



EMPLOYMENT TRIBUNALS

Claimant: Donovan Davy

Respondent: Ministry of Defence

Heard at: Southampton **On:** 07 September 2022

Before: Employment Judge Housego

Representation

Claimant: In person

Respondent: Sophie Garner, of Counsel

JUDGMENT

The claim is dismissed.

REASONS

1. In this case I gave a full ex tempore judgment. In the judgment I promulgated I set out a summary of the reasons why I dismissed the claim. The Claimant seeks full reasons, hence this fuller judgment.
2. The Claimant was a long serving member of HM Armed Forces. He was discharged on 24 March 2022.
3. He brings a claim of race discrimination against the Ministry of Defence. It was lodged on 21 January 2021. The claim is that he was paid less than others in similar circumstances, and that the reason he was being paid less is his race. He describes himself as black. He relies on two others, both white, as comparators.

4. I heard oral evidence from the Claimant and from James Gondelle, senior manager of the Royal Navy's Service Complaints team. There was a full bundle of documents and the Claimant provided further documents.
5. The issue arises from his transfer from the Army into the Royal Navy. This was on 04 May 2015. The Claimant says that he was treated as a new direct graduate entrant and his 12 years of service in the Army was not recognised. He left the Army with the rank of Sergeant. He had been in line for promotion when he transferred to the Royal Navy. He joined the Royal Navy as a Sub-Lieutenant Environmental Health Officer with one year's seniority.
6. He says that if that service had been recognised he would have been paid more. He says that two white colleagues were treated differently and that he should have been treated in the same way as he says they were. He claims that from February 2017 to November 2020 he was paid less than he should have been.
7. Because he was in the Armed Forces the Claimant cannot bring a claim to the Employment Tribunal without first raising a Service Complaint about it¹. This is a jurisdictional matter. If there is no Service Complaint about a matter there can be no claim to an Employment Tribunal about it. If there is a service complaint about race discrimination the Tribunal has jurisdiction to hear it.
8. The Respondent says that there was no Service Complaint about race discrimination and so it must be dismissed because the Tribunal has no jurisdiction to hear it.
9. The Respondent also says that the transfer was on 04 May 2015, that the Claimant accepted the terms offered to him and so any claim would be outside the time limits by some years. They say it would not be just and equitable to extend time.
10. The Claimant says that all the facts were set out in the Service Complaint he raised, and so he satisfies the jurisdictional requirement. He says that this was on going discrimination and so he was not out of time when he lodged his claim.
11. Service Complaints have a statutory framework². That includes a provision that the statement of complaint must state whether any matter complained of involved discrimination³.
12. The Service Complaints form (Annex F) asks, specifically, whether the complaint involves an allegation of discrimination (or harassment, bullying or other things).
13. On 12 December 2017 the Claimant raised a Service Complaint. He set out his complaint in box 2 of that form. He stated that his pay did not reflect his 12 years' Reckonable Service in the Army, and that it should have done. Box 3 of the form asks if the complaint includes allegations of bullying harassment or discrimination. There are two boxes to tick, yes and no. The Claimant ticked neither. The form

¹ S120(1) of the Equality Act 2010

² Armed Forces Act 2006 and the Armed Forces (Service Complaints) Regulations 2015

³ Regulation 4(2)(c)

asks the complainant either to set out the discrimination claim in section 4 or if there is no such claim to move on to section 5. The Claimant did not complete anything in section 4.

14. On 19 March 2018 this was accepted as an admissible Service Complaint.
15. On 16 November 2018 the outcome letter stated that the complaint was *“You believe that on transferring to the RN from the Army you were put onto an incorrect pay scale, on which you remain”*. The Claimant did not challenge that summary of his complaint.
16. On 31 August 2017 the Claimant’s line manager⁴ partially supported the Claimant’s Service Complaint. That was on the different bases that the Army and the Royal Navy approached the process of becoming a candidate for a commission. He would have been better off had he remained in the Army and been commissioned there and then transferred, for (usually) he would then have had the benefit of the 12 years reckonable service. He did not get that benefit when commissioned into the Royal Navy. Had he transferred into the Royal Navy with a commission he would (it was suggested) have had the benefit of that reckonable service. His circumstances were said to be unique, as he not only transferred between services but also transferred out of the ranks and into an officer role at the same time.
17. The Service Complaint was not upheld. There was only one route into the role the Claimant took in the Royal Navy since 1999 that was the Direct Entry route⁵ which had been offered to the Claimant, and which he had accepted⁶. The outcome letter apologised for the errors made in effecting the transfer. A first offer letter had been incorrect and had been withdrawn and another issued, which the Claimant had accepted.
18. The Claimant appealed. He named two comparators, Lt Tagg (by then retired) and Lt Cdr Wood. In acknowledging receipt of that appeal⁷ the Navy Service Complaints Secretary stated⁸ that matters that did not form part of the Service Complaint when the Admissibility Decision was made could not be added subsequently *“I refer you to paragraph 11 of your Application where I note that you suggest there may have been “...unconscious bias and discrimination” which so far as I can tell is not an allegation that featured in your Annex F dated 5 Dec 2017 or at any time prior to Cdr Dreelan’s admissibility decision.”*
19. The Claimant did not dispute this. Nor did he seek to raise a second Service Complaint of race discrimination.
20. That appeal was decided by a letter dated 21 June 2019. The decision was upheld. The reasons contain a detailed analysis of the situation the Claimant was in, and the rules applicable⁹. It is not necessary to set out the detail of this reasoning. It

⁴ Cdr J Churcher, Base Executive Officer

⁵ Page 46 of the bundle of documents, Cdr A Witt email 18 May 2018 to Legal Casework Team

⁶ Claimant’s Service Complaint at page 41

⁷ Page 66

⁸ 29 January 2019, page 65 et seq

⁹ 76 et seq

accepts that there was *“undoubtedly been inconsistency in the handling of then Sgt Davy’s application to join the RN as a commissioned EHO, but that can be attributed at least in part to the comparatively unusual circumstances of the case.”*

21. On 01 August 2019 the Claimant referred the matter to the Service Complaints Ombudsman for the Armed Forces (SCOAF) asking for an investigation into the merits of his complaint and saying that the way it had been handled was maladministration. It does not raise race discrimination but challenges the outcome of the appeal.
22. SCOAF decided that there was only one route into the Royal Navy for this role, and that was as a Direct Entrant, and the pay he had been receiving had been correct. It found maladministration in the handling of the Service Complaint which had suffered undue delay, during which the Claimant was not properly updated. SCOAF also said that the Claimant was due an apology for the confusion which arose in his recruitment into the Service.
23. The evidence of Mr Gondelle was that some years before Lt Tagg had indeed been treated better than the Claimant, but that this was an error, and he should have been treated the same way as the Claimant. He also said that the other comparator who transferred into the Royal Navy had a commission before transferring into the Royal Navy, not to an Environmental Health role, and so fell under a different rule. I accept that evidence as correct. None of the decision makers have felt that the Claimant was treated incorrectly, while also having some sympathy for his situation.
24. The Claimant’s claim form states in box 8.2 that: *“I have exhausted the internal dispute process and now believe that my different treatment amounts to discrimination.”* It is implicit in this statement that at the time he raised his Service Complaint he did not think that race discrimination might be a motivational factor.
25. There was no Service Complaint about race discrimination. When he filed his Service Complaint the Claimant did not think he had suffered race discrimination. That cannot be read into the document by implication. Box 4 where such a claim would be set out was left blank. The appeal referred to it being a possibility that there was race discrimination, but the word used was *“may”* so that even then it was not put as an allegation. Even if that is taken as an allegation of race discrimination the Claimant was told that he could not add in extra allegations to his appeal. The appeal was only about the decision on the matters raised in the 2017 Service Complaint, and that did not include race discrimination. The letter acknowledging the appeal is clear on this point. There was no second Service Complaint alleging race discrimination.
26. Therefore, this claim must be dismissed for want of jurisdiction, as a Service Complaint of race discrimination is a requirement of bringing a claim of race discrimination to this Tribunal.
27. The second reason for dismissing the claim is that it is a long way out of time. The transfer was in 2015 and the claim was not until 2021. The Claimant says that there was continuous detriment in receiving less pay than he should have received. I find

the act said to be race discrimination was the terms he was offered to join the Royal Navy as a Sub-Lieutenant. The Claimant did not say that he found out about his comparators within three months of lodging his claim on 21 January 2021. It would not be just and equitable to extend time given such a long delay.

28. I observe also that the claim does not have any great merit. Several people unconnected to the Claimant or to one another have examined his situation. While some express sympathy with his situation, which plainly was unusual (leaving the Army a Sergeant and joining the Royal Navy with a commission, into a role which from 1999 was filled only by Direct Graduate Entrants, where people who transfer into the Royal Navy from a commissioned rank usually get credit for reckonable service, he being someone in line for promotion in the Army) all conclude that the terms he was on were the right terms. I have covered the evidence of Mr Gondelle about the comparators. There is nothing to suggest that the conclusions of these disparate decision makers were influenced in any way by considerations of race.
29. The Claimant's sense of injustice is not assisted by the way his complaints have been handled, nor the way his transfer into the Royal Navy was handled. That is not relevant to the issue I have to decide.
30. I am not critical of the person deciding that the complaint was admissible when the box about discrimination was not ticked yes or no, because if the Claimant had mistakenly omitted to tick yes he also left blank the subsequent boxes where he should have set out the race discrimination claim.
31. The Claimant's submitted that the Royal Navy should have looked at his human resources file, noted that he was black from his ethnic diversity monitoring form and taken the complaint as one of race discrimination as well. However the form, Annex F, specifically does ask that very question.
32. It would, in any event, be impossible for this to be done. The Royal Navy would, if this was an obligation, have to ask whether every complainant was gay, disabled, what religion the complainant had, or none, and whether it was thought to be the reason for the treatment complained of. This is far beyond what is reasonable. The purpose of the Service Complaint form is to enable service people to put forward complaints, and the form expressly asks a complainant if there is a discrimination claim. If a complainant does not fill in the boxes asking what such a claim is that claimant cannot complain that the issue was not investigated. There can be no obligation to investigate a claim which has not been made.

Employment Judge Housego
Date 06 October 2022

REASONS SENT TO THE PARTIES ON
11 October 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE