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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
O M	**AND**	Ministry of Defence (Navy)

Heard at: London Central **On**: 11 & 12 February 2020

Before: Employment Judge Glennie

Representation
For the Claimant: Mrs M (Representative)
For the Respondent: Mr S Murray, (Counsel)

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is as follows:

1. **The claim is struck out on the grounds that by virtue of Regulation 13(2) of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 the Tribunal does not have jurisdiction to hear it.**

REASONS

1. By way of an introduction to these reasons I should say that the hearing proceeded in the ordinary way with submissions on each side on Day 1 and then a period of deliberation by myself on the morning of Day 2. I had reached a conclusion and was ready to deliver my judgment and reasons in support of that when I was informed by the Tribunal's clerk that the Claimant wished to make a further statement, which had in fact been put in writing. I accepted that and took a copy of the statement, heard it read out, and read it to myself.

2. I will say two of things about this statement at this stage. One is that it quite rightly recognises that the Tribunal's decision about jurisdiction does not involve any element of discretion: it is a legal question that has to be resolved as such. Secondly, as I hope will be apparent from the Reasons that I am going to give, I have decided certain points in the Claimant's favour, albeit not in a way that

affects the ultimate outcome and my decision that there is no jurisdiction to hear the complaint. I will also refer to what is said in the statement where I deal with the point on which I have decided the issue that is before the Tribunal.

3. The Claimant brings a claim under the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, which I will refer to as "the Regulations".

4. It is not necessary for me to say a great deal about the substantive issues in the case, but I should explain the background to the matters that I have to decide. In addition to the regular Royal Navy there is the Royal Naval Reserve (RNR). This exists in order to provide a reserve force that is available, if called upon, to supplement the regular forces in the activities of the Navy. These activities are not, of course confined to warfare or the like, but can extend to civil emergencies or other activities that are necessary in the national interest. When regular servicemen or servicewomen, whether officers or ratings, leave the Royal Navy, there is generally an opportunity for them to join the RNR. This is different from being automatically being placed on a reserve list for a period on leaving the Royal Navy. It is also possible to join the RNR without having previously been in the Royal Navy.

5. The Claimant was until April 2018 a serving Royal Navy Officer under a commission for a period of years. In April 2017, at which time he held the rank of Lieutenant, he gave notice that he wished to leave the service early, which is possible with permission. That was granted and he was due to leave, and did leave, the Royal Navy on 9 April 2018.

6. Meanwhile, on 22 February 2018 a signal with general distribution was sent out regarding promotions to Lieutenant Commander to be effective from 1 October that year, and the Claimant was included in that list. It is not the totality of his claim, but the heart of the claim in this matter is that the Respondent maintained that this promotion would only take effect if the Claimant withdrew his application to leave the regular service early, and maintained that if he were to join the RNR that would be at the rank of Lieutenant.

7. This preliminary hearing was listed to determine three issues. The order listing the hearing was made by Employment Judge Harper on 4 November 2019 and is at page 206 of the agreed bundle of documents. That recorded the three issues to be considered as being related to jurisdiction and referred to paragraph 4.1 of the Respondent's agenda for that preliminary hearing. That paragraph, 4.1, said that there were three prior questions of jurisdiction which it expressed in the following terms:

1. Whether the Tribunal has jurisdiction to consider the claim pursuant to regulation 13(2b) of the Regulations.

2. Whether the Claimant is able to satisfy the pre-condition to bringing a claim under regulation 5 and/or regulation 7, the pre-condition being that set out at regulation 2(4)(a) of a full-time comparator within the meaning of that part of the Regulations.

3. Whether the Tribunal has jurisdiction to hear two specific allegations of detriment advanced as part of the Claimant's regulation 7 complaint as he has not complained of the same matter in the Armed Forces Service Redress Procedures.

8. The first and third of those are internally expressed as being jurisdictional. The second was not, but the overall rubric to those three items was that they were questions of jurisdiction, and they were presented in that way in the Respondent's skeleton argument drafted by Mr Murray. In the course of the hearing I questioned whether the second point was in fact one that went to jurisdiction, and ultimately it seems to me that it is not. This means that for the purposes of a preliminary hearing there could be a preliminary issue determined within rule 53(1)(b) of the Rules of Procedure.

9. Determining a preliminary issue of that sort, however, would usually involve evidence and a determination in final terms of an issue such as whether the Claimant and any comparator were employed under the same type of contract, or whether they were engaged to do the same or broadly similar work. Given that the initial approach to the issue was one of jurisdiction, I have not had any evidence in proper terms on the point, and there has not been a full investigation of the contractual or other basis on which service men and women, including reservists, are engaged, or as to whether reservists are engaged in the same or broadly similar work. There has been some argument on that point, but not the sort of evidence that one would expect or require in order to reach a final determination of it. Nor have I been referred to any authorities on how that comparison might be made, although mention has been made on the Claimant's side of the litigation in relation to part-time retained firefighters.

10. In the circumstances it seemed to me that I should take the second point under rule 53(1)(c) and consider whether the claim should be struck out on the grounds that there is no reasonable prospect that the Claimant could succeed in it by reason of the requirements of regulation 2(4)(a). The parties were agreeable to my approaching it in that way because the arguments would then be the same as would be put forward were it to be treated as a jurisdictional point. I have also decided that it makes sense for me to deal with that point first as it includes a fundamental question as to the Claimant's status, that is whether he is a reservist at all. It seemed to me to be logical to make any decision of that aspect first as it underpins the entire case.

11. So, I look at the second point that was advanced under regulation 2(4) of the Regulations. That provides as follows:

> *A full-time worker is a comparable full-time worker in relation to a part time worker if at the time when the treatment that is alleged to be less favourable to the part time worker takes place*
>
> *(a) both workers are*
>
> *(i) employed by the same employer under the same type of contract; and*

(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualifications, skills and experience; and

(b) the full-time worker works or is based at the same establishment as the part time worker or, where there is no full-time worker working or based at that establishment who satisfies the requirements of sub paragraph (a), works or is based at a different establishment and satisfies those requirements

12. In this regard Mr Murray advanced two arguments, both of which I have approached in terms of the test of there being no reasonable prospect of success. First, he argued that the circumstances of the Claimant's departure from the regular Navy and apparent transfer to the RNR were such that the Claimant did not in fact join the latter, and so is not at present a serving officer. In this regard I refer to page 85 and the letter of 29 March 2018 to the Claimant on this subject. This was sent by Lieutenant Commander Pizii on behalf of the Second Sea Lord, who I am told effectively exercises personnel functions in relation to the Navy, encompassing both the Royal Navy and the RNR. This reads in part as follows:

> "I am directed to inform you that the Second Sea Lord on behalf of the Admiralty Board has approved your transfer into the Royal Naval Reserve (RNR) which will result in you serving under the terms and conditions set out below"

The letter then continued that the Claimant would be transferred to a particular unit, that this unit reflected the work that he had carried out up to that point in the Royal Navy, and that he would do so in the rank of Lieutenant. It said that he would remain on a new employment model contract known as the Career Commission Stage to complete the balance of his regular service and that therefore his RNR service would end on 27 June 2025, which I understand is when the Commission that he was engaged under would come to an end in any event. There was then reference to rank, seniority and pay all referring to the rank of Lieutenant. Over the page there were other conditions set out under the heading Conditions of RNR Service which I will return to on a different point.

13. At paragraph 11 of the letter the Claimant was asked to notify his decision to accept or otherwise the terms of that letter as soon possible, and there was attached a standard form of acceptance of those terms and conditions.

14. The Claimant in fact returned that form on 8 April 2018 with an endorsement that he added in manuscript. He inserted a reference to his email to Lieutenant Commander Pizii and then added the following:

> "I accept the terms and conditions of service in accordance with the reference"
>
> and then in manuscript;

> "subject to my continued objection to the proposed rank of transfer as stated in clauses 2, 4 and 5. I reserve all my rights in this respect, please refer to reference b, which is the email and to my email of 8 April 2018 to Lieutenant Commander Pizii to which the present enclosure is attached".

15. On 16 April 2018 at page 247 a letter was sent by Lieutenant Commander Pizii to the Commanding Officer of the unit to which the Claimant was to be transferred. That letter said that the Claimant's appointment had been approved and that he would enter the RNR in the rank of Lieutenant as previously stated, and there were references then to the necessary administrative steps that would be taken.

16. Lieutenant Commander Pizii's reply to the Claimant was at page 92 in email of 25 April 2018. The substantial part of this read as follows:

> "You have been given the option to join the MR [that is Maritime Reserve, which I believe that to be synonymous with the RNR for at least for present purposes] as a Lieutenant in the……..department. Should you chose to do so, which is unclear as you have you stated that you do not accept the TCOS [Terms and Conditions of Service], you would have an opportunity along with any other eligible members of the MR to be offered a position in the acting higher rank should a position become available, this would be subject to the appointing process. Should you join the MR you would be considered for promotion within the RNR at board subject to eligibility and MAUN within that specification.
>
> We did discuss that you could still decline the offer to join the MR at this stage".

Then there was a reference to the opportunity to complain about the policy that was being applied. The substantial point is the one that I have already mentioned, namely the Claimant's view or position that he should be able to transfer to the RNR in the rank of Lieutenant Commander in accordance with the promotion that had been published.

17. The factual position is that the Claimant has not attended for performance of any duties within the RNR. He considers himself to be on unpaid leave and refers to the terms of his service complaint in which he expressed that and sought that as an outcome to the complaint. The Respondent does not accept that that is the position; but it is not necessary for me to decide whether he is indeed on unpaid leave or anything other than that for the purposes of this hearing. This is because I find that it is not the case that there is no reasonable prospect of a Tribunal concluding that the Claimant is a serving reservist. That, I should emphasise, is not the same as a finding that he is a serving reservist, nor is it the same as saying that I believe that a Tribunal will be bound or even likely to find that he is a serving reservist. It is only that the test of there being no reasonable prospect of a Tribunal finding that has not, in my judgment, been satisfied.

18. It seems to me that the Claimant's equivocal acceptance of the transfer might be found to be an acceptance under protest as to the applicable rank, and that Lieutenant Commander Pizii's response might be found to be an acceptance that the Claimant had joined the RNR, albeit subject to an ongoing dispute about his rank. I have not been referred to any correspondence in which the Respondent has clearly asserted that the Claimant has never become a reservist or that, given his non-attendance for duties, he is considered to have resigned, or anything of that nature.

19. The second point with regard to this aspect that Mr Murray advanced was that there was no reasonable prospect of demonstrating the necessary comparison under regulation 2(4). There are two reasons why I was not satisfied that the no reasonable prospect test had been made out. One is that, as I have already said, there would be evidential matters for the Tribunal to consider in relation to the type of contracts or relationships involved and the nature of the work in the two roles, one in the Royal Navy and the other in the RNR. In the absence of the full evidence about all of these matters I am not able to say that the position is so clear that there are different types of contract, or so clear that the work is not the same or broadly similar, that there is no reasonable prospect of a Tribunal finding otherwise. These are fact-sensitive questions.

20. Secondly, Mrs M raised an argument under regulation 3 of the Regulations to the effect that the Claimant could be his own comparator. This regulation applies to a worker who was identifiable as a full time worker under Regulation 2(1) and, following a termination or variation of his contract, continues to work under a new or varied contract which requires him to work for a number of weekly hours that is lower than the number he was required to work immediately before the termination or variation. The regulation provides, in summary, that there can be drawn a comparison between the position of the worker before and after that termination or variation.

21. This was not an argument, I think, that either the Respondent or for that matter the Tribunal had anticipated in advance of this hearing, and so I approached the argument with a degree of caution. On the face of the matter, however, I find that I cannot say that there is nothing in the point or that it would have no reasonable prospect of success. So, my conclusion on the second issue is that I would not strike out the claim on that basis.

22. I turn, then, to the first matter raised by the Respondent, being regulation 13(2)(b). Regulation 13 is headed "Armed Forces" and paragraph 1 provides that these Regulations shall have effect in relation to:

> *(a) subject to paragraph 2 and 3 and apart from regulation 7(1) to service as a member of the Armed Forces.*

So, the starting point is that the Regulations apply to the Armed Forces.

Paragraph 2 of regulation 13 provides that

"These Regulations shall not have effect in relation to service as a member of the reserved forces in so far as that service consists in undertaking training obligations……

(b) under section 22 of the Reserve Forces Act 1996, or consists in undertaking voluntary training or duties under section 27 of the Reserved Forces Act 1996.

23. I approach this issue on the basis that the Claimant is a serving reservist. I do so not having decided that point, but it is of course an essential requirement for him to be able to succeed in the claim at all that he is indeed a reservist, and so I assume that for the purposes of this part of the case. It is therefore necessary for me to look at how the Regulations apply to the Armed Forces. I have already quoted regulation 13(1) and (2). Paragraph 2 of the regulation refers to the Reserve Forces Act 1996: section 22 of that Act provides as follows:

(1) A member of a reserve force may in accordance with orders or regulations under section 4 be required by virtue of this section in any year to train in the UK or elsewhere for:

(a) One or more periods not exceeding 16 days in aggregate; and
(b) Such other period as may be prescribed, none of which shall exceed 36 hours without the consent of the person concerned.

Section 27 provides under the heading "Voluntary training and other duties" as follows:

(1) Nothing in this Part prevents a member of a reserve force;
(a) Undertaking any voluntary training in the UK or elsewhere that is made available to him as a member of that force;
(b) Undertaking any voluntary training or performing other voluntary duties in the UK or elsewhere being training or duties undertaken or performed at his own request or following a request made to him by or on behalf of his Commanding Officer.

24. I pause there in order to consider what service as a reservist might involve. It is apparent from section 22 that it can involve required training up to 16 days a year. It is apparent from section 27 that it might also include voluntary training or other duties in excess of the 16 days arising under section 22. The other provision which I had my attention drawn to is section 25. This provides in sub-section (1) that a member of a reserve force may enter into a commitment in writing under this section (an additional duties commitment) to perform such duties for such period or periods as maybe specified in the commitment. So, it is apparent that there could be other duties under section 25 that do not fall under sections 22 or 27, and therefore would not, on the face of the matter, fall within regulation 13(2).

25. It seems to me that it is also evident that duties could include those that arise under a call out or mobilisation. There has been some debate in the course

of the hearing about whether these terms mean exactly the same thing, but it is sufficient for the purposes of this matter to say that call out or mobilisation would, as I understand it, involve requiring reservists to serve because (to paraphrase) the Minister had made a decision that it was in the national interest to require them to undertake duties.

26. All of this is reflected in the letter of 29 March 2018 to which I have already referred. On page 86 the conditions of RNR service are set out. Paragaraph 7 refers to the Defence Reform Act as amending the call out powers under the Reserve Forces Act 1996. The same paragraph states that there is by virtue of the Defence Reform Act a broader call out power than that which had previously existed, and details of that are given. Under "liability to call out" in paragaraph 8 the letter said, "however your call out liability has been exceptionally waived until 10 April 2020 to enable you to settle into civilian employment, thereafter you will be fully liable under the new call out powers as stipulated in paragraph 6".

27. Under "training commitments" paragraph 9 read as follows; "You will be placed on RNR list one, this requires you to commit to 24 annual training days per year to qualify for your certificate of efficiency for your tax free bounty". There is then provision about how that would be split up. Paragraph 9 continues: "You are advised to consider carefully whether you and, if appropriate, your family and your civilian employer are prepared to accept your training commitments and legal obligations under the Reserve Forces Act before accepting this offer of appointment", and there was then reference to the employment protection that is available in civilian employment for reservists.

28. What, then, is the effect of Regulation 13 in relation to the issues in this case? Mr Murray argued that, to the extent that the Claimant is serving at all, his service consists in undertaking training obligations within regulation 13(2). He contended that the letter of 29 March specifies training commitments, and that these would be for 24 days in order to qualify for "bounty" which is a payment. He contended that 16 of those days would arise under s.22 of the 1996 Act and the remaining 8, if attended, would arise under s.27. It seems to me that this analysis is correct. There would be 16 required days and 8 voluntary days all, however, for training.

29. Mr Murray's argument then continued that this is the full extent of the service of a reservist who has not been called out or who has not signed up to a commitment to additional duties under s.25. This would mean that, in the absence of either of those things, all reservists would fall within regulation 13(2)(b). Mr Murray further contended that the point was all the stronger in the Claimant's case because he is still under the terms of a specific waiver of liability to call out.

30. Mrs M accepted that a complaint relating to training obligations would not be within the Tribunal's jurisdiction because of regulation 13(2). She argued that reservists are liable to call out when required unless specifically exempted, and further that issues of rank are unrelated to training obligations. Essentially Mrs M contended that regulation 13(2) should be given a narrow construction as it is an exemption to the wider point that the Armed Forces are included within the scope

of the Regulations, and that it should be interpreted as excluding complaints relating to training obligations only.

31. In resolving this point I find it important to note that the regulation refers to "service". It seems to me that a naval officer does not serve or render service simply by existing. Service concerns what the officer does, or is required or expected to do. If the Claimant were to fulfil the service set out in the conditions of RNR service in the letter 29 March 2018 then, in the absence of commitment to additional duties and in the absence of call out, his service, I find, would consist in undertaking training obligations. Part of these would be under s.22 and the other part, if undertaken, would be under s.27.

32. In my judgment it would be artificial to regard issues as to rank as divorced from that service. In the course of performing training obligations a Lieutenant would be serving as a Lieutenant, a Lieutenant Commander as a Lieutenant Commander, and so on. I do not consider that liability to call out is relevant to the nature of a reservist's service in this way. If it were, then regulation 13(2) would only apply to reservists' training activities. That seems to me to be unrealistic, and I cannot see what the purpose would be in exempting only those specific activities in the case of reservist.

33. In any event, even if I am wrong about that, the Claimant is currently exempted from call out and so in his case there is not (at present, at least) any such liability. In the additional statement that I have already referred to the Claimant asserted that it was inconceivable that Parliament meant to leave reservists in what he described as a "black hole", meaning outside the regime of the Regulations. I find that regulation 13(2) shows that Parliament did indeed intend to do that in the terms and to the extent provided. I therefore find that the Tribunal does not have jurisdiction to hear this complaint by virtue of regulation 13(2)(b).

34. The third point relied on is raised by reference to regulation 13(3), which provides that no complaint concerning the service of any person as a member of the Armed Forces may be presented to an Employment Tribunal under regulation 8 unless;

> *(a) that person has made a complaint in respect of the same matter to an Officer under the Service Redress Procedures; and*
> *(b) that complaint has not been withdrawn.*

It is not necessary to decide this point, given what I have decided in relation to regulation 13(2), but I will give my conclusions on it in any event.

35. The Claimant made a service complaint. Mr Murray's argument was that the complaints in paragraphs 84 and 86 of the particulars of claim were not included in or covered by that service complaint, and so the Tribunal has no jurisdiction to consider them. Mrs M contends that these were indeed within the terms of the service complaint.

36. Paragraph 84 of the particulars of claim begins with the words “irrespective of the Claimant’s service complaint” which Mr Murray contended was something of a giveaway about the position. I do not take that into account: I have to consider whether the complaint to the Tribunal has or has not been the subject of a previous service complaint. The complaint to the Tribunal goes on to say that the Respondent failed to accede to the Claimant’s request for a review of the decision in view of the OJAR 16 Report. That report was made available to the Claimant on 22 May 2018. The service complaint was raised before that on 1 May 2018, and so in simple terms the service complaint cannot be referring to that report.

37. Mrs M in effect contended that the complaint in the service complaint about incomplete information in relation to the decision about rank is sufficient to cover the point, including covering information that only came to light after the complaint had been made. This is, perhaps, an ingenious argument, but I find it to be stretching the point too far. In reality the complaint is that the decision was not reconsidered in the light of the OJAR Report. I find that it is not realistic to say that part of the complaint about Lieutenant Commander Pizii’s original decision was that she did not take into account a report that did not exist at that time, and so if necessary I would find that there is no jurisdiction in relation to that matter.

38. The second point is paragaraph 86, which complains that Lieutenant Commander Pizii has remained the Claimant’s Career Manager in the RNR, and that this creates a conflict of interest and the risk of further prejudice to the Claimant’s career. Paragraph 17 of the service complaint at page 102 raised a complaint of there being a conflict of interest in Lieutenant Commander Pizii’s case as Career Manager for the Claimant. I find that paragaraph 86 raises essentially the same complaint, albeit on a continuing basis. I find that it would not be realistic to say that an officer in the Claimant’s position should raise another service complaint in order to say, in effect, that the situation that he had originally complained about had not be remedied, and so I would find that there was jurisdiction over this complaint were that the only matter for decision. However, that does not affect my overall conclusion that the Tribunal lacks jurisdiction by virtue of regulation 13(2).

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Employment Judge Glennie

Dated 22/04/2020

Judgment and Reasons sent to the parties on:

27/04/2020

For the Tribunal Office