# EMPLOYMENT TRIBUNALS

**Claimant:**
Miss B Lodge (1)
Mr S McVicker-Orringe (2)

**Respondent:** Ministry of Defence

**HELD AT:** Manchester (by CVP) **ON:** 30 November 2021

**BEFORE:** Employment Judge Johnson

**REPRESENTATION:**

**Claimant:** Mr K Hirst (solicitor)
**Respondent:** Ms N Ling (counsel)

# RESERVED JUDGMENT ON THE PRELIMINARY ISSUE

The judgment of the Tribunal is that:

(1) The letter sent on 29 July 2019 did not constitute a service complaint in the correct format and does not comply with section 121 Equality Act 2010.

(2) Issues [1A], [1B], [4] and [8] were included within the letter sent on 29 July 2019, but because this letter did not constitute a service complaint under section 121 Equality Act 2010, the Tribunal does not have jurisdiction to hear these issues in relation to that particular document.

(3) However, the following issues were raised within valid service complaints under section 121 Equality Act 2010:

(a) Issues [1A], [1B] and [4] were included in the matters raised under HoC1 as raised in the claimants' SC2/SC3; and,

(b) Issues [1] and [8], were included in the matters raised under the claimants' Heads of Complaint 'HoC1' and 'HoC10' respectively and formed part of service complaints SC2/SC3.

This means that issues [1], [1A], [1B], [4] and [8] can be considered by the Tribunal in accordance with sections 120 and 121 Equality Act 2010, but subject to any determination that may be made by the Tribunal at the final hearing concerning the question of whether these complaints were presented to the Tribunal in time in accordance with section 123 Equality Act 2010.

(4) Issue [8] can be considered as part of allegations of discrimination asserted by the second claimant, but subject to any determination that may be made by the Tribunal at the final hearing concerning the question of whether these complaints were presented to the Tribunal in time in accordance with section 123 Equality Act 2010.

(5) Issue [25] was not included in matters raised within Heads of Complaint 'HoC17' and 'HoC31' of service complaint 'SC2' brought by the first claimant and issue [25] brought by the second claimant. This means that the Tribunal does not have jurisdiction to hear issue [25] in accordance with sections 120 and 121 of the Equality Act 2010.

(6) The first claimant did not complain of victimisation on the part of Lieutenant Colonel Duncan in service complaint 'SC6' and the Tribunal does not have jurisdiction to hear the matters raised in issues [33A] and [37B] as they did not constitute valid service complaints under section 121 Equality Act 2010 and the Tribunal does not have jurisdiction to hear these complaints under section 120 Equality Act 2010.

(7) The second claimant did not raise issue [33] in his service complaint 'SC6' as it did not form part of a valid service complaints under section 121 Equality Act 2010 and the Tribunal does not have jurisdiction to hear this complaint under section 120 Equality Act 2010.

(8) The second claimant did not raise issue [37D] as a service complaint under section 121 Equality Act 2010 and the Tribunal does not have jurisdiction to hear this complaint under section 120 Equality Act 2010.

(9) In summary:

a) issues [1], [1A], [1B], [4], [8] can proceed and be included in the final list of issues, but will be subject to the provisions of section 123 Equality Act 2010 concerning time limits, where relevant: and,

b) Issues [25], [33], [33A], [37B] and [37D] cannot proceed as the Tribunal does not have jurisdiction to hear them in accordance with sections 120 and 121 Equality Act 2010.

# REASONS

## Introduction

1. This preliminary hearing was listed to determine whether or not the Tribunal has jurisdiction to hear all of the claimants' (C1 and C2) claims in accordance with section 121 Equality Act 2010 ('EQA'), or whether certain particular claims should be struck out because they do not comply with the provisions of section 121 EQA.

2. Ms Lodge who is C1, was engaged by the respondent as a reservist soldier and worked in this role from 28 January 2018. By a claim form presented on 19 April 2020, following a period of early conciliation from 13 March 2020 to 31 March 2020, C1 brought complaints of discrimination on grounds of age and sex, victimisation and unpaid wages.

3. Mr McViker-Orringe who is C2, was engaged by the respondent as a reservist commissioned officer and worked in this role from 26 September 2015 until 17 or 18 March 2021, (it was not clear which was the correct date at this preliminary hearing). By a claim form presented on 19 April 2020, following a period of early conciliation from 13 March 2020 to 23 March 2020, C2 brought complaints of victimisation relating to protected acts made in respect of the alleged discrimination experienced by Ms Lodge and also unpaid wages.

4. On 24 April 2020, Employment Judge Holmes determined that both claims should be considered together. In a separate letter sent on the same date, he also advised that there were a number of issues relating to jurisdiction and (in relation to this preliminary hearing), whether the claimants had complied with section 121 EQA concerning the requirement for a prior service complaint.

5. On 22 May 2020, Employment Judge Holmes considered the claims following the provision of further information by the claimants. He ordered that further information be provided concerning a number of matters including the jurisdiction issue. A lengthy document of some 51 pages was provided by the claimants on 29 June 2020. The Tribunal sent a reply to the claimants on 11 August 2020 confirming that Employment Judge Holmes had reviewed the papers and that the claim forms would now be served on the respondent.

6. The case was subject to further case management and in particular, before Employment Judge Doyle on 11 January 2021, following the presentation of a response by the respondent and he listed the case for a final hearing on 6 to 24 June 2022. An earlier preliminary hearing took place before Employment Judge Sharkett on 1 September 2021 concerning a question of legal professional privilege. It is understood that Employment Judge Sharkett's decision had not been promulgated at the time of the preliminary hearing before me. It is likely however, that the parties will have received her decision by the time that my decision concerning the section 121 EQA preliminary issue is promulgated.

7. Finally, the case was listed for a further preliminary hearing on 16 and 17 December 2021 to deal with a further issue involving time limits and my intention was to have promulgated my decision within the short period of time between the two hearings. Unfortunately, for a number of reasons (including ill health on my part), I was unable to complete the judgment until a later date.

8. The parties' representatives had both provided skeleton arguments for the preliminary hearing before me and I am grateful for the additional detailed oral submissions in what turned out to be a particularly complicated matter. Unfortunately, this case involved an internal process where the claimants were dissatisfied with how the respondent had treated them and as each complaint did not achieve what the claimants sought, further complaints were added with a complicated array of headings and sometimes, in a repetitive way. It was unfortunate that a more clear and concise single list of issues and complaints could not have been prepared before the preliminary hearing took place as the numerous and varied lists and schedules provided to me, made it more difficult to conclude my decision as quickly as I would have liked.

9. I would remind the parties of the overriding objective under Rule 2 and their duty to further that objective by cooperating to ensure that the case can be dealt with in a proportionate way and thereby avoiding delay. In many respects, Ms Ling was correct in saying that this was not a complicated preliminary issue, but I did feel that it became unnecessarily complicated by reason of the disproportionate amount of documentation provided. The background to this case no doubt sparks many strong emotions, (and not just among the claimants). But it is important that as the case approaches the final hearing, the parties cooperate and behave reasonably to ensure that everyone can focus upon the core issues which need to be determined.

**The complaints which are currently advanced by the claimant (and the specific issues where admissibility is in dispute)**

10. A draft list of issues was provided at the preliminary hearing and which in addition to complaints of sex and age discrimination contrary to the EQA, the question of limitation under section 123 EQA and remedy is also addressed. However, I have referred to the complaints of discrimination/victimisation and the only those where their admissibility is in contention and which form part of the preliminary issues summarised in the relevant section below. I make reference to the issues as numbered in the lists provided, so that they can be cross referenced with that document and the further discussions in this judgment below.

11. For the avoidance of doubt, I have used the abbreviations as applied by the parties in their skeleton arguments and related documentation. This will mean that each numbered service complaint is coded 'SC1, 2, 3' etc and where both claimant's service complaints have been identified, they will linked together as (for example) 'SC2/SC3' with the first claimant's and then second claimant's service complaints listed

respectively. Heads of Complaint are referred to as 'HoC1, 2, 3' etc with the number of that complaint being applied as appropriate.

Direct sex/age discrimination (section 13 EQA)

12. Did the respondent subject C1 to the following detriment?

b) On a date between 4 September 2018 and mid-September 2018, Captain Parry and/or Lt Col Hetherington requiring C1 to travel to Longmoor from Manchester to tell Lt Col Hetherington 'in person' that she was withdrawing her application to join the regular army. **Issue [1A]** (paragraphs A1 – A8) {SC2/SC3 of 19 April 2020, HoC1}
c) On 16 or 17 September 2018, Lt Col Hetherington stating, in front of the whole body of troops, that C1 was transferring to the regulars in October 2018. **Issue [1B]** (paragraphs A9 – A15) {SC2/SC3 of 19 April 2020, HoC1}

Harassment (section 26 EQA)

13. This complaint appears to have an agreed list of issues with no challenges with regard to the admissibility of specific complaints

Victimisation (section 27 EQA)

14. The alleged protected acts do not appear to be in dispute in terms of their admissibility, although it is understood that the respondent still disputes that these acts occurred or amounted to acts protected by section 27 and these issues will be determined at the final hearing.

15. Did R subject C1 to the following detriment?

a) On 15 April 2019, Captain Knapp lying to senior formation about behaviour towards C1 (ie, he wrote that she is in a vulnerable state blaming 'external factors') **Issue [8]** (paragraphs 71-74) {SC2/SC3 of 19 April 2020, HoC 10}.

k) On 28 August 2019, the claimants' valid subject access requests ('SAR') denied under the Management Forecasting exemption by Annys Samuel (a contractor working for Army HQ holding the job title "SO3 Data Protection") **Issue [22]** (paragraphs 201-207) {SC2/SC3 of 19 April 2020, HoC16}

l) On 30 September 2019, Emily Watson withholding SAR material on the basis of Defence Purposes. **Issue [23]** (paragraphs 208-212) {SC2/SC3 of 19 April 2020, HoC17}

n) Between October and December 2019, Emily Watson incorrectly delaying the release of information due after a Freedom of Information request. **Issue [25] (**paragraphs 230-241)

o) On or around 13 December 2019, an unknown person producing and Emily Watson providing a draft, undated and uncirculated memo to the Information Commissioner's Office to justify the use of section 26 Data Protection Act 2018. **Issue [24]** (paragraphs 213-229)

**The service complaint history**

16. It should be noted that this summary relates solely to the issues being considered in this preliminary hearing based upon the documentary evidence available and should not be treated as findings of fact in relation to any of the issues to be considered at the final hearing. The summary is based upon the updated factual summary of service complaints by the respondent and the version amended by the claimant.

17. On 4 April 2019, the second claimant ('C2'), raised a service complaint (SC1), following his being told that he would be subject to Major Administrative Action ('MAA'), which appeared to arise from his relationship with the first claimant ('C1'), both being serving soldiers with the army. It raised what became known as issue [6] and it is understood that this is not the subject of a challenge under s121 EQA. This SC1 was stayed by letter on 1 July 2019, in order that the MAA could be concluded. It was then determined to be admissible, and this was confirmed by letter on 21 January 2020.

18. On 16 April 2019, C2 then raised a further service complaint (SC2). This raised what has become known as issue [5] and is not the subject of the s121 EQA arguments in this preliminary hearing. He received a letter on 24 July 2019 from Brigadier J Buczacki, whom I understand was the commander for the 1st Intelligence Surveillance and Reconnaissance Brigade and who ruled on the admissibility of SC2. He determined that SC2 was inadmissible contrary to regulation 5(2)(b) of the Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015, because they were substantially the same as SC1. This decision was upheld by the Service Complaints Ombudsman Armed Forces ('SCOAF'), on 19 August 2019.

19. Meanwhile, the first claimant (C1), raised her first service complaint (SC1) on 16 May 2019. It was entitled Service Complaint Admissibility Letter and which related to the MAA which she was being subjected to. It is understood that the SC was stayed in July 2019 pending the conclusion of the MAA. On 9 March 2020, the Brigadier wrote to C1 and summarised the complaints as her being unfairly subjected to MAA by her chain of command (HoC1) and that the outcome of the MAA was unfair (HoC2). These were deemed to be admissible and would be allocated to a suitable 'deciding body'. C1 argues that these HoC had been changed by the respondent unilaterally.

20. C1 then raised her second service complaint (SC2) on 29 July 2019. She argues that this alleged harassment and victimisation raising

those issues now known as issues [1], [1A], [1B], [2], [3], [4], [9], [10] and [11]. She argues that SC2 was treated as informal without her consent and was subject to pressure from Laura Bales-Smith and Captain Parry to withdraw it, thereby generating further issues [19] and [20]. In any event, C1 asserts that no decision was ever made in relation to SC2, but that it was effectively 'superseded' by service complaint 3 ('SC3') which she brought on 2 March 2020. However, it should be noted that the admissibility of [1], [1A], [1B] and [4] are in issue in this preliminary hearing.

21. C2 also raised his third service complaint ('SC3') on 2 March 2020. As no reply was received, both C1 and C2 resubmitted these SC3s on 19 April 2020. It is understood that these complaints were identical and raised 32 issues under a number of HoC. It appears that issues [8] and [32] were mentioned within SC3, although Mr Hirst acknowledged in his version of the summary of service complaints that issue [33] was not raised within this document, but he asserts that he mentioned it in his letter dated 29 June 2020 which he sent to Lt Col Duncan. This issue appears to relate to a criticism that the SC3 allegations raised by C1 and C2 were not handled in accordance with policy and law and accordingly, issue [33] could not have been raised when these service complaints were raised.

22. What actually happened following the submission of the SC3, Lt Col Duncan was that he prepared a letter dated 18 May 2020, which (insofar as is relevant):

a) accepted HoC relating to issues [22] and [23];
b) identified issues [1], [8], [20] and [26] as relating to C1 rather than C2;
c) issues [5], [6], [12], [13], [14], [27],[28], [29] and [31] had already been included in SC1 and thereby inadmissible in relation to SC3
d) issues [7], [15], [16], [17], [21a], [21b] and [32] were deemed to be referring to allegations of maladministration and inadmissible in accordance with regulation 5(2)(b) Armed Forces (Service Complaints) Regulations 2015.
e) Issue [30] was deemed to be admissible.

23. Lt Col Duncan also wrote to C1 on 18 May 2020 and determined (insofar as is relevant):

a) Accepted issues [22] and [23];
b) Identified issues [6], [7], [17], [21a], [21b], [29], [30] and [32] related to C2 rather than C1;
c) Identified issues [1], [5], [8], [9], [10], [11], [12], [13], [14], [26], [27], [28] as being essentially the same as her previous service complaints raised;
d) issues [15], [16] and [20] were deemed to be referring to allegations of maladministration and inadmissible in accordance

with regulation 5(2)(b) Armed Forces (Service Complaints) Regulations 2015.

24. On 19 May 2020, C1 raised SC4 and C2 raised SC4, although there appears to be no dispute that they essentially relied upon the same HoC as service complaints raised earlier. Lt Col Duncan subsequently determined in a letter to C1 on 26 June 2020 and C2 on 14 July 2020, that all of the SC4 service complaints were inadmissible because they had either already been raised by the claimant or related to issues of maladministration.

25. On 14 July 2020, the SCOAF reviewed the decisions made on 18 May 2020 relating to both SC3. The decision relating to C1 was upheld, but with issues [1] and [8] were inadmissible because they were out of time, as they originally arose from September 2018. The decision relating to C2 and his SC3 were upheld.

26. On 17 August 2020, the SCOAF reviewed the admissibility decisions made on 14 July 2020 relating to C2's SC4 and 29 June 2020 concerning C1's SC4 and determined that both had been considered inadmissible.

27. On 4 November 2020, the SCOAF concluded that C2's HoC which were determined as maladministration had been rightly identified apart from issue [32], which was now admissible. The same decision was reached in relation to C1's service complaints deemed to involve maladministration.

28. On 9 November 2020, C2 raised SC5 where he identified victimisation relating to issues [36] and [37]. On 11 December 2020, they were determined issue [37] was admissible, whereas the other issue had already been raised in SC3.

29. On 9 February 2021, SCOAF determined that issue [36] was admissible.

30. On 23 February 2021, C2 raised SC6 and bringing issues [33A], [37A] and [37B].

31. On 3 March 2021, the SCOAF determined that insofar as they related to C2, issues [7], [15], [16], [17] and [21] were admissible as complaints of victimisation, even though they had previously been treated as complaints of maladministration. In relation to C1, they made a similar decision in relation to issues [15], [16] and [20].

32. On 10 March 2021, C2 raised SC7 and the admissibility of this service complaint had not been determined by the respondent at the date of the preliminary hearing, although this may have progressed at time of writing this judgment.

33. On 14 May 2021, Lt Col Read determined that in relation to SC6, issues [33A] and [37B] were inadmissible because they involved a complaint *about an admissibility decision,* (my emphasis). Issue [37] however, was considered to be admissible.

34. On 28 June 2021, the SCOAF reviewed the decision concerning the admissibility of SC6 and the specified officer's decision was upheld.

**What issues are agreed as admissible and which issues remain in dispute?**

35. As a result of this lengthy chronology and numerous service complaints, the parties agreed the following:

a) Issues [7], [15], [16], [17], [20], [20], [21A], [21B], [22], [23], [30], [32], [36], [37] and [37A] are admissible service complaints and can be included within the proceedings in accordance with section 121 EQA;
b) Issues [5], [6], [9], [10], [11], [12], [13], [14A], [14B], [19], [26], [27], [28], [29] and [31] were declared inadmissible in relation to later service complaints because they had been raised in earlier service complaints. But this of course means that there has been a service complaint raised where they were determined to be admissible and can be included within the proceedings in accordance with section 121 EQA.

36. Service complaints which are in contention are:

a) The respondent submits that issues [1] and [8] are inadmissible because they were determined to be out of time during the internal SC process. However, the claimants submit that they are admissible because they were submitted in time as they were included in earlier SCs and relate to both claimants.
b) The respondent submits that issues [2], [3] and [4] were not raised in any service complaints, although they acknowledge that issue [3] will effectively be investigated in respect of C2's SC1 alleging that he was unfairly subjected to an MAA process. The claimant argues that these issues have been raised in C2's SC3 and C1's SC2.
c) The respondent submits that issues [1A], [1B], [24], [25], [28A], [33] and [37D] were not raised as service complaints. The claimants, however, argue that issues [1A] and [1B] were raised in C1's SC2 and issue [33] was raised in C2's SC6. They also say that issue [24] was expressly raised in both claimants' SC3 under 'HoC 31'. They concede that issue [25] was not expressly raised, but that disclosure by the respondent shows that the alleged conduct was by the same individual as asserted in issue [24]

**The issues to be determined in the preliminary hearing**

37. As described in the previous section, the parties discussed agree that most of the issues attributed to the service complaints are compliant with section 121 EQA, namely:

**2, 3, 5, 6, 7, 9, 10, 11, 12, 13, 14A, 14B, 15, 16, 17, [18], 19, 20, 21A, 21B , 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 32A, 36, 37, 37A and 37C.**

This means that the following issues remain in dispute and the respondent asserts that they are *not* compliant with section 121 EQA:

**1, 1A, 1B, 4, 8, 25, 28A, 33, 33A, [34, 35], 37 B and 37D**

38. The agreed list of issues are as follows:

a) Did C1 make a service complaint on 29 July 2019?

b) Did this service complaint cover issues **[1], [1A], [1B], [4]** and **[8]**?

c) Were issues **[1A], [1B], [4]** included in the matters raised under the claimant's Heads of Complaint ('HoCs') 1 and 2 in the Service Complaints ('SC') SC2 (brought by C1) and SC3 (brought by C2)?

d) Were issues **[1]** and **[8]** covered by service complaints submitted before C1's SC2 and C2's SC3 of 2 March and/or 19 April 2020?

e) Does the Tribunal have jurisdiction to hear issues **[1]** and **[8]** on the basis that a Service Complaint Ombudsman Armed Forces ('SCOAF') report of 17 August 2020 excluded them on the basis of '*admissibility*' rather than '*out of time'*, notwithstanding the fact that a report of 14 July 2020 did exclude them on the basis of being out of time?

f) Does the Tribunal have jurisdiction to hear issue **[8]** in relation to C2 on the basis that it was excluded in relation to him on the basis that it did not relate to his *service*, rather than on the basis of being *out of time*?

g) Was issue **[25]** included in the matters raised by HoC17 and HoC31 of SC2/SC3?

h) Does the Tribunal have jurisdiction to hear the matters raised in issues **[33A]** and **[37B],** given the terms in which the SC was made? In particular, did C complain of victimisation on the part of Lt Col Duncan?

i) Was issue **[33]** raised in C2's SC6?

j) Was issue **[25]** included in matters raised by HoC17 and HoC31 of SC2/SC3?

k) Was issue **[28A]** included in the matters raised by HoC 24 and HoC26 of SC3/SC3?

l) Does the Tribunal have jurisdiction to hear matters raised in issue **[33A]** and **[37B]** given the terms in which the SC was made? In particular, did C1 and C2 complain of victimisation in relation to Lieutenant Colonel Duncan?

m) Was issue **[37D]** raised by C2 as a service complaint or was it raised *after* his resignation took effect?

**The Law**

39. Service Complaints are internal complaints which can be raised by those serving in the Armed Forces and which have a right to appeal to the SCOAF. Part 14A of the Armed Forces Act 2006 ('AFA') makes provision for service complaints in sections 340A-340O. Section 340B gives the Defence Council power to make regulations for the procedure of making a service complaint. Section 340B(3) and (5)(b) provide that a service complaint shall be 'not admissible' if made after the end of three months, unless 'specified circumstances' apply. These specified circumstances include where a matter is capable of being pursued as a claim under Chapter 3 of Part 9 of the EQA 2010 (which includes sections 120 and 121), in which case the time limit is six months (Regulation 6 of the *Service Complaints Regulations 2015*).

40. Section 340B(5)(c) provides that:

*"the complaint is not admissible on any other ground specified in service complaints regulations".*

41. *The Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015* ('AFMR'), identifies those matters where a service complaint may not be made. Regulation 3(2) provides that:

*(a) A decision under regulations made for the purposes of section 340B(4)(a) (admissibility of the complaint);*

*…*

*(e) alleged maladministration (including undue delay) in connection with the handling of his or her service complaint.*

*(f) a decision by the Ombudsman for the purposes of any provision of Part 14A of the Act.*

*(h) a decision for the purposes of regulations made under section 344(2) whether a service complaint could be made about a matter.*

*(j) a decision under regulations made for the purposes of paragraph (b) of section 344(5) whether a service complaint, or an application referred to in that paragraph, could be made after the end of a prescribed period.*

42. SCOAF was established by section 365B of the AFA and section 340H provides that SCOAF has the power to investigate a service complaint, once finally determined, and in the same circumstances, an allegation of maladministration of a service complaint. It can also investigate an allegation

of undue delay in the handling of a service complaint which has not been finally determined.

43. The *Armed Forces (Service Complaints) Regulations 2015* ('AFR') explains the procedure that applies in relation to service complaints. Regulation 4 provides that a service complaint must be made to the commanding officer and must include specific information, that (if relevant), the service complaint must state whether the subject of the complaint involved discrimination or harassment. Discrimination is described in regulation 4(5) as being *'discrimination or victimisation on the grounds of colour, race, ethnic or national origin, nationality, sex, gender reassignment, status as a married person or civil partner, religion, belief or sexual orientation, and less favourable treatment of the complainant as a part-time employee.'*

44. Upon receipt of a service complaint, a decision is made as to its admissibility of the service complaint. Regulation 5(b) provides that a service complaint will not be admissible if it is substantially the same as a service complaint which a complainant has already brought.

45. As mentioned above, appeals to a decision in a service complaint are made to SCOAF. Regulation 7(3) provides that a SCOAF decision is binding on both complainant and the chain of command.

46. Representatives referred me to the case of ***Moloudi v Ministry of Defence*** **[2011] UKEAT/0463/10/JOJ** where the Employment Appeal Tribunal ('EAT') considered a service complaint that had been presented out of time. It dealt with a Tribunal complaint of race discrimination under the earlier legislation of the Race Relations Act 1976 ('RRA'), which had equivalent provisions to that provided by section 121 EQA. The EAT found that the service complaint been brought correctly under these equivalent provisions of the RRA (section 75(9A), which required not only the bringing of a service complaint, but also that this complaint had been determined by the Defence Council.

47. The question to be determined was whether an 'out of time' service complaint nevertheless complied with the requirements of the legislation. The judge concluded that as there was a requirement that the complaint be dealt with by the Defence Council, there was also a requirement that it be accepted as valid. He also considered that there were a number of purposive reasons why this interpretation was correct and provided the illustration of a *'…simple short note made long after the event by a dissatisfied soldier saying that he has suffered from racial discrimination without giving any particulars and therefore not allowing the prescribed officer to make a sensible or realistic determination of it.' [paragraph 27].*

48. The EQA 2010 consolidated UK discrimination legislation and section 121(1) provides that the service complaint must have been made before a complaint can be made to the Tribunal and that the service complaint has not been withdrawn. Section 121(2) provides that a complaint will be considered withdrawn if the complaint has been dealt with by the Defence Council and period for bringing a review against a decision has expired or an application for

a review has not been made, but that the SCOAF has decided that an appeal made to it cannot proceed. While I agree with Ms Ling that section 121(1) bears some similarity to the provisions under section RRA, I do not accept that it has retained the requirement that the Defence Council must have made a determination with respect to the service complaint in question. Instead, the focus under section 121 is that a service complaint has been made and that it has not been withdrawn or *deemed to have been withdrawn.* This would suggest to me that a service complaint which has been brought which has not yet been determined or withdrawn, can be the subject of a Tribunal claim under the EQA and not fall foul of section 121.

49. In terms of the application of the EQA, the parties referred me to the judgment in the case of ***Zulu & Gue v Ministry of Defence*** **2205688/2018**. Correctly, they reminded me that this decision being a first tier Employment Tribunal decision, is not binding upon me when considering the preliminary issue before me. However, I agree with the parties that Employment Judge McNeill QC provided a detailed and excellent discussion concerning the interpretation of section 121 and I will refer to the decision as appropriate in my discussion below.

50. Within this section of my judgement concerning 'The Law', I would note that ***Zulu*** concerns claims of race discrimination dating from 2017 and 2018. Ms Ling drew my attention to the difference between section 340A AFA which required the complaint to be a matter *'relating to'* the soldier's service and Employment Judge McNeill QC notes that in the Tribunal an act of race discrimination did not need to be aimed at the claimant. This was relevant in ***Zulu*** because the claimants were not involved in incidents to which they complained about.

51. Employment Judge McNeill QC found that an issue did not have to be specifically referred to in a service complaint before it could be brought as a complaint in the Tribunal. Insofar as section 121 EQA is concerned, the term *'matter'* is a requirement for the claimant to identify 'how he thinks himself wronged' and the judge found that as the complaints in ***Zulu*** related to claims of racial harassment and a failure to deal with reports of race discrimination, it was acceptable for the purposes of section 121 for greater elaboration to made within the claim form if they related to those forms of discrimination.

52. Interestingly however, the Tribunal complaints of victimisation which were made in the claim form, but not identified in the service complaints were found not to have complied with section 121 as they were different in character from the complaints of the 'racial environment' and failure to deal with issues raised. Additionally, a complaint of racial abuse dating from 2009 was found too far removed in time to fall within the matters raised in the service complaint.

53. Ms Ling also referred me to the question of EU law and the requirement and noted that in ***Zulu*** the judge had rejected that section 121 EQA was incompatible with EU law. Where the Defence Council or its delegated body had determined a service complaint as inadmissible, it was acknowledged by the Tribunal in ***Zulu*** that it was bound by the judgment in ***Moloudi.*** However,

where service complaints had been rejected on a point of substance, it considered whether or not the absolute bar presented by s121 was invalid because it prevented the claimants from obtaining an effective remedy for their EU law rights.

54. What concerned the Tribunal in ***Zulu*** was that while excluding a complaint because of a procedural requirement (not making a complaint within the appropriate time limits for example), involved no contravention of EU law principles of effectiveness and equivalence, the exclusion of substantive complaints of discrimination, could only be resurrected following a successful application for judicial review. The Tribunal considered this process could not be a practical and effective means of enforcing an EU law right and an exclusion of this nature, could not be correct.

55. As Ms Ling stated, the Tribunal were of the view in ***Zulu*** that the service complaint had been wrongly rejected and requiring the conduct complained of to be targeted against the complainant, amounted to a hurdle that would not have been applied in the Tribunal.

56. Ms Ling submitted that the reasoning in ***Zulu*** does not have any application where there is in fact no bar rendering the enforcement of EU law rights *'practically impossible or excessively difficult'.* Moreover, she added that the question of whether a provision should be disapplied in accordance with EU law, because it renders the exercise of a right excessively difficult, is to be determined on a 'case by case basis'. It is not the case that because a national provision has been disapplied in one case, that it will be disapplied across the board. She provided the Tribunal with relevant extracts from ***EU Law, Text, Cases and Materials*****,** Craig and De Burca (7th edition), Chapter 9 4(A)I (p286). Ms Ling noted that the authors relied on the cases of ***Van Schijndel & Van Veen v Stichting Pensionenfonds voor Fysiotherapeuten*** **Case C-430-431/93** and ***Peterbroeck, Van Campenhout & Cle v Belgian State*** **Case C-312/93** to illustrate the point: being that the ECJ found in one case that a court did not need to raise a point of EU law of its own motion to render EU law effective, but in the other, that it did.

## Discussion

57. It should be noted that the majority of the issues identified in this claim have been accepted by the respondent as satisfying the test provided by section 121 EQA and accordingly, the Tribunal in principle has jurisdiction to hear those alleged complaints.

58. I have dealt with each of the issues identified above (i.e., where admissibility remains in dispute), in turn, but where any discussion involves a repetition of previous comments, I have referred to that earlier part of the discussion.

Did C1 make a service complaint on 29 July 2019?

59. Ms Ling acknowledges that C1 wrote to Lt Col Hetherington, whom R accepts was the commanding officer of 6MI of C1's battalion on 29 July 2019. Her letter related to Major Administrative Action ('MAA') brought against her and C2 and she indicated her intention to use the documentation as evidence within a service complaint and it had been submitted to Captain Parry to begin the procedure. On the same date, she sent an email to Captain Parry which refers to a previous discussion that she had with him and confirming her decision to *'put in'* a service complaint against Captain Knapp, who is the adjutant for 6MI for *'bullying, harassment and victimisation'.* This email concludes by saying, *'[p]lease find attached my representation for the Major Administrative Action, I am using this document as a basis for my complaint as I have covered the full breach of contract within it'.*

60. However, Ms Ling submits that this does not amount to a service complaint as the email containing the substance of her service complaint was actually sent to Captain Parry and not her commanding officer, Lt Col Hetherington. She goes onto say that her letter to the commanding officer is in the context of an MAA, and not as a service complaint.

61. In addition to her assertion that the letter cannot amount to a service complaint, Ms Ling further submits that the complaint was withdrawn. She referred me to a series of correspondence between C1, Captain Parry and Laura Bales Smith where they pressed C1 to confirm whether she wished to take her complaint forward and indeed offering support in completing Annex F, which was the document that should be completed by service personnel when bringing a formal service complaint. This correspondence continued from 31 July 2019 until 18 February 2020, when C1 (following an earlier request to put the complaint '*on hold')* explained that she would complete a separate Annex F for her second complaint, but that in relation to the first complaint, it would not be appropriate to submit it through Captain Parry.

62. Ms Ling argues that the second complaint (known as 'SC2'), was separate from that submitted on 29 July 2019, being more wide-ranging and containing 32 separate complaints and C1's correspondence with the relevant officers described in the previous paragraph amounted to a withdrawal of the first complaint. She notes that C1 in paragraph 10 of her statement confirms that '*the complaint dated 29 July 2019 was forced into informal status where I had every intent on pursuing a complaint'.*

63. Ms Ling also submits as an alternative submission that SC2 effectively amounted to a progression or revision of the complaint dated 29 July 2019. As a consequence, the decision of SCOAF dated 14 July 2020 that issues [1] and [8] are out of time must stand and any other allegations not dealt within the MAA process referred to above, will also be out of time.

64. In response, Mr Hirst referred me to regulation 5(1) of the 2015 Service Complaints regulations and noted that it stated, '*After receipt of a statement of complaint, the specified officer must decide whether the complaint is admissible in accordance with section 340B(5).'* He argued that the respondent was required to take this action by the legislation and treated it as an informal

complaint, but nonetheless treated the C1 document dated 29 July 2019 as a service complaint.

65. I considered the email dated 29 July 2019 and the enclosed letter of the same date which was sent by C1 to Captain Parry. In the covering email, she informs him that *'I have made the decision to put in a service complaint against Captain Knapp, 6MI Adjutant for bullying, harassment. And victimisation'.* This is a statement of C1's intent to bring a service complaint, rather than an indication that the email should be treated as a warning of possible future action. However, she concludes the email with a sentence which says, *'Please find attached my representation for the [MAA], I am using this document as a basis for my compliant [sic] as I have covered the full breach of conduct within it'.*

66. The actual letter enclosed with the email refers to the document as being *"my representation in respect of the Major Administrative Action. I will also be using the document as evidence within a service complaint. I have submitted this document to Captain Parry as the Welfare Officer today in order to begin this procedure. The basis of this Service complaint is bullying, harassment and victimisation predominantly from the adjutant 61 MI Bn, Captain Knapp, but I would like the investigation to look at all conduct and failures within the Battalion and wider Army that caused this misconduct to be brushed under the carpet'."*

67. Having considered the contents of this letter, I think it is reasonable that an officer receiving this document would be on notice that C1 was attempting to make a service complaint. Although she describes using the document as '*evidence within a service complaint',* Captain Parry as an officer experienced in welfare of soldiers, could be expected to assist C1 in lodging this complaint in the correct way. He sent her an email on 31 July 2019 explaining that for the service complaint to proceed as a formal complaint, she must submit an Annex F (Request to Register a Formal Complaint) form and if so, support would be given to help her lodge the complaint in the correct form. Captain Parry recognised C1's intention regarding this potential service complaint, but also recognised the need for her to use the correct process and he guided her towards taking this necessary step.

68. However, while she was trying to lodge this matter as a service complaint, it appears that it became the subject of prolonged discussion and for whatever reason, C1 decided to put the complaint on hold, possibly because of the pending MAA. This concluded with her sending emails to Major John Stephen and on 11 February 2020, he reminded her in an email that she had two complaints, one of which was stayed pending the MAA and a second raised with Captain Parry ('the Parry complaint'). On 18 February 2020, she said that she *'…would like to see the original complaint to be dealt with. As for the second that was raised through Captain Parry, I have advised that I will be putting in a service complaint but will be filling out an Annex F and submitting it separately from the unit'.* However, she goes onto say that *'I am currently in the process of writing the second complaint however we are completing on our house on Friday so have other priorities now.'*

69. It was noted from the service complaint bundle that a service complaint was made regarding the decision by the respondent to proceed with an MAA against her and C2 and this was raised in her letter dated 16 May 2019. Brigadier Buczacki deemed these to be admissible. In her correspondence with her senior officers, C1 was clear about the need to submit a formal Annex F document in relation to the document sent to Captain Parry, in order that a formal service complaint could be made. However, she then appeared to focus her mind towards the second service complaint 'SC2' and completing that document using the correct Annex F document. SC2 was submitted on 2 March 2020. While C1 asserts that she was forced to put the first complaint into 'informal status', I am not convinced that this was the case and I find that SC2 was effectively a product of the evolution of the Parry complaint. Ultimately, the Parry complaint was not properly submitted (indeed if it what *submitted* at all), and remained dormant following discussions in early 2020, being superseded by SC2 on 2 March 2020. As such, the letter etc, sent on 29 July 2019 did not constitute a service complaint in the correct format and is not admissible as a service complaint within the meaning of section 121 EQA.

Did this service complaint cover issues [1], [1A], [4] and [8]?

70. I have approached this next preliminary issue on the basis that I am wrong in my assessment concerning the first preliminary issue, because if my determination of the previous issue is correct, there is no first service complaint dated 29 July 2019 to cover issues [1], [1A], [4] and [8]. If so, the admissibility of these issues must be considered in relation to later service complaints which have been accepted by R.

71. Firstly, Ms Ling acknowledges that the service complaint covers issue [1], but [1A] is not covered because the service complaint only referred to the treatment of C1 by Captain Knapp and not anyone else, (as was suggested by issues [1A] and [1B]. Additionally, she asserts that these allegations would have been out of time by the time the service complaint was made on 29 July 2019, being 6 months for allegations of discrimination and/or harassment as provided by regulation 6 of the service regulations.

72. Mr Hirst asserts that issues [1], [1A] and [1B] were expressly raised in this document, but that [4] and [8] were not expressly raised. However, he invites me to accept his argument that full particulars are not required in the same way as they would be in a claim raised with the Tribunal or Court. He specifically refers to issue [4] amounts to a general complaint and can be accepted if I apply the principles expressed in the judgment of ***Zulu.***

73. Issue [1] asserts that Captain Knapp attempted to force C1 to join the regulars. Issue [1A], is related to, but different from issue [1] in that it is alleged that in September 2018, Captain Parry and/or Lt Col Hetherington required C1 to travel to Lt Col Hetherington's location at that time, at Longmoor Military Camp in Hampshire from her location in Manchester to tell Lt Col Hetherington '*in person'* that she was withdrawing her application to join the regular army. Issue [1B] alleges that in September 2018, Lt Col Hetherington stated, in front

of the whole body of troops, that C1 was transferring to the regulars in October 2018, which again relates to, but differs from issue [1].

74. Issue [4] alleges that in July 2019, Captain Knapp addressed C1 as 'Acting' Lance Corporal, which presumably is raised because C1 believes that Captain Knapp was emphasising that she had not been permanently appointed to this junior non-commissioned officer role and her role was non-substantive in nature.

75. Issues [1A], [1B] and [4] form part of the allegations of direct sex/age discrimination under section 13 EQA.

76. Issue [8] involves the complaint of victimisation and alleges that R subjected C1 to a detriment when Captain Knapp lied to senior officers about behaviour alleged by C1 against him, by suggesting that external factors had given rise to her being in a vulnerable state.

77. All 4 of these issues, are identified in SC2/SC3 raised in April 2019. However, I considered the letter dated 29 July 2019, which C1 explained in her accompanying email correspondence was her representation to the MAA, but which was to be used as a basis for her service complaint.

78. In the penultimate and final paragraphs of the second page of this document, C1 makes a clear reference to pressure being placed upon her to join the regulars and when turning over to the third page, reference is made to Captain Knapp exacerbating matters when he became involved. I do find that issues [1], [1A] and [1B] were raised in this document and which C1 argues amounted to a formal service complaint. It refers to C1 being encouraged to travel to Longmoor. While expressly referring to Captain Parry, Lt Col Hetherington is referred to as Commanding Officer ('CO'). The CO is also referred to as addressing her platoon that C1 would be joining the regulars.

79. Issue [4] and issue [8] are not expressly raised and this is conceded by Mr Hirst, but he refers me to the case of ***Zulu*** and the finding that full particulars are not required. In this judgment, Employment Judge McNeill QC reminded the parties of the law and in particular the 2015 service complaints regulations and the procedure for making a service complaint under regulation 4, which explains that the statement of complaint must state how the complainant felt that they had been wronged, whether it involved discrimination or harassment etc, the date when the matter complained of occurred, (to the best of the complaint's recollection). He goes onto say at paragraph (59):

*'As a matter of ordinary statutory construction, the reference to having made a service complaint "about a matter" in s121(1) [EQA] does not require that each and every act of discrimination later relied on in a complaint to the tribunal should have been set out in the service complaint. A "matter" is a broad notion.'*

He goes on to refer to the reality of soldiers as young as 16 with *"varying degrees of formative education"* should not be expected to fully plead particulars of claim under a service complaints procedure. He notes that the claimants in ***Zulu*** referring to an *'an*

*environment of racial harassment'* and that this covered all of the acts alleged by the claimants' complaints to the Tribunal.

> 80. I do think that this judge makes a fair assessment concerning this particular concept. While I recognise that the claimants appear to be well educated and knowledgeable individuals and perhaps with a more experienced that the hypothetical 16 year old referred to in ***Zulu,*** they were nonetheless relatively junior soldiers who did not not appear to have employee relations experience and specifically, detailed experience of the service complaints procedure. In the case of issues [4] and [8], I accept that while not specifically referred to in the first 'service complaint', her reference to *'harassment and victimisation'* identifies in broader terms the environment that she believes existed between the claimants and R at that time . Moreover, the letter that she sent did raise several related matters involving Captain Knapp and I find that it would be unreasonable to conclude that the first 'service complaint' did not cover issues [4] and [8].
>
> 81. Accordingly, I accept that issues [1A], [1B], [4] and [8] were covered by the first 'service complaint. However, as I explained at the beginning of this section, this finding is on the basis of my previous finding that the letter dated 29 July 2019 could not be considered a formal complaint sufficient to fall within section 121 EQA.
>
> 82. I appreciate that Ms Ling has raised the question of time limits in relation to issues [1A] and [1B] and that they are out of time applying regulation 6 of the 2015 service complaints regulations in that as potential EQA complaints raising matters of discrimination, they allegedly occurred more than 6 months before July 2019 letter was sent. However, given that this was not an issue determined by R in relation to this matter, I will consider this issue below if relevant. However, I would remind the parties that time limits in relation to section 123 EQA (in relation to Tribunal claims involving the EQA), may be something that could form part of the list of issues considered at the final hearing as part of the Tribunal's responsibility to consider its jurisdiction.

Were issues [1A], [1B] and [4] included in the matters raised under the Heads of Complaint [HoC] 1 and 2 included with SC2/SC3?

> 83. Ms Ling says that issues [1A] and [1B] relate to pressure being placed on C1 by Captain Parry and Lt Col Hetherington to join the regular army as a full-time soldier and as before, she asserts that these issues are not covered by HoC1 or HoC2 as complaints are directed at Captain Knapp and not the other officers. Again, it is asserted that HoC1 is out of time.
>
> 84. Finally, in terms of substance of the complaint, Ms Ling questions how it could be contrary for officers to refer to her as *'Acting Lance Corporal',* as opposed (presumably) to Lance Corporal with no reference to her acting up in this role.
>
> 85. Mr Hirst says that issues [1A] and [1B] were expressly raised in HoC1. Issue [4] was not, but he repeats his argument raised in relation to the previous

section involving general complaints. However, he says that issues [1A], [1B] and [4] will now be investigated by the respondent as they have conceded this in their email dated 15 November 2021.

86. HoC1 says that *'[C1] was discriminated against and harassed by adjt 6MI, Captain Ian Knapp on the ADE and subsequently in the process'.*

87. HoC2 says that *'The adjutant 6MI, Captain Ian Knapp, repeatedly treated [the claimants] not in accordance with policy'.*

88. I would refer to my comments in the previous section concerning ***Zulu*** and the expectations placed upon a serviceman or woman in pleading a service complaint. I do not find HoC2 particularly helpful as it does not allude to discrimination or harassment, but HoC1 does refer to these matters. However, the subsequent details provided by C1 in relation to both HoC1 and 2 provides further information. By its very nature, the HoC is a summary heading of the forms of discrimination taking place and while the details provided under each HoC assist R investigating these matters, I find it is reasonable that issues [1A], [1B] and [4] were matters raised under HoC1 given that allegations of discrimination are alleged. While the initial complaint was focused upon Captain Knapp, it is not unreasonable for the Tribunal complaint to be widened to include other officers as in issues [1A] and [1B], especially they all concern the application to join the regulars and the pressure which C1 believes she was placed under. As for issue [4], that relates to the general discrimination and harassment alleged to have taken place from Captain Knapp.

89. While Ms Ling asserts that the complaints covered by HoC1 are out of time, this did not appear to have been formally resolved in Lt Col. Duncan's letter dated 18 May 2020. Instead, he deemed HoC1 & 2 to be inadmissible because they *'essentially the same as HoC1 in SC1.* The view of the SCOAF in relation to his finding concerning HoC1, was that this and other HoCs 7 and 10 were not *'substantially the same'* and thereby not inadmissible contrary to regulation 5(2)(b) of the 2015 regulations. However, the SCOAF went onto say that the allegations were out of time having arisen from events in September 2020 and were therefore out of time. C1's argument that it was just and equitable to extend time because of Captain Knapp's alleged bullying were mentioned but not accepted by the SCOAF *'…so far out of time'.* However, the SCOAF did not discuss their reasoning concerning this refusal in any detail.

90. I do accept that in principle, issues [1A], [1B] and [4] were included in HoC1 of SC2/SC3. I have taken into account the discussion in ***Zulu*** concerning the tension between the service complaint process and the ability of claimants to pursue EU law rights in the Tribunal, (paragraphs (90) to (121) and the Supreme Court decision in ***GMC and others v Michalak*** **[2017] 1 WLR 4193 SC**, which confirmed the primacy of the Employment Tribunal in determining work-related discrimination complaints and ***P v Commissioner of Police for Metropolis*** **[2018] ICR 560** where Lord Reed noted that they fulfil the principle of effectiveness, (paragraphs (48) to (49) and (112)). I appreciate that in the ***Zulu*** case, a complaint relating to allegations from 2009 were considered to be legitimately inadmissible in the service complaint process because it involved

limitation and there is a possible distinction to be drawn between admissibility of substance and admissibility of procedure.

91. However, I note that the while the SCOAF considered the question of time limits and the question of a just and equitable extension, I was not satisfied from the SCOAF written decision, that there had been a proper consideration of the application of time limits as they might be determined by a Tribunal under section 123 EQA and especially with regards to the just and equitable grounds advanced by the claimant. Accordingly, the SCOAF had accepted that the substance of these HoC were not the same as earlier service complaints and potentially they were admissible complaints. However, I find that it would be contrary to the legal principles discussed in the previous paragraph to prevent the claimants from having an admissible service complaint because of an insufficiently considered procedural defect.

92. On this basis, I think these issues were part of a service complaint and can be accepted. There is nothing of course preventing R from making submissions regarding limitation in relation to these issues and C1 will still be expected to explain whether the issues were part of a series of continuing acts and if not, whether there are just and equitable grounds to allow an extension of time to be granted. There is no guarantee that C1 will succeed on this particular matter as a consequence of my decision in this preliminary hearing.

93. Therefore, for the purposes of this preliminary hearing, issues [1A], [1B] and [4] were included in the matters raised under HoC1, but subject to any determination at the final hearing with regard to the application of time limits under section 123 EQA.

<u>Were issues [1] and [8] covered by service complaints submitted before C1's SC2 and C2's SC3 of 2 March and 19 April 2020? [she asserted that Cs were to confirm which ones applied]</u>

94. Ms Ling asserted in relation to this question, that it was not clear why C1 refers to any other service complaint apart from that featured above and made on 29 July 2019.

95. Mr Hirst asserted that issue [1] was raised, whereas issue [8] could not have been raised earlier than January 2020 because the claimants only received a response to their relevant subject access request, (made on 29 July 2019), by that date.

96. Issues [1] and [8] related to C1 and it is to her initial complaint identified in the service complaint bundle and contained in a letter dated 16 May 2019 and accepted by R. This document relates from my reading to C1's assertion that the proposed MAA at that time was unfair and it does not address questions of discrimination, harassment or victimisation. This was confirmed in the admissibility letter of 9 March 2020 sent to C1 by Brigadier Buczacki.

97. Issues [1] and [8] were of course raised in C1's letter dated 29 July 2019 in my view, but for reasons given above, I was unable to accept that this letter constituted a service complaint which was properly submitted, but which evolved into SC2.

98. I am therefore unable to accept that issues [1] and [8] were covered by service complaints submitted before C1's SC2 and C2's SC3 on 2 March 2020 and 19 April 2020 respectively.

Does the ET have jurisdiction to hear issues [1] and [8] on the basis that a SCOAF report of 17 August 2020 excluded them on the basis of 'admissibility' rather than 'out of time', notwithstanding the fact that a report of 14 July 2020 did exclude them on the basis of being out of time?

99. Ms Ling submitted that issues [1] and [8] were raised on two occasions by the Cs in SC2/SC3 raised on 2 March and 19 April 2020 and also SC3/SC3 raised on 19 May 2020. She noted that Lt Col Hetherington considered the admissibility of SC2/SC3 on 18 May 2020, determining that [1] and [8] were essentially the same in relation to C1 and that they did not relate to C2, (only C1). He then considered SC3/SC3 on 26 June 2020 and noted that they were inadmissible because they had already been raised previously.

100. Upon appeal by Cs, SCOAF reviewed the two decisions and determined that in relation to SC2/SC3, [1] and [8] the decision was upheld and in relation to SC3/SC4, these decisions were also upheld.

101. Ms Ling asserts that despite the claimants arguing that these decisions excluded on a substantive rather than a procedural basis, excluding a previously raised complaint is not contrary to the ability to enforce one's EU rights, but moreover, if an earlier complaint had been excluded as being out of time, any subsequent attempts to raise the complaint would equally be out of time.

102. Mr Hirst simply asserted that issue [1] was raised, whereas issue [8] could not have been raised earlier than January 2020 because the claimants only received a response to their relevant subject access request, (made on 29 July 2019), by that date.

103. This preliminary issue seemed to me, to be an example of how the continuous process of service complaints being brought by the claimants, added to the confusion of the process for R, SCOAF and also the claimants. It also caused additional confusion my consideration of the case. However, I have tried to summarise the SCOAF decisions below.

104. On 14 July 2020, the SCOAF considered the admissibility decision contained in R's letter dated 18 May 2020. As already explained, it determined that HoC 1 (issue [1]) and HoC 10 (issue [8]) were not substantially the same as the matters identified in the first service complaint, but that they were

inadmissible because they were brought out of time and it was not just and equitable to extend time.

105. On 17 August 2020, the SCOAF upheld the decision given in R's admissibility letter dated 29 June 2020 with HoC1 (issue [1]) being deemed inadmissible because of the subject of a previous service complaint and HoC10 (issue [8]). This was clearly correct in that these matters raised in SC3 had been brought in the previous SC2. However, I would conclude that the SCOAF failed to address this matter in its report and did not address the question of time limits. This presumably was because the remit of the SCOAF was to deal with the admissibility letter dated 29 June 2020 and not its own earlier decision made on 14 July 2020. As such, HoC 1 and 10 in relation to SC3 were not admissible and the matter therefore being dealt with in SC2.

106. Accordingly, I have determined that I would return to the SCOAF decision of 14 July 2020 and find that the final decision that was reached in relation to HoC1 and 10 was the SCOAF determination in relation to SC2 on 14 July 2020. However, as I explained above in relation to issues [1A], [1B] and [4], I find that issues [1] and [8] were included in the matters raised under HoC1 and HoC10 respectively, but subject to any determination at the final hearing with regard to the application of time limits under section 123 EQA.

Does the ET have jurisdiction to hear issue [8] in relation to C2 on the basis that it was excluded in relation to him on the basis that it did not relate to his service rather than on the basis of being out of time?

107. Ms Ling explained that she repeated her arguments in relation to the previous issue and noted that Lt Col Duncan ruled issue [8] under SC3 to be inadmissible on the basis that it related to C1 rather than C2. She submitted that if the principles of ***Zulu*** are applied in this case, this would amount to a procedural rather than a substantive rejection. However, if this was a substantive rejection, it would still have been rejected for the procedural reason of being raised out of time.

108. ***Zulu*** is also referred to by Mr Hirston the basis that paragraphs 59 to 122 support the claimant's argument that jurisdiction should be allowed.

109. As has already been discussed, Issue [8] can be found in HoC10. C2 brought SC3 and included HoC10 within this service complaint. This was presented on 19 April 2020 and seemingly resubmitted on 19 May 2020 which referring to victimisation. The first submission was considered by Lt Col. Duncan in his letter of 18 May 2020 and he found in relation to C2, that this allegation related to C1 and not C2 and there was inadmissible. In relation to the second submission under SC4, Lt Col. Duncan further considered the allegation on 14 July 2020 and found that HoC10 was inadmissible because it had already been raised previously.

110. C2 appealed these decisions to the SCOAF who upheld the decision relating to SC3 in its report dated 14 July 2020 and in relation to SC4, SCOAF

in its report dated 17 August 2020 upheld the decision that the complaint had already been raised previously.

111. SC3 brought by C2 identified a complaint in section 4a of the Annex F document involving *'Discrimination on the basis of age and sex, unlawful harassment on the same grounds.'* It enclosed 32 HoC including HoC10. In SC3, C2 identified a complaint of victimisation in Annex F explaining *'…I have been victimised by members (past and present) of 6MI, 1ISR Bde, 6 (UK) Div (formerly FTC) and the MOD because I made allegations that a member of 6MI bullied, harassed and discriminated against Bethany Lodge'.* The 32 HoCs previously raised, where repeated.

112. It is clear to me that by raising victimisation in a second service complaint SC4, which relied upon the same 32 HoC as raised in SC3 only relying upon discrimination and harassment, there was a failure by the admissibility officer and the SCOAF to appreciate this distinction and to consider this allegation anew. The question of victimisation was raised and unlike the issues arising in ***Zulu***, SC4 placed R on notice of this potential complaint which as EJ O'Neill QC described in paragraph (74)(i) of his judgment, was *'different in character from the complaints of an environment of racial harassment…and a failure to deal with race discrimination grievances…'* I would agree that this approach is reasonable and appropriate where this specific complaint has not been alleged. These complaints were not withdrawn and taking into account my earlier comments concerning the discussion of the law in ***Zulu*** and the primacy of the Tribunals to deal with EU discrimination law including the EQA, this issue should be capable of being heard by the Tribunal.

113. C2 will still of course need to convince the Tribunal of the extent to which issue [8] can be applied to him and of course, the question of time limits under section 123 EQA will be a material consideration for the Tribunal, but these can be dealt with at the final hearing.

Was issue [25] included in the matters raised by the HoC17 and HoC31 of SC2/SC3?

114. Ms Ling confirms that this issue related to delay and although there is some reference to matters connected to this issue within the HoCs, she submits that they do not raise concerns about 'delay' which was the primary reason given for issue [25]; Delay is not identified in relation to the actions discussed within the HoCs.

115. Mr Hirst submits that issue [25] was included in HoC 31, if paragraph 9 of that HoC is considered.

116. Similarly, he raises the same argument in relation to issue [28A] at HoC26 paragraph 8a, although I did not believe that particular issue was the subject of the preliminary issues that I needed to determine in this preliminary hearing.

117. Issue [25] alleges that *'Between October and December 2019, Emily Watson delaying the release of information'.*

118. HoC17 says that *'The MOD reviewed the management forecasting exemption and agreed that this was wrong; however, they applied s26 DPA 2018 instead i.e. Defence Purposes. The reviewing officer also stated (misleadingly) that fake legislation was a 'definition' which it was not.'*

119. HoC31 says that *'The Army and MOD have only ever attempted to use s26 DPA 2018 once – in the case of Bethany and Sebastian. This was only invoked after a successful challenge of a previously ill-thought-out exemption.'*

120. I was referred by Ms Ling to page 100 of the service complaint bundle which forms part of C1's SC2, provides further information concerning HoC17, but the focus is more concerned with the question of whether the *'Defence Purposes'* argument under section 26 DPA 2018, was an appropriate course of action in this case.

121. I was referred by Mr Hirst to page 430 of the service complaint bundle relating to C2's SC3 includes details of HoC31. This section again focuses upon the question of how appropriate it was for R to use the *'Defence Purposes'* argument.

122. Neither of these sections specifically make reference to delay, although clearly the activities of R relating to the use of section 26 DPA. While it could be argued that inappropriate management decisions could result in delay as a possible outcome, issue [25] is effectively seeking to argue a deliberate attempt on the part of Ms Watson to delay the release of information. I am unable to see that this issue can be identified in the contents of documents that the parties took me to in their oral and written submissions expressly formed part of HoC17 or HoC31, or indeed that it could be considered '*implied',* from the context of these HoCs.

<u>Does the ET have jurisdiction to hear the matters raised in issues [33A] and [37B], given the terms in which the SC was made? in particular, did C1 complain of victimisation on the part of Lieutenant Colonel Duncan?</u>

123. Ms Ling noted that both of these issues related to victimisation, but that s121 EQA did not present a bar to the enforcement of EU rights because C2 took no steps to raise these as service complaints.

124. Mr Hirst argues that these matters were expressly raised on 29 June 2020 by C2 in his letter to Lt Col Duncan, who failed to address the complaint and in SC6. In any event, he argues that the implicit complaint of victimisation is sufficiently clear to be accepted as section 121 EQA's definition of 'matter' should be broadly applied.

125. Issue [33A] states that *'On 18 May 2020, Lt. Col. Duncan finding that heads of complaint 8, 9, 13, 14, 28, 29 and 30 were maladministration'.*

126. Issue [37B] states that *'On 11 December 2020, Lt Col. Duncan making an admissibility decision excluding part of SMO's service complaint that was subsequently found to be unlawful'.*

127. Both of these allegations are directed at Lt Col. Duncan as part of the way in which he managed the service complaints placed before him. C2 raised these matters in SC6 and referred to the decisions made by Lt Col. Duncan on 18 May 2020 and 11 December 2020. Reference is made to discrimination and also victimisation, although in the context of C2's allegation that, '*Because of these breaches of law, the persons victimising me have been able to continue victimising me without challenge to their behaviour'.* Accordingly, I find that Ms Ling is correct in her submission that this allegation does not actually assert victimisation against *the subject* of these issues, namely Lt Col. Duncan.

128. SC6 was considered by Lt Col. Read on 14 May 2021 and he considered that this was a complaint about an admissibility decision taken in a previous admissibility decision and is therefore inadmissible in accordance with regulation 3(2)(a) of the 2015 miscellaneous provisions regulations.

129. This decision was reviewed in turn by the SCOAF on 25 June 2021 and upheld. It was noted that C2 had tried to distinguish this issue from the simple question of admissibility under regulation 3(2)(a) (and section 340B(4)(a) of the 2006 Act). However the SCOAF concluded that it related to the admissibility of the decision and it is noted that the appeal to the SCOAF did not raise the question of victimisation by Lt Col. Read.

130. I therefore must conclude that the decision made concerning these issues was made to challenge a previous admissibility decision and was not made asserting victimisation on the part of Lt Col. Read. I would therefore adopt the same approach that I identified as being discussed in ***Zulu*** distinguishing between allegations of discrimination and harassment and victimisation and which I agree is a reasonable approach for a Tribunal to adopt. The SCOAF informed C2 on 3 March 2021 that where a complaint had been considered inadmissible on maladministration grounds involving an earlier decision, it could be accepted if a victimisation complaint had been brought in relation to that decision. However, I note that C2 did not seek to update his complaint in relation to issues [33A] and [37B] and do not accept that the Tribunal has jurisdiction to consider these issues. I agree with Mr Hirst, that the matters referred to in section 121 EQA should be broadly applied but given the failure to identify victimisation as a separate complaint, it cannot be considered.

Was issue [33] raised in C2's SC6?

131. Ms Ling noted that SC6 did not identify delay, whereas this was the basis of issue [33].

132. Mr Hirst notes that this was raised but was held to be inadmissible being a complaint about a decision made during the service complaint process and which should be escalated through SCOAF. However, he goes on to argue

that such a restriction would effectively prevent the claimant's ability to raise complaints of victimisation. Instead, he says there has been an effective compliance with section 121 EQA and failure to accept this complaint would prevent the claimant from exercising his Article 6, 8 and 14 rights under the ECHR. Moreover, such a restriction was not the intention of parliament when making these rules.

133. Issue [33] *'On and after 2 March 2020, the claimants' allegations delayed'.* It formed part of SC6 and as I explained in the previous section, it did not raise victimisation as a complaint. I agree with Ms Ling that this service complaint did not deal with an 'umbrella heading', making allegations about the overall process and nor did it refer to delay. It is also fair to acknowledge Ms Ling's submission that the admissibility decision of Lt Col. Duncan was concluded within a short period following the raising of SC4 by C2 in May 2020. I am therefore unable to accept that issue [33] was raised in C2's SC6.

Was issue [37D] raised by C2 as a service complaint or was it raised *after* his resignation took effect?

134. Ms Ling informed me in her submissions that R does not understand Cs dispute that [37D] was not raised as a service complaint.

135. Mr Hirst explained that C2 submitted his complaint on 23 February 2021 and that his subsequent resignation from R came into effect on 17 or 18 March 2021. He then received an admissibility decision on 14 May 2021 which deemed this complaint inadmissible because it involved an act done when C2 was not serving with the armed forces. However, given that the issue involves delay and for most of the period involved, he was serving with R, this a service complaint which is consistent with the requirements of section 121 EQA.

136. Issue [37D] alleges that *'By 7 March 2021, [R] failing to determine the admissibility of [C2's] service complaints relating to the decision by Lt Col Vaughan to uphold the complaint of bullying against [C2], and relating to Lt Col Duncan's decisions not to admit a number of C2's service complaints.'*

137. I considered SC6 raised on 23 February 2021 and agree with Ms Ling that issue [37D] was not expressly raised as a service complaint in SC6. It is not clear to me that this complaint was raised before C2's resignation took place. Accordingly, I am unable to agree that issue [37D] was correctly raised as a service complaint and it does not comply with section 121 EQA.

## Conclusion

138. Accordingly, my decision concerning the preliminary issues is as follows:

(10) The letter sent on 29 July 2019 did not constitute a service complaint in the correct format and does not comply with section 121 Equality Act 2010.

(11) Issues [1A], [1B], [4] and [8] were included within the letter sent on 29 July 2019, but because this letter does not constitute a service complaint, it

does not comply with section 121 Equality Act 2010 and therefore the Tribunal does not have jurisdiction to hear this complaint under section 120 Equality Act 2010 in relation to the letter dated 29 July 2019.

(12) However, issues [1A], [1B] and [4] were included in the matters raised under HoC1 as raised in the claimants' SC2/SC3, but subject to any determination that may be made by the Tribunal at the final hearing concerning the question of whether these complaints were presented to the Tribunal in time in accordance with section 123 Equality Act 2010.

(13) Issues [1] and [8], were included in the matters raised under the claimants' Heads of Complaint 'HoC1' and 'HoC10' respectively and formed part of service complaints.

(14) This means that issues [1] and [8] can be considered by the Tribunal in accordance with sections 120 and 121 Equality Act 2010, but subject to any determination that may be made by the Tribunal at the final hearing concerning the question of whether these complaints were presented to the Tribunal in time in accordance with section 123 Equality Act 2010.

(15) Issue [8] can be considered as part of allegations of discrimination asserted by the second claimant, but subject to any determination that may be made by the Tribunal at the final hearing concerning the question of whether these complaints were presented to the Tribunal in time in accordance with section 123 Equality Act 2010.

(16) Issue [25] was not included in matters raised within Heads of Complaint 'HoC17' and 'HoC31' of service complaint 'SC2' brought by the first claimant and issue [25] brought by the second claimant. This means that the Tribunal does not have jurisdiction to hear issue [25] in accordance with sections 120 and 121 of the Equality Act 2010.

(17) The first claimant did not complain of victimisation on the part of Lieutenant Colonel Duncan in service complaint 'SC6' and the Tribunal does not have jurisdiction to hear the matters raised in issues [33A] and [37B] as they did not constitute valid service complaints under section 121 Equality Act 2010 and the Tribunal does not have jurisdiction to hear these complaints under section 120 Equality Act 2010.

(18) The second claimant did not raise issue [33] in his service complaint 'SC6' as it did not form part of a valid service complaints under section 121 Equality Act 2010 and the Tribunal does not have jurisdiction to hear this complaint under section 120 Equality Act 2010.

(19) The second claimant did not raise issue [37D] as a service complaint under section 121 Equality Act 2010 and the Tribunal does not have jurisdiction to hear this complaint under section 120 Equality Act 2010.

(20) In summary:

c) issues [1], [1A], [1B], [4], [8] can proceed and be included in the final list of issues, but will be subject to the provisions of section 123 Equality Act 2010 concerning time limits, as appropriate: and,

d) Issues [25], [33], [33A], [37B] and [37D] cannot proceed as the Tribunal does not have jurisdiction to hear them.

139. The parties shall therefore cooperate in accordance with the overriding objective under Rule 2 of the Tribunals' Rules of Procedure and agree an updated list of issues to be used in preparing the case for the final hearing in May 2022.

140. Finally, if this decision affects the orders made by Employment Judge Aspinall at the preliminary hearing before her on 16 December 2021, the parties should cooperate and jointly write to the Tribunal in order that further case management can take place as appropriate.

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Employment Judge Johnson

Date: 1 February 2022

JUDGMENT SENT TO THE PARTIES OF

11 February 2022

FOR THE TRIBUNAL OFFICE