



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Kemp  
**Respondent:** Ministry of Defence  
**Heard at:** East London Hearing Centre  
**On:** 28 April 2022  
**Before:** Employment Judge Jones

**Representation**  
Claimant: In person (accompanied by Mrs Kemp)  
Respondent: Mr Bershadski (Counsel)

## JUDGMENT

The complaints of defamation and mishandling of personal data are dismissed by way of withdrawal.

Under Rule 37(a) Employment Tribunals Rules of Procedure 2013, the complaint of disability discrimination is dismissed as it has no reasonable prospects of success.

## REASONS

1. This was an open preliminary hearing to consider the Respondent's application that:
  - i. the Tribunal should dismiss elements of the claim because it has no jurisdiction to hear it, and
  - ii. to strike out the remainder of the claims because they have no reasonable prospects of success or to order the Claimant to pay a deposit as a condition of continuing to pursue his claims on the basis that they have little reasonable prospects of success.
2. Judgment in this matter was given in open court today. The judgment and these reasons are produced as the Respondent has requested written reasons.

3. The Tribunal heard submissions from both parties. The Tribunal had a bundle of documents prepared by the Respondent which included the Claimant's documents.
4. The Tribunal apologises to the parties for the delay in producing the written judgment and reasons which was due to the pressure of work.
5. Before today's hearing, the Claimant had written to the Tribunal to confirm his withdrawal of his defamation complaint and his complaint that the Respondent had breached the rules relating to information governance and the protection of his personal data. The Tribunal would not have had jurisdiction to consider these complaints. The Claimant pursued his case that he should be allowed to proceed with his complaint of disability discrimination. At the start of the claim, the Claimant had submitted that he was not disabled but that he had been dismissed because he told someone that he had PTSD some time ago. In today's hearing the Claimant submitted that he was a disabled person.
6. In considering the Respondent's application, the Tribunal considered the following law.

*Law*

7. Rule 37 of the Employment Tribunal Rules 2013 gives the Tribunal the power to strike out a claim or part of a claim at any stage of the proceedings, either on its own initiative or on the application of a party, if it is scandalous, vexatious or has no reasonable prospects of success. A claim cannot be struck out unless the Claimant has been given a reasonable opportunity to make representations, either in writing or, if requested, at a hearing.
8. On a strike out application, the Tribunal must consider the claimant's case at its highest. It must assume that the claimant will establish the factual allegations that he is making in explanations the case. Today, I listened carefully to the claimant's explanation and further information provided by his wife and father-in-law as to why he considered that he had suffered disability discrimination.
9. Previous cases make it clear that the Tribunal must take into account that cases involving allegations of discrimination are particularly fact-sensitive and assessing the strength of such claims involves the Tribunal having to assess credibility/plausibility of such allegations without hearing all the relevant evidence as would be available at the final hearing. There is a public interest in such allegations being resolved in the light of all the evidence, rather than on the papers, save in the most obvious of cases and the exercise of the discretion to strike out should be sparing and cautious. Nevertheless, the law does allow for complaints of discrimination to be struck out if the tribunal judges that there are no reasonable prospects of success. In *Chandhok v Tirkey* [2015] IRLR 527, Langstaff P held that that there were occasions when a discrimination claim can properly be struck out – where for instance, there is really no more than an assertion of a difference in treatment and a difference of protected characteristic which

only indicate a possibility of discrimination. In such cases, (see *Madarassy v Nomura International PLC* [2007] ICR 867) they are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

*Conclusions on the facts*

10. Having heard both parties' submissions, the Tribunal came to the following conclusions as far as was required to determine the Respondent's application.
11. The Claimant was employed by the Respondent from 26 October 2020 until his dismissal which took effect on 10 August 2021. The Claimant was employed as constable in the Ministry of Defence Police (MDP). The MDP is a civilian special police force forming a part of the Ministry of Defence (MOD) with responsibility for
  - (a) providing armed security and counter terrorism services to designated high risk areas;
  - (b) uniformed policing; and
  - (c) investigative services to Ministry of Defence property, personnel, and installations throughout the United Kingdom.
12. All MDP officers are trained as Authorised Firearms Officers. In order to be a constable in the MOD police, the Claimant had to undertake and pass a firearms course. To that end, he attended a course at Southwick Park on 4 January 2021. The Claimant was unsuccessful in a number of areas of the course.
13. The Claimant attended meetings with senior officers under internal processes, to address their capability concerns. This meeting took place on 24 February 2021. The purpose of the meeting was to address any appropriate support that could be given to him to enable him to pass the course. At the meeting the Claimant did not raise any health concerns that could affect his ability to do so. He did not mention any mental or physical conditions to the Respondent. He agreed to retake the course and accepted a referral to Occupational Health (OH). He was warned that a further failure in this essential aspect of his role could lead to his dismissal. He was assigned to alternative duties in the interim.
14. The Claimant attended a second firearms course, beginning 22 March 2021. On 9 April, the Claimant engaged in a serious breach of safety when he removed his Glock pistol from its holder while in a Troop Shelter and waved it in a lateral sweeping motion with the muzzle of the gun pointing at a number of his colleagues. The gun was not loaded but the Respondent considered that the Claimant's action of merely taking it from its holster was a breach of safe handling even before he had waved it at colleagues.
15. There were other aspects of the Claimant's behaviour during the course that gave the Respondent cause for concern. It was reported that the Claimant

was seen slapping his head whilst sitting in a vehicle, tapping his PAVE (incapacitant spray) against his ballistic helmet, jumping up and down in a tyre track and displaying demeanour of being generally withdrawn from colleagues. The Claimant had previously mentioned to one of his firearms instructors while on the first course, that he had Post Traumatic Stress Disorder.

16. The Respondent's case is that it was because of his conduct on the second course that the Claimant was immediately removed from the course on the basis of both safety concerns and concerns over his psychological state. He was referred to OH so that the Respondent could understand what support he could be given and whether there were health concerns that should be taken into account when addressing this issue.
17. The OH report confirmed that the Claimant had historical PTSD, which had been successfully treated and that at the time, he was not suffering from either anxiety or depression. The Respondent's OH advised that he might be disabled within the meaning of the Equality Act 2010 by reason of his dyslexia. It was not the Claimant's case that the dyslexia was related to the events that led to his dismissal. He relied on the PTSD.
18. The Respondent's Chief Firearms Officer advised that having considered the contents of the OH report, he concluded that it did not reassure him about the risk in allowing the Claimant to undertake the course for a third time, given his conduct. He was not prepared to allow that risk and he agreed with the recommendation that the Claimant does not undergo any further firearms training.
19. The Tribunal finds that the Chief Firearms Officer (CFI) was referring to the conduct the Claimant displayed during the course rather than any previous diagnosis of PTSD. The CFI's responsibility is to provide a safe system of work to comply with MOD policy and legal obligations concerning the health, safety and welfare of all employees. He is personally responsible for overseeing the management of risk and safe delivery of all firearms training. The Respondent has detailed policies, risk assessments, safety briefs and associated material to ensure compliance in this area. The CFI confirmed that firearms training contains a significant element of risk that the Respondent has to continually manage.
20. I also accept the Respondent's evidence that it was unusual for anyone to take this course three times. That is part of the Respondent's management of the risk involved.
21. Without firearms training, the Claimant was unable to meet the minimum competency and capability requirements for the role. As a result, the Claimant was invited to a meeting on 28 February where the Respondent discussed its concerns with him and he had an opportunity to respond to those concerns. The Respondent's decision at the end of the meeting was that the Claimant should not be permitted to undertake a third firearms course, which meant that he could not meet the essential minimum capability and competency requirements for the role.

22. As there were no further adjustments or support that it was reasonable for the Respondent to provide, it decided that it was appropriate to terminate his employment. The Respondent wrote to the Claimant on 10 August 2021 to confirm the termination of his employment. The Claimant appealed against that decision but the appeal was not upheld and the dismissal was confirmed.

*Disability*

23. The Claimant confirmed in his written answer to Tribunal questions that he had been diagnosed with PTSD from a childhood trauma. He had not disclosed it on applying for employment with the MOD but had declared this in confidence to a firearms instructor while on the first course. It had been his case prior to today's hearing that the condition did not substantially affect his ability to carry out day to day activities.
24. Up to today, the Claimant's case had been that he was not disabled and that PTSD was no longer something that he dealt with on a day-to-day basis. This was what the Claimant stated in the written answers he sent to the Tribunal's questions for details on the impairment that he relied on in order to bring a complaint of disability discrimination. In that document, the Claimant stated that although he had been diagnosed with PTSD as a child, his day-to-day activities were not affected by it at all. He stated that he had served in the military for 18 years and that he had no present PTSD as he had successfully completed CBT and Talk Therapy some time ago. He stated clearly that since his recovery in 2018, he has had no re-occurrences. He stated that he had written those details on the Optima Health questionnaire that the Respondent sent to him after he had been successfully vetted.
25. In the hearing, he submitted that in fact, the condition did have substantial, adverse effect on his life. He stated that he suffered from flashbacks, vivid dreams, aggression and low mood. Before treatment he would suffer from suicidal ideation but that is no longer a feature. It is likely that he has not suffered with thoughts of suicide since 2018. He submitted that he had most recently served for 5 months in Afghanistan and that the condition did not affect his judgment.

**Decision**

26. The complaints relating to the handling of the Claimant's data and defamation of character are dismissed upon the Claimant's withdrawal.

*Disability status*

27. It is possible that the Claimant has the impairments of PTSD and dyslexia, which have a substantial and adverse effect on his ability to carry out day to day activities, within the meaning of the Equality Act 2010.
28. This Tribunal is unable to give a judgment the Claimant was a disabled

person at the time of his dismissal because in his written submission to the Tribunal, he categorically denied that he was. It has always been his case that the condition was no longer present after successful treatment in 2018. It was unclear whether the change in the Claimant's case today was because he had decided to face his disability status or because of an awareness of difficulties with the case.

29. If this case were going ahead, this would be a matter to be determined after a contested hearing. The only continuing symptoms he referred to today were sleep disturbances, aggression and low mood. It was not clear how those affected his ability to carry out day to day activities. The Tribunal would take all evidence into consideration when determining the issue of the Claimant's disability status.

*Disability Discrimination complaint*

30. In relation to the complaint of disability discrimination, the Claimant's complaint appears to be of direct disability discrimination. The case he put forward today is that once the Respondent found out that he had PTSD, it decided to try to force him out and when he did not resign, they used the explainable conduct that he displayed on the second course as an excuse to get rid of him. His case is therefore that he was dismissed on the grounds of his disability. In this Tribunal's judgment, that case has no prospects of success, for the following reasons:
  31. Firstly, if the Claimant is not disabled, he would not be able to pursue a complaint of disability discrimination.
  32. Secondly, it was the Claimant's case that he told the firearms instructor on the first course about his PTSD and that other colleagues joined in with similar stories. If that is true, the Respondent knew about his PTSD when he failed the first course but significantly, he was not dismissed at that time.
  33. From the Claimant's evidence, the Tribunal concludes that the Respondent knew about his PTSD either from his conversation with the instructor or from the information that he put on the Optima form. However, the Respondent did not dismiss him when he failed the first course. No action was taken on him in relation to the declaration of PTSD. Instead, the Claimant was booked on a second course.
  34. He was told in a meeting and in writing that the firearms qualification was an essential qualification for this job and that without it, he was likely to be dismissed.
  35. Thirdly, the Respondent only took action when the Claimant displayed bizarre and dangerous conduct on the second course. It was only after he released his Glock from its holder and brandished it around, while pointing it towards his colleagues that the Respondent took action. The senior officers were also told about the other incidents referred to above which also occurred on the second course.
  36. It was this information which made the Respondent remove the Claimant

from the course and refer him to OH for diagnosis and advice.

37. Fourthly, the OH advice was that the Claimant was not disabled by way of PTSD. Therefore, at the time the Respondent took its decision to not re-book the Claimant on the course for a third time, it believed that the Claimant was not a disabled person within the meaning set out in the Equality Act 2010. It therefore could not have done this because he was disabled.
38. Fifthly, the Chief Firearms Officer's advice shows that his concern was not about the Claimant's diagnosis or his status as a disabled person but his assessment that there was a very real danger of a re-occurrence of the behaviour that the Claimant displayed on the second course. At the time, the CFI had been advised that the Claimant was not disabled. Even if the Claimant was perceived as disabled because he talked about having PTSD, the evidence shows that the reason why he was not booked on the course for a third time was his conduct at the second course.

### *Judgment*

39. It is therefore this Tribunal's judgment that the even if the Claimant was a disabled person at the time of his dismissal, the Respondent did not know and could not have known that he was disabled.
40. It is also this Tribunal's judgment that the Claimant would not be able to make a prima facie case of disability discrimination as the Respondent has shown clearly that the reason for the Claimant's dismissal was that he could not complete the firearms course which is a pre-requisite for his continued employment as a constable in the Ministry of Defence Police. The Claimant could not complete his firearms course because of the concerning and dangerous conduct that he displayed on the second course, because he failed the first course and because the CFI considered that it was too risky to put him on a third course. The Respondent followed reasonable advice from its CFI, which was based on the Claimant's conduct on the second course and with an awareness of the CFI's responsibilities to create a safe system of work for the Claimant and the other employees and to manage the risk associated with firearms training.
41. The Claimant would not be able to prove facts from which an Employment Tribunal could conclude that the reason for the termination of his employment was his disability or a perception that he was disabled. The reason for his dismissal is clear. He was dismissed because he had not completed his firearms training and could not do so because the Respondent decided not to put him on a third course because of the dangerous and concerning behaviour he displayed on the second course.
42. In those circumstances, it is this Tribunal's judgment that the Claimant's complaint of disability discrimination has no reasonable prospects of success and it is struck out.

**Employment Judge Jones  
Dated: 14 December 2022**