Neutral Citation Number: [2024] EAT 3

Case No: EA-2022-000240-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 January 2024

Before :

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE

- -

Between :

MISS P SULLIVAN **Appellant**

- and –

ISLE OF WIGHT COUNCIL **Respondent**

- -
- -

JEFFREY JUPP (instructed through **Advocate**) for the **Appellant**
FERGUS MCCOMBIE (instructed by **Isle of Wight Council**) for the **Respondent**

Hearing date: 04 July 2023

- -

JUDGMENT

SUMMARY

JURISDICTION, EMPLOYEE, WORKER OR SELF-EMPLOYED

The Appellant had presented claims under the Employment Rights Act 1996 ('the ERA') contending that, as a job applicant, she had been subjected to detriments on the ground that she had made protected public interest disclosures. Following a preliminary hearing, the employment tribunal determined that, having regard to the four questions to which the Supreme Court had referred in *Gilham v Ministry of Justice* [2019] ICR 1655, it lacked jurisdiction to consider those complaints. On appeal, its answers to the second to fourth of those questions were subject to challenge. It was said that the tribunal's findings contravened the Appellant's rights under Articles 10 and 14 ECHR.

Dismissing the appeal, the EAT held that the tribunal had been right to conclude that the Appellant had not been treated less favourably than others in an analogous situation and that external job applicant did not constitute 'some other status' for the purposes of Article 14. Furthermore, the treatment of which the Appellant complained had not been suffered qua external applicant. Whilst, when considering the issue of justification (question four), the tribunal had erred in its approach to proportionality, that error had been of no material effect, having regard to its answers to the second and third *Gilham* questions. In any event, the Appellant's proposed amendment to section 43K of the ERA, with a view to rendering the statute Convention-compliant, would not have 'gone with the grain' of the legislation and, had the position been otherwise, the nature of any required amendment would have called for legislative deliberation.

THE HONOURABLE MRS JUSTICE ELLENBOGEN DBE:

1. In this judgment, each party is referred to by her/its status below.

2. By its reserved judgment following a preliminary hearing, sent to the parties on 4 January 2022, the Exeter Employment Tribunal (EJ Goraj, sitting alone) found that it lacked jurisdiction to consider the Claimant's whistleblowing complaints pursuant to sections 47B, 48 and/or 49B of the Employment Rights Act 1996 ('the ERA') and dismissed them. The Claimant appeals from that finding. She had represented herself before the Tribunal but, before me, was represented by Mr Jupp. Both here and below, the Respondent was represented by Mr McCombie. I am grateful to them both for the clarity of their submissions.

3. The facts giving rise to the relevant claims, as found by the Tribunal, were set out at paragraphs 30 to 55 of its reasons, so far as material to the issues arising on appeal recited below (sic):

> **'The position of DPSS Account Officer**
> **30. On 31 October 2019, the claimant attended an interview with the respondent for the position of DPSS Account Officer. The interview was conducted by Ms Martin, Mr Porter and Mr Philbrick.**
>
> **31. On 4 November 2019 the respondent emailed the claimant advising her that she had been unsuccessful at interview. The respondent complemented the claimant on her academic achievements and gave advise for future interviews. … The claimant replied the same day thanking the respondent for the email. The claimant stated that it had been nice to meet everyone and informed the respondent of her intention to look for employment with other companies ...**
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> **The position of Direct Payment Finance Officer**
> **32. On 5 December 2019 the claimant attended an interview with the respondent for the post of Direct Payment Finance Officer. The interview was conducted by Ms Martin, Mr Porter and Mr Higginson.**
>
> **33. On 7 December 2019 the claimant emailed the respondent with information regarding previous employment and associated matters …**
>
> **34. On 10 December 2019 the respondent advised the claimant that she had been unsuccessful at interview. The respondent further stated that although the claimant had not been successful, she had done well at her interview and thanked her for attending… The claimant replied thanking the respondent for the email. The claimant advised the respondent that she had received news of her exams that day and that she had now completed her postgraduate Diploma in Environment Management…**
>
> **The crime report**
> **35. On 7 January 2020, the claimant filed an online crime report with the Hampshire Police concerning an alleged verbal assault during an interview … which she stated she had not reported at the time. The claimant also stated that she had not raised a complaint with the respondent but intended to email their Safeguarding Team relating to the alleged statements made by the respondent during the interview that the claimant was mentally insane. The claimant also made reference to the Shanklin**

Chine [Charitable Trust] which she stated was dormant but had been taking revenues for many years.

36. The claimant also filed a report on the respondent's confidential safeguarding helpline …in which she alleged that it had been repeatedly stated during the interviews on 31 October 2019 and 5 December 2019, that the claimant was apparently "mentally insane" and requested confirmation of whether anyone had raised any safeguarding reports concerning such false statements.

…

38. On 12 February 2020 the claimant emailed the Chief Executive of the respondent, Mr J Metcalfe, in which she stated that she was attaching a copy of the report which she had sent to the Hampshire police together with other documents relating to the Shanklin Chine Trust….The claimant advised the Chief Executive that she would allow 28 days for the review of her Police complaint and any internal steps by the respondent after which she would progress her complaint to the Local Government and Social Care Ombudsman.

39. The respondent's Chief Executive, Mr Metcalfe, acknowledged receipt of the claimant's email which he stated he understood to be a complaint about the way in which the interviews were conducted. The Chief Executive advised the claimant that he would ask the respondent's Director of Corporate Resources (Ms Shand) to have her complaint investigated and a reply sent to her... The Chief Executive further stated that the respondent had no connection with the Shanklin Chine and was therefore unable to comment any further on the allegations which she had made regarding its operation.

40. Ms Shand wrote to the claimant on 19 February 2020 advising the claimant that as the matter related to employees of the respondent, and in accordance with section 8 of the respondent's complaints policy, it would investigate the matter in accordance with its employee code of conduct utilising the respondent's disciplinary policy and employee conduct procedure. Ms Shand subsequently wrote to the claimant on 2 April 2020 apologising for the delay in concluding the investigation which she attributed to the impact of the covid 19 pandemic on the respondent's resources.

The email dated 17 March 2020

41. The claimant emailed Mr Metcalfe and Ms Shand on 17 March 2020 advising them that she had contacted the CQC and Justin Tomlinson MP and attached copies of her letters. The claimant also stated in her letter that she had attempted to contact the Local Government and Social Care Ombudsman but had been advised that she required a final response from the respondent before being able to progress the complaint...

42. The letter to the MP … is the document which is relied upon by the claimant as her protected public interest disclosure ... In brief, the letter complains about the following matters:- (a) the comments allegedly made by the respondent at the interview/ interviews that the claimant was "apparently 'mentally insane'" together with the claimant's consequential concerns regarding the stigmatisation and treatment of disabled people by the respondent during the recruitment process and (b) the alleged financial irregularities in the operation of the Shanklin Chine Trust and the alleged involvement of one of the respondent's managers, Mr Porter. … The claimant stated that she had sent details of her complaint to the Police and to the respondent.

43. Ms Shand advised the claimant in July 2020 that it would then be possible to recommence the investigation.

The claimant's reports of the interviews of 31 October 20[19] and 5 [Dec]ember 20[19]

44. On 13 July 2020 the claimant emailed Ms Shand and Mr Metcalfe attaching what

she described as the full reports of the interviews on 31 October 20[19] and 5 December 20[19] (created on 12 July 2020) ...

45. … The claimant has recorded in the report [of the interview of 31 October 2019] multiple alleged inappropriate/discriminatory comments by members of the interview panel including that it was stated at the interview that she was mentally insane and that she had ugly lumps on her face. The claimant also recorded that Miss Martin had referred during the interview to an Employment Tribunal case from 2009 against the Post Office regarding allegations of a physical assault on the claimant. The claimant also submitted at that time a document recording alleged financial irregularities relating to the operation of the Shanklin Chine Trust of which it was alleged that Mr Porter was a trustee...

46. Ms Shand acknowledged receipt of the reports submitted by the claimant and advised her that they would be passed to the investigating officer. The claimant was advised that as the complaint related to employees of the respondent it would not be possible to inform the claimant of the detailed progress of the investigation or the outcome of any disciplinary action.

The further/ amended reports submitted on 14 July 2020

47. On 14 July 2020 the claimant emailed to Ms Shand her amended reports of the interviews on 31 October 2019 and 5 December 2019. … The claimant stated that she believed that the amended reports were a full account of the interviews.

48. The claimant's further accounts of the interview on 31 October 2019 are at pages … of the bundle. The notes record multiple allegations of alleged inappropriate / discriminatory comments /conduct by the members of the interview panel. The recorded comments/conduct include: - (a) alleged observations and comments regarding the claimant's bottom and (b) an alleged reference to "the Post Office" by Ms. Martin which the claimant stated in the document she understood to be a reference by Ms Martin to a previous Tribunal claim involving an alleged physical assault with "sexual tones".

49. The claimant's detailed accounts of the Interview on 5 December 2019 are at pages … of the bundle. The notes again record details of alleged inappropriate/discriminatory comments/conduct by members of the interview panel. The record includes an allegation that during the course of the interview Mr Higginson banged his hand on the table and said to the claimant that she should "get some contraception" which the claimant speculated in the notes might have been said by him because she had a blemish on her nose.

50. An investigation into the claimant's complaint was undertaken by a Strategic Manager in the Business Centre, to which the claimant was invited to contribute.

The respondent's outcome email dated 18 September 2020

51. Ms Shand emailed the claimant on 18 September 2020 advising the claimant of the outcome of the investigation into her complaints... In summary, …Ms Shand advised the claimant:- (a) that the respondent had concluded its investigation, in accordance with stage one of the respondent's complaints procedure, into the complaint which the claimant had raised with the chief executive concerning the conduct and behaviour of four of its employees (b) summarised the process undertaken including that additional information had been sought from the police regarding the crime reports submitted by the claimant (c) that as advised previously, she was unable to share with her the detailed investigation report as it related to the conduct of employees and was therefore investigated pursuant to the respondent's internal disciplinary procedure (d) assured the claimant that the allegations had been treated very seriously and a thorough investigation undertaken (e) the investigation had however concluded that there was no evidence of any wrongdoing by the members of staff and that her complaint was therefore not upheld (f) if she was dissatisfied with the decision the claimant would normally have the right to refer the matter to a stage 2 review which would be carried out by another senior officer. However, having

given the situation very careful consideration Miss Shand had concluded that this would not be an appropriate course of action in the circumstances of the case as a thorough investigation had been undertaken and the process had had a significant impact on the staff involved (g) in the circumstances she considered it necessary to take measures to protect the respondent's employees from any further distress being caused by any further pursuit of the allegations (h) further, as she considered that there was nothing further to be attained by a stage 2 review she was "disapplying that option" in the exceptional circumstances of the case. Accordingly, the claimant had no further option to pursue the complaint pursuant to the respondent's complaints procedure (i) that the respondent did and would continue to treat any complaint against an employee very seriously however unjustified complaints about the same matter would not be investigated further unless they were properly evidenced and substantiated by new information (j) she hoped that the claimant would be assured that the allegations had been taken seriously but also appreciate the importance of the need to protect the well-being of staff. Ms Shand concluded her letter by confirming the claimant's right to complain directly to the Local Government and Social Care Ombudsman ("the Ombudsman") and provided the contact details.

The claimant's complaint to the Local Government and Social Care Ombudsman

52. The claimant submitted a complaint to the Ombudsman on 19 February 2021... In brief summary, the claimant complained about the respondent's refusal to allow her a right of appeal against its complaint response dated 18 September 2020. The claimant stated that she felt that the refusal of the appeal was both discriminatory and due to her raising whistle blowing concerns relating to the Shanklin Chine Trust. The claimant further stated that she had progressed the matter to the Employment Tribunals, the Solicitors Regulation Authority and to the independent office of Police Complaints.

53. The Ombudsman declined to investigate the claimant's complaint on the grounds that it related to a grievance by the claimant relating to two job interviews with the respondent and that it was not allowed as a matter of law to investigate employment related complaints. The Ombudsman's draft decision dated 22 March 2021 is at pages … of the bundle.

54. The claimant subsequently raised concerns relating to the matters raised in the Tribunal proceedings with other public bodies including a complaint to the Solicitors Regulation Authority concerning the alleged conduct of the respondent's solicitor concerning the contents of the respondent's response in the Tribunal proceedings, which complaint was rejected (the email dated 22 April 2021 at pages … of … the bundle).

The respondent's complaints procedure

55. The Tribunal has had regard to the provisions of the respondent's Complaints Policy including in particular:- paragraphs 2, (the definition of a complaint) 3 (aims and objectives) 4 (who can complain) - including that anyone can make a complaint if they believe that the respondent had done something wrong or done/ failed to do anything that they should or should not have done 5 (the respondent's undertaking to complainants - including that they would not suffer any penalty or discrimination as a result of making a complaint, 7 (unreasonable complainant behaviours) - including that that respondent has a separate policy for dealing with unacceptable behaviours, 8 (the procedure for dealing with complaint against members of staff) - including that complaints against members of staff are normally dealt with under the respondent's code of conduct for staff or through the internal disciplinary policy and procedure and further that it would not normally be possible to advise a complainant of the specific outcome of any disciplinary action taken, 9 & 10 (the procedures at stage 1 and stage 2) - including that at stage 2 a Head of Service/Strategic Manager would consider the complaint and response at stage 1 and respond to the claimant - there is no stated right to refuse a request for a stage 2 review save that at paragraph 4 the policy states that the respondent would not always use the stage 2 procedure as some types of complaints had their own procedures. The alternative appeal procedures listed in the Policy are not however

applicable in this case.'

4. The Claimant presented her claim form on 14 November 2020. In her attached particulars of claim, she stated:

> **'This is a claim for discrimination, victimisation, and whistleblowing on the following:**
>
> **The Claimant … asserts that the Respondent's refusal of the Claimant's right to a grievance appeal (Claire Shand email to Claimant dated 18.09.2020) was due to the Claimant raising a grievance in relation to detected accounting and taxation irregularities associated with Mr Matthew Porter's (Manager for the Isle of Wight Council) involvement with Shanklin Chine Trust… and Shanklin Chine Limited… under…, the European Convention on Human Rights and the Human Rights Act 1998, the PIDA 1998, ERA 1996…**
>
> **The Claimant…asserts suffering a detriment by the Respondent due to the Claimant…being perceived as likely to 'blow the whistle' and/or actually having 'blown the whistle'.**
>
> **…**
>
> **The Claimant believes that the Respondent would have permitted the Claimant the right to appeal her grievance through the Isle of Wight's grievance channels had the Claimant not raised a complaint which involved whistleblowing…and reported the matter to a regulatory body…and the Police.'**

5. At the outset of the preliminary hearing, the Tribunal clarified the issues arising for determination. So far as material to this appeal, it recorded the following:

> **'The issues**
>
> **12. …**
>
> **…does the claimant have the necessary status as a job applicant to bring a complaint that she has been subjected to detriments on the grounds that she has made protected public interest disclosures?**
>
> **13. The claimant accepted that, as a job applicant (and not a worker), she was not, without the assistance of wider statutory interpretation (as referred to further below), entitled to pursue a claim for protected public interest disclosure detriment pursuant to sections 47B(1)/48 of the Employment Rights Act 1996 ("the Act").**
>
> **14. The claimant further confirmed that she accepted that for the purposes of section 49B of the Act (which section affords protection to applicants for employment in the health service from detriment for making protected public interest disclosures), that the respondent is not included in the list of NHS Employers/Public Bodies for the purposes of section 49B(6)/(7)(a) – (p) of the Act.**
>
> **15. The claimant's position in summary, is however that: -**
>
> **(1) The provisions of section 47B(1)/48 of the Act, should be extended/interpreted to include job applicants by reason of: - (a) … and/or (b) Articles 10 and 14 of the European Convention of Human Rights and/or the Human Rights Act 1998 and/or … the judgment of the Supreme Court in *Gilham v Ministry of Justice*.**
>
> **(2) … the provisions of section 49B(7) should in any event be extended/interpreted to include the respondent in the light of the wider provisions referred to in paragraph (1) above.**

> **16. The respondent's position continues to be however that: -**
>
> **(1) The provisions of section 47B(1)/48 and/or 49B of the Act are clear and unequivocal. They do not provide any protection to the claimant who was a job applicant (not a worker) for employment (in financial roles) with the respondent. Moreover, the respondent was/is not a designated NHS Employer/NHS Public body for the purposes of section 49B of the Act and the claimant cannot therefore rely upon such provisions.**
>
> **(2) Further, the relevant statutory provisions are not capable of being extended interpretated pursuant to any EU Directive (insofar as it is in any event of any relevance/ongoing application) and/or Human Rights provisions and/or… any other authorities such as to bring the claimant within such protections.'**

6. At [18] of its reasons, the Tribunal went on to record (with emphasis added):

> **18. The Tribunal clarified with the claimant her position in the light, in particular, of paragraphs 10-12 of her written submissions. After further discussion during the Preliminary hearing (including an explanation from the Tribunal that any disclosure would for the purposes of causation have to predate any alleged detrimental (bad) treatment, the claimant clarified her position with regard to her protected public interest disclosure claim as follows:**
>
> **(1) The claimant confirmed (having acknowledged that any remaining alleged disclosures identified at paragraph 10 of her written closing submissions were made after the alleged detrimental treatment relied upon (i.e. the refusal of Ms Shand on 18 September 2020 to permit the claimant to pursue an appeal against the rejection of her complaint regarding the conduct of the interviews in November and December 2019 pursuant to the respondent's complaint's policy) that the only alleged disclosure upon which she relied was contained in the letter to Mr Justin Tomlinson MP dated 17 March 2020 (section C - pages 19 and 22-23 of the bundle). The claimant also contends however, that this disclosure was copied to the respondent - the Chief Executive of the respondent - Mr J Metcalfe and/or Ms Shand on 17 March 2020 (…). The claimant therefore relies on sections 43 C and /or 43 F of the Act in respect of such alleged disclosure.**
>
> **(2) Whilst the main focus of the claimant's letter to the MP dated 17 March 2020 (…) related to the alleged conduct of the respondent during the interviews (including that the claimant had allegedly been described during the interview(s) as "mentally insane"), the letter also referred to alleged financial irregularities. The claimant's alleged disclosure relates to the alleged activities of a man[a]ger in the respondent, Mr M Porter, (who was also a member of the interview panels) regarding the operation of a charitable trust and the alleged failure to submit to companies house truthful accounts of trading revenue received.**
>
> **(3) The claimant confirmed that it is her case that the references to such matters in the letter dated 17 March 2020 constituted a qualifying disclosure for the purposes of Section 43(B)(1)(a) and/or (b) of the Act. <u>In summary, the claimant says that she made a disclosure which in her reasonable belief was in the public interest and tended to show that a manager of the respondent (Mr Porter) had committed a criminal offence (fraud) and /or had breached his legal obligations relating to the financial operation of a charitable trust (the Shanklin Chine Trust) in respect of alleged financial irregularities / the failure to submit truthful accounts of trading revenues to companies House</u>.**

> **(4) The claimant identified three detriments upon which she relied at paragraph 11 of her written submissions (the rejection on 4 November 2019 and 10 December 2019 of applications for employment and the refusal on 18 September 2020 of a right of appeal against the rejection of her subsequent complaint regarding the conduct of the interviews for such positions).**
>
> **(5) Following the clarification of the claimant's alleged protected public interest disclosure (and the explanation by the Tribunal that the disclosure had to predate the alleged detrimental treatment) the claimant confirmed that the only alleged detriment upon which she relied was accordingly, the refusal by Ms Shand on 18 September 2020 to allow the claimant a right of appeal against the rejection of her complaint pursuant to the respondent's complaints procedure.'**

7. The Tribunal's findings on the issues with which this appeal is concerned were set out at paragraphs 75 to 82 of its reasons:

> **'Issue 1 1.1 (b) whether the claimant is, in any event, able to establish worker/ the necessary status by virtue of the application (for the purposes of section 47B / 48 (1) and/or 49 B of the Act) of the European Convention on Human Rights and/or the Human Rights Act 1998 ("the 1998 Act") and /or the Enterprise and Regulatory Reform Act 2013.**
>
> **The relevant law**
>
> **75. The Tribunal has had regard to the legal provisions referred to above (including in particular Articles 10 (freedom of expression) and 14 (prohibition of discrimination) of the Convention Rights contained in … Schedule 1 to the 1998 Act together with the judgment of the Supreme Court in Gilham v Ministry of Justice [2019] UKSC 44.**
>
> **Submissions**
>
> **76. In summary, the claimant contends that:- (a) the Tribunal is required, pursuant to section 3 of the 1998 Act, to read and give effect to primary and subordinate legislation in a way which is compatible with the Convention rights and (b) the failure (in respect of both section 47B and/or section 49B of the Act) to extend the "whistleblowing" detriment protections to job applicants such as the claimant is a violation of the claimant's rights under Articles 10 and 14 of the claimant's Convention rights.**
>
> **77. The claimant further contends that the Tribunal is required to consider the four questions identified in Gilham as follows:- (i) do the facts fall within the ambit of one of the Convention rights – the claimant contends that they fall within the ambit of the right to freedom of expression protected by Article 10(ii). Has the claimant been treated less favourably than others in an analogous situation - the claimant contends that job applicants have been denied protection in comparison to others who make responsible public interest disclosures within the requirements of the Act. (iii) Is the reason for that less favourable treatment one of the listed grounds (in Article 14) or other status – the claimant contends that a job applicant is an occupational classification which is clearly capable of being a status within the meaning of Article 14 and (iv) – is that difference without reasonable justification – the claimant contends that there is no justifiable reason for falling to afford protection to job applicants (including as for the purposes of section 49B local authorities also recruit/employ staff who care for vulnerable people) and such exclusion must therefore be a breach of Articles 10 and 14 of her Convention rights.**
>
> **78. In summary, the respondent's primary position is that there is no scope for extending whistleblowing protection to applicants, as opposed to office holders, by using human rights law. Further, Parliament has already considered the position of applicants and has chosen not to extend the NHS employer protection to other applicants for employment. In respect of Gilham the respondent contends in particular as follows:- (a) "job applicants" do not have "other status" for the purposes of Article 14, if it was extended in that way it would apply to anyone who applies for a job whereas**

officer holders (as in Gilham) do have such status and (b) Parliament has already considered "job applicants" as a category for whistleblowing protection but has chosen to limit the protection to those working in the NHS by way of section 49B of the Act. There is reasonable justification for the decision to limit the extension of the protection to the NHS field as the NHS is a large employer with responsibility for patient safety and staff regularly move between NHS trusts (c) further a distinction should be drawn between this case and the situation in Gilham as for the purposes of remedy judicial officer holders such as Gilham readily fit within the worker relationship whereas job applicants do not have any such relationship and (d) as far as the claimant's contentions regarding section 49(B) of the Act are concerned there is no justification for extending the section as contended by the claimant – the section carefully identifies which bodies are deemed to be NHS employers which definition is too tightly defined for any extension on Human rights grounds and (e) the respondent also relies, for the purposes of interpretation, on paragraph 16 of the EAT in Elstone, which stresses the importance of the relationship between the worker and the "employer" which is absent in this case.

The conclusions of the Tribunal

79. Having given careful consideration to all of the above, including that the Tribunal is required pursuant to section 3 of the 1998 Act to read and give effect to legislation in a way which is compatible with Convention Rights, the Tribunal has reached the conclusions set out below.

80. The Tribunal has for such purposes given careful consideration to the four questions identified at paragraph 28 of Gilham as follows:-

(i) – Do the facts fall within the ambit of one of the Convention rights – having for such purposes taken the claimant's case at its highest, the Tribunal is satisfied that the facts may potentially fall within Articles 10 (freedom of expression) and Article 14 (prohibition of discrimination – in respect of "other status") namely, that the claimant was allegedly subjected to a detriment (the refusal of a right of appeal under the respondent's Complaints Policy) because she made an alleged protected public interest disclosure to her MP/the respondent on 17 March 2020 concerning the alleged conduct of Mr Porter in respect of the financial operation of the Shanklin Chine Trust as referred to above.

(ii) Has the claimant been treated less favourably than others in an analogous situation – the claimant compares herself with others who are afforded protection under the Act namely employees/workers generally and also job applicants applying to join an NHS employer/NHS body (as defined in section 49B of the Act). Having given the matter careful consideration the Tribunal is not satisfied on the facts of this case that the claimant has established that she was in an analogous situation to the above for the following reasons:- (a) the Tribunal is not satisfied that a job applicant is in an analogous situation to an employee or worker of an organisation who has, by way of contrast as a minimum, entered [in]to a contract of employment or other contract/ office and has become a member of the workforce with associated rights and responsibilities. The position in this case is very different to that in Gilham. In Gilham, although the claimant was not a worker or employee, she was an officeholder who was integrated into and operated as part of the workforce and who held a substantive and highly responsible judicial role (b) further the Tribunal is not satisfied the a job applicant such as the claimant (who applied to a local authority for financial positions) is in an analogous situation to a job applicant who applied for a role with an NHS employer/body where staff, with specialist medical and associated skills, regularly transfer between such organisations and where patient safety is of paramount importance.

(iii) Is the reason for that less favourable treatment one of the listed grounds in Article 14 of the Convention rights or some "other status?" The Tribunal is not satisfied that a "job applicant" which is a very wide and generic grouping

constitutes, particularly having regard to the matters previously referred to at paragraph (ii) above, some "other status" for the purposes of Article 14 of the Convention Rights.

(iv) Is the difference without reasonable justification – the Tribunal is, in any event, satisfied on the basis of the available information that there is reasonable justification for the difference in treatment between a generic and very wide ranging group of job applicants, who otherwise have no relationship with the organisation (to which the claimant belongs), and the categories which Parliament has chosen to protect namely:- (a) employees/ workers who work or have worked for the organisation and (b) those that apply to NHS employers (as defined). The situation in this case is very different to that in Gilham. Moreover, the Tribunal is strengthened in its view by the fact the EU, who considered the position of job applicants in 2019 chose to limit its protections to those job applicants who had gained "information of breaches" during the recruitment process.

81. For the avoidance of doubt the Tribunal is not satisfied that the claimant's reliance on the Enterprise and Regulatory Reform Act 2013 (which was the mechanism by which the meaning of the term worker was extended by the amendment of section 43 K of the Act) adds anything to the above deliberations and this is therefore not separately addressed.

82. In all the circumstances, the Tribunal is not satisfied that it has jurisdiction to entertain the claimant's complaint of detrimental treatment for making a protected public interest disclosure which complaint is therefore dismissed.'

The grounds of appeal

8. Following a preliminary hearing, the grounds of appeal were amended with the permission of HHJ Tayler, who further ordered that, once approved, the amended grounds of appeal be served on the Government Legal Department, for it to make any submissions on behalf of the Secretary of State, as to whether he wished to be joined as an interested party in the appeal. No such submissions were made and the appeal, therefore, proceeded without his contribution.

9. In amended (summarised) form, the grounds of appeal are that the Tribunal erred in law:

   a. (ground one) in its consideration of whether the Claimant, as a job applicant, had been treated less favourably than others in an analogous situation, for the purposes of Article 14 ECHR;

   b. (ground two) in failing to have found that the Claimant had had 'some other status', as required by Article 14 ECHR; and

   c. (ground three) in its determination that the exclusion of job applicants from protection under Part IVA of the Employment Rights Act 1996 ('the ERA') had been a proportionate means of achieving a legitimate aim (having failed to identify the latter).

The parties' submissions

For the Claimant

10. On behalf of the Claimant, Mr Jupp submitted that the Tribunal's findings were in contravention of her rights under Articles 10 and 14 of the ECHR. Her claim was that she had been treated less favourably by reason of her status as a job applicant than had others in analogous situations, the latter being (i) internal job applicants (already employed) and (ii) NHS job applicants seeking non-clinical roles. That treatment had not been justified. Thus, in accordance with section 3 of the Human Rights Act 1998 ('the HRA'), the EAT was under a duty to give effect to her right not to be discriminated against contrary to Article 14 in respect of Article 10 ECHR. He submitted that, unless that proposition went against the grain of the ERA, the EAT was bound to construe that Act so as to give effect to her Convention rights. It was acknowledged that that would require the EAT to read in words which were not present, a permissible approach: see *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, HL. The Employment Rights Act 1996 (NHS Recruitment — Protected Disclosure) Regulations 2018/579 ('the NHS Regulations') conferred upon an applicant (as defined by section 49B(2) of the ERA) a right of complaint against an NHS employer. In so doing, they extended the provision made by the ERA, indicating that the extension sought by the Claimant in this case did not go against the grain of the ERA, or of the NHS Regulations, that is it would not contravene the policy objectives of either piece of legislation. In Mr Jupp's submission, the objective of the ERA was to afford protection to whistleblowers in the workplace sphere or environment. Extending protection to job applicants would be consistent with that objective. Employment protection legislation in other areas had not excluded applicants for all purposes; the Equality Act 2010 was an example. One could readily see how a protected disclosure under section 43B of the ERA could also constitute a protected act for the purposes of section 27 of the Equality Act 2010 (victimisation). It was incongruous that an internal job applicant would be protected under both statutes, but an external applicant under only the latter. To go against the grain would be to extend protection to any member of the general public.

11. *Gilham v Ministry of Justice* [2019] ICR 1655, SC required four questions to be answered. In this case, the first had been answered in favour of the Claimant and it had not been suggested by the Respondent that it ought not to have been. As to the second, it was necessary, first, to compare the circumstances of the internal job applicant with those of the external applicant. The fact that the former had an existing contract (the only point of distinction) did not mean that s/he was not in an analogous situation; each was applying for the same role and it was

irrelevant whether s/he was doing so from within or without the organisation. Analogous circumstances could encompass broader comparisons than those required under the Equality Act 2010. To rely upon the presence or absence of a contract was to rely upon the very fact which gave rise to the claim. By contrast, a member of the public would not be in an analogous situation, in having no relationship of any form with the putative employer.

12. A separate class of people in analogous circumstances would be applicants protected by the NHS Regulations. The Tribunal had made a clear error in stating that those regulations were concerned with medical professionals [80]. Even if that were considered to have been simply comment, there was no difference between an applicant for employment of the nature covered by the NHS Regulations and any employment concerned with vulnerable people in any sphere. In this case, the Claimant had applied for a finance role within a local authority. The NHS Regulations would protect an applicant for such a role in the NHS, who would be in analogous circumstances. The Respondent's reliance upon the absence of a substantive workplace relationship between the Claimant and either the person to whom the disclosure had been made or the person who was alleged to have acted to her detriment was simply an alternative way of saying that the Claimant was not a worker. Whilst a worker would always have a closer existing relationship with the employer than would an external applicant, the latter still had a relationship, albeit at an earlier stage in response to an advertisement. It was difficult to see the rationale for excluding such an applicant from protection within the workplace sphere.

13. As to question three in *Gilham*, it was clear, from *R (Stott) v Secretary of State for Justice* [2020] AC 51, that, for the purposes of Article 14 ECHR, 'other status' could include a category of persons who did not necessarily share characteristics personal to the individual and could have different occupational statuses. Job applicants had a different status from members of the public in general and, crucially, from those who were already employed. Job applicants had been defined and protected as a group in the Equality Act 2010 and in the NHS Regulations and it was difficult to see why protection should not be extended to applicants in other areas. There was no floodgate risk: any detriment was likely to arise from the application process itself; as a matter of causation, the disclosure must antecede the detriment; and other extensions of whistleblowing protection (see *Woodward v Abbey National* [2006] EWCA Civ 822) had not led to a slew of claims.

14. Finally, question four in *Gilham* had not been considered appropriately by the Tribunal, which had not identified a legitimate aim. The Respondent had not led any evidence, including as to proportionality. The Government had not sought to be joined as an interested party in this appeal. Thus, the Tribunal and the EAT could only speculate. Whilst it might be possible to identify the aim from the statute itself, the Tribunal had not done so. Further, the burden was on a respondent to establish proportionality. It was apparent from the Parliamentary debate which had related to extension of protection to NHS applicants that the door had been left open to a further extension for which Parliament had lacked the evidence base at that time. The purpose of drawing the EAT's attention to that material was twofold: to indicate that the legitimate aim advanced by the Respondent (that it was inappropriate to open the floodgates to an unlimited category of job applicants and potential job applicants) was wrong; and to illustrate the extent of the matters which would need to be considered before a conclusion on proportionality could be reached; a matter which was not within the remit of the EAT and which would require evidence to be produced and considered. As the Respondent had elected not to call such evidence, the Tribunal had been in no position to conclude that the means of achieving any legitimate aim had been proportionate. In the alternative, the fourth question in *Gilham* would need to be remitted for consideration afresh.

15. Were the EAT to accept the above submissions, the Claimant's preferred remedy would be the amendment of section 43K of the ERA to include an additional subsection:

> **(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who –**
>
> …
>
> **(e) applies for employment and who, if they were successful in that application, would be a worker within section 230(3).**

For the Respondent

16. Mr McCombie submitted that it was important to have regard to the nature of the Claimant's position in this case. The alleged disclosure had been made some three months after the later of the two rejections which she had received. It had concerned the alleged conduct of a panel member in relation to financial irregularities connected with a separate charitable trust. That conduct had not been connected with the interview itself. Albeit that the Claimant had raised other complaints about the conduct of her interview, the relevant disclosure had not related to that, as paragraph 18(3) of the Tribunal's reasons (see above) had made clear.

17. The only detriment pursued had been the denial of a right of appeal from the outcome of the Claimant's complaint, itself made under a local authority complaints procedure which it had been open to anyone to invoke (as the Tribunal had recorded at paragraph 55 of its reasons). That was of relevance because the EAT was being asked to extend protection to individuals who had at one time applied for employment, been rejected and then gone through a process independent of the job application process. Whilst it was not submitted that the Claimant lacked locus to advance the submissions made, consideration of analogous circumstances and 'other status' ought to be heavily influenced by the factual matrix. In addressing the boundaries of any arguable extension of protection to applicants for employment, the EAT would have to consider status and analogous circumstances by reference to the facts as found and, it was submitted, this was not the case in which to decide the issues raised. This Claimant's position was analogous to that of any other member of the public who complained about any aspect of the Respondent's conduct and, thus, there was no analogy established with the groups upon which she relied. It was for that reason that the Respondent placed so much emphasis on the work relationship as being the relevant criterion.

18. In any event, addressing the *Gilham* questions on the hypothesis that the disclosure made did relate to employment, it was not accepted that applicants for employment constituted a group; that was to consider that which someone did, as opposed to that which someone was. What was required was some individual characteristic of the group which was susceptible to discrimination contrary to Article 14 ECHR. Applicants for employment had been identified as a group in domestic legislation, but that group would not suffice to establish other status under Article 14 ECHR. Furthermore, the internal job applicant would be protected anyway, as being a worker. It would not suffice to define a group by reference to the sole fact that, at some point in the past, its members had done something. Whilst that submission was directed at the issue of status, it was also relevant to the question of less favourable treatment, contended Mr McCombie.

19. Acknowledging that, on the facts of this case, the internal applicant could have made a complaint, whereas the external applicant could not, the class of applicants to whom protection would be extended would encompass those who had made an application at some point. In any event, the internal applicant who complained about a matter wholly distinct from his or her work would run into difficulty. The fact that the disclosure the subject of this appeal had not related to the workplace meant that the issues which Mr Jupp had identified did not arise in this case.

20. Mr McCombie submitted that, save in the circumstances (not advanced here) outlined in *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3, Parliamentary statements by ministers were not relevant to construing legislation, whilst explanatory memoranda were. A boundary had been drawn around avoiding detriment based upon workplace complaints rather than upon something arising outside the workplace by which a member of the public or user of the service was aggrieved. The appropriate comparison was between those who had a workplace relationship and those who had not. It would not do to define a sub-set of job applicants, such as those who applied from within the organisation. The expansion of protection through caselaw such as *Woodward* had related to those who had previously had a relationship which had ended. *Gilham* was an exception but, nevertheless, questions of status, analogous circumstances and justification had been answered by reference to the claimant's occupational status as someone present in workplace. The distinction was between presence in and absence from the workplace; between those who were protected by the legislation and those who were not. The protection envisaged by the ERA had been made clear in caselaw, and in the explanatory memorandum to the NHS Regulations. In none of the material to which it was proper to have regard had Parliament indicated an intention to expand protection to job applicants in general. A line had been drawn, subject to piecemeal extension in the NHS. It was open to the EAT to discern the legitimate aim from the legislation and explanatory memoranda. The EAT could also decide the issue of proportionality on the available material. It was for the Claimant to identify an error of law in the Tribunal's consideration of justification. None had been demonstrated and it was inappropriate for the Claimant to rely on new material in the form of Hansard, from which, in any event, it was very clear that the Government had wished to adopt an evidence-based approach. The Tribunal had made a finding of fact, adopting the correct approach and any assertion to the contrary was of perversity, which had not been the basis of the Claimant's appeal. Contrary to the position in *Gilham*, in this case submissions had been made regarding Parliament's considered opinion, by reference to the text of the ERA and the amendments to protection which had been made and the question was whether the Tribunal had been justified in reaching a conclusion on that basis. Whether or not Parliament had referred to proportionality and human rights was irrelevant if the measures adopted were in fact proportionate in pursuit of a legitimate aim. In the alternative, the issue of justification would need to be remitted for consideration by the Tribunal, subject to which question the EAT could give guidance as to whether the ERA ought to be amended.

21. In the event that the Claimant succeeded in her appeal, Mr McCombie submitted that the Claimant's proposed amendment to section 43K(1) of the ERA would be the appropriate remedy.

For the Claimant in reply

22. In reply, Mr Jupp submitted that all of the Tribunal's reasoning had proceeded upon the basis that the Claimant had been an applicant at the time of her disclosure, as was clear from paragraphs 76 and 77 of its reasons. In any event, there had been no cross-appeal on the basis that she had not been an applicant, a point which had not featured in the Tribunal's reasons.

23. He submitted that, in addition to protecting job applicants, the NHS Regulations had created a new cause of action in the form of breach of statutory duty, which was not sought by the Claimant in these proceedings.

24. Mr Jupp acknowledged that the relevant question was whether the legislation was compatible with the Claimant's Convention rights.

25. As to proportionality, he submitted that the Tribunal had not addressed the well-known four-limb test set out in *Bank Mellat v HM Treasury* [2013] UKSC 39 [77] and, accordingly, had been led into speculation. The EAT would not itself be in a position to address that test on the material available and, if it considered the Respondent not to be shut out from arguing it, that matter should be remitted for consideration by a different employment tribunal, with an invitation extended to the Secretary of State to join the proceedings.

Discussion and conclusions

26. Article 10 ECHR provides for the right to freedom of expression. Article 14 provides:

> **'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'**

27. By section 3(1) of the HRA, so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights. The compatibility of legislation with such rights falls to be assessed when the issue arises for determination, not as at the date when the legislation was enacted, or came into force:

Wilson v First County Trust Ltd (No. 2) [2004] 1 AC 816 [62]. In *Ghaidan*, Lord Nicholls held ([32] and [33]):

> **'32. … the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.**
>
> **33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.'**

At paragraph 121, Lord Rodger held:

> **'121. For present purposes, it is sufficient to notice that cases such as *Pickstone v Freemans plc* and *Litster v Forth Dry Dock & Engineering Co Ltd* suggest that, in terms of section 3(1) of the 1998 Act, it is possible for the courts to supply by implication words that are appropriate to ensure that legislation is read in a way which is compatible with Convention rights. When the court spells out the words that are to be implied, it may look as if it is "amending" the legislation, but that is not the case. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute.'**

28. The primary legislation with which this appeal is concerned is the ERA, the relevant sections of which are set out below:

a. **43A. Meaning of "protected disclosure"**

> **In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.**

b. **43K. Extension of meaning of "worker" etc for Part IVA**

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

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

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

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

(bb) works or worked as a person performing services under a contract entered into by him with a Health Board under section 17J or 17Q of the National Health Service (Scotland) Act 1978,

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

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

(ii) by a Health Board under section 2C, 17AA, 17C, 25, 26 or 27 of the National Health Service (Scotland) Act 1978, or

(cb) is or was provided with work experience provided pursuant to a course of education or training approved by, or under arrangements with, the Nursing and Midwifery Council in accordance with article 15(6)(a) of the Nursing and Midwifery Order 2001 (S.I. 2002/253), or

(d) is or was provided with work experience provided pursuant to a training course or programme or with training for employment (or with both) otherwise than—

(i) under a contract of employment, or

(ii) by an educational establishment on a course run by that establishment;

and any reference to a worker's contract, to employment or to a worker being " employed" shall be construed accordingly.

(2) For the purposes of this Part "employer" includes—

(a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged,

(aa) in relation to a worker falling within paragraph (ba) of that subsection, NHS England, or the Local Health Board referred to in that paragraph,

(ab) in relation to a worker falling within paragraph (bb) of that subsection, the

Health Board referred to in that paragraph,

(b) in relation to a worker falling within paragraph (c) of that subsection, NHS England or the board referred to in that paragraph, and

(c) in relation to a worker falling within paragraph (cb) or (d) of that subsection, the person providing the work experience or training.

(3) In this section "educational establishment" includes any university, college, school or other educational establishment.

(4) The Secretary of State may by order make amendments to this section as to what individuals count as "workers" for the purposes of this Part (despite not being within the definition in section 230(3)).

(5) An order under subsection (4) may not make an amendment that has the effect of removing a category of individual unless the Secretary of State is satisfied that there are no longer any individuals in that category.

c. **230 Employees, workers etc**

…

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under) —

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or personally perform 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;

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

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b) in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly.

(6) This section has effect subject to sections 43K 47B (3) and 49B(10); and for the purposes of Part XIII so far as relating to Part IVA or section 47B, " worker ", " worker's contract " and, in relation to a worker, " employer ", " employment " and " employed " have the extended meaning given by section 43K.'

29. In *Gilham*, the Supreme Court held that the facts of the claimant district judge's case fell within the ambit of the right to freedom of expression protected by Article 10 ECHR; that she and others like her had been denied the protection which was available to other employees and workers who made responsible public interest disclosures within the requirements of Part IVA of the ERA, including protection from 'any detriment' and the possibility of bringing proceedings before an employment tribunal; that the denial of those advantages amounted to

less favourable treatment than that afforded to others in the workplace who wished to make responsible public interest disclosures; that being a judge was a "status" within the meaning of Article 14; that, since the difference in treatment was without reasonable justification, the exclusion of judges from the protection in Part IVA of the ERA was in breach of their rights under Article 14 read with Article 10 of the ECHR; and that, in all the circumstances, the ERA should be read and given effect so as to extend the protection given to whistleblowers to the holders of judicial office.

30. The Court reached those conclusions having considered the four questions to be addressed [28]: (i) Do the facts fall within the ambit of one of the Convention rights? (ii) Has the claimant been treated less favourably than others in an analogous situation? (iii) Is the reason for that less favourable treatment one of the listed grounds or some "other status"? and (iv) Is that difference without reasonable justification — put the other way round, is it a proportionate means of achieving a legitimate aim?

31. In this case, no issue is taken with the answer given by the Tribunal to the first question — taken at their highest, the facts alleged fall within the ambit of the right to freedom of expression protected by Article 10 ECHR.

32. The issue between the parties regarding the second question is whether the others with whom the Claimant seeks to compare herself are in an analogous situation. If they are, the Claimant has been treated less favourably in relation to the exercise or enjoyment of her Article 10 right because, unlike those individuals, she has been denied the possibility of bringing proceedings before an employment tribunal, with its associated advantages. It is of note that, when answering the second question in *Gilham*, Baroness Hale held, at [30] and [31] (with emphasis added):

> **'30 …This is undoubtedly less favourable treatment than that afforded to <u>others in the workplace</u>—employees and "limb (b)" workers—who wish to make responsible public interest disclosures.**
>
> **31. 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….'**

33. In *Gilham*, the distinction was not between those who operated in the workplace and those who did not — the Claimant was a sitting judge; the issue in that case had arisen by reason of

the claimant's status as a statutory office-holder, such that she had had no contractual relationship with the Executive, or with the Lord Chief Justice, nor had she been in Crown employment, as defined by section 191 of the ERA. So it was that the wording in paragraph 30 of Lady Hale's judgment which I have emphasised above was apt. I accept Mr McCombie's submission that the external job applicant is not in a situation analogous to that of the internal applicant, who is already embedded in the workplace and whose disclosure is made in that context. That is not to fall foul of the analysis in paragraph 31 of *Gilham*; it is the external job applicant's lack of existing working relationship with the putative employer which means that his or her situation is not analogous to that of the internal job applicant. The internal applicant does not derive protection from his or her status as such, which is a matter of irrelevance. Entitlement to statutory protection derives from his or her status as a worker in the existing role. So viewed, the external applicant's situation is not analogous.

34. Whilst acknowledging that the Tribunal did not decide the issue on this basis, I also accept Mr McCombie's submission that this particular Claimant's situation was not analogous to that of an internal applicant. Her application process had come to an end, some months previously. Her subsequent disclosure, as identified at paragraph 18(3) of the Tribunal's reasons, had related to matters unconnected with the application made, or, indeed, with the Respondent itself, and had been advanced under a complaints policy of which any member of the public was able to avail himself or herself in relation to any perceived wrongdoing by the Respondent.

35. The second group of people whose situation is said to be analogous is that comprising external applicants for non-clinical roles who are protected by the NHS Regulations. In material part, those regulations provide:

    a. **3. Prohibition of discrimination**

        An NHS employer must not discriminate against an applicant because it appears to the NHS employer that the applicant has made a protected disclosure.

    b. **4. Right of complaint to an employment tribunal**

        (1) An applicant has a right of complaint to an employment tribunal against an NHS employer if the NHS employer contravenes regulation 3.

        (2) If there are facts from which the employment tribunal could decide, in the absence of any other explanation, that an NHS employer contravened regulation 3, the tribunal must find that such a contravention occurred unless the NHS employer shows that it did not contravene regulation 3.

36. The NHS Regulations were made under sections 49B and 236 of the ERA. I need not set out the latter. Section 49B provides:

> **49B Regulations prohibiting discrimination because of protected disclosure**
>
> **(1) The Secretary of State may make regulations prohibiting an NHS employer from discriminating against an applicant because it appears to the NHS employer that the applicant has made a protected disclosure.**
>
> **(2) An "applicant", in relation to an NHS employer, means an individual who applies to the NHS employer for —**
>
> **(a) a contract of employment**
>
> **(b) a contract to do work personally, or**
>
> **(c) appointment to an office or post.**
>
> **(3) For the purposes of subsection (1), an NHS employer discriminates against an applicant if the NHS employer refuses the applicant's application or in some other way treats the applicant less favourably than it treats or would treat other applicants in relation to the same contract, office or post.**
>
> **(4) Regulations under this section may, in particular —**
>
> **(a) make provision as to circumstances in which discrimination by a worker or agent of an NHS employer is to be treated, for the purposes of the regulations, as discrimination by the NHS employer;**
>
> **(b) confer jurisdiction (including exclusive jurisdiction) on employment tribunals or the Employment Appeal Tribunal;**
>
> **(c) make provision for or about the grant or enforcement of specified remedies by a court or tribunal;**
>
> **(d) make provision for the making of awards of compensation calculated in accordance with the regulations;**
>
> **(e) make different provision for different cases or circumstances;**
>
> **(f) make incidental or consequential provision, including incidental or consequential provision amending —**
>
> **(i) an Act of Parliament (including this Act),**
>
> **…**
>
> **(iv) an instrument made under an Act or Measure within any of sub-paragraphs (i) to (iii)**
>
> **(5)…**
>
> **(6) "NHS employer" means an NHS public body prescribed by regulations under this section.**
>
> **(7) "NHS public body" means —**
>
> **(a) NHS England;**
>
> **(b) an integrated care board;**
>
> **(c) a Special Health Authority;**
>
> **(d) an NHS Trust;**
>
> **(e) an NHS Foundation Trust;**
>
> **(f) the Care Quality Commission;**
>
> **(g) [repealed]**
>
> **(h) the Health Research Authority;**
>
> **(i) [repealed]**
>
> **(j) the National Institute for Health and Care Excellence;**

> **(k) [repealed]**
>
> **(l) a Local Health Board established under section 11 of the National Health Service (Wales) Act 2006;**
>
> **(m) the Common Services Agency for the Scottish Health Service;**
>
> **(n) Healthcare Improvement Scotland;**
>
> **(o) a Health Board constituted under section 2 of the National Health Service (Scotland) Act 1978;**
>
> **(p) a Special Health Board constituted under that section.**
>
> **(8)…**
>
> **(9)…**
>
> **(10) For the purposes of subsection (4)(a) —**
>
> **(a) "worker" has the extended meaning given by section 43K, and**
>
> **(b) a person is a worker of an NHS employer if the NHS employer is an employer in relation to the person within the extended meaning given by that section.**

Section 49C, as yet not in force, makes similar provision for the Secretary of State to make regulations prohibiting a 'relevant employer' from discriminating against an applicant for a children's social care position because it appears to the employer that the applicant has made a protected disclosure. A children's social care position is defined to mean a position in which the work done relates to the children's social care functions of a relevant employer. It is convenient, at this point, to note that section 49B(3) provides that the proscribed discrimination must be constituted in refusal of the application or other less favourable treatment by comparison with other applicants *in relation to the same contract, office or post.*

37. The basis upon which the, then proposed, extension of protection to whistleblowing job applicants was restricted to those in the NHS emerges clearly from Hansard (11 March 2015). Baroness Neville-Rolfe noted that the Government was taking action in the wake of the reports, produced following, respectively, (1) the Mid-Staffordshire NHS Foundation Trust public inquiry, led by Sir Robert Francis KC, and (2) an independent investigation into the management, delivery and outcomes of care provided by the maternity and neonatal services at the University Hospitals of Morecambe Bay NHS Foundation Trust from January 2004 to June 2013, by Dr Bill Kirkup CBE. She noted that the extension of protection to applicants in other sectors had been debated at Committee stage, but that her concern had been as to the lack of evidence of a widespread problem right across the board, or, for other sectors, of the nature of the gap or scale of the problem. Broader amendment would apply to the private sector and the coverage would be very wide-ranging. It was necessary to legislate in an informed and evidence-based way. On 1 May 2018, a motion to approve the draft NHS Regulations was

moved in the House of Lords by Baroness Manzoor, who stated, *'On the issue of culture, the whole point from the Government's perspective is that we need to ensure that the culture within the NHS is changed so that those people who want to highlight poor practice in the NHS, who are concerned about patient safety, have the right to speak up. It is very important that their rights are protected. Should they wish to move to a new employer, the regulations will help to safeguard them. Paramount is patient safety, and the regulations will go some way to addressing those issues…we want an NHS where lessons are learned to provide the safest possible care for patients. This is what it is about: actually changing the culture…'*

38. I have regard to that material not for the purposes of construing the legislation, but, at this stage, for the purposes of considering whether the circumstances of the putative comparator group are analogous to those of the external applicant in other sectors. It is consistent with the Tribunal's findings on the issue of analogous circumstances (albeit made without the benefit of the above material). The external applicant in a sector other than the NHS is not in circumstances analogous to one in the latter sector. S/he is not, even indirectly (that is, in a non-clinical capacity), concerned with patient safety, nor was a sound evidence-base, indicative of the existence of issues of a similar nature and extent outside the NHS provided to the Tribunal. It is of note that the power conferred on the Secretary of State by section 49C of the ERA (albeit not yet in force), to make regulations to prevent discrimination by, amongst other relevant employers, a local authority, is limited to one protecting a particular class of persons, being those who apply for a children's social care position, as defined. I conclude that, the analogy is not established, whether in general, or having regard to the circumstances of this particular Claimant, as already described.

39. Thus, in my judgement the answer to the second *Gilham* question was 'no' and the Tribunal was right so to find.

40. But, in any event, the Claimant runs into further difficulty with the third *Gilham* question. The 'other status' upon which the Claimant relies for the purposes of Article 14 is that of external job applicant. I accept Mr McCombie's submission that that will not suffice for the purposes of Article 14 ECHR. It is not of the same quality as the occupational classification (judicial officeholder) which was held to constitute that status in *Gilham*. I accept Mr McCombie's submission that to define one's status by reference to the fact that, at one time, one has been an external job applicant is to define it by reference to the act of making the application, rather

than by reference to a characteristic personal to the applicant (albeit one which is not necessarily innate or inherent), consistent with the nature of the other grounds of discrimination outlawed by Article 14 ECHR (though I do not thereby suggest that a strict ejusdem generis approach to the specified grounds, deprecated in *Stott* [80], should be followed).

41. I reject Mr Jupp's submission that such a conclusion is inconsistent with the Supreme Court's approach in *Stott*, in which the claimant had been sentenced to an extended determinate sentence of imprisonment, following his convictions for ten counts of rape of a child under 13. As such, he would become eligible for release on parole having served two thirds of his 'appropriate custodial term', whereas other prisoners serving determinate sentences would become eligible having served only half of their sentences. Mr Stott had sought judicial review of the early release provisions, on the ground that they constituted discrimination in the enjoyment of his right to liberty, contrary to Articles 5 and 14 ECHR. Albeit dismissing the appeal, by a majority the Supreme Court held that the difference in treatment constituted a difference on the ground of 'other status'. Lady Black JSC set out a detailed exegesis of domestic and ECtHR caselaw to that date. She observed that Mr Stott had committed offences for which the extended determinate sentence had been imposed. Once that sentence had been imposed, however, it had existed independently of his criminal activity (see *Stott* [77]) and had constituted an acquired personal status. By contrast, in this case, the Claimant did not possess or acquire a status, or occupational classification, independent of her act of applying for a job. As Lord Mance observed in *Stott* [229], the concept of status should be construed broadly, but not every difference in treatment is on the ground of status.

42. Even if I am wrong in my analysis thus far, per *Tiplady v City of Bradford Metropolitan District Council* [2020] IRLR 230, CA (in particular at [45], per Underhill LJ) in order for the Claimant to rely upon any less favourable treatment the latter would need to have been suffered by the Claimant qua external applicant. In this case, as Mr McCombie submitted, it is clear that neither the alleged disclosure nor the treatment of which complaint was made (both of which the Tribunal had been at pains to clarify at the outset of the hearing and to record in its reasons) related to the Claimant in that capacity. Mr Jupp's reliance upon paragraphs 76 and 77 of the Tribunal's reasons is misplaced; both simply summarise the Claimant's submissions. The absence of a cross-appeal does not remove the need for careful analysis of the factual premise of the claim and its relevance to the questions to be addressed in this appeal.

43. As to the fourth *Gilham* question, as Lady Hale observed in *Gilham* [35]:

> **'The courts will always, of course, recognise 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: see *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 381. But the… problem is that in this case there is no evidence at all that either the executive or Parliament addressed their minds to the exclusion of the judiciary from the protection of Part IVA. While there is evidence of consideration given to whether certain excluded groups should be included (police officers), there is no evidence that the position of judges has ever been considered. There is no "considered opinion" to which to defer.'**

The position as there explained is to be contrasted with the position in this case, in which it is clear from the Parliamentary debates with which I have been provided that the question of whether to extend the protection of Part IVA of the ERA to applicants outside the NHS was specifically considered. I am satisfied that it is appropriate to defer to the evidence-based opinion and choice then made by Parliament. I am further satisfied that the Tribunal was entitled to discern the aims of the primary and secondary legislation from their terms and to find that those aims were legitimate. That it did so is apparent from its language, albeit contracted, at [80(iv)]:

> **'…the Tribunal is, in any event, satisfied on the basis of the available information that there is reasonable justification for the difference in treatment between a generic and very wide ranging group of job applicants, who otherwise have no relationship with the organisation (to which the claimant belongs), and the categories which Parliament has chosen to protect namely:- (a) employees/workers who work or have worked for the organisation and (b) those that apply to NHS employers (as defined).'**

44. Problematic, however, was the Tribunal's approach to the question of proportionality, in the absence of any evidence going to that matter and the structured approach to answering that question required by *Bank Mellat*. Had the answers to the first to third *Gilham* questions (and my conclusions set out below) been otherwise, I would have remitted the matter for fresh consideration of that particular question. Whilst having sympathy with Mr Jupp's submission that this particular Respondent had made its bed in deciding not to adduce any evidence in that connection, the issue is of significance beyond this litigation and, had the matter been remitted, it would have been appropriate for the Secretary of State to have been invited to consider whether he would like the opportunity to adduce evidence and be heard on the point, as Mr Jupp's submissions in reply acknowledged.

45. Finally, and whilst the issue of remedy does not arise in this case, I am satisfied that, had it done so, the amendment proposed to section 43K would not have been appropriate, for two reasons:

a. Having regard to the dicta in *Ghaidan*, set out at paragraph 27 above, I have concluded that it would not have gone with the grain of the ERA, but would have constituted an amendment which it would have been for Parliament, and not for the courts, to have made. The question is not merely one of language; as is clear from the legislative scheme, there has been a clear decision taken to exclude job applicants from the protection conferred on whistleblowers by the ERA. The NHS Regulations do not, as Mr Jupp submits, themselves serve to indicate that the amended wording which he proposes would go with the grain of the ERA — quite the opposite; they derive from the provision made by section 49B of the latter, which allows a limited exception to the general rule. The same will be true of section 49C, when in force. A broader exception of the nature which Mr Jupp urges would run entirely contrary to the scheme of the legislation. I do not accept that assistance may be derived from caselaw such as *Woodward*, in which it was held that the ERA prohibited detriment suffered post-termination, but the ratio of which was firmly rooted in the prior existence of the workplace relationship. Nor, in my judgement, does the fact that the protection conferred by a different statute — the Equality Act 2010 — is differently framed in certain respects assist the Claimant. Consistent with the dicta of Underhill LJ in *Tiplady* [44], the differences reflect the legislative choice to afford whistleblowing protection only as between worker and employer and it is the grain of the legislation which is said to require amendment with which I am concerned.

b. Furthermore, and had I considered the position to be otherwise than I have found it to be, I am satisfied that there is more than one way in which (on that hypothesis) the ERA could have been rendered Convention-compliant, involving issues calling for legislative deliberation. Here again, the Claimant's own circumstances afford a case in point — the fact that she had been an applicant for a job at one time, but that her disclosure and allegedly less favourable treatment had related to unconnected matters, illustrates the need for careful thought and draftsmanship.

Disposal

46. It follows that grounds one and two are dismissed. Ground three is allowed in part but has no effect on the outcome of the appeal, which is dismissed.