EMPLOYMENT TRIBUNALS

Claimant: **XA**

Respondent: **Ministry of Defence**

Heard at: **Bristol (by CVP)** **On:** **12, 13, 14, 15, 16 September 2022**

Before: Employment Judge Street
S Maidment
G Meehan

Representation
Claimant: in person
Respondent: Mr J-P Waite, counsel

REASONS

Written reasons having been requested by the Respondent at the close of the hearing after the oral judgment, the following reasons are provided:

1. EVIDENCE

1.1 The Tribunal heard from the claimant and for the Respondent from

i) Joanne Barker, currently employed by the Ministry of Defence ("MOD") in People Accommodation and hold the grade of Senior Civil Servant Grade 1 (SCS 1), She has day to day responsibility for Defence living accommodation policy as Head of Armed Forces Accommodation Policy (Hd Accom). She oversees the policy delivery for the Future Accommodation Model (FAM) as well as Current Accommodation Policy. She holds responsibility for the Equality Impact Assessment of JSP 464.

ii) Stuart Lawrence, Head of Promotions for the Royal Navy ("RN"), managing RN promotions for officers and ratings/other ranks.

iii) Wing Commander Elliott-Mabey formerly Staff Officer One, Joint One responsible for Personnel and Human Resources advice and guidance to Service and civilian personnel in the Directorate Overseas Bases area of responsibility; he has retired and is now a full-time reserve officer.

1.2 The Tribunal read the documents referred to in the agreed bundle.

2. ISSUES

2.1 Following the liability judgment issued on 3 November 2021, the issues were defined in the Case Management Order of 21 February 2022, and are as follows.

2.2 For the purposes of sections 124(4) and (5) of the Equality Act 2010, is the Tribunal satisfied that the provision, criteria or practice held to be discriminatory was not applied with the intention of discriminating against the Claimant? That is because the tribunal must in such a case give consideration to a declaration or recommendation before considering financial compensation.

2.3 Should the Tribunal make any further declaration as to the rights of the claimant and the respondent?

2.4 Should the Tribunal make recommendations that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

2.5 What financial losses has the discrimination caused the Claimant?

In particular, did the discrimination found cause the Claimant to lose an opportunity for promotion in April 2019. The Tribunal will assess that not on balance of probability but on the basis of the chance or percentage probability that the Claimant lost promotion as a result of the discrimination found.

If so, what are the Claimant's losses?

2.6 For what period of loss should the Claimant be compensated?

2.7 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

2.8 Should the Claimant be awarded aggravated damages?

2.9 Should the Claimant be awarded exemplary damages?

2.10 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent fail to comply with it by the breaches identified by the Claimant in his witness statement and schedule of loss? If so, is it just and equitable to increase any award payable to the Claimant and, if so, by what proportion up to 25%?

2.11 Should interest be awarded? How much? The calculation will be based on the statutory rate of 8% from the date of the discrimination in respect of injury to feelings and otherwise from the midpoint date (between the date of discrimination and the remedy hearing)

2.12 As to the impact of taxation on the award and grossing up.

3. FINDINGS OF FACT

3.1. Abbreviations used, where not explained, are as used in the liability judgment. References are as to the physical bundle first, then the electronic bundle.

3.2. The following findings are to assist the reader with the chronology and focus on the matters relevant to remedy, supplementing the findings in the liability judgment.

Background

3.3. As established in the liability judgment, no full Equality Impact Assessment of the Ministry of Defence ("MOD") accommodation policy had been carried out.

3.4. A limited Equality Impact Assessment was carried out following the findings of the Employment Tribunal in the case of Boswell v MOD, 1401879/2012 and 1400419.2013 (1 – 32 and 36/38). Those hearings were in 2013 and 2014. The assessment then carried out related to the circumstances of that case.

3.5. A limited Equality Impact Assessment was carried out on March 2016. That was to do with the introduction of the Combined Accommodation Assessment System approved I October 2014 and applied from 1 April 2016 in relation to charges for occupancy of Service Family Accommodation ("SFA").

3.6. As set out in 3.14 of the liability judgment in this case, a new policy applied from 2016, permitting one offer only of accommodation to Substitute Service accommodation for single officers, (the "SSSA" group). Those entitled to SFA and SSFA (substitute SFA) continued to have two offers. There was no Equality Impact Assessment.

3.7. Following the Defence Internal Audit report published on 21 July 2017, a direction was issued, emphasising the need to assess equality impacts for all relevant policies, practices or services as part of the legal obligation. The audit had found that there was limited evidence of staff completing an Equality Impact Assessment on policy changes and that there was a lack of awareness of the legal requirement to do so (262/268 para 36 and 39).

3.8. The Boswell Tribunal had recommended Equality Act Training. Mr Brennan confirmed that he had had the training the Tribunal required.

3.9. Both the Decision Body and the Appeal Panel handling the Service Complaint in this case agreed that there had been a failure to carry out a proper Equality Impact

Assessment and a failure to have regard to the Public Sector Equality Duty, and apologised to the Claimant for that.

3.10. The Claimant guards his privacy with considerable care. His sexual orientation prior to these events was known to few within the service. It was not known to his Reporting Officer, peers or others with whom he worked. It has been a strong concern throughout to preserve his confidentiality in this regard.

Chronology

3.11. On 23 May 2017, the Claimant applied for Substitute Service Single Accommodation.

3.12. On 14 June 2017, the Claimant provided the contractor Mears with information he had already provided to the MOD as to what he was seeking:

> "a property in Central Bristol, within a reasonable walking distance of Bristol Temple Meads station so that I could commute to MOD Abbey Wood. I indicated that I was willing to provide a Personal Contribution in the region of £200 per month, though I advised I was willing to reconsider this amount, should the local conditions require it. The Field Operative advised that the budget they had to work with was £750 per month, but that with a PC of £200, £950 per month should be sufficient to locate a flat within the Central Bristol area."

3.13. Mears initially considered a property in central Bristol that met the requirements of MOD policy, and which the claimant was willing to accept. The landlord found a tenant able to move in earlier, so the offer was never formally made.

3.14. Mears then found a property which cost £1020 per month, that is, £70 per month more for the Claimant to find from his own pocket, and which had no parking, that is, neither off-street parking nor parking with a resident's permit. He was told the property had "no parking of any kind". That did not meet MOD specifications. The Claimant refused that, on the basis that it was not a valid offer.

3.15. On 28 June 2017, the Claimant was advised that a property had become available, that the contractor had been required to fill it for the balance of the initial tenancy period and so it had been allocated to the Claimant. That was a first and final offer.

3.16. On 29 June, it was confirmed that no other property would be sought for him.

3.17. He saw the property on 4 July. He felt the property allocation did not take proper account of his circumstances and that there was an equality aspect to it.

3.18. Discussion proposed no options other than to take the property and appeal, to abandon the application for accommodation or to refuse the property and appeal.

3.19. He did not have time to find alternative accommodation himself and accepted the property on 11 July 2017, given his Bristol assignment start date of 17 July 2017.

3.20. He did not consider the property to be suitable, as explained in the earlier judgment, as follows:

> "His preference was for City Centre accommodation.

> He explains his preference on the basis that, unlike the non-LGB community, certain communities, including the LGB community, are of their nature small. People tend to cluster together, networks are established where those clusters are. Elsewhere, people can be very isolated.
> On 28 June 2017, the Claimant was told accommodation was available in a *new town (name removed)* created with families in mind (para 3.47)"

3.21. It was 90 minutes by bus from Bristol City Centre. It took him more than 40 minutes to travel to work from the address, and there was insufficient parking available at the MOD for him to be able to rely on his car.

3.22. He attempted to resolve the matter informally. In so doing, he had to explain his sexual orientation for the first time to senior officers and he found that difficult *(liability judgment para 3.50).*

3.23. He was advised that a Special to Type Complaint through Mears and DIO (Defence Infrastructure Organisation) was required before a Service Complaint could be submitted. He needed to know how to go about that. The MOD regulations did not cover the Special to Type Complaint nor was the JSAU (Joint Services Administration Unit) able to give any guidance.

3.24. He asked Mears for guidance on 7 July. That was accepted as an official complaint *(120/125).* There was no substantive response with further guidance by 27 July when he sent a reminder.

3.25. He had, also on 7 July requested the equality analysis conducted for the policy provision of SSSA in the Bristol area. Mears did not have a copy and the people he was in touch with there did not know what an Equality Impact Assessment was.

3.26. He understood this to be a straightforward request.

3.27. On 1 August 2017 Gp Capt Rowlands emailed him and Wing Commander Elliott-Mabey to report information from the Accommodation Policy Staffs that, following the Boswell judgment, an Equality Impact Assessment "to remove such discrimination was undertaken and at the direction of the Tribunal and the then head of SCW, JSP 464 in all its variants at the time (Parts 1 – 4) was impact assessed to ensure that there was no further direct or indirect discrimination contained with the said JSP" *(887/93).*

3.28. The Claimant was not provided with that assessment. He pursued his request on the basis that he wanted to see the evidence base and argument generated at the time, rather than simple confirmation that the policy did not discriminate *(120/125).*

3.29. The Stage 1 complaint was dismissed on 4 August. The Claimant was told he could progress to Stage 2 of the Special to Type Complaint.

3.30. He indicated by email to the Commanding Officer ("CO") at MOD Abbey Wood that he would escalate to Stage 2 "once I've seen the information that you have kindly requested on my behalf from the Accom Policy Team." He was waiting to see the Equality Impact evidence before proceeding. The CO at that stage was Gp Cpt Rowlands.

3.31. He followed up with an email on 29 August 2017 to the CO as to whether there had been any response from the Accommodation Policy Staffs.

3.32. The CO responded on 30 August, "Accom Pol staffs would come in at the IRHP stage" and asked the Claimant for an update on the complaint with Mears. ("IRHP" is the Independent Housing Review Panel).

3.33. The Claimant asked whether there had been no response to the request for information and whether he should go ahead through an Freedom Of Information ("FOI") request.

3.34. In reply the CO set out, "the Accom Pol staffs have advised me that the policy is compliant. You wish to press that it is not…. The IHRP would be the stage at which Accom Pol staffs would come in. Your right to FOI remains in place of course but the next stage is stage 2 into DIO." *(56/61, 122/127).* There was no disclosure.

3.35. On 31 August 2017, the Claimant made an FOI request, asking for,

> "Associated papers, minutes or other documentation used in the production of the Equality Impact Assessment conducted by the MOD in 2014 against JSP 464 (specifically concerning the provisions of SSSA) plus the final Equality Impact Assessment document itself and its supporting evidence…" *(62)*

3.36. He also asked for information as to whether the policy had been subject to any further equality analysis

3.37. The Claimant received a response to the FOI request on 29 September 2017. Two documents were produced. They did not include the requested Equality Impact Assessment carried out in 2014 or the evidence for one. As to later review, the information given, without any disclosure of records, was that the JSP 464 is "continually reviewed and monitored from an Equality perspective", discussions that occurred in the office or when there were "amendments made to Accommodation Policy agreed via the relevant decision-making bodies." *(63/68 also 88/93).* Discussion in the office was not recorded.

3.38. In 2014, the guidance on Equality Analysis was clear:

> 12. Decision-makers and policy, procedure or practice sponsors, whether military or civilian, should use the Template at Annex C for recording the results of the Equality Analysis before decisions are made. Any proposal that is likely to affect staff is subject to Trade Union consultation. The Trade Unions, along with the Management Boards that approve the proposed decision, policy, procedure or practice, will expect to see the fact that analysis has been undertaken and, if relevant, the results of the Equality Analysis. In addition, in the event of a subsequent challenge to a policy, procedure or practice in the courts or by the Equality and Human Rights Commission or other stakeholders, the Department will need to be able to produce evidence that the potential impact of the decision, policy, procedure or practice on people with the protected characteristics was taken into consideration and mitigated as much as possible. Completion of the Template at Annex C will assist the Department to do this.
>
> 13. Evidence can be provided by various sources e.g. statistics (where available and relevant) or notes from meetings to demonstrate engagement. It should be quantitative and qualitative with clear facts and findings set out and, where relevant, should also include mitigation and any potential for the

> policy, procedure or practice to effectively reduce or remove perceived or existing inequalities, advance equality of opportunity and foster good relations.
>
> 14. Records of the results of Equality Analysis should be kept on the appropriate policy files to be drawn on should these be required at a later date and the fact that analysis has been undertaken and its outcome should be included in the policy document. Whilst TLBs should promulgate their internal governance and quality assurance programmes, a small monitoring group, which includes external expertise, will be established to review a proportion of these forms to assure that they stand up to scrutiny. (557/568) *from JSP 887, Diversity, Inclusion and Social Conduct – Defence Strategy and Social Conduct Code to meet Public Sector Equality Duties, Ch 3, Equality Impact Assessment). (557/568).* ("TLB" means Top Level Budget.)

3.39. He was still hoping for a resolution with an alternative offer of accommodation. It had been suggested that his remedy could be seeing a second property himself, but that would have been at his own cost.

3.40. He could not proceed with a Service Complaint until the Special to Type procedure had been exhausted and he had been told that this required the stage 2 complaint. There were concerns and a lack of clarity about the stage 2 procedure and he sought advice as to whether it was appropriate to continue with that.

3.41. He still did not have the Equality Impact Assessment on which he sought to rely in relation to his complaint of discrimination.

3.42. He sought the minutes of the APWG meetings (Accommodation Policy Working Group). While they did not cast light on any equality assessment, they disclosed that Wing Commander Elliott-Mabey, now the CO, had been an attender at those meetings in his earlier role. That gave rise to concerns for the Claimant about conflict of interest and the appropriate conversations that he could have with the CO. A difficulty arose too about the specified officer for a service complaint, given that that would usually be the CO.

3.43. He was mindful of the time-limit for Employment Tribunal proceedings, which required that a Service Complaint had been concluded.

3.44. On 10 January 2018, having made no progress, the Claimant started the ACAS conciliation process.

17 January 2018 exchange of emails

3.45. He emailed Wing Commander Elliott-Maybe on 17 January 2018 to update him. The Wing Commander had advised him to consult Lt Richardson. The Claimant explained a lack of response over two months from Lt Richardson, and asked if there was someone else who could advise about the complaints process, to avoid further delay.

3.46. In the course of that email, he explained that had to meet the six-month time limit for the Employment Tribunal, and that he had therefore approached ACAS. He hoped for settlement discussions with the MOD. He was still unclear about how this would work given the requirement for a Service Complaint before embarking on Tribunal proceedings,

> "Again, an issue that I am awaiting a response from Lt Richardson on. However, if no advice is received and MOD do not settle prior, I will have to proceed to Tribunal to protect the LGBT community from further discrimination." (67/72)

3.47. The Wing Commander responded the same day. He asked if the Claimant had completed the special to type process as advised. The tone is critical – "I am uncertain why you have not followed the agreed process."

3.48. He asked whether a discussion with Lt Col Smith had taken place, as advised – "It seems a shame that you have spent the Christmas period working on your thesis of concern when you may have been able to get a better understanding by discussing this more openly."

3.49. He adds, "It does seem that your own machinations on this matter have been somewhat tardy and that when advice has been given, you have chosen to ignore it"

3.50. That response was copied to five other officers, on the basis that that would progress the complaint.

3.51. He had not discussed his criticisms of the Claimant in that response before that circulation, so had not had the benefit of the detailed rebuttal the Claimant then provided.

3.52. The Claimant immediately recognised that the effect of circulating his own email with its reference to the LGB community, must disclose his own sexual orientation, contrary to his wish or expectations. He spent a sleepless night, deeply anxious.

3.53. Wing Commander Elliott-Mabey says he did not know the Claimant's sexual orientation and that it was not obvious from the email. In the Claimant's later Service Complaint and Appeal, the Board and Appeal panel reached the same view: that Wing Commander Elliott-Mabey had not disclosed the Claimant's sexuality in circulating that email. That is not the Tribunal's view and this is discussed more fully below.

3.54. In January 2018, the Claimant also followed advice to seek guidance from Navy Legal Direct, only to be told that advice could not be given to individuals (254).

February 2018 onwards

3.55. The ACAS certificate was issued on 5 February 2018.

3.56. The Service Complaint was submitted on 8 February 2018 (74/80)

3.57. The Stage 2 Special to Type appeal was submitted on 20 February 2018 (or thereabouts).

3.58. On 1 March 2018, the Employment Tribunal claim was submitted to the Tribunal. Proceedings were stayed by consent to 30 September 2018.

3.59. On 22 March 2018, it was confirmed that the Claimant had technically exhausted the Special to Type process and he could proceed with the Service Complaint. That is reported by the Service Complaints Ombudsman to have been because "the DIO were not in a position and did not have the authority to answer most of the issues raised in his complaint. Lt Col. Smith also stated that the MOD could not insist on the use of the accommodation STT process." That was because it was not covered in the JSP 464 policy (148/152)

3.60. The Service complaint was ruled admissible on 1 May 2018.

3.61. The first officer appointed as the decision board for the service complaint was appointed in June 2018 but stood down and a new officer was appointed on 17 July 2018. It was determined that a fee-earning harassment investigation officer ("FEHIO") was to be appointed. That appointment was known to be one subject to delay. The Claimant made a successful undue delay application to The Service Complaints Ombudsmen for the armed forces, upheld with regard to delay in relation to that appointment (145/150 et seq)..

3.62. On 30 July 2018, the Claimant learned of the 2017 Defence Internal Audit ("DIA") audit into equality analysis and made a Freedom of Information request for details. It showed, as set out in the guidance issued to the Diversity and Inclusion Board, "limited evidence of staff completing an Equality Assessment on their policy, projects and services and that there was a lack of awareness within Department of the legal requirement to do so. It also found that there was a lack of TCB procedure to ensure that equality assessments have been completed." (128/133).

> "We recognise that there is more that we need to do to make the EA process as clear and straightforward as possible and to ensure that people are fully aware of their legal obligation to consider how decisions impact differently on groups that share a protected characteristic." (128/133*).*

3.63. The MOD sought a further stay of six months of the Employment Tribunal proceedings to enable its determination of the Service Complaint to be completed. The Claimant consented to a stay of 3 months. Time was extended to 3 January 2019.

3.64. In the investigation of the Service Complaint, it was reported to the Investigation Officer that there had been an Equality Impact Assessment of the Accommodation Policy:

> "Claim is that JSP 464 has not been subject to EA, Paul Brennan (People Accom Policy 2) provided me with evidence that it has."
>
> "Paul Brennan has already confirmed the Accommodation policy has been subjected to an Equality Assessment."

3.65. The interviewee relied on that for the answer to four out of five questions put. (161/166).

3.66. On 14 December 2018, a new Decision Body was appointed, due to a bereavement (261).

3.67. Also in December 2018, the Initial Investigation Report was produced but held by the MOD to be inadequate.

3.68. On 18 December 2018, the Respondent applied for an extension of the stay. The claimant agreed to a stay to 12 April 2019.

3.69. A different investigator appointed 5 Feb 2019, his report being disclosed on 22 March 2020.

3.70. A further application to the Ombudsman re undue delay and other matters was not upheld.

3.71. On 11 February 2019, the Respondent applied for the stay to be lifted and for the Employment Tribunal Claim to be struck out. That was on the basis that paragraph 18(2) of Schedule 9 of the Equality Act 2010 permitted the discrimination complained of. The history of that application is set out in the Judgment of Employment Judge Midgeley issued on 9 November 2020.

3.72. By further stays, the Employment Tribunal proceedings remained stayed until 15 July 2019.

Decision of Decision Body

3.73. On 30 April 2019, the Respondent's decision body issued its decision letter (249/255).

3.74. It was held that the MOD's change of policy to limit to one the choice of SSSA accommodation would have a disproportionate effect on the group of Service Personnel who identify as gay (254/276). The Complaint was dismissed in reliance on the exception in para 18(2) of Schedule 9 of the Equality Act 2010. The more favourable treatment of those with children was not separately considered.

3.75. The MOD was not exonerated; for example,

> "The evidence supports your contention that the MOD does not appear to have considered the impact of SSSA policy changes on gay Service Personnel; there is no up to date EA of JSP 464, and very little mention of equality issues in the records of the APWG or in related policy making discussions. Moreover, MOD record keeping in this regard is poor and there is strong evidence that MOD Accommodation Policy staffs sought to obfuscate and or avoid addressing these equality issues when you first raised them in 5 July 2017." (270/277)

3.76. The following paragraphs are from the earlier judgment at paragraphs 3.59 to 3.64.

> "A number of failings were recognised,
>
> - The MOD failed in its statutory duty to conduct an Equality Assessment of the change to its revised SSSA Accommodation Policy
> - The MOD failed to comply with MOD policy that required an Equality Impact Assessment on the change to SSSA policy
> - The MOD failed in its statutory Public Sector Equality Duty, under section 149 of the Equality Act 2010, to consider the impact on equality of the changes to SSSA policy and in failing to consider how to meet the needs of protected groups and increase their participation in public life
> - The failure to consult with under-represented groups in the development of accommodation policy likely contributed to the failure of the MOD to have due regard for equality matters in recent changes to JSP 464.

3.77. There were apologies for those and for failures of governance and in relation to the complaints processes. MOD processes were held to be flawed with inadequate record keeping, inadequate training and awareness of Equality Assessments and it was held that it had become normal practice to fail to conduct Equality Assessments of the accommodation policy JSP 464.

3.78. There were a substantial number of recommendations, They are set out here because they are sound and should not be forgotten: the decision on Appeal wholly replaces that of the Decision Body, but the Appeal Body approved and adopted the Decision Body's evaluation and summary of the evidence (*328/334)*. Given that slightly confusing position, the careful thought put into that decision risks being lost. They include that,

- An EA (Equality Assessment) of the revised policy to reduce to one the number of choices of SSSA accommodation is subject to an EA within 20 working days
- The MOD develops a prioritised action plan, with clearly defined timelines, for the conduct of Equality Impact Assessments on all its policies, within 3 calendar months
- The MOD conducts a cultural analysis of its approach to its statutory duties and policy defined procedures, for the handling of diversity and inclusion matters in its policy making and complaints handling
- The MOD conducts a training needs analysis to identify any training required for staff who conduct Equality Impact Assessments
- The MOD set in place, within 6 months of this notification, any necessary training required to support statutory and policy compliance with the Public Sector Equality Duty defined in the Equality Act 2010 and the MOD's Diversity and Inclusion Strategy in JSP 887
- The MOD conducts Equality Impact Assessments on all its policies within 12 months of this notification, ensuring meaningful engagement with the relevant representative groups for all the protected characteristics
- The MOD sets in place procedures that ensure the conduct, assurance and reporting of all necessary periodic Equality Impact Assessments across the Department, required to meet the MOD's obligations in statute and policy.
- The MOD reviews its record taking and keeping procedures and requirements to appropriately support diversity and inclusion matters across Defence and sets in place appropriate policy and procedures within 6 months
- The MOD reviews and identifies how best to publish its Equality Act work, along with the supporting evidence, whenever possible

3.79. Others related to the handling of complaints and freedom of information procedures, with regular review and reporting on progress.

3.80. In relation to the applications the Claimant had made during the period from August 2017 to January 2018 for disclosure of the Equality Impact Assessment,

supporting evidence for it and for later Equality Act consideration, the Decision sets out that there had been inappropriate reliance on an unnecessary FOI process which incurred unnecessary time and cost, and, “the release of incorrect and incomplete information under the FOI process incurred further time and effort on your part.” *(264/270).*

3.81. There were a significant number of apologies to the claimant, including for the failure to conduct an Equality Impact Assessment in respect of the Accommodation Policy and in relation to the reduction in offers to on, under the revised SSSA Accommodation policy *(para 40 286/293);* the failure to deliver complete information under the FO! Regime; the failure to meet the Public Sector Equality Duty and to consider how to increase participation of protected groups in public life and in relation to the Complaints process.

Appeal

3.82. On 17 June 2019, the Claimant appealed.

3.83. In his appeal he included a detailed and informed submission that the exemption relied on by the Respondent was incompatible with EU law and could not apply *(303 – 306/312).*

3.84. Before his appeal, he was asked for consent for the case file to be disclosed to the appeal body members but did not give it – he had objected to two of the proposed panel *(291/297).* The appeal proceeded in spite of that. The SCT (Service Complaint Team) later advised that they believed that they had a basis to process his data, but have not explained what that was. His data was released without consent when consent had been explicitly requested.

3.85. On 3 July 2019, the Appeal Body dismissed the appeal *(321/327)* save with regard to failures to carry out an Equality Act Assessment and to adhere to the Public Sector Equality Duty.

3.86. There was no hearing or invitation to a hearing *(321).* The claim of indirect discrimination was dismissed, again relying on the exemption *(336).*

3.87. The Claimant was criticised for delays.

3.88. In addressing the disclosure of 17 January 2018, the Appeal Body did not accept disclosure of the Claimant’s sexual orientation: it was said to be “quite a leap from referring to “protecting the LGBT Community” to this being an interpretation as a revelation of the Complainant’s sexual orientation, when there are many personnel within the service who are LBGT Champions but are not part of the “LBGT Community”.

3.89. Three relevant recommendations were made; that the reduction in choices of SSSA from two to one be subject to an Equality Impact Assessment; that greater engagement be undertaken with underrepresented groups when creating, changing or formulating Policy and that the MOD review their compliance with the Public Sector Equality Duty in line with their own Diversity and Inclusion Strategy.

3.90. On 15 July 2019, the claimant raised in his Employment Tribunal claim the argument that the exemption in para 18(2) was incompatible with the European Convention on Human Rights.

3.91. 31 July 2019, the Claimant applied for an anonymity order. The Respondent resisted that application which went to a hearing alongside the application for strike-out.

March 2020 – disclosure

3.92. On 3 February 2020 the Restricted Reporting Order was promulgated.

3.93. On 3 March 2020, the Claimant's identity and sexual orientation were included in material posted to a digital calendar.

3.94. The Respondent had made application to the Tribunal to vary an Order. The application mentioned the intention to hold a tri-service meeting. The meeting was posted on MODnet outlook calendars. It identified the Claimant by name, not using "XA" and the body of the email indicated his sexual orientation with further instances of identification *(365/371).* The meeting invitation was not marked as private.

3.95. The Claimant complained on 4 March 2020 to Mr Valentine, solicitor for the Respondent, pointing out that the effect was to disclose to any of the 200,000 individuals with access to the MODnet his identity and his sexual orientation, sensitive personal data to which enhanced safeguards should apply independently of the Restricted Reporting Order made (*372/378).*

3.96. The incident was then reported as a security incident by the officer who had posted the details. That report indicates that the Claimant's name was removed and the meeting marked as private, with the invitation amended on 4 March 2020.

3.97. The Claimant did not get a response or an outcome to his complaint. He had drafted a proposed letter giving guidance to colleagues with reference to the Restricted Reporting Order pointing out inappropriately shared information should not be used and an apology to himself but it was not used *(375).*

3.98. Not long after that there was a further breach, again a failure to properly protect information in a Microsoft calendar invitation and again it gave away his identity and sensitive details of the case. The Claimant reported the repeated breach to the Secretary of State for Defence and received an angry response.

3.99. In May 2021 he was moved away from Bristol and posted overseas.

3.100. He is now advised that he will be in the UK for his next posting, in some months' time.

Promotion and Performance

3.101. The Claimant has impressive assessment reports ("OJARS"). They show him to be intelligent, highly skilled, competent, resourceful and dedicated.

3.102. He has done less well in each promotion board between 2019 and 2021, going from grade B+ to B to C.

FAM

3.103. Future accommodation policy is being developed under the Future Accommodation Model ("FAM") which in essence will give personnel greater choice, with limitations, on whether to occupy accommodation within the MOD estate or the private sector. If rolled out, it would render the current model for SSSA and SSFA obsolete. Single personnel would still be able to live in SLA but could receive financial support to rent (either on their own or with friends) or to buy a home. It is also intended that FAM would widen family entitlement beyond those who are married or in civil partnerships by enabling (for example) those in established and registered long-term

relationships and divorced parents with shared custody of children with access to subsidised accommodation in the private rental market. It recognises divergence from traditional family models. Roll out may be in 2023 if government level approvals are given. It has not yet been subject to an equality impact assessment *(JB ws).*

3.104. In the meantime, the arrangements that were found to be indirectly discriminatory remain in place and are highly likely to be in place when XA next seeks SSSA.

4. **LAW**

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Discrimination Remedy

4.1. Section 124 of the Equality Act 2010 ("EA 2010") provides by way of remedy for discrimination, a declaration, as given in making the initial judgment, financial compensation and scope to make recommendations.

Recommendations

4.2. The Tribunal may, under section 124 of the EA 2010, may a declaration as to the rights of the claimant and the respondent in relation to the matters to which the proceedings relate and may make an appropriate recommendation.

4.3. An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate" *(s124(3)).*

4.4. The Tribunal has to consider practicability, both from what is practicable in terms of the effect on the complainant and also from the perspective of the employer (*Lycee Francais Charles De Gaulle v Delambre UKEAT/0563/10 [2011] EqLR 948 and Fasuyi v London Borough of Greenwich UKEAT/1078/99) ("Fasuyi").*

4.5. In Fasuyi, HHJ McMullen QC confirmed that a recommendation which is generally ameliorative, that is applying across the board, may be justified if the effect of it will obviate or reduce the adverse effect of discrimination on the complainant, who is a person within the general application *(para 24).*

4.6. A recommendation can include in principle one that requires the Respondent to give undertakings. If so, there should be a time limit, a requirement that it should be in writing and it should be specific as to what was to be done as well as consideration as to practicability. As to enforcement under section 124(7), that would only apply if the Respondent refused to give the undertaking, not if the undertaking were later breached. An undertaking that in certain circumstances the claimant should be treated as redundant was upheld in the case of Hill v Lloyds Bank plc *([2020] UKEAT/0173/19)* in the context of reasonable adjustments for disability, with the explanation that giving special benefits is inherent in the whole reasonable adjustments disability discrimination scheme.

Indirect Discrimination and compensation

4.7. An order for monetary compensation is only made where it is just and equitable to do so.

4.8. Where the Tribunal has found indirect discrimination, and where the tribunal is satisfied that the provision, criteria or practice was not applied with the intention of discriminating against the claimant, the Tribunal must consider making either a declaration or a recommendation before it awards compensation *(sections 124(4) and (5))*. There is no bar on an award of compensation provided that the Tribunal gives the required consideration to declaration or recommendation (*Wisbey V Commissioner of the City of London Police and another [2021] IRLR 691).*

4.9. Intention may be inferred where it is established that the employer was aware that discriminatory consequences would flow from its actions (*JH Walker Ltd v Hussain [1996] IRLR 11).* The real consideration is whether it is just to award a declaration or recommendation in cases where the employer did not realise that the PCP would unjustifiably put persons with the claimant's protected characteristic at a particular disadvantage.

4.10. The issue in relation to intention is not the generalised intention relating to the introduction of the arrangements that have been shown to be discriminatory but the intention with which the requirement or condition was applied (*London Underground Ltd v Edwards [1995] IRLR 355).* The question therefore is whether the Respondent had knowledge of the unfavourable consequences for the claimant from which intention can be inferred.

Financial Loss

4.11. The measure of damages is the same as it would be in a civil court in tort – that is, the assessment of damages is not simply what is just and equitable. There is no upper limit on what can be awarded. The question is what would be the position of the Claimant if the statutory tort of indirect discrimination had not been committed against him.

4.12. Where compensation is awarded, it is on the basis that "as best as money can do it, the claimant must be put into the position she would have been in but for the unlawful conduct of [the] employer"' *(Ministry of Defence v Cannock [1994] IRLR 509, EAT, per Morison J at 517, [1994] ICR 918, EAT).*

4.13. Losses must be attributable to the specific acts of discrimination found by the Tribunal based on the pleaded claim. So long as the losses claimed can be causally linked with the unlawful act, the respondent must meet them,

4.14. Causation is a factual issue of whether the damage would have occurred "but for" the wrongful act, whereas questions of remoteness involve a value judgment as to what was "direct" or "natural" or "foreseeable" as a consequence. (*Bullimore v Pothecary Witham Weld (No 2) [2011] IRLR 18 EAT)* but the test of reasonable foreseeability does not apply to limit the liability *(Essa v Laing Ltd [2004] EWCA Civ 02 [2004] IRLR 313).*

4.15. Heads of damages include pecuniary losses, that is, personal financial losses, and non-pecuniary losses, such as injury to feelings and in some cases personal injury. Financial losses include loss of earnings and benefits derived from the employment.

Where failure to mitigate is demonstrated, a deduction can be made in respect of earnings that were not but should have been achieved.

4.16. The task is to put the employee in the position he or she would have been in had there been no discrimination. The fact that there has been a discriminatory dismissal may mean that the employee is on the labour market at a time and in circumstances which are not of his own choosing. It does not follow therefore that their prospects of obtaining a new job are the same as they would have been had he or she stayed where they were. In addition, there may be stigma by reason of taking proceedings, and that may have some effect on the chances of obtaining future employment. (*Chagger v Abbey National plc & anor [2009] EWCA Civ 1202 ("Chagger") Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102, [2003] ICR 318 ("Vento")).*

4.17. When an act of discrimination results in the loss of employment, for example, or promotion*,* a tribunal will have to calculate future loss, and in so doing have to make decisions about the chances that the employment would have continued or that the claimant would have been promoted had the discrimination not taken place. It is important that this is done by reference to calculating the percentage probabilities, and not on a simple balance of probabilities *(Chagger).* The assessment must be made by focusing on the degree of chance and not on a balance of probabilities approach; in other words, it would be wrong to conclude that something was more likely than not to have happened and then to deem it to have happened rather than considering the chance of it happening and applying a percentage factor to reflect that chance *(Chagger).*

Injury to Feelings

4.18. Injury to feelings awards are compensatory and should be just to both parties. The matters compensated encompass subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress and depression (*Vento)*. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award. Tribunals should remind themselves of the value in everyday life of the sum proposed (*HM Prison Service v Johnson* [*1997] IRLR 162).*

4.19. Allowing a grievance procedure to drag on for 14 months was held to be a factor that a tribunal could take into account in awarding damages for injury to feelings (*British Telecommunications plc v Reid [2003] EWCA Viv 1675, 2004 IRLR 327).*

4.20. The Vento case is the source of guidance on the level of compensation for injury to feelings which have since been updated. They identify three broad bands of compensation for injury to feelings as distinct from psychiatric or personal injury, but Tribunals should have regard to the Judicial College Guidelines on psychiatric personal injury when determining the appropriate injury to feelings award.

4.21. This claim was brought on 1 March 2018. Applying the guidance issued by the Presidents of the Employment Tribunals in respect of claims issued after 11 September 2017**,** the lower band is for less serious acts of discrimination. Awards in this band are currently between £800 - £8400.

4.22. The middle band is for cases which are more serious but do not come into the top band. These awards tend to be from £8,400 to £25,200.

4.23. The top band is for the most serious cases such as where there has been a lengthy campaign of harassment. These awards are between £25,200 and £42,000, but are relatively rare.

4.24. A case would have to be highly exceptional for any sum higher than this to be awarded.

Public Sector Equality Duty

4.25. The Public Sector Equality Duty is a key element of the Equality Act 2020, intended to ensure that public authorities actively pursue equality objectives in exercising their functions. It is mandatory and it may not be delegated.

4.26. Section 149 of the EA 10 states;

> (1) A public authority must, in the exercise of its functions, have due regard to the need to:
>
> > (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
> > (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
> > (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

4.27. Subsection 149(3) explains,

> "Having due regard for the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:
>
> > (a) remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
> > (b) take steps to meet the needs of persons who share a relevant protected
> > characteristic that are different from the needs of persons who do not share it;
> > (c) encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low."

4.28. Subsection 149(5) adds,

> "Having due regard for the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:

(a) tackle prejudice, and
(b) promote understanding.

4.29. The relevant protected characteristics include sexual orientation.

4.30. It requires a more positive, proactive approach than just avoiding discriminating.

4.31. Breach of section 149 Equality Act does not confer a claim in itself.

4.32. Technical Guidance published pursuant to section 13 2006 EA, by E and HRC, sets out how public authorities should comply with the duty. It can be used as evidence in legal proceedings. A public authority that has failed to follow its guidance will need to explain its reasons (paras 1.4 and 1.5)

4.33. In *G v Head Teacher and Governors of St Gregory's Catholic Science College 2011 EWHC 1452, QBD, ("G")* Mr Justice Collins, giving the judgment of the High Court, noted that the purpose of the duty is "to require public bodies to whom it applies to give advance consideration to issues of race discrimination before making any policy decision that may be affected by them". He quoted Lady Justice Arden in R (on the application of Elias) v S of S for Defence 2006 IRLR 934 CA ("Elias") speaking of the race equality duty then in place under section 71 RRA as "an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation"

Aggravated Damages

4.34. Aggravated damages may be awarded in particularly serious cases of discrimination. The principles were laid down in *Alexander v The Home Office [1988] ICR 685* and in *Kuddus v Chief Constable of Leicestershire Constabulary [2001] UKHL 29, [2001], 3 All ER 193*. They are compensatory only and should not be awarded to punish the respondent. They may be awarded where the complainant is able to establish a causal link between "a high-handed, malicious, insulting, or oppressive manner in committing the act of discrimination" on the employer's part and the injury to feelings suffered *(Alexander).*

4.35. They are seen as part of injury to feelings but while a separate award is to be made, Tribunals should avoid compensating claimants under both heads for the same loss.

4.36. In *HM Prison Service v Salmon 2001 IRLR 425 EAT*, it is said that,

> "Aggravated damages are awarded only on the basis and to the extent that the aggravating features have increased the impact of the discriminatory act or conduct on the applicant and thus the injury to his or her feelings"

4.37. Exceptionally, damages are available for the manner of conducting the tribunal proceedings where that aggravates the harm caused by the original act of discrimination. In that case it was inappropriate and monumental effort put into the defense of the proceedings in a manner deliberately designed to be intimidatory and cause the maximum unease and distress to the claimant (*Zaiwalla and Co and anor v Walia 2002 IRLR 697 EAT).*

4.38. The EAT in that case thought there was a very good public policy reason for allowing a claim for aggravated damages in an appropriate discrimination case, since the alternative would be for the claimant to bring further proceedings for victimisation increasing the tribunals' already considerable workload. It is preferable for the tribunal hearing the case to assess the seriousness of the misconduct and its effect.

4.39. There must be some causal link between the conduct and the damage suffered: high-handed conduct on its own is not enough to lead to an award of aggravated damages. The ultimate question according to the then President of the EAT, Mr Justice Underhill, in *Commissioner of Police of the Metropolis v Shaw [2012] ICR 464 EAT* is whether the overall award is proportionate to the totality of the claimant's suffering. It is an aspect of injury to feelings reflecting the making more serious the injury to feelings by some additional element which would fall into one of three categories,

> (a) the manner in which the wrong was committed, that is, where it is done in an exceptionally upsetting way – high-handed, malicious, insulting or oppressive way
>
> (b) bad motive, provided that the claimant was aware of it , for example conduct based on, prejudice, animosity spite or vindictiveness is likely to cause more distress
>
> (c**)** Subsequent conduct, such as where the defence is conducted at a trial in an unnecessarily offensive manner, a serious complaint is not taken seriously, where there is a failure to apologise, or the respondent has defended in a way that is wholly inappropriate and intimidatory.

4.40. The actions are not required of themselves to be discriminatory.

4.41. Tribunals must be wary of focusing on the quality of the respondent's conduct – that is, assuming that the more heinous the conduct, the more devastating its impact on the claimant. Tribunals must not lose sight of the ultimate purpose of aggravated damages, which is to compensate for the additional distress caused to the claimant by the aggravating features in question. The award must overall be fair and proportionate, in respect of non-pecuniary loss (*Ministry of Defence v Fletcher [2010] IRLR 25 EAT, "Fletcher",* to which we are referred).

4.42. Maladministration alone does not itself justify the award of aggravated or exemplary damages, in the absence of aggravating factors such as the lack of good faith, the targeting of the claimant personally, malice or a campaign of deliberate humiliation (*see Elias, above).*

Exemplary damages

4.43. The availability of exemplary damages in discrimination cases was confirmed in Kuddus *(above),* a case of alleged misfeasance in public office, and again in Fletcher (*above*). They are punitive, not compensatory. Again, the risk of double recovery must be avoided.

4.44. There are two categories of case where exemplary damages may be awarded:

i) Where there is oppressive, arbitrary or unconstitutional action by servants of the Government, for example, where the conduct an officer of a public body with sufficient seniority is conscious and contumelious.

ii) Where the guilty party's conduct was calculated to profit beyond the level of any compensation payable to the claimant *(Rookes v Barnard [1964] 1 All ER 367)*

ACAS Code of Practice

4.45. The ACAS Code establishes "basic practical guidance to employers and employees and their representatives and sets out principles for handling disciplinary and grievance situations in the workplace."

4.46. The Code sets out that issues should be dealt with promptly and consistently and be investigated to establish the facts. Employees should have the opportunity to put their case, to be accompanied in any formal disciplinary or grievance meeting and have the right to appeal.

4.47. The ACAS Code is made under section 199 of Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA"). Breach of the ACAS Code brings penalties under section 207A of TULRCA. The award is the just and equitable amount up to 25%. The breach of the Code of Practice must be identified.

4.48. Section 273 of TULRCA applies its provisions to Crown employment but section 274 provides that section 273 does not apply to service as a member of the armed forces, as more fully discussed below.

Interest

4.49. A tribunal may award interest on awards of compensation made in discrimination claims brought under s124(2)(b) EA 2010, to compensate for the fact that compensation has been awarded after the relevant loss has been suffered *(see s139 EA 2010, EA 2010 (Commencement No 4 etc) Order SI 2010/2317 and Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996.*

4.50. The tribunal may award interest to the following types of discrimination award:

- Past financial loss;
- Injury to feelings;
- Aggravated and exemplary damages; and
- Physical and psychiatric injury.

4.51. Interest is calculated as simple interest. The current statutory rate is 8%. (1/365 or 0.00273973 per day). The period of accrual of interest in injury to feelings runs from the act of discrimination to the hearing. For other sums it is from the mid-point of the period since the act of discrimination.

4.52. Awards for injury to feelings unrelated to termination of employment are tax-free.

Penalty

4.53. Under S12A ETA 1996, where the employer has breached any of the worker's rights and it is of the opinion that the breach has "one or more aggravating features", the Tribunal may award a penalty, payable to the Secretary of State. According to the explanatory notes, the Tribunal may consider the size of the employer, the duration of the breach, the behaviour of the employer and employee as well as whether the action was deliberate or committed with malice, whether the employer was an organisation with a dedicated human resources team or the employer had repeatedly breached the employment right concerned.

5. Submissions

5.1. The Tribunal had the benefit of helpful written submissions, supplemented by short oral submissions and a joint bundle of authorities. Those were considered and referred to here without summarising them.

5.2. Regrettably, submissions in relation to the application of the ACAS Code, although sent in on 15 September did not reach the Tribunal until some days later, after Judgment had been given. The issue of the Judgment and Reasons were delayed to allow those submissions to be addressed. They are dealt with below.

6. Reasons

5.3. This hearing was delayed from the agreed two day hearing due to take place in February 2022. The Claimant would have been giving evidence from Belgium. The President's Guidance on receiving evidence from abroad was circulated on 2 February 2022 following the Upper Tribunal case of Agbabiaka *(evidence from abroad; Nare guidance) [2021] UKUT 00286 (IAC).* The present hearing was booked on the basis that the Claimant would be giving evidence from within the jurisdiction, as he did. The time estimate was extended, in the light of the potential complexity of the issues and the number of documents.

5.4. The Tribunal had some difficulty with the electronic documents. The following note is intended to assist.

5.5. It is customary to include all relevant pleadings and Tribunal documents at the start of the Tribunal file or bundle. Here, the judgment in the preliminary hearing, the Restricted Reporting Order and the Case Management Orders for the remedy hearing were relevant as was the judgment on liability. It is often necessary even in a remedy hearing to consult the claim and response. The pleadings, Orders and Judgments are not counted in the page count. Those documents would helpfully have been included in date order at the start of the bundle.

5.6. An earlier version of the index was included in the electronic bundle, with each entry bookmarked. That made it difficult to find documents quickly or to search – every document appeared twice. It also led to the page numbers being different in the electronic version from those used in the index.

5.7. The electronic index refers to document numbers. It does not include dates or page numbers. The witness statements refer to page numbers. They do not refer to document numbers. Many of the electronic index entries simply identify email chains, which without dates or page numbers make those entries of little use in finding the right point of reference. Searches produced multiple irrelevant entries. Additional bookmarks created by the reader made an already lengthy list of documents yet more unwieldy.

5.8. Brief identifiers, including dates and page numbers would be more helpful.

5.9. A great deal of work went into preparing the documents and that is appreciated. These comments are intended to be helpful, to make electronic files more user-friendly for the future.

Application

5.10. There was an application from the Respondent at the start of the hearing for the admission of an additional witness statement from J Barker and for the Equality Impact Assessment of the accommodation policy now completed and signed off in August 2022.The Tribunal file was already 650 pages. The Claimant objected and the Tribunal refused to admit them.

5.11. The Impact Assessment had been disclosed to the Claimant only on the previous Friday, the last working day before the start of the hearing. Competent though the Claimant undoubtedly is, that is not helpful to a litigant in person facing final preparation for a five-day hearing.

5.12. The focus of the Tribunal was on the discrimination found and remedy for it. While it was tempting to consider the equality assessment, there was a substantial risk of being drawn into a critique of the work carried out, and of being distracted from the issues already before the Tribunal. While the witness statement relating to future accommodation policy may have shown progress by the MOD since the case started, we were told that there were no decided plans. Approval is awaited. While there has been every expectation that the plans would be implemented, current circumstances must render that more uncertain, particularly given that they are not without cost - even though we are told the potential costs have been brought sharply down. Nor has the pilot been the subject of equality assessment, (on which the comments of Mr Justice Collins in G above are helpful, see para 4.22 above). The MOD statements that the Claimant had seen made it clear that moving to an allowance-based system for accommodation was not imminent.

5.13. The consideration of further documents was not incorporated in the time estimates, already tight given the number and density of the documents already agreed.

5.14. This is a claim brought in 2018 and further delay, in particular if there was a risk of going part-heard, had to be avoided at all costs.

Policies and training

5.15. The policies that the MOD has in place are sound. They are careful, clear, detailed. The criticisms made are not of the policies themselves. The issue is the stark disparity between the requirements of the policies and the guidance and their implementation. The policies and guidance are not applied.

5.16. There is also training. Training can only be judged by its effectiveness. We commented at paragraph 5.70 of our earlier judgment on the lack of understanding of diversity and discrimination shown by Mr Brennan, who had had the training. The events described above show an awareness of diversity and inclusion issues to be very largely absent from day-to-day consideration and that there are failures of understanding across all staff levels.

5.17. The Public Sector Equality Duty is not applied.

5.18. The handling of sensitive personal information is not understood, nor is it even recognised as sensitive.

5.19. What we see is ignorance and complacency.

5.20. That is reflected in the impact on XA. In his victim statement, he mentions being a committed Diversity advocate with experience in his professional Association and he felt insulted and upset that the needs of the gay community had not been considered. He had an admission from Accommodation Policy Staffs that there had been no meaningful equality analysis since 2014, with the suggestion that it was handled in conversation in the office; as he said,

> "Their suggestion that they just chat about equality in the office seemed to suggest that the required rigorous consideration of the needs of protected characteristics had been reduced to the same level as that of discussing the previous night's football match."

5.21. To him,

> "Whilst I am obviously upset at the fact that the needs of the gay community have not been considered, it is the lack of contrition for failing to do so that really grates." *(82/87)*

Special Category Data

5.22. Data Protection Act 2018 is the UK implementation of the General Data Protection Regulation ("GDPR"). Some categories of personal data are singled out as likely to be more sensitive and are given extra protection. That includes information concerning a person's sexual orientation. It does so because the use of such special category data can create significant risks to an individual's fundamental rights and freedoms, or as the European Court of Justice expressed it, "significant nuisance" in their private life[1]. Such personal information must be treated with great care: its use may expose someone to discrimination or harassment or lead to interference with rights, such as the right to enjoy their private or family life.

5.23. Such information is to be transmitted and used only with express consent or as necessary in accordance with restrictive provisions. Necessary means limited to what is genuinely needed, targeted, proportionate, fair and transparent. Alternatives to sharing such information must be considered; if there are alternatives, sharing is not necessary.

[1] (Case C-184/20: OT v Vyriausioji tarnybinės etikos komisija (Chief Official Ethics Commission, Lithuania); information indirectly disclosing sexual orientation is special category personal data (ECJ)).

5.24. XA is a member of the LGB community. This case arises because of his sexual orientation. He has guarded his privacy with great care.

5.25. Sexual orientation is not visible. Historically, it has been something to keep hidden. There is a right to privacy in private life and the wish to keep sexual orientation private requires no justification.

5.26. The ban on homosexuals serving in the forces was lifted in 2000, only very shortly before the Claimant joined. Any in the service before that would have been compelled to maintain their privacy. Those working with them would have had no experience of working with members of the LGB community – that will include many senior officers still in the services. Attitudes take time to change and there remains a risk of prejudice and preconception, with very direct personal consequences.

5.27. The Claimant did not share his sexual orientation with his peers or with those he reported to. Knowledge was kept to a minimum. When seeking advice about the impact on him of the one choice rule for SSSA, he did not share that information with the Chief Clerk, for example, though it was germane to his difficulties.

5.28. It has been a significant source of distress and anxiety to him that his personal circumstances have been repeatedly and unnecessarily shared in the course of these proceedings. His concerns about that have been rebuffed.

5.29. These instances are significant but not alone.

i) The email circulated by WC Elliott-Maybe of 17 January 2018 *(65/70)*. The email from XA on 17 January 2018 referred to the LGB community in terms that make it clear that he is a member of that community and on that basis may be bringing an Employment Tribunal claim. There is no other way of reading it. Wing Commander Elliott-Mabey had attended training on diversity and inclusion, on unconscious bias, had dealt with such issues throughout his career. He was not unaware that to bring a claim, the claimant had to be personally affected, not merely a concerned bystander. That is the case with Service Complaints and is the well-known basis on which litigation can proceed – someone with no involvement cannot simply embark.

ii) He did not, in his evidence to us, say anything about the individuals to whom he had circulated the email that showed that its circulation in its entirety was necessary. That circulation had the opposite effect that the Claimant wanted: casual dissemination of his sexual orientation amongst more senior officers who had no need to know.
While Wing Commander Elliott-Mabey may have acted in haste, there is a similar response from the Appeal Body, from whom the Claimant was entitled to expect careful reflection. They write that it is,

> “quite a leap from stating “protecting the LGBT Community” to this being an interpretation as a revelation of the Complainant’s sexual orientation, when there are many personnel within the service who are LBGT Champions but are not part of the “LBGT Community”.

On the contrary, the leap is in thinking that someone who was not a member of the LGB community would – or could - be trying to bring an Employment Tribunal case to protect those that were. This is dismissive and unthinking.

iii) The Claimant refers in his complaint to the Ombudsman on 16 August 2019 of "Insensitive Handling –

> "There has been a general lack of understanding throughout this complaint that someone's sexual orientation is particularly sensitive information and should have been minimised to those who absolutely needed to know, with my name anonymised as appropriate. Handing it off through large number of officers, including 2 Deciding Bodies and 2 Investigation officers with numbers of junior officers being given access to information that should have stayed with their OF4 team heads. ((340/346).

That is demonstrated in the handling of the appeal. The Claimant was asked for but did not consent to the case being presented to the Appeal Panel. That was disregarded and the papers were put before the panel. He complained, and was told that there had been a (lawful) basis for sharing his data but not what it was.
Again, this is a casual disregard of the fundamental principles for the lawful handling of sensitive personal data. It should not have been shared without his consent. It is disturbing that he was not even told the basis on which it was thought it could be so shared.

iv) We know of two instances when data was inappropriately shared on a widespread basis, using the Microsoft Outlook Calendar meeting invitation system. On 3 March 2020, information was shared which included his name, and documents disclosing his sexual orientation. It was removed on 4 March after his complaint. His complaint received no response. It then happened again, and his complaint met with an angry rebuff. Both instances were after the making of the Restricted Reporting Order in the Order issued on 3 February 2020. (368).
Those postings were open to other users of the MODnet to access as well of course as having been openly shared with all invitees to the meetings concerned.

5.30. That casual circulation increases the likelihood of the information being further shared, there being nothing to indicate it was unwelcome. That is why guidance as for example in the draft letter of guidance and apology that XA drafted should have been issued.

5.31. There has been at no stage an apology or other recognition that that was wrongful conduct and serious.

Impact

5.32. XA is reticent at putting his personal difficulties into words. We have however heard from him over the two hearings and have the benefit of his careful submissions for the Service Complaint and the appeal and to the Tribunal. The documents include a victim impact statement that XA drafted as part of his Service Complaint, in February 2018 *(82)* and a chronology *(116 et seq).* We have found his evidence, oral and in writing, to be reliable and honest.

5.33. The accommodation he had was in an estate built for family occupation on the edge or beyond of the intended travel time to the office. There was no parking available. He had to rely on the bus, so the trip took 45 minutes or more. Getting into central Bristol was a 90 minute bus ride. He was isolated. It was not a place that had a community of like-minded people into which he could fit, in particular within a relatively short service term.

5.34. It is quite right that he did not lose an offer of preferable accommodation. He lost the chance of preferable accommodation. That the field officer had in fact found something suitable when first looking shows that his preference was not impossible to meet. His second offer might have been no better, but there was a prospect that it might have been. And choice itself is important.

5.35. Even in 2018, he spoke about the uncertainty created by the situation. He had hoped the matter of his accommodation might be resolved quickly. He tried to find a resolution informally but found himself having to navigate an unclear complaints system.

5.36. There was uncertainty about when he would get responses to his complaint and whether he might be moved. He felt in limbo. He felt unable to book holidays; his fitness declined, as noted by the Ombudsman. It was not unreasonable to expect some resolution; the delay and lack of resolution take a toll.

5.37. He reports that the need to reveal his sexual orientation to a significant number of personnel has caused significant anxiety. That was compounded by the repeated breaches of his confidentiality and by the lack of recognition, response or apology, as quoted above.

5.38. He faced the difficulty of not being able to explain what was happening, in particular to those to whom he reported or who carried out assessments. He had to try not to let it affect him, while undertaking very substantial work over and above his duties. He is credited in all the assessments for being hard-working and dedicated. This was added to an already demanding workload.

5.39. That workload was compounded on a basis he could not have foreseen by difficulties in the complaints system and the attitude of some of those involved, in particular the accommodation team. His request in the summer of 2017 for the equality assessment of the reduction of choice should have produced a document by return, with no further correspondence. Instead, there were months without response, of obfuscating replies and delay, with false insistence that the equality assessments had been undertaken and that the policies were compliant. Those actions were found to be deliberate obfuscation in the report of the officer handling his Service Complaint. They led to a belief in senior officers that the right equality assessments had been carried out and that the policy was compliant. That undermined his complaint and no doubt his credibility.

5.40. As recognised by the Decision Body for the Service Complaint,

> "He feels that the time he has had to invest in making his Service Complaint has led to a drop in his ability to demonstrate his capabilities in his new role, which will adversely impact on his appraisal."

5.41. He was distressed by the fact that consideration of his needs, as a member of the gay community, was not thought worthy of serious time or effort. It "makes me feel that somehow I am sub-human and not worthy of the consideration that others would receive.".

5.42. He adds,

> "I have found the whole experience stressful, draining and a distraction from just being able to lead a normal life." *(84/89)*

5.43. That was compounded by the criticisms he unfairly faced, for delay, for "machinations", for failing to follow advice, in terms that made his actions appear irrational or ridiculous.

Injury to Feelings – the approach

5.44. The Respondent's submission is that the discrimination is a simple, one-off event, and the injury to feelings correspondingly limited, putting it at £4,000, the middle of the lower band, Vento.

5.45. We do not agree. The lack of choice had ongoing consequences in the accommodation that was provided. It was awarded on the basis of a frank difference in treatment between those who qualified for a second choice and those who did not. The Claimant saw the equality implication of that and was entitled to bring forward a complaint. The MOD require a Special to Type Complaint first, that is, a complaint to the accommodation provider. That is before the Service Complaint that is itself a required threshold for bringing an Employment Tribunal claim.

5.46. He was criticised for delay in not bringing forward his stage 2 special to type claim during the period between August and February. That was the period when he was trying to obtain the equality assessment records that should have existed, when he was met with that delay and obfuscation and when he was also having difficulty with the procedures and inherent conflicts within them. Part of his difficulty was the lack of clarity as to who was responsible for equality procedures and where records (had they been made) would be retained.

5.47. As the facts set out in the Chronology above show, the procedures are tortuous. The Special to Type complaint procedure was not clear and although he was repeatedly told he had to pursue it through stage 2, it was finally agreed that stage 2 did not apply and he was able to pursue the Service Complaint.

5.48. The history there is yet more troubling. It is reasonable to expect that members of the services have no less fair and reasonable handling of grievances than employees elsewhere. The ACAS Code of Practice on Disciplinary and Grievance Procedures is a short statement of basic principles. Amongst them is that issues should be dealt with promptly.

5.49. His complaint began on 7 July 2017. The Service complaint was presented on 8 February 2018. The delay between those dates is attributable to the difficulties in getting information, documents or guidance. The Decision on that complaint was issued on 30 April 2019. The Appeal decision was issued on 3 July 2019. Two years to deal with a complaint is exorbitant. It bears reiterating that his Employment Tribunal claim required to be stayed, on the question of jurisdiction, throughout.

5.50. Amongst the impacts on him of the Respondent's conduct is the extraordinary length of time over which he was occupied dealing with those complaint procedures. He speaks of many hundreds of hours of work, and that is supported by the care he took over his documents and his records of needless obstacles in failures to respond and diversions.

5.51. He was aware of an impact on his work. He was not able to give the time to undertaking activities in a highly competitive environment that would have supported his promotion. He felt less able to perform in his key role to the best of his ability or to support others. He was aware of that, and of the potential impact over the long term on his career prospects, another source of anxiety for a highly professional and ambitious individual.

5.52. This is not a one-off event.

5.53. We are entitled to take into account the difficulties he has experienced over the period of the handling of the complaint.

5.54. It is very much to our concern that the SSSA system offering reduced choice to single individuals remains unchanged in spite of the Tribunal's findings and in spite of the time that has passed. We know that there has now been an EIA of the accommodation policy, and that substantial progress has been made on FAM. However, at present there is no certainty about whether that will progress to implementation in 2023 and on the evidence we heard, an allowance based system is not likely to be wholly implemented within five years. A suggestion was that it might not apply to new recruits for some years. That in itself raises the same issue as XA faced – it is known that it would not be appropriate for him, for example, to have to reside in MOD premises. We can only flag up that there are sensitive issues about young LGB recruits and their accommodation.

5.55. It bears noting that the Respondent's position on this case was that there was indirect discrimination, recognised in both the outcome of the Service Complaint and the Appeal, but that it was justified by the exemption in the EA 2010 at Schedule 9 para 18(2). That point went to a preliminary hearing and the judgment that showed the exemption did not apply was issued on 8 November 2020.

5.56. Given that history, there was a reasonable expectation that action would be taken in relation to the SSSA following the liability judgment issued on 3 November 2021 , notwithstanding that the remedy hearing had not been reached.

5.57. XA was moved from Bristol and posted abroad in May 2021. He is now due for a further British posting. As things stand, he will be presented with the same provisions in relation to a single offer of accommodation as have already been found to be discriminatory in this case.

Addressing the Issues

5.58. The first issue is:

> For the purposes of sections 124(4) and (5) of the Equality Act 2010, is the Tribunal satisfied that the provision, criteria or practice held to be discriminatory was not applied with the intention of discriminating against the Claimant? That is because the tribunal must in such a case give consideration to a declaration or recommendation before considering financial compensation.

5.59. The Tribunal does not find that the provision, criterion or practice was applied with the intention of discriminating against the Claimant. The Respondent was not aware that discriminatory consequences would flow from its actions – albeit that that arose from the failure to explore the impacts on protected groups of the policy change.

5.60. The Tribunal has given consideration to a declaration or recommendation before considering financial compensation.

Declarations

5.61. Should the Tribunal make any further declaration as to the rights of the claimant and the respondent?

5.62. The declaration that the Claimant was discriminated against has already been given as the Judgment in this case.

5.63. The Claimant asks for a declaration that the Respondent failed to comply with the Public Sector Equality Duty.

5.64. Mr Waite objects to the making of a declaration on the basis that it is not a declaration as to the rights of the complainant and the respondent in the matters to which the proceedings relate. It is the case that the Claimant is an intended beneficiary of the Public Sector Equality Duty, but it is not a field within which this Tribunal has jurisdiction and on that basis a declaration is not appropriate.

5.65. We prefer the course of making that finding, that the Respondent failed to comply with the Public Sector Equality Duty, noting that it is agreed to be the case and supported by the apologies in that regard from both the Decision Body (249/255 – 289/295) and the Appeal Body (321/327 – 326/332).

Recommendations

5.66. Should the Tribunal make recommendations that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?

5.67. This is a case where there is a very marked disparity between the MOD policies and guidance, for example on equality impact assessments and the practice. Equality, on the evidence of this case, has not even been an add-on. It was being routinely dealt

with without understanding and on a tick-box approach, uninformed by the training given, consultation or experience.

5.68. We were not persuaded that the witnesses we heard, who had undergone the training offered, understood either the principles of diversity and inclusion or the approach required by the MOD's own diversity and inclusion policies. They did not understand or apply the Public Sector Equality Duty.

5.69. The Claimant continues in service. We therefore make recommendations intended to obviate or reduce the adverse effect on him of the discrimination found, and the underlying failures that create risks for him and others.

5.70. The difficulty is that there is no culture of compliance with the MOD's diversity and inclusion policies. Information about whether there are equality impacts often seems to be sought from those without the relevant experience – senior officers for example may well have little or no knowledge of the lived experience of the LGB community. With the sound policies that the MOD has, careful thought is required to establish the necessary cultural awareness.

5.71. The Tribunal has to consider practicability, both from what is practicable in terms of the effect on the complainant and also from the perspective of the employer. *Lycee Francais Charles De Gaulle v Delambre UKEAT/0563/10 [2011] EqLR 948 and Fasuyi v London Borough of Greenwich UKEAT/1078/99) ("Fasuyi")*

5.72. In "Fasuyi", HHJ McMullen QC confirmed that a recommendation which is generally ameliorative, that is applying across the board, may be justified if the effect of it will obviate or reduce the adverse effect of discrimination on the complainant, who is a person within the general application (para 24).We recognise that that is an old case, but in spite of the narrowing of the jurisdiction in respect of recommendations, we have to find a way to make recommendations that will meet the situation that the Claimant is in because of the discrimination found.

5.73. We make the following general recommendation:

> "The MOD takes steps to ensure the compliance with their own diversity and inclusion policies. That is not a time-limited recommendation."

5.74. To do that, along with other measures that the MOD itself adopts to address this, we recommend as follows:

i) That the MOD identifies in each department or staff team the person responsible for implementing and quality assuring MOD policies in respect of diversity and inclusion, including equality impact assessments and the application of the Public Sector Equality Duty.

ii) That the MOD provides contact details of those individuals so that staff know who to contact with policy concerns independently of any complaints process.

5.75. This reflects the difficulty the Claimant had in identifying which team had responsibility in respect of the equality impacts of accommodation policy changes, and the fact that more than one team may have involvement.

5.76. Understanding equality and implementing changes that support equality is a dynamic field. There needs to be a continuing process of evaluation and learning. .A

"Lessons learned" process is a process of assessment from which experience can be fed into future planning, whether recognising mistakes or finding better ways of approaching problems. If there is a "Lessons learned" process, we have not heard about it or seen evidence that it is applied.

5.77. We recommend as follows:

iii) "Lessons learned" needs to be part of the quality assurance. The MOD needs to create opportunities for feedback that do not depend solely on formal complaints by setting up a structure for assessing and evaluating lessons learned for future implementation as part of the routine of supporting equality.

iv) As part of that, a simple procedure needs to be established for reporting concerns, failures or breaches particularly when raised by an individual who reports being harmed or at risk of harm.

5.78. That is because the complaints of serious breaches of data protection in relation to the Claimant did not meet proper recognition. Such complaints need to be part of the quality assurance and not to rely on the willingness of the individual to take the matter forward in formal complaints. Nor should such feedback depend on there being harm or anger: this is a way of sharing experience and creating opportunities for improvement.

5.79. Those recommendations are not major and do not commit the MOD to any significant reorganisation. The resource commitment is of additional time, but there is no justification for holding to practices that fail as badly as these have been shown to do. The good that comes out of this is far greater than the resource required.

5.80. There was here a failure to comply with the Public Sector Equality Duty and no genuine understanding of the policies even when signing off equality impact assessments. There was often no record of such assessments being carried out or the evidence for them. It was wrong that the Claimant had to carry out the lengthy enquiries he did, with the very limited results that he obtained. We recommend as follows:

v) The MOD is to ensure that relevant policies are only signed off on confirmation that the general equality duty has been complied with and that the evidence of compliance including equality impact assessments is available to those within the MOD, for example, by being published on the MOD intranet

5.81. The intranet is the place that is easiest for people to access. Equality assessments should be transparent and published. We do not understand why FOI applications should be required for the disclosure of equality assessments.

5.82. Those recommendations should be implemented within six months. We take into account that change is slow, but these changes are consistent with and in our judgment readily incorporated into existing practice and promote the creation of the essential culture of compliance.

5.83. We bear in mind the serious breaches of the claimant's personal data, the lack of recognition or apology and the clear risk of repetition. He cannot be singled out in

any such recommendation, but remains at risk from further breaches so we recommend as follows:

vi) Within 3 months the Diversity and Inclusion team issue or remind of existing guidance that clearly and in plain language sets out the necessity of protecting *"special category data",* that is, sensitive personal information and of taking simple steps to limit circulation of such information only to those with a need to know, and with consent, reflecting the GDPR protections.

5.84. One of the difficulties faced by the Claimant and plainly apparent from the evidence is that the training given did not translate into the day-to-day discharge of duties. Other public bodies incorporate equality and the implementation of diversity and inclusion policies in appraisals of administrative staff on the basis that evidence is required to illustrate the way that equality matters have been effectively incorporated into the work achieved during the year. We have not heard how administrative officers are appraised but recommend as follows:

vii) The MOD considers the incorporation of evidence-based appraisal in relation to diversity and inclusion policies into the annual appraisal of those administrative officers responsible for those policies in practice.

5.85. We do not make a recommendation in relation to possible further breaches. That was explored with a view to assisting both parties to avoid further litigation in a situation where it appears very possible that the discriminatory provisions considered here will apply again very shortly. There was no consensual approach based on. for example, an undertaking, and we conclude that it is better to recognise that such breaches attract their own remedies.

Injury to Feelings award

5.86. In assessing the award for injury to feelings, we take into account the impacts on him as set out above, to include the following:

- *The Claimant suffered from the lack of choice, the lack of the opportunity of a better offer*
- *There was a clear difference of treatment – he was denied a benefit on a basis discriminatory in relation to a protected characteristic.*
- *The location of accommodation is of particular sensitivity in such a case, with significant impact on his quality of life over the period of his term, and his disappointment was the more acute*
- *The consequence was to be isolated over the two-year term of his Bristol service, without ready access to his own community. That might have been the case with a second offer, but to have a second offer would at least have been to be treated the same as others*

- *The change in the rule that led to that position arose in a context where there was no adherence to the MOD procedures on equality, no application of the Public Sector Equality Duty and no equality impact assessment*
- *Those steps should have informed the policy makers of the particular considerations and risks for this community, including those who safeguard their privacy*
- *He was particularly hurt by the disregard of his needs as a member of the LGB community, a disregard apparent throughout*
- *His attempt to resolve the matter led to a protracted complaints process with unclear provisions and conflicting information*
- *There were significant delays, not of his making*
- *Those provisions operated as a statutory bar with the effect of preventing the claim to the Tribunal from proceeding for 18 months after the claim was lodged*
- *There was stress and anxiety associated with it which were the more acute on the criticisms he met with including for seeking equality documents and guidance on procedures that should have been readily available*
- *The engagement with the complaints process was substantially time-consuming for him. He may be criticised for the length of his submissions, but they are cogent and well researched in a complex field*
- *He was aware of the impact of the stress and workload on his performance, potentially long term for his career*
- *The system continues unchanged – he faces a further issue over accommodation within a few months, with the discriminatory provisions likely to apply to him in the same way. No reassurance has been given that they will not be.*

5.87. We find the top of the middle band of Vento to be appropriate, and put the damages for injury to feelings at £25,200.

Aggravated damages

5.88. Should the Claimant be awarded aggravated damages?

5.89. We have taken into account the failures to follow the sound policies that the Ministry has, and the statutory protections that the PSED and EIAs are supposed to confer.

5.90. What aggravates the discrimination is the course of action that led the investigating officer in the service complaint to be confidently told that there had been equality impact assessments when there had not been. Legitimate enquiry was met with a lack of frankness and misleading information. That reflects a serious gap between the requirements of the policies and the level of understanding amongst staff operating them.

5.91. The same is reflected, and in our view most seriously, in the repeated breaches of confidentiality. That is in a context in which, for very understandable reasons, sexual orientation is something serving officers would have every reason to keep as a private matter and will have concerns about the ramifications of it becoming public

5.92. We have evidence of the stress and anxiety on each occasion

5.93. There has been a failure to recognise or apologise for breaches of confidentiality and no steps taken to prevent further casual circulation of his circumstances, or “outing”.

5.94. Those have had a significant impact on him, aggravating his distress and, anxiety.

5.95. The Claimant points to the fact that the Boswell case was under discussion at the very meetings at which the change in this policy, the reduction of choice, was under discussion. Equality considerations should have been clearly in mind. Yet the officers have not taken more than a tick box approach in spite of the policies and training – there is no culture of understanding.

5.96. With particular regard to these aggravating factors , in particular the breaches of his privacy in the handling of his special category data, the absence of apology or steps to prevent repetition, even eventually in the light of the Restricted Reporting Order, we award aggravated damages of £8000.

Exemplary Damages

5.97. Should the Claimant be awarded exemplary damages?

5.98. There are actions that were arbitrary and oppressive but they have been taken into account in the aggravated damages award. We must avoid double counting.

5.99. We do not find conscious and contumelious conduct by a senior officer.

5.100. We bear in mind that exemplary damages were awarded in Boswell. But that was a judgment by consent. We do not have the reasons for the award. Reading the liability judgment, it is not plain on what the exemplary damages were based. We cannot regard that as setting a precedent on the basis of which we can make an award.

5.101. We do not accept that the savings from the reduction in choice in SSSA accommodation can be regarded as wrongful profit from the discrimination: that arises from the overall reduction in choice for single people not from the impact of the policy on the protected group.

5.102. We have looked very carefully at the caselaw and in particular the Fletcher case. We do not find that the threshold for exemplary damages has been met.

Loss of earnings

5.103. The Claimant seeks compensation for loss of earnings.

5.104. He is able and ambitious and looks to move up to high rank.

5.105. His OJARS prior to these events were commendable. The comments show a high-flyer with an impressive range of skills and qualities and consistently high performance.

5.106. He describes the system as one that depends very much on the nuance of comments rather than the grades – the grades are not moderated, that is, there is no objectivity as between the way one officer approaches them and another.

5.107. What he has not been able to do in particular is devote his time and attention as unreservedly as he would wish to his duties. He equally has not been able to undertake a wider range of activities that he could have called upon to show his strengths, as others in the competition would have done.

5.108. The promotion boards are highly competitive, with large numbers competing and relatively few posts available for good candidates.

5.109. The evidence shows that he was in contention for promotion before the discrimination. It does not show he would have got it. Able candidates who went through to the next stage of assessment failed, and were put on a list of A candidates, "non-select".

5.110. As he himself points out, where there are external pressures adversely affecting performance, if they are shortlived, the unaffected period may offer material on which to base warm recommendation. If they are prolonged, the year's performance may produce no evidence of the genuine underlying ability.

5.111. His reporting officers were unaware of the extent and nature of the difficulties he was having in handling this case and the previous complaints. But if they had been, they could not have called upon it as evidence to support promotion.

5.112. He says himself that OJARS are not relevant in terms of performance after 2017, because the Officer could not have known what was going on and how it impacted on his performance *(para 2 of C ws)*.

5.113. Looking at the reports themselves, including the later OJARS, we agree. It is simply not possible to say trace the impacts on him. The changes would be reflected in very subtle changes in wording and choice of illustration and to those outside the field, there is little to choose between them. They do not show a clear trend, and they do not obviously reflect any failure to perform, or drop in quality of performance. He comes across as a star candidate, from the comments.

5.114. We do not have the competitors OJARS for comparison.

5.115. It is his own regretful judgment that he has performed less well.

5.116. The objective evidence for that is that he has done less well in each promotion board between 2019 and 2021, going from grade B+ to B to C.

5.117. He may have less chance now of promotion than he had. He may have less chance of achieving the rank he desires in the long run.

5.118. However, on the B+ grade, he was not close to promotion in 2019. That was after a period when he secured commendation for impressive performance and was strongly recommended for promotion.

5.119. We have to bear in mind that litigation is of its nature stressful and demanding. Some impact is inevitable and not attributable to discrimination.

5.120. The loss that we have to assess is the loss of a chance of promotion, not the loss of promotion.

5.121. It is not possible to measure the damage to his career on the basis of the evidence we have, whether the immediate loss of a chance of promotion or any longer term impacts.

5.122. He would have had to perform significantly better, relative to other candidates to achieve promotion and the evidence that he has been unable to do so because of the discrimination is absent.

ACAS Code and section 207A TULRCA 1992

5.123. n our judgment, the uplift for breach of the ACAS Code of Practice under section 207A of TULRCA is not available to members of the armed forces.

5.124. The ACAS Code on Grievance and Disciplinary Procedures is made under the authority of section 199 of TULRCA. Section 207A provides for a discretionary uplift or reduction to an award where there has been a breach of a provision of the Code.

5.125. Section 274 disapplies section 273 in relation to service as a member of the naval, military or air forces of the Crown. Section 273 applies TULRCA to those in such service as if they were employees (save for a few excepted provisions which include the procedure for handling collective redundancies under Chapter II of Part IV of TULRCA).

5.126. Section 274 therefore takes members of the services out of the provisions of TULRCA.

5.127. The Claimant contends, as set out in his written submission, that section 274 of that Act is a disproportionate interference with the Claimant's rights under the EU Charter of Fundamental Rights.

5.128. The Claimant relies on the Boswell case mentioned above as demonstrating that the ACAS Code of Practice applies in respect of a serving member of the Royal Navy. He contends very reasonably that the Code relates to good practice in grievance handling and there is every reason for that good practice to apply to members of the services. We have already criticised the MOD for the extraordinary delay in handling the grievance procedures in his case, during a period when that delay precluded his claim to the Tribunal from proceeding.

5.129. The issue here is not whether the ACAS Code of Practice applies but whether the Tribunal is empowered to award an uplift under section 207A of TULRCA in respect of a breach of the Code.

5.130. Section 207A is a late addition to TULRCA. It was introduced to provide an incentive to follow proper procedures and recommended practice. It applies where there is an unreasonable failure to follow the Code. It can be applied to increase or reduce awards. It is a discretionary remedy, to be exercised having regard to the overall value of the award made.

5.131. It is worth noting that section 199 is in Chapter III of Part IV of TULRCA. Chapter II of Part IV gives effect to the duty to implement Directive 98/59/EC and its predecessor. That relates to collective redundancies. Article 1(2)d) of that Directive sets out an exemption to its provisions,

> "This Directive shall not apply to workers employed by public administrative bodies or by establishments governed by public law (…or equivalent bodies)."

5.132. Hence the exception referred to above, precluding the application of TULRCA to Crown employment with regard to collective redundancies.

5.133. Article 1(2)(d) of 98/59/EC demonstrates that the exemption of members of the services is not regarded as incompatible with rights under the Charter of Fundamental Rights. The exception in section 274 is in fact narrower than the exception in Article 1(2)(d).

5.134. We are not aware that section 199, authorising the issue of the ACAS Code of Practice derives from any requirement to implement European law and we are not referred to any such duty or requirement. We are equally not aware of a source in European law for the uplift or reduction provided for in section 207A.

5.135. The Claimant relies on Article 52 of the Charter,

> "Any limitation on the exercise of the rights and freedoms recognised by this charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."

5.136. Having regard to the content of Article 27 – Workers' right to information and consultation within the undertaking, Article 31 – Fair and just working conditions and Article 47 – Right to an effective remedy and fair trial, we are not persuaded that the failure to apply section 207A to members of the armed services breaches those rights. European law does not require this discretionary uplift (or reduction) in an award.

5.137. The Claimant relies on the prohibition of discrimination under Articles 13 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, referred to as "ECHR"). The same principle of non-discrimination is reflected in the Charter.

5.138. The Claimant has succeeded in a claim in respect of discrimination. In the judgment of the Tribunal, he has not demonstrated that Articles 13 and 14 are breached by the failure to apply the potential uplift under section 207A to members of the services. The difference in treatment is unrelated to any protected characteristic. We are aware of the wider scope of Article 14 and Protocol 12 as explained in Sejdic and Finci v Bosnia and Herzegovina (27996/06). No basis has been identified on which the difference in treatment falls within the ambit of the ECHR.

5.139. We have not had full argument. The submission from the Claimant unfortunately arrived after the oral judgment was given, as did that of the Respondent. The Respondent's case was that such an argument could not reasonably be addressed in the very closing stages of a hearing and that a day should be set aside for the arguments to be adduced and examined.

5.140. The Tribunal is reluctant to do that. This case is already long delayed. The question is whether it is proportionate to allow further time, the issue only having been raised after the provisions of section 274 TULRCA were explained to the Claimant, on Wednesday 14 September.

5.141. In our judgment, the arguments adduced by the Claimant do not point to an arguable breach of his Charter rights or of the European Convention on Human Rights, even without addressing the provisions of the European Union (Withdrawal) Act 2018, section 3 relied on by the Respondent. It is not appropriate given the prolonged history of this case to allow further delay for fuller argument.

Grossing up

5.142. No award is made here on termination of employment or service and so there is no basis on which the award requires to be grossed up to mitigate the impact of taxation.

Interest

5.143. The Tribunal awards interest as is customary and appropriate. We are mindful of the length of these proceedings. The date of the act of discrimination is that of the offer of accommodation and refusal of any further offer. We take it as 11 July 2017, the date when the Claimant accepted the offer, in the face of guidance that no other offer would be made. That is five years, two months and five days at the statutory rate.

Quantum

5.144. The award made is therefore as follows:

Injury to feelings	£25,200
Aggravated damages	£ 8,000
	£33,200
Interest	£13,759
	£46,959

Penalty

5.145. It is within our jurisdiction to order a penalty but we see little merit in ordering a government department to pay the government a penalty. We hope we have explained our judgment in terms that make it clear what the level of disapproval is without that.

Employment Judge Street
Date 6 October 2022

Reasons sent to the Parties: 17 October 2022

FOR THE TRIBUNAL OFFICE