EMPLOYMENT TRIBUNALS

claimant		**respondent**
Mrs Anne Rubery	-v-	Ministry of Defence

Heard at: Watford Employment Tribunal (via CVP) **On**: 20 July 2022
Before: Employment Judge Hanning

Appearances
For the claimant: Mr C Milsom (Counsel)
For the respondent: Mr Chegwiddin (Counsel)

RESERVED JUDGMENT

1. The respondent's application to strike out the claimant's claims on the grounds they fall outside the Tribunal's jurisdiction is dismissed.

REASONS

2. The issue at hand in this case is whether the Tribunal has jurisdiction or not to consider the claimant's claim of victimisation and indirect sex discrimination.

3. The claimant, a serving member of the armed forces, presented an ET1 on 9 July 2021. The claim relates to the conduct of a service complaint she had made (itself alleging discrimination).

4. The respondent presented its defence on 8 October 2021 and advanced a preliminary jurisdictional issue, namely that the ET is precluded from considering the majority of the complaints by reason of s121 Equality Act 2010 (Armed Forces Cases) (EqA 2010).

5. Pursuant to ss120-121 EqA 2010, in order for the ET to have jurisdiction over a complaint of discrimination pursued by a serving member of the armed forces, the claimant must have made a service complaint and not withdrawn the same.

6. A service complaint is as defined by Armed Forces Act 2006 (AFA 2006) and regulations enacted thereunder including the Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015 (the 2015 Regs).

7. Regulation 3 of the 2015 Regs identifies "excluded complaints" about which a person "may not make a service complaint." These include complaints about (a) a decision on the service complaint, a determination of an appeal from a service complaint or alleged maladministration in connection with the handling of the service complaint.

8. Since maladministration and discrimination in the administration of a service complaint constitutes an excluded complaint, it is impossible for a claimant to satisfy the requirement under s121 EqA 2010. It follows that where the alleged discrimination relates to the administration or outcome of a service complaint by a serving member of the armed forces the ET can never have jurisdiction.

9. On 7 September 2021 the respondent applied for a preliminary hearing to determine the question of jurisdiction. The matter was directed for determination by EJ Lewis on 12 November 2021.

10. The application was initially to be heard on 27 May 2022 but, because it was said the claimant had raised new issues for which the respondent had been unable to prepare, the hearing was adjourned to 20 July 2022.

11. On 20 July 2022 I heard lengthy submissions from Mr Milson for the claimant and Mr Chegwiddin for the respondent supplemented by written skeleton arguments. It behoves me to record how immeasurably helpful both their contributions were and to stress that my failure below to record the full breadth of their submissions intends no disrespect. Even though I do not record all both submitted, I have considered it all in reaching my judgment.

12. I reserved judgment on 20 July 2022 and apologise unreservedly to the parties that illness has seriously delayed the preparation of this judgment.

Factual Background

13. The claimant has served in the RAF for over 30 years. She is currently engaged as a Personnel Support Officer Sqn Leader. She maintains that her experience in the RAF has been blighted by sex discrimination particularly following treatment for IVF. She alleges that she has been subject to unlawful sex discrimination, whilst undergoing IVF treatment, by three senior RAF officers and that she had been subject to discriminatory comments by a fourth senior officer during the subsequent investigation of her service complaint.

14. On 27 September 2018 the claimant submitted what proved to be her first service complaint. That complaint alleged, inter alia, that there was bullying and discrimination as regards career progression and a lack of support compounded by

an email which contained a derogatory depiction towards a female". The respondent concedes that the original complaint amounted to a complaint of sex discrimination.

15. On 7 February 2020 the claimant amended her service complaint and provided comprehensive further particulars of her complaint of sex discrimination.

16. The service complaint was determined without an oral hearing and, by letter of 30 October 2020, over 2 years after the initial complaint, it was dismissed.

17. The claimant's complaints as to support and career progression were rejected in terms which the claimant describes being pejorative and unsustainably critical of her.

18. The claimant appealed the outcome on 1 December 2020. The claimant requested an oral hearing but that request was refused. By decision letter dated 28 April 2021, with the exception to a finding that the inordinate delay in the determination of the service complaint constituted maladministration, the appeal was dismissed.

19. On 4 June 2021 the claimant presented a complaint to the Service Complaints Ombudsman for the Armed Forces (SCO). on 21 December 2021 the SCO upheld the claimant's allegations of maladministration. A "moderate consolatory payment in line with SCO's financial remedy guidelines" was recommended.

20. The claimant presented her ET1 on 9 July 2021. In broad terms she avers:

    a. Indirect Discrimination in the respondent's practice of not holding oral hearings which amounts to an indirectly discriminatory PCP in that (a) women are more likely to present service complaints; and (b) the failure to hold oral hearings presents additional barriers to proving discrimination

    b. Victimisation in that service complaint (and the amendments) constituted a protected act and that, because of the complaint, the respondent is alleged to have contorted its process in various ways so as to avoid upholding a discrimination complaint essentially by way of a wholesale failure to investigate certain matters (or an inadequacy of investigation), a failure to convene an oral hearing and the adoption of conclusions which were at odds with the facts.

21. It is common ground that the claimant has not made a service complaint in respect of these matters because they fall within the categories of complaint which are excluded by Reg 15 of the 2015 Regulations.

22. Insofar as that serves to exclude the Tribunal's jurisdiction, the claimant says the Tribunal is compelled to adopt a construction of s121 EqA 2010 compatible with ECHR rights and retained EU law as, otherwise, s121 EqA 2010 would be

incompatible with the principles of effectiveness and equivalence and/or with Articles 6, 8 and/or 14 of the European Convention on Human Rights (ECHR).

23. To that end, the claimant proposes reading a suggested term into s.121(1) EA2010 as follows

"(1A) Section 121(1) is not applicable to the extent that the matter is an excluded matter as defined by Reg.3(2) Armed Forces (Services Complaints Miscellaneous Provisions) Regulations 2015."

24. The respondent opposes any such implication. First, the respondent says that by reason of paragraph 3(2) of Schedule 1 of the European Union Withdrawal Act 2018 ("EUWA2018"), as of 31 December 2020, no court or tribunal may disapply or quash any enactment or other rule of law on the basis of incompatibility with the general principles of EU law; the claimant's proposal is that the Tribunal does precisely that.

25. Secondly, as to s.3 HRA 1998, the respondent says is not accepted that the current legislation (unless read down/into) results in the violation of Article 14 read with Article 6 or other ECHR rights; but even if it did, it is not 'possible' to do so as s.3 HRA 1998 requires.

The Issues

26. The issues which I need to determine therefore are:

a. Do the existing statutory formulations exclude the jurisdiction of the Tribunal to consider the claims?

b. If so, may the Tribunal disapply any provision on the grounds that it is incompatible with the general principles of EU law?

c. Alternatively, may the Tribunal 'read-in' to the relevant provisions in order to give effect to them in a way which is compatible with Convention rights pursuant to s3 of the Human Rights Act 1988

The Domestic Law

27. The material parts of sections 120 and 121 of the EqA 2010 provide as follows:

120 Jurisdiction

(1) An Employment Tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—

(a) a contravention of Part 5 (work);

121 Armed forces cases

(1) Section 120(1) does not apply to a complaint relating to an act done when the complainant was serving as a member of the armed forces unless:

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

(b) the complaint has not been withdrawn.

28. The reference to a "service complaint" is to a complaint brought by a member of the Armed Forces within the statutory service complaints process set out in the Armed Forces Act 2006 (AFA) and the regulations made thereunder including the Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015 (the 2015 Regulations).

29. Regulation 3 of the 2015 Regulations materially provides as follows:

3 Excluded complaints

(2) A person may not make a service complaint about:

(b) a decision under regulations made for the purposes of section 340C(2) (decision on the service complaint);

(d) a determination of an appeal brought under regulations made for the purposes of section 340D(1) (appeals);

(e) alleged maladministration (including undue delay) in connection with the handling of his or her service complaint;

Determination

30. Pausing at this juncture, the effect of the domestic legislation is clear. As the respondent had pleaded and, quite properly the claimant now concedes, the Tribunal cannot have jurisdiction. The claimant is not allowed to bring a service complaint in respect of the subject matter of this claim. This means she cannot meet the condition set out in s121 of the EqA 2010. Having failed to do so, jurisdiction is not afforded. But for the possible impact of EU law, that would be an end of the matter.

EU Law

31. Article 14(1)(b) of the Recast Equal Treatment Directive (Directive 2006/54/EC) provides that there shall be no direct or indirect discrimination on grounds of sex in the public or private sectors in relation to employment and working conditions.

32. The Directive contains the following relevant provisions:

    a. Recital 29: “The provision of adequate judicial or administrative procedures for the enforcement of the obligations imposed by this Directive is essential to the effective implementation of the principle of equal treatment

    b. Recital 35: “Member states should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive”;

    c. Article 18: “Member states shall introduce into their national legal systems such measures as are necessary to ensure real and effective compensation or reparation as the member states so determine for the loss and damage sustained by a person injured as a result of discrimination on grounds of sex, in a way which is dissuasive and proportionate to the damage suffered.”.

33. Article 6 of the ECHR provides that:

    “In the determination of his civil rights and obligations…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial Tribunal established by law…”

34. Article 8 provides that

    “Everyone has the right to respect for his private and family life”

35. Article 1 Protocol 1 provides that:

    “every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

36. Article 14 provides that:

    “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour…or other status”

37. The principle of effectiveness is fundamental to EU law and the ECHR jurisprudence. Procedural requirements, in accordance with the principle of effectiveness, must not render “practically impossible or excessively difficult” the exercise of rights conferred by EU law, as confirmed and explained in *R(Unison) v Lord Chancellor* [2017] 3 WLR 409.

38. Procedures applying to a directly effective right to be treated in accordance with the principle of equal treatment under EU law must comply with the general principles

of effectiveness and equivalence and with the right to an effective remedy *P v Commissioner of Police for the Metropolis* [2018] ICR 560.

39. Employment Tribunals are the specialist forum for determining claims of discriminatory treatment under domestic law and fulfil the requirements of the principle of effectiveness: *P* (Lord Reed, paragraphs 28 and 29). They can award a comprehensive range of remedies to meet the variety of difficulties arising in employment: *GMC and others v Michalak* [2017] 1 WLR 4193 SC.

40. Further, the right to an effective remedy is a fundamental provision of EU law so that provisions which prevent an effective remedy must be disapplied when rights fall within the ambit of EU law: *Benkharbouche v Embassy of the Republic of Sudan* [2016] QB 347 SC.

41. The procedural rules applying to claims based on EU law must be no less favourable than those governing similar domestic law claims. In considering equivalence, the purpose and essential characteristics of the allegedly similar causes of action fall to be considered. I was referred to *Totel Ltd v Revenue and Customs Commissioners* [2018] 1 WLR 4053 [6] and [11].

42. In order to establish equivalence, there must be a sufficiently similar domestic action but, in focusing on whether a cause of action is comparable, the focus should be on substance over form: *Preston v Wolverhampton Healthcare NHS Trust (No. 2)* [2001] 2 AC 455. It is for each member state to establish its own procedures for the vindication of rights conferred by EU law and it is for the courts of each member state to identify what domestic law claims are true comparators and whether the procedure applying to the EU claim is less favourable than that applying to the domestic law claim: see *Totel*.

43. Subject to any inconsistency with EU law, s121 falls to be interpreted in accordance with its ordinary natural meaning and in the context of the AFA and the 2015 Regulations, which embody and govern the service complaints process.

44. Where directly effective EU rights are in issue, however, EU law is both “the starting point” and “the finishing point” of the analysis: *P* [27]. If the provisions of s121 bar the bringing of directly effective EU law rights, subject to the effect of Brexit, those provisions must be disapplied. Disapplication does not entail an amendment of the legislation. Words may be added (or removed) to indicate how a statutory provision should be interpreted in a particular type of case in order to avoid a violation of EU law (Lord Reed [34]).

45. Following the Brexit referendum, terms governing the UK’s departure implemented into domestic law by a series of measures, including the EUWA 2018. The substantive intention of the EUWA 2018 was to restore UK legislative supremacy over that of the EU but provision was made for existing EU-derived law to continue

to apply and also that EU derived rights and obligations continued to apply unless repealed or revoked.

46. For the purposes of this application, the parties are agreed that the principles of equivalence and effectiveness constitute general principles of EU law and that those principles are part of retained EU law.

47. However, that is subject to Schedule of 1 of EUWA 2018 which provides as follows:

> **3** (2) No court or Tribunal or other public authority may, on or after [IP completion day]:
>
> (a) disapply or quash any enactment or other rule of law, or
>
> (b) quash any conduct or otherwise decide that it is unlawful,
>
> because it is incompatible with any of the general principles of EU law.

48. Schedule of 8 of EUWA 2018 provides as follows

> **39** (6) Paragraph 3(2) of Schedule 1 does not apply in relation to any decision of a court or Tribunal, or other public authority, on or after [IP completion day] which is a necessary consequence of any decision of a court or Tribunal made before [IP completion day] or made on or after that day by virtue of this paragraph.

49. Section 39 of the European Union (Withdrawal Agreement) Act 2020 provides that IP completion day means 31 December 2020 at 11pm.

50. Section 3 of the Human Rights Act 1998 provides:

> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

51. In this context I have been referred to the Supreme Court's decision in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. Particularly helpful passages are:

Per Lord Nicholls:-

> *26. Section 3 is a key section in the Human Rights Act 1998. It is one of the primary means by which Convention rights are brought into the law of this country. Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the Convention rights "so far as it is possible to do so". This is the intention of Parliament, expressed in section 3, and the courts must give effect to this intention. …*

30. *From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. …*

31. *… once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.*

32. *…Section 3 … is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.*

33. *Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, "go with the grain of the legislation". Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.*

Per Lord Steyn:

50. *Having had the opportunity to reconsider the matter in some depth, I am not disposed to try to formulate precise rules about where section 3 may not be used. Like the proverbial elephant such a case ought generally to be easily identifiable. What is necessary, however, is to emphasise that interpretation under section 3(1) is the prime remedial remedy and that resort to section 4*

must always be an exceptional course. In practical effect there is a strong rebuttable presumption in favour of an interpretation consistent with Convention rights.

Per Lord Rodger:

123. Attaching decisive importance to the precise adjustments required to the language of any particular provision would reduce the exercise envisaged by section 3(1) to a game where the outcome would depend in part on the particular turn of phrase chosen by the draftsman and in part on the skill of the court in devising brief formulae to make the provision compatible with Convention rights. … Parliament was not out to devise an entertaining parlour game for lawyers, but, so far as possible, to make legislation operate compatibly with Convention rights. This means concentrating on matters of substance, rather than on matters of mere language.

124. Sometimes it may be possible to isolate a particular phrase which causes the difficulty and to read in words that modify it so as to remove the incompatibility. Or else the court may read in words that qualify the provision as a whole. At other times the appropriate solution may be to read down the provision so that it falls to be given effect in a way that is compatible with the Convention rights in question. In other cases the easiest solution may be to put the offending part of the provision into different words which convey the meaning that will be compatible with those rights. The preferred technique will depend on the particular provision and also, in reality, on the person doing the interpreting. This does not matter since they are simply different means of achieving the same substantive result. However, precisely because section 3(1) is to be operated by many others besides the courts, and because it is concerned with interpreting and not with amending the offending provision, it respectfully seems to me that it would be going too far to insist that those using the section to interpret legislation should match the standards to be expected of a parliamentary draftsman amending the provision: cf R v Lambert *[2002] 2 AC 545, 585, para 80, per Lord Hope of Craighead. It is enough that the interpretation placed on the provision should be clear, however it may be expressed and whatever the precise means adopted to achieve it.*

52. Therefore s3 in principle permits a court or Tribunal to rewrite even a wholly unambiguous legislative provision if the Convention requires it but only if doing so does not go against a fundamental feature of the legislation.

53. The proper approach for considering whether there has been a violation of Article 14 of the ECHR was set out by Lady Black in *R (Stott) v Secretary of State for Justice* [2018] UKSC 59, [2020] AC 51, at [8]:

> *'In order to establish that different treatment amounts to a violation of art 14, it is necessary to establish four elements. First, the circumstances must fall within the ambit of a Convention right. Secondly, the difference in treatment must have been on the ground of one of the characteristics listed in art 14 or "other status". Thirdly, the claimant and the person who has been treated differently must be in analogous situations. Fourthly, objective justification for the different treatment will be lacking. It is not always easy to keep the third and the fourth elements entirely separate, and it is not uncommon to see judgments concentrate upon the question of justification, rather than upon whether the people in question are in analogous situations. Lord Nicholls of Birkenhead captured the point at para [3] of* R (on the application of Carson) v Secretary of State for Work and Pensions [2005] *UKHL 37, [2005] 4 All ER 545, [2006] 1 AC 173. He observed that once the first two elements are satisfied:*
>
> > *"the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact".'*

Discussion and Determination

54. The parties agree that the principles of effectiveness and equivalence continue to apply. The claimant says that the domestic legislation is incompatible with those principles because (doing Mr Milsom's far more extensive submissions an injustice):

    a. the provisions effectively bar any claimant from bringing a claim for discrimination arising in the handling of her service complaint. Thus the domestic legislation is to all intents and purposes ineffective; and

    b. by imposing this bar on serving members of the armed forces, the provision was manifestly not equivalent to the position of other employees who face no such bar when bringing a claim for discrimination.

55. Had I needed to do so I anticipate that I would have agreed with Mr Milsom and found that the effect of the legislation was incompatible with the principles of effectiveness and equivalence for all the reasons he advanced.

56. However, I do not need to determine the point because I consider that Mr Chegwiddin is right that a complete answer lies in the provisions of paragraph 3 of Schedule 1 of EUWA 2018 which, since 31 December 2020, prevents a court or tribunal disapplying any enactment or other rule of law on the grounds of incompatibility.

57. In answer to this Mr Milsom made 2 submissions. First, he argued that what the claimant proposed was not the disapplication or quashing of an enactment but an exercise of interpretation.

58. I do not consider this withstands scrutiny in this context. It may be a matter of how the provisions are being interpreted but the effect is to disapply an operative part of s121 even if it only does so in a limited number of cases. By imposing an explicit exemption to the application of the condition imposed by s121, the condition imposed by the enactment is being disapplied.

59. Secondly, he submitted that the claimant could rely on paragraph 39(6) of Schedule 8 of EUWA 2018. He pointed to the ET decision in *Zulu and Gue v MOD* in which, in 2019, EJ McNeill QC determined that s121 EqA 2010 could be purposefully interpreted to give jurisdiction where a service complaint had been held to be inadmissible. He argued that it was a necessary consequence of this decision that where a service complaint could not be made at all, s121 should be similarly interpreted.

60. It is important to record that *Zulu and Gue* predated IP Completion Date and so was not subject to the EUWA bar. In any case, there is nothing in that decision which renders a decision in this case a 'necessary consequence'. As a matter of principle it is not binding on me and even if it might otherwise be, it was concerned with a different issue (the effect of barring the remedy was the same but for a different, albeit similar, reason). The decision in this case cannot be 'necessary consequence' of another Tribunal finding incompatibility on different facts.

61. In my judgment, this claim does not fall within the ambit of 39(6) and I remain barred from relying on incompatibility as grounds to disapply or quash the operative part of s.121.

62. Turning to s3 HRA 1998, the respondent argues that there is no violation of Article 14 read with read with Article 6 or other ECHR rights but that even if there were, to interpret the legislation in the way proposed by the claimant would be to fly impermissibly 'against the grain' of the legislation.

63. Mr Chegwiddin set out comprehensively the background to and substance of the provisions in the 2015 Regulations. As he concisely put it, the effect is to impose

> "a bar such that decisions made within the statutory SC regime (including the SCOAF referral mechanism which is part of the regime) are ring-fenced from challenge either within a new SC or in the Employment Tribunals. They may be challenged, however, in SCOAF referral or via judicial review in the High Court. ...
>
> This effect was wholly intentional, deliberate, and with a particular legislative good in mind: namely to ensure sufficient levels of finality within the SC system itself…The limitation thus seeks appropriately to protect the principle of finality within the SC process, by preventing repeat claims and other challenges to the internal system or SCOAF review"

64. I accept that summary but only up to a point. In my judgment it is right that the limitation was imposed to provide finality within the SC process. If complaints could be made about the complaints process itself then in theory there is scope for an infinite number of complaints about the handling of each iteration of the same initial complaint.

65. But that is not the same thing as providing complete finality and deliberately intending to exclude the jurisdiction of the Employment Tribunal. As Mr Chegwiddin notes, the handling of the SC could be challenged by SCOAF referral or via judicial review in the High Court. The finality was only within the SC process (and I did not understand Mr Chegwiddin to saying it went further than that).

66. There is nothing to suggest the 2015 Regulations intended to oust the jurisdiction of the Employment Tribunal. Mr Chegwiddin referred me to the Explanatory Note but this does not mention the Employment Tribunal. The extract cited explains that the intention was "to prevent repeat complaints, challenges to decisions made in the internal system or by the Ombudsman". None of that is inconsistent with the Employment Tribunal dealing such a 'process' complaint.

67. In any event, the claimant is asking the Tribunal to interpret s121 EqA 2010 not the 2015 Regulations. Were the effect of s121 EqA 2010 to be altered to permit the Employment Tribunal to have jurisdiction of the claimant's complaint, that would do nothing to undermine the stated intent and result of the 2015 Regulations. They would still exclude the claimant's complaint from the SC process and provide that process with the desired finality. The only change would be enable the claimant to bring the complaint to the ET as an additional remedy to those the respondent concedes would otherwise still exist.

68. Similarly, such a revision would not 'fly against the grain' of s121 EqA 2010. The underlying purpose of s121 is for the services to deal with its complaints in the SC process first. In my judgment, an interpretation which excludes from that

requirement only those complaints which are themselves excluded from the SC process is not so inconsistent as to amount to 'flying against the grain'.

69. I further do not accept the submission that this would risk the ET 'wading into the second prohibited category identified by Lord Nicholls, namely "*requir[ing] courts to make decisions for which they are not equipped*" and which involve "*issues calling for legislative determination*".

70. I was referred to *Steer v Stormsure Ltd* [2021] IRLR 172 but this is a very different situation. There, the remedy sought would have extended the jurisdiction of Employment Tribunals in respect of interim relief to a new and potentially very large category of claims. Here we are concerned only with a limited number of claims. It is not even every member of the armed services claiming they have suffered discrimination but only those who complain of discrimination (or victimisation) in the handling of the service complaint itself.

71. I am therefore satisfied that, if it is required, the Tribunal may legitimately read-in in such a way as to permit this claim.

72. Helpfully, Mr Chegwiddin has conceded for the purposes of these proceedings that the current circumstances, in which the claimant wishes to raise a claim for indirect discrimination and victimisation under EA2010 in the Employment Tribunal concerning the process and outcome of her service complaint fall within the ambit of Article 6.

73. It is therefore unnecessary for me to consider whether the current case also falls within Article 8 or A1P1, and the respondent made no concessions as to either of these Articles' applicability to the claimant's circumstances.

74. Also helpfully, the respondent accepted that the status of being a serving serviceperson as opposed to a civilian employee employed under a contract of employment by a private body would constitute "other status" within the meaning of Article 14.

75. I need therefore only consider the 3rd and 4th elements identified by Lady Black. Are the claimant and the person who has been treated differently in analogous situations and, even if so, can the different treatment be justified?

76. Mr Chegwiddin argues that there is not an analogous situation between service personnel and civilians because for the service personnel, their internal review process is established by statute, persons are appointed thereto by a statutory process and decision bodies are accorded unlimited powers of redress; referral to SCOAF and then judicial review of the Ministry of Defence as a public body exercising public functions under AFA2006 are both available.

77. This, it is submitted, is not the case for a civilian employee. For the civilian employee, access to the Employment Tribunals (and in certain scenarios, the County Court) is the only available forum for redress of complaints as to an internal process involving discrimination, harassment and victimisation.

78. The difference is thus said to be that even if barred from the Employment Tribunal, service personnel have other remedies available to them whereas the civilian would have none.

79. In my judgment, in light of the decisions in *Michalak* and *P* as well as *Chief Constable of Avon and Somerset Police v Eckland* [2022] ICR 606, it is clear that the Employment Tribunal is the appropriate forum for complaints of this nature and access to SCOAF or Judicial Review are not. Neither of the latter offers the expertise, independence and remedial powers inherent in the Employment Tribunal.

80. It seems to me that service personnel and civilians seeking to complain of discrimination in the handling of their internal complaints are in a directly analogous position and this is not altered by the fact the service personnel may have some limited additional remedies. There is an obvious difference in treatment in that service personnel are barred from the Employment Tribunal but civilians are not.

81. As to justification, Mr Chegwiddin relies on the legitimate aim of securing "adequate" (but as he accepts not absolute) finality of the "internal SC process and its protection from repeat claims, or concurrent external claims".

82. I accept that the aims of finality of the internal SC process and protection from repeat claims are legitimate ones and the exclusion of complaints about that process, in and of itself, would be a proportionate means of achieving them. But the result of the exclusion is more than simply that service personnel cannot make a service complaint; it also bars access to the Employment Tribunal.

83. There is no evidence that this was the intended aim nor, rightly, is it said that this would be a legitimate aim. It is obviously not a proportionate means of achieving the actual stated aim. Barring a claim from the Employment Tribunal is a much broader outcome than is needed to achieve finality of the internal SC process.

84. The reference to 'concurrent external claims' being an aim of the 2015 Regulations cannot be right. Service personnel may currently make a service complaint and then submit a claim to the Employment Tribunal. There is no requirement to wait for the service complaint to be determined before the Employment Tribunal may be seised of the matter. Nothing in the 2015 Regulations changed that save in respect of complaints about the SC process itself.

85. I am therefore satisfied that the respondent has not shown justification for barring of complaints of discrimination about the SC process from the jurisdiction of the Employment Tribunal.

Conclusion

86. By excluding such complaints from the service complaint process, the effect of the 2015 Regulations is to make it impossible for a claimant to bring to the Employment Tribunal a complaint about discrimination in the service complaint process itself.

87. While that may well be incompatible with the retained EU principles of effectiveness and equivalence, the Tribunal is barred from disapplying the material provisions by paragraph 3 of Schedule 1 of EUWA 2018

88. However, I consider that the natural reading of the legislation would be inconsistent with the claimant's rights under (at least) Articles 6 and 14 of the ECHR and it is therefore appropriate to interpret s121 EqA 2010 in such a way as to avoid that violation.

89. In my judgment, the simplest way to achieve this would be to read in the words "where the complainant is entitled to do so, " to the start of s121(1)(a). However that would have a much broader effect than is required for this claim so I am content to adopt the claimant's suggestion there be read in:

> *"(1A) Section 121(1) is not applicable to the extent that the matter is an excluded matter as defined by Reg.3(2) Armed Forces (Services Complaints Miscellaneous Provisions) Regulations 2015."*

90. In light of the above I dismiss the respondent's application to strike out the claims.

91. There will need to be a further preliminary hearing to deal with the progression of the claim so I invite the parties to agree a time estimate for this and to apply in writing for a date to be fixed for a remote hearing with their dates to avoid. Alternatively they may submit agreed directions for approval.

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Employment Judge Hanning

Date: 12 November 2022

Sent to the parties on: 14 November 2022

For the Tribunal Office

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Public access to Employment Tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/Employment-Tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.