



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Smith

**Respondent:** Ministry of Defence

**Heard at:** Southampton

**On:** 19 November 2019

**Before:** Employment Judge Reed sitting alone

**Representation**

**Claimant:** In Person

**Respondent:** Mr S Tibbitts, Counsel

## RESERVED JUDGMENT

The Judgment of the Tribunal is that the claimant's claims have no reasonable prospect of success and they are dismissed.

## REASONS

1. In this case the claimant Mr Smith made a number of distinct claims (unfair dismissal, disability discrimination and breach of contract) against the Ministry of Defence (MOD). This was a preliminary hearing to consider whether the claims should be dismissed on the basis that they had no reasonable prospect of success and also whether the claims were "out of time".
2. I heard evidence from Mr Smith and my attention was directed to a number of documents. I reached the following findings.
3. Mr Smith began his military career in 1976 when he joined the junior leaders' regiment of the Royal Armoured Corps. The following year he was posted to the cadet regiment of the Royal Hussars Prince of Wales Own Regiment, as a trooper.
4. He went through the ranks, becoming Regimental Sargent Major and then, in the year 2000, Captain in (then) the King's Royal Hussars.
5. In 2003, he resigned his commission and took up a post as a member of Non Regular Permanent Staff (NRPS) in the Territorial Army (TA) or reservists.

He remained a Captain but was now undertaking broadly administrative duties.

6. Mr Smith told me that he developed PTSD, anxiety and depression. He thereby became a disabled person, giving rise to an obligation on the part of the MOD to make reasonable adjustments to accommodate his condition. In brief, his case was that they had failed to do so in the course of the period from 2013 onwards.
7. In 2016, he submitted two service complaints and he was discharged on 31 October 2016. He considered he had thereby been unfairly dismissed.
8. The service complaints were resolved in March 2018 and Mr Smith appealed against that outcome in July 2018. The appeal itself was resolved in February 2019 and the matter was thereafter referred to the Ombudsman.
9. In the meantime, Mr Smith made a subject access request and received documents in March 2019. He told me that they demonstrated that he had consistently been lied to and he therefore presented a claim to the Tribunal in April 2019.
10. Under rule 37 of the Employment Tribunals Rules of Procedure 2013 a tribunal may strike out a claim on the ground that it has no reasonable prospect of success.
11. I first addressed the question of whether Mr Smith's employment status was such that the Tribunal had jurisdiction to entertain his claims. Helpfully, Mr Tibbitts produced in his skeleton argument a detailed analysis of the legislation relating to the claims and in particular the power of the Tribunal in relation to members of the Armed Forces.
12. In brief, section 192(1)(a) of the Employment Rights Act 1996 indicates that the right to claim unfair dismissal does not apply to members of the Armed Forces.
13. Section 38(4)(a) of the Employment Tribunals Act 1996 indicates that the right to claim breach of contract does not apply to a member of the Armed Forces.
14. Paragraph 4(3) of schedule 9 to the Equality Act 2010 prevents a member of the Armed Forces making a claim to the Tribunal of disability discrimination.
15. The respondent's case was that Mr Smith was indeed a member of the Armed Forces and therefore could not take forward his claims. That was the matter I first addressed.
16. I certainly accepted that analysis of the legislation, and Mr Smith himself did not disagree. However, he claimed that he was not a member of the Armed Forces from 2003. If I understood his submissions correctly, it was his case that, although the MOD had attempted to modify the situation thereafter, he was essentially taken on as a civilian (and therefore an employee) at the time he actually transferred. The MOD's subsequent attempts to recategorise him were ineffectual.

17. It did not appear that any document was produced at the time Mr Smith joined the TA. However, a letter was sent on 5 January 2004 which (effectively in retrospect) granted approval for his appointment. The appointment is expressly stated to be “under the provisions of Regulations for the TA1978 paragraph 4.004 – 4.005”. The letter states that he will be appointed in the rank of Captain and will retain his personal number.
18. I was prepared to accept that his role was very much an administrative one with the TA and he then would not have regarded himself as “combat effective”.
19. His role itself went beyond what one might expect an administrator within the regular army to have, including recruitment, administration of pay etc. On the other hand, there clearly are members of the regular army that have administrative roles, such as a quartermaster.
20. He had a rank and he had a commanding officer. Furthermore, there was nothing to suggest that his appointment was otherwise than on terms of service. No contract of employment was ever produced.
21. The complaints process he had actually gone through was one that was only available to a member of the Armed Forces. It was clearly the case that a review of TA regulations was undertaken in 2004 and 2005 and I was shown a letter dated 3 February 2005 that referred to it. I was at a loss, however, to understand how it might be suggested that that document illustrated that the pre-existing situation rendered Mr Smith an employee.
22. In short, it appeared to me that throughout the relevant period Mr Smith was indeed a member of the Armed Forces. It followed that his claims had no reasonable prospect of success and they were therefore struck out.
23. In those circumstances, it was not necessary for me to address the issue of late presentation, although I was bound to observe that, given the way he was able actively to pursue his complaints and deal with the Ombudsman in the period following his discharge it would be very difficult for me to conclude that it was not reasonably practicable for him to bring the claims promptly, or that it was just and equitable for them to go forward. Although he referred to late disclosure of documents, it was apparent that he always harboured a sense of injustice about his treatment and had in mind that he wished to challenge it.

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Employment Judge Reed

Date: 20 December 2019

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