EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
T		Ministry of Defence

Heard at: London Central (by video) **On**: 8 December 2021

Before: Employment Judge Stout

Representations
For the claimant: Nicola Braganza (counsel)
For the respondent: James Chegwidden (respondent)

JUDGMENT ON STRIKE-OUT AND DEPOSIT ORDER APPLICATIONS

The judgment of the Tribunal is that:-

(1) The Respondent's application to strike out the Claimant's disability discrimination claim under Rule 37(1)(a)/(b) as falling outwith the jurisdiction of the Tribunal by virtue of paragraph 4(3) of Schedule 9 to the EA 2010 is dismissed.

(2) The Respondent's application to strike out the Claimant's sex discrimination and victimisation claims under Rule 37(1)(a)/(b) on grounds that they stand no reasonable prospect of success and/or are an abuse of process is dismissed.

(3) The sex discrimination and victimisation claims stand little prospect of success and accordingly the threshold for making deposit orders in respect of both claims under Rule 39 is met. Further directions are given for the further determination of the deposit orders applications.

REASONS

The type of hearing

1. This has been a remote electronic hearing by video under Rule 46. The public was invited to observe via a notice on Courtserve.net. A member of the public joined. There were no connection issues.

2. The participants were told that it is an offence to record the proceedings.

Background

3. The Claimant was enlisted as an Able Seaman in the Royal Navy from 12 October 2014 until 1 April 2018. She left the Royal Navy after being medically discharged. She suffers from PTSD, anxiety and depression which she contends constituted a disability under the Equality Act 2010 (EA 2010) at the relevant time. This is not admitted by the Respondent. In these proceedings she brings claims of sex discrimination, disability discrimination and victimisation under the Equality Act 2010 (EA 2010). The claims are concerned with the handling by the Respondent, following the Claimant's discharge, of the Claimant's Service Complaints about alleged sexual harassment as submitted by the Claimant in accordance with the procedures laid down for such complaints under Part 14A of the Armed Forces Act 2006 (AFA 2006) and the *Armed Forces (Services Complaints) Regulations 2015* (SI 2015/1955) (the 2015 Regulations) made thereunder.

4. An anonymity order in respect of the Claimant and some individuals employed by the Respondent was made by EJ Snelson on 19 July 2021 and remains in place.

5. This hearing was listed to determine applications by the Respondent to strike out the claims under Rule 37 or in the alternative for deposit orders under Rule 39. The applications were refined by the Respondent in the light of the Claimant's response to the applications, so that at the hearing the following issues arose for me to determine. I have reorganised these grounds into the order in which it is convenient to deal with them in the judgment:-

    a. Whether the whole claim should be struck out under Rule 37(1)(a) on the ground that it had been brought prematurely and was therefore an abuse of process (Application 4);
    b. Whether the sex discrimination claims and victimisation claims should be struck out under Rule 37(1)(b) as being unreasonably pursued because they are in substance attempts to appeal the

decision of the Deciding Body (DB) to the Tribunal rather than to the Appeal Body (AB) and/or an attempt to litigate matters of delay and/or maladministration in her Service Complaint which ought to be taken to the Service Complaints Ombudsman (Application 2, part 1);

c. Whether the sex discrimination claims and victimisation claims should be struck out as standing no reasonable prospect of success under Rule 37(1)(b) and/or whether a deposit order should be made under Rule 39 in respect of these claims (Application 2, part 2); and,
d. Whether the disability discrimination claim should be struck out under Rule 37(1)(a)/(b) on the ground that the Tribunal has no jurisdiction to hear it by virtue of paragraph 4(3) of Schedule 9 to the Equality Act 2010 (EA 2010) (Application 1).

Relevant factual background

6. I have not heard any evidence and am not making any findings of fact. Very little of the factual background of the claim is relevant to the issues that I have to decide. The following will suffice as a brief summary.

7. As already noted, the Claimant was enlisted as an Able Seaman in the Royal Navy from 12 October 2014 until 1 April 2018. On 29 September 2017 she made a Service Complaint (SC) about what she alleged to be harassment, bullying and discrimination while she was serving on HMS Scott in 2015 and 2016, and also about treatment while was assigned to the Fleet Hydrographical Meteorological Unit (FHMU) after leaving HMS Scott.

8. There was a delay in dealing with that SC. The Claimant complained to the Service Complaints Ombudsman (the Ombudsman). On 21 June 2018 the Ombudsman ruled that there had been excessive delay and recommended that the SC be separated into different parts. On 15 October 2018 the Claimant resubmitted her complaints, with the FHMU and HMS Scott issues separated.

9. The FHMU complaint ran to just over a page. The Respondent's SC Form defines discrimination in much the same way as the EA 2010 and directs complainants to complete sections 3 and 4 of the form if they are making such a complaint. The Claimant ticked the box in section 3 to indicate that she was complaining about bullying, harassment and discrimination, and provided some details in section 4. The details she provided were not obviously consistent with a claim under the EA 2010, however, since they referred to discrimination *"due to my previous reputation held from HMS Scott and that also I was discriminated because of my JMES code"*, rather than to discrimination because of sex or disability (or any other protected characteristic).

10. The FHMU complaint was determined by the Deciding Body (DB) on 17 December 2018. Three admissible heads of complaint were identified, two of which were upheld. It was not found that any of the conduct was because

of any protected characteristic. The procedure adopted to determine the complaint had involved the appointment of a fee-earning Harassment Investigation Officer, and input from 5 witnesses.

11. The HMS Scott complaint ran to 8 pages. Sections 3 and 4 were again completed by the Claimant, this time including explicit allegations of sexual harassment. The HMS Scott complaint was not determined until 30 April 2020. 23 heads of complaint were identified, of which 19 were dismissed, 2 were partially upheld, 1 was upheld and the DB was unable to make a decision on the other. The process followed involved the appointment of a Fee-earning Harassment Investigation Officer. 16 individuals were contacted in connection with the investigation. Heads of complaint 1 to 5 were originally paused pending the outcome of a Service Police Investigation, which concluded with no formal disciplinary outcome.

12. On 16 April 2020 the Ombudsman ruled that there had been excessive delay by the Respondent in dealing with the HMS Scott complaint.

13. On 5 June 2020 the Claimant appealed the DB's decision on the HMS Scott complaint to the Appeal Body (AB).

14. On 28 July 2020 the Claimant commenced these proceedings in the Tribunal.

15. On 19 November 2021 the Ombudsman again ruled that there had been undue delay by the Respondent in dealing with the Claimant's appeal, with *"more than nine months when no progress was made on her appeal, which is unacceptable"*. That appeal has still not been determined.

16. The Respondent sought a stay of proceedings in its ET3. That application was refused by EJ Snelson on 19 July 2021.

17. A List of Issues was agreed before Employment Judge Snelson, but in advance of this hearing the Claimant withdrew the issues at paragraph 3.b, 3.i and 8 to 9 of that list. It was also clarified at this hearing that paragraph 3.c. should read: *"Considering C's allegations in isolation rather than in the round …".* As so amended, the core list of issues against which I must assess the applications before me at this hearing is as follows. Each of these matters is alleged to constitute direct sex discrimination under s 13 of the EA 2010 or alternatively victimisation under s 26 of the EA 2010 for having made protected disclosures in (among other things) her Service Complaints:-

    a. Para 3(a): Delay between C's SC being lodged on 29 September 2017 and decided on 30 April 2020;
    b. Para 3(c): The Decision Body erred by considering the Claimant's allegations in the round rather than in isolation and dismissing each sequentially and in isolation; and/or failed to consider the pattern of events that the Claimant's account disclosed;

c. Para 3(d): The Decision Body erred by failing to consider the highly specific detail provided by the Claimant in respect of her individual complaints;
d. Para 3(e): The Decision Body erred by relying selectively on the evidence in respect of the Claimant's 23 complaints;
e. Para 3(f): The Decision Body erred by failing to consider the Claimant's contention that in claims of harassment there is rarely direct evidence and they will more usually concern one word against the other; failing to properly consider the previous accounts by the Claimant as essential evidence;
f. Para 3(g): Failing to make reasonable investigative inquiries;
g. Para 3(h) The Decision Body erred by failing to find that B committed harassment towards the Claimant and/or failing to find that CW had committed harassment towards the Claimant.

18. The Claimant also brings claims of disability discrimination in the form of claims that the Respondent failed to comply with the duty to make reasonable adjustments under ss 20-21 of the EA 2010, specifically that the Respondent's practice or not progressing or resolving SCs within the expected timescale substantially disadvantaged her because of her disability.

Relevant legislative background

The Service Complaints Legislation

19. Part 14A of the AFA 2006, and the 2015 Regulations made thereunder make provision for the making and determination of service complaints by the Defence Council, or bodies to whom the Defence Council delegates its functions under that legislation.

20. Pursuant to regulation 9 of the Regulations the Defence Council or a panel appointed on its behalf (in this case, the DB) must make a decision on any complaint that has been determined by the specified officer (i.e. the officer to whom the Regulations require the complaint first to be submitted: see reg 5) to be admissible.

21. Pursuant to regulation 10 where a complaint has been determined under regulation 9, the complainant has a right to appeal to the Defence Council, which may again delegate the decision to a panel (in this case, the AB).

22. Both the DB and AB have the power under regulations 9(2) and 13(2) respectively to determine whether the complaint is well-founded and, if so, to determine what redress (if any) *"within the authority of the person or persons on the panel … would be appropriate"* and to *"grant any such redress"*. While that sounds as if the redress might be limited, Section 340C(3) of the AFA 2006 stipulates that *"The Defence Council must not appoint a person or panel to deal with a service complaint unless: (a) the person is, or all the persons on the panel are, authorised by the Council to*

decide [whether a complaint is well-founded and what redress would be appropriate] *and to grant appropriate redress"*. Section 340D(4) makes similar provision in relation to appeals. These functions are non-delegable: s 340F(3)(c).

23. The Respondent publishes policy and guidance on the Service Complaints procedure, *JSP 831: Redress of Individual Grievances: Service Complaints*. Mr Chegwidden in these applications has placed some emphasis on paragraph 60 of Part 2 of that guidance which provides: *"A valid Appeal Application renders the entirety of the DB decision void, including any redress granted. As the AB considers the entirety of the complaint afresh, you need to know that the AB can reach a different decision entirely about whether your Service Complaint is well founded and about any redress that might be appropriate."*

24. Section 340H of the AFA 2006 makes provision for the Service Complaints Ombudsman, on application, to investigate (s 340H(1)): "*(a) a service complaint, where the Ombudsman is satisfied that the complaint has been finally determined; (b) an allegation of maladministration in connection with the handling of a service complaint (including an allegation of undue delay), where the Ombudsman is satisfied that the complaint has been finally determined; (c) an allegation of undue delay in the handling of a service complaint which has not been finally determined; (d) an allegation of undue delay in the handling of a relevant service matter."*

25. For the purposes of s 340H(1)(a) where there is a right of appeal against a determination of the complaint, the complaint is not 'finally determined' until an appeal against the decision has been made and determined. In this respect therefore the Ombudsman acts as a 'second appeal' in relation to the determination of any service complaint. Where the Ombudsman is required to fulfil that function he/she is also given full power under s 340H(6) to decide for him-/herself whether the complaint is well-founded and, if so, what redress would be appropriate.

26. For the other types of complaint that may be made to the Ombudsman under s 340H(1)(b)-(d), the Ombudsman has power to determine whether the complaint is well-founded and whether this has or could have resulted in injustice being sustained by the complainant (s 340H(6)(b)).

27. For all types of complaint if the Ombudsman finds them to be well-founded he/she has power to make recommendations for remedying any maladministration, undue delay or injustice (s 340L). The recommendations are not binding, but I am informed by Mr Chegwidden that the Royal Navy at least always abides by them.

28. The Ombudsman's powers are reinforced by the power to require information, documents and evidence (s 340J) and offences for obstruction or contempt of an Ombudsman investigation as if the Ombudsman were the High Court (s 340K)

The Equality Act 2010

29. The relevant provisions of the EA 2010 are as follows:-

Section 39: Employees and applicants

(2) An employer (A) must not discriminate against an employee of A's (B)—
…(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—
…(d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

Section 108: Relationships that have ended

(1) A person (A) must not discriminate against another (B) if—

(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and
(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.

Section 121: Armed Forces cases in the Employment Tribunal

(1) Section 120(1) [i.e. the provision conferring jurisdiction on the Employment Tribunal to determine cases under Part 5 of the Act (Work)] 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.

(2) Where the complaint is dealt with by a person or panel appointed by the Defence Council by virtue of section 340C(1)(a) of the 2006 Act, it is to be treated for the purposes of subsection (1)(b) as withdrawn if –
(a) the period allowed in accordance with service complaints regulations for bringing an appeal against the person's or panel's decision expires, and
(b) either—
(i) the complainant does not apply to the Service Complaints Ombudsman for a review by virtue of section 340D(6) of the 2006 Act (review of decision that appeal brought out of time cannot proceed), or
(ii) the complainant does apply for such a review and the Ombudsman decides that an appeal against the person's or panel's decision cannot be proceeded with.

(5) The making of a complaint to an employment tribunal in reliance on subsection (1) does not affect the continuation of the procedures set out in service complaints regulations.

(6) In this section – …"service complaints regulations" means regulations made under section 340B(1) of the 2006 Act".

Schedule 9, paragraph 4: Armed forces

(1) A person does not contravene section 39(1)(a) or (c) or (2)(b) by applying in relation to service in the armed forces a relevant requirement if the person shows
that the application is a proportionate means of ensuring the combat

effectiveness of the armed forces.

(2) A relevant requirement is—
(a) a requirement to be a man;
(b) a requirement not to be a transsexual person.

(3) This Part of this Act, so far as relating to age or disability, does not apply to service in the armed forces; and section 55, so far as relating to disability, does not apply to work experience in the armed forces.

The Framework Directive

30. Recital 19 to Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ("the Framework Directive") provides that:

> "…in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces. The Member States which make that choice must define the scope of that derogation".

31. Article 3(4) of the Framework Directive provides:

> "Member States may provide that the Directive, insofar as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces"

The relevant provisions of the Human Rights Act 1998 (HRA 1998) and the European Convention on Human Rights (ECHR)

32. Section 3 of the HRA 1998 provides:-

Interpretation of legislation.

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be
read and given effect in a way which is compatible with the Convention rights.

(2) This section—
(a) applies to primary legislation and subordinate legislation whenever enacted;
(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.'

33. The relevant articles of the ECHR, set out in Schedule 1 to the HRA 1998, provide so far as relevant;

Article 6 Right to a fair trial
1. 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 …

Article 8 Right to respect for private and family life

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> **Article 14 Prohibition of discrimination**
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> **Article 1 of Protocol 1 (A1/P1) Protection of property**
> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law …

<u>The approach that the Tribunal should take to applications for strike-out or deposit orders</u>

34. Rule 37 permits the tribunal to strike out all or part of a claim or a response, at any stage of the proceedings, on its own initiative or on the application of a party, on grounds that: (a) the claim or response (or part thereof) is scandalous or vexatious or has no reasonable prospect of success; or (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious.

35. This is a power to be exercised judicially, taking into account all the relevant circumstances, and in accordance with the over-riding objective. A strike-out will not normally be appropriate in cases where there are substantial disputes of fact, especially in discrimination claims which are highly fact sensitive as the House of Lords emphasized in *Anyanwu* [2001] UKHL 14, [2001] ICR 391.

36. However, Langstaff J in *Chandhok & Anor v Tirkey* UKEAT/0190/14/KN observes at [20] that *Anyanwu "stops short of a blanket ban on strike-out applications succeeding in discrimination claims"* and holds:

> There may still be occasions where a claim can properly be struck out – where for instance there is a time bar to jurisdiction, and no evidence is advanced that it would be just and equitable to extend time; or where, on the case as pleaded, there is really no more than an assertion of difference of treatment and a difference of protected characteristic which (per Mummery LJ at paragraph 56 of his judgment in Madarassy v Nomura [2007] ICR 867):
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> "… only indicate the possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

37. In *Ahir v British Airways Plc* [2017] EWCA Civ 1392 Underhill LJ observed:

> '16. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be 'little reasonable prospect of success'. …

> 24. [However,] Where there is on the face of it a straightforward and well-documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that the explanation is not the true explanation for what happened without the claimant being able to advance some cogent basis for that being so.'

38. I have also had regard to the helpful summary of the principles by Linden J in *Twist DX Ltd v Armes* (UKEAT/0030/20/JOJ) at [43] as follows:-

> a. A decision to strike out is a draconian measure, given that it deprives a party of the opportunity to have their claim or defence heard. It should, therefore, only be exercised in rare circumstances: see, for example, *Tayside Public Transport Company Limited v Reilly* [2012] IRLR 755 at paragraph 30.
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> b. The power to strike out on the no reasonable prospect ground is designed to weed out claims and defences, or parts thereof, which are bound to fail. The issue, therefore, is whether the claim or contention "has a realistic as opposed to a fanciful prospect of success": see, for example, paragraph 26 of the Judgment of the Court of Appeal in *Ezsias v North Glamorgan NHS Trust* [2007] 4 Wll ER 940, CA. case (supra).
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> c. The court or tribunal should not conduct a mini-trial of the facts and therefore would only exceptionally strike out where the claim or contention has a legal basis, if the central or material facts are in dispute and oral evidence is therefore required in order to resolve the disputed facts. There may, however, be cases in which factual allegations are demonstrably false in the light of incontrovertible evidence, and particularly documentary evidence, in which case the court or tribunal may be able to come to a clear view: see, for example, paragraph 29 of *Ezsias*.
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> d. Subject to this point, the court or tribunal must take the case of the respondent to the application to strike out at its highest in terms of its factual basis and ask whether, even on that basis, it cannot succeed in law.
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> e. The court or tribunal generally should not seek to resolve novel issues of law which may not arise on the facts, particularly in the context of a developing area of the law: see, for example, *Campbell v Frisbee* [2003] ICR 141 CA.
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> f. The fact that a given ground for striking out is established gives the ET a discretion to do so – it means that it "may" do so. The concern of the ET in exercising this discretion is to do justice between parties in accordance with the overriding objective and an ET, therefore, would not normally strike out a claim or response which has a reasonable prospect of success simply on the basis of the quality of the pleading. It would normally consider the pleading and any written evidence or oral explanation provided by a party with a view to determining whether an amendment would clarify or correct the pleaded case and render it realistic and, if so, whether an amendment should be allowed. In my view, this last point is important in the context of litigation in the employment tribunals, where the approach to pleading is generally less strict than in the courts and where the parties are often not legally represented. Indeed, even in the courts, where a pleaded contention is found to be defective, consideration should be given to whether the defect might be corrected by amendment and, if so, the claim or defence should not be struck out without first giving the party which is responding to the application to strike out an opportunity to apply to amend: see *Soo Kim v Yong* [2011] EWHC 1781.
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> g. Obviously, particular caution should be exercised where a party is not legally represented and/or is not fully proficient in written English (see the discussion in *Hassan v Tesco Stores Limited* UKEAT/0098/16 and *Mbuisa v*

Cygnet Healthcare Limited UKEAT/0109/18), but these principles are applicable where, as here, the parties are legally represented, albeit less latitude may be given by the court or tribunal.

39. As to deposit orders, Rule 39(1) permits the Tribunal where it considers that any specific allegation or argument in a claim or response has little reasonable prospect of success to make an order requiring a party to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument. By sub-s (2) the Tribunal must make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit. By sub-s (4) if the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. By sub-s (5) if the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76 (costs orders), unless the contrary is shown; and (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders) and will count as part-payment in respect of any costs order made (sub-s (6)). If the party succeeds on the allegation, the deposit shall be refunded.

40. The purpose of a deposit order is: *"To identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs, ultimately, if the claim fails"* (*Hemdan v Ishmail and anor* [2017] ICR 486 at [10] per Simler J).

a. Whether the whole claim should be struck out under Rule 37(1)(a) on the ground that it had been brought prematurely and was therefore an abuse of process (Application 4)

41. This application relates to the whole of the claim and so I take it first.

The parties' submissions

42. Mr Chegwidden for the Respondent submits that the claim is premature and therefore an abuse of process because the claim is wholly concerned with the decision of the DB of 30 April 2020 in respect of which the Claimant appealed on 5 June 2020. Since the Respondent's policy JSP 831 provides at [60] that initiating an appeal *"renders the entirety of any Decision Body decision void, including as to any redress granted"*, and the AB will consider all the complaints *de novo*, the Respondent submits that the claim is an abuse of process because the Claimant is seeking to pursue claims in these proceedings against a decision that is 'void' and moreover which duplicate the issues that will be determined by the AB as the *"statutorily-created body"* designated to hear appeals from the DB.

43. He further submits that there is the potential for a disparate outcome where the AB might reach a conclusion different to that of the Employment Tribunal. He distinguishes the situation from that of a civil employer with an ongoing internal appeal process, submitting that the AB is a statutory process and not subject to control by the employer in the same way. It will reach independent findings. Unlike the appeal process of a civil employer, the Service Complaint process can also be subject to judicial review. Mr Chegwidden submits that in character these claims, which seek to challenge the approach taken by the DB to determining complaints of harassment are more suited to determination on judicial review as being matters of public law or administrative process.

44. Mr Chegwidden also submits that the AB is in a position to completely remedy what the Claimant is complaining about, in that it may get right all the things that the Claimant says the DB got wrong in deciding the original complaint and has the power to award any redress.

45. Ms Braganza for the Claimant submits that the Respondent mischaracterises the Claimant's claim, that the Claimant is bringing claims to this Tribunal that the DB discriminated against and/or victimised her in the way that it handled and determined her SC and that the effect of the DB's conduct on her was significant. She submits that any discrimination or victimisation that there was will not be eradicated by the AB, even if it ultimately upholds her complaint. She has had to endure many years of distress in the course of the process and the AB will not remedy that.

My decision

46. I have some sympathy for Mr Chegwidden's argument that the issues for determination in this case set out as allegations 3.a, c, d, e, f, g, and h do indeed look much more like grounds of appeal against the decision of the DB on a point of law or grounds of claim in a judicial review than they do like a matter that would normally form the subject of a claim to this Tribunal. However, it is a mistake to read those paragraphs of the List of Issues as if those are the freestanding claims that the Tribunal will be determining in these proceedings. In these proceedings, those allegations are in fact the alleged detriments to which the Claimant claims she was subjected because of her sex or because she had done protected acts.

47. Under the service redress procedures, the AB will not be determining as part of the Claimant's appeal whether or not the DB discriminated against or victimised the Claimant in its handling of the SC or its determination. As Mr Chegwidden submits, the AB starts *de novo* considering the underlying complaints of sexual harassment against various of the Respondent's officers who worked with the Claimant during the time that she was a serving officer. If the AB upholds those complaints and grants redress it will be redress for the underlying complaint of sexual harassment, not redress for anything that the DB did or did not do. If the AB upholds the complaints that may no doubt provide some vindication for the Claimant's concerns about

the processes adopted by the DB, but it will not determine the claims of discrimination and victimisation that she makes in these proceedings.

48. I do not consider it makes any difference that as a matter of policy under the JSP 831 the Respondent treats the decision of the DB as void as soon as an appeal is commenced against it. I cannot see that this reflects any element of the governing legislation so it is not a nullity as a matter of law in the way that it would be if it had been quashed by a court. In any event, I am doubtful whether the concept of a legal nullity really has any relevance in the discrimination context, as there is no reason why the 'act' of doing something that is subsequently found to be (or rendered) a legal nullity should not be a real historic act about which complaint can be made under the EA 2010.

49. I further note in this regard that it is accepted by Mr Chegwidden (rightly) that s 121 of the EA 2010 does not set up a bar to commencing proceedings in the ET before a SC has been finally determined. It merely requires a person to make a SC before commencing proceedings, and s 123(2) also extends by three months the time limit for commencing proceedings where this is done. It was clearly not Parliament's intention to prevent members of the Armed Forces bringing complaints to the Employment Tribunal before service redress procedures were complete or ss 121 and 123 would have so provided. It is not correct to describe the DB and AB as *"statutorily-created"* bodies because under the legislation they are panels that the Defence Council is empowered to appoint to carry out its own delegated functions, but even so the Defence Council is not afforded an exclusive jurisdiction over service complaints by the legislative scheme: in effect its role so far as a employment tribunal claim is concerned is similar to the requirement to contact ACAS before commencing proceeds, save that the service complaint must not be withdrawn before Employment Tribunal proceedings are commenced, thus making it effectively mandatory for a member of the armed forces to permit the Defence Council fully to investigate their complaint even if employment tribunal proceedings are commenced. A stay while that happens may be appropriate in some cases, but it was refused in this case by Employment Judge Snelson for the very sound reason that there has already been inordinate delay in dealing with the Claimant's case under the service redress procedures. It is entirely appropriate in those circumstances that the claim be permitted to proceed. It is not an abuse of process for it do so.

b. Whether the sex discrimination claims and victimisation claims should be struck out under Rule 37(1)(b) as being unreasonably pursued because they are in substance attempts to appeal the decision of the DB to the Tribunal rather than to the AB and/or an attempt to litigate matters of delay and/or maladministration in her Service Complaint which ought to be taken to the Service Complaints Ombudsman (Application 2, part 1)

The parties' submissions

50. The Respondent submits that each of allegations 3.c, d, e, f, g and h are essentially complaints of maladministration or public law failings or failings of law or grounds of appeal against the decision of the DB which ought properly to be considered by the AB. Alternatively, he submits these are the sort of grounds that might more appropriately be made the subject of judicial review of the decision of the DB. Mr Chegwidden submits it is unreasonable to seek to use the Tribunal as a route to 'appeal' the decision of the DB. He emphasises the wide powers of redress available to the AB.

51. He further argues that in relation to allegation 3.a (delay) the proper forum for redress is the Ombudsman, who is empowered by statute to consider that sort of complaint in relation to the conduct of service redress procedures. He submits that although the Ombudsman is only empowered to make non-binding recommendations, in practice the Royal Naval always follows the Ombudsman's recommendations.

52. Ms Braganza for the Claimant again submits that the Respondent mischaracterises the claim. This is a discrimination and victimisation claim for which the proper forum is the Tribunal. The AB will not be considering the actions of the DB, and the Ombudsman only has power to make non-binding recommendations.

My decision

53. I agree with Ms Braganza for the reasons I have already given that the Respondent is mischaracterising the Claimant's case. The Claimant is bringing claims of sex discrimination and victimisation concerning the DB's handling of her SC. The AB will not be considering those complaints so the fact that the Claimant has a right of appeal to the AB cannot make it unreasonable for her to bring these claims in the Tribunal.

54. The Ombudsman may consider complaints that the DB discriminated, but I have not been shown anything that suggests the Ombudsman would approach such a complaint in the way that a Tribunal would approach a discrimination claim. In other jurisdictions, ombudsmen are not generally expected to apply the approach and principles that would be applied by a court or tribunal, *cf R (Siborurema) v Office of the Independent Adjudicator* [2007] EWCA Civ 1365, [2008] ELR 209 at [69]-[70] *per* Moore-Bick LJ.

55. So far as redress is concerned, I have not been shown anything which suggests that either the AB or the Ombudsman will apply the principles of remedy that would be applied by a Tribunal.

56. In any event, access to the Employment Tribunal is not subject to a discretion to refuse a claim because there is an 'adequate alternative remedy' available as in judicial review claims. Subject to compliance with the rules, and the Tribunal's jurisdiction, access is as of right, and in circumstances where Parliament has in s 121 legislated about the relationship between the service redress procedures and employment tribunal claims and not sought to prevent them proceeding concurrently, it is

not in my judgment unreasonable for the Claimant to seek to pursue that course.

c. Whether the sex discrimination claims and victimisation claims should be struck out as standing no reasonable prospect of success under Rule 37(1)(b) and/or whether a deposit order should be made under Rule 39 (Application 2, part 2)

The parties' submissions

57. Mr Chegwidden acknowledges the high threshold for strike out of a discrimination claim, but submits that the Claimant's claims stand no reasonable prospect of success because the Claimant has identified nothing in the claim form or in argument for this hearing from which it could be concluded that she was less favourably treated because of her sex than a man would have been. Further, he submits that it is fanciful to suggest that the Claimant was victimised by the DB for making complaints to it of discrimination and harassment (protected acts) given that the DB's purpose is to consider such complaints.

58. Ms Braganza submits that there is ample evidence from which it could be inferred that the DB's handling of her complaints constituted direct sex discrimination. She points out that her HMS Scott SC took much longer than the average to be determined by the DB, i.e. 138 weeks as against an average of 37 weeks (although I note from the Ombudsman's *Annual Report 2020*, bundle p 184, that during 2020 two pre-2016 complaints were finalised, *"leaving 2 complaints made before 2016 still open at the end of 2020"* so the Claimant's case is not the worst case). She points to the evidence that women are disadvantaged generally in employment with the Respondent, in particular to the conclusions of the House of Commons Defence Committee report *Protecting those who protect us: Women in the Armed Forces from Recruitment to Civilian Life: Second Report of Session 2021-22* which includes the following 'headlines': that the Respondent is *"failing to help female personnel achieve their full potential"*; that women are under-represented among senior officers, that 62% of female service personnel and veterans report experiencing bullying, harassment and discrimination and women are more than twice as likely as men to experience bullying, harassment and discrimination and (in 2021) ten times more likely to have experienced sexual harassment in the last 12 months; that nearly 40% of women rated their experience of the complaints process as *"extremely poor"*; and *"A lack of faith in the system contributes to 89% of both male and female personnel in the Regular Forces not making a formal complaint".* She also points to the Service Complaints Ombudsman's *Annual Report 2020* which concludes that the Service Complaints system is *"not yet efficient, effective and fair"* and finds that female (and BAME) personnel were over-represented in the Service Complaints system, making up 21% (and 15%) of complainants compared to their representation in the UK Armed Forces (12% and 8%). Ms Braganza submits that because there is

evidence that the system is disproportionately disadvantaging women, an inference can be drawn that the reason for what she submits was unreasonable treatment of the Claimant's complaint by the DB was because she was a woman and that a man's complaint of sexual harassment would have been dealt with more favourably.

59. As for the evidence from which victimisation can be inferred, Ms Braganza points to the difference in treatment of the Claimant's FHMU complaint (which was resolved relatively quickly) and the Claimant's HMS Scott complaint (which took 138 weeks). Although for both complaints the Claimant completed the SC forms to indicate that she was bringing a complaint of bullying, discrimination and harassment, she submits that the FHMU complaint does not include an allegation of contravention of the EA 2010 (and was not therefore a 'protected act' for the purposes of s 26), whereas the HMS Scott complaint does constitute a protected act. She suggests it could therefore be inferred that this was the reason for the difference in the time taken to deal with the two complaints.

60. Mr Chegwidden in reply submits that the Claimant has not identified any evidence at all that women are treated less favourably than men in the Service Complaints process or from which it could be inferred that a man's complaint would have been treated differently by the DB because he was a man. He further submits, regarding the victimisation claim, that the more obvious explanation for the longer delay in dealing with the HMS Scott complaint was that it was a much longer and more complex complaint.

My decision

61. I have significant doubts about the merits of the Claimant's sex discrimination and victimisation claims, as they are currently pleaded. The evidence to which the Claimant points in the House of Commons Defence Committee Report provides a basis for an argument that there remains in the Armed Forces a culture that is less favourable to women than it is to men, which could provide the basis for an inference of sex discrimination in relation to a complaint about events that occurred while the Claimant was on active service, such as the matters about which she was complaining in her SCs, or a failure to promote her or to afford her some other benefit. However, I find it difficult to see how such evidence assists in a claim concerned with the handling of her SC. The Claimant has not pointed to any evidence at all that women are generally less favourably treated than men in relation to the complaints process, let alone that the DB would have approached the complaint of a man bringing a sexual harassment complaint any differently to the way her complaint was approached. Indeed, the statistic in the House of Commons Defence Committee Report that 89% of both male and female servicemen and women have a lack of faith in the SC system points in the opposite direction indicating a system that is failing both men and women alike. The Ombudsman's 2020 Report reflects that too in finding (without distinction between men or women or types of complaint) that this is a system that is not efficient, effective or fair.

62. There is evidence that women are disproportionately represented among complainants, and that they are more likely than men to complain of discrimination, bullying and harassment. As such, there is an argument that failings in the system disadvantage more women than men, but that is the first building block of an indirect discrimination claim, not a direct discrimination claim such as has been brought in this case. I asked Ms Braganza in argument if there was a reason why an indirect discrimination claim had not been brought, and she said that the Claimant was considering it, and would wish to make an application to amend if the case is permitted to proceed, although she did not make the application at this hearing.

63. In the circumstances, I have to consider the Claimant's prospects of success in relation to the direct discrimination claim as it stands, although the possibility that it *may* be saved by amendment (if an amendment is permitted, which it may not be) is a matter that may be relevant to the exercise of my discretion, but not one to which I give much weight given that no application has as yet been made.

64. Although I have very significant doubts about its merits for the reasons I have set out, I bear in mind that this is a discrimination claim, I know nothing about the individuals who handled the Claimant's HMS Scott SC. It is, I accept, possible that given the evidence of culture in the forces outlined in the House of Commons Defence Committee Report that this might extend to those handling the SC complaints and that the Claimant may establish at trial that their approach was influenced by her sex. As such, I consider that this claim as it stands has little prospect of success, but it does not have no reasonable prospect. As such, I will make a deposit order in respect of this claim under Rule 39, but not strike it out under Rule 37.

65. As to the victimisation claim, I agree with Mr Chegwidden that the more obvious explanation for why the Claimant's HMS Scott complaint took longer to resolve was because it was much longer and more complex than the Claimant's FHMU complaint, and involved more people and events that happened longer ago. There is also the matter of the Service Police Investigation which prolonged the process for the HMS Scott complaint. Another factor that tells against the drawing of any inference of victimisation is that it appears that simply completing sections 3 and 4 of the SC form for discrimination, bullying and harassment triggers a different process to be followed by the DB in the appointment of a Fee-Paid Investigating Officer. In any event, it appears very unlikely that the investigating officer or DB would approach a complaint differently if sections 3 and 4 of the SC form included an allegation of contravention of the EA 2010 rather than bullying, harassment or discrimination for non-protected reasons. Again, however, I am not prepared to say that there is no reasonable prospect of succeeding on such claim for essentially the same reasons as in relation to the discrimination claim: if the evidence of culture in the forces generally extends to the handling of SC complaints, it is possible that this might influence the approach to complaints of sexual harassment, which are mostly brought by women, or provide the inference for it doing so. I do not therefore strike the claim out under Rule 37. But I am satisfied that this is also a claim that stands

little prospect of success in respect of which a deposit order should be made under Rule 39.

d. Whether the disability discrimination claim should be struck out on the ground that the Tribunal has no jurisdiction to hear it by virtue of paragraph 4(3) of Schedule 9 to the Equality Act 2010 (EA 2010) (Application 1)

The parties' submissions

66. Mr Chegwidden relies on paragraph 4(3) of Schedule 9 which provides that Part 5 of the EA 2010 relating to work so far as concerns age and disability does not apply to service in the armed forces. He submits that this exemption for disability discrimination is lawful under the European Framework Directive even though it is not subject to any proportionality requirement or limited to situations where combat effectiveness may be prejudiced because the High Court so held in relation to age discrimination in *R (Child Soldiers International) v Secretary of State for Defence* [2016] ICR 1062 (Kenneth Parker J) and there is no basis for taking a different approach in relation to disability. He further argues that, even if the exemption breaches the Claimant's rights under the European Convention on Human Rights (ECHR) and the Human Rights Act 1998 (HRA 1998), the EA 2010 is in bald terms and any 'reading down' of the provisions of the EA 2010 would 'go against the grain' of the legislation and is thus not permitted or required by the interpretative obligation in s 3 of the HRA 1998: see *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [33] *per* Lord Nicholls and *Steer v Stormsure Ltd* (UKEAT/0216/20/AT (V)). If he is wrong about that, he does not accept that paragraph 4(3) of Schedule 9 engages, let alone breaches, any Convention right of the Claimant. However, if it does, he was unable to identify any justification for not permitting ex-servicemen or women from bringing disability discrimination claims in respect of matters occurring after they have left the service. In any event, he submits a tribunal cannot grant a declaration of incompatibility under s 4 of the HRA 1998 because it is not 'a court'.

67. Ms Braganza submits that paragraph 4(3) of Schedule 9 breaches the Claimant's rights under the ECHR. She relies on Articles 8 and 6, read together with Article 14. She submits that the Claimant's case falls within the ambit of Article 8 in the light of the authorities of *Xhoxhaj v Albania* 15227/29, *Costello-Roberts v the United Kingdom* (1993) 19 EHRR 112 and *Glor v Switzerland* 13444/04 [2009] ECHR 2191 at [52]. She contends that her case falls within the ambit of Article 6 because it relates to access to judicial remedies for the enforcement of the civil right not to be subjected to discrimination: *R (Leighton) v Lord Chancellor* [2020] EWHC 336 (Admin) at [165]. She suggests that paragraph 4(3) is a 'procedural bar' such as that identified in *Benkharbouche v Sudan* [2017] UKSC 62 at [15]-[16]. She argues that she is in an analogous situation either to non-disabled ex-service personnel or to an ex-employee of a civilian employer in that because she is disabled and/or because she is an ex-service-woman (either of which are, she submits, a 'status' for the purposes of Article 14) she is prevented from

bringing a disability discrimination when ex-service persons are permitted to bring other types of discrimination claim and ex-employees of civilian employers are able to bring disability discrimination claims. She submits there can be no justification for that because, once a person has left the armed forces there can be no purpose to the exemption in paragraph 4(3), which is evidently intended (reflecting recital (19) to the Framework Directive) to safeguard the combat effectiveness of the armed forces.

68. I add that in her Skeleton Argument Ms Braganza also raised arguments by reference to the UN Convention on the Rights of Persons with Disabilities, but did not pursue those at the hearing. For the avoidance of doubt, I do not consider that such arguments can assist her in the light of *R (SC) v Secretary of State for Work and Pensions* [2021] UKSC 26, [2021] 3 WLR 428 at [77]-[96].

My decision

69. Both parties were agreed that as this is a preliminary issue going to jurisdiction I should determine this application in the same way as I would at a final hearing, i.e. as a matter of law and not by reference to the 'reasonable prospects of success test'. Accordingly, if I do not strike the claim out on this ground, my decision that the Tribunal has jurisdiction will be final and binding on the Tribunal at the full hearing and the parties will not be at liberty to revisit the argument at that stage.

70. I take as my starting point that, unless s 3 of the HRA 1998 requires the EA 2010 to be interpreted differently as the Claimant contends, the meaning and effect of paragraph 4(3) of Schedule 9 to the EA 2010 is established by the *Child Soldiers* case. In that case Kenneth Parker J held that article 4(3) of the Framework Directive had afforded Member States an unqualified right to derogate completely from the Framework Directive so far as concerns age and disability in the armed forces. He held that even though Recital (19) of the Framework Directive refers to the purpose of that derogation being to enable Member States to safeguard the combat effectiveness of their armed forces, the derogation itself in article 4(3) of the Framework Directive is unqualified and accordingly paragraph 4(3) of the Schedule 9 was (as regards age discrimination) lawful even though it included no requirement for proportionality or link to combat effectiveness. In the light of s 6(3) of the European Union (Withdrawal) Act 2018, that position remains unchanged as a result of the United Kingdom's withdrawal as the *Child Soldiers* case is 'retained case law' as defined in that section. Although the *Child Soldiers'* case was concerned with age discrimination, I cannot see that there is any scope for argument that the exemption for disability discrimination could be approached any differently.

71. On its face, therefore, paragraph 4(3) of Schedule 9 provides a complete exemption from Part 5 of the EA 2010 (Work) insofar as concerns the protected characteristic of disability for the armed forces. Although paragraph 4(3) is framed in terms of (current) 'service in the armed forces', by virtue of s 108(1)(b) of the EA 2010 the exemption also applies where the

service relationship has ended because discrimination that arises out of and is closely connected to a relationship that used to exist between an employee and employer if that conduct would have constituted discrimination if it had occurred during the relationship. By this indirect means, the exemption for the armed forces for disability is extended to apply where the individual has left the armed forces in the same way as it applies while they are serving members.

72. On the face of the Act, accordingly, the armed forces are free to discriminate against disabled ex-servicemen and women. That is a surprising position because, despite Kenneth Parker J's decision in the *Child Solders'* case as to the width of the derogation provided by the Framework Directive, the purpose of the derogation is (as Recital (19), and commonsense, make clear) to protect the combat effectiveness of the armed forces. However, there can be no possible link between combat effectiveness of the armed forces and the way that the armed forces is permitted to treat disabled ex-servicemen and women. I cannot see why the same obligation not to discriminate against members of the public on grounds of disability, which applies to the armed forces as to other public authorities by virtue of s 29(6) of the EA 2010, should not also apply to ex-servicemen and women. However, by dint of s 28(2) of the EA 2010 it does not. By virtue of their former employment status, ex-servicemen and women must bring their claims under Part 5, and thus are barred by the combination of paragraph 4(3) of Schedule 9 and section 108(1)(b) from bringing disability discrimination claims. Unless this position infringes the rights of the Claimant under the ECHR, that is the law.

73. While it may appear to be putting cart before horse, I have considered next whether, *if* the legislation as currently drafted breaches the ECHR, it would be open to me to interpret the EA 2010 compatibly or whether, as Mr Chegwidden submits, to do so would impermissibly go against the grain of the legislation. I put the cart before the horse in this way because if the interpretative obligation in s 3 of the HRA 1998 cannot assist the Claimant, then neither can this Tribunal because, not being a court as defined in s 4 of the HRA 1998, I do not have jurisdiction to make a declaration of incompatibility.

74. As to the extent of the interpretative obligation, I have been referred to the Supreme Court's decision in *Ghaidan*, from which I take the following:-

Per Lord Nicholls:-

> 26. Section 3 is a key section in the Human Rights Act 1998. It is one of the primary means by which Convention rights are brought into the law of this country. Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the Convention rights "so far as it is possible to do so". This is the intention of Parliament, expressed in section 3, and the courts must give effect to this intention. …
>
> 30. From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to

depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. …

31. … once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.

32. …Section 3 … is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.

33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, "go with the grain of the legislation". Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.

Per Lord Steyn:

50. Having had the opportunity to reconsider the matter in some depth, I am not disposed to try to formulate precise rules about where section 3 may not be used. Like the proverbial elephant such a case ought generally to be easily identifiable. What is necessary, however, is to emphasise that interpretation under section 3(1) is the prime remedial remedy and that resort to section 4 must always be an exceptional course. In practical effect there is a strong rebuttable presumption in favour of an interpretation consistent with Convention rights.

Per Lord Rodger:

123. Attaching decisive importance to the precise adjustments required to the language of any particular provision would reduce the exercise envisaged by section 3(1) to a game where the outcome would depend in part on the particular turn of phrase chosen by the draftsman and in part on the skill of the court in devising brief formulae to make the provision compatible with Convention rights. … Parliament was not out to devise an entertaining parlour game for lawyers, but, so far as possible, to make legislation operate compatibly with Convention rights. This means concentrating on matters of substance, rather than on matters of mere language.

> 124. Sometimes it may be possible to isolate a particular phrase which causes the difficulty and to read in words that modify it so as to remove the incompatibility. Or else the court may read in words that qualify the provision as a whole. At other times the appropriate solution may be to read down the provision so that it falls to be given effect in a way that is compatible with the Convention rights in question. In other cases the easiest solution may be to put the offending part of the provision into different words which convey the meaning that will be compatible with those rights. The preferred technique will depend on the particular provision and also, in reality, on the person doing the interpreting. This does not matter since they are simply different means of achieving the same substantive result. However, precisely because section 3(1) is to be operated by many others besides the courts, and because it is concerned with interpreting and not with amending the offending provision, it respectfully seems to me that it would be going too far to insist that those using the section to interpret legislation should match the standards to be expected of a parliamentary draftsman amending the provision: cf *R v Lambert* [2002] 2 AC 545, 585, para 80, per Lord Hope of Craighead. It is enough that the interpretation placed on the provision should be clear, however it may be expressed and whatever the precise means adopted to achieve it.

75. It is clear from those passages I have quoted that the interpretative obligation in s 3 in principle permits a court or tribunal to rewrite even a wholly unambiguous legislative provision if the Convention requires it and if doing so does not go against a fundamental feature of the legislation. In my judgment a revision to the EA 2010 so as to provide that the exemption enjoyed by the armed forces in relation to disability discrimination does not apply to claims brought by ex-servicemen and women by virtue of s 108 of the EA 2010 would not alter a fundamental feature of the legislation. Indeed, since it is not possible to think why the armed forces should be permitted to discriminate against disabled ex-servicemen and women, the overwhelming impression is that no consideration was given to the interaction between paragraph 4(3) of Schedule 9 and s 108(1)(b) when it was enacted. I was not referred by the parties to any parliamentary materials or even the Explanatory Notes, but I have checked the latter myself and this point is not mentioned (indeed, paragraph 4(3) itself is not mentioned in the Explanatory notes, only paragraphs 4(1) and (2)). In my judgment an interpretation of the legislation whereby paragraph 4(3) of Schedule 9 is read as not applying to claims brought in reliance on s 108 would remedy what appears to be a legislative oversight rather than cutting across the grain of the existing legislation. In any event, this is nothing like the situation that was being considered by Cavanagh J in *Steer v Stormsure Ltd* [2021] IRLR 172 where the remedying of the discrimination between claimants in whistleblowing cases and claimants in discrimination claims would have required extending the jurisdiction of Employment Tribunals in respect of interim relief to a new category of claims and effectively amalgamating unfair dismissal law with discrimination law, when Parliament has always dealt separately with those rights and in separate statutes. Cavanagh J in that case viewed that as quintessentially a legislative issue for Parliament. It is quite different to the possibility arising in this case of making a very modest adjustment to the scope of the exemption for the armed forces for disability discrimination to ensure that it does not apply to discrimination against a small category of claimants where there is nothing to suggest that the exemption was ever intended to apply to those claimants in any event.

76. The next question, however, is whether the Convention requires such a reading or not. This depends on whether the EA 2010 as it stands breaches the Claimant's rights under Article 14 of the ECHR. The proper approach for considering whether there has been a violation of Article 14 of the ECHR was set out by Lady Black in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59, [2020] AC 51, at [8]:

> 'In order to establish that different treatment amounts to a violation of art 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in art 14 or "other status". Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para [3] of R (on the application of Carson) v Secretary of State for Work and Pensions [2005] UKHL 37, [2005] 4 All ER 545, [2006] 1 AC 173. He observed that once the first two elements are satisfied: "the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact".'

77. Mr Chegwidden submits that the Claimant does not even fall within the ambit of the Convention rights under Articles 6 or 8 in order to engage Article 14. I disagree. The Claimant's case plainly comes within the ambit of Article 8. Her claim is that she was discriminated against, in relation to her disability, and that this discrimination caused injury to her feelings and distress. As such, her psychological integrity has been (she claims) affected and thus her Article 8 rights engaged on the basis of the authorities to which the Claimant refers (*Costello-Roberts v the United Kingdom* (1993) 19 EHRR 112, *X and Y v the Netherlands* (1985) 8 EHRR 235 and *Glor v Switzerland* 13444/04 [2009] ECHR 2191). A further helpful summary of the case law on Article 8 in the employment context is to be found in the judgment of the Strasbourg Court in *Denisov v Ukraine* (Application No. 76639/11), judgment of 25 September 2018 at [95]–[107]. In that case, the European Court of Human Rights (ECrtHR) noted that a person's private life may include activities of a professional or business nature and Article 8 will be engaged where factors relating to private life have been brought into the work context (eg personal relationships, sexuality, disability etc), or where the consequences of a decision in the work context (eg a disciplinary decision or a dismissal) may have negative effects on an individual's private life, including their 'inner circle' of friends and family, their opportunities to establish and develop relationships with others in future (both in work and out of work) and their reputation. I accept that decisions taken by the Respondent in the operation of the service redress procedures are, if

discriminatory as alleged, capable of affecting the Claimant's psychological integrity. The Claimant's claim therefore falls within the ambit of Article 8.

78. Since I have concluded that the case is within the ambit of Article 8, I do not also have to decide whether Article 6 is engaged. In this respect, there is some force in Mr Chegwidden's argument that this case is not like that in *Steer v Stormsure* which was concerned with the remedies available for enforcement of a civil right to claim that a dismissal was unlawfully discriminatory which had clearly been granted by Parliament. Likewise, this is not a case like *R (Leighton) v Lord Chancellor* [2020] EWHC 336 (Admin) on which the Claimant relied where the issue was about financial support for access to the courts to enforce existing legal rights. The effect of paragraph 4(3) of Schedule 9 as currently drafted, however, is that Parliament has *not* granted to disabled servicemen and women the civil right to claim disability discrimination against their employer. As Lord Sumption noted in *Benkharbouche v Sudan* [2017] UKSC 62, [2019] AC 777 at [15] Article 6 is not concerned with the substantive content of the laws of a Member State. As such, it is arguable that Article 6 is not engaged in this case, but I have not heard full argument on the point.

79. The second question that *Stott* requires to be considered is whether the alleged discrimination is on grounds of 'other status' within Article 14. I have no difficulty concluding that it is. If the discrimination is as between disabled ex-servicemen and women (who cannot bring discrimination claims on the basis of their protected characteristic) and non-disabled ex-servicemen and women (who can bring discrimination claims on the basis of other protected characteristics), then the discrimination is because the Claimant is a disabled person, which is a recognised status under Article 14: see *Glor v Switzerland* ibid at [53]. Alternatively, the legislation discriminates between ex-servicemen and women and ex-employees of civilian employers on the basis of their status as ex-services rather than ex-civilian. I am satisfied that being an ex-serviceman or woman is also capable of being an 'other status' for the purposes of Article 14: *cf R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 1 AC 311 *per* Lord Neuberger at [43].

80. The third question that *Stott* requires to be considered is whether the Claimant and the person alleged to have been treated differently are in analogous situations. I cannot see that there is any material distinction to be made between disabled ex-servicemen and women and non-disabled ex-servicement and women, or between ex-servicemen and women and ex-civilian employees so far as concerns the bringing of employment tribunal claims for discrimination. Their situations are analogous.

81. The fourth and final question is justification. That requires me to consider whether the measure in question pursues a legitimate aim, and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In this case the Respondent has not identified any legitimate aim, and it is not possible to think what the aim might be because, as I have set out above, the purpose of the exemption must be to safeguard the combat effectiveness of the armed forces, and as such can

have no relevance once the individual has been discharged from the armed forces.

82. I therefore conclude that the EA 2010 as presently drafted breaches the Claimant's rights under Articles 8 and 14 of the ECHR because it prevents her bringing a disability discrimination claim against the Respondent in respect of matters that have occurred since her discharge and accordingly s 3 of the HRA 1998 requires it to be interpreted to avoid that result. For the reasons I have already set out, I consider that it can be so interpreted without offending any fundamental feature of the legislation. It is even possible readily to envisage the minor amendment to the drafting that would be required. In my judgment, s 108(1)(b) of the EA 2010 should be read as follows: *"A person (A) must not discriminate against another (B) if- (a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and (b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act* ***(or would do were the Act not disapplied by paragraph 4(3) of Schedule 9)****."* With that minor amendment, the exemption from the prohibition on disability discrimination for those serving in the armed forces remains intact, but the armed forces are not permitted to discriminate against disabled ex-servicemen and women.

Conclusions

83. In the light of my judgment as set out above:

(1) The Respondent's application to strike out the disability discrimination claim under Rule 37(1)(a)/(b) as falling outwith the jurisdiction of the Tribunal by virtue of paragraph 4(3) of Schedule 9 to the EA 2010 is dismissed.

(2) The Respondent's application to strike out the sex discrimination and victimisation claims under Rule 37(1)(a)/(b) on grounds that they stand no reasonable prospect of success and/or are an abuse of process is dismissed.

(3) The sex discrimination and victimisation claims stand little prospect of success and accordingly the threshold for making deposit orders in respect of both claims under Rule 39 is met.

(4) There will be a further Closed Preliminary Hearing (CPH) on **27 January 2022 at 10am** (time estimate 2 hours) **before EJ Stout** for the purpose of:

a. Considering in what amount to make the Deposit Order; and,
b. Further case management.

(5) If the Claimant wishes her means to be taken into account in determining the amount of the deposit order she must file **at least 14 days before**

the CPH a statement detailing her financial circumstances, including any earnings, regular expenditure, savings and property, together with supporting documentary evidence.

(6) Any other applications that the parties wish to make at that hearing must also be filed and served **at least 14 days before.**

(7) If the date of the CPH is not convenient to parties, they should liaise and provide alternative mutually convenient dates.

Employment Judge Stout

Date:13/12/2021

JUDGMENT & REASONS SENT TO THE PARTIES ON

13/12/2021..

FOR THE TRIBUNAL OFFICE