EMPLOYMENT TRIBUNALS

Claimant: **Mr Michael Greatorex**

Respondent: **Ministry of Defence**

Heard at: **East London Hearing Centre (by cvp)**

On: **12 April 2022**

Before: **Employment Judge Housego**

Representation

Claimant: In person

Respondent: John-Paul Waite, of Counsel

JUDGMENT

The claim is struck out for want of jurisdiction.

REASONS

The issues

1. The Claimant was a reservist with the Royal Navy between 11 July 2015 and 08 May 2021. He lodged this claim on 09 June 2021. The claim asserts that the Claimant was subjected to harassment by reason of gender reassignment. It also claims arrears of pay and other payments, but does not set out what these claims are.

2. Members of the Armed Forces may bring discrimination claims to the Employment Tribunal. However, S121 of the Equality Act 2010 first requires the complainant to bring a Service Complaint:

   "121 Armed forces cases

(1) Section 120(1)[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(b) the complaint has not been withdrawn."

3. The effect of this is that a claim must be struck out if there is no unwithdrawn service complaint.

4. The Respondent says that this *"gateway"* provision is not met by the Claimant and so the claim must be struck out for want of jurisdiction.

5. To this the Claimant responds that he made multiple service complaints about harassment, and this is too simplistic. He says that:

> *"The above premise is based on the assumption that:*
>
> *- The Respondent has handled the complaint lawfully, and that*
> *- It has been possible for a lawful admissibility decision to be made in relation to the complaint.*
> *- It can only be deemed a valid service complaint by the Respondent*
>
> *I must respectfully assert that these three conditions were either not met or else do not apply to the handling of what the Respondent refers to as "SCv2". As such, the reason why it has still not been considered for admissibility or else not accepted as being already considered for admissibility is the responsibility of the Respondent rather that my own."*

The Claimant asserts that the way his Service Complaints were handled was unlawful (in a variety of ways).

6. The Respondent replies that none of the grievances raised mentioned gender reassignment, and that S121 is simply phrased, and that the Claimant is not able to meet it, for that reason. It says that the one which did raise transgender issues was not sent to the correct commanding officer, and so is not a Service Complaint either. Accordingly, the Claimant cannot meet the requirements of S121 and the claim must be dismissed.

7. The Claimant says that the reason he was treated as he claims was his gender reassignment, and *"the matter"* of harassment was raised by him in a Service Complaint on 02 September 2019 (SC1).

8. The Respondent replies that any claim has to say what it is about, and *"the matter*" must be gender reassignment discrimination, and SC1 does not raise this.

[1] This is the subsection giving the Employment Tribunal jurisdiction to determine discrimination claims.

9. The Respondent's case is that the earlier complaints were not of transgender discrimination, so are not within S121, and that the document said to be the service complaint that did raise this as an issue is not a valid service complaint, because, they say, it was made to the wrong person – Regulation 3 sets out who is the *"nominated officer"*. This is the complainant's current, or after leaving service the most recent, commanding officer. As the Claimant was based at HMS King Alfred when that Service Complaint was raised, it should have been brought to that commanding officer, Cdr Andrew Robinson RN and it was not, being sent to Cdr Young.

10. The Claimant re-joins that he did not chose Cdr Young to handle the complaint – it was the Navy which decided that. If he wanted to amend his complaint, as he did, he said that he had no alternative but to send that to Cdr Young.

11. The Respondent drew attention to Molaudi v. Ministry of Defence (Jurisdictional Points) [2011] UKEAT 0463_10_1504, (on similar legislation) the headnote of which reads:

> *"*The Claimant sought to bring a claim for racial discrimination against the defendant relating to events which occurred while the Claimant was a serving soldier. He had previously made a complaint about the same matters to the military authorities, which was not brought in time and which was rejected.
>
> The Employment Tribunal held that (a) pursuant to section 75(9) of the **Race Relations Act 1976** as amended, a "*service complaint*" had to be brought to the military authorities before a claim could be brought in the Employment Tribunal; and (b) a complaint to the military authorities which was brought out of time and was rejected by the military authorities was not a valid "*service complaint*" and so the pre-condition for bringing a claim in front of the Employment Tribunal was not satisfied. There were adequate judicial procedures in this country "*available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them*" as specified in article 7 of the Directive.
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> The Claimant appealed on (b).
>
> **Held**: Dismissing the appeal
>
> (1) The term "*service complaint*" meant a complaint which could be considered substantively and that meant a complaint rejected by the military authorities brought out of time did not fall within that definition; and
>
> (2) The Racial Discrimination Directive 2000/43/EC did not require a different meaning to be given to the words "*service complaint*" so that it covered a complaint to the military authorities which was brought out of time."

12. At §26:

> "The second reason I consider that a "*service complaint*" must mean a complaint which has been accepted by the appropriate prescribed officer as being valid is that this meaning is consistent with the purpose of the provisions in requiring a complaint to the prescribed officer as a pre-requisite to making a complaint to the Tribunal. There is much authority to the effect that "*a certain amount of common sense [must be applied] in construing statutes*" (per Lord Goddard CJ in **Barnes v. Jarvis** [1953] 1WLR 649, 652)."

13. The making of Service Complaints is governed by Regulations 3-8 of the Armed Forces (Service Complaint) Regulations 2015. It is necessary to set them out in full:

> **"Procedure for making a service complaint**
>
> **4.**—(1) A service complaint is made by a complainant making a statement of complaint in writing to the specified officer.
>
> (2) The statement of complaint must state—
>
> (a) how the complainant thinks himself or herself wronged;
>
> (b) any allegation which the complainant wishes to make that the complainant's commanding officer or his or her immediate superior in the chain of command is the subject of the complaint or is implicated in any way in the matter, or matters, complained about;
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> (c) **whether any matter stated in accordance with sub-paragraph (a) involved discrimination [emphasis added]**, harassment, bullying, dishonest or biased behaviour, a failure by the Ministry of Defence to provide medical, dental or nursing care for which the Ministry of Defence was responsible or the improper exercise by a service policeman of statutory powers as a service policeman;
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> (d) if the complaint is not made within the period which applies under regulation 6(1), (4) or (5), the reason why the complaint was not made within that period;
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> (e) the redress sought; and
>
> (f) the date on which the statement of complaint is made.
>
> (3) The statement of complaint must also state one of the following –
>
> (a) the date on which, to the best of the complainant's recollection, the matter complained about occurred or probably occurred;
>
> (b) that the matter complained about occurred over a period, and the date on which, to the best of his or her recollection, that period ended or probably ended;
>
> (c) that the matter complained about is continuing to occur;
>
> (d) that the complainant is unable to recollect the date referred to in sub-paragraph (a) or (b).
>
> (4) A service complaint may only be made by one person, but other persons may make service complaints about the same or similar matters.
>
> (5) In this regulation, "discrimination" means discrimination or victimisation on the grounds of colour, race, ethnic or national origin, nationality, sex, gender reassignment, status as a married person or civil partner, religion, belief or sexual orientation, and less favourable treatment of the complainant as a part-time employee.

Action on receipt of a service complaint and admissibility

5.—(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.

Period for making a service complaint and power to stay

6.—(1) Subject to paragraphs (4) and (5), a person may not make a service complaint after three months beginning with the relevant day.

(2) Except in a case within paragraph (3), the "relevant day" means the day on which the matter the person wishes to complain about occurred or (if it occurred over a period of time) the last day on which it occurred.

(3) Where it appears to the specified officer that, before a service complaint about a matter is or would be considered, the person is or was expected or required to comply with another formal system for the consideration of that matter, the "relevant day" means the day on which it appears to the specified officer that the person exhausts or exhausted the process provided for under that other formal system.

(4) If a matter is or has been capable of being pursued as a claim under Chapter 3 of Part 9 of the Equality Act 2010(**1**), a service complaint may not be made about the matter after six months beginning with the day on which the matter complained about occurred or, where the matter occurred over a period of time, the final day of that period.

(5) If a matter is or has been capable of being pursued as a claim under Chapter 4 of Part 9 of the Equality Act 2010, a service complaint may not be made about the matter after the end of the qualifying period for a claim as determined in accordance with section 129 of that Act.

(6) A person may make a service complaint after the end of the period in whichever of paragraphs (1) and (4) applies to the complaint if, in all the circumstances, the specified officer considers it is just and equitable to allow this.

(7) Where a person makes a service complaint about a matter, and it appears to the specified officer that the person is expected or required to comply with another formal system for consideration of that matter, the specified officer may stay consideration of part or all of the complaint until the person has exhausted the process provided for under that other formal system.

Ombudsman's review of admissibility

7.—(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.

Application of these regulations where further matters raised by way of complaint

8. If the complainant raises an additional matter by way of complaint at any time after the specified officer has made a decision on the admissibility of a service complaint, that matter must be made the subject of, and dealt with as, a fresh service complaint."

14. It can be seen from these Regulations that there is a system of complaints for those in the Armed Forces and oversight of it by an independent Ombudsman[2]. If the complaint is about discrimination that system is, plainly, modelled on the statutory framework for everyone where complaints are brought to Employment Tribunals.

15. Apart from these jurisdictional points the Respondent says that the claim was filed out of time and that it would not be just and equitable to extend time. They say there is no jurisdiction to hear the other claims brought by the Claimant, Service Complaint or no.

The hearing

16. The Claimant provided a witness statement as did Trefor Martin, recently retired as Navy Service Complaints Secretary. There is no dispute of fact. It is a matter of what I decide upon hearing the submissions of each. There was a substantial bundle of documents and position papers from both Claimant and Respondent. The Claimant had some technical difficulty during the hearing, but I am satisfied that this did not place him at a disadvantage.

The facts

17. There were three Service Complaints filed:

    a) SC1 – statement of complaint dated 02 September 2019 – relating to the Officers' Joint Appraisal Report ("OJAR");

    b) SC2 – statement of complaint dated 19 January 2020 – relating to the result of an Admiralty Interview Board ("AIB") result; and

    c) SC3 – statement of complaint dated 24 April 2020 – relating to alleged bullying and prevention of career progression.

    While all of them refer to bullying or harassment, none of them refer to gender reassignment discrimination. Therefore, they do not meet the requirements necessary to be a gateway to Employment Tribunal proceedings.

18. On 13 October 2020 Capt A Cowan sent the Claimant an outcome letter to a Service Complaint of 24 April 2020 ref JPA 6208590. It refers to an evolution of the matters complained of, and set them out in 17 different heads of claim. He decided that matters 1-15 were not admissible, but that 16 and 17 were admissible. Those related to an assertion that the

[2] Service Complaints Ombudsman Armed Forces

Commanding Officer had not taken adequate, or any, action on receipt of an allegation of bullying made by the Claimant on 22 April 2020, and that it was wrong that he had not been promoted to Lieutenant RNR. Most of the other matters were said to be out of time. Number 14 was a matter that Capt Cowan said should have been sent to the Ombudsman (because it was about the administration of a Service Complaint). This does not bear on the issue of transgender discrimination.

19. On 31 March 2021 the Ombudsman decided that there had been maladministration (undue delay) in the handling of SC1, and directed that Cdr Young, currently commanding officer of HMS President, deal with SC1, which had correctly been submitted to Cdr Richmal Hardinge, then commanding officer of HMS President, where the Claimant had been based when it was submitted.

20. On 06 April 2021 the Claimant sent to Cdr Young another document, entitled "Annex F", which the Claimant said was a clarification and revision of SC1.

21. On 26 April 2021 Cdr Young wrote to the Claimant and said that this was a new complaint, of transgender discrimination, and should be sent to Cdr Robinson at HMS King Alfred, because the Claimant had since moved units and that was the commanding officer to whom the new complaint should be made. He decided the complaints based on SC1.

22. The Claimant did not want to do this. This was because it might well be said that this was now out of time and so not considered admissible. The Claimant felt that while SC1 was about what happened, the later document was about why, as time had led to understanding of the motivation of those about whom complaint was made. The Claimant felt this was further manoeuvring by Navy Legal to stop the complaint from being adjudicated upon.

23. The outcome letter dated 26 April 2021 from Cdr Young (which dealt with SC1) was appealed by the Claimant. He did not think it fair that Cdr Young had used a complaint that was now not the complaint he was bringing.

24. On 13 December 2021 the Admiralty Board made its decision on SC1 of 02 September 2019. It ordered that Annex F be sent to HMS King Alfred for an admissibility decision:

> *"42. As we have stated above, in our capacity as the Admiralty Board of the Defence Council we consider it to be highly undesirable that Mr Greatorex has made allegations which are yet to be considered for admissibility. Until those matters are considered by a SO in accordance with the relevant statutory provisions, the RN cannot provide a proper response to them within the SC process. Consequently, we make the following directions:*
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> *a. Following publication of this decision, a member of the RN SC Casework team is to make contact with Mr Greatorex and seek his consent to pass his 6 Apr 21 Annex F to CO HMS KING ALFRED for an admissibility decision.*

b. On receipt of the 6 Apr 21 Annex F, CO HMS KING ALFRED is to make suitable arrangements to discuss its contents with Mr Greatorex in order to understand fully the background of the complaint in advance of making an admissibility decision."

If that results in a decision that the complaint is admissible then (subject to time points) the Claimant will be able to make a further claim based on Annex F. This is a procedural decision not a substantive one.

25. On 17 January 2022 the Claimant again complained to the Ombudsman, saying that he wanted the document sent on 06 April 2021 to be the admitted service complaint. He said that it was the Navy which had decided to send SC1 to Cdr Young, who had never been his commanding officer. He said they should have chosen either Cdr Hardinge, who was his commanding officer at the time, or Cdr Robertson, at HMS King Alfred. He said that the decision was wrong because it was based on SC1 of 02 September 2019 and not *"the later draft dated 06 April 2021".* He said that revising something did not make it a new complaint. He said that the DB should have dealt with the 06 April 2021 document. If Annex F had been sent to the wrong person (and if it was a new complaint he accepted that it should have gone to the commanding officer at HMS King Alfred) that was only because the Ombudsman had directed Cdr Young to deal with it.

26. The Ombudsman responded on 25 January 2022 to say that there would be an investigation into the substance – the merits – of the Service Complaint. It did not identify which complaint. It is a standard letter.

27. The Claimant says that as there was a very great deal in his application to them about the document of 06 April 2021 – in fact the whole point of the complaint was that Cdr Young and the DB had not considered that document – he says that the Ombudsman must impliedly have accepted that the document of 06 April 2021 was an admissible complaint. That is because the Ombudsman had said that the merits of the complaint would he addressed, and the Ombudsman only does that when the Service Complaint has been found to be admissible. The Respondent accepts that last premise is correct.

Conclusions

28. No service complaint about discrimination was put in before 06 April 2021. Therefore, none of the other documents can meet the gateway provision of S121.

29. As a matter of fact, Cdr Young decided that the document of 06 April 2021 was a new Service Complaint and so should have been sent to the commanding officer of HMS King Alfred. For that reason, although it clearly refers to transgender discrimination it still did not count as an admissible Service Complaint by the Claimant, and so the gateway provision of S121 is not met by that complaint either. The DB also did not consider it to be under consideration: they felt the present situation was unsatisfactory and directed the commanding officer of HMS King Alfred consider it.

30. The Ombudsman did not see Annex F before sending out the letter of 31 March 2021, as it was sent to Cdr Young on 06 April 2021. It follows that the Ombudsman could not have decided that Annex F was a Service Complaint.

31. If the Ombudsman later said Annex F was an admissible decision it would not matter what Cdr Young decided, because the Ombudsman hears complaints, and decides them, about officers carrying out the role being undertaken by Cdr Young.

32. However, the letter from the Ombudsman acknowledging the Claimant's January 2022 complaint is a standard acknowledgment and notification that the matter complained of will be investigated as there is a public interest in so doing. There are other aspects of the letter from Cdr Young of 26 April 2021 and the DB decision where the Ombudsman might investigate the merits. It is not that the letter from the Ombudsman states that the merits of Annex F are to be evaluated. That only occurs after a Service Complaint has been decided. The Claimant's complaint it that it has not. (I record that the Claimant was not dissatisfied by what the DB said, rather that they had not taken on the allegations set out in Annex F.) It is the merits of the claim that the DB should have looked at what he put in Annex F that the Ombudsman is, it appears, going to be investigating. If the Ombudsman finds that they should have done, then someone will doubtless be tasked with doing so. Of course, that is exactly what the DB has already done. That would not convert Annex F into a Service Complaint, but more importantly, even of it did that would only be if and when the Ombudsman decided that Annex F should have been dealt with by Cdr Young or by the DB. For Mr Greatorex to succeed it must be shown that Annex F is already a Service Complaint, not that the Ombudsman is investigating whether it should have been.

33. In specific terms, when the text of SC1 and of Annex F are compared[3] they are very different documents. It is not a case of taking SC1 and adding an extra sentence or two to each allegation to set out that the motivation is alleged to be transgender discrimination. If SC1 had been a statement of claim, and Annex F an application to amend, it is hard to see how such an application would have succeeded[4]. This does not lend support to the Claimant's assertion that this was to attribute motive to already pleaded detriments. It reads as a wholly different claim.

34. I was not addresses on the out of time issue. The time limit in service cases is six months, not three (to give time for a Service Complaint to be determined). The test for extending time is whether it is just and equitable to do so. Given that there have been, on any reading, considerable difficulties with the handling of these matters by the Respondent, it is likely that I would have found it just and equitable to extend time.

[3] Pages 48 and 115 mark the start of each document

[4] Applying the principles in Selkent Bus Co Ltd (t/a Stagecoach Selkent) v Moore [1996] UKEAT 151_96_0205, Galilee v The Commissioner of Police of The Metropolis [2017] UKEAT 0207_16_221 and Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.

35. The Claimant is claiming *"arrears of pay"* and *"other payments"*. No further detail or information was provided in respect of this claim. The Respondent's written submission sets the matter out accurately:

> *"20. Section 191 of the ERA states that the provisions contained within parts I to III and part X of the ERA have effect in relation to persons in Crown employment, subject to sections 192 and 193 ERA. As section 31 of the Trade Union Reform and Employment Rights Act 1993 has still to come into force, the version of section 192 ERA currently in force is that contained in schedule 2 part 1 paragraph 16. Accordingly, section 191 does not apply to members of the Armed Forces. The Employment Tribunal does not therefore have jurisdiction to consider any complaints of unfair dismissal or unlawful deductions from wages.*
>
> *21. The jurisdiction of the Employment Tribunal to consider claims for breach of contract is limited to claims by employees for damages for breach of a contract of employment or other contract connected with employment that arises out of or is outstanding on the termination of the employee's employment. The Claimant was not an employee but a reservist, subject to Terms and Conditions of Service rather than an employment contract, and accordingly the Tribunal has no jurisdiction to consider his complaint."*

36. The secondary argument is also reason why these two claims must be dismissed:

> *"22. Further, or in the alternative, the jurisdiction of the Tribunal to consider breach of contract claims was formally extended by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ("the Order"), at the time pursuant to section 131 of the Employment Protection (Consolidation) Act 1978 ("EPCA"). The EPCA was consolidated and re-enacted by the Employment Rights Act 1996 and the Employment Tribunals Act 1996 ("ETA"). The relevant enabling provisions are now to be found in section 3 ETA. As a result of Schedule 2 Pt 1 ETA, any subordinate legislation, including the Order, has effect as if made under the ETA.*
>
> *23. By virtue of section 38(4) ETA (see schedule 2 part II para 9 for the provisions currently in force), the ETA does not apply to members of HM Armed Forces. Consequently the Order cannot apply to members of HM Armed Forces. As a result the Tribunal has no jurisdiction to hear a complaint by the Claimant of breach of contract. The Claimant's apparent claims for breach of contract should therefore be struck out for want of jurisdiction."*

37. When this was explained to the Claimant, he graciously accepted that there was no jurisdiction to hear such claims and asked that they be dismissed on withdrawal.

38. It follows that I am obliged to dismiss all the claims for want of jurisdiction.

Employment Judge Housego

12 April 2022