



EMPLOYMENT TRIBUNALS

Claimant: Mr S St Jean

Respondent: Ministry of Defence

Heard at: Southampton **On:** 14, 15, 16, 17 and 18 March (in Chambers) 2022

Before: Employment Judge Dawson, Ms C Lloyd –Jennings, Mrs C Earwaker

Appearances

For the Claimant: Representing himself

For the Respondent: Mr Gray, counsel

JUDGMENT

1. The claimant's claims are dismissed.

REASONS

Introduction

1. In this claim, the claimant brings claims of direct discrimination because of race, harassment and victimisation.
2. By way of brief introduction, at the time to which these complaints relate the claimant was a Corporal in the British Army within the Squadron Quartermaster Sergeant (SQMS) department of 33 Armoured Engineer Squadron, 26 Armoured Engineer Regiment. His case is that because of his race he was awarded a position in the Corporal's Order of Merit (which is related to promotion) which was lower than it should have been and that he was given untrue explanations for that ranking which were related to his race, namely that other individuals "were just better than him". He says that assumptions had been made about him in respect of a dispute with a sergeant which were based upon his race. The claimant contends that when he complained of those matters, he was victimised by being treated with aggression by his Officer Commanding and ostracised by the squadron hierarchy.
3. References to page numbers below are to the bundle of documents used at the hearing, unless otherwise stated.

The issues

4. The issues were identified at a hearing on 10th of January 2020 as follows:

1. Section 26: Harassment on grounds of Race.

- 1.1. Did the Respondent engage in unwanted conduct as follows:
 - 1.1.1. The claimant was awarded a position in the Corporal's Order of Merit which was lower than it should have been .
 - 1.1.2. On 7 June 2018 the officer commanding told the claimant that other individuals who were ranked higher than him in the Corporal's Order of Merit "were just better than him" when that was not true.
 - 1.1.3. In July 2018, Staff Sergeant Connell assumed that the Claimant was the aggressor in a previous exchange between him and Sergeant Cardy which led to the claimant being treated differently
- 1.2. Was the conduct related to the Claimant's protected characteristic of race? The claimant describes himself as Black Caribbean .
- 1.3. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
- 1.4. If not, did the conduct have the effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him? In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

2. Section 13: Direct discrimination on grounds of Race.

- 2.1. Did the Respondent subject the Claimant to the following treatment falling within section 39 Equality Act, namely:
 - 2.1.1. The claimant was awarded a position in the Corporal's Order of Merit which was lower than it should have been .
 - 2.1.2. On 7 June 2018 the officer commanding told the claimant that other individuals who were ranked higher than him in the Corporal's Order of Merit "were just better than him" when that was not true.
 - 2.1.3. In July 2018, Staff Sergeant Connell assumed that the Claimant was the aggressor in a previous exchange between him and Sergeant Cardy which led to the claimant being treated differently
- 2.2. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies upon the following comparators
 - 2.2.1. Corporal Arnold
 - 2.2.2. Corporal Sinnott
 - 2.2.3. Corporal Davies
 - 2.2.4. Corporal Prinsloo
 - 2.2.5. and/or hypothetical comparators.
- 2.3. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
- 2.4. If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

3. Section 27: Victimisation

- 3.1. Did the Claimant carry out a protected act?. The Claimant relies upon the following:
 - 3.1.1. His first service complaint dated 10 July 2018

- 3.2. If there was a protected act, did the Respondent carry out any of the treatment set out below because of the act?
 - 3.2.1. Being treated with aggression and hostility in the 1st, 2nd and 3rd interviews in respect of the 1st Service complaint
 - 3.2.2. Before leaving Estonia the claimant was ostracised by the squadron hierarchy, as more fully particularised in the second Service Complaint
5. During his evidence in chief the claimant further clarified his position on those issues.
6. In respect of his position in the order of merit, the claimant stated that he was not suggesting that either Captain Clifford or Lieutenant Colonel Doyle had given him a low score in the relevant annual performance review (SJAR) because of his race but he was asserting that Major Buchanan had given him a lower score because of his race. His case was that the lower score given to him by Major Buchanan meant that his ranking in the regimental order of merit was lower than it would have been. He also asserted that Major Buchanan had not argued for him forcefully enough at the regimental meeting where the order of merit was finalised. He clarified that in respect of his position within the order of merit, he was not saying that race impacted his position in any other way.
7. During the course of the hearing it became apparent, however, that the claimant's position was somewhat more nuanced. He argued that he had been given an unfair assessment in his Mid Year Appraisal Review (MPAR) in 2017 insofar as it referred to a need to curtail behaviour which came across as overbearing or brash (see page 81 of the bundle for the precise wording). During the hearing, the claimant indicated that was due to, at least in part, to a racial stereotype about black people being aggressive. That, in turn, fed into the SJAR which went to the regimental board and upon which the regimental order of merit was based.
8. In respect of issue 1.1.3 above, in his evidence the claimant confirmed that the different treatment he was referring to was that Staff Sergeant Connell informed Captain Clifford that he, the claimant, was the aggressor in an exchange between him and Sergeant Cardy which led to a statement in the subsequent MPAR, completed around October 2018, that he had a lack of respect for SNCOs (page 204).
9. During the course of the hearing, after the claimant had given his evidence but before Major Montgomery came to give evidence, the tribunal raised with the parties whether the list of issues should be widened to include an assertion that a protected act, in respect of the victimisation claim, was the claimant's statement to Major Montgomery on 3 July 2020 that, perhaps, things had happened to him because he was black. The matter was left, at that stage, the basis that a final decision would be made following closing submissions, but the parties should address it in evidence. That did not appear to the tribunal to be problematic since both the claimant and Major Montgomery had already dealt with the matter in their statements and, seemingly, all of the relevant evidence was before the tribunal. During closing submissions the respondent resisted that matter being added as a protected act, primarily on the basis of the jurisdiction of the tribunal to consider the matter in connection with the service complaints raised by the claimant. As we set out below, in the event, we did not need to make a final

determination on this point, but had it been necessary, we would have allowed the list of issues to be widened.

The Role of the Tribunal

10. It may assist in the understanding of our judgment and reasons if we briefly set out the role of the employment tribunal. Much of the cross-examination by the claimant and his closing submissions were based around the existence of biases, racial stereotypes and racial tropes. As a tribunal, we do not doubt that all people are affected by biases, although they are not always the same biases, and many, if not all, are influenced by stereotypes and tropes. Again those stereotypes and tropes are likely to be different for different people. Whenever the tribunal assesses evidence and considers the reason for behaviour it must be alive to the fact that people may be influenced by biases, stereotypes and tropes.
11. However, although the tribunal must be alive to biases, stereotypes and tropes, its function is to determine the case before it on the evidence presented to it. The Court of Appeal in *Aylott v Stockton on Tees Borough Council* [2010] EWCA Civ 910 stated “Direct discrimination claims must be decided in accordance with the evidence, not by making use, without requiring evidence, of a verbal formula such as ‘institutional discrimination’ or ‘stereotyping’ on the basis of assumed characteristics. There must be evidence from which the ET could properly infer that wrong assumptions were being made about that person’s characteristics and that those assumptions were operative in the detrimental treatment, such as a decision to dismiss” .
12. In his closing submissions, the claimant (to whom we pay tribute in terms of the way he presented his case and, as we shall go on to say, his work in the army) made a number of statements. They included that “we are gathered to right a wrong and show hard work does pay off, regardless of others’ prejudices and biases” and “we are here to create a more inclusive workforce free from discrimination”. Although those aims are important, the role of an employment tribunal is defined by statute and we are limited by the statutory jurisdictions which are granted to us. We must apply the relevant legislation to the facts of the case in accordance with the guidance laid down by more senior tribunals and courts. The tribunal cannot show that hard work pays off, unless doing so is a consequence of the application of the appropriate legal principles to the factual issues in a case before it. Likewise it cannot operate in an inquisitorial role to create a more inclusive workforce except by the application of the relevant law to the facts before it. It can however, in respect of proven discrimination, make recommendations which are intended to have that effect.
13. The legal principles which we must apply are as follows:

The Law

14. The following are relevant sections from the Equality Act 2010.

13 Direct discrimination

- 1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

26 Harassment

- 1) A person (A) harasses another (B) if—
- a. A engages in unwanted conduct related to a relevant protected characteristic, and
 - b. the conduct has the purpose or effect of—
 - a. violating B's dignity, or
 - b. creating an intimidating, hostile, degrading, humiliating or offensive environment for B

...

- 4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
- a. the perception of B;
 - b. the other circumstances of the case;
 - c. whether it is reasonable for the conduct to have that effect.

- 5) The relevant protected characteristics are—

...

race;

...

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

- (a) B does a protected act, or
- (b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

- (a) bringing proceedings under this Act;
- (b) giving evidence or information in connection with proceedings under this Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

15. In considering questions of causation, in Nagarajan v London Regional Transport [1999] IRLR 572, the House of Lords held that that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case was, 'why the complainant received less favourable treatment ... Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'

16. In the victimisation case of Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830, Lord Nicholls considered that the test (in the context of victimisation) must be what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously was their reason?

17. In Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425 it was held at para 12: "Both sections use the term "because"/"because of". This replaces the terminology of the predecessor legislation, which referred to the "grounds" or "reason" for the act complained of. It is well-established that there is no change in the meaning, and it remains common to refer to the underlying issue as the "reason why" issue. In a case of the present kind establishing the reason why the act complained of was done requires an examination of what Lord Nicholls in his seminal speech in Nagarajan v London Regional Transport [2000] 1 AC 501, referred to as "the mental processes" of the putative discriminator (see at p. 511 A-B). Other authorities use the term "motivation" (while cautioning that this is not necessarily the same as "motive"). It is also well established that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome: see, again, Nagarajan, at p. 513B."

18. In Madarassy v Nomura International plc [2007] IRLR 246, the Court of Appeal held, at paragraphs 56-57,

"The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the

tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a 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.

57 'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

19. In Laing v Manchester City Council [2006] IRLR 748 Elias P observed as follows:

"71. We would add this. There still seems to be much confusion created by the decision in *Igen v Wong*. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race.

72. The courts have long recognised, at least since the decision of Lord Justice Neill in the *King* case to which we have referred, that this would be unjust and that there will be circumstances where it is reasonable to infer discrimination unless there is some appropriate explanation. *Igen v Wong* confirms that, and also in accordance with the Burden of Proof directive, emphasises that where there is no adequate explanation in those circumstances, then a Tribunal must infer discrimination, whereas under the approach adumbrated by Lord Justice Neill, it was in its discretion whether it would do so or not. That is the significant difference which has been achieved as a result of the burden of proof directive, as Peter Gibson LJ recognised in *Igen*.

73. No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865 (at para

17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single right answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.'

20. In Bahl v The Law Society [2004] IRLR 799, the Court of Appeal held

100 ...It has been suggested, not least by Mr de Mello in the present case, that Sedley LJ was there placing an important gloss on Zafar to the effect that it is open to a tribunal to infer discrimination from unreasonable treatment, at least if the alleged discriminator does not show by evidence that equally unreasonable treatment would have been applied to a white person or a man.

101 In our judgment, the answer to this submission is that contained in the judgment of Elias J in the present case. It is correct, as Sedley LJ said, that racial or sex discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it. However, the final words in the passage which we have quoted from Anya are not to be construed in the manner that Mr de Mello submits. That would be inconsistent with Zafar. It is not the case that an alleged discriminator can only avoid an adverse inference by proving that he behaves equally unreasonably to everybody. As Elias J observed (paragraph 97):

'Were it so, the employer could never do so where the situation he was dealing with was a novel one, as in this case.'

Accordingly, proof of equally unreasonable treatment of all is merely one way of avoiding an inference of unlawful discrimination. It is not the only way. He added (ibid):

'The inference may also be rebutted – and indeed this will, we suspect, be far more common – by the employer leading evidence of a genuine reason which is not discriminatory and which was the ground of his conduct. Employers will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination to be made. Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason.'

We entirely agree with that impressive analysis. As we shall see, it resonates in this appeal

21. In deciding whether the claimant was treated unfavourably we have had regard to the decision in Shamoon that, in respect of the definition of detriment,

“As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522 g, the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.

But once this requirement is satisfied, the only other limitation that can be read into the word is that indicated by Brightman LJ. As he put it in Ministry of Defence v Jeremiah [1980] ICR 13, 30, one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to “detriment”: Barclays Bank plc v Kapur (No 2) [1995] IRLR 87. But, contrary to the view that was expressed in Lord Chancellor v Coker [2001] ICR 507 on which the Court of Appeal relied, it is not necessary to demonstrate some physical or economic consequence. (Paragraph 34 to 35).

22. We were referred to the case of Aylott above, in addition we were referred to B v A [2010] IRLR 400 and which the Employment Appeal Tribunal held “Any conclusions as to C’s motivation must be based on the evidence. We can see no basis in the evidence for any inference that C’s fear that the claimant might be violent was based on his gender, or, therefore, that he would have treated a female alleged aggressor differently. The possibility that C was influenced by a stereotype of male violence could be no more than speculation, without any evidential foundation”

23. In Gestmin SGPS SA v Credit Suisse (UK) Ltd, Leggatt J gave the following helpful guidance

Evidence Based On Recollection

[16] While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people’s memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

...

[22] In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. ... Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.

24. We have approached the evidence in that way.

The Evidence

25. We heard from the claimant and on behalf of the respondent we heard from the following witnesses:

- a. Captain Harris
- b. Captain Clifford
- c. Staff Sergeant Connell
- d. Major Buchanan
- e. Major Montgomery
- f. Lieutenant Colonel Doyle

26. In addition we were given a witness statement from WO Husband but he was not called. Given that the claimant was not able to cross-examine him we have given his evidence little weight.

27. The titles given above are the titles of the individuals at the relevant dates. Some of them (including the claimant) have been promoted since that date but it was agreed we would continue to refer to them by the titles they held at the time. No discourtesy is intended.

28. The claimant served two witness statements on the respondent. One in 2020 and one in 2022. The statements were largely the same except for certain deletions and additions which the respondent had highlighted by creating a tracked changes version of the statement. The version which the claimant confirmed as his evidence was the 2022 version.

29. We received a bundle running to 508 pages and in the course of the hearing additional documentation was handed to the tribunal without objection.

30. Captain Clifford gave evidence from overseas. The respondent lodged written submissions setting out why it contended that no permission was needed from the country in which Captain Clifford was situated for him to give evidence. In essence it contended that because of his location he was giving evidence from

sovereign UK territory. The claimant did not dissent from that analysis and we accepted that it set out the correct position.

Findings of Fact

31. The claimant was at the relevant times a Corporal in the British Army and was serving as the Accounts Non—Commissioned Officer within the Squadron Quartermaster Sergeant department of 33 Armoured Engineer Squadron in the 33 Armoured Engineer Regiment. The claimant's description of himself is "I am brown in complexion, 6ft 2 with dreadlocks and am from the West Indies island of St Lucia."
32. It is not in dispute that the claimant was highly dedicated and enthusiastic in his role. He was also very good in his role. He was ambitious and keen to be promoted. It is apparent from his evidence that he believes in his own abilities and believes that he should have been promoted faster than he was.
33. The claimant reported to Captain Thomas as his first reporting officer and, when he left, to Captain Clifford. The claimant's second reporting officer was Major Buchanan who was the Officer Commanding for the Squadron. He was replaced by Major Montgomery in June 2018. The claimant's third reporting officer was Lieutenant Colonel Doyle, who was the Commanding Officer for the Regiment.

Position in the Corporal's Order of Merit

34. It is necessary to set out some background as to the appraisal process which leads, ultimately, to the board of promotions. We start with an overview.
35. Appraisals (SJARs) are done annually and although we were not told expressly, it appears the appraisal year runs from 1 February to 31st January (see, for instance, page 114). Within the appraisal year an MPAR is carried out. This is designed to give a soldier feedback on their performance and inform them of the assessment that is likely to be made in the final appraisal.
36. Running alongside the appraisals, within the squadron and, then, within the regiment, Corporals (in this case) are ranked in an order of merit. The order of merit within the squadron is a relatively informal process carried out by the relevant officers in the squadron, headed by the Officer Commanding (at the relevant times in this case, Major Buchanan). The ranking within the squadron order of merit is used to inform what is written in the SJAR. The SJAR is then forwarded to the regimental board for the regimental order of merit to be created.
37. The regimental order of merit and the Corporals' SJARs are then forwarded to the Promotions Board which is run by the Army Personal Centre in Glasgow. It is the Promotions Board which makes the final decision on promotions.
38. We now give more precise details as to what happened in this case.

The 2017/18 MPAR

39. In September 2017, the claimant's MPAR for the year 2017/018 was completed. It was primarily completed by Captain Thomas, the claimant's first reporting

officer, and was largely in glowing terms. It stated that the claimant had “a first-class mid-term performance to date. You have worked hard so far this year as can be seen by the myriad of activities undertaken” and went on in similar terms (page 81). It also, however, had a section headed “Sustain/Curtail/Develop”. Within that section, in respect of “curtail”, it was written “be aware of a tendency to come across as overbearing, this is not the case but can come across as such because of quite a brash and forthright persona.”

40. By the time the MPAR was to be given to the claimant, Captain Clifford had taken over as his first reporting officer and it was him who delivered it to the claimant. He, it is not disputed, indicated to the claimant that he should not worry much about the entry in respect of “curtail”. He told us that his motivation for doing so was that he had only been in the regiment a couple of weeks and said that it was Captain Thomas’s view not his, at that stage. Although we accepted Captain Clifford’s explanation as given to us by him (no reason was given to doubt that explanation and the claimant did not suggest that there was), it was unhelpful for the claimant to be given mixed messages. Either there was an issue which the claimant needed to address or there was not. In this respect Captain Clifford did not help the claimant. However, it has not been suggested that Captain Clifford was motivated by the claimant’s race in the way he presented the MPAR to him—indeed in cross examination of Captain Clifford, the claimant said that he did not think that Captain Clifford was motivated by his race.
41. We find that the entry written by Captain Thomas was objectively justifiable. We do so for the following reasons:
 - a. In his first service complaint made on 10 July 2018 the claimant set out why he felt he had been wronged. In the course of that section he wrote “for example on Tuesdays, when I should have been dealing with demands and other G4 issues, my time was spent sending people who should not have been there away and controlling others who were causing distraction. *This made me come across as aggressive or angry when all I was doing was following orders*” (emphasis added). Later on in the same section he refers to being looked upon as unapproachable. Although the claimant may well have been following orders (at least as he understood them) his comments give insight as to how he understood that he was perceived by others.
 - b. In his statement within the service complaint proceedings the claimant stated “due to constraints in time I needed to be blunt on many occasions...” (page 149)
 - c. In cross-examination the claimant accepted that he would lead using a directive approach. He accepted that that approach carried downsides in that it was authoritarian and could make him be viewed as unapproachable. Likewise in cross-examination, he was asked whether he did not place a priority on building supportive relationships with subordinates and answered that he did with subordinates but the issues were on the outside with those who did not work with him and did not understand his leadership style, they just saw him going at a fast pace.

d. The claimant also accepted in cross-examination that he could be described as brisk and in his witness statement, he refers to adopting a brusque style (paragraph 10).

42. There is not, in this respect, any facts from which we could conclude that the comment in the MPAR was based on a negative racial stereotype or otherwise because of the claimant's race. Indeed the evidence which we have quoted suggests that the comment was written because it was an accurate reflection of the claimant's leadership style.

The 2017 Squadron Order of Merit

43. The squadron order of merit was carried out by Major Buchanan and it is apparent that it was completed, at the latest, by 15th November 2017. On that day the claimant wrote to Captain Clifford stating that after a conversation regarding his placing in the squadron he was left demoralised (page 50).

44. We have not been provided with a copy of the squadron order of merit but, according to the evidence of Captain Clifford, it was reached following a discussion with a number of officers including him, Captain Harris, WO Husband, the Sergeant Major at the time and the troop commanders. That evidence was not challenged by the claimant but it was also not in dispute that Major Buchanan made the final decision.

45. Although we have not been given a copy of the squadron order of merit, in the subsequent SJAR, Major Buchanan wrote "Corporal St Jean is graded top of the mid-third of 14 Corporals not yet selected for promotion in my squadron." (Page 117). The claimant did not dispute that is where Major Buchanan had placed him, although he felt he should have been placed higher. According to the evidence of Major Buchanan there were five Corporals above the claimant, including the four comparators to who we now turn.

46. The claimant has identified four comparators for the purpose of his discrimination claim, who were Corporals placed above him in the squadron order of merit. They were identified at an earlier case management hearing as:

- i. Corporal Arnold
- ii. Corporal Sinnott
- iii. Corporal Davies
- iv. Corporal Prinsloo

47. The respondent had redacted the identity of those Corporals in the hearing bundle and in its witness statements. No application had been made under rule 50 of the Tribunal Rules of Procedure and although the tribunal raised the matter, no application was made during the course of the hearing. We can see no reason for the redaction which, at least during Lieutenant Colonel Doyle's evidence, lead to some confusion. Although we can understand the desire to protect the identity of people who are not parties to the proceedings, higher courts have repeatedly emphasised the need for open justice.

48. In order to aid understanding of the bundle and the respondent's witness statements, where the comparators have been referred to as C1 C2 C3 & C4, they are references to Corporal Arnold, Corporal Sinnott, Corporal Davies and Corporal Prinsloo respectively.
49. Major Buchanan has set out in detail in his witness statement why he believed the four comparators were properly ranked more highly than the claimant. He is able to give a detailed analysis for his reasoning which was not significantly challenged by the claimant. Although in respect of Corporal Prinsloo, the claimant says he was off work for some of the year with an injury, we accept the point made by the respondent that it does not take absence for that reason into account in assessing in creating the order of merit. Major Buchanan stated that he considered it unfair to allow injury or illness to affect someone's career.
50. Major Buchanan concludes that part of his witness statement by observing "In this way, the grading is made by me (with support from others) and my judgement on who has performed best is taken from a holistic view of every aspect of performance and potential available to me. There is no doubt that Corporal St Jean performed well. There is no doubt that he did a great deal. But what he seems to fail to recognise that it is more about how an individual did these duties and in this his ability to deal with people let him down. As such the comparators were rated better" (sic paragraph 76 of his witness statement).
51. The claimant asked Lieutenant Colonel Doyle during the course of his evidence to consider the SJARs of him and Corporals Arnold, Sinnott and Prinsloo and give them a score by reference to the scoring criteria used by the regiment and squadron when ranking people (at page 84). He scored the claimant joint bottom at 7.5, placing him and Corporal Sinnott between "above standard" and "well above standard", he scored Corporal Prinsloo and Arnold at 8 ("well above standard").
52. Lieutenant Colonel Doyle was having to score the men under time pressure within his cross-examination in an unfamiliar environment. He had only the SJARs to work from. The precise weight which can be given to his scoring might, therefore, be debated. However for the purposes of this issue, it is noteworthy that he scored the claimant joint bottom. That gives some support to the opinion of Major Buchanan in his ranking of the claimant.
53. In the claimant's first service complaint, in which he raised the issues of his ranking within the Corporals order of merit, he was asked the following question "does your complaint include allegations of bullying, harassment, discrimination or any other allegation specified in regulation 5(2) of the Armed Forces... Regulations 2015". The claimant ticked "no". Not only does the form itself refer to discrimination, the notes to the form at Annex F list the allegations contained in regulation 5 and state "discrimination (in this context, "discrimination" means discrimination or victimisation on the grounds of colour, race, ethnic or national origin, nationality, sex, gender reassignment ..." (Pages 167 and 164).
54. When asked why he did not say that the claim related to discrimination the claimant replied that he was hoping that it was not discrimination. Given that the claimant had reached the point of making a service complaint, that answer is

perhaps a little surprising although we do not disbelieve it. People are sometimes reluctant to assume that things happen to them for a particular reason. However, the answer does indicate that there was no specific thing that had happened by that time which made the claimant think that Major Buchanan was acting because of his race.

55. Within his evidence the claimant pointed to the person who had come top of the regiment order of merit being Corporal MacKenna. He said that he was much more brisk than the claimant was, but was white in colour and fit the stereotypical image of a British soldier. The difficulty with using this Corporal as a comparator is that Major Buchanan was not his Officer Commanding and he was not ranked in the claimant's squadron order of merit. He was in a different squadron. We do not know how the Officer Commanding the other squadron perceived Corporal MacKenna or whether that officer considered the quality of relating to people to be particularly important. Moreover we do not know what other skills Corporal MacKenna had (or did not have) which may have caused him to be ranked more highly than the claimant.
56. It was put to Captain Clifford that it was Major Buchanan who dictated the squadron order of merit and placed the claimant where he was because he did not want a black soldier higher up in the squadron. Captain Clifford denied that, stating that there was a discussion between all of the officers in respect of ranking and he was not aware of any actions of Major Buchanan because he did not want a black soldier to be ranked more highly. That evidence is of some assistance but relatively limited in so far as it would be unusual for somebody who was motivated by race to admit that or show it to their colleagues.
57. We must consider whether there is any evidence from which we can find that Major Buchanan's positioning of the claimant in the squadron order of merit was because of or influenced by the claimant race.
58. We have already set out above that there is objective evidence to support Major Buchanan's view that the claimant's ability to deal with people let him down. The claimant has accepted that he came across as blunt and aggressive on occasions. The evidence of Lieutenant Colonel Doyle also provides some support for the ranking of the claimant by Major Buchanan. The ranking was discussed amongst a number of officers who agreed with the claimant's rank even though it was the final decision of Major Buchanan. The claimant has been able to point to no evidence which shows that Major Buchanan was acting on the basis of stereotypes or tropes and did not assert that his treatment was on the grounds of race in his first service complaint. Major Buchanan is able to give a precise account of why he ranked the claimant and his comparators as he did, which has not been materially challenged by the claimant. All of those matters point away from there being any facts from which we could decide that Major Buchanan acted because of the claimant's race.
59. The only evidence which might be said to point in the other direction is the assertion that Corporal MacKenna was more brisk than the claimant but white and ranked higher in the regimental order of merit. However that evidence alone, when no more is known about Corporal MacKenna and he was not ranked by Major Buchanan, is not a fact from which we could decide, in the absence of any

other explanation, that when Major Buchanan ranked the claimant in the squadron order of merit he was influenced by the claimant's race. Even if it had amounted to such evidence, we accept the evidence of Major Buchanan that the claimant was ranked not because of his race but because of his merit, relative to the other Corporals in the squad. Major Buchanan's evidence was cogent in this respect and supported by those of the matters which we have recounted above.

SJAR

60. The next part in the process of appraisal leading to the board of promotion was the completion of the SJAR. The SJAR was written in the light of the squadron placement but may have been in draft form prior to the squadron order of merit meeting. Part of the form was completed by Captain Clifford, part by Major Buchanan as the claimant's second reporting officer and part by Lieutenant Colonel Doyle as the claimant's third reporting officer.
61. As we have set out above, the claimant stated in his evidence in chief that he did not assert that Captain Clifford or Lieutenant Colonel Doyle marked him lower than they otherwise would have done because of his race. At that stage, as we understood his evidence, the claimant was talking specifically about the scores B+ which appear at the end of the SJAR form. Later in the evidence it became apparent that the respondent's case (which was not challenged by the claimant) is that those scores are only entered onto the form after the regimental order of merit has been finalised (a point which we will return). However as we understood the overall thrust of the claimant's evidence and his challenges to the respondent's witnesses, he was not suggesting that either Captain Clifford or Lieutenant Colonel Doyle had manipulated their comments on the form because of his race. Indeed, whilst cross-examining Captain Clifford the claimant put to him (as a preface to a question) that he had given the claimant a true report in both SJARs (the 2017/2018 and the 2018/2019).
62. It appears from other evidence to which we were taken that Captain Clifford would complete his part of the SJAR form in draft and then allow others to comment on it, and then amend it. The evidence which we were taken to was in respect of the completion of the SJAR for the year 2018/19, where in the draft sent to Captain Harris on 23 October 2018, Captain Clifford described the claimant as being top of three Corporals he reported on (page 219) but in the final SJAR he described the claimant as second of three Corporals (page 257). Captain Clifford's evidence on this point was somewhat vague (the documents being referred to were dated October and December 2018) but accepted that the draft may have changed after the squadron order of merit meeting. He said that was standard practice, he would pitch his opinion and then "it was a balanced approach". We note that, by that time, Major Buchanan was no longer the claimant's Officer Commanding. It was, by then, Major Montgomery.
63. The report written by Captain Clifford in the 2017/18 SJAR was a very positive one. He stated "Confident, enthusiastic and dedicated Corporal St Jean has delivered an excellent performance this year. With outstanding ability in trade and working well above his current grade, he has proven his ability to work calmly under pressure and prioritise very effectively." He goes on in similar terms (page 116).

64. The claimant complains within his witness statement that some of his accomplishments had been missed out from the form (see paragraph 10). In answer to a question asked by the tribunal, the claimant confirmed that insofar as in paragraph 16 of his witness statement he stated that Staff Sergeant Connell failed to provide crucial information to Captain Clifford, he was referring to the information in paragraph 10 of his statement.
65. However Captain Clifford explained that there is a limit on the number of characters which can be written into the form. He therefore had to choose the best examples to put the claimant in the best light. That evidence was confirmed by other witnesses. He was able to explain why he did not think that those matters which the claimant had highlighted should have been in the form, stating that he was aware of the claimant's work as a PTI and in respect of the squadron's AinUs but he personally did not perceive those matters were strong enough to get the claimant over the line and so he concentrated on other areas. We accepted that evidence is being reasonable and honestly given. As we will set out below, when the SJARs are sent to the regimental board, each assessor has three minutes to read a form and score it. The form must, therefore, be short and highlight the best examples. The claimant did not suggest that the examples which were on the form should have been left out in preference to those which he referred to in his witness statement. We, therefore, accept Captain Clifford's evidence in this respect.
66. Major Buchanan also wrote in very positive terms. He stated "he is very strongly recommended for promotion now, ahead of most of his peer group." He stated "he would be excellent in a Log Spec Sergeant role at RD but equally would be perfect at the Defences Logistics School as a trade instructor. His broad skill set and experience from this year will stand him in excellent stead for either. Further out he is a definite for staff sergeant and I expect him to beat most of his cohort in getting there."
67. In his witness statement Major Buchanan states that he might have been able to be even more positive if it was not for the claimant's tendency to be overbearing. But it is important to note that the SJAR did not refer to any difficulties with the claimant's interpersonal skills. There was no negative comment on the SJAR.
68. We can see no evidence from which we could decide that Major Buchanan described the claimant in a way designed to harm his chances of promotion or higher ranking within the regimental order of merit. Although the claimant was described differently to his comparators, they were doing different jobs with different skill sets. There is no evidence to suggest that the description by Major Buchanan of the claimant was anything other than an accurate account of him and we accept Major Buchanan's evidence that it was. Again, he is able to give a clear account of his views of the claimant and there is nothing from which we could decide that the narrative given by Major Buchanan was influenced by the claimant's race.
69. In respect of the narrative section completed by Lieutenant Colonel Doyle, he writes "in the top third of 64 Corporals in the Regiment yet to be selected for promotion, Corporal St Jean gains my unequivocal recommendation for promotion amongst first rank of his peers." Again there is no evidence that

Lieutenant Colonel Doyle wrote anything other than an honest account and what he wrote certainly is not negative. The claimant does not suggest that he was motivated by race in any event.

Regimental Board Corporals Order of Merit

70. The SJARs were then sent to the regimental board for the regimental order of merit. The process by which the regimental order of merit operates is set out at page 85. The ranking is done by reference, primarily, to the written SJARs. The briefing to those on the board states, amongst other things
- a. discussion is not take place during scoring rounds unless it is process - related or a technical query
 - b. grade on the evidence provided
 - c. under no circumstances is an individual to be discussed until completion of scoring
 - d. the marking guide should be used on which to base your score
 - e. at the end of each scoring round the chairman must ensure that where more than two points separate the score awarded to an individual by a board member mediation takes place to reduce the difference to 2 points or less.
71. The board consisted of six members, including Lieutenant Colonel Doyle as president. Once scoring had been completed and the rank of the Corporals could be seen it was then possible for Officers Commanding to make comments. Lieutenant Colonel Doyle gave evidence that Squadron Commanders could make oral arguments to advocate for their soldiers if they believed that they had been misplaced during the scoring process and he could observe if soldiers had been placed in positions that were manifestly inappropriate. However it was also apparent to us from the evidence of Lieutenant Colonel Doyle and Major Buchanan that oral advocacy at that stage was not encouraged.
72. Insofar as the claimant's comparators are concerned, it can be seen from the ranking sheet at page 96 of the bundle that the claimant was scored 37.5 marks. Corporal Davies was given the same score. Corporal Prinsloo was scored at 39 points, Corporal Sinnott was scored at 42 points and Corporal Arnold was scored 44.5 points.
73. As we have indicated, when the claimant clarified the issues in his own evidence he told us that he did not suggest that anything had influenced his position in the regimental order of merit beyond the way Major Buchanan had scored him. He did not refer to members of the board scoring him inappropriately. We raise this because, later, he did make reference to it being obvious to the panel, from his name, that he was black.
74. Given that the claimant was given exactly the same score as one of his comparators and was within 1.5 marks of another, there is no obvious evidence that the claimant was treated differently because of his race. Whilst there is a

difference of 4.5 marks between the claimant and Corporal Sinnott, where six members of the board are scoring, the difference is relatively easily explained simply by slight differences of opinion between individuals. We have already accepted Major Buchanan's evidence that, in fact, the claimant's chosen comparators are not true comparators in the sense that their circumstances were different because they performed better than the claimant, at least in their relationships with others. Thus it is not surprising that they were scored more highly.

75. In relation to Corporal Arnold who scored significantly more highly than the claimant, we accept Major Buchanan's evidence that he was highlighted early as an exceptional talent and identified as a potential instructor at Sandhurst. He states "every dealing I had with him further underlined this impression, in the high pressured environment of the battle group command post on exercise in Canada in July 2017, he was outstanding and I was in no doubt that he was worthy of his position at the top of the squadron." (paragraph 67).
76. We have considered whether the fact that Corporal MacKennon scored the highest ranking and was, in the claimant's evidence, much more "brisk" than him, is evidence from which we could decide that the claimant's ranking was influenced by his race. We do not find that we can for the following reasons:
- a. At the regimental board, there were no references to the claimant's attitude within the SJAR. Although the MPAR referred to the need to curtail the appearance of being overbearing, that was not said in the SJAR. Thus there is no evidence that briskness was a consideration before the regimental board.
 - b. Although the claimant has picked up the word "brisk", that is not a completely accurate description of the perception of him. The MPAR referred to "overbearing" and a "brash and forthright persona". Likewise Major Buchanan, in his witness statement, referred to a tendency to be overbearing and stated that without that he might have been able to be even more positive than he was. Captain Clifford states in his witness statement that the claimant could be "quite abrupt and domineering".
 - c. We have no evidence as to why Corporal MacKennon scored as highly as he did, or what other strengths he had. Whilst it might be said (although this was not, in fact, a point made by the claimant) that such information was in the hands of the respondent, Corporal MacKennon was not named as a comparator and was not mentioned until witness statements were exchanged.
77. The claimant suggested in the course of the hearing that Major Scrivener failed to advocate for him during the scoring process. We find there would have been no role for Major Scrivener to do so. He was only present during the scoring part of the board. Discussion in relation to scoring was expressly prohibited. However the claimant also says that Major Buchanan then failed to advocate for him at the discussion afterwards. It is true that Major Buchanan did not seek to argue that the claimant should be placed higher up, but having heard the evidence of him and, especially, Lieutenant Colonel Doyle we have found that such advocacy

would not have been effective unless it was very obvious that the claimant had been scored wrongly. Major Buchanan did not believe that the claimant had been scored wrongly, in the light of what we have said above, that view was reasonable and we do not think that there was anything wrong with Major Buchanan's approach. In any event there is no evidence from which we could conclude that he behaved as he did because of race.

78. There is no doubt that the claimant was (and is) a very good NCO but there is also evidence, which we have accepted, that his chosen comparators were also very good and, in fact, somewhat better than him.
79. Again, we find ourselves in the position of there being no evidence from which we could conclude that a white person who was in exactly the same position as the claimant was, would have scored more highly than he did. There is no evidence that the claimant's ranking was being affected by prejudice, stereotypes or tropes. The evidence is that the claimant was a very good soldier which is reflected in the fact that he was ranked 19/64 in the Regiment. Only a relatively small score separated him from those ranked more highly than him. However there is no evidence that the claimant was so good that he should have scored more highly than he did or that he was scored lower than he should have been because of his race.

The Promotions Board

80. Once the board had met and decided the order of merit, the SJAR was finalised with the grades being inserted onto the last page. Those grades were allocated on a proportional basis, Lieutenant Colonel Doyle told us (and it was not disputed) that for example, the top 5% of soldiers received an A grade.
81. Once the SJARs were completely finalised matters proceeded to the Promotions Board. Decisions at the Promotions Board worked on quotas (according to the unchallenged evidence of Captain Harris). Captain Harris told us, and we accept (given that there is no evidence to the contrary and the claimant did not dispute it) "If Corporal St Jean had been in a different trade group, I am sure he would have promoted. Promotion works on quotas, and if there aren't the jobs, then no matter how good you are you will not promote"
82. There was a delay between the meeting of the regimental board (which appears to have been on 17 January 2018 (page 83)) and when promotions were decided upon and announced in June 2018.
83. There is no suggestion that the Promotions Board was influenced by the claimant's race.
84. Those are our findings in relation to issue 1.1.1.

Being told that others were "just better than him"

85. Following the outcome of the regimental order of merit the claimant met with Major Buchanan.

86. The claimant had received his SJAR in February 2018 when he saw his grade. He states, in his witness statement, that he thought he should have received a higher grade, an A with “exceptionally high for promotion”. He was unhappy that Corporal Prinsloo had been placed in the top third of the squadron while he had been at home on sick leave for the first half of the reporting year. He questioned his squadron QM and was told to wait for the board results (being a reference to the Promotion Board). He states that after a few weeks he was still annoyed and requested a second interview with his QM and was again told to wait for the Board results. The claimant says that when the promotion board results were finally out he was extremely disappointed not to be selected for promotion..
87. In respect of this issue the claimant states that his complaint is that he was told that others were better than him, when that was not true. In his witness statement he goes further and says that he was described as arrogant by Major Buchanan.
88. The claimant’s account, contained within his witness statement, is that it was only towards the end of the interview that Major Buchanan told the claimant that other individuals “who were ranked higher than me in that Corporals Order of Merit were “just better than me””. The witness statement does not suggest that Major Buchanan used a particular tone in telling the claimant that or behaved in a particular way while he said it.
89. Major Buchanan states that he is likely to have said something along the lines of the claimant having performed very well but, after careful consideration, others were placed above him. He states that the claimant was, in fact, already aware of the result and was sullen in his attitude and blunt. He accepts that he would have said something along the lines described by the claimant and, when pushed by the claimant may have said that he was arrogant and standoffish. He says that was towards the end of the interview when the claimant became more animated. He says that he would not normally use such a blunt term but the claimant’s demeanour and attitude in the interview pointed to the development point in the MPAR.
90. We must decide whose account we prefer. In the original service complaint the claimant talked about the meeting with Major Buchanan and stated “he stated that I was not ranked highly because the Regt QM had not fought for me on the Corporals OOM which I believe to be my OC’s responsibility. Therefore I feel he neglected his duty as my OC” (page 167). The claimant elaborated in his supporting witness statement and referred to the OC thinking that he was arrogant but did not complain of being told that others were just better than him.
91. Given that the claimant was likely to be in a state of agitation when he went into the meeting (he was already angered by being told to wait for the Promotion Board results) we think it likely that Major Buchanan’s account of the meeting is the more accurate. However, in some respects, it does not matter whose account is more accurate. Even if the claimant was told that those ranked higher than him were just better than him, we find that that was a statement of truth. We reiterate that no one was saying that the claimant was not good. However, in both the squadron order of merit and the regimental order of merit, others had been ranked more highly than the claimant because officers considered that they were better than the claimant. It was not unfavourable treatment for the claimant to be

told that fact and nor would it reasonably violate his dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. It is usually necessary for people in the position of the claimant (whether they be employees or soldiers) to be given the truthful reason why they have not been promoted. That is the case even if the reason is likely to hurt the feelings of the person being told.

92. In any event, there is no evidence that a white person in the position of the claimant would have been treated any differently. There is no evidence that white people who did not get promoted and who asked the same questions that the claimant asked were not told (or would not have been told) that others were simply better than them.

Staff Sergeant Connell assuming that the claimant was the aggressor in an exchange between him and Sergeant Cardy

93. The claimant clarified this issue stating that the different treatment being referred to at issue 1.1.3 is that Staff Sergeant Connell shared his view that the claimant was the aggressor with Captain Clifford, who added it to the MPAR for the year 2018/2019. The particular part referred to is under the subheading "curtail" and, especially, "Lack of respect for SNCOs".
94. The claimant's case is that while he was discussing the impact of his low ranking placement with Staff Sergeant Connell, the latter assumed that the claimant had been the aggressor in a previous exchange between him and Sergeant Cardy.
95. Staff Sergeant Connell said that he did not recall a conversation with the claimant about Sergeant Cardy although he did not deny that it may have taken place (see his witness statement paragraphs 19 and 20). He said that if Sergeant Cardy had a serious issue with the conversation than it would have been for him to take appropriate action.
96. The claimant's witness statement states, in paragraph 17, that it was plain that Staff Sergeant Connell had not looked into matters and jumped to the conclusion that the claimant was in some way the aggressor and that in the discussion with him he stated "you should not gob off at SNCOs". The claimant says that the assumption that he was the aggressor was based on his colour and physical appearance.
97. The claimant accepted, however, in cross examination that Staff Sergeant Connell did not mention Sergeant Cardy's name when he told him that he should not gob off and said "I may be putting one and one together but that is how I took it".
98. In his evidence, Captain Clifford was asked by the claimant "the reason you mentioned lack of respect [in the MPAR] was because Staff Sergeant Connell told you of an issue between me and Sergeant Cardy?". Captain Clifford replied "yes" and elaborated that it was Staff Sergeant Connell who had mentioned the issue with Sergeant Cardy.

99. The claimant is not able to say what, if anything, Staff Sergeant Connell said to Captain Clifford since he was not there. Staff Sergeant Connell is not able to say what, if anything, he said to Captain Clifford because he has no recollection. Thus the evidence on this point comes down to the question to, and answer of, Captain Clifford that we have set out above. Even in respect of that answer, Captain Clifford was recalling events from mid-2018.
100. That evidence is only that Staff Sergeant Connell mentioned an issue between the claimant and Sergeant Cardy. Captain Clifford did not say that Staff Sergeant Connell had said that the claimant was the aggressor. At one level, that is sufficient to dispose of the issue, because there is no evidence that Staff Sergeant Connell assumed that the claimant was the aggressor.
101. However, it is necessary to consider the issue in more depth. The entry on the MPAR which Captain Clifford wrote refers to a lack of respect for SNCOs. Thus Captain Clifford has not recorded the issue between the claimant and Sergeant Cardy in a neutral way, he has recorded the claimant as having a lack of respect. Thus we have asked ourselves whether that is sufficient evidence for us to conclude that Staff Sergeant Connell had assumed that the claimant was the aggressor and communicated that to Captain Clifford.
102. The entry in the MPAR however, has to be seen in its context. By the time of the 2018/19 MPAR, there was evidence that the claimant had difficult relationships with others. We have set out some of that evidence above, including Captain Clifford's own observation that the claimant could be quite abrupt and domineering (paragraph 16 of his witness statement) and the claimant's own statement that he could come across as aggressive and angry.
103. In addition to those matters, there are two documents the bundle which give insight into the claimant's relationship with his SNCOs. In his response to the respondent's grounds of resistance, the claimant stated "at no point were any of the comparators placed with an incompetent SNCO..." (which in context carries the clear implication that the claimant felt he was placed with an incompetent SNCO, page 56). In an email in respect of his Service Complaint sent on 2 July 2019 the claimant wrote "Because of my extreme work load, my work-life balance was non existent and I was penalised for working my absolute best while neglecting to show ingratiante to my SNCOs and Officers. If this was mentioned in my 2017 MPAR that I am required to do this in order to progress then my work output would have either decreased in an effort to personally and socially please the hierarchy or it would have stayed the same with hopes that why work ethics would be considered highly over brown-nosing of the sqn's hierarchy." (sic, p288).
104. Furthermore, the 2018/2019 MPAR highlights the need for the claimant to curtail not only a lack of respect for SNCOs but also an inability to be approachable whilst in the working environment, his attitude towards other members of the squadron and the use of inappropriate mediums to engage with officers and SNCOs to establish his point of view.
105. Doing the best we can on an extremely limited factual basis, we think it most likely that when Staff Sergeant Connell mentioned an issue between the

claimant and Sergeant Cardy he did so in a context of saying that the claimant lacked respect for SNCOs. However, we cannot draw from that an implication that he either said that the claimant was the aggressor in exchanges with Sergeant Cardy or had made that assumption. There is evidence that the claimant did not have a lot of respect for SNCOs and it is just as likely (indeed we think it is more likely) that anything which Staff Sergeant Connell said was because of his perception that the claimant did not have respect for SNCOs rather than stereotypical assumptions based on the claimant's race or racial characteristics.

106. There is no evidence from which we could decide that a white person who was in the same situation as the claimant, with the same relationships with other members of his squadron, would have been treated any differently to the claimant.

107. Before we move on from this issue, we would wish to highlight that the issues which the claimant had with colleagues were not enormously significant. No one had sought to discipline the claimant and the entry in the MPAR was intended as feedback to enable the claimant to obtain a good SJAR. Even in the 2018/19 MPAR, the overall assessment of the claimant was that he "is a soldier who has immense potential within logistics trade and shows he has ability in bucket loads. He is a little rough around the edges and now has the second part of the reporting period to develop the areas he has failings in to put him in the best position for Jan 19" (p204). The report went on to state that he had a definite potential for Sergeant, potential which we note the claimant has now realised.

Victimisation

The Protected Act

108. The list of issues defined the protected act as being the claimant's first service complaint dated 10 July 2018.

109. The document launching the service complaint is at page 166 of the bundle. That is the document we have referred to above which asks the complainant to tick whether their complaint includes any allegations of discrimination. The claimant ticked "no". The service complaint was supported by a witness statement which appears at page 171 to 173 of the bundle.

110. The claimant did not point to anything within the document launching the service complaint or the supporting witness statement as being within the definition of a protected act. We have considered those documents and can see nothing which would fall within the definition of protected act within section 27 Equality Act 2010. There is no allegation (whether or not express) that somebody had contravened the Equality Act 2010 and the document did nothing for the purposes of or in connection with the Equality Act 2010.

111. We have noted that we raised with the parties whether the evidence contained within the claimant's witness statement was such that the list of issues should be treated as including (or widened to include) the fact that in the claimant's second meeting with Major Montgomery, the claimant raised his

concern that people black in colour were treated less favourably than white individuals in the squadron (see his witness statement paragraph 18). Those meetings took place because Major Montgomery had been asked to discuss the claimant's service complaint with him (by email dated 27 June 2018 from Captain Howard, page 176) and it might be argued they formed part of the service complaint.

112. The respondent resisted that widening of the list of issues. Had it been necessary to do so we would have been minded to widen the list of issues. The respondent has had the claimant's witness statement since 2020 and was well aware of what the claimant is saying. The meetings were part of the process which took place in respect of the service complaint. There is no prejudice to the respondent in dealing with the matter. Thus we have considered the next issues, namely whether the claimant was subjected to detriment because he did a protected act, on the basis that the claimant did a protected act by raising the issue of race and discrimination in the second meeting with Major Montgomery.

113. In respect of the respondent's argument about the jurisdiction of the tribunal, to the extent that it was elaborated, it appeared to be an assertion that because of s121 Equality Act 2010, unless the claimant had raised a service complaint about the matter presented to the tribunal, the tribunal could not consider it. The law in this respect was set out in more detail in an earlier judgment in these proceedings. Suffice it to say, for these purposes, that the second service complaint, at page 193, was in respect of victimisation and, therefore, a service complaint has been received in respect of it.

Being Treated with Aggression and Hostility in the 1st, 2nd and 3rd interviews in respect of the 1st Service complaint.

114. Following the claimant making the first service complaint, Captain Howard emailed Major Montgomery enclosing the service complaint and stating "Action

—

- You discuss with him
- Together we will book him a phone call with CO
- Corporal St Jean calls mediation."

115. One of the points made by the claimant in cross-examination of Major Montgomery was that he had no choice, therefore, but to speak to him. Major Montgomery accepted that he was required to speak to the claimant but stated that he had a choice of how, where and how long the meetings would be. He stated that he went far in advance of what was required, having two long meetings, lasting approximately 3 to 4 hours combined, where he sought to get to know the claimant, the background of the complaint and attempted to help him navigate the system.

116. There is no dispute that meetings took place on 2 and 3 July 2018 and 9 July 2018. The meetings took place in Estonia to where the claimant and Major Montgomery had been deployed as part of Operation CABRIT. We accept that

the deployment would have been pressurised for Major Montgomery who had just taken over the role as Officer Commanding whilst, as he says, concurrently being deployed to an operational theatre and starting a new relationship with his battle group. It is relevant, in that context, that he was willing to meet with the claimant three times (albeit that the third time was simply to be told that the claimant was pursuing his service complaint).

117. Again, there is a dispute as to what happened in the meetings. The claimant describes Major Montgomery, at his first meeting, as being uninterested and short with him and in his second interview as having aggressive body language and being disgusted with the claimant. As we have said, the claimant served two witness statements on the respondent- one in 2020 and one in 2022. In the witness statement served in 2020 the claimant stated, in paragraph 19 “Major Montgomery’s body language was aggressive when I raised these points and he was clearly disgusted with me saying this. I offhandedly said, “maybe I am being paranoid” and Major Montgomery was very quick and ready to agree to this. *At final Service Complaint interview* I genuinely felt major hostility towards me from Major Montgomery. His body language and demeanour were ones of irritation and anger towards me and I believe that if we were in a different environment or I was a bit smaller in appearance, he would have become physically aggressive with me” (emphasis added). In his statement served in 2022, the penultimate sentence of the part we have quoted was amended so it read “*At the service complaint interview* I genuinely felt major hostility towards me from Major Montgomery. His body language ...” (Emphasis added). The most natural reading of the claimant’s 2022 statement is that where he talks about feeling major hostility from Major Montgomery he is talking about the second interview rather than the third.
118. Major Montgomery’s version of events is different, he says that in the first interview the claimant was “ranty and incoherent”. He stated that it felt like he was bringing up every perceived wrong that had happened during his career. He describes feeling like they had made progress but needing time to process the discussion before meeting again. He says there was a second meeting on 3 July which, from his memory, lasted approximately two hours. He accepted in that meeting that the claimant mentioned discrimination and they went on to discuss the army leadership spectrum. He felt that the time was well spent. At the end of the second meeting, Major Montgomery says, the claimant told him that he was inclined to stop progressing with the complaint and he told him to take a few days to think about it. At the third meeting on 9th July, the claimant came to his office and said that he was not going to withdraw his complaint.
119. Major Montgomery made brief handwritten notes which appear at page 163 of the bundle. We accept they are contemporaneous. He also made later notes for the purposes of the investigation, which appear at page 272, which are more full but which we place no real reliance upon, they were not contemporaneous and were made for the purposes of the investigation into the second service complaint.
120. The notes at page 163 show that the first meeting lasted between 4:20 PM and 5:30 PM. The notes are very brief and give no real insight into the discussion. The notes of the second interview do not record the times but are a little more

full. They show that there was at least some discussion as to what the claimant wanted, they show that the claimant said it would not be happy until he was promoted or moved on and that he wanted to build on his profile.

121. Following the email from Captain Howard, Major Montgomery wrote to her on 3 July 2018 stating "I have had a long chat with Corporal St Jean and he would like to close his SC. Would you please advise on the process...". He then wrote on 9 July 2018 stating that the claimant had now decided to proceed with the service complaint. He said "I think the key is rewriting his Annex F (original attached) to make it coherent and to articulate his requested redress. He is currently conflating numerous complaints and doesn't really understand how he wants them addressed.... I have talked him through mediation but he is unwilling to give it a go" (page 175).
122. The claimant did not take notes of the meetings and when he was asked in cross-examination about the second meeting and whether he was asked by Major Montgomery about being able to move up and down the leadership spectrum "I don't recall, the only parts I recall is how I felt emotionally."
123. The claimant gave an account of the meetings in his second service complaint in September 2018. He stated that in the first meeting Major Montgomery was more interested in resolving the issue than understanding it, in the second interview he got the impression that Major Montgomery felt he was wasting his time "with slight aggression and hostility" and that on the third interview, when he mentioned he would like to continue with his service complaint he received nothing but hostility and aggression (page 193).
124. That account is somewhat different to the claimant's witness statement. The most natural reading of the claimant's witness statement is that he has placed all of the hostility and aggression in the second meeting and he does not link any hostility and aggression with him saying that he wanted to continue his service complaint.
125. The claimant asks us to draw an inference from the way in which Major Montgomery responded to the second service complaint. On 30 April 2019 he sent an email to the service complaint investigator stating that the second service complaint was vexatious and slanderous, with no evidence corroboration or witnesses. He described the claimant as having a victim complex and believing there was a conspiracy against him. He stated that the claimant had accused five respected officers and SNCOs of racism, victimisation and ostracising and none of those individuals had been accused before (page 272).
126. There is force in the claimant's submission. It can fairly be argued that, given the extreme way in which Major Montgomery reacted to the second service complaint, it is likely that he would not have reacted well to the first service complaint. Major Montgomery answered that point by stating that he was not a respondent to the first service complaint and was simply seeking to resolve it as the claimant's Officer Commanding. It was a very different situation when he, personally, was being accused of racism which he considered unfair.

127. Given the changes in account and the fact that the claimant, on his own evidence, cannot really remember what happened but only his emotions, we are more inclined to rely upon Major Montgomery's account of what happened. That account is consistent with the brief but contemporaneous notes at page 163 and also the emails which he sent to Captain Howard. We accept Major Montgomery's explanation of his different reaction to the second service complaint on the basis that he would be likely to be less emotional when dealing with the first service complaint which did not relate to him and when he was discussing it as the claimant's Officer Commanding. We accept that had Major Montgomery had a hostile intention towards the claimant he need not have held three meetings with him. One meeting would have sufficed. We accept that Major Montgomery was seeking to help the claimant which is why he set out his thoughts in the email at page 175 as to rewriting Annex F. That was a constructive suggestion.

128. In those circumstances we find that the claimant's claim that he was treated with aggression and hostility in the three service interviews is not made out on the balance of probabilities.

Being Ostracised in Estonia

129. In his second service complaint the claimant states that he felt ostracised to the point where he would greet the Officer Commanding (Major Montgomery) in the corridors and he would ignore him. He felt that nothing he did was good enough and the squadron hierarchy was constantly trying to find faults in him to justify their own attitude towards him.

130. In his witness statement the claimant has given no real particulars of how he says he was ostracised he simply states "I was treated in an offhand way by my OC Major Montgomery and suffered members of the squadron hierarchy ignoring me on a regular basis. I believe that the word had 'got out' amongst the squadron that I had made a complaint and therefore I was not being treated in an equal way by others".

131. Apart from the allegation that Major Montgomery would not greet him in the corridors, nothing specific was put to any of the witnesses during the hearing. The claimant did not point to any meetings or gatherings or discussions that he was not invited to and we found this allegation to be too vague to be able to make any useful findings. The witnesses who were asked about the point generally, all denied that the claimant was ostracised and there is no evidence that any of them knew of the allegation of racism made in the second interview with Major Montgomery. Having heard from Major Montgomery and observed the way he gave evidence we think it unlikely that he would have ignored the claimant deliberately. He appeared to us to be somebody who would confront a problem rather than resort to ignoring someone. In a busy operation he had taken time out to speak to the claimant on three occasions about his service interview.

132. In those circumstances we do not find, on the balance of probabilities, that the allegation in respect of being ostracised is factually made out.

Standing back

133. It is important, when one has analysed the issues individually, to step back to ensure that the bigger picture has not been lost in the fine detail. Even stepping back, the evidence does not paint a picture where the claimant has been treated unfairly on the basis of his race. We find that the overall picture is that the claimant was a capable, industrious and conscientious Corporal. He was destined for promotion and the appraisals which he was given, as well as his placing in the orders of merit, reflected that. The claimant was frustrated that he was not reviewed in more glowing terms and did not achieve promotion faster than he did. However, we find that the reports written about the claimant and the rankings given to him were appropriate for him, certainly they were an accurate reflection of how his officer's saw him and there is no evidence that they were motivated or influenced by his race. There is no evidence that he was the victim of stereotypical assumptions, biases or tropes, it seems to us more likely that, as he himself has recognised, he was perceived by some as being aggressive and angry and that perception has made its way into the MPARs. However, the perception was not based on stereotypical assumptions of race, it was based on the way the claimant behaved and, we find, anybody who behaved in a similar way would have been perceived in the same way that the claimant was and received similar appraisals and a similar ranking.

Conclusions

134. We state our conclusions by reference to the list of issues.
135. In respect of issue 1.1.1 we do not think that the claimant was awarded a position in the Corporal's order of merit which was lower than it should have been. That is the case whether one considers the squadron order of merit or the regimental order of merit.
136. In respect of issue 1.1.2 we accept that the officer commanding told the claimant that other individuals were just better than him, but we do not find that statement was not true.
137. In respect of issue 1.1.3 we do not find, on the balance of probabilities, that Staff Sergeant Connell assumed that the claimant was the aggressor in a previous exchange between him and Sergeant Cardy.
138. In respect of issue 1.2, we have not found the conduct alleged, to be proved. Thus we do not need to consider this issue. However, for the sake of completeness:
- a. We find that there is no evidence from which we could decide that the conduct which we have found proved related to the claimant's protected characteristic of race.
 - b. Further, we accept the respondent's explanation that the position of the claimant within the Corporal's order of merit and what he was told about others being better than him was not because of race but was an accurate reflection of the claimant's abilities. Staff Sergeant Connell's comments to Captain Clifford were because he perceived the claimant to lack respect

for SNCOs, but that perception was based in reality, not a reflection of racial stereotypes.

139. In respect of issue 1.3 we do not consider that the conduct of the respondent's witnesses had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The conduct we have found proved was part of the normal management of soldiers within the regiment.

140. In respect of issue 1.4:

- a. The claimant was not awarded a position in the Corporal's order of merit which was lower than it should have been. Moreover, we do not find that the position where the claimant was actually ranked ought reasonably to have had the effect of violating the claimant's dignity or creating an intimidating hostile, degrading, humiliating or offensive environment for him. It was an accurate reflection of his ability.
- b. The statement made to the claimant about others being better than him was not untrue. Moreover, we do not find that the claimant being told that others who ranked higher than him in the Corporal's order of merit "were just better than him" ought reasonably to have had the effect of violating the claimant's dignity or creating an intimidating hostile, degrading, humiliating or offensive environment for him. That, too, was an accurate reflection of his ability.
- c. There was no assumption made by Staff Sergeant Connell and therefore the question does not arise in respect of that issue.

141. In respect of issues 2.1.1 to 2.1.3 we refer to our findings above.

142. In respect of issue 2.2, the respondent did treat the claimant less favourably than it treated the actual comparators. However they were not true comparators in that their circumstances were different from the claimants in material respects as explained by Major Montgomery in his witness statement. They were doing different jobs, had different skill sets and were operating at a different level of ability. The claimant was not treated differently to a hypothetical comparator who was in all material respects the same as the claimant.

143. In respect of issue 2.3, the claimant has not proved facts from which the tribunal could conclude that the difference in treatment was because of the protected characteristic of race.

144. In respect of issue 2.4, we accept that the respondent's witnesses have provided non-discriminatory reasons for the claimant's ranking within the Corporal's order of merit and for what he was told by Major Buchanan in respect of others being better than him. We are also satisfied that there is a non-discriminatory reason for Captain Clifford recording the comment that the claimant had a lack of respect for SNCOs, it was not based on any assumption of aggression by Staff Sergeant Connell and we do not find that Staff Sergeant Connell made that assumption.

145. In respect of issue 3.1.1, the documents launching the service complaint did not amount to a protected act. However, the claimant did do a protected act when he referred to his race in the second meeting with Major Montgomery on 3 July 2018.

146. In respect of issues 3.2.1 and 3.2.2, we do not find that the respondent treated the claimant with aggression and hostility in the service complaint interviews carried out by Major Montgomery and we do not find that the claimant was ostracised by the squadron hierarchy.

Final Comment

147. In those circumstances this claim must fail. However, to the extent that it is relevant, we record that we did not think that the complaints made by the claimant were vexatious, as suggested during the investigations into the second service complaint. We accept that the claimant genuinely believed in the veracity of the allegations he made within these proceedings and we do not think that he sought to mislead us. We have not accepted his case but we have not found that he was less than honest with us. As we have said more than once in the course of these reasons, we think he was a good and dedicated soldier and we hope that he will go on to have a long and successful career with the respondent. We wish the same for the respondent's witnesses from whom we heard.

Employment Judge Dawson

Date :23 March 2022

Judgment sent to parties: 11 April 2022

FOR THE TRIBUNAL OFFICE