EMPLOYMENT TRIBUNALS

Claimant: **Michael Greatorex**

Respondent: **Ministry of Defence**

Heard at: **East London Hearing Centre**

On: **13 June 2022**

Before: **Employment Judge Housego**

Representation

Claimant: Written Application
Respondent: Written Response

JUDGMENT ON RECONSIDERATION

The judgment of the Tribunal is that:

1. **The judgment of 12 April 2022 be set aside.**

2. **The claim be stayed pending the outcome of the investigation and report of SCOAF.**

3. **The claim then be relisted to consider:**

    (i) **striking out the claim for the jurisdictional reason that no service complaint was raised;**

    (ii) **and if not whether it is just and equitable for the claim to be allowed to proceed, it being filed out of time, and if so;**

    (iii) **for case management orders to be made.**

REASONS

1. In my judgment of 12 April 2022 (§20) I found that on 06 April 2021 the Claimant submitted to the Navy a document entitled Annex F, said to be a revision of his earlier complaint, SC1.

2. I found (§24) that if that complaint is found to be a new complaint, then the Claimant will be able to bring a new case to the Employment Tribunal, because then he will have brought a service complaint.

3. At §29 I noted that it was accepted that the document of 06 April 2021 was a service complaint, but that it was not an admissible service complaint because it was not submitted to the correct officer.

4. At §24 I noted that if the submission of Annex F to HMS King Alfred resulted in it being considered an admissible complaint, then a new claim could (subject to out of time points) be submitted.

5. At §33 I noted that Annex F is was a wholly new document, not an amendment of, or elaboration upon, a previous complaint, but that if an issue been raised that it was out of time it was likely that I would have considered it just and equitable to extend time (because much of the time was because of issues with the way the Respondent dealt with matters).

6. The Claimant wrote to ask for a reconsideration of the judgment, and the Respondent has set out its objection to that request:

   “On 30 Apr 2022, at 22:55, Michael Greatorex wrote:

   Good morning ET,
   Please find attached my letter to EJ Housego requesting reconsideration of his judgement. Please also find attached further new evidence in support of my case that I think is very relevant.
   The respondent is copied in to this email.
   Kind regards
   Michael”

   His letter stated:

   “3204690/2021
   30 April 2022
   To Employment Judge Housego,

Thank you for hearing my claim brought to the employment tribunal in relation to the discriminatory harassment I experienced during my time employed within the Royal Navy.

I understand that on completion of the hearing you struck out my claim due to concerns you did not have jurisdiction to hear it in full. This was despite you agreeing that if the Ombudsman had agreed to investigate the substance of my revised complaint dated 6th April 2021, which clearly alleged discrimination in relation to gender reassignment, this demonstrated her acceptance of it as the valid Service Complaint.

The respondent alleged that this could not be proven from the Ombudsman's letter in isolation and you agreed that it was possible that the letter was a standard text that may not have necessarily referred to the complaint dated 6th April 2021, which alleged discrimination in relation to gender reassignment. I disagreed with this premise and argued that should the Ombudsman have viewed the complaint dated 6th April 2021 as distinct from the text dated 2 Sep 2019, she would have rejected my request to investigate the substance of the complaint I sent to her (which was the Service complaint dated 6th April 2021, not it's earlier draft dated 2 Sep 2019). She would have rejected it on the grounds that it was not a valid Service complaint and therefore she had no powers to investigate its substance.

As such, I find there is no ambiguity in her response in which she received my complaint dated 6th April 2021 and accepted it for investigation into its substance.

During the hearing, your position was that should I be able to provide further confirmation from the Ombudsman that it is specifically the complaint dated 6th April 2021 that she will investigate, that you would overturn your decision to strike out my claim. I am now able to provide this confirmation. Please find email chain attached.

I wrote to Athikur Chowdhury, Investigator Support, Service Complaints Ombudsman for the Armed Forces (SCOAF), on 12 April 2022, requesting:

"Could you write me a short note confirming that the SCOAF intends to investigate the substance of my Service Complaint dated 6 April 21 and the maladministration I also allege? This is the Annex F that I sent her to investigate.

"I understand from her letter accepting my application into both that this is her intention however I would be grateful if you could confirm."

On 21st April 2022 I received response from Michelle Yore, Investigator, SCOAF, reading: "**Yes, I can confirm that after an initial triage we have decided to investigate your complaint."** [emphasis added]

As such, with respect I am confident that the Ombudsman has confirmed with certainty that by deciding to investigate my complaint dated 6th April, she has demonstrated that she considers it a valid Service Complaint whereby I am hoping you may now also accept jurisdiction to hear my claim in full.

I would like you to reconsider the facts as laid out in para 17 of your judgement, if you feel able: SC1 was revised in April 2021 and does include details of intent behind the matters raised. These details describe in depth why I believe the writing of the OJAR and surrounding related negative behaviours during the same period were actions that were committed out of prejudice to me in relation to gender reassignment.

The revisions were presented to the SO who then made an admissibility decision. Irrespective of his intentions and his lack of jurisdiction to consider any part of my complaint due to his appointment (which I allege was unlawful as per the Armed Forces Service Complaints Legislation 2015 as he was not my CO at the time), his decision was that my complaint was admissible in its entirety. Given that the only complaint that was presented to him was the one dated 6th April 2021, this decision can only be interpreted to apply to this Service Complaint. This is why the Ombudsman has been able to accept it for investigation into its substance. Therefore I do believe that the requirements necessary have been met to be a gateway to Employment Tribunal proceedings.

The Ombudsman has also decided to investigate maladministration in relation to the handling of the complaint. This investigation will be separate from the investigation into substance. She does not accept all applications to investigate maladministration. Rather, she accepts those applications where it would seem most likely that maladministration has occurred. To me this further demonstrates a high probability that the Navy mishandled the complaint, and in doing so also attempted to convince you to decline jurisdiction.

The Navy have not denied the fact that the appointment of Cdr Young as SO was unlawful, neither have they conceded that their interpretation of Cdr Youngs admissibility letter causes them to admit unlawful handling of the complaint on many counts:

1. An SO must be the complainants CO

2. The SO must consider the complaint actually submitted to them for admissibility

3. It is the complainant who writes the complaint and the SO must not replace it with their own words that they know do not reflect the scope of the complaint raised in the knowledge also that the complainant has rejected them

I have concerns that there is a misunderstanding of the information I provided in my application to the Ombudsman to investigate substance and maladministration that is referenced in para 25 of your judgement:

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.

I wrote words to this effect as a request for redress should maladministration be found to have occurred. This was part of my application to investigate

maladministration rather than a further complaint. One is not able to complain to the Ombudsman.

In this section of the form, I could have instead requested further compensation and not said anything about the complaint itself. But all I did instead was request that the complaint of 6 April 2021 be recognised as the Service complaint. I see now this was a foolish thing to request as redress as it is essentially asking for no redress in relation to the maladministration in isolation. (But as I have said before, I am not a solicitor and I am not well versed in legal understanding, hence writing such nonsense. I was also greatly distressed writing that application as I was having to relive my experiences in detail). Either way, this redress has been granted already by the Ombudsman because she has decided to investigate my complaint dated 6th April 2021 which she has since confirmed. This section has been taken out of context and may have distorted the meaning of the Ombudsman's decision letter on 25th January 2022, which can only refer to the complaint dated 6th April 2021.

The Ombudsman has further confirmed that she will investigate the substance of my complaint dated 6th April 2021.

Therefore, I would be grateful if you could also reconsider your conclusion in that a Service complaint about discrimination was put in on 6 April 2021 and was presented to the nominated SO to consider for admissibility and it is this complaint that I believe meets the gateway provision of S121 on the basis that the Ombudsman deems it a valid Service Complaint, thus allowing her to investigate its merits.

The Ombudsman did see the earlier draft of the complaint dated 2 Sep 2019 before sending out her letter of 31 March 2021. It is a requirement for investigating undue delay that the complaint that is delayed be sent to the ombudsman for reference. The Ombudsman was since sent the revised version of this complaint by me in my application to investigate its substance and maladministration in its handling. I did not send her the original because it was no longer current and it was not what I ultimately presented to the SO to decide on admissibility. She has accepted the April 2021 submission as a version of SC1 that was deemed an admissible Service Complaint.

In investigating the substance of my complaint, the Ombudsman will not examine the letter from Cdr Young as this is not part of the complaint. It is the merits if the complaint she will be investigating. If she examines Cdr Youngs letter, then this will be within the scope of identifying maladministration, an entirely separate part of her investigation which will look only at the Navy's handling of the complaint.

I was very dissatisfied with the DBs decision which was why I applied to the Ombudsman to investigate the substance of the complaint and such alleged maladministration. Something she has agreed to do on both counts.

If the Ombudsman finds that the Navy should have referenced the later draft of my complaint dated 6th April 2021 as a form of proven maladministration, she will not then task the Navy with investigating its substance.

Instead this investigation into substance will be carried out by the Ombudsman and this is what she has agreed to do from the onset.

Annex F 6th April 2021 is already a Service Complaint. It was a revision to SC1, dated 6th April 2021. It was presented to the nominated SO for admissibility upon his invitation to do such. The Ombudsman has interpreted the subsequent admissibility decision to refer to the complaint dated 6th April 2021 because otherwise the admissibility decision is unlawful. The SC process within the Navy has completed, I have since asked the Ombudsman to investigate the substance of my complaint dated 6th April 2021 and she has agreed to do this. She is acting within her powers to agree to such an investigation which proves that the complaint dated 6th April 2021 is admissible, completed and in the public interest for the ombudsman to investigate.

Thank you for reading. I hope this further evidence and enhanced clarification is enough to enable you to review your initial decision and hopefully now accept your jurisdiction to hear my claim in full.

Kind regards,

Michael Greatorex"

And

"**From:** V. Michael Greatorex
Sent: 11 May 2022 17:07
To: Nicholls, Andrea (TS, East London)
Cc: Sarah Bains
Subject: Re: 3204690/2021 M M Greatorex v Ministry of Defence
Good afternoon ET,
I would now also like to submit further evidence in support of my case. Please find letter attached below.
As I would like to invite the judge to consider, he may see conclusively that I have submitted a valid service complaint in relation to discriminatory harrassment (obviously in relation to gender reassignment) and the SCOAF will be investigating its substance. This confirms that the criteria has been met in order for him to accept his jurisdiction.
I have copied in the respondent.
Many thanks
Michael

7. On 23 May 2022 the Respondent's solicitor wrote to the Tribunal and to the Claimant:

"**From:** Sarah Bains
Sent: 23 May 2022 12:34
To: EastLondonET
Cc: Greatorex, Michael
Subject: RE: 3204690/2021 -Greatorex v Ministry of Defence
Dear Employment Tribunal

I write on behalf of the Respondent and further to the Claimant's recent email below regarding his application for reconsideration.
On 30 April 2022, the Claimant sought reconsideration of EJ Housego's judgment dated 12 April 2022. In the 30 April 2022 letter from the Claimant he refers to being confident that the Ombudsman has confirmed with certainty that by deciding to investigate his complaint dated 6 April 2022, it considers it to be a valid Service Complaint. The Claimant goes on to state that the Ombudsman has also decided to investigate maladministration in relation to the handling of the complaint. The Respondent's position is that the email chain dated 21 April 2022, which the Claimant seeks to rely on, is not a definitive confirmation of the same. In fact, **the email dated 21 April 2022 from Michelle Yore, states that an investigator will be allocated and the Claimant contacted about the scope of the investigation, as the terms of reference for the investigation have not yet been determined**. [emphasis added]
As part of the Claimant's further evidence provided to the Tribunal on 11 May 2022, the 11 May 2022 Ombudsman's letter which the Claimant also seeks to rely on, does not set out the terms of reference for any investigation and quite clearly also states that the investigator will commence a thorough review of the available information and send the Claimant the terms of reference outlining the scope of the investigation within 10 days.
The Respondent therefore submits that the evidence thus far provided by the Claimant pre-empts a decision by the Ombudsman. The Respondent opposes the Claimant's application for reconsideration on this basis.
Kind regards
Sarah Bains
Lawyer, Employment Team E3
Employment Group, Government Legal Department

8. On 24 May 2022 the Claimant wrote to the Tribunal and to the Respondent:

"**From:** Greatorex, Michael
Sent: 24 May 2022 11:43
To: Sarah Bains; EastLondonET
Subject: RE: 3204690/2021 -Greatorex v Ministry of Defence
Dear Employment Tribunal,
I acknowledge the respondents points as articulated below and am able to provide further update:
I now agree with the Respondent that the two pieces of evidence I have submitted so far should not be taken as confirmation of the SCOAFs position, whatever it may be.
I have since received the Terms of Reference and (very frustratingly to all involved) they are worded extremely ambiguously. From the ToRs alone, it is not clear whether the SCOAF considers the Annex F dated 6 Apr 21 which clearly alleges discrimination to be the admitted service complaint and I believe this has been done purposefully in order to avoid prejudging the SCOAFs investigation into maladministration.
I have sought further clarification from Ms Esther Martins, Senior Investigator to the SCOAF, who is my assigned investigator. She has confirmed that:

> "I confirm my singular use of the word "complaint" is to explain that we are looking into the substance of the Service Complaint which has had a final determination. Your concerns relating to the way in which the Annex F of 6 April 2021 will be considered as explained in the terms of reference. <u>Please note, the Ombudsman has not taken a view as to whether or not it forms one complaint</u>.
> "

As such**, I will concede that the SCOAF has not yet have committed herself to considering the Annex F dated 6 Apr 21 as the admissible service complaint** (as I previously believed). HOWEVER, she has also not yet committed herself to excluding content within the Annex F dated 6 Apr 21 from what she considers the admissible service complaint. So currently, it's a maybe rather than a yes or a no.
My understanding currently is that the SCOAF needs to now conduct her investigation into maladministration so that she can either support or not support my argument that I did in fact raise a service complaint relating to discriminatory harassment that was subsequently admitted.
Therefore, could I make a specific request to the judge that he allows me time for the SCOAFs investigation to be completed before reconsidering his decision? I feel this is the only way that is fair to both sides for the decision to ultimately be based off certainty rather than interpretation of ambiguous letters and emails. I hope the respondent would agree.
Kind regards,
Michael

9. On 08 June 2022 the Respondent's solicitor wrote:

"**From:** Sarah Bains <Sarah.Bains@governmentlegal.gov.uk>
Sent: 08 June 2022 17:15
To: Greatorex, Michael C2 (People-DS Sec-Current Med Pol) <Michael.Greatorex101@mod.gov.uk>; EastLondonET <eastlondon@Justice.gov.uk>
Subject: RE: 3204690/2021 -Greatorex v Ministry of Defence - FAO: Employment Judge Housego
FAO: Employment Judge Housego
I write on behalf of the Respondent and further to the Claimant's 24 May 2022 email below.
The Respondent wishes to formally object to the Claimant's requests that SCOAF investigation be completed before a decision is made on the Claimant's 30 April 2022 application for a review of the judgment dated 12 April 2022.
The Claimant has no new evidence to show that the 6 April 2021 Annex F is already considered a Service Complaint but **rather that the Ombudsman is investigating whether it should have been, which for the avoidance of doubt is not consistent with wording of the Ombudsman's Terms of Reference**. (copy attached)
Paragraph 5 states '*As your Annex F of 6 April 2021 has not been finally determined, my investigation can't take into account any of the additional issues which were raised in your Annex F of 6 April 2021. However, as part of my investigation into maladministration, I will look at the way in which the Service handled the Annex F of 6 April 2021*.'
The Respondent submits the above paragraph confirms that the **Ombudsman is not seeking to investigate the substance of the Claimant's 6 April 2021** Annex F, instead they are investigation the way in which it was handled by the Service.
Any decision made by the Ombudsman in relation to an investigation of a service complaint, must take into account section 340H (1) (a – d) of the Armed Forces Act 2006, **which precludes the Ombudsman from investigating a service complaint that has not been finally determined** in the first instance, meaning an admissibility decision made on the relevant Annex F."

A letter was attached to that email, dated 20 May 2022, to the Claimant, from SCOAF. It stated that the matters raised in the document of 06 April 2021 had not been finally determined. SCOAF would look into how that was handled. The

letter makes clear that SCOAF will make recommendations in respect of any failings it finds, but that they are not binding. The letter does not give any indication as to how the matters raised in the 06 April 2021 document are to be addressed.

10. The Claimant, also on 08 June 2022 at 17:26

Greatorex, Michael
To:

- Sarah Bains;
- EastLondonET <eastlondon@Justice.gov.uk>

Wed 08/06/2022 17:26
Thanks Sarah,
I appreciate what you're saying but on completion of the SCOAFs investigation, should she find that maladministration has occurred in relation to the handling of my later draft dated 6 Apr 21, she could very well deem it an admissible service complaint at that point and may then either instruct the RN to progress it or potentially instead investigate the substance of it herself, seeing as the RN considers the internal process complete and therefore 'finally determined' already.
As such, I maintain that it is reasonable for me to request that ET Judge Housego awaits the outcome of the SCOAF's investigation before reconsidering his decision. My hope is that he is in agreement that my request to postpone his decision on these grounds is well founded.
Kind regards,
Michael"

11. The relevant procedural rules are in Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013. Those Rules are as follows:

RECONSIDERATION OF JUDGMENTS

Principles

70. *A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.*

Application

71. *Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.*

Process
72.—*(1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.*

(2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

(3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

Reconsideration by the Tribunal on its own initiative
73. *Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).*

12. From this it can be seen that:

    12.1. The document of 06 April 2021 is the document said by the Claimant to be the service complaint necessary for him to be able to bring this claim.

    12.2. There has been no final determination of the issues raised in that document.

    12.3. For that reason SCOAF will not investigate it.

12.4. Neither SCOAF nor any part of the Respondent indicate how a final determination is to be reached on that document, but the necessary implication is that SCOAF consider that to be necessary.

12.5. SCOAF do not say that it is not a service complaint and so will not be investigated.

12.6. SCOAF will investigate whether the Respondent handled the Claimant's complaints appropriately, or not.

12.7. That will necessarily involve saying whether or not the 06 April 2021 document was, or was not, a valid Service Complaint.

13. While I have the authority to make the decision as to what is, or what is not, a valid service complaint, it seems to me much better for the Ombudsman overseeing service complaints to decide that. The Claimant wants it so, and the Respondent cannot credibly oppose a decision to await a decision from the Ombudsman whose entire raison d'étre is to oversee such matters.

14. This may appear to lengthen proceedings, because at present the claim is struck out, but I consider the Claimant to have an arguable case that the decision I made that it was not a Service Complaint is legally unsound as (he says) I should have waited until the Ombudsman gives judgment on that issue. It would not be just for the claim to be struck out on the basis that it was not a Service Complaint, and then for SCOAF to conclude that it was, and the decision of the Respondent that it was not to be maladministration (which is part of the remit of their role, as I understand it). This is a possible outcome of the referral to SCOAF. The Claimant may decide to appeal the decision to the EAT, and so there may not be any saving in time or cost in any event.

15. There has been extensive correspondence between the parties, copied to the Tribunal. Neither has requested an oral hearing. I have not concluded that there is no reasonable prospect of the judgment being varied or set aside, and so Rule 72(1) sets out a requirement for the Tribunal to set a time limit for final observations.

16. I conclude that a hearing is not necessary in the interests of justice, and that both parties have now said all they wish to say, and (understandably) I am pressed to make my decision on the application. There is, therefore no need for a time limit for further submissions.

17. I set aside the judgment I gave, and substitute for it a judgment that the claim be stayed until SCOAF have reported on the Claimant's grievances and then be relisted for a further preliminary hearing to consider (i) striking out the claim for the jurisdictional reason that no service complaint was

raised, (ii) and if not whether it is just and equitable for the claim to be allowed to proceed, it being filed out of time, and if so (iii) for case management orders to be made.

18. If the Respondent has further points it wished to raise they may, of course, apply for this judgment to be reconsidered, setting out any additional reasons why they say the matter should be regarded as concluded in the way set out in the original judgment.

Employment Judge Housego
Dated: 14 June 2022