EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102617/2018

Held in Glasgow on 29 April 2019

Employment Judge: Iain F. Atack

Kamaljeet Singh	**Claimant** **In Person**
Advocate General for Scotland as representing the Ministry of Defence	**Respondent** **Represented by:** **Mrs P Macaulay - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that under section 121(1) of the Equality Act 2010 the Employment Tribunal does not have jurisdiction to hear the claimant's complaint of indirect race discrimination which is dismissed.

REASONS

Introduction

1. This was a preliminary hearing to consider whether the employment tribunal had jurisdiction to hear the claimant's complaint of indirect discrimination.

2. The claimant had originally brought three claims, being a claim of direct discrimination on the grounds of race; a claim of disability discrimination and a claim of indirect discrimination on the grounds of race. A preliminary hearing took place on 3 May 2018 to consider whether the claim of direct race discrimination was time-barred and whether the employment tribunal had jurisdiction to consider the claim of disability discrimination. By judgment dated 15 May 2018 and issued on 21 May 2018 I concluded that the tribunal

did not have jurisdiction to consider either of those complaints which were dismissed.

3. That left the claim of indirect discrimination to be dealt with. At the time of the previous preliminary hearing held in May 2018 the respondent had not taken any preliminary issue with the claim of indirect discrimination although their position was that the claim lacked specification.

4. Following various procedures, the claimant identified the provision criterion or practice upon which he based his claim for indirect discrimination and the case was set down for an open preliminary hearing as the respondent submitted that the employment tribunal lacked jurisdiction to consider that claim.

5. The provision criterion or practice identified by the claimant as discriminatory in terms of section 19 of the Equality Act 2010 was that the provision of legal aid and recovery guidelines along with court costs orders in disciplinary appeals was discriminatory and put black and minority ethnic soldiers, such as the claimant at a disadvantage when compared to those who did not share that characteristic.

6. The respondent produced a bundle of documents extending to 88 pages and the claimant produced a copy of the statement he had produced to the Service Complaints investigation team of the Army extending to 19 pages. Reference to these documents will be to the relevant page number preceded, in the case of respondent's documents by the letter R and in the case of those of the claimant by the letter C.

7. No evidence was given by either party and they were content to rely upon their submissions and the documents to which they referred.

Material Facts

8. The relevant facts were not disputed and can be summarized relatively briefly.

9. The respondent is the Advocate General for Scotland as representing the Ministry of Defence, the government department responsible for the Armed Forces.

10. The claimant held the rank of corporal in the Third Battalion, the Rifles (3 Rifles).

11. The claimant was not employed under a contract of employment. Members of the Armed Forces are appointed at will by the Crown under the Royal Prerogative.

12. The claimant gave notice to terminate his service on 25 October 2016. He was discharged on 25 October 2017.

13. The claimant was charged with failing to attend for duty contrary to section 15(1)(a) of the Armed Forces Act 2006.

14. He attended a Summary Hearing before Major Raw of 3 Rifles on 23 June 2017.

15. The claimant denied the charge. It was found proved and the claimant was sentenced to a fine of eight days pay to be paid over three instalments.

16. The claimant appealed that decision.

17. Initially the claimant appealed against both the findings of the Summary Hearing and the punishment imposed.

18. The claimant subsequently restricted his appeal to the punishment imposed only.

19. On 21 September 2017 the Summary Appeal Hearing Court restricted the fine to be imposed to £175 .

20. If a serviceman wishes to complain about a disciplinary sanction which has been applied to him he is entitled to make a “Service Complaint”. That complaint is then considered by an appropriate officer and if held to be “admissible” is allocated to a “Decision Body” who will ensure that the Service

Complaint is investigated and then decide whether or not to uphold the complaint and grant any redress.

21. A person who disagrees with the decision on admissibility of a Service Complaint is entitled to appeal to the Service Complaints Ombudsman

22. The claimant submitted a Service Complaint on the 29 June 2018. A copy of the complaint is contained in the bundle pages R 13 to 26.

23. That Service Complaint was considered in accordance with the Armed Forces (Service Complaints) Regulations 2015.

24. The allegations made in the Service Complaint were split into different Heads of Complaint numbering six in total. The head of complaint which included allegations now referred in these proceedings as relating to indirect discrimination was categorised as a Breach of Human Rights Legislation, R85.

25. Brigadier Stanning, who was the officer designated to decide upon the admissibility of the Service Complaint, ruled that the allegation of a breach of human rights legislation was inadmissible under Article 1 (i) of the Armed Forces Service (Service Complaints Miscellaneous Provisions) Regulations 2015. The other aspects of the Service Complaint were deemed to be admissible even although some had been submitted outwith the permitted time limits.

26. The claimant was advised of Brigadier Stanning's decision by letter dated 29 June 2018, R85-87.

27. In that letter the claimant was advised *"If you disagree with my decision on admissibility and want the decision to be reviewed, you have four weeks plus 2 days from the date of this letter to apply in writing/email to the Service Complaints Ombudsman."*

28. The claimant did not exercise his right to apply for the decision to be reviewed by the Service Complaints Ombudsman, R88.

Submissions

Claimant

29. Mr Singh had set out the provision criterion or practice upon which he relied for his complaint of indirect race discrimination in his communications with the respondent and the employment tribunal and in particular as set out on pages R 53, 61- 65,72- 75 and 80-82. He referred to these pages and expanded on them in his oral submissions. Put shortly his main submission was that the basis on which legal aid was provided to members of the Armed Forces seeking to appeal disciplinary action taken against them and the regime of costs which could be imposed in respect of such matters was indirectly discriminatory.

30. He also submitted that the employment tribunal had jurisdiction to entertain his claim of indirect discrimination under the Council Directive 2000/43/EC.

31. He submitted as set out in his Service Complaint that the Summary Hearings procedure was not compliant with Article 6 of the European Convention on Human Rights. His position was that the way in which the Armed Forces regulations worked was to make the Ministry of Defence the gatekeeper for the employment tribunal which put the respondent in an advantageous position.

32. Mr. Singh's position was that the basis upon which legal aid was provided to members of the Armed Forces and the provision for payment of costs created the imposition of an extra hurdle for those seeking redress for racial discrimination. This hurdle acted as a deterrent for anyone with a complaint of racial discrimination from appealing against the findings of a summary hearing.

33. He also submitted that the summary hearing procedure was not fair as it was the same officer who decided the charges to be brought, who heard the charges and who applied the punishment.

34. It was his position that section 121 of the Equality Act 2010 did not make it mandatory for Service Complaints to be required to be "admissible" in all

circumstances before they can be raised with the employment tribunal. If that was the case the Ministry of Defence would always have the upper hand as it would cherry pick the issues it wished to hear. He submitted that the military was reducing the level of protection available to soldiers by the regulations which they had put in place which made it unnecessarily complex and burdensome and with no real prospect of success for military personnel unless they had taken legal advice before and after submitting a Service Complaint. It was his submission that while the process applied to every soldier, the impact of it was far greater on persons who had the protected characteristic of race.

Respondent

35. Mrs. Macaulay produced a detailed written submission upon which she expanded. Put shortly, her position was that the employment tribunal did not have jurisdiction to consider the claim of indirect discrimination because of the provisions of sections 120 and 121 of the Equality Act 2010.

36. She stated that these provisions recognised that complaints by members of the Armed Forces should in the first instance be considered via the Service Complaints process provided for by section 340B (1) of the Armed Forces Act 2006 and Regulations enacted thereunder.

37. Mrs. Macaulay outlined the process by which members of the Armed Forces could pursue complaints. There was now a process for the Service Complaints Ombudsman to investigate a Summary Complaint to determine whether that has been handled properly and/or whether the complaint is well-funded and consider what, if any, redress would be appropriate.

38. She submitted that service in the Armed Forces is fundamentally different to employment. The relationship is not based on contractual arrangements but rather on the concept of command and it was vital that service personnel follow the lawful orders of their superiors. The Summary Complaints procedure is specifically designed for dealing with a broad range of potential wrongs relating to service in the Armed Forces which is far wider than those wrongs just relating to discrimination. There are sound reasons why the

Summary Complaint process is in existence and the Armed Forces have primary authority to deal with service matters internally before the matter scrutinised by an independent body.

39. She referred to the cases of ***Moluadi v Ministry of Defence*** UKEAT/0463/10/JOJ and [2012] EWCA Civ 576

40. ***Duncan v Ministry of Defence*** UKEAT/0191/14/RN; and

41. ***Williams v Ministry of Defence*** UKEAT/0163/12/JOJ and [2013] EWCA Civ 626 as authority for the proposition that the statutory aim behind section 121 of the Equality Act 2010 is to enable the Armed Forces to determine complaints under the Summary Complaint process prior to litigation. In particular she referred to paragraph 27 of ***Molaudi*** where Silber J stated that what was required for a service complaint was a valid one which was capable of being determined on its merits by the prescribed officer or the service authorities before any matter is brought before the employment tribunal.

42. It was her position that if the Summary Complaint is determined as inadmissible under the Armed Forces Act 2006 than no valid Service Complaint has been made and accordingly the tribunal does not have jurisdiction to hear the claim.

43. She also submitted that it was not for the tribunal to concern itself with the merits of the decisions taken under the Summary Complaints process in respect of admissibility.

Decision

The Law

44. The Equality Act 2010 provides insofar as relevant :-

"120 Jurisdiction

(1) an employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to -

(a) a contravention of Part 5 (work);

(b) a contravention of section 108, 111 or 112 that relates to Part 5

……."

"121 Armed Forces cases

(1) Section 120 (1) does not apply to a complaint relating to an act done when the complainant was serving as a member of the Armed Forces unless

(a) the complainant has made a service complaint about the matter, and

(b) the complaint has not been withdrawn.

….."

45. In this case the claimant had submitted a Service Complaint on 29 November 2017 at which time he was still a serving soldier. The complaint was considered by Brigadier Stanning on 29 June 2018 and he ruled that the complaint relating to an alleged breach of human rights legislation was inadmissible. His reason was that it was inadmissible under Article 1 (i) of the Armed Forces (Service Complaints and Miscellaneous Provisions) Regulations 2015. The remaining aspects of the claimant's Service Complaint were allowed to proceed even although some of them had been presented out of time. Brigadier Stanning had considered it just and equitable to allow those other aspects, which had been presented out of time, to proceed.

46. In his letter to the claimant setting out his decision on 29 June 2018 Brigadier Stenning advised the claimant that if he disagreed with the decision upon admissibility he had four weeks plus 2 days from the date of the letter to apply in writing to the Service Complaints Ombudsman. The claimant did not make any application to the Service Complaints Ombudsman.

47. The issue in this case is whether the employment tribunal has jurisdiction to consider the claimant's claim of indirect discrimination or whether it is precluded from doing so by the provisions of section 121 of the Equality Act 2010. What that means is the employment tribunal has to consider whether a

claim which was held by the service authorities to be inadmissible could fall within the definition of a service complaint.

48. I was referred to the case of ***Molaudi*** where at paragraph 24 Silber J stated **"So a complaint which has not been accepted by the prescribed officer cannot be dealt with by the Defence Council. It must therefore follow that the intention of the legislature was that a" service complaint" was a complaint which was accepted as valid by the prescribed officer as otherwise it could not have been considered by the Defence Council."**

49. Silber J goes on to state at paragraphs 26 and 27

"26. A second reason why I consider that a service complaint must mean a complaint which has been accepted by the appropriate prescribed officer as being valid is that this meaning is consistent with the purpose of the provisions in requiring a complaint to the prescribed officer as a prerequisite to making a complaint to the tribunal. There is much authority to the effect that *"a certain amount of common sense [must be applied] in construing statutes"* (per Lord Goddard CJ in Barnes v Jarvis [1953] 1All ER 1061, 117 JP 254.

27, The structure of the provisions to which I have already referred is that a prerequisite for making a complaint of racial discrimination by a soldier to the Employment Tribunal is that he or she had previously made a valid service complaint to the Army authorities, which had been determined on its merits. If a valid service complaint was not a prerequisite, then all that would be required to constitute a "service complaint" would be a simple short note made long after the event by a dissatisfied soldier saying that he has suffered from racial discrimination without giving any particulars and therefore not allowing the prescribed officer to make a sensible or realistic determination of it. This indicates clearly that what is required for a "service complaint" is a valid one, which is capable of being determined on its merits by the prescribed officer or the service authorities before any matter is brought before the Employment Tribunal."

50. In the case of ***Duncan*** it was accepted that the Employment Tribunal's jurisdiction to hear a claim brought by a serving member of the Armed Forces is contingent on their having submitted a valid internal Service Complaint which has not been withdrawn. ***Williams*** also affirmed that the statutory aim behind section 121 is to enable the Armed Forces to determine complaints under the summary complaints process prior to litigation.

51. It is not for the Employment Tribunal to review the decisions of persons such as Brigadier Stenning as it has no jurisdiction to do so.

52. Once the Brigadier had decided that the claim which had been categorised as a breach of human rights legislation was inadmissible that complaint could not be regarded as a valid complaint. It could not therefore be regarded, following the cases to which I was referred, as a service complaint as defined in section 121. It therefore follows that the claimant has not made a service complaint about the matter and accordingly the employment tribunal does not have jurisdiction to consider the claim of indirect discrimination.

53. I reject Mr Singh's submissions about a right to a fair trial under Article 6 of the Directive. In ***Molaudi*** the EAT held at paragraph 35 *"The English courts have been content to accept that the Directive does not preclude measures which specify a procedure which must be pursued before a claim can be brought in the Employment Tribunal, especially where such a requirement does not act as an absolute bar to the bringing of their claims."*

54. I accepted that the prerequisite to bringing a claim in the Employment Tribunal by a "Service Complaint" did not infringe the claimant's rights under the Directive where it is still possible for a valid complaint to be subsequently brought in the Employment Tribunal. The point is that in this case a valid Service Complaint was not brought and the claimant did not challenge the decision of Brigadier Stanning on that matter, despite being advised of his right to do so.

55. For the reasons set out above the claimant's claim of indirect discrimination is dismissed.

Employment Judge: Iain F. Atack
Date of Judgment: 08 May 2019
Entered in register : 17 May 2019
and copied to parties