EMPLOYMENT TRIBUNALS

Heard at: Southampton (by video) **On:** 10 August 2022

Claimant: Mr Antonio Jardim

Respondent: Ministry of Defence

Before: Employment Judge E Fowell

Representation:

Claimant Keir Hirst, Solicitor, Wace Morgan Solicitors

Respondent Laura Robinson of counsel, for the Government Legal Department

JUDGMENT ON A PRELIMINARY ISSUE

1. The Tribunal has no jurisdiction to consider any claim made by the claimant unless contained in a valid service complaint.
2. For these purposes, the complaints raised by the claimant about events up to an including 16 June 2020 (and which were contained within the complaint labelled "HoC1") were rejected by the respondent and so the Tribunal has no jurisdiction to consider them.
3. The claimant's remaining claims, as amended at this hearing, will proceed to a hearing on **13 March 2023**

REASONS

4. These written reasons are provided at the request of the respondent following oral reasons given earlier today.
5. Mr Jardim join the Royal Navy in 2019 as a Weapons Engineering Officer. After completing his initial officer training and joining the submarine service he was assigned for a further of training on board HMS Vanguard. HMS Vanguard carries nuclear missiles as part of the UK's nuclear deterrent. Mr Jardim's case is that as a Christian he is opposed to nuclear weapons, and that when he made his views known shortly after his appointment he was removed from the boat (as submarines

are styled in the Royal Navy), had his security clearance cancelled and then spent about a year with shore-based employment before deciding to leave the Service. Since he was still within a period of training, and since the Navy has acronyms for most events, this was known as a Voluntary Withdrawal from Training (VWFT).

6. This preliminary hearing concerns both time limits and the additional procedural requirements which face members of the armed services who wish to bring a claim of discrimination in the Employment Tribunals.

7. Section120(1) Equality Act 2010 states that the tribunal does not have jurisdiction unless the complainant:

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

   b) the complaint has not been withdrawn.

8. This is therefore an extra gateway through which Mr Jardim has to pass. It is not necessary to go into the detail of this service complaints procedure but it involves a decision by a responsible officer coupled with the right of appeal to the Service Complaints Ombudsman, which is an independent office.

9. The respondent's position is that where the responsible officer has rejected a complaint on time limit grounds it is deemed to have been withdrawn, relying on the Employment Appeal Tribunal decision in **Molaudi v Ministry of Defence** 2011 ICR D19. That remains a binding authority and the claimant did not seek to go behind it. Hence the starting point is to ask whether there has been a valid service complaint in relation to the matter.

10. Given this additional requirement, service personnel are given an extra three months in which to lodge tribunal proceedings. Section 123 Equality Act 2010 provides that in the case of proceedings under section 121 (Armed forces cases) the normal period is extended to six months, or "such other period as the employment tribunal thinks just and equitable."

11. That is the relevant framework for assessing the various allegations made by Mr Jardim, or Sub-Lieutenant Jardim as he then was. In each case it is necessary to consider:

    a) whether a particular matter was raised within a service complaint,

    b) whether that complaint was accepted as such by the RN, and

    c) if so, whether it was then presented to the Tribunal in time.

12. Those considerations are also relevant to the application made on behalf of the claimant on 4 February 2022 to amend his claim.

13. In considering the complaints presented in this case, no evidence was called on either side and the hearing proceeded on the basis of submissions. Both sides were expertly represented and provided skeleton arguments in advance of the hearing together with a bundle of about 280 pages, much of it simply providing background documentation.

14. Before turning to the factual allegations in question it is necessary to say a little more about the internal process followed on this occasion. Sub-Lieutenant Jardim submitted his Service Complaint using the prescribed form on 21 April 2021. That form was accompanied by a detailed Chronology. There were then further discussions between him and an appointed staff officer which resulted in the complaint being distilled into two broad Heads of Complaint, labelled HoC1 and HoC2.

15. HoC1 concerned the way he was treated after he announced his concerns about nuclear weapons. HoC2 concerned the removal of his security clearance in November 2020. That security clearance was restored in January 2021 subject to a proviso that he could not apply for Developed Vetting (DV) for another further two years. DV is a particular degree of vetting, required for any personnel serving on a nuclear-armed submarine (or SSBN to give it the appropriate NATO designation).

16. In due course all of his complaints were rejected as inadmissible on 14 July 2021 (pages 139 - 141). HoC1 was considered to be out of time in its entirety and HoC2 was rejected because complaints about security clearance were considered to be outside the scope of the service complaints procedure.

17. Sub-Lieutenant Jardim then referred the matter to the Ombudsman who issued a decision on 31 August 2021 (pages 142-152) agreeing that HoC1 was out of time but overturning the decision in respect of HoC2. An investigation then took place in respect of the matters covered by HoC2, resulting in a decision – on 8 August 2022. That has not resolved matters but the key question for today's purposes is whether or not any of the allegations he wishes to pursue were included within the scope of HoC2.

18. Following exchange of skeleton arguments there is in fact a good deal of agreement between the parties. Ms Robinson's skeleton argument has helpfully itemised the factual allegations in the claim form, and the further points set out in the amended details of claim. With some simplification of the numbering and content, the points set out in the claim form are that:

    a) on 11 May 2018 (in his joining interview) there were no questions asked relating to nuclear weapons

    b) nor was there any mention of a change in the Return of Service requirement

    c) during Initial Officer Training he was told it was not possible to serve on SSBNs as a dual national as he could not get DV clearance

    d) in September / October 2019 he was told he would need DV clearance and would have to surrender his Portuguese nationality

    e) he submitted a preference pro-forma to his Career Manager and was told not to worry about security clearance as he would not need to serve on SSBNs

    f) on 24 January 2020 he was selected for service on SSBNs;

g) on 6th February 2020 he made the Royal Navy aware that due to his Christian beliefs he was against being personally involved with the operational deployment of nuclear weapons

h) as a result, he earned the nickname “Trigger” amongst his peers, reflecting his reluctance to “pull the trigger”.

19. The claimant accepts that all of those allegations (labelled 9.1 to 9.9 by Ms Robinson) were raised in HoC1, were rejected as out of time and so may not now be relied on. They are therefore merely background matters.

20. The next allegations are these, i.e. that:

a) on 2 June 2020, on the Trident Officers General Course, having told the course officer about his concerns, he was removed from the course and told to wait in his cabin,

b) that for the next two weeks he had interviews and phone calls and

c) he was told not to return to the boat, and had his name was written in the Quarter Masters book stating that he was not to be let on board.

21. Those issues are labelled by Ms Robinson as 9.9 and 9.10, with 9.10 embracing the last two points about being interviewed and not being allowed to return to the boat.

22. She submits that (a) and (b) were mentioned in the service complaint (page 124). Hence they formed part of HoC1 and so cannot be pursued. As to (c), this was not even mentioned in the complaint, and so does not get over that first hurdle.

23. There are also some factual allegations (9.11 to 9.13) which the respondent accepts *were* raised within HoC2 and so are within the tribunal’s jurisdiction, namely that:

a) on 30 November 2020 his Security Check (SC) clearance was suspended and his ID removed

b) on 15 January 2021 his SC clearance was restored but he was prevented from applying for DV clearance for 2 years, and

c) the delay in the Security Clearance process.

24. The claimant’s position is that the disputed matter about not being allowed to return on board was raised within HoC2, or at least that they were considered in that aspect or that the respondent had a chance to consider them. My reading of the two heads of claim however is that they are quite separate. It is clear that the issue of security clearance arose from the same incident on 2 June 2020, when he told Lt Powney about his views on nuclear weapons, but that does not mean that his concerns on that issue were included in HoC2 or that being confined to his cabin, interviewed and excluded from the boat fell within the ambit of that complaint.

25. The claimant submits that a broad interpretation should be given to the question of what is a relevant matter for these purposes and relies in particular on a first

instance decision of Employment Judge McNeill QC in a case on similar facts heard on one March 2019 – *Zulu and Gue v MOD, 2205687/2018 and 2205688/2018*. That is a comprehensive decision. The key passage provides, at paragraph 70,

> "70. The purpose of the statutory [Service Complaint] process is to give an opportunity for complaints, which may subsequently be brought to an Employment Tribunal, first to be considered by the Military Authorities. That means that there must be sufficient detail in the Service Complaint to make it possible for a decision to be made in relation to it before a claim is brought to the Employment Tribunal about the same matter. However, that does not mean that each and every detail of the wrong complained of must be particularised in the Service Complaint form.
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> 71. The [Armed Forces Act] and 2015 regulations set out the requirements for a Service Complaint, but a Service Complaint is not the same as a pleading. Although a significant degree of particularity is required in a Service Complaint, the approach to a Service Complaint should not be overly legalistic. The SC process is there to resolve complaints outside the structure of a Court or even Tribunal process. Indeed, in discrimination matters, the Military Authorities have the opportunity to resolve the complaint before any Tribunal process commences. Complainants are asked to attach relevant documents to their Service Complaint form and the process may involve an interview at which complainants may further explain their complaints. Where complainants have incorporated documents by reference into their Service Complaints which clarify or elaborate upon their Service Complaint, as the Second Claimant did, or have clarified or elaborated upon their written complaints at interview, there is no reason to construe the meaning of "Service Complaint" narrowly so as to exclude those further particulars. The "Service Complaint" is the complaint about the wrong which the complainant wishes to have redressed"

26. I do not disagree with any of that and it was not challenged by Ms Robinson. Yet it does not seem to me that even on the most flexible view, this particular allegation can be deemed part and parcel of HoC2. In avoiding a legalistic view it is also important to recognise that the Service went to some lengths to clarify and categorise the complaints in question, with the first batch concerning the way he was treated in relation to his views and the second batch relating in particular to his security clearance. It would therefore be artificial to try to include in that second batch of complaints specific details from the first. There was no specific mention of these points in HoC2 and no reason to imply their presence. At the risk of labouring the point, had they been expressly raised in HoC1 they would also have been rejected as out of time. Hence, none of the matters relied on in the ET1, up to 16 June 2020 (at the end of two weeks of interviews following his disclosure on 2 June 2020) are within the Tribunal's jurisdiction.

Time limit issues

27. Given those views it is unnecessary to go into great detail about the time limit issue it surrounds all of these complaints under HoC1. The latest of them is dated from two weeks after raising his concerns on 2 June 2020, i.e. by 16 June 2020. Mr Jardim did not begin early conciliation until 7 June 2021, nearly a year later and so

all of these allegations are substantially out of time. There is no basis for concluding that they form part of a continuing act since all of them concerns specific events which almost generous view ended at the end of June 2020 when he was assigned to a shore-based role in Portsmouth. Later events form a separate and distinct episode, and it was not suggested otherwise today.

28. From then on, the focus of attention switched to his future career options, which were hampered as an officer in the submarine service by his removal from SSBNs and by related issues over his security clearance. His ET1 describes those events as follows:

> At the end of the next month, on 29 Jul 20, I had a Counter-Terrorism interview with National Security Vetting (NSV) with regards to my Counter Terrorist Check.
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> I had a comprehensive interview with NSV on 21 Sep 20 regarding in depth questions of my views, relationships and background, as part of my security clearance (SC). I received a read-out from my meeting with NSV on 15 Nov 20 which I was asked to agree to; I did. As a result, on 30 Nov 20 my SC clearance was suspended and I was briefed to hand in my military ID to the Base Warrant Officer (BWO).
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> Having heard nothing in the interim, on 15 Jan 21 I received a letter from Navy PSyA. I was informed that my SC clearance had been reinstated, but that I had been barred from holding a DV for at least 2 years, past which point a further application for DV might be considered. In practice, given that I was still under training, this was a bar to serving in any branch that would require me to hold a DV. I was not provided with a reason for this, and was told that this would allow me time to demonstrate good security behaviours.
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> After consideration of options and talking to my current DO, I wanted to leave the service after the treatment I received when making my moral views known. I believe I have been subjected to a series of connected acts of discriminatory treatment based upon my religious beliefs. On 02 Feb 21, I was given the details of the Voluntary Withdrawal From Training (VWFT) process, and to contact Navy terms of service to determine how much money I owed the service. After a great deal of thought, and with much regret, I submitted a request for VWFT on 18 Mar 21, and have carried on working with the service since then with no update. I also submitted a Service Complaint regarding this ordeal on 09 Apr 21, from which I also have had no update. Due to the stress from the entire process, along with an unbearable workload and lack of progress with my VWFT and Service Complaint, I was sent sick on shore for a week from 24 May 21.

29. I have set this out to make clear that the thrust of his complaint, as set out in HoC 2, was that there were ongoing concerns about his security clearance, the options that left him in the Royal Navy and his eventual conclusion that he would have to leave.

30. In the application to amend his claim the phrase “constructive dismissal” is used, and although there is no statutory right to claim unfair dismissal, section 39(7)(b) Equality Act 2010 states that a reference to dismissing a person includes a reference to the termination of their employment “including giving notice in

circumstances where [the person] is entitled because of [the other party's] conduct to terminate the employment without notice." That is a reflection of the relevant definition of dismissal in the Employment Rights Act, and there is no objection to the use of the term constructive dismissal in this sense.

31. That "constructive dismissal" claim is clearly set out in the ET1 and equally clearly it relates to the complaints in HoC2. For present purposes, the significance of this point is that a claim of constructive dismissal, so described, is in time. According to the ET1 his request for VWFT was submitted on 18 March 2021 and early conciliation began on 7 June 2021, within three months (let alone six). Consequently the claim form sets out a clear, arguable claim for a series of events ending with his resignation. It remains open to the Tribunal at the main hearing to conclude, for example, that the claimant delayed too long before he resigned and hence there were not circumstances in which he was entitled then to do so, or that this was not a continuing act culminating in resignation, but those are matter to be decided having heard all of the evidence.

Application to amend

32. That is the background to the application to amend.

33. The respondent says that this application introduces a number of entirely new allegations which were not raised within the service complaint and therefore cannot now be pursued, alternatively that they are out of time. The new allegations, it is said, are that:

    a) the claimant was "detained" in his cabin,

    b) and subjected to oppressive interviews,

    c) was referred to Counter Terrorism "in misleading or inappropriate terms",

    d) that the interview with NSV was "inappropriate or oppressive",

    e) that there was an overall delay in the Security Clearance procedure,

    f) or generally that the Service Complaint investigation was unsatisfactory, and

    g) that he was constructively dismissed.

34. Objection is also taken to the fact that the various heads of claim have been re-labelled including sections dealing with harassment, direct discrimination indirect discrimination and victimisation.

35. Dealing first with the factual allegations, for the reasons already given the first two of these points are squarely within the scope of HoC1 and therefore the tribunal does not have jurisdiction.

36. As to (c), the fact that he was referred to Counter Terrorism is clearly stated in the ET1, but not the fact that it was in misleading or inappropriate terms. That is new.

37. As to (d), similarly, the ET1 mentions the interview with NSV and describes it as comprehensive, but not inappropriate or oppressive, so that too is new.

38. As to (e) and (f), there seems to have been an understandable confusion over the delay point and whether the initials SC referred to service complaints or security clearance but Mr Hirst clarified that it referred to the latter and that is clearly a point touched on at the end of the ET1 – "I also have had no update".

39. As to (g), as already discussed, it seems to me that the complaint of constructive dismissal is clearly explained in the claim form as a relevant act of discrimination.

40. The factual additions are therefore minor, and Mr Hirst downplayed them in his submissions. He conceded that no previous criticism was made of the reference to Counter Terrorism or to the interview with NSV, and suggested instead that it was the fact of these referrals rather than the manner in which they were carried out that was in issue. Set out in that way, I see no remaining objection to the factual content.

41. There is a further question over the re-labelling, which now sets out the allegations under four headings. The most obvious difficulty here is with the allegation of victimisation. That requires a protected act, i.e. it requires the claimant to have told his superiors not just that he had a protected characteristic - in this case his religion – but that he had suffered discrimination as a result. I accept Ms Robinson submissions on that point, that this was not previously suggested as part of his service complaint.

42. Whilst I also accept the general point made by Mr Hirst that a service complaint is not expected to be a legal pleading, in the present case it is a full and detailed explanation of the facts in question and at no point does Mr Jardim suggest that he complained about discrimination or that he suffered as a result. Nor is it clear to me at this stage, despite all the material in the bundle, that there has been any such protected act. No such document has been identified.

43. Otherwise, and subject to consideration of the time limit point, the remaining allegations appear to have been recast in an understandable way. The respondent points to the fact that this application was made eight months after the claim form was submitted but Mr Hurst makes the perfectly fair point in response that it was done in response to requests from the respondent for further information. The complaint by the Ministry of Defence also has to be seen against the 15 months delay in dealing with the service complaint over HOC2, which is still ongoing.

44. In considering applications to amend, the key test, applying the principles in the case of **Selkent Bus Company v Moore** 1996 ICR 836, is the balance of prejudice between the parties. Without setting out that guidance at any length, the main three considerations are

a) the nature of the amendment, i.e., whether it is a minor amendment or the addition of factual details on the one hand, or on the other hand raises entirely new factual allegations

b) the applicability of time limits to the new claim or cause of action and

c) the timing and manner of the application.

45. Ms Robinson referred me to the presidential guidance on amendments, but this now has to be read in light of subsequent cases, in particular **Galilee v Commissioner of the Police for the Metropolis** UKEAT/0207/16/RN. The Employment Appeal Tribunal in that case has held that time limits may now be addressed at a later stage. It may be that the question of whether or not it is just and equitable to extend time is better decided having heard all of the evidence. Here there is some question of whether or not there was a continuing act of harassment or discrimination in relation to security clearance which does not need to be conclusively decided today.

46. So, applying these three main considerations the nature of the amendment is in my view relatively modest. The respondent and the Tribunal are assisted by having the allegations set out in numbered paragraphs under the relevant legal headings and by and large that is what the amendment seeks to achieve. It is a stocktaking exercise with the various items laid out appropriately, subject to my comments about the victimisation claim.

47. Ms Robinson accepted that direct discrimination is apparent from the claim form and my view is that harassment is a closely related phenomenon. It adds very little to the respondent's burden to have them described in those two different ways i.e. either as less favourable treatment or as unwanted conduct related to his religion.

48. The allegation of indirect discrimination is less obvious from the claim form but it is apparent that there is the PCP operated by the Royal Navy i.e. a requirement of service personnel to serve in SSBNs, which would place those who object to the use of nuclear weapons at a substantial disadvantage, a group which appears to include the claimant.

49. Turning to the second consideration, all of these points appear to be essentially a relabelling exercise and so no fresh time limit point arises which would prevent the amendment.

50. Thirdly, the timing and manner of the application is as already stated. It was raised by the claimant shortly before the first preliminary hearing, which is still at a fairly early stage of proceedings. Most of the objections by Ms Robinson concerned the potential need for additional witnesses who may have little knowledge of these events two or three years afterwards, particularly since they were not included as part of the service complaint. However that situation should not apply. There is no remaining concern about the manner in which interviews

were conducted so no need to call on those conducting the interviews, and so no real prejudice to the respondent.

51. Applying those considerations therefore, and subject to the various amendments or deletions considered above, the application to amend is allowed.

52. After some further discussion at this hearing it was considered preferable for the list of issues to be documented by the tribunal at this stage rather than have the application to amend redrafted. Those issues are set out in a separate case management order and will form the basis of the hearing on 13 March 2023.

Employment Judge Fowell

Date 10 August 2022

Judgment & reasons sent to parties: 22 August 2022

FOR THE TRIBUNAL OFFICE