



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**  
Mr F Campbell

AND

**Respondent**  
Ministry of Defence

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT** Exeter                      **ON**                      30 and 31 March 2022

**EMPLOYMENT JUDGE**    J Bax

### Representation

**For the Claimant:**            Mr F Campbell (in person)  
**For the Respondent:**        Mr S Murray (counsel)

### RESERVED JUDGMENT

**The judgment of the tribunal is that:**

1. The matters referred to in Service Complaints SCO712/17 and SCO183/19 were presented out of time. It was just and equitable to extend time for the last matters referred to in each service complaint. This was without prejudice to the Respondent being able to argue that the earlier matters did not form part of a continuing act and were presented out of time and that it is not just and equitable to extend time. The Tribunal accordingly has jurisdiction to hear the last matters within Service Complaints SCO712/17 and SCO183/19 which were admissible service complaints.

### REASONS

1. This is the judgment following a Preliminary Hearing to determine whether the claimant's claims of discrimination on the grounds of race in relation to

service complaints SCO712/17 and SCO183/19 were presented in time and if not whether it would be just and equitable to extend time.

## **Background**

2. The Claimant is a serving sergeant in the British Army, having commenced service on 2 May 2011. He is currently a Logistics Supply Specialist in the Royal Logistic Corps. He describes himself as being of Black Afro-Caribbean origin.
3. The Claimant presented his claim on 8 April 2020.
4. At the start of the hearing discussion took place as to the issues to be determined. The claim form had set out that the incidents referred to in Service Complaints SCO712/17 and SCO183/19 were separate to the subsequent service complaints. This had been the approach of Employment Judge Roper at a case management preliminary hearing on 20 January 2021 and by Employment Judge Smail on 29 July 2021 when it had been agreed with the Claimant that the issue was whether the claims were in time or whether it was just and equitable to extend time. The Claimant at the start of the hearing, referred to there being a continuing act. This was explored and he considered that the psychological effects were ongoing. He confirmed that the two sets of service complaints were separate, they were at separate times, involving separate units and separate personnel. he was unable to point towards any evidence that there was a link between the 2 sets and confirmed that he was not alleging that there was a continuing act.
5. It was agreed that consideration would be given as to whether the last allegations in SCO712/17 and SCO183/19 were presented in time and if not whether it would be just and equitable to extend time in relation to those allegations. The allegations within those service complaints appeared to be linked and it was agreed that evidence would need to be heard to determine whether there was a continuing act and the best forum to do so would be at a final hearing. If time was extended in relation to the last allegations, it would be open to the Respondent to rely on a limitation defence in relation to the earlier matters in those service complaints.
6. The Respondent raised a further issue in relation to whether SCO 217/17 should be considered as having been withdrawn and if so whether the Tribunal would have jurisdiction to hear the matters complained of in it in any event. At the start of the second day the Claimant and counsel for the Respondent were provided with sections 340B and 340C of the Armed Forces Act 2006 and regulations 5, 7, 9 and 10. It was raised with Counsel for the Respondent that the letter from the Ombudsman dated 3 May 2019 related to a review of an admissibility decision, rather than a decision

whether an admissible complaint was well founded. Counsel for the Respondent accepted that the letter related to an admissibility review and that the service complaints were not caught by s. 221(2) of the Equality Act 2010 and that the Claimant's failure to seek a review in time did not mean he was deemed to have withdrawn his complaint.

7. The Respondent submitted and the Claimant accepted that under SCO712/17 heads of complaint 10 and 11 were ruled inadmissible and that they did not form part of a valid service complaint and he could not bring those matters before the Tribunal.
8. Counsel for the Respondent also raised at the start of the second day that the ruling in relation to SCO712/17 that complaint 11, namely that the racial abuse was not prosecuted, was inadmissible because it related to a decision of a prosecuting officer exercising the function of Director of Service Prosecutions, which was excluded under the Armed Forces (Service Complaint Miscellaneous Provisions) Regulations 2015, meant that the allegation under SCO183/19 that Col Allen had upheld the decision not to prosecute would also be inadmissible. There was no documentary evidence before the Tribunal as to which complaints under SCO183/19 were deemed admissible or inadmissible. Counsel for the Respondent submitted that I should make a determination, however taking such a course of action could result in a decision contrary to what factually happened. It was a factor to be taken into account when deciding whether it would be just and equitable to extend time and it was suggested that an indication would be given as to what was considered the most likely decision in relation to that allegation.
9. The events which were subject to the preliminary hearing occurred, according to the claim form, between October 2016 and September 2017 and concerned alleged racial abuse by three individuals and his treatment by his chain of command after trying to address the issues.

### **The evidence**

10. I heard from the Claimant. I was also provided with a bundle of 386 pages and some additional documents by the Claimant. Any reference in square brackets is a reference to a page in the bundle. The Respondent made closing submissions at the end of the first day and additional submissions at the start of the second day. The Claimant made his closing submissions at the start of the second day so that he had time to consider what he wanted to say.

### **Facts**

11. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
12. In relation to service complaints a serving member of the armed forces can either bring it to their chain of command and then appeal that decision to the Service Complaints Ombudsman. Or they can bypass the chain of command and go straight to the ombudsman.
13. Prior to June 2010, the Claimant was a teacher in Jamaica. In June he came to the UK to stay with his sister in Birmingham and she suggested he joined the army. The Claimant applied to join the army and started his basic training in May 2011. After completing his basic training, he was posted to Germany and the Canada. In 2016 he was promoted to corporal.
14. In 2016 he was posted to Army Training Regiment Grantham; it was at this posting the Claimant alleges that he was subjected to the treatment complained of in SCO712/17.
15. On 9 November 2016 the Claimant raised a service complaint against Cpl Lynch, alleging that he had been referred to as 'nigger'. The Claimant was provided with a decision letter on 24 March 2017 by Lt Col Stone. It was considered the words alleged were used, but that there was no intention to bully and that they had used the unacceptable term mistakenly after having heard it during banter amongst black basketball players. Lt Col Stone concluded that the investigation revealed that the environment and working culture within the gymnasium required improvement, at best there was a relaxed attitude to banter and at worst a blind eye was turned to clear harassment. The matter would be dealt with by Lt Col Stone and appropriate disciplinary or administrative action would be taken. The Claimant was informed of his right to appeal within 6 weeks and 2 days of the decision.
16. Between 2016 to 2017, when the events occurred at ATR Grantham the Claimant became unwell, but did not seek medical attention because he did not want to seem weak. The Claimant started drinking heavily at night to help him sleep. He was not sleeping well and had difficulty concentrating and thinking straight. He became 'snappy' with his partner and children. He was isolated from his friends. At this time the Claimant was using leave to remove himself from the situation.
17. The Claimant transferred to 27 Regiment in July or August 2017, at which he did not experience acts of discrimination. After discussing the previous matters with his commanding officer, the Claimant felt supported and was encouraged and decided to make a service complaint. He was guided by his chain of command in how to make a service complaint. He was also

given a role by his commanding officer that kept him very busy in order to distract him from what had occurred at Grantham.

18. The Claimant submitted service complaint SCO712/17 on 20 August 2017, which he resubmitted on the correct form on 28 September 2017. The Claimant complained of racist language and behaviour towards him by three personnel, CPLs Lynch and Spence and Mr Dixon, in late 2016. In relation to CPL Lynch, although his initial service complaint was upheld, afterwards CPL Lynch played songs with a racial context. Cpl Spence had used the term 'Umbongo' and was told many times it was racist and offensive by another corporal, but carried on saying it. An incident occurred with Mr Dixon in November 2016, when he greeted the Claimant with the words 'nigger nigger white thing'. It further set out that In February 2017, the Claimant was interviewed by Capt Lewis and was informed that Mr Dickens had lost their job. On 18 July 2017, the Claimant was interviewed by Maj Moxon and was told Mr Dixon had got their job back. In June 2017 Maj Moxon said if he had demons to see the Chaplain. The Claimant enquired of WO2 Hill as to why he did not inform Capt Lewis of the racial abuse and was told that he did not think it was his job to grass on anyone. He was told that if he forwarded comments to Maj Moxon administrative action would be taken against him. He then said that he was treated badly and forced to sit with those who had abused him. He also referred to an abuse of power by Maj Moxon. Following the interview on 20 June 2017, the notes were incorrect and changed, however Maj Moxon ordered WO2 Hill to use incorrect information in the SJAR and MPAR. On 22 June 2017, he was ordered to sign inaccurate notes. This was reported to Capt Lewis. On 20 July 2017 the Claimant saw Capt Lewis and spoke about the situation with Maj Moxon and Capt Lewis said he did not realise the Claimant wanted to file a complaint. This was the last allegation of discrimination alleged in the service complaint.
19. Service Complaint SCO712/17 was stayed pending investigation by the Royal Military Police (RMP). The alleged incidents occurring on 17 October 2016 and 18 November 2016 involving Cpl Lynch and Cpl Spence were investigated in 2018.
20. On 10 August 2018, the Claimant was informed by the prosecuting officer, Wg Cdr Saunders of the Service Prosecuting Authority, that although there was sufficient evidence to prosecute Cpls Lynch and Spence, it was concluded that it was not in the public interest to do so. Therefore, Court Martial proceedings would not be taken. The reasons given were that administration action had already been taken, a significant period of time had elapsed and it was considered the offences were at the lower end of criminal culpability [p132].

21. The Claimant's evidence was that at this stage he suffered badly, he started drinking heavily again, was having problems at home and he had a mental breakdown. This evidence was at odds with the evidence of Professor Elliott who considered the symptoms suffered by the Claimant at this stage were mild. I concluded that the Claimant was upset by the outcome, however he was mistaken as to when the breakdown occurred.
22. On 5 October 2018, the Claimant appealed against the decision not to take Court Martial proceedings against Cpls Lynch and Spence. The letter [p134] was 4 pages long and the Claimant accepted in cross-examination that it carefully set out his reasons and he was in a good enough mental state to compile it. It was suggested that what the Claimant was seeking was for a prosecution, to which his response was, 'if appropriate.'
23. On 7 November 2018, Col Allen, Managing Prosecutor of the Service Prosecuting Authority, wrote to the Claimant and said he had considered the case afresh. After considering the evidence and the Claimant's letter he said the decision not to prosecute was the correct one in the circumstances. He said that the decision did not imply that the behaviour was accepted, rather it acknowledged action had already been taken some time ago. The impact on the Claimant was acknowledged. It was not considered appropriate bring criminal proceedings in addition to the administrative action already taken. The Claimant was informed that there was no scope for further review and if he wanted to challenge it further, he should seek legal advice regarding an application for judicial review.
24. The Claimant submitted service complaint SCO183/19 [p88-95] on 19 February 2019 to the Service Complaints Ombudsman, in which he complained that Lt Col Stone had not handled the situation appropriately and had not address all the matters in his first complaint [p88]. He complained about the decision of Lt Col Stone in 2016 regarding his complaint about CPL Lynch. It set out the history of SCO712/17. He sought for Cpls Lynch and Spence to face disciplinary action and for Lt Col stone to face action for failings in handling his initial complaint. The last incident referred to in the complaint was Col Allen's rejection of his appeal on 7 November 2018, the allegation before that related to Wg Cdr Saunders decision not to prosecute on 14 September 2018. The allegation previous appeared to be that on 2 October 2017 when the Claimant discovered that the incidents had not been recorded on the soldier tracking system.
25. After the review of Col Allen, the Claimant's Service Complaint 712/17 was referred to Lt Col West to consider the admissibility of his complaint now that there would not be a prosecution. On 26 February 2019 the Claimant was sent a letter informing him that complaints 1 to 9 were admissible and accepted, however complaints 10 and 11 were deemed inadmissible. The aspects deemed to be admissible would be allocated to a decision body.

The Claimant was informed that if he disagreed and wanted the decision to be reviewed, he had 4 weeks 2 days from the date of the letter to apply to the Ombudsman. As at February 2019 no findings had been made as to whether the admissible complaints under SCO712/17 were well founded. I was not provided with any evidence that suggested by the time of presentation of the claim that conclusions on that complaint had been reached.

26. On 23 March 2019, the Claimant contacted the Ombudsman's office and said that he had only received Col Allen's letter on 13 March 2019. A response was sent on 29 March 2019, outlining the powers of the Ombudsman. No reply was received, and the office chased him on 18 April. On 23 April 2019 the Claimant informed the office that a response would be sent in a few days and an application to review the decision was sent on 26 April 2019.
27. On 3 May 2019, the Claimant was informed that Service Complaints Ombudsman had decided not to investigate further, because he had appealed outside of the time limits and had been chased by the appeal office and it was not considered sufficient to explain the 6 week delay [p140-141]. Although the reference in the letter said it related to SCO183/19, the letter of 26 February 2019 related to SCO712/17. It was most likely that the letter related to SCO712/17 on the basis that no decision had been taken in relation to SCO183/19.
28. In October 2019, the Claimant was promoted to sergeant and assigned to 24 Commando. On being assigned to 24 Commando, the Claimant said there not a welcoming culture. He was not a Royal Marine, which differentiated him from other members of 24 Commando. He said that he was taken off the Commando training course after reporting racial abuse. The Claimant alleged that he suffered from micro-aggression relating to his race, including that at an SNCO mess he was presented with a toilet roll, whereas others were given reasonable gifts. He also referred to other alleged incidents of racially related behaviour for which he raised 3 service complaints about incidents occurring between November 2019 and March 2020. Alleged incidents included being locked in his room in January 2020. 2 service complaints were raised on 3 March and the other on 16 March 2020.
29. On 3 March 2020, the Claimant sent a 7 page letter to the 24 CDO commanding officer, setting out what had happened from 1 December 2019.
30. After an incident with WO2 Hoskins the Claimant broke down in tears and sought medical help on 6 March 2020. The following matters from his medical records were relevant:

- a. On 6 March 2020, it was recorded he was in a considerable state of emotional upset;
  - b. The Claimant was signed off sick on 18 March 2020;
  - c. On 25 March 2020, the Claimant was sleeping poorly and not concentrating well;
  - d. On 2 April 2020, the Claimant continued to feel down and distressed about the service complaint. He had developed a habit of drinking at night to try and sleep. He was prescribed Citalopram;
  - e. On 9 April 2020, the Claimant was diagnosed with an adjustment reaction with anxious mood;
  - f. By 7 May 2020, the Claimant had been to CBT session, which was not considered helpful whilst the legal case was ongoing. On 13 May 2020, he was prescribed with fluoxetine.
31. After being signed off sick in March 2020, the Claimant was downgraded to 'non-effective soldier' for 6 months, during which time he was taking anti-depressants and could not bear being near his unit or anyone from it. He was anxious and demotivated. He lost interest in physical fitness and found it difficult to eat and sleep. He was snappy with his family and was irrational. He had frequent headaches and suffered from sweating and nightmares. He had problems with concentration and in evidence referred to his partner querying 'whether he was there'. He was only able to think about the complaints and what was going on the background. He stopped socialising.
32. After submitting his March 2020 service complaints, the Claimant spoke to a colleague/friend who informed him about the Employment Tribunal and ACAS. The Claimant spoke to ACAS, who tried to encourage him to first use the internal process, however the Claimant's colleague advised him not to do this first due to time limits.
33. I accepted the Claimant's evidence that he had not heard of the Employment Tribunal until the conversation with his colleague. The Claimant had moved from Jamaica in 2010 and not worked in the United Kingdom until he started his Army basic training. He did not have friends outside of the Army and his only UK based family was his sister. His first deployment was to Germany and then he was posted to Canada. I accepted that military life, when living in barracks, is very different to civilian life.
34. On 3 April 2020, the Claimant notified ACAS of the dispute and the certificate was issued on 7 April 2020. The claim was presented on 8 April 2020.



35. On 20 May 2020, the Claimant received an admissibility decision letter [p200] in which it was concluded that all allegations raised under the March service complaints were admissible, apart from an allegation relation to CCTV which was better investigated by the Information Commissioner's Office. The accepted matters were passed to a decision body. Those matters proceeded slowly prompting a complaint by the Claimant to the Ombudsman, which was upheld.
36. In September 2020 the Claimant was assigned to 1<sup>st</sup> Regiment RLC.
37. I was referred to further medical records from June 2021 in which the Claimant was diagnosed with depression. By 21 June 2021, he was having suicidal thoughts, very depressed and drinking heavily [p341].
38. I was also provided with a medical report by Professor Elliott, consultant psychiatrist dated 23 September 2021 [p349]. In relation to the matters in 2016 -2017, the Claimant reported feeling anxious and on edge at work and was overly aware and alert. His sleep pattern was disturbed, and he had nightmares. He began to drink heavily. The symptoms continued into 2017. After his transfer in July/August 2017, there was improvement in his symptoms, his alcohol consumption returned to normal. He was anxious when dealing with his service complaints. From October 2019, after the events at 24 Commando, he started having low mood and he broke down in March 2020 and felt unable to cope with work. He felt optimistic again, from September 2020 when he was reposted. Following an incident in February 2021 he worsened again.
39. Professor Elliot diagnosed that the Claimant had moderate to severe Complex Post Traumatic Stress Disorder. He had mild to moderate symptoms in 2016 and 2017 and there was some improvement between 2017 to 2019 and it was mild at that stage. After re-exposure to incidents in 2019 his condition became moderate and it waxed and waned when he was exposed to further incidents [p377-378].
40. I was also referred to a Med-7 form from October 2021 and the Claimant's medical discharge following a review by the medical board in November 2021.
41. I accepted the Claimant's evidence that he had been trying to follow the Army's service complaint procedure and that he did not abandon that process and he thought he was doing the correct thing. I also accepted that the Claimant had assisting officers when making his service complaints, but that he was not advised that he could bring a claim in the Employment Tribunal.

42. I accepted the Claimant's evidence that he was not paying close attention to the JSPs. I was not referred to the contents of the Respondent's JSPs as part of the evidence but was directed to JSP831 in closing submissions. JSP 831 sets out the process for redress of grievances (service complaints) for service personnel and is available online to anyone and can be found by a search of the internet. Within the JSP there was reference to that claims under the Equality Act 2010 can be brought in the Employment Tribunal and to do so a service complaint must be made and not withdrawn.

### **Submissions**

43. The Respondent initially submitted that under s. 121(2)(b)(ii) the letter dated 3 May 2019 should have the effect that the Claimant should be treated as having withdrawn both SCO712/17 and SCO183/19, however this argument was abandoned at the start of the second day of the hearing. The Respondent submitted that the last complaint within SCO183/19 should be deemed inadmissible because it related to a decision of a prosecuting officer.

44. In relation to whether it would be just and equitable to extend time it was submitted that the seat of the claims was 2016 and therefore 6 years had passed and made reference to whether all personnel were still in service, although no evidence was adduced that they were not. The Claimant could refer to the matters as part of the background to the case for the matters contained in his other service complaints. It was submitted the Respondent had dealt with matters seriously and upheld the 2016 complaint. After the Claimant left Grantham he was in a calm period and was working well. Professor Elliott said that there were clinically significant symptoms at the end of 2017, but he was still at work. Between 2017 and 2019 the symptoms were mild.

45. It was submitted that if the Claimant had sought advice, he would have been able to discover that he could bring a claim in the Tribunal and that he had an assisting officer at the various meetings of whom he could have sought advice. It was also submitted that information could have been found in the JSPs. It was submitted that there was not a good reason for the delay on the basis that it was not until he started at 24 Commando his mental health deteriorated rapidly.

46. The Claimant submitted that it was wrong for the Service Prosecuting authority to refuse to prosecute, because the personnel were also members of the military. He said he did not know about the Employment Tribunal at the time and the Respondent never told him about it. His mental health was better when he moved to 27 Regiment and that the symptoms were mild and at that time the reason why he had not presented his claim was that he

did not know he could. He submitted that the Respondent had a tendency to stretch things out

## The Law

47. The Armed Forces Act 2006 provides:

### **[340B Procedure for making a complaint and determining admissibility]**

- [(1) The Defence Council may make regulations (referred to in this Part as “service complaints regulations”) about the procedure for making and dealing with a service complaint.
- (2) Service complaints regulations must make provision—
- (a) for a service complaint to be made to an officer of a specified description;
  - (b) about the way in which a service complaint is to be made (including about the information to be provided by the complainant);
  - (c) that a service complaint may not be made, except in specified circumstances, after the end of the specified period.
- “Specified” means specified in the regulations.
- (3) The period referred to in subsection (2)(c) must be at least three months beginning with the day on which the matter complained of occurred.
- (4) Service complaints regulations must make provision—
- (a) for the officer to whom a service complaint is made to decide whether the complaint is admissible and to notify the complainant of that decision;
  - (b) for the Service Complaints Ombudsman, on an application by the complainant, to review a decision by the officer to whom a service complaint is made that the complaint is not admissible;
  - (c) for securing that the Ombudsman's decision in relation to admissibility, on such a review, is binding on the complainant and the officer to whom the complaint was made.
- (5) For the purposes of subsection (4), a service complaint is not admissible if—
- (a) the complaint is about a matter of a description specified in regulations made under section 340A(4),
  - (b) the complaint is made after the end of the period referred to in subsection (2)(c) and the case is not one in which circumstances referred to in that provision apply, or
  - (c) the complaint is not admissible on any other ground specified in service complaints regulations.
- (6) Nothing in this Part with respect to the provision that must or may be made by service complaints regulations is to be taken as limiting the generality of subsection (1).]

**[340C Decisions on service complaints]**

- [(1) Service complaints regulations must provide for the Defence Council to decide, in the case of a service complaint that is found to be admissible, whether the complaint is to be dealt with—
- (a) by a person or panel of persons appointed by the Council, or
  - (b) by the Council themselves.
- (2) The regulations must provide for the person or panel appointed to deal with the complaint or (in a subsection (1)(b) case) the Defence Council—
- (a) to decide whether the complaint is well-founded, and
  - (b) if the decision is that the complaint is well-founded—
    - (i) to decide what redress (if any), within the authority of (as the case may be) the person, the persons on the panel or the Defence Council would be appropriate, and
    - (ii) to grant any such redress.
- (3) The Defence Council must not appoint a person or panel to deal with a service complaint unless—
- (a) the person is, or all the persons on the panel are, authorised by the Council to decide the matters mentioned in subsection (2) and to grant appropriate redress, or
  - (b) the Council propose to authorise that person or those persons for those purposes.
- (4) Provision made by virtue of subsection (1) is subject to regulations made under section 340E(1) (eligibility for appointment, requirements relating to independent decision-making, etc).]

48. The Armed Forces (Service Complaints) Regulations 2015 provide:

**5. Action on receipt of a service complaint and admissibility**

- (1) After receipt of a statement of complaint, the specified officer must decide whether the complaint is admissible in accordance with section 340B(5).
- (2) For the purposes of section 340B(5)(c), a service complaint is not admissible if—
- (a) the complaint does not meet the requirements of whichever of section 340A(1) and (2) applies to the complainant; or
  - (b) the complaint is substantially the same as a complaint brought by the same person which has either been decided previously under the service complaints process or is currently being considered under the service complaints process.
- (3) If the specified officer decides that any part or all of the service complaint is admissible, he must notify the complainant in writing of the

decision and refer that part or all of the service complaint to the Defence Council.

(4) If the specified officer decides that any part or all of the service complaint is not admissible, he must notify the complainant in writing of the decision, giving the reasons for the decision and informing the complainant of his or her right to apply for a review of the decision by the Ombudsman.

## **7. Ombudsman's review of admissibility**

(1) After receiving an application by the complainant for a review of the specified officer's decision that a service complaint is not admissible, the Ombudsman must decide whether the service complaint is admissible and notify both the specified officer and the complainant in writing of his or her decision and the reasons for it.

(2) The Ombudsman must not consider an application under paragraph (1) made after four weeks beginning with the day the complainant received notification of the specified officer's decision, unless the Ombudsman considers it is just and equitable to allow the complainant to apply after that period.

(3) A decision by the Ombudsman in relation to admissibility is binding on the complainant and the specified officer.

(4) Where under paragraph (1) the Ombudsman decides that the service complaint is admissible, the specified officer must refer the complaint to the Defence Council as soon as reasonably practicable

## **9 Decisions on a service complaint**

(1) After they receive a referral of a service complaint from the specified officer, the Defence Council must decide whether the complaint is to be dealt with—

- (a) by a person or panel of persons appointed by the Council; or
- (b) by the Council themselves.

(2) The person or panel of persons appointed to deal with the service complaint or (in a paragraph (1)(b) case) the Defence Council must—

- (a) decide whether the complaint is well-founded; and
- (b) if the decision is that the complaint is well-founded—
  - (i) decide what redress (if any), within the authority of the person or persons on the panel or (in a paragraph (1)(b) case) the Defence Council, would be appropriate; and
  - (ii) grant any such redress.

(3) The person or panel of persons appointed to deal with the service complaint or (in a paragraph (1)(b) case) the Defence Council must notify the complainant in writing of a decision made under paragraph (2)(a) or (b), giving reasons for the decision.

(4) If a decision under paragraph (2)(a) or (b) is made by a person or panel of persons appointed under paragraph (1)(a), that person or panel of persons must inform the complainant of the right of appeal under regulation 10(1).

(5) If a decision under paragraph (2)(a) or (b) is made by the Defence Council, they must inform the complainant of the right to apply to the Ombudsman to conduct an investigation in relation to the service complaint under section 340H(1).

### **10 Appeal against decisions on a service complaint**

(1) Where a decision under regulation 9(2)(a) or (b) is made by a person or panel of persons appointed under regulation 9(1)(a), the complainant has a right to appeal to the Defence Council against that decision.

(2) An appeal under paragraph (1) must be brought by the complainant in writing to the Defence Council.

(3) The appeal must be dated and state those aspects of the decision under regulation 9(2)(a) or (b) which the complainant disagrees with and his or her reasons for disagreeing.

(4) If the complainant brings an appeal after the end of the period stated in regulation 11(1) the appeal must state the reason why it was not brought within that period.

49. Reg. 3 of the Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015 provides that a person may not make a service complaint about a matter within the Schedule. The Schedule includes:

“(I) is a decision of the Director of Service Prosecutions, or of a prosecuting officer exercising a function of the Director of Service Prosecutions, under any provision in or made by virtue of the Act or in relation to the exercise of a right of review under the Schedule to the Criminal Justice (Armed Forces Code of Practice for Victims of Crime) Regulations 2015.”

50. Section 120 of the EqA provides

(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—

(a) a contravention of Part 5 (work);...

51. S. 121 (Armed forces cases) of the EqA provides:

(1) Section 120(1) does not apply to a complaint relating to an act done when the complainant was serving as a member of the armed forces unless—

(a) the complainant has made a service complaint about the matter, and

(b) the complaint has not been withdrawn.

[(2) Where the complaint is dealt with by a person or panel appointed by the Defence Council by virtue of section 340C(1)(a) of the 2006 Act, it is to be treated for the purposes of subsection (1)(b) as withdrawn if—

(a) the period allowed in accordance with service complaints regulations for bringing an appeal against the person's or panel's decision expires, *and*

[(aa) there are grounds (of which the complainant is aware) on which the complainant is entitled to bring such an appeal, and]

(b) either—

(i) the complainant does not apply to the Service Complaints Ombudsman for a review by virtue of section 340D(6) [340D(6)(a)] of the 2006 Act (review of decision that appeal brought out of time cannot proceed), or

(ii) the complainant does apply for such a review and the Ombudsman decides that an appeal against the person's or panel's decision cannot be proceeded with.]

(3) . . .

(4) . . .

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

[(6) In this section—

“the 2006 Act” means the [Armed Forces Act 2006](#);

“service complaints regulations” means regulations made under section 340B(1) of the 2006 Act.]

52. Section 123(1) of the EqA provides

**123 Time limits**

(1) [Subject to [[section] 140B],] proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

- (b) failure to do something is to be treated as occurring when the person in question decided on it.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
  - (a) when P does an act inconsistent with doing it, or
  - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

53. A prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing relevant employment tribunal proceedings. Section 18 of the Employment Tribunals Act 1996 (“the ETA”) defines “relevant proceedings” and includes the discrimination at work provisions under section 120 of the Equality Act 2010.

54. Section 140B of the EqA provides: (1) This section applies where a time limit is set by section 123(1)(a) ... (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.

55. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service IRLR 434 CA that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the Claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA. However, this does not



- mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require exceptional circumstances: it requires that an extension of time should be just and equitable - Pathan v South London Islamic Centre EAT 0312/13.
56. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13 before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.
57. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: “In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it.”
58. In exercising its discretion, tribunals may have regard to the checklist contained in S.33 of the Limitation Act 1980 (as modified by the EAT in British Coal Corporation v Keeble and ors [1997] IRLR 336, EAT). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case and in particular ,
- a. the length of and the reasons for the delay.
  - b. the extent to which the cogency of the evidence is likely to be affected by the delay.
  - c. the extent to which the party sued has cooperated with any requests for information
  - d. the promptness with which the claimant acted once he knew the facts giving rise to the cause of action.
  - e. the steps taken by the claimant to obtain appropriate professional advice.
59. In Department of Constitutional Affairs v Jones [2008] IRLR 128, CA, the Court of Appeal emphasised that these factors are a ‘valuable reminder’ of what may be taken into account, but their relevance depends on the facts

of the individual cases, and tribunals do not need to consider all the factors in each and every case. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the Court of Appeal did not regard it as healthy to use the checklist as a starting point and that rigid adherence to a checklist can lead to a mechanistic approach to what is meant to a very broad general discretion. The best approach is to assess all factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular the length of and reasons for the delay. If the Tribunal checks those factors against the list in Keeble, it is well and good, but it was not recommended as taking it as the framework for its thinking.

60. A tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other: Pathan v South London Islamic Centre EAT 0312/13 and also Szmidt v AC Produce Imports Ltd UKEAT 0291/14.
61. No one factor is determinative of the question as to how the Tribunal ought to exercise its wide discretion in deciding whether or not to extend time. However, a claimant's failure to put forward any explanation for delay does not obviate the need to go on to consider the balance of prejudice.

## Conclusions

### Whether the Claimant should be deemed as having withdrawn his service complaints

62. The Respondent conceded that the Claimant should not be treated as having withdrawn his service complaint.
63. It is a pre-requisite for armed forces personnel to make a service complaint about the matter, before they may bring a claim to the Employment Tribunal. The Claimant complied with this aspect.
64. S. 121(2) EqA makes specific reference to where a complaint is dealt with by a person or panel by virtue of s. 340(C)(1)(a) of the 2006 Act.
65. S. 340B of the 2006 Act sets out the procedure for making a complaint and determining admissibility. It requires the regulations to make provision for an office to decide whether the complaint is admissible and notification of the decision and for a review of a decision that a complaint is not admissible by the Ombudsman. Regs 5 and 7 of the Armed Forces Services Complaint's regulations 2015 give effect to this section.

66. S340(C)(1)(a) says that the regulations must provide for the Defence Council to decide in the case of a service complaint that is found to be admissible, whether it should be dealt with by a panel appointed by the Council or the Council itself. The remainder of s.340C concerns the decision on whether the admissible complaint is well founded and what if any redress should be granted.

67. S340C relates to decisions taken as to whether admissible complaints were well founded. Decisions had not been taken as to whether admissible complaints in relation to SCO712/17 and SCO183/19 were well founded and therefore s. 122(2) EqA did not apply to the service complaints being considered at the hearing.

Was the complaint in SCO183/19, in relation to Col Allen's review of the decision not to prosecute, an admissible complaint?

68. I was hampered by not having been provided with an admissibility decision in relation to this complaint. The Claimant suggested that all complaints had been deemed admissible, however neither he nor the Respondent had a copy of such a decision at the hearing.

69. On 10 August 2018, Wg Cdr Saunders on behalf of the Service Prosecuting Authority, as prosecuting officer, informed the Claimant that they had taken the decision not to prosecute Cpls Lynch and Spence. The Claimant was informed of his right to review.

70. On 7 November 2018, Col Allen, on behalf of the Service Prosecuting Authority, in the capacity of Managing Prosecutor reviewed Wg Cdr Saunders' decision and concluded that the decision not to prosecute was the correct one.

71. Although I had not been provided with an admissibility letter for SCO183/19 it was highly likely that Wg Cdr Saunders and Col Allen were exercising functions as a prosecuting officer exercising the functions of the Director of Service Prosecutions, when writing their letters dated 10 August and 7 November 2018. It was therefore highly likely that if SCO183/19 was being considered on an admissibility basis that those allegations would be considered to be inadmissible and not valid service complaints.

**Were the last matters referred to in SCO712/17 and SCO183/19 presented in time and if not whether it was just and equitable to extend time.**

72. The last allegation in SCO712/17 occurred on 20 July 2017. The Claimant should have presented his claim by 19 January 2018 in respect of that matter. The last allegation in SCO183/19, not including the allegations against Col Allen and Wg Cdr Saunders, was on 2 October 2017 and

therefore he should have presented his claim by 1 April 2018. The Claimant notified ACAS of the dispute after time had expired and therefore, he was not availed of an extension of time under s. 140B EqA.

73. The claims in respect of the last matters in SCO183/19 and SCO712/17 were therefore presented 2 years 1 week and 2 years 2 months out of time.
74. I accepted that the Claimant did not know that he could bring a claim in the Employment Tribunal until about March 2020. This was understandable. The Claimant had moved from Jamaica to the UK in 2010 and his first work was with the Army, when he started his basic training. A person who has arrived from a different country is unlikely to know that the Employment Tribunal exists. Further life in the armed forces is different to civilian life. Claims under the Equality Act are an exception to the general position that armed forces personnel cannot bring claims in the Employment Tribunal. Therefore, it was very unlikely that there would be conversations in which the Claimant would become aware of its existence. It was relevant that the Claimant's social circle was based on Army personnel and his only UK based family was his sister.
75. I accepted that the Claimant did not pay much notice to the JSPs when making his complaints. He was relying on advice from his chain of command at 27 Regiment. The Respondent effectively submitted that if the Claimant had checked JSP 831 he would have seen that he could bring a claim in the Employment Tribunal. The Claimant was faced with a very distressing and disturbing situation when he was at Grantham. The effect of what occurred caused him to resort to alcohol to help him sleep and it was damaging to his relationship with his partner and family. He was having difficulty with concentration and thinking straight.
76. He was kept very busy when at 27 Regiment in order to distract him from what happened previously. He was encouraged to make a service complaint and had the benefit of an assisting officer, however he was not advised he could bring a claim in the Tribunal. The Respondent submitted that the Claimant was seeking a prosecution only, however I accepted the Claimant's submission that the redress under a service complaint did not include compensation and he was following the process which he knew about.
77. If the Claimant had studied JSP831 he would have seen reference to the Employment Tribunal, however he did not. The Claimant was receiving guidance from his chain of command. There is a difference between someone who has heard of a Tribunal and does not make any enquiry about it, and someone who has no idea of its existence. The Claimant could have undertaken more investigation, but did not do so and in the present circumstances was not on notice that he should and was relying on advice

he received following a very distressing situation. Although limitation expired whilst the Claimant was at 27 Regiment, it took a year for a decision to be taken as to whether there should be a prosecution and as far as the Claimant was concerned he thought he was doing the right thing by following the service complaint process. In the circumstances of the present case it was reasonable that the Claimant was unaware that he could bring a claim in the Employment Tribunal. When the Claimant transferred to 24 Commando his mental health significantly deteriorated and I accepted that he had a breakdown in March 2020 resulting in care from his doctor and a period of 6 months when he was unable to work.

78. The prejudice relied upon by the Respondent was that there has been a significant delay in bringing the claim and that memories might have faded. There was no evidence that relevant personnel had left or were uncontactable. It was significant that the initial service complaint was upheld and was documented. There should be records of the actions taken as a consequence. The Claimant set out his service complaints in detail and the Respondent should have been investigating them in line with the procedure. It was notable that by the time the claim was presented that a decision had not been taken as to whether the matters referred to were well founded. Therefore, it can be said that at best the response to the service complaints was slow. Even as late as May 2019 the decision as to admissibility of SCO712/17 had only been concluded. The length of time taken to resolve the internal complaints is a relevant factor to take into account.
79. It was accepted by the Respondent that the matters subject to the preliminary hearing could be referred to as background for the other parts of the claim.
80. The subject matters of SCO712/17 and SCO183/19 are interlinked and interrelated, the effect is that the claim was presented about 2 years out of time, which is a significant delay, however the internal process in relation to those matters had not been concluded at the time of presentation. The Claimant was following the process he was advised to follow and that was the only process he was aware of. The Claimant acted promptly as soon as he was aware that he could bring a claim in the Employment Tribunal.
81. The Respondent did not adduce any evidence of prejudice it would suffer if time was extended, other than a reliance on the possibility that memories might have faded. The Claimant's service complaints were not resolved by the time he presented the claim and that process had taken much longer than expected. In all the circumstances of this case it was just and equitable to extend time in relation to the last incidents referred to in SCO712/17 and SCO183/19. It should be noted that the decisions of Wg Cdr Saunders and Col Allen were disregarded for the purposes of determining when limitation expired, however if it should transpire that they were admissible service

complaints, on the basis of the above reasoning, it would be just and equitable to extend time in relation to them. It should be noted that this decision is without prejudice to the Respondent being able to argue that the earlier acts were not part of a continuing act or discriminatory state of affairs, however such a determination should be made after hearing all of the evidence at the final hearing.

Employment Judge J Bax

Date: 1 April 2022

Judgment sent to parties: 12 April 2022

FOR THE TRIBUNAL OFFICE