EMPLOYMENT TRIBUNALS

PUBLIC PRELIMINARY HEARING BY VIDEO

Claimant: Mr S Matthews

Respondents: Cleveland Army Cadet Force [First Respondent]
Ministry of Defence [Second Respondent]

Heard: Remotely by video link **On:** 11 August 2021

Before: Employment Judge S A Shore

REPRESENTATION:

Claimant: In Person
Respondent: Mr T Kirk, Counsel

RESERVED JUDGMENT AND REASONS

The judgment of the Tribunal is that:

1. The claimant's was neither a worker of either of the respondents within the meaning of section 230 of the ERA or an employee of either of the respondents within the meaning of section 83 of the EqA. His claims are all struck out.

REASONS

Background and History of the Claim

1. The claim arises from the claimant's position with the first and/or second respondents. He is currently a Major in the Northumberland Army Cadet Force, being the Medical Support Officer in that organisation. He has held that position

since early 2021. His claim before the Tribunal concerns his position as Captain and Medical Support Officer at Cleveland Army Cadet Force (CACF), which he held from 2006 until early 2021.

2. The parties are not in agreement as to the identity of the correct respondent. The claimant issued his claim against the first respondent only, but at a Private Preliminary Hearing (PPH) on 27 January 2021 before Employment Judge Langridge, the second respondent was added because the respondents both submitted that the second respondent was the correct respondent.

3. The claimant alleged in his ET1 that the respondent had:

    3.1. Directly discriminated against him because of sex, contrary to section 13 of the Equality Act 2010 ("EqA");

    3.2. Harassed him, contrary to section 26 of the EqA;

    3.3. Victimised him because he had stood up for a female colleague who had been the subject of discrimination because of her sexual orientation, contrary to section 27 of the EqA; and

    3.4. Subjected him to a detriment because he had made a protected disclosure contrary to section 47B of the Employment Rights Act 1996 ("ERA").

4. In a Scott Schedule dated 24 March 2021, the claimant appears to have indicated a number of additional claims. I make no determination of whether the claimant needs to be granted leave (permission) to add these claims to the existing claim, as I was not required to do so at this hearing and that question is no longer moot because of my decision in this hearing.

5. The claimant had issued Employment Tribunal proceedings in 2018 under case number 2501245/2018 against the first respondent only. Those proceedings were withdrawn after the parties agreed terms of settlement in an ACAS form COT3 dated 13 March 2019. I was not advised of the terms of settlement and the copy of the COT3 form in the joint bundle [53-54] was almost entirely redacted.

6. I was not shown the ET1 or ET3 filed in the 2018 case, but the CMO at paragraph 3(a) indicates that the claimant made claims in that case of:

    6.1. Unfair dismissal;

    6.2. Discrimination on the grounds of sexual orientation;

    6.3. Transferred on the grounds of gender; and

    6.4. Whistleblowing.

7. The importance of those proceedings to this hearing is that in the previous proceedings, a PPH was held before Employment Judge Garnon on 22 August 2018. That PPH produced a case management order (CMO) of even date [pages

123.1-123.10 of the bundle] that addressed the issues in the case at some length and in considerable detail.

8. The claimant seeks to rely on some of the remarks that EJ Garnon made in his CMO on the issue of jurisdiction in support of his position in this hearing. The most relevant part of EJ Garnon's CMO is paragraphs 10 and 11. I will return to the CMO in more detail below, but I can summarise the remarks as follows:

    8.1. The respondent's assertions that the Tribunal had no jurisdiction to deal with the claimant's case under the EqA because of the absence of mutuality of obligation was "misconceived" following the decisions in **Breakell v West Midlands Reserve Forces' and Cadets' Association** UKEAT/0372/10, and **Stephenson v Delphi Diesel Systems Ltd** [2003] ICR 471 (and other cases that I will return to below); and

    8.2. The claimant's claim of whistleblowing under the ERA was doomed because of lack of jurisdiction, but contained nothing that was not made unlawful by section 27 of the EqA.

9. The claimant began early conciliation on 19 October 2020 and obtained a conciliation certificate on 26 October 2020. He presented his ET1 on 11 November 2020. The first respondent failed to respond to the claimant's claim within the prescribed period and a judgment was entered in favour of the claimant in respect of his claims on liability only by EJ Johnson on 7 January 2021 [30-31].

10. The case was case managed in chambers by EJ Jeram on 15 December 2020 [55-56], when she considered the first respondent's application for an extension of time and the claimant's objection to that application before setting aside the liability judgment and extending time for the first respondent to present a response. The Employment Judge made case management orders, which included listing the case for a PPH on 27 January 2021 before EJ Langridge.

11. At that PPH, EJ Langridge added the second respondent as a respondent to the claimant's claim and made a number of case management orders dated 2 March 2021, that included a requirement for the claimant to give further details of his claim in a Scott Schedule and requiring the parties to set out their respective positions on the jurisdiction points. The parties were also ordered to prepare a bundle of documents and witness statements for this PuPH.

12. The CMO records an extensive discussion about the jurisdiction points and noted EJ Garnon's comments in his CMO from the previous proceedings. EJ Langridge also raised the potential relevance of sections 49 and 50 of the EqA and the decision in the case of **Jivraj v Hashwani** [2011] IRLR 827. Both parties were in agreement that this point was not relevant on the facts of this case.

13. The respondent made its first submissions on the jurisdiction points on 24 March 2021 [106-121]. The claimant responded on 30 March 2021 [122-123.12]. EJ Langridge had provided for the possibility of the respondent requesting a PuPH

to determine the jurisdiction points. The respondent applied for this PuPH on 26 April 2021 [124-125].

14. The only other relevant point to note in the history of the case to this point is that the respondent wrote to the Tribunal on 9 July 2021 (letter not in the bundle) about a number of matters. The most relevant of these was that the claimant's witness statement had asserted that he had not relinquished his Land Forces Commission, with the tacit implication that the claimant could assert that he is a member of the armed forces within the meaning of section 83(3) of the EqA. It was submitted that the respondent was not aware of this possibility and so sought for the discreet point to be dealt with at this PuPH.

15. The claimant helpfully confirmed that he was not asserting that he is a member of the armed forces and that he could therefore claim protection under section 83(3) of the EqA. On the basis of that concession, I heard no evidence on the point and, with the agreement of the parties, discounted the point in my consideration of the matters before me.

16. The respondent had also sought confirmation that this PuPH would deal only with the jurisdiction issues. The tribunal confirmed both points in a letter to the parties dated 22 July 2021.

Issues

17. The issues before me were, therefore:

    17.1. Was the claimant a worker of the respondents within the meaning of section 230 of the ERA 1996?

    17.2. Was the claimant and employee of the respondents within the meaning of section 83 of the EqA 2010?

18. I did not have to consider whether the claimant was a member of the Armed Forces within the meaning of section 83(3) EA 2010 and, if so, whether the Tribunal has jurisdiction to hear his complaints given that he did not lodge a service complaint before issuing proceedings as required by s.121(1) EA 2010. The reason that I did not have to consider this issue was that the claimant conceded the point in our preliminary discussions.

Hearing

19. The parties had prepared a bundle of documents for the hearing that consisted of 737 pages. If I refer to any pages in the bundle, I have recorded the relevant page numbers in square brackets [ ].

20. I was also provided with:

    20.1. A copy of the respondent's letter of 9 July 2021;

    20.2. The respondent's authorities bundle that ran to 174 pages;

20.3. The respondent's updated written submissions on the jurisdiction points; and

20.4. A copy of The Armed Forces (Service Complaints) Regulations 2015.

21. Both parties had prepared and exchanged witness statements. The respondent produced a witness statement from Commander Paul Haines dated 17 May 2021 that ran to 19 paragraphs. The claimant produced a witness statement dated 17 May 2021 that ran to 68 paragraphs. The claimant's statement dealt with the totality of his claim, rather than focussing on the issues that I had to determine in the PuPH. Both witnesses gave evidence on affirmation.

22. Commander Haines gave evidence first and confirmed that the contents of his witness statement were true. Mr Matthews did not ask Commander Haines any questions.

23. Mr Matthews then gave evidence and confirmed that the contents of his witness statement were true. As I have recorded above, his witness statement did not really engage with the issues that I had to determine at this hearing, but did give a comprehensive history of the chronology of his claims. Mr Kirk cross-examined the claimant thoroughly.

24. At the end of the evidence, I gave as much time as the parties requested to prepare closing arguments and then heard closing submissions from Mr Matthews, who summed up his own case, and from Mr Kirk on behalf of the respondents. Given the large number of documents and the complexity of the case, I advised the parties that I would make a reserved decision. I apologise to the parties for the delay in producing this judgment and reasons, which has been due to pressure of work.

Findings of Fact

25. All findings of fact were made on the balance of probabilities. If a matter was in dispute, I have set out the reasons why I decided to prefer one party's case over the other. If there was no dispute over a matter, I have either record that with the finding or made no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so I have dealt with the case on the basis of the documents produced to me. I make the following findings.

26. As I have recorded above, I find that the issue of whether the claimant was a member of the Armed Forces within the meaning of section 83(3) of the EqA 2010 was conceded by the claimant. Therefore, the issue of whether the Tribunal has jurisdiction to hear his complaints given that he did not lodge a service complaint before issuing proceedings as required by s.121(1) EqA 2010 never arose. I find that the claimant was not a member of the Armed Forces

within the meaning of section 83(3) of the EqA 2010 at any time that is material to this claim.

27. I should make the preliminary point that I had to accept the evidence of Commander Haines as being correct because it was unchallenged by the claimant.

28. I find that the claimant was engaged with the title of Adult Volunteer ("AV") in the Cleveland Army Cadet Force ("CACF") in or around 2006. The CACF is a branch of the Army Cadet Force ("ACF"), which is a volunteer youth movement. This was not in dispute.

29. At the time that the claimant commenced his service, the relevant terms regulating the engagement of AVs were those set out in a document headed "Terms of Employment", entered into by the Secretary of the relevant TAVR2 Association on behalf of the Secretary of State for Defence ("the 1985 agreement") [126-127]. These terms made provision for a paid allowance but stated there was no entitlement to sick or holiday pay or a pension (see clauses 5-6). This was not disputed.

30. In 2009 the UK government announced the removal of the allowance of finance for Adult Instructors because of financial constraints caused by the effects of the global recession. It was accepted by the claimant in cross-examination that there was a period during 2009 during which he did not get paid an allowance. The claimant accepted in cross-examination that he made no complaint at the time, either internally or to an Employment Tribunal, claiming that he was contractually entitled to be paid an allowance.

31. It was agreed that on 30 April 2015 the claimant signed an Adult Volunteer Agreement ("the 2015 agreement") [128]. The preamble to this agreement made it clear that it superseded and replaced any previous terms, including those set out in the 1985 agreement. I find that these are the terms which have governed the claimant's relationship with the respondent (whatever its identity) since 2015, as the claimant did not suggest any different. The 2015 agreement included the following terms:

    31.1. Paragraph 6, which provided that "I accept that I am being enrolled for voluntary service with the Cadet Forces as a Cadet Force Adult Volunteer in a role and from a date that will be notified to me by the Cadet Forces."

    31.2. Paragraph 14, which provided that "I understand and accept that I am a volunteer offering my services on a voluntary basis which can be terminated by me or the Cadet Forces at any time."

    31.3. Paragraph 10, which provided that "I understand that, as I am volunteering my services, there is no legal obligation on me to accept any voluntary activities. Nor is there any legal obligation on the Cadet Forces to provide me with any voluntary activities. However, I accept that in order for the Cadet Forces to plan its activities, if I am subsequently unable to attend an activity that I

have previously agreed to attend, I will contact the Cadet Forces in advance, so that alternative arrangements can be made in my absence."

31.4. Paragraph 11, which provided that "I understand that, if I persistently fail to turn up for activities without contacting the Cadet Forces in advance, this agreement may be terminated in accordance with current or future amendments to the policies, rules and regulations of the Cadet Forces."

31.5. Paragraph 15, which provided that "I understand and accept that there is no automatic entitlement to Volunteer Allowances or other payments and that, if I wish to claim such allowances, I must apply for them. I further understand that such allowances may only be paid where funds are available and even then, are only payable at the absolute discretion of the Cadet Forces."

31.6. Paragraph 18, which provided that "I understand and accept that I am engaged as a volunteer and that there is no intention on the side of either party that this agreement should create an employment relationship or worker arrangement either now or at any time in the future."

32. I find that the claimant's relationship with the respondent was also governed by The Army Cadet Force Customs of the Service: A Guide for Officers and Adult Instructors ("The Guide") [575-685] and then, from 2016, by the Army Cadet Force Regulations ("the ACF Regulations") [176-534] when the Guide was superseded by the ACF Regulations. I make that finding because Commander Haines' evidence on the point was not challenged.

33. The Guide contains, amongst other things, Para 8.086 which states that:

> *"Payment for ACF service is not pay in the normally accepted sense of pay for work. It is intended more towards defraying any loss of earnings potential, or personal expense you may necessarily incur by your ACF service, such as by attendance at camp or on courses. Hence you are not entitled to receive anything for evening work at your Detachment, which is where most of your service is undertaken" [649].*

34. The ACF Regulations contain the following provisions on the limited circumstances in which remuneration, in the form of a Volunteer Allowance ("VA"), can be paid:

34.1. Regulation 2.4.1.1.1, which states "An officer or Adult Instructor is eligible to receive remuneration in the form of Volunteer Allowance (VA) and allowances as per JSP 752 – Tri-Service Regulations for Allowances" [356].

34.2. Regulation 2.4.1.1.2, which states "Some duty with the ACF can be remunerated; this part sets out the conditions that must be met before a CFAV [Cadet Force Adult Volunteer] is eligible to receive

remuneration. Meeting the eligibility requirement in no way entitles the CFAV to receive remuneration. In line with the MOD sponsored Volunteer Agreement the ACF is a voluntary organisation and CFAVs should not expect remuneration for their time, however the Army does provide funding for the ACF to ensure that the charter of the ACF can be met" [356].

34.3. Regulation 2.4.1.2.2, which states "CFAVs will receive remuneration at special daily rates which are published annually by the MOD..." [356]. The daily rate applicable from July 2020 to the Claimant, who was a Captain (ACF) was £103.64; see Appendix 38 Annex A [574].

34.4. Regulation 2.4.1.3.1, which provides "General. Everyone who receives units of VA is limited as to how many they may receive in a Financial Year (FY)". For the year March 2020 onwards, the maximum units of VA that could be authorised by a Cadet Commandant was 28. Deputy Regional Point of Command ("RPoC") Commanders or Assistant RPoC Commanders could authorise between 29-50 units of VA but this is "normally only allowed for those CFAVs who have supported regional and national activity" (Regulation 2.4.1.3.2) [357].

34.5. Not all activities attract eligibility for VA. Whilst VA could be paid for Annual Camp and other authorised training courses, Regulation 2.4.1.4.4 made it clear that Adult Volunteers were not eligible for remuneration for parade nights, charity events or social events [358].

35. I find that the claimant held a Cadet Forces Commission in the ACF. I find that the claimant no longer holds any commission in the Armed Forces.

36. In summary, I make the following findings that are drawn from the findings above:

36.1. There was never any obligation to pay the claimant an allowance;

36.2. There was a period in 2009 when the claimant was not paid an allowance for sessions he undertook. I do not accept his argument that the situation at that time was analogous to a worker working without pay when their employer was in financial difficulty. I take judicial notice that an employee in that position would expect reimbursement when the financial picture improved;

36.3. The claimant accepted that there was no obligation on him to provide services, other than his admirable sense of duty;

36.4. There was an expectation that a volunteer would notify their ACF if they were unable to fulfil a volunteer session, but this was no more than common courtesy;

36.5. There was no obligation upon either of the respondents to provide "voluntary activities" for the claimant;

36.6. The claimant had not asserted the rights he now asserts when his volunteer allowance was not paid in 2009. He makes no claim for holiday pay, pension or sick pay in these proceedings;

36.7. The fact that the claimant was paid through the PAYE system is not determinative of worker or employee status

Relevant Law

37. I find that Mr Kirk mostly set out the relevant law accurately in his written submissions. Section 230(1) ERA 1996 defines an employee "as an individual who has entered into or works (or, where the employment has ceased, worked under) a contract of employment". Section 230(2) ERA 1996 goes on to define a contract of employment as "a contract of service or apprenticeship, whether express or implied and (if it is express) whether oral or in writing".

38. A contract cannot amount to a contract of employment in the absence of a mutuality of obligations between the parties. It is one of three irreducible minima of a contract of service (**Carmichael v National Power** [1999] 1 WLR 2042). The requirement of mutuality of obligations means that the arrangement between the parties must have involved an obligation on a respondent to provide work and an obligation on a claimant to accept any offer of work.

39. Under section 230(3) ERA, a "worker" means "an individual who has entered into or works under (a) a contract of employment, or (b) any other contract whereby they undertake to do or perform personally any work or services for the other party 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".

40. Under s.83(2) of the EqA "employment" is defined in like terms as meaning "(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work (b) Crown employment; (c) employment as a relevant member of the House of Commons staff (d) employment as a relevant member of House of Lords Staff".

41. In order for the clamant to be a limb b "worker" (s.230(3)(b) ERA) or within the wider definition of being in "employment" under s.83(3) EqA he must show that he is, as a minimum:

41.1. subject to a contract;

41.2. whereby he undertakes to perform work personally; and

41.3. for someone who is not a client or customer of a profession or business of his.

42. In **Byrne Bros (Formworkers) Ltd v Baird** [2002] IRLR 96, the EAT indicated at para 25:

> *"We accept that mutuality of obligation is a necessary element in a 'limb (b) contract' [a worker contract] as well as in a contract of employment. The basis of the requirement of mutuality is not peculiar to contracts of employment: it arises as part of the general law of contract".*

43. In **Uber BV and others v Aslam and others** [2021] UKSC 5, the Supreme Court clarified that:

> *"The fact...an individual has the right to turn down work is not fatal to a finding that the individual is an employee or a worker and, by the same token, does not preclude a finding that the individual is employed under a worker's contract. What is necessary for such a finding is that there should be what has been described as "an irreducible minimum of obligation": see* ***Nethermere (St Neots) Ltd v Gardiner*** *[1984] ICR 612, 623 (Stephenson LJ), approved by the House of Lords in* ***Carmichael v National Power plc*** *[1999] 1 WLR 2042, 2047. In other words, the existence and exercise of a right to refuse work is not critical, provided there is at least an obligation to do some amount of work" (at para 126).*

44. The case of "volunteers" who are paid expenses was specifically considered by the EAT in **South East Sheffield Citizens Advice Bureau v Grayson** [2004] IRLR 353. In that case, the EAT held that in order for a volunteer to be found to be an employee it is necessary to be able to identify an arrangement under which, in exchange for valuable consideration, the volunteer is contractually obliged to render services to or work personally for the employer (per paragraph 14).

45. The crucial question is whether such an agreement imposes a contractual obligation upon the respondents to provide work for the volunteer to do and upon the volunteer personally to do for the respondents any work so provided, being an obligation such that, were the volunteer to give notice immediately terminating his relationship with the respondents the latter would have a remedy for breach of contract against him (per paragraph 21).

46. On the facts of Grayson, the agreement between the CAB and its volunteer advisers might evidence a binding contractual relationship but only in the nature of a unilateral "if" contract i.e. it made clear that "if" the volunteer did work the CAB would reimburse them for their expenses incurred but it did not impose any obligation on the volunteer actually to do any work for the CAB (paragraph 18).

47. The Court of Appeal has subsequently confirmed that in the case of a voluntary worker with no contract governing the working arrangements and no legal obligation to work, there is no protection against discrimination under UK law (see **X v Mid Sussex CAB** [2011] IRLR 335).

48. The specific issue at hand in this case, namely the worker status of paid volunteer adult instructors working within the Army Cadet Force, was considered by the Employment Appeal Tribunal in **Breakell v West Midlands Serve Forces' and Cadets' Association** UKEAT/0372/10. In that case the EAT had to

review an Employment Judge's findings that there was no mutuality of obligation between a Forces' and Cadets' Association and an adult instructor under an equivalent agreement.

49. The Employment Judge's conclusions in **Breakell** are reproduced at paragraph 5 of the EAT's judgment. In essence the Judge found that:

> *"…the respondent was not under any obligation to provide any work for the Claimant…there was no obligation on him to attend any training days. If he did so he would generally, but subject to the maximum 28 days and any "cuts" unilaterally imposed by the MoD, as happened in 2009, expect to be remunerated and, on those occasions, be subject to the instructions of his superior officer, but those obligations are what are described in* ***Grayson*** *as being an "if" contract".*

50. The Employment Judge also found that "if the claimant does attend, as he was not under any obligation to do so the respondent would have no remedy other than, in accordance with the AI's Terms of Service, to terminate his appointment without notice".

51. The EAT did not find any fault with the Employment Judge's analysis and found that the claimant had simply "failed on the facts as found by the Employment Judge that there was no mutuality of obligation in this case" (at paragraph 31). The EAT accordingly dismissed the claimant's appeal.

52. Lastly, ACF volunteers are not subject to the National Minimum Wage. The position is regulated by section 37A of the National Minimum Wage Act 1998.

53. Whilst I have every respect for EJ Garnon, his opinion expressed in his CMO in the claimant's previous case, I have to bear in mind that he heard no evidence and that, although the first respondent settled the proceedings with the claimant, the legal and factual arguments on worker/employee status were never aired in a full hearing; he heard no evidence; he heard no submissions; and no findings of fact were made.

54. The first point to make is that EJ Garnon found that the claimant's claims under the ERA to be hopeless, with the caveat that there was nothing on them that could not be put as discrimination claims under the EqA. At this hearing, the claimant did not seek to persuade me that EJ Garnon's rationale on the ERA point was wrong.

55. EJ Garnon made the point that **Breakell** did not decide that no ACF officer could ever be an employee. He then developed his argument by reference to **Stevenson v Delphi Systems**, in which it was stated that there was always a mutuality of obligation where work is being done, but the issue of mutuality only arises "where one is seeking to establish the existence of a contract for service in between individual engagements."

56. He distinguished **South East Sheffield Citizens Advice Bureau v Grayson** from Mr Matthews' previous claim because the volunteers were only paid expenses and relied on **Cornwall County Council v Prater** [2006] ICR 731 as

authority for the principle that a succession of individual contracts for work, within each of which was a mutuality of obligation relating to the work provided and performed under that contract, established status.

57. EJ Garnon then, however, went on to say (§13) that in Mr Matthews' previous case "…under the EqA continuity of employment is not required. Section 83 [of the EqA] speaks of "service in the armed forces." If in between assignments, the claimant's "service ended and started again, he can reply on section 108." The flaw in that argument, which was not tested at the time, was that the claimant in this case has expressly said that he **was not** claiming to have service in the armed forces.

Decision

58. I find that the claimant cannot show that there was a binding contractual relationship between him and either of the respondents under which, in exchange for valuable consideration, he was contractually obliged to render services.

59. The factual nexus of this case is virtually the same as that in the case of **Breakell**. I find that the rationale in **Breakell** binds this Tribunal.

60. My findings of fact above lead me to the conclusion that there was no continuing mutuality of obligation between the claimant and either respondent. I find the claimant to have been a volunteer at all material times. He was neither a worker of either of the respondents within the meaning of section 230 of the ERA or an employee of the respondents within the meaning of section 83 of the EqA.

61. I therefore strike all the claimant's claims.

Employment Judge S A Shore

Date 31 August 2021