# EMPLOYMENT TRIBUNALS
## PUBLIC PRELIMINARY HEARING

**Claimant:** **Mr J Robertson**
**Respondent:** **South Tyneside Council**

**Heard at:** **Newcastle Hearing Centre (by video)** **On:** **18 March 2022**

**Before:** **Employment Judge Morris (sitting alone)**

**Representation:**
**Claimant:** **In person**
**Respondent:** **Mr H Menon of counsel**

# RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The Tribunal does not have jurisdiction to entertain the claimant's claims of detriment on the ground that he made one or more public interest disclosures, which are therefore dismissed.

2. The application by the claimant that the respondent's response should be struck out was withdrawn by the claimant and is dismissed.

# REASONS

**The hearing, representation and evidence**

1. This was a remote hearing, which had not been objected to by the parties. It was conducted by way of the Cloud Video Platform as it was not practicable to convene a face-to-face hearing, no one had requested such a hearing and all the issues could be dealt with by video conference.

2. The claimant appeared in person. The respondent was represented by Mr H Menon of counsel who called Mr JL Rumney, who is employed as the respondent's Corporate Lead Legal & Governance, to give evidence on its behalf.

3. In the main, however, the parties relied upon submissions made on behalf of the respondent and by the claimant during the course of which they both made

reference to a large amalgamated bundle of documents (which was added to during the course of the hearing) and a large number of case authorities that are relevant in this area of law. The numbers shown in parenthesis below are the page numbers (or the first page number of a large document) in the amalgamated document bundle; the numbers shown in parenthesis below that are prefixed by the letter "R" are the page numbers in a small bundle of documents attached to the second witness statement of Mr Rumney.

## Context

4. Today's public preliminary hearing resulted from an earlier public preliminary hearing held on 26 November 2021 ("the November Hearing") at which, amongst other things, Employment Judge Jeram set out what would be the purpose of today's hearing in the following terms:

4.1. "to consider whether the Tribunal has jurisdiction to entertain the claimant's claims of detriment on the ground that he made one or more public interest disclosures;

4.2. to consider whether the claimant has either no reasonable prospects, or little reasonable prospects of establishing the same."

5. I record, for completeness, that at the November Hearing the claimant confirmed that he did not seek to advance a complaint of unfair dismissal for making a protected disclosure and was content for such claim to be dismissed on withdrawal. Employment Judge Jeram gave effect to that in a Judgment, which was promulgated on 29 December 2021, dismissing the claimant's complaints of unfair dismissal including automatic unfair dismissal on withdrawal by the claimant.

## The issues

6. In the above context, the parties were agreed that the issues to be determined at today's hearing were as follows:

6.1. Applying the decision of the Supreme Court in Gilham v Ministry of Justice [2019] UKSC 44, whether the claimant is entitled to the "protection which was available to other employees and workers who made responsible public interest disclosures within the requirements of Part IVA of the Employment Rights Act 1996, including protection from "any detriment" and the possibility of bringing proceedings before an employment tribunal".

6.2. Applying the decision of the House of Lords in Derbyshire v St Helens Metropolitan Borough Council [2007] UKHL 16, whether "a reasonable employee would or might take the view that the employer's conduct had in all the circumstances been to his or her detriment".

6.3. Whether, by reference to section 48(3) of the Employment Rights Act 1996 ("the 1996 Act") the Tribunal does not have jurisdiction to consider claimant's claims as they were presented 'out of time'.

6.4. On application having been made by the claimant in an email dated 14 February 2022, some 19 additional respondents should be added as parties to these proceedings in accordance with rule 34 of the Employment Tribunal Rules of Procedure 2013 on the basis that "it appears that there are issues between [*those*] person[*s*] and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings".

7. For want of time, the parties were agreed that I should first consider the first of the above issues. The parties described that issue as the "Gilham point", which term I have adopted below. They were agreed that if I decided that issue against the claimant and in favour of the respondent, it would result in it being unnecessary to consider the remaining three issues; as the claimant put it, if I found against him in that respect, it would be, "a knock-out blow". More particularly, the claimant confirmed that if I were to decide against him in relation to that Gilham point, the addition of respondents referred to in the fourth of the above issue would become irrelevant. In light of the overriding objective, not least the considerations of avoiding delay and saving expense, I agreed that this would be a sensible approach.

8. In the circumstances, the remainder of this hearing focused mainly upon the Gilham point. For that reason and given my Judgment above, I have not addressed the remaining three issues in my Judgment or these Reasons.

**The evidence**

9. In giving evidence Mr Rumney relied upon two witness statements respectively dated 5 November 2021 and 7 March 2022, attached to the second of which was a bundle of documents comprising 35 pages. The evidence in the first of Mr Rumney's witness statements was divided into two parts as follows:

9.1. First, that the claimant had advanced his claim on the basis that, in his capacity as an elected councillor, he was able to rely upon the protection afforded to employees and workers by section 47B of the 1996 Act but, as sections 7 and 83 of the Local Government Act 1972 make clear, the status of a councillor is an elected office and not employment or any other position or status based on contract. In this regard he relied upon the decisions in Gilham and Moores v Bude-Stratton Town Council [2000] EAT 313 99 2703 that in relation to vicarious liability, "The councillors are not employees of the council". In this connection, in cross examination, Mr Rumney confirmed that contrary to the statement in the respondent's Grounds of Resistance that it denied that the claimant "was an Employee, or an office holder", he accepted that the claimant held office as an office holder.

As acknowledged by Mr Rumney, much of this first part of his witness statement was "a matter for legal argument" rather than evidence in relation to which I might in other circumstances have gone on to make findings of fact.

9.2. Secondly, the claimant is pursuing his claim for the improper purpose of continuing a decade-long campaign, which has as its aim not only

harassing individuals associated with the respondent but also to cause as much disruption and cost to the respondent as possible. In this connection, he relied, amongst other things, on observations by District Judge DG Morgan (34) and Mr Justice Dingemans (65) in judgements in Court proceedings in, respectively, July 2013 and January 2014, in the latter of which a general civil restraint order was made against the claimant for a period two years.

10. The evidence in the second of Mr Rumney's witness statement focused upon the list of some 94 detriments that the claimant had submitted in response to orders made at the November Hearing which, for the reasons set out above, need not be addressed in these Reasons.

**Submissions**

11. Mr Menon and the claimant made oral submissions as to the Gilham point by reference to relevant statutory and case law. In this regard Mr Menon relied upon a written skeleton argument and the claimant relied upon written annotations that he had made on that skeleton argument of Mr Menon. It is not necessary for me to set out the submissions in detail here because they are a matter of record and the salient points will be obvious from my findings and conclusions below. Suffice it to say that I fully considered all the submissions made in the context of relevant statutory and case law to which I was referred and the parties can be assured that all submissions were taken into account in coming to my decision. That said, I set out below some of the key points made in the respective submissions. As the skeleton arguments are a matter of record, I have concentrated primarily on the oral submissions.

12. The key points made by Mr Menon on behalf the respondent included as follows:

12.1. The four questions to be answered in this case are those numbered (i) to (iv) at paragraph 28H of the judgment in Gilham, the answers to which in turn were:

(i) Yes, this is conceded, the Convention rights being Articles 10 and/or 14.

(ii) No, because the claimant is not in an analogous situation. There is no quasi-employment relationship where the claimant is subject to management and discipline imposed by that management.

(iii) Yes, this is also conceded because the office of an elected councillor is status.

(iv) Yes, the difference is with reasonable justification as it is a proportionate means of achieving a legitimate aim.

12.2. With reference to the decision in Ezsias v North Glamorgan NHS Trust [2007] ICR 1126, there are strictures on strikeouts in whistleblowing or discrimination cases, where they are reserved for cases where it is

indisputably appropriate and therefore the burden on the respondent is onerous.

12.3. It is not within the power of a council to remove a councillor from office or stop him from acting: see Heesom v Public Services Ombudsman [2014] EWHC 1504, especially at paragraph 28. There is a limitation imposed on councils from doing anything to obstruct or fetter the rights of elected members. That contrasts with employment as there is no equivalent power of dismissal. The entire process by which an elected councillor can be disciplined or censured is contained in sections 27 and 28 of the Localism Act 2011. When a local authority investigates a breach of the code, as the respondent did with the claimant, it is exercising a mandatory statutory function. This is not analogous with employment or quasi-employment. As such, any challenge is to be by way of an appropriate public law remedy, judicial review, challenging such matters as bias, natural justice, ultra vires, breach of human rights, Article 10 violations or substantial or procedural unfairness: see, R (on the application of) Harvey v Ledbury Town Council [2018] EWHC 1151, which is on all fours with the claimant's complaint. All the points of challenge engaged by the claimant are exclusively public law matters and not susceptible to challenge.

12.4. Members of a local authority are afforded the protection of the Equality Act by section 58. Despite amendments to the 1996 Act in 1998, however, there is no mention of extending the whistleblowing provisions to local authority members. This is a powerful indicator that Parliament did not intend whistleblowing legislation to cover elected members.

12.5. The respondent in Gilham did not raise the question of justification as there was no evidence in support. In this case, however, there is: first, the claimant is in an elected office with limited tenure at the will of the electorate; secondly, that is a uniquely adversarial office in which disputation within the same organisation is par for the course. To enable a councillor to raise a whistleblowing claim in the course of a dispute would make it an incestuous affair; so elastic as to make whistleblowing disreputable as it would be so easy to raise an allegation. The claimant has sufficient statutory protection from removal from office and in relation to complaints of breach of the code of conduct including the mandatory appointment of an independent person. He is not without remedy, judicial review, but has chosen the wrong one. To have a parallel regime side-by-side, such as whistleblowing under 1996 Act, would put courts and tribunals in a difficult position: which is take to precedence and who decides which is appropriate? It would drive a coach and horses through the procedure of public law remedies.

12.6. It is not clear why the claimant relied upon the decision in Griffiths v The Institution of Mechanical Engineers (ET case number 2200023/2020), which was unhelpful to his case; and decisions of the employment tribunal are not binding or persuasive. The claimant in that case was not elected to a statutory public office; although it was right that the Supreme Court in O'Brien commented, "judicial office partakes of most of the characteristics of employment", that does not apply in this case; as in Griffiths, first, the

claimant in this case is not in an analogous situation to others in the workplace and, secondly, his exclusion from whistleblowing protection does not breach Article 14.

13. I first clarified with the claimant that, with reference to the decision in Gilham, he did not suggest that he came within the first or second categories considered by the Supreme Court of whether he was a "worker" or was in "Crown employment". He confirmed that he was not pursuing his complaints on either of those bases and was clear that he came within the third area considered by the Supreme Court, "Human rights". The key points then made by the claimant in submissions included as follows:

13.1. He relied upon his skeleton argument, which he would not regurgitate. I carefully considered the entirety of that document recording below only certain key points (avoiding any duplication with the claimant's more detailed oral submissions that I also address below) as follows:

13.1.1. The analogous situation for him as a councillor is the respondent's employees who are protected. A councillor must sign to agree to the code of conduct which provides for penalties for councillors who can be subject to severe disciplinary sanctions by "management", which is the Standards Committee, which sanctions are subsequently approved by the full Council. Councillors are continually monitored by the monitoring officer who acts in a supervisory/managerial role on a daily basis and conducts investigations into complaints against councillors. These points clearly demonstrate a quasi-managerial hierarchy supervision and discipline of councillors by the "management".

13.1.2. The respondent has ignored the statutory obligation to properly appoint an independent person under section 28 of the Localism Act. It has conceded a technical breach but this was a serious procedural irregularity making all decisions and sanctions against him illegal/ultra vires. The respondent also failed to follow the correct disciplinary procedure: Harvey.

13.2. As to the points made by Mr Menon:

13.2.1. He had said that a councillor does not do work for a council but the complaints form says that a councillor can only accept complaints if he or she is acting on official business of the council.

13.2.2. As to legitimate aims, Mr Menon had repeated the arguments of the Ministry of Justice in the Gilham case but, ultimately, there was no justification.

13.2.3. Mr Menon said that there was no quasi-managerial position and the council was not my boss but part of my punishment was that all emails would go into a box to be checked/monitored. Additionally, I submitted my resignation as a councillor at 19:39 on 9 June 2021 (33). I was then offered, by the monitoring officer, the opportunity for reconsideration and, at 07:59 on 10 June 2021, (R12) I requested

that I could retract it. Each of those emails was written outside working hours. As was stated in the respondent's grounds of resistance (25), "The Claimant in any event, sought to retract his resignation a matter of hours after submitting it, and he was advised that the law did not permit him to do so." The role of Mr Rumney as proper officer includes receipt of councillors' resignations from office (R17). In accordance with section 84 of the Local Government Act 1972, resignation takes effect on receipt by the appropriate person or body. Mr Rumney did not receive my resignation email until 08:33 on 10 June (R25), so I was dismissed after I had retracted my resignation at the 07:59. In his second witness statement Mr Rumney states that he read the text of my resignation email on Facebook around 20.15 on 9 June but reading on Facebook is not receipt for the purposes of section 84. As my emails had been diverted until they had been triaged I cannot say if Mr Rumney had received my retraction. In the email from the monitoring officer timed at 18:03 on June 2021 (R20) it was stated that as my resignation had taken effect it could not be withdrawn and that in the eyes of the law I was no longer a councillor. So they were dismissing me. Further, councillors have to accept the monitoring officer and the code of conduct is very complex. If that is not managerial I do not know what is. When a councillor accepts office (159) he/she also accepts the code (160), which has very intense rules to comply with in comparison with run-of-the-mill employees.

13.2.4. Mr Menon said that I have other places to turn but if that was only judicial review that could be at a cost of £3,000 to £5,000 and it is not if fair employees can go to an employment tribunal. The council says that it will protect councillors from reprisals but not if they cannot go to an employment tribunal and can only pursue judicial review at the cost of £15,000 if not £20,000.

13.2.5. I do not claim to be the same as a judge but the public came to me with disclosures and when I put my head on the block I was dragged in front of the Standards Committee that wanted to cover things up.

13.2.6. I accept that politics can be adversarial but I would not dream of coming to an employment tribunal to say that the Labour Party were picking on me.

13.3. As to the decision in Gilham, the claimant relied upon his detailed written submissions (292), which I carefully considered noting that the claimant had sensibly adopted the structure of the judgment handed down by Baroness Hale of Richmond in that decision of the Supreme Court and, as I observed to him during the hearing, had intelligently echoed not just her approach but certain of her wording.

13.4. The respondent states that it "has a Whistleblowing Policy to protect Members and Officers who wish to disclose matters raising serious concerns about the conduct of the Council, Officers or Members" and that its whistleblowing policies enable employees and elected members to

raise concerns about issues of conduct without fear of reprisal (164), and the phrase "employees and elected members" is repeated throughout (297). So it is analogous that they will be treated the same. How can the respondent say that it will protect members and employees if members cannot go to the employment tribunal but only seek judicial review? Councillors are signposted for the public and employees to make disclosures to (178 and 188). People came to me in droves. The respondent cannot signpost and then say that I cannot come to the employment tribunal but must go for judicial review at a cost of £10,000 to £15,000.

13.5. Paragraphs 76 to 84 of the judgment in Griffiths (289) explain why the claimant in that case did not get over the hurdle but I should: I entered into an undertaking with the respondent in the shape of the code of conduct; I was elected but that is not a necessary bar; councillors are not volunteers but receive a minimum of £600 per month; Mr Menon accepted that councillors are included in the Equality Act; as a councillor I cannot delegate; my duties derived from a personal undertaking when I signed the code of conduct and agreed the respondent's constitution; the word "appointment" does not necessarily exclude those who have been elected.

13.6. My P60s, P45 and pay statements (171 - 174) all refer to me as an "employee" and councillors get SSP and maternity leave analogous to employees.

13.7. As to the implications of the decision in Gilham, the claimant relied upon an article produced by a barrister acknowledged in the field of whistleblowing protection (197) and Bulletin No 496 of Harvey on Industrial Relations and Employment Law.

14. I agreed that Mr Menon could respond briefly to the claimant's submissions, which he did including as follows:

14.1. Redress under the whistleblowing legislation has nothing to do with the respondent but arises from statutory rights. The fact that, first, councillors are assured that they will protected from reprisals and, secondly, the respondent provides a mechanism to protect whistleblowers is nothing to the point. The Tribunal has to ask whether the 1996 Act covers the claimant. That is nothing to do with internal protections or processes and nothing to do with the statutory protection of whistleblowers.

14.2. The claimant asserts that he retracted his resignation but that is irrelevant to the Gilham point. In his email of 10 June (R12) the claimant only asks, "Would it be okay to withdraw my immediate resignation and consider my position over the weekend …?" There is nothing to say that he was retracting his resignation – quite the opposite. There has never been a retraction. Resignation is a statutory construct imposed by section 84. Resignation is effective by delivery in relation to which Mr Rumney took the opinion of leading counsel (R23). The claimant did not challenge anything in Mr Rumney's evidence relevant to Gilham. He referred to paragraph 7 of Mr Rumney's second witness statement but that contains only half the story, the important point being paragraph 8. The Council

does not have a managerial role but only applies the statute. The resignation took effect automatically when the statutory conditions were met.

14.3. The claimant had complained that redress for councillors is different to employees. That type of distinction always happens. Complaints against the claimant are mediated through a statutory scheme: complaints against employees are not.

14.4. Remuneration paid to councillors was a stipend that is now an allowance. In no way is it a wage or consideration for work done. It is just a recognition that volunteers for public office should not be expected to do so for free. It is nowhere near to a substantive relationship of quasi-employment or anything like it.

15. In the interests of balance I also agreed that the claimant could reply to the above points, which he did including as follows:

15.1. In the grounds of resistance the respondent confirmed that I tried to retract my statement.

15.2. Mr Menon said that the respondent will protect councillors from reprisals but there is no protection.

**Consideration**

16. I repeat that for the reasons set out above, my consideration is limited to the first of the issues also set out above of whether, applying the decision of the Supreme Court in Gilham, the claimant is entitled to the "protection which was available to other employees and workers who made responsible public interest disclosures within the requirements of Part IVA of the Employment Rights Act 1996, including protection from "any detriment" and the possibility of bringing proceedings before an employment tribunal". In that regard, the claimant confirmed that he was pursuing his complaints on the basis that he came within the third area considered by the Supreme Court of, "Human rights". That being so, the focus of the parties was rightly on the four questions numbered (i) to (iv) at paragraph 28H of the judgment handed down by Lady Hale in Gilham, and I adopt those questions as the structure for my decision.

17. That said, I need not take time considering the first of those questions given that the respondent conceded that the facts in this case do "fall within the ambit of one of the Convention rights", those rights being Articles 10 and/or 14.

18. I therefore turn to the second of those four questions being, "has the claimant been treated less favourably than others in an analogous situation"? The focus of the parties before me was on the second element of that question of whether the claimant was in a situation analogous to that of others. I too adopt that approach of considering that second element first. In this regard, the claimant was clear that those others in respect of whom he contended that he was in an analogous situation were the other employees of the respondent but, given the decision in Gilham, I have also had in mind whether the claimant is in an analogous situation with workers of the respondent. Although having those two statuses of employee

and worker in mind throughout my deliberations, so as to avoid continual repetition I have referred below only to the status of employee but from that it should be inferred that I also had regard to the status of worker.

19. I first make two preliminary points. The first is that I note that contrary to the above approach of focusing on the second element of the above question of whether the claimant was in an analogous situation, the judgment of the Supreme Court in Gilham primarily addressed the issue of detriment. The claimant in that case was found to have been denied protection from "any detriment" which was said to be much wider than protection from dismissal or other disciplinary sanctions, she was denied the possibility of bringing proceedings before an employment tribunal and was denied the right to compensation for injury to feelings as well as injury to her health. From those findings, the judgment of the Supreme Court continued as follows:

> "*It is no answer to this to say that, by definition, judicial office-holders are not in an analogous situation to employees and "limb (b)" workers. That is to confuse the difference in treatment with the grounds for it. What matters is that the judicial office-holder has been treated less favourably than others in relation to the exercise or enjoyment of the Convention right in question, the right to freedom of expression. She is not as well protected in the exercise of that right as are others who wish to exercise it.*"

20. The second preliminary point is that the conclusion of the Supreme Court in Gilham, was that the 1996 Act "should be read and given effect so as to extend its whistle-blowing protection to the holders of judicial office". To that end it was determined that an appropriate approach would be "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 work or services otherwise than for persons who are clients or customers of a profession or business carried on by the office-holder."

21. I brought the above points into account in coming to my decision. In light of the above and other relevant aspects of the judgment of the Supreme Court in Gilham, I repeat that my focus, as was the focus of the parties, was on whether the claimant was indeed in an analogous position to "others" in relation to the exercise or enjoyment of the Convention right, in respect of which I again repeat that in this regard, as is clear from my above summary of the submissions made by the claimant in this connection, he contended that the "others" by reference to whom his position was equivalent or comparable were the employees of the respondent.

22. Moving on from the above preliminary matters, I now turn to consider the principal contentions of the parties in these proceedings, which I do in no particular order of priority.

23. A significant feature of any relationship between an employer and employees or workers is the payment by the employer to its employees as consideration for work done. Whatever term is used to describe such payment (including wage, salary, fee or other emolument) an important aspect is that it constitutes due remuneration to the employee for the work he or she has provided to the employer. That central bargain is at the heart of any employment relationship. In

this respect, I acknowledge the claimant's submission that councillors receive an annual allowance but that is to recognise what they do in the performance of their office and the commitment of time and effort that they willingly give. I am not satisfied on the evidence before me or submissions made to me that such an allowance can be categorised as being pay in the sense of a wage or other such emolument. I also acknowledge that the HMRC certificates submitted by the claimant and his pay statement use the words "employee" and "employer" but I am satisfied that the respondent has simply used its standard forms for these purposes and, as is the case when an employment tribunal is called upon to determine the status of an individual in other jurisdictions such as unfair dismissal, I am not satisfied that the use of those terms is determinative.

24. An equally significant feature of an employment relationship is the ability of the employer to terminate that relationship within the law. In this regard, I accept the submission made by Mr Menon that (apart from limited powers of disqualification, which do not apply in this case) the respondent is not able to remove, or even suspend, the claimant or any other councillor from office. This is clear from the relevant provisions of the Localism Act 2011. Thus, from April 2012 the sanctions available to a local authority are limited, for example, to a formal finding that a councillor has breached the code, formal censure, adverse publicity and removal from certain roles: see Heesom. Similarly, as was made clear in the decision in Harvey, subsections 28(6) to (9) of the 2011 Act contain a mandatory statutory process for investigating and determining complaints that a councillor has failed to comply with the code of practice. It is thus clear that, as submitted by Mr Menon, local authorities such as the respondent must follow that mandatory statutory process and that failure to do so will lay it open to public law remedies such as judicial review. I fully understand the point made by the claimant that such a means of redress for councillors is different to the measures of which employees can avail themselves, and that significant costs might be involved, but I am not satisfied that from that it follows that it places the claimant in a position analogous to that of an employee.

25. The claimant sought to distinguish the judgment of the employment tribunal in Griffiths. In that regard it is obviously right that decisions of another employment tribunal are not binding on me. That said, as was the employment tribunal in that case, I am similarly satisfied that the fact that the claimant in this case was elected rather than appointed is not necessarily a bar in these proceedings; although I do accept Mr Menon's point that in this case the claimant was elected to a statutory public office, unlike the claimant in Griffiths. I also accept that in this case, again unlike in Griffiths, a central role of councillors is to represent their electorate, which cannot be delegated. In relation to the code of conduct, I do accept that in signing that code and agreeing the respondent's constitution, the claimant entered into a form of undertaking with the respondent. Indeed, that is the very wording of the "Undertaking" that the claimant signed upon election which was to, "undertake to observe the Council's Code of Conduct for members throughout my term of office" (160). Finally in relation to Griffiths, the claimant explained in submissions that he did not claim to be the same as a judge. In that connection, although it was observed by the Supreme Court in O' Brien v Ministry of Justice [2010] UKSC 34, that "judicial office partakes of most of the characteristics of employment", the claimant not being a judicial officeholder, I am not satisfied that that applies in this

case or that the office of councillor similarly "partakes of most of the characteristics of employment".

26. I accept that the respondent's policies make the references referred to by the claimant in submissions regarding protecting councillors and enabling them to raise concerns without fear of reprisal, and that the phrase "employees and elected members" is repeated throughout. I am not satisfied, however, that it flows from the wording of such policies that the claimant is in a position analogous to an employee of the respondent or that they enable him to avail himself of the protections that are afforded to whistleblowers by the 1996 Act.

27. The claimant contends that, having agreed to the respondent's code of conduct, which provides for penalties and disciplinary sanctions, he was subjected to "management" or "a quasi-managerial hierarchy supervision" by the Standards Committee, the principal officer on behalf of the respondent or its monitoring officer. In these respects, much was made by the claimant of the particular matter of his resignation and his purported retraction of that resignation, and the timing of the email correspondence and decisions in that connection. In that respect, the claimant suggested that there was an inconsistency between the respondent's grounds of resistance (25) in which it is stated, as set out above, "The Claimant in any event, sought to retract his resignation a matter of hours after submitting it, and he was advised that the law did not permit him to do so", and Mr Rumney's second witness statement in which his evidence is, "At no point did the Claimant retract or attempt to retract his resignation, he simply asked if doing so would be "ok"." I accept that, in isolation, those sentences are inconsistent and it is clear from the documentary evidence (R12) that the sworn evidence of Mr Rumney is the accurate version. That notwithstanding, the relevance of these matters for me is fairly limited to being whether, as the claimant contends,

27.1. the role of principal officer in respect of, for example, receipt of councillors' resignations signifies that the principal officer on behalf of the respondent is in a managerial or hierarchical position over the claimant; and/or

27.2. the monitoring officer is in a supervisory/managerial or even quasi-managerial role in respect of the claimant.

28. Before addressing those questions, I interject my understanding of the role and functions of a proper officer and a monitoring officer as follows:

28.1. A proper officer of a local authority is a 'creature of statute'. Such officer is defined in section 270(3) of the Local Government Act 1972 simply as being an officer appointed for a particular purpose by the local authority in question. He or she has many functions and can be different people depending upon the statutory basis of those functions, many of which are contained in that Act. So far as is relevant to these proceedings, section 83 of that Act relates to witnessing and receiving declarations of acceptance of office while section 84 of that Act relates to receiving written notice of resignation from office. No statutory basis has been put before me in this case by reference to which it can be said or even implied that the proper officer has a statutory function in relation to the management of a member of a local authority in a way analogous to the

management by the respondent of its employees and workers; for example, appointing them, assigning work to them, directing how that work is to be undertaken, paying them consideration for undertaking that work, disciplining them, etc.

28.2. A monitoring officer of a local authority is also a 'creature of statute'. Section 5 of the Local Government and Housing Act 1989 requires relevant local authorities to designate one of their officers to be its monitoring officer. His or her duties include to report on matters that he or she believes to be unlawful or amount to maladministration, to be responsible for matters relating to the conduct of councillors and officers and to be responsible for the operation of the constitution of the local authority. Although I acknowledge that the monitoring officer is said to be "responsible" for matters relating to the conduct of councillors, I am satisfied that that conveys responsibility for ensuring that such matters are appropriately dealt with rather than personal responsibility for undertaking duties relating to the conduct of an individual councillor; for example, the imposition of sanctions or the enforcement of matters relating to a councillor's conduct. This appears to be borne out by the document produced by the claimant in which he sets out some 94 detriments in which he refers to point 13 of the respondent's Constitution to the effect that the monitoring officer must make enquiries and investigations to assess how a complaint should be dealt and may refer the complaint to the Standards Committee but it is that Committee that has the power to impose sanctions from the list of sanctions available to it (paragraph 6.1.3 of the Constitution). On the evidence before me I am not satisfied, that it can be said (as with the proper officer) that the monitoring officer has a statutory function in relation to the management of a member of a local authority in a way analogous to the management by the respondent of its employees and workers; including in relation to the examples given above.

29. In light of the above, and the evidence and submissions before me, I am not satisfied that any manifestation of the respondent, be that the Standards Committee, principal officer or monitoring officer, can be said to have been in such a managerial, supervisory or hierarchical position as the claimant contends they were in relation to him. I accept that in accordance with the statute penalties or sanctions might be imposed on a councillor who breaches the code of conduct but I am not satisfied that that constitutes such as the Standards Committee to be to be in a position of management over the claimant analogous to the position of an employer. I acknowledge the point made by the claimant that one of the punishments that was imposed upon him was that his emails would go into a box to be checked/monitored or triaged but, given the statutory powers available to the respondent in relation to its members, I do not accept that such a measure signifies that the claimant was in a position analogous to the respondent's employees. In regard to the particular issue of the claimant's resignation and purported retraction, while in no way seeking to minimise the important function of the principal officer, his function in this regard could be described as being little more than 'a post-box' or depository for the receipt of resignations in respect of which the respondent is bound by and applies the statutory provisions, including that the claimant's resignation took effect automatically on receipt. While it is

probably unfair to describe the proper officer as being little more than 'a post-box' it perhaps makes the point that the claimant has failed to satisfy me that he is in a managerial position in relation to him or that his situation was analogous to that of the respondent's employees.

30. On what I consider to be a relatively minor point of detail, I accept, if only because it was not challenged on behalf of the respondent, the claimant's submission that a councillor can only accept complaints if he or she is acting on official business of the Council. I am not satisfied, however, that that entails the claimant or any other councillor being in a position analogous to an employee or worker as those terms are defined in section 230 of the 1996 Act.

**Conclusion**

31. As set out above, the second of the four questions in Gilham is, "has the claimant been treated less favourably than others in an analogous situation"? In answering that question I repeat that my focus, as was the focus of the parties before me, has been on the second element of whether the claimant can be said to be in a situation analogous to others.

32. Having carefully considered the evidence, mainly documentary evidence, before me and the submissions made at this preliminary hearing in light of the relevant statutory and case law referred to above, for the reasons set out above I find that the claimant was not in an analogous situation to others; in relation to which I repeat that the others with whom he sought to compare himself are the employees of the respondent in respect of which I have also brought into my consideration the position of workers of the respondent.

33. That being so, my answer to the second question in Gilham is that the claimant has not been treated less favourably than "others in an analogous situation". That being so, it is unnecessary to me to consider and determine the first element in that question of whether the claimant was treated unfavourably or the remaining third and fourth questions in Gilham; although I do record, for completeness, that the respondent conceded that the answer to the third question would be in the affirmative given that the office of an elected councillor is status.

34. In the circumstances, my determination of the first aspect of what was described at the November Hearing as the purpose of this preliminary hearing, is that the Tribunal does not have jurisdiction to entertain the claimant's claims of detriment on the ground that he made one or more public interest disclosures.

35. That being so, it is unnecessary for me to proceed to consider the second purpose set out at the November Hearing of whether the claimant has either no reasonable prospects, or little reasonable prospects of establishing the same.

**EMPLOYMENT JUDGE MORRIS**
**JUDGMENT SIGNED BY EMPLOYMENTJUDGE**
**ON 1 April 2022**

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