EMPLOYMENT TRIBUNALS
PUBLIC PRELIMINARY HEARING

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

Heard at: **Newcastle Hearing Centre (by video)** **On: 28 September 2022**

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

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

RESERVED JUDGMENT ON RECONSIDERATION

The Judgment of the Employment Tribunal is that the original decision made on 1 April 2022 is confirmed.

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. As had been the case at the original hearing on 18 March 2022 ("the Original Hearing"), the claimant appeared in person and the respondent was represented by Mr H Menon of counsel.

3. No evidence was given to the Tribunal. Instead, the parties relied upon submissions made by the claimant and on behalf of the respondent during the course of which they both made reference to several documents: first, the large amalgamated bundle of documents, which had been before the Original Hearing; secondly, a supplemental bundle of documents that the respondent had prepared for the purpose of this reconsideration hearing; thirdly, a 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 extended document bundle.

The context

4. As indicated above, on 18 March 2022, I conducted a public preliminary hearing in relation to the claimant's complaints in this case. Although it had been intended that other issues would be considered at the Original Hearing, for the reasons given in my judgment, the only issue that was considered and determined was as follows:

> "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".

5. At the conclusion of the Original Hearing I reserved judgment, which I then produced in writing giving full reasons. It was signed by me on 1 April 2022 and sent to the parties on 3 May 2022.

6. My principal finding was as follows: "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.

7. In a letter dated 7 May 2022 (albeit addressed to EJ Walker), the claimant requested a reconsideration of my decision and gave reasons. Having considered the claimant's application in accordance with rule 72(1) of the Employment Tribunals Rules of Procedure 2013 ("the Rules") I was not satisfied that there was "no reasonable prospect of the original decision being varied or revoked". As such, I directed that a letter be sent to the parties to that effect and in that letter invited the respondent to submit a response to the claimant's application and the parties to state whether the application could be determined without a hearing.

8. The respondent duly submitted such a response (in relation to which the claimant then submitted written comments) and submitted that a hearing would be necessary. The claimant had replied that he was content for there to be decision on the papers or, equally, he would participate in any hearing. Given, in particular, the potential complexity of the issues to be considered and the fact that the claimant is a litigant in person, I decided that the claimant's application for a reconsideration should be considered at a hearing.

The law

The Rules

9. So far as is relevant to this application for reconsideration, the Rules provide as follows:

"***70 Principles***

A Tribunal may, either on its own initiative …. or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked."

"***71 Application***

"…. *an application for reconsideration shall be presented in writing (and copied to all of the other parties) within 14 days of the date upon which the written record …. of the original decision was sent to the parties …. and shall set out why reconsideration of the original decision is necessary.*"

"72 Process

(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

The overriding objective

10. In dealing with the question of reconsideration I must seek to give effect to the overriding objective contained in rule 2 of the Rules to deal with cases fairly and justly.

The interests of justice

11. As set out above, under rule 70 of the Rules a judgment will only be reconsidered where it is necessary in the interests of justice to do so. This allows an employment tribunal a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. Although there is that discretion, it must be exercised judicially. Amongst other things, this means having regard not only to the interests of the party seeking the reconsideration but also to the interests of the other party to the proceedings and having in mind that there is an underlying public policy principle in all proceedings of a judicial nature that there should, so far as possible, be finality in litigation.

12. The phrase "interests of justice" is not defined in the Rules but, drawing on examples arising from rule 34 of the previous 2004 Tribunals Rules of Procedure, it is likely to include instances where the judgment was wrongly made as a result of an administrative error; a party did not receive notice of the proceedings; the judgment was made in the absence of a party; new evidence has come to light since the conclusion of the hearing, particularly if its existence could not have been reasonably known or expected at the time of the hearing.

13. That is not an exhaustive list, however, and I repeat that the guiding principle for me is to seek to deal with this application fairly and justly in accordance with the overriding objective contained in rule 2 of the Rules.

Submissions

14. Mr Menon and the claimant made oral submissions by reference to relevant statutory and case law. In this regard Mr Menon relied upon the respondent's written response to the claimant's application for reconsideration and the claimant relied upon, first, the written application for reconsideration that he had made and, secondly, his written response to the respondent's written response.

15. 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 written documents to which I have just referred are a matter of record, I have concentrated primarily on the oral submissions.

16. The key points made by the claimant in support of his application included as follows:

16.1. The original decision that I had made was mainly down to him not being in an analogous situation but at paragraph 31 of the decision of the Supreme Court in Gilham (271), Lady Hale states 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 ground or reason for it. What matters is that the judicial office-holder has been treated less favourably than others *in relation to the exercise or enjoyment of the Convention right in question*, the right to freedom of expression. She is not as well protected in the exercise of that right as are others who wish to exercise it."

16.2. In the Press Summary of the decision in Gilham (158) it is stated, "Judges hold a statutory office, and office-holders do not necessarily hold office pursuant to a contract", and, "In the appellant's case, the essential components of the relationship are derived from statute and not a matter for negotiation"; that is exactly the same as a councillor. Also in that Summary it is stated, "she has been treated less favourably than other employees and workers who made responsible public interest disclosures"; that is exactly the same as me and the respondent has confirmed my status.

16.3. In the conclusion to an article produced by a barrister (201), which considers the decision in Gilham, it is stated:

16.3.1. "A Judge as a worker for discrimination legislation, but not the whistleblowing legislation", which is the same as a councillor; and

16.3.2. "A Judge, and very likely any office holder, can nevertheless rely on whistleblowing protection by a legislative interpretation based on art.14"; my emphasis being on "any office holder".

16.4. Referring to the points made in the respondent's response to my application for reconsideration (324):

16.4.1. Paragraph 3 – the 2015 legislation is only applicable to a council's chief executive, monitoring officer and head of finance. The respondent's constitution refers to disciplinary action against those three employees. It must bring in an externally legally qualified person to investigate.

16.4.2. Paragraph 4 – it is untrue that councillors have superior protection than that available to employees.

16.5. The respondent is simply saying that councillors are not similar to employees but Lady Hale said that being in an analogous situation did not rule it; see paragraph 31 in Gilham above.

16.6. The respondent has said that a decision of the Employment Tribunal in R Moon v Lancashire and South Cumbria NHS Foundation Trust, Case Number 2414248/2021 (331), is not binding but has not included any

authorities. In accordance with the decision of the House of Lords in AL (Serbia) v Secretary of State for the Home Department [2008] 1 WLR 1434,

",,,, unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification."

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

17.1. The Concise Oxford Dictionary defines "analogous" as meaning, "Similar, parallel" (379). The word in Gilham is "analogous" and not "identical"; and the claimant's complaint seems to be that he is not in an identical position to employees of the respondent, but that is not the test.

17.2. The issue is not whether the claimant has exactly the same rights but whether he has protection.

17.3. The claimant is correct to an extent that protection is available only to the three senior officers of the respondent (367) but that was updated in 2015 (372 and 375), after the Localism Act 2011. The top three staff members are the only ones with relevant independent person protection and that is the same as is given to councillors by the Localism Act; the claimant had the same protection. Those staff do not have absolute protection from dismissal. A councillor can only be removed by the electorate; there is absolute protection from dismissal. When considering if the claimant was in an analogous situation account has to be taken of this because he has an advantage that no employee has. As a result, there is no section 103A protection because it is not needed. The claimant seeks a hybrid position: he cannot have protection from dismissal because section 103A does not apply and he can only (if he is right) claim detriment. How can it be that the whistleblowing legislation can only protect from detriment when there is no protection from dismissal under the 1996 Act? There is no case in which a person has protection from detriment and not from unfair dismissal. The definition of "worker" was extended under section 43K. Leaving that out of account, the claimant is not in an analogous situation because the claimant in Gilham had section 103A protection and could claim unfair dismissal. What is referred to in Gilham as "the right to freedom of expression" can be infringed in two ways dismissal and detriment. The claimant has adequate protection in respect of dismissal.

17.4. Looking at detriment, the claimant has what the respondent's employees do not have: he already has statutory protection of an independent person to intercede on his behalf if he is the subject of an allegation. Such person can ensure before a claim of detriment is made that the detriment is remedied or 'headed off at the pass'. It is pre-emptive relief that employees do not have: see sections 27 and 28 of the Localism Act, particularly section 28(7). Employees other than the top three referred to above do not have that right.

17.5. He had been unable to find any appellate authority where whistleblowing protection had been held to extend to an elected official. By reference to authorities in his previous skeleton argument, any complaint by a councillor is a matter for judicial review. What the claimant is doing is to shoe him and his circumstances into Gilham in an unthinking and formulaic way without regard to the significant differences between an employee and a councillor.

17.6. The facts of the case in Moon were materially different as she was not an elected official. The point is not whether the claimant's position was analogous but whether it can be less favourable, which must be viewed in the round (i.e. dismissal and detriment) and in what way his position is inferior bearing in mind the right the claimant has and other employees do not have: the benefit of the independent person and insulation from dismissal.

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

18.1. Referring to paragraph 32 in Gilham, the judge's status got her over the hurdle, and referring to paragraph 41, his position was the same as in Gilham: a councillor has nowhere to turn in respect of victimisation or detriment apart from judicial review at a cost of some £15,000, which compares with an employee who can complain to an employment tribunal free.

18.2. In this respect Mr Menon had referred at length to dismissal but that is not relevant.

18.3. He relied upon paragraph 144 in the decision in Moon.

18.4. Mr Menon referred to section 28 of the Localism Act but an independent person can only give views. He or she cannot change the views of the Standards Committee.

Consideration

19. As stated above, I provided full reasons for my judgment arising from the Original Hearing, which were sent to the parties on 3 May 2022. In those reasons I set out in some detail the evidence of or on behalf of the parties, the submissions made by or on behalf of the parties, relevant statutory and case law and how I had applied the facts and the law so as to determine the issues that were before me. I have again had regard to those matters and do not need to restate them here. I have, however, brought all such matters and the points I made in the Consideration section of the judgment I made into account in coming to my judgment in relation to the reconsideration application. That being so, I have focused in this Consideration section of this judgment primarily on the points that were raised in the claimant's written application for reconsideration and at the reconsideration hearing.

20. I first address certain of the matters arising from the submissions made at this hearing. I certainly accept the opinion of the barrister to which the claimant referred

me that one implication of the decision in Gilham is that a Judge can rely on whistleblowing protection by a legislative interpretation based on Article 14 and, further, that that might equally apply in the case of certain other office-holders. That said, such office-holders would need to establish, referring to the second question set out in paragraph 28 of the decision in Gilham and the answer to that question given in paragraphs 30 and 31 of that decision, that he or she is in an analogous situation; and in that regard I accept the submission of Mr Menon that "analogous" does not mean "identical". Further, like Mr Menon I have been unable to find any appellate authority to the effect that whistleblowing protection extends to an elected member of a local authority.

21. This leads to what is perhaps the key point made by the claimant in his application was that the Supreme Court had confirmed at paragraph 31 of its decision in Gilham that an analogous situation was not required (in respect of which he also relied upon paragraphs 26-37 of that decision) and contended, "No mention of analogous situation from the SC".

22. I do not accept that contention. As mentioned above, the second question in paragraph 28 of the judgment in Gilham is, "has the claimant been treated less favourably than others in an analogous situation". It is that question which was the focus of the Original Hearing and is therefore the focus of this hearing; and I repeat the point made in paragraphs 18 and 21 of my original judgment that the focus of the parties at the Original Hearing was on the second element of that question of whether the claimant was in a situation analogous to that of others.

23. Central to this reconsideration is what is said in paragraphs 30 and 31 of the judgment in Gilham, upon which both parties relied. In paragraph 30 Lady Hale refers to the claimant in that case having "been denied the protection which is available to other employees and workers who make responsible public interest disclosures within the requirements of Part IVA of the 1996 Act." Lady Hale is renowned for being careful to use precise language and, in the highly unlikely event that she did not do so in drafting the judgment in Gilham, the point would have been identified by any one of the other four judges in that case, all of whom agreed with that judgment. In the phrase that I have just quoted, reference is made to "other" employees and workers. I repeat that I do not accept that the use of that word was loosely made or was otherwise in error. In that phrase the reference could have been simply to 'employees and workers' but that is not what is said; similarly, the reference could have been to 'other people' but again that is not what is said. Instead, I repeat that the phrase is "other employees or workers" and I am satisfied that the Supreme Court intended that and intended to convey something by that.

24. Similarly, in paragraph 31 the reference is to "others" who wish to exercise the right to freedom of expression, which I am satisfied, following on from paragraph 30, is to be read as meaning "other employees and workers" who may exercise rights under Part IVA of the Employment Rights Act 1996.

25. There is a rule of statutory construction known as "ejusdem generis", which, at risk of some oversimplification, means that where a list of specific words is followed by one or more general words, the general words are limited in meaning to the same

kinds of things as are mentioned in the list of specific words. A trite example would be that if there were to be a list containing the words, "sheep, cows, pigs" followed by the general phrase "and other animals", it is likely that that general phrase "other animals" would be deemed to include other farm animals such as goats and horses but not lions or tigers. I do not suggest that the ejusdem generis rule is applicable in this case (not least because I repeat that it is a rule of statutory construction) but I do consider that parallels can be drawn to an extent.

26. In the above context, and particularly the reference to "other employees and workers", I am satisfied that what the Supreme Court intended to convey by using that phrase "other employees and workers" was that the others who are to have the benefit of being included within 'limb (b)' (as is referred to in paragraph 43 in Gilham) are to be other people who, like the claimant in Gilham, share at least some of the characteristics of an individual with the status of employee or worker and, therefore, can be said to come within a class or category with "other employees and workers" and so avail themselves of the protection provided by Part IVA of the 1996 Act.

27. Such characteristics might include the following: the exercise of control over the other; the ability to discipline the other; the obligation to pay the other as consideration for work done; the others' entitlement to paid holiday and to sick pay and other similar statutory rights. In this connection I refer again and bring in to account what I have recorded in paragraphs 23 to 29 inclusive of my original judgment. Put the other way, I am not satisfied that in using the phrase "other employees and workers" the Supreme Court intended to convey a reference to any individual or relationship that did not possess such characteristics, and I am not satisfied on the evidence available to me that the relationship between the claimant and the respondent as an elected member of a local authority did have such characteristics.

28. At the hearing I explored this line of thinking with the claimant and Mr Menon and have had regard to the observations made by each of them.

29. Further and in addition, in that paragraph 43 in Gilham, it is suggested that 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 ….". For the reasons set out in this judgment and my original judgment, and having taken into account everything that the claimant has written and submitted to me at both hearings, I am not satisfied that he, as a councillor, did work "by virtue of appointment to an office whereby the office-holder undertakes to do or perform personally any work or services".

Decision

30. For the above reasons and those contained in my original judgment, and having carefully considered the claimant's application for reconsideration, the reasons he has given and the submissions made by him and on behalf of the respondent at this hearing, I remain satisfied (referring to question (ii) in paragraph 28 of the decision in Gilham) that the claimant does not come within the phrase "others in an analogous situation" and, therefore, 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.

31. That being so, in accordance with rule 70 of the Rules, the original decision made on 1 April 2022 and sent to the parties on 3 May 2022 is confirmed.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 21 October 2022

JUDGMENT SENT TO THE PARTIES ON 24th October 2022

AND ENTERED IN THE REGISTER 24th October 2022

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