 1996, the Tribunal must assess the true nature of the agreement between the parties, without focusing excessively on wording that might be designed to avoid worker status.

54. In **Rainford v Dorset Aquatics**, a case involving directors and shareholders of a company, the EAT found the following propositions of law to be relevant:

*“(1) The primary underlying question in all these cases is one of statutory, rather than contractual, interpretation; the relevant statutory purpose of the **Employment Rights Act 1996** and other employment legislation is the protection of workers who are vulnerable because they are in a relationship of subordination and dependence towards their employers; and a “touchstone” of subordination and dependence is the degree of control exercised by the putative employer over the work or services performed by the individual concerned (see: **Uber** per Lord Leggatt JSC at paras [69],[71] and 87));*

*(2) It is open to an employment tribunal to take account of the “subjective” views of the parties as to their obligations and status in ascertaining the terms of any agreement between the parties (see **Carmichael** per Lord Hoffman at p1234 D-H.)*

(3) *A genuine right of substitution is inconsistent with an obligation to perform personal services; if there is such a right it does not matter if it is used in fact (see: Autoclenz per Lord Clarke JSC at para [19]).*

(4) *The payment of “salary” with payslips and PAYE/national insurance deductions is a relevant factor which would point towards employment but is by no means decisive in itself....” [para 17]*

55. In **Gilham v Ministry of Justice** in the Supreme Court, Lady Hale, giving the leading judgment, held that:

“16. *It is clear, therefore, what the question is: did the parties intend to enter into a contractual relationship, defined at least in part by their agreement, or some other legal relationship, defined by the terms of the statutory office of district judge? In answering this question, it is necessary to look at the manner in which the judge was engaged, the source and character of the rules governing her service, and the overall context, but this is not an exhaustive list.*

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....which the appellant was invited to accept and did accept. However, the manner of appointment is laid down in statute....*

18....*The essential components of the relationship are derived from statute and are not a matter of choice or negotiation between the parties....*

35....*in this case there is no evidence at all that either the executive or Parliament addressed their minds to the exclusion of the judiciary from the protection of Part IVA. While there is evidence of consideration given to whether certain excluded groups should be included (such as police officers), there is no evidence that the position of judges has ever been considered....*

37.... *I conclude, therefore, that the exclusion of judges from the whistle-blowing protection in Part IVA of the 1996 Act is in breach of their rights under article 14 read with article 10 of the ECHR....*

43....*It would not be difficult to include within limb (b) an individual who works or worked by virtue of appointment to an office whereby the office-holder undertakes to do or perform personally any work or services otherwise than for persons who are clients or customers of a profession or business carried on by the office-holder....None of this would go against the grain of the legislation....”*

56. In **MacLennan v The British Psychological Society**, HHJ James Tayler held that the Employment Tribunal had been entitled to conclude that there was no intention to enter into a contractual relationship between a charity and a charity trustee. The Employment Tribunal had correctly asked the questions:

1. Did the facts fall within the ambit of one of the Convention rights;
2. Was the claimant treated less favourably than others in an analogous situation?
3. Was the reason for that less favourable treatment because of some 'other status'?
4. Was the difference of treatment without reasonable justification?

57. The Tribunal had, however, failed to adequately consider the relevant circumstances and conduct the broad-brush assessment necessary to decide whether there was an 'analogous situation' between the claimant and employees or limb B workers, and whether being a charity trustee is an 'other status'. The Tribunal had also failed to consider the possibility of focusing on the issue of justification.

Submissions

58. I summarise briefly below the submissions made by each party. The summary is just that, and the fact that a point raised by a party in submissions is not referred to below does not mean that it has not been considered.

59. I was referred by the parties to the following authorities:

Jameel v British Medical Association [2024] 2219173/2023
Lancashire and South Cumbria NHS Foundation Trust v Moon [2024] EAT 4
Catt v English Table Tennis Association [2023] 3312887/2020
Sommerville v NMC [2022] EWCA Civ 229
Sejpal v Rodericks Dental Limited [2022] EAT 91
Uber v Aslam [2021] ICR 657
Percy v Church of Scotland Board of National Mission [2006] ICR 134 HL
Bates van Winkelhof v Clyde & Co LLP [2014] ICR 730 SC
Autoclenz Ltd v Belcher and others [2011] UKSC 41
Secretary of State v Neufeld [2009] EWCA Civ 280 CA
GMB v Hughes [2006] UKEAT 0288/06/0208
102 Social Club v Bickerton [1977] ICR 911
Oni & others v London Borough of Waltham Forest [2024] 3204635/2021
MacLennan v The British Psychological Society [2025] IRLR 4
Gilham v Ministry of Justice [2019] ICR 1655
Wilson v First Country Trust Ltd (No.2) 1 AC 816
R (SC) v Secretary of State for Work and Pensions
Adami v Malta (2006) 44 EHRR 3
R (Stott) v Secretary of State for Justice [2020] AC 51
Sullivan v Isle of Wight [2024] EAT 3
Koreshi v Abertawe [2012] IRLR 4
Day v Lewisham & Greenwich NHS Trust [2017] IRLR 623

McMillan v Guest [1942] AC 561

Sharpe v Worcester Diocesan Board of Finance Ltd [2015] ICR 1241

Johnson v Unisys Ltd [2003] 1 AC 518

Rainford v Dorset Aquatics EA-2020-000123-BA

North Essex Health Authority v David-John [2004] ICR 112

Stack v Ajar-Tec Ltd [2015] IRLR 474

Johnson v Ryan [2000] ICR 236

Sellars Arenascene Ltd v Connolly [2001] IRLR 222

60. Mr. Stubbs submitted a bundle of authorities, and Mr. Ryan sent in a further list of authorities after completing his closing submissions. I am grateful to both counsel.

Claimant

61. Mr. Ryan submitted on behalf of the claimant that:

5. The claimant was both a worker and an office holder;
6. There was a meaningful distinction between the claimant's office and his contracted role with the respondent. The respondent had gone significantly further than the statute required by issuing a job description and terms of engagement;
7. The respondent's position that the claimant was only an office holder is misconceived. It is unusual for an office holder to have a job description and job purpose;
8. The job description and objectives set in the appraisal amounted to instructions as to what the claimant should do;
9. The fact that the claimant had discretion does not prevent him from having worker status. It is common within organisations for senior individuals to have a large degree of discretion;
10. The fact that something arises under statute does not prevent the claimant obtaining worker status. The legislation and principles of governance of NHS Trusts do not determine the claimant's status;
11. The Tribunal should consider the overall context of the relationship;
12. To qualify as a worker the claimant must meet 3 conditions:
 - i. There must be a contract between the claimant and the respondent;
 - ii. The contract must be one under which the claimant undertakes to perform work personally; and
 - iii. The respondent must not be a client or customer of a profession or business carried on by the claimant.

13. Much of the case law referred to by the respondent involves cases in which there was no contract – the existence of a contract in this case causes difficulties for the respondent;
14. Whistleblowing protection should be extended to the Chairs of NHS Trusts in order to protect their human rights, in accordance with Article 14 of the European Convention on Human Rights (“**ECHR**”);
15. A finding that the claimant was not a worker and as such cannot pursue a complaint under sections 47B and 48 of the ERA would amount to an unjustified interference with the claimant’s rights under Articles 10 and 14 of the ECHR;
16. The Tribunal should ask the following questions:
 - i. Do the facts fall within the ambit of one of the Convention rights?
 - ii. Has the claimant been treated less favourably than others in an analogous situation? In considering this question, the relevant factors to be taken into account are:
 1. The type of role undertaken and level of responsibility;
 2. The duties of the role and the likelihood that the person will become aware of wrongdoing;
 3. The importance of the person making disclosures of wrongdoing in the public interest;
 4. The vulnerability of the person to retaliation for making a protected disclosure – including the extent to which livelihood or reputation might be at risk;
 5. The availability of alternative routes to making disclosures of wrongdoing and any alternative protections; and
 6. Any other relevant distinction between the office holder and an employer and/or limb B worker.
 - iii. Is the reason for the less favourable treatment one of the listed grounds or some ‘other status’?
 - iv. Is the treatment a proportionate means of achieving a legitimate aim?

62. Mr. Stubbs submitted, on behalf of the respondent, that:

1. The claimant was not required to do work personally pursuant to the contract between the parties, but pursuant to a statutory obligation or requirement;
2. The very basis of the appointment of a Chairperson of an NHS Trust is that the Chairperson is independent of and distinct from the Trust;

3. The protection for whistleblowers was not intended to apply to office holders and the Tribunal should not artificially extend the protection;
4. The claimant's position was distinct to that of a District Judge. In contrast with District Judges, there is no clear occupational classification of Trust Chairs.
5. In **Gilham** and **MacLennan** it was held that it was necessary to look at whether the office holder had a contract with the employer to perform work or services, and relevant considerations include:
 - i. The manner in which the office holder was engaged;
 - ii. The source and character of the rules governing the service the respondent provides;
 - iii. The overall context; and
 - iv. Any other relevant factors.
6. The starting point should be the contract between the parties, although excessive focus on the wording should be avoided. Ultimately the Tribunal has to determine what the true agreement between the parties was (**Autoclenz**), and in order to do that the Tribunal has to examine all of the evidence, including the written terms and how the parties conducted themselves in practice;
7. The claimant's appointment was on a statutory basis pursuant to Schedule 7 of the National Health Service Act 2006. The basis of the contract and of the claimant's obligations as Chair are statutory;
8. In **North Essex Health Authority v David-John** the EAT held that a GP whose terms of service were set out in the National Health Service (General Medical Services) Regulations 1992 were statutory and not contractual;
9. The primary question is one of statutory interpretation not contractual interpretation;
10. The statutory purpose of the Employment Rights Act is the protection of workers who are vulnerable because they are in a relationship of subordination and dependence towards their employers;
11. The appointment, removal and key aspects of the claimant's role are all pursuant to statute;
12. The claimant's appointment was not as a member of the respondent's management team, but to a senior governance position with direct links to NHS England;

13. As Chair the claimant was able to decide whether or not to attend a meeting and, if required, a substitute was available;
14. The claimant had control over when meetings took place and was not subject to control by the respondent. He had discretion when carrying out his role and was independent in thought and deeds;
15. NHS England guidance on Chairs of NHS Trusts states that the appointment to Chair is a public appointment, not employment, and does not fall within the jurisdiction of Employment Tribunals; and
16. This is not a case which falls within section 43K of the Employment Rights Act 1996.

Conclusions

63. I have reached the following conclusions having considered carefully the evidence before me and the written and oral submissions of both parties, for which I am grateful.
64. The starting point in my considerations has been the wording of the statute itself, section 230(3)(b) of the Employment Rights Act 1996. The requirements of that provision can, in summary, be split into three separate components:
 1. There must be a contract, whether express or implied and (if it is express) whether oral or in writing;
 2. Pursuant to that contract the individual must undertake to do or perform personally any work or services for another party to the contract; and
 3. The party for whom the work is carried out must not be a client or customer of the individual.

The contract issue

65. There was, in this case, not one but two written contracts between the parties, both headed "Terms of Engagement" and both in very similar terms. The first contract was entered into in April 2019 and the second in April 2022. Both contracts explicitly stated that "*Your appointment gives rise to a contract for services between yourself and Bradford Teaching Hospitals NHS Foundation Trust*". This wording is consistent with and demonstrates an intention to create legal relations between the parties through the terms of the contract. The claimant was required to sign both contracts to confirm that he had read and accepted their terms. Both parties agreed to and expected to be bound by the terms of the contract.
66. Prior to issuing the first contract, a letter was sent to the claimant offering him the position subject to certain conditions being fulfilled. There was a classic offer and acceptance in relation to the claimant's appointment as Chairperson.
67. The contracts contained provisions which were consistent with the claimant being a worker or even an employee of the respondent, such as provisions for termination, for appraisals, for remuneration and a requirement on the claimant to comply with the respondent's policies. As well as imposing obligations on the claimant, the contracts also set out rights

and protections for the claimant, such as the right to remuneration, the right to claim mileage allowance, and an indemnity protecting the claimant against claims made against him.

68. There were some provisions which were inconsistent with a worker contract, such as a statement that the appointment “*does not create a contract of employment and is not within the jurisdiction of Employment Tribunals*”. To its credit, the respondent accepted that such a statement was not sufficient to oust the jurisdiction of this Tribunal. It does not comply with section 203 of the Employment Rights Act 1996 which sets out the circumstances in which parties can contract out of the provisions of that Act.
69. In addition to the written Terms of Engagement, which he signed, the claimant was also provided with a written Job Description which is lengthy and detailed, and which imposed a large number of obligations on the claimant in terms of his role and responsibilities. It contained instructions on what he should do as Chairperson, set out the values that he was expected to uphold and champion, and identified a number of policies that he was required to comply with. The language used in the Job Description is such as to impose mandatory requirements on the claimant, and to set out clearly what he was required to do as Chairperson.
70. I have no hesitation in finding, on the evidence before me, that there was a legally binding written contract between the claimant and the respondent at all times that the claimant was working as Chairperson of the respondent.
71. There was no evidence before me to suggest that the parties did not conduct themselves in accordance with the terms of the contracts and the Job Description, nor any suggestion that the terms of the contract were a sham or did not reflect the reality of the working relationship. Similarly, there was no suggestion that the respondent, which was responsible for drafting both contracts and the Job Description, did so by mistake, or without intending to create legally binding obligations on both sides.

The personal service issue

72. I have then gone on to consider whether, pursuant to the contract between the parties, the claimant undertook to perform work or services personally for the respondent. Mr Stubbs submitted, on behalf of the respondent, that the claimant’s obligation to provide services to the respondent arose under statute rather than under the contract.
73. I accept Mr Stubbs’ submission that the respondent was required by statute to have a council of governors and a Chairperson, and that certain of the responsibilities of the Chairperson are set out in statute. For example, the requirement for the Chairperson to chair meetings of the council of governors is set out in Para 12 of Schedule 7 of the National Health Service Act 2006.
74. Other duties of the Chairperson are set out in the respondent’s Constitution, which the respondent was required, by virtue of paragraph 1(1) of Schedule 7 of the National Health Service Act 2006 to have.
75. By far the majority of the claimant’s duties and obligations however are set out in the Job Description which the claimant was provided with. That contains a long list of duties and responsibilities which the claimant, as Chairperson, was required to undertake. Further obligations are set out in the contracts that the claimant signed. There was no suggestion

that the wording of the contracts or of the Job Description were mandated by statute, but rather, it appears on the evidence, that it was the respondent who chose what to include in them. Both the Job Description and the contracts appear to be tailored to specific requirements of the respondent, rather than being generic or national documents mandated by statute.

76. The fact that the claimant's role itself is one required by and appointed pursuant to statute does not in itself prevent the claimant having worker status. I accept Mr Ryan's submission that an individual can 'wear two hats' and be both a worker and hold a statutory appointment. In **Catt v English Table Tennis Association Ltd** the EAT noted that an individual can be simultaneously a director or office holder and a worker and referred to the previous authority of **Percy v Church of Scotland Board of National Mission [2006] ICR 134** in which a minister in the Church of Scotland was found to be employed under a contract personally to execute work, notwithstanding the religious nature of those services and the ecclesiastical office she held.

77. In **Neufeld v Secretary of State for Business, Enterprise and Regulatory Reform [2009] EWCA Civ 280** the Court of Appeal held that:

"80. There is no reason in principle why someone who is a shareholder and director of a company cannot also be an employee of the company under a contract of employment....

81. Whether or not such a shareholder/director is an employee of the company is a question of fact for the court or tribunal before which such issue arises...."

78. I see no reason why the same principle cannot apply in this claim, namely to the chairperson of an NHS Foundation Trust. It is in my view possible for the same individual to hold a statutory office and be a worker. Indeed there have been other cases in which those holding a statutory appointment have been found to be workers, specifically the District Judge in **Gilham v Ministry of Justice**. In her judgment, Lady Hale commented (paragraph 43) that it would not be difficult to include office-holders within the definition of limb (b) workers, provided that they meet the requirements of that section, and that *"None of this would go against the grain of the legislation"*.

79. Turning next to the question of personal service, I find that the claimant was obliged to provide services personally. The importance of the identity of the person carrying out the role of Chairperson was underlined by the fact that the claimant was required to have a Disclosure and Barring Service check and to be a fit and proper person. There was no right of substitution, either in the contract or in practice. The claimant did all of the work that he was required to do personally.

80. I do not accept the respondent's submission that the provisions in the statute, the respondent's constitution and the Standing Orders of the Board of Directors, for someone else to chair meetings of the council of governors and the board of directors, in the absence of the claimant, amounted to a genuine power of substitution. If the vice chair or deputy chair were to chair a meeting in the claimant's absence, their responsibilities would be limited to chairing that meeting. They would not take on any of the other duties or responsibilities of the claimant. Rather, the provisions allowing for someone else to chair a meeting in the absence of the claimant were designed to ensure that the meeting could still take place should the Chairperson not be present, because of the requirement to have someone chair the meeting.

81. For the above reasons I find that the claimant was required to undertake work personally for the respondent, pursuant to the terms of the contract between the parties.

The client or customer issue

82. It was agreed between the parties that the respondent was neither a customer nor a client of the claimant. There was no evidence before me to suggest either that the claimant was in business on his own account or that the respondent was a client or customer of the respondent. I have no hesitation in finding that the respondent was neither a client nor a customer of the respondent.

Other considerations / the context

83. Both the contract and the way in which it was performed by the parties gave rise to obligations on both sides. The claimant was required to provide his services personally on at least 10 days a month, and a long list of obligations and responsibilities was imposed on him through the Job Description and the contracts. The respondent was obliged to pay the claimant, and provided him with an office, equipment, and administrative support to enable him to carry out the role of Chairperson. There was therefore clearly a mutuality of obligations between the parties.

84. I turn next to the question of control. Although the claimant was free to organise his time as he saw fit, his work was directed by the respondent through the detailed Job Description and through the objectives which were set in his annual appraisals. He was held accountable to the respondent through the regular reports that he wrote and through the appraisal system. The appraisal system involved the obtaining of feedback from those with whom the claimant had worked, in the way that many employees are appraised. It cannot be said therefore that the respondent exercised no control over the work carried out by the claimant.

85. The fact that the claimant had freedom to organise his time as he wished, and that he had a considerable degree of discretion in the performance of his duties is not in itself inconsistent with worker status, particularly when the duties themselves are imposed by the respondent through the Job Description. Rather it is an indication of the claimant's seniority within the organisation. Many senior employees are given discretion in the performance of their duties.

86. The claimant was paid a fixed level of remuneration irrespective of the hours that he worked and performed an important function for the respondent. He was provided by the respondent with the tools he needed to do the job, such as a laptop, iPad, office and administrative support. He attended external events on behalf of the respondent and represented the respondent externally. Although the claimant's remit included exercising a degree of independent oversight, it cannot be said that he was independent of the Trust.

87. The terms upon which the claimant was appointed were decided upon and imposed by the respondent following a competitive recruitment process. There was no evidence before the Tribunal to suggest that the claimant was in a position to negotiate terms with the respondent, either when he was first appointed or at any time during the course of his appointment. He was, to that extent, subordinate to the respondent.

88. I find that the context in which the claimant performed his duties was, consistent with the

claimant having worker status.

89. It was agreed at the start of the hearing that the first question that would need to be decided at this hearing was whether the claimant falls within the definition of “worker” in section 230(3)(b) of the Employment Rights Act 1996. For the reasons set out above I find that he did. There was a contract between the parties, pursuant to which the claimant was required to perform work personally for the respondent, and the respondent was not a client of the claimant.
90. In light of my conclusions on the first question, it has not been necessary for me to consider whether the claimant’s Convention rights mean that section 230(3)(b) should be read so as to include the claimant to enable him to bring a claim for whistleblowing detriment. I make no findings on that issue.

Employment Judge Ayre

Date: 18 March 2025

JUDGMENT SENT TO THE PARTIES ON



Date: 20 March 2025

.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

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

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>