



EMPLOYMENT TRIBUNALS

Claimant: Ms P-M Edwards
Respondent: Ministry of Defence
Heard at: Bristol
On: 29 July 2021
Before: Employment Judge Oliver

Representation

Claimant: Ms Lainchbury, solicitor

Respondent: Mr Allsop, counsel

RESERVED JUDGMENT ON A PRELIMINARY HEARING

1. The claimant's claim for disability discrimination is dismissed upon withdrawal.
2. The Tribunal does not have jurisdiction to hear the claimant's claim for race discrimination because she had not made a service complaint about the matter as required by section 121(1) of the Equality Act 2010. This claim is struck out.
3. The claimant's application to amend her claim to add claims for sex discrimination, harassment related to sex and victimisation is refused because she had not made a service complaint about these matters as required by section 121(1) of the Equality Act 2010 and so the Tribunal would not have jurisdiction to hear the new claims.
4. The hearing provisionally listed for 28 October 2021 is no longer required and is vacated.

REASONS

1. This was a Preliminary Hearing to decide whether the claimant should be permitted to amend her claim, and whether the Tribunal had jurisdiction to hear

her existing claim. The hearing of this matter took all day and judgment was reserved.

2. The hearing was conducted by the parties attending by video conference (CVP). It was held in public with the Judge sitting in open court in accordance with the Employment Tribunal Rules. It was conducted in that manner because the parties had consented to such a hearing and because a face to face hearing was not desirable in light of the restrictions imposed by the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020 and the Health Protection (Coronavirus, Restrictions) (All Tiers) (England) Regulations 2020, as amended and because it was in accordance with rule 46, the *Presidential Guidance on remote hearings and open justice* and the overriding objective to do so.

Procedural background

3. The claimant is a serving soldier in the Royal Logistical Corps. She presented a claim for race and disability discrimination on 27 December 2019. As she is currently serving in the Armed Forces, she must bring a service complaint in accordance with the procedure set out in the Armed Forces (Service Complaint) Regulations 2015 before she can make an Employment Tribunal claim. The respondent disputes that she has done so correctly and says the Tribunal does not have jurisdiction to consider her claim.

4. There was a Case Management Preliminary Hearing before EJ Christensen on 22 September 2020. The claimant was representing herself at this point. At this hearing, EJ Christensen:

- a. Explained to the claimant that it was not possible for the Tribunal to identify the claims and issues from her narrative claim form, and encouraged her to seek legal advice to assist her in clarifying her claim and the law relating to it.
- b. Listed a Preliminary Hearing to determine whether the claim for disability discrimination should be struck out on the basis that it has no reasonable prospect of success, because a member of the Armed Forces cannot bring a claim for disability discrimination under the Equality Act 2010 (under paragraph 4(3) of Schedule 9).
- c. Directed that there should be case management at the next Preliminary Hearing in relation to the race discrimination claim, in particular to look at the issues of: (1) whether a service complaint had been raised under the statutory scheme, and (2) whether the claimant could rely upon things said to her during the voluntary mediation process that formed part of the service complaint.

5. The claimant obtained legal representation at the end of October 2020. Her representatives prepared a draft amended claim and draft application for permission to amend her claim. The respondent confirmed on 5 January 2021 that it did not consent to the amendments. The claimant filed an application to amend on 6 January, and the respondent gave summary grounds for objection on 12 February.

6. On 19 February 2021 the claimant's representative stated in writing to the respondent that the claimant has withdrawn her claim of disability discrimination.

7. This Preliminary Hearing has been relisted a number of times, partly to ensure that the service complaint process had been completed. The respondent informed the Tribunal that this would be likely to be complete by 30 June 2021. I understand that the outcome of the service complaint has still not been provided to the claimant.

The Issues

8. I discussed the issues for the Preliminary Hearing with the parties at the start of the hearing. The following list of issues was agreed.

9. ***Withdrawal of the disability discrimination claim.*** The respondent asked the Tribunal to dismiss this claim upon withdrawal. The claimant's representative confirmed that the claim was withdrawn and could be dismissed. I have done so in the judgment set out above.

10. ***Whether to grant the claimant's application to amend her claim.*** This involves two issues:

- a. Whether the matters set out in the amended claim have been raised in a service complaint so that the Tribunal has jurisdiction.
- b. Whether the amendments should be permitted in accordance with the usual principles for deciding such applications.

11. ***Whether a service complaint had been raised in relation to the claimant's original claim of race discrimination so that the Tribunal has jurisdiction.*** It was originally directed by EJ Christensen that this issue should be considered in case management after the substantive Preliminary Hearing. However, the parties agreed that I could determine this point at this hearing. It made sense to do so because I was already considering the same point in relation to the amendment application.

12. ***Whether the claimant could rely on things allegedly said during the voluntary mediation process that formed part of the service complaint.*** The claimant was prepared to address this point at the hearing, while the respondent invited me to either take a high-level view of this issue or list a separate hearing for the point to be decided.

Evidence and submissions

13. I was provided with a bundle of documents running to nearly 400 pages, a bundle of correspondence, and a large bundle of authorities. I had skeleton arguments from both parties. I also had a witness statement from the claimant with a supporting exhibit. I spent the morning reading the witness statement and submissions, together with the key documents and authorities as listed for me by the parties.

14. I took the claimant's witness statement as read. There was no cross-examination of the claimant and I did not ask her any questions. I heard oral submissions from both parties. I thank both representatives for their well-prepared and clear written and oral submissions.

Relevant facts

Case Number: 1406413/2019

15. The claimant is a black woman who is originally from Dominica. She has been employed by the respondent since 9 April 2012 and holds the rank of Lance Corporal.

16. The claimant made a service complaint on 25 July 2019. It contains considerable detail about what the claimant says happened to her, and runs to some 45 pages in total. A high-level summary of the claimant's complaint is that she was treated badly in various ways after having knee surgery following an injury sustained during non-commissioned officer training.

17. The claimant ticked "yes" on page 19 of the form in response to the question "*Does your complaint include allegations of bullying, harassment, discrimination or any other allegation specified in regulation 5(2) of the Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015?*". The claimant gave a lengthy answer in response to the following question, "*State which category (or categories) you consider your complaint falls into...why you believe it falls within that category (or categories) and details of the relevant conduct*". This refers to bullying and unfair treatment, and lists a number of specific examples. The claimant states, "*Throughout this lengthy ordeal, it feels like I have become the sacrificial lamb, discredited and dismissed repeatedly. I have been demoralized, humiliated, disrespected, alienated and excluded in the workplace*".

18. The claimant also provided a lengthy summary of what happened and when. She introduced this by saying, "*I have experienced a sequence of events post-surgery to present which can be best characterized as a failure of a duty of care by my COC, unfair and unnecessary intimidation by the COC during my recovery path; culminating with an unjustified recommendation for non-retention based on fabricated evidence*". She refers to having a temporary disability.

19. At no point in the lengthy service complaint form does the claimant use the word "discrimination". She does not make any specific reference to being treated differently because of her race or sex. On page 11 of the form she states, "*My SSM told me that 'I am better off than other Commonwealth soldiers in the Troop since I travel home alternate years or periodically once a year'*". On page 24 of the form, she refers to a specific incident involving a colleague and states, "*I felt that I had lost my integrity as a soldier, as a JNCO, as a female and as an adult among colleagues*". On page 25 of the form, she refers to her unfair treatment, and says, "*Ironically, this is a clear demonstration of why the Armed Forces is again facing serious media scrutiny for failing to battle the '...culture of bullying and sexism'*" – quoting an article in the Telegraph.

20. In paragraph 24 of the claimant's witness statement, she says that she was "*clearly cautioned that I could not explicitly allege that I had been a victim of racial discrimination in the form*". She also says she was reluctant to do so because she feared that if she focused on race or gender issues too much things would become even worse for her. She says she did not understand her rights under the Equality Act 2010 at the time and the overlap between the law and military procedure.

21. The claimant submitted her claim to the Employment Tribunal on 27 December 2019. She did not have any legal advice at this stage. She ticked the boxes for race and disability discrimination. She did not tick the box for sex discrimination. She attached lengthy grounds of complaint which largely

duplicated the information in her service complaint. These grounds did not provide details of the basis on which she was alleging race and/or disability discrimination.

22. The claimant eventually obtained pro bono legal representation and her advisers prepared an amended claim on her behalf. The amended claim brings claims of race discrimination, harassment related to race, sex discrimination, harassment related to sex, and victimisation. The amended details of claim cover many of the same factual allegations as the original claim, but are completely rewritten. The amended claim alleges that the claimant was subjected to a campaign of racially and/or gender motivated harassment, discrimination and victimisation. It alleges that the mistreatment of the claimant by the respondent and/or its employees was related to and/or because of race and gender. The claimant names a hypothetical comparator of a white male soldier, of the same age and rank, and with the same type of training injury. She says that this hypothetical white male soldier would not have been treated in the same way.

Applicable law

23. Sections 120, 121 and 123 of the Equality Act 2010 (EqA) provide as follows:

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);*

.....

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.*

.....

123 Time limits

.....

- (2) *Proceedings may not be brought in reliance on section 121(1) after the end of –*
 - (a) *the period of 6 months starting with the date of the act to which the proceedings relate, or*
 - (b) *such other period as the employment tribunal thinks just and equitable.*

24. A service complaint is a complaint brought by a member of the armed forces within the statutory service complaints process. This is set out in the Armed Forces Act 2006 (“AFA”) and the Armed Forces (Service Complaints) Regulations 2015 (the “2015 Regulations”).

25. Section 340A AFA states, “*If a person subject to service law thinks himself or herself wronged in any matter relating to his or her service, the person may make a complaint about the matter.*” This is defined as a “service complaint”.

26. Regulation 4 of the 2015 Regulations sets out the process for making a service complaint.

Procedure for making a service complaint

- 4(1) *A service complaint is made by a complainant making a statement of complaint in writing to the specified officer.*
- (2) *The statement of complaint must state—*
- (a) *how the complainant thinks himself or herself wronged;*
- (b) *any allegation which the complainant wishes to make that the complainant's commanding officer or his or her immediate superior in the chain of command is the subject of the complaint or is implicated in any way in the matter, or matters, complained about;*
- (c) *whether any matter stated in accordance with sub-paragraph (a) involved discrimination, harassment, bullying, dishonest or biased behaviour, a failure by the Ministry of Defence to provide medical, dental or nursing care for which the Ministry of Defence was responsible or the improper exercise by a service policeman of statutory powers as a service policeman;*
- (d) *if the complaint is not made within the period which applies under regulation 6(1), (4) or (5), the reason why the complaint was not made within that period;*
- (e) *the redress sought; and*
- (f) *the date on which the statement of complaint is made.*
- (3) *The statement of complaint must also state one of the following—*
- (a) *the date on which, to the best of the complainant's recollection, the matter complained about occurred or probably occurred;*
-
- (5) *In this regulation, "discrimination" means discrimination or victimisation on the grounds of colour, race, ethnic or national origin, nationality, sex, gender reassignment, status as a married person or civil partner, religion, belief or sexual orientation, and less favourable treatment of the complainant as a part-time employee.*

27. There is very little appellate authority on the meaning of these provisions. The caselaw can be summarised as follows.

28. ***Molaundi v MOD***, UKEAT/0463/10 - a service complaint which was brought out of time and rejected by the military authorities did not meet the definition of "service complaint" for the purposes of a race discrimination claim under the Race Relations Act 1976. Silber J found that, "*the purpose of the statutory scheme is to ensure that the complaint of racial discrimination by the soldier is in the first instance determined by a body deemed by the legislature to be the appropriate body to resolve such disputes with the Employment Tribunal being the body dealing with this matter at the next stage.*" (paragraph 28).

29. ***Williams v MOD***, UKEAT/0163/12 - a failure to appeal internally in relation to a service complaint in time meant that the complaint was treated as withdrawn and the Employment Tribunal had no jurisdiction.

30. ***Duncan v MOD***, UKEAT/0191/14 - section 121 EqA should be read as operating a jurisdictional bar to Employment Tribunal proceedings only where the right to make referral to the Defence Council (the final stage in the complaint process) had arisen and not been exercised. The respondent conceded the point before the hearing. Eady J agreed with the respondent's position that "*a purposive construction of s121 [is] required to achieve a lawful balance between*

the statutory aim to enable the Armed Forces to determine complaints internally prior to litigation and a complainant's right of access to a Court/Tribunal within a reasonable time." (paragraphs 15 and 16). Eady J referred to this as an issue of how the service complaint process is compatible with a complainant's Article 6 rights under the European Convention on Human Rights.

31. Both parties also referred me to the Employment Tribunal decision of EJ McNeill QC in **Mr H Zulu (and another) v The Ministry of Defence** (2205687/2018 and 2205688/2018). This case considered what needed to be included in a service complaint in order for the Employment Tribunal to have jurisdiction. The parties agreed for the purposes of this hearing that the analysis used in this case could be followed.

32. The key issue in **Zulu** was whether the claimants had made a service complaint about "the matter" in accordance with section 121 EqA. The claimants had made service complaints about "discrimination and harassment on grounds of race", and provided details about a number of specific incidents. The respondent submitted that the Employment Tribunal did not have jurisdiction to consider a number of allegations made in the claimants' claims because they had not been raised as service complaints at all, or had been ruled inadmissible during the service complaints process. EJ McNeill found the following principles:

- a. Section 121 requires a link between "the matter" complained of in the service complaint and the "act(s) done" complained about in the claim to the Employment Tribunal (paragraph 66).
- b. The service complaint may not require the particularity of a pleading or claim form, but it requires more than a general complaint (paragraph 66).
- c. The word "matter" means something more general than "the act complained of" or "the act done" – it means something broader than a "specific incident" (paragraph 68).
- d. The word "matter" in s121 is used to refer to how a person thinks they have been wronged in relation to his or her service. The service complaint must be particularised to some extent as set out in the 2015 Regulations, but the primary requirement is for the complainant to say "how he thinks himself wronged" (paragraph 69).
- e. *"The purpose of the statutory [service complaint] process is to give an opportunity for complaints, which may subsequently be brought to an employment tribunal, first to be considered by the military authorities. This means that there must be sufficient detail in the service complaint to make it possible for a decision to be made in relation to it before a claim is brought to the employment tribunal about the same matter. However, that does not mean that each and every detail of the wrong complained of must be particularised in the service complaint form."* (paragraph 70).
- f. A service complaint is not the same as a pleading, and the approach should not be overly legalistic. It is the complaint about the wrong which the complainant wishes to have redressed (paragraph 71).

33. EJ McNeill decided that where clear and detailed allegations illustrated an alleged prevailing racist environment over a period of time as set out in the service complaint forms, and were then elaborated upon in the claim form, the complaints in the claim form did fall within the meaning of "the matter". However, complaints of victimisation did not, as they did not form any part of the service complaints and were different in character from complaints of an environment of

racial harassment. A comment from 2009 also did not, as it was many years distant from the matters complained of.

34. I have also considered the relevant provisions of the European Convention on Human Rights (“ECHR”) and the Human Rights Act 1998 (“HRA”). The parties did not make any submissions on these provisions. However, under section 3 HRA, the Tribunal is to interpret domestic law in a way which is compatible with ECHR rights so far as it is possible to do so.

35. Article 6 ECHR provides that, “*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*”. Under Article 14 ECHR, the ECHR rights and freedoms are to be secured without discrimination on any ground.

Conclusions

36. The first issue is ***whether to grant the claimant’s application to amend her claim***. I start with the respondent’s argument that the matters set out in the amended claim have not been raised in a service complaint, meaning that the Tribunal does not have jurisdiction to consider the claims.

37. The respondent’s representative submitted that it is necessary for the “wrong” complained of in the Employment Tribunal claim to have been included in the service complaint. The service complaint does not contain any allegations of sex discrimination. It uses the word “harassment” in a colloquial sense, but does not say that this was based on sex or race. There is no reference to anything that would form the legal basis for a victimisation claim.

38. The claimant’s representative submitted that the claimant had ticked the box for “discrimination” on the service complaint form. It is not necessary for a claimant to include technical legal terms – the requirement from **Zulu** is simply to explain how she has been wronged. A fair reading of the service complaint form shows allegations of bullying, harassment and discrimination, which shows the environment. The claimant had also explained in her witness statement why she did not make specific references to gender or race in the service complaint.

39. The key question is – what is “the matter” that needs to be included in a service complaint, in order for an individual to bring a “complaint” about an “act done” under the EqA? Is simply a description of the events and acts done by a respondent which form the basis for a claim? Or is it necessary for the service complaint to specify that there has been unlawful discrimination?

40. The decision in **Zulu** makes it clear that a service complaint is not required to be the equivalent of legal pleadings, the approach should not be overly legalistic, and it is not necessary to particularise each and every detail of the wrong complained of. I agree with the approach taken in this decision. It would be an unfair barrier to claimants if they were required to set out the equivalent of detailed legal pleadings in a service complaint before being permitted to bring a claim to the Employment Tribunal.

41. However, I also agree that the service complaint must set out the “wrong” that the complainant wishes to have redressed. As stated in **Zulu**, the purpose of the service complaint process is to give an opportunity for potential Employment

Tribunal complaints about discrimination to be considered by the military authorities first. As stated by Silber J in *Molaundi*, the purpose of the statutory scheme is to ensure that a complaint of discrimination is in the first instance determined by a body deemed by the legislature to be the appropriate body to resolve such disputes, with the Employment Tribunal being the body dealing with this matter at the next stage. As quoted by Eady J in Duncan, “...*the statutory aim to enable the Armed Forces to determine complaints internally prior to litigation..*” A service complaint must, therefore, contain sufficient detail to make it possible for a decision to be made in relation to it before a claim is brought about the same matter.

42. If this is the purpose of section 121(1) EqA, it appears to me that this requires a complainant to specify that they are making allegations of discrimination, rather than a general complaint about unfair treatment. Otherwise, the military authorities would not have the opportunity to investigate the very allegations which would then lead to an Employment Tribunal claim. It is not possible to make a free-standing claim about bullying or other unfair treatment to the Employment Tribunal. There will only be a valid claim if the allegations are of discrimination or harassment based on one of the protected characteristics under the EqA, or victimisation based on a protected act under the EqA.

43. The *Zulu* case involved a different situation. The claimants had made it clear in their service complaints that they were making allegations of race discrimination, but the respondent disputed that all of the incidents relied on had been set out in the service complaints. The military authorities did, therefore, have the opportunity to investigate the overall allegations of race discrimination that were then pursued before the employment tribunal. Race discrimination was the “wrong” complained of in that case. I note that the claimants were not permitted to pursue claims of victimisation, as these did not form any part of the service complaint.

44. The claimant’s representative submitted that it is not necessary for the “technical causes of action” to be included in a service complaint. I agree to the extent that legal pleadings are not necessary – for example, using technical terms or specifying which types of discrimination (direct, indirect etc) are being complained about. However, that is different from a requirement to indicate to the respondent that this is a complaint about discrimination, and which protected characteristics are relied on, as opposed to general bullying or unfair treatment.

45. I therefore find that section 121(1) EqA requires a potential claimant to specify in a service complaint that the “wrong” they are complaining about is discrimination, including the protected characteristic(s) relied on if applicable. Section 120 gives the Employment Tribunal jurisdiction to determine a “complaint” relating to a contravention of Part 5 – unlawful discrimination at work. Section 121 specifies that in Armed Forces cases this does not apply to “a complaint relating to an act done” unless the complainant has made a service complaint about “the matter”. The “complaint relating to an act done” is a complaint of discrimination, and so a service complaint about “the matter” must also be a complaint of discrimination.

46. I have looked carefully at the claimant’s service complaint to decide whether it contains sufficient information about the new complaints in her amended claim

to meet the requirements of section 121 EqA. I find that it does not, for the following reasons.

- a. There are two references to sex or gender in the 45 page document. The first reference talks about losing integrity as a “female”. This is as part of a list of other characteristics, in relation to one incident only. The second reference quotes a newspaper report about “a culture of bullying and sexism”, in the context of her overall complaint that is put on the basis of bullying and unfair treatment rather than sex discrimination. Neither of these references specifies that the claimant is alleging sex discrimination or harassment.
- b. The general allegation now made in the amended claim is that a male soldier would have been treated differently, in relation to all of the incidents complained of by the claimant. She also alleges harassment related to sex. There is nothing in the service complaint which would tell the respondent that the claimant thought she was treated in this way because of her sex, or that she was subjected to harassment related to sex.
- c. Individuals are not expected to use legal language or technical pleadings in a service complaint. However, there are various ways an individual can make it clear that the “wrong” they are complaining about is a type of unlawful discrimination, for example simply by saying “I think this happened to me because I am female”. The closest the service complaint comes to alleging discrimination is the claimant’s references to having a “temporary disability”. This might arguably be seen as a complaint about disability discrimination, but the claimant is not able to make this type of claim.
- d. The service complaint also contains no reference to a protected act that could form the basis of a victimisation claim, or allege a detriment as a result of a protected act. The word “victimisation” is used once, in box 5 of the service complaint form which asks what outcome or redress is sought. This is used in a colloquial sense in a sentence complaining about “relentless victimisation and distress”. The service complaint does not set out any facts which could form the basis of a victimisation claim – i.e. allegations that the claimant had made a complaint about unlawful discrimination and was treated badly as a result.
- e. The claimant did tick the box “yes” in response to the question “*Does your complaint include allegations of bullying, harassment, discrimination or any other allegation specified in regulation 5(2) of the Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015?*”. However, this is not sufficient to tell the respondent that she was making a sex discrimination or victimisation claim. The tick box also covers bullying. The claimant’s response to the following question, which asks the individual to state which category the complaint falls into and why, refers only to bullying and unfair treatment.

47. I have taken account of the claimant’s evidence in her witness statement that she was reluctant to specify discrimination in her service complaint because she feared that if she focused on race or gender issues too much things would become even worse for her, and that she did not understand her rights and the overlap between the law and military procedure. However, the Tribunal does not have any discretion under section 121 EqA. The Tribunal does not have jurisdiction if the requirements of section 121 have not been met, and there is no scope to take account of the claimant’s reasons for any failure. I also note that

the claimant only ticked the boxes for race and disability discrimination in her original Employment Tribunal claim, and not the box for sex discrimination.

48. I conclude that the Tribunal would not have jurisdiction to consider the main amendments to the claim – the addition of the claims for sex discrimination, harassment related to sex and victimisation. A Tribunal cannot allow an amendment to add claims which it does not have jurisdiction to hear. In addition, this means that these claims have no reasonable prospect of success. Applying the guidance in ***Selkent Bus Company Ltd v Moore*** [1996] ICR 836 EAT, it is clearly not in the interests of justice to allow amendments to a claim which have no reasonable prospects of success. This would cause hardship to the respondent as it would be required to respond to these unmeritorious claims, and ultimately would not be in the claimant's interests either if the claims are simply struck out at a later stage in proceedings.

49. I therefore refuse the claimant's application to amend her claim to add claims for sex discrimination, harassment related to sex and victimisation. The amendment application also covers rewording of the original claim for race discrimination, including harassment related to race. These amendments are also refused due to the decision I have reached on jurisdiction in relation to the original claim, as explained below.

50. ***Whether a service complaint had been raised in relation to the claimant's original claim of race discrimination so that the Tribunal has jurisdiction.*** This issue can be dealt with more briefly, as it is based on the same principles as the decision on the amendment application.

51. Again, I have looked carefully at the claimant's service complaint to decide whether it contains sufficient information about a complaint of race discrimination to meet the requirements of section 121 EqA. I find that it does not, for the following reasons.

- a. The original claim does not explain the basis on which the claimant is alleging race discrimination. The general allegation now made in the amended claim is that a white male soldier would have been treated differently, in relation to all of the incidents complained of by the claimant. The amended claim also says that treatment was "*because the Claimant is black, from Dominica, not of British origin*". This indicates that the claimant's intention was to bring a race discrimination claim based on colour, nationality or national origin.
- b. There is only one potential reference to race discrimination in the service complaint – the allegation that the claimant was told, "*I am better off than other Commonwealth soldiers in the Troop since I travel home alternate years or periodically once a year*". There is nothing in the service complaint to indicate that the claimant is complaining she was treated differently because of her colour, nationality and/or national origin. The comment about being better off than other Commonwealth soldiers is an isolated incident, it is unclear how this would be an allegation of race discrimination, and it does not show an unfavourable difference in treatment. At no point does in the service complaint the claimant mention race discrimination, or allege that her treatment was because of her colour.
- c. As already noted, individuals are not expected to use legal language or technical pleadings in a service complaint, but there are various ways an individual can make it clear that the "wrong" they are complaining

about is a type of unlawful discrimination. There appears to be nothing in the service complaint to tell the respondent that the claimant was complaining about a “wrong” of race discrimination.

- d. As noted above, ticking the box “yes” in response to the question about whether the complaint includes allegations of bullying, harassment or discrimination is not sufficient to tell the respondent that she was making a race discrimination claim. The tick box also covers bullying. The claimant’s response to the following question refers only to bullying and unfair treatment.

52. I have considered the claimant’s witness statement which alleges she was cautioned that she could not explicitly allege that she had been a victim of racial discrimination in the form. She also says she was reluctant to do so because she feared that if she focused on race or gender issues too much things would become even worse for her, and she did not understand her rights at the time. However, as discussed above, the Tribunal does not have any discretion under section 121 EqA and does not have jurisdiction if the requirements of section 121 have not been met, meaning there is no scope to take account of the claimant’s reasons for any failure.

53. I therefore conclude that the Tribunal does not have jurisdiction to consider the claim for race discrimination as the requirements of section 121 EqA have not been met. The claimant has failed to raise a service complaint about “the matter”, namely the alleged wrong of race discrimination, before making a complaint about race discrimination to the Employment Tribunal.

54. Although not raised by the parties, I have considered whether this interpretation of the provisions in the EqA is compatible with Article 6 ECHR. As stated by Eady J in *Duncan*, a purposive construction of section 121 is required to achieve a lawful balance between the statutory aim to enable the Armed Forces to determine complaints internally prior to litigation, and a complainant’s right of access to a Court/Tribunal within a reasonable time.

55. My decision means that the claimant is currently unable to bring her race discrimination claim before the Employment Tribunal, and has been refused permission to amend her claim to add complaints of sex discrimination, harassment and victimisation. Her complaints relate to events in 2019 and earlier, and she has not yet been given a right of access to the Tribunal. This is to be balanced against the aim of enabling the Armed Forces to determine complaints internally prior to litigation. My interpretation of the EqA is that it is necessary to specify that a service complaint is about discrimination, including the protected characteristic(s) relied on. This is so the military authorities have the opportunity to resolve the potential claim. They are unable to do this if the service complaint does not specify that it is a complaint about discrimination, which is the only basis on which a claim can be made to the Tribunal. I find that this does achieve a lawful balance between the statutory aim and a complainant’s right of access to the Tribunal.

56. The statutory regime does treat those working for the Armed Forces differently from others, by adding an additional hurdle of a service complaint before a claim can be made to the Tribunal. It is not easy for individuals representing themselves to understand what is required of a service complaint in order for it to satisfy section 121 EqA. As noted by EJ McNeill in *Zulu* (paragraph 87), although members of the Armed Forces face a jurisdictional

hurdle which does not apply to others in similar situations, the Tribunal cannot change the key principles and scope of the legislation.

57. This means that the claim for race discrimination is struck out as the Tribunal does not have jurisdiction to hear it, and the claimant currently has no other claims that can be considered by the Tribunal.

58. A hearing had been provisionally listed for 28 October 2021 to consider whether the claimant could rely on things allegedly said to her during a voluntary mediation process. This hearing is no longer required as the claims have not been permitted to proceed.

59. By way of concluding remarks, I understand that the claimant has still not received the outcome of the service complaint which she submitted in July 2019. The respondent told the Tribunal on 29 March 2021 that the process was likely to be concluded by 30 June, and hearings were listed on that basis. This ongoing delay is particularly disappointing as the claimant remains a serving soldier and it is to be hoped that this will be resolved shortly.

**Employment Judge Oliver
Date: 13 August 2021**

Sent to the Parties: 23 August 2021

FOR THE TRIBUNAL OFFICE