EMPLOYMENT TRIBUNALS

RESERVED DECISION

Claimant: Ms H

Respondent: Ministry of Defence

On: 14 – 28, 30 November 2022
1 - 3 December 2022
12 December 2022 (in chambers)

Before: Employment Judge Ahmed

Members: Ms J Dean
Mrs J Barrowclough

At: Leicester

Representation
Claimant: Ms Nicola Braganza KC of Counsel
Respondent: Mr Niazi Fetto of Counsel

JUDGMENT

The unanimous decision of the Tribunal is that:

1. The Claimant was sexually harassed on 18 August 2018. The assault occurred during the course of employment. The Respondent is liable to pay damages and compensation for the act of sexual harassment.

2. The complaints of direct sex discrimination, direct discrimination by reason of sexual orientation, indirect sex discrimination, victimisation and harassment are all dismissed.

3. The Tribunal has jurisdiction to deal with those allegations which are brought in these proceedings but were not included in the Service Complaint.

4. The Tribunal does not have jurisdiction to deal with excluded complaints in particular the allegations of delay and maladministration arising from the Service Complaint.

5. The issue of remedy is adjourned.

REASONS

General overview

1. By a claim presented to the Tribunal on 7 May 2020 the Claimant brings complaints of sexual harassment, direct and indirect sex discrimination, direct discrimination by reason of sexual orientation, harassment on the grounds of sex and sexual orientation, victimisation and indirect sex discrimination.

2. This case involves a former RAF Corporal who was employed as an Avionics Technician. She was sexually assaulted whilst stationed at Souda Bay, Crete, in August 2018. The assault was committed by Corporal F who was with the same Squadron. The Claimant reported the incident to her chain of command. The manner in which the investigation by the RAF Police (RAPF) has been dealt with is the subject of strong criticism. The Respondent recognises a number of failings by the RAF Police deployed at Souda Bay. The Claimant was repatriated to the UK the day after the incident. She makes a number of allegations as to the way she was treated by her Commander Sqn Ldr Catherine Hall upon her return and in the months following.

3. After a period of sick leave the Claimant returned to work on a gradual return to work programme until January 2019 when she returned to full time duties. In February 2019 she was interested in a move to a different role in the Air Force Careers Office in Manchester where her family was based. She sought a recommendation from Sqn Ldr Hall who felt the Claimant was not in the right 'headspace' for a move. The Claimant did not ultimately apply.

4. In April 2019 the Claimant wanted to change to a set shift day pattern. Her request was granted but as a consequence she had to accept working in a different role. She believes that a male comparator was permitted to remain in the same role on a set shift day pattern whilst she was not.

5. In July 2019 she again indicated a wish to apply for a role with AFCO in Manchester/Liverpool. This time Sqn Ldr Hall supported the application but it was rejected by RAF Career Management (manning) as they were unwilling to release her from trade due to shortage of capacity in her field. It is alleged that Sqn Ldr Hall could have 'gapped' (left the post open) but refused to do so. As a consequence, the Claimant was not able to obtain a transfer to AFCO. The role was ultimately offered to a male comparator.

6. Following a somewhat fractious meeting between the Claimant and Sqn Ldr Hall in early August 2019 the Claimant was signed off sick. As it transpired she did not return to work again.

7. In October 2019 Cpl F was acquitted at Court martial.

8. The Claimant was offered transfers elsewhere which were not suitable for her. She was medically discharged in February 2020.

9. In September 2020 the Claimant made a complaint about the RAF handling of her case in a procedure known as a 'Special-To-Type' complaint. This was dealt with

in November 2020 when the complaint was rejected. The appeal was dealt with in February 2021.

10. Before service personnel can bring proceedings in the Employment Tribunal they must make a Service Complaint (SC) and not withdraw it. The Claimant lodged her SC on 25 November 2019. The process has taken a very long time to be completed. The outcome of the Decision Body (DB) was not released until 22 July 2021. The DB upheld the complaint of sexual assault. Whilst at several places it was critical of the treatment by Sqn Ldr Hall it did not find that there was any bullying intent nor did it find there was bullying related to a protected characteristic. The complaints of sexual harassment and indirect sex discrimination were upheld but the complaints of harassment and victimisation were not. It did not find that the Claimant was discriminated against by reason of sexual orientation or any other protected characteristic. An offer of £15,750.00 was made for injury to feelings and maladministration which was rejected.

11. The Claimant appealed and the Appeal Body (AB) issued its decision on 2 November 2022, just 2 weeks before the date of this hearing. The AB did not revise the award.

12. The Claimant presented her ET1 Claim Form on 7 May 2020 following ACAS early conciliation.

<u>This hearing</u>

13. In coming to our decision we have taken into consideration the evidence of the following witnesses on behalf of the Claimant:

13.1 The Claimant herself;

13.2 Cpl Woollard.

14. On behalf of the Respondent we heard oral evidence from:

14.1 Sqn Ldr Hall;

14.2 Flt Sgt (now Warrant Officer) Martyn Hodgson who gave evidence via a video link as a reasonable adjustment

14.3 Wing Commander Lavallee;

14.4 Wing Commander Alison McLean;

14.5 Wing Commander Philip Ashley.

15. In addition the Respondent relied on a witness statement of WO Neil Cook who could not give evidence as he is currently stationed abroad. His statement is not in dispute and consists largely of documentary exhibits.

16. Throughout the course of the hearing both parties produced texts and WhatsApp messages which had not been disclosed earlier in the proceedings. These were in most cases admitted into evidence by agreement. Where agreement

could not be reached we were satisfied they were relevant. Ultimately, they had little bearing on the final outcome.

17. There was some controversy as to the evidence of WO Hodgson who, after having heard the Claimant give evidence, wished to comment on parts of the evidence. This would ordinarily been the subject of supplemental questions in-chief. However in an effort to ensure there was no later dispute about this additional evidence the Tribunal asked for it to be reduced to writing by way of a supplemental statement. Unfortunately, and we make no criticism of anyone, the supplemental statement extended beyond the scope of a reasonable reply and commented on matters that could arguably have been contained in the original statement. The Claimant was permitted to be re-called in order to reply and comment on this further evidence.

18. Unfortunately the issues arising over WO Hodgson's additional evidence did de-rail the agreed timetable with the result that we were not able to deliver an oral decision on the last day of the hearing as anticipated. The tribunal therefore reserved its decision to allow further time for deliberations and met again on 12 December 2022. This decision represents the views of all three members of the Tribunal.

19. Anonymity orders have been made in relation to the Claimant and to Cpl F. Reasonable adjustments were made at the hearing for the Claimant and for WO Hodgson.

20. In arriving at our decision have also taken into consideration the documents in the agreed bundle and the detailed skeleton arguments and closing submissions by Counsel on both sides. We are grateful to them both for their assistance throughout the hearing. By consent this hearing was limited to the issue of liability only.

21. The following acronyms have been used in this decision:

AB - Appeal Body

AFCO - Air Force Careers Office

DB - Decision Body

DCMH - Defence Community Mental Health

DIN - Defence Instruction Notice

DWP - Detachment without prejudice

GROW - Graduated return to work programme

JSP - Joint Services Publication

MAA - Minor Administrative Action

PVR - Premature Voluntary Retirement

RAFP - RAF Police

SC - Service Complaint

SCOAF - Service Complaint Ombudsman Air Force

SENGO - Senior Engineering Officer

STT - Special-To-Type complaints

TML – Trade Manning Level

WO - Warrant Officer

22. The following have been involved or referred to in these proceedings whether as witnesses or otherwise:

Sqn Ldr Philip Ashley
(Station Officer responsible for career management assignment policy)
Sqd Ldr Ashley gave evidence as to the application for AFCO in July 2019 and the relevant Trade Manning Level

Flt Sgt Jennifer Baldwin
Welfare officer RAF Waddington

Flt Lt Alex Bragg
(Junior Engineering Office at 51 Sqn Souda Bay)

Air Commander Tom Burke
(Station Commander RAF Waddington at the time of the incident)

WO Neil Cook
(RAF Police Professional Standards Dept)
Tasked with evaluating the Claimant's Special To Type complaint. WO Cook produced a statement in these proceedings but did not give oral evidence.

Flight Sgt David Hall (also referred to a 'Albert')
(Support on 51 Sqn - now retired)

Sqd Ldr Catherine Hall
Claimant's Commanding Officer and the SENGO (Senior Engineering Officer).

WO Martyn Hodgson
(At the time Flt Sgt on 51 Sqn Souda Bay)

Wing Commander Peter Lavallee
Consultant Psychiatrist in the RAF.

Sgt Wg Cdr McConnell
(OC of 51, RAF Waddington) (deceased)

Wg Cdr Daniel McGinley
(Commanding Officer 904 EAW)

Wg Cmdr Alison McLean
(Air Personnel Casework).

WO Sowersby
(Based at RAF Waddington)

Flt Sgt Spouge
(Support on 51 Sqn around September 2019)

Sgt Nicola Stagg
(RAF Police - has now left the Force)

Sgt Matthew Woollard
(Avionics Fpl on 51 Sqn. Claimant's colleague also at Souda Bay)
Gave oral evidence at this hearing.

SAC David Yates
(Deployed with 51 Sqn at Souda Bay)

THE FACTS

23. The Claimant joined the RAF on 9 June 2010 as a trainee. She was 19 years old at the time. Her initial engagement was for 9 years which was extended to 12. She later agreed to an extension to her service so it would expire on 18 November 2030. She joined RAF 51 Squadron as an Avionic Technician in June 2014. 51 Sqn is based at RAF Waddington. At the time of the events in question 51 Squadron was deployed at Souda Bay, Crete.

24. The Claimant is a gay woman. There is no dispute that she has always been open about her sexuality. At the time of the events she was in a stable relationship and is now married to her long-term partner. All of her close colleagues, particularly those who are involved in the incidents relating to this case, were aware of her sexual orientation.

25. Upon joining the RAF in 2010 the Claimant trained as an Aircraft Technician initially training as an aircraft maintenance mechanic and then moving on to Avionics. Her initial responsibilities were to carry out flight servicing, ground handling of Typhoon aircraft, maintenance tasks and associated responsibilities.

26. The Claimant's appraisals prior to the events in question are all in glowing terms. Her performance was described as 'outstanding', her communication skills and technical abilities as 'excellent', her work ethic and reliability as 'extremely good'. She was selected for further specialist training and encouraged to think about a future career in a deployable front-line squadron or as an instructor. By 2015 she was marked first in her peer group. She had been selected to go overseas for a 'Q' course where she met Sgt (then Cpl) Woollard and became good friends. He was also her next-door neighbour.

27. Upon promotion to the rank of Corporal the Claimant was given the role of Line Controller something that would normally be allocated to a more experienced junior NCO. At that point the Claimant had 9 Senior Aircraftmen/women (SACs) under her command.

28. At the time of the incident 51 Sqn was supported by 904 Expeditionary Air Wing (EAW) and the Squadron fell under their rules and procedures. There was some tension between 51 Squadron and EAW. As a consequence of recent incidents a curfew was in place that all personnel must return to their rooms by 2300 hrs and limit themselves to no more than three drinks. The curfew was strictly monitored.

29. On 19 August 2018, a group of 10 members from 51 Squadron went out to a pool bar in nearby Platanias, also on the Island of Crete. The group drank cocktails at several bars during the day until the evening. Whilst some of them returned to the base in compliance with the curfew, about half of the group decided to stay overnight in Platanias and booked a hotel. They knew that this would be a breach of curfew. All of the group other than the Claimant were male.

30. During the course of this hearing we were taken to an exchange of texts which had not been disclosed before the hearing immediately prior to the decision to stay overnight. The messages are between the Claimant and Sgt Storer as follows:

H: Can I stay out?

Sgt Storer: You know the rules. Stay safe

H: So yes then?

31. There is no reply from Sgt Storer to the last message. Insofar as it was suggested we did not regard his lack of response as a form of implied consent.

32. At approximately 0200hrs, all of the group who decided to stay in Platanias went back to the hotel they had booked for the night. The accommodation was an apartment with two bedrooms, a living room and kitchen. In one bedroom there were two beds pushed together and in the other there were two single beds. The Claimant went to sleep in the bedroom with the two beds pushed together. In that room three of her male colleagues were also sleeping there.

33. At some point in the night (the Claimant does not know the exact time as her phone was switched off) she woke up feeling sick. Cpl F, who was sleeping in the other room, came to check on the Claimant. After a few attempts of checking on the Claimant he guided her back to his room. The Claimant decided to sleep on the floor as it was cooler. Sometime later in the night F suggested that the Claimant might wish to get into his bed where it would be more comfortable. The Claimant did not suspect anything untoward because she knew him as a friend and trusted him. She got into F's bed with him and fell asleep on her front.

34. Unaware of the time, the Claimant then describes waking up at some point in the night to discover F penetrating her she believes with his fingers. Having woken up to this, the Claimant says she was in shock did not move or try to leave. She says that Cpl F must have known what he was doing because when another member of the group who was in the next bed moved, Cpl F stopped. The Claimant says she then left the room and went to sleep on the sofa. The Claimant says she woke up at around 0900 hrs on the next day, 20 August 2018.

35. Once everyone was awake Cpl F made several attempts to get the Claimant's attention but the Claimant did not reply. Cpl F then got in the bath and stayed there

for quite a while. One of those in the group said in his statement in the Service Complaint that Cpl F was acting strangely that morning.

36. The group then arranged to return to base, the Claimant choosing to return in a different vehicle to Cpl F. One of the Claimant's colleagues in the subsequent investigation said that Cpl F had said to him: 'I tried to stick something in [H] last night'.

37. When they had all returned to base, one of the Claimant's colleagues asked if they were going for lunch. During lunch the Claimant says she broke down and told a colleague what had happened. She spent the afternoon deciding whether to report the incident or not. She came to the conclusion that she should.

38. At 1700hrs she spoke to Sgt Leighton Storer who was the Claimant's 'one up' in charge. Sgt Storer then reported the matter to Flight Sgt (now WO) Martyn Hodgson. FS Hodgson went to see the Claimant who had to recount the whole incident again.

39. It is agreed that it was sometime after 2100 hrs that the matter was reported to the RAFP.

40. We accept the Claimant's evidence that FS Hodgson did not mention the need to preserve evidence and he did not refer to the need for medical care. FS Hodgson accepts that his initial reaction was not appropriate. The Claimant says FS Hodgson was cross and was preoccupied with the fact that the Claimant had broken curfew.

41. FS Hodgson said that he would refer the matter to Warrant Officer (WO) Ray Sowersby who was in charge of the shift. WO Sowersby passed on the information back to his chain of command in the UK who were Squadron Leader Catherine Hall, also referred to as the Senior Engineering Officer ('SENGO') and the Executive Officer, Sqn Leader Nick Foley.

42. The Claimant stayed outside the block for the rest of the day and was accompanied by several colleagues including Sgt Garnett, Sgt Storer and her friend Cpl Woollard. The Claimant says she was not given any advice on preserving evidence, asked if she needed medical care or encouraged to speak to the police. The Sqn was briefed at around1900hrs that an incident had occurred and that Cpl F was under guard in his accommodation. The Claimant's evidence was that she was told by both FS Hodgson and WO Sowersby before the time of the briefing at 1900hrs that the RAFP had been informed but it is now accepted that was not the case and the RAFP were not informed until 2000hrs at the earliest. The Claimant's flight commander Flt Lt Bragg came to see the Claimant. The Claimant says he did not offer any words of sympathy but just said that he 'felt sick'.

43. At 2320hrs the Claimant was called to go and see the RAF Police. The Claimant is extremely critical of the interview. She says that those interviewing her did not seem to have any experience in interviewing people let alone experience with dealing with cases of sexual assault. They were writing notes on a scrap of paper. They did not ask for the Claimant's underwear or clothing that she was wearing on the night. The meeting with RAFP took about 15-20 minutes. The Claimant was told to go to bed as they needed to work out the next course of action.

44. Before going to bed the Claimant says she became extremely upset at how she was being treated and the apparent lack of a plan. She went to see WO Sowersby and said that she was going home and was intended to book her own flight. WO Sowersby told her that if she did he would have to charge her with an offence of going absent without leave.

45. The Claimant decided in the circumstances not to make her own arrangements. She was woken in the night by a text from FS Hodgson which told her to go to the front gate to get picked up and taken to the US Navy Medical facility in Souda Bay for an examination. There the Claimant was medically examined following which she returned to her base.

46. The following day the Claimant enquired what was happening and in particular if she had been booked on a flight home. She was told that no flights had yet been booked but that there was a meeting between RAF executives at 0900hrs to decide what to do. She spoke to FS Hodgson and told him that she should have been sent home already. FS Hodgson said that because the Claimant was not married she would not be entitled to be sent home on welfare grounds. The Claimant asked: 'what about my welfare?' FS Hodgson said that consideration was being given to everyone in the group of being charged with a service offence for staying out past curfew.

47. It is agreed that Cpl F and the others who had broken curfew had been booked back to the UK on a flight at 1330hrs. However the military aircraft allocated for the flight needed some repairs. As it transpired those repairs could not be completed within in a reasonable period so they were booked on a different flight.

48. The Claimant was then informed that a flight was booked for her on a commercial airline at 1540 hrs. It would land at Gatwick which was some distance from her home and partner in Manchester. The Claimant discovered that there were earlier flights direct to Manchester. She was willing to pay for one of these but this was not approved. It was however agreed that Cpl Woollard could accompany the Claimant.

49. Unfortunately, the journey home was not without difficulty. The driver assigned to pick up the Claimant and Cpl Woollard was late arriving to the airport. He got caught stuck in traffic. Upon arriving at the airport he was obliged to take his mandatory break. To avoid further delay it was agreed that Cpl Woollard would drive the Claimant home.

50. After landing and at some point during the journey home the Claimant relayed a message to her chain of command via Cpl Woollard that she would not be coming in to work for a few days as she was distressed and exhausted. Sgt Woollard received a missed call from Sqd Ldr Hall. The Claimant replied by text to say that Sgt Woollard would call back once he was home.

51. Later that evening Sgt Woollard spoke to Sqn Ldr Hall who said that the Claimant must turn on her phone and come in to work the next day. She said the Claimant was lucky to be home. Sgt Woollard explained what had happened and said that the Claimant would not be coming to work the following day.

52. Sgt Woollard received a further text message from the SENGO that evening asking him to persuade the Claimant to agree to see the RAFP the next day pointing

out that any delay might prejudice the case and this might leave H and the Sqn exposed to not following due process.

53. On 21 August 2018 at 1927hrs the Claimant received a text from FS David Hall as follows:

'Hi [H]. I'm very sorry to hear of your situation. My ears are yours if you need them. I have a message for you. Please call FS Steve Murphy (RAF Police) on ... tomorrow at 9am to arrange a suitable time to meet ... regards FS Hall (Albert).'

54. The Claimant replied as follows:

'Thank you, I won't be calling the police tomorrow. I need a day to get my head straight I'm sorry. Today has been the worst day ever and I haven't slept in a few days. All arrangements have to go through Woolly [Sgt Woollard] as I am switching off my phone for a few days. Agreed by the WO that all arrangements be made through Woolly on ...' (p219).

55. At 1955hrs Sqd Ldr Hall emailed FS David Hall to say:

"I'm not sure where [H] has got the understanding from that she is allowed to go off for a few days – she is not. My last (sic) with the WO he confirmed that she **is** to see SIB [Serious Investigations Branch] tomorrow morning." (emphasis in original)

56. At 1946 hrs there is an email from FS David Hall to the SENGO (to which the Claimant is not copied) to say:

"Clearly she [H] has been deeply affected by the situation. If we can all get together this morning to discuss, I will contact FS Murphy and provide him with an update and seek guidance as to how we handle this from his perspective."

57. The Claimant then received a late text from FS Hall at 23:18hrs that both the SENGO and WO [Sowersby] were now directing that the Claimant must contact the RAFP again the next day. The Claimant explained that she had been up since 5.00am and would ring the police once she woke up.

58. The next day, 22 August 2018, Cpl Woollard made the necessary arrangements for the Claimant to see the RAF Police for an official interview on 24 August. He also went to RAF Waddington to speak to the senior members of 51 Sqn to explain the seriousness of the incident including the SENGO and human resources. It is agreed that the SENGO did not go and speak to the Claimant herself or attempt to contact her on the telephone.

59. The RAFP prepared an initial investigation report dated 23 August 2018 which inter alia, refers to Joint Services Publication (JSP) 839 and 'Victims Services'. The JSP contains specific guidance to Commanding Officers and victims on dealing with allegations of serious criminal offences including sexual offences.

60. The Claimant was interviewed by Sgt Nicola Stagg on behalf of the RAFP SIB Team at Spring Lodge by video on 24 August. The Claimant considers that this aspect of the investigation was undertaken professionally and in a manner deserving of a serious sexual offence.

61. In late August 2018 the Claimant discovered that Cpl F had been allocated a temporary posting to RAF Coningsby whilst awaiting his appearance before a military court. The posting actually occurred on 4 September 2018. The Claimant

was not asked for her views and was upset when she discovered that F was posted relatively close to her. Wg Cdr McClean gave evidence in relation to this issue. She said that the unit HR and others normally consult on the matter. She was not in post at the time of Cpl F's DWP and the documentation does not specify why F was moved to RAF Coningsby. It does however contain the following record:

"A requirement has been identified (I presume by phone) to Detach Without Prejudice (DWP) ['F'] from RAF Waddington to RAF Coningsby. The DWP should be processed and acted upon as soon as possible to allow a serious situation to cool slightly, benefitting all concerned. We have pushed the issue with WAD, as we would always do, to understand why an MOB cannot manage this situation, we have received assurances that lead us to conclude this is the best and least disruptive COA."

62. The Claimant was placed on sick leave on 24 August 2018. She was referred to the Defence Community Mental Health Services (DCMH) on 15 October 2018. The Claimant had her first session on 10 December 2018 with Ms Ann Argile.

63. In early October 2018 the Claimant was told by FS David Hall that she should return to work as anything over 56 days absence on sick leave would mean a referral to Occupational Health. She returned to work on a graduated return to work (GROW) programme working a few hours a week and gradually getting back into shift life.

64. On 22 October 2018 the Claimant returned to her regular work as an Aircraft Avionics Technician working 2 - 3 days a week on shift over the next couple of months compared to the usual 5 day working week (on shift). The Claimant returned to work full time in her capacity as an Aircraft Avionics Technician on 7 January 2019.

65. On 18 December 2018 the Claimant was informed that Cpl F was to attend RAF Waddington the following day to collect his belongings. The Claimant had medical appointments that day and clearly she did not wish to be anywhere near Cpl F. She asked for F's visit to be rescheduled but was told that could or would not be done. As a result the Claimant had to reschedule *her* medical appointments.

66. The procedures put in place in relation to avoiding contact is dealt with in the witness statement of WO Cook who says this:

"On each occasion F was due to attend RAF Waddington, WO Thomson contacted Sgt Stagg to inform her of the dates of F's proposed visit. The Claimant was then contacted to check whether this would clash with any attendance by the Claimant, and in her words "de-conflict" the arrangements. This was necessary because the RAFP would not have had access to details of the Claimant's medical appointments such as those on 18 December 2018, as access to medical records (and particularly to DCMH records) is tightly controlled in these circumstances unless the Claimant had provided consent for medical records to be divulged to the RAFP; specifically in relation to her ongoing care or she had volunteered the information, verbally or otherwise, to the RAFP. I was assured by both Sgt Stagg and WO Thomson that on 18 December 2018 the same process was followed."

67. On 7 January 2019 the Claimant returned to work full time.

68. In February 2019 a vacancy arose at the Armed Forces Careers Office (AFCO) in Manchester where the Claimant's partner was based and which was the Claimant's home at weekends.

69. On 25 February 2019 the Claimant spoke with WO Sowersby regarding the AFCO role which had a closing date of 16 March 2019. WO Sowersby suggested the

Claimant should consider carefully about applying because the role may not have the same support for her as at 51 Sqn. The Claimant was advised that the application needed approval from the SENGO.

70. The Claimant met with Sqn Ldr Catherine Hall on 28 Feb 2019 in order to obtain her approval and/or consent to the AFCO role. Sqn Ldr Hall had not met or spoken directly to the Claimant up to this point.

71. There is some dispute as to the arrangements for the meeting as well as what was discussed. We are satisfied that the time of the meeting (at 1630 near the end of the working day) was fixed by Sqn Ldr Hall and not the Claimant demanding to be met at that time. Sqn Ldr Hall had interviews arranged for the afternoon. She arrived late for the meeting and explained she needed to leave at 5.00pm to pick up her children from school as her husband was not available that week to do so.

72. Sqn Ldr Hall started the meeting by saying ‘let's get the elephant out of the room’ then going on to say that it was a ‘shit situation’ but ‘don't let this define you as a person’. Sqn Ldr Hall she had a friend who had been through ‘the same situation’ but on the opposite side where he was the one accused as being the perpetrator of a sexual assault. She said that the friend had in fact he had been falsely accused and that this had placed a significant toll on him.

73. In relation to the request for recommendation Sqn Ldr Hall said that she did not think that the Claimant was in the right 'headspace' to move to Manchester and was reluctant to endorse the application. She said she thought that the Claimant should stay at 51 Sqn where her 'family' (referring to the RAF) and friends were. She said that she said she would be willing to consider the request again in a few months’ time.

74. At around 1650hrs Sqn Ldr Hall left the meeting as she had indicated at the outset that she would for childcare reasons. A few days later the Claimant told Sqn Ldr Hall that she would not apply for the AFCO role.

75. In early April 2019 Ms Argile made a formal request on behalf of the Claimant for Ms H to be re-assigned to permanent day shifts between 9.00 – 5.00pm Monday to Friday as opposed to the shift work which the Claimant was undertaking at the time. Shift work sometimes entailed working longer working days. In her email of 3 April 2019 Ms Argile wrote:

“At present I feel that she [the Claimant] would benefit from working a set shift pattern, (9 -5 mon – Fri.)This will enable her to spend some time at home in the evenings to gain support from her partner and allow her to spend time with family to gain support at weekends, in addition it will help her establish a sleep pattern and exercise routine.”

76. On 15 April 2019 Ms Argile records that WO Sowersby had apparently suggested that instead of working a day shift on aircraft the Claimant could work instead on document support on a 9 - 5 basis. It was noted that WO Sowersby told Ms Argile that if after a week the Claimant was not happy with the arrangement he would seek to have her posted elsewhere.

77. Sqn Ldr Hall did not permit the Claimant to work dayshifts on aircraft. It does not appear that she was asked to give her reasons nor did she do so at the time. The reasons emerged later in the SC where Sqn Ldr Hall said that there was a danger

that the Claimant could be under-utilised, that she would have a number of different supervisors on shift who would not have known her skill level and this could undermine her confidence, undermine team cohesion and raise airworthiness concerns. The Claimant's request for a day shift of 9.00 – 5.00pm was therefore refused by Sqn Ldr Hall.

78. The Claimant says that she was also told by WO Sowersby she could not work on aircraft on a permanent day pattern because she could not work with a certain individual on the Sqn. The Claimant did not who this was referring to. She assumed it to be FS Hodgson because she believed he had not been happy about what had happened in Souda Bay. FS Hodgson had however already left the Squadron in December 2018.

79. WO Sowersby told the Claimant he needed someone to assist the documents controller in 'general support flight duties' as they were lacking in manpower. The Claimant said she would give it a try though her preference was to remain working on aircraft. WO Sowersby told the Claimant that he would place her there for 6 months and if the Claimant was still not happy he would do what he could to facilitate a move. The Claimant says that FS Hall strongly disagreed with the proposal but that he was not listened to.

80. In relation to these matters that the Claimant relies on a male comparator who for the purposes of these proceedings has been referred to as Comparator 1. He was a mechanic working in Avionics ranked as Sergeant. The comparator is said to have been permitted to work on aircraft on days and not on shifts.

81. On 15 Apr 2019 the Claimant began working in the Support Cell in what has been described as a 'Support Flight Duties' role. We are satisfied that this role largely entailed office clerical duties rather than working on aircraft. Those who worked in this section were all higher in rank than the Claimant. We are satisfied that there was not always enough work to keep the Claimant busy but we also accept Sqn Ldr Hall's evidence that she was not aware that the Claimant was being under-utilised. She relied on others to inform her if that was the case. We accept Sqd Ldr Hall's evidence that had she known the Claimant was under-used she would have taken appropriate steps to rectify it.

82. The Claimant's appraisals during her time in Flight Support record her doing good work:

"She [the Claimant] identified that the civilian contracted L3 Field Service Rep (FSR) arrivals procedure was due review. She duly updated the procedure cross mapping the military elements with the civilian fundamentals. She was then able to book all the relevant courses to bring them into MAA compliance. This has improved the effectiveness of the arrival process for the L3 FSR's

Having been employed in both the Sqn Documentation and Training Cell she has utilised her management and communication skills to complete tasks of greater magnitude and to the benefit of both the Service and the Sqn. Examples are; the completion of an a/c major servicing dispatch package, which if not completed on time would have had a financial cost to the Service from the US maintenance organisation. Secondly, recognising issues with Sqn documentation, she updated it to reduce the risk of future incidents whilst completing aircraft ground movements"

83. The Claimant's desk was situated outside the SENGO's office and it could be viewed from a window from the SENGO's office. The Claimant felt uncomfortable as she felt she was in Sqn Ldr Hall's view and was being watched.

84. The Claimant discussed her unhappiness at the Flight Support role and raised her concerns with FS Hall. She asked if she could return to working on aircraft. It is not clear whether FS Hall raised this with his chain of command. There is no direct evidence of it. FS Hall left in April 2019 (the exact date is not known) after which FS Blanchard was the main point of contact. The Claimant found him less approachable. FS Spouge took over from FS Blanchard but had little direct contact with the Claimant. We are satisfied that any reservations the Claimant had were not communicated back to Sqn Ldr Hall.

85. On 13 June 2019 the Claimant took it upon herself to move her desk to the Training Cell in a different building so that she felt more comfortable and was not being watched. No issue appears to have arisen from her decision to move her desk to another location.

86. In June 2019 the Claimant had a discussion with WO Sowersby about a possibility of a transfer to Manchester. The Claimant says that WO Somersby suggested the Claimant may wish to consider Premature Voluntary Release (PVR). The exact nature of the discussion is not clear. The only reference to it is in the Claimant's SC where she discusses her options with WO Sowersby, one of which included a PVR. In the end the Claimant decided not to PVR because she felt it did not suit her career plan as she still wanted to remain in the RAF.

87. A post in AFCO Manchester arose. On 4 July 2019 the Claimant spoke with Sqn Ldr Hall to see if she would be willing to recommend her. Sqn Ldr Hall said she was still reluctant to do so because she believed the Claimant was doing excellent work in Flight Support and was reluctant to lose her. Sqn Ldr Hall said she was working on creating a permanent role for a Corporal within that which the Claimant could fill. The Claimant said she would prefer the AFCO role. Sqn Ldr Hall agreed to endorse the application and gave a favourable reference completing her part of the form on 17 July 2019.

88. At the 4 July meeting there was what Sqn Ldr Hall describes as a lengthy discussion about Cpl F's upcoming court martial. We are satisfied that the Claimant was willing to discuss it otherwise she could have cut short the discussion. Sqn Ldr Hall said she was concerned if the court martial did not go the way the Claimant was hoping. She gave a couple of examples which were assault cases (it is not known whether they were sexual assault cases) where there was not a satisfactory outcome. The Claimant says that Sqn Ldr Hall said that if the court martial did not go her way she 'might end up considering a PVR' (Premature Voluntary Retirement). Sqn Ldr Hall denies making such a suggestion. We conclude that the discussion included a reference to a possible PVR but it was not by way of encouragement or suggestion for the Claimant to do so.

89. The Claimant completed her application for the AFCO Manchester on 3 July 2019. The Claimant was keen to get the recommendation from Sqn Ldr Hall done as soon as possible. She became concerned that it was taking longer than it should. She says she mentioned it regularly to WO Sowersby. We accept that she would have done so though we cannot know for certain (and therefore cannot find) that WO Sowersby chased Sqn Ldr Hall regularly. Even if the Claimant chased WO Sowersby it is not necessarily the case that he would have repeatedly reminded Sqn Ldr Hall of it. Sqn Ldr Hall completed the form and dealt with the recommendation before the deadline. The Claimant said she that the delay made her feel as if Sqn Ldr Hall had a personal problem with her.

90. The recommendation by Sqn Ldr Hall was signed off on 17 July 2019. In it she wrote:

"H Has excellent organisational skills and would be an asset to the recruitment team in that respect. She is exceedingly motivated in her aspiration to join an AFCO team and her dedication to her goals is to be admired. H is a dedicated team individual who has organised a number of Sqn team events and has demonstrated through this her ability to interact with any rank."

91. On 7 Aug 2019 the Claimant learned that 'manning' (effectively HR) would not release her. The reason was 'the TML [trade manning level] for Cpl AVs was 84%' which refers to the fact that the section was already running 16% short of capacity.

92. The Claimant discovered that if Sqn Ldr Hall was willing to accept a gap on the post then the Claimant could be considered for interview.

93. The Claimant and Sgt Baldwin went to see Sqn Ldr Hall on 7 August 2019 about gapping the post. There is a note of the meeting produced by Sqn Ldr Hall. The veracity of that was questioned by the DB. We are satisfied it is not a contemporaneous note and parts of it are self-serving. In the overall scheme it is not of great significance and our findings do not depend on it.

94. The Claimant explained how she did not want to be at 51 Sqn any longer because it was a constant reminder of the incident in Souda Bay and that she needed a fresh start. She explained that she did feel effective on the Squadron because she was not being employed on aircraft and did not really have a proper job. She said that if Sqn Ldr Hall was willing to gap the post she could take the AFCO role.

95. Sqn Ldr Hall asked for details. She understood that if she agreed to gap the Claimant would not be replaced immediately and was also concerned that in the absence of a replacement the role may be removed altogether. She felt that that a lengthy gap would have a detrimental effect on the Sqn. She was under the impression that the Flight Support role was a temporary measure to support the Claimant and that in time the Claimant would return to the aircraft rectification shift. Her evidence to the Tribunal, which we accept, was that Corporals in the RAF are heavily relied on and she was reluctant to lose one of them. We also accept that she did not articulate all of these reasons to the Claimant but she did say to the Claimant that she could consider gapping for three months but the gapping could not be open-ended.

96. There is a dispute as to the facts on this issue. The Claimant says that Sqn Ldr Hall said:

"It would be better for me if you left the service as I would get someone in quicker".

97. Sqn Ldr Hall says that is inaccurate or at least that it is taken out of context. Sqn Ldr Hall says that she was asked by Sgt Baldwin whether she would prefer an indefinite gap or accept the Claimant's early termination. Sgt Baldwin has not of course given evidence. The only note of the meeting is that of Sqd Ldr Hall.

98. At the end of the day it is unnecessary for us to make a finding in relation to what was said as our conclusions are unaffected by it but insofar as it is necessary to do so we accept that Sqd Ldr Hall said the above words but it was in response to Sgt Baldwin asking whether the SENGO preferred an indefinite gap or the Claimant's

early termination. We conclude that what she meant in terms of 'better' was in relation to replacement of resource.

99. We accept that Sqn Ldr Hall said the Claimant: 'I don't understand why you don't want to work at 51 Sqn, the individual is no longer here. And 'it happened in a different country'. We also find that she said she 'did not accept the Claimant's reasons for moving' and 'did not believe her reality'.

100. Sqn Ldr Hall asked the Claimant if she wanted to return to aircraft rectification shift she would be willing to support her. The Claimant said she was not interested and said: "I am done". Sgt Baldwin said: "I don't think there is anything more to discuss" at which both she and the Claimant left the office. We accept that the Claimant was very upset.

101. On 8 August 2019 the Claimant was signed off sick. As it transpired she did not return to work.

102. On or about 13 August the Claimant went to see Sgt Baldwin to see if it was possible to obtain a transfer to Manchester either under the 'Preferential Treatment Policy' or via welfare. Sgt Baldwin told her that she was not eligible for the Preferential Treatment Policy as she did not meet the relevant conditions. In its decision the DB referring to this said:

"We judge that whilst your case did not fit with the Preferential Treatment policy, there was a clear welfare need to support you with a geographical move. We are convinced that with proper executive support this could have been achieved. The DB concludes that you were failed by the Service's current Preferential Treatment policy as it does not take account of the needs of the Service Person."

103. On 15 Aug 2019 the Claimant discovered that Sqn Ldr Hall had a private discussion with Cpl Woollard in which she discussed certain personal matters about the Claimant. Sqn Ldr Hall said that if the Claimant had gone to see her 'as a friend' then she would have behaved differently. She said that if the Claimant was prepared to do shift work she would consider allowing her back to work on aircraft.

104. On 8 August 2019, Ms Argile received an email from Sgt Baldwin about a medical posting to AFCO Manchester. This was refused as the Claimant was not eligible for what is referred to as a 'Med Geo' transfer. Wing Commander Lavallee, reviewing the CPN's request noted in the medical record that this was a welfare and not a medical issue.

105. The Claimant subsequently spoke to manning about other locations. On 19 August the Claimant was offered several alternative locations including RAF Brize Norton, Lossiemouth in Scotland or RAF Cosford. None of these locations were acceptable to the Claimant as they were some distance from where her family lived.

106. The Claimant subsequently discovered that the AFCO role had been offered to a male serviceperson. This person is identified as Comparator 2. He is said to be a Corporal and a Mechanic. The Claimant says that whereas the TML for her trade was 84%, the TML for his trade was (in February 2019) 87% and by February 2020, 89%.

107. On 3 September 2019 the Claimant received a call from FS Spouge to say that as the Claimant had been off sick for 28 days they need to contact her every

week for welfare. The Claimant says that she was not asked about her welfare from Sqn 51 from this point on.

108. On 4 September 2019 the Claimant had a meeting with the Padre who told her that manning were happy to move her but she could end up at any location and would not receive preferential treatment. The Claimant weighed up her options. Leaving at that stage would mean having to pay back some £9,000 under the Forces 'Help to Buy Scheme'.

109. On 12 Sep 2019, the Claimant was signed off sick until after the court martial of Cpl F which was now scheduled for 2 October 2019. The Claimant was told that a medical posting to Manchester would be considered again after the court martial.

110. On 2 October 2019 Cpl F was acquitted of sexual assault by penetration.

111. On 25 November 2019 the Claimant lodged her SC. Her interview for admissibility of the SC took place in January 2020.

112. In February 2020 the Claimant began having consultations with Psychiatrist Capt. Coetzee. Following those consultations he recommended a medical discharge.

113. On 4 February 2020 the Claimant was declared unfit for all military duties and a medical discharge was recommended. Her last day of service was deemed to be 13 April 2021.

114. On 28 April 2020 the Claimant received the ACAS early conciliation certificate.

115. On 7 May 2020 the Claimant presented her complaint to the Employment Tribunal.

116. On 22 July 2021 the DB issued its decision on the SC.

117. On 16 September 2021 the Claimant appealed the DB decision to the AB. The AB decision was not published until 2 November 2022.

118. On 21 September 2021 the re-submitted her complaint to the RAFP as a Special-to-Type complaints.

THE LAW

119. The following are relevant statutory provisions from The Equality Act 2010 ("EA 2010")

Section 13 Direct discrimination

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

Section 19 Indirect discrimination

"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim."

Section 26 Harassment

"(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

c) whether it is reasonable for the conduct to have that effect."

Section 27 Victimisation

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act."

Section 39 Employees and applicants

"(2) An employer (A) must not discriminate against an employee of A's (B)—

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—

(c) by dismissing B;

(d) by subjecting B to any other detriment."

Section 109 – Liability of employers and principals

"(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description."

Section 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);

Section 121 Armed Forces Cases

"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"

Section 123 Time limits

(2) Proceedings may not be brought in reliance on section 121(1) after the end of -

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or (b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

Section 136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

120. The relevant provisions from the Armed Forces Act 2006 ("AFA 2006") and Regulations made under that Act are as follows:

Section 340B AFA 2006 - 'Procedure for making a complaint and determining admissibility'

"(1) The Defence Council may make regulations (referred to in this Part as "service complaints regulations") about the procedure for making and dealing with a service complaint.

(5) For the purposes of subsection (4), a service complaint is not admissible if—

(a) the complaint is about a matter of a description specified in regulations made under section 340A(4)"

Section 340A(1) AFA 2006 - Who can make a service complaint?

"(1) If a person subject to service law thinks himself or herself wronged in any matter relating to his or her service, the person may make a complaint about the matter.

(2) If a person who has ceased to be subject to service law thinks himself or herself wronged in any matter relating to his or her service which occurred while he or she was so subject, the person may make a complaint about the matter.

(3) In this Part, "service complaint" means a complaint made under subsection (1) or (2).

(4) A person may not make a service complaint about a matter of a description specified in regulations made by the Secretary of State."

Section 340H AFA 2006 Ombudsman investigations

"(1) The Service Complaints Ombudsman may, on an application to the Ombudsman by a person within subsection (2), investigate—

(a) a service complaint, where the Ombudsman is satisfied that the complaint has been finally determined;

(b) an allegation of maladministration in connection with the handling of a service complaint (including an allegation of undue delay), where the Ombudsman is satisfied that the complaint has been finally determined;

(c) an allegation of undue delay in the handling of a service complaint which has not been finally determined;

(d) an allegation of undue delay in the handling of a relevant service matter."

Armed Forces (Service Complaints) Regulations 2015/1955

Regulation 4 - Procedure for making a service complaint:

"(1) A service complaint is made by a complainant making a statement of complaint in writing to the specified officer.

(2) The statement of complaint must state—

(a) how the complainant thinks himself or herself wronged;

(b) any allegation which the complainant wishes to make that the complainant's commanding officer or his or her immediate superior in the chain of command is the subject of the complaint or is implicated in any way in the matter, or matters, complained about;

(c) whether any matter stated in accordance with sub-paragraph (a) involved discrimination, harassment, bullying, dishonest or biased behaviour, a failure by the Ministry of Defence to provide medical, dental or nursing care for which the Ministry of Defence was responsible or the improper exercise by a service policeman of statutory powers as a service policeman;

(d) If the complaint is not made within the period which applies under regulation 6 (1)

(4) or (5) the reason why the complaint was not made within that period;

(e) the redress sought; and

(f) the date on which the statement of complaint is made.

(3) The statement of complaint must also state one of the following—

(a) the date on which, to the best of the complainant's recollection, the matter complained about occurred or probably occurred;

(b) that the matter complained about occurred over a period, and the date on which, to the best of his or her recollection, that period ended or probably ended;

(c) that the matter complained about is continuing to occur;

(d) that the complainant is unable to recollect the date referred to in sub-paragraph (a) or (b)."

The Armed Forces (Service Complaints Miscellaneous Provisions) Regulations 2015/2064

Regulation 3 - 'Excluded complaints'

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

(a) a decision under regulations made for the purposes of section 340B(4)(a) (admissibility of the complaint);

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

(c) a decision under regulations made for the purposes of section 340D(2)(c) (decision relating to whether an appeal has been brought before the end of the specified period);

(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;"

Relevant caselaw

Time limits

121. **In Commissioner of Police of the Metropolis v Hendricks** [2003] ICR 530, [48] the Court of Appeal gave the following guidance on dealing with time limits:

'the burden is on [the Claimant] to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are

evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period".

122. In considering whether there has been a continuing act (that is an act extending over a period) a relevant – though not determinative – factor is whether the same individual or different individuals was or were involved in the alleged incidents (see **Aziz v FDA** [2010] EWCA Civ 304).

123. In **British Coal Corporation v Keeble** [1997] IRLR 336**,** the Employment Appeal Tribunal suggested that Tribunals would be assisted by considering the factors set out in section 33(3) of the Limitation Act 1980. Those factors are, relevantly, the length of and the reasons for the delay, the extent to which the evidence is likely to be less cogent than if brought within the time allowed, the conduct of the defendant after the cause of action arose, the extent to which the Claimant acted promptly and reasonably once they knew of the possibility of taking action.

124. In **Bexley Community Centre v Robertson** [2003] IRLR 434, the Court of Appeal held that there is no presumption to extend time and it is up to a Claimant to convince a tribunal that it is just and equitable to extend time. At paragraph 25 of the judgment it said:

"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

125. In **Secretary of State for Justice v Johnson** [2022] EAT 1, it was said that an Employment Tribunal should take into account all relevant factors, which will almost always involve considering the length and reason for the delay and whether the delay has prejudiced the Respondent in respect of matters such as investigation and obtaining evidence.

126. In the Court of Appeal case **of Abertawe Bro Morgannwg University Local Health Board v Morgan,** Leggat LJ said this (at paragraph 18):

"First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act 2010 does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corpn v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: (see Southwark London Borough Council v Afolabi [2003] ICR 800."

<u>Direct discrimination</u>

127. In **Shamoon v Chief Constable of the Royal Ulster Constabulary** (2003) ICR 337, Lord Nicholls in the House of Lords (NI) said that the Tribunal should focus on the primary question which was why the complainant was treated as he or she was? The issue essentially boiled down to a single question: did the complainant,

because of a protected characteristic, receive less favourable treatment than others? At paragraphs 7 of his judgment we find the following passage:

"Thus the less favourable treatment issue is treated as a threshold which the Claimant must cross before the tribunal is called upon to decide why the Claimant was afforded the treatment of which she is complaining.

128. And further at paragraph 11:

"Employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

129. In **Nagarajan v London Regional Transport** (1999) ICR 877, a case concerned with the definition of direct discrimination under the previous legislation of the Race Relations Act 1976 (which referred to treatment 'on racial grounds'), the House of Lords considered the proper approach to dealing with discrimination cases. In that case Lord Nicholls said:

"a variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds… had a significant influence on the outcome, discrimination is made out'. The crucial question, in every case, was 'why the complainant received less favourable treatment..?"

130. In **Chief Constable of West Yorkshire Police v Khan** (2001) ICR 1065 the House of Lords made it clear that in a case of alleged subjective discriminatory treatment the test to be adopted was: a tribunal must ask itself why did the alleged discriminator act as he or she did? What, consciously or unconsciously, was his or her reason?

131. In the case of **Stockton on Tees Borough Council v Aylott** [2010] ICR 1278, CA, Mummery LJ (at paragraph 49) said:

'Direct discrimination claims must be decided in accordance with the evidence, not by making use, without requiring evidence, of a verbal formula such as "institutional discrimination" or "stereotyping" on the basis of assumed characteristics. There must be evidence from which the employment tribunal could properly infer that wrong assumptions were being made about that person's characteristics and that those assumptions were operative in the detrimental treatment.'

132. Section 136 of EA 2010 refers to what are often called the 'reversal of the burden of proof' provisions. The correct interpretation of section 136 EA 2010 was set out in the Court of Appeal case of **Madarassy v Nomura International Plc** [2007] IRLR 246 (approving the guidance given in the earlier case of **Igen v Wong** [2005] ICR 931). Although **Madarassy** predates the EA 2010, the approach in **Madarassy** was subsequently approved by the Supreme Court in **Hewage v Grampian Health Board** (2012) UKSC 37.

133. In **Madarassy** the Court of Appeal made it clear that the burden does not shift to the employer simply on the Claimant establishing the difference in status (for

example a difference in sex) and the difference in treatment. Those 'bare facts' only indicate a possibility of discrimination, not that there was in fact discrimination. "Could conclude" in the wording of section 136 EA 2010 must mean that a reasonable Tribunal could *properly conclude* from all the evidence before it. Thus at paragraphs 56 and 57 of the judgment we find the following passages:

"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. 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…

'Could… conclude' in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment".

134. The first of the two-stage process envisaged by section 136 EA 2010 is therefore to consider whether the Tribunal could properly conclude from the facts (if proved by the Claimant) whether discrimination is a possible explanation for the treatment. At the second stage of the process the Respondent must provide a non-discriminatory explanation for its treatment of the Claimant. If, upon a balance of probabilities, the Respondent is not able to show that discrimination was not the reason for the treatment, the Claimant must succeed. If the Respondent discharges the burden by proving, for example, that a non-discriminatory reason for the treatment exists then the claim must fail. Whether the burden shifts is often, as it is in this case, a matter of significant dispute.

135. In **Chief Constable of Greater Manchester Police v Bailey** [2017] EWCA Civ 425) (paragraph 29) the Court of Appeal said:

'It is trite law that the burden of proof is not shifted simply by showing that the Claimant has suffered a detriment and that he has a protected characteristic or has done a protected act'"

<u>Indirect discrimination</u>

136. There is no definition of 'provision, criterion or practice' (PCP) in the EA 2010. The Equalities and Human Rights Commission Employment Code ("EHRC") at paragraph 6.10 states:

"The phrase 'provision, criterion or practice' ….. should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements or qualifications including one-off decisions and actions."

137. A PCP has been held to consist of a one-off decision (**Starmer v British Airways** [2005] IRLR 862) where a decision not to allow an employee to reduce her work to 50% of normal hours constituted the application of a provision. **Starmer** however now needs to be read in the light of subsequent authorities, particularly **Ishola** below.

138. In **Nottingham City Transport Ltd v Harvey** [2013] EqLR 4*, (*EAT*)* Langstaff P held that the manner in which a disciplinary procedure was applied to an employee did not amount to a PCP because:

"a practice connotes something which occurs more than on a one-off occasion and … has an element of repetition about it."

139. Arguably the most authoritative guidance on the definition of a PCP emerges in the relatively recent case of **Ishola v Transport for London** (2020) ICR 1204. In that case the Court of Appeal (Simler LJ at paragraph 37 - 38) said this:

"In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.

In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. Like Kerr J, I consider that although a one-off decision or act can be a practice, it is not necessarily one."

Vicarious Liability

140. Paragraph 10.46 of the EHRC Code states:

"The phrase 'in the course of employment' has a wide meaning: it includes acts in the workplace and may also extend to circumstances outside such as work- related social functions or business trips abroad. For example, an employer could be liable for an act of discrimination which took place during a social event organised by the employer, such as an after-work drinks party."

141. In **Jones v Tower Boot Co Ltd** [1997] ICR 254, the Court of Appeal said that an Employment Tribunal should interpret the statutory words in the sense in which every layman would understand them.

142. In **Chief Constable of Lincolnshire Police v Stubbs** (1999) IRLR 81 the EAT upheld a finding that drinks after work and an organised leaving party were sufficiently work-related to be treated as an extension of work.

143. We raised with the parties the question of whether the Morrison line of cases (**Mohamud v WM Morrison** [2016] IRLR 362 and **Various Claimants v WM Morrisons** [2020] UKSC 12) in the field of common law had any bearing on the how we should interpret the expression 'in the course of employment'. Mr Fetto was of the view that the cases were not directly relevant but that if they were they support the Respondent's position. Miss Braganza did not think they were applicable at all but referred us to a passage in the IDS Handbook which states:

"29.7 Employment law originally adopted the approach of the common law in tort cases, whereby an employer is only liable for acts done by employees when those acts are connected with acts which the employer has authorised and which could rightly be regarded as modes, albeit improper modes, of doing the authorised acts — see, for example, **Irving v Post Office** [1987] IRLR 289 However, in **Jones v Tower Boot** [1997] ICR 254 CA, the Court of Appeal expressly rejected the proposition that the common law principles of vicarious liability are to be imported into anti-discrimination legislation.... Relying on the Court of Appeal's decision in **Irving**, the EAT overturned a tribunal's decision that the employees had been acting in the course of their employment.

29.8 The Court of Appeal restored the tribunal's decision. It explained that the **Irving** case was not, in fact, authority for the proposition that the common law principles should apply in statutory discrimination cases. Although its decision certainly proceeded on that basis, the Court in **Irving** never addressed its mind to the question. In the instant case the Court of Appeal accepted that there is a broad conceptual similarity between the common law principles of vicarious liability and an employer's secondary liability under section 32(1) of the Race Relations Act 1976 (the equivalent of section 109(1) Equality Act 2010) but insisted that the two contexts are not so similar as to require that the phrase 'course of employment' in the statute be read as subject to the gloss imposed upon it at common law. To do so would impose a far more restricted meaning than the natural everyday meaning of the words allowed and would result in the anomaly that the more heinous the act of discrimination, the less likely it would be that the employer would be found liable. That would cut across the underlying policy of the discrimination legislation, which is to deter harassment by making the employer liable for the unlawful acts of employees while providing a defence for the conscientious employer that has done its best to prevent such harassment.

The Court of Appeal concluded that the words 'in the course of… employment' are to be construed in the sense in which every layperson would understand them. The question whether an employee's discriminatory acts were done in the course of his or her employment, thereby rendering the employer liable for them, should be treated as a question of fact, which, the Court stated, an employment tribunal is well suited to resolve."

144. We are satisfied that the above extract accurately sets out the applicable law and that we must focus on the statutory test of the words in section 109 EA 2010 which is wider than the common law.

Harassment

145. In **Richmond Pharmacology v Dhaliwal** [2009] ICR 724, EAT, Mr Justice Underhill P (as he then was) gave guidance on the elements of harassment as defined under the Race Relations Act 1976 (which was in slightly different terms to section 26 EA 2010). Underhill LJ revised that guidance as it applies to section 26 in the case of **Pemberton v Inwood** [2018] ICR 1291, CA, as follows (at paragraph 88):

"In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances—subsection (4)(b).…… The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

146. **In GMB v Henderson** [2017] IRLR 340, the Court of Appeal said that in deciding whether the unwanted conduct 'relates to' the protected characteristic the Tribunal would need to give consideration to the mental processes of the putative harasser.

Victimisation

147. For it to amount to victimisation the employer must subject the employee *because* the latter has committed a protected act and not for any other reason. 'Because of' in this context carries the sense of an employer penalising or prejudicing the employee for taking steps to exercise their rights (**Chief Constable of the West Yorkshire Police v Khan** [2001] ICR 1065; **St Helens BC v Derbyshire** [2007] ICR 841).

148. The burden of proof provisions also apply to complaints of victimisation. To shift the burden of proof the Claimant would have to show facts from which the Tribunal could find that that the Respondent put the Claimant to a detriment because the Claimant did such a protected act (**Chief Constable of Greater Manchester Police v Bailey** [2017] EWCA Civ 425).

THE ISSUES

149. For cross-referencing purposes we shall adopt the same numbered paragraphs and sub-paragraphs as those which appear in the agreed list of issues.

Time limits

1.1 Was the claim brought within 6 months of the acts complained of?

1.2 Did the conduct complained of extend over a period?

1.3 If so, was the claim brought in time?

1.4 If not, is it just and equitable to extend time?

Jurisdiction (sections 120 and 121 of the Equality Act 2010)

2. Does the Tribunal have jurisdiction to determine claims for unlawful discrimination, direct discrimination and/or victimisation in relation to the following?

2.1 Being told to decide on Voluntary Retirement sooner rather than later;

2.2 Being pushed into asking about Premature Voluntary Retirement;

2.3 That on 20 September 2019 the Claimant was made non-effective due to mental health issues;

2.4 Failing to progress and resolve the SC dated 25 November 2019;

2.5 Whether in part or whole due to the above, the Claimant being left with no option but to agree to being medically discharged on 7 February 2020;

Jurisdiction (excluded complaints – Armed Forces (Service Complaints) Regulations 2015)

3. Does the Tribunal have jurisdiction to determine the Claimant's complaint of delay in the Service Complaints process?

Vicarious Liability

4. Was the Respondent vicariously liable for Cpl F's alleged sexual assault on the Claimant on 20 August 2018?

Direct discrimination because of sex and/or sexual orientation and victimisation

5. [This merely identifies the way the case is put and is not an issue as such]

6. Did the Respondent subject the Claimant to the following treatment and, if so, was it less favourable treatment on grounds of her protected characteristics or by reason of her having committed a protected act?

On 20 August 2018

6.1 The Claimant being sexually assaulted by Cpl F (this is not a complaint of victimisation;

6.2 Flight Sgt Hodgson reacted with anger and failed to prioritise concern for the Claimant's welfare;

6.3 The whole shift was briefed of the incident prior to the police having been notified or other appropriate plan devised;

6.4 Flt Lt Bragg failing to speak to the Claimant and saying that he 'felt sick';

6.5 There was a delay in the RAFP being notified of the sexual assault;

6.6 Threatening to charge the Claimant with a service offence if the Claimant booked her own flight home;

6.7 Threatening the Claimant with being charged with a service offence for breaking curfew in Souda Bay, later changed to a MAA;

On 21 August 2018

6.8 Making arrangements to send Cpl F, as the accused perpetrator, home before the Claimant;

6.9 Not making appropriate arrangements for the Claimant's travel home, in particular not prioritising her welfare, being preoccupied with addressing rule-breaking and/or not making appropriate onward travel arrangements;

6.10 Not informing the Claimant's management in the UK of the seriousness of the matter;

6.11 Sdn Ldr Hall failing to contact the Claimant to check on her physical and mental welfare, directing her to turn her phone on, and saying that she was 'lucky' to be home;

6.12 After 21 August 2018 by Sqn Ldr Hall making no attempt to contact the Claimant to check on her welfare.

6.13 On 4 September 2018 temporarily posting her assailant Sgt F to RAF Coningsby;

On 18 December 2018

6.14 Informing the Claimant that her assailant was allowed to attend RAF Waddington the following day to collect his belongings when she had medical appointments scheduled at 10 am and 11am and that his attendance would not be rescheduled, causing the Claimant to cancel and reschedule her medical appointments to enable Cpl F to attend camp;

6.15 The ongoing lack of support around her report and return to the UK, not feeling gainfully employed in work and being directly prevented from applying for a more suitable position elsewhere;

6.16 A refusal to recommend the Claimant for transfer to Manchester communicated to the Claimant on 28 February 2019;

6.17 Sqn Ldr Hall stating that she had a friend in the 'same situation' who was a male accused of sexual assault and not the victim;

6.18 After 3 April 2019 refusing the CPN's request for the Claimant to work a permanent day shift to assist the Claimant's mental health;

6.19 Demoting/ taking the Claimant off her duties on 15 April 2019 by Sqn Ldr Hall to place the Claimant in a support cell rather than her current role working on aircraft;

6.20 Being told by WO Sowersby that the latter was because she could not work with a certain individual on Squadron, though without explaining any further;

6.21 Telling the Claimant she should make a decision on Premature Voluntary Retirement (PVR) sooner rather than later following her enquiry about Return Of Service;

6.22 Placing the Claimant on 13 June 2019 directly outside the SENGO's office;

6.23 Having her welfare needs neglected;

6.24 Being under tasked throughout her time on support cell, and even more so since she moved office;

6.25 Delaying completing her second request to transfer to AFCO Manchester, from 25 February 2019 and following her formal application on 4 July 2019;

6.26 Stating that the SENGO was reluctant to support the application, as 'she would PVR anyway';

6.27 Delay by the SENGO of recommending her transfer and supporting it;

6.28 On 18 July 2019 refusing to release her from trade. The Claimant relies in this regard on a male comparator (comparator 2) who was released and allocated her place.

On 7 August 2019

6.29 On 7 August refusing the Claimant's AFCO transfer application;

6.30 Refusing to gap her post for more than 2-3 months;

6.31 The SENGO in the meeting attended by the Claimant and Sgt Baldwin on 7 August 2019 stating that the SENGO did not accept the Claimant's reasons for wanting a move, "not accepting (her) reality" and, "it would be better for me if you left the service as I would get someone in quicker";

6.33 The SENGO also saying "I don't understand why you don't want to work at 51, the individual is no longer here, and it happened in a different country";

6.33 The combination of the above to make the Claimant feel ostracised;

6.34 On 8 August 2019 that the SENGO would not gap the post at all, even though the previous day she said she would for 2 or 3 months;

6.35 The Claimant being told her only option was RAF Benson, which was even further away from her family support network than Waddington;

6.36 The Claimant being pushed into asking about PVR;

6.37 The Claimant being told there was no chance of a move to Manchester and that she was not eligible for a welfare move or preferential treatment;

6.38 On 15 August 2019 the SENGO discussing the Claimant's private affairs with Cpl Matthew Woollard without the Claimant's consent;

6.39 Not providing the Claimant with any victim support;

6.40 On 20 September 2019 the Claimant being made non-effective due to mental health issues following the Respondent's treatment of her;

6.41 Failing to engage with why the Claimant could not be posted to Manchester;

6.42 In October and November 2019 offering the Claimant manifestly unsuitable placements in Brize Norton, West Oxfordshire, and one in Lossiemouth, North-east Scotland, in the knowledge of the Claimant's request for transfer to Manchester, the

reasons for the repeated requests, as a victim of a sexual assault and as a vulnerable person;

6.43 Offering the Claimant the transfer to Manchester but for only 6 - 9 months;

6.44 The Respondent failing to progress and resolve the SC dated 25 November 2019;

6.45 Not interviewing the Claimant as a vulnerable individual until 20 January 2020 for her SC;

6.46 Whether in part or whole due to the above leaving the Claimant with no option but to agree to being medically discharged on 7 February 2020;

6.47 Failing to comply with the provisions of the DIN as to the support of victims and vulnerable individuals;

As to the RAFP investigation the Claimant contends that there was:

6.48 A failure to investigate promptly after being notified of the offence;

6.49 A failure to take fingernail scrape evidence from the suspect;

6.50 A failure to advise the Claimant on preservation of evidence or to request her clothing until prompted;

6.51 A failure to conduct the initial account interview appropriately;

6.52 A failure to have available or to consult a sexual offences booklet;

6.53 A failure to have an Early Evidence Kit;

6.54 A failure to have any standing medical facilities in place;

6.54 A failure to provide any victim support prior to the hearing;

6.55 A failure to provide the Claimant with 'the entire investigation, the court notes, and the forensics sheet' in response to her email of 7 October 2019.

[Paragraph 7 of the list of issues contains a number of admissions which are set out elsewhere]

8. Failing to progress and resolve the Service Complaint dated 25 November 2019.

<u>Harassment</u>

9. Did the Respondent subject the Claimant to the treatment alleged?

10. If so, was that treatment unwanted conduct?

11. Did it relate to the Claimant's sex and/or sexual orientation?

12. Was it of a sexual nature?

13. Did the conduct have the purpose or effect of violating the Claimant's dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Indirect discrimination

14. Did the Respondent apply the following provision, criterion or practice ('PCPs') to women and men?

14.1 By the RAFP in how they carried out or in the manner in which they carried out their sexual assault investigation;

14.2 Failing to comply with or apply the Joint Services Publication (JSP) and Defence Instruction Notice (DIN) on supporting victims of sexual assault and vulnerable individuals;

14.3 Operating a Preferential Treatment policy and/or a practice/policy of its focus being solely on Service needs without proper consideration of what was best for the individual.

14.4 The practice of delays within the Service Complaints system, as exemplified by the Respondent not progressing or resolving the Service Complaint dated 25 November 2019 promptly.

15. Did each such PCP put, or would it have put, women at a particular disadvantage to a greater proportion when compared with men?

[Issue 16 is an admission]

17. In each case was that PCP applied to the Claimant?

18. In each case did that PCP put the Claimant at a particular disadvantage?

[Paragraph 19 is an admission]

20 Can the Respondent show each such PCP to be a proportionate means of achieving a legitimate aim?

22.1 Was the PCP an appropriate and reasonably necessary way to achieve those aims;

22.2 Could something less discriminatory have been done instead;

22.3 How should the needs of the Claimant and the Respondent be balanced?

Victimisation

23. It is accepted that the Claimant's reporting of assault on 20 August 2018 was a protected act. The Respondent admits that the report was made to Sgt Storer at around 17:00 on 20 August 2018 and later reported to the RAF Police.

24. Did the Respondent subject the Claimant to the treatment set out at paragraph 6 other than 6.1 above?

25. In each case, was the treatment because the Claimant did the protected act and/or because the Respondent believed that the Claimant had done or might do the protected act?

CONCLUSIONS

Jurisdiction - the time issue

150. We do not find that there was an act extending over a period (formerly known as a 'continuing act') for the following reasons:

150.1 The allegations involve different people in relation to acts which occurred at different times;

150.2 There are considerable gaps between the allegations relied on;

150.3 There is no common thread to link them other than the fact that the Claimant feels she has been treated wrongly in respect of them;

150.4 There is no direct link between the incidents at Souda Bay and the acts relied on in the UK other than the effect on the Claimant. The alleged discriminatory acts must be distinguished from the ongoing effects of any act;

151. We therefore find all of the allegations have been presented out of time. We do however consider it just and equitable to extend time for the following reasons:

151.1 The Claimant was beginning to suffer from mental health issues from September 2019 when she was signed off sick. Her health did not improve, rather it got worse over time;

151.2 The Claimant lodged her SC on 25 November 2019. She could not issue ET proceedings until she had done so.

151.3 The Claimant was not to know that the delay in dealing with her SC would be as long as it was. Once she was in the process of the SC she was obliged to give it a reasonable period of time to conclude. She only lodged her claim in the ET after inordinate and inexcusable delays in the SC process.

151.4 There is little prejudice to the Respondent by extending time other than the prejudice of having to defend the claim. It is true that at least one person has died

and one is no longer with the RAF but it is far from clear that the Respondent would have called them in any event. The Respondent does not dispute the central fact of the sexual assault and it would be highly inequitable to strike out an otherwise unarguable claim on time limits alone. The prejudice to the Claimant is therefore much greater than to the Respondent. The prejudice by reason of the delay alone to the Respondent is minimal. It is just and equitable to extend time up to the SC. The delays from then are largely if not wholly due to the Respondent.

Jurisdiction - allegations pleaded but not part of the SC

152. Mr Fetto argues that several issues and allegations in these proceedings were not the subject of complaints in the SC and should therefore be dismissed for that reason. Those allegations are:

152.1 An allegation that a request for three-year return of service lifted was refused on or around 6 June 2019. This is not in the list of issues and it is not clear whether it is being pursued;

152.2 An allegation of allegedly being pushed into asking about PVR on or around 8 August (this appears to be issue 6.34);

152.3 Issue 6.40 in these proceedings relating to the Claimant allegedly being made non-effective on 20 September 2019;

152.4 The failure to progress the SC dated 25 November 2019 (issue 8);

152.5 The issue (6.46) relating to the Claimant being left with no option but to agree to being medically discharged on 7 February 2020.

153. There is no directly applicable EAT authority on the matter other than **Molaudi v MOD** (UKEAT/0463/10) which is authority for the proposition that an SC must be validly made in line with the relevant legislative framework before it can 'unlock' the jurisdiction of the Employment Tribunal. However it is not directly on the point.

154. In the Employment Tribunal case of **Zulu & Gue v MOD** (case number 2205687/2018), a decision of Employment Judge Jane McNeill KC, the Tribunal at a Preliminary Hearing considered the issue of allegations which were not specifically pleaded as part of the SC but were pursued in the Tribunal.

155. In particular the following we consider the following passages from the decision (at paragraphs 69 – 70) to be relevant:

"Interpreting s121 in the context of the SC process, the word "matter" in s121 is used to refer to how a person thinks they have been wronged in relation to his or her service. That is the essential basis for a service complaint under s340A(1) of the AFA. The service complaint must be particularised to some extent as set out in regulation 4 of the 2015 Regulations but the primary requirement is for the complainant to say "how he thinks himself wronged". Pursuant to regulation 4, the service complaint must be in writing but further clarification of a service complaint may take place at interview as occurred in the current cases.

The purpose of the statutory SC process is to give an opportunity for complaints, which may

subsequently be brought to an employment tribunal, first to be considered by the military authorities. That means that there must be sufficient detail in the service complaint to make it possible for a decision to be made in relation to it before a claim is brought to the employment tribunal about the same matter. However, that does not mean that each and every detail of the wrong complained of must be particularised in the service complaint form.

The AFA and 2015 regulations set out the requirements for a service complaint but a service complaint is not the same as a pleading. Although a significant degree of particularity is required in a service complaint, the approach to a service complaint should not be overly legalistic. The SC process is there to resolve complaints outside the structure of a court or even tribunal process. Indeed, in discrimination matters, the military authorities have the opportunity to resolve the complaint before any tribunal process commences. Complainants are asked to attach relevant documents to their service complaint form and the process may involve an interview at which complainants may further explain their complaints. Where complainants have incorporated documents by reference into their service complaints which clarify or elaborate upon their service complaint, as the Second Claimant did, or have clarified or elaborated upon their written complaints at interview, there is no reason to construe the meaning of "service complaint" narrowly so as to exclude those further particulars. The "service complaint" is the complaint about the wrong which the complainant wishes to have redressed.

156. **Zulu & Gue** is not binding on this Tribunal but we respectfully agree with the above. In our view the SC is not intended to be drafted in the manner of a High Court pleading and provided the allegations are broadly related to and flow from the same series of events we consider that the Tribunal has jurisdiction to deal with them even if they are not spelt out with the same precision of language in the SC. We therefore consider that the above allegations can and should be considered save for issue 8 which is dealt with as part of the excluded matters.

Jurisdiction - excluded matters

157. In relation to allegations which cannot be pursued because they are 'excluded complaints' within the meaning of Regulation 3 of the 2015 Regulations, Ms Braganza invites us to follow the recent decision of the Watford Employment Tribunal in **Rubery**. In that case the Tribunal considered it was necessary to read into section 121 EA 2010 the following words:

"(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."

158. The facts of **Rubery** are materially the same. The Claimant worked for the RAF and brought claims of discrimination. The Respondent applied to strike out the Claimant's claims on the ground as that the claims of discrimination relating to the conduct of SC were outside the Tribunal's jurisdiction. Her SC was determined without an oral hearing and after more than two years the complaint was dismissed. She appealed and requested an oral hearing but that was refused. With the exception of a finding of inordinate delay in the determination of the SC, her appeal was dismissed. She went to the Service Complaints Ombudsman for the Armed Forces (SCOAF). The SCOAF upheld her allegations of maladministration. She brought claims of indirect discrimination. She did not make a SC of that complaint because that is excluded by virtue of Regulation 15 of the 2015 Regulations. As to the Respondent's argument that her claims were excluded from the Tribunal's jurisdiction, she argued that the Tribunal was compelled to adopt a construction of section121 EA 2010 compatible with ECHR rights and retained EU law.

159. We do not propose to repeat the legal arguments run in **Rubery** which are more or less the same arguments here. In **Rubery** the fact of Brexit was held to be fatal in relation to the application of EU law in reading words into the Act or Regulations. Ms Braganza argues that in this case the Claimant can still rely on EU law as this claim was brought in May 2020, prior to IP completion day.

160. In the alternative Ms Braganza relies on section 3 of the Human Rights Act 1998 and in particular the various passages in **Ghaidan v Godin-Mendoza** [2004] 2 AC 557 (which we do not need to set out here) and several other authorities as the basis for doing so.

161. Having considered the submissions carefully, we reject the argument that it is necessary to read words into section 121 EA 2010 for the following reasons:

161.1 With respect, we do not agree with the decision in **Rubery**.

161.2 We do not agree that the statutory scheme offends the EU law principle of effectiveness (making the pursuing or enforcement of a right impossible or practically difficult) or the principle of equivalence (that procedures and remedies for claims derived from EU law should be no less favourable than those that apply to similar actions of a domestic nature).

161.3 In our judgment to read the suggested words would 'go against the grain' of the legislation as well as being incompatible with the underlying thrust of the legislation being construed. The effect would be to emasculate the statutory scheme. It is not appropriate to read in words based on Convention rights.

161.4 In cases of maladministration a complainant is not left without remedy. He or she can pursue maladministration issues through SCOAF. The Ombudsman has a wide range of powers. There is no evidence that it is more difficult to do so than pursuing a claim in the Employment Tribunal.

161.5 The government has made a legislative choice to deal with matters in the form of a statutory scheme. It has been in place for some time. It is not for us to set it aside. The primary function of the Tribunal, as with any court, is to interpret legislation not to re-write it.

<u>Vicarious Liability</u>

162. The Respondent accepts vicariously liability for the actions of its employees other than in relation to the issue of sexual assault by Cpl F. The only defence to the sexual harassment claim is that the act did not occur in the course of employment within the meaning of section 109 EA 2010.

163. We are satisfied that the act of sexual harassment *did* occur in the course of employment for the following reasons:

163.1 We consider that it is appropriate to take a broad view of the phrase 'in the course of employment' based on both the decision in **Stubbs** and having regard to wording of paragraph 10.46 of the EHRC. In **Stubbs** the discriminatory acts took place in a social setting. The only reason why the Claimant was in Crete in the first place was because she had been posted there.

163.2 The assault was dealt with as a service matter and by the RAFP rather than by the local Greek police;

163.3 The Claimant was told she would face potential disciplinary action which would be unlikely if this was not in the course of employment;

163.4 Cpl F was dealt with in the military justice system by being court martialled rather than charged by the Greek or the UK police.

Conclusions on the allegations

164. Before we deal with the allegations we would wish to make a few general observations on the evidence. There has been considerable criticism from Ms Braganza of the Respondent's personnel not being familiar with RAF policies and procedures in particular the various JSP, DIN and Guidance leaflets. This criticism is to some extent acknowledged in the DB at paragraph 59 where it states:

"We observed that adequate training is critical in ensuring police officers are aware of and familiar with the relevant policy and can exercise appropriate judgement in its application. We opined that all RAF Police should have ready access to a user-friendly guide on how to act when a sexual offence investigation is required. We considered Service policy to be adequate, but that training on and access to that policy was lacking. We considered that reach- back to specialist advice by phone was reasonable and aligned with procedures used in the UK by the Home Office Police Forces."

165. We have however borne in mind that whilst a breach of policy might be unfavourable treatment is not necessarily indicative of less favourable treatment.

166. The Respondent's approach to the evidence that it has called (or perhaps more accurately not called) is also the subject of sharp criticism from Ms Braganza. It is of course generally unsafe for a Respondent not to call a material witness as it runs the risk of not being able to provide a non-discriminatory explanation. But we do not consider that in this case we have been deprived of any crucial relevant evidence. The majority of the allegations of discrimination are against Sqd Ldr Hall who *was* called and cross-examined at length. Cmg Officer Air Commander Burke was not called but there are no allegations against him personally. He would only be able to comment on policy matters and it is unlikely his evidence would have added anything of significance. Wg Cmdr McConnell had died by the time of the interviews for the SC. Sgt Stagg had left the Force. FS Hall was not called by either party.

167. WO Sowersby has refused to co-operate all along. He did not provide a statement to the DB. He has since left the RAF but now undertakes work for the MOD as an independent contractor. The Respondent did not call WO Sowersby and there are areas where he may have corroborated either the Claimant's account or that of Sqd Ldr Hall. His evidence may have been helpful but we recognise it is often difficult to call someone who refuses to co-operate. However the argument cuts both ways. There is of course no property in a witness and it was always open to the Claimant to seek a witness order if she felt it was necessary but the Claimant would have faced the same difficulties as the Respondent. Overall whilst his absence is unfortunate it is not crucial.

168. Sgt Baldwin was sympathetic to the Claimant during her employment.

There is no explanation as to why she was not called by the Claimant. It may be argued that as she is still in the employ of the RAF she has conflicting loyalties but then Sgt Woollard is still employed and he was called. It seems to us that the position as to who should or should not have been called to give evidence is at best neutral. It has not left us with what has been termed a 'black hole' in the evidence.

169. The Claimant relies on the protected characteristics of sex as a woman and sexual orientation as a gay woman. With the exception of two allegations she relies on a hypothetical comparator, someone who had suffered an assault. She relies on two male comparators: Comparator 1 who was a Sargent and on the Claimant's case was permitted to work on aircraft on permanent day shifts and Comparator 2 who was accepted for the AFCO role in August 2019.

170. In coming to our decision on the complaints of direct discrimination we have focussed primarily on the reason for the treatment. Why was the Claimant treated the way she was? Motive and intention are irrelevant. The Claimant's sexual orientation was well known to those who worked with her. There is nothing to suggest that her gender or sexual orientation was ever an issue with anyone, including Sqn Ldr Hall. The Claimant was well-liked and respected by all her colleagues and those in command. There has been no evidence to the effect that anyone had a problem with her being a woman despite working in a male-dominated environment or that they had a problem with her as a gay woman.

171. There has been a considerable amount of material included in the bundles, evidence and submissions about discriminatory practices in the military. Reference is made to the House of Commons Defence Committee Inquiry Report. There are references to failures in compliance with relevant procedures. But there is no claim, nor is one available of 'institutional discrimination'. Whether there is a culture of discrimination, which we are not asked to decide, is not relevant for our purposes.

172. The proper legal approach in our view is that submitted by Mr Fetto which is to consider the operation of the burden of proof provisions and the inference-drawing exercise integral to them. It is for the Claimant to prove facts from which an inference of discrimination may be drawn. As a general conclusion we do not find that the Claimant has proved such facts from which we could conclude that a contravention of the Equality Act had occurred in relation to either protected characteristic. Unfortunately for the Claimant therefore, she fails at the first of the two-stage test. In our view the burden does not (save on one occasion) pass to the Respondent and on that occasion we are satisfied that the Respondent has provided a non-discriminatory explanation for the treatment. Thus the complaints of direct discrimination in relation to both protected characteristics must fail.

173. The Respondent accepts that there are areas where matters could have been handled better, particularly in relation to the RAFP investigation. But those failings are not inherently evidence of less favourable treatment or matters from which an inference can or should be drawn of discrimination. There is nothing to suggest things would have handled things differently if the Claimant had been a man reporting a physical assault for example. There is similarly no justification for saying it was handled the way it was because of the Claimant's sexual orientation.

174. We set out our reasons below in relation to each allegation. For ease of reference we propose to use the same numbering as the list of issues above.

6.1 The Claimant was sexually assaulted by Cpl F;

There is no factual dispute that the sexual assault took place. The Respondent denies liability solely on the grounds that it is not vicariously liable. We have proceeded on the basis that there is no dispute that the Claimant's account of the incident occurred as she describes it. We have also found that the act occurred in the course of employment. This allegation is therefore upheld and the complaint of sexual harassment succeeds.

6.2 Flight Sgt (now WO) Martyn Hodgson reacted with anger and failed to prioritise concern for the Claimant's welfare.

WO Hodgson gave oral evidence and took issue with the description of 'anger'. He preferred to use the terms 'disappointment' or 'being upset'. It is difficult to see how WO Hodgson can remember now exactly how he felt given the passage of time. It is also difficult to decide on such subtle distinctions particularly as no words were used. The Claimant bases her allegation on how she perceived WO Hodgson's facial expression.

WO Hodgson accepts he could have handled the situation better when he was first told of the assault. We accept his evidence that once he had more information about the seriousness of the incident he went into 'business mode' and acted appropriately. He properly reported the matter through the chain of command. The Claimant was then supported by others.

The reason for WO Hodgson's initial reaction was because he expected better from the Claimant than breaking curfew. There is nothing to suggest that he would have reacted differently to someone who was not gay or a man or that he in fact treated any of the others (who were all male) who had broken curfew any better. We do not find that he treated the Claimant less favourably.

We also do not agree that either WO Hodgson or the Respondent generally failed to prioritise the Claimant's welfare. WO Hodgson reported the matter to his chain of command. The Respondent arranged for someone to always remain with the Claimant and reported the matter to the RAFP.

6.3 The whole shift was briefed of the incident prior to the police having been notified or other appropriate plan devised.

There was nothing improper or discriminatory in the briefing preceding the notification to the RAFP. There was a legitimate need to stop potential rumours.

6.4 Flt Lt Alex Bragg failed to speak to the Claimant and disclosed that he felt sick.

It is difficult to see how Flt Lt Bragg saying that he felt sick was discriminatory. If anything it showed that he was disgusted at what had happened. If Flt Lt Brigg did fail to speak it was not designed to show a lack of sympathy as is clear from the fact that he later went to see the Claimant to check up on her.

6.5 There was a delay in the service police (the Royal Air Force Police, RAFP) being notified of the sexual assault.

It is accepted there were a number of failings in the way that the RAFP dealt with the matter. Those undertaking the investigation were largely inexperienced in such matters, did not have access to the necessary equipment and at times failed to follow proper procedure.

Incompetence or inefficiency does not establish less favourable treatment or an inference of discrimination. Whilst there was some delay it was not related to any protected characteristic or the making of a protected act.

6.6 Threatening to charge the Claimant with a service offence if the Claimant booked her own flight home.

Whilst 'threaten' is a somewhat emotive word we accept that what the Claimant was proposing would be contrary to RAF procedures and rules. It would potentially amount to absconding. Regardless of gender or sexual orientation we are satisfied that anyone booking their own flight home without permission would have been treated in the same way.

6.7 Threatening the Claimant with being charged with a service offence for breaking curfew in Souda Bay, later changed to a Minor Administrative Action.

All those who broke curfew were treated the same. They were all initially referred to as the 'Souda 6'. The reason for being told of the possibility of action was to ensure that the Claimant would not be surprised to learn it later. There was no less favourable treatment.

6.8 Making arrangements to send Cpl F, as the accused perpetrator, home before the Claimant.

Sqn Ldr McGinley, the CO of 904 EAW, decided that when it became clear that investigations in Souda Bay could not proceed further the Claimant and F were ordered to be repatriated. F was booked on an RAF Aircraft which at the time needed some repairs. When it was clear that aircraft would not be fixed soon, F was returned on a separate commercial flight. There was no conscious decision to treat F better by sending him home earlier.

6.9 Not making appropriate arrangements for the Claimant's travel home, in particular not prioritising her welfare, being preoccupied with addressing rule-breaking and/or not making appropriate onward travel arrangements.

The Claimant's flight home was arranged less than 24 hours after she reported the assault and thus within a reasonable period. She could not be released immediately due to ongoing investigations.

The Claimant was booked on the first available commercial flight. The Claimant's issue appears to have been primarily that her choice of destination would have been Manchester rather than Gatwick. There is nothing to suggest that Gatwick was chosen to cause difficulty for the Claimant.

It is not clear what the 'pre-occupation with rule-breaking' refers to nor is it specified. There is no evidence of it being mentioned repeatedly and a reference to it earlier was not altogether surprising given that a serious breach of curfew had in fact occurred and could not reasonably be ignored.

Insofar as the allegation relates to welfare, Cpl Woollard was assigned to travel with the Claimant. It is therefore not correct to say that the Claimant's welfare was not considered particularly as his departure along with the Claimant left the base short of essential resource.

Arrangements were made for the Claimant to be picked up from the airport. Unfortunately, there were traffic delays and the driver who was to pick them up was late. When he arrived the driver was required to take his statutory break. Sgt Woollard was given permission to drive the Claimant home. None of that could be helped and none of it was discriminatory.

6.10 Not informing the Claimant's management in the UK of the seriousness of the matter.

The information was passed orally via several people from the time the Claimant related the events to Sgt Storer to Flt Lt Hodgson to WO Sowersby to Sqn Ldr Hall. Wo Sowersby was concerned about confidentiality issues. There was nothing discriminatory in the failure to pass on the correct information to Sqd Ldr Hall who rightly asked about the level of seriousness of the incident.

6.11 Sdn Ldr Hall failing to contact the Claimant to check on her physical and mental welfare, directing her to turn her phone on and saying that she was 'lucky' to be home.

Sqd Ldr Hall *did* attempt to contact the Claimant but Cpl Woollard made it clear that the Claimant did not wish to speak to anyone. We find that Sqn Ldr Hall did not direct the Claimant to turn on her phone. Had she done so we doubt the Claimant would have refused an instruction from a senior officer. Instead we accept that she asked Cpl Woollard to relay information to the Claimant that the phone should be left on so that the police could speak to her.

We will deal with Sqd Ldr Hall's comment that the Claimant was lucky to be home. It had nothing to do with the Claimant's gender or her sexual orientation. Sqd Ldr Hall had made efforts to get the Claimant back to the UK (information that the Claimant was not aware of) and Sqd Ldr Hall was alluding to those efforts. Sqd Ldr Hall was challenged in cross-examination as to her part in getting the Claimant back home (the suggestion being that she had nothing to do with it) but we accept Sqn Ldr Hall's evidence that she was instrumental in expediting the repatriation. The DB found that was the case and we agree.

There is no link with the protected act of reporting the assault. Sqd Ldr Hall was not referring to the fact that the Claimant was fortunate to be home following an assault. That would not make sense particularly as she had been instrumental in the repatriation.

The fact that the level of seriousness of the incident was not communicated was unfortunate but it was not the fault of any one individual. WO Sowersby was concerned about confidentiality and had not given sufficient information on the allegation and Sqd Ldr Hall wanted clarity as to the gravity of the matter.

6.12 After 21 August, Sqn Ldr Hall making no attempt to contact the Claimant to check on her welfare.

There is evidence in the statements to the DB that Sqd Ldr Hall was told by FS Hall and others that the Claimant did not want any contact from Sqd Ldr Hall. There was no reason for FS Hall to lie about this.

As a general point we would have found it unusual for Sqd Ldr Hall to have regular direct contact with the Claimant in any event. Sqd Ldr Hall was several ranks up. She had assigned FS Hall to act on her behalf and had put measures in place. There was no reason for her to have regular communication though we accept that she did not go out of her way to establish a rapport which she could have done.

6.13 On 4 September 2018 temporarily posting her assailant Sgt F to RAF Coningsby

Cpl F is not a comparator. It is therefore difficult to see how his posting (under the DWP procedure) was less favourable treatment. F had to be sent somewhere and the process of where he was sent involved a number of factors.

It was also not the decision of Sqd Ldr Hall to allocate a location. It was her decision to DWP him but the decision to allocate RAF Coningsby was that of others. In that respect we heard evidence from Wg Cdr McLean who explained that the unit HR and APC (Air Personnel Casework) consult with the relevant Career Manager on how a DWP should be effected. Whilst Wg Cdr McLean was not able to say why F was moved to RAF Coningsby it is clear it was not Sqn Ldr Hall's decision. We do not find that the posting of F to RAF Coningsby was in any way a discriminatory act.

6.14 On 18 December 2018 informing the Claimant that her assailant was allowed to attend RAF Waddington the following day to collect his belongings when she had medical appointments scheduled at 10 and 11am and that his attendance would not be rescheduled, causing the Claimant to cancel and reschedule her medical appointments to enable Cpl F to attend camp.

There is little documentary evidence on this. All we have is the statement of WO Cook which is referred to above. Whilst arrangements were usually in place to avoid F attending RAF Waddington when the Claimant was there, on this occasion the Claimant was informed the day before of his intended visit. C had two medical appointments she had that day which she had to re-arrange.

This is in reality an allegation that F was being treated more favourably than the Claimant because it was the Claimant who had to make other arrangements and not F. The comparison is therefore not appropriate. It was unfortunate that the Claimant was told very late and she must have found it upsetting and inconvenient but in our view it was not discriminatory.

6.15 The ongoing lack of support around her report and return to the UK, not feeling gainfully employed in work and being directly prevented from applying for a more suitable position elsewhere.

The allegation is vague and seems to be a general sweep-up of the other allegations. The Respondent did nothing to prevent the Claimant from applying for other roles nor, apart from those dealt with below, did the Claimant apply for any other roles.

6.16 The refusal to recommend the Claimant for transfer to Manchester, as communicated to the Claimant on 28 February 2019.

There is a conflict as to who called the meeting on 28 February 2019 and who set the somewhat late time at 1630. We accept that the Claimant's version is more likely to be correct as to the arrangements. It is hardly likely that the Claimant would have *insisted* that a senior officer several ranks above her MUST meet at the time the Claimant stipulated. We accept her evidence that to do so would be rude.

Turing to the substance of the allegations, we do not accept the proposition that Sqd Ldr Hall refused to recommend the Claimant for the role. We do accept that she dissuaded Ms H because she thought the Claimant was not in the right 'headspace', in other words she did not think the Claimant was ready. WO Sowersby appears to have agreed with that sentiment. The Claimant thought about it and decided not to apply.

We would therefore have thought that the allegation properly worded would have been to 'dissuade the Claimant from applying' rather than a refusal to recommend as there was no application and therefore no recommendation but in any event it does not succeed.

Sqn Ldr Hall was advising the Claimant that she had a support network at RAF Waddington (which was true) and that it may not be an ideal time to move. The advice had nothing to do with the Claimant's gender or sexuality. The making of a sexual assault complaint was not even discussed. Stating that Sqn Ldr Hall had a friend in the 'same situation' who was a male accused of sexual assault and not the victim may have been crass and insensitive but not discriminatory.

The DB criticised Sqd Ldr Hall for failing to take into account the Claimant's views or the reasons why Ms H wanted to move including the support network she would have of her family but it did not find that there was anything discriminatory. Indeed it says that the subsequent application was 'well-considered' (thus implying perhaps that the February one was not). We agree that there was no discrimination involved.

6.17 Sqn Ldr Hall stating that she had a friend in the same situation who was a male accused of sexual assault and not the victim

We accept that it would have been insensitive to mention the situation of a male friend having been falsely accused but we are satisfied that Sqn Ldr Hall was not alluding to Cpl F being innocent or not having committed the act of sexual assault. Sqn Ldr Hall has never doubted that the incident happened.

6.18 After 3 April 2019 refusing the CPN's request for the Claimant to work a permanent day shift to assist the Claimant's mental health.

The Claimant has not established any less favourable treatment. The DCMH asked for the Claimant to work on a shift pattern of 9 – 5.00pm, Monday to Friday. The request was granted.

6.19 Demoting/ taking the Claimant off her duties on 15 April 2019 by Sqn Ldr Hall to place the Claimant in a support cell rather than her current role working on aircraft.

There are several assumptions in the allegations which are not factually proved. It was neither a demotion nor was the Claimant "taken off" her duties. Flight Support workers are usually of Sgt rank or above (we were not taken to any who were not) and thus they were all above the Claimant's rank. The work did involve work on aircraft though more of a clerical nature. The Claimant gave no indication she was not happy with it. Her medical records suggest she was at least content.

The Claimant relies on a male comparator who it is alleged to have been permitted to continue working on aircraft on a day shift. Sqn Ldr Hall's evidence, which we accept, was that Comparator 1 was working on reduced hours, rather than set hours and it was possible to accommodate the reduced hours whilst maintaining his presence on the shift. The arrangement was put in place before Sqn Ldr Hall arrived. In any event the more serious problem with this allegation is that there is no firm evidence of the hours Comparator 1 was actually doing. There is an email exchange attached to Sqn Ldr Hall's witness statement of someone working reduced hours but it does not by any means confirm that he was working days. It is quite possible therefore that this person was working nights. In view of the doubt we do not find the Claimant has proved any fact in support of the allegation.

The Claimant was not demoted and therefore that part of the allegation is factually incorrect. The reason why the Claimant was placed on the support cell was because of her desire to have a more stable shift pattern. The only way this could be accommodated was to move the Claimant to another role. Unfortunately the work in the support cell was largely clerical but that appears to have been the price the Claimant was evidently willing to pay for a more stable home life otherwise she would have rejected it. At no point did the Claimant ask to return to her old duties.

6.20 Being told by WO Sowersby that the latter was because she could not work with a certain individual on Squadron, though without explaining any further.

There is a considerable degree of confusion as to this allegation. At the end of the day neither the Claimant nor the Respondent is entirely sure of what was said. WO Sowersby did not give evidence to the tribunal or in the DB process. The Claimant believed that this was a reference to WO Hodgson but now accepts that it could not have been because the remark was said to have been made in April 2019 but WO Hodgson had left the Squadron in December 2018. The Claimant has not named the person who did not wish to work with her. The best that can be said is that something has got lost in translation. The Claimant *assumed* it was about WO Hodgson but that assumption must be wrong.

WO Hodgson thought very highly of the Claimant. There was absolutely no reason for him to indicate to others that he did not wish to work with the Claimant and, given the fact that he had already left 4 months earlier, it would have been impossible for him to express such thoughts.

Our conclusion is that there has been a simple misunderstanding as to what was said and we make no finding that the alleged words were actually said.

6.21 Telling the Claimant she should make a decision on Premature Voluntary Retirement (PVR) sooner rather than later, following her enquiry about Return of Service.

This allegation is vague not least because there is no record other than the information in the SC and that in itself is a discussion as to the Claimant considering *all* her options, including PVR. The context is clear from the passage itself:

"I was currently on a return of service (ROS) due to a course I did the previous year in America. This ROS was for 3 years but the Warrant Officer Ray Sowersby had managed to get another colleagues ROS taken off so that they could leave the service. I asked the WO if he would take mine off so that I could look at my options as I was still looking into Manchester AFCO but wanted options. He said he had spoken to manning and they said they would take it off but it could get put back on in two weeks so I should decide to PVR sooner rather than later as it could go back, this made me feel as though he wanted me to PVR."

Seen in its context this is scarcely an allegation of discrimination but insofar as it is being pursued it is plainly not less favourable treatment.

6.22 Placing the Claimant on 13 June 2019 directly outside the SENGO's office.

The Claimant was given a desk that was available. We accept Sqn Ldr Hall's evidence that she could not see the Claimant. There was no reason for the SENGO to keep an eye on the Claimant and we do not find that she did so. The fact that the Claimant could - and did - move her desk elsewhere suggests there was no conscious decision to place her there otherwise Sqn Ldr Hall would at least have queried why the Claimant had moved.

6.23 Having her welfare needs neglected.

This is a general allegation supported by any additional facts.

6.24 Being under tasked throughout her time on support cell, and even more so since she moved office.

We accept that the Claimant was under-tasked but there is nothing to suggest that this was done deliberately nor is there is any evidence that Sqn Ldr Hall was aware of it. The Claimant was undertaking some copying and shredding but that was common to all those in the Unit and even Sqn Ldr Hall had to do some copying. The relevant appraisals show the Claimant was doing important work. The Claimant's primary issue appears to be that she was not working on aircraft. If there was a shortage of work it would have applied to all the others in the Unit not just the Claimant.

6.25 Delaying completing her second request to transfer to AFCO Manchester, from 25 February 2019 and following her formal application on 4 July 2019.

The allegation is curiously worded. The Claimant decided not to pursue the AFCO application in February 2019 so there is no question of delay from February onwards. The July application is dealt with separately.

6.26 Stating that the SENGO was reluctant to support the application, as 'she would PVR anyway'.

The allegation is not factually correct. The application was ultimately supported. In its proper context Sqn Ldr Hall's comments were an attempt to lower the Claimant's expectations about the court martial and to warn her of the possibility that it may not go her way. Her caution was that in her experience where court martials fail

individuals can lose faith in the system. Less than a month after Cpl F was acquitted the Claimant went off sick never to return to work again. That would suggest Sqn Ldr Hall's concerns were justified.

6.27 Delay by the SENGO of recommending her transfer and supporting it.

This is dealt with above. The DB did not find any evidence to support the assertion that Sqn Ldr Hall unduly delayed signed the paperwork. We agree.

6.28 On 18 July 2019 refusing to release her from trade The Claimant relies in this regard on a male comparator (comparator 2), who was released and allocated her place.

It is not entirely clear against whom the allegation is made. The relevant evidence at this hearing came from Sqn Ldr Ashley. He confirmed that the Claimant could not be released from trade for the reasons which were set out in an e-mail from career management of 18 July 2019, namely that the trade manning level (TML) for this post was at 84%, that is to say already undermanned to the extent of 16%. To release the Claimant was not viable. The reason for the treatment had nothing to do with the Claimant gender or sexual orientation.

The Claimant relies on a male comparator (comparator 2) who was allocated the place the Claimant was seeking. We do not find there is a like-for-like comparison. Comparator 2 was in a different trade. He was already out of trade whereas the Claimant was not, so an extension would not impact the percentages. Each trade has a certain number of people that are allowed to be out of trade. The Claimant's trade was allowed 3 and at the material time had 8 out of trade with one returning in the next six months. There was no such issue in relation to Comparator 2. We are therefore satisfied that the material circumstances were different. The Claimant has failed to establish less favourable treatment.

The Claimant accepts that the refusal was based on manning levels but argues the decision did not take into account the welfare needs or her personal history. Ms Braganza argues that the view expressed by manning was no more than a 'recommendation' and that Sqd Ldr Hall could gap the post but that is a different point (and a different allegation). At the time it was viewed as determinative.

It may have been possible for Sqd Ldr Hall to have mentioned welfare concerns to manning but she was balancing those with operational needs and chose to go with the latter. We agree with the DB's observations in relation to this:

"The DB acknowledge the balance to be struck between the Service need and that of the individual. Sqn Ldr Hall put the needs of the Service first and we opined that in principle this was correct. However, we consider that Sqn Ldr Hall took the short-term view, likely driven by operational pressure and pressure exerted by OC 51 Sqn and failed to give due regard to the broader perspective of the situation and the longer-term interests of the Service when faced with your pressing welfare requirements."

Those findings do not suggest any element of discrimination. We respectfully agree.

6.29 On 7 August 2019 refusing the Claimant's AFCO transfer application.

This is dealt with above.

6.30 Refusing to gap her post for more than 2-3 months.

We accept that Sqn Ldr Hall refused to gap for more than 2 – 3 months. The DB made the following conclusions in relation to this:

> "On the second occasion Sqn Ldr Hall refused to gap your position on 51 Sqn and when challenged she told you that as SENGO, given the choice between a known gap and an open-ended gap she had to choose the known gap. She stated "If you ET [early terminate], then I know that career management will replace you, whereas the alternative is an unfilled position for an unknown space of time. The operational impact of this cannot be accepted." We considered that Sqn Ldr Hall's decision was a further failure to place your welfare needs as a victim of serious crime, first and a failure in her duty of care to you as her subordinate. We noted carefully the MOD policy at Reference E. We find that Sqn Ldr Hall's failure to seek support from OC 51 Sqn or RAF Waddington HR executives to ensure the correct and holistic management of your needs was a further example of her poor management. In placing the needs of the Sqn first, she also failed to recognise your welfare needs or the long-term benefit to the Service of doing so."

We agree with those findings. Sqd Ldr Hall's placed the needs of the business above the welfare needs of the Claimant in failing to seek support from OC 51 or HR as to whether they might be prepared to assist the Claimant given her personal circumstances. That could amount to potentially unfavourable treatment but not less favourable treatment. No actual comparator is identified. In relation to a hypothetical comparator we consider that Sqd Ldr Hall would almost certainly have done the same thing. When operational needs conflicted with welfare demands Sqn Ldr Hall chose the former.

6.31 The SENGO in the meeting attended by the Claimant and Sgt Baldwin on 7 August 2019 stating that the SENGO did not accept the Claimant's reasons for wanting a move, "not accepting (her) reality" and, "it would be better for me if you left the service as I would get someone in quicker".

There does not appear to be any dispute that the words "not accepting (her) reality" were used and if there is we find that they were. They are set out almost verbatim in a fairly contemporaneous email of 27 September 2019 from Sgt Baldwin.

The gist of the remark "it would be better for me if you left" is dealt with elsewhere. We do not however find that Sqd Ldr Hall said to the Claimant that you should "pull yourself together" which does not appear in the allegation though it is mentioned in the Claimant's witness statement. It does not appear in Sgt Baldwin's email. We conclude that if those words had been said the email would almost certainly have mentioned them.

However the words used were not indicative of less favourable treatment by reason of a protected characteristic. Also no-one had in mind at that stage any protected act. Sqd Ldr Hall was putting her operational needs above the Claimant's welfare needs and that was not discriminatory.

6.32 The SENGO also saying "I don't understand why you don't want to work at 51, the individual is no longer here, and it happened in a different country".

It appears to be accepted that those words were said and if not we would find that they were. This is an instance where we feel that the burden does pass to the Respondent to provide a non-discriminatory explanation because there is a specific reference to the incident which was the basis of the first protected act. We have

therefore considered whether the Respondent has discharged the burden placed upon it.

The reason for the remark was not because the Claimant had committed a protected act but because Sqd Ldr Hall wanted to know why the Claimant wanted a move. Her view was that the Claimant already had a good support network at Sqn 51 which, by implication, she may not have if she went elsewhere. The key words in our view are "I don't understand why you don't want to work here." They preface the alleged discriminatory remarks and must be seen in context.

The reason for the remarks in our judgment was not that the Claimant had made a report of sexual assault, which is not part of the context, but because Sqd Ldr Hall did not understand why the Claimant wished to move from 51 Sqn. The Claimant had gone to see Sqd Ldr Hall to ask if the current position could be gapped. Sqn Ldr Hall did not want to gap it for operational reasons because she feared that an open-ended gap might lose her a person for the role altogether. That is the context. In the circumstances we do not find that the comment was less favourable treatment by reason of any protected act.

6.33 The combination of the above to make the Claimant feel ostracised.

We do not read this as a specific allegation. In any event it is more of a remedy than liability issue.

6.34 On 8 August 2019 that the SENGO would not gap the post at all, even though the previous day she said she would for 2 or 3 months.

Wo Sowersby has not given evidence and the above discussion relates entirely to what he is supposed to have told the Claimant based upon his discussion with Sqd Ldr Hall. The Claimant says that she discussed the matter with SO Sowersby on 8 August and he relayed to her that Sqd Ldr Hall was not now willing to gap at all, that is to say Sqn Ldr Hall had changed her mind.

First of all we have heard sworn evidence from Sqd Ldr Hall and in the absence of evidence from SO Sowersby we place more weight on the evidence of Sqd Ldr Hall.

Secondly, we do not find that Sqd Ldr Hall had any discussion with SO Sowersby to the effect that she had changed her mind. Sqd Ldr Hall did not say at the meeting on 7 August that she would not gap at all. What she said was that she was not willing to gap for more than 3 months or an open-ended gap. There was thus no question of her changing her mind on 8 August.

6.35 The Claimant being told her only option was RAF Benson which was even further away from her family support network than RAF Waddington

This comment is said to have been made by WO Sowersby. There is no independent evidence in support. In any event it is not factually correct because the Claimant was offered other posts albeit none of them were agreeable to the Claimant. The offer of other roles was not discriminatory.

6.36 The Claimant being pushed into asking about PVR.

This is an expression of how the Claimant was feeling. It is not alleged to be a statement made to her.

6.37 The Claimant being told there was no chance of a move to Manchester and that she was not eligible for a welfare move or preferential treatment.

The absence of the possibility of moving to Manchester merely reflected the reality of what was available. The Claimant was not eligible for a welfare move under the rules and the Preferential Treatment Policy did not apply to her.

6.38 On 15 August 2019 the SENGO discussing the Claimant's private affairs with Cpl Matthew Woollard without the Claimant's consent.

This may have been a breach of confidentiality but the reason was not related to a protected characteristic.

6.39 Not providing the Claimant with any victim support.

Sqd Ldr Hall had however assigned FS Hall as the victim support officer. It is not therefore correct to say there was no victim support.

6.40 On 20 September 2019 the Claimant being made non-effective due to mental health issues following the Respondent's treatment of her.

This is a potential remedy issue and not one of liability. It also describes a consequence rather than an act.

6.41 Failing to engage with why the Claimant could not be posted to Manchester.

The Claimant has not stipulated how the Respondent failed to engage. The reason why the Claimant could not be posted to Manchester was because her role did not exist there. It existed in other locations but they were not suitable or acceptable to her.

6.42 In October and November 2019 offering the Claimant manifestly unsuitable placements in Brize Norton, West Oxfordshire, and one in Lossiemouth, North-east Scotland, in the knowledge of the Claimant's request for transfer to Manchester, the reasons for the repeated requests, as a victim of a sexual assault and as a vulnerable person.

We repeat our findings at 6.41.

6.43 Offering the Claimant the transfer to Manchester but for only 6-9 months.

This relates to what has been termed a Med Geo contemplated move. This is dealt with in the evidence of Wg Cmdr Lavallee. The reasons given were explained in his witness statement and his oral evidence which are not seriously challenged. For the reasons he gives (and which are not related to any protected characteristic) the allegation is unfounded.

6.44 The Respondent failing to progress and resolve the SC dated 25 November 2019.

The delay itself is not direct discrimination as there is nothing to suggest that it was because of a protected characteristic or the protected acts. As to allegation of indirect discrimination that is dealt with elsewhere. Insofar as it relates to a maladministration issue that is outside the jurisdiction of the Tribunal as explained elsewhere in this decision.

6.45 Not interviewing the Claimant as a vulnerable individual until 20 January 2020 for her SC.

In relation to any issue of delay or jurisdiction we repeat what is said above.

6.46 Whether in part or whole due to the above leaving the Claimant with no option but to agree to being medically discharged on 7 February 2020.

This is another 'consequence' rather than an act of discrimination.

6.47 Failing to comply with the provisions of the DIN as to the support of victims and vulnerable individuals.

As complaints of direct discrimination, harassment and victimisation there is nothing to suggest that failure to comply with procedures was less favourable treatment due to a protected characteristic or the commission of a protected act.

<u>The RAFP investigation</u>

6.48 A failure to investigate promptly after being notified of the offence.

6.49 A failure to take fingernail scrape evidence from the suspect.

6.50 A failure to advise the Claimant on preservation of evidence or to request her clothing until prompted.

6.51 A failure to conduct the initial account interview appropriately.

6.52 A failure to have available or to consult a sexual offences booklet.

6.53 A failure to have an Early Evidence Kit.

6.54 A failure to have any standing medical facilities in place.

6.55 A failure to provide any Victim Support prior to the hearing.

6.56 A failure to provide the Claimant with the entire investigation, the court notes and forensics sheet in response to her e-mail of 7 October 2019.

We propose to deal with allegations 6.48 to 6.56 together. It is accepted that there were a number of procedural failings on the part of the RAFP. The staff concerned appear not to have been familiar with such situations. As a general point we conclude that none of these allegations establish less favourable treatment by reason of the Claimant's gender or sexual orientation. There is nothing to suggest that if the Claimant had been a man or heterosexual then the processes would have been any different, more efficient or undertaken more professionally.

It is acknowledged that the failure to take fingernail samples was an oversight. The notes taken were not fully legible though an attempt was made to subsequently transcribe them. Neither of those were affected by the Claimant's gender or sexual orientation.

It is accepted that a sexual offences booklet and an Early Evidence Kit should have been available. They were procedural failures but they had nothing to do with the Claimant's gender or sexual orientation.

It is correct that the Respondent did not have standing medical facilities but Souda Bay was a US Air Force base and it was their facilities that were being used. A Medical Examiner was only available later in the evening. The allegation as to not providing victim support is vague and lacking particularity. In any event there is nothing to suggest that the reason was because of the Claimant's gender or sexual orientation.

As to the provision of information the Claimant was not entitled, irrespective of gender or sexual orientation, to all information in relation to proceedings.

In relation to those matters that we have not addressed specifically we would conclude that they do not raise a prima facie case of direct discrimination, harassment or victimisation.

8. Failing to progress and resolve the Service Complaint dated 25 November 2019.

This is an excluded matter and falls outside the jurisdiction of the Tribunal. If it does we would have dismissed it (as an allegation of direct discrimination) in any event as there is nothing to suggest that the delay was because of the protected characteristics or protected acts.

<u>Conclusions on victimisation</u>

175. The Claimant relies on broadly the same allegations of victimisation as she does for direct sex discrimination save for the allegation of a sexual assault.

176. In relation to the protected acts relied on the Respondent admits that the reporting of the sexual assault was a protected act. The Claimant also relies on an allegation that the Respondent believed that she might bring Equality Act proceedings as a protected act. There does not appear to be any concession to this but for our purposes we are satisfied that it can and does amount to a protected act.

177. However, we are satisfied that the Claimant was not treated less favourably by reason of either of the two protected acts. The fact that the Claimant could bring Equality Act proceedings would scarcely have entered the minds of those alleged to have victimised her, other than Sqd Ldr Hall. As Mr Fetto points out it is not even clear when, or from when, the Claimant alleges that the Respondent believed Equality Act proceedings might be brought.

178. In relation to the first protected act the fact that the Claimant had made a complaint of sexual assault was never an issue for Sqn Ldr Hall and there is no reason why it should have been. The complaint was not against Sqn Ldr Hall, she was not involved in the facts relating to it, she was not part of the sexual assault

investigation and any finding in relation to it had no bearing on her. It did not form part of her thinking in deciding what she did. We do not find that Sqd Ldr Hall victimised the Claimant.

179. We have also considered the glowing recommendation completed by Sqn Ldr Hall on 17 July 2019 for the AFCO post. The terms of it seem to us to be inconsistent with someone seeking to victimise for having committed a protected act.

180. Equally it is difficult to see why it is suggested that the making of a complaint of sexual assault was a problem for anyone else in the RAF. Neither Sqn Ldr Hall nor anyone else thought it was wrong of the Claimant to report the sexual assault.

181. Where we have not specifically set out under each allegation that it does not amount to victimisation our conclusion is that the Claimant was not treated less favourably by reason of having committed a protected act. All of the allegations of victimisation are therefore dismissed.

Conclusions on harassment

182. The sole defence in relation to the complaint of sexual harassment under section 26(2) EA 2010 is that the act did not happen in the course of employment or to use a shorthand that the Respondent is not vicariously liable. As we have found that the actions of Cpl F occurred in the course of employment the complaint of sexual harassment succeeds. The conduct was clearly of a sexual nature and would have the relevant effect in section 26(4) EA 2010.

183. As for all the complaints of non-sexual harassment these do not succeed for the following reasons:

183.1 The Claimant has not established a *prima facie* case that her treatment related to her sex or sexual orientation;

183.2 There is nothing to suggest that any of the relevant mental processes were in play. There was no reason for Sqd Ldr Hall to harass the Claimant by reason of her sex or sexual orientation. Even the Claimant concludes that she must have a personal problem with her but does not at the time attribute it to her gender or sexual orientation;

183.3 Whilst some of the conduct was clearly unwanted it would be wrong to describe it as having violated the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for her. We are satisfied that it does not meet the 'objective test' of the provisions;

183.4 The list of issues identifies as harassment all of the allegations at paragraphs 6.1 to 6.55. This includes matters such as the RAFP handling of the investigation such as a failure to investigate promptly, not taking fingernails scrapes, not having a sexual offences booklet to hand, not having an Early Evidence Kit or standing medical facilities (RAFP used the US facilities in some instances). It is difficult to see how any of these matters meet the statutory test.

184. In our judgment the Claimant has failed to specify how the relevant proscribed environment is created and why it was reasonable for it to have the relevant effect.

185. We should mention that the DB did not find any link between the factual allegations and the protected characteristics relied on. We respectfully agree. The complaints of harassment related to the protected characteristics of sex and sexual orientation under section 26(2) EA therefore fail and are dismissed.

Conclusions on indirect sex discrimination

186. In our judgment paragraphs 14.1 and 14.2 are not valid PCPs. The former is something that is peculiar to the Claimant and is an attempt to introduce specific issues relating to her own case. There is no evidence that this is an archetypal case of how the RAFP deal generally with sexual assault investigations. The matters relied on are all individual decisions or failings.

187. In relation to paragraph14.2 there is no evidence that the MOD fail to comply with JSP Guidance and DINs on a regular, recurring basis. This allegation (and the previous) fall exactly into the type of matters that **Ishola** warns against as adopting by way of PCPs.

188. Paragraph 14.2 has also been phrased too widely to be established as a fact. Whilst some aspects of the Guidance and Codes were not complied with it would be wrong to say that it was not fully complied with in all of its terms.

189. We also agree with Mr Fetto's submission this is really an allegation that the Respondent did not take steps which the Claimant legitimately expected because they were in its policy. That is an allegation that positive steps were not taken rather than that steps amounting to a PCP were taken and applied to her and others.

190. We would also have dismissed the indirect discrimination allegations based on the first two PCPs as failing to show disparate impact.

191. In relation to paragraph 14.3 (operating a Preferential Treatment Policy) we would agree that operating the Preferential Treatment Policy would amount to a PCP. We would not agree with the remainder of paragraph 14.3 and as such this allegation must be dismissed as the PCP relied on goes further.

192. We also conclude that the indirect sex discrimination claim based on paragraph 14.3 must fail for the following reasons:

192.1 The Preferential Treatment Policy was not applied to the Claimant – the Claimant never made an application under that policy;

192.2 There is no evidence of group disadvantage to women as a whole;

192.3 There is no individual disadvantage to the Claimant by reason of the above;

193. We would also have found if necessary that the PCP was a proportionate means of achieving a legitimate aim. It was a legitimate aim not to lose a trained technician. The means to do so were proportionate.

194. As to paragraph 14.4 we do not accept that a PCP of delay is established. Again the wording of the proposed PCP sought is in our view too wide. The words from "as exemplified by the Respondent not progressing or resolving the Service Complaint dated November 2019 promptly" introduce what is peculiar to the Claimant's case rather than a PCP of general application.

195. Even if we were to disregard the additional words we do not accept the key issue of delay as a PCP. There is data within the SCOAF reports that between 49% and 75% annually of RAF SCs have been resolved within the 24-week target period over the period 2016 - 2020. However determination or resolution outside the target period does not necessarily mean undue delay. Each SC will have to be considered on its own facts and the more complex ones will naturally take longer. A PCP of delay is not established on the facts.

196. We would also have dismissed paragraph 14.4 as an allegation falling within the excluded matters and thus outside the jurisdiction of the Tribunal.

197. We should also mention that the DB found indirect sex discrimination and here we depart from their conclusions. In our judgment, and with great respect, we do not consider that the issue of what constitutes a PCP was fully explored at the DB stage. That matter was revisited by the AB who concluded:

"Turning to your claim of indirect discrimination on the grounds of sex, the Panel carefully considered the definition of indirect discrimination and gave close consideration to the issue of what amounts to a PCP in law. We noted that however widely the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment. Although a one-off decision or act can be a practice, it is not automatically a PCP and all three of the words 'provision, criterion or practice' suggest that there is a level of repetition about how similar cases are generally treated or how a similar case would be treated if it reoccurred".

198. In our view the correct approach was that applied by the AB. For the reasons given the complaint of indirect sex discrimination is dismissed.

199. The case will now be listed for a telephone preliminary hearing on a date to be fixed to make case management orders for the remedy hearing.

_____

Employment Judge Ahmed

Date: 19 December 2022

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.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877568/t426-eng.pdf