EMPLOYMENT TRIBUNALS

Claimant: The Reverend D Green

Respondent: The Lichfield Diocesan Board of Finance

Heard at: Manchester **On:** 4-6 July 2023 and 12 and 20 July 2023 (in chambers)

Before: Employment Judge Slater

Representation
Claimant: In person
Respondent: Ms M Murphy

RESERVED JUDGMENT

1. The claimant was a "worker" for the purposes of bringing a complaint of protected disclosure detriment.

2. The claimant was not an employee for the purposes of bringing a complaint of disability discrimination under section 39 of the Equality Act 2010 but can pursue his complaints under section 49 as the holder of a personal office.

3. The Tribunal has no jurisdiction to consider a complaint under s.53 against the respondent and this claim is dismissed.

4. If complaints of indirect discrimination and complaints relying on section 55 of the Equality Act 2010 are included in the claim form, these complaints are dismissed on withdrawal by the claimant.

REASONS

Summary

1. This preliminary hearing was primarily about whether the claimant, who is an ordained deacon in the Church of England and was, at relevant times, an assistant

curate in a parish in the Diocese of Lichfield, had the status to enable him to bring complaints of detrimental treatment because of making protected disclosures (whistleblowing) and disability discrimination based on a perception that he was disabled by reason of autism.

Claims and issues

2. The claimant brings complaints of protected disclosure detriment (whistleblowing) under the Employment Rights Act 1996 (ERA) and disability discrimination, based on a perception that the claimant is autistic, under the Equality Act 2010 (EQA).

3. The claims are all brought against the Lichfield Diocesan Board of Finance. The respondent made an application for the Bishop of Lichfield in his corporate capacity to be joined as a respondent but the claimant, by letter dated 2 March 2023, objected to that application.

4. This public preliminary hearing was listed for 3 days to deal with, on the first two days, issues which can be broadly described as "status" issues, going to whether the Tribunal has jurisdiction to consider the complaints. These issues were set out in the record of a preliminary hearing held on 30 March 2023. The claimant disagreed with the description of his claim, in the record of that hearing, including a complaint that he suffered a detriment of refusal to ordain him as a priest as a result of making a public interest disclosure. After the preliminary hearing, the claimant also identified a further basis on which he asserts that he could bring his complaints of disability discrimination, relying on section 49 the Equality Act 2010 (EQA), being the holder of a personal office. The respondent did not object to the claimant relying on this alternative basis for his discrimination complaints. The claimant does not assert that he was employed by the respondent under a contract of employment.

5. We had a considerable amount of discussion about the issues at the start of the hearing and after I had done my reading. I produced three versions of a revised list of issues which I gave to the parties, with further discussions about the issues between the different versions. The final version of this list of issues relating to the status, agreed by the parties prior to closing submissions, is annexed to these reasons, with the correction of a typographical error and correction to dates in number 4 of the list of complaints of direct discrimination for the s.39 or s.49 EQA complaints.

6. In the course of discussion on the first day of the hearing, the claimant identified four complaints of direct discrimination which he wishes to pursue, relying on section 39 or section 49 EQA. At the start of the second day, the claimant produced a table setting out further complaints he wished to bring. Since the respondent informed me that they accepted that at least some of the four complaints identified on the first day were referred to factually in the claim form and they would not object to an amendment to plead them as complaints of direct discrimination, I decided it was not necessary, at this hearing, to spend what might be a considerable amount of hearing time clarifying further complaints of direct discrimination which the claimant wished to bring. There would be at least some complaints of direct discrimination under s.39 or s.49 going forward to a further hearing, so clarification of other complaints and any amendment applications could

be dealt with at a later stage. In closing submissions, the respondent accepted that the first of these four complaints was included in a factual sense in the claim form, although identified as a whistleblowing detriment complaint and not as a direct disability discrimination complaint, but the respondent did not object to the claim being amended to "relabel" this complaint as one of direct disability discrimination as well as whistleblowing detriment.

7. The respondent wished it to be noted that they take issue with the third complaint of direct discrimination (delay in the Bishop of Stafford allowing the claimant to go forward to ordination while reasonable adjustments were looked into), Ms Murphy arguing that delay was a consequence of an act, rather than being an act or omission, so it was not less favourable treatment. However, the complaint is currently framed as put by the claimant in his claim form and identified by him in discussion so I have retained it in the list in this form. If the claimant wishes later to apply to amend this complaint, that is a matter for him.

8. The list of issues to be decided also includes issues as to whether four complaints of direct discrimination identified by the claimant were included in the claim form and, if not, whether the claimant should be allowed to amend his claim to include these complaints.

9. The claimant had indicated at the previous preliminary hearing that he was bringing complaints of indirect disability discrimination as well as direct disability discrimination. However, following discussion about the requirements for a complaint of indirect disability discrimination, the claimant said that he was not pursuing any complaint of indirect discrimination.

10. The issues identified at the previous preliminary hearing also included determining whether respondent was an employment provider as defined by section 55 EQA. However, after discussion, the claimant said he was not pursuing any complaint under section 55.

11. It is not clear that the claim form included any complaint of indirect discrimination or any complaint under section 55 EQA. However, for the avoidance of doubt, I dismiss such complaints on withdrawal by the claimant.

12. The whistleblowing complaints had not been clarified prior to this hearing and I did not consider it necessary to do so at this hearing, since it was agreed that the claim form contained complaints of protected disclosure detriment. If the claimant succeeds in his status arguments, so the Tribunal has jurisdiction to consider these complaints, the complaints will be clarified at the next preliminary hearing.

13. The status issues took the three days of hearing, plus a further two days in chambers. There was not time to deal with the ancillary matters referred to in the record of the preliminary hearing on 13 March 2023. These ancillary matters were: dealing with an application to amend the claim; dealing with the respondent's application to include the Bishop of Lichfield as a second respondent; and considering the respondent's application for strike out on the grounds that the claim has no reasonable prospect of success or deposit on the grounds of little reasonable prospect of success.

14. I have listed a further preliminary hearing to deal with clarification of the complaints, any amendment applications made by the claimant and whether the Bishop of Lichfield should be added as a second respondent. There is an existing application from the respondent for strike out on the grounds of the claim has no reasonable prospect of success or for a deposit on the grounds of little prospect of success. This application may be revised in the light of my decision and the clarification of the complaints at the start of the next preliminary hearing, but will be dealt with, unless the judge considers this inappropriate, at the next preliminary hearing.

Evidence

15. I heard evidence from the claimant and, for the respondent, from The Right Reverend Dr Michael Ipgrave, Diocesan Bishop of Lichfield (the Bishop or the Diocesan Bishop) and Mrs Julie Jones, CEO/Diocesan Secretary of the Lichfield Diocesan Board of Finance (DBF). There were written witness statements for all three witnesses and they gave oral evidence.

16. There was an agreed bundle of 251 pages initially. Some additional pages were added by the respondent, with the agreement of the claimant.

Facts

17. The Church of England is made up of dioceses in England. Each diocese is headed by a Diocesan Bishop. Within each diocese, there are a number of benefices, each under the care of a rector or vicar.

18. This case concerns matters within the Diocese of Lichfield. The role of the Lichfield Diocesan Board of Finance (DBF) is to facilitate the work of the Church of England in the Diocese of Lichfield. The document on p.251 sets out the organizational structure of the DBF. The DBF is a charitable company limited by guarantee. Its directors are the members of the Bishop's Council. The Bishop's Council is an advisory body, responsible for considering matters of policy, for advising the Diocesan Bishop and for determining how matters should be taken forward to the Diocesan Synod for further consideration. Julie Jones is Secretary of the Bishop's Council

19. The Church of England and its officers are governed by canon law. Canon law is derived from a number of sources. It includes a set of written "Canons of the Church of England" (the "Canons"), which are pre-Reformation in origin and were subject to the last major revision in the 1960s. Since 1920, a major source of canon law has been the Measures passed by the Church Assembly (1920-1970) and the General Synod, which replaced the Church Assembly in 1970. The Canons are part of the law of the land and receive the Royal Assent and Licence. No canon can be made which is "repugnant to…the customs, laws or statutes of the realm" (Submission of the Clergy Act 1533, as applied by the Synodical Government Measure 1969 s.1(3)). Once passed by the General Synod, a Measure is scrutinized by the Ecclesiastical Committee of both Houses of Parliament. On the report of that Committee, each House is invited to pass a resolution approving the Measure (without the right to amend it) and it goes for Royal Assent. Once assented to, a Measure has the same force and effect as an Act of Parliament.

20. Under canon law, the Bishop of a Diocese has the responsibility for discerning who should be ordained deacon and then priest. Canon C4 states:

> "Every bishop shall take care that he admit no person into holy orders but such as he knows either by himself, or by sufficient testimony, to have been baptized and confirmed, to be sufficiently instructed in Holy Scripture and in the doctrine, discipline, and worship or the Church of England, and to be of virtuous conversation and good repute and such as to be a wholesome example and pattern to the flock of Christ."

21. No one can minister within a diocese without the Bishop's permission.

22. Ministers often hold an ecclesiastical office under the Clergy (Ecclesiastical Offices) Terms of Service Measure 2009 (the 2009 Measure) under a framework know as "Common Tenure". The 2009 Measure gave clergy under Common Tenure some limited rights to go to an employment tribunal: for failure to provide a written statement of terms and to complain of unfair dismissal if dismissed on grounds of capability. No right was introduced to complain of detrimental treatment or unfair dismissal because of making protected disclosures. No evidence has been provided that there was any discussion in General Synod or Parliament about whether or not to provide such rights to clergy under common tenure.

23. The Guide to Common Tenure (2016 edition) states that the statement of particulars is not a contract of employment. It notes that the statement of particulars is not intended to be a comprehensive statement of all the rights and obligations that apply to clergy office holders. It states that much material that is relevant is not included e.g. material in the Canons. (p.134). The Guide includes a section summarising legal entitlements conferred on clergy by common tenure (p.129). These include: an uninterrupted rest period of not less than 24 hours in any period of seven days; a minimum of 36 days' annual leave; maternity, paternity, parental and adoption leave in accordance with directions given by the Archbishops' Council; and to request time off, or adjustments to the duties of the office, to care for dependants in accordance with directions given by the Archbishops' Council. Obligations conferred on clergy by common tenure are summarized as including: an obligation to participate and co-operate in ministerial development review; to participate in arrangements approved by the diocesan bishop for continuing ministerial education and development; to use all reasonable endeavours to make arrangements for the duties of the office to be performed by another person when unable to perform the duties of office through sickness, which may, where appropriate, consist of notifying a responsible person or authority of the absence.

24. Some clergy are employed as chaplains e.g. by the NHS or the Prison Service, or by the DBF in a role such as the Bishop's Director of Ordinands.

25. On 30 June 2019, the claimant was ordained as a deacon by the Bishop and licensed as assistant curate to the Benefice of Longnor, Quarnford, Sheen and Warslow with Elkstone for a four year term, terminating on 29 June 2023 (p.95). The Bishop wrote:

> "We require you to minister there under the direction of the Incumbent…. so as assist in the spiritual care of the Parishioners thereof and We invest you with all the rights and duties belonging to your office: to which end We charge you

> and give you our licence and authority to preach the Word of God; to lead public worship; to read the Common Prayers and to perform all ecclesiastical spiritual and temporal duties of your office; doing all things in your power to evangelize and to instruct the people of the parishes comprised within the Benefice in the Christian faith.
>
> "And We further Authorise you to exercise the ministry of your Holy Order at any time or place within the Diocese of Lichfield at which the Incumbent or other competent authority shall assent to you so officiating."

26. The Licence was issued subject to 2009 Measure, regulation 29(1)(c).

27. The Licence and Authority specified that this was a training post and the claimant was required to undertake ministerial education whilst he held it.

28. The legal effect of ordination as a deacon is that the person is called to that order, recognized by law and charged with functions which are spiritual in nature, designated by law and described in the Ordinal for Deacons. The Ordinal was originally annexed to the Book of Common Prayer but the version most often used is that in Common Worship: Services and Prayers for the Church of England.

29. According to the Ordinal:

> "Deacons are called to work with the Bishop and the priests with whom they serve as heralds of Christ's kingdom. They are to proclaim the gospel in word and deed, as agents of God's purposes of love. They are to serve the community in which they are set, bringing to the Church the needs and hopes of all the people. They are to work with their fellow members in searching out the poor and weak, the sick and lonely and those who are oppressed and powerless, reaching into the forgotten corners of the world, that the love of God may be made visible.
>
> Deacons share in the pastoral ministry of the Church and in leading God's people in worship. They preach the word and bring the needs of the world before the Church in intercession. They accompany those searching for faith and bring them to baptism. They assist in administering the sacraments; they distribute communion and minister to the sick and housebound.
>
> Deacons are to seek nourishment from the Scriptures; they are to study them with God's people, that the whole Church may be equipped to live out the gospel in the world. They are to be faithful in prayer, expectant and watchful for the signs of God's presence, as he reveals his kingdom among us."

30. Being ordained priest or deacon is distinct from being appointed to a particular employment or ecclesiastical office. Ordination as a deacon or priest is not an automatic route to any particular employment or ecclesiastical office (with or without stipend). Under current canon law, except in rare cases of voluntary relinquishment or disciplinary prohibition, requiring formal legal process, a person ordained deacon or priest retains that status until death.

31. Some curates and priests are in non-stipendary (unpaid) roles. The claimant's evidence was consistent with a description of the purpose of a stipend on the

Church of England website: “It is paid in order to enable the clergy person to exercise their ministry without the need to take another job in order to earn their living.” Fees paid for weddings and funerals are commonly assigned to the diocese and “set off” against the stipend received by the incumbent.

32. Receipt of a stipend does not bring with it any particular obligations. A non-stipendiary deacon or priest will have the same obligations under canon law as a stipendiary deacon or priest.

33. Ministerial education does not consist only of professional training or academic study. During the initial stage of ministerial training, as well as studying theology as an academic discipline, the ordinand opens up the whole of their lives and relationships to the process of personal spiritual formation. This formational training continues into ordained life and throughout a person’s ministry.

34. The formation criteria for ordained ministry in the Church of England were formulated by the Ministry Division of the Church of England. These fall under seven headings:

34.1. Christian faith, tradition and life
34.2. Mission, evangelism and discipleship
34.3. Spirituality and worship
34.4. Relationships
34.5. Personality and character
34.6. Leadership, collaboration and community
34.7. Vocation and ministry within the Church of England.

35. Because deacons need to continue their formation in a title post, they will not be ordained as deacon unless they have such a post to go to. There is a process of appointing Training Incumbents and offering curacies.

36. The claimant’s post as an assistant curate in training was a stipendiary (paid) role. In addition to the stipend, the claimant was provided with housing during his curacy.

37. As an assistant curate in training, the claimant was placed with a Training Incumbent. An incumbent is a vicar, rector or team rector with a benefice (a permanent Church appointment). The claimant’s Training Incumbent was the incumbent of the benefice to which the claimant was licensed as an assistant curate. The Training Incumbent gave guidance to the claimant and delegated some tasks to the claimant. For example, he would ask if the claimant was free to take a funeral on a particular day. When the Training Incumbent was on a period of long term sick leave, the claimant was approached directly by funeral directors or families, asking if he would conduct funerals. The claimant was not obliged to conduct any funeral.

38. The claimant was issued with a statement of particulars of office under the 2009 Measure (p.99). The claimant says he did not receive this until April 2023. The respondent says they sent out a version in July 2019. It is not necessary for me to decide whether or not the claimant received a version of this statement before April 2023. There is no dispute that the terms set out in the statement in the bundle correctly reflect the terms applying to the claimant. These included that the

post was a full-time stipendiary post; the stipend to be paid (£24,860 per annum as at 1 April 2019; a provision about reimbursement of expenses reasonably incurred; and provision of housing. It set out provisions about rest periods: the claimant was entitled to an uninterrupted rest period of not less than 24 hours in each period of seven days, and at least once a month an uninterrupted rest period of 2 consecutive days. It stated that the claimant was entitled to 36 days' annual leave in each full leave year, which began on 1 January, and, in addition, time off in lieu of the Bank Holiday entitlement in respect of Christmas Day and Good Friday. There were also provisions about maternity, paternity and other leave reflecting the entitlements under common tenure. If unable to perform his duties because of sickness, paragraph 10 required the claimant to inform the officer of the diocese designated for this purpose and to provide a medical certificate for absence of more than 7 days. He was required to use all reasonable efforts to make arrangements for the duties of his office to be performed by another person during any absence because of illness. Other obligations were to cooperate in any ministerial development review and to use all reasonable endeavours to participate in and complete any training provided for him. Reference was made to a learning agreement. Paragraph 15 stated that the body to be treated for the purpose of the regulations as the respondent in any proceedings he might bring before an employment tribunal was the Diocesan Board of Finance of the Diocese of Lichfield. The statement was signed by Julie Jones, an officer of the diocese nominated for this purpose under regulation 3 by the Bishop of Lichfield.

39. The Learning Agreement referred to in the statement of particulars was an agreement between the claimant and his supervisors: the Incumbent of the Longnor Benefice, and The Rev'd Dr Jeanette Hartwell, Director of Reader and Curate Training, appointed by the Bishop of Lichfield (p.106 and 110). The first clause of the agreement states that it is not intended to be a legally binding agreement. The agreement refers to a programme to be attached to the agreement, showing how the learner's time would be allocated to various activities. If such a programme was completed, neither party has included this in the bundle. The activities referred to in the agreement are: Worship, Spirituality and personal development, Structured learning and reflection, Team working, Pastoral responsibilities, Administration and Finance, and Time off and annual leave.

40. The Diocese of Lichfield has guidelines for the newly ordained and their incumbents. The Handbook for Ordinations 2019 begins at page 145 in the bundle. Points stated to be given high priority include: a regular staff meeting, weekly with full-time staff, to include a review of the past week, forward planning for the next week, exchange of pastoral information and detailed arrangements for coming events or responsibilities; a regular study day to be agreed; mandatory attendance at IME Phase 2 events.

41. The duties of a deacon are set out in ecclesiastical legislation, in particular in the Canons and the Ordinal. The functions for deacons in the Canons and Ordinal embrace spiritual, liturgical and doctrinal matters. The claimant gave evidence that most of the day to day activities of clergy are dictated not by contract but by conscience, subject to guidance from the Training Incumbent, in the case of a deacon serving as an assistant curate in training.

42. In accordance with the Canons, ordained deacons must say morning and evening prayer and normally attend Sunday services and other principal Feast Days.

43. A curate's duties are not enforceable, save to a very limited extent under the Clergy Discipline Measure 2003 (CDM).

44. When asked by me what he regarded as contractual obligations, the claimant referred to: saying morning and evening prayer on a daily basis; being present on most Sundays; pastoral care of parishioners; academic work; carrying out duties delegated to him by his Training Incumbent; and carrying out duties when his Training Incumbent was on sick leave such as dealing with memorial applications. In answer to further questions from Ms Murphy, the claimant said there was no contractual obligation to conduct funerals, but a moral obligation. He agreed that the obligation in relation to prayer was under canon law, rather than being a contractual obligation.

45. There are statutory obligations on curates in training, which also apply to other ordained ministers and others, to report safeguarding concerns.

46. Deacons serving as assistant curates in training, as with other clergy, enjoy a considerable degree of autonomy over their activities, within the broad framework of ecclesiastical law.

47. Curates have a high degree of autonomy as to how they manage their time between any appointments, services or other formal engagements.

48. At least initially, the content of a curate's day to day activities will be shaped by those of the Training Incumbent. There will be an element of shadowing and, later, delegation. The curate is also encouraged to explore and develop their own particular gifts and abilities, with a view to discerning where their future ministry may lie.

49. Deacons are normally ordained priests around one year into curacy. Some take longer and others remain indefinitely as deacons. A few never intend to be ordained priest but to remain as "distinctive deacons". It is unusual for a deacon who had intended to be ordained priest not to be so ordained.

50. The claimant had intended to be ordained priest. He was not ordained priest during his period as an assistant curate in training. He does not make a complaint about not being ordained priest. One of the complaints of direct discrimination which the claimant wishes to pursue is about a delay in allowing him to go forward to ordination while reasonable adjustments for a perceived disability of autism were looked into.

51. On 18 October 2022, the Bishop of Lichfield decided that the claimant would not be ordained priest in the Diocese of Lichfield and wrote to him to this effect.

52. In order to take up a post with Common Tenure, as a deacon or a priest, the curate must complete the second stage of their Initial Ministerial Education (IME2) training. Stage 1 is ordination training at a Theological Training Insitution and is completed prior to ordination as a deacon and beginning curacy. Ordinands are

normally certified as having completed IME2 and being capable of applying for incumbent status roles around the third year of their curacy. Their office as a curate continues for up to a further year to allow them time to find their next post. It is the responsibility of the Diocesan Bishop to sign off curates' training. The Bishop of Lichfield delegates this responsibility to the Area Bishops, who act on the recommendations of the Director of Ministry. In the case of the claimant, the Area Bishop was the Bishop of Stafford. The Director of Ministry was the Rev'd Prebendary Dr Jeanette Hartwell.

53. In deciding whether to sign off a curate's training, curates are reviewed in the light of the formation criteria (see paragraph 34).

54. On 21 January 2022, the Bishop of Stafford made it clear in a meeting that his decision on whether to ordain the claimant as a priest was dependent on his progress in IME2.

55. By a letter dated 16 November 2022 (p.252), the Bishop of Stafford informed the claimant formally that his assessment was that the claimant's ministerial formation and practice did not currently satisfy the standards expected by the Church of England for Primary Responsibility, as set out in the Formation Criteria and he did not expect that the claimant would meet these criteria by the end of his curacy. The claimant relies on this letter as conveying the decision not to "sign off" his IME2 stage of training. The claimant was given the opportunity to appeal this decision to the Bishop of Lichfield, but did not do so.

56. Most employees of the respondent are lay people. The DBF employs a small number of ordained ministers. These include the Director of Ministry. The DBF also employs under contracts of employment a small number of interim ministers on fixed term contracts, most of 6-12 months, to serve a particular parish. These are all priests. Other interim ministers, on longer terms, such as 3-5 years, do not have contracts of employment but serve under Common Tenure.

57. I heard evidence about Simon Foster, who is employed by the respondent as Diocesan Mission Enabler, advising and supporting parishes in developing their mission, but is also a non-stipendiary assistant curate in training, licensed to a particular parish. Mr Foster has been ordained as a priest.

58. The claimant would have needed to be ordained as a priest and have been "signed off" as having completed IME2, to be able to apply for positions as an incumbent.

59. There are some paid positions open to people who have been ordained as a deacon, but not a priest, and for which completion of IME2 is not an essential requirement e.g. roles as chaplain in the NHS or the prison service.

60. I accept the claimant's evidence that he was told by someone at another diocese, when he enquired about applying for Permission to Officiate as a deacon, that lack of IME2 sign off was potentially an issue that would make it difficult to receive him. Permission to Officiate does not, by itself, bring with it any entitlement to pay and is separate from having a paid position. I consider that this reaction is, however, an indication that the claimant might be viewed with some concern as to

his suitability for a paid role, in theory open to him, if he has not completed his IME2.

Submissions

61. Ms Murphy produced a skeleton argument at the beginning of the hearing. She updated this and produced a final version at the beginning of the third day, before making oral closing submissions. She took us through the changes to the original version and made some additional oral submissions.

62. The claimant made oral submissions only.

63. During closing submissions, the claimant said he did not argue that he had a contract with the respondent.

64. The respondent's written submissions can be read if required. I do not seek to summarise both parties' submissions but address the principal arguments in my conclusions.

Law

Law relating to "worker" status for bringing a protected disclosure detriment complaint

65. Section 47B(1) Employment Rights Act 1996 (ERA) provides:

> "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

66. "Worker" is defined in s.230(3) ERA as being:

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

67. In **Percy v Church of Scotland Board of National Mission** [2006] IRLR 195, the House of Lords held that an associate minister in a Church of Scotland parish was an "employee" within the meaning in the Sex Discrimination Act 1975, but this was based on finding, on the facts, that she was engaged under a contract personally to execute work as an associate minister. The definition of "employee" in what is now the Equality Act 2010 is the same as that of "worker" in the ERA.

68. In **Sharpe v Bishop of Worcester** [2015] IRLR 663, the Court of Appeal upheld an employment tribunal's decision that a Church of England rector was not

an employee or a worker within the definition of s.230 ERA, because there was no employment contract between him and the Bishop. The Rev'd Sharpe was not able to pursue a complaint of protected disclosure detriment because of this conclusion.

69. The **Sharpe** case pre-dated the case of **Gilham v Ministry of Justice** [2020] IRLR 52 in which the Supreme Court held that a judicial office holder could pursue a complaint of protected disclosure detriment, although there was no contractual relationship. The Supreme Court held that the failure to extend the protection of the provisions prohibiting detriment on grounds of making protected disclosures to judicial officers holders was a violation of Ms Gilham's rights under A.14 of the European Convention on Human Rights (ECHR) (non-discrimination on grounds of status) read with A.10 (freedom of expression) rights.

70. In paragraph 12, Lady Hale P recorded: "It is not in dispute that a judge undertakes personally to perform work or services and that the recipient of that work or services is not a client or customer of the judge." The issue as to whether the judge came within the definition of "worker" as set out in the ERA was whether the work or service was performed pursuant to a contract with the recipient of the work or services. The Court found that there was no contract.

71. The Court then went on to consider whether the failure to extend the protection of Part IVA to judicial office-holders was a violation of the judge's rights under A14 read with A10.

72. Lady Hale P identified at paragraph 28 four questions to be addressed:

72.1. Do the facts fall within the ambit of one of the Convention rights?

72.2. Has the applicant been treated less favourably than others in an analogous situation?

72.3. Is the reason for that less favourable treatment one of the listed grounds or some "other status"; and

72.4. Is that difference without reasonable justification – put the other way round, is it a proportionate means of achieving a legitimate aim?

73. The Court found the answer to all four questions to be clearly yes.

74. The answer to the second question was dealt with succinctly in paragraphs 30-31. Lady Hale P wrote, in paragraph 30: "The applicant, and others like her, have been denied the protection which is available to other employees and workers who make responsible public interest disclosures within the requirements of Pt IVA of the 1996 Act."

75. When considering question four, the Court recognised, at paragraph 35, that "sometimes difficult choices have to be made between the rights of the individual and the needs of society and that they may have to defer to the considered opinion of the elected decision maker." The Court noted that there was no evidence that either the executive or Parliament had addressed their minds to the exclusion of the judiciary from the protection of Part IVA ERA. Lady Hale P wrote: "There is no "considered opinion" to which to defer. The Court found that the difference was

without reasonable justification, the respondent having put forward no legitimate aim for the exclusion.

76. The Court considered that the definition of worker in the ERA should be extended to remedy the breach. Lady Hale P wrote, at paragraph 43:

> "it would not be difficult to include within limb (b) an individual who works or worked by virtue of an appointment to an office whereby the officeholder 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 officeholder."

77. I was not referred to, and am not aware of, any protected disclosure detriment claim brought by a member of the Church of England clergy (or, indeed, from any other denomination) since the **Gilham** decision, where Convention rights have been relied on to argue that the claimant is a "worker" under an extended definition.

Law relating to "employment" for an Equality Act 2010 (EQA) claim

78. The definition of "employment" in s.83(2)(a) EQA is "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work."

79. The Equal Treatment Framework Directive 2000/78/EC (the Framework Directive 2000) prohibits discrimination on the grounds of disability.

80. In **O'Brien v Ministry of Justice** [2014] UKSC 6, the Supreme Court held that a part-time judge was in an employment relationship within the meaning of the Framework Agreement on Part-Time Work and accordingly was to be treated as a "worker" for the purposes of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000. The Supreme Court's decision followed a reference to the European Court of Justice (CJEU). The Supreme Court noted, at paragraph 29, that the CJEU noted in its judgment that there is no single definition of worker in EU law. The PTWD and the Framework Agreement did not aim at complete harmonization of national laws in this area, but only, to establish a general framework for eliminating discrimination against part-time workers. It was for national law to determine whether a person in part-time work has a contract of employment or an employment relationship.

81. In **Perceval-Price v Dept of Economic Development** [2000] IRLR 380, the Court of Appeal for Northern Ireland held that tribunal judges were "workers" for the purpose of discrimination on grounds of sex. The Supreme Court in **Gilham** noted, in paragraph 8, that it was accepted that Ms Gilham's claim for disability discrimination as a result of failure to make reasonable adjustments would continue because of the decisions in **O'Brien** and **Perceval-Price**. The Court noted that **O'Brien** decided that a judge was a "worker" for the purposes of EU law and national law had to be interpreted in conformity with that and the same result was reached in **Perceval-Price** for discrimination on grounds of sex.

82. In accordance with the European Union (Withdrawal) Act 2018, EU derived legislation including the EQA continues to have effect. Section 6 of the 2018 Act preserves the principle that domestic courts are obliged to apply national law "so

far as possible" to give effect to the wording and purpose of the related EU directive.

83. Section 39 EQA prohibits certain discrimination against employees, including subjecting the employee to a detriment. Section 82(2) EQA defines employment as "employment under a contract of employment, a contract of apprenticeship or a contract personally to do work" as well as some "employment" not argued to be relevant in this case. Case law has equated the definition of employment in the EQA with the definition of a "limb (b)" "worker" for the ERA.

84. Section 49 EQA relates to office-holders. It includes a prohibition on a relevant person discriminating against the holder of a personal office by subjecting that person to any other detriment.

85. The effect of Schedule 6 paragraph 1 EQA is that, if s.39 applies in relation to an office, an office is not a personal office

86. Section 49 has its origin in amendments made to the predecessor legislation to the EQA. For example, the Sex Discrimination Act 1975 (SDA) was amended by the addition of sections 10A and 10B which related to discrimination against office-holders etc. The amendments were introduced by the Employment Equality (Sex Discrimination) Regulations 2005 SI 2005/2467. The Explanatory Memorandum to these Regulations explains that the amendments are needed so that the SDA and Equal Pay Act 1970 were compatible with the requirements of European Legislation. It was to implement Directive 2002/73/EC which updated the original Equal Treatment Directive (76/207/EEC)(ETAD). The Regulatory Impact Assessment attached to the Memorandum noted that the ETAD extended to office holders but the SDA and EPA did not extend to office holders who were not technically in employment but whose position may be similar to that of employees (p.25 of the Memorandum). Proposals for the amendment of the SDA to cover office holders not already specifically protected by the SDA in the Regulatory Impact Assessment included discussion about the position of clergy.

87. The Disability Discrimination Act 1995 was amended by regulations SI 2003/1673, to add similar provisions relating to office holders. I have not been able to find an Explanatory Memorandum relating to that Statutory Instrument.

88. With the consolidation of equality legislation in the EQA 2010, s.49 replaced the provisions relating to office holders in the predecessor legislation.

<u>Law relating to "qualifications bodies" EQA section 53</u>

89. The relevant part of section 53 EQA for this case is as follows.

> (1) A qualifications body (A) must not discriminate against a person (B)—
>
> (a) in the arrangements A makes for deciding upon whom to confer a relevant qualification;
>
> (b) as to the terms on which it is prepared to confer a relevant qualification on B;
>
> (c) by not conferring a relevant qualification on B.

90. S.54(2) defines a qualifications body as “an authority or body which can confer a relevant qualification.”

91. S.54(3) states that “A relevant qualification is an authorization, qualification, recognition, registration, enrolment, approval or certification which is needed for, or facilitates engagement in, a particular trade or profession.”

92. The EAT in **Rev’d Canon Pemberton v Right Reverent Inwood** [2017] IRLR 224, said that cases under section 54(3) are “fact dependent (paragraph 104).

Law relating to amendments

93. The Tribunal has power to permit a party to amend a claim, or to refuse permission to amend. In common with all such powers under the rules, the Tribunal must have in mind the overriding objective in rule 2, which is to deal with the case fairly and justly. That includes, so far as practicable, ensuring that the parties are on an equal footing, dealing with cases in ways which are proportionate to the complexity and important of the issues, avoiding delays, so far as compatible with proper consideration of the issues, and saving expense.

94. The leading case on how this discretion should be exercised remains **Selkent Bus Co Limited v Moore** [1996] ICR 836, in which the then President of the Employment Appeal Tribunal, Mr Justice Mummery, gave guidance on how Tribunals should approach applications for permission to amend. He wrote:

> **“Whenever the discretion to grant an amendment is invoked, the Tribunal should take account of all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.”**

95. Mummery J in **Selkent** identified a number of relevant circumstances on a non-exhaustive basis as follows:

> (a) The nature of the amendment. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.
>
> (b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions.
>
> (c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information. The paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

96. The Tribunal must consider whether a new complaint would be out of time as at the date of the application to amend. It may either decide the time point when dealing with the amendment or it may, if it does not refuse the amendment, grant the amendment subject to the time limit being decided at the final hearing.

97. In **Vaughan v Modality Partnership** [2021] IRLR 97, EAT, HHJ Tayler reminded tribunals that the core test in considering applications to amend is the exercise, described as fundamental, of balancing injustice and hardship in allowing or refusing the application. The **Selkent** factors should not be treated as a box ticking list to be checked off. **Selkent** factors are simply a discussion of the kinds of factors likely to be relevant when carrying out the required balancing process.

Conclusions

Whether the claimant was a worker and entitled to claim protected disclosure detriment (whistleblowing)

98. Since the claimant in closing submissions said he did not argue that he had a contract with the respondent (which I consider to be a correct concession on the facts), I need only to decide whether the **Gilham** extended meaning of worker applies.

99. I have to decide whether the answer to all four questions posed in **Gilham** is yes in the case of the claimant. I am considering the claimant in his position as an assistant curate in training. I am not deciding whether any other type of minister would be entitled to claim protected disclosure detriment.

100. The four **Gilham** questions are:

100.1. Do the facts fall within the ambit of one of the Convention rights?

100.2. Has the claimant been treated less favourably than others in an analogous situation?

100.3. Is the reason for that less favourable treatment one of the listed grounds or some “other status”?

100.4. Is that difference without reasonable justification – put the other way round, is it a proportionate means of achieving a legitimate aim?

101. The respondent accepted that the facts potentially fell within the ambit of the Convention rights: Article 14 (non-discrimination on grounds of status) read with Article 10 (freedom of expression). I consider the respondent was correct to accept this. The respondent disputes that the other four questions can be answered affirmatively.

102. In relation to the second question, the claimant argues that he was treated less favourably than others in an analogous situation. He considers the closest analogous case to be that of Simon Foster. He also compares his treatment with that of those interim ministers employed under contracts of employment.

103. In **Gilham**, there was no dispute between the parties that a judge undertakes personally to perform work or services and that the recipient of that work or services is not a client or customer of the judge. The comparison was made with others who performed work or services personally, but had the right to complain of detrimental treatment on the grounds of making protected disclosures. Little of the Supreme Court's judgment was spent on consideration of the second question, finding the answer in that case to be clearly yes (paragraphs 30-31). The Court was starting from the premise that Ms Gilham satisfied the definition of "worker" in the ERA, with the exception of the work being performed pursuant to a contract rather than pursuant to some different legal arrangement. It was not, therefore, difficult for the Court to conclude that Ms Gilham was being treated less favourably than others in an analogous situation, being other employees and workers who have protection against detrimental treatment when making protected disclosures. The Court did not identify any specific individuals or groups doing analogous work. I infer they did not consider this necessary because judges were in the same position as other employees and workers save for the lack of a contract. This is reinforced by the remedy the Court found: including 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 (paragraph 43).

104. I conclude that, for the **Gilham** extension to apply to the claimant, I would need to find that the claimant was performing personally any work or services otherwise than for persons who are clients or customers of a profession or business carried on by him. It is not agreed in this case that the claimant, as an assistant curate, was personally performing work or services. Considering whether the claimant was treated less favourably than others in an analogous position, therefore, requires a closer examination of the claimant's position and those with whom he seeks to make a comparison than was required in **Gilham**.

105. Ms Murphy submitted that an assistant curate cannot be in an analogous situation to employees and workers. She submitted that the claimant was in a process of spiritual discernment, a vocation, quite unlike any employees or workers of the respondent. She relied on what she described as the highly specific and peculiar position of clergy in arguing that they were not in an analogous position to employees and workers. She further submitted that Parliament had addressed its mind to what rights clergy should have, by providing rights including a limited right to claim unfair dismissal, by the 2009 Regulations and had not given clergy the right to complain to a Tribunal about detrimental treatment on the grounds of making protected disclosures. She submitted that some clergy, like Simon Foster, might hold an additional role as an employee or worker. Their employment and ordained roles were distinct. In relation to interim ministers, she submitted that they were not in an analogous position to the claimant because they were ordained priests, they were taken on to do a particular task for a parish and had a line manager, the Archdeacon. The claimant did not have a line manager in the same way.

106. I agree with Ms Murphy that clergy are in a specific and peculiar position. I do not agree, however, that this means that they cannot be in an analogous position to workers and employees. I will deal only with the position of a stipendiary assistant curate in training, the position held by the claimant, in reaching my

conclusions on this second question. Although it is true that an assistant curate in training has a vocation and is in a process of spiritual discernment, the curate also has duties. The curate has considerable autonomy in ordering their day, subject to guidance from their Training Incumbent. However, I consider it clear from the statement of particulars, learning agreement, guidance on common tenure and the Diocesan guidance for the newly ordained and their Incumbents, that curates have duties. If they had complete freedom to do what they wanted, in pursuit of their spiritual vocation, there would be no need to set out an entitlement to a day off a week, or a period of leave, or to require them to report sickness absence and to try to ensure that duties are covered if they are absent. I note that the Licence from the Bishop included the direction "to minister there [in the benefice] under the direction of the Incumbent…. so as assist in the spiritual care of the Parishioners thereof", which is consistent with the claimant being regarded as having duties in the parish (see paragraph 25). The respondent may not have the same legal tools available to it as conventional employers if duties are not fulfilled, but I do not consider this means that curates do not have real obligations and duties. I conclude that they undertake to perform work or services and the recipient of that work or services is not a client or customer of the curate.

107. Given this conclusion, I consider it unnecessary to examine any particular role as a worker or employee of the respondent for a comparison to be made. The respondent has employees who, because of this status, have the right to bring complaints of protected disclosure detriment in the employment tribunal. The claimant, as a stipendiary assistant curate in training, was denied the protection available to other employees and workers of the respondent who make protected disclosures as, in **Gilham**, the judge was denied the protection available to other employees and workers. The Supreme Court in **Gilham** did not find it necessary to examine the employment arrangements of any particular workers or employees who had that protection by virtue of their status as workers with a contract. I conclude that the answer to the second question is yes, the claimant was treated less favourably than others in an analogous position.

108. Simon Foster is just one of the respondent's employees who is treated more favourably by the claimant but this more favourable treatment, in having the right to protection against detriment on the grounds of protected disclosure, arises from his employment as Diocesan Mission Enabler, not because of his non-stipendiary role as an assistant curate in training.

109. If I had concluded that it was necessary to examine the employment arrangements of particular workers or employees for the comparison, those in the closest analogous position would be the interim ministers. By virtue of having a contract of employment, they enjoy employment rights, including to complain to a Tribunal about detrimental treatment on the grounds of whistleblowing. I do not consider that the differences pointed to by Ms Murphy are sufficient to mean they are not in an analogous position. However, for the reasons I have given in the previous paragraph, I do not consider it is necessary to examine the particular circumstances of any individual or class or worker or employee of the respondent to conclude that the claimant was treated less favourably than those in an analogous position.

110. In relation to the third **Gilham** question, was the reason for that less favourable treatment one of the listed grounds or "some other status", the answer

is yes. I conclude that the claimant's occupational classification as a stipendiary assistant curate is capable of being a "status" within the meaning of A14. I reject the respondent's submission that, because the claimant has a "calling", his role cannot also be an occupational classification. As in **Gilham**, it is that status which took him out of the whistleblowing protection enjoyed by employees and those who meet the unextended definition of worker in the ERA.

111. In relation to the fourth question, I conclude that there has been no "considered opinion" by Parliament that stipendiary assistant curates in training (or any other clergy) should not be given protection against detrimental treatment on the grounds of making protected disclosures to which I must defer. There is no evidence that there was any specific consideration of whether this protection should be given to clergy, either by General Synod, or by Parliament, when approving the 2009 Regulations, or any other legislation applying to the clergy.

112. Ms Murphy identified, as a legitimate aim, "the spiritual and pastoral relationship" between the claimant and the Bishop or the respondent. I asked Ms Murphy how depriving someone of the right not to be subjected to detriment was a proportionate means of achieving this spiritual and pastoral relationship. Ms Murphy referred to other routes of grievance open to the claimant under the Clergy Discipline Measure and said this was a unique and complex situation and the claimant was independent and had to follow his conscience. I accept that fostering or maintaining a spiritual and pastoral relationship may be a legitimate aim. There may be other routes available to the claimant to pursue complaints but not routes which give the same protection against detrimental treatment as the ERA. I am not persuaded that depriving the claimant of the right to complain to a Tribunal if he suffers detrimental treatment on the ground of making a protected disclosure would assist in any material way, and certainly not in a proportionate way, to achieve the legitimate aim.

113. For these reasons, I conclude that the definition of worker in the ERA should be read in the extended way set out in **Gilham**, giving the claimant the right to continue with his complaints of detrimental treatment on the grounds of making protected disclosures.

Whether the claimant was an employee of the respondent within the meaning in section 83(2)(a) EQA

114. Since the claimant in closing submissions said he did not argue that he had a contract with the respondent, I need to decide whether the definition of employee should be extended to include the claimant:

114.1. relying on the arguments used in **Gilham**, based on Convention rights; or

114.2. to achieve conformity with EU law (the Framework Directive 2000).

115. In relation to the **Gilham** argument, I conclude that the Convention rights to freedom of expression and non-discrimination in relation to Convention rights are not potentially engaged. Bringing a complaint of disability discrimination about one's personal position does not engage the right to freedom of expression, unlike in relation to whistleblowing, which was the subject of the Convention arguments in **Gilham**. Although Ms Gilham brought complaints of disability discrimination, these proceeded, without dispute, on the basis of the application of EU law, rather than Convention rights.

116. The claimant had not articulated the EU argument, although he did refer, in discussion of the issues, to complaints of disability discrimination proceeding in **Gilham**. Ms Murphy, very fairly, on behalf of the respondent, having regard to the claimant's position as a litigant in person, had anticipated EU law arguments in her original skeleton argument and made no objection to the claimant pursuing arguments relying on EU law. The claimant frankly admitted in closing submissions that he did not really understand the EU arguments so did not make any specific submissions on this point.

117. The respondent argued that the nature of the relationship between the claimant and the Bishop or respondent was substantially different from that between employers and employee which fall within the category of "workers" in s.39 and s.83(2)(a) EQA and that there was a distinguishing and material feature of the EQA that a person cannot be a personal office holder within s.49 EQA if they are within the EQA definition of employment.

118. The claimant does not fall within an unextended interpretation of EQA employment because he did not have a contract with the respondent (or anyone else). If it was necessary to extend the interpretation of the EQA to comply with related EU directives, I could do so if I considered that the relationship between the claimant and the respondent was not substantially different from that between employers and their employees falling, according to national law, under the category of workers.

119. The relevant legislation was given an extended definition in both **Perceval-Price** and **O'Brien** to comply with EU law because the domestic legislation did not, in its unextended form, provide the judicial office holders with protection against the relevant discrimination. The situation is, however, different in this case, due to the existence of s.49 EQA.

120. The legislative history I have referred to shows that the predecessor legislation to s.49 and, therefore, s.49, was intended to give protection against discrimination to clergy office holders, amongst others. I note that the Church of England Guide to common tenure 2016 edition notes (p.132 of the bundle) that the Equality Act applies to "personal offices (stipendiary curates)". The respondent in this case accepts that the claimant can continue to pursue his disability discrimination complaints (in so far as they are contained in the claim form or allowed to be added by amendment), relying on s.49.

121. In these circumstances, I conclude that it is not necessary to extend the meaning of s.39 EQA to ensure compatibility with EU law. The protection afforded to clergy office holders such as the claimant by EU Directives is provided by s.49 EQA. I conclude, therefore, that the claimant was not an "employee" within the definition of employment in the EQA.

122. The claimant's complaints of disability discrimination will, therefore, proceed under s.49 rather than s.39 EQA. At the final hearing, unless the complaints are withdrawn or struck out before that stage, the Tribunal will determine whether the respondent is the "relevant person" for a complaint under s.49.

Whether the respondent was a qualifications body in relation to a relevant qualification of IME2, for the purposes of s.53 EQA

123. The qualification the claimant relies on is IME2. Being "signed off" as having completed this second stage of training is required, as well as being ordained priest, to obtain a role as an incumbent minister.

124. There are roles, including, for example NHS or prison chaplain, open to an ordained deacon who has not been priested and for which completion of IME2 is not essential. I have found, however, that the claimant might be viewed with some concern as to his suitability for a paid role, in theory open to him, if he has not completed his IME2 (see paragraph 60).

125. Ms Murphy submitted that IME2 is not a relevant qualification. She submitted that the process of spiritual discernment involved in deciding whether to sign off on IME2, does not fit with pass/fail in a transparent way.

126. The wording in the definition of relevant qualification is wide, including "qualification", "recognition", "approval" and "certification". I conclude that sign off on IME2 falls within these descriptions. Whilst not essential for paid employment in a religious role, I conclude that IME2 would facilitate engagement in the profession of paid religious roles. I, therefore, conclude that sign off on IME2 is a relevant qualification as defined in s.54.

127. Ms Murphy submitted that, if it was a relevant qualification, the respondent does not have power to confer the qualification, this being the decision of the Bishop.

128. The Bishop of Lichfield is the person with the responsibility to sign off curates' training. The Bishop delegates this responsibility to the Area Bishops, who act on the recommendations of the Director of Ministry.

129. The Church of England Guide to common tenure 2016 edition notes (p.132 of the bundle) states, after referring to the EQA applying to personal offices: "There is also the issue of whether a bishop is a "qualification body" within the meaning of the Equality Act." This suggests uncertainty on the part of the writers of that guide as to whether a bishop is a qualification body for s.53, as defined in s.54. It does not suggest that any other body within the Church of England might be a "qualifications body".

130. I conclude that the respondent is not a qualifications body as defined in s.54 since it is the Bishop and not the respondent who has the responsibility to sign off on IME2. The Tribunal has no jurisdiction to consider a complaint under s.53 against the respondent and this claim is dismissed.

Whether the four complaints of direct discrimination identified by the claimant for the s.39 or s.49 complaints are contained in the claim form and, if not, whether the claimant should be allowed to amend his claim to include these complaints

131. This is a matter for case management decisions, rather than judgment, so I record my case management decisions formally in separate case management orders which also contain orders relating to the next preliminary hearing. However, to help the understanding of the parties and other readers of these reasons, I record my case management decisions on this issue and my reasons for these decisions in these reasons.

132. In relation to the first complaint (Jeanette Hartwell asking the claimant to rewrite a reflective statement for IME2), the respondent accepted that this was factually in the claim form, but as a protected disclosure complaint, so an amendment would be required. The respondent did not object to the amendment. I allow this amendment. Ms Murphy agreed that, since this was a relabelling of the complaint, the relevant date for time limit purposes was the date of presentation of the original claim.

133. The second complaint is about Jeanette Hartwell sending the claimant on 16 September 2022 an email saying that the claimant did not show evidence of understanding how "that" was affecting his colleagues. The respondent says this complaint is not in the claim form on any grounds and objects to amending the claim to include the complaint. The claimant accepted it was not in his claim form. He said he did not understand he needed to make the claim explicit. The respondent made no specific arguments about prejudice it would suffer if the amendment was allowed and Ms Murphy informed me that the respondent has the email. I do not consider the claimant has given a satisfactory explanation for not including the complaint in his claim. However, he is a litigant in person so cannot be held to the same standards as if the claim form had been drafted by a legal professional. A complaint about this matter would be out of time if presented at the date of the application to amend, unless it forms part of a continuing course of conduct ending with an act in respect of which the claim was presented in time. I consider that the claimant would potentially suffer more prejudice if not allowed to pursue this complaint than the respondent would suffer if the amendment is allowed. I allow the amendment, subject to the time limit issue being considered at the final hearing. The relevant date for time limit purposes is the date of the application to amend – 4 July 2023 – unless the complaint forms part of a continuing course of discriminatory conduct.

134. The third complaint is a delay in the Bishop of Stafford allowing the claimant to go forward to ordination while reasonable adjustments were looked into. Ms Murphy's primary argument was that the delay was a consequence of the Bishop looking into reasonable adjustments rather than an act or omission so it was not an allegation of less favourable treatment. In reply, Ms Murphy accepted for the respondent that the complaint as framed was contained in the claim form and alleged to be broadly direct discrimination. Ms Murphy asked that I note the respondent's position, as I have done, that this complaint does not correctly identify an act or omission. Ms Murphy said this was important given the claimant's primary position that he is not making a complaint of disability discrimination about the decision not to ordain him as a priest. I conclude that the complaint about the delay is contained in the claim form as a complaint of discrimination due to perception of disability (paragraph 15 at pp19-20 of the hearing bundle). No amendment is, therefore, required, to pursue this complaint.

135. The fourth complaint is about continued references to autism verbally from the Bishop of Stafford on 21 January 2022 and in a written submission by Jeanette Hartwell dated 2 February 2022. The claimant accepted that this was not included in the claim form so an amendment might be needed. The respondent objected to the amendment. Ms Murphy argued that the claimant had given no good explanation why he had not included these complaints. Time delay should weigh heavily against allowing the amendment. It would be more difficult for witnesses to recall oral references. The claimant said that the Bishop's references to autism were recorded in Jeanette Hartwell's notes. I consider that the claimant has not provided a satisfactory explanation for not including a complaint about these matters in his claim form. The complaints would be considerably out of time if they had been presented at the date of the application, unless they form part of a continuing course of conduct, ending with an act in respect of which the claim was presented in time. I consider there would be little prejudice to the respondent if I allowed the amendment. If the Bishop's remarks were recorded in Jeanette Hartwell's notes, the point about recollection of oral remarks would have less weight, although the witnesses might still have to try to recollect details and context not recorded in the notes. However, I consider the claimant would suffer little, if any, prejudice if I did not allow this amendment. I consider it would not add substantially, if at all, to any remedy he might receive for his other complaints, if successful. Not allowing the claimant to rely on the alleged references as a complaint of discrimination would not prevent the claimant from relying on evidence about these remarks if this evidence would be relevant to other complaints. On balance, I consider that the balance of injustice and hardship lies against allowing the amendment and I do not do so.

Employment Judge Slater

Date: 22 July 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

31 July 2023

FOR EMPLOYMENT TRIBUNALS

ANNEX
List of issues to be determined at preliminary hearing

Equality Act 2010 complaints – s.13 and s.39 or s.49 EQA

These are complaints of direct disability discrimination based on a perception that the claimant is autistic. The claimant does not pursue complaints of indirect discrimination. The claimant referred on 5.7.23 to possible complaints of harassment and victimisation. Whether there are any such complaints within the claim form or, if not, whether an application is made to amend the claim to add such complaints and whether, if so, that application is allowed, will be dealt with at a further hearing. The list of direct discrimination complaints under s.13 and s.39 or s.49 which the claimant wishes to pursue, listed below, may be non-exhaustive. Whether there are any further complaints of direct discrimination in the claim form or to be added by amendment (if allowed) will be decided at a further hearing.

The claimant does not pursue complaints based on s.55 EQA (employment service provider).

The following are complaints of direct discrimination for the s.39 (EQA employment which is the same as whether the claimant is a limb b worker for ERA) or s.49 (personal office):

1. Jeanette Hartwell asking the claimant to rewrite a reflective statement for IME2.
2. Jeanette Hartwell sending the claimant on 16 September 2022 an email saying that the claimant did not show evidence of understanding how “that” was affecting his colleagues.
3. A delay in the Bishop of Stafford allowing the claimant to go forward to ordination while reasonable adjustments were looked into.
4. Continued references to autism verbally from the Bishop of Stafford on 21 January 2022 and in a written submission by Jeanette Hartwell dated 2 February 2022.

1. Are these complaints contained in the claim form?

2. If not, should the claimant be allowed to amend his claim to include these complaints?

3. Was the claimant an employee of the respondent within the meaning in s.83(2)(a) EQA (the same test as for a "limb b worker" for the ERA complaints – see below)?

4. If not, should the definition of "employee" be extended to include the claimant,

    a. relying on the arguments used in **Gilham v Ministry of Justice** [2019] UKSC 44 based on A.14 and A.10 ECHR rights or
    b. to interpret the definition in conformity with EU law (the Framework Directive 2000)?

If the claimant is found to be an employee for the purposes of s.39 EQA, the EQA complaints must proceed, relying on s.39 (Schedule 6, para 1 EQA). If s.39 does not apply, the respondent accepts that the claimant was the holder of a personal office for the purposes of s.49 EQA. The respondent disputes that the respondent is the "relevant person" for a complaint under s.49. The issue of whether the respondent is the "relevant person" for complaints relying on s.49 will be dealt with at the final hearing, unless the complaint is struck out as having no reasonable prospect of success or a deposit ordered as a condition of the complaint proceeding and the deposit not paid.

<u>Equality Act complaint – s.13 and s.53 EQA (qualifying body)</u>

The complaint is of direct discrimination based on a perception that the claimant is autistic about the respondent not signing off the claimant's Initial Ministerial Education part 2 training (IME2) i.e. not conferring a relevant qualification on the claimant. The claimant does not pursue complaints of indirect discrimination. The claimant is not making a complaint under s.53 about the decision not to ordain the claimant as a priest.

1. Was the respondent a qualifications body in relation to a relevant qualification of IME2, for the purposes of s.53 EQA?

<u>Whistleblowing detriment complaints – s. 47B Employment Rights Act 1996</u>

[The claim form is agreed to include complaints of whistleblowing detriment. If the Tribunal has jurisdiction to consider these complaints, the protected disclosures and detrimental treatment relied on will be clarified by a judge at a further hearing].

1. Was the claimant, as an assistant curate in training, a worker within the definition in s.230(3)(b) ERA (a "limb b worker") i.e. did he work under any other contract, whether express or implied (and if express) whether oral or in writing, whereby he undertook to do or perform personally for another party to the contract (the respondent) whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the claimant?

2. If the claimant was not a “limb b worker” as defined in s.230(3)(b) ERA, does the Tribunal have jurisdiction to consider his complaints of detrimental treatment because of his status as an office holder, relying on the arguments used in **Gilham v Ministry of Justice** [2019] UKSC 44 based on A.14 and A.10 ECHR rights?